

Throughout Europe and internationally Victim-Offender Mediation is very often discussed in relation to the mediation-connected perspectives of restorative justice, a term for which in German no equivalent has yet been introduced and generally accepted. An approximate equivalent would be, for example, "Gerechtigkeit und sozialen Frieden wiederherstellende Strafrechtspflege" (cf. Bundesministerium des Inneren, Bundesministerium der Justiz 2006) which, directly translated, means "fairness- and social-peace-restoring administration of penal justice".

A) LEGAL BASE

Legislative position of RJ in the ordinary justice system (adults) and the juvenile justice system

Definition: in jurisprudence restitution (Latin: restitutio = restore/re-establish) means the restoration of the condition that would exist if the condition obligating the reparation or compensation had not occurred. VOM is often used together with the term compensation (for damages). They are, however, not to be used as synonyms and it is often the case that too little value is placed on differentiating between them. Compensation in a legal sense is to be found mainly in the areas of civil and economic law. The main difference between compensation and VOM lies in the communicative process and the solution striven for with regard to the underlying overall conflict (cf. Wikipedia 2008: Täter-Opfer-Ausgleich).

Since the term restorative justice is hardly used in Germany, the following document aims to provide the reader with the best possible explanation of the term 'restorative justice' via the terms (conventional) 'mediation' and 'victim-offender mediation' (VOM).

- Explicit regulation or potential entry doors

Following successful test projects, VOM as the main part of Restorative Justice in Germany was legally incorporated into the juvenile penal system in 1990. Due to the positive results VOM was then, in 1994, introduced as a new § 46a StGB in the general penal law and designated as grounds for mitigation (see Federal Ministry of Justice 2005).

Mediation is used in civil, commercial, labour, family and administrative disputes; disputes related to consumer rights and other disputes involving natural and/or legal persons.

The mediation method has developed out of family mediation over the past 20 years or so. Over this period the fields of application have continued to diversify, which has led to the following division:

¹ Based on the template devised by David Miers included in D. Miers and J. Willemsens (eds.) (2004), *Mapping Restorative Justice. Developments in 25 European countries*, Leuven, European Forum for Victim-Offender Mediation and Restorative Justice.

divorce, school-based mediation, economic mediation, environmental mediation, and as new fields of application intercultural mediation and internal mediation in companies.

- Any non-statutory basis for intervention (codes of practice; departmental circulars...)

Victim-offender mediation (VOM) is a measure of extrajudicial settlement of conflicts called mediation in criminal cases. There are no specified proceedings. Its particularities are voluntary participation of offender and victim in order to clear the consequences of a conflict by means of mutual communication. This makes it distinct from the decreed effort for a VOM (§ 59a Abs. 2 Nr. 1 StGB), the voluntary restitution by the offender (§ 46a Nr. 2 StGB) and the procedure of adhesion.

In the course of the autumn conference the ministers of justice in Germany decreed with the resolution of November 2005 to support the consensual settlement of conflicts and emphasized the support of the extrajudicial settlement of conflicts as a prevailing political aim.

On the political level it will have to be decided if the legal politics in Germany will actively support the strengthening of mutual conflict resolution proceedings – also – by means of offering such proceedings on the part of the judicial system and how such an offer can be designed concerning structure and contents (see *Abschlussbericht des Niedersächsischen Justizministeriums „Gerichtsnaher Mediation in Niedersachsen“ 2005*).

- Particular points of legal or doctrinal interest

In Germany not all crimes are regulated by mediation or victim-offender-mediation (VOM), for example serious offences such as murder, manslaughter or rape cannot be cleared by mediation or respectively VOM. But it is an ideal measure in the case of theft, vandalism, threat or humiliation. *Very often* mediation or VOM is *used for youths*, but it can also be seen as an option for adults. The process can only take place if offender and victim agree and the application is regarded as useful.

Victim-offender-mediation in Juvenile Court Aid

Juvenile court aid offers, amongst others, accompanying work sessions, social training courses and VOM. This is where offenders and victims are in direct confrontation and compensation is sought for a criminal offence. According to the DVJJ (Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen) – vice Susanne Zinke this is supposed to be much more difficult for youths than remaining in custody, because here they have to assume responsibility. Vice versa the victims have a chance to “get rid of their rage”. The re-offence quota lies a little under ten percent, compared to 87 per cent after custody.

The costs for such offers are lower than the average 150 Euros per day in prison, as Sonnen emphasizes. Nevertheless the number of juvenile prisoners has increased by more than one third over the past five years. Six to seven per cent of the juvenile offenders, a

good 540,000 yearly, ended up in prison (see „Mehr Hilfe für jugendliche Straftäter gefordert“; Agence France-Presse AFP, 23.05.2003).

Further Proceedings of Mediation within the Juvenile penalty system

According to the juvenile criminal law the lawyer has the possibility to refrain from prosecution in the case of minor offences if there has already been a reasonable sanction. This procedure is called *Diversion*. At present two different procedures of diversion are being tested in different places in Germany:

1) So-called “Teen Courts”, also called pupils’ courts, introduced since 2000 in Bavaria. In this proceeding the juvenile offender is presented to a jury of the same age who sentence the delinquent for a measure. This can be a written letter of excuse to the victim, social work hours, or similar. This under the condition that the offender admits his crime and agrees to a hearing before a “Teen Court”.

2) The procedure called „Yellow Card“ places the close cooperation of different administrations in the foreground. The youth is directly confronted with three administrations, in the presence of his parents. At first, policemen question the delinquent. In the room next door an official of the youth welfare administration explains the implications and consequences of his criminal offence and agrees on an appropriate sanction. In the end the public prosecutor explains that he could have introduced a criminal prosecution but in this case would refrain from it. The whole procedure is built on the expectation that the offender becomes aware of his wrong behaviour and a relapse will be prevented.

B) SCOPE

- Whether RJ provision is primarily victim or offender focused, neutral approach

RJ in Germany is used mainly as an approach, which takes the interests of the victim more into focus than those of the offender. The interest of a victim of a crime in damage compensation is highlighted more strongly by VOM, because, for example, the victim is more able to come to terms with what has happened.

Restorative Justice includes a further function for victims and demands that the offenders assume responsibility for their actions and the damage that they have caused (cf. Zehr 1995).

The particular strength, the potential of the “restorative justice process” lies above all in confirmation of the victim's claim created by the communicative situation by means of appreciation and encouragement and the active assumption of responsibility on the part of the offenders (cf. TOA-Thesen des 26. Deutschen Jugendgerichtstages 25.-28.09. 2004 in Leipzig).

- Types of eligible offences

These include theft, vandalism, threat or humiliation (but also family conflicts and conflicts inside companies as parts of no-crime-related mediation) – those offences that are called “petty offences”.

According to VOM statistics, which have been continuously updated in Germany since 1993, the main areas for the application of VOM have constantly been violence and assault.

- The stage at which the RJ practice is used

VOM is a form of mediation that, by emphasizing the concept of compensation, aims at a social peace agreement between offender and victim. VOM begins after a crime has been committed and recognized. VOM assumes a peace-making function: in order to restore law and order after a crime, the punishment of the offender is restored by reconciliation with the victim (cf. Kriminologie-Lexikon ONLINE: Täter-Opfer-Ausgleich).

- Relation between the RJ scheme and judicial system (alternative or part of the criminal process)

The law court associated mediation describes the relation between the mediation process and the law court process. According to their closeness to the law court process can be differentiated:

- Pure mediation: mediation is carried out as independent procedure.
- Law court associated mediation: is like pure mediation an independent procedure, but mediated by initiative of the judge in charge of the case.
- Law court internal mediation: as for the law court mediation this is an isolated procedure. But by contrast the internal mediation is performed by a judge not in charge of the case. The law court internal mediation is a sub-category of the law court associated mediation
- Integrated mediation: in contrast to pure mediation integrated mediation is useful within consultation, a law court process or wherever there is a conflict potential.

It is debatable whether mediation or VOM can be conceived as a third way alongside punishments and other measures in the sanctions system of criminal law. The judiciary takes a critical view of this extension to the sanctions system, since mediation or VOM must, in the eyes of many lawyers, be seen as a vehicle that allows the offender to evade his/her due punishment. Moreover, the efficiency of mediation or VOM is also debatable (cf. Kriminologie-Lexikon ONLINE: Täter-Opfer-Ausgleich).

The Essence and characteristics of mediation in penal conflicts are in many cases neither recognized nor accepted by the judiciary. The essential thing is not penal/legal subsumption, but the concrete experiences and interests of those involved in the conflict, their active participation and assumption of responsibility, the openness regarding the results and at the same time concentration and focusing on the (legal and fair) restorative compensation. The extensive autonomy of the mediation process, which is respected by the judiciary, is therefore necessary. The instrumentalization of VOM as a sanction or educational measure can obscure the different nature of the communicative form of conflict resolution/management. (cf. TOA-Thesen des 26. Deutschen Jugendgerichtstages 25.-28.09. 2004 in Leipzig).

Kondziela (1989) for example regards VOM (and a subsequent compensation for damages) in preliminary proceedings as being anticonstitutional. His justification: as part of an informal termination of proceedings without the establishment of guilt by the court the accused assumes the obligation to provide compensation (cf. Wikipedia 2008: Täter-Opfer-Ausgleich).

- Bodies or officials exercising the gate keeping function

When the preliminary proceedings are underway the responsible head of department of the public prosecution service decides, under consideration of the recommendations of the police and/or the youth welfare service, whether the case is suitable for VOM or not and hands over the file to the office co-ordinating the proceedings.

So policemen, judges, lawyers, social workers and their institutions and offices are exercising the gate keeping function and are sometimes called “mediators” in the literature. The job title “mediator” is not yet a legal title in Germany.

In literature as well as in practice the incompatibility of mediation and social care is discussed because the mediators should be unbiased. This, however, cannot be guaranteed if there is a relationship with an affected person, be it the suspect or the victim, at the same time. Even if the mediators are able to separate the jobs of social care and mediation for themselves, the change from biased social care to neutral mediation would be difficult to understand by the clients. Therefore the VOM should only be performed by specialized acting mediators (see Federal Ministry of Justice 2005).

C) IMPLEMENTATION

- Establishment and structure of the agencies: which agency carries out the RJ work, its relation with the statutory and non-statutory agencies within the criminal system, source and periodicity of the funding, territorial reach, internal organisation.

Law Court Associated Mediation in Germany is organised – due to the federal structure of Germany – to the competences of each federal state (Bundesland)

There were and still are different attempts in Germany to combine court proceedings and mediation (see. zum Folgenden *Abschlussbericht des Niedersächsischen Justizministeriums „Gerichtsnaher Mediation in Niedersachsen“ 2005*):

In Cologne there is mediation office of the local lawyers association in the law court building since the beginning of 2001. Despite full information of the public as well as the lawyers and judges only 14 cases had been taken into mediation between February 2001 and December 2002. The mediants had visited the mediation office before the process of their own accord. None of the procedures was caused in a court reference.

In the years 2000 and 2001 the Ministry of Justice of Baden-Württemberg carried out a model scheme at the district court and the magistrates court in Stuttgart. The involved judges were supposed to suggest and recommend mediation to the process parties in appropriate cases. The listed lawyers and other mediators lowered their fees. The department of justice held out the prospect of disclaiming the court fees after a mutual settlement of the process. All in all only 37 procedures were given the incentive of mediation, of which only 11 processes ended in mediation.

Since May 2001 the magistrates court in Hannover has a mediation project which is entertained and advised by the association Fairmittelt e.V. The mediation office at the magistrates court in Hannover offers a low-barrier possibility within daily opening hours to discuss the chances and limits of a mediation process personally with trained mediators. If the parties decide for a mediation an interdisciplinary operating team of mediators accompanies the interviews. The majority of mediated cases are family conflicts. Mostly the processes go into mediation before the process: more and more parties and lawyers do not follow the judges recommendation but address the mediation office by own initiative beforehand. And increasingly the judges at the magistrates court in Hannover suggest mediation to those involved in pending processes. Related to this the mediation office carried out a cost-free further training in mediation for judges.

Since January 2004 there is a mediation project in Mecklenburg-Vorpommern closely related with the one in Niedersachsen. A mediation offer guided by judges is presented as procedure to the partners at the district court Rostock, the higher regional court Rostock and the administrative court Greifswald. The project wide success quota is more than 70 percent. Especially the development at the regional court Rostock, with 150 cleared mediations and consequently 126 terminated legal proceedings between 1.1.2004 and 31.10.2004, confirms the preliminary experiences in the course of the Niedersachsen project in regard to the offer of mediation at regional courts.

In Bavaria mediation has been offered since January 2005 at selected regional courts and administrative courts and since 2004 at the social court in Munich.

In Berlin a workshop has been occupied with the preparation of a mediation project, which is supposed to involve the courts of the ordinary jurisdiction, since summer 2004. The

workshop wanted to present concrete recommendations for the planning of the project in summer 2005. Since 2004 there has been a mediation project of the Senate of Justice at the administrative court Berlin.

In Nordrhein-Westfalen mediation has been offered at the regional court Paderborn and the administrative court of the same area since 2004.

In Hessen a mediation project is carried out at all administrative courts and also at the higher administrative court Kassel.

In Baden-Württemberg the participants of pending proceedings at the administrative court Freiburg have the option of mediation since spring 2002.

In Niedersachsen mediation is offered at the regional courts Braunschweig and Verden and also at the social court in Lüneburg.

- Practice and intervention types:
 - The form which restorative interventions take such as victim-offender mediation (direct, indirect), conferencing, circles, family group conferencing.

Restorative interventions take all mentioned forms into account: direct and indirect mediation, conferencing, circles, family group conferencing and intercultural dialogues.

VOM offers the possibility of a universal method of treating offenders, especially youths and young adults, whereby penal and civil law as well as pedagogical concepts play a role. The interests and needs of the victim are given more consideration than in formal criminal proceedings.

- General stages of the (mediation) process.

General stages of the mediation process:

- 1) Phase: Terms of reference. The participants are informed about the type of process, the role of the mediator, Negotiation of a mediation agreement and agreement on how to proceed further.
- 2) Phase: Drawing up of a list of topics. The parties put forward their points of contention and concerns/wishes, which are then structured.
- 3) Phase: Positions and interests / research into viewpoints and background. In the third phase, called "exploration" the conflict parties are given the possibility to explain their positions in detail. Exchange of information, data and perceptions, in order to finally be able to address the issue of both the common and the differing wishes of the participants.

- 4) Phase: collection and evaluation of options / alternatives. The creative phase of looking for ideas begins to develop various options for a solution. Options are evaluated, the decision in the way of a consensus and the preparation of a binding final recommendation, in which so-called win-win results are concretized and formulated.
- 5) Phase: final agreement. In a (usually written) agreement the conflicting parties lay down the rules for the conflict. In this way conflicting parties can, in the course of mediation, become people who have settled their conflict.
 - The typical outcomes (e.g. symbolic redress, financial compensation, reparation of the damage, activity)

Ideally the accused and victim discuss the crime as well as its background facts and consequences in a direct dialogue in the presence of independent mediators. Depending on the case, may be compensation may be negotiated. According to the requirements of the particular case constellations, however, other forms of equalization are possible. The basic requirement for VOM is that the participants be voluntarily prepared to work out a solution to the conflict together. The accused must assume responsibility for the crime s/he is accused of having committed. As well as coming to terms with their own behaviour and its consequences for the victim, this can also include the provision of damages or smart-money. In many of the German federal states, so-called "equalization funds" have been set up by state associations for delinquent support and probation assistance, in order that a material form of equalization (e.g. smart money payments) do not fail for a lack of money (cf. Landesverband für Bewährungs- und Straffälligenhilfe Schleswig-Holstein 2008).

- Provisions concerning the follow-up or monitoring of the agreement's completion

The post-mediation phase/implementation phase is divided into various working steps:

The agreement is checked by third persons (e.g. lawyers of the parties). Official approval and ratification (e.g. authentication from a notary, from the court) is requested and specified in the mediation process and the corresponding agreement. Adherence to the agreement may be checked by an external monitoring agent. This means that the mediators have to reflect upon their own actions (debriefing). Finally, if necessary, those involved in the mediation process arrange a follow-up-meeting.

- The extent to which it is used in practice: accessibility to the service by the citizen, extent of the victim involvement and take-up.

Every perpetrator and victim of a crime should be granted the opportunity to take part in VOM. Contact with the mediation centre must be made as easy as possible for the conflicting parties. In this respect, the degree of awareness, the accessibility and the opening times of the VOM centre play an important role. At the present time there are no data on availability and accessibility to mediation centres and procedures.

- Type of information given to the referral source once finished the RJ intervention.

No information and references in the German context of restorative justice to be found on this issue.

- Referral numbers and outcomes if possible

Empirical Results respectively Evaluation of the Offender-Victim-Compensation proceedings respectively Mediation

Results from quantitative research, increasing case numbers, but large regional differences

- VOM is used for all offences (especially also offences of violence), not only for minor offences
- 70% of all VOM offences are applied for physical assault, 8.5% for property and capital offences, 2.7% for robbery/blackmail, and 0.5% for property damage

Concerning offenders/victims

- The offenders are mostly male, over 60% accept the accusation, over 75% are prepared for compensation
- In over 70% of the cases offenders and victims knew each other at least superficially
- In over 80% of the cases successful efforts of compensation can be achieved
- 87% of the court cases are withdrawn in the case of successful compensation

From the re-offence research

- After VOM offenders fall back significantly less than after formal sanctions (money penalty etc.)

Positive signals from qualitative research

- Offenders as well as victims saw their interests guarded and the social situation was improved decisively (see Rössner 2007).
- Any RJ interventions or mediation interventions practised in other contexts by the same agencies or by others.

No information and references in the German context of restorative justice to be found on this issue.

D) EVALUATION

- Context: some background to the jurisdiction's present RJ provision (factors influencing the introduction of the RJ intervention, legal culture ...)

The findings of the empirical research into the success and acceptance of victim-offender mediation (VOM) and conventional mediation are more positive than to be expected, but are not given the recognition they deserve, especially from the legal practice. Victim-offender mediation does enjoy a high level of acceptance among the victims and perpetrators concerned, but with regard to its quantitative and qualitative use victim-offender mediation still lives in the shadow of more traditional methods of criminal justice. VOM was once the "most hopeful alternative to (youth) penal law, has (quantitatively with regard to the figures used) become a marginal entity in the penal system (cf. TOA-Thesen des 26. Deutschen Jugendgerichtstages 25.-28.09. 2004 in Leipzig).

The internal legal perspectives and the dependence of case allocation on the judiciary prevent the potential of VOM being fully exploited as regards its application and effect. The legal allocation context has proved to be inadequate as a sole filter system for the selection of suitable VOM cases. The introduction of a mediation or of VOM still depends on the personal opinion of a single public prosecutor or judge, even though the law provides for the verification of eligibility in each case. At 0.1% per 10,000 inhabitants Germany has a very low proportion of VOM cases in comparison with other European countries (excluding the absolute number annually of about 25,000 cases relatively) (vgl. TOA-Thesen des 26. Deutschen Jugendgerichtstages 25.-28.09. 2004 in Leipzig).

- Current evaluation: the impact of the intervention on the criminal justice system. The attitude of judiciary, lawyers, policy makers or civil servants as well as the opinion of the public.

The results of the works of the so-called „mediation centres“ performing offender-victim-compensation have been stated in the offender-victim-compensation statistic since 1993. This project which has been initiated and supervised by several criminological research institutions is probably unique in Europe. In the following several important developments in regard to the application of the offender-victim-compensation in the youth penalty system will be outlined:

Since the beginning of the evaluation of the relevant data in the year 1993 almost all institutions taking part were dealing directly with juvenile offenders. Of all participating institutions their number decreased in the course of the time. Still the largest age group of accused persons remained the one of youths and adolescent between 1993 and 1998.

In absolute figures the number of accused adult persons increased from 427 in 1993 to 2,432 in the year 1999, whereas the number of accused youths and adolescent increased from 951 in 1993 to 4,398 in 1999. This state of facts changed within the last two years of evaluation, since then the age group of accused youths and adolescent has decreased proportionately and in absolute figures. In the year 2002 both of the large destiny age groups are equally represented in the offender-victim-compensation. The number of the accused youths and adolescent is now 2,537, the number of accused adolescent 2,148.

The number of cases in the institutions

Starting point for the counting are all cases the VOM institutions (youth welfare departments, social services of justice/court aid, independent institutions) were entrusted with, on account of case allocation and requests of different institutions or persons.

Case numbers in the institutions										
	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Initial cases	1238	1652	1813	3392	3976	4311	5177	3711	3052	4466
Procedural holdbacks	172	279	167	314	660	405	223	115	78	85
Cleared cases	1066	1373	1646	3078	3316	3906	4956	3596	2974	4381

„Procedural holdbacks“ are the collection of circumstances that exclude further application of a VOM process (for example death of a person involved) (see Federal Ministry of Justice 2005).

- Future direction: tendencies that can be foreseen, crime policy trends, new strategies or actions devised on RJ...

Dialogue with the public is a neglected element in the development of VOM and must be intensified. Restorative Justice will fail if it does not form alliances with other initiatives of citizen-oriented legal policy. Victims of crime must be informed at an early stage about the possibilities of out-of-court (damage) compensation and conflict mediation possibilities. There is still a need for increased efforts for expanding low-threshold, yet high-quality, community orientated possibilities for conflict-settlement. It is important to create a strong network that also includes new collaborative partners: schools and the police, district offices, so called “Quartiermanager” (community manager) and parishes, rectors and pastors, doctors, helplines, victim support and prevention councils and many others. (vgl. TOA-Thesen des 26. Deutschen Jugendgerichtstages 25.-28.09. 2004 in Leipzig).

E) PUBLISHED LITERATURE

Some references to literature published in the jurisdiction in question which describes or evaluates its RJ or VOM provision (please indicate the language availability)

Literature mediation/victim-offender-mediation in justice in general

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Literature mediation/victim-offender-mediation in the juvenile justice system

Einhaus, A.: *Täter-Opfer-Ausgleich für jugendliche Straftäter – Konzepte, praktische Umsetzung und Rolle der Sozialpädagogik*. München 2007

Grin, J.: *Umgang mit Jugendkriminalität - Der Täter-Opfer-Ausgleich als Alternative zum Jugendgerichtsverfahren*. München 2007

Hartmann, A.: *Schlichten oder Richten. Der Täter-Opfer-Ausgleich und das (Jugend)Strafrecht*, München 1995.

Projektgruppe TOA-Standards und TOA-Servicebüro (Hrsg.) (2000): TOA-Standards. Qualitätskriterien für die Praxis des Täter-Opfer-Ausgleich. Köln: Eigenverlag

Trenczek, T.: *TOA mit erhobenen Zeigefinger – Das Conferencing Verfahren bei Jugendlichen in Australien*; ZJJ 4/2002; 13. Jg., S. 393-399