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Victim-Offender-Reconciliation with Adult Offenders in Germany

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1 Introduction

1.1 The idea of "restitution"

Conflict-mediation and victim-offender-reconciliation are very much part of the international criminological discussion about alternative reactions to deviant behavior. Numerous projects developed, combined by the term "restitution", with the aim to relieve the sanctioning system of the state by extrajudicial mediation.[1] On closer examination, however, these projects differ considerably due to the different national justice systems.[2] In the following I would like to introduce a victim-offender-reconciliation project in the German law for adults.

Conflict-mediation and restitution as elements of the penal system have been ardently discussed in Germany since the beginning of the eighties.[3] In the course of this discussion, victim-offender-reconciliation projects developed, dealing with offences which victimized natural persons. Reconciliation means - at the very best - that the offender and the victim meet to talk about the offence and its causes and consequences in order to solve the conflict. The emotional consequences of the offence will be considered and the financial compensation will be settled extrajudicially.[4]

Experts have argued fiercely about whether a measure like victim-offender-reconciliation can possibly be part of the instruments of the criminal law or whether it should be established as a medium preceding reactions of the justice system, i.e., as a so-called private concept of action. Meanwhile, criminologists and politicians agreed to accept victim-offender-reconciliation as a mean of the criminal law and consequently decided on new sections of sentencing.

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1 For surveys on the German projects cp. Schreckling 1991 and Bannenberg 1993.

2 Examples are the Autrian project in the criminal law for adults (Hammerschick, Pelikan & Pilgram 1994) and the position of "restitution" in the United States (Trenczek 1993).

3 Representative for the supporters: Schöch 1987; Rössner & Wulf 1987, and Roxin 1990; critical comments can be found in Albrecht 1993 and Hirsch 1990.

4 On the procedure of victim-offender-reconciliation cp. Pfeiffer, 1992, 338 ff, and Netzig & Petzold-Bergner 1993, 146.

1.2 Victim-offender-reconciliation and prosecutors

The "WAAGE Hannover" is a pilot project for adult perpetrators carrying out victim-offender-reconciliation which is integrated in the criminal law. The prosecutors are to initiate the measure at a very early stage - that does by no means exclude initiative of the persons affected! After the reconciliation has happened, the prosecutors have two alternatives of how to deal with the case further. Which alternative they choose depends on the gravity of the offence.

In German criminal law, the legal classification of the severity of the offence is quite different from the British or American justice system. We categorize offences by distinguishing between crimes of minor or medium severity and severe crimes. Only offences of the first category can be completed extrajudicially by the prosecutor, when victim-offender-reconciliation has been carried out successfully. In the case of felonies, however, he has to take legal proceedings. Imprisonment or a fine are unavoidable, so that a victim-offender-reconciliation can only mitigate the sentence, whereas offences of minor or medium gravity can be dismissed extrajudicially. These are, e.g., simple and dangerous assault (i.e. assault with a weapon or other dangerous objects or collective assault), whereas aggravated assault leading to irreparable physical damage or permanent disfigurement is a capital felony.

The very few victim-offender-reconciliation projects in the law for adults are based on experiences of the more than 200 victim-offender-reconciliation projects within the frame of the juvenile penal law.[5] They have been working very successfully for years and even induced a reform of the Juvenile Court Act. Only three of the projects for adults are accompanied by research.[6] One of these is the "WAAGE Hannover" which I will introduce to you now.

2 The pilot project "WAAGE Hannover"

In 1990, the "WAAGE Hannover" was founded as a non-profit-organisation for conflict-mediation and restitution with the aim of reconciliation between victims and offenders within the criminal law for adults. The prosecutors of the local municipal court refer those cases to the project they consider to be suitable for a victim-offender-reconciliation.[7] Due to the fact

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5 Bannenberg 1993, 188 ff.

6 These are the already finished projects in Tübingen (Rössner 1993) and Nürnberg-Fürth (Dölling 1994); the third one is the pilot project "WAAGE Hannover".

7 On the implementation and its problems cp. Netzig 1994, 178 ff.

that the prosecutors decide on the suitability (and consequently on the amount) of cases, they are able to influence the success or failure of such a project directly. Therefore, it was not only sensible, but also inevitable to include the prosecutor's office in the preparatory process of the project. Together with the prosecutors, the "WAAGE" mediators developed and compiled a catalogue of criteria for the referral of cases suitable for victim-offender-reconciliation. In the following, I will present some of the most relevant criteria. Firstly, the quality of the victim must be ascertained and the case must be sufficiently solved and indictable. Furthermore, we have drawn up a catalogue of offences which are especially suited for victim-offender-reconciliation.

2.1 Criteria for victim-offender-reconciliation

2.1.1 Quality of victims

One condition for the referral of cases to the project is that the victim is a natural person. Other kinds of victims, which can also be affected by an offence, like associations or companies, are excluded from victim-offender-reconciliation. As this measure is based on the communication and interaction between two persons which are personally affected, it is not suited for these victims. Here, we have other elements of restitution.[8]

2.1.2 Sufficiently solved and indictable case

This criterion must comply with three conditions:

(a) The first condition for the referral of cases to the project is that the facts of the case have been sufficiently investigated, i.e., the responsibilities for the offence as well as the victim/offender role could be ascertained. The WAAGE mediators are neutral and independent of the justice system; they may not be abused as investigators.[9]

(b) By this requirement we are able to point out that petty offences, which would be dismissed without charges anyway, are excluded from a mediation which would influence the legal decision. Victim-offender-reconciliation is not meant to widen the net of social control or to legitimate interference of the state. The penal law must always be the ultima ratio!

(c) The third condition is the offender's confession. For victim-offender-reconciliation, only offenders who admitted or confessed at least essential parts of the offence or who gave no statement at all, can be considered. For constitutional reasons, the offender's protestation of innocence must be respected.

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[8] On symbolic restitution for offences without personal victim cp. Schöch 1993, 369 f.

[9] On the mediators' indepent and neutral position cp. Hering 1993, 42 f. and Delattre 1989, 42 ff.

2.1.3 Voluntary participation

The voluntary participation in a victim-offender-reconciliation is inevitable. The refusal of participation on the other hand may not lead to a more severe punishment.

2.1.4 Catalogue of offences

In order to facilitate the selection of offences which are especially suited, the "WAAGE" mediators explicitely listed individual delicts. These offences are of minor and medium severity. In addition, there is a general category for "capital felonies".

By the way - it is at least doubtful whether offences like aggravated assault are suited for reconciliation at all.[10] Some experts support the opinion that is is generally not possible to compensate for a damage or injury; all we can do is relieving or moderating. In the case of aggravated assault with considerable physical and psychological damage, it is quite clear that measures like mediation or restitution would not work. Therefore, it would be most sensible to concentrate on offences of minor and medium severity, because here we have the highest amount of cases.[11]

Assault, breach of domicile, coercion/threat, and delicts of libel and slander are among those offences expecially suited for victim-offender-reconciliation. In German criminal law there is a delict which, as far as I know, does not exist in Australian law: verbal injury. If two persons are quarreling, calling each other names, are cursing and swearing - that would be a case for criminal law in Germany. There has been a case recently where the whole justice system with its bureaucracy was set in motion because somebody called another person "Dumme Kuh" (which means "silly cow" and is a rather mild insult). The fact that the justice system deals with trivial cases like that questions in principle the criminal law as ultima ratio and preoccupies critics and supporters, when discussing about legalization of certain offences.[12] But that is another problem. Let us go back to the project "WAAGE Hannover".

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[10] Cp. Rössner 1994, 18 ff.

[11] Sessar 1980, 175.

[12] Cp. the conference proceedings of the 51st German Law Conference 1976 and Albrecht et al. 1992.

2.2 Project development

The project started 1st July 1992, when all prosecutors had been required to refer cases suitable for conflict mediation to the "WAAGE Hannover". The expected number of cases could not be achieved. Within the first six months, 37 prosecutors referred only 43 cases. In 1993, the amount of cases increased and reached the number of 191 cases, i.e. 16 cases per month. In 1994 we had 94 cases between January and June, that are 15 to 16 cases per month on average. In spite of a certain increase in the number of cases during the first months, it still seems to be insufficient.

2.3 Objectives and research questions

The legal research of the project started with two objectives: The first one was to evaluate the prosecutors' conduct concerning the referral of cases. The second aim was to investigate the prosecutors' frequent criticism of victim-offender-reconciliation and their recurring reasons for the low referral rate of cases. The main critical arguments are: " Adult offenders are hardly ever confessing", "Victim-offender-reconciliation is too time-consuming", "There are hardly suitable case constellations" etc.

In order to answer our questions, we had to find out how many of the cases of the prosecutor's office in Hannover are probably suited for victim-offender-reconciliation. As a first step, we registered the case capacity in a comparable period before the project started. The next step was to register the cases which have actually been referred to the project and to verify their suitability by the criteria-catalogue mentioned above. These surveys yielded the necessary data to compare the aspired referral rate of a representative year with the number of cases actually referred for victim-offender-reconciliation.

The method with which the data were collected was the analysis of case records.[13] To analyze those records, we developed a survey instrument accordingly to the structure of the prosecutors' investigation records.[14] The first survey, which had been carried out to investigate the capacity of suitable cases of a representative year, was a random sample of 750 records of 1990. The random sample was drawn from a population of 27.920 cases of the prosecutors' department in 1990. The second survey of the actual number of referred cases had been carried out over 17 months from summer 1992 to November 1993. Here, we could include 201

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[13] On the problem of analyses of case records in criminology cp. Dölling 1984, 265 ff.

[14] Hartmann & Strobl 1994.

records out of 230 which had undergone victim-offender-reconciliation. The other records were not available.

3 Results

In the course of the data evaluation, we have found a lot of problems and relations. With regard to the time limit, I will concentrate on the most important ones.

3.1 Capacity of eligible cases in 1990

First of all, I will show you as a result of the first survey, which capacity of cases probably suited for referral to the project we may basically assume for a prosecutor's office in a city like Hannover with 500.000 inhabitants.

As you can see, we have collected and analyzed 750 records (see fig. 1). 6 records could be subtracted because they were mistakenly registered as criminal offences. We then distinguished between records with at least one personal victim and those without personal victims, like department stores, associations etc.. 335 cases with at least one personal victim were left. These cases were further separated in cases with offenders who confessed or made no statement at all, and those who did not confess. At the same time, we have investigated whether the 335 cases are petty offences or not. This could be done by evaluating the prosecutors' final directions. If they decided to dismiss without charges or referred to private prosecution, these cases are definitely petty offences. Due to the fact that in some cases, the offenders' denials overlapped with the classification as petty offences, we tested the data for this problem. 187 suspects denied charges. In these cases, 104 suspects merely denied and 83 denied petty offences. 29 cases could be evaluated as merely petty ones. Since basically all criminal offences are suited for victim-offender-reconciliation, the evaluation could be finished at this point.

In 1990, 119 cases altogether were left, which would have been suited for victim-offender-reconciliation. Projected to the population of 27.920 cases in 1990, there are 4.430 cases per year the prosecutors could refer to the victim-offender-reconciliation project.

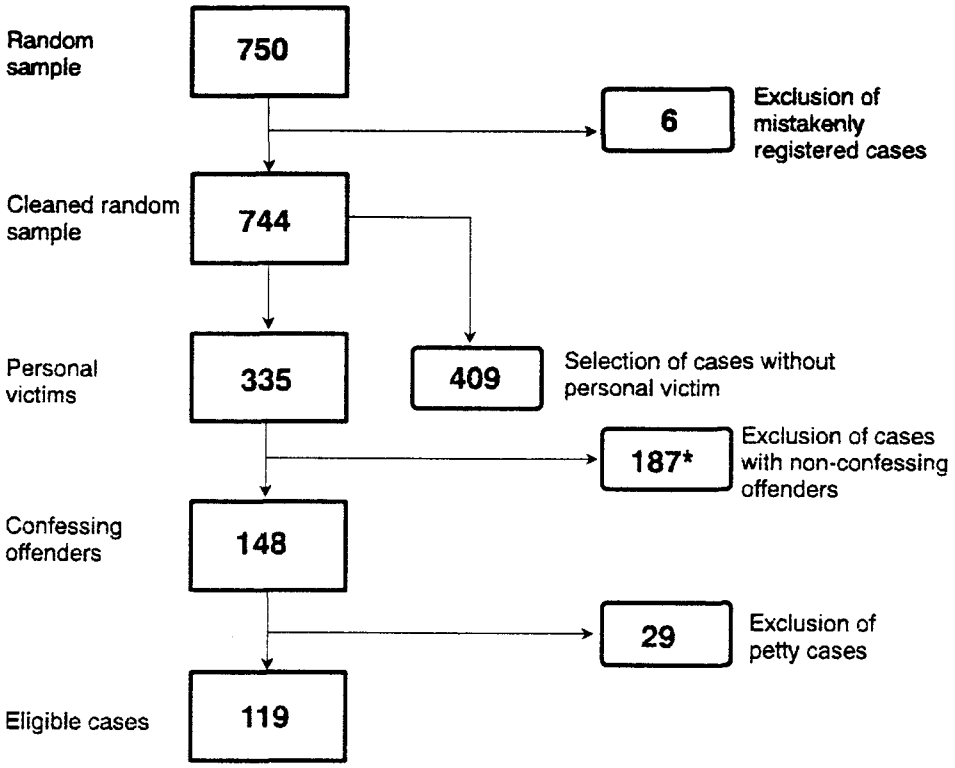

Figure 1: The ascertainment of cases suited for victim-offender-reconciliation in 1990

* Of these cases, 104 are with non-confessing offenders and 83 with offenders denying charges in the case of petty offences.

3.2 Prosecutors' coverage of case capacity during the project phase 1992/1993

The next figure shows the result of our investigation on the prosecutors' coverage of the actual case capacity during the project phase and their keeping to the criteria for the suitability of cases (see fig. 2). For this, we evaluated the "WAAGE" cases, i.e. those records which have been referred to the project for mediation by a prosecutor. Within the first 17 months, 201

out of 230 finalized records could be evaluated and analyzed according to the criteria I mentioned before.

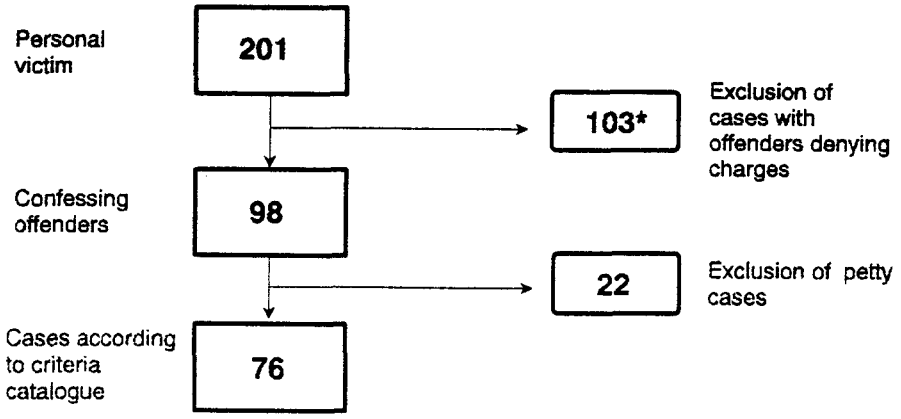

Figure 2: Sum of cases according to criteria for referral to victim-offender-reconciliation (n = 201); 1992/93

* Of these cases, 71 are with non-confessing offenders and 32 with offenders denying charges in the case of petty offences.

As agreed, these 201 records contained only natural persons as victims, but surprisingly more than 50 % of the perpetrators denied the offence and their participation. These 103 records should not have been referred to the project and had to be excluded.

When investigating the petty offences of the remaining 98 "WAAGE" cases, we could not always proceed according to the prosecutors' closing directions. The explicit intention of victim-offender-reconciliation is to achieve a reduction of the sanction and a dismissal of the case after mediation has taken place. Possible mitigations of sentence could not be established, however, since the prosecutors only announced the sentence when mediation had been successful. Therefore, only cases without successful mediation could be identified indirectly as petty cases by the prosecutor's closing direction. If he or she dismissed a case for insignificance or referred it to private prosecution in spite of a failed mediation, we could certainly assume a petty offence. This fact applied to 54 out of 98 cases. In 32 of these 54 cases, the suspects denied the offence. The remaining 22 cases were identified as petty offences and consequently excluded.

The investigation resulted in the fact that within 17 months, only 76 cases met the criteria for suitability, i.e. 54 per year. A coverage of the case capacity of some thousand cases per year - e.g. 4.430 in 1990 - could not nearly be achieved. Only 1.2% were actually referred to victim-offender-reconciliation!

3.3 Quality of "WAAGE" cases

In the following, I will now concentrate on the quality of the "WAAGE" cases. Despite the fact that only 38 % of all referred cases met the agreed criteria, the "WAAGE" mediators, for reasons of "survival", tried to achieve a reconciliation also in cases which were formally not suitable. In 94 cases, of which only 76 cases were suited according to the criteria, a successful victim-offender-reconciliation was carried out and the success rate increased. Therefore, we had 94 cases where victim-offender-reconciliation had been successful and 107 cases where mediation could not take place within the period of our investigation.

In most of the 107 cases without successful mediation, the offenders refused to participate, partly without giving any reasons. In some cases, the offenders refused to meet the victim, the lawyer advised them not to participate, or the offender did not approve of the victim's damage claim.

Taking a close look at each of the 94 cases with successful and the 107 without successful victim-offender-reconciliation, the 94 cases showed characteristics of petty offences, such as low financial damage. There were scarcely physical damages, only once hospital treatment was necessary, in few cases out-patient treatment. In most cases with physical damage, medical treatment was not necessary at all. Another result was that victim-offender-reconciliation was more likely to be successful when victim and offender were unknown to each other. Looking at the successful and failed mediations, our assumption was confirmed that the offender's confession or denial does not matter in the case of petty offences. This effect cannot be expected, however, in the case of more severe offences with more considerable consequences.

The petty cases the prosecutors referred to the project were more often successfully settled by a mediator than other cases, no matter whether the perpetrator confessed or denied the offence. Obviously, the prosecutors referred rather "quantity" instead of "quality" to the project - a fact which induced the undesirable net-widening effect. The agreed criteria were not recognized.

In future, the cognition of a conflict between victim and offender should lead the prosecutors to a greater differentiation of action. For reasons of prevention, they should, e.g., continue

to refer also petty cases to victim-offender-reconciliation projects, but without postponing the handling of the case or suspending its evaluation. In this way, a functional alternative to the conventional sanctioning system could be established.

The finding, that a reconciliation between victim and offender who were unknown to each other and therefore had no cause for conflict was more successful than between acquainted persons, is also convincing. Especially in the case of conflicts in relationships like marriage or neighbourhood, the affected persons' appeal for the help of the justice system was often the last attempt to settle the conflict. If the relationship has already been ruined for a long time, the offer for reconciliation was often too late.

4 Preview

The evaluations showed that the practical realization of the mediation concept was not as successful as expected. Despite the prosecutors' promised support, they were obviously not prepared for reacting in a true-to-life way. Their education seems to concentrate too much on punishing and the performance of proceedings. A communicative measure like victim-offender-reconciliation can hardly be integrated in this system.

The dilemma is, however, that only the prosecutors are responsible for the referral of cases and therefore, only these cases can be investigated. At present, other cases cannot be recorded and evaluated. Under these circumstances, a measure like victim-offender-reconciliation can hardly leave the fringe area of the justice system.

But fortunately, also a few - and no petty - cases were referred which met exactly the criteria. These cases could be very successfully settled and therefore give us cause to some hope.

Mediation as a conciliatory and true-to-life element in the criminal justice system can only succeed if the justice system contributes to the necessary legal and social acceptance of the measure.

5 Literature

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