Helmut Kury
Max Plank Institute for International and Foreign Criminal Law, Freiburg, Germany
Annette Kuhlmann
University of Wisconsin, Baraboo, USA

MEDIATION IN GERMANY AND OTHER WESTERN COUNTRIES

Abstract

The article is devoted to comparative analyses of mediation in Germany and other countries. Authors discussed historical precursors of conflict resolution after crimes from the Code of Hammurabi to contemporary approaches.
The theoretic part of paper is based on in extensive empirical criminological research results over the last 50 years. The authors analysed definition of mediation and development of mediations process in USA, Germany and other countries. "Overall, mediation is throughout faster and more inexpensive for all participants than the classic confrontational court procedures"

Key words: Mediation; Restorative justice; Reconciliation; Restitution; Harm; Offenders

1. Introduction

In recent decades professionals in criminal justice in western industrial countries have increasingly "rediscovered" forms of dealing with crime, deviance, and other forms of social conflict that were prevalent in earlier periods of European history and non-European indigenous societies. Generally these practices have become known as mediation or restorative justice and have spawned a sheer overwhelming body of literature and approaches [18], [25], [34].

A main reason for the "rediscovery" of mediation can be seen in extensive empirical criminological research results over the last 50 years which has shown repeatedly that today's classical approach to dealing with crime and criminals can only rarely, if at all, address the harm created through the criminal act. This classical approach concentrates on harsh punishment of the offenders, while "using" victims only as witnesses [29]. Another important contributing factor was the emergence of victim research and the foundation of the field of victimology as part of post WWII criminology. This new field rightly criticized that with the classic criminal justice approach the victims of crime receive little attention and support [3]. Over the last several decades many countries established special legal provisions for more effective victim support, but in practice little, if anything has changed. The role of victims in the justice system remains limited to being "used" as witnesses; compensation occurs, if at all, mostly through private institutions. In Germany, for instance, access to the few victim support measures available through the state require surmounting so many bureaucratic obstacles that in most cases compensation is unachievable [54], [55].

International research clearly shows that most crime victims, with the exception of those of severe victimizations, are more interested in restitution of the material or immaterial damage inflicted by the criminals than in (harsh) punishment of the offender [47]. But exactly the latter is the focus of the current penal law and state organized criminal justice system. It is thereby ignoring the needs of victims and a broad variety of the public groups which, in contrast, strive to find solutions for the social harm created by the crime. Beginning in the 1960s and 70s in the United States, these conditions have led to an increasing number of projects that seek to find solutions through mediation and the building of bridges between offenders, victims, and community.

Restorative justice presents a different approach to achieving justice than the traditional court system. Whereas court systems depend on punitive measures and do not attend to victim concerns, restorative justice focuses on repairing the harm caused by an offense, bringing the offender back into society, and giving all actors affected by the crime (the offender, the victim and the community) a direct voice in the justice process [11].

Important for the acceptance of mediation is the familiarity of the public as well as of penal law and criminal justice institutions of its potential and possibilities for conflict resolution. Johnstone and Van Ness [26, 6] point out: "Yet, despite its growing familiarity in professional and academic circles, the meaning of the term 'restorative justice' is still only hazily understood by many people". Professionals at a recent international conference in Germany identified the reasons for the limited use of restorative justice as a lack of understanding or familiarity with this approach among the general public as well as the court. "Because of the overwhelmingly punitive orientation in the relevant arenas such as politics, penal justice, and public discussion it is difficult to create a change in this situation since restorative justice is seen as a rather soft reaction to crime" [34, 240].

The following chapter will first present a short overview of the historical background and use of mediation and conflict solution techniques, particularly those ideas which are "rediscovered" today. Mediation is a general term which has been used in a number of different ways; we will attempt a short definition. The main focus of the chapter will then be a discussion of forms of application and experiences with mediation in Germany and other (western) European countries. The central question regarding the possible preventative impact of mediation in contrast to "classical" approaches to crime will subsequently be addressed. In this context results of evaluation programs will be discussed by comparing the different effects of mediation and penal punishment.

2. Historical precursors of conflict resolution after crimes

Supporters of mediation and restorative justice emphasize correctly the historical background of this approach to problem solving. For example, Frühauf points to the history of restitution as one of the most interesting topics in the history of law [10, 8]. In the beginning restitution was a natural part of any system of sanctioning and can be traced back to the beginning of written law

[12]. Already the Code Ur-Nammu (2050BC) shows the legal roots of modern forms of restorative justice [2]. The Code of Hamurabi originating in 1.700 B.C., one of the oldest traditional law books, describes, beside harsh punishment, also extensive regulations regarding restitution for the victim by the offender. This applied, for example, to cases of theft, but also bodily harms or killings. Even more extensive forms of restitutions by the offender were regulated in the law of the Hethiter from about 1.300 B.C.

Extensive regulations regarding restitution were common among most cultures; for instance, in antiquity, in the Islamic legal system, and in most tribal societies [34, 11], [7]. Barak [2] reports in this regard on the Roman Law of Twelve Tablets (449 BC). Although North American Indian cultures have deep and extensive differences between their respective traditions, restorative justice has been a wide-spread theme which is now revived among many tribes, most notably the Navajo [1], [17], [60]. Sharpe [48, 26] points out: "Reparation has been a vehicle for justice throughout human history." Rössner [41, 878] explains these findings from the point of view of behavioral sciences when he writes "that behavioral rules regarding reconciliation are part of humankind's biological program". He further explains that there is no human society "without systematic rules for conflict resolution" and "the restoration of peace through social restitution was the central goal of criminal policy" in the historical penal law until the Middle Ages.

Frühauf [10, 13] describes the development of the concept of restitution for the German legal tradition over the last several centuries. Beginning with the 5th Century A.D. penal law increasingly became a written system. An institutional reaction to crimes in the form of restitution was regarded as normal and customary [10, 17]. With the emergence of institutional regimes of kingdoms the distribution of power between state and tribes changed dramatically [10, 37]. These kingdoms were interested in the abolition of the old systems of penal law since they understood jurisdiction also as a medium of political power over which they wanted to be in charge, effecting deep change in social control as a result. The concept of restitution had no place in the newly established forms of punishment through these authorities. In the process the victim lost participation in the regulation of the conflict and thereby also the right to cooperate in the finding of a "solution" [8].

Punishment now became a means to impose power. Upon the completion of an investigation the state imposed a "Peace fine," a monetary punishment, so punishment became a source of state income. This created a problem that continues to this day, "…by the end of the Franconian period the involvement of the state had become the main focus, the complete monetary penance had to be paid to the judge without exception. The problem of restitution for the victim was seen as solely his or her problem [10, 44]. Essentially these principles have remained unchanged to this day. Frühauf [10, 45] talks about a thorough 'fiscalization' of penal law in response to the massive financial interests of the kingdom. Fines have been and continue to be today a profitable business for the state; discussions regarding restitution to the victim as a responsibility of the state have only recently re-emerged. At the same time, however, Frühauf points out correctly

that there is no way around state control of criminal justice, despite all the problems of social control connected with it, since it led to a more just and equal treatment [10, 59].

What remain open according to new scientific inquiry are questions regarding the extent to which the state has to necessarily limit itself to punishment in its reaction to crime [10, 60]. This question in particular has to be reconsidered in light of the changed societal conditions today. The missing component of restitution in penal law can be seen as a disadvantage of modern penal law. In dealing with crime the focus is nearly exclusively on the offender, with a network of treatment and diversions options beside criminal sanctions. For instance, in Germany today monetary fines have become the most prevalent form of sanction – victims, however, are not significantly benefiting from these measures. Only recent considerations from the field of victimology have led to some new forms of thinking regarding these issues [10, 65] and the creation of several restitution projects which started in the US, but are now also becoming increasingly visible in western European countries.

3. Definition of Mediation

Braithwaite, one of the founders of the modern mediation movement, distinguishes between "mediation" and "restorative justice" when he emphasizes,"Mediation between just a victim and just an offender can be described as a 'restorative process', but it does exclude other stakeholders such as the family of the offender." Mediation as a restorative process stands in contrast to restorative justice which he understands as a process where all the stakeholders affected by a crime have an opportunity to come together to discuss the consequences of the crime and what should be done to right the wrong and meet the needs of those affected. Of course such an ideal is secured to greater and lesser degrees [4, 497].

However, according to Braithwaite restorative justice does not only refer to procedures

> … it is also about values. It is about the idea that because crime hurts, justice should heal. The key value of restorative justice is non-domination … The active part of this value is empowerment. Empowerment means preventing the state from 'stealing conflicts' [8] from people who want to hang on to those conflicts and learn from working them through in their own way. Empowerment should trump other restorative justice values like forgiveness, healing and apology, important as they are [4, 497].

The central role of 'empowerment' in this context also means that it has to be accepted when a victim reacts in a retributive rather than restorative manner to the experienced injuries. "But because non-domination is the fundamental value that motivates the operational value of empowerment, people are not empowered to breach fundamental human rights in their pursuit of revenge" [4, 497].

According to Walgrave the following characteristics distinguish restorative justice from criminal justice

> Crime in restorative justice is defined not as a transgression of an abstract legal disposition, but as social harm caused by the offence…. In criminal justice, the principal collective agent is the state, while collectively in restorative justice is mainly seen through community….The response to crime is not ruled by a top-down imposed set of procedures but by a deliberative bottom-up input from those with a direct stake in the aftermath …. Contrary to formalized and rational criminal justice procedures, restorative justice processes are informal, and include emotions and feelings….The outcome of restorative justice is not a just infliction of a proportionate amount of pain but a socially constructive, or restorative, solution to the problem caused by the crime…. Justice in criminal justice is defined 'objectively', based on legality, while justice in restorative justice is seen mainly as a subjective-moral experience [55, 559].

At the same time the author emphasizes that the differences between criminal und restorative justice have become blurred in recent years.

Similarly, there are no clear distinctions between the different types of mediation. According to Zernova and Wright there are numerous models that can be applied in practice as restorative justice approaches. "There is no agreement among restorative justice proponents as to how exactly restorative justice should be implemented and what its relationship to the criminal justice system should be" (2007:91). The authors distinguish between a process oriented and an outcome oriented model. In the face of such diversity of approaches, a distinction is often made between three kinds of mediation. In one instance, mediation is part of the court proceedings and conducted by the judge. In the other situation mediation is used parallel to the court proceedings in an "institutional interlocking with the court proceedings and yet at the same time implies a procedural disengagement from the court." Finally, an out-of-court mediation aims to prevent a court proceeding in the first place [20, 9, 19]. The latter two were the prevalent forms in those countries analyzed by these authors [20].

According to Hot and Steffen [20, 12], who have conducted an international comparison, the definitions for mediation vary widely depending on the respective legal system. According to their results, the smallest common denominator of a definition of mediation is:

> Mediation is a procedure based on voluntary participation. Without using any coercion or decision making power, a facilitator supports the communication between the parties involved with the goal of finding a responsible resolution of their conflict.

The various legal systems are in agreement in regard to one central element, voluntariness; however the extent to which this concept applies varies in the different countries.

A central element in mediation is victim-offender reconciliation or restitution. Heinz [15, 376] rightly emphasizes that victim-offender reconciliation is closely connected to the idea of restitution, but goes beyond it, since the central idea in reconciliation includes a social peace.

> The goal is to reach a mutual settlement and, in the best instances, a reconciliation of the parties by addressing the needs and interests of both sides. By using the opportunity for a private, autonomous solution, the offender is supposed to gain an increased awareness of the damage caused and thereby gain a greater sense of social responsibility. However, this foundational concept points beyond a victim-offender reconciliation in its current form to the consideration of the victims perspective as a starting point for social learning in offender- and probation treatments as well as corrections."

4a. Developments in the United States

In western countries restorative justice first emerged in the United States as a result of several strands of development. In connection with the social unrest of the 1960s and 70s the US government developed strategies that focused on community development and poverty reduction. They provided resources for the development of neighborhood justice and community panels. Beginning in the 1980s these initiatives contributed to a vibrant sense of community as a cultural resource, which included forms of community justice. At the same time critique of the traditional, state-sponsored adversarial legal system mounted and the ensuing disillusionment with the system became known as the 'nothing works' thesis.

> The criminal justice system was seen as failing, and to be doing so with spectacularly tragic consequences for the social fabric. The law was depicted as deploying anachronistic institutions ill-equipped to accommodate the changing volume, type and cause of dispute in the late 20th century. The system was labeled as costly, inefficient, alienating, arbitrary, inaccessible, and inappropriately focused on the interests of lawyers and judges [37, 5].

The era was characterized by dissatisfaction with the status quo and a zest for experimentation. As mentioned before, victim logy had emerged and became increasingly established. In criminology Richard Quinsy emerged as a leading figure in a new, critical approach to crime that emphasized social justice. One of his transformative contributions was the formulation of an influential kind of restorative justice that became known as Peacemaking Criminology. Consistent with the era's exploration of different religions, he brought a general spiritual dimension to restorative justice based on its prevalence in ancient wisdom tradition, including Hinduism, Taoism, and Buddhism beside those mentioned earlier and gained quite a following among criminologists as well as lay people [5, 267], [49], [50], [59]. Restorative justice now became applied in an ever wider array of settings, mediation circles, race circles, family violence, prisons, specialty courts, capital punishment, juvenile justice, as well as various settings of trauma resulting from war and government violence [50].

But another, confluent strand enhanced this development. Restorative justice had been the focus of most justice systems in antiquity and in tribal societies, including North American Indians. In the process of colonizing the tribes in North America the US Government took over many parts of tribal law enforcement as well as criminal justice (see for instance the Major Crimes Act of 1885 or Public Law 280 in 1953). In the context of the American Indian Movement and tribal revitalization of the 1970s, the re-creation of tribal courts became a central means of re-establishing political sovereignty. Even the Attorney General of United States supported these new developments [38]. The Peacemaker Court of the Navajo Nation was at the forefront of this movement. Similar to other contemporary tribal courts it is built on traditional and spiritual tribal values which emphasize social harmony, but lack concepts, even words, for guilt [17]. These traits, however, potentially leave tribal courts open to the danger of idealization [23]. In Navajo jurisprudence today both systems exist parallel to each other and supplement each other. Still, the Navajo Peacemaker Court not only became the most successful and most well-known of these tribal courts, but by bringing its ancient tradition into the present, it, in turn, had a major impact on the establishment of restorative justice in the main stream administration of justice in the United States.

The re-establishment of tribal courts illustrates one aspect of the ongoing debate surrounding restorative justice in the US – that of the role of the state. The state used its criminal justice system as one of the ways to oppress indigenous people [39]. But the revival of traditional tribal justice systems has the potential for spaces of tribal autonomy (relatively) free from state intrusion [64]. Pelvic points to an inherent paradox in restorative justice. On one hand it has a distinct identity and distinct approaches to crime which are "fundamentally incommensurable with and independent of, state criminal justice agencies" [37, 17]. On the other hand, restorative justice works predominantly "within (rather than against) state criminal justice arenas" [37, 19]. Johnston goes even further when he asks: Is restorative justice "an alternative to punishment or an alternative form of punishment" [23, 88]. Some of the other controversies include questions regarding reiterative shaming, ethical roles for victims, and the appropriate use of restorative justice in various settings [23], [50].

4b. Developments in Germany

As Fruehauf [10, 20] states.... the need to talk about a social conflict so that it can be resolved is still deeply rooted in society, but this potential for conflict resolution is hardly ever, if at all, used in existing criminal proceedings. … The idea of restitution and satisfactory conflict resolution in penal politics has therefore a certain conviction and legitimacy (1996:1088).

In the middle of the previous century this fact was obviously increasingly recognized after an extended period of "forgetting." It allowed the newly created victim logy, based on sound research, to revitalize this idea relatively quickly and spread it at first throughout western industrial states and then globally. In Germany penal sanctions have been supplemented through a net of diversion and treatment measures. However, these considerations have focused so far predominantly on the offender or on appropriate sanctions for him/her [10, 64]. The history of

mediation emerged in Germany during the 1980s on the backdrop of reports about its successes in the United States. An intensive discussion about "restorative justice" had already emerged in that country during the previous decade [41, 889].

> Restorative justice as both a philosophy and an implementation strategy developed from the convergence of several trends in criminal justice: the loss of confidence in rehabilitation and deterrence theory, the rediscovery of the victim as a necessary party, and the rise of interest in community-based justice [34, 13].

In the US, during the 1970s and 80s, punitiveness increased among the population, but, at the same time, so did the emergence of alternative forms of sanctions. "Along with their interest in punishment, the public's interest in alternative non-punitive solutions has also been recognized"[34, 103]. When the public is educated about the low deterrent impact of classical sanctions as well as about alternatives to these forms of punishment, punitiveness declines [40], [43]. "In sum, while the public's support for punishment is well known, its support for alternatives to punishment and sanctions with a restorative quality is also strong" [34, 104] and especially "punishment alone is an extraordinarily poor way of restoring trust either in an offender or in society" [34, 105].

The emerging discussion on alternative forms of crime reduction especially lauded the advantages of mediation as

> … expanded access to implementation of justice, lasting satisfaction and acceptance of the results, conflict resolution that benefitted all effected by the crime, a greater sense of justice and resolution in the perspective of the parties involved as well as the community, a strengthening of all parties through an integrative and constructive method of conflict resolution, an easy access point, workload reduction of the judiciary, as well as cost savings for the state and the parties involved [18, 7].

In this context support of mediation increased "… in the 1990s to a point of euphoria which praised mediation as an omnipotent resolution to any kind of conflict "(Hopt and Steffek 2008c:7). According to Hopt and Steffek [18, 9] there is "a tradition in mediation orientation of focusing on foreign legal codes."

The German penal code (Strafgesetzbuch or StGB) mentions restitution once in connection with requirements for parole (§ 46 section 2 of StGB) and once in the context of sentencing (§ 46 section 2 StGB). § 46 sets policies for sentencing which are based in the notion of personal guilt and thereby the measure of individual guilt**.** Section 2 lists the main charges against the accused with special mentioning of possible efforts of the offender for restitution attempted already before the conviction [10, 66]. It is possible to use restoration of the damage caused by the crime as part of the probation requirements. § 46a allows for the dismissal of a trial after successful victim-offender reconciliation in cases of misdemeanor (offenses that carry a sentence of less

than a year). Even in felony cases victim-offender reconciliation can be considered for a reduction in sentencing.

Re-socialization is a central theme in German juvenile law (Jugendgerichtsgesetz or JGG). Consequently, restitution is seen as particularly valuable in this regard, since it is well suited to bring home the injustice of the offense to the offender. "Victim-offender reconciliation holds a privileged function in juvenile justice because of the normative consideration of the concept of restoration" [15, 376]. Accordingly it is already possible in the juvenile law of 1923 to impose restitution as a special obligation. Through such restitution the young offender is supposed to "recognize the injustice of his acts and acknowledge the negative consequences for himself" [10, 76]. Consequently, victim-offender reconciliation was first accepted into the juvenile penal law (1. JGGÄndG August 30, 1990; BGB1 I, 1853) which was the first time it was explicitly mentioned in a law. Then, in 1994, it was included in the general penal code (§46a StGB). In juvenile penal law the judge has the option to require the convict to attempt victim-offender reconciliation (§10 paragraph 1 section 3 Number 7 JGG).

To increase the application of victim-offender restitution, the justice system was required to encourage its use in 1999 (§§ 155a, 155b, Strafprozessordnung – StPO). The prosecutor and the court were asked to explore the possibility of restitution and work towards it or to include an appropriate agency to do so [46, 438].

Nationally applied approaches are not uniform. Criteria for victim-offender reconciliation have to include: no petty offenses, presence of personal harm, clear facts of the case, agreement of the offender with the facts of the case and acceptance of responsibility, voluntary participation by both parties [9, 93], [30]. Johnstone points to the danger of 'net-widening' when harder cases are tried in court and more minor offense are addressed through restorative justice programs.

> Less serious cases will be diverted to informal restorative processes and sanctions. But, because they are less formal and regarded as more benign, these processes will be extended to cases which previously would not have given rise to penal interventions. Overall the reach of the system of penal control will be extended rather than cut back [24, 609].

On one hand restitution requirements are rightly given great pedagogical value, on the other hand this approach is still used relatively rarely in Germany; payments to a charity are more common. Similarly, Frühauf [10, 77] emphasizes that a requirement for restitution is "...given great significance on the theoretical level, ... yet in practice it is rarely used." This may be related to the training of judges, especially judges in juvenile courts.

As a result of a resolution by the German government in 1992, the national organization for probation and parole (Deutsche Bewährungshilfe e.V.) established a service office for victim-offender reconciliation as a trans-regional counseling center which is funded predominantly by the department of justice and the states (http://www.toa-servicebuero.de/) [6, 589]. Since 1995

Kerner et. al [28] are compiling data about victim-offender reconciliation nation-wide at the request of the German department of justice. According to these statistics an increasing number of non-partisan conflict resolution offices have been established by various organizations, including support agencies for the court and juvenile courts as well as court related social service agencies. These services can be sought by the prosecutor in the pre-trial stage or by the court during the trial to initiate victim-offender reconciliation. The professionals who conduct mediation are usually social workers and already have significant additional training in conflict resolution [9, 90]. According to Schwind [46, 439] there are approximately 400 such reconciliation offices in Germany. According to Delattre [9, 90] currently more than 300 victim-offender reconciliation agencies staffed with full-time employees work annually on 25,000 cases (Germany has ca 82 million citizens) [52, 104]. Delatorre [9, 91] shows, those 35,000 cases are resolved annually through victim-offender reconciliation. While these absolute numbers put Germany at the top in Europe in regard to the application of this approach, "[i]t is still relatively rare considering the 550,000 annual indictments" [46, 439].

According to Kerner et al. [28] the majority of victim-offender reconciliations were about assault (47%), about half of which were instances of domestic abuse [51, 105], [52, 2012]. Schmidt [44, 189] agrees that victim-offender reconciliation is used predominantly in cases of physical assault, but also property damage, slander, threat of a crime, coercion, unlawful entry, and property crime. The emphasis of victim-offender reconciliations is "…not on addressing material damage, but on the interpersonal realm [56, 339]. According to Jehle, the largest number of incidents occurred in 2002 namely in 69.8% apologies, 25.1% recovered damages, 13.6% compensation for pain and suffering, and 5.7% labor for the victim. In cases where the victim-offender reconciliation is successful the prosecutor usually dismisses the case. In other cases the court may reduce the sentence or even abstain from sentencing all together [21, 39], [46, 439].

On July 21, 2012 the German Parliament passed the "law in support of mediation and other procedures for out-of-court conflict resolution" (Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung. Bundesgesetzblatt 2012, Teil I, Nr.35; (http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/17_wp/mediationsg/bgbl.pdf;jsessionid=B20051C2D06C174DE282AB87C67EBC4B.2_cid344?__blob=publicationFile). This law represents the implementation of guideline 2008/52/EG of the European Parliaments from May 2, 2008 concerning specific aspects of mediation in civil and trade affairs (ABIL 136 from May 24, 2008, p. 3).

Hopt and Steffek [20, 7] correctly emphasize that in Germany today mediation "is partially established in the system of conflict resolution and seen as a helpful approach, however, according to general opinion, its potential is underutilized." Delattre [9, 90] argues similarly when he says that there is a general agreement that "victim-offender reconciliation, as a new perspective in dealing with law-breaking behavior, deserves greater attention in the administration of justice and should be anchored more solidly in criminal law."

5. Development in Other European Countries

In an anthology contracted by the German Department of Justice, Hopt and Steffek (2008b) provide an overview of the situation of mediation in other countries [41, 881]. The volume contains studies about the regulations in the United States, England, Australia, Canada, Bulgaria, Poland, Russia, and Hungary. Foremost it was the successes and positive descriptions of mediation in the US which increasingly encouraged other countries to introduce and support mediation.

As Hopt and Steffek [20, 12] rightfully emphasize, there are significant variations in the practice of mediation between these countries – even the term itself is defined differently. Participation in mediation on a voluntary basis is a characteristic of this approach in all countries; some states do, however, discuss the question of the extent to which parties can possibly be forced to participate. Furthermore, the role of the mediator is defined differently; for instance in regard to the extent to which he or she may become involved in the solution of the problem. In addition, extra-legal conflicts such as domestic or work-related disputes can benefit from mediation; "It is one of the shared views in all of the studied social systems that the particular strength of mediation lays in its primary focus on social conflict while the legal resolution remains only a supportive function" [20, 13].

According to the authors, in situations where problems with mediation do emerge, the causes have to be found and evaluated in the context of the countries' legal system [20, 85]. Difficulties occur particularly in countries which are still unfamiliar with the process and thereby lack experience with its implementation such as poor procedures, insufficient institutional support, or abuses leading to delays of the court proceedings. It is important that the courts and public are familiar with the process.

While restorative justice, at least in terms of theoretical discussions, has become wide-spread in Western industrialized countries since the 1980s, there are fewer Eastern European countries that have developed such approaches. Those that did usually had already oriented their policy development in accordance with the west for several decades. Willemsens and Walgrave, for instance, emphasize: "Although a number of countries in Central and Eastern Europe already have well established victim-offender mediation practices (for example, Poland, the Czech Republic, and Slovenia), others are still struggling to take the first steps" [56, 491]. The European Forum for Restorative Justice tries to provide support in the context of the AGIS2- Project "Meeting the challenges of introducing victim-offender mediation in Central and Eastern Europe." Based on their own experiences with collaborations in Eastern European countries Willemsens and Walgrave [57, 491] point to specific difficulties and resistances:

> …a highly punitive attitude among the public and policy makers, - an uncritical reliance on incarceration, - strong resistance within the police, prosecutors and judges, who fear competition from alternatives, - a passive civil society and weakened

> public legitimacy of the state and its institutions, - limited trust in NGOs and in their professional capacities, - lack of information about restorative justice and of restorative justice pilots, - low economic conditions, making it difficult to set up projects, - no tradition of co-operation and dialogue in several sectors and professions, - a general loss of trust in a better future, and a mood of despondency and cynicism, - forms of nepotism and even corruption in parts of the criminal justice system, - heavy administrative and financial constraints on the agencies, preventing investment in qualitative work" [31].

Kuzynsky-Singer emphasize, with regard to Russia, that mediation represents "…a relatively new phenomenon whose foundations are not yet fully developed, particularly since special court regulations for restorative justice procedures do not yet exist" [32, 837]. Professional discussions lend more significance to this approach in regard to business-related conflicts. However, in 2007 a bill on "Reconciliation procedures with participation of a mediator" was introduced on the federal level in the Duma. The draft also addressed conflicts in labor and domestic disputes.

The same authors further report that the court has to grant permission for a settlement, confidentiality does not exist, and even the procedures for this approach are not regulated. The mediator can be subpoenaed and interrogated by the court. The profession of a mediator is available to anyone; no post-secondary educational degree is required. The majority of mediators do not have any legal background and there is not consistency in their approaches. "The practice of mediation in Russia at this time is very opaque" [32, 848].

Mediation is developing in Russia particularly as an alternative to the state's court system. "The Russian literature addresses the possibility that the risks of court corruption and false court judgments can be circumvented through mediation. It would thereby be more logical to forego state legal structures in the enforcement of the agreement [32, 846].

Jessel-Holst [22, 906] reports about the state of mediation in Hungary. A law regarding the process of mediation was implemented on March 3, 2003. This approach is intended for civil legal conflicts. The law offers few incentives for the initiation of a mediation process although it was introduced to alleviate the workload of the courts. Mediation was first practiced in Hungary in the regulation of conflicts in the area of health care. Mediators are required to hold an academic degree, although a special professional certification is not required. The procedure has been applied relatively rarely so far. Among all certified mediators in 2005, 51% were lawyers, 16% were teachers, or persons with a technical background. The number of mediations has increased to 721 in 2004, 532 of these led to a successful conclusion. Among the total number of mediations that year, 254 were related to family law, 34 to labor law, and 433 to civil controversies. Overall these mediation procedures were seen as positive and the low rates of utilization were deplored.

6. Evaluation Results for Mediation

While there were only a small number of research projects, even internationally, that focused on the evaluation of mediation or restorative justice, Bazemore and Elis showed that today a number of studies document "the positive impact of restorative practices at multiple levels, with case types ranging from first-time offenders and misdemeanants to more serious chronic and violent offenders". In contrast to counseling, which shows uneven success rates, the evaluation of restorative justice programs is more consistent. "Most studies of restorative programs, including recent meta-analyses … indicate some positive impact …, and some suggest that restorative programs may have equal or stronger impacts than many treatment programs…"(2007:397). Most importantly, these studies also document positive impacts on the victims. However, it remains controversial if causes for these positive impacts are to be attributed to the reparation or to the experience of just treatment.

Hayes [14, 426] also arrived at a positive evaluation of restorative justice programs: „It seems clear that restorative justice processes have many benefits for victims, offenders and their communities. Victims benefit from active participation in a justice process. Offenders benefit from the opportunity to repair harms and make amends. Communities (of care) benefit from the negotiation of restorative resolutions to conflict… In this sense, restorative justice has achieved many of its aims (i.e. holding offenders accountable and affording them opportunities to make amends in symbolic and material ways, encouraging reconciliations between offenders, victims and their communities of care)".

However, there is still little research available on the preventative impact such as a reduction in recidivism among offenders who have participated in such victim – offender reconciliation programs. The existing evaluation results show significant methodological problems in regard to individual studies and the limited generalizability of the finding which are the same problems that have characterized the research on treatment options for decades [33]. Restorative Justice is a wide concept with varying approaches which are applied in different segments in the administration of criminal justice. The actual meetings, and thereby the opportunity for direct influence on the offender, often last only 60 to 90 minutes and can thereby only have limited impact. In addition, other factors that contribute to recidivism have to be considered such as unemployment, attachments to social networks, such as family, with their own particular dynamics, special life events, and possible drug and alcohol problems. Finally, there is the possibility of a "self-selection bias" since the offender as well as the victim have to agree to this approach [11, 41].

The most frequently articulated critique of restorative justice relates to the possible danger that (hard) punishment as deterrence might be eliminated. Proponents, in contrast, argue that such deterrence does not actually exist anyway. "It is of course true that the deterrent effects of punishment tend to be greatly overestimated and its tendency to re-enforce criminality underestimated. However, the average citizen will probably find this response unconvincing…" [58, 117-144], "….because the idea that without penal sanctions for law-breaking, many people will succumb to temptations to break the law seems self-evident to most people" [24, 601]. Some

critics emphasize that for reasons of justice, restorative justice can only supplement, not replace, judicial punishment, though it may be significant in this role.

Johnstone [24, 610] argues for a role of restorative justice as part of a larger reaction pattern to criminality; "What is most interesting is that even the most fervent critics tend to regard restorative justice – suitable reformulated and modified – as an extremely valuable contribution to the ongoing debate about how we should understand, relate to, and handle the problem of wrongdoing".

The impact and meaning of mediation is based in the interplay of the legal situation of a country and its cultural traditions of resolving conflicts, this is a central point in particular in regard to international comparisons [18, 77], [17]. Therefore the legal conditions and attitudes towards this form of conflict resolution have to be seen in the context of historical developments which are different in the countries of the former Soviet Union than those in western industrial countries and are also reflected in the respective punitive attitudes [31]. The experiences of the judiciary as well as the public with alternative sanctions is more limited, as public discussion and media reporting focus more on hard sanctions [35]. In many countries mediation is a new and still unfamiliar form of conflict resolution, based on little experience.

Hopt and Steffek come to the conclusion that "mediation is a meaningful method of conflict resolution worthy of support. However, it reaches its potential only when those involved see it as attractively rooted in the larger system of conflict resolution methods" [18, 79]. Also in regard to duration and costs this approach shows clear advantages. "Overall, mediation is throughout faster and more inexpensive for all participants than the classic confrontational court procedures" [18, 80].

7. Concluding Discussion

As illustrated above, there exists now an extensive international body of literature on mediation and restorative justice, especially in western industrial countries. Beginning after WWII, but particularly in the 1960s and 70s, the increasing significance of the emerging field of victimology initiated a necessary discussion about more prominent considerations of the needs of victims in criminal proceedings. In criminal court proceedings the victim only appears as a witness; restitution is left to him or herself. Considering that the majority of offenders were not able to provide restitution due to small or non-existing incomes, many victims were left either empty-handed or limited to insurance benefits. The penal law did not care about victim needs, but focused exclusively on the sanctioning of offenders. With this background it is not surprising that many victims were and are dissatisfied with the outcome of criminal proceedings; the only satisfaction left to them was the more or less harsh punishment of the offender.

According to Sessar [47, 21] the re-establishment of a "legal peace", the sole goal of modern criminal prosecution, does not automatically lead to a 'social peace' because 'legal peace' means "…first and foremost recognition and control. Social peace has then to be achieved separately.

This includes the effort to retract displacements of the problem; i.e. the problem has to be traced back to its origin and a solution has to be identified from there. If this is possible and if the general public agrees, penal law can become superfluous or take over the responsibility for indemnity bonds. However, this agreement has to occur independently of the criminal justice system and in appreciation of the socializing and rebalancing elements of such interpersonal regulations."

With this Sessar also addresses also public opinion, a particularly important factor since no innovations in this regard are possible without public support. Delattre [9, 91] correctly called victim-offender-mediation the most important and the most encouraging criminal justice initiative of the last 25 years. "The dialogue with the public has been a neglected element in the emergence of victim-offender-mediation and has to be intensified" [9, 101]. Law enforcement plays a central role since they are often the first institution to come into contact with the victim and the offender.

According to Young [60,137] the 1984 British crime survey indicates that 51% of those interviewed indicated that they were willing to meet the offender outside of court in the presence of an official to discuss restitution. In 1998 the same survey revealed in a different questionnaire item that 41% of the respondents agreed to a meeting with the offender, again in the presence of a third person, to learn about the circumstances leading up to the offense and to explain one's own feelings to him/her. This indicates generally a wide-spread willingness in the public to find restoration with an offender. Sanders [42, 222] emphasizes that research has shown that if offenders understand the criminal proceedings and view them as legitimate, they more readily accept the results, even if they consider it unjust. The same applies to the victim.

With the background of these overall encouraging results of victim-offender mediation it is not possible to ignore these alternative modes of reacting to law-braking behavior. "All modern legal codes are facing the question if and how victim-offender mediation is to be included in penal law" [41, 881]. The international comparison suggests "an integration of the appropriate restoration on all levels of penal control"[41, 894]. Most importantly the victims report predominantly positive results after participation in mediation.

Mediation was originally intended for victims; they were to experience better treatment following the offense. They were supposed to obtain better options for restitution of the material and non-material damage resulting from the offense. Numerous research results document convincingly that a professional approach to mediation has a high probability of fulfilling this goal. The vast majority of victims are doing better after participation in mediation; they clearly have better chances of overcoming the trauma than through traditional criminal proceedings.

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