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Victim-offender-reconciliation, the danger of cooptation and a useful reconsideration of law theory

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1. Abstract

The conceptual orientation and enforcement of „Täter-Opfer-Ausgleich" (TOA), the German version of victim-offender-reconciliation/mediation-programming (VORP/ VOMP), in the criminal and juvenile justice system in Germany brings some dangers with it. It hides the real nature and the character of conflict mediation and it prevents elements of restorative justice giving up their shadowy existence. The practice of TOA in its majority is far away from corresponding to the basic idea of conflict resolution and reconciliation as well as of the established professional reconciliation standards. Conspicuous is the multiple search for niches of acceptance and an adaptation to inappropriate ideas out of the world of ideas of juvenile welfare and criminal law. TOA/VORP in its conception it is not the ideal way to foster a restorative justice approach, but on a continuum of possible steps for the treatment of conflicts it is one possible, useful area of use. If victim-offender-reconciliation has an essential meaning, then it is not because of the modest attempts of the practical realization, it is because the connected idea and vision make the essential tasks of law clear to us.

2. The Danger of Cooptation

In this article[1] I am going to deal with some problematical aspects and consequences of the present predominant TOA implementations, the implementation of victim-offender-reconciliation-programming in Germany. But, to make it very clear in the beginning, a fundamental criticism which does not lead to any development is not my intention. All of the expressed thoughts are not suitable as an – what the German language calls – "killer argument" (*Totschlagsargument*) against the implementation of restorative justice elements within the criminal justice system but they might be a reason to think about the current use and status of victim-offender-reconciliation and its further development.

First of all, I need to explain the German term TOA. TOA is the acronym of "Täter-Opfer-Ausgleich", literally translated „Offender-Victim-Balancing" which means both settlement as well as reconciliation (cf. Arbeitsgemeinschaft TOA-Standards 1989;

KUBACH ET.AL. 1995; Trenczek 1992). The TOA-programs are in approach and procedure quite similar to the US-American Victim-Offender-Reconciliation-Programming (VORP) which aim to emphasize the process of reconciliation and see restitution for the victim as a (symbolic) end of a conflict resolving process to demonstrate that the harm done is restored (cf. Trenczek 1990, 1996a, p.21 ff.; Weitekamp/Tränkle 1998). Beyond restitution, "balance", "making good" as well as reconciliation implies a dynamic dimension and an interactive process between at least two parties. The term TOA in the criminal codes of Germany has therefore an integral meaning which emphasizes the process as well as the outcome. Therefore, TOA although integrated in the criminal code as a measure, is and can only be an offer to victims and offenders/the accused to find with the help of a neutral mediator a consensual solution of the *conflict* which led to or came out of the criminal act.[2]

Why do I complain about a TOA practice that seems to be opportunistic? I take the view that in the very beginning some important courses were set in an incorrect manner and that this has not been changed until today. And I mean that without a self righteous reproach, because as a founder and supporter of VORP in Germany I myself often compromised in the same criticized beliefs. Maybe the course couldn't be set differently in the former situation to experience a totally different model compared to the traditional thinking. But now the trial and error time within a model phase is over and we need to start thinking about the structural future of victim-offender-reconciliation and restorative justice.

In Germany we tried from the very beginning to establish victim-offender-reconciliation through diversion models or as a so-called alternative educational measures for juveniles, because of the understandable recruitment for acceptance and esp. financing (cf. Trenczek 1990). And this is precisely the problem. In connection with the reformatory efforts in the criminal law system, *Feeley* (1979) and *Zehr* (1985) draw the attention to the problem that good innovative ideas are not immune to be coopted by powers within the system. The criminal justice system seems to be [quote:] "*so impregnated with self-interests, so adaptive that it takes in any new idea, molds it, changes it until is suits the system's*

own purposes" (Zehr 1985, p. 3). From an organization related sociological perspective, such a self referencing cooptation seems to be necessary because the alternatives are supposed to be threatening to the system. And, according to *Feeley* and *Zehr*, that is the reason why simple reformatory solutions have to fail. Victim-offender-reconciliation in Germany has not failed yet, but if we do not take care it will be coopted, it will be changed and adapted to the purposes of the penal system.

3. A critical review in a criminal law perspective

3.1. Provisions in German Criminal Law which refer to Victim Offender Reconciliation

One can find several provisions in the German juvenile and criminal code which make it possible to consider victim-offender-reconciliation within the judicial decision. Since 1991, besides the order of restitution (§ 15 sec. 1, No. 1 JGG) victim-offender-reconciliation (which means both, the process and the outcome) is explicitly mentioned in the juvenile criminal code as a judicial measure (§ 10 sec. 1 No. 7 JGG). But also the prosecutor can refrain from a formal procedure if the juvenile has made a serious attempt within a victim-offender-reconciliation (§ 45 sec. 2, 2 Alt. JGG). Even the so-called legality principle in the German law (§ 152 StPO/German Criminal Procedure Code) does not allow for extensive use of discretion within law enforcement like in the common law systems, there are some unique exceptions to the requirement of mandatory prosecution which refer explicitly to victim-offender-reconciliation. Under § 153a sec. 1, No. 5 StPO the prosecutor can defer and finally refrain from formally charging an accused person in a misdemeanor case and if serious attempts in favor of a reconciliation with the victim are undertaken. In 1994 the new § 46a StGB (German Penal Code) was introduced that explicitly refers to victim-offender-reconciliation (again: VOR/TOA has an integral meaning of process and outcome) not only as a means to mitigate a sentence but even further, the judge is allowed to refrain (!) from imposing a sentence in all cases where there would be a maximum of one year imprisonment. In these cases also the prosecutors can drop the charge (§ 153b StPO). Finally last year, 1999, several regulations within the Criminal Procedure Code where established which refer explicitly to victim-offender-reconciliation. According to § 155a StPO the prosecutor as well as the judge not only

have to prove in every phase of a proceeding if a reconciliation between victim and offender seems to be attainable but also have to initiate and foster all attempts of the parties to do so. Therefore, according to § 155b StPO they are allowed to refer the case to a VOR-Program, which may be a criminal justice agency like probation service or so called TOA-Program, a dispute resolution program run by an association outside the criminal justice system.

3.2. Empirical observations and comments

The number and content of the provisions in Germany seem to be an ideal fundament for a substantial use of victim-offender-reconciliation within the criminal justice system. However, the inner perspective of criminal law gives victim-offender-reconciliation almost no chance to become the "*most hopeful alternative*" to the punishment oriented catalogue of measurements of the criminal law, which was announced in the late 80ies (cf. Schreckling/Pieplow 1989, S 10). And it give TOA almost no chance to provoke an effect above a marginal existence. It is true that the TOA as an instrument of the criminal justice agencies still remains in a shadowy existence and that its quantitative and qualitative meaning is conversely proportional to the public and political interest. Five empirical observations are the basis of my assessment:

(1) Because of the peculiarities of the German law statistics we can only estimate the actual use of victim-offender-reconciliation. Altogether the number of the restitutive discontinuance of proceedings by public prosecutors and courts has risen during the last years from 6798 in the year 1993 to 10.865 in the year 1997.[3] Compared to the 530.000 charges and the 250.000 diversion decisions according to §153a StPO this is not a truly impressive number. The fine dominates (85 to 90% of the dismissals), it just fits better into the experiences and the repertoire of sanctions of the criminal justice system. The practical use of restorative justice elements in the German criminal procedure which altogether do not extent more than 5% of all criminal law proceedings is described correctly as a „*stagnation on a low level*." (cf. Böttcher 1994, p. 48; Weitkamp/Tränkle 1998, p. 11: „*a little, delicate seedling*").

(2) The same can be noted from the view of the TOA programs. Most institutions that foster victim-offender-reconciliation deal with less than 50 proceedings per year. Altogether the 368 TOA programs that were registered at the TOA service bureau, Cologne, until 1995 dealt with about 9,000 cases per year. Even though the number might have reached already more than 20.-25.000 cases a year, it is not an impressive number compared to the number of 1 million criminal trials that were taken care of by the courts. Furthermore, the caseload of the VORP concentrates on juvenile cases, victim-offender-reconciliation in the adult system occurs in less than 1/3 of all VORP cases.

(3) But not only in regard of the numbers, also in regard of the quality of cases, we have to notice that victim-offender-reconciliation is being used for the treatment of minor offenses and other criminal justice marginalia. This assessment by criminal law standards of course does not say anything about the meaning for the participants of the conflict. However, here I deal with the criminal law point of view. In this view the TOA is supposed to be - I quote from one of the most well known commentaries (Dreher/Tröndle 1995, § 46a note 3) - only suitable for „*small and minor crimes*“ and "*it is hardly imaginable that § 46a StGB finds any use for crimes where violence against the victim was used or where the victims life and limb was in danger*." Although there are not any restrictions referring to the offenses in the juvenile criminal law and the criminal law in general, the cases that are referred to the VORPs are usually limited to trifles and bagatelles, simple misdemeanors and other minor offenses. Because of the previous connection of TOA with the idea of diversion, especially §153a StPO, its elements - minor offenses, exclusions of felonies - got connected with the character of victim-offender-reconciliation. In the practical field, one has to argue with the public prosecutors office about the appropriateness of a case to be mediated without distinguishing between the two points „appropriateness“, as the adequacy of conflict mediation, and the judicial criteria of the dismissal of the criminal procedure. And to keep friends, TOA programs their representatives and commentators hurry on ahead to announce at every (in)appropriate opportunity that victim-offender-reconciliation "obviously" is not suitable for heavy crimes: "*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." (Hartmann 1994, p. 6.) Why is it "*quite clear*" that mediation does not work? And what is the standard of success or failure?

(4) A questionable development has occurred when TOA/VORP is used as an educational measure in juvenile proceedings. That very often leads to a misuse of VORP as a rounding of all possible sanctions (so called "sanction-cocktails") under the slogan „*education can never be bad*." In almost all concepts of VORP with young people the educational effect of VORP is pointed out - with the surely justified hope to make a nice TOA popular to the ambitious decision makers in justice, youth services, and household committees. The reason is quite clear. The juvenile welfare provisions in Germany only allow the financing of remedies if the juvenile is in educational need (cf. §§ 13, 27 ff. SGB VIII/Juvenile Welfare Code). And because nearly every single program in Germany is financed by the juvenile welfare departments, with the magic of definition victim-offender-reconciliation becomes an educative tool, despite the fact that the established VORP-standards rightly distinguish victim-offender reconciliation in contents and methods from educational measures of the juvenile law and the juvenile welfare system (cf. Trenczek 1996b). There are a lot of other reasons in regard of the peculiarity of the German welfare provisions, why one should avoid the concepts of TOA as an educating aid, but I will spare you with the details. So much for today, besides the increasing budgetary problems of the communities, the characterization as a educational remedy (for juveniles) hinders the development of mediation outside the juvenile sector. Further, although victim-offender-reconciliation clearly has an intrinsic educational *value*, the juvenile welfare construction strengthens the danger to misjudge the character of mediation and to abuse it as an *instrument* for education. A little while ago an engaged TOA mediator did not realized a problem as he confessed: „*If a young person doesn't want to apologize, then I will make him do so*." Unfortunately it is not the exception that educating solutions are forced

upon a youth to “successfully” close down the case - of course always in their “best interest”.

(5) A questionable development further takes place in (adult as well as juvenile) proceedings if the public prosecutor or the court states some preconditions that are conceived as the result of the mediation process or insists on further penal (sanctions as) add-ons to the agreed mediation outcome. The same occurs if the amount of a fine or the level of any other sanction that is reserved by the prosecutor is made dependent on the amount of the restitution that the participants will agree. If the victim renounces a part of the compensation, no matter what the reasons are, it could be that for example, both participants agreed on another (symbolic) form of compensation, then it is usually the prosecutors office who demands the compensation, otherwise it would be „too easy to get away“ for the offender.

3.3. Critical assessment

Since the first introduction of victim-offender-reconciliation (TOA) into the (juvenile) criminal code as a judicial “educational” measure (§ 10 paragraph 1, No. 7 JGG), it was tried to improve its legal position and meaning by other renewals of the law. But the introduction of the TOA as a judicial instruction to juveniles (“jugendrichterliche Weisung”) was criticized from the beginning. It is not only contradictory, even absurd to sentence a young person to a solution, which needs to be balanced out with another party, but it also gives the possibility to connect this instruction with other educating and disciplining measures (comparison § 8 JGG), which hinders a truly reconciliation. However, despite of this unanimous critical comments the law was never changed. In December of 1994, the legislature took a decisive step in the criminal law by creating the §46a StGB which asks for a explicit consideration of the TOA within the estimation of criminal responsibility. However, the German criminal justice officials acted with conspicuous caution towards victim-offender-reconciliation. One reacted to this in December of 1999, anchoring the TOA into the criminal procedure Code by establishing a duty for prosecutors as well as the courts to recognize as well as to initiate a reconciliation process at every stage of the criminal procedure (§ 155a StGB). This was expressly done “*to give*

the TOA a wider area of application" (cf. Explanation of the Federal Government for the law proposal from 29.10.1999, BT-Drs. [German Federal Congressional Publication] 14/1928, p. 1). Nevertheless, it is doubtful if criminal justice officials will change their conduct of decision making in substantial dimensions, because this duty has existed already on the base of general law principles and further, several states had underpinned this duty by internal instructions. In an overall assessment from an European perspective, *Löschnig* (2000, p. 2) criticizes the (new) German provisions as not very much binding (in regard to §155a StPO), without a content or definite line (in regard to §153a, 153b, 155a StPO) as contradictory and therefore not only strange to the character of the victim-offender-reconciliation but also as detrimental (in regard to §153a StPO). It does not surprise that according to the new instructions the TOA and mediation came out as an tool for the criminal justice officials themselves. Criminal justice officials may, but do not have to refer a case for mediation to a specialized institution, but have the right "to reconcile the parties" themselves: The public prosecutor as a mediator. Mediation and reconciliation is perceived as something criminal justice officials have always done. Why do we need professional mediators and expensive victim-offender-reconciliation- programs anyway?

As you see, my criticism is not concentrated on that fact *that* victim-offender-reconciliation is integrated in the decision program of criminal justice, my point applies to *how* victim-offender-reconciliation is perceived and misused by the criminal justice system. According to the law (§ 46a StGB, §153a StPO), based on the present practice of sanctioning in Germany it would be possible to renounce a condemnation to a criminal sanction in about 95-97% of all criminal procedures in case a victim-offender-reconciliation attempt was carried out (cf. Dölling/Weitekamp 1998 p. 2; Kilchling 1996, p. 311; König/Seitz 1995, p 2. As far as that goes the TOA/VORP is already a partially abolitionistic concept! Actually, one really did not need a law to give TOA a "*wider area of application*". If the criminal justice officials wanted to, they could use victim-offender-reconciliation already as an alternative to common sanctions in the criminal law. But apparently, whatever reasons they might have, they don't want that.

Predominantly they give economic reasons. Initiating a victim-offender-reconciliation has always been refused by the individual prosecutor as time consuming because the time advantages (especially the release and exoneration effects with a regard esp. to appeal or civil law trials) does not give credit to the persons who have initiated the mediation. However, the argument that a victim-offender-reconciliation procedure might be too time costly is given predominantly by such officials who refused a mediation of conflicts because of other reasons, it might be that they do not feel well informed, it might be because they have no own experience with mediation or because the idea of mediation is just to strange (cf. Meier 1999). This indicates the actual, deeply rooted reason for the minor readiness of use. The reason for the low use of victim-offender-reconciliation cannot be explained with belated, rationalistic reasons of the expenditure. Though, it seems to lay partly deeper in the way of thinking in the criminal law. A thought of patterns that has an outstanding meaning within the all day action of justice especially with the interpretation of indefinite law terms and with the taking of legal discretion. For example, what are the „*suitable*" cases in which according to the law (§155a StPO) victim-offender-reconciliation should be used by the public prosecutors? What measures are „*suitable*" to remove for the public interest of the criminal prosecution (§153a, paragraph 1, sentence 1 StPO) and which standards will be relevant if a trial „*can*" (not must) be abandoned? If one opens up such interpretation, assessment and discretion margins within non-obligatory decision structures, then, those basic standards become relevant. Therefore, my criticism is pointed against those values one can find not only in the law materials and in comments but also in explanations of the so called "Alternative Draft on Reparation"[4] (Baumann et al. 1992) or even in some VORP concepts.

Although the justice system is seen as an instance that has to guarantee a fair, legal trial, it seems that in practice the prosecutors see themselves more as the guardian of the - however justified – "*governmental claim of punishment*". Therefore, victim-offender-reconciliation is seen as a subversive tool, because it does not focus on punishment but on a mutual acceptable solution of a conflict. Mediation and reconciliation, of course, is only an offer to the victim as well as for the offender, it is a new way to solve a conflict (independent from the criminal law relevance of the case) through professional guided nego-

tiations. Both, victim and offender, should actively and autonomously find a common, future orientated settlement or solution of the conflict, but mediation does not get preoccupied with a past-oriented, necessarily repressive re-action to the crime. In the eyes of many criminal justice representatives, victim-offender-reconciliation must look like a measure that withdraws the offender from his just punishment. Ed Watzke, an Austrian colleague, described it humorously but also impressively: „*In one way or the other, they* [the mediators, t.t.] *are all accomplices of the offenders because they try to find hundreds of excuses to dismiss the offender from responsibility. Therefore it is the fault of traumatic events in the early childhood, the parents, if there are any, the absence of the parents, if they are no longer living, the absence or existence of all possible social relationships, schools, homes, homelessness, unemployment, the society and so on. All of these excuses that are impossible to prove are helpful to show the offender as a victim himself and to withdraw him from the just punishment*" (Watzke 1997 S. 81). The fundamental mistrust of prosecutors and criminal justice officials against social work pairs with the mistrust against mediation, an attempt that gets more connected with a suspect, counter-culture movement than with the basic request of law.

Instead of stopping this mistake, a lot of times this tendency gets strengthened in the way TOA is sold to the criminal justice officials and even by the justifications of the reform movements (Baumann et al 1992; Roxin 1987). With the goal to get "*the highest amount of cases*" (cf. above, p. 6) a lot of program officials are in danger to corrupt themselves. The assessment that "*it is quite clear that measures like mediation or restitution won't work*" (cf. above, p. 6; Hartmann 1994, p. 6.) might only be understandable from the antiquated, purely punishment oriented point of view. VORP should not get mixed up with restitution and diversion programs or traditional sanctions – in procedure and outcome it is something different.[5] While asking for more acceptance, TOA/VOR-programs and their officials should not deny their own basis and potential and anticipate the criteria of the criminal law as a measurement also for the evaluation of mediation and conflict resolution.

With the understandable attempt to attract a wider criminal-political acceptance one can observe the effort to give reasons for the typical criminal law relevance of victim-offender-reconciliation and its compatibility with the system of criminal law sanctions and the goals of punishment. Victim offender reconciliation is presented as measure, as a "*third lane*" (besides punishment and incapacitation) in criminal justice which meets "*the punishment purposes and the need of the victim well or even better as a traditional sanction alone*" (Baumann et al. 1992, p. 37; Roxin 1987, p. 52). This perspective, however, is the dilemma of an "alternative" measure. On this yardstick those could only replace traditional punishments and be accepted by the criminal justice, indeed, if they do justice "*to the punishment purposes ... well or even better as a traditional sanction alone*". At that follows the decisive question: how much reparation is necessary, how punitive must victim-offender-reconciliation be that it serves "*as well or even better for punishment purposes*" than the punishment itself? In this equation, the chronic overestimation of the punishment purposes is already disturbing as well as the premise that the traditional sanctions of the criminal law would do justice or meet the needs of the victim. But it is dreadful for the acceptance of VORP and other restorative devices that this dimension fades out the essential character of mediation, reparation and reconciliation. Victim-offender-mediation and reconciliation (differently than the restitution order, the diversion measures or incarceration alternatives) do not let themselves arrange with the traditional punishment purposes and the vertical system of traditional criminal sanctions. Although restorative remedies may have relevant, inherent effects they go beyond the restitution and the punishment purposes by including the victim and leaving space for an autonomous and active regulation of the conflict by the concerned parties (cf. Trenczek 1996a, 217 ff.).

The acceptance of a restorative and mediative conflict resolution in public is a lot bigger than many criminal justice officials can imagine, especially the victims of crimes are not suitable as advocates for a repressive criminal policy (cf. Sessar 1989). The punishment needs of the population is – here I can quote our colleague and president Hans-Jürgen Kerner - "*if not only a psycho-hygienically useful fiction of criminal law practitioners, first of all a need for justice and an acknowledgement of the victim as a victim*" (Kerner 1991, p. 208). The simplistic upholding on punishment needs and claims has its source in

a judicial authoritarianism that gives special emphasis to a formal order but not to the social peace.

4. An Useful Orientation in Law-Theory

One cannot think about conflict mediation and punishment at the same time. Mediation and reconciliation are not more or less a punishment but qualitatively an „aliud," a different material legal principle that has it own character at the reparation of the peace under the law. As good as it is, to rescue the perspective of the damaged victim, it doesn't make a lot of sense to designate victim-offender-mediation and reconciliation as peace making solutions for the conflict and to subordinate them at the same time to the evil adding function of the punishment. Then it is to fear that with such a benchmark the process and the result of victim-offender mediation cannot be appropriate because of the demands, the overburdening and the restriction of the traditional view of the judicial system which is constantly reproduced in law schools. Then, victim-offender-reconciliation is seen just as another instrument "*to fight the crime*" (cf. BT-Drs. [German Federal Congressional Publication] 12/6853, p. 1), not as a remedy for conflict resolution.

As far as the conceptions and the normative orientation of the VORP encourage the penal, functional thinking they are not consequently and primarily obligated to reconciliation and reparation: victim-offender-reconciliation has to subordinate itself to the system of the conceptional poor and unsatisfactory, from empirical doubts unaffected, constantly perpetuated penal purposes. As far as the concept of the „third lane" is orientated towards a vertical pattern of repressive sanctions, it is obvious that the victim-offender-reconciliation and the reparation cannot succeed the penal and incapacitative aims in the first place. As a (more or less) meaningful sanction annexation for minor offenses and triple cases VORP will have no impact on the current criminal law practice. If VORP needs to be an adequate punishment, then one cannot blame the criminal justice representatives when they hold on to the original instead of getting involved in a "functional equivalent", which takes place under the main control of social workers and psychologists, who are suspicious anyhow. We have to make clear, that mediation and victim-offender-reconciliation may be recognized by the criminal system but is not a method of the formal judicial system and not at all of the criminal justice system. With regard to

(criminal) law theory, it is more than ever necessary to take the offensive and to point out positively that the restoration of the peace under the law through reparation and victim-offender-reconciliation is not a penal purpose but an aim and a purpose of the law in its whole. I am not concerned about an additional justification of state coercion, because - as *Detlef Frehsee* (1991, p. 59) has put it - „*the criminal law doesn't need an additional legitimization of intrusions*." My concern is another point of view which *Howard Zehr* has called a "*new lens*" (Zehr 1990) through which we can perceive the tasks of the public social control.

The demands for a new orientation of the criminal law social control are not new but it is not accidentally that, right in this connection, following *Thomas Kuhn (1970)*, also in Germany one speaks about a *new paradigm (*Sessar/Beurskens/Boers 1986). *Randy Barnett* earlier described restitution as a new paradigm of criminal justice but his suggestions focussed on the material component of the reparation of the damage (Barnett 1977, 279; cf. Galaway 1988). In contrast to this we have to supersede the traditional „retributive paradigm" with a new ethically funded *restorative paradigm* of justice that gives the reconciliation of the conflict partners special emphasis (Zehr 1985). To dismiss all of the suggestions as pure idealistic and as an utopian dream makes it very clear how far the (criminal) law dogmatics already has departed from the fundamental ideas of the (criminal) law itself.

The legitimation of state sanctions cannot be separated without contradictions from the fundamental philosophy and essentials of the (criminal) law itself (cf. Richards 1979; Rössner 1999, 215 ff.; Trenczek 1996a, 227 ff.). Whatever is required by the foundations of the criminal law and its legitimation has to be called in with regard to any measurement which is imposed. The reaction of the state to a misbehavior, even if it is defined as a criminal act, has to take seriously the thought of freedom (autonomy) and responsibility which both are constitutive for modern criminal law. The clarification of the responsibility and the reaction of the state to the breaking of the norm are not independent sceneries (even if the criminal procedure like in the US is separated into two sections of the trial) but more integral parts of the sane unified process. Only together can a verdict of guilt

and the corresponding sanction serve the perpetuation of the idea of individual autonomy as a rational basis of imposing criminal responsibility. We do not have to decide the question if the criminal law system "*through its ceremonious adjudication of guilt, and through its imposition of coercive sanctions*" immanently preassumes or does create „*images of autonomous individuals and represents them to the community as reality*" (Boldt 1986, p. 1017 vs. Silving 1961). However, it would be contradictory to assume the principles of autonomy and responsibility on the level of the foundations of the law and then to ignore them afterwards once we have to pass the judgment in a concrete case.

In a community freedom and responsibility define themselves without a metaphysical reference exclusively through the social relationship of the members of the community (Noll 1962/1985, p. 96; Fattah 1992, p. 86). The basic ideas of freedom and responsibility require that every single person does not get treated as an object that gets punished but gets recognized as an autonomously acting subject. Responsibility is not passive, one doesn't take over responsibility by enduring and suffering of an evil but through an (autonomous) over-taking of duties. We need to recall the wisdom of Peter Noll (1962/1985, 99) in order to acknowledge that state „*punishment"* on crime, "*might be a necessary evil, but it does not have to be necessary an evil*".

If the criminal law should not only serve for the maintenance of a formal order but also for the restoration of the (social) peace under the law, then one has to realize that the function of balancing and reparation, which by the traditional doctrine are exclusively attributed to the civil law, are an inherent and essential part also of the criminal law.[6] The legal regulations for the rescission of the criminal attempt (§ 24 StGB) and the so-called "active remorse" (in German: "Tätige Reue"; cf. §§ 306e, 314a, 320, 330b StGB) which we find in the German criminal code point out that reparation and the idea of making-good are an ethically based tenet of criminal law: The law demands that the offender is ready to repair the previous injustice by himself. This principle has to be put into concrete form and to be kept at all legally successive decisions. Therefore, state sanctions need to have a positive component that helps to overcome the violation of the border and the violation of the relationship (Trenczek 1996b, 118 ff.). This educational principle does not mean that criminal sanctions have an educative value, however, it shows that the

principles of law and educational theory are based on the same fundament (cf. Flitner 1982, p.86). You have to refer to the reparation and atonement, the „making-good“ of the situation. First of all, the reaction to the injustice has to be obligated to reconciliation and reparation. As a decisive criteria of the responsibility under criminal law, both, reconciliation and reparation, are compelling for the law and the legitimation of state sanctions as well. In contrast to this, the dominance of the penal purpose theory leads to an independence and a release of punishments from constitutive principles of freedom and responsibility of the criminal law.

A penal law that is built upon the principles of autonomy and freedom has to allow and to lighten the voluntary assumption of responsibility and cannot block up the socially constructive path. The fulfillment of the facts of the (criminal) case is a necessary, but not a sufficient condition for a sanction. The necessity of a penal sanction does not follow from a behavior which meets the facts of the case but from the impossibility of the enforcement of priority alternatives.[7]

5. Conclusion: Within or outside or transformation of the system – where do we go from here?

Despite our initial enthusiasm it seems to be a hopeless attempt to establish a higher degree of acceptance for victim-offender-reconciliation within criminal justice system without adaptation and cooptation. Therefore, the path that was taken until now, needs to be reconsidered. In view of the persisting powers of the practice of penal law even the most substantiated argumentation will hardly have a chance to conquer the overemphasized interpretations offered by the majority of the justice system. Of course, the new restorative paradigm and VORPs seem to be frightening, since they question the traditional point of view of the penal law focusing on the behavior controlling power of the law than on the aspect of punishment. But the retraction of the supposed „claim to punish“ by the state is not identical with the removal of the social control of behavior. The fears of an uncontrolled “*free game of the powers*” on the costs of the weak and victims build up a horrible „bugbear“ and is used to discredit mediation because it is an informal procedure undertaken mainly not by lawyers but social workers or psychologists. But, also mediation as an informal, external-judicial settlement of the conflict is only possible under the

"*rule of law*" (Silving 1961, cf. Frehsee 1991, 56ff.). Through the law it is defined in advance what is a legally protected right and with that - in case of a violation of the norm - one can determine who is the victim and who the offender. Maybe we have forgotten, that "the characteristic of the criminal law system is state control, not punishment " (Rössner 1999, 219). Even in favor of mediation we should not forget that force and compulsion belongs to the law as an inherent instrument of public social control like the brakes to a car or the reins to a horse. The „*autonomous regulation of the conflict after a crime lives from the fact that there are coercive measures ready in the background*" (Rössner 1992, p. 271) and that these can be activated for the defense of the law and the protection of the weak. Nothing should be changed on this. The point is, that even we free ourselves from the penal (part of the) law, the law itself must remain. It is decisive - how *Detlef Frehsee* (1991, p. 59) has put it – that "*the law is effective through its shadow than through the actual execution of force*". Therein lays, beyond the short term system functional usage, the wide ranging potential of reparation of victim-offender-reconciliation.

The change of view from a penal, punishment oriented to a model of justice that is predominantly laid out to influence the behavior in the future, the change of paradigms from the repression to prevention, opens up the vision of a community related conflict culture that is close to the peoples orientation. In the practice of German VORPs it is shown more and more that the citizens do not wait until a case is referred by the state attorneys office or other criminal justice agencies but they take up the offer of mediation right away by themselves.[8] This access shows that the mediation of conflicts and victim-offender-reconciliation are more connected with the daily life than the judicial system. Those close community connections should be extended and - outside of the penal system - should open up more the low threshold access to mediation and reconciliation. The practical experience with the TOA in Germany shows that victim-offender-reconciliation is not the only or ideal way but on a continuum of possible steps of the treatments of conflicts it is one possible area of use. A community justice center where criminal relevant conflicts as well as civil law conflicts (for example: neighborhood, consumer and family conflicts) can be mediated, meet the needs of citizens for participation, justice and security. Such a dispute resolution culture can, and shall not, replace the judicial system to-

tally, but the parallel system of mediation and ADR can fill out a gap that exists between the self organized regulating mechanism in the population, that a lot of times is left to chance, and the judicial system that is quantitatively and qualitatively overstrained with the resolution of conflicts. If victim offender reconciliation as part of the ADR-movement is established everywhere and cannot be ousted anymore from the all day experience of the people, the criminal justice system representatives as a part of this society might learn that even a criminal relevant conflict cannot be solved only through punishment.

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Notes:

[1] Manuscript closed Febr. 2001.

[2] We owe to Nils Christie (1977), the editor emeritus of the CJR, the revival of the understanding of crime as a cause, expression and consequence of conflicts, of difficulties and problems of and between victim and offender. From the wide range of literature about this conflict oriented approach to crime, cf. also Hanak/Stehr/Steinert 1989; Kuhn 1987; Steinert 1988; Trenczek 1992a.

[3] All numbers from Kilchling 1999: In 1997, the restitution conditions played a role in only 2.3% of the public prosecutors dismissals according to §153a I No. 1 StPO (without important changes to the previous years). It was a little bit more with the judicial dismissal of the proceeding according to §153a II (7.8%) and with the decisions according to § 15 I JGG (3.4% of the imposed conditions).

[4] The „Alternative Draft on Reparation" is a legislative initiative of leading law teachers from Austria, Germany and Switzerland, which tries to use victim-offender-mediation/VORP in the criminal justice system to a bigger and more qualitative extent.

[5] Regarding the theoretical foundation of restitution, victim-offender-mediation and TOA, cf. Frehsee 1982, 1987, 9f and 47ff; 1991; Rössner 1989, Trenczek 1991, 1996a.

[6] In this respect the English term "criminal law" is much more suited than the German "penal law".

[7] Therefore, about the possibility to refrain from punishment if the reparation happens voluntarily (§ 46a StGB), one should grant a precedence of the interests of the conflict parties through a

material decriminalizing regulation: „Offenses are not punishable if the offender repairs the consequences of the crime before the start of the trial or if he removes the dangers.“

[8] Mostly a TOA-case is referred to the VORP by the state attorney office or sometimes by the judge (cf. Trenczek 1990). However, due to the growing degree of fame of the VORP, esp. the WAAGE in Hanover, victims or perpetrators themselves contact the VORP in order to resolve their conflicts and problems. If the case has already been reported to the police (too), then the WAAGE informs the state attorney about the (beginning) mediation procedure. In all other cases, the conflict resolution procedure remains private.