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Restorative Justice as Participation

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According to a story told over many generations, somewhere in a faraway land there was once a wise, old Rabbi with a white beard who put a question to the people gathered around him. A big, strapping farmer stood up, laid out the facts of the matter, moving his hands a great deal as he spoke, and gave a convincing answer. The Rabbi listened attentively and said to the farmer, "You are right". Then a thin, frail-looking tailor got up, argued a completely different case to the farmer and finally came to a completely different conclusion. The Rabbi listened just as patiently, stroked his beard, thought for a short while and then said to the tailor, "You are right." Upon this, an educated scripturalist jumped up and cried, "But Rabbi, this cannot be! Both men have answered your question in completely different ways and you say that both are right!." The wise Rabbi thought once more and then said to the scholar, "Yes, and you too are right." (Watzke 1994)

And here, as the white-bearded Rabbi walks away from his astonished audience, the story ends and victim-offender reconciliation begins.

1. Society, Justice and Participation

1.1 The need for justice and participation

Humans need justice. Justice is essential for both individuals and society. Probably the most frequent cause of disruption, pain and suffering is when situations and rules are perceived as being unjust. This is true of the relationship between nations and societies and also holds for the day-to-day contact between individuals. War, destruction and personal catastrophes are based on the perception of injustice and unfairness. We see this happening in the world about us, in Ireland, Palestine or Bosnia, in acts of domestic violence or other criminal offenses or injuries. Throughout the history of mankind we can find numerous examples of the destructive power of the perception of injustice. Didn't Cain murder his brother Abel because he felt that his father loved Abel more? (Stierlin 1992, 158).

In contrast, when rules and relationships are perceived as fair and just, people and societies are able to develop and flourish. Whilst "justice" is obviously not characterized by the absence of conflict, if the social, political and legal order is perceived as fair, conflicts are more likely to be solved in a manner which does not cause the destruction of the opponent and may lead to social peace.

But the crucial question is, how are just relations being established? How can we establish rules which are considered to be just and fair and which prevent people behaving like wounded

animals? What makes people and groups accept rules and regulations which prevent destructive conflict behavior?

Based on research in cognitive science, constructivism has taught us about the subjectivity and the selectivity of perception. Human beings do not live in an objective world; rather, through observation and awareness, thinking, acting and communication they produce their own empirical reality (Watzlawick **19--**; Maturana/Varela 1984; Richards/von Glaserfeld 1987). In order to survive, our brains do not process sensory perception in "the" correct way. Instead they assimilate our perceptions according to certain transmitted or learned criteria which are significant for an individual biography. For each individual, only one world exists, the one which he/she perceives, and this only partly overlaps with the one which others see. The order of social reality loses its appearance of objectivity. Rather, social reality is composed of various aspects which are structured by a certain relevant personal priority. Particularly relevant for the definition of social situations are a person's specific individual interests as well as the compatibility of personal experiences with existing knowledge. Thus, various realities are established by following different rules in the construction of personal truths (cf. **Messmer** 1991, 524), which is why our Rabbi was able to agree with both versions of the truth, the farmer's and the tailor's.

Postmodern theories might call this the transition of reality into a model of pluralistic constructions of life. However, we have to acknowledge that comprehensive blueprints of societal models - traditions, religions, political orders - and definitions of justice have lost their persuasiveness (Stierlin 1992, 158). Therefore, in order to cope with the growing uncertainty there is an increasing need for orientation. This is one reason why fundamentalism or systems which rely on brainwashing attract so many people. A participatory approach may offer a possible way out of the dilemma. Given the history of civilization, people in today's western hemisphere will accept only those rules which are based on democratic consensus. Consensus, however, is inconceivable without the active participation of its addressees. Aside from parliamentary elections, societies need to allow for the negotiation of rules and solutions in order to keep consensus alive. Negotiation processes are fundamental and vital in a democratic social reality because they are both the prerequisite for and the outcome of that part of social reality which is relevant for its individuals **(Messner** 1991, 524).

In modern industrial societies, however, citizens have tended to delegate responsibility even as far as most personal questions are concerned. People have tended to pull back into their "safe" private spheres. As a result of this trend toward the individualization and isolation of interests, people are losing the ability to deal with their differences and conflicts. Governments, lawyers,

the police and the insurance companies which handle client's legal costs are supposed to enforce citizens' interests. Conflicts are increasingly dealt with and settled by anonymous third parties. The consequences are fatal. If people lose the ability to cope with direct and interpersonal conflicts, intolerance and the potential for violence will grow.

On the other hand, in many social areas the opposite trend is in evidence. Under the heading of "participation", various levels of freedom have been created to make people more responsible. Large industrial groups such as Sony, Chrysler and Ford are shifting management techniques from a hierarchical mode toward a cooperative, team-oriented system of working. In order to maximize profits, companies have recognized that employees need to have more direct responsibility for the outcome (cf. Womack/Jones 1990; Warnecke 1992; Hammer/Champy 1993). In urban areas, people have begun to reorganize their communities. Neighborhood centers have been emerging which give citizens a say in the reorganization of social life. Furthermore, individuals need to be encouraged to exercise their own responsibility for conflict rather than to entrust the conflict to the care of the professional services. While the legal system has come up against its inherent limiting factors, alternative dispute resolution is receiving more and more attention. Today, in nearly every aspect of social life, (work, school, the family, divorce) the mediation of conflict is seen as one of the most promising means of dispute resolution (Cf. Fisher/Ury). More and more, the importance of increasing community members' ability and capacity to manage their own conflicts is being recognized. Moreover, mediation has found its way into the criminal justice system, albeit comparatively late.

1.2 Criminal justice systems and restitution

Unfortunately, the criminal justice system does not provide an active role for victims and offenders. In the criminal justice system, victims and offenders are required to enact their roles as witnesses and defendants, but beyond that, they have to remain passive. Once they have stated their immediate cases, the system "steals" their conflict and takes over (Christie 1977). The system is very much concerned with reestablishing legal order, but fails to leave any room for the interpersonal resolution of conflict and the restoration of social peace.

The same is true in pure restitution proceedings. Although the term restitution is used in various ways, definitions of the term usually focus simply on the outcome, the concrete restitution agreement as a means of compensation for the victim. In practice, this is often reduced to the payment of a sum of money. Restitution is best characterized as an offender-oriented measure with educational and penal functions (Galaway 1987, 2; Trenczek 1992a, 1995). The civil

liability for damages takes on a penal character simply by virtue of the fact that the sentence is imposed and executed by the criminal justice system. Payment is enforced by the courts and in the extreme case of a refusal, is enforced by revoking probation, i.e. imprisonment (cf. Harland 1982, Trenczek 1995).

In the extensive American literature on restitution, the significance of restitutive behavior control in earlier legal systems has been pointed out time and again. Nevertheless, in critical commentaries on this historic legal concept it is almost universally disregarded that in these legal cultures restitution was always incorporated into a process geared toward settlement and reconciliation, i.e. into rituals of reconciliation (cf. Pfohl 1981, 81; Fogel, Galaway and Hudson 1972, 648f; Jacob 1970, 154). Rituals of symbolic satisfaction and restitution were inextricably linked with the aim of settling the social disturbance and reestablishing the damaged communication and relationships between those involved in the conflict, thus restoring peace to the community. Compensation was not an end in itself but simply an element within the framework of a wider solution to the conflict which mediation was designed to achieve. In contrast, social control in criminal law today is characterized by rituals of exclusion (Pfohl 1981, 67ff, 84), to which any implemented restitutive elements are (inevitably) also subordinated in this process.

Both the criminal justice system and restitution schemes are clearly offender-oriented. In both concepts, the attention paid to the victim is purely functional especially as he/she has to serve as a principal witness for the prosecution. The fact that the criminal act is often entangled in a complex interpersonal conflict structure is also ignored, which constitutes a major shortcoming in both of these ways of dealing with the problem (Fattah 1992, 74 ff.; Hanak/Stehr/Steinert 1989; Trenczek 1992a). As a result, the envisioned roles of victim and offender in both criminal and restitution proceedings do not provide for active participation (Trenczek 1990, 109).

Restitution programs occasionally employ mediation in order to determine the amount of restitution to be paid by the offender. Over and above that, mediation has no significant relevance in a conflict-resolving process. Although a shift from purely repressive to restorative sanctions can be observed, one can say that restitution programs do not mediate in the victim-offender conflict; rather, they are involved in the negotiation of punishment. Without any doubt, a repressive and pecuniary sanction like restitution has a certain innate appeal in today's world and - unlike reconciliation - it has also become dominant in our society and criminal justice systems, both of which are also very concerned with commercial interests in addition to straightforward "get tough" attitudes.

Restorative justice goes beyond restitution and connotes a dynamic dimension and an interactive process of establishing justice and fairness. With its focus on conflict resolution and the re-establishment of peace (justice and fairness), restorative justice is essentially based on the voluntary and participatory nature of the conflict-resolving procedure. Therefore, mediation in particular is employed as a technique for increasing victim participation in the (criminal) justice process.

German *Täter-Opfer-Ausgleich* (TOA) programs are fairly similar in approach and procedure to the North American victim-offender reconciliation programs (VORP). They focus on the participation of both victim and offender, and emphasize the process of conflict resolution and reconciliation. Restitution for victims is seen as only one possible (symbolic) end in a conflict-resolving process which demonstrates that the damage done is made good. The German translation for reconciliation (*Versöhnung*, *Aussöhnung*) often has a strong religious connotation and has therefore been criticized as being an unrealistic goal for criminal justice purposes. Indeed, the North American VORPs do have strong historical and philosophical roots in the religious community, especially the Mennonite church. But reconciliation actually has a broader, secular meaning, i.e. to resolve, settle, make consistent or to restore equity and equality. In this sense reconciliation and conflict resolution are synonymous and there is no other suitable translation in this context for the German word *Ausgleich* (literally: "balancing out"). For this reason, and because the acronym VORP has already been introduced into criminal justice terminology for participatory concepts and programs in which face-to-face encounters form an integral part, we will use reconciliation/VORP and *Ausgleich*/TOA interchangeably to describe the German concept of victim-offender mediation.

1.3 The law and alternative dispute resolution

Although it carries an "alternative" label, dispute resolution is only possible within the confines of the law acting as a framework for orientation and classification. The law has to fulfill functions on several different levels. Even if the ability of legal regulations to govern behavior tends to be overestimated in general, on a basic level the law does represent a point of orientation for social behavior in its function as a normative mechanism for resolving conflicts. It is clear from the outset what is expected of people and how they should behave. Nevertheless, it is inevitable that norms will be violated without causing the norm itself to be invalidated as a result. In order to guarantee basic principles of social behavior, criminal law must therefore not only, like any class of law, serve as a means of orientation - preceding penalization both temporally and functionally - but it must perform a regulatory and supervisory role by publicly

monitoring and applying sanctions against the violation of particular norms armed with the threat of punishment. Therefore force is by necessity an integral part of the law, and of criminal law in particular, since it is the severest instrument of public social control (Frehsee 1991, 59; Rössner 1992, 270ff; Spittler 1980, 4). Autonomous post-crime conflict resolution is dependent on the fact that enforcement measures are held in readiness in the background and can be activated to uphold the law and protect the weak.

The conditions and demands of our way of life and our social systems today appear to rule out a currently relevant discourse on the validity of norms in concrete conflicts. The "heterogenization of value preferences" in an open, pluralistic society has made a certain minimum level of consistent and binding norms indispensable for social contact (Frehsee, 1991, 56ff.). However, this must be distinguished from the question of whether, and to what extent, public social control for purposes of reparation and conflict management respects the autonomy of the parties involved in certain life and conflict contexts and can, if need be, permit them a degree of freedom to find their own consensus on alternative norms, without the law losing its function as an orientation yardstick for social action.

Criminal law makes it clear from the outset which legal interests are deemed worthy of particular protection, and thus, in the case of norm violation, who the victim is and who the offender (Rössner 1992, 271). However, the results of victimological research show that such definitions do not always live up to social reality. However their relative positions might be defined in abstract, normative terms, the roles in concrete conflict situations cannot necessarily be distinguished that easily - it is not always clear which person is the offender and which the victim. The emphasis upon conflict rather than upon a normative definition of criminality in VORP's mediatory approach to solving problems provokes the question, quite rightly, as to the legitimacy and scope of the prevailing definition of delinquency. This also holds both for the neglect of the degree to which criminally relevant behavior is inextricably linked to conflict itself (Hanak/Stehr/Steinert 1989) and to the origins of criminal law norms *per se* (Jäger 1988).

2. Restorative Justice in Germany

2.1. The law and the program's development

The TOA program in Germany was started up with the aim of establishing a new aspect to the state's handling of criminal acts. Unlike the concept of restitution which prevails in the US, the principle of *Wiedergutmachung* in German criminal law permits a perspective which contains

the peace-making aspect of the law. *Wiedergutmachung* (literally "making good again", and best translated as "reparation" or "redress" in its deeper sense rather than the more limited legal meaning) is a much wider concept than the compensation for damages or loss which occurs under civil law. The criminal law concept of *Wiedergutmachung* not only has a material component (damages), but above all a spiritual and interactive component. It involves those involved in the conflict making good the (material and spiritual) consequences of the offense or injustice. The *Ausgleich* (balancing out, or reconciliation) between victim and offender must aim at overcoming the conflict, reaching an understanding, and deescalating the problem with a view to the future, thus hopefully making a real contribution to a social and legal peace.

In the ten years that have passed since the first model projects in Germany, the concept of TOA has developed at breakneck speed. In the mid-eighties, pioneering work was carried out by a small circle of committed social workers and criminal justice officials as they tried out TOA in the field of juvenile delinquency, i.e. on crimes that had been carried out by young offenders (cf. Trenczek 1990). In the scientific studies carried out by independent research institutions that accompanied the projects, TOA was judged favorably and considered to have been a success (Schreckling, **19..**).

In an "Alternative Plan for Redress" published in 1992 (Baumann et al 1992) prominent German, Austrian and Swiss criminal law lecturers called for changes in the administration of justice and demanded that *Wiedergutmachung* be taken into greater consideration during criminal proceedings. In the same year, the first model projects for testing TOA were started in Hanover and Nuremberg in the field of general criminal law, i.e. with adult offenders and their victims. And once again, it was only a matter of a few years before the projects were followed by changes in the law: in December 1994 TOA was made an integral part of general criminal law. It is of particular significance that TOA is not only designated as a possible component in a probation order, or as a general basis for sentencing and grounds for mitigation, but Sec. 46a of the Criminal Code (StGB) also provides that TOA may constitute a sentence in its own right if other sanctions are dispensed with.

In Germany at the moment politicians are hoping to establish TOA across the whole country. In order to coordinate the explosive development of TOA, especially in the juvenile delinquency sector, the Federal Ministry of Justice set up a Service Bureau as early as 1990. Its experts offer practical advice and support for TOA projects throughout the country, publish a journal and organize further training courses and conferences. The Service Bureau's most important job is planning and running a one-year on-the-job training course, which leads to a basic qualification

for conflict counselors in the TOA field (Netzig 1993). The target group is social workers employed in private and public-sector organizations that wish to offer TOA. The course has now firmly established itself: it is a prerequisite for working as a professional mediator, around 350 workers at centers providing legal assistance (for juveniles) and non-profit organizations have taken part. The number of projects practicing TOA in Germany has risen to over 200 within just a few years (Wandrey 1994). If up until now most of the participants have been organizations working with young people, one can expect a similar boom for adult offenses in the near future, now that the legal conditions have been finalized in the field of general criminal law too.

However, such a rapid and complex development has its pitfalls! The boundaries of TOA become blurred, there is the threat of a tendency to abuse or undermine the concept, and standards are called into question. Some District Attorneys' offices (*Staatsanwaltschaften*) try to starve the projects out of existence by not referring them any cases. Some so-called TOA projects merely carry out the judiciary's restitution penalties and palm this off as TOA. Social workers confuse one-sided counseling with conflict resolution. Victims are misused in the role of helping toward the resocialization of offenders. If the attempt to establish a common base and common standards for structuring and running the great variety of TOA projects proves unsuccessful, TOA threatens to deteriorate into a travesty of itself, an insignificant didactic appendage to the criminal justice system, much to the disadvantage of the victims and offenders involved. Its educational intentions, wherein its true value lies, would then have burst like a bubble (Netzig 1995a). To prevent this happening, a group of experts, in collaboration with 30 experienced mediators from a number of the German states, has developed a manual entitled "Standards for TOA" which lays down standards for running TOA projects in Germany in a reputable manner (Kubach et al. 1995). Its chief priorities include safeguarding the voluntary nature of an offer of TOA, ensuring thorough training and a high degree of specialization amongst mediators, networking the projects and keeping accountable statistics for monitoring the individual projects' success and aiding comparisons amongst them.

2.2. "WAAGE" in Hanover

2.2.1 Program goals and characteristics

The *Verein für Konfliktschlichtung und Wiedergutmachung - WAAGE Hannover e.V.* (Association for Conflict Mediation and Redress; "WAAGE" = scales), a non-profit organization founded in late 1990, has been carrying out TOA within the field of general criminal law since the fall of 1992 (Netzig et al 1992). Victim and offender are given the opportunity to talk about

the offense, its causes and consequences, and to negotiate a redress in the presence of an impartial mediator. If an agreement is reached, charges are then dropped or in cases involving particularly serious crimes or an offender with a previous record, the sentence is reduced. From the project's point of view, a case's suitability for TOA does not in principle depend on the seriousness of the crime but on the acceptance of those involved. However, in order to gain the cooperation of the judiciary, the spectrum has had to be limited for the time being to cases involving moderately serious crimes such as theft and burglary, (grievous) bodily harm, damage to property and fraud. In spite of this, mediation is carried out across the entire offense spectrum if either of the affected parties have initiated the contact to WAAGE themselves.

Despite the majority of juvenile programs (cf. Trenczek 1990, 113), WAAGE does not focus strictly on a narrow diversion concept. Naturally, the aim is to have the case dismissed once the persons involved have resolved their conflict. However, due to legal limits (sec. 153, 153a German Criminal Procedure Code) which only permit the dismissal of minor offenses in adult proceedings (in contrast to juvenile cases, cf. sec. 45, 47 of the Juvenile Code), WAAGE also accepts cases where criminal justice proceedings may continue or an additional sanction may be imposed. However, WAAGE does not accept any conditions imposed by the prosecution or the judiciary as regards the outcome of the mediation process. Once the parties have reached an agreement, (and fulfilled it) the case is returned to the source which referred it so that a final decision can be made.

WAAGE manages a **fund for victims**, from which offenders without means may receive an interest-free loan in order to pay the compensation to the injured party. The offenders then either pay the money back by installments or do community or charity work.

When it comes to VORP, all those involved - criminal justice officials, representatives of the social services, clients or those working on the program itself (VORP directors, case managers or mediators) - put their own different, sometimes contradictory emphasis on **the goals of the program's activities**: i.e. to humanize the criminal justice process, to increase the offender's personal accountability, to provide meaningful roles and restitution for victims, to punish the offender, to help the offender stay out of trouble, to provide an alternative to imprisonment, to ease the probation service's case load, to improve the community's understanding of crime and criminal justice and to provide an opportunity for reconciliation (cf. Coates and Gehm 1985, 3). VORP seems to offer something for everyone and can be very attractive, regardless of one's political persuasion. On the other hand, this makes a new program vulnerable to those influences which tend to coopt innovative processes to make them function in the traditional system.

WAAGE's central objective is to facilitate participation. The initiation and facilitation of a controlled forum for settling and resolving conflicts is at the center of the idea of reconciliation. This reflects an interactive, conflict-oriented perspective on crime, a move away from one-sided partisanship toward an integrative approach which is sensitive to the needs and problems of both victims and offenders. With VORP, we are implementing new and specific communicative elements in the justice system. Victim and offender are given the chance to represent their own interests. VORP gives those involved the necessary freedom and space to enable them to cope with or make good both the emotional and material consequences of criminal acts, and thus actively participate in reducing and resolving conflicts.

2.2.2 Program statistics

In the first 12 months of the project's operation, the number of cases assigned to it by the District Attorney's Office fell far short of its initiators' expectations. Department heads attributed their reticence to the need to keep down their workload. A great deal of effort was necessary on the part of WAAGE's staff to reduce their reservations. After a special TOA department was set up at the District Attorney's Office, our efforts bore fruit. Both the quality and the quantity of cases developed along the desired lines.

In the period from January 1-December 31, 1994, **509 TOA experiments** (cases) were completed involving **670 injured parties** and **614 defendants**. Here one has to bear in mind that WAAGE, unlike most other projects (including those in the USA), counts the cases it deals with according to the number of actual judicial cases. At WAAGE we refer to the number of judicial cases which have been filed, regardless of how many victims and offenders were involved on each occasion.

59 of our cases were proceedings in which both sides had been injured and in which both were accused of a crime.

Offenses dealt with (only the most serious offense being prosecuted in each case is shown):

Assault (*Körperverletzung*: sec. 233 StGB)	199
Grievous bodily harm (*gefährliche Körperverletzung*: sec. 223 StGB)	89
Malicious damage to property (*Sachbeschädigung*: sec. 303/304 StGB)	52
Insulting behavior (*Beleidigung*: sec. 185 StGB)	49
Unlawful compulsion (*Nötigung*: sec. 240 StGB)	38
Threatening behavior (*Bedrohung*: sec. 241 StGB)	30
Fraud (*Betrug*: sec. 263 StGB)	17
Theft/Burglary (*Diebstahl*: sec. 243 StGB)	14
Other	21

The **most "serious" offense** which we have successfully dealt with at WAAGE to date was a case of grievous bodily harm in which the injured party's nipple was split in two as a result of a stab wound to the chest - here the mediation talks resulted in damages of approx. $9,000 being paid to the victim. A particularly conflict-ridden situation occurred with a case of indecent exposure in which the female victim described to the offender the fear and anxiety she suffers as a result of his actions in a session lasting nearly 3 hours. The degree of difficulty in a mediation case is not therefore dependent on the (normative) seriousness of the crime. Sometimes, offenses which appear relatively minor can conceal a serious underlying conflict.

WAAGE also dealt with a large number of cases in which the victim and the offender knew each other before the offense occurred. The center has been able to settle both **crimes involving domestic relations** and **disputes between neighbors** and **colleagues** successfully. However, the relationship between victim and offender has a great influence on the way a TOA reconciliation develops and what chance of success it has. Such cases generally prove to be particularly difficult and time-consuming.

Of the 509 cases completed, **79 were considered unsuitable for a TOA** according to WAAGE's criteria, since the accused denied the charge brought against him/her. These cases were returned to the District Attorney's Office.

Of the 430 cases considered suitable in principle, we were able to conclude **232 successfully**. In **198 cases**, there was **no reconciliation**.

Reasons for failure:

Offender could not be contacted:	66
Offender refused to participate:	43
Victim could not be contacted:	7
Victim refused to participate:	55
Mediation unsuccessful:	27

WAAGE only offers the injured party a TOA if the offender has indicated his/her readiness to participate. The first time most participants learn about the possibility of a settlement out of court is when they receive our letter. Approximately half of the injured parties turn down the offer. The reasons are varied: some people do not want anything more to do with the matter and leave any further action in the hands of their lawyer. Some do not want to make the effort. Others would like the matter to be decided in court by a judge. Sometimes the parties involved are so embittered from years of conflict that any attempt at reconciliation seems pointless to them. The most important element in terms of participation is the fact that the affected parties can decide themselves whether they wish to take up TOA or not. At WAAGE, the success of a TOA is usually determined as soon as contact is made: if the victim and the offender are willing to attempt a settlement out of court, the mediation is successful in 94% of cases!

The manner in which cases are dealt with is determined by the needs and interests of the victims and offenders concerned. Many participants support the notion of a TOA, but reject a personal meeting with the other party out of fear, bitterness or **because they are unwilling to get involved**. Some injured parties are simply interested in the material aspect of the case. **Mediation talks** took place in **79** of the 232 **cases** successfully dealt with, whilst in 153 cases mediation took place indirectly, with the mediator talking to each of the affected parties individually (shuttle-diplomacy).

The **results** of negotiations are extremely varied: in some cases, a financial redress such as compensation for injury or damages has top priority. The victim and offender then negotiate the amount to be paid. The affected parties often agree on a symbolic gesture, for example, that the offender makes a donation to charity. Sometimes, after a successful settlement they decide on a joint activity and go for a coffee or meet in the evening for a drink. In domestic cases, the affected parties are concerned with laying down rules for future behavior, for example a strict ban on any form of contact. With disputes amongst neighbors, the TOA usually ends in binding agreements which govern specific aspects of living next-door to one another.

WAAGE's mediators make sure that the agreements are complied with. Payments are made through the association's interim account in all cases. The TOA has only failed in one case because the offender failed to keep his promise.

3. Empirical Assessment of Restorative Justice

3.1 Definition of success: The views of victims and offenders

Law-and-order policy considerations always address the success of TOA programs, in order to justify their funding. But the crucial question is, what does "success" mean? How is success measured? What kind of goals are supposed to be met? Should we focus on criminal justice goals or on the intrinsic aims of conflict resolution and VORP?

As regards the criminal justice system, success is often expressed in recidivism statistics. Aside from their low selectivity (there are enough indications which show that in terms of the prevention of recidivism, legal measures are interchangeable), this standard reflects an overestimation of the influence of formal measures on whether a person will reoffend or not. Behavior toward the law is influenced less by such a measurement made at one point in time, and more by personal biographies, social chances and the general social and cultural condition of a society (Galaway 1987, 9). Even if we stick to the traditional yardstick of recidivism figures, people often ignore the fact that traditional measures have not been very successful. The situation can hardly get worse if we pursue alternative methods of dealing with crime.

Although the number of programs is growing, we have to acknowledge that VORP has not yet become routine procedure. The number of cases is still small and it is very difficult to make a financial assessment of the costs and benefits of pursuing a VORP case. Predominantly a result of the remarkable commitment and support of those involved, the budget for a VORP is fairly low. WAAGE Hanover has an annual budget of some $130,000, enabling us to employ two highly-qualified mediators and one part-time secretary. Although WAAGE has nothing to fear from comparisons with the formal system of social control, it is too early yet for a short-term analysis of the efficiency of victim-offender reconciliation. It may well be that the mutual agreements between the affected parties lead to a reduction in criminal, civil and appeal proceedings. Nevertheless, an efficiency evaluation of this kind is not only premature; subjecting the program to a purely quantitative definition of success based on the criminal justice system is too limiting for an appropriate assessment of the conflict resolution approach. Success may occur on levels that have not yet been appreciated by traditional justice standards. This should not be

used as a vehicle for criticizing new, alternative measures but, if anything, points up deficiencies and inadequacies in the present system. Moreover, in the long run satisfying legitimate demands for conflict settlement could ultimately contribute to the legitimation of social control.

Since participation is one of WAAGE's major goals, it should be self-evident that success can not be measured solely by researchers and criminal justice professionals, but that the views of those involved, the victims and the offenders are of great significance. By virtue of the fact that the affected parties are asked about their goals for mediation, and their experiences and criticism of TOA, they themselves are able to influence the work of the mediators.

One major step in facilitating conflict resolution is that the parties come together. However, with an eye to the participation principle in particular, it is important for the parties themselves to be able to decide which form of conflict resolution they wish to choose. In cases where damage to property has been minor (and the emotional problems caused negligible), participants often find complex proceedings involving face-to-face contact unnecessary for settling financial compensation. Furthermore, the rates of mutual agreement and compliance with restitution obligations, the participants' satisfaction with the procedure and its results, and the change in attitudes toward the other party also stress different aspects of a definition of success. Compared to the personal experience of those involved, even this more sophisticated type of evaluation might not be sufficient. Aside from all the intangible benefits that occur in the work of VORP (for example, even when the parties were unwilling to meet each other, the personal contact with the mediator was perhaps the first time that anyone had listened to a participant's grievances), this phenomenon seems to flow from the subject and from the social dynamics of conflict resolution and reconciliation. Because a program can only provide an opportunity for participation, we may not be able to prove if and to what extent reconciliation has occurred. Nonetheless, carefully undertaken evaluations which consistently take these restrictions into account could give us some indication as to whether VORP constitutes a practicable approach to crime. In this respect, we should remember that this kind of ambitious analysis of success is seldom undertaken to legitimate the criminal justice procedure.

3.2 Methodology - Action research

No systematic, wide-ranging surveys of victims and offenders have yet been carried out in Germany after TOA has been concluded. The extensive surveys carried out by Mark Umbreit (Umbreit 1988-90) are only partially applicable to the German situation due, for one, to the

difference in legal systems, though his research methods and results would provide a good basis for a more in-depth survey of victims and offenders, adjusted to specific German circumstances.

In the event, the academic research accompanying WAAGE's projects has placed its emphasis elsewhere. Mediation talks are emotionally charged situations. They are concerned with a criminal offense, with material and non-material damage, with injuries, with humiliation and anger. For the victims and offenders involved, they are usually accompanied by insecurity and anxiety. An abstractly standardized research approach would not be suitable in this case. In addition, the questions we are interested in suggest the need for an open and unstandardized method of questioning: we are not interested in a supposedly objective measurement of satisfaction, but rather in an evaluation of dimensions such as the major motivations, perceptions and assessments of the affected parties in connection with their attempts to resolve the conflict out of court at WAAGE. For this reason, the survey was carried out using qualitative, semi-structured interviews.

WAAGE is based on the concept of action research. By constantly reflecting upon and reviewing our practices, the intention is to gradually and meaningfully improve what the project offers. A survey of the views of victims and offenders therefore plays a particularly important role and has to fulfill two functions. Firstly, it helps us to directly improve and optimize our methods in practice and secondly, it aids the analysis of the mediation work. Shortly after each set of talks has taken place, the mediators receive substantial and detailed feedback on the participants' views and points of criticism. In regular meetings and supervision sessions WAAGE's staff discuss the individual cases and air any problems which have cropped up. Minutes are taken of the matters discussed at the meeting and their outcome, thus ensuring that the learning and improvement process is documented in such a way that its progress can be clearly followed (practice-oriented insight).

Furthermore, the survey is an aid to discovering the motives of victims and offenders, their interests and perceptions, their evaluations and their attitudes (theory-oriented insight). The survey is designed to enable those involved to explain what expectations they take with them into a mediation session, how they really experience what happens and how well they think the mediator did his/her job and to say which aspects played an important role in their subsequent satisfaction. On this basis, some new answers may possibly be provided to the question of the TOA's success.

The interviewing of victims and offenders took place continually throughout the entire period of the action research. From October 1992 to February 1995, 75 qualitative, open interviews, lasting between 45 and 90 minutes, were carried out with victims and offenders who had taken part in mediation talks. The survey therefore does not claim to be representative. The interviews were carried out by staff of the Criminology Research Institute of Lower Saxony (KFN), so as to reduce any possible inhibitions the respondents might have and to enable them to openly criticize WAAGE and the work that it does.

The interviews were tape-recorded and transcribed, and the data thus obtained both served as direct feedback for the mediators and was also used in the action research project, which constantly analyzed and evaluated the interviews' content (Netzig 1995b).

3.3 Results of the interviews

Just as they voice a wide range of expectations of TOA, the parties affected also gave diverse reasons for being satisfied with the outcome of the mediation talks in which they were involved.

3.3.1 Expectations and motivation

Victims and offenders give a broad range of reasons for taking part in mediation talks. Emotional aspects relating to, and motives for, trying to obtain a satisfactory solution to the incident are situated alongside a variety of hopes and aims regarding the outcome of TOA. Moreover, the desire to settle the case out of court or the fear of negative alternatives also play a role in deciding on TOA. Often, the goals of the affected parties change whilst the reconciliation is in progress. Many victims, for example, initially say that they only have a material interest in the case, but as talks progress the non-material and emotional aspects of the case gain importance after all.

Many **victims** participate in TOA because the crime has shaken, confused or frightened them. They want to ask the offender a few questions so that they can come to terms more easily with what happened. They want to know what kind of person the offender is, why he/she committed the crime and what exactly happened as it occurred. Some victims - especially those who sustained injuries - only have a dim recollection of the event. Their fears escalate as their imaginations get the better of them and they feel threatened and traumatized by certain places or

people's shadows. A face-to-face encounter with the offender can help victims such as these to reduce their excessive anxiety.

For other victims, it is more important to have one opportunity to tell the offender exactly what they think, to be able to get their anger, disgust, or grief "off their chests", to "let off steam" and confront the offender with the consequences of his/her actions. The injured parties in neighborhood crimes often see an opportunity in TOA to finally put an end to the conflict, which has usually been going on for some time, and to put the dispute behind them. With the mediator's help, they want to clear up what happened in order to minimize the constant stress and threat to their environment and to avoid any further escalation of the conflict. Furthermore, in cases where people are victims of domestic crimes, motives can be identified which are connected to their situation and their relationship to the offender.

Victims' statements on what made them take part in TOA:

"It would probably never have come out in court why he did it. It would have been established that he did it, that he broke my nose. Okay, whether it had been deliberately, or was an accident or had been done in self-defence, that could probably have been sorted out in court too. And after that they would have passed the sentence. Then I'd never have known why he did it! In the talks, as we both sat there, it came out a bit, why (...) Anyway now I know a couple of reasons for why it happened."

"We just wanted to get it over with. What I mean is, I didn't want to have this hanging around me for maybe another six or nine months."

"It was just important to me that a third person was there! He thought that he was in the right and he could do just what he liked. And it was good that he got to hear how it really was from other people, someone else's opinion. And that [the mediator] made him realise and said, 'Hey, stop, it can't go on like this any more!' And then, you see, [the accused son] needs help too, he really does (...) I mean truly neutral help, not just always here in the family! (...) Some kind of an agreement has to be reached. That's what I expected. And not that a lot of dirty washing got done in public! That was very important for me."

"The main reason for me was, I thought that going to court with my own sister really was taking things a bit far! And I just wanted to avoid it."

A lot of **offenders** take part in an attempt to reach an agreement out of court at WAAGE, because they want to make amends for what they have done. They hope to "wipe the slate clean" by means of material compensation. Pride and honor not infrequently play an important role for male defendants. They want to take responsibility for the crimes they have committed. These

offenders see an opportunity in TOA to show that they are fair and have the courage of their convictions, to admit to their mistakes and play an active part in minimizing the damage. The majority hope that by settling the matter out of court and making good the damage caused, this will have a positive influence on the District Attorney responsible for their case. First offenders want to avoid having a criminal record, and those with previous convictions hope to avoid a tough and/or expensive sentence. Aside from hoping for a reduced sentence or no sentence at all, a lot of offenders also want the civil side of the case to be cleared up. Here, they see an opportunity to settle the question of damages amicably and without an expensive court case. A lot of offenders take part in TOA because they want to talk to the victim, explain their own behavior, to apologize, to ease their consciences and reduce their feelings of guilt. Often, they express the wish that the victim will understand them and accept them as a person.

Statements from defendants on their motives for taking part in TOA:

"Well, it was important to me that he knew, I mean, the victim knew, that I wasn't a thug or anything. I wanted to prove to him, that foreigners aren't..., that foreigners aren't all bad, there are nice ones too! I wanted to tell him that."

"I just thought, how can I get out of this? How can I explain the incident, what happened there. It just kept going through my head! (...) How can I explain it to the woman? What I did, how it happened? That it all got out of hand! (...) I think, I was very preoccupied with it, with the situation that I got myself into, and what I did to her in the process. I thought more about that than I did about this meeting. (...) That was more important for me then anything else. That was the main reason why I went there. To talk to the woman!"

"This thing couldn't just be ignored. And so I said to myself, I've got the courage to say that it wasn't right what I did. (...) I'm a sportsman. I'm a fair man. And I say, when I'm in the wrong then I'll admit it. When I'm not in the wrong, then I won't."

"That you were given the chance to speak to the ***defendant(?)****. If a case goes to court, then it doesn't happen. There both parties are practically summoned, and perhaps you meet each other in the corridor. (...) See, both positions are pretty rigid there. And as it was you could speak to the other person and have it out with them. (...) Goals? First of all that an agreement is reached in any case. That you can get on with one another again. And that's practically what happened in this case. That you get back on friendly terms. That you don't avoid one another or anything".*

3.3.2 Participation and satisfaction

Although the material side of the damage often seems to be the top priority after the preliminary talks with victims and offenders have taken place, during the course of the mediation talks a surprising turnaround frequently occurs: financial demands take a back seat and non-material aspects gain in importance. Often the affected parties - both victims and offenders - say that the result of TOA for them was that they have now come to terms with what happened, after they have got to know the other party personally. Victims of violent conflicts, in particular, say that the mediation talks - often after initial skepticism - have helped them to overcome the excessive fears resulting from the incident. They find that the open exchange of views at WAAGE helps in coming to terms with what happened. For many participants the most important outcome of TOA was that the danger of further conflicts or a renewed escalation of the violence was diminished. During mediation talks, they were able to overcome hate, anger and thoughts of revenge. The affected parties can now view the prospect of a possible chance meeting in the future without fear. Especially for crimes in people's immediate social environs, i.e. for incidents between neighbors, colleagues or relatives, this aspect of deescalation is of great significance. Victims of crimes which occur within the family often see TOA as an opportunity to set the defendant clear and binding limits, without destroying his/her life, ending the relationship or dragging other members of the family into the conflict.

Statements from the affected parties on the outcome of TOA:

"I knew I might never get the money. If it had gone to court, it would have been more expensive for sure. (...) I told [the female mediator]: 'If my demands are met, then that's okay and if not, then I'm going to take it to court!' And she said: 'Yes, okay, I'll suggest it [to the defendant]'. I said: 'I've made my demands and I'm not going to budge an inch!' Well that's what I said at first, until I saw him looking so pathetic and then I said 'Forget it, it's okay' (...) We even called each other 'Du' then (...) I said: 'I don't care as long as I get it [the money] paid into my account in one go, then it's all right.' It was there in a couple of days as well. (..) I didn't want to bite the man's head off! I got out of there and went home. I'm glad there we've got something like this! I'm happy with it and as far as I'm concerned it's all over."

(Victim of grievous bodily harm)

"For me in the night that man was, if you like, the incarnation of fear, of danger. (...) What I've got out of [TOA] is that I'm glad that I got to know who [the offender] was, that I'm glad that I, sort of, heard it all from him, so that I know a little bit about what kind of a person he is, what kind of life he leads and that, really, he isn't violent. (...) I am really glad about that. (...) To see this phantom disappearing! Glad that the victim has the chance to have a good look at the offender. Just to see that he's only a human being as well and not some kind of monster! But also to have a protected space, to tell the defendant just what you think of him! (...) After he [the mediator] went out of the room, we had a bit of a chat (...) That was sort of important for me."

(Female victim of an assault at night)

"I now get on very well with the victim. I've thought about it: if it had come to a court case then it would have left a nasty taste in my mouth. Afterwards we had a meal here and then that was it. (...) As he said to me: He still would have been scared of me. Which I can understand. If you do things like I did there, I would have still been scared of whoever did it too. He isn't scared of me anymore, otherwise he wouldn't have gone for a meal with me. Anyway, I explained it again to him in the pub properly, how it was with me. And he could understand it as well."

(Offender in a case of grievous bodily harm)

Often, the non-material aspects particularly stand out in the participants' statements on the outcome of TOA for them. The face-to-face encounter with the other party clearly has a value all of its own for many participants. They were active in reducing the damage done, negotiated the type and amount of compensation personally and can strongly identify with the result. From the point of view of those involved TOA is a success! The majority of victims and offenders who took part in mediation talks at WAAGE are positive about the work carried out by the mediators and the outcome of the settlements.

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In the mean time, for many people in our anonymous society "Law" and "Justice" have deteriorated into abstract, empty phrases. In TOA the affected parties get to experience that they too can decide what is just and fair. They themselves are responsible for sorting out the dispute and have the authority to do so. Their subjective criteria, views and arguments are taken seriously and determine the outcome. Because they actively participate in settling the case and take part in negotiating the compensation, the victims and offenders are able to identify with the result. "Justice" then becomes something which they can experience directly and tangibly.

An example will illustrate the significance of participation for the satisfaction of those affected. The repayment behavior of those defendants who receive a loan from WAAGE's victim fund is remarkably good in view of their social circumstances - many are unemployed, in debt and live off welfare support: out of 34 loans totaling DM39,000, payment is outstanding in only 2 cases - amounting to a total of DM1,350. Although the offenders know that they cannot be forced to pay because they are classed as living below the subsistence level, they keep their word and pay off their debts. The active and autonomous participation in TOA increases their sense of identification with the outcome. They are able to reduce the negative consequences of the offense, without losing face and being humiliated. Actually sticking to the agreement then becomes a question of pride and honor.

As a rule, victims and offenders see an outcome which they themselves have achieved in a fair and voluntary negotiation process, which takes their demands and arguments into account and is directly relevant to the underlying conflict, as fairer and more satisfactory than the abstract verdict of a judge! It is **their** outcome ...

4. Outlook: Toward a Community Justice Approach

A decision to directly involve victim and offender and to make participation easier, rather than focusing on punishment does not mean that injurious behavior is then accepted or played down, rather it indicates a recognition of the limitations of the adversary process. If we take it seriously, the logical conclusion to the idea that criminal law is situated at the end of a long line of measures for social control, is that formal measures should play a subsidiary role (as a last resort). This would correspond to a proposal for facilitating the resolution of conflicts that entails a procedure which is legally monitored (and even initiated by the system) but which is nevertheless extrajudicial. Furthermore, conflict resolution is not limited to a "victim-offender" perspective. On a continuum of possible stages for facilitating conflict resolution, WAAGE (or the current VORP model) only represents one possible application. A community justice center that mediates in neighborhood disputes as well as dealing with conflicts in the "tougher" criminal cases would be in keeping with the fact that there is no such thing as crime "*per se*" but rather that behavior from a certain point on a continuum is defined as criminal. In contrast to its present rank in the list of criminal law sanctions, VORP serves less to augment criminal justice decision-making programs, and is more in keeping with principles of autonomous conflict resolution which are independent of categories of delinquency and which precede criminal law itself. A community justice approach might be able to demonstrate that mediation and VORP, unlike a restitution order, is not an alternative sentence but constitutes a totally different approach to dealing with conflicts between people and represents an alternative way of thinking. Community justice forums need to provide means for the early expression and potential resolution of conflict. They need to provide support and participation in order to mediate in conflicts as they emerge and before they become court statistics (cf. Schonholtz 1984).

Victim-offender reconciliation is certainly not a panacea. However, VORP seems to constitute an attempt at implementing participation within the justice process. For some, it may seem too early, for other it may seem too late for peacemaking and reconciliation within the confines of criminal law. But even today we can still learn a lot from wise Rabbis...