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Предложены материалы, в которых обсуждаются проблемы юридической науки и практики с позиций преемственного и инновационного развития национальных правовых систем и международного права.

Адресован научной юридической общественности, практическим работникам, преподавателям, студентам юридических факультетов, слушателям переподготовки по специальности «Правоведение», а также всем, кто интересуется актуальными проблемами в праве.

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THE EFFECT OF ALTERNATIVE SANCTIONS ON REINTEGRATION OF OFFENDERS – MEDIATION AND RESTORATIVE JUSTICE

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1. Introduction

International and in all centuries punishment is primarily used to prevent social deviant, especially criminal behaviour. Until today if crime increases especially a sharpening of penal laws is discussed and a more intensive punishment. Politicians regularly tell the population to sharpen the laws and punishment in cases of individual serious crimes nevertheless empirical criminological research results since long time show that this is not the best way to reduce crime (vgl. Kury and Shea 2011; Dölling et al. 2011; Kury and Kuhlmann 2016). In the context of an increasing punitiveness in western industrial countries, which has to be seen on the background of clear changing social conditions, like the opening of the boarders in the European Union, an increasing number of refugees, the impression citicens have more and more that politicians can no more handle the big problems in society or the anxieties on the background of the fast changing economic realities, the desire in society to sharpen the laws increased (Hassemer 2009).

An increasing number of criminological research projects shows the reduced or very often missing effects of preventive results of criminal punishment. There are a lot of negative siede effects of imprisonment, especially with young offenders or if parents are incarcerated on children or families. This had the last years the effect that experts discussed more and more alternative sanctions. The development of "alternatives" has to be seen also on the background that since beginning of the 1990s in criminology began a more intensive discussion about the relevance of emotions in dealing with crime and criminals. On this background the incarceration rate decreased the last decades in many western countries in Germany meanwhile to the level of 78 prisoners per 100.000 population (Belarus = 306; Russian Federation = 450; USA = 693; Wikipedia 2017). Sherman (2003) for example voted in this context for a more emotionally intelligent justice. Karstedt (2011, S. 3) points out, that the development shows since the 1990s a „surprisingly abrupt end of the secular movement and modern project of the 'rationalisation' and 'de-emotionalisation of law'" (Laster and O'Malley 1996). This development mirrors for example in the rediscovering of shame in the penal procedure, especiall in form of restorative justice (Braithwaite 1989), an increasing concentration of victims of crime and of their emotional needs.

Research results from different regions and topics show the positive effects of a broader involvement of emotions in dealing and solving problems, also in cases of penal conflicts. The meanwhile more discussed forms of alternative measures to reduce conflicts are not new, they were „re-discovered", used in older times, for example in

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the Medieval in Europe or until today in traditional societys to reduce conflicts in a society. Mostly these forms of conflict solution were summarized as mediation, in English often also as mediation or Restorative Justice. Meanwhile there exists a huge number of publications and procedures, also for example in Germany (see for example: Hopt and Steffek 2008a; Johnstone and Van Ness 2007a; London 2011).

Especially the development of a more and more expanding research about victims of crime after second World War and the establishment of a victimology as an essential and important part of criminology pointed out correctly, that the victims of crimes received too less attention and support (Braithwaite 1989). There are many countries which established the last decades special legal regulations for a better support and help for victims but in practice mostly and regularly there was only few changes if at all. Victims are used by the penal institutions until today mostly only as witnesses in penal procedures, compensation is given, if at all, mostly by more or less private institutions, in western European countries, especially in Germany.

International empirical research shows clearly that most victims, may be without those victimised by very severe crimes, are more interested in restitution of the caused damage and less in sharp punishment of the offender (Sessar 1992; 1995). But just on the last topic the reaction on crimes organized by the official governments in a state is concentrated, disregarding the interests of most victims and broad parts of the population about restoring of peace in a society and reducing the conflict caused by a crime. Here measures of mediation can help to establish a bridge between different interests. „Restorative justice presents a different approach to achieving justice than the traditional court system. Whereas court systems depend on punitive measures and do not attend to victim concerns, restorative justice focuses on repairing the harm caused by an offense, bringing the offender back into society, and giving all actors affected by the crime (the offender, the victim and the community) a direct voice in the justice process" (Gromet 2009, p. 40).

Very important for accepting mediation in a society is that this measure and the chances by using it is well known by the population and the penal institutions, especially the judges and courts. Johnstone and Van Ness (2007b, S. 6) point out in this context: „Yet, despite its growing familiarity in professional and academic circles, the meaning of the term 'restorative justice' is still only hazily understood by many people". During an international conference in Germany there was discussed as a main reason for using Restorative Justice until today very seldom that these alternatives in society and also on the level of courts are not very well known. Also judges very often are not very well informed an trained. Politicians and justice professinals are more oriented in traditional punitive reactions on crime. Also the discussion in the public is one-sided, people are not informed, restorative justice is seen more or less as a "mild" reaction, not so effectice in crime prevention as hard punishment (Lummer 2011, p. 240f.; Kury and Shea 2011). The effects of restorative justice has also to be seen on the "athmosphere" in a society concerning the penal climate and punitivenss.

2. Historical exampels of conflict reduction in society after criminal events

Advocates of mediation and restitution after crimes very often and correctly point out to historical examples (see also Kury u. Kuhlmann 2015). For example

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Frühauf (1988, p. 8) discusses the history of restitution and shows that this is one of the most interesting topic of history of punishment, in older times a natural part of each system of sanctioning and used already at the beginning of written laws (see also Hagemann 2011). Already the Codex Hamurabi, developed round about 1.700 B.C. and one of the oldest law books handed down includes beside sharp punishment a lot of regulations about restitution of the victim by the offender. Broader and more detailed are measures of restitution of victims by offenders in the laws of the Hethiters from the time before reound about 1.300 years B.C. So these alternative measures to reduce conflicts in societies caused by crimes have a long and obviously successful history.

Intensive and broad regulations about restitution in most cultural regions seem to be a general phenomenon as Frühauf (1988, p. 11) points out, for example in antique times, in the Islamic penal system or in highly developed cultures and tribes (see for example about punishment and restitution in the Bible: Burnside 2007). Sharpe (2007, p. 26) points out: „Reparation has been a vehicle for justice throughout human history". As Rössner (1998, p. 878) writes on the basis of behavioral research we can come to the result, that behavior with the aim of establishing peace is part of a biological program of mankind. There would be no human community without systematic measures to reduce conflicts. Until the times of medial ages in historical penal laws the restitution of penal peace by social compensation was the main topic of penal justice.

Frühauf (1988, p. 13ff.) also presents a description of the development of restitution in the last centuries in the German law. Onwards from the 5th century A.C. in these regions more and more laws of different nations were written. In the „Lex Salica" for example, which was developed between 507 and 511 A.C., there was defined a catalogue of penances, which fixed for each crime a restitution of the offender to the victim, also for crimes of killings. The punishment of offenders by restitution was in that times seen as normal and general usual (p. 17). The offender was pressured to restitute the caused damage by his criminal act. But in the following centuries the principle of restitution of the caused damaged by a crime was more and more replaced by sharper punishment. With the establishment of kingdoms the distribution of power between state and tribes changed fundamentally (p. 37). The kingdoms were interested in an abolition and ending of the old law regulatiaons, were motivated to increase the own power, by taking the jurisdiction in own hands, this was also the beginning of a fundamental change in social control.

Punishment is used as a measure of power. Especially in using the death penalty there becomes clearly the combination between move towards power of the kings and enforcing the new autoritarian penal laws (Frühauf 1988, p. 43). Frühauf (1988, p. 45) discusses an allround "fiscalisation" of penal law on the background of massiv financial interests of the kingdoms. Fines were and are until today a good income for the state, only in the last years the problem of restitution of the victims as a task for the state is again discussed. Frühauf (1988, p. 59) points out that the regulation and control of justice in a society by the state to control the social behaviour of citizens is the best way, despite new problems araised by this regulation. At the end we have more justice and more equal treatment of all penal cases. Insofar the development beginning in

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middle ages was a huge progress in civilization. But Rössner (1998, p. 880) points out in this context additionally that in the concept of penal law of Kant and Hegel with the absolute theories of punishment, which have influence until today and politics of punishment and crime control, there is no place for restitution and solution of conflicts. This might be the background that in German penal law victim offender restitution in the development the last decades not reached the importance it had in earlier times. In the penal practice of today Victim offender restitution in Germany plays a reduced role (Rössner 1998, p. 880f.). Schmidt (2012, p. 191) points out that victim offender restitution has become more important, but altogether in handling crimes it plays a minor role.

Critical discussed is the question how far the state necessarily needs forehand the principle of punishment (Frühauf 1988, p. 60). Just this question should be discussed today on the background of meanwhile changes in the living conditions in society. The missing of a broader used component of restitution can be seen as a disadvantage of modern penal law, especially in handling crimes of young persons. Dealing with crime means more or less primarily a concentration on the offender, beside penal sanctions there was established a broad network of treatment and diversion measures, in Germany fines are meanwhile the primary sanctions but without a special profit for the victims of crime. Only modern discussions about victimology have slowly effected another thinking about crime control (Frühauf 1988, p. 65). On the background of developments in other countries, like the USA, also in Germany more and more projects about restitution were begun.

3. Definition of Mediation

Braithwaite (2009, p. 497) one of the founding fathers of the newer movement in mediation distinguishes between "Mediation" and "Restorative Justice" and points out: „Mediation between just a victim and just an offender can be described as a ‚restorative process', but it does exclude other stakeholders such as the family of the offender". In contrast he defines Restorative Justice "a process where all the stakeholders affected by a crime have an opportunity to come together to discuss the consequences of the crime and what should be done to right the wrong and meet the needs of those affected. Of course such an ideal is secured to greater and lesser degrees". On the basis of this process-definition "one on one victim-offender mediation is not as restorative as a conference or a circle to which victims and offenders are encouraged to bring their families and other supporters. In a restorative justice conference both victims and offenders are asked to bring along the people who they most trust and respect to support them during the conference".

But Restorative Justice refers according to Braithwaite (S. 497) not only on processes, „it is also about values. It is about the idea that because crime hurts, justice should heal. The key value of restaurative justice is non-domination (Braithwaite and Pettit 1990; Braithwaite 2002). The active part of this value is empowerment. Empowerment means preventing the state from 'stealing conflicts' (Christie 1977) from people who want to hang on to those conflicts and learn from working the through in their own way. Empowerment should trump other restorative justice values like forgiveness, healing and apology, important as they are". In this context to accept really and fun-

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damentally „Empowerment“ means also that if a victim wants to react on a victimisation in a more retributive than restorative way, this is also accepted. „But because non-domination is the fundamental value that motivates the operational value of empowerment, people are not empowered to breach fundamental human rights in their pursuit of revenge” (Braithwaite 2009, p. 497f.).

According to Walgrave (2007, p. 559) the difference between restorative justice and criminal justice can be seen especially in the following charateristics: „- Crime in restorative justice is defined not as a transgression of an abstract legal disposition, but as social harm caused by the offence. - In criminal justice, the principal collective agend is the state, while collectivity in restorative justice is mainly seen through community. - The response to crime is not ruled by a top-down imposed set of procedures but by a deliberative bottom-up input from those with a direct stake in the aftermath. - Contrary to formalized and rational criminal justice procedures, restorative justice processes are informal, and include emotions and feelings. - The outcome of restorative justice is not a just infliction of a proportionate amount of pain but a socially constructive, or restorative, solution to the problem caused by the crime. - Justice in criminal justice is defined ‘objectively’, based on legality, while justice in restorative justice is seen mainly as a subjective-moral experience”. The same way the author points out additionaly, that differences between criminal and restorative justice the last years more and more reduced. „It is becoming obvious that a clear-cut distinction between restorative justice and criminal justice cannot be sustained as was originally proposed“ (p. 560).

There is also no clear and unique definition and separation of different kinds of mediation. As Zernova and Wright (2007, p. 91) points out there are a lot of different modes how restorative justice can be used in practice. „There is no agreement among restorative justice proponents as to how exactly restorative justice should be implemented and what its relationship to the criminal justice system should be“. The authors differentiate between a process-oriented and a result-oriented model. Very often there is a differentiation between a court-intern mediation, organized and managed by the judges themselves and included in the penal process, a mediation near to the penal process with a more or less inclusion in the penal process and the same time a separation of the penal procedure and finaly a mediation outside the penal procedure, absolutely separated from the court procedure, interested is in preventing a penal process (Hopt and Steffek 2008c, p. 9, 19).

On the basis of the broad international research results of Hopt and Steffek (2008c, p. 12) the definitions of mediation are very different in the countries included in the project. On the basis of their research the smallest common sense of a definition of mediation is: “Mediation is a procedure based on voluntary cooperation of the parties, with a mediator without the power to make decisions who facilitates systematically the communication between the parties with the aim to find a solution of a conflict beween the parties accepted and produced by the parties”. A central element which is accepted widely by all penal systems is that of voluntarism but which is defined in different countries different. Also the power to realize the founded solutions is regulated differently from compulsion (like in England, Austria or Portugal) to free decisions of

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the parties (like in China). Agreement exists also more or less about the regulation that the mediator has no power to decide, so the regulation of the existing conflict is fully in the hands of the parties (p. 12). As Hopt and Steffek (2008c, p. 13) point out there are differences between the countries for example in the point, how far the mediator has the right to propose solutions for conflict regulation.

All law systems agree that mediation has the positive effects on the basis of support of the communication by professionals not by spontaneous engagements. The definitions of mediation in the different countries included in the project point out according Hopt and Steffek (2008c, p. 13) unique the topics: 1. Existence of a conflict, 2. The engagement to solve the conflict on voluntary basis, 3. Systematic promotion of the communication between the different parties, 4. Acceptance of responsibility for the solution found out including no power for decisions by the mediator. Voluntarism is also insofar a very important topic because agreements on the basis of mediation have more or less no chance to be executed by force. Especially with juveniles this is a good example to them to learn how to handle conflicts. They feel more respected.

An important part of mediation is victim offender restitution respectively repair of the damage. Heinz (1993, p. 376) points out that victim offender restitution on one hand is strong correlated with the idea of repair of the damage but the same time has a broader frame in the central idea of compensation, of satisfaction. By consideration of the interests and needs of both parts a compensation should be reached, in best cases a reconciliation. This should be arranged by using the chance of a privat-autonomous solution. The offender should learn to see and to accept the effects of the damages of the crime on the victim and should accept his social responsibility. This idea exceeds the frame of Victim offender restitution as practiced today and includes the perspective of the victim, as an example of social learning in parole and probation and in imprisonment (Heinz 1993, p. 376).

Meanwhile restitution is supported in the countries included in the research project by Hopt and Steffek (2008c, p. 22) by financial support. As the authors point out in this context, the measure is supported especially hoping to save money with a cheaper solution of crime problems. The different law systems don't separate clearly mediation from other forms of conflict reducing measures (Hopt and Steffek 2008c, p. 15ff.). Partly different topics overlap or the title is the same but the procedure different. Some countries ask for a special additional education and training in mediatiors (like attorneys, social pedagogs or psychologists). The regulations differ strongly between the countries. Some authors discuss also a reduction of the chances of mediation by strong regulations.

A controversial topic in some countries and publications is also a separation between mediation and retribution. Are both opposites or not. Some authors discuss that mediation and retribution are absolute different reactions on deviant behaviour (Braithwaite and Strang 2001). Restitution is hindered if the focus is concentrated on punitive measures which exclude the offender from society instead of including him. McCold (2000) for example refuses all kinds of pressures by courts in cases of restorative justice, this would the procedure direct again in a punitive direction.

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Other authors suggest that a combination of mediation and retribution is a better procedure. Proponents of this concept point out, „that retribution is an essential component of addressing wrongdoing, and it is the combination of restoration and retribution that will best achieve justice (Barton 1999; Daly 2002; Duff 2003; Robinson 2003). In this view, a pure restorative response is rejected as an acceptable response to wrongdoing. Proponents of this model contend that both the victim and the community have a right to desire retribution for the crimes that wronged them" (Gromet 2009, p. 45). Also Gromet (2009, p. 45f.) points out an "integrative view of restorative justice. … restoration and retribution are not necessarily competing. …The combination of restoration and retribution in fact may provide a better response to wrongdoing than either response on its own, as multiple justice goals can be accomplished. … The justice goals with regard to restoration and retribution are punishment and rehabilitation of the offender, restitution and restoration of the victim, reinforcement of the values of the community and restoration of the community". This shows that the definition of the key-components of mediation are seen different by authors.

4. The development in Germany

Mid of last century the new established victimology on the background of relevant empirical research could bring into discussion on international level, at the beginning mostly in western industrial countries the topic of mediation (Hentig 1948; Schneider 1975). Also in Germany the penal sanctions more and more have included a broad network of treatment and diversion measures. This development concentrated first and mostly on offenders that is useful sanctions for this part of crime (Frühauf 1988, p. 64). The development of mediation in Germany in the 1980s mainly was engaged by reports about positive effects of the procedure from USA. In USA already in the 1970 was the beginning of an intensive discussion about "restorative justice", in some parts a controversial discussion (Rössner 1998, p. 889; Rössner and Wulf 1984; Frehsee 1987; Abel 1982; Matthews 1988; Harrington 1985; Kaiser 1996, p. 216ff.).

„Restorative justice as both a philosophy and an implementation strategy developed from the convergence of several trends in criminal justice: the loss of confidence in rehabilitation and deterrence theory, the rediscovery of the victim as a necessary party, and the rise of interest in community-based justice" (London 2011, p. 13). While in USA especially from beginning of the 1970s and 1980s on one hand an increasing punitiveness in society was found out the same time the development of alternatives to classical sanctions increased. „Along with their interest in punishment, the public's interest in alternative nonpunitive solutions has also been recognized" (London 2011, p. 103). Especially if the public is informed about punishment and the weak effects of this reaction on crime and about the more effective alternatives to classical procedures of hart punishment the punitiveness is decreasing as could be shown in different empirical research (Doob and Roberts 1983; Roberts and Hough 2002; Sato 2013). "In sum, while the public's support for punishment is well known, its support for alternatives to punishment and sanctions with a restorative quality is also strong" (London 2011, p. 104). Especially "punishment alone is an extraordinarily poor way of restoring trust either in an offender or in society" (London 2011, p. 105). This is true especially with juvenile offenders.

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In Germany in 1999 the government installed the „Gesetz zur Förderung der außergerichtlichen Streitbeilegung“ (Law of solving conflicts outside the court). With this law the victim offender restitution (TOA) was official part of the penal procedure (DeLattre 2010, p. 90). As defined since that time prosecutors and judges in all stadiums of a penal procedure should proof the chance and possibilities to solve the cases by a mediation between the offender and the victim (Bundesministerium des Innern/Bundesministerium der Justiz 2006, p. 590). On the background of experiences until today most of the offenders and victims which are asked are willing, to participate in a victim offender restitution program. The results of the cases dealt with TOA meanwhile show after 10 years between 1993 and 2002 mainly the following solutions: in 69 % of all cases the offender apologized for his crime to the victim, in 30 % of all cases he payed damages, in 19 % he payed for causing the pain and sufferings, in 13 % of cases there were other benefits, in 7 % no other benefits and in 6 % he did any work for the victim (Bundesministerium des Innern/Bundesministerium der Justiz 2006, p. 594). Only 2.5 % of agreements failed.

In the juvenile penal law (Jugendgerichtsgesetz – JGG) the idea of education of the offender is absolutely in the foreground. So here restitution is seen from the side of education as very important because this shows the offender clearly the wrong of his crime. So the juvenile penal law has the role of bringing forward the idea of restitution and victim offender mediation (Heinz 1993, p. 376). On this background a separate restitution by the offender could be asked by the court on the basic of the JGG already in 1923. The young offender should learn by restitution that he caused pain and did a mistake and should learn also the negative effects for him (Frühauf 1988, p. 76). Victim offender restitution was so first implemented in the juvenile penal court, then 1994 in the penal code for adults. On the basis of the juvenile penal code the judge has the possibility to impose the offender the directive to engage in victim offender restitution.

To promote the victim offender mediation in Germany and to use it more in practice 1999 there was established the duty for the justice institutions to bring forward the TOA. According to this regulation the prosecutor and the court should in all cases proof the possibilities and chances of a (voluntary) victim offender restitution and should engage in qualified cases professional institutions to do it (Schwind 2011, p. 438f.).

The procedure in victim offender restitution is in Germany in the different Länder not the same. Criteria to use TOA should primarily be (see Delattre 2010, p. 93): - not for petty crimes, so no net widening of social control (see Kury and Lerchenmüller 1981), - there should be a personal victim, - clear situation, the offender should accept the crime and should confess his guilt, - both parties, victim and offender, should accept the procedure and should be willing to cooperate. Also Johnstone (2007, p. 609) points out the problem that more severe cases are brought to court and petty crimes are dealt by victim offender mediation programs what might have the effect of a net widening: „Less serious cases will be diverted to informal restorative processes and sanctions. But, because they are less formal and regarded as more benign, these processes will be extended to cases which previously would not have given rise

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to penal interventions. Overall the reach of the system of penal control will be extended rather than cut back" (see. also Zehr 1990, p. 222).

Victim offender mediation is seen correctly as a great pedagogic chance for the offender and shows also good examples for reducing the harm of the victim, but in Germany in practice it is used non the less until today relatively seldom. More often the courts punish the offender by the duty to pay fines to a non-profit institution. Frühauf (1988, p. 77) for example points out that the duty for restitution for the offender was discussed broadly on a theoretical level in the juvenile code but in praxis it is used only in relatively few cases. That might have to do with the training of jurists, especially also of judges for juvenile cases.

The German Probation Organisation (Deutsche Bewährungshilfe e. V.) has installed 1992 on the background of a decision of the Government (Bundestag und Bundesregierung) a service bureau for victim offender restitution as a supra regional counselling bureau, financed most by the ministery of justice and the Länder.

As informed by the TOA-statistic which is organized since 1993 by Kerner et al. (2005) in order of the ministery of justice more and more neutral bureaus of conflict resolution were established by nongovernmental organisaitons but also by social services of the justice and social work bureaus. These institutions can be used before the beginning of the penal trial by the prosecutor or during the trial by the courts to promote a restitution. Experts who do the restitution (mediators) regularly are social worker or social pedagogs and mostly have an additional relevant training as mediator (Delattre 2010, p. 90). Schwind (2011, p. 439) points out that meanwhile round about 400 of these mediation bureaus are installed in Germany. Delattre (2010, p. 90) informs that meanwhile in Germany more than 300 institutions use the TOA with fulltime professionals (Germany has round about 82 Million inhabitants). These institutions deal with round about 25.000 cases every year (Trenczek 2003, p. 104). As Delattre (2010, p. 91) informs per year in Germany TOA is used effectively in round about 35.000 cases. This shows that Germany has the highest number of cases in Europe. Im comparison with round about 550.000 charges per year these number is nevertheless relatively small (Schwind 2011, p. 439).

As Kerner et al. (2005) informs in 2002 cases handled by TOA mostly are crimes of bodily injury (47 %, see also Jehle 2005, p. 40), from these cases half are conflicts in partnership and other forms of inner-familiar violence (Trenczek 2003, p. 105; Vázquez-Portomene 2012; see also about mediation in cases of partner conflicts: Rössner et al. 1999). Also Schmidt (2012, p. 189) informs that in Germany TOA is used primarily in cases of bodily harm, additionaly in cases of damages of goods, insult, threat by a crime, intimidation, trespass and crimes against the property. The concentration of victim offender restitution is not on the regulation of material damages but of personal conflicts between human beings (Walter 2004, p. 339). As Jehle (2005) reports 2002 the results of mediation were: in 69,8 % apology, in 25,1 % pay damages, in 13,6 % paying for punitive damages for pain and suffering and in 5,7 % of cases to do any work for the victim. If there is a succesfull victim offender restitution between both parties in 80 % of all cases the prosecutors finalize the penal process so the case

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don't come to the court. In other cases the court can reduce the punishment or don't punish the offender (Jehle 2005, p. 39, summarizing: Schwind 2011, p. 439).

5. The development in other european countries

As pointed out the regulations of the handling of mediation is in different countries clear differentiated. In some countries there is a financial support. Most countries report good results of the mediation programs. Hopt and Steffek (2008c, p. 42) point out correctly these positive results have the background that the reduction of conflicts is not from the beginning pressed in a rigid corset but the parties and the mediators of the procedure of conflict solution can orient them flexible on the basis of the characteristics of the conflict.

While in western countries restorative justice meanwhile is broadly used, at least in form of a theoretical criminological discussion, since the beginning of the 1980s, in eastern European countries the alternatives are less very well known, if at all in that countries which orient their penal policy since decades to the west. Willemsens and Walgrave (2007, p. 491) point out in this context: „Although a number of countries in Central and Eastern Europe already have well established victim-offender mediation practices (for example, Poland, the Czeck Republic and Slovenia), others are still struggling to take the first steps". The European Forum for Restorative Justice is motivated in the frame of the AGIS2-Project "Meeting the challenges of introducing victim-offender mediation in Central and Eastern Europe" to support the development. Willemsens and Walgrave (2007, p. 491) point out on the background of their experiences in the cooperation with eastern European countries problems and opposition like: "- a highly punitive attitude among the public and policy makers, - an uncritical reliance on incarceration, - strong resistance within the police, prosecutors and judges, who fear competition from alternatives, - a passive civil society and weakened public legitimacy of the state and its institutions, - limited trust in NGOs and in their professional capacities, - lack of information about restorative justice and of restorative justice pilots, - low economic conditions, making it difficult to set up projects, - no tradition of co-operation and dialogue in several sectors and professions, - a general loss of trust in a better future, and a mood of despondency and cynicism, - forms of nepotism and even corruption in parts of the criminal justice system, - heavy administrative and financial constraints on the agencies, preventing investment in qualitative work" (see also Kury and Shea 2011). Chankova and Van Ness (2007, p. 530) emphasize: "The strength of restorative justice as a global reform dynamic is based on more than local dissatisfaction with criminal justice. The recognition that new approaches were being adopted, expanded and evaluated in different parts of the world has encouraged and equipped local practitioners and given them credibility with policy makers". This is the background that meanwhile also in eastern European countries the discussion about restorative justice increased.

On the background of the reports by Hopt and Steffek (2008a) we want present shortly information about mediation in Russia. Kurzynsky-Singer (2008, p. 837ff.) points out about Russia that mediation in this country is a relatively new development without specific foundations and regulataions in the law. In the scientific discussion the benefit of the procedure is first seen in quarrels in economical affairs. There is no

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special legal regulation about mediation. 2007 there was formulated a first draft of a law about mediation including a mediator. The draft also discusses quarrels in the topic of workplaces and family affairs.

The court has to accept the result of a mediation, the procedure is not confidential, the procedure is not defined by law. The mediator can be heared by the court as witness und has to report. A penal procedure can be closed after a mediation. To begin a mediation process the parties can get information and help for a mediator or a mediation-centre. The job of a mediator can be done by everybody, there is not needed a special training. Most mediators ar not jurists and the procedure is not standardized, so the used procedure is unclear (Kurzynsky-Singer 2008, p. 846). There are only few statistical information, for example from the Saint Petersburg Center of Conflict resolution. There between 1994 and 2006 520 mediation processes were realized of which 364 related to an interpersonal topic, 104 on problems in economy and 42 on problems at work places. In 89 % of these cases an agreement was found which was realized in 69 % voluntarily. Mediation is in Russia seldom used (p. 846). The costs are not necessarily lower than in classical penal procedures. Deplorable are missing standards of quality. Mediation develops in Russia especially as an alternative to the classical penal law system. The Russian literature discusses the positive point that with help of mediation the risk of corruption at the court and the risk of a false court decision can be reduced. So it is also consequent if the parties also concerning the realization of the mediation result give up help by governmental instituions (Kurzynsky-Singer 2008, p. 848.

Meanwhile mediation is international and also in Germany not only used in penal or civil law cases but also in cases of other conflicts like in Families (Bannenberg et al. 1999), schools (Morrison 2007), at the working places or in cases of conflicts in a community (McEvoy and Mika 2002), in conflicts in commercial companies (Young 2002), in the police (Senghaus 2010; see also the chapters by Delattre 2010 and Röchling 2010) or in prisons (Walther 2002; Matt and Winter 2002; Van Ness 2007; Sasse 2010). But it can be said, „it is within criminal justice that it is fast becoming most influential“ (Green 2007, S. 183).

Van Ness (2007, p. 314) reports about mediation programs in US-american prisons, concentrating for example in the context of “victim awareness and empatahy programmes” on the attitude of prisoners to the victims but also on the solution of conflicts between inmates and prison staff. In some programs also victims or substitutes are included, in some programs the direct victims don’t participate (see a program in Germany in Hamburg: Hagemann 2003, p. 225). Just in prisons restorative justice and victim offender mediation is used in European countries like Belgian and Germany meanwhile more. Buntinx (2012) for example presents results from Belgia. She works in the organisation Suggnomè (“ancient Greek word which means looking from different perspectives at the same reality”, Buntinx 2012, p. 1) uses victim offender mediation in prisons also in very severe cases, for example homicides. On the basis of the Belgian law of 2005 “a mediation process can be started on the demand of everybody who has a direct interest in a criminal procedure, and this is possible during the whole criminal procedure”, p. 2). In prisons mediation was started in 2001, since 2008 in

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each prison in Belgium a prisoner and his victim can ask for mediation (p. 2). In the time from 2008 until 2012 there were 1.792 demands, 614 mediations and 167 face-to-face meetings. The author comes to the result: "… the most important conclusion is of course the very great level of satisfaction on the part of the parties that have participated in mediation. This satisfaction is found both on the side of the offender and that of the victim" (Buntinx 2012, p. 6).

6. Results of empirical Evaluation of Mediation

While we had until few years ago also on an internatiaonal level relatively few empirical research and results of evaluation of mediation, especially also to restorative justice, as Bazemore and Elis (2007, p. 397) show, meanwhile a lot of research documents clearly „the positive impact of restorative practices at multiple levels, with case types ranging from first-time offenders and misdemeanants to more serious chronic and violent offenders" (see also Hayes 2007). The authors point out, that in contrast to empirical research about treatment programs for offenders, the results of these were not unique positive, the positive research results about programs of restorative justice is more unique: „Most studies of restorative programmes, including recent meta-analyses (Bonta et al. 2000; Nugent et al. 2003) indicate some positive impact …, and some suggest that restorative programmes may have equal or stronger impacts than many treatment programmes…" Especiall there were found clear positive effects for the victims of crimes. There is an ongoing discussion about the question, if the positive effect is a result of restitution or more of the experience of a just treatment during the penal process.

Also Hayes (2007, p. 425) finds out positive results of restorative justice programs: „It seems clear that restorative justice processes have many benefits for victims, offenders and their communities. Victims benefit from active participation in a justice process. Offenders benefit from the opportunity to repair harms and make amends. Communities (of care) benefit from the negotiation of restorative resolutions to conflict… In this sense, restorative justice has achieved many of its aims (i.e. holding offenders accountable and affording them opportunities to make amends in symbolic and material ways, encouraging reconciliations between offenders, victims and their communities of care)".

Until today there is only few research about the question how far the programs also have a positive effect of prevention by reducing the recidivism rate by participating in victim offender restitution programs. Comparative studies about recidivism after participation in a victim offender restitution program in contrast to the classical penal procedure were carried out, as Hayes documents (2007, p. 433) primarily in USA, Great Britain and Australia.

On this background Hayes (2007, p. 440) comes to the summarizing result: "Despite results that show restorative justice effects no change … or in some cases is associated with increases in offending …, the weight of the research evidence on restorative justice and reoffending seems tipped in the positive direction to show that restorative justice has crime reduction potential. I am not making a definitive claim about restorative justice's ability to prevent crime because, at this stage, we simply do

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not know enough about how and why restorative justice is related to offenders' future behaviour. I am however, suggesting that, on balance, restorative justice 'works'".

The most pointed out critics about restorative justice concentrades on the possible problem of a reduction or destructive effect on deterrence of (sharp) punishment. But proponents of restorative justice in this sense point out that deterrence beside this has no substantive effects. „It is of course true that the deterrent effects of punishment tend to be greatly overestimated and its tendency to re-enforce criminality underestimated. However, the average citizen will probably find this response unconvincing (Wilson 1983, p. 117-144), because the idea that without penal sanctions for lawbreaking, many people will succumb to temptations to break the law seems self-evident to most people" (Johnstone 2007, p. 601).

Some critics point out that restorative justice on the background of justice can be not more than a supplement of the official punishment by courts, but here has an important role, but is no replacement for punishment. Johnstone (2007, p. 610) pleads in his critical appreciation of restorative justice that the programs have to be implemented in a broader pattern of reactions on criminal behaviour. „What is most interesting is that even the most fervent critics tend to regard restaurative justice – suitable reformulated and modified – as an extremely valuable contribution to the ongoing debate about how we should understand, relate to, and handle the problem of wrongdoing".

As Braithwaite (1999; 2009), one of the founding fathers of restorative justice points out, the positive effects of the programs ar impressive, also concerning the reduction in recidivism rates. He reports results of empirical research from different countries which found a remarkable reduction of recidivism rates. As he points out also a reduction in familiar violence could be shown, in some cases also the consumption of alcohol after participation in restaurative justice conferences could be reduced. „Restorative justice is more successful in getting offenders to take responsibility for their wrongdoing. This happens because they experience greater remorse than in traditional criminal law process". Also in schools Bullying could be reduced by the procedure substantially (Olweus 1993).

Also Gromet (2009, p. 41ff.) points out that the recidivism rate of offenders after participating in programs of restaurative justice reduced, but another important effect was that the victims were more satisfied than after a traditional penal process, they experienced more fairness with the effect of feeling in a better emotional condition, had less fears to be victimized again and expressed less feelings of revenge. „There is evidence that, overall, offenders who participate in restorative justice procedures are less likely to reoffend than those who participate in a more traditional court-based process …, particularly for juvenile offenders" (p. 41). Positive effects are caused as Gromet (2009, p. 42) points out especially because the parties, especially also the offender, is treated with more respect, he or she can experience better the pain caused to the victim, he can develop shame and emotions, can relieve by an apology, takes over more responsibility for the crime. Especially offenders which showed relating psychic experiences and effects had a lower recidivism rate (Tyler et al. 2007). But some studies also showed an increase in the recidivism rate after participation in programs of restaurative justice.

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As Hopt and Steffek (2008a, p. 77) point out the effects and importance of mediation has to be seen in combination with the legal situation in a country and the culture of dealing with disputes. This is an important point, especially in comparing results from different countries. For example the legal conditions and the attitudes of people about this form of solving a conflict are different on the background of the historical development in the former Sovjet States (Kury and Shea 2011). The population of western countries had a long time to have experience with this forms of conflict regulation, to get familiar with these procedures and more lenient reactions to crime. The attitudes of the population about punishment is influenced by the practice of dealing with crimes in a country. When the German government abolished the death penaly in 1949 after the second world war nearly 75 % of the population voted for the death penalty in cases of severe crimes meanwhile it is reduced to round about one fifth (Kury and Shea 2012). In the former Sovjet States the experiences of penal justice professionals as well as the population with alternatives to classical punishment is smaller, the public discussion and the media reports are more oriented to sharper punishment for crime prevention (Ludwig and Kräupl 2005). Mediation in many countries is a new method to reduce conflicts not very well known and only few discussion. As Hopt and Steffek (2008c, p. 42) point out the positive results of mediation in many countries have to be seen on the background that reducing of conflicts is not from the beginning seen as pressed in a strong corset, but the parties and the mediators deal flexible with the conflict and relate more on the specifity of different conflicts.

Hopt and Steffek (2008b, S. 79) come to the final conclusion that mediation is a usefull and helpful method to reduce conflicts and should be promoted. Mediation has the best positive effects, as the participants see, if it is included in a system of conflict resolution. The method is also less time consuming and cheaper. The procedure is faster and much cheaper in comparison to the classical penal procedure (p. 80). Research results from England and the Netherlands, but also Germany show that mediation needs in comparison to traditional court procedures one third to one half less time. The inclusion of mediation into the official penal process has no effect on the positive results (p. 82; but see also critically Tränkle 2007). The authors also point out that mediation has a more intensive effect on reconciliation than the official penal procedure. Agreements are much more often kept than after traditional penal processes (p. 84). This is also a proof of the fact that the positive effects are not only promised in the books but can also be seen in practice. Even in cases of failing of a mediation the parties report a good satisfaction with the experience.

Lippelt and Schütte (2010, p. 43) summarize the most important results of german studies, include also the methodological good studies by Busse (2001) or Dölling et a. (2002) and come to the final result that victim offender mediation in most cases show a lower recidivism rate than classical procedures, even in unfavourable cases the results were as positive as in classical court procedures. Also here the costs were lower especially in cases of juveniles (Kumpmann 2007). As a central positive effect of TOA very often is pointed out that the parties are more satisfied, both offenders and especially victims, compared with the classical procedure. Bals (2006) could show that

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more than 90 % of the offenders and victims voted positive about mediation, 80 % of victims and 57,1 % of offenders fehlt treaded very fair.

7. Final Discussion

As we have shown meanwhile we have internationally, especially in western industrialized countries an overwhelming number of publications about mediation and restorative justice. The starting point was the legitimate discussion about a more intensive inclusion of the interests of victims in the penal prosecution of crimes which was supported after the second world war, especially from the 1960s and 1970s, promoted by a fast growing and rediscovered importance of victimology, also very fruitful from the women movement. The penal law was not interested in interests of the victims, concentrated only on the sanctioning of the offender. On this background it is not astonishing that many victims were not satisfied with the result of a penal procedure. They only had the "satisfaction" that the offender now is punished, more or less severe. This also promotes the desire for a sharp punishment.

The attitude of people and so their information is a very important factor, without public support innovations are only hard to install. As Delattre (2010, p. 91) points out victim offender restitution was promoted as the most important and positive initiative in crime policy the last 25 years. The chances of these new dealing with crime are not fully used until today, despite obvious positive aspects. The dialogue with the public is until today a neglected element in promoting the procedure and has to be intensified (p. 101). The most important partners here are police because they are the institution in most cases first in contact with offender and victim.

Young (2002, p. 137) points out that in the British Crime Survey already 1984 51 % so more than half of the interviewed victims reported they would be willing to meet the offender outside the court together with an official helping person to speak about restitution. Using another formulation of the question in the British Crime Survey from 1998 41 % accepted a meeting with the offender in comparison with a third person to ask him what were the background of the crime and to tell him about the effects of the victimization. That shows a great willingness of the public to promote a mediation with the offender. Sanders (2002, p. 222) emphasizes that research has shown that if offenders understand the penal procedure and see it as legitime they also can accept the result better, also in cases when they see the result as unjust. The same is the case for the victims. Hopt and Steffek (2008a, p. 79) point out that in a country the culture of reducing conflicts in a society has to be promoted by informing judges and prosecutors but also forehand the public. The procedure has to be explained, judges and prosecutors have to be trained and informed about the effects, there must be good educated mediators and financial support is to be given to the officials in the procedure.

London (2011, p. 320) emphesizes that all parties profit after a successfull mediation: „For the victim, the restoration of trust approach offers the prospect of genuine repair for the material and emotional harm … For the community, the restorataion of trust offers the prospect of involvement in problem solving toward the goal of achieving safety and resolving ongoing conflicts. For the offender, the restoration of trust approach enhances the likelihood of regaining acceptance into the moral community of

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law-abinding people by the demonstration of accountability both for the material losses and the moral transgressions involved in the crime".

On the background of the positive and encouraging results about victim offender restitution today we have to see these alternatives to punishment referring to law-breaking behaviour. All modern penal law systems are confronted with the question how to relate to victim offender restitution in their systems (Rössner 1998, p. 881). The international comparison by Rössner (p. 894) shows clearly to include restitution in all systems of penal law control. Especially victims report in most cases positive effects. So mediation is not to use victims to heal offenders, as sometimes criticised, is it a measure with effects for both parts, offenders and victims. We also should see that a big part of victims are women and children.

At the beginning mediation was established to help victims, they should experience a better situation after the victimization and have better chances for restitution of the damages. The meanwhile broad research results show clearly that this aim can be reached if the measure is practised professionally. Most victims have a better situation after participation in mediation, they have a better chance to overcome the damage caused by the crime than in classical penal procedures.

Concerning the effects on side of the offenders, especially the results on resozialization of the offenders the results are not so unique, what should not be surprising. Mediation is regularly a short procedure of few hours and if that is all a long lasting effect on offenders with regularly strong social deficits, especially looking on incarcerated offenders, cannot be expected in all cases. But as part of a comprehensive resozialisationprogram which includes other elements mediation plays a very important role. On this background also from the point of view of an effective resozialisation of offenders a broader use and an extension of the method is to support. The classic penal procedure has clear disadvantags concerning the reintegration of offenders which can be reduced by professional mediation at least partly.

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