

RECONCILIATION IN GERMANY (VICTIM-OFFENDER MEDIATION)

ALMANYA'DA UZLAŞTIRMA (MAĞDUR-FAİL ARABULUCUĞU)

Araştırma Makalesi

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ÖZ

Almanya'da “*Täter-Opfer-Ausgleich*” (TOA), ceza adalet sistemine entegre edilmiştir ve mağdur ile fail arasında uzlaşma sağlanması amacıyla kullanılmaktadır. TOA, 1991'de Gençlik Mahkemesi Kanunu'nda ve daha sonra Ceza Muhakemesi Kanunu'nda yapılan değişikliklerle kanuni bir dayanak kazanmıştır. Gençlik Mahkemesi Kanunu'nda uzlaşturma, çocuk faillerin eğitim ve refahı bakımından özel bir önlem olarak uygulanmıştır. Ceza Muhakemesi Kanunu'nda ise, ceza muhakemesinin her aşamasında savcı ve mahkemeler tarafından dikkate alınması gereken bir kurum olarak düzenlenmiştir. TOA'nın uygulama biçimleri, genellikle hafif ve orta dereceli suçlarla sınırlı kalmakta olup, ağır suçlar için daha sınırlı bir etkiye sahiptir. Almanya'daki TOA uygulamaları, devlet ve sivil toplum kuruluşları tarafından yürütülmekte olup, mağdurların ve faillerin adil bir şekilde temsil edilmesini hedeflemektedir. Uzlaşturma süreçlerinde yer alan bu kuruluşlarda gönüllü olarak görev alan uzlaştırmacılar, mağdur ve fail arasında sağlıklı bir iletişim kurmaya ve anlaşmazlıkları çözmeye yönelik çalışmalar yaparlar. Ancak uygulamada karşılaşılan zorluklar ve eksiklikler, TOA'nın etkili bir şekilde uygulanmasını sınırlayabilmektedir. Genellikle savcı tarafından başlatılan uzlaşturma süreci dosyanın uzlaştırmaya uygun olduğunun kararı ile birlikte uzlaştırmayı gerçekleştirecek kuruma gönderilmektedir. Uzlaştırmacılar, fail ve mağdurla ayrı ayrı görüşmeler yaparak uzlaşma müzakerelerini yürütmekte ve uzlaşma sağlanırsa savcı, takibatı sona erdirmektedir. Bu kapsamda Almanya'da uzlaşturma uygulaması incelenecektir.

Anahtar Kelimeler: Mağdur-fail arabuluculuğu, uzlaşturma süreci, çocuklar bakımından uzlaşturma, sivil toplum kuruluşları, çocuğun refahı, ağır suçlar

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ABSTRACT

In Germany, “*Täter-Opfer-Ausgleich*” (TOA) is integrated into the criminal justice system and is used for reconciliation between the victim and the offender. TOA gained a legal basis with the amendments made to the Youth Court Code in 1991 and later to the German Code of Criminal Procedure. In the Youth Court Code, reconciliation is implemented as a special measure for the education and welfare of juvenile offenders. In the German Code of Criminal Procedure, reconciliation is regulated as an institution that should be taken into account by prosecutors and courts at every stage of criminal proceedings. The application forms of TOA are generally limited to minor and moderate crimes and have a more limited effect on serious crimes. TOA practices in Germany are conducted by state and non-governmental organizations and aim to provide fair representation for victims and perpetrators. The conciliators working voluntarily in these organizations involved in reconciliation processes work to establish healthy communication between victims and perpetrators and to resolve disputes. However, the difficulties and deficiencies encountered in practice may limit the effective application of TOA. The reconciliation process, which is usually initiated by the prosecutor, is sent to the institution that will conduct the reconciliation upon the decision that the file is suitable for reconciliation. The conciliators conduct reconciliation negotiations with the perpetrator and the victim separately, and if a reconciliation is reached, the prosecutor terminates the proceedings. In this context, the practice of conciliation in Germany will be examined.

Keywords: Victim-offender mediation, reconciliation process, reconciliation for children, civil society organizations, child welfare, high crimes

EXTENDED SUMMARY

In Germany, reconciliation practices are conducted within the criminal justice system under the name of victim-offender mediation. Although there are difficulties in implementing reconciliation within the criminal justice system, it is observed that TOA is strongly implemented in Germany and victim-offender mediation plays an important role.

The federal structure of Germany influences how the criminal justice system is shaped. According to Article 74(1) of the Constitution of the Federal Republic of Germany, the German Criminal Code (StGB), the German Code of Criminal Procedure (StPO) and the German Youth Court Code (JGG) are enacted by the German Federal Parliament. However, in cases where the parliament does not legislate in these areas, the state authorities may use their own powers. States may set their own rules regarding the organization of criminal justice institutions and the implementation of laws, and states may issue different guidelines regarding reconciliation. However, there is no unity of practice among these guidelines and there are differences among the states in the implementation of reconciliation.

Victim-offender mediation provides change and adaptation in line with the objectives of the criminal justice system and successful cases are observed. It is stated that TOA is used conceptually in two senses in Germany: The first is reconciliation in the classical sense, which refers to the reconciliation between the victim and the perpetrator, and the second is reconciliation, which is used in the sense of voluntarily compensating for the damage. In the Youth Court Code, reconciliation is defined as taking necessary initiatives for the perpetrator to reach a reconciliation with the victim. In Germany, where there are two different understandings of reconciliation, situations arise in which these two meanings merge in practice.

The first legal regulation on reconciliation in German criminal law was made in 1990 and special importance was given to it in the juvenile criminal justice system. Since 1991, TOA has been mentioned as an alternative dispute resolution in the Youth Court Code. The legal basis for reconciliation was provided by the amendments made to the Youth Court Code and it was determined as an alternative resolution in terms of criminal procedure. The prosecutor and the judge are obliged to evaluate out-of-court measures before opening a public case. The juvenile offender's efforts to reconcile are considered a special reason for the prosecutor to stop the prosecution and the judge may dismiss the case. With regard to adult offenders, the applicability of mediation is subject to mandatory prosecution requirements, with certain exceptions, and the prosecutor may postpone the opening of the public case when reconciliation is attempted.

Article 46a, added to the StGB in 1994, has placed greater emphasis on victim-offender reconciliation. This article provides the possibility of reducing the penalty or waiving the penalty if the perpetrator pays the damage. The reconciliation must be of the perpetrator's own volition and forced reconciliation is not considered sufficient. While Article 46a applies to all types of crimes, it does not apply to crimes without a victim. Even if the victim does not compensate for the damage, the perpetrator's reconciliation efforts are evaluated. However, there are debates as to whether this article is valid for crimes that remain in the attempted stage.

With the amendments made in 1999, many new provisions regarding TOA were added to the StPO. The prosecutor's office and the court must evaluate the possibilities required for reconciliation at every stage of the trial. In addition, the prosecutor's office and the court may provide information to certain authorities in order to conduct reconciliation proceedings. Reconciliation can enable prosecutors and courts to terminate proceedings and issue a decision of non-prosecution.

Reconciliation services are provided by non-profit non-governmental organizations and state institutions. State-owned institutions are funded by states and municipalities, while non-governmental organizations receive support from various sources. Reconciliation institutions conduct reconciliation proceedings between perpetrators and victims and in some cases may be instructed by prosecutors. Reconciliation practices are generally applied to less serious crimes and are less preferred in relation to serious crimes.

Victim-offender reconciliation is generally used in minor incidents and in cases that are considered marginal by the judicial authorities in criminal law. Reconciliation is generally not effective for crimes that

cause severe physical and psychological harm. Although reconciliation practices are used as a method of education and rehabilitation for children, this can sometimes lead to abuse. In juvenile and adult proceedings, various preconditions may be put forward regarding the results of the reconciliation process and various problems may arise in the implementation processes. A better understanding and development of reconciliation processes is important to increase the effectiveness of the criminal justice system.

INTRODUCTION

In Germany, unlike other countries, mediation¹ activities are implemented under the name of victim-offender mediation (VOM in English/MFA² in Turkish) in the field of public law rather than private law. However, the conceptual orientation and sanctions of victim-offender mediation programs also bring some difficulties within the criminal justice system (both for the traditional criminal justice system and for mediation programs)³. Although the Täter-Opfer-Ausgleich (TOA)⁴ seems to be strongly practiced in Germany, theoretically there are challenges in the criminal justice system⁵.

In order to understand the theoretical framework of reconciliation in Germany, it should first be remembered that it is a federal state. The first paragraph of Article 74(1) of the German Constitution (Grundgesetz-GG) regulates the “authority to enact laws”. Accordingly, the German Federal Parliament has the authority to enact fundamental criminal laws such as the StGB, the StPO and the JGG⁶. The Federal Parliament has priority in legislating. In cases where the German Bundestag does not legislate in these areas, the state authorities can exercise their own powers, in particular in the application

¹ The equivalent of the mediation institution, which is envisaged as an out-of-court alternative solution for disputes arising in the field of private law, is reconciliation in criminal proceedings. In this study, the term “victim-offender mediation / tater-opfer-ausgleich” will be used in the same sense with reconciliation, as used in German terminology.

² Victim-offender mediation / Mağdur-fail arabuluculuğu.

³ Thomas Trenczek, ‘Victim-Offender Mediation in Germany - ADR Under the Shadow of the Criminal Law?’, (2001) 13(2) Bond Law Review 1.

⁴ The term Täter-Opfer-Ausgleich, abbreviated as “TOA” will be used in the explanations that follow.

⁵ Trenczek (n 3) 1.

⁶ “Concurrent legislative power shall extend to the following matters: *civil law, criminal law, court organisation and procedure (except for the law governing pre-trial detention)...*” <<https://legislationline.org>> (Text of 2022 with amendments) Date of Access 23 July 2024.

of criminal procedure law, by taking advantage of the right to autonomy. In other words, since the sixteen states are competent in matters of institutional structure and administration, they can exercise this competence in the organization of criminal justice authorities and the enforcement of laws⁷. The state ministers of justice regularly publish various guides containing rules on how to interpret certain provisions in their states. Although most states have similar guidelines on reconciliation, there is no unity of practice among them. There is, however, a general guideline on criminal proceedings adopted at a conference of state ministers of justice, which contains general rules on the application of the main provisions of the StPO. On the implementation of reconciliation, the Ministry of Justice publishes guidelines with general rules. In addition, each state can prepare similar guidelines according to its needs. These guidelines may set standards on issues such as the structure of the reconciliation agreement between the parties, the status of legal person victims and the types of crimes within the scope of reconciliation⁸.

Reconciliation has become an indispensable element of the whole of the StGB. Howard Zehr (1985) noted that innovative ideas cannot be protected from being assimilated by forces within the system, highlighting this issue in relation to reform efforts within the criminal justice system. Zehr has considered why simple reformist ideas are doomed to failure⁹. If the assimilation of victim-offender mediation within the system is not taken into account, it can be said that it is successful but that it has changed and adapted in line with the purposes of the penal system.

⁷ Klaus Goetz, Michael Koß, Jorge Villarino Marzo and Zubek Radoslaw, 'Parliaments and Executive Oversight and Control: Comparing Selected European Experiences' (2015), <https://www.tbmm.gov.tr/yayinlar/sigma_17112015.pdf> Date of Access 23 July 2024 6-7.

⁸ Ekrem Çetintürk, *Ceza Adalet Sisteminde Uzlaştırma* (HD Yayıncılık 2009) 273.

⁹ Howard Zehr, *Restitutive Justice, Restorative Justice* (4th edn, Office of Criminal Justice 1985) 3; Trenczek (n 3) 4.

I. CONCEPT OF TOA

In German law, the concept of TOA, is used in two different senses. TOA refers to offender-victim balancing. It means both dispute resolution and reconciliation¹⁰. Accordingly, the concept of reconciliation has two different meanings: both victim-offender reconciliation and voluntary compensation¹¹ (restitution)¹². When we look at it as a term; the word “*mediation*” is also used in German law¹³.

When evaluating the provisions on reconciliation in German criminal legislation, it should be noted that in German practice, reconciliation is used in two different senses. The term “reconciliation” refers firstly to classical reconciliation in the literal sense, which is conducted by a conciliator in order to reach an agreement between the victim and the perpetrator. Secondly, reconciliation is used in the sense of voluntary restitution. The definition of reconciliation in the Youth Court Code as taking the necessary initiatives for the perpetrator to reach a compromise with the victim can be given as an example of this second understanding. This is because there is no obligation for the parties to come together personally with an appointed conciliator for reconciliation. In German criminal law, it is seen that both of these approaches are equally dominant in terms of reconciliation. In addition, the perpetrator’s attempt to reach an agreement with the victim

¹⁰ TOA translates as Victim-Offender-Stabilisation, meaning both dispute resolution and reconciliation. It is similar to Victim-Offender Mediation Programming (VOMP) in Australia and the United States in both its approach and operations. Even the Australian Community Conferencing Schemes for Minors are similar in some respects to the German TOA programmes. However, the purpose of the VOMP is to emphasise the process of dispute resolution and reconciliation and to ensure compensation and restitution of losses for the victim as a (symbolic) outcome of the dispute resolution process. Unlike loss reimbursement plans, VOMPs have broader objectives: Here, the mediation process is considered as important as any specific outcome. Beyond restitution and compensation, victim-offender mediation implies a dynamic dimension and an interactive process between adversaries consisting of at least two parties. for detailed information qq v. Trenczek (n 3) 2; Victim-offender mediation is a process in which a person discusses the dispute arising from a crime committed by one person against another with the support of a neutral third party (mediator), identifies the issues of dispute, develops different opinions, evaluates alternatives and strives to reach an agreement. With the assistance of a neutral third party (a mediator), victim-offender mediation is a process wherein parties discuss a dispute resulting from a crime committed by one person against another. They identify the issues at hand, consider various viewpoints, assess potential solutions, and work toward reaching a resolution.

¹¹ The requirement in the Juvenile Code that the perpetrator must take necessary initiatives to reach a reconciliation with the victim is an example of reconciliation used in this second sense.

¹² Trenczek (n 3) 1.

¹³ Such as mediation in criminal law and mediation in civil law.

is considered sufficient for reconciliation. Due to the expansion of the scope of reconciliation over time, it can be said that in practice, reconciliation in the classical sense and the regulations regarding the compensation of damages are intertwined with each other¹⁴. For this reason, in the explanations we will make, the provisions on reconciliation and compensation of damages in German criminal law will be evaluated together. Again, as can be understood from the explanations we will make, in most of the provisions that provide the possibility of reconciliation, reconciliation is not explicitly mentioned. However, in practice, reconciliation is used as a means for the perpetrator to benefit from the opportunities in these articles (such as no punishment or reduction in punishment), and this expands the scope of application of reconciliation¹⁵.

Even though TOA is incorporated into the criminal code, it is applied by providing both parties with an option, mostly to the victim but also, at least partially, to the offender. The neutral conciliator assists the parties in reaching a mutually agreeable resolution to a problem that results from or is caused by criminal conduct by drawing on the theories of restorative justice and dispute resolution¹⁶.

II. PROVISIONS IN NORMATIVE REGULATIONS

When examining the issue of reconciliation in Germany, the legal system adopted by this country should also be taken into consideration. In Germany, where the Continental European legal system is applied, the principle of legality is given importance. Therefore, institutions related to criminal law must be based on legal regulation. This basically indicates that every move made by the government or public institutions, particularly those pertaining to criminal law, must be supported by a specific legal requirement¹⁷.

The first legal regulation on reconciliation in Germany was made in December 1990 in the JGG, thus giving special importance to reconciliation in the juvenile criminal justice system. Since 1991, TOA has been explicitly mentioned as an alternative solution

¹⁴ Çetintürk (n 8) 266.

¹⁵ Çetintürk (n 8) 266.

¹⁶ Trenczek (n 3) 2.

¹⁷ Trenczek (n 3) 4.

method in the JGG¹⁸ (article 10) Apart from this, when we look at the legal basis of reconciliation in Germany; apart from Articles 10, 15, 45 and 47 of the JGG of 1953; in particular, we see that there are provisions in Article 46a of the StGB¹⁹ Articles 153, 153a/5, 153b, 155a and 155b of the StPO²⁰. There are also rules regulating reconciliation practices at both federal and state level.

¹⁸ Trenczek (n 3) 4.

¹⁹ Article 46a under the heading Victim-offender mediation, restitution: The court may mitigate the penalty under section 49 (1) or, if the offender's sentence consists of no more than one year of imprisonment or a fine no more than 360 daily rates, it may forego imposing a penalty. These circumstances arise when the offender: 1. has made full or substantial restitution for the act committed or has made earnest efforts to do so; or 2. has made compensation to the victim in full or substantial degree in cases where making restitution for the harm caused required substantial personal effort or personal sacrifice on the offender's part. <<https://legislationline.org>> (StGB - Text of 2021 with amendments) Date of Access 23 July 2024.

²⁰ <<https://legislationline.org>> (The relevant articles of the StPO below are taken from the amended text of 2021.) Date of Access 23 July 2024.

Article 153 under the heading non-prosecution of petty offences: (1) If the offender's guilt is deemed to be minor and there is no public interest in the prosecution, the public prosecution office may choose not to pursue prosecution for a less serious criminal offence (Vergehen) with permission from the court that has the authority to open the main proceedings. When a less serious criminal offense is not subject to a mandatory minimum term and the consequences of the offense are not severe, the court's consent is not necessary. (2) If charges have already been filed, the court may end the case at any point in time subject to the requirements of subsection with the approval of the public prosecutor's office and the accused party who was charged.

Article 153a under the heading non-prosecution subject to imposition of conditions and directions: In a case involving a less serious criminal offense, the public prosecution office may forego the preferment of public charges and instead issue directives and conditions to the accused if these are of a kind that eliminates the public interest in criminal prosecution and if the accused's degree of guilt does not stand in the way of it, with the consent of the accused and the court that has the authority to order the opening of the main proceedings. Specifically, the following guidelines and requirements could be taken into consideration: 5. making a sincere effort to mediate a settlement with the party who was wronged (victim-offender mediation), in an effort to seek full or partial restitution for the offense.

Article 153b, non-prosecution where imposition of penalty may be dispensed with: 1) The public prosecution office may forego the preferment of public charges with the approval of the court that would rule over the main hearing if the circumstances that justify allowing the court to forego imposing a penalty are satisfied. (2) If charges have already been preferred, the court may end the prosecution at any time before the main hearing begins, with the approval of both the accused party and the public prosecutor.

Article 155a, victim-offender mediation: The public prosecution office and the court are required to investigate if a mediated settlement between the accused and the aggrieved party can be reached at every step of the proceedings. When appropriate, they should strive for this kind of mediation. It is forbidden to accept an agreement against the express wishes of the party who has been victim.

Article 155b, conduct of victim-offender mediation: (1) The public prosecutor's office and the court may provide the required personal data ex officio or upon request from an organization they have hired to handle the mediation in order to facilitate victim-offender mediation or reparation. If providing information would take undue effort, the commissioned agency may be allowed to inspect the files. The

Since 1991, there has been an explicit provision on reconciliation for juveniles in the JGG of 1953. In particular with the amendment of Articles 45 and 47 of the JGG, reconciliation appears as an alternative measure in criminal proceedings. Accordingly, before a public prosecution is initiated or a verdict is rendered, the prosecutor and the judge must consider out-of-court measures²¹. Here, reconciliation is particularly emphasized in terms of the education and welfare of the child²². According to the law, the juvenile offender's efforts to reconcile are a special reason for the prosecutor to stop the prosecution²³. Likewise, the judge may dismiss the case on this ground. If a serious application is made for child victim-offender mediation, the District Prosecutor, in his/her capacity as Public Prosecutor, may withdraw from the proceedings. Although the principle of legality in German law (Article 152 StPO²⁴) prevents the extensive use of appeals within the legal sanctions in relation to adult offenders, there are some specific exceptions that point to the mandatory prosecution requirements, in particular the TOA. According to the StPO (Article 153a), if a serious attempt at reconciliation has been made together with the victim, the prosecutor may postpone the opening of public proceedings and refrain from bringing formal charges against the perpetrator for a crime that was ultimately committed²⁵. If the reconciliation is successful, the prosecutor may decision of

submitted information may only be used for victim-offender mediation or compensation, a non-public agency will be informed about this.

²¹ Çetintürk (n 8) 267.

²² In terms of the establishment in Europe of the understanding of reconciliation focusing on the welfare of the child qq v. Aslıhan Öztezel, 'Çocukların Taraf Olduğu Suçlarda Uzlaştırmada Geliştirilmesi Gereken Hususlar', (2023) 18(215) Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 812-814.

²³ In 1994, a new provision was added to the German Criminal Code that specifically refers to the TOA and gives the judge the right not only to commute the sentence but also to refrain from passing a sentence for offenses punishable by an upper limit of 1 year imprisonment (46a StGB). In such cases, the prosecutor may even drop the charge before sentencing (153b StPO).

²⁴ Indicting authority; principle of mandatory prosecution: "(1) *The public prosecution office shall be authorised to prefer public charges. (2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.*" <<https://legislationline.org>> (Taken from the amended text of the German Code of Criminal Procedure of 2021.) Date of Access 23 July 2024.

²⁵ Sebastian Peters, *Münchener Kommentar zur Strafprozessordnung* (C.H.BECK Verlag 2016), margin number 88; Trenczek (n 3) 4.

non-prosecution in cases where the crime is not serious²⁶. In cases where the crime is more serious or the perpetrator has a criminal record for a significant crime, the prosecutor may continue the proceedings by informing the court about the results of the reconciliation. According to Article 10 of JGG, the judge may end the trial by giving a reconciliation decision as part of an educational measure²⁷. Moreover, in order for this decision and the disciplinary measure of compensation or apology in Article 15 of the Law to be given, there is no need for the person suspected of committing a crime to accept his/her responsibility, as in Articles 45 and 47. In fact, the measures in Articles 10 and 15 are regulations that are implemented to make it clear to the perpetrator that she/he has done wrong, rather than a reconciliation, and are predominantly security measures²⁸.

Article 46a added to the StGB on 28.10.1994 attaches more importance to the reconciliation of the perpetrator and the victim than it has been given to date²⁹. Indeed, until that date, the effort of the perpetrator, the compensation of the damage, and the reconciliation of the victim and the perpetrator had gained importance in the calculation of the penalty³⁰. Thus, the offender has been given the opportunity to receive a reduced sentence or avoid punishment altogether. Again, reconciliation with the victim in this way will produce more beneficial results than punishing the perpetrator. The application of the article does not primarily depend on the perpetrator paying the victim's damage; it depends on the perpetrator paying the damage voluntarily, that is, of his/her own will. In other words, forced reconciliation or forced compensation of damages is not considered sufficient³¹. Again, in terms of this article, the grounds for reconciliation or the grounds on which reconciliation is accepted are not important. If the perpetrator compensates all

²⁶ qq. v. Soner Demirtaş, 'Alman Ceza Kanunu'nda Kurala İlişkin Örnekler Müessesesi: Kanunilik İlkesi Açısından Bir Değerlendirme' (2022) (49) Türkiye Adalet Akademisi Dergisi 430.

²⁷ Çetintürk (n 8) 267.

²⁸ Çetintürk (n 8) 268.

²⁹ Klaus Detter, 'Die Verteidigung und der Täter-Opfer-Ausgleich: Probleme des §46a StGB' in Stefan Hiebl, Nils Kassebohm and Hans Lilie (eds), *Festschrift für Volkmar Mehle* (Nomos Verlag 2009) 157.

³⁰ Jörg Kinzig and Walter Stree, 'Kommentierung der Vorbem. § 38-46a, der § 47-51, der § 56-67g, der § 68-72, sowie der § 46b, 67h StGB' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30. Auflage, C.H.BECK Verlag 2019) margin number 1.

³¹ Kinzig/Stree (n 30) margin number 1.

or part of the victim's damages or makes a serious sacrifice for the compensation of the damages, the conditions of 46a/1 will be fulfilled. Such a perpetrator-victim reconciliation relationship will lead to the elimination of the violation of law caused by the act committed. Reconciliation is also valid for crimes that remain at the attempt stage. It is also valid especially in terms of intangible damages. Even if the victim refuses to reconcile or the effort shown by the perpetrator does not cover the damage caused, his/her effort is considered sufficient for reconciliation³². Article 46a is valid for crimes and misdemeanor³³. In this respect, there is no separation of certain crimes (e.g. crimes of violence)³⁴. From the systematic organization of the norm, it can be said that it does not apply to misdemeanors. From the literal meaning of 46a and the purpose of the article, it can be said that 46a will not be valid for crimes without victims³⁵. In crimes without victims, a certain person has not suffered any material or moral damage. On the other hand, 46a can be applied to all crimes with a natural victim or to legal entities where the dispute is personalized. While the institution of reconciliation is possible for crimes that have remained at the attempted stage, it is debatable whether the provision 46a will be applied for crimes that have remained at the attempted stage³⁶. Although it is rejected by some authors³⁷, it is stated that it is possible in terms of the purpose of the norm that foresees the protection of the victim³⁸. It is debatable whether the norm will be applied in tax criminal law³⁹.

³² Werner Theune, *Strafgesetzbuch Leipziger Kommentar Band 2* (12. Auflage, De Gruyter 2006) margin number 57; Detter (n 29) 161.

³³ Jacqueline Kempfer, '§ 46 bis 51 StGB', in Dieter Dölling, Gunnar Duttge, Stefan König and Dieter Rössner (eds), *Gesamtes Strafrecht Handkommentar* (5. Auflage, Nomos Verlag 2022), margin number 12; Kühl K, Heger M, Drehe E, Maasen H and Lackner K, *Strafgesetzbuch §46a* (29. Auflage, C.H.BECK Verlag 2018) margin number 1b.

³⁴ Kempfer (n 33) margin number 12; Kinzig/Stree (n 30) margin number 4.

³⁵ Kempfer (n 33) margin number 14.

³⁶ Kempfer (n 33) 474.

³⁷ Wolters, Gereon, *Systematischer Kommentar zum Strafgesetzbuch* (9. Auflage, Carl Heymanns Verlag 2016) §46a, margin number 4

³⁸ Kempfer (n 33) margin number 15; Kinzig/Stree (n 30) margin number 4.

³⁹ Kempfer (n 33) margin number 15.

In 1999, many new regulations were made in the StPO, especially regarding TOA. The public prosecutor's office and the court are now obliged to examine the possibilities for reconciliation between the suspect and the person affected by the crime at every stage of the proceedings (article 155a); They make efforts to reconcile the parties in suitable cases. If necessary, they must initiate initiatives themselves and support all reconciliation initiatives of the parties. For this purpose, StPO (Article 155b); The prosecutor's office and the court may provide the necessary personal data to the authority (which are TOA programs operating within the criminal justice system or TOA programs operated by an institution outside the criminal justice system. Also referred to as dispute resolution programs⁴⁰) assigned by them to conduct these procedures for victim-offender reconciliation or compensation for damages, either on their own or upon their request. Except in cases where the transfer of information on the subject would constitute a disproportionate burden, the authorized authority may be granted the right to examine the file. It is explained to the non-public authority that the information submitted may only be used for victim-offender reconciliation or compensation for damages⁴¹.

In Germany, reconciliation is usually conducted as follows: After the police collect the necessary information and evidence on behalf of the prosecutor, the prosecutor decides whether the file will be sent to court or to mediation. If the prosecutor does not find it necessary to file a lawsuit and to try reconciliation, he or she sends the file to an institution that will conduct reconciliation⁴². Conciliators assigned by the relevant institution usually first contact the perpetrator by phone and ask if they can reach an

⁴⁰ Trenczek (n 3) 4.

⁴¹ The designated authority may process and make use of the personal data transmitted only to the extent necessary for "victim offender reconciliation" or "compensation for damages" and to the extent not contrary to the interests of the data subjects worthy of protection. This authority may collect personal data or process and make use of the collected data only if the data subject consents and to the extent necessary for the purposes of "victim offender reconciliation" or "compensation for damages". Informs the prosecutor's office or the court to the extent necessary after completing its work. If the commissioning authority is non-public, the relevant provisions of the Federal Data Protection Code apply even if no data processing has been conducted on or from data in databases. The documents containing such personal data shall be destroyed by the designated authority one year after the end of the criminal proceedings. The end of the proceedings shall be notified ex officio without delay to the prosecutor's office or the authority designated by the court (155b StPO).

⁴² Abdurrahman Kavasoğlu, 'Alman Usul Hukukunda Uyuşmazlıkların Mahkeme Dışı Çözüm Yolları ve Mediation', (2010) 68(1-2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 205-206.

agreement with the victim. If the perpetrator agrees, then the victim is contacted, and if the victim agrees, separate meetings are held with the perpetrator and the victim. If the conciliator is convinced that the parties are serious about reconciliation and have reasonable expectations from reconciliation, reconciliation negotiations are held with the parties. At the end of the reconciliation negotiations, an agreement is prepared between the victim and the perpetrator and the reconciliation report is sent to the prosecutor along with this agreement. The prosecutor then terminates the proceedings and issues a decision of non-prosecution (that there is no grounds for filing a public case)⁴³. As can be seen, victim-offender mediation focuses on the relationship between the perpetrator and the victim and encourages the elimination of the dispute by making the perpetrator pay compensation. By resolving the dispute, the need to demand compensation for the crime will be largely satisfied⁴⁴.

III. APPOINTMENT OF CONCILIATOR

Conciliation services are basically provided through two different channels. The first is through non-profit non-governmental organizations and the second is through state institutions. While the financial resources of state institutions are provided by the states and municipalities, the financial resources of civil society organizations are provided by different sources such as churches and social welfare institutions⁴⁵. Some institutions are supported by the federal government. The mediation files that these institutions handle throughout the year vary. Likewise, the applications for reconciliation may also be different⁴⁶. The reconciliation programs of these institutions, most of which deal only with children dragged into crime, are conducted independently. The non-profit non-governmental organizations that conduct reconciliation are also administratively independent. However, in practice, prosecutors can sometimes give instructions to mediators on certain issues such as how the file will be handled, the minimum amount of

⁴³ Nuri Berkay Özgenç, *Türk Hukukunda ve Mukayeseli Hukukta Uzlaşma* (Legal Yayıncılık 2015) 164-168.

⁴⁴ Dieter Dölling, 'Der Täter-Opfer-Ausgleich', (May 1992) 47(10) *Juristen Zeitung* 493.

⁴⁵ Çetintürk (n 8) 275.

⁴⁶ Some look at 100 files while others only look at 10 files. For detailed information qq v. Çetintürk (n 8) 275.

compensation to be discussed, or a period for the termination of mediation⁴⁷. In places where there is more than one reconciliation institution, the judicial authorities decide which one the file will be sent to⁴⁸. The conciliators who will serve in the relevant institutions are selected from among those who are suitable for this position according to their abilities. Those who are not authorized to work in public services cannot be conciliators. Similarly, persons under guardianship cannot be conciliators. Those who are under 25 years of age, those whose residence is not in the reconciliation authority, those whose assets have been restricted by the court cannot be conciliators. Likewise, those who are over 75 years of age cannot be selected as conciliators⁴⁹.

There are currently around 400 programs operating in Germany, most of which are community-based and/or funded by the state; around two-thirds operate in the context of juvenile courts; one-third work with adult offenders⁵⁰. In both, the majority of cases are referred through the prosecutor's office. Many programs also started directly with referrals from victims or perpetrators themselves⁵¹.

IV. CRIMES WITHIN THE SCOPE OF RECONCILIATION

The StGB does not limit the crimes that fall within the scope of reconciliation. Nevertheless, in practice, it is generally observed that the cases sent for reconciliation are limited to less serious and minor offenses. It has been argued that for crimes that cause severe physical and psychological harm, measures such as reconciliation will not work and that reconciliation should concentrate on crimes of mild and moderate severity⁵². However, when we examine the research conducted based on crime types, most of the

⁴⁷ Çetintürk (n 8) 274.

⁴⁸ In some states and territories there are provisions for prosecutors to send files to state-owned reconciliation institutions. However, this applies to cases officially referred by the prosecutor. There is no such obligation if the parties go to reconciliation voluntarily or if the reconciliation decision does not have to be formally taken by the judicial authorities. For detailed information qq v. Çetintürk (n 8) 275.

⁴⁹ Eduard Dreher and Herbert Tröndle, *Strafgesetzbuch und Nebengesetze* (46. Auflage, C.H.BECK Verlag 1993) 310-356. Code of 1992 on conciliators.

⁵⁰ Trenczek (n 3) 2.

⁵¹ Trenczek (n 3) 2.

⁵² 10% of all offenses are felonies, or what we would refer to as serious offenses.

cases referred for reconciliation involve injury crimes⁵³. This is followed by theft, fraud and property damage crimes. The rest can be said to be minor and moderate gravity offences related to different types of crimes⁵⁴.

V. EVALUATION

When the relevant provisions in Germany and the content of these provisions are examined, it is seen that an ideal basis is provided to ensure significant use of victim-offender mediation within the criminal justice system. However, it is also noted that the practice of TOA is still a shadow entity and that its qualitative and quantitative importance is inversely proportional to public and political interests⁵⁵. This situation makes it difficult to collect reliable information about the implementation rate of reconciliation. It is possible to base this assessment on various reasons⁵⁶:

Over the last few years, the total number of compensatory interruptions of prosecutors' and judges' proceedings, including reparative elements, has increased from about 7,000 (6,798) in 1993 to 11,000 (10,865) in 1997 and perhaps 15,000 today. Together they do not reach 5% of all hearings. Therefore, the implementation of restorative justice elements in German criminal proceedings can be correctly described as a low level of stagnation⁵⁷. In the opposite case (i.e. non-reconciliation), fines are frequently imposed (85-90%) and in the case of fines, the money is taken from the victim and transferred to the state. A similar process is also observed in relation to TOA programs⁵⁸. The obligation imposed by Article 155a of the StPO to examine the

⁵³ Arthur Hartmann, Marie Schmidt, Sophie Settels and Hans-Jürgen Kerner, *Täter-Opfer-Ausgleich in Deutschland: Auswertung der bundesweiten Täter-Opfer-Ausgleichs-Statistik für die Jahrgänge 2019 und 2020* (Forum-Verlag Godesberg 2021) s. 44; Çetintürk (n 8) 277.

⁵⁴ Hartmann/Schmidt/Settels/Kerner (n 53) 43-45.

⁵⁵ Trenczek (n 3) 5.

⁵⁶ Trenczek (n 3) 5.

⁵⁷ Trenczek (n 3) 5; Compare with Reinhard Böttcher, 'Täter-Opfer-Ausgleich. Eine kritische Zwischenbilanz bisheriger Praxiserfahrungen und Forschungsergebnisse' (1994) *Bewährungshilfe* 48.

⁵⁸ All numbers are taken from the following source; Michael Kilchling, 'TOA-E versus ATA-E, Empirische Befunde zur Praxis des Täter-Opfer-Ausgleichs' in Jörg-Martin Jehle (eds), *Täterbehandlung und neue Sanktionsformen* (Forum-Verlag Godesberg 2000) 295-321; Terms of compensation in 1997, According to §153a I No 1 StPO, only 2.3% played a role in the withdrawal of public prosecutors (without significant changes compared to previous years). According to §153a II

possibility of a TOA procedure at every stage of the proceedings has a marginal benefit in terms of stopping the proceedings in view of Article 153a. In 2010, this accounted for 5.2% of all non-prosecutions under Article 153a. Above-average success is particularly evident in the states of Rhineland-Palatinate (10.6%) and Saarland (16.8%). Despite the combination of TOA and restorative justice (Article 153a), it only accounted for an average of 11.8% of all interceptions⁵⁹. In 2017, a record number of 76 institutions participated in the statistics; in the years covered by the 2019-2020 report, 71 and 68 institutions participated, despite the pandemic. As of 2021, there have been 302,535 victims and defendants and 125,781 registered victim-offender mediation cases⁶⁰.

Victim-offender reconciliation is mostly used in the treatment of crimes that the judicial authorities consider minor incidents and marginal in criminal law⁶¹. As we have mentioned above, although the criminal law in Germany does not contain any restrictions on the type of crime, the cases subject to TOA are limited to lighter and simple crimes. The application of TOA (especially 153a StPO) to simple crimes and the exclusion of more serious crimes from its scope are the basic ideas and characteristics of victim-offender reconciliation⁶². In the actual situation, it is necessary to discuss the suitability of the case with the public prosecutor's office without making a distinction between the two aspects of suitability. The judicial criteria for the eligibility to resolve the dispute and the ability to ignore criminal proceedings, and on the other hand, the efforts to maintain good relations with the criminal law authorities, lead the representatives and commentators of TOA programs to say at every opportunity that victim-offender reconciliation is clearly not suitable for serious crimes. It is clear that methods of

(7.8%), judicial withdrawal from the process increased only slightly and The same can be seen in the judgments according to § 15 I JGG (3.4% of the asserted requirements). Trenzcek (n 3) 5.

⁵⁹ Wolfgang Heinz, 'Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882 – 2010' (jura.uni, 13 January 2012) 65-66 <<https://www.jura.uni-konstanz.de/heinz/aktuelles/aktuelle-meldungen/sanktionspraxis-in-deutschland-1882-2010>> Date of Access 24 July 2024.

⁶⁰ For statistical data including 2019-2020 qq v. Hartmann/Schmidt/Settels/Kerner (n 53) 8.

⁶¹ According to Trenzcek, this assessment of criminal law standards is of no relevance to the parties to dispute. Trenzcek (n 3) 6.

⁶² Bernd-Dieter Meier, 'Täter-Opfer-Ausgleich und Schadenswiedergutmachung im Strafrecht: Bestandsaufnahme zwanzig Jahre nach der Einführung von § 46a StGB', (May 2015) 70(10) Juristen Zeitung 494.

reconciliation or compensation do not work in cases of violent assault that result in serious physical and psychological injuries. Therefore, it would be more appropriate to focus on small and medium-scale violence. Because most cases are encountered at these scales⁶³.

Reconciliation practices are more commonly applied in cases involving children than adults, but there is a problematic development when it is used as a method of education⁶⁴ (or rehabilitation) of children⁶⁵. Although TOA clearly has a substantial educational (and also rehabilitation) value, because it uses a specific child (welfare) design, it increases the danger of misjudging the character of reconciliation and its misuse as an educational tool. Not long ago an active conciliator (or TOA mediator) did not recognize the problem when he admitted the following: "If a young person doesn't want to apologize, I force them to." In this context reconciliation will have a 100% success rate. But this success will lead to problems for the free development of the victim and the young person. Unfortunately, this so-called educational solution imposed on a young person (always for their own benefit, of course) in order to successfully close a case is no exception⁶⁶.

In juvenile as well as adult proceedings, another problematic development occurs when the public prosecutor or the court imposes preconditions that are perceived as the outcome of the reconciliation process or insists on a (higher) penalty in addition to the agreed reconciliation outcome. The same happens when the amount of sanctions

⁶³ Ute Ingrid Hartmann, 'Victim-Offender-Reconciliation with Adult Offenders in Germany', presented at the 8th international Symposium on Victimology (KFN Forschungsberichte Nr 27, Hannover: Institute of Criminology in Lower-Saxony, 21-26 August 1994) 6.

⁶⁴ Since TOA was first introduced into the Youth Court Code as an educational measure for children (Art. 10 para. 1, No. 7 JGG), the Federal Ministry of Justice has endeavored to increase its legal status and importance through further amendments to the law.

⁶⁵ In this respect, the German TOA theory clearly differs decisively from the Australian community conferencing model. The impact on education is pointed out in almost all concepts of TOA related to children. The hope is to legitimately popularize TOA with ambitious decision-makers involved in justice, youth services and household committees. This is because child welfare benefits in Germany only finance legal proceedings if the child has educational needs (compare with 13, 27 ff. SGB VIII/Juvenile Welfare Code). Almost every single program for children in Germany is funded by child welfare departments. Despite the fact that the established TOA standards in Germany completely separate victim-offender mediation from the educational measures of child law and the child welfare system, victim-offender mediation has become an educational tool thanks to the magic in its definition. Compare with Trenczek, Thomas, Strafe, *Erziehung oder Hilfe? Neue ambulante Maßnahmen und Hilfen zur Erziehung - Sozialpädagogische Hilfeangebote für straffällige junge Menschen im Spannungsfeld von Jugendhilfrecht und Strafrecht* (Forum-Verlag Godesberg 1996).

⁶⁶ Trenczek (n 3) 7.

requested by the prosecutor is determined by the amount of compensation agreed by the parties. If the victim waives part of the compensation for any reason (both parties may agree on another form of symbolic compensation), the public prosecutor often demands more compensation. Because otherwise the perpetrator can easily get away with it. As the German philosopher Friedrich Nietzsche said, “*there must be a punishment!*”⁶⁷. Therefore, the amount of compensation awarded at the end of the reconciliation process should also have a deterrent effect on reducing the commission of crimes⁶⁸.

As stated above, the article added to the StPO in December 1999 regarding TOA (155a Reconciliation in German Criminal Procedure Practice) has made TOA practice widespread by assigning prosecutors and judges the task of evaluating and initiating mediation or reconciliation activities at every stage of criminal proceedings⁶⁹. However, it is doubtful whether criminal justice authorities will drastically change the way they take decisions. German legislation still leaves wide room for interpretation and discretion⁷⁰. For example, according to Article 155a of the StPO, it is not clear in which cases prosecutors can resort to victim-offender mediation. Likewise, it is not regulated which measures are appropriate in the public interest to terminate criminal proceedings in relation to a criminal case. It is also unclear what conditions are required when deciding whether or not to dismiss a case. It is not surprising that in the new guidelines, TOA and mediation have been transformed into an instrument for criminal justice authorities (compare with StPO 155b). State attorneys and judges may, but are not obliged to, submit a case to a specialized institution for reconciliation. They also have the right to reconcile the parties themselves. This raises the question of why, on the one hand, the

⁶⁷ Friedrich Nietzsche, Thus Spake Zarathustra, (Translated by Thomas Common), <<https://ia803405.us.archive.org/32/items/thus-spoke-zarathustra/Thus%20spoke%20Zarathustra.pdf>> Date of Access 12 July 2024, 109.

⁶⁸ Trenczek (n 3) 7.

⁶⁹ Meier (n 62) 490.

⁷⁰ Trenczek (n 3) 8. For a comprehensive evaluation compare with Gspandl Löschnig, ‘TOA-E versus ATA-E Ausgewählte Fragen zu den normativen Grundlagen’ in Jörg-Martin Jehle (eds), *Täterbehandlung und neue Sanktionsformen - Kriminalpolitische Konzepte in Europa* (Forum-Verlag Godesberg, 2000) 277-294: It has been stated that the German provisions are not sufficiently strictly binding (in relation to §153a, 153b, 155a StPO) without a final content (in relation to §155a StPO) and ultimately contain contradictions: this has been described as strange and even harmful for victim-offender mediation (in relation to §153a StPO).

prosecutor is allowed to act as a conciliator and, on the other hand, why there is a need for trained conciliators⁷¹.

Current practice indicates that, within the scope of the sanctioning power of criminal courts, the possibility of dismissal is granted in 95-97% of all crimes. This provides a serious field of activity for victim-offender mediation⁷². In fact, there is no need for a law that offers a wider field of application in terms of TOA. A criminal court judge can, if he or she wishes, invoke the TOA as an alternative to the traditional sanctions of criminal law. But clearly, for whatever reasons, they do not do this very often. When we look at the reasons for this, it is seen that criminal justice representatives, especially state attorneys, judges and prosecutors have negative opinions about reconciliation. They refuse to use victim-offender mediation because they see it as a time-wasting process. However, the authorities who claim that victim-offender mediation is a waste of time, in fact, either do not know enough about this institution or have little experience with it, so the idea of reconciling the parties is foreign and they stay away⁷³. These factors are deep-seated reasons why there is little willingness to use victim-offender mediation in criminal justice settings. This model of thinking has a dominant influence in justice activities, especially in the interpretation of ambiguous legal terms or in areas of legal initiative, within the limits of judgment⁷⁴. Prosecutors see their role in the system as diminished, which leads them to use their discretion in the opposite direction. Although reconciliation is conceived as a formal structure guaranteeing the right to trial, in practice prosecutors clearly see themselves as guardians of the state's right over punishment. Since this perspective does not focus on punishment but instead seeks to resolve the dispute by mutual consent, victim-offender reconciliation is seen as a disruptive tool. This is because

⁷¹ Trenczek (n 3) 8.

⁷² Trenczek (n 3) 8. Compare with Michael Kilchling, 'Aktuelle Perspektiven für Täter-Opfer-Ausgleich und Wiedergutmachung im Erwachsenenstrafrecht. Eine kritische Würdigung der bisherigen höchstrichterlichen Rechtsprechung zu § 46a StGB aus viktimologischer Sicht', (1996) 16(7) *Neue Zeitschrift für Strafrecht* 311; Peter König and Helmut Seitz, 'Die straf- und verfahrensrechtlichen Regelungen des Verbrechensbekämpfungsgesetzes', (1995) (15) *Neue Zeitschrift für Strafrecht* s. 2.

⁷³ Compare with Bernd-Dieter Meier, 'Wiedergutmachung im Strafrecht? Empirische Befunde und kriminalpolitische Perspektiven' in Jörg-Martin Jehle (eds), *Täterbehandlung und neue Sanktionsformen Kriminalpolitische Konzepte in Europa* (Forum-Verlag Godesberg, 2000) 255-276.

⁷⁴ Trenczek (n 3) 9.

reconciliation requires the victim and perpetrator to actively and autonomously find common, future-oriented remedies or solutions to their disputes. This does not concern itself with past-oriented and necessarily harsh reactions to the crime. In the minds of many criminal courts, TOA is merely a measure to prevent the perpetrator from being punished. One reason for this view is that in Germany reconciliation is predominantly conducted by social workers or psychologists. In the eyes of jurists, this causes distrust in every way⁷⁵. Ed Watzke, an Austrian jurist, expresses this view eloquently as follows:

“In one way or another they (the conciliators) are accomplices of the perpetrators, because they make up a hundred excuses to remove responsibility from the perpetrator. They blame traumatic events in early childhood, they blame the parents if they are alive, they blame the absence of parents if they are dead, they blame the presence or absence of all possible social relationships, they blame school, home, homelessness, society, unemployment, etc. All of these excuses are impossible to prove, but they allow the perpetrator to appear as the real victim and avoid punishment⁷⁶.”

The fundamental distrust of prosecutors and criminal courts towards social workers is also reflected in the distrust of mediation⁷⁷. Instead of putting an end to these failures, they are further entrenched by program managers and reform movements that often represent TOA and seek to legitimize their actions. Many program officials expose themselves to the risk of corruption by aiming for the highest number of cases⁷⁸.

In Germany, there is an acceptance that reconciliation does not work for serious crimes. Generally, the cases sent to reconciliation are limited to less serious crimes⁷⁹.

⁷⁵ Trenczek (n 3) 9.

⁷⁶ Ed Watzke, ‘Von Strafruristen und Sozialarbeitern’ in Ed Watzke (eds), *Äquibristischer Tanz zwischen Welten* (Forum-Verlag Godesberg 1997) 81.

⁷⁷ Trenczek (n 3) 10.

⁷⁸ For detailed information qq v. Watzke (n 76) 81.

⁷⁹ To give an example of three separate reconciliation files;

1) Decision of 05.10.2021 of the Landgericht Paderborn Court of jurisdiction as appellate chamber of the 5th criminal grand penal chamber 05 Ns 8/21 - Speed Limit Violation & Negligent Homicide:

A driver driving 85 - 100 km/h on a street with a speed limit of 70 km/h caused the negligent death of a person. The defendant paid money to the heir of the deceased as compensation. The requirements for mitigation pursuant to § 46a StGB are not fulfilled, because § 46a/1 StGB does not apply to completed murder offenses. This is because the injured party within the meaning of § 46a/1 StGB is only the person

Victim-offender reconciliation is presented as a measure that follows punishment and incapacitation in criminal justice. As a third strand, it combines the goals of punishment and the needs of the victim in a better way than the traditional form of sanction alone. But this perspective is a dilemma of the alternative solution. If this is taken as a criterion or supported very much, victim-offender reconciliation replaces traditional punishment and is accepted by criminal justice. In this respect, it is the amount of compensation that must ultimately be determined. At this point, it is necessary for the parties to examine to what extent the victim-offender reconciliation is punitive in relation to the crime committed by the perpetrator and the amount of compensation to be determined⁸⁰. Although reconciliation is the same as remedial measures in terms of its effects in relation to the

directly affected by crime. Those indirectly affected by the crime (such as the husband and children of the deceased in this case) do not fall within the definition of injured party according to the wording of the provision. §46a StGB is not applicable as it is a means of communication and settlement and therefore cannot be agreed with the deceased person. Based on the other articles, only the perpetrator's sentence was reduced.

<https://www.justiz.nrw.de/nrwe/lgs/paderborn/lg_paderborn/j2021/05_Ns_8_21_Urteil_20211005.html> Date of Access 26 July 2024.

2) BGH - Court Decision of 20.07.2021 4 StR 116/21 - Attempted intentional homicide & Qualified plunder

The defendant is sentenced to 8 years and 6 months imprisonment for attempted intentional homicide and qualified plunder (by the Landgericht). Before the trial date, the defendant writes a handwritten letter to the victim apologizing and giving €5,000. The BGH found that in this case the Landgericht had ignored the application of § 46a StGB and partially reduced the sentence.

<<https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=121270&pos=0&anz=1>> Date of Access 26 July 2024.

3) Federal Court of Justice, judgment of 13.03.2019 1 StR 367/18 - Tax evasion offense:

Payment of the tax amount determined after the tax evasion offense is not sufficient for the application of § 46a StGB. However, § 46a StGB applies if the perpetrator makes the tax payment on his own terms and despite very difficult circumstances (such as taking out a loan). Because the defendant was able to recover damages without any effort or coercion to the extent required by § 46a sentence 2 StGB. Even after paying the taxes he evaded, he still has assets worth between 18 and 22 million euros. In addition, he has a current income of more than EUR 500,000 from tenancy and shareholdings in companies in Germany, leaving EUR 250,000 per year to cover living expenses and other costs after deducting taxes and maintenance obligations. According to the findings of the Court of jurisdiction, the defendant has the necessary creditworthiness for such borrowing, enabling it to service the loans. § 46a did not apply because the fact that the loan burden had reduced the respondent's 'economic capacity' did not reach the weight required by § 46a StGB for a 'personal waiver', which the tax authorities could also apply, given the respondent's existing assets. <<https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=95076&pos=0&anz=1>> Date of Access 26 July 2024.

⁸⁰ Trenczek (n 3) 10.

purpose of compensation and punishment, it goes beyond them in that it involves the victim and opens space for an active and independent resolution of the dispute by the parties involved⁸¹.

There is reliable concrete information that the public is much more accepting of remedial dispute resolution through mediation and compensation than many criminal justice institutions. Dispute resolution and punishment cannot be considered on the same level. Reconciliation is not a superior or inferior form of punishment. It is something completely different in nature. It is a different instrument in which the perpetrator and the victim play their respective roles to achieve peace. While it is important to emphasize the victim's perspective and the harm suffered, it should not turn into a system where the perpetrator is rewarded. If such an understanding is at the center, victim-offender mediation can neither proceed on its own proper path nor produce appropriate results in the face of the demands, burdens and limitations of the traditional view of the judicial system, which is constantly reproduced by the German legal schools⁸².

Although reconciliation is an extrajudicial solution to the dispute between individuals concerning criminal law, it is possible to make it within the framework of the law as a requirement of the continental European legal system. The legislator determines the behaviors that constitute a crime and the conditions under which mediation will be applied. Even when supporting reconciliation, it must be remembered that force and coercion as natural instruments of public social control belong to the law, as the brake belongs to the car or the halter to the horse. TOA is supported under the protective shadow of the law and is thought to be effective in this way⁸³.

The wholesale rejection of these proposals as pure idealism or utopian fantasy shows how far the dogmatic ideas in their laws have strayed from the basic principles of the law. The shift in perspective from a punishment-oriented model to a justice model will

⁸¹ Compare with Thomas Trenczek, *Restitution - Wiedergutmachung, Schadensersatz oder Strafe? Restitutive Leistungsverpflichtungen im Strafrecht der USA und der Bundesrepublik Deutschland (Restitution – Making Good, Compensation or Punishment?)* (Nomos Verlag 1996) 217.

⁸² Trenczek (n 3) 11.

⁸³ Trenczek (n 3) 12.

effectively determine future behavior and paradigm shifts from oppression to healing and protection and will reveal a society-oriented dispute culture perspective that is in line with the people's orientations. The German TOA practice has shown that more and more citizens are beginning to discuss the option of reconciliation among themselves, without waiting for the state attorney's office or other criminal justice institution to take up a case. The practical experience in Germany has shown that victim-offender mediation is not the only ideal way, but it is a useful tool for resolving disputes and pursuing possible steps. A community justice center where criminal disputes can be negotiated meets the justice and security needs of citizens. It can fill the gap in the judicial system, which is overburdened with dispute resolution in both quantity and quality⁸⁴.

CONCLUSION

In Germany, the reconciliation process called victim-offender mediation (TOA) has an important place in the criminal justice system. In Germany, which has a federal state structure, the execution and regulation of these processes are conducted by both the federal government and the state authorities. The criminal justice system successfully implements victim-offender mediation both theoretically and practically.

Reconciliation programs based on criminal procedure laws in Germany play an important role, especially in youth courts and in cases involving juvenile offenders. Reconciliation processes for children require prosecutors and judges to consider out-of-court measures, taking into account the education and welfare of children. Moreover, in cases of adult perpetrators, reconciliation is presented as an option that prosecutors and courts should consider at every stage. The perpetrator's attempt to reconcile with the victim provides opportunities such as not giving a sentence or reducing the sentence.

Regulations such as Article 46a of the German Penal Code and Articles 153a and 155a of the StPO provide the legal basis for victim-offender mediation. These regulations encourage the perpetrator's efforts to reconcile with the victim and integrate elements of restorative justice into the criminal justice system. Mediation processes are based on the perpetrator voluntarily compensating the victim for the damages she/he suffered and do

⁸⁴ Trenczek (n 3) 14.

not accept situations such as forced mediation or forced compensation for damages, but the legislation encourages the parties to reconcile.

In Germany, reconciliation services are provided by non-profit non-governmental organizations and state institutions. These institutions conduct reconciliation processes independently and take necessary initiatives to ensure victim-offender reconciliation. The files referred to the mediation process by the police and prosecutors are handled by the mediators and if the parties reach an agreement, the prosecutor decides non-prosecute.

Although the implementation rate of victim-offender mediation within the German criminal justice system is still relatively low, given the potential benefits of reconciliation and the integration of restorative justice elements into the system, these processes should be more widely implemented and promoted. The success of reconciliation programs is closely related to the support of justice authorities, civil society organizations and the general public for these processes.

Although victim-offender mediation has an important place in the criminal justice system in Germany, continuous improvement and support are needed to increase implementation rates and make the system more effective. Germany's experiences in this area could also serve as a valuable model for other countries and serve as inspiration for the adoption and implementation of restorative justice approaches.

REFERENCES

- Böttcher R, 'Täter-Opfer-Ausgleich. Eine kritische Zwischenbilanz bisheriger Praxiserfahrungen und Forschungsergebnisse', (1994) *Bewährungshilfe* 45-57.
- Çetintürk E, *Ceza Adalet Sisteminde Uzlaştırma* (HD Yayıncılık, 2009).
- Demirtaş S, 'Alman Ceza Kanunu'nda Kuralla İlişkin Örnekler Müessesesi: Kanunilik İlkesi Açısından Bir Değerlendirme', (January 2022) (49) *Türkiye Adalet Akademisi Dergisi* 425-454.

- Detter K, 'Die Verteidigung und der Täter-Opfer-Ausgleich: Probleme des §46a StGB' in Stefan Hiebl, Nils Kassebohm and Hans Lilie (eds), *Festschrift für Volkmar Mehle* (Nomos Verlag 2009) 157-176.
- Dölling D, 'Der Täter-Opfer-Ausgleich', (May 1992) 47(10) *Juristen Zeitung* 493-499.
- Dreher E and Tröndle H, *Strafgesetzbuch und Nebengesetze* (46. Auflage, C.H.BECK Verlag 1993).
- Goetz K, Koß M, Manzo J V and Zubek R, 'Parliaments and Executive Oversight and Control: Comparing Selected European Experiences' (SIGMA Raporu, 2015), <https://www.tbmm.gov.tr/yayinlar/sigma_17112015.pdf>.
- Hartmann A, Schmidt M, Settels S and Kerner H J, *Täter-Opfer-Ausgleich in Deutschland: Auswertung der bundesweiten Täter-Opfer-Ausgleichs-Statistik für die Jahrgänge 2019 und 2020* (Forum-Verlag Godesberg 2021).
- Hartmann U I, 'Victim-Offender-Reconciliation with Adult Offenders in Germany', şurada sunuldu: the 8th international Symposium on Victimology (KFN Forschungsberichte Nr 27, Hannover: Institute of Criminology in Lower-Saxony, 21-26 August 1994).
- Heinz W, 'Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882 – 2010' (jura.uni, 13 January 2012) <<https://www.jura.uni-konstanz.de/heinz/aktuelles/aktuelle-meldungen/sanktionspraxis-in-deutschland-1882-2010>>.
- Kavasoğlu A, 'Alman Usul Hukukunda Uyuşmazlıkların Mahkeme Dışı Çözüm Yolları ve Mediation', (2010) 68(1-2) *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 197-218.
- Kempfer J, '§ 46 bis 51 StGB', in Dieter Dölling, Gunnar Duttge, Stefan König and Dieter Rössner (eds), *Gesamtes Strafrecht Handkommentar* (5. Auflage, Nomos Verlag 2022).
- Kilchling M, 'Aktuelle Perspektiven für Täter-Opfer-Ausgleich und Wiedergutmachung im Erwachsenenstrafrecht. Eine kritische Würdigung der bisherigen höchstrichterlichen Rechtsprechung zu § 46a StGB aus viktimologischer Sicht', (1996) 16(7) *Neue Zeitschrift für Strafrecht* 309-317.

- Kilchling M, 'TOA-E versus ATA-E, Empirische Befunde zur Praxis des Täter-Opfer-Ausgleichs' in Jörg-Martin Jehle (eds), *Täterbehandlung und neue Sanktionsformen* (Forum-Verlag Godesberg 2000) 295-321.
- Kinzig J and Stree W, 'Kommentierung der Vorbem. § 38-46a, der § 47-51, der § 56-67g, der § 68-72, sowie der § 46b, 67h StGB' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30. Auflage, C.H.BECK Verlag 2019).
- König P and Seitz H, 'Die straf- und verfahrensrechtlichen Regelungen des Verbrechensbekämpfungsgesetzes', (1995) (15) *Neue Zeitschrift für Strafrecht* 1-6.
- Kühl K, Heger M, Drehe E, Maasen H and Lackner K, *Strafgesetzbuch §46a* (29. Auflage C.H.BECK Verlag 2018).
- Löschnig G, 'TOA-E versus ATA-E Ausgewählte Fragen zu den normativen Grundlagen' in Jörg-Martin Jehle (eds), *Täterbehandlung und neue Sanktionsformen - Kriminalpolitische Konzepte in Europa* (Forum-Verlag Godesberg 2000) 277-294.
- Meier B D, 'Täter-Opfer-Ausgleich und Schadenswiedergutmachung im Strafrecht: Bestandsaufnahme zwanzig Jahre nach der Einführung von § 46a StGB', (May 2015) 70(10) *Juristen Zeitung* 488-494.
- Meier B D, 'Wiedergutmachung im Strafrecht? Empirische Befunde und kriminalpolitische Perspektiven' in Jörg-Martin Jehle (eds), *Täterbehandlung und neue Sanktionsformen Kriminalpolitische Konzepte in Europa* (Forum-Verlag Godesberg 2000) 255-276.
- Nietzsche F, Thus Spake Zarathustra, (Translated by Thomas Common), <<https://ia803405.us.archive.org/32/items/thus-spoke-zarathustra/Thus%20spoke%20Zarathustra.pdf>> .
- Özgenç N B, *Türk Hukukunda ve Mukayeseli Hukukta Uzlaşma* (Legal Yayıncılık 2015).
- Öztezel A, 'Çocukların Taraf Olduğu Suçlarda Uzlaştırmada Geliştirilmesi Gereken Hususlar' (2023) 18(215) *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi* 811-866.
- Peters S, *Münchener Kommentar zur Strafprozessordnung* (C.H.BECK Verlag 2016).

Trenczek T, *Restitution - Wiedergutmachung, Schadensersatz oder Strafe? Restitutive Leistungsverpflichtungen im Strafrecht der USA und der Bundesrepublik Deutschland (Restitution – Making Good, Compensation or Punishment?)* (Nomos Verlag 1996).

Trenczek T, *Strafe, Erziehung oder Hilfe? Neue ambulante Maßnahmen und Hilfen zur Erziehung - Sozialpädagogische Hilfeangebote für straffällige junge Menschen im Spannungsfeld von Jugendhilferecht und Strafrecht*, (Forum-Verlag Godesberg 1996).

Trenczek T, 'Victim-Offender Mediation in Germany - ADR Under the Shadow of the Criminal Law?', (2001) 13(2) Bond Law Review 1-17.

Theune W, *Strafgesetzbuch Leipziger Kommentar Band 2* (12. Auflage, De Gruyter 2006).

Watzke E, 'Von Strafruristen und Sozialarbeitern' in Ed Watzke (eds), *Äquibristischer Tanzzwischen Welten* (Forum-Verlag Godesberg 1997) 79-94.

Wolters, Gereon, *Systematischer Kommentar zum Strafgesetzbuch* (9. Auflage, Carl Heymanns Verlag 2016).

Zehr H, *Restitutive Justice, Restorative Justice* (4th edn, Office of Criminal Justice 1985).