

Restorative Justice in Prisons: The Final Cornerstone in the General Concept of RJ in Germany



- Introduction:
The Concept of Restorative Justice in Germany
- Legal Framework for Victim/Offender Mediation
- Implementation of VOM in Prisons
- Consequences and Open Questions

Introduction: The Concept of Restorative Justice in Germany

- Universal approach to restorative justice
 - All cases
 - » all crimes
 - » all offenders
 - All stages
 - » pre-trial, parallel to trial, post-trial
 - Open access
 - » self-referrals possible
 - Open model of restorative justice
 - » legal provisions use the term victim/offender mediation (VOM)
 - » functional approach: communication between victim and offender as minimum requirement

Legal Framework for Victim/Offender Mediation in Germany

- Mid-1980s: Introduced as pilot projects within the already existing framework of diversion (for juveniles and adults)
 - focus on compensation, (still) without explicit reference to VOM
- 1986: Introduced in the Criminal Code as general aspect for the adjudication of the sentence (section 46)
 - VOM as 'positive post crime behavior' (with / without referral)
 - Court *can* mitigate a sentence
- 1990: Introduced as educational measure in the Juvenile Justice Act (section 10 no. 7)
 - as a formal sanction
 - providing the first official legal definition: "...attempt to reach an agreement with the victim (victim/offender mediation)."

- 1994: Introduced in the Criminal Code as 'standardized' mitigating factor (section 46a)
 - VOM as 'positive post crime behavior' (with / without referral)
 - Court *must* mitigate the sentence according to standardized rules
 - » 3 years minimum replacing a regular life sentence
 - » 2 years minimum replacing a regular 5 or 10 years minimum
 - » 6 months minimum replacing a regular 2 or 3 years minimum
 - » 3 months minimum replacing a 1 year minimum
 - » in addition, a general maximum of three thirds applies for all penalties (prison sentences and fines)

- 1999: Introduced in the Code of Criminal Procedure as explicit type of judicial order in the context of diversion (section 153a no. 5)
 - now two legal options available: possibility to issue a restitution order (without VOM), amended by the possibility to issue an explicit VOM order as condition for dismissal
- 1999: "Procedurally anchored" in the Code of Criminal Procedure (sections 155a, 155b)
 - public prosecutors and judges should consider the possibility to make a referral to VOM at any time
- Since 2010: Introduced in the prison laws of some of the Federal States of Germany as a regular part of the treatment program for prisoners
 - first pilot projects running

Legal options available:

- General Criminal Justice
 - Measure of diversion
 - Mitigating factor in sentencing
 - Probation order
 - Parole order
 - Measure of treatment for prisoners (regional only)
- Juvenile Justice
 - *Measure of diversion*
 - *Educational measure (penalty)*
 - Probation order
 - Parole order
 - Measure of treatment for young prisoners (regional only)

Legal options available:

- Front end of prosecution
 - Measure of (prosecutorial) diversion
- Back end of prosecution
 - Measure of (court) diversion
 - Waiver of sentence
 - Mitigating factor
 - Coercive measure (penalty, for juveniles only)

- Condition for probation

- Measure of treatment during prison term

- Condition for earlier release (parole)

post sentencing options

- Possible legal consequences for offenders:
 - Waiver of prosecution and (public) criminal trial
 - Waiver of punishment
 - Mitigation of punishment
 - Alteration of punishment
 - Reduction of prison term (earlier release)
- Intended by the legislature as an attractive incentive for offenders to participate in VOM

Implementation of Victim/Offender Mediation in Prisons

- International comparison shows a number of countries which have introduced RJ in prison settings either as regular programs or as pilot projects
 - » Europe (e.g., Belgium, UK, Hungary, Austria, Germany)
 - » US, Canada
 - » Australia, New Zealand

- According to the German approach of universal applicability of restorative justice the enforcement stage of prison sentences lies within the scope of the (legal) concept of VOM
- Potential areas of application in regard to different categories of cases
 - » the crime(s) for which the prisoner has been convicted
 - » conflicts (crimes) amongst prisoners
 - » conflicts between prisoners and prison staff (disciplinary contraventions, crimes)

- Added value of restorative justice in prison settings
 - » responsabilization of the offenders
 - » sensibilization of the offenders for the dignity of the victim and the harm they have inflicted on him / her
 - » stimulation of remorse
 - » compensation as an area in which prisoners can train and actively demonstrate responsibility
 - » access for victims to the prison and to their prisoners
 - » facilitation of the coping process of victims
 - » rehabilitation and public peace
- Incentive for prisoners to engage in VOM: credits for early release (parole)

- In the past VOM rarely applied in prison settings
 - » lack of explicit (administrative) rules
 - » lack of demand
 - » only occasional cases
- Recently, official pilot projects were started, or are about to start, in 5 of the 16 Federal States
 - » Baden-Württemberg (4), Berlin (1), Bremen (1), Northrhine-Westfalia (1), Schleswig-Holstein (2)
 - » different models
 - » different legal approaches

- Different legal approaches
 - Administrative: restorative justice efforts to be considered and, when appropriate included, in the *individual treatment plan* for the prisoners
(e.g., prison acts of Bavaria, Hamburg, Hesse and Lower Saxony)
 - Principled: restorative justice as an explicit part of the legal catalogue of *general prison rules* – as an additional core principle/aim of the execution of prison sentences
(e.g., prison act of Baden-Württemberg)

- Allocation
 - Any RJ providers?
 - Especially accredited RJ providers only?
- Standards
 - Universal?
 - Special?
- Confidentiality
 - Communication with the prisoner in the preparation phase?
- Organization
 - Security measures and manifold further restrictions
- The prison environment

Consequences and Open Questions

- Application of VOM at the post-conviction stage is an essential cornerstone of a general concept of restorative justice
- Application post-conviction makes the restorative justice process more independent of criminal justice interests and procedures
- Application in prisons cases opens a new spectrum of cases for VOM
 - The most serious crimes
 - The most vulnerable victims (in particular relatives and other indirect victims)
- The serious cases explicitly show that RJ / VOM is a highly valuable resource which should be available with priority in such cases
 - Waste of resources in petty crimes?

- Expansion of the temporal scope of availability (restorative justice services as a long term option)
 - When is the 'right moment' in such a continuum?
 - Objective (professional) vs. subjective perception
 - The problem of asymmetric psychological development of victim and offender in serious cases
 - Opportunity for repeat approaches / attempts (including re-opening of cases that had been rejected at an earlier stage)?
- Mid / long term shift towards later application?
 - Preference of post-conviction instead of pre-conviction?

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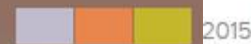


This years' RJ WEEK will be between 15-22 November and on 18 November the EFRJ will celebrate its 15th anniversary! Many events will



22-24 June 2016

Leiden The Netherlands



Thank you for your attention.

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