

REPARATION AND CRIMINAL JUSTICE: CAN THEY BE INTEGRATED?

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I. The Traditional Role of the Victim: Supporting State Prosecution

The role of the victim within the public criminal justice process has traditionally been one of supporting public prosecution. Without the victim's cooperation, police and prosecutors would neither be informed about the occurrence of crimes, nor be able to bring sufficient evidence to secure convictions or extra-judicial settlements. In Germany, for instance, about 90% of all prosecutions are initiated by private complaint.¹

Compared to what the victim gives the state, the state traditionally gives little to the victim. While the victim's procedural position has been strengthened in Germany in recent decades, namely by the expansion of the right to join the prosecution as a collateral complainant,² procedural participation alone has not been sufficient to satisfy the victim's need to be made whole. Victimological research indicates that the victim has a profound interest in compensation of damages.³ However, since according to our traditional understanding, the victim's claims and the State's claims against the offender are inherently different in nature, they ought to be governed by different types of principles and proceedings. Doctrinally, the criminal courts settle the *State's* conflict with the

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1 B.-D. Meier, "Umleitung der Geldstrafe für Zwecke der Wiedergutmachung", (1991) 68 *ZRP* 69.

2 §§ 395 *et seq.*, Strafprozessordnung.

3 K. Sessar, *Wiedergutmachen oder Strafen* (Pfaffenweiler, 1992); H.-J. Albrecht, "Kriminologische Perspektiven der Wiedergutmachung", in A. Eser/G. Kaiser/K. Madlener, *Neue Wege der Wiedergutmachung im Strafrecht* (Freiburg i.Br., 1990), 43 *et seq.*

offender, while the victim's conflict with the offender is a matter for the civil law and the civil courts. Therefore, the legal consequences of crime, it is believed, reflect primarily the needs of the general public and not the "private" interests of the victim (whether defined as to receive: compensation; reparation; satisfaction; vindication).

This traditional relationship between the State, the offender and the victim still describes the prevailing status of criminal justice in Germany: The victim's claim to *recognition* as a person injured, both in terms of substance and in psyche, and his or her chances to be made whole within the criminal justice process are slim.

We can distinguish between reparation-oriented mechanisms *at trial* and *before trial*. Reparation-oriented mechanisms *at trial* are the following:

- The court-administered reparation order which requires the offender to make reparation of damages to the victim. This option exists not as a sanction in its own rights, but only as a collateral penalty. It can only be applied in combination with either a suspended sentence and probation term (§ 56b StGB), or a relatively new type of sanction, an admonition with reservation of punishment (§ 59 StGB). In practice, a reparation order typically consists of monetary compensation.

- The so-called adhesion proceeding (§§ 403 *et seq.* StPO), which allows the victim to bring his or her civil damages claim jointly with the criminal proceeding. This proceeding has maintained its long-standing reputation as a dead-letter law, despite procedural improvements in the mid-eighties.

Besides these mechanisms, a relatively new provision concerning the enforcement of fines allows courts to adjust payment conditions when an offender's obligation to pay restitution would be jeopardized.⁴

While reparation-oriented mechanisms *at trial* play only a minor role in practice, the victim's chances of receiving compensation within the criminal justice process are greater when a case can be settled *without* the intervention of the court. Leaving recent reforms aside for the moment, the following mechanisms exist:

- Conditional dismissal of proceedings by the prosecution: The criminal procedure code lists reparation of damages first among a set of

4 § 459a StPO.

enumerated orders available to the prosecutor which, if complied with by the accused, will preempt public interest in formal accusation.⁵ While it has long been decreed that formal orders of reparation have statistically rarely been issued, the role of informal, or voluntary reparation in prosecutorial discretion seems to be considerably greater.⁶

• Reparation as part of a mediation process: For a limited set of crimes, the so-called private complaint offences (§§ 374 et seq. StPO), the criminal procedure code prescribes mandatory mediation before criminal proceedings can be instituted by the victim. For this purpose, each state provides special conciliation boards (§ 380 StPO). A private complaint, which gives a victim the option to institute criminal proceedings without prior consultation of the state prosecutor, is limited to a set of enumerated crimes, generally deemed to affect only the victim's "private" interests, not the public's.⁷ In addition, there exists a mediation-oriented remedy based on former GDR law and therefore limited in application to the new *Länder*: with the consent of the accused, the prosecutor can delegate misdemeanors of minor import to a community mediation board whose task is to help settle the matter without recourse to the courts. The hearing before the board is aimed at restoration of social peace and reaching a "balance" between offender and victim.⁸

While the existing reparative mechanisms have long been in the shadow of criminal justice, recent years have seen a trend reflecting greater emphasis on reparation and victim-offender-reconciliation in general.

II. *Current Trend Toward Greater Recognition of the Victim's Interest to be Made Whole*

This trend can be observed not only in Germany, but also in many other countries, such as the United States, Great Britain, the Nordic

5 § 153a StPO.

6 See D. Frehsee, *Schadenswiedergutmachung als Instrument strafrechtlicher Sozialkontrolle* (Berlin, 1987), 316 et seq.

7 Private complaint offenses are, for instance, trespass, insult and defamation, assault, and damage to property.

8 §§ 40, 43 *Gesetz über die Schiedsstellen in den Gemeinden* (Law of Sept. 13, 1990, GBl. I, p. 1527).

countries, and the Netherlands. The impetus for this trend comes from both academia and practice and is further fueled by criminological research.⁹

Need for clarification: What are we actually talking about?

The first problem anyone will encounter in the area of “reparative justice” is the existence of a confusing variety of terms.¹⁰ In Germany, we will, for instance, find the terms “Wiedergutmachung”, “Schadenswiedergutmachung”, “Entschädigung”, and “Täter-Opfer-Ausgleich”. Semantically, the degree of specificity of each term is different. The term “Wiedergutmachung”, literally meaning “making good again”, is least specific. “Wiedergutmachung” leaves entirely open the type of action that is required of the offender. It might consist of material reparation or of symbolic acts. More specific than “Wiedergutmachung”, the term “Schadenswiedergutmachung”, literally meaning “reparation of damage”, addresses reparation by monetary compensation. The term “Entschädigung” implies monetary compensation as well, but does not necessarily imply acts by the offender. In fact, the term is typically used for compensation by the State. “Täter-Opfer-Ausgleich”, literally meaning “offender-victim-balance”, is approximately as general in scope as “Wiedergutmachung”, but alludes more to notions of conflict resolution by mutual effort of both offender and victim. If we look to the English-language legislation and literature, court-ordered payments are either termed “restitution”, as in the U.S., or “compensation”, as in Great Britain. In scholarly writings on the subject, however, we will increasingly find the terms “reparation” or “restorative justice”. These terms reflect a readiness to extend the concept of harm, and therefore the dimensions of “making amends”, to the psychological, relational and social effects of victimization, reaching far beyond mere payment for material harm.¹¹

9 K. Sessar, *supra* n. 3 (Germany); for public attitude surveys in England see L. Zedner (*infra* n. 10), at 232 with further references.

10 I wish to thank Lucia Zedner for our discussions on this which greatly helped to heighten my sensitivity on this subject, particularly with regard to the situation in England. She provides an instructive inquiry into the meaning of terms associated with “reparative justice” in L. Zedner, “Reparation and Retribution: Are they Reconcilable?”, (1994) 57 *Modern L. R.* 229-250, at 234.

11 See L. Zedner, *ibid.*, with further references.

The variety of terms we encounter reflects the difficulty inherent in defining *what* "making good" to the victim is actually about, and sheds light on the awkward, doctrinally unresolved standing of the victim's interests between the spheres of private and public law. This difficulty is easily obfuscated if we borrow a term from civil, or "private" law and try to redefine it as an umbrella term for "making amends" to a victim of crime. Both the terms "restitution" and "compensation" are too narrowly predefined by civil law to properly serve this purpose. Although the term "reparation" also exists in civil law, it appears better suited for the umbrella function since, unlike "restitution" and "compensation", it does not per se predetermine the modalities of "making good".¹² "Reparation", as well as the German term "Wiedergutmachung", may therefore be used to address the "making good" of harm in cases of both civil and criminal wrongs, leaving to further analysis whether a concept of "criminal" reparation could be sustained at all, doctrinally or practically. The term "compensation", in contrast, should be limited to describe a specific type of performance, the monetary balancing of harm.

Reparation in international perspective

Drawing on preliminary findings of the multi-national study on reparative justice that we are conducting at the Max Planck Institute, we can subdivide efforts to make the victim whole into four major categories.¹³

Victim-offender reconciliation

In Germany, as well as in the United States and Finland, criminal justice systems (police and prosecutors) have delegated responsibility

12 See L. Zedner, *ibid.*

13 The following references to reparation in foreign legal systems essentially draw on the comprehensive national surveys provided by L. Zedner (England), M. Groenhuijsen and D. van der Landen (Netherlands), T. Lappi-Seppälä (Finland), K. Madlener (Spain), E. Silverman (USA), and K. Warner (Australia). These and other national surveys have been or will be published under the title "Wiedergutmachung im Kriminalrecht: Internationale Perspektiven"/Reparation in Criminal Law: International Perspectives (A. Eser/S. Walther, (eds.), Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, edition iuscrim, Freiburg i.Br., 1996 *et seq.*).

for solving certain conflicts to non-legal offender-victim mediation programs.¹⁴ To take Germany as an example, voluntary reparation under the *aegis* of prosecutorial dismissal (§ 153a StPO) has become more and more institutionalized through the advent of so-called "Offender-Victim-Balance" projects (*Täter-Opfer-Ausgleich*, TOA). While considerable regional differences continue to exist, there is a trend towards a regulated cooperation between prosecution officials and project staff with regard to types of crimes eligible for reparation and reconciliation. Instead of filing an accusation with the court, the prosecution will hand over the case to a mediation office. The office is staffed by social workers, who are either employed by the prosecution-annexed court aid service (*Gerichtshilfe*), by a youth authority, or by non-governmental projects. If both victim and offender agree, a meeting will be arranged. Under the mediator's guidance, the parties are encouraged to reach an agreement that reasonably satisfies the victim's needs for material and immaterial reparation. Once the offender has fulfilled the terms of the agreement, the prosecutor will be informed, and the matter will be dismissed without further proceedings (§ 153a StPO).

Victim-offender mediation projects were initially introduced in juvenile justice, where prosecution officials traditionally have enjoyed greater discretion in the disposition of cases.¹⁵ The idea has now taken hold in adult criminal justice as well. With different emphases, both established and experimental mediation projects in a number of German cities accept cases where the offender is an adult.¹⁶ The offender is given the chance to accept responsibility for the harmful results which his or her crime had on the particular victim. By 'regulating' the 'conflict' autonomously, victim and offender are deemed to attain an essential goal of the criminal justice process, namely the 'satisfaction and securing of legal peace'.¹⁷

Among the crimes typically eligible for mediation are causing bodily harm, property crimes, defamation, threatening a felony, and, within

14 For a comprehensive overview see B. Bannenberg, *Wiedergutmachung in der Strafrechtspraxis* (1993).

15 For the broader options aimed at victim-offender mediation in juvenile law, cf. §§ 10, 15 JGG.

16 See D. Dölling, "Der Täter-Opfer-Ausgleich", (1992) JZ 493-499.

17 See B. Wagner, "Konfliktregulierung im Rahmen des Täter-Opfer-Ausgleichs bei der Staatsanwaltschaft Ravensburg", in E. Marks/K. Meyer/J. Schreckling/M. Wandrey (eds.), *Wiedergutmachung und Strafrechtspraxis* (Bonn, 1993) 104 *et seq.*

certain limits, even crimes against sexual self-determination. To guard against inappropriate widening of the “net” of public social control, TOA-projects typically deem so-called petty cases, i.e., cases that are normally either dismissed or referred for private prosecution, inappropriate for conflict regulation. The goals of conflict regulation include monetary, as well as symbolic restitution, for both material and immaterial damages.¹⁸ Ideally, conflict regulation includes face-to-face conciliation of victim and offender, but if the victim refuses a meeting, conciliation may be reached by the victim accepting the offender’s apology in writing.¹⁹ Finally, a feature of great practical importance is the establishment of a victim’s fund, financed through fines and donations. This allows for quick and unbureaucratic payment to victims. Offenders receive interest-free loans in the amount payable to the victim, and must pay back into the fund in monthly installments. If this is impossible or unreasonably burdensome, the debt may be satisfied by performing unpaid community service.²⁰

Victim-offender mediation projects enjoy a considerable degree of acceptance in practice. Preliminary empirical data²¹ available for juvenile cases indicate that between 78% and 95% of offenders and between 82% and 92% of victims were ready to enter such projects. Success rates of mediation projects are quite impressive: about three-fourths of the referred cases end with an agreement.²² However, it is still an open question whether victim-offender mediation is more “efficient” than traditional criminal justice processes, as is commonly assumed.

Encouraging voluntary reparation within the criminal justice process

While victim-offender mediation pursues the settlement of conflicts without the intervention of the criminal courts, the idea of *reparation* has recently been conceptualized in conjunction with traditional criminal prosecution. According to a concept proposed namely by Professor Roxin, “Wiedergutmachung” could be a “third track” within the sanctioning process (the other two tracks consisting of punishment and measures of

18 See B. Wagner, *supra* n. 17, at 107.

19 This seems to be true for other projects as well; see D. Dölling, *supra* n. 16, at 496.

20 See B. Wagner, *supra* n. 17, at 110.

21 For the following D. Dölling, *supra* n. 16, at 496.

22 See D. Dölling, *ibid.* (67-81%).

rehabilitation and incapacitation). This has recently found strong support from German academics; the basic idea is to *encourage voluntary* "making good" as part of the criminal justice process.²³

Starting out from this premise, a sophisticated concept for encouraging voluntary reparation has been submitted by the so-called "alternative professors", a standing group of German, Austrian and Swiss criminal law professors whose work is devoted to progress in criminal law reform, based on the central tenet that punishment can only be *ultima ratio*. In their recent "Alternative Draft", the *Alternativentwurf Wiedergutmachung* of 1992,²⁴ entirely focused on the integration of reparation into the criminal justice process, they define "Wiedergutmachung" as the "balancing of the results of the crime by a voluntary performance of the perpetrator" (§ 1). In 25 sections, the draft sets out a new type of criminal justice process, designed to provide incentives for the offender: should one make reparations, the prosecution may be dismissed, the court may abstain from punishment, or punishment may be mitigated. In its central provisions (§§ 13-18), the Draft places heavy emphasis on the duty of the prosecution and the court to explore and further the chances of reparation. Where the preconditions for formal accusation are given, a mandatory, temporary stay of proceedings for up to three months serves to make room for reparative action, if there are reasonable grounds to expect that reparation may be made.

To this end, the prosecutor may refer such a case to a mediator. The participation of accused and the victim is, however, voluntary (§ 13). If the prosecutor does file a formal accusation, he or she must "propose" to the court that the case be diverted to a new type of court-based intervention, the so-called "judicial reparation proceeding", if there is an "expectation" that this might lead to reparative acts (§ 14). The "judicial reparation proceeding" provides the court with several new instruments, all aimed at reparation. The first is simple: The court may postpone the

23 The concept has been advocated by American proponents of "restorative justice" as well. See D.W. Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice", (1993) 4 Criminal Law Forum 251; for the ensuing dispute see A. Ashworth, "Some Doubts about Restorative Justice", (1993) 4 Criminal Law Forum 277, and D.W. Van Ness, "A Reply to Andrew Ashworth", (1993) 4 Criminal Law Forum 301.

24 J. Baumann et al., *Alternativentwurf Wiedergutmachung* (München, 1992).

opening of formal proceedings up to six months in order to give the accused time to make reparations. Alternatively, the court may refer the case to a mediation authority. Finally, the court may itself conduct a judicial reparation *hearing* (§§ 17, 18). The court is bound to enter into the "judicial reparation proceeding" whenever a positive prognosis for reparation exists (§ 16). It has already been said that the prosecution has a duty to "propose" the proceeding where appropriate; also, the accused has a right to enter a motion to this end (§ 15 I). It is curious that the Draft does not give the *victim* the option to make such a motion; on the other hand, should accused and victim *jointly* ask the court to postpone the opening of trial, the court has to grant this motion, unless it is obvious that reparation is futile (§ 16 I 4).

In 1994, the legislature responded to the call for a more reparation-oriented criminal justice system. In its new § 46a StGB, the legislature provides that the court may mitigate punishment (or even abstain from it, where a sentence no higher than one year, or the equivalent fine, would be forfeited), if the offender has *made efforts* to find a "balance" with the victim by making, or seriously attempting, reparation, or where he or she *made reparation* and this required considerable personal effort or self-denial. Generally, but not necessarily, reparation will require reparation of damages. Like the Alternative Draft, the new § 46a StGB does not limit the legal benefits of reparation to specific crimes; even felony cases are not generally excluded. But, unlike the Draft, which details the practical steps to be taken in a given case, the new legislation is entirely devoid of procedural provisions. The thorny questions of *who* should bear the duty and responsibility for encouraging reparation *when* and *how*, were left unsettled, thereby relegating their solution to the wisdom and good will of the practitioners.

It is noteworthy that the new law also gives greater weight to the fact that the offender made serious efforts at reparation when considering suspension of sentences between one and two years, since such suspension must be justified by special circumstances (§ 56 II 2 StGB).

Reparation as a sanction

Another approach to integrating reparation into the criminal justice process is to define it as a sanction. Court-ordered reparation, which in practice is compensation, possibly in combination with other sanctions, can be found in common law countries such as the United States,

Australia, England, and recently even in the Netherlands.²⁵ English language terminology in this regard is divided: In England and Australia, court-ordered reparation is done through “compensation orders”; in the United States, an offender is ordered to make “restitution”. Reparation in this setting is conceptualized as a regular sanctioning practice. This is typically emphasized by the fact that the courts must give specific reasons if they wish to abstain from issuing an order.²⁶ The sanction model focuses on payment or service rendered to the victim or to a person/institution designated by her or him. In the United States, some states allow for the substitution of community service in exceptional cases. American-type “restitution” is generally limited to damage caused by offenses of conviction²⁷ and does not cover non-material damage such as mental anguish and pain.²⁸ Should an additional fine be imposed, payment of the restitution order takes priority.²⁹ If the victim later brings a civil proceeding, a defendant sentenced to restitution may not deny the essential allegations of the offense giving rise to the restitution order.³⁰

While this approach to reparation conceptualizes reparation as a sanction properly applied in a criminal setting, court-ordered reparation assumes an awkward position between punishment, measure (rehabilitative, reparative, or *sui generis*), and civil debt. Consequently, there is considerable uncertainty regarding the principles governing its administration. It is unclear, for instance, to what extent courts must ascertain a defendant’s ability to pay and tailor the compensation or restitution order accordingly. It is similarly unclear whether and to

25 See also Th. Weigend, “‘Restitution’ in den USA”, in A. Eser/G. Kaiser/K. Madlener, *supra* n. 3; L. Zedner, *supra* n. 10, at 235; for developments leading up to reform in the Netherlands see M. Groenhuijsen, “Neue Wege der Wiedergutmachung im Strafrecht der Niederlande”, in A. Eser/G. Kaiser/K. Madlener, *supra* n. 3, at 257-289, 261 *et seq.*; M. Groenhuijsen/D. van der Landen, in A. Eser/S. Walther (eds.), *Wiedergutmachung im Kriminalrecht: Internationale Perspektiven*, Vol. 1 (Freiburg, 1996), at 51 *et seq.*

26 See Th. Weigend, *supra* n. 25, at 115; H. Jung, in A. Eser/G. Kaiser/K. Madlener, *supra* n. 3, at 96; L. Zedner, *supra* n. 10, at 235; for Australia K. Warner, *supra* n. 13.

27 For the U.S. this was held by the Supreme Court in *Hughey v. U.S.*, 110 S.Ct. 1979 (1990).

28 See Th. Weigend, *supra* n. 25, at 116.

29 For the United States, USSG § 5 E.1.1., *Federal Sentencing Guidelines Manual* (1993).

30 18 U.S.C. § 3664(e)(1985).

what extent the degree of an offender's blameworthiness should be taken into account. Questions also arise with respect to bankruptcy and subsequent civil discharge of an offender as a debtor.

Combining criminal procedure and civil proceedings

Finally, another way to integrate reparation into the criminal justice process is to combine the procedures determining the state's claim to punishment and the victim's claim to reparation. There are two types of combinations: the formal one, such as the one found in the German *Adhäsionsverfahren*,³¹ which preserves the traditional separation of civil and penal functions, and another type, in which this separation is less distinct. We find this latter type, for instance, in Spain, France and other legal systems sharing the Roman law tradition, but also in the Nordic countries. In such countries, the criminal courts regularly consider a victim's right to compensation. In Spain and in Italy we even find that the civil liability for delicts is codified in the criminal code, not in the civil code.

A rapprochement between civil and criminal procedure is most obvious in the Nordic systems.^{31a} The prosecutor has a duty to *assist* the victim with his or her civil claims. Another interesting characteristic of the Nordic system is that, while the *scope* of compensation is derived from civil law principles in which material loss *and* personal injury are covered, it is possible to adjust the *amount* of compensation should full compensation be unreasonably burdensome in view of the financial circumstances or the young age of the offender. In Finland, the court can even take compensation into account as a *mitigating* factor in sentencing. Finally, in both Finland and Spain the civil claim can be tried even if an offender is not convicted on the criminal charge.

III. *Reparation and Criminal Justice: Open Questions*

This necessarily sketchy description of various concepts for the furtherance of reparation obviously raises a number of basic doctrinal questions which need to be looked at more closely.

31 §§ 403 *et seq.* StPO.

31a See J. Zila (Sweden) and T. Lappiseppälä (Finland), in A. Eser/S. Walther, *supra* n. 25, at 229 *et seq.*, 317 *et seq.*

Reparation as direct goal of the criminal justice process?

The first question is whether reparation can, or even should, be a *direct* goal of the criminal justice process.

A strong argument in favor is that reparation is fundamental to basic principles of justice. This encompasses substantive and procedural facets. In terms of substantive law, an offender's general duty to make reparation can be viewed as the flip side of the general duty not to harm, a basic tenet of natural law (*neminem laede*) firmly cast into modern-day principles of liability. The victim's specific right to reparation when harmed by crime has been incorporated in international conventions and declarations, and in national constitutions.³² On the international level, the Council of Europe in 1985 endorsed recommendations for the improvement of the rights of victims of crime, namely the right to receive restitution, within the criminal justice process.³³ In the same year, the General Assembly of the United Nations adopted a "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", which endorsed the compensation of material and immaterial damage to the victim as an essential goal in criminal justice.³⁴ But proclaiming the right to reparation is not enough. Of elementary importance is granting to victims *actual legal access* to mechanisms of justice in a timely, unbureaucratic, inexpensive and least cumbersome fashion. While neither the German Constitution nor the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁵ has expressly incorporated rights of crime victims, it can be argued that guarantees such as the protection of human dignity (Art. 1 Grundgesetz), the right to have one's case heard in a timely fashion (Art. 6 European Convention), the right to have one's privacy and family life respected

32 Some American states such as California, Michigan and Rhode Island have expressly embodied in their constitutions the victim's right to receive "restitution". See S. Hillenbrandt, "Restitution and Victims Rights in the 1980s", in A.J. Lurigio/W.G. Skogan/R.C. Davis (eds.), *Victims of Crime: Problems, Policies and Programs* (1990) 188-204, at 194.

33 Council of Europe, *Explanatory Report on the European Convention on the Compensation of Victims of Violent Crimes* (Strasbourg, 1984); Council of Europe, *The Position of the Victim in the Framework of Criminal Law and Procedure* (Strasbourg, 1985).

34 United Nations, *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (New York, 1986) 43-48.

35 Nov. 4, 1950, 213 U.N.T.S. 222.

(Art. 8 European Convention, Art. 6 Grundgesetz), as well as basic principles of government such as the pursuit of social justice and of due course of law (Art. 20 cl. 3 Grundgesetz) require that in cases in which the State prosecutes crime with the assistance of the victim, the State be obliged to recognize and protect the victim's reparation rights.

But is it possible to integrate, rather than merely coordinate, reparation and criminal justice?

To what extent can this be achieved *within* the criminal justice process itself? It is clear that the challenge of reparative justice goes beyond issues of *coordination* of claims or proceedings. The challenge of reparative justice is the *integration* of reparation into the framework of society's legal response to crime. This provokes thorny doctrinal questions with regard to the relationship between reparation and punishment,³⁶ and with regard to the original mandate of the criminal law.

In Germany, the problem has been approached mainly by examining the functional dimensions of reparation and punishment. To the extent that reparation and punishment serve the same *purposes* or *functions*, the argument goes, reparation may preempt punishment. However, this approach is weakened by the empirical complexities connected with the "functions" of punishment. Additionally, the contention that punishment

36 For English language literature specifically addressing doctrinal issues, see in particular L. Zedner, *supra* n. 10, at 228-250; E. Fattah, "From a Guilt Orientation to a Consequence Orientation", in W. Küper/J. Welp (eds.), *Beiträge zur Rechtswissenschaft, Festschrift für Walter Stree und Johannes Wessels* (Heidelberg, 1993) 771-792; A. Ashworth, "Punishment and Compensation: Victims, Offenders and the State", (1985) 6 Oxford J. of Legal Studies 86-122, as well as the already cited articles by D.W. Van Ness and A. Ashworth, *supra* n. 23. From the proliferating German discussion, see D. Frehsee, *Schadenswiedergutmachung als Instrument strafrechtlicher Sozialkontrolle* (Berlin, 1987); C. Roxin, "Die Wiedergutmachung im System der Strafzwecke", in H. Schöch (ed.), *Wiedergutmachung und Strafrecht* (München, 1987) 37-55; *Ibid.*, "Zur Wiedergutmachung als einer 'Dritten Spur' im Sanktionensystem", in *Festschrift für Jürgen Baumann* (Bielefeld, 1992) 243-254; D. Rössner, "Autonomie und Zwang im System der Strafrechtsfolgen", *ibid.*, 269-279; Th. Weigend, *Deliktsoffer und Strafverfahren* (Berlin, 1989) 532 *et seq.*; *Ibid.*, "Restitution' in den USA", *supra* n. 25, at 111-128, 126 *et seq.*; *Ibid.*, "Schadensersatz im Strafverfahren", in M.R. Will (ed.), *Schadensersatz im Strafverfahren* (Kehl a.Rh., 1990) 11-24.

and reparation are (to some extent) functionally commensurable and, therefore, potentially interchangeable, tends to repudiate the symbolic singularity of punishment. If, on the other hand, we were to conceive the “destinations” of reparation and punishment as essentially different, as Karl Binding has said,³⁷ in that reparation is destined for the reparable and punishment for the irreparable, our issue seems to hinge on the extent to which the wrong inflicted by crime can be repaired and the extent to which it is irreparable. Indeed, a concept of “reparation of crime” would have to encompass all the effects specific to crime with regard to the victim, his or her closer social environment, and the community. Given the often *immeasurable* nature of these effects, it appears unlikely that such a concept could plausibly be sustained.

A third, new approach must therefore be explored. The basic premise of this approach has been endorsed by the authors of the German “Alternativ-Entwurf Wiedergutmachung” of 1992. According to this approach, the primary and central issue is not whether reparation can fulfil the functions of punishment, but whether the furtherance of reparation conforms with the ‘basic functions’, or as I prefer to put it, the original mandate, of the criminal law.³⁸

The crucial question is, of course, what that mandate is, a question which makes sense only if a specific role of the criminal law within the legal order exists. The challenge of identifying such a role poses a methodological problem. In Germany, a clear-cut “program” for the criminal law or for criminal justice officials, from which such a specific role could be gleaned, is not to be found in statutory law. Likewise, no specific role can be safely derived from the actual structures of criminal procedure and criminal sanctions, given that these structures have undergone drastic change during the past decades (and the process of change seems to be ongoing). Neither would contrasting the ‘functions’ of criminal law with those of the civil law yield satisfactory answers: both criminal and civil law serve functions of prevention and norm-affirmation, and both the criminal law and the civil law protect “legal goods”. What remains is this: to contrast the archetypal mandates of criminal law and civil law, as discernible from the constitutive principles of the modern state.

To the extent that such analysis may yield a principled framework for the legitimacy of reparation as a task of criminal justice officials,

37 K. Binding, *Normen I* (3rd ed., Leipzig, 1916) 290.

38 See J. Baumann, *supra* n. 24, at 23.

questions of implementation arise. Could institutionalized furtherance of personal, 'voluntary' reparation by the offender be implemented without jeopardizing basic defense rights of the accused? Could the fine (which in Germany makes up more than 80% of state punishment)³⁹ be used to fulfil reparative purposes without seriously undermining its punitive functions? Given that economic reparation can often be more efficiently achieved through financial compensation by the State or by insurance funds, the more intriguing issues arise in the area of non-economic forms of reparation which require personal acts by the offender (for which, however, a more fitting term than 'reparation' should be sought). Here, the criminal justice system's potential for adopting victim-oriented 'measures' as a distinct track of measures of intervention should be explored.

To the extent that reparation is a legitimate goal of the criminal justice system, a revision of the structure of the state's responses to crime and of the functions of prosecutors and judges would be called for. Such a revision would be aimed at greater recognition of the needs of both victim and offender in coping with the effects and consequences of crime. This might lead to a kind of intervention which would better reflect both the fairness due to the offender and the justice due to the victim.

39 Cf. F. Streng, *Strafrechtliche Sanktionen* (Stuttgart, 1991) 45.