

MEDIATION IN PENAL MATTERS FOR JUVENILES IN GERMANY

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The article shows the development and legal framework of victim-offender mediation for juveniles and young adults in Germany. Based on promising results of victim-offender mediation experienced in model-projects, mediation expanded throughout the country and became legally enacted. Following the reform of the Juvenile Justice Act in 1990 (and later in the Criminal Code and the Code of Criminal Procedure), the number of victim-offender mediation projects increased even more. Today, victim-offender mediation projects have been established nationwide. Latest statistical data from the Federal Statistics on victim-offender mediation involving juveniles and young adults are presented in particular for the years 2006-2009. The findings mainly refer to information on the accused, categories of offences, initiation of victim-offender mediation cases and outcomes of the mediation process. The data show that mediation cases are most often referred by public prosecutors during preliminary proceedings as a diversionary measure. The majority of victim-offender mediation meetings result in a final agreement and have a high fulfilment rate. In overall, the implementation of victim-offender mediation shows positive results. However, there is potential to refer more cases to mediation facilities and to encourage justice officials to apply mediation even more.

Keywords: victim-offender mediation, juveniles and young adults, Germany.

1. DEVELOPMENT OF VICTIM-OFFENDER MEDIATION IN GERMANY

During the 1970s and the 1980s, discussions in criminal policy shifted towards an enhancement of victims rights. Besides improving the situation of victims in criminal proceedings, discussions also focused on the reintegration of offenders. Alternatives to sanctioning with the aim to hold offenders accountable while repairing the harm done were a central issue. Reform debates were furthermore influenced by the international restorative justice movement. In this context, victim-offender reconciliation programs emerging in North America since the 1970s inspired the development in European countries such as Germany.

Following the reform discussions, the first mediation model projects for juveniles and young adults were established in Germany from 1985 to 1989. The four projects have been implemented in the cities of Braunschweig, Reutlingen, Köln and München/Landshut.

Each of the model projects has been evaluated.¹ A few adult victim-offender mediation projects were also set up, starting from 1984. Across the country, the development of victim-offender mediation projects in general experienced a boom until the mid 1990s.²

A further survey by Dünkel *et al.* revealed that in 1994 victim-offender mediation for juveniles and young adults was available in most parts of Germany. In 88,2% of the youth welfare departments in the new federal states and in 70,1% in the old federal states mediation was delivered either only by youth welfare departments or in cooperation with private organizations, or, to a smaller extent, by private organizations.³ From 1991 to 1993, the numbers of participants in victim-offender mediation have risen from 2,073 in 1991 to 3,359 in 1992 and to 5,182 in 1993.⁴ However, most of the facilities offered mediation on an ad hoc basis. Only 21% of the facilities across Germany focused on victim-offender mediation.⁵

According to a national survey from 1996, the number of victim-offender mediation projects increased from 226 in 1992 to 368 (63%) in 1995. Regarding case numbers, an increase from 2,100 in 1989 to 5,100 in 1992 and even to 9,100 in 1995 was shown.⁶ Between 1989 and 1992, more than 100 juvenile mediation projects were established. From 1993 to 1995 the trend was declining, as 55 new facilities in juvenile law were founded. Regarding adult victim-offender mediation projects, more facilities were established from 1993 to 1995 compared to previous years.⁷

Based on the results of the national survey and further data sources such as the Federal Victim-offender statistics, Bannenberg estimated that at least 13.600 cases of victim offender mediation were conducted in Germany in 1997.⁸ According to Kilchling, about 400 organizations with an annual caseload of about 20,000 cases apply victim-offender mediation for all age categories. Out of these, about 13,000 cases implement victim-offender mediation for juveniles.⁹

2. LEGAL FRAMEWORK OF VICTIM-OFFENDER MEDIATION

The positive experiences with victim-offender mediation led to the legal implementation in juvenile and later on in adult criminal law.

In 1990, the Juvenile Justice Act (JJA) was reformed and introduced victim-offender mediation (*Täter-Opfer-Ausgleich*) both as diversionary and educational

¹ For an overview see Bannenberg 1993, p. 91 ff, Dölling/Henninger 1998, p. 203 ff.

² See Schreckling 1991, p. 13, Netzig/Wandrey 1997, p. 215.

³ Dünkel/Geng/Kirstein 1998, p. 167 ff.

⁴ *Ibid.*, p. 171.

⁵ *Ibid.*, p. 178 ff.

⁶ Wandrey/Weitekamp 1998, p. 130 ff.

⁷ *Ibid.*, p. 130-131.

⁸ Bannenberg 2000, p. 263.

⁹ Kilchling 2005, cited in Doak/O'Mahony 2011, p. 1700.

measures. The Juvenile Justice Act, literally translated as Juvenile Courts Act, came into force in 1923 and is generally applicable to juveniles aged 14 to 17 years. The law is also applicable to young adults aged 18 to 20 years under the condition that the personality in terms of the moral and intellectual development is similar to a juvenile, or that the act committed indicates a youth misconduct (section 105 I JJA).

Victim-offender mediation is explicitly mentioned in different sections of the JJA. The act contains the conditions for referral of a case to victim-offender mediation and points out the legal consequences. The legislator decided for a wide approach and considered it sufficient if there is an attempt by the accused to reconcile with the injured person.

This provision is based on the regulation of section 46 II Criminal Code, which was introduced through the Victim's Protection Act in 1986. The section provides that the offenders' attempt to achieve a mediated agreement with the injured person had to be taken into account when establishing the sentence. This regulation underlines that serious efforts towards reconciliation shall be taken into account even if the victims does not agree to participate in a mediation.¹⁰

Regarding mediation as part of the diversion process, the legislator provided in section 45 and 47 JJA for the possibilities to dismiss the case or waive the penalty. According to the principle of subsidiarity, milder measures such as diversionary measures are prioritized. In appropriate cases, they should be preferred to formal sanctions. The regulations are based on the principle of voluntariness of juvenile accused and injured person.

According to section 45 II JJA, the juvenile public prosecutor shall suspend the prosecution in case the juvenile attempts to achieve reconciliation with the injured person, and if neither the participation of the judge nor the bringing of charges is necessary. The attempt towards reconciliation is seen as an equivalent to an educational measure.

After charges have been laid, according to section 47 I no. 2 JJA, the juvenile judge may suspend the proceedings with the consent of the public prosecutor taking into account the efforts of the young offender towards victim-offender mediation. The young offender must within a period of 6 months meet the measure.

Beside the possibility to divert cases, the legislator introduced victim-offender mediation in 1990 as part of an order in section 10 I no. 7 JJA. The order is categorized as an educational measure, which in general aim at removing social deviance by educational influence.¹¹ According to this section, the judge may instruct the juvenile to attempt to achieve a settlement with the injured person.

Victim-offender mediation may also be ordered as part of a disciplinary measure, as set out in section 15 I no. 1 JJA. The section explicitly refers to restitution and was enacted already in 1953 in the JJA. Besides financial restitution,

¹⁰ BT-Drucksache 11/5829, p. 17.

¹¹ Rössner/Klaus 1998, p. 114.

also unremunerated work may fulfil the restitution order¹² and victim-offender mediation can be taken into account.

The law further provides that the judge may apply during the probationary period an order according to section 10 or section 15 to exercise a supervisory influence on the youth's conduct (section 23 I). Victim-offender mediation in form of an educational or disciplinary measure can be applied alongside the probation order.

Both measures - section 10 I no. 7 and section 15 no. 1 – have been criticized because the order to achieve a mediated agreement is not in accordance with the principle of voluntariness and with the participation rights of victims.¹³

Further, when deciding upon the sentence, victim-offender mediation shall be taken into account and the sentence be mitigated. The idea of mitigating the sentence as stipulated in the Criminal Code (section 46a) following an attempt by the offender to achieve reconciliation, has to be transferred into juvenile criminal law.¹⁴

The law does not provide for a restriction on offences. Theoretically, victim-offender mediation is possible for all categories of offences. As pointed out in the motivation on the reform of the JJA, the provisions including victim-offender mediation are especially applicable for minor and medium severity offences.¹⁵ Petty offences are excluded as the principle of subsidiarity provides that misdemeanors shall be diverted without any educational measure. Further, the presence of a mediator is not legally required. In principle, parties can reach independently an agreement.

Victim-offender mediation is possible both in juvenile and adult law at all stages of the criminal proceedings.¹⁶ The law provides for the possibilities that mediation can be conducted at an early stage of the preliminary proceedings, after charges were filed, during and after the main proceedings. According to section 155a Code of Criminal Procedure, in conjunction with section 2 II JJA, judges and public prosecutors have to assess at every stage of the proceedings whether victim-offender mediation is possible and shall encourage the use of mediation in appropriate cases. The law specifies that the agreement may not be accepted against the expressed will of the injured person.

As regards legal reforms in the field of mediation, a draft Law to promote mediation and other forms of conflict resolution¹⁷ contains provisions on the definition of mediation, role and responsibilities of mediators and general duties to (ongoing) training. The law serves to implement the EU Directive on certain aspects of mediation in civil and commercial matters and will enter into force in

¹² Guideline 1 to section 15 JJA.

¹³ See among others Rössner/Klaus, p. 114-116.

¹⁴ Rössner/Klaus 1998, p. 117.

¹⁵ See BT-Drucksache 11/5829, p. 11.

¹⁶ Guideline 4 to § 10 JJA.

¹⁷ BT-Drucksache 17/5335.

Germany soon. As a general law, it is applicable to all fields of mediation. The law affects other laws, but has no impact on criminal procedure law or juvenile criminal law, because victim-offender mediation is already adequately regulated.

3. STATISTICAL DATA ON VICTIM-OFFENDER MEDIATION

Several surveys and statistics include data on victim-offender mediation in Germany, but there is no uniform documentation system in Germany to collect data on all victim-offender mediation cases across the country. Most cases including victim-offender mediation are being diverted, and there exist no statistics that explicitly give information about the number of these cases.

The Statistics on the administration of justice (*Rechtspflegestatistik*) provide data on the number of adult convicted and persons who have been ordered to achieve a mediated agreement with the injured person as part of an educational or disciplinary measure under the JJA. According to these statistics, the number of decisions including victim-offender mediation increased from 1.134, thereof 1.012 under the JJA, in 2004 with slight oscillations to 3.695, thereof 2.664 under the JJA, in 2009.¹⁸ The development during recent years shows that judges increasingly apply the order to attempt to achieve a mediated agreement with the injured person.

Federal Statistics on victim-offender-mediation

The Federal Statistics include data on victim-offender mediation in Germany since 1993, based on the work of the Victim-offender mediation Research Group.¹⁹ Among the aims was to show the continuing development of victim-offender mediation in Germany. Since its beginning, many ten thousands of cases have been documented. The statistics are the most comprehensive data collection on victim-offender mediation in Germany, providing for detailed information on victims, offenders, initiators of victim-offender mediation cases, results, categories of offences, fulfilment of the agreements, etc.

Facilities do voluntarily provide for data of victim-offender mediation, therefore the statistics are not nationwide representative. However, no other statistics in Germany comprise such in- depth information on the above mentioned aspects over a longer period.

In the following, selected findings of the Victim-offender mediation Statistics regarding juvenile and young adults will be presented.

¹⁸ Statistisches Bundesamt, Rechtspflege, Ausgewählte Zahlen für die Rechtspflege 2005-2010, p. 75 (2005-2007), p. 89 (2008-2010).

¹⁹ The Victim-offender mediation Research Group consists of professors of departments and institutes of criminology at the universities of Bremen (A. Hartmann), Gießen (B. Bannenberg), Heidelberg (D. Dölling), Konstanz (W. Heinz), Marburg (D. Rössner) and Tübingen (H.-J. Kerner, E. Weitekamp).

Victim-offender mediation is to a large extent delivered by specialized agencies. From 2006 to 2009 in average 84.5% of all facilities were specialized on victim-offender mediation. At the beginning of the 1990s, the majority of mediation facilities were integrated (not specialized on mediation, case workers may fulfil several tasks in the same case). In recent years, the trend has been towards greater specialization.²⁰ Partly specialized agencies, where case workers have other responsibilities than mediation, and integrated facilities, have a smaller caseload. Most mediation facilities run independently by private organizations. Youth welfare departments or youth justice agencies implement mediation to a smaller part.

Table 1

Age structure of the accused 2002-2009

	2002	2003	2004	2005	2006	2007	2008	2009
Juveniles and young adults	54.2%	45.1%	46.3%	42.1%	60.6%	49.9%	46.9%	40.1%
Adults	45.8%	54.9%	53.7%	57.9%	39.4%	50.1%	53.1%	59.9%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Kerner/Eikens/Hartmann 2011, p.10.

Regarding the age structure of the accused (Table 1), the share of juvenile and young adult accused decreased in recent years and was lower than the share of adult offenders. Only in 2006 the share of juveniles and young adults was higher than those of adult offenders.

From 2006 to 2008, the age group of 14-to 20-year-olds made up the largest proportion. In 2009 for the first time more 21-to 40-year-old accused were involved.²¹

Compared to the age distribution of the injured persons, from 2007 to 2009 the largest share among the victims is the age group of 21-to 40-year-olds. In 2006, juveniles and young adults aged 14 to 20 years made up the greatest proportion among victims. According to the statistics, most of the accused committed offences at the same age group.²² About two thirds of all accused stated that they knew the victim either well or volatile, only one third in average reported that they did not know each other.²³

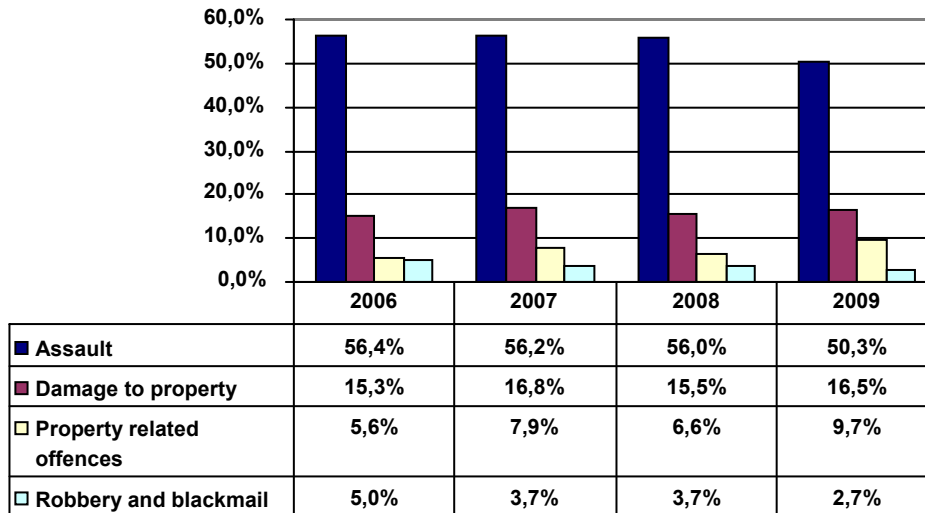
²⁰ Kerner/Eikens/Hartmann 2011, p. 7-8.

²¹ Kerner/Eikens/Hartmann 2011, p. 22.

²² Ibid., p. 18 ff.

²³ Kerner/Eikens/Hartmann 2011, p. 29.

Table 2

Main categories of offences²⁴ 2006-2009 – juvenile and young adults

Source: Kerner/Eikens/Hartmann 2011, p.28.

More than half of all offences are made up by assault, followed by damage to property and other property related offences²⁵. While the proportion of damage to property offences has remained approximately the same, the share of property related offences increased from 2006 to 2009. Robbery and blackmail offences were declining over recent years.

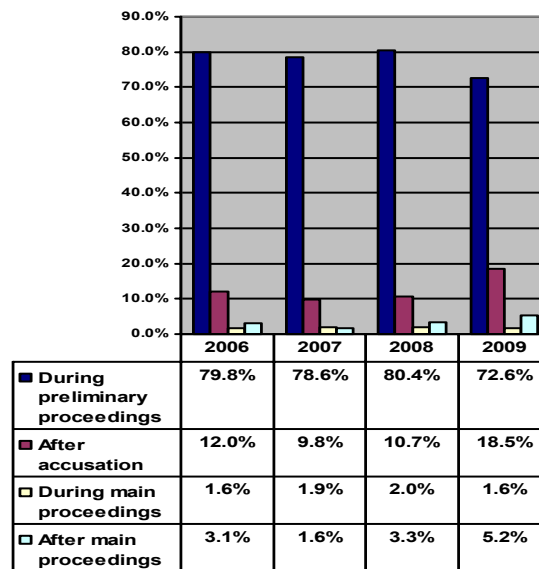
The overwhelming part of the cases were referred during the preliminary proceedings, on average 77.9%. The referral during this early stage shows that most cases are being diverted. Less cases, 12.8%, were referred after charges have been laid, after main proceedings (3.3%) and during main proceedings (1.8%).

²⁴ The data are based on the number of offences indicated by the accused and not on the number of the accused. The accused had the possibility to indicate more than one offence.

²⁵ Other property related offences include theft, fraud, embezzlement, breach of trust, concealment, etc.

Table 3

Case referrals in the stages of the proceedings 2006-2009 – juveniles and young adults



Source: Kerner/Eikens/Hartmann 2011, p. 114-115.

Table 4

Initiators of case referrals 2002-2009 – juveniles and young adults

	2002	2003	2004	2005	2006	2007	2008	2009
Public prosecutor	80.7%	64.0%	58.4%	66.2%	57.6%	66.2%	59.4%	60.8%
Youth court services	6.6%	16.7%	13.7%	9.3%	11.6%	14.6%	9.5%	14.4%
Police	3.1%	5.2%	14.3%	12.8%	15.7%	14.1%	14.8%	7.0%
Judge	1.6%	2.3%	4.2%	3.6%	5.9%	2.4%	5.8%	7.0%
Offender	4.3%	2.5%	1.5%	1.0%	1.4%	1.0%	2.4%	6.7%
Victim	0.9%	1.0%	0.5%	0.5%	1.4%	0.3%	0.3%	0.6%
Probation services	0.2%	0.3%	0.4%	0.3%	0.2%	0.3%	–	0.2%
Court services	0.7%	0.2%	0.1%	–	–	–	–	–
Other	1.8	7.9%	7.0%	6.1%	6.2%	1.1%	7.7%	3.4%

Source: Kerner/Eikens/Hartmann 2011, p. 120-121.

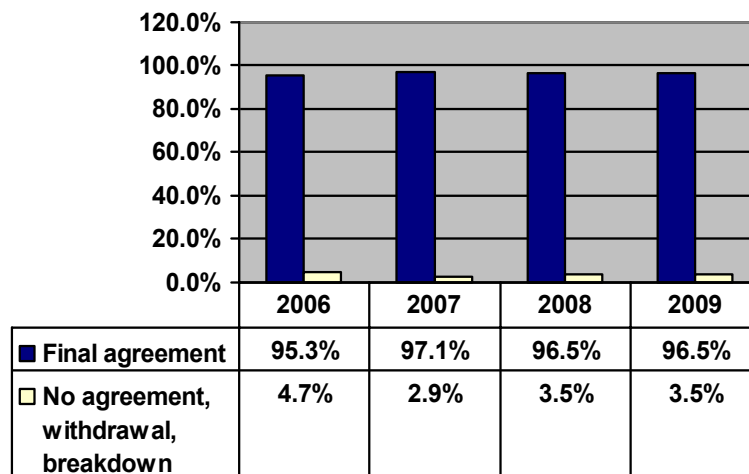
As Table 4 shows, most of victim-offender mediation cases were initiated by the public prosecutor (from 2002 to 2009 on average 64.2%), which corresponds to the findings that most cases are being diverted during the preliminary proceedings.

Further, youth court services (12.1%) and police (10.1%) proposed victim-offender mediation to the public prosecutor. To a smaller extent, mediation was initiated by judges (4.1%), by the accused (2.6%), the victim (0.7%) or probation services (0.2%).

During the preliminary proceedings, only the public prosecutor decides upon the implementation of mediation. In practice, public prosecutors often select the cases after consultation with the police and the youth court services. After the bill of indictment has been submitted, the decision to conduct victim-offender mediation lays in the discretion of the judge. In case the judge decides to refer a case to a mediation facility, the public prosecutor has to consent to this measure.

Table 5

Results of victim offender mediation 2006-2009 – juveniles and young adults



Source: Kerner/Eikens/Hartmann 2011, p. 173

Regarding the willingness to participate in a victim-offender mediation, for the period from 2006 to 2009, on average 70.4% of the injured juvenile and young adults agreed to participate in mediation. The willingness to participate was even higher among juvenile and young adult offenders: on average 91.0 % agreed to take part in victim-offender mediation. Compared to previous years, a slight decline among injured juveniles and young adults regarding the acceptance to participate in mediation can be stated.²⁶

In terms of the outcome of the victim-offender mediation process (Table 5), the vast majority of mediated cases resulted in a final, consensual agreement between the young accused and the injured person. From 2006 to 2009, on average 96.4 % reached during mediation a consensus. Compared to previous years, a slight

²⁶ Kerner/Eikens/Hartmann 2011, p. 151 ff.

increase in the proportion of final agreements can be found. The share among juveniles and young adults is slightly higher than among adults, where on average 90.0% of mediation procedures resulted in a final and mutual agreement.²⁷

The content of the mediation outcome included several forms of agreement. On average, from 2006 to 2009 can be found: 83.5% apologies, 23.4% financial compensation for material damage, 9.4% financial compensation for immaterial damage, 9.3% services for the victim, 4.8% gifts, 2.7% joint activities with the injured person, 1.7% restitution of the goods and other forms.²⁸

As regards the fulfilment of the settlements between accused and injured person, 89.7% of the agreements were (partially or completely) fulfilled, 5.5% of the cases were not yet completed and only a small share of 4.7% of cases has not been adequately been fulfilled.²⁹

4. CONCLUSION AND CHALLENGES

The data of the Federal Statistics on victim-offender mediation reveal positive results regarding mediation outcomes and high levels of willingness to participate in a mediation process, in particular among the accused. The very high proportion of consensual solutions demonstrates that the parties widely accept mediation as a way of conflict resolution. This can be also seen in the fact that almost all young offenders comply with the requirements of the mediation sessions.

The promising results encourage the further use of victim-offender mediation as an alternative conflict resolution method. In appropriate cases, mediation should be preferred to formal sanctions, as it offers the opportunity for offenders to take responsibility and repair the harm done by the offence and to actively involve victims in the process of reconciliation.

In practice, there is more potential to implement victim-offender mediation in Germany. Although legal provisions allow for a relatively wide use of diversionary measures such as mediation and to take victim-offender mediation into account at all stages of the proceedings, public prosecutors and judges do not tap the full potential of this measure. Only a small part of public prosecutors and judges refer the majority of the cases.³⁰ Awareness-enhancing activities among all justice professionals including police and lawyers would encourage the wider use of mediation as a constructive form of conflict resolution. Improved inter-institutional cooperation in all regions would further promote the application of mediation across the country.

²⁷ See *ibid.*, p. 174.

²⁸ See *ibid.*, p. 182-183.

²⁹ See *ibid.*, p. 188-189.

³⁰ See Bannenberg 2000, p. 270.

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