Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Victim-Offender Mediation Between Syrian Refugees

Question(s) at stake:

Whether a mediation process carried out according to norms of a cultural minority can qualify as a legitimate form of reconciliation within the meaning of Section 46 a of the German Penal Code.

Outcome of the ruling:

A mediation process carried out according to norms of a cultural minority can qualify as a legitimate form of reconciliation within the meaning of Section 46 a of the German Penal Code if all the requirements of German law are fulfilled.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Alternative Dispute Resolution (ADR)
- Bodily harm
- Mitigating circumstances

Tag(s):

- Private mediation
- Victim-offender mediation
- Syrian refugees
- Volutariness of the victim

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Germany

Official citation:

Regional Court Freiburg, 10th Small Criminal Chamber, Judgment of 18 June 2019, 63/17 10 Ns 130 Js 3000/17 (LG Freiburg 10. Kleine Strafkammer, Urteil vom 18.Juni 2019, 63/17 10 Ns 130 Js 3000/17)

Link to the decision:

http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=28546

ECLI:

ECLI:DE:LGFREIB:2019:0618.63.17.10NS130JS30.00

Date:

18 June 2019

Jurisdiction / Court / Chamber:

Regional Court Freiburg, 10th Small Criminal Chamber

Remedy / Procedural stage:

Appeal on points of fact and law

Previous stages:

- Local Court Freiburg (Amtsgericht), Judgment of 20 September 2017, 26 Cs 130 Js 3000/17

Subsequent stages:

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Branches / Areas of law:

Criminal law

Facts:

The crime took place among young Syrian refugees. On New Year's Eve 2017, the defendant hit the victim in the head with a glass bottle with such force that the bottle broke, leaving the victim with a bleeding head wound several centimetres long. The defendant appealed against the imposed summary penalty order (*Strafbefehl*) and against the subsequent judgement of the local court. His appeal was limited to the amount of the punishment, especially in light of a mediation procedure that had taken place after the offence.

The Regional Court re-examined the facts and in particular found the following with regard to the events that occurred after the commission of the crime: Some time after the crime, the accused was told by a third person that the victim was planning to attack him with a knife. It could not be established whether this was to avenge the initial assault or whether the victim had demanded a payment of €500 as compensation. Other refugees, who knew both the perpetrator and the victim learned about this incident, wanted to mediate between the two. They turned to the uncle of the victim, an authority figure for him. The two had fled Syria together during the Syrian Civil War. In the next few weeks, the mediators and the uncle met twice. At one meeting, probably the second one, the perpetrator and the victim were also present. It was agreed that the offender would apologize to the victim with a handshake and pay him €500. This happened before eye witnesses, and the mediators and the uncle thus considered the conflict to be settled.

Ruling:

Apart from the aspects that were decisive for the amount of the penalty, the court discussed in particular the reconciliation process. What mattered was whether this private mediation fulfilled the requirements of victim-offender mediation according to Section 46a of the GPC. The court first examined whether communication had taken place between the parties involved and answered in the affirmative because the accused had accepted responsibility for the offence to the injured party, had apologized to him, and had paid him €500. The fact that the perpetrator possibly acted out of fear of the injured party or possibly also

considered the latter to be responsible, was declared immaterial by the court. What was significant, however, was whether the victim had accepted the apology voluntarily. On this matter, the court explained that the victim was of age and knew what the process meant. The fact that his uncle had possibly influenced him to participate in the perpetrator-victim settlement would not have changed anything about the voluntary nature of his participation. There were no other indications that could cast doubt on the voluntary nature of the victim's involvement in the mediation. The court also noted that it was not necessary for an official body to participate in the victim-offender mediation, it was possible for other refugees that shared the ideas of their culture to act as mediators in a similar way. Finally, the court emphasized that this was not parallel justice, without elaborating on what it understood parallel justice to be. Since all requirements for a victim-offender mediation had been fulfilled, the perpetrator's sentence was reduced in the application of Section 46a of the German Penal Code.

Main quotations on cultural or religious diversity:

- "The defendant accepted responsibility for the offence during the mediation proceedings. It is true that he is of the opinion that the injured party contributed to the commission of the offence through his behaviour and possibly also deserved the reaction of the accused. However, especially in the culture of the defendant and the injured party, it has a strong symbolic meaning of acknowledging one's own guilt that the accused nevertheless apologized to the injured party in front of witnesses and shook hands." (para. 27)
- "The mediation event thus fulfils all the requirements for a victim-offender mediation according to Section 46a no. 1 of the [German] Criminal Code. The fact that it was not carried out by a victim-offender mediation office, but by other refugees from the Arab culture and in accordance with their ideas of mediation, does not change this. In particular, this is not to be seen as a form of parallel justice." (para. 32)

Main legal texts quoted in the decision:

- Section 46 a, 223. 1, 224 para. 1 no. 2 German Penal Code

Cases cited in the decision:

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Commentary

Victim-Offender Mediation Between Syrian Refugees

Is a mediation among Syrians in criminal cases accepted by a German court? It is noteworthy that the court considered it advisable to explicitly state that this was not a case of (inadmissible) parallel justice. Parallel justice, which has recently received much public attention, attempts to keep the judiciary out of the punishment of even the most serious crimes and to do so by all means, including criminal ones, such as threatening victims and witnesses. This system of justice also seeks to settle the conflict instead of the state without any guarantees of the rule of law (see, e.g., Rohe 2019: 306-309). In the present case, however, we are dealing with a procedure provided for in the German criminal law.

Victim-offender mediation was introduced in German juvenile criminal law in 1990. It was also adopted in adult criminal law in 1994 in Section 49a of the GPC. In victim-offender mediation, although out-of-court settlements of conflicts are sought, there remains cooperation with the judiciary: the result is presented to the court and if all the legal requirements are met in the victim-offender mediation, the court will take it into account in its sentencing. It serves the purpose of pacification after a conflict in a communicative process between offender and victim, which must be aimed at comprehensively compensating for the consequences caused by the offense (LK-Schneider, § 46a, recital 2.). It can be used for all criminal offenses in which such a communicative process may occur. It presupposes that the offender admits his guilt and makes amends and that the victim accepts this arrangement of his own free will. Victim-offender mediation is predominantly used for minor offenses. However, it cannot be ruled out that in rare cases, it may even be used for serious crimes such as robbery or

sex crimes. However, it is excluded in the case of homicides, because here no communicative process between the offender and the victim is possible (Federal Court of Justice, decision of June 6, 2018, 4 StR 144/18). The offender must admit his guilt, which usually involves a confession, and he or she must also make reparations, as further regulated in Section 49 of the German Penal Code. The victim must be willing to accept the offered excuse and reparations as peacemaking compensation. In doing so, however, he or she must act entirely voluntarily and must not be subject to any pressure that would impair his or her freedom of choice. As a rule, an official reconciliation body acts as a mediator. This is done so that the weaker party, usually the victim, is not put under pressure during such negotiations. However, this is not laid down by law, and case law, as in this case, accepts mediations that have come about without the involvement of such a body. This has been criticized in academia on various occasions, because it could harm the position of the weaker party (see, e.g., Meier 2015: 490). If a victim-offender mediation has been concluded, the court may mitigate the penalty in accordance with Section 49 of the Criminal Code and, in the case of minor offenses for which the penalty does not exceed one year in prison or 360 daily fines, waive the penalty entirely. In the present case, the court affirmed the existence of all necessary conditions for an effective victim-offender mediation according to German law. The offender’s inner reservations and the fact that the victim’s uncle may have influenced him to accept the victim-offender mediation (as described in more detail above) were not so strong in the eyes of the court as to preclude the offender’s confession of his crime and the victim’s will to accept the compensation. In particular it accepted the role of the Syrian mediators as conciliators and a procedure in accordance with their traditions. When the Federal Court of Justice recently overturned a judgement involving, among other things, mediation between Afghan families, it was because the requirement of comprehensive compensation for the damage had not been met, but not because of the actors in the mediation and the procedure in accordance with their cultural traditions (BGH 22.5.2019, 2 St R 203/18).

Literature related to the main issue(s) at stake:

General legal literature on the topic that may not directly be connected with the case

- Schneider, Ursula. 2020. “§ 46a”. In: Rissing-van Saan, Ruth, et al. *Leipziger Kommentar*. 13. ed. Berlin/Boston: De Gruyter.
- Meier, Bernd-Dieter. 2015. “Täter-Opfer-Ausgleich und Schadenswiedergutmachung im Strafrecht: Bestandsaufnahme zwanzig Jahre nach der Einführung von § 46a StGB”. *Juristenzeitung* 70 (10). Mohr Siebeck GmbH & Co. KG: 488–494.
- Richter, Natalie. 2014. *Täter-Opfer-Ausgleich und Schadenswiedergutmachung im Rahmen von § 46a StGB: eine Problemanalyse unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung seit 1995*. Berlin: Duncker & Humblot.
- Rohe, Mathias. 2019. “Paralleljustiz – Herausforderung für den Rechtsstaat“. *Deutsche Richterzeitung* 97: 306–309.

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