

THE VICTIM IN CRIMINAL PROCEEDINGS: A SYSTEMATIC PORTRAYAL OF VICTIM PROTECTION UNDER GERMAN CRIMINAL PROCEDURE LAW

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I. PART TWO: DAMAGE COMPENSATION AND VICTIMS' ASSISTANCE

Victimological studies show that, contrary to a broadly held public view, the crime victim's need for punishment is usually far removed from motives of revenge. Rather, the need for reparations, especially in its pecuniary dimension, generally plays a very large role.¹ The following more closely examines which possibilities for material and immaterial damage compensation are allowed under German criminal procedure law and in which ways victims can also obtain financial and psychological assistance outside of criminal proceedings.

A. Material Compensation from the Offender

Damage compensation claims based on damage arising from criminal offences generally must be asserted by victims under civil law jurisdiction (§ 823 subsections (1) and (2) German Civil Code *Bürgerlichesgesetzbuch*). Particularly in regard to the burdens of presentation and of proof, civil law proceedings and criminal law proceedings are subject to different requirements. This may, for example, lead to the situation that a defendant is convicted of having committed bodily harm, but a civil law claim for damage compensation against him cannot be enforced. Judicial practice shows that it is very difficult to communicate the artificial separation of one matter into criminal law and civil law aspects to crime victims. However, criminal proceedings also provide several possibilities for taking account of victims' civil law claims.

1. Compensation Prior to Filing Criminal Charges

As early as the investigation proceedings there is a possibility for inducing the accused to redress the damage caused to the victim. Pursuant to § 153a subsection (1) sentence 2 no. 1 German Criminal Procedure Code (*Strafprozessordnung*; hereinafter cited as "StPO"), the public prosecution office can dispense with the investigation proceedings with the agreement of the accused if he makes certain payments in reparation for the damage caused by the offence. This payment may also be paid to the victim of the crime. In the case of serious offences, the consent of the court at which the charges must be filed is required (§ 153a subsection (1) sentences 1 and 7 in conjunction with § 153 subsection (1) sentence 2 StPO). The provision is one of the "discretionary decisions" under criminal procedure law, which moderate the strict rule of compulsory prosecution derived from the principle of legality. Dispensing with the proceedings based on conditions generally is not of inconsiderable importance in practice. About half as many proceedings are concluded in this way by the public prosecution office as through the filing of charges.² The development of the statistics on the conclusion of cases in the past years clearly shows that the filing of charges is increasingly being replaced by dispensing with the proceedings based upon the imposition of conditions. Nevertheless, the provision especially relevant to the interests of victim protection, § 153a subsection (1) sentence 2 no. 1 StPO, is only unsatisfactorily used by the public prosecution offices.³ This may be connected to the fact that the provision explicitly requires taking the civil law duty of damage compensation into account. In practice, money conditions are often paid into the state treasury (§ 153a subsection (1) sentence 2 no. 2 StPO), whereby in addition to the legal aspects mentioned, fiscal aspects and the simpler administration of this approach is also decisive.

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¹ *Kilchling*, Opferschutz und der Strafanspruch des Staates – Ein Widerspruch? NSTZ 2002, 57, 62; *Kilchling*, Empirische Erkenntnisse aus Kriminologie und Viktimologie zur Lage von Opfern, DVJJ-Journal 2002, 14 with additional citations; Federal Parliament (Bundestag) Printed Matter 15/814, p. 6 with additional citations.

² Source: Federal Statistical Office, Geschäftsentwicklung bei Gerichten und Staatsanwaltschaften seit 1998 (status: 23 January 2004), no. 4.

³ Cf. *Schöch*, Expert Opinion C of the 59th German Legal Conference (*Deutscher Juristentag*), p. 57 fn. 26.

In addition, the option of dispensing with proceedings pursuant to § 153a StPO only exists in regard to less serious crimes, not to crimes for which the minimum possible sentence is imprisonment of one year or more (§ 12 subsection (1) German Criminal Code (*Strafgesetzbuch*; hereinafter cited as “StGB”). This is different in the area of juvenile law. Pursuant to § 45 subsection (2) of the Juvenile Court Act (*Jugendgerichtsgesetz*; hereinafter cited as “JGG”), the public prosecutor can refrain from prosecuting juvenile offenders when an educational measure has already been implemented or initiated and he does not believe that participation of a judge is necessary. Pursuant to sentence 2 of the provision, efforts by the juvenile to achieve a settlement with the victim are equal to an educational measure. This provision, the area of application of which is not limited to less serious crimes, allows for a variety of measures that enable damage compensation for the victim. Payment of a settlement can take place not only by the payment of money, but also through the performance of other services for the victim, e.g., assistance services. The flexible area of application of this standard corresponds to the fundamental idea that juvenile criminal law should have an educational influence over the juvenile offender.⁴ In practice, the provision has significant importance. Approximately 45% of all criminal proceedings against juveniles are concluded in accordance with this provision.⁵

Additionally German criminal procedure law knows the institution of recovery assistance as a means to help victims’ interests prior to the filing of criminal charges. This legal institution, which is set forth in §§ 111b through 111p StPO allows the victim to have assets that derive from the offence secured by the state for a certain period of time during which the victim may obtain a civil law claim against the offender. At the moment § 111i StPO allows the seizure of the assets for a period of three months after the conviction of the offender, which is, with regard to the average duration of a civil law suit, not a long time. Through the draft of a law to increase recovery assistance, this period is intended to be prolonged to three years.

2. Compensation in the Main Proceeding

It is also possible to dispense with the proceedings on the condition of the provision of reparation payments or performance of services after the public charges have been filed by the court with the agreement of the public prosecution office. The decisive standards for this are in § 153a subsection (2) StPO and § 47 subsection (1) no. 2 JGG. At this stage of the proceedings as well, such practice has significant importance. Approximately 15% of all proceedings where public charges have been filed are concluded in this way, which, however, is not a statement about corresponding satisfaction of victims’ interests.⁶

In addition, the provisions in §§ 403 through 406c StPO deserve particular attention. These rules govern the assertion of civil law damage compensation claims by the victim in the context of the criminal proceedings. In contrast to the basic separation of criminal and civil law jurisdiction, pursuant to these provisions the victim may be awarded damage compensation in the criminal proceedings. This is known as an “adhesion proceeding”. The prerequisite therefore is a well-founded application by the victim in which the nature and the reason for the damage compensation claim or claim for return is set forth in detail (§ 404 subsection (1) StPO). However, the amount of the damage compensation can be placed within the discretion of the court. If the defendant is convicted of the crime, the court shall grant the application for compensation in its judgment (§ 406 subsection (1) sentence 1 StPO). As an alternative, a settlement between the defendant and the victim may be concluded, which will be incorporated into the court protocol (§ 405 StPO). Outside of the main proceeding, that is, during the course of summary proceedings without a main proceeding, implementation of an adhesion proceeding is not admissible.⁷ Pursuant to the Rules for Criminal Proceedings and Proceedings on Regulatory Fines (*Richtlinien für das Straf- und Bußgeldverfahren*; hereinafter cited as “RiStBV”) No. 173, the public prosecutor is to inform the victim of the possibility of asserting a claim for compensation pursuant to §§ 403 et seq. StPO.

Despite the many benefits contained in this proceeding – particularly, the avoidance of a contradictory

⁴ Cf. e.g. the Conference Report (*Tagungsbericht*) of the 64th German Legal Conference, during which the special significance of the pedagogical goal in juvenile criminal law was confirmed, JZ 2003, 190.

⁵ Source: First Periodical Report on Crime and Crime Control in Germany, p. 353.

⁶ Source: Federal Statistical Office (fn. 2), no. 2.3.

⁷ In detail and in favour of the admissibility of victim compensation in summary punishment proceedings: *Sommerfeld/Guhra*, Zur Entschädigung des Verletzten im Verfahren bei Strafbefehlen, NSz 2004, 420.

judgment, the swift attainment of compensation for the victim, and the timely establishment of legal peace⁸ – its significance in practice is small. The frequency of use of adhesion proceedings is only about 0.5% of concluded criminal proceedings.⁹ Adhesion proceedings are often viewed by practitioners who specialize in criminal law as out of place in the criminal proceedings. In the end, judgments in adhesion proceedings contain an additional source of potential mistake that could provide the basis for an appeal. The gathering of additionally necessary evidence for the establishment of the scope of damage may also lead to considerable delays in the proceedings. Through the Victims' Rights Reform Act of 2004, amendments were incorporated into §§ 405, 406, and 406a StPO through which adhesion proceedings should gain more importance in the future.¹⁰ Whether this will result in a revival of adhesion proceedings, however, is doubtful given the fundamental reservations against this type of proceeding in practice.¹¹

3. Compensation in the Framework of Execution of a Sentence

Obtaining equalization payments for the victim can also be encouraged by the court through the formulation of the sentence. The suspension of a sentence of imprisonment on probation with the condition of making reparations for the damage caused by the offence has significant practical meaning here (§ 56, 56b subsection (2) sentence 1 no. 1 StGB). The suspension of a sentence on probation is not, contrary to how it is often understood by the public, a “second class acquittal”, but rather, a special formulation of the execution of a sentence of imprisonment, which may be associated with significant limitations on the convicted person. Nevertheless, this manner of proceeding is usually advantageous to the defendant because his willingness to make damage reparations within the context of the assessment of the punishment and the preparation of the criminal prognosis necessary for suspension of the sentence can be taken into account in his favour and the money paid can be setoff against civil law claims by the aggrieved person, so that there is not “double” payment. For the victim this proceeding has the advantage that the fulfilment of his/her claim for compensation or pain and suffering is furthered by the “Damocles sword” of the threatened revocation of probation. This form of proceeding is often the only possibility for the victim to obtain compensation.

Example: A defendant is sentenced to imprisonment of six months because for three years he did not make any support payments for his minor child who lives with his ex-wife. The court suspended the sentence on probation and imposed the condition that the convicted person must pay the overdue support payments and timely make future payments. In this way, the convicted person can continue his gainful employment and pay the support.

If the convicted person violates a condition imposed by the court, this can lead to revocation of the suspension of sentence (§ 56f subsection (1) sentence 1 no. 3 StGB). An obstacle to the application of these provisions for the satisfaction of victim interests here also lies in the fact that in the assessment of the condition the civil law claims are to be taken into account.¹²

If a sentence of imprisonment is not suspended on probation, but rather, is executed upon, prisoners usually have very little chance to pay material compensation to the victim. At any rate prisoners who work in prison receive remuneration (§ 43 Prison Act; *Strafvollzugsgesetz*; hereinafter cited as “StVollzG”). Pursuant to § 49 subsection (1) StVollzG, upon application of the prisoner for the fulfilment of a statutory maintenance obligation a maintenance amount is to be paid to the entitled person from this remuneration (cf. also § 73 StVollzG). In addition, in preparation of his release the prisoner is to be counselled in organizing his financial affairs (§ 74 sentence 1 StVollzG). This particularly includes counselling regarding damage compensation claims by the victim. In order to secure the satisfaction of their claims, victims may also work towards a resocialization fund being involved by the prison. This fund pays the instalment amounts that have to be paid by the prisoner pursuant to a binding agreement directly to the entitled victim.¹³

⁸ Summary: *Brokamp*, Das Adhäsionsverfahren – Geschichte und Reform (1990), pp. 155 et seq.

⁹ Cf. Bundesrat Printed Matter 246/89; Federal Parliament (Bundestag) Printed Matter 15/814, p. 9.

¹⁰ Detail: *Dallmeyer*, Das Adhäsionsverfahren nach der Opferrechtsreform, JuS 2005, 327 et seq.

¹¹ Likewise: *Hilger*, Über das Opferrechtsreformgesetz, GA 2004, 478, 485; *Dallmeyer* (fn. 10), 330.

¹² *Kintzi*, Verbesserung des Opferschutzes im Strafverfahren, DRiZ 1998, 65, 70.

¹³ Cf. also *Kerner*, Opferrechte/Opferpflichten. Ein Überblick über die Stellung der durch die Straftaten Verletzten im Strafverfahren seit Inkrafttreten des Zeugenschutzgesetzes, 2nd Ed. 1992, p. 83.

Finally, in the case of suspension of the remainder of imprisonment on probation pursuant to § 57 subsection (3) in conjunction with § 56b subsection (2) sentence 1 no. 1 StGB, there is also the possibility of imposing reparation obligations on the convicted person. The same applies for the – practically insignificant – warning with punishment reserved (§§ 59, 59a subsection (2) no. 1 StGB). If there is enforcement of fines, damage reparation to the victim generally has priority in the sense that easy payment terms may be granted to the convicted person upon the payment of the penalty when the reparation would otherwise be considerably endangered (§ 459a StPO).

B. Immaterial Compensation

Victimological studies show that for victims of crimes, in addition to material compensation of the damage they have suffered, it is also important that there are pedagogical effects on offenders in order to avoid future criminal acts. For victims of violent crime, the symbolic act of damage reparation by the offender and acknowledgment of the victim's role is above all important.¹⁴ These aspects have also recently been taken into account in German criminal law.

1. Offender-Victim Mediation

Offender-victim mediation also allows for the compensation of material damage, but its particular importance lies in the fact that the conflict is “returned” to the offender and the victim, who thereby have the opportunity themselves to again achieve legal peace.¹⁵ This also includes immaterial compensation of the wrong committed, particularly through personal acknowledgement of guilt and mutual understanding of the motives behind and background of the offence and the reactions and needs of the victim. *Uwe Wesel* states the matter concisely with a view to the cultural history of conflict resolution, which is characterized by settlement between the offender and victim: “There must be reconciliation.” Mere punishment of the offender, a “negation of a negation”, is insufficient in this sense.¹⁶

(i) Legal development

In juvenile criminal law, offender-victim mediation has been known as a diversion measure pursuant to §§ 45, 47 JGG since the early 1980s and was expressly embodied in statute in 1990 in § 45 subsection (2) sentence 2 and § 10 subsection (1) no. 7 JGG. In adult criminal law, offender-victim mediation was initially introduced into the material criminal code by the Act on Combating Crime (*Verbrechensbekämpfungsgesetz*) of 1994 as grounds for mitigation of a sentence (§ 46a StGB). In accordance therewith, the court can mitigate the punishment or dispense with punishment if the offender, in an effort to reach a settlement with the injured party, makes restitution for his act in whole or substantial part or earnestly strives to do so. By the Act on the Criminal Procedure Law Embodiment of Offender-Victim Mediation (*Gesetz zur strafverfahrensrechtlichen Verankerung des Täter-Opfer-Ausgleichs*) of 1999, rules were created in § 153a subsection (1) and §§ 155a and 155b StPO that should enable simpler and more frequent use of offender-victim mediation. In particular, the public prosecution offices and the courts are called upon at every stage of the proceedings to examine the possibility of achieving a settlement between the accused and the victim and to work towards this in suitable cases. However, this cannot take place against the express will of the victim (§ 155a StPO). By the Victims' Rights Reform Act (*Opferrechtsreformgesetz*) of 2004, a rule was finally incorporated in § 136 subsection (1) sentence 4 StPO that the accused should be advised of the possibility of offender-victim mediation already during police questioning.

(ii) Goal of offender-victim mediation

In general, offender-victim mediation is aimed at harmonizing the purposes of punishment and victims' interests. In a study commissioned by the Federal Ministry of Justice it was stated that offender-victim mediation enables “confirmation of standards by voluntary acceptance of

¹⁴ *Baurmann/Schädler*, Das Opfer nach der Straftat – seine Erwartungen und Perspektiven, 2nd Ed. 1999, p. 294 with reference to the studies by *Shapland*.

¹⁵ In about 75% of the mediation cases there is immaterial redress (apology); cf. *Kerner/Hartmann*, Täter-Opfer-Ausgleich in der Entwicklung. Auswertung der bundesweiten Täter-Opfer-Ausgleichs-Statistik für den Zehnjahreszeitraum 1993 bis 2002 (2005), pp. 91 et seq. The study (in German) can be retrieved at:

http://www.bmj.bund.de/enid/7b8b0dddb4e2ed9fbab8eab52d2afdd1,0/Statistiken/Taeter-Opfer-Ausgleichsstatistik_66.html.

¹⁶ *Wesel*, Täter-Opfer-Ausgleich als Ausdruck einer allgemeinen Entwicklung von Recht, in: TOA-Servicebüro (Ed.), 8. TOA-Forum: Grenzen verschieben. Mit dem Täter-Opfer-Ausgleich auf dem Weg zur bürgernahen Rechtspolitik, p. 162.

responsibility as well as material and immaterial compensation by the offender for the consequences of the offence. The offender is reintegrated into society by the offender-victim mediation. Through complete compensation the victim experiences justice. His needs for settlement of the dispute and regulation of the conflict are fulfilled. The purposes of punishment are served in regard to offender-victim mediation to the extent it leads to atonement of guilt. Compensation also serves positive general prevention and if the offender acknowledges standards, this also has a special preventive effect.”¹⁷

Example: After a traffic incident, there is a physical dispute between two 28 year old men. One of the men suffers bruises to the face from this and files a report of a crime. The public prosecution office assigns the matter to a mediation agency. During the mediation, it becomes apparent that the accused and the aggrieved person experienced the incident very differently. Both argue that they were intentionally obstructed in traffic. The accused states that the aggrieved person offended him with an obscene gesture. After he wanted him to explain himself about this and was again offended, he struck. The aggrieved person stated that he had not experienced significant pain from the blows, but that he filed the crime report out of annoyance and to give the accused a warning that he cannot behave in this manner. He suggested that the accused should make a donation to a charitable organization as compensation, which the accused in the end accepted.¹⁸

The case described above fulfils fundamental criteria for the prospects of a high degree of success of the offender-victim mediation: the accused does not controvert commission of the offence, he did not know the victim previously, the injury to physical integrity was not considerable, but it also did not involve solely a trifling matter.¹⁹

(iii) *Implementation*

The majority of offender-victim mediations – about 90% – are prompted by the public prosecution office during preliminary proceedings.²⁰ Offender-victim mediation is conducted by a professional mediation agency that is commissioned by the public prosecution office or the court to conduct the mediation proceedings (§ 155b StPO). In Germany, there are currently about 400 such agencies.²¹ An increasing number of these agencies work with appropriately specialized employees.²² The mediator has the role of a neutral third party and guarantor of the rule of law in the offender-victim mediation. In a preliminary discussion the mediator clarifies, among others, whether there is a general willingness on the part of the offender and the victim to participate in the proceedings, he fully informs the participants, pays attention that the mediation proceeds fairly, assesses the reasonableness of damage and pain and suffering compensation claims, supervises that the agreements reached are complied with, and at the conclusion informs the public prosecution office or the court of the results of the mediation. The mediator is neither a caregiver nor an educator for the participants, nor is the mediator an investigator.²³ The final decision about the formal conclusion of the criminal proceeding lies with the assigning authority, that is, the public prosecution office or the court.

(iv) *Problem areas*

The concept of offender-victim mediation – welcome as such – is not without difficulties from a dogmatic legal perspective, which is made evident by the following example.

Example: After a verbal dispute under the influence of alcohol, a husband strikes his wife several times in the face and kicks her with shoes on many times in the lower abdomen. Thereupon the wife grabs a knife with a blade 16 cm long and stabs the husband. The woman suffers a perforated ear drum, a haematoma of the eye, and considerable facial bruising. The man suffers cuts on his chest and upper arm. Both file

¹⁷ Dölling (Ed.), Täter-Opfer-Ausgleich. Eine Chance für Opfer und Täter durch einen neuen Weg im Umgang mit Kriminalität (1998), p. 79.

¹⁸ Pursuant to DHB Materials No. 42, p. 31 et seq.; Dölling (fn. 17), p. 73 et seq.

¹⁹ Cf. Hartmann, Staatsanwaltschaft und Täter-Opfer-Ausgleich (1998), pp. 184 et seq.

²⁰ Kerner/Hartmann (fn. 15), pp. 17 et seq.

²¹ Dölling (fn. 17), p. 38.

²² Kerner/Hartmann (fn. 15), p. 17.

²³ Dölling (fn. 17), p. 29.

crime reports based on dangerous bodily harm. The public prosecution office assigns the matter to the offender-victim mediation agency. During the mediation it becomes evident that the marriage has been broken for a long time and that there have already been repeated instances of mutual physical disputes. After intensive discussion, the spouses spontaneously decide to go to a marriage counselling office. During two additional mediations it appears that the spouses again have a significantly better relationship to one another. Both withdraw their crime reports and the public prosecution office dismisses the criminal proceeding based upon the report from the mediation agency.

This example is taken from the case documentation of an expert association to which offender-victim mediation agencies belong.²⁴ On the one hand, the case shows that very positive developments can be initiated by the mediation agency, which created legal peace as a result. However, from the criminal procedure perspective, the formal result of the dismissal of the proceeding is unsatisfactory. This is because based upon the seriousness of the offences, the “withdrawal of the crime report” does not have any effect on the public interest in the criminal prosecution. Dangerous bodily harm (§ 224 StGB) is subject to a minimum sentence of six months imprisonment. If the criminal acts, particularly the use of the knife, by chance had led to serious injury (§ 226 StGB) or to the death of a participant (§ 227 StGB), from the outset dismissal of the proceedings could not have been considered. It must also be taken into account that particularly in cases of domestic violence, as to which there is hardly any effective social control, authoritarian intervention by the state is urgently necessary and a “re-privatization of the conflict” can further harm the victim. However, in choosing a case for conducting offender-victim mediation the actual background of the offence usually is insufficiently known. Return of the case to the judicial system based upon unsuitability rarely takes place in practice.

In addition, with offender-victim mediation there is a danger that the victim will be instrumentalized for offender interests and again victimized.

Example: The defendant accused of rape continues to deny having used force. All sexual acts were consensual. Once the conviction of the defendant was apparent and he was advised of the possibility of offender-victim mediation, he admitted that the offence was based on a “misunderstanding” between himself and the victim. In addition, he offered to pay the victim compensation for pain and suffering in the amount of € 3,500. This amount was paid to the victim by the defendant’s family during the main proceeding. In his final arguments, the defence counsel applied for the defendant’s acquittal. The court approved a reduction of sentence based upon the successful implementation of offender-victim mediation and convicted the defendant for rape sentencing him to imprisonment of two years, which was suspended on probation.

In this case the Federal Court of Justice (*Bundesgerichtshof*) stated that the prerequisites for a reduction of sentence based upon the implementation of offender-victim mediation did not exist and overruled the judgment. The court stated that for successful offender-victim mediation as to violent crimes and sexual offences the defendant’s confession must be demanded.²⁵

The case example illustrates the danger that the legal institution of offender-victim mediation, which should primarily serve the victim’s needs, can also be misused in order to “purchase” a reduced sentence to a certain extent. The reprivatization of the conflict primarily conceals risks for the victim.²⁶ In addition, there are reservations about offender-victim mediation in judicial practice because the consideration of reduced punishment pursuant to § 46a StGB does not fit into the traditional dogma of the assessment of punishment and it can make court decisions more susceptible to appeal.²⁷ The choice of appropriate cases is often difficult for the public prosecution offices, whose decision processes follow other parameters.²⁸ The separation of the implementation of offender-victim mediation from the judicial system in the end is fraught with fundamental problems that exist in connection with the privatization of measures in the area of criminal

²⁴ DBH Materials No. 42, pp. 25 et seq.

²⁵ Collected Decisions of the Federal Court of Justice in Criminal Matters (*Entscheidungssammlung des Bundesgerichtshofs in Strafsachen*) 48, 134.

²⁶ *Kilchling*, Opferinteressen und Strafverfolgung (1995), p. 696.

²⁷ Details on the reservations in the judiciary: Stein in: TOA-Servicebüro (fn. 16), pp. 87 et seq.

²⁸ Cf. *Hartmann* (fn. 19), pp. 186 et seq.

law.²⁹ In particular, it is difficult to guarantee supra-regional quality control.

(v) *Practical significance*

Offender-victim mediation has increasingly gained acceptance in Germany, especially in the area of violent crime. The majority of mediation cases – between 45 and 70% with a recent decreasing tendency – are within this area of crimes.³⁰ In total, between 1989 and 1995³¹ as well as between 1993 and 2002³² the number of mediation cases increased about fourfold, although with clear regional differences. When viewed by result, offender-victim mediation for the most part seems to be successful: in about 80% of cases agreement is reached between offenders and victims.³³ However, in recent years willingness on the part of aggrieved persons to participate in offender-victim mediation has decreased.³⁴ It also cannot be overlooked that offender-victim mediation is not a criminal law panacea. In particular, this instrument is hardly suitable for remedying a supposed “crisis of legitimacy of criminal law”.³⁵ Criminal law, as public law, is initially legitimized as a reaction to a serious injury to the community. This reaction – regardless of the nature – must be a public one. Its formulation may pursue different goals, e.g., confirmation of the rejection of the damaging behaviour by the community, therapy for the offender, and in extreme cases, his/her isolation. The establishment of legal peace between offender and victim is only one of these goals.³⁶ If one considers that criminal law, as the state’s “sharpest sword” is always the last resort, it becomes clear that the (partial) return of the conflict to the offender and the victim can only encompass a portion of crime as to which other goals of state reaction can be waived to some extent.³⁷ Reparation understood in the ideal sense is justifiably seen as far removed from reality in cases of serious crimes against personal legal interests.³⁸ Of course, this should not raise doubts about the fact that in principle offender-victim mediation is a valuable instrument for drawing attention to victims’ interests in criminal proceedings.

2. Student Arbitration Boards

A further new development has also been indicated in Germany in the area of juvenile criminal law. In correspondence with the model of US “teen courts”, student arbitration boards have now since been created in several regional court districts.³⁹ Their establishment is legally based on § 45 subsection (2) JGG mentioned above. This procedure, thus, is only available for juvenile offenders. Participation in the proceeding is voluntary for offenders. Within the framework of a settlement discussion, the juvenile offender must answer for his actions at a “roundtable” with three juveniles similar to the offender in age, who previously participated in special training. In so doing, there is a particular attempt to awaken the offender’s understanding of the needs of the victim of the offence. At the end, the three members of the student arbitration board decide on a settlement measure, the choice of which should consider both educational needs in regard to the offender as well as the victim’s interests. The band-width of possible settlement

²⁹ Cf. e.g., Meyer, *Privatisierung und Strafvollzug*, BewHi 2004, 272; Kötter, *Privatisierung der Bewährungshilfe?* BewHi 2004, 211.

³⁰ Dölling (fn. 15), pp. 54 et seq., 65; Kerner/Hartmann (fn. 17), pp. 31 et seq.

³¹ Dölling (fn. 15), p. 42.

³² Kerner/Hartmann (fn. 17), p. 14.

³³ Dölling (fn. 15), p. 65; Kerner/Hartmann (fn. 17), pp. 85 et seq.

³⁴ Kerner/Hartmann (fn. 17), pp. 62 et seq.

³⁵ This term raises the question of whether it is legitimate to punish in light of empirical studies that establish that there is little influence of the form of punishment on whether further crimes will be committed; cf. e.g., Hartmann (fn. 19), pp. 11 et seq.

³⁶ In large sections of legal academia the establishment of legal peace is universally seen as the “highest goal” of the criminal proceeding, cf. Rieß in: Löwe-Rosenberg, StPO, 25th Ed., Introduction B margin note 4 et seq.; Meyer-Gobner, 48th Ed., Introduction margin note 4; Pfeiffer in: Karlsruher Kommentar, 5th Ed., Introduction margin note 1 each with additional citations.

³⁷ Similar Walter, *Theoretische Perspektiven des Täter-Opfer-Ausgleichs*, in: Federal Ministry of Justice (Ed.), *Täter-Opfer-Ausgleich. Zwischenbilanz und Perspektiven*, 3rd Ed. 1995, pp. 61, 69 et seq., which places the main importance of offender-victim mediation outside of the criminal law area.

³⁸ Hinz, *Opferschutz, Genugtuung, Wiedergutmachung*, DRiZ 2001, 321, 327.

³⁹ Detailed description in Schöch/Traulsen, *Kriminalpädagogisches Schulerprojekt Aschaffenburg*, DVJJ-Journal 2002, 54; Löffelmam, *Kriminalpädagogisches Schülerprojekt “Fallschirm.” Bericht über die Arbeit der Schülerschiedsstelle in Ingolstadt*, ZJJ 2004, 171.

measures is broad. It extends from a written or personal apology to the victim, the provision of assistance services for the victim, joint activities, to community service. If the offender fulfils the settlement measure, the proceeding will be dismissed by the public prosecution office. Otherwise public charges will be filed at the juvenile court. The benefit of these student arbitration boards is that in a less authoritarian environment a detailed and therefore educationally valuable confrontation with the offender's motives and the victim's needs takes place. It can, thus, be hoped that this concept will find even more acceptance in the future.

C. State and Private Victims' Assistance

Material or immaterial compensation for the victim cannot always be achieved within the context of the criminal proceeding, whether because the offender does not have the financial means therefor, or because the criminal prosecution authorities were not able to provide sufficient professional assistance. However, both can also take place outside of the criminal proceeding.

1. Victims' Compensation

The Victims' Compensation Act (*Opferentschädigungsgesetz*; hereinafter cited as "OEG") of 1976 determined that victims of serious crimes should have a claim to state assistance under certain conditions. The main thought behind this statute is that when the state is unable to fulfil its duty of protection of its citizens, it must to some extent assume responsibility as "jointly responsible" for the damage that arises.⁴⁰ In so doing, it must be taken into account that victims of serious crimes fulfil a fundamental task as to controlling serious crime in that they initiate the proceedings by their crime report.⁴¹ In an academic publication it was succinctly stated: "Victims of serious crime provide a special service for the general public that cannot be underestimated.... If these persons had not been murdered, mistreated, injured, raped, robbed, it would have been another in a similar situation."⁴² Thus, it is a duty of a caring society to support victims of serious crime after the offence.

Those entitled to make claims under the OEG are persons who have suffered detriment to their health as the result of an intentional, illegal, physical attack or in defending against the same, as well as relatives of persons who die as a result of such attacks. However, it cannot involve only property damage. The purpose of the OEG, rather, is compensation for the additional expenses incurred by the aggrieved person as a result of the detriment to health. The claim for compensation, thus, primarily encompasses costs for curative treatments as well as expenses for necessary care. In addition, the victim is paid a basic pension without regard to his income circumstances, the highest amount of which – depending upon the severity of the injuries – is € 615 per month. Persons severely injured by the offence receive additional compensation. Similarly, the surviving dependants of violent crime victims may receive a pension.

Example: The father of a family is beaten to death by three violent offenders. He left behind a wife and three children between the ages of five months and eight years. Two weeks after the offence the surviving dependants applied for compensation pursuant to the OEG. Two months after the offence, still prior to the conviction of the offenders, the application was approved. The widow receives a widow's basic pension, independent of income, of € 300 per month and the children each receive a monthly pension for fatherless children of € 85.

Approximately € 100 million is spent annually nationwide for compensation under the OEG.

The OEG, however, does not provide assistance in all possible compensation cases. In particular, its applicability is dependent upon whether the crime was committed on German territory (the principle of territoriality). Foreign victims receive compensation only when Germans would be correspondingly compensated in their native country (principle of reciprocity).⁴³ In addition to the OEG, however, there are additional forms of state assistance in the form of victims' compensation funds. At the federal level, such

⁴⁰ As to the legislative process and the motives of the legislature: Ebert, *Hilfe für Verbrechenopfer – Die Bewältigung einer staatlichen Aufgabe mit dem Gesetz über die Entschädigung für Opfer von Gewalttaten* (1981), pp. 14 et seq.

⁴¹ Schneider, *Die Rechtsstellung des Verbrechenopfers im Strafrecht und Strafverfahren*, Jura 1989, 72, 73; likewise, Federal Parliament (Bundestag) Printed Matter 15/814, p. 6.

⁴² Ebert (fn. 40), p. 22.

⁴³ Cf. Federal Parliament (Bundestag) Printed Matter 8/2333, p. 5.

funds have been established for victims of right-wing extremist attacks and terrorist crimes. The money provided for this must be annually approved with the federal budget. Support for victims of right-wing extremist violence and terrorist crimes is granted in the form of a onetime special payment from this.

Example: In 2002, 14 Germans were killed by a terrorist attack at a Jewish synagogue on the Tunisian island Djerba and another 17 were injured, some seriously. Because the offence took place outside of Germany, the Victims' Compensation Act could not provide any assistance. Thus, in 2002, the federal government made € 10 million available in immediate assistance funds.

Victims' protection funds also exist in the individual federal Lander. Victims' funds are also established by numerous offender-victim mediation agencies in order to enable instalment payments by offenders and nevertheless to be able to fulfil the victim's claims immediately.⁴⁴

2. Victims' Assistance Agencies

Victimological studies show that private milieu of violent crime victims' often fail when it comes to working through the psychological consequences of the crime by the victim. Not infrequently, families feel that they have been damaged and shamed when a family member has become the victim of a violent crime. Victims are often forced by their social milieu to accept joint guilt for the offence committed upon them in order to "relieve" the family.⁴⁵ The criminal prosecution authorities usually are not in the position, either as regards personnel or expertise, to assume the psychological care of the victim. Thus, in academic circles there is a call for establishing nationwide professional counselling services for victims. It is criticized that there is an insufficient number of qualified institutions for the protection and psychosocial care of crime victims.⁴⁶ This situation has since been improved by targeted awareness training. For example, since 2001 the Federal Ministry of Justice publishes a guide for victims, which, in addition to legal tips for crime victims, also contains contact information for many victims' assistance agencies. The Weiße Ring e.V., which is the leading victims' assistance agency in Germany, also established a national victim emergency number. With all of the efforts to improve the psychosocial care of victims, however, it should not be overlooked that intensive care of the victim by victims' protection institutions may be contrary to the central task of the criminal proceedings – discovery of the truth of the factual circumstances that form the basis of the accused crime. Not infrequently, victims are so intensively prepared for their testimony that it is almost no longer possible for them to provide spontaneous testimony based upon memory.⁴⁷ This may considerably limit the value of the witness evidence.

3. Concluding Example

In conclusion, an actual example should illustrate the ways in which the different mechanisms described above can mesh together for protection of the victim and the important role that close cooperation among the public prosecution office, police, and assistance organizations plays in this.

Example: The aggrieved person is a Russian citizen. She entered German federal territory illegally in September 2003. The flight to Germany was organized for her by a Russian coaccused, on whose instructions she entered into prostitution after her arrival in N. The aggrieved person received 50 % of the income. After the aggrieved person sought to discontinue her activities as a prostitute in December 2003, she was brought to I. by the defendant's coaccused. He took the aggrieved person's passport and ordered her to continue working as a prostitute for him. In so doing he threatened the aggrieved person that he would report her based upon her illegal residency if she did not comply with his order. Out of fear of being reported the aggrieved person continued to work as a prostitute until April 2004. The defendant retained the income from this for himself. In order to emphasize his order, during this time the aggrieved person was repeatedly struck by the defendant. After her arrest the aggrieved person was examined by an investigating magistrate. At the conclusion she was returned to Russia. During the main proceeding before the court in I. her statements were controverted. Numerous witnesses who were friends of the defendant testified that the aggrieved person was the defendant's girlfriend and had not worked as a

⁴⁴ Kerner/Hartmann (fn.17), pp.104 et seq.

⁴⁵ Baurmann/Schädler (fn.14), pp.291 et seq. with reference to the studies by Mitscherlich, Shapland and Maguire, and Corbett.

⁴⁶ One of many examples: Baurmann/Schädler (fn.14), pp. 305 et seq.

⁴⁷ Accord also, Hasseln, Was leistet das geltende Recht für Opfer von Straftaten? DVJJ-Journal 2002, 5.

prostitute. The public prosecution office and criminal police then attempted to contact the aggrieved person. Through Interpol it was discovered that the aggrieved person was residing in St. Petersburg. However, contact could not be made. The defendant was only convicted of being an accessory to illegal residency with a fine set at 170 daily rates. One day before the expiration of the appeal deadline, contact was made with the aggrieved person. She stated that she was willing to come to Germany and testify. The public prosecution office filed an appeal against the judgment issued. In cooperation with the German consulate in St. Petersburg, the aggrieved person was provided with a passport, a visa, and an airplane ticket. During this time the aggrieved person was repeatedly threatened over the telephone by unknown callers and ordered not to travel to Germany. Three days before her departure three men whom she did not know lay in wait for the aggrieved person and beat her up. Nevertheless, the aggrieved person came to Germany where the criminal police placed her under continuous protection. The psychosocial care of the aggrieved person was taken over by the organization JADWIGA, which specializes in caring for Eastern European women who are forced into prostitution in Germany. The defendant was excluded from the main proceeding before the regional court in I. during the examination of the aggrieved person. After her testimony the defendant confessed and was convicted and sentenced to imprisonment for two years, which was not suspended on probation. After her testimony the aggrieved person was brought back to the organization JADWIGA by the criminal police. They organized a residence toleration for the aggrieved person and a room in a women's shelter. The aggrieved person can continue to remain in Germany. Her care takes place through JADWIGA. The social welfare office assumed the payments for the organization. Her six year old son was also allowed to come to Germany.

This case illustrates in an exemplary way the different legal and actual facets that characterize the role of the victim in a criminal proceeding. After she was picked up, the aggrieved person initially was an accused person because she was illegally residing in Germany and there was a suspicion that she was engaged in illegal prostitution. As a witness against the defendant she had a right of refusal to provide information (§ 55 StPO). This made it necessary to have her examined by an investigating magistrate (RiStBV No. 248). As an important prosecution witness she was subject to pressure from the side of the defendant and was again victimized. The state complied with its protection obligation by making police protection available (ZSHG) and the exclusion of the defendant from the main proceeding (§ 247 sentence 1 StPO). In parallel to this, additional measures were taken in cooperation with an assistance agency that served the "resocialization of the victim". The case, however, does not only show the complexity of dealing with victims of serious crime, but also that these issues cannot be reduced to the idea of "reprivatizing the conflict." Here, where super-individual requirements are affected to a considerable extent by the offence, the aggrieved person must be primarily understood not as a victim, but as a witness.

II. CONCLUDING COMMENTS

The systematic overview of the consideration of victim's needs in German criminal proceedings shows that both politics and the public are paying increasing attention to crime victims. With all of the efforts for legislative integration of victim protection into criminal procedure law it should not be overlooked that there is always a danger of instrumentalizing⁴⁸ the crime victim for purposes external to the law, e.g., for the general criminal-political motive of "intensifying" criminal law⁴⁹. Repeated demands for more severe punishment of sexual offenders as a conclusion of media reports on serious crimes clearly show this danger.⁵⁰ Yet, victims' needs are hardly suitable for the legitimatization of reprisal ideologies. Rather, victims desire compensation for their damage and the hindrance of future crimes. The legal rules as to the first aspect, damage compensation, could still be improved, for example, by simplifying the prerequisites in § 153a subsection (1) sentence 2 no. 1 StPO and § 56b subsection (2) sentence 1 no. 1 StGB⁵¹, through more extensive reaction options in the case of a violation of probation conditions (§ 56b subsection (2), § 56f

⁴⁸ Cf. on this *Rieß*, *Der Strafprozess und der Verletzte – eine Zwischenbilanz*, Jura 1987, 281, 284; *Janssen*, *Opferfeindlich oder opferfreundlich? Widersprüche in Tendenzen aktueller Kriminalpolitik*, BewHi 1989, 340, 342; *Kilchling* (fn. 26), p. 8.

⁴⁹ Cf. on this discussion, e.g., *Heinz*, *Entwicklung der Kriminalität junger Menschen – Anlass für eine Verschärfung des Jugendstrafrechts?* DVJJ-Journal 2002, 277; *Walter*, *Die Krise der Jugend und die Antwort des Strafrechts*, DVJJ-Journal 2001, 358; *Killias*, *Reduktion der Kriminalität durch "Unschädlichmachung" von Vielfachtätern – ein statistischer Trugschluss*, BewHi 1999, 427.

⁵⁰ Critical, e.g., *Duttge/Hörnle/Renzikowski*, *Das Gesetz zur Änderung der Vorschriften über die Straftaten gegen die sexuelle Selbstbestimmung*, NJW 2004, 1065, 1066, 1072.

⁵¹ *Kintzi*, *Verbesserung des Opferschutzes im Strafverfahren*, DRiZ 1998, 65, 69 et seq.

StGB)⁵², through careful expansion of private accessory prosecution⁵³, through directly using fines for victims' interests⁵⁴, or also through the determined application of existing legal institutions such as adhesion proceedings. Similarly, improvement of post-offence victim prophylaxes in the sense of professional care for the victim, in light of increasing cooperation between criminal prosecution authorities and socialpedagogic institutions, seems to be less of a fundamental structural problem than a fiscal one. The second point, hindering crime, on the other hand demands looking at the causes of the origins of crime, including the fear of crime among the public. Shifting State focus to hindering victimogenic lifestyles, e.g., through awareness training and community crime prevention (pre-offence prophylaxis),⁵⁵ would be an important step here in preventing persons from becoming victims. In addition, from the point of view of victim protection there are still numerous deficits particularly in the area of sexual delinquency as to therapeutic work with offenders.⁵⁶

⁵² *Peglau*, Der Opferschutz im Vollstreckungsverfahren, ZRP 2004, 39, 40.

⁵³ *Hinz* (fn. 38), 331.

⁵⁴ *Kilchling* (fn. 1), 63.

⁵⁵ Examples in *Schuster*, Opferschutz und Opferberatung (1985), pp. 5 et seq.; *Stumpf*, Opferschutz bei Kindesmißhandlungen (1995), pp. 145 et seq.; *Steinherr*, Prävention durch Realisierung von Opferschutz, Kriminalistik 1995, 799.

⁵⁶ Cf. e.g., *Wischka*, Sexualdelikte – Opfer und Täter: Einführung in die Thematik, KrimPäd 2001, 4; *Bullens/Egg*, Therapiemotivation bei Missbrauchstätern, BewHi 2003, 273 et seq.; *Boetticher*, Neue Aufgaben für die Bewährungshilfe – zum Umgang mit Sexualstraftätern, BewHi 2000, 196 et seq.

APPENDIX

SELECTED STATUTES

GERMAN CRIMINAL PROCEDURE CODE (*STRAFPROZESSORDNUNG*; “STPO”)

STPO § 52 (Right to Refuse Testimony on Personal Grounds)

Version: 15 December 2004

Effective as of 1 January 2005

- (1) The following persons may refuse to testify:
 1. the fiancé(e) of the accused or the person with whom the accused has promised to enter into a same sex partnership;
 2. the spouse of the accused, even if the marriage no longer exists;
 - 2a. the same sex partner of the accused, even if the same sex partnership no longer exists;
 3. a person who is or was lineally related or related by marriage, collaterally related to the third degree, or related by marriage to the second degree, to the accused.
- (2) If minors for want of intellectual maturity, or if minors or persons placed in care due to mental illness or mental or emotional deficiency have no sufficient understanding of the importance of their right of refusal to testify, testimony may be taken from such persons only if they are willing to testify and if their statutory representative also agrees to their examination. If the statutory representative is accused himself he may not decide on the exercise of the right of refusal to testify; the same shall apply to the parent who is not accused, if both parents are entitled to act as statutory representative.
- (3) Persons entitled to refuse to testify, in the cases of subsection (2) also their representatives authorized to decide on the exercise of the right of refusal to testify, shall be instructed concerning their right prior to each examination. They may revoke the waiver of this right during the examination.

STPO § 55 (Refusal of Information)

Version: 7 April 1987

Effective as of 1 April 1987

- (1) Any witness may refuse to answer any questions the reply to which would subject him, or one of the relatives specified in Section 52 subsection (1), to the risk of being prosecuted for a criminal offence or a regulatory offence.
- (2) The witness shall be informed of his right to refuse to answer.

STPO § 58a (Examination by Audio-Visual Medium)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) The examination of a witness may be recorded on an audio-visual medium. The examination shall be recorded:
 1. in the case of persons of less than sixteen years of age who have suffered injury as result of the criminal offence; or
 2. if there is a fear that the person cannot be examined during the main hearing and if the recording is required in order to establish the truth.
- (2) Use of the audio-visual recording shall be admissible only for the purposes of criminal prosecution and only to the extent that it is required in order to establish the truth. Section 100b subsection (6) shall apply mutatis mutandis. §§ 147 and 406e shall apply mutatis mutandis with the proviso that those entitled to inspect the files may be given copies of the recording. The copies shall not be copied or passed on to others. They shall be handed over to the public prosecution office as soon as there is no longer a justified interest in their further use. Transfers of recordings or the handing over of copies to an authority other than the one mentioned above requires the consent of the witness.

- (3) If the witness opposes the transfer of a copy of the recording of his examination pursuant to subsection (2) sentence 3, a written transcript shall take the place of the transfer of a transmission of the recording to the person entitled to inspect the files pursuant to §§ 147, 406e. Whoever produced the transmission shall add to his signature that the correctness of the transmission is confirmed. The right to inspect the recording pursuant to §§ 147, 406e remains unaffected. The witness shall be informed of his right of opposition pursuant to sentence 1.

STPO § 68 (Examination as to Witness' Identity and Personal Particulars)

Version: 15 July 1992

Effective as of 22 September 1992

- (1) The hearing begins with the witness being asked to state his first name and family name, age, position or trade and place of residence. Witnesses who have made observations in their official capacity may state their place of work instead of their place of residence.
- (2) If there is reason to fear that the witness or another person might be endangered by the witness stating his place of residence, the witness may be permitted to state his business address or place of work or another address at which documents can be served instead of stating his place of residence. Under the condition set out in the first sentence, the presiding judge may permit the witness not to state his place of residence during the main hearing.
- (3) If there is reason to fear that revealing the identity or the place of residence or whereabouts of the witness would endanger the witness' or another person's life, limb or liberty, the witness may be permitted not to state personal particulars or to state particulars only of an earlier identity. However, if so asked at the main hearing, he shall be required to state in what capacity the facts he is indicating became known to him. Documents establishing the witness' identity shall be kept by the public prosecution office. They shall only be included in the files when the danger ceases.
- (4) Where necessary, questions relating to circumstances justifying the witness' credibility in the case at hand, particularly concerning his relationship with the accused or the aggrieved party, shall be submitted to him.

STPO § 68a (Questions Concerning Degrading Facts and Previous Convictions)

Version: 24 August 2004

Effective as of 1 September 2004

- (1) Questions concerning facts which might dishonour the witness or a person who is his relative within the meaning of Section 52 subsection (1) or that concern their personal sphere of life are to be asked only if essential.
- (2) A witness is to be asked about his previous convictions only if their ascertainment is required for a decision on the existence of the conditions of Section 60 number 2 or to judge his credibility.

STPO § 81d (Examining Person)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) If the physical examination may violate a sense of shame, it shall be conducted by a person of the same sex or by a physician. When there is a justified interest, the desire to have the examination conducted by a person or physician of a particular sex shall be complied with. Upon the request of the person who is to be examined, a trusted person is to be admitted.
- (2) This provision shall also be applicable to cases where the person affected consents to the examination.

STPO § 110b (Consent of the Public Prosecution Office; Consent of the Judge; Non-Disclosure of Identity)

Version: 15 July 1992

Effective as of 22 September 1992

- (1) Use of undercover investigators shall be admissible only after the consent of the public prosecution

office has been obtained. In exigent circumstances and if the public prosecution office's decision cannot be obtained in time, such decision shall be obtained without delay; the measure shall be ended if the public prosecution office does not give its consent within three days. Consent shall be given in writing and for a specified period. Extensions shall be admissible providing the conditions for use of undercover investigators are still fulfilled.

(2) Use of undercover investigators:

1. concerning a specific accused, or
2. which involve the undercover investigator entering private premises which are not generally accessible

shall require the consent of a judge. In exigent circumstances consent of the public prosecution office shall suffice. Where the public prosecution office's decision cannot be obtained in time, it shall be obtained without delay. The measure shall be ended if the judge does not give his consent within three days. Subsection (1), third and fourth sentences, shall apply *mutatis mutandis*.

- (3) The identity of the undercover investigator may be kept secret even after the operation has ended. The public prosecutor and the judge responsible for the decision whether to give consent may require the identity to be revealed to them. In all other cases, maintaining the secrecy of the identity in criminal proceedings shall be admissible pursuant to Section 96, particularly if there is cause for concern that revealing the identity will endanger the life, limb or liberty of the undercover investigator or of another person or endanger the continued use of the undercover investigator.

STPO § 136 (First Examination)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) At the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable penal provisions. He shall be advised that the law grants him the right to respond to the accusation or not to make any statements on the charges and at any time, even prior to his examination, to consult with defence counsel of his choice. He shall further be instructed that he may request evidence to be taken in his defence. In appropriate cases the accused shall be informed that he may respond in writing, as well as about the possibility of offender-victim mediation.
- (2) The examination should give the accused an opportunity to dispel the reasons for suspicion against him and to assert the facts which are in his favour.
- (3) At the first examination of the accused, his personal situation should also be ascertained.

STPO § 152 (Indicting Authority; Principle of Mandatory Prosecution)

Version: 7 April 1987

Effective as of 1 April 1987

- (1) The public prosecution office shall have the authority 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 criminal offences which may be prosecuted, provided there are sufficient factual indications.

STPO § 153a (Provisional Dispensing with Court Action; Provisional Termination of Proceedings)

Version: 20 December 1999

Effective as of 28 December 1999

- (1) In a case involving a less serious criminal offence, the public prosecution office may, with the consent of the court competent to order the opening of the main proceedings and with the consent of the accused, dispense with the preferment of public charges and concurrently impose conditions and instructions upon the accused if they are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. In particular, the

following conditions and instructions may be applied:

1. to make a certain contribution towards reparation for damage caused by the offence,
2. to pay a sum of money to a non-profit-making institution or to the Treasury,
3. to perform some other service of a non-profit-making nature,
4. to comply with duties to pay maintenance at a certain level,
5. to make a serious effort to reach a mediated agreement (perpetrator-victim mediation), thereby trying to make reparation for his offence, in full or to a predominant extent, or to strive therefor, or
6. to participate in a seminar pursuant to section 2b subsection (2), second sentence, or section 4 subsection (8), fourth sentence, of the Road Traffic Act.

The public prosecution office shall set a time limit within which the accused is to comply with such conditions and instructions, and which, in respect of the cases referred to in numbers 1 to 3, 5 and 6 of the second sentence, shall be a maximum of six months and, in respect of the cases referred to in number 4 of the second sentence, a maximum of one year. The public prosecution office may subsequently revoke the conditions and instructions and may extend the time limit once for a period of three months; with the consent of the accused it may subsequently impose or change conditions and instructions. If the accused complies with the conditions and instructions, the offence can no longer be prosecuted as a less serious criminal offence. If the accused fails to comply with the conditions and instructions, there shall be no compensation for such contribution as he has made towards compliance. Section 153 subsection (1), second sentence, shall apply *mutatis mutandis* in the cases referred to in the second sentence, numbers 1 to 5.

- (2) If the public charges have already been preferred, the court may, with the consent of the public prosecution office and of the indicted accused, provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined, and concurrently impose the conditions and instructions referred to in subsection (1), first and second sentences, on the indicted accused. Subsection (1), third to sixth sentences, shall apply *mutatis mutandis*. The decision pursuant to the first sentence shall be given in a ruling. The ruling shall not be contestable. The fourth sentence shall also apply to a finding that conditions and instructions imposed pursuant to the first sentence have been met.
- (3) The running of the period of limitation shall be suspended for the duration of the time limit set for compliance with the conditions and instructions.

STPO § 154c (Victim of Coercion or Extortion)

Version: 11 February 2005

Effective as of 19 February 2005

If coercion or extortion (sections 240 and 253 Penal Code) was committed by threats to reveal a criminal offence, the public prosecution office may dispense with prosecuting the offence, the disclosure of which was threatened, unless expiation is imperative because of the seriousness of the offence.

STPO § 155a (Working Toward a Mediated Agreement)

Version: 20 December 1999

Effective as of 28 December 1999

At any stage of the proceedings the public prosecution office and the court should examine whether it is possible to reach a mediated agreement between the accused and the aggrieved party. In appropriate cases they are to work towards reaching a mediated agreement. Agreement shall not be accepted against the express will of the aggrieved person.

STPO § 155b (Offender-Victim Mediation)

Version: 20 December 1999

Effective as of 28 December 1999

- (1) For the purpose of offender-victim mediation or of reparation of damage, the public prosecution office and the court may transmit the necessary personal information, *proprio motu* or upon application by an agency they have commissioned to carry out the mediation concerned. The files may also be sent to the commissioned agency for inspection if provision of information requires disproportionate

effort. A non-public agency shall be informed that the transmitted information may be used solely for the purposes of offender-victim mediation or for reparation of damage.

- (2) The commissioned agency may only process and use the personal information transmitted pursuant to subsection (1) to the extent that this is necessary for carrying out the offender-victim mediation or the reparation of damage and provided that interests of the person concerned that are worthy of protection do not present an obstacle thereto. The commissioned agency may only collect personal information and only process and use such information to the extent that the person concerned has given his consent and that this is necessary for carrying out the offender-victim mediation or the reparation of damage. Upon conclusion of their activity they shall report to the public prosecution office or the court to the necessary extent.
- (3) Where the commissioned agency is not a public agency, the provisions of Chapter III of the Federal Data Protection Act shall also apply if the information is not processed in, or from, data files.
- (4) The documents containing the personal information referred to in subsection (2), first and second sentences, shall be destroyed by the commissioned agency upon expiry of one year following conclusion of the criminal proceedings. The public prosecution office or the court shall inform the commissioned agency without delay and proprio motu of the time when proceedings are concluded.

STPO § 158 (Criminal Informations; Applications for Prosecution)

Version: 7 April 1987

Effective as of 1 April 1987

- (1) Information of a criminal offence or an application for criminal prosecution may be filed orally or in writing with the public prosecution office, with authorities and officials in the police force, and with the Local Courts. An oral information shall be recorded in writing.
- (2) In the case of criminal offences which may be prosecuted only upon application, the application shall be made in writing or orally for the records to a court or to the public prosecution office; where the application is made to another authority, it shall be made in writing.

STPO § 161a (Witnesses and Experts before the Public Prosecution Office)

Version: 7 April 1987

Effective as of 1 April 1987

- (1) Witnesses and experts shall be obliged to appear before the public prosecution office upon being summoned and to make statements on the subject matter or to render their opinion. Unless otherwise provided, the provisions of Chapters VI and VII of Part One concerning Witnesses and Experts shall apply mutatis mutandis. Examination under oath shall be reserved for the judge.
- (2) If a witness or expert fails or refuses to appear without justification, the public prosecution office shall have the authority to take the measures provided in Sections 51, 70 and 77. However, the imposition of detention shall remain reserved for the judge; the Local Court, in the district of which the public prosecution office applying for imposition of detention is located, shall have jurisdiction.
- (3) A decision by the court may be requested against the decision of the public prosecution office pursuant to subsection (2), first sentence. The Regional Court in the district of which the public prosecution office is located shall decide on the application unless otherwise provided for in section 120 subsection (3), first sentence, and section 135 subsection (2) of the Courts Constitution Act. Sections 297 to 300, 302, 306 to 309 and 311a as well as the provisions on the imposition of costs in complaint proceedings shall apply mutatis mutandis. The decision of the court shall not be contestable.
- (4) If the public prosecution office requests another public prosecution office to examine a witness or expert, the powers pursuant to subsection (2), first sentence, shall also be vested in the requested public prosecution office.

STPO § 172 (Proceeding to Compel Public Charges)

Version: 20 December 1999

Effective as of 28 December 1999

- (1) If the applicant is at the same time the aggrieved party, he shall be entitled to lodge a complaint against the notification made pursuant to Section 171 to the official superior of the public prosecution office within two weeks after receipt of such notification. On the filing of the complaint with the public prosecution office the time limit shall be deemed to have been observed. The time limit shall not run if no information has been given pursuant to Section 171, second sentence.
- (2) The applicant may, within one month of receipt of notification, apply for a court decision in respect of the dismissal of the complaint by the superior official of the public prosecution office. He shall be informed of this right and of the form provided for such application; the time limit shall not run if no information has been given. The application shall not be admissible when the subject of the proceedings is solely a criminal offence which may be prosecuted by the aggrieved party by way of a private prosecution, or if the public prosecution office dispensed with preferring public charges in accordance with Section 153 subsection (1), Section 153a subsection (1), first and seventh sentences, or Section 153b subsection (1); the same shall apply in cases under Sections 153 c to 154 subsection (1), as well as under Sections 154b and 154c.
- (3) The application for a court decision shall indicate the facts which are intended to substantiate preferment of public charges as well as the evidence. The application must be signed by an attorney-at-law; legal aid shall be governed by the same provisions as in civil litigation. The application shall be submitted to the court competent for the decision.
- (4) The Higher Regional Court shall be competent to decide on the application. Section 120 of the Courts Constitution Act shall apply *mutatis mutandis*.

STPO § 240 (Right to Ask Questions)

Version: 7 April 1987

Effective as of 1 April 1987

- (1) The presiding judge shall permit the associate judges, upon request, to address questions to the defendant, witnesses and experts.
- (2) The presiding judge shall give similar permission to the public prosecution office, to the defendant, and to defence counsel, as well as to the lay judges. Direct questioning of a defendant by a co-defendant shall be inadmissible.

STPO § 241 (Rejection of Questions)

Version: 7 April 1987

Effective as of 1 April 1987

- (1) A person who in the case of Section 239 subsection (1) abuses his right of examination may be deprived of this right by the presiding judge.
- (2) In the cases of Section 239 subsection (1) and Section 240 subsection (2) the presiding judge may reject inappropriate or irrelevant questions.

STPO § 247 (Removal of the Defendant from Courtroom)

Version: 7 April 1987

Effective as of 1 April 1987

The court may order that the defendant leave the courtroom during an examination if it is to be feared that a co-defendant or a witness will not tell the truth when examined in the presence of the defendant. The same shall apply if, on examination of a person under sixteen years of age as a witness in the defendant's presence, considerable detriment to the well-being of such witness is to be feared or if an examination of another person as a witness in the defendant's presence poses an imminent risk of serious detriment to that

person's health. The defendant's removal may be ordered for the duration of discussions concerning the defendant's condition and his treatment prospects, if substantial detriment to his health is to be feared. When the defendant is present again the presiding judge shall inform him of the essential contents of the proceedings, including the testimony, during his absence.

STPO § 247a (Witness Examination in Another Place)

Version: 24 August 2004

Effective as of 1 September 2004

If there is an imminent risk of serious detriment to the well-being of the witness were he to be examined in the presence of those attending the main hearing the court may order that the witness remain in another place during the examination; such order shall also be admissible under the conditions set out in Section 251 subsection (2) insofar as this is necessary for establishing the truth. The decision shall be incontestable. A simultaneous audio-visual transmission of the testimony shall be provided in the courtroom. The testimony shall be recorded if there are grounds to fear that it will not be possible to examine the witness at a future main hearing and if the recording is necessary for establishing the truth. Section 58a subsection (2) shall apply *mutatis mutandis*.

STPO § 251 (Reading Out Records)

Version: 24 August 2004

Effective as of 1 September 2004

- (1) Examination of a witness, expert, or co-accused may be replaced by reading out the written record of his previous examination or a document that contains a written statement originating from him if:
 1. the defendant has defence counsel and the public prosecutor, the defence counsel, and the defendant agree thereto;
 2. the witness, expert, or co-defendant has died or cannot be judicially examined in the foreseeable future based upon some other reason;
 3. to the extent the written record or document relates to the existence or amount of property damage.
- (2) The examination of a witness, expert, or co-defendant may also be replaced by the reading out of a transcript of his earlier judicial examination if:
 1. illness, infirmity, or another insurmountable obstacle prevents the witness, expert, or co-defendant from appearing at the main hearing for a long or indefinite period;
 2. the witness or expert cannot be expected to appear at the main hearing because of the great distance involved, having regard to the importance of his testimony;
 3. the public prosecutor, defence counsel, and the defendant agree to the reading out.
- (3) Where the reading is to serve purposes other than specifically reaching a judgment, particularly the purpose of preparing the decision on whether an individual is to be summoned and examined, records of examinations, certificates and other documents serving as evidence may also be read out.
- (4) In the cases of subsections (1) and (2), the court shall decide whether the reading shall be ordered. The reason for reading out shall be announced. If the record of a judicial examination is read out, it shall be stated whether the person concerned was examined under oath. If not, an oath shall be administered where the court deems this necessary and can still administer such oath.

STPO § 255a (Showing Audio-Visual Recordings)

Version: 11 February 2005

Effective as of 19 February 2005

- (1) The provisions on the reading out of a record of an examination pursuant to Sections 251, 252, 253 and 255 shall apply to showing an audio-visual recording of a witness examination *mutatis mutandis*.
- (2) In proceedings based on criminal offences against sexual self-determination (sections 174 to 184f

Penal Code) or against life (sections 211 to 222 Penal Code) or for ill-treatment of an individual placed in the charge of another (section 225 Penal Code) or based on criminal offences against personal freedom pursuant to sections 232 – 233a Penal Code, examination of witnesses under sixteen years of age may be replaced by showing an audio-visual recording of his previous judicial examination if the defendant and his defence counsel had to opportunity to participate in such examination. Supplementary witness examination shall be admissible.

STPO § 374 (Admissibility; Persons Entitled to Prosecute)

Version: 24 August 2004

Effective as of 1 September 2004

- (1) An aggrieved party may bring a private prosecution in respect of the following offences without needing to have recourse to the public prosecution office first:
 1. trespass (section 123 Penal Code);
 2. defamation (section 185 to 189 Penal Code) when it is not directed against one of the political bodies specified in section 194 subsection (4) of the Penal Code;
 3. violation of the privacy of correspondence (section 202 Penal Code);
 4. bodily injury (sections 223 and 229 Penal Code);
 5. threat (section 241 Penal Code);
 - 5a. taking or offering a bribe in business transactions (section 299 Penal Code);
 6. criminal damage to property (section 303 Penal Code);
 - 6a. criminal offences pursuant to section 323a of the Penal Code, if the offence committed under the influence of drugs is one of the less serious offences in nos. 1-6;
 7. criminal offences pursuant to sections 16 - 19 of the Act against Unfair Competition;
 8. criminal offences pursuant to section 142 subsection (1) of the Patent Act, section 25 subsection (1) of the Utility Models Act, section 10 subsection (1) of the Semi-Conductor Protection Act, section 39 subsection (1) of the Plant Variety Protection Act, section 143 subsections (1), section 143a subsection (1) and section 144 subsections (1) and (2) of the Trade Mark Act, section 51 subsection (1) and section 65 subsection (1) of the Industrial Design Act, sections 106 to 108 and section 108b subsections (1) and (2) of the Copyright Act, and section 33 of the Act on the Copyright of Works of Fine Art and Photography.
- (2) A person who in addition to the aggrieved person or on his behalf is entitled to file an application for criminal prosecution may also file a private prosecution. The persons designated in section 77 subsection (2) of the Penal Code may also bring a private prosecution if the person with prior entitlement has filed the application for criminal prosecution.
- (3) If the aggrieved person has a statutory representative, the right to bring a private prosecution shall be exercised by the latter or, if the aggrieved party is a corporation, a company, or another association which as such may sue in civil litigation, by those persons who represent them in civil litigation.

STPO § 380 (Conciliation Attempt)

Version: 24 August 2004

Effective as of 1 September 2004

- (1) Prosecution for trespass, defamation, violation of privacy of correspondence, bodily injury (sections 223 and 229 Penal Code), threats and criminal damage to property may be brought only after a conciliation was unsuccessfully attempted by a conciliation board which is to be designated by the Land Department of Justice. The same applies based on criminal offences pursuant to section 323a Penal Code if the offence committed under the influence of drugs is one of the less serious offences in sentence 1. When bringing his private prosecution, the plaintiff shall submit a certificate showing that conciliation has been attempted.
- (2) The Land Department of Justice may determine that the conciliation board may make its involvement dependent upon payment of a reasonable advance on costs.
- (3) The provisions of subsections (1) and (2) shall not apply where an official superior has the authority

to apply for criminal prosecution pursuant to section 194 subsection (3) or section 230 subsection (2) of the Penal Code.

- (4) If the parties do not live in the same municipal district, a conciliation attempt may be dispensed with in a specific order by the Land Department of Justice.

STPO § 395 (Right to Join as a Private Accessory Prosecutor)

Version: 11 February 2005

Effective as of 19 February 2005

- (1) Whoever
 1. by an unlawful act
 - a) pursuant to sections 174 to 174c, 176 to 181a, and 182 of the Penal Code,
 - b) pursuant to sections 185 to 189 of the Penal Code,
 - c) pursuant to sections 221, 223 to 226 and 340 of the Penal Code,
 - d) pursuant to sections 232 to 233a, 234 to 235, 239 subsection (3), and sections 239a and 239b of the Penal Code,
 - e) pursuant to section 4 of the Act on Civil Law Protection Against Violence and Stalking,
 2. by an attempted unlawful act pursuant to section 211 and 212 of the Penal Code is aggrieved, or
 3. through an application for a court decision (Section 172) gave rise to preferment of public charges may join a public prosecution or an application in confinement proceedings as a private accessory prosecutor.
- (2) The same right shall vest in:
 1. the parents, children, siblings, and the spouse or the same sex partner of a person killed through an unlawful act,
 2. the person who, pursuant to Section 374 in the cases designated in Section 374 subsection (1), numbers 7 and 8, is entitled to act as a private prosecutor and persons aggrieved by an unlawful act pursuant to section 142 subsection (2) of the Patent Act, section 25 subsection (2) of the Utility Models Act, section 10 subsection (2) of the Semi-Conductor Protection Act, section 39 subsection (2) of the Plant Variety Protection Act, section 143 subsection (2) of the Trade Mark Act, section 51 subsection (1) and section 65 subsection (1) of the Industrial Design Act, and sections 108a and 108b of the Copyright Act.
- (3) Whoever is aggrieved by an unlawful act pursuant to section 229 of the Penal Code may join the public prosecution as a private accessory prosecutor if for special reasons, especially because of the serious consequences of the act, this appears to be imperative to safeguard his interests.
- (4) Joinder shall be admissible at any stage of the proceedings. It may also be effected for the purpose of seeking appellate remedy after judgment has been given.

STPO § 397 (Rights of the Private Accessory Prosecutor)

Version: 7 April 1987

Effective as of 1 April 1987

- (1) The private accessory prosecutor shall, after joinder, be entitled to be present at the main hearing even if he is to be examined as a witness. In other respects Sections 378 and 385 subsections (1) to (3) shall apply mutatis mutandis. The private accessory prosecutor shall also be entitled to challenge a judge (Sections 24 and 31) or an expert (Section 74), to ask questions (Section 240 subsection (2)), to object to orders by the presiding judge (Section 238 subsection (2)) and to object to questions (Section 242), to apply for evidence to be taken (Section 244 subsections (3) to (6)), and to make statements (Sections 257 and 258).
- (2) If prosecution is limited pursuant to Section 154a, the right to join the public prosecution as a private accessory prosecutor shall remain unaffected. If the private accessory prosecutor is admitted to the proceedings, a limitation pursuant to Section 154a subsection (1) or (2) shall no longer apply insofar as it concerns the private accessory prosecution.

STPO § 397a (Appointment of an Attorney-at-Law as Counsel)

Version: 11 February 2005

Effective as of 19 February 2005

- (1) Upon application of the private accessory prosecutor an attorney-at-law shall be appointed as his counsel if his right to join the proceedings as a private accessory prosecutor is based on Section 395 subsection (1), number 1a, number 2, or subsection (2) no. 1, or if he was injured by an unlawful act pursuant to sections 232 – 233a Penal Code and if the act which gave rise to the right to join the proceedings was a serious criminal offence. If, at the time of his application, the private accessory prosecutor is under the age of sixteen, or if it is apparent that he cannot sufficiently look after his own interests, an attorney-at-law shall be appointed as his counsel even if the act within the meaning of the first sentence is a less serious offence or if the private accessory prosecutor is aggrieved by an unlawful act pursuant to section 225 of the Penal Code. The application may be made even before the declaration of joinder is issued. Section 142 subsection (1) shall apply mutatis mutandis to the appointment of the attorney-at-law.
- (2) Where the conditions for an appointment pursuant to subsection (1) have not been fulfilled, the private accessory prosecutor shall, upon application, be granted legal aid for calling in an attorney-at-law under the same provisions as those applicable in civil litigation if the legal and factual situation is complex, if the aggrieved person cannot sufficiently safeguard his own interests, or if this cannot reasonably be expected of him. Subsection (1), third and fourth sentences, shall apply mutatis mutandis. Section 114, second part of the sentence, and section 121 subsections (1) to (3) of the Civil Procedure Code shall not be applicable.
- (3) The court seized of the case shall decide on the appointment of the attorney-at-law and on the granting of legal aid. In cases referred to in subsection (2) the decision shall be incontestable.

STPO § 403 (Conditions)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) The aggrieved person or his heir may, in criminal proceedings, bring a property claim against the accused arising out of the criminal offence if the claim falls under the jurisdiction of the ordinary courts and is not yet pending before another court, in proceedings before the Local Court irrespective of the value of the matter in dispute.

STPO § 404 (Application by the Aggrieved Person)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) The application asserting the claim may be made in writing or orally to be recorded by the registry clerk, or orally at the main hearing before the closing speeches begin. The application must specify the subject of, and the grounds for, the claim and should set forth the evidence. If the application is not made at the main hearing, it shall be served on the accused.
- (2) Making an application shall have the same effect as bringing an action in civil litigation. They take effect upon receipt of the application by the court.
- (3) The applicant shall be notified of the place and time of the main hearing if the application is made before the main hearing begins. The applicant, his statutory representative, and the spouse or the same sex partner of the person entitled to make the application may take part in the main hearing.
- (4) The application may be withdrawn prior to pronouncement of the judgment.
- (5) The applicant and the indicted accused shall, upon application, be granted legal aid under the same provisions as in civil litigation as soon as public charges have been preferred. Section 121 subsection (2) of the Civil Procedure Code shall be applicable with the proviso that, if the indicted accused has defence counsel, the latter shall be assigned to him; if the applicant avails himself of the assistance of an attorney-at-law in the main proceedings, the latter shall be assigned to him. The court seized of the case shall be competent to decide; the decision shall not be contestable.

STPO § 405 (Incorporation of a Settlement in the Record)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) Upon application by the aggrieved party or his heir and the defendant, the court shall incorporate a settlement regarding the claims arising from the offence in the record. Upon unanimous application of those mentioned in sentence 1, it shall put forward a settlement proposal.
- (2) The court of civil jurisdiction is competent for the decision regarding objections to the legal effectiveness of the settlement in whose district the criminal court of the first instance is located.

STPO § 406d (Notification of the Aggrieved Person)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) The aggrieved person shall, upon application, be notified of the dismissal and outcome of the court proceedings to the extent that they relate to him.
- (2) The aggrieved person shall, upon application, be notified of whether detention measures against the accused or the convicted person have been ordered or ended or whether a first time relaxation of prison or prison leave has been granted, if he presents a legitimate interest and the affected person does not have a prevailing opposing interest worthy of protection for the exclusion of such notification. The cases specified in section 395 subsection (1) no. 1a, c, and d and no. 2 do not require the presentation of a legitimate interest.
- (3) Notification need not be furnished if delivery is not possible at the address which the aggrieved person indicated. If the aggrieved person has selected an attorney-at-law as counsel, if counsel has been assigned to him or if he is legally represented by counsel, Section 145a shall apply mutatis mutandis.

STPO § 406e (Inspection of Files)

Version: 2 August 2000

Effective as of 1 November 2000

- (1) An attorney-at-law may inspect, for the aggrieved person, the files that are available to the court or, if public charges are preferred, the files that have to be submitted to it, and may inspect officially impounded pieces of evidence, if he shows a legitimate interest. In the cases mentioned in Section 395 such legitimate interest need not be shown.
- (2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation appears to be jeopardized or if the proceedings could be considerably delayed thereby.
- (3) Upon application and unless important reasons constitute an obstacle, the attorney-at-law may be handed the files, but not the pieces of evidence, to take to his office or private premises. The decision shall not be contestable.
- (4) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in other cases the presiding judge of the court seized of the case shall give this decision. An application may be made for a court decision pursuant to Section 161a subsection (3), second to fourth sentences, appealing against the decision made by the public prosecution office pursuant to the first sentence. The presiding judge's decision shall be incontestable. These decisions shall not be given with reasons if their disclosure might endanger the purpose of the investigation.
- (5) Under the conditions in subsection (1) the aggrieved person may be given information and copies from the files; subsections (2) and (4) as well as section 478 subsection (1) sentences 3 and 4 shall apply mutatis mutandis.
- (6) Section 477 subsection (5) shall apply mutatis mutandis.

STPO § 406f (Assistance and Representation of the Aggrieved Person)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) The aggrieved person may avail himself of the assistance of an attorney-at-law or be represented by such attorney in criminal proceedings.
- (2) The attorney-at-law shall be permitted to be present at the aggrieved person's examination by the court or by the public prosecution office. He may exercise the aggrieved person's right to object to questions (Section 238 subsection (2), Section 242) and may submit an application to exclude the public pursuant to section 171b of the Courts Constitution Act, but not if the aggrieved person objects thereto.
- (3) If the aggrieved person is examined as a witness, a person whom he trusts may, at his request, be permitted to be present, unless the presence could endanger the purpose of the examination. The decision shall be made by the person conducting the examination; it shall not be contestable.

STPO § 406g (Assistance for an Aggrieved Person Entitled to Private Accessory Prosecution)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) Whoever is entitled to join the proceedings as a private accessory prosecutor pursuant to Section 395 is entitled to be present at the main proceedings. He may, also prior to preferment of public charges, avail himself of the assistance of an attorney-at-law or be represented by such attorney, also where joinder as a private accessory prosecutor is not declared. If there is doubt about whether a person is entitled to be present pursuant to sentence 1, the court shall decide after hearing the person and the public prosecution office regarding the entitlement to be present; the decision shall not be contestable.
- (2) In addition to the rights of the attorney-at-law designated in Section 406f subsection (2), he shall be entitled to be present at the main hearing, also if the main hearing is not held in public. He shall be permitted to be present at judicial examinations and judicial inspections if the purpose of the investigation is not jeopardized thereby; the decision shall be incontestable. Section 168c subsection (5) and Section 224 subsection (1) shall apply mutatis mutandis to the notification.
- (3) Section 397a shall apply mutatis mutandis to:
 1. the appointment of an attorney-at-law and
 2. the granting of legal aid for calling in an attorney-at-law.

In preparatory proceedings the court which would be competent to open the main proceedings shall give a decision.

- (4) Upon application by the person entitled to join the proceedings as a private accessory prosecutor an attorney-at-law may, in the cases under Section 397a subsection (2), be appointed as counsel provisionally if:
 1. this is imperative for special reasons,
 2. the assistance of counsel is urgently required, and
 3. the granting of legal aid appears to be possible, but a decision cannot be expected on it in time.

Section 142 subsection (1) and Section 162 shall apply mutatis mutandis to the appointment. The appointment shall end unless an application for granting legal aid is filed within a time limit to be set by the judge, or if the granting of legal aid is refused.

STPO § 406h (Information as to Rights)

Version: 24 June 2004

Effective as of 1 September 2004

- (1) The aggrieved person shall be informed of his rights pursuant to Sections 406d, 406e, 406f, and

406g, as well as of his right to join the public prosecution as a private accessory prosecutor (Section 395) and to apply for an attorney-at-law to be appointed or called in as counsel (Section 397a).

- (2) The aggrieved person or his heir as a rule shall be informed as early as possible that he can assert claims for property damage arising from the offence pursuant to the provisions of Chapter Three and the ways in which this can be done.
- (3) The aggrieved person shall be informed of the possibility of also receiving support and assistance through victims' assistance agencies.
- (4) Section 406d subsection (3) sentence 1 shall apply *mutatis mutandis*.

STPO § 459a (Facilitating Payment)

Version: 7 April 1987

Effective as of 1 April 1987

- (1) After the judgment has entered into force the executing authority shall decide whether to grant relaxation of conditions of payment of a fine (section 42 Penal Code). It may also grant relaxation of conditions of payment if, without such grant, there is substantial jeopardy to reparation by the convicted person for damage caused as a result of the offence; the convicted person may be required to furnish proof of reparation.
- (2) The executing authority may subsequently amend or revoke a decision concerning relaxation of payment conditions pursuant to subsection (1) or section 42 of the Penal Code. Here it may deviate from a preceding decision to the convicted person's detriment only on the basis of new facts or evidence.
- (3) Where relaxation in the form of payment in specified instalments is revoked pursuant to section 42, second sentence, of the Penal Code, this shall be noted in the files. The executing authority may grant relaxation of conditions of payment again.
- (4) The decision concerning relaxation of conditions of payment shall also extend to the costs of the proceedings. It may also be given with regard to costs alone.

GERMAN CRIMINAL CODE (*STRAFGESETZBUCH* "STGB")

STGB § 46a Offender-Victim Mediation, Restitution for Harm Caused

Version: 13 November 1998

Effective as of 1 January 1999

If the offender has:

1. in an effort to achieve a settlement with the aggrieved party (offender-victim mediation), completely or substantially made restitution for his act or earnestly strived to make restitution; or
2. in a case in which the restitution for the harm caused required substantial personal accomplishments or personal sacrifice on his part, completely or substantially compensated the victim,

then the court may mitigate the punishment pursuant to Section 49 subsection (1), or, if the maximum punishment which may be incurred is imprisonment for not more than one year or a fine of not more than three hundred sixty daily rates, dispense with punishment.

STGB § 56 Suspended Execution of Punishment

Version: 13 November 1998

Effective as of 1 January 1999

- (1) Upon a sentence of imprisonment of no more than one year the court shall suspend the execution of the punishment and grant probation if it can be expected that the sentence will serve the convicted person as a warning and he will commit no further crimes in the future even without the influence exerted by serving the sentence. Particularly to be considered are the personality of the convicted

person, his previous history, the circumstances of his act, his conduct after the act, his living conditions and the effects which can be expected as a result of the suspension.

- (2) The court may also suspend the execution of a longer term of imprisonment which does not exceed two years under the provisions of subsection (1) and grant probation if a comprehensive evaluation of the act and personality of the convicted person reveals the existence of special circumstances. In making the decision the efforts of the convicted person to make restitution for the harm caused by the act should particularly be considered.
- (3) The execution of a sentence of imprisonment of no less than six months shall not be suspended when defence of the legal order so requires.
- (4) A suspended execution of punishment may not be limited to a part of the punishment. It shall not be excluded by the crediting of time served in remand detention or any other deprivation of liberty.

STGB § 56b Conditions

Version: 13 November 1998

Effective as of 1 January 1999

- (1) The court may impose conditions on the convicted person to the end of making amends for the wrong committed. No unreasonable demands should thereby be made on the convicted person.
- (2) The court may order the convicted person:
 1. to make restitution to the best of his ability for the harm caused by the act;
 2. to pay a sum of money to a non-profit-making institution if this is appropriate in light of the act and the personality of the offender;
 3. to render some other community service; or
 4. to pay a sum of money to the public treasury.

The court should impose a condition pursuant to sentence 1, nos. 2 to 4, only to the extent that the fulfilment of the condition does not impede making restitution for the harm caused.

- (3) If the convicted person offers to perform appropriate tasks to the end of making amends for the wrong committed, then the court shall, as a rule, temporarily refrain from imposing conditions if it can be expected that the offer will be fulfilled.

Juvenile Court Act (*Jugendgerichtsgesetz* "JGG")

JGG § 45 (Dispensing with Prosecution)

Version: 30 August 1990

Effective as of 1 December 1990

- (1) The public prosecutor may dispense with prosecution without the judge's consent if the conditions set out in section 153 of the Code of Criminal Procedure are met.
- (2) The public prosecutor shall dispense with prosecution if an educational measure has already been enforced or initiated and if he considers neither the participation of the judge pursuant to subsection 3 nor the bringing of charges to be necessary. An attempt by the youth to achieve a settlement with the aggrieved person shall be considered equivalent to an educational measure.
- (3) The public prosecutor shall propose issuance of a reprimand, of instructions pursuant to section 10, subsection 1, third sentence, numbers 4, 7 and 9, or conditions by the juvenile court judge if the accused admits his guilt and if the public prosecutor considers that the ordering of such a judicial measure is necessary but that the bringing of charges is not necessary. If the juvenile court judge agrees to the proposal the public prosecutor shall dispense with the prosecution; where instructions or conditions are imposed he shall dispense with the prosecution only once the youth has complied with them. Section 11, subsection 3 and section 15, subsection 3, second sentence, shall not be applied. Section 47, subsection 3, shall apply *mutatis mutandis*.

COURTS CONSTITUTION ACT (*GERICHTSVERFASSUNGSGESETZ* “GVG”)

GVG § 26 (Competence in Youth Protection Matters)

Version: 9 May 1975

Effective as of 1 January 1975

- (1) In the case of criminal offences committed by adults through which a child or a juvenile is injured or directly endangered, and in the case of violations by adults of legal provisions serving the protection or education of young people, the juvenile courts shall also have jurisdiction in addition to the courts with jurisdiction over general criminal matters. Sections 24 and 25 shall apply *mutatis mutandis*.
- (2) In matters relating to the protection of children and juveniles, the public prosecutor should only prefer charges before the juvenile courts if children or juveniles are required as witnesses in the proceedings or if a hearing before the juvenile court appears expedient for other reasons.

GVG § 171b (Exclusion of the Public for the Protection of the Private Sphere)

Version: 18 December 1986

Effective as of 1 April 1987

- (1) The public may be excluded if circumstances from the private sphere of a participant in the proceedings, a witness or a person aggrieved by an unlawful act (section 11 subsection (1), number 5, of the Criminal Code) are mentioned, the public discussion of which would violate interests that are worthy of protection, unless there is an overriding interest in public discussion of these circumstances. This shall not apply if the persons whose private sphere is affected object to exclusion of the public in the main hearing.
- (2) The public shall be excluded if the preconditions of subsection (1), first sentence, exist and the person whose private sphere is affected applies for such exclusion.
- (3) The decisions pursuant to subsections (1) and (2) shall not be contestable.

GVG § 172 (Exclusion Based on Endangerment)

Version: 15 July 1992

Effective as of 22 September 1992

The court may exclude the public from a hearing or from a part thereof if

1. endangerment of state security, the public order or public morals is to be feared,
 - 1a. endangerment of the life, limb or liberty of a witness or another person is to be feared,
2. an important business, trade, invention or tax secret is mentioned, the public discussion of which would violate overriding interests worthy of protection,
3. a private secret is discussed, the unauthorized disclosure of which by a witness or expert carries a penalty,
4. a person under the age of sixteen is examined.

GVG § 177 (Measures upon Disobedience)

Version: 9 May 1975

Effective as of 1 January 1975

Parties, accused persons, witnesses, experts or persons not participating in the hearing who fail to follow the orders given to maintain order may be removed from the courtroom or taken into coercive detention and held for a period of time to be determined; such period may not exceed twenty-four hours. Decisions on measures pursuant to the first sentence in respect of persons who are not participants in the hearing shall be made by the presiding judge and in all other cases by the court.

GVG § 178 (Coercive Measures for Contempt of Court)

Version: 27 July 2001

Effective as of 1 January 2002

- (1) A coercive fine of up to one thousand euros may be imposed or coercive detention of up to one week

may be ordered and immediately executed against parties, accused persons, witnesses, experts or persons not participating in the hearing who are found to be in contempt of court at the sitting, subject to prosecution by a criminal court. At the time the coercive fine is imposed, a determination shall also be made concerning the extent to which it shall be replaced by coercive detention in event that the fine cannot be collected.

- (2) The decision on the imposition of coercive measures in respect of persons who are not participants in the hearing shall be made by the presiding judge and in all other cases by the court.
- (3) If a person is later sentenced for the same offence, the coercive fine or coercive detention shall be credited against the sentence.

**RULES FOR CRIMINAL PROCEEDINGS AND PROCEEDINGS TO IMPOSE A REGULATORY FINE
(*RICHTLINIEN FÜR DAS STRAFVERFAHREN UND DAS BUßGELDVERFAHREN "RISTBV"*)
(STATUS: 1 JULY 2002)**

19 Examination of Children and Juveniles

- (1) Repeated examination of children and juveniles prior to the main hearing should be avoided as much as possible because of the psychological strains on these witnesses associated therewith.
- (2) As to witnesses under the age of 16, to avoid repeated examinations, the option of audio-video recordings should be used (§ 58a subsection (1) sentence 2 no. 1, § 255a subsection (1) StPO). In this regard it must be taken into account that the examining person and the witness must be audio-visually recorded together and at the same time and in the case of § 52 StPO the instruction and the willingness of the witness to make a statement (§ 52 subsection (2) sentence 1 StPO) must be documented. Care must be taken as to the presence of a trusted person in accordance with § 406f subsection (3) StPO. With a view toward the later use of the recording as evidence in the main hearing (§ 255a StPO) judicial examination is recommended (§§ 168c, 168e StPO). As to offences within the meaning of § 255a subsection (2) sentence 1 StPO it should be timely worked towards that the accused and his defence counsel have the opportunity to participate in the examination.
- (3) In cases under § 52 subsection (2) sentence 2 StPO, the public prosecution office shall work towards the earliest possible order of supplementary guardianship (§ 1909 subsection (1) sentence 1 German Civil Code) by the competent Guardianship Court (§§ 37, 36 German Ex Parte Judicial Act).
- (4) All circumstances that are significant to the trustworthiness of a child or juvenile should be established as early as possible. It is appropriate to question parents, teachers, caregivers, or other role models about this; if necessary, contact should be made with the Youth Office.
- (5) If the trustworthiness remains doubtful, an expert who has special knowledge and experience in the area of child psychology should be called in.

19 a Examination of the Injured Party as a Witness

- (1) If it is discernible that the examination as a witness may be associated with considerable psychological strain for the injured party, he must be treated with particular empathy and consideration during the examination; reference is made to §§ 68a, 68b StPO. The presence of a trusted person pursuant to § 406f subsection (3) StPO should be granted when the purpose of the examination is not endangered.
- (2) During the judicial examination of the injured party, the public prosecutor shall work toward appropriate implementation of the examination through proposals and the filing of applications. He shall pay particular attention that the injured party is not subject to more strain from questions and explanations of the accused and his defence counsel than must be accepted in the interest of discovery of the truth.
- (3) Repeated examination of the injured party prior to the main hearing may lead to considerable strain

for these persons and, thus, shall be avoided as much as possible.

123 General

The public prosecutor shall avoid anything that could even only appear to cause impermissible influence over the court; therefore, he shall not enter or leave together with the bench, shall not go to the consultation room, and during hearing breaks he shall not converse with members of the bench.

135 Witnesses and Experts

- (1) Meetings between the defendant and witnesses, particularly victims, that go beyond what is necessary should be avoided and special waiting rooms for witnesses should be used.
- (2) Witnesses and experts who are no longer needed for the remainder of the hearing should be released after their examination.
- (3) Children and juveniles should be examined before other witnesses when possible. They should be supervised in waiting rooms and cared for to the extent possible.
- (4) The public prosecutor should work towards appropriate methods of proceeding through suitable applications.

173 Instruction of the Injured Party about Compensation Proceedings

The public prosecutor shall advise the injured party or his heirs of the possibility of asserting a compensation claim pursuant to §§ 403 et seq. StPO. In so doing, the injured party shall be instructed about the possibility of assistance with costs of proceedings (§ 404 subsection (5) StPO), the form and contents of the application (§ 404 subsection (1) StPO), and about the right to participate in the main hearing (§ 404 subsection (3) StPO). He will also be advised that it is usually advisable to file the application as early as possible, that he can still pursue his claim, to the extent it is not approved, through civil law means (§ 406 subsection (3) StPO), and that the court can refrain from a decision on the application for certain reasons (§ 405 StPO).

221 Expediting Proceedings with Child Victims

- (1) The proceedings are to be expedited primarily because children's memories fade fast and because they are particularly easy to influence.
- (2) If an accused person, who lives in a household with the aggrieved person or can directly affect him in another way, is released, the Youth Office shall be promptly notified so that the necessary measures for protection of the aggrieved person can be taken. That office that carried out the release shall provide the notice.

222 Examination of Children; Exclusion and Limitation of the Public

- (1) If children are examined as witnesses, Nos. 19, 19a, 130a subsection (2), and 135 subsection (2) shall be taken into account. It is frequently recommended to call in an expert for the first examination who has special knowledge and experience in the area of child psychology.
- (2) If the accused person makes a credible confession to the judge, it is in the interest of the child to assess whether his examination is still necessary (cf. No. 111 subsection (4)).
- (3) As to exclusions or limitations of the public, Nos. 131a, 132 shall be taken into account.