ANCILLARY (ADHESION) PROCEEDINGS IN GERMANY AS SHAPED BY THE FIRST VICTIM PROTECTION LAW: AN ATTEMPT TO TAKE STOCK

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I. INTRODUCTION

Even in the 1970s, an aggrieved person was still treated as a "forgotten man";[1] in scientific debate the victim of a crime was a mere shadow. In the 1980s that situation changed fundamentally. Specific amendments were rapidly made to the legislation of the time, which I shall look at later, and these changes are particularly remarkable because at the time no real "pressure group" existed to push for change.[2]

What victim protection in criminal proceedings basically aims to do is to stop a person aggrieved because of a criminal act from being a mere object of the proceedings, whose main function it is to be a witness in court; s/he should be made a player in the proceedings with rights which s/he can assert there. Victim protection also aims to deflect the focus of the proceedings from the accused ensuring that, while the proceedings still concentrate on establishing the accused's guilt, the proceedings also take on board the interests of the aggrieved person and the relationship between them and the accused.[3]

The concept of victim protection derives from the principle of the social state.[4] The state complies with that principle only if it ensures social justice in legislation and government, and helps the weaker members of society to assert their legitimate rights. It is quite obvious that the victims of crime are often weaker members of society and that they need help, emotional care, social stability and, last but not least, financial support.[5]

Finally, it should not be forgotten that improved victim protection can also contribute to ensuring effective criminal prosecution: this can be seen from the fact that in some 90% of cases, crimes are solved as a result of information provided by victims.[6] Consequently, if the judicial authorities take better care of victims of crime, this can have positive repercussions on people's feeling of well-being. Hence, in this way victim protection can help to strengthen the legal order.[7]

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations on 29 November 1985 shows that this rediscovery of the aggrieved person or the victim of crime is not merely

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1 Cf. Weigend, ZStW 96 (1984, p.761).

2 Cf. Riess, Jura 1987, p281, p.283.

3 Cf. Jung, ZStW 93 (1981, p.1147).

4 Cf. *inter alia* Compendium of Judgments of the Federal Constitutional Court 39, 1 (p.47 f.); 88, 203 (p.257 f.)

5 Cf. Goll, ZRP 1988, p.14.

6 Cf. Kirchhoff, in: *Das Opfer und die Kriminalitätsbekämpfung* [Victims and the fight against crime] published by the Federal Criminal Investigation Office, 1996, p.48; Cf. also Koch/ Poerting/Störzer, *Kriminalstatistik 1996* [Criminal statistics for 1996], p.2 f.

7 Cf. Goll, *op. cit*.

a national phenomenon but an international one. As you are aware, the Declaration contains a range of recommendations intended to assist governments in the international community to help and assist the victims of crime and abuse of power of various levels.

As I shall tell you about ancillary proceedings as regulated by the German Code of Criminal Procedure, which governs compensation for aggrieved parties in criminal proceedings, it appears vital to start by quoting the basic provision of the aforementioned Declaration, which deals with asserting claims for damages:

> "*8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.*"

Later on we shall be looking at whether - and to what extent - German procedural law, as improved by the Victim Protection Law of 18 December 1986, takes accunt of these maxims.

II. ANCILLARY PROCEEDINGS IN PRACTICE

A. Basic Aims of Criminal Proceedings Under German Law

Criminal proceedings are not of an adversarial nature in the same way as civil proceedings, which are characterised by the parties freedom to shape them.[8] The aim of criminal proceedings is to investigate the substantive truth behind the criminal act and to punish the perpetrator of the act.[9] The traditional form of criminal proceedings under English law is that of an adversarial proceeding with the result that representatives of the prosecuting body and the defendant or their legal counsel shape the proceedings: if the prosecutor withdraws the charges or the accused confesses their guilt they can influence the course of the proceedings. In this way the judge is merely a neutral arbiter who delivers judgment on the basis of incriminating or exonerating evidence collected by the "parties".

The duty incumbent on German criminal judges to establish the substantive truth rather than formal truth also changes the roles in another way: the judge is master of the proceedings; s/he has to know what is in the case files, s/he does not merely examine the witnesses but is required, on their own responsibility, to gather all information which might incriminate or exonerate the accused. The duty to clarify the facts of the case, which is enshrined in the Code of Criminal Procedure, can require that the court collects evidence which exonerates the accused even against their will or that it clarifies incriminating facts, even if the public prosecutor shows no interest in them. Even if the accused and the public prosecutor both agree to forgo the further collection of evidence, that is not sufficient to release the court from its duty to clarify the facts of the case.

The principle that the court must clarify the facts of the case renders ancillary proceedings, which are part of the criminal proceedings, particularly attractive to victims of crime: they do not have to produce evidence themselves but can leave it to the public prosecutor and the court to

[8] Cf. Federal Court of Justice, NJW 1960, p.2346.

[9] Cf. KK Pfeiffer, Fourth Edition, Introduction, margin reference 2, with further references.

bring charges against the accused.

Ancillary proceedings are based on the notion that proceedings relating to a single set of circumstances should be handled together. So, where claims to substantive or symbolic compensation arise from a criminal act - be it fraud, embezzlement, even assault or slander - then there is much to be said for dealing with the aggrieved person's claim to damage in the criminal proceedings rather than waiting for a subsequent civil action to be brought, thereby avoiding duplication of efforts and also the possibility of contradictory judicial decisions.

The decision on the application is actually taken during the main proceeding, not, for example, at a separate, later hearing. To that extent, the term "ancillary proceeding" is in fact a misnomer. As already said, the principles of criminal proceedings - i.e. the inquisitorial maxims - apply to the proceedings. This means that the court must clarify the facts of the case of its own motion and is hence also not bound by the procedural declarations of the accused. Consequently there is no judgment of admission of the sort found in section 307 of the Code of Civil Procedure.[10]

The Victim Protection Law pursues the aim of improving reparation for damages within the criminal proceeding, primarily by aiming to broaden use of ancillary proceedings. This is done in the following way.

According to the revised version of section 403, subsection 1, of the Code of Criminal Procedure, in proceedings before the Local Court, the aggrieved person may, without the consent of the accused, also assert a property claim arising out of the criminal offence which exceeds the maximum value applicable to litigation before the Local Courts (previously DM 5,000, now DM 10,000).

This is important because some 99% of criminal proceedings at first instance are held before the Local Courts.[11] In proceedings before the Local Courts, it is possible to assert property claims (e.g for return of stolen assets or for pecuniary compensation - mainly reparation for pain and suffering - or claims for reimbursement of funeral expenses or claims resulting from unjustified enrichment) irrespective of the value of the object of litigation.

An amendment to section 406, subsection 1; 2, subsection 3, of the Code of Criminal Procedure has made it possible - as proposed in the government's draft legislation[12] - to produce judgments on the grounds of the claim or on a portion thereof. In the draft it was assumed that a decision on the grounds of the claim (which would be easier to clarify using the resources of the criminal proceedings) could in the future be taken in the ancillary proceedings. The level of compensation - which, as a point of detail, is irrelevant to the criminal proceedings, and to establish would delay clarification of the criminal proceedings - could, if necessary, be dealt with in later civil proceedings. In this way, so the 'explanatory' notes, it would be possible to avoid taking evidence on the grounds of the claim more than once. Moreover, in many cases it would make it possible to do without further acrimonious discussion as to the level of compensation.[13]

Where, however, a decision has been taken only on the grounds of the claim, the

[10] BGHSt 37, 263, as confirmed by Wendisch, JR 1991, p.297.

[11] Cf. Riess, Jura 1997, p.281, p.289.

[12] Cf. Explanatory comments in *Bundestag* Publication 10/5305, p.16.

[13] Cf. *Bundestag* Publication, *op. cit.*, p.15.

hearing to decide the amount (level of the claim) takes place, upon application, before a competent civil court.[14] The victim does not require legal assistance to do this (see section 404, subsection 1).

According to section 404, subsection 5, of the Code of Criminal Procedure, as amended by the Victim Protection Law,[15] the applicant may receive legal aid for the ancillary proceeding under the same provisions as in civil litigation.[16] The effect of this is as follows.

If the victim is unable to meet the costs of the litigation (or part of the costs, or in instalments), and if the case shows prospects of success (see sections 119 to 122, Code of Civil Procedure), the criminal court shall award legal aid once public charges have been brought. The decision is not subject to challenge by the other participants in the proceedings.

Where the court has convicted the accused and held that the victim is to be indemnified, the following problem in not uncommon. As a conviction means that the offender must also pay a fine and court costs, s/he will do all they can to avoid a substitute prison term (applicable if they defaulted) by using their available assets primarily to pay off the fine (and the costs) before indemnifying the aggrieved person.[17] The new rule introduced into the second sentence of section 459a, subsection 1, of the Code of Criminal Procedure is intended to prevent that from happening and to promote indemnification for damage by the offender. In effect, the execution agency may facilitate payment of costs or a fine (by delaying payment or the granting of payment by instalments) if, without such easier payment terms, the indemnification would be consiberably endangered. This might be the case even if the offender were able to pay the fine promptly but, given the primacy of the fine, s/he would subsequently be compensating the victim only much later.[18]

In summary, it can be seen that the law offers victims of crime the following options for initiating ancillary proceedings:

(i) Ancillary proceedings allow for the criminal and civil-law consequences of a criminal offence to be dealt with in a single set of proceedings. Hence they would allow the victim to assert their rights quickly and simply.

(ii) Normally speaking, even lawyers should be happy about the existence of these proceedings: they spare the judge and legal counsel from going through civil proceedings; they reduce the time spent in court because there is no need to bring the case before several different courts and so judicial decisions are not likely to become contradictory.

The interests of the aggrieved person or their heirs are taken on board in a number of ways:

(i) S/he is supposed to be informed of their option to assert a claim, even in criminal proceedings, at an early stage (section 403, subsection 2, Code of Criminal Procedure).

(ii) Claims must not take any particular

[14] Cf. section 406, subsection 3, third sentence, Code of Criminal Procedure, in conjunction with section 304, subsection 2, Code of Civil Procedure.

[15] Version pursuant to the *Bundesrat* proposal, cf. *Bundestag* Publication 10/5305, page 15, 29 no. 11, page 33.

[16] Sections 114 f., Code of Civil Procedure.

[17] Cf. Riess, Jura 1987, 281, 289; Riess/Hilger, NStZ 1987, 145, 157.

[18] Cf. Riess/ Hilger, NStZ, *op.cit*.

form - it can be made (even orally) at the main hearing before the beginning of the closing arguments (first sentence of section 404, subsection 1, Code of Criminal Procedure). S/he does not require a lawyer to file the claim.

(iii) If the victim is unable to meet the costs - in part or in instalments - of bringing the case, and if the case has sufficient prospects of success, they receive legal aid and a legal representative is appointed.

(iv) The victim has the right to be present and to be heard. As a participant in the proceedings, s/he must be heard at the main hearing.[19] The victim may apply for evidence to be taken,[20] has the right to ask questions pursuant to section 240 of the Code of Criminal Procedure, and is authorised under section 238, subsection 2, Code of Criminal Procedure, to challenge orders of the presiding judge concerning the way in which the hearing is conducted. Finally, in line with section 257, Code of Criminal Procedure, the victim has the right to make statements after the defendant has been examined and after each individual taking of evidence. In the main hearing, victims enjoy these rights, however, only insofar as they are relevant to the civil claim.[21] Finally, and of particular significance, is the right to consult the case files, which all aggrieved persons may assert through their lawyer.

(v) The fact that the ancillary proceedings are part of the criminal proceedings is particularly advantageous for the aggrieved party as it means that the principles of the criminal proceedings are applicable. Hence, unlike in civil proceedings, the court is required to establish the facts of the case (section 244, subsection 2, Code of Criminal Procedure). Consequently it must, of its own motion, extend the taking of evidence to all facts and evidence which are important for the decision. Unlike in civil proceedings, the aggrieved party is therefore not required to produce evidence; it can leave it to the public prosecutor and the court to establish the facts. However, the court's duty to establish the facts is limited by section 405 of the Code of Criminal Procedure: if an examination of the facts would protract the criminal proceedings disproportionately, section 405 requires the court to abstain from a decision.[22] I shall be looking at this provision in more depth later.

(vi) Finally, the aggrieved party still has the possibility of asserting before the civil courts claims asserted unsuccessfully before the criminal courts. In principle, therefore, the aggrieved party can only emerge from ancillary proceedings as a winner, not a loser.[23]

Thus, at first sight, it would appear that the catalogue of rights and entitlements enjoyed by the victims of crime takes full

[19] Cf. LR Hilger, *op. cit*.

[20] Federal Court of Justice, NJW 1956, p.1767.

[21] Cf. LR Hilger, *op. cit*.

[22] Cf. LR Hilger, 25th Edition, section 405, margin reference 11, with further references.

[23] Cf. Riess, Die Rechtsstellung des Verletzten im Strafverfahren, Gutachten für den 55. Deutschen Juristentag [Legal status of the aggrieved party in criminal proceedings; expert report to the 55th Conference of German Lawyers], Volume 1, Part C, margin reference 42.

account of the basic principles of justice for victims of crime and abuse of power adopted by the United Nations' General Assembly.

However, things look different in practice. Only a couple of weeks after the Victim Protection Law came into force, this attempt by Parliament to increase the aggrieved party's chance of obtaining reparation for damage suffered within ancillary proceedings was critically appraised in the literature.[24] The amendments which it introduced to the law were pejoratively described as "cosmetic" and there was said to be much doubt as to their ability to incriease the "enthusiasm" felt for ancillary proceedings in practice.[25]

Regret was expressed that no attempt had been made to deprive the courts of the possibility of abstaining from a decision on the substitute claim within the framework of the second sentence of section 405.[26] The latter provision allows the judge to abstain from a decision "in the event the motion cannot be properly settled in a criminal proceeding, in particular, if its examination would protract the proceedings or if the motion is not permissible". This was a facility of which the courts had made all too frequent use for a substantial period of time.

Criticism was also voiced that the law had failed to resolve the tug of war between the state's action to enforce pecuniary fines and the legitimate indemnity claims of the aggrieved party in a way which favoured the aggrieved party. This belies the fact that in many cases it becomes impossible to assert the aggrieved party's indemnity claims because the offender simply does not have sufficient resources. As already mentioned, in the face of a substitute prison sentence, the offender will first attempt to pay a fine. The solution identified by Parliament, i.e, to facilitate payment by the offender under the second sentence of section 459a, subsection 1 of the Code of Criminal Procedure, if, without such facility, the indemnification by the convicted person for damage caused as a result of the offence would be considerably endangered, was described as an unsatisfactory minimum and a "faltering first step".[27]

From the victim's point of view, it would certainly have been more satisfactory to refrain from collecting the fine if the offender complied with a duty to make reparation for damages or to satisfy the aggrieved party's claim from the proceeds of the fine.[28] As this manner of compensating victims would, however, have caused the state coffers to suffer considerable financial loss, the chance of pushing it through were rather slim from the outset.

As was to be feared, given the criticisms expressed in the literature, the improvement which Parliament expected to see in the settlement of victims' claims for damages from criminal acts, and the expected extension in the use of ancillary proceedings,[29] failed to materialise. Despite the fact that ancillary proceedings have formed part of the criminal proceedings since as far back as 1943 and that they are familiar to all lawyers, their use continues to be infrequent as the following figures illustrate.

[24] Cf. Riess, Jura 1987, p.281, p.290; Weigend, NJW 1987, p.1170, p.1176.

[25] Cf. Jung, JuS 1987, p.159; Weigend, NJW 1987, p.1170, p.1176.

[26] Cf. Weigend, *op. cit*.

[27] Cf. Weigend, *op. cit*., Riess, Jura 1987, *op. cit*.

[28] Cf. Wiegend, *op. cit*., with further references, cf. Weigend, ZStW 96 (1984) p.761, p.793.

[29] Cf. *Bundestag* Publication 10/5305, p.8.

In 1997 Germany's Local Courts handed down 2,951 judgments in ancillary proceedings. Of these, 2,840 were final judgments and 111 judgments on the grounds;[30] 142 judgments were handed down in ancillary proceedings by first-instance Regional Courts - 119 as final judgments and 23 as judgments on the grounds.[31] By contrast, over the same period the Local Courts handed down a total of 395,179[32] judgments and the Regional Courts handed down 10,823[33] judgments overall. These figures show how seldom ancillary proceedings are conducted; as a proportion of all judgments delivered, ancillary proceedings made up only about 1% of proceedings before the Regional Courts and 0.75% of proceedings at the Local Courts.

That said, it has been estimated in some competent studies that it would have been possible to bring ancillary proceedings in just about 70% of all cases in which a judgment was handed down.[34] In about 65% of those possible cases, reparation had yet to be made for damage caused. Given that in about a quarter of all such cases a civil action had already been brought or a lawyer had already issued a claim for the amount at issue, it can be assumed that there was a genuine need for ancillary proceedings to be conducted in about 35% of the eligible cases.[35] Had, therefore, ancillary proceedings been used as envisaged by Parliament, the proportion would not have been around 1% or 0.75% but more like 15 to 25%.

The reasons why people are less than keen to use ancillary proceedings in practice, than Parliament would have wished are well known. A wide-ranging study of legal trends carried out in the early 1990s demonstrated[36] that there was "broad" rejection of ancillary proceedings by judges, public prosecutors and legal professionals overall and proved that aggrieved persons are generally unfamiliar with this type of proceeding.[37] The low practical significance of ancillary proceedings in also decried by Germany's European neighbours, insofar as the legal prerequisites are comparable there.[38]

The reason given in the study for why Germany's judges, public prosecutors and legal professionals tend to shy away from ancillary proceedings is that they consider them to be "anathema to criminal proceedings".[39] The reason for this is possibly that the strict separation between criminal and civil law instilled during legal studies, and the mental distinction between punishment and reparation, run deep; also criminal judges might fear that they will be put under pressure and overburdened by having to deal with complex issues of civil law.[40] The reason for this may well be that the conditions attaching to culpability under the criminal law and those applicable to claims for damages under civil law are too dissimilar in German law: the causality obtaining

[30] Federal Statistical Office, Wiesbaden, Criminal Courts, 1997, working documents, p.12.

[31] Federal Statistical Office, Wiesbaden, Criminal Courts, 1997, working documents, p.46.

[32] Federal Statistical Office, Wiesbaden, Criminal Courts, 1997, working documents, p.16.

[33] Federal Statistical Office, Wiesbaden, Criminal Courts, 1997, working documents, p.50.

[34] Cf. Kaiser, *op. cit.*, p. 276.

[35] Cf. Kaiser, *op. cit.*, p. 276.

[36] Cf. Kaiser, Die Stellung des Verletzten im Strafverfahren, Implementation und Evaluation des Opferschutzgesetzes [Status of the aggrieved person in criminal proceedings, implementation and evaluation of the Victim Protection Law], Freiburg/Breisgau, 1992.

[37] Cf. *op. cit.*, p.278.

[38] Cf. Kintzi, DriZ 1998, p.65, p.72.

[39] *Op. cit.*, p.278.

[40] Cf. Kintzi, *op. cit.*

under the criminal law is one of equivalence, under civil law it is one of adequacy; liability under criminal law is restricted to actual guilt, under civil law exposure to risk is also taken into account; finally, there are major differences as to the distribution of the burden of proof and the duty to tell the truth (the defendant has the right to lie whereas respondents (under civil law) and witnesses are required to tell the truth[41]).

Moreover, the case-law of the Federal Court of Justice, which increasingly feels bound to reverse erroneous decisions in ancillary proceedings, is not apt to encourage the judiciary to make more use of this special type of proceeding.[42] This shows that, from the viewpoint of the Federal Court of Justice, the grounds that judges take for establishing compensation for pain and suffering in ancillary proceedings are not infrequently erroneous. Often there is insufficient detail on judicial findings on the facts and the reasoning used. If such shortcomings lead to judgments being reversed, the judge concerned is hardly likely to continue wanting to make decisions in ancillary proceedings.

However, not only legal difficulties cause lawyers to be shy of ancillary proceedings. Many people support claims that ancillary proceedings place an unnecessary burden on criminal judges. It is claimed that a considerable amount of additional work can stem from the ancillary proceedings.[43] First and foremost, judges and lawyers feel that the procedural delays resulting from the taking of additional evidence are considerable.[44] All professional groups agree that ancillary proceedings are the one source of rights for aggrieved persons causing the longest delays in criminal proceedings.[45]

The view of judges, public prosecutors and lawyers are in stark contradiction to the results of surveys of aggrieved parties: these surveys generally revealed a great deal of interest in active participation in criminal proceedings. 96.9% of all victims of crime favoured the possibility of dealing with the question of damages as part of the criminal proceedings.[46]

It must therefore be concluded that ancillary proceedings, which were created more than fifty years ago to reflect the interest of victims of crime and which have been improved by a number of provisions in the Victim Protection Law, are considered by those victims of crime to reflect their concerns, yet they have found few friends in the judiciary.

B. What Needs to be Done?

On this point, the Grand Criminal Law Commission of the Association of German Judges was appointed in the mid-1990s by the Federal Ministry of Justice to produce an expert report on improving victim protection in criminal proceedings. It took the view that (further) attempts at legislating would have no real prospect of breathing new life into ancillary proceedings.[47] They conceded that thought should be given to a mandatory provision requiring, upon application of the victim, the civil law aspects of establishing

[41] Cf. LR Hilger, *op. cit.*, introductory comment to section 403, margin reference 9.

[42] Cf. Kintzi, *op. cit.*, with reference to the decisions of 27 March 1987 (2 StR 106/87); 9 August 1999 (4 StR 342/88); 25 August 1989 (3 StR 159/89); 13 December 1990 (4 StR 519/90); 14 August 1991 (3 StR 37/91); 30 October 1992 (3 StR 478/92); 30 April 1993 (3 StR 169/93); 9 June 1993 (2 StR 232/93).

[43] Cf. Kaiser, *op. cit.*, p.265.

[44] Cf. Kaiser, *op. cit.*

[45] Cf. Kaiser, *op. cit.*

[46] Cf. Kaiser, *op. cit.* p.276.

[47] Cf. Kaiser, *op. cit.*

damages always to form part of the criminal proceedings. Yet, as not all primary claims for damages under civil law are suitable for being dealt with in criminal proceedings, a statutory provision of that type could not be implemented in the face of opposition from practitioners. This would mean that ancillary proceedings will probably continue to be of minimal significance.[48]

Against the background of these - in my view, convincing - arguments, it is no surprise that current legislative work by the *Länder* aimed at breathing new life into ancillary proceedings (ancillary settlement before the courts between the victim of the crime and the accused) have necessarily been doomed to failure.[49]

It continues to be doubtful whether reorganising ancillary proceedings more to the benefit of victims can bring about their renaissance. It would seem to go without saying that the judicial authorities must adopt a less reticent stance here if, in criminal proceedings, large numbers of victims of a crime can associate and press for a decision in ancillary proceedings.[50] Thought could be given to reducing the already low threshold for access to ancillary proceedings further, so that when the parties concerned - who, in any case, contribute to about 90% in solving crime - lay a criminal information before the police, they could be given a form which they could complete within a few minutes, constituting a full and proper application for the opening of ancillary proceedings.[51] In so doing, it could be possible to assist the parties by providing standard text, which applicants would have only to tick or supplement, for run-of-the-mill cases such as reparation for damage, compensation for pain and suffering, and the return of specific objects.

Even if such attempts at revitalising what might almost be considered "dead" law appear wholly praiseworthy, they cannot prevent judges, where necessary, from pulling on the handbrake by applying section 405 of the Code of Criminal procedure and abstaining from a decsion because dealing with the application for ancillary proceedings might considerably protract the criminal proceedings, e.g. because a motion by the victim for further clarification of the events at issue might cause new witnesses to be heard.[52]

In Germany, practice has shown that even organisational improvements (or training and increased publicity) have been unable to increase the use of ancillary proceedings. This is borne out by the fact that the above-mentioned proposals, which were tabled in the summer of 1996, have failed to have a positive effect on the numbers of cases involving ancillary proceedings. In the year thereafter, the Local Courts handed down very nearly four hundred fewer judgments in ancillary proceedings than in 1995; before the Regional Courts the number of judgements was reduced from 186 to 142. There can be no clearer proof of a trend away from ancillary proceedings in practice.

III. USING VICTIM-OFFENDER MEDIATION TO TAKE ACCOUNT OF THE VICTIM'S INTERESTS

While my comments might have shown that Parliament's attempts to improve the lot of victims of crime within the ancillary proceedings have not been entirely

[48] Cf. Kintzi, *op. cit.*, p.72.

[49] Cf, Bundesrat Publications, 50/95; 70/96; *Bundestag* Publication 13/6899.

[50] Cf. here Rössner/Klaus, NJ 1996, p.288, p.292.

[51] Cf. Rössner/Klaus, *op. cit.*, p.293.

[52] Cf. LR Hilger, *op. cit.*, section 405, margin reference 11, with numerous references.

successful, it should however be pointed out that the Victim Protection Law has set an important signal for the (further) extension of victim-offender mediation in Germany.

Among the detailed list of factors listed in section 46, subsection 2, of the German Criminal Code, which help exonerate the offender when criminal tariffs are calculated, an "attempt by the offender to arrive at a settlement with the aggrieved party" was included almost as a flag for future legislative action.[53] Its inclusion is intended to indicate that when fixing punishment, the courts should have special regard to an attempt by the offender to satisfy the aggrieved party's claim for reparation in ways other than by material reparation for damage. This provides an incentive for the accused to take on board the victim's interests - where possible before the hearing takes plase - to enable the court to impose a more lenient sentence.

That such facilities to improve the possibility of arriving at a settlement between perpetrator and victim were initially made practically possible, and later enshrined, in normative texts is one of the most significant criminal policy developments in Germany over the past years. In this connection, projects designed to allow for a settlement between perpetrators and victims were first set up under the criminal law relating to young people. Such projects under general law were included later. Their aim is to provide help for victims in coming to terms with the consequences of a criminal act. Under the supervision of a third party not involved in the conflict, a specially regulated mediation process aims to achieve a comprehensive settlement between perpetrator and victim. The settlement is centred upon an agreement arrived at during a mediation session by which the perpetrator commits themself to make good the damage caused. Given the manifold difficulties which such agreements may encompass, they are concluded only under the supervision of recognised experts (psychologists, social-education experts, social workers).

The settlement focuses not only on substantive reparations but, as far as possible, also aims to achieve genuine reconciliation between perpetrator and victim. This is why reparations are not restricted to replacing material damage; other - non-material acts - can also be considered, e.g, the perpetrator apologising to the victim.

While in 1989, 2,100 cases were handled in this way, in 1992 the figure rose to 5,100. In 1995 settlements were sought with more than 9,000 perpetrators and 8,000 victims,[54] i.e, more than three times the judgments handed down in ancillary proceedings. The most important classes of offence in terms of attempted settlements include:

- bodily injury - 63.6%
- theft/fraud - 11.3%
- damage to property - 14.5%
- robbery and blackmail - 9%
- defamation - 9.3%

[53] Cf. here Riess, Jura 1987, p.281, p.290; Weigend, NJW 1987, p.1170, p.1176.

[54] Cf. Wandrey/Weitekamp, Die organisatorische Umsetzung des Täter-Opfer-Ausgleichs in der Bundesrepublik Deutschland - eine vorläufige Einschätzung der Entwicklung im Zeitraum von 1989 bis 1995 [Organisational implementation of victim-offender mediation in the Federal Republic of Germany - an initial estimation of developments from 1989 to 1995], in "Täter-Opfer-Ausgleich in Deutschland, Bestandsaufnahme und Perspektive" [Victim-offender mediation in Germany - taking stock and looking forward], published by the Federal Ministry of Justice, Bonn 1998, p.131.

It is surprising to see how willing aggrieved parties are to arrive at a settlement:

- bodily injury - 78.1%
- theft/fraud - 82.5%
- damage to property - 84.9%
- robbery and blackmail - 62.6%.[55]

The most important criterion for assessing the success of victim-offender mediation is the settlement between aggrieved party, and the accused. The number of successful settlements is surprisingly high, broken down here by classes of offence:

- bodily injury - 86%
- theft/fraud - 91.3%
- damage to property - 92.4%
- robbery/blackmail - 94.3%.[56]

The content of the settlements is also of great interest. Looking at the actions agreed between the accused and aggrieved party, as part of the victim-offender mediation, the following picture emerges. Actions agreed included:

- apology - 72.4%
- giving a present - 6.8%
- return of property - 2.1%
- money for pain and suffering - 21.5%
- job of work - 6.6%
- joint activities with the victim - 8.4%
- compensation - 27.3%

As this assessment takes account of all the different possible actions, the total arrived at is in excess of 100%[57].

As regards the, sums of money, the picture obtained is as follws:

Reparation for Damages Payments	
up to DM 250	54.4%
from DM 251 to DM 2,000	39.8%
from DM 2,001 to DM 4,200	4.2%
in excess of DM 4,200	1.8%[58]

Payment for Pain and Suffering	
up to DM 500	62.3%
from DM 501 to DM 1,000	17.7%
from DM 1,001 to DM 35,000	20.0%

The evaluations so far have related to the agreement that services are to be provided. This sort of solution makes sense only if there is compliance, as otherwise the aggrieved person is merely disappointed yet again. It is pleasing to note that in about 80% of cases, the sums of money agreed were paid in full.[59]

As a result of the positive experience gained with victim-offender mediation, this facility became specifically enshrined in general criminal law as part of the Law to Combat Crime, which entered into force on 1 Decemer 1994. Section 46a of the German Criminal Code permits the courts to reduce penalties or - if the penalty imposed does not go beyond imprisonment not exceeding one year or a fine of not more than 360 daily increments - to refrain wholly from punishment if, in the attempt to achieve a settlement with the aggrieved party, the perpetrator has made reparation in full - or to a considerable degree - for their actions or has made a serious attempt at making reparation for their act.

By introducing this rule, Parliament attempted to focus greater attention on those of the victim's interests which can best be dealt with under victim-offender

[55] Hartmann/Stroezel, Die bundesweite TAO-Statistik [German national statistics on victim-offender mediation] in "Täter-Opfer-Ausgleich in Deutschland" [Victim-offender mediation in Germany], *op. cit.*, p.175.

[56] Hartmann/Stroezel, *op. cit.*, p.187.

[57] Cf. Hartmann/Stroezel, *op. cit.*, p.186.

[58] Hartmann/Stroezel, *op. cit.*, p.187.

[59] Cf. Hartmann/Stroezel, *op. cit.*, p.188.

mediation using forms of material and non-material assistance - compensating for damage and allaying fears. The explanatory memorandum to the legislation states that this approach is also more apt than simple punishment to gain the perpetrator's understanding of the reprehensible nature of their actions and to accept responsibility for the consequences of the crime committed.[60]

In cases where the court would be allowed to abstain from punishment, the public prosecutor - with the consent of the competent court - can even refrain from bringing public charges; in cases of that nature, there is not even a need for the case to come before the courts.

As the law currently stands, it is entirely up to the accused to decide whether s/he wishes to try and achieve a settlement with the aggrieved party and to make up for loss suffered as a result of the crime. This means that those accused persons who have competent legal counsel and sufficient resources are more likely to see their punishment reduced or to escape punishment than those accused persons who are unfamiliar with such possibilities. As this circumstance does not square with the German Government's concern to ensure comprehensive support for the interests of victims of crime, the Federal Ministry of Justice is currently considering enshrining victim-offender mediation in criminal procedural law. It is intended that the basic provision, which was drafted by the Ministry only a couple of months ago, should be worded as follows:

> *"At all stages in the proceedings, the public prosecutor and the court shall examine the possibility of achieving a settlement between the accused and the aggrieved person and, in suitable cases, take steps to achieve this."*

This "appellate norm" is intended to bring about more widespread use of victim-offender mediation in practice by ensuring that the public prosecutor and the court must - except in manifestly unsuitable cases - examine whether a settlement between the accused and the aggrieved person can be achieved. Yet this still leaves it for the court and the public prosecutor to decide how intensive that examination will be and how to bring about the mediation. There is a range of possibilities, from distributing a leaflet with abstract information to making oral recommendations in specific cases concerning how the damage might be repaired.

This provision has been supplemented by a further provision allowing the public prosecutor to instruct the accused "to take serious steps to achieve a settlement with the aggrieved party". Once that has happened, the public prosecutor has the option of discontinuing the proceedings.

While it is true that the aforementioned draft legislation, which aims to enshrine victim-offender mediation, has yet to overcome all the various Parliamentary hurdles, hardly anyone in Germany worth taking seriously would consider calling into question an extension of victim-offender mediation. Consequently, everything seems to support the view that victim-offender mediation, which it is now impossible to dissociate from the system of criminal law sanctions as a conceivable reaction to criminal acts, will continue - to a greater degree than hitherto - to help victims of crime to escape the psychological, social and financial problems which can result from crime.

[60] Cf. *Bundestag* Publication 12/6853, p.21.