The Rights of (Minor) Victims of Sexual Violence in German Criminal Procedure

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Abstract

In criminal proceedings, the victim plays a special role. His/her legal position has been considerably reinforced by various provisions in the current law. Despite the criticism directed at individual regulations, some of it justified, this development in the law has proven to be beneficial. At the heart of it all is the legal institution of private accessory prosecution, which may well serve as an inspiration for other jurisdictions.

Keywords: *Private accessory prosecution; victim in criminal trials; statute of limitations; minor victims; sexual violence*

A criminal offence is an individual's violation of a legal prohibition or obligation.[1] Through punishment, we react to such misconduct. We oppose the individual's objectionable challenge to the legal order and further confirm the validity of the infringed legal norm by imposing a penalty. The defendant deserves punishment, because he/she continue to be an equal member of society despite his/her offence. Thus, his/her challenge cannot remain unobjected.

However, his/her criminal offence is not merely a violation of the law. Above all, it is a violation of a victim's legal position.[2] The 'de-privatisation' of the conflict through criminal law, i.e., the removal of the conflict from the private sphere, which forms the context for the relationship between perpetrator and victim, into the public sphere may lead us to losing sight

1 Frauke Rostalski, Der Tatbegriff im Strafrecht, Mohr Siebeck 2019, 16ff; Georg Freund / Frauke Rostalski, Warum Normentheorie? Zur selbständigen Bedeutung vorstrafrechtlich legitimierter Verhaltensnormen, auch und gerade im strafrechtlichen Kontext, *Goltdammer's Archiv für Strafrecht (GA* 2020*)*, 618; Georg Freund / Frauke Rostalski, Normkonkretisierung und Normbefolgung, *Goltdammer's Archiv für Strafrecht (GA* 2018*)*, 264, 273; Frauke Rostalski, Normentheorie und Fahrlässigkeit. Zur Fahrlässigkeit als Grundform des Verhaltensnormverstoßes, *Goltdammer's Archiv für Strafrecht (GA* 2016*),* 78.

2 The statement refers to criminal offences for the protection of individual legal rights.

of the individual victim that suffered at the hands of the defendant.[3] The criminal offence is an attack on the rights of the society to which the victim belongs: the criminal offence is grounded in the specific violation of the victim's legally protected right, which in turn gives rise to the reaction of the state in the shape of punishment. Thus, the victim should be accorded an appropriate role in the criminal process – as a person who has a special interest in the resolution of the conflict.[4]

German criminal procedural law is able to take this into account. This contribution presents the legal position of the victim in the German criminal process and demonstrates its role against the background of the aims of criminal trials. Simultaneously, the article shines a light on the victims' role in disciplinary law. The matter at hand will be limited in two ways: first by focusing on the *rights of minor victims* in criminal trials, and second, in the context of *sexual offences*, i.e., offences against the sexual autonomy of the individual.

1. The Development of Victim Rights in German Procedural Law

National criminal procedural law aims to provide victims of crimes with the opportunity to pursue his/her legitimate interests by being able to influence the trial to a certain extent and to further account for his/her potential desire to partake, gain information and to receive remedies for losses.[5] The decisive instruments to realise this are private accessory prosecution (II. 1.) and the assertion of rights in adhesion proceedings (II. 2.). Such measures of victim participation are accompanied by the risk of further emotional damage following the crime against them. This may not only arise from direct confrontation with the perpetrator, but also in the process of recapitulating the criminal actions.[6] This tension must be considered in the creation of victim rights. The victim must have the opportunity to participate effectively in the trial – but as considerately as possible with

3 Tatjana Hörnle, Straftheorien, Mohr Siebeck 2017, 37.
4 Ibid. 36ff.
5 For details, see II. and III. below and VI. on the disciplinary procedure.
6 Jutta Bader, Legitime Verletzteninteressen im Strafverfahren: Eine kritische Untersuchung der Rechtslage und Vorschläge de lege ferenda, Springer 2019, 32; Claus Schroth / Marvin Schroth, Die Rechte des Verletzten im Strafprozess, C.F.Müller 2018, Part 2, VI., marginal no. 61.

regard to his or her individual psychological constitution. This is especially relevant when underage victims are involved.[7]

Strengthening victims' rights in German procedural law has been a long-drawn-out process. As early as in the 1900s, criminal law allowed for private accessory prosecution in the context of civil claims for damages.[8] In the following, significance will be awarded to the Victim Protection Act from the 18.12.1986, which aimed to considerably improve the legal position of the injured party in criminal procedures. The initial law was followed by numerous additions to criminal procedural law to strengthen the role of the victim, e.g., by passing the Witness Protection Act from 30.04.1998 and the Violence Protection Act from 17.12.2001.[9] As regards offences against sexual autonomy, the Act to Strengthen the Rights of Sexual Abuse Victims (26.6.2013) should be noted, which brought about an extension of civil and criminal statutes of limitation periods, as well as a change to Section 58a of the Code of Criminal Procedure (StPO), preventing multiple interrogations of the same victim. Overall, the "origin story" of the role of victims in criminal procedures is one of continuous strengthening and improvement. However, this development also received criticism, urging equal adjustment of the legitimate procedural interests of the accused.[10] Furthermore, the Modernization of Criminal Procedure Act from 10.12.2019 puts a slight damper on the role of the victim by implementing Section 397b StPO. This provision grants a margin of discretion to courts, to allocate a "joint" lawyer to claimants that are pursuing similar interests.

7 See III.–VI. below for the specific system.

8 Bernhard Weiner, § 395, in Jürgen Graf (ed), Beck'scher Online-Kommentar StPO, C.H.Beck 2022, marginal no. 4.

9 A comprehensive account of the development of the law can be found in: ibid. marginal no. 4ff.

10 Bader (n 6) 50ff; Matthias Jahn, *S*chriftliche Stellungnahme im Rahmen der öffentlichen Anhörung des Rechtsausschusses des Deutschen Bundestages zu den Gesetzentwürfen am 13. Mai 2009, available on https://www.jura.uni-frankfurt.de/55029494.pdf, access 20.07.2022.

2. *Adhesion Proceedings and Private Accessory Prosecution as Legal Institutions*

The institutions of adhesion proceedings[11] and private accessory prosecutions are significant legal instruments to strengthen victims' rights in criminal procedures.

A. Private Accessory Prosecution

According to Section 395(1) (no.1) StPO, victims of sexual violence are entitled to join proceedings as private accessory prosecutors. Subsection 4 of this provision allows this "joint action" to enter appellate remedies at every stage of the trial, even after the judgement is passed. The EU Victims' Rights Directive from 15.10.2012 defines "victim" not merely as the person whose legal rights were immediately violated but includes family members of victims who died in the commission of the crime. Section 395(2) StPO entitles relatives and spouses to join as private accessory prosecutors regarding the deceased individual.

Private accessory prosecution aims to give the injured party the opportunity to actively participate in order to pursue and realise his/her own interests in the criminal proceedings. The distinctive feature of this legal instrument lies in its ability to provide the private accessory prosecutor with rights to join the proceedings as an independent participant, wholly separate from the other parties involved.[12] Behind this lies the idea that victims are granted a special ability to communicate with the defendant and society as a whole, by having his/her own procedural standing.[13] The injured party is given the opportunity to present his/her specific situation and emphasise the suffering he/she endured, to strengthen his/her claim for redress. The latter may be pursued by combining it with adhesion proceedings that fall on the civil law side of the conflict.[14] Simultaneously,

11 Section 403 ff stopp.

12 Urs Kindhäuser / Kay Schumann, Strafprozessrecht, Nomos 2022, § 26 marginal no. 79.

13 Weiner (n 8), marginal no. 1; Karsten Altenhain, Angreifende und verteidigende Nebenklage, *Juristen Zeitung (JZ 2001),* 795ff.

14 Bertram Schmitt, Strafprozessordnung, in Lutz Meyer-Goßner / Bertram Schmitt (eds), Strafprozessordnung mit GVG und Nebengesetzen, C.H.Beck 2022, before § 403 marginal no. 2, 10.

private accessory prosecution may function to protect the injured party from unjustified recriminations – even though this falls within the remit of the duty of care held by the prosecution and the courts.[15] It grants the claimant the opportunity to present to the court how he/she perceived the criminal offence that the defendant is being tried for.[16] Furthermore, the conviction of the guilty defendant may serve to provide a sense of justice, which affects the standing of the victim as a member of society. However, here it should be reiterated that this is not the only purpose of punishment. Against this background, academic views that assign the concept of private accessory prosecutions the purpose of providing a sense of satisfaction, even retribution, to the victim, should be regarded critically.[17] It is perceivable that such effects are the "byproduct" of a justified sentence given to the perpetrator. However, these are not the purpose of punishment and should thus not be identified as a function of a legal instrument such as private accessory prosecution instigated by the state.[18] Here it should be taken into account that private accessory prosecution is not a proper lawsuit in itself. Rather, it allows the injured party to join a lawsuit conducted by the state prosecution, if specific requirements are met.[19]

B. Adhesion Proceedings

Where the claimant instigates adhesion proceedings, he/she is able to claim damages in civil law in the context of a criminal trial. This cannot compare to private accessory prosecution, insofar as it does not give the injured party a role as an active participant in the trial. The idea behind this is to prevent conflicting decisions in criminal and civil law.[20] However, we

15 Dieter Rössner, § 395, in Dieter Dölling / Gunnar Duttge / Stefan König / Dieter Rössner (eds), Gesamtes Strafrecht Handkommentar, Nomos 2022, marginal no. 22; Kindhäuser (n 12), § 26 marginal no. 80; Werner Beulke / Sabine Swoboda, Strafprozessrecht, C.F.Müller 2020, marginal no. 889.

16 BT-Drs. 10/5305: 13; Brian Valerius, § 395, in Christoph Knauer (ed), Münchener Kommentar zur Strafprozessordnung vol 3, C.H.Beck 2019, marginal no. 5.

17 On the function of satisfaction, see Schmitt (n 14), before § 403 marginal no. 1; on the function of retribution: Rössner (n 15), marginal no. 3.

18 Critically also: Weiner (n 8), marginal no. 3.

19 For further details on the construction of Private Accessory Prosecution, see II. 1. below.

20 Reinhard Granderath, Opferschutz – Totes Recht?, *Neue Zeitschrift für Strafrecht (NStW 1984),* 399.

widely view the use of adhesion proceedings as critical.[21] The concerns are of a complex and fundamental nature: Adhesion proceedings pose the risk of overlap between civil and criminal proceedings, which, considering his/her widely separate purposes and corresponding yet widely different procedural principles, may end up harming the legal positions of all parties involved. This may be especially detrimental to the investigation of civil law questions.

3. *The Legal Position of (Minor) Victims of Sexual Violence in Criminal Trials*

The focus of this contribution lies on analysing the legal position of minor victims of sexual violence in national criminal trials. This entails an analysis of the different forms of representation injured parties may have, along with their peculiar role as witnesses in the criminal process.

A. Right to Bring a Criminal Charge as a (Minor) Victim of Sexual Violence

The person whose legal position was violated by the criminal offence has the right to report and bring a criminal charge against this violation. According to Section 158(1)(1) StPO, this is directed towards the state prosecution, public authorities and members of the police or the district courts as an oral or written submission. Minors have this right as well.[22] However, in reporting the crime, he/she has the right to be represented by a legal

21 For example, Georg Freund, Stellungnahme eines Arbeitskreises der Strafrechtslehrer zum "Eckpunktepapier zur Reform des Strafverfahrens", *Goltdammer's Archiv für Strafrecht (GA 2002)*, 84; Thomas Weigend, Deliktsopfer und Strafverfahren, Duncker & Humblot 1989, 524ff; Christian Betmann, Das Adhäsionsverfahren im Lichte des Opferrechtsreformgesetzes, *Kriminalistik 2004*, 570; Amina Hoppe, Opfer, Verletzter, Zeuge: Was muss, kann und soll Opferschutz im Strafverfahren leisten?, in Markus Abraham / Jan Christoph Bublitz / Julia Geneuss / Paul Krell / Kilian Wegner (eds), Verletzte im Strafrecht (7. Symposium Junger Strafrechtlerinnen und Strafrechtler), Nomos 2019, 163; Alexander Poretschkin, Verfassungswidriges Adhäsionsverfahren, *Zeitschrift für Rechtspolitik (ZRP 2020)*, 123ff; Bernd-Dieter Meier, Nina Dürre, Das Adhäsionsverfahren, *Juristenzeitung (JZ 2006)*, 18ff. See also Schmitt (n 14), before § 403 marginal no. 2, 3 with further references.

22 Schmitt (n 14), § 158 marginal no. 12.

spokesperson or his/her parents. One peculiarity of German law should be noted regarding offences that are only prosecuted upon the request of the injured party. According to Section 77(1) of the German Criminal Code (StGB), the charge must be brought forward by the victim, unless he/she is legally incapacitated or has limited legal capacity. In this case, the prosecution may be requested by legal representatives or legal guardians.[23] Nevertheless, offences against sexual autonomy do predominately fall outside this category.

B. Proceedings to Compel Public Charges

German criminal procedure law provides the injured party with the ability to defend themselves against a termination decision by the prosecution. If the prosecution services do not find sufficient reason to bring a public charge, they will terminate the proceedings as per Section 170(2) StPO. If the injured party puts forward a request for criminal prosecution and it is later terminated, he/she must be informed about the decision of the prosecution as stipulated in Section 171 StPO. He/she may then appeal this decision according to Section 172 StPO. If the claimant is underage, he/she must be represented.[24]

C. Access to Information Relevant to the Criminal Process and the Laws of Evidence

During the criminal proceedings the injured party has a number of different rights to demand and receive information, as well as the right to view relevant records. The private accessory prosecutor has a special relevance. Section 406d StPO contains a number of inquiry rights, which the injured party may rely on to be informed about the trial. Alongside the right to be informed about the termination of the proceedings, he/she may have the right to learn about where and when the main proceedings are held, as well as what charges are to be brought against the defendant. However, he/she do not have the right to receive a copy of the decision.[25] Thus, the duty

23 Section 77(3) StGB.
24 Ibid. Section 172 marginal no. 7.
25 Ibid. § 406d marginal no. 2; Carsten Grau, § 406d., in Knauer (n 16), marginal no. 8.

to provide information entails that regarding the result of the proceedings (conviction, acquittal or the cancellation of the proceedings (nolle prosequi)[26] presented to the injured party in a comprehensive manner.[27]

Furthermore, Section 406d(2) StPO stipulates that the injured party must be provided with such information required to meet his/her safety needs regarding the recently convicted defendant. This may include, for example, instructions to not get in touch with the injured party, as well as an order for incarceration. Beyond that, the injured party has a right to review records, which however has to be exercised through a lawyer as per Section 406e(1) StPO. Section 397 (1)(3) StPO grants the private accessory prosecutor an absolute right to apply to take evidence according to Section 244 (3–6) StPO, as long as he/she may join a public charge.[28] The details of this right are controversial, however, especially considering that the Supreme Court considers it justifiable to apply it in a less restrictive fashion to the private accessory prosecutor than to the defendant.[29]

D. Other Extensive Procedural Rights of the Private Accessory Prosecutor

As a private accessory prosecutor, the injured party enjoys extensive procedural rights in addition to the ones listed above. Those are found in Section 397 StPO. Particularly noteworthy is the right to be present at the main proceedings, which extends to previous parts of the proceedings and continues into the part where he/she is questioned as witness.[30] The private accessory prosecutor may reject judges and experts. They are allowed to question the defendant, witnesses and experts themselves. They have a right to object to orders from the presiding judge and may even make applications to take evidence. The court has to hear the private joint prosecutor, especially when a termination of the proceedings in line with Section 153 ff. StPO is planned.

26 Petra Velten / Luís Greco / Andreas Werkmeister, § 406d, (2020) in Jürgen Wolter (ed), Systematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz, Carl Heymanns 2020, marginal no. 10.

27 Ibid. marginal no. 10.

28 Schmitt (n 14), § 397 marginal no. 5.

29 BGH ruling dated April 28, 2010, 5 StR 487/09; Other view: BGH ruling dated April 7, 2011, 3 StR 497/10. In detail on the dispute: Jutta Bader, Legitime Verletzteninteressen im Strafverfahren: Eine kritische Untersuchung der Rechtslage und Vorschläge de lege ferenda, Springer 2019, 161ff.

30 Schmitt (n 14), marginal no. 2.

E. Legal Remedies for (Minor) Victims of Sexual Violence

The right to appeal of (minor) victims of sexual violence depends crucially on whether he/she appear as private accessory prosecutors in the proceedings. Section 401 StPO grants the private accessory prosecutor the right to appeal independently of the public prosecutor. Section 400 StPO, however, limits the scope of the private accessory prosecutor's right to appeal by specifying that the judgement may not be challenged with the objective of having another legal consequence of the offence imposed or of the defendant being sentenced for a violation of the law which does not justify joinder by the private accessory prosecutor. Within the context of an appeal, the accessory plaintiff can thus not successfully pursue the goal of having a higher sentence imposed on the convicted individual,[31] but may challenge the acquittal of the offender or, for example, the failure of the court to take into account another offence committed through the same act.[32] Whether the private accessory prosecutor can file an appeal on points of fact and law (*Berufung*) or an appeal only on points of law (Revision) depends, in principle, on the court having jurisdiction at first instance. Given the victim's particular vulnerability, an appeal on points of law is the only possible option in cases of offences against a person's sexual self-determination. In addition, Section 400 (2) StPO provides for the possibility of an immediate appeal against the order not to open the main proceedings as well as against the order to terminate the proceedings pursuant to Sections 206a and 206b StPO, as long as the order in question concerns the offence entitling the accessory private prosecutor to join the proceedings.

F. The Representation of (Minor) Victims of Sexual Violence in Criminal Proceedings

There are different ways for (minor) victims of sexual violence to be represented in criminal proceedings. The specific arrangement depends not least

31 Petra Velten, § 400, (2020) in Wolter (n 26) marginal no. 8; Raik Werner, Nebenklage, in Klaus Weber (ed), Rechtswörterbuch, C.H.Beck 2022; Rössner (n 15), marginal no. 3; Brian Valerius, § 400, in Knauer (n 16), marginal no. 4.

32 Velten (n 31), marginal no. 8; Bernhard Weiner, § 400, (2022) in Graf (n 8), marginal no. 3; Valerius (n 31), marginal no. 11–13.

on whether the injured person appears as a victim or as a private accessory prosecutor.

a. Representation of the (Minor) Victim in the Role of a Witness

If the victim is questioned as a witness, he/she may avail his/herself of the assistance of legal counsel, according to Section 68b (1), sentence 1 StPO. Pursuant to paragraph 2 of this provision, witnesses that do not make use of this option must be assigned counsel for the duration of their examination if their interests meriting protection cannot be taken into account in another way. This provision is equivalent to those on the assistance for aggrieved persons or private accessory prosecutors pursuant to Sections 406f, 406g StPO.[33] The rights of participation of the counsel are derived from the legal status of the witness. In particular, the counsel can object to inadmissible questions and help to prevent testimony errors or misunderstandings if the witness is restricted in his/her ability or willingness to testify. Representing the witness during the testimony itself, however, is not possible.[34]

b. Representation of the (Minor) Victim in the Role of a Private Accessory Prosecutor

Persons entitled to join proceedings as private accessory prosecutors may also avail themselves of counsel and be represented by them, according to Sections 397 (2), sentence 1, 406h (1), sentence 1 StPO. If the private accessory prosecutor is a victim of one of the offences against sexual self-determination listed in Section 397a (1), no. 4 StPO, a lawyer shall be appointed to assist them upon request, provided he/she had not reached the age of 18 at the time of the offence or cannot adequately represent his/her interests themselves. The powers of the counsel include, among other things, the right to be present at the entire main hearing (including during the questioning of the victim), which also extends to its non-public parts. Although he/she has no right of participation, he/she may be allowed

33 Schmitt (n 14), § 68b marginal no. 2.
34 On this and further aspects: ibid., § 68b marginal no. 4.

to ask questions. In addition, he/she has the right to ask the person interrogated questions of his/her own.[35]

c. Representation of the (Minor) Victim Not Entitled to Private Accessory Prosecution

A victim not entitled to join proceedings as a private accessory prosecutor may also be represented, as follows from section 406f StPO. In this case, however, the counsel's powers are essentially limited to the right to be present at the examination of the victim in the preliminary proceedings and the main hearing.[36]

d. Additional Means of Support for (Minor) Victims of Sexual Violence in Criminal Proceedings

Section 406g StPO provides for the possibility of psychosocial assistance in legal proceedings for persons injured in a criminal offence. According to this provision, the person providing this assistance must be allowed to be present with the injured person during his/her examination and the main hearing. If the conditions of section 397a (1), no. 4 StPO are met – i.e., that the victim of an offence against sexual self-determination was under 18 years of age at the time of the act or is unable to sufficiently safeguard his/her own interests – the court must, upon request, appoint a person who provides assistance. The legal institution of psychosocial assistance is meant to meet the need for support of the victim during the proceedings, which includes non-legal aspects. The objective is to protect the victim from secondary victimisation by providing them with qualified support and relevant information. Last but not least, the victim is to be strengthened in this way in his/her ability to actively participate in the process by giving testimony. The psychosocial assistant is to clearly distinguish his/her activities from the counsel related to the criminal proceedings, so that no influence, even indirect or unconscious, is exerted on the victim as a witness. The

35 On further aspects, see Schmitt (n 14), § 406h marginal no. 4; Sabine Ferber, § 406h, (2022) in Dieter Dölling / Gunnar Duttge / Stefan König / Dieter Rössner (eds), Gesamtes Strafrecht Handkommentar, Nomos 2022, marginal no. 4; BGH ruling dated November 11, 2004, 1 StR 424/04.

36 Schmitt (n 14), § 406f marginal no. 2.

psychosocial assistant may be present during the examination of the victim but does not have the right to ask questions or the like.[37]

4. (Minor) Victims of Sexual Violence as Witnesses in Criminal Proceedings

The role of a witness can be particularly difficult for (minor) victims of sexual violence. The direct confrontation with what he/she has experienced, and possibly also with the perpetrator, can bring back memories that force the victim to relive the suffering he/she has endured, cause trauma and severely disrupt the necessary psychological healing process.[38] Against this background, a particularly sensitive approach to the victim is imperative in criminal proceedings.[39] The German Code of Criminal Procedure takes due account of this concern through a number of provisions. First of all, victims of sexualised violence should, if possible, be subjected to only one examination by a judge.[40] Direct examination by a judge, as provided for in section 58a (1), sentence 3 StPO, is meant to guarantee this. This provision also prescribes the audio-visual recording of this examination, provided the witness consents. In addition, section 255a (2), sentences 1, 2 StPO allows for the showing of a record of an examination of a witness, especially in cases of sexual violence against minors, thereby relieving the witness from the burden of having to testify again during the main hearing. If a second examination should nevertheless be necessary and admissible, the defendant may be directed to leave the courtroom during the hearing by order of the court. Such an order is admissible if a considerable detriment to the well-being of a witness under 18 years is to be feared in the presence of the defendant, as is laid out in Section 247 sentence 2 StPO. If the victim

37 Bernhard Weiner, § 406g, in Graf (n 8), marginal no. 1–29; Schmitt (n 14), § 406g marginal no. 1ff.

38 Jan Gysi, Psychotraumatologie in Sexualstrafverfahren, in Jan Gysi / Peter Rüegger (eds), Handbuch sexualisierte Gewalt, Hogrefe 2018, 17ff.

39 Bundeskoordinierung Spezialisierter Fachberatung gegen sexualisierte Gewalt in Kindheit und Jugend (BKSF), Stellungnahme zum Referentenentwurf eines Gesetzes zur Modernisierung des Strafverfahrens 1ff, available on https://kripoz.de/wp-content/uploads/2019/12/Stellungnahme_BKSF_Modernisierung-Strafverfahren.pdf, access 21.07.2022.
Ute Nöthen, Vom Spannungsfeld polizeilicher Arbeit zwischen Strafverfolgung und Opferbedürfnissen am Beispiel des Deliktfeldes der sexualisierten Gewalt gegen Kinder in Deutschland. (2018) in Gysi / Rüegger (n 38), 280.

40 According to Section 241a (1) StPO, hearings of witnesses under 18 years of age in court are conducted by the presiding judge alone.

is already over 18 years of age at the time of the examination, there must be an imminent risk of serious detriment to his/her health in order for the defendant to be removed from the courtroom. Moreover, Sections 168e, 247a StPO allow for the possibility of an examination via audio-visual means of witnesses who are particularly vulnerable. And finally, according to the provisions of Section 171b of the Courts Constitution Act, the presence of the general public may be excluded or restricted in order to safeguard the interests of minor victims of crimes against sexual self-determination.

In order to adequately assess the testimony of the (minor) victim of sexual violence, the court may use the services of an expert, as stated in Sections 72ff. StPO. This practice is very common in proceedings involving an offence against sexual self-determination committed against a minor.[41] In this context, the involvement of an expert is significant in two ways. It protects the legal position of the witness by helping the court to arrive at an adequate assessment of his/her testimony, taking into consideration the special characteristics of the testimony given by a minor victim of sexual violence, for which particular technical expertise may be required. At the same time, however, the expertise provided also serves the rights of the defendant, who likewise has an interest in a factually correct assessment of the witness's testimony.[42]

Section 52 StPO deals with an anomaly. This provision grants relatives of the accused the right to refuse testimony, and also applies to (minor) victims of sexual violence. Paragraph 2 specifies that minors who have no sufficient understanding of his/her right to refuse testimony (due to lack of intellectual maturity or mental or psychological influences, for example on account of a disability) may only be questioned if he/she is willing to testify and if his/her statutory representative, too, agrees to the examination. The agreement of the representative is, of course, not required if he/she themselves are accused of the offence, in which case a supplementary guardian must be appointed pursuant to Section 1909 (1), sentence 1 of the German Civil Code in order to decide on the exercise of the right to refuse testimony.

41 Klaus Haller, Ausgewählte Möglichkeiten des Opferschutzes, insbesondere bei Sexualdelikten, in Gysi / Rüegger (n 38), 457; Thomas Trück, § 72, in Hans Kudlich (ed), Münchener Kommentar zur Strafprozessordnung, vol 1, C.H.Beck 2014, marginal no. 6.

42 Monika Egli-Alge, Glaubhaftigkeitsbegutachtung der Zeugenaussage, in Gysi / Rüegger (n 38), 482.

5. *Statute of Limitations as a Strengthening of the Legal Position of (Minor) Victims of sexual violence*

Statute of limitations rules are usually significant in proceedings for offences against sexual self-determination, due to the fact that victims of sexual violence are often minors at the time of the offence. Repression but also fear of the consequences are massive obstacles which prevent the victim from reporting the offence, especially when the person in question is close to the victim. The law has to take due account of this reality, especially when it comes to the relevant statute of limitations. In Germany, a statute of limitations of ten years applies to sexual offences, Sections 78 (3) no. 3, 174f. StGB. As a result of a legislative amendment, however, the statute of limitations is suspended for certain offences against sexual self-determination until the victim reaches the age of 30, as stated in Section 78b (1) no. 1 StGB. This amendment has significantly strengthened the rights of the victim, a development viewed critically by some.[43] It does not, in any case, violate the principle of non-retroactivity enshrined in Article 103 (2) of the German Basic Law.[44] This provision does not cover any retroactive changes to the statute of limitations.[45]

6. *Reporting Obligations in Protecting (Minor) Victims of Sexual Violence*

Certain institutions or associations foster the formation of intimate relationships to children and young people, for example due to his/her thematic orientation. These relationships can result in (emotional) dependence. Against this background, guidelines have been developed by various bodies on how to deal with the suspicion of a criminal offence having been committed within the institution.[46] However, there is generally no obligation enforced by penalty to report such suspicions to law enforcement authorities.

43 Thomas Fischer, Strafgesetzbuch, C.H.Beck 2022, § 78b marginal no. 3–3e.
44 Frank Saliger, § 78b, in Urs Kindhäuser / Ulfried Neumann / Hans-Ulrich Paeffgen (eds), Nomos Kommentar Strafgesetzbuch, Nomos 2017, § 78b marginal no. 7.
45 BVerfG ruling dated January 31, 2000, 2 BvR 104/00.
46 See for example: Aufsichts- und Dienstleistungsdirektion Rheinland-Pfalz 2022.

7. Victim Rights in Disciplinary Proceedings

The question of the role of the victims' rights may also arise in disciplinary proceedings. The purposes of a disciplinary proceeding, however, differ greatly from those pursued in a criminal trial. Criminal proceedings serve communication with the potential offender. If the suspicion of a criminal offence is confirmed, the accused is given a societal response by the court to his/her unjustified challenging of the law. In this way, he/she is stripped of the additional freedom he/she has unjustifiably claimed for themselves, and the injustice is thus compensated.[47] Disciplinary proceedings, on the other hand, play out on a different level. These are forms of conflict resolution within specific institutionalised societal groups. Disciplinary proceedings are supposed to maintain order within the respective group[48]—meaning they are precisely not about compensating society as a whole for wrongs committed. The disciplinary bodies, in any case, lack the power to do so.

Even so, disciplinary proceedings are occasionally seen as having a repressive function – just as some consider criminal proceedings to serve a preventive purpose.[49] There is nevertheless a decisive difference between the two: criminal proceedings alone represent the legitimate societal response to the individual's wrongful conduct. Punishment is the response to the individual's violation of a legal norm, which amounts to a challenge to the legal order. Only the judge in criminal proceedings is in a position to determine the societal reaction to the wrong thus committed. Criminal laws are acts by the parliamentary legislature that grant the criminal justice

47 Frauke Rostalski, Zur objektiven Unmöglichkeit schuldlosen Verhaltensunrechts im Strafrecht, in Anne Schneider / Markus Wagner (eds), Normentheorie und Strafrecht, Nomos 2018, 105; Rostalski (n 1) B. I. 2; Georg Freund / Frauke Rostalski, Strafrecht Allgemeiner Teil, Springer 2019, 14ff.

48 Gernot Steinhilper, Chapter 5. Disziplinar- und Entziehungsverfahren aus Sicht der Kassenärztlichen Vereinigungen, in Alexander Ehlers (ed), Disziplinarrecht für Ärzte und Zahnärzte, C.H.Beck 2013, marginal no. 818; Ulrich Herrmann, § 95, in Stefan Görk (ed), Beck'scher Online-Kommentar BnotO, C.H.Beck 2021, marginal no. 1.

49 Examples of measures with a usually repressive function: Klaus Weber, Disziplinarmaßnahme, (2022) in Weber (n 31).
On the preventive function of criminal law: Christoph Degenhart, Art. 74, in Michael Sachs (ed), Grundgesetz Kommentar, C.H.Beck 2021, marginal no. 12; Thomas Ullenbruch, Verschärfung der Sicherungsverwahrung auch rückwirkend – populär, aber verfassungswidrig?, *Neue Zeitschrift für Strafrecht (NStZ 1998)*; BVerfG ruling dated February 26, 2008, 2 BvR 392/07.

system the authority to punish criminal offences.[50] Disciplinary sanctions, however, react to breaches of disciplinary law. The latter is a separate legal order for individual social groups such as lawyers, members of the Church, etc. In this respect, there is a crucial difference between the two kinds of procedure. The details of the different systems of disciplinary law will not be discussed here.

8. Conclusion

In criminal proceedings, the victim plays a special role. His/her legal position has been considerably reinforced by various provisions in the current law. Despite the criticism directed at individual regulations, some of it justified, this development of the law has proven to be beneficial. At the heart of it all is the legal institution of private accessory prosecution, which may well serve as an inspiration for other jurisdictions.

Biography

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References

Aufsichts- und Dienstleistungsdirektion Rheinland-Pfalz (2022): Leitlinien zur Einschaltung der Stafverfolgungsbehörden, https://add.rlp.de/fileadmin/add/Abteilung_3/Kinderschutz/Leitlinien.pdf.

Altenhain, Karsten (2001): Angreifende und verteidigende Nebenklage, *Juristen Zeitung (JZ)*, 791–801.

Bader, Jutta (2019): Legitime Verletzteninteressen im Strafverfahren: Eine kritische Untersuchung der Rechtslage und Vorschläge de lege ferenda, Springer.

Betmann, Christian (2004): Das Adhäsionsverfahren im Lichte des Opferrechtsreformgesetzes, *Kriminalistik*, 567–572.

Beulke, Werner / Swoboda, Sabine (2020): Strafprozessrecht, 15th edn., C.F.Müller.

Bundeskoordinierung Spezialisierter Fachberatung gegen sexualisierte Gewalt in Kindheit und Jugend (BKSF) (2019): Stellungnahme zum Referentenentwurf eines Gesetzes zur Modernisierung des Strafverfahrens, https://kripoz.de/wp-content/uploads/2019/12/Stellungnahme_BKSF_Modernisierung-Strafverfahren.pdf.

Degenhart, Christoph (2021), Art. 74, in: Sachs, Michael (ed), Grundgesetz Kommentar, 9th edn., C.H.Beck.

50 Freund / Rostalski (n 1), 264ff.

Egli-Alge, Monika (2018): Glaubhaftigkeitsbegutachtung der Zeugenaussage, in: Gysi, Jan / Rüegger, Peter (eds), Handbuch sexualisierte Gewalt, Hogrefe, 475–494.

Ferber, Sabine (2022): § 406h, in: Dölling, Dieter / Duttge, Gunnar / König, Stefan / Rössner, Dieter (eds), Gesamtes Strafrecht Handkommentar, 5th edn., Nomos.

Fischer, Thomas (2022): Strafgesetzbuch, 69th edn., C.H.Beck.

Freund, Georg (2002): Stellungnahme eines Arbeitskreises der Strafrechtslehrer zum "Eckpunktepapier zur Reform des Strafverfahrens", *Goltdammer's Archiv für Strafrecht (GA)*, 82–97.

Freund, Georg / Rostalski, Frauke (2018): Normkonkretisierung und Normbefolgung, *Goltdammer's Archiv für Strafrecht (GA)*, 264–273.

Freund, Georg / Rostalski, Frauke (2019): Strafrecht Allgemeiner Teil, 3rd edn., Springer.

Freund, Georg / Rostalski, Frauke (2020): Warum Normentheorie? Zur selbständigen Bedeutung vorstrafrechtlich legitimierter Verhaltensnormen, auch und gerade im strafrechtlichen Kontext, *Goltdammer's Archiv für Strafrecht (GA)*, 617–633.

Granderath, Reinhard (1984): Opferschutz – Totes Recht?, *Neue Zeitschrift für Strafrecht (NStW)*, 399–401.

Grau, Carsten (2019): § 406d, in: Knauer, Christoph (ed), Münchener Kommentar zur Strafprozessordnung, vol. 3, C.H.Beck.

Gysi, Jan (2018): Psychotraumatologie in Sexualstrafverfahren, in: Gysi, Jan / Rüegger, Peter (eds), Handbuch sexualisierte Gewalt, Hogrefe, 8–34.

Haller, Klaus (2018): Ausgewählte Möglichkeiten des Opferschutzes, insbesondere bei Sexualdelikten, in: Gysi, Jan / Rüegger, Peter (eds), Handbuch sexualisierte Gewalt, Hogrefe, 449–474.

Herrmann, Ulrich (2021): § 95, in: Görk, Stefan (ed), Beck'scher Online-Kommentar BnotO, 5th edn., C.H.Beck.

Hoppe, Amina (2019): Opfer, Verletzter, Zeuge: Was muss, kann und soll Opferschutz im Strafverfahren leisten?, in: Abraham, Markus / Bublitz, Jan Christoph / Geneuss, Julia / Krell, Paul / Wegner, Kilian (eds), *V*erletzte im Strafrecht (7. Symposium Junger Strafrechtlerinnen und Strafrechtler), Nomos, 147–166.

Hörnle, Tatjana (2017): Straftheorien, 2nd edn., Mohr Siebeck.

Jahn, Matthias (2009): *S*chriftliche Stellungnahme im Rahmen der öffentlichen Anhörung des Rechtsausschusses des Deutschen Bundestages zu den Gesetzentwürfen am 13. Mai 2009, https://www.jura.uni-frankfurt.de/55029494.pdf.

Kindhäuser, Urs / Schumann, Kay (2022): Strafprozessrecht, 6th edn., Nomos.

Meier, Bernd-Dieter / Dürre, Nina (2006): Das Adhäsionsverfahren, *Juristenzeitung (JZ)*, 18–25.

Nöthen, Ute (2018): Vom Spannungsfeld polizeilicher Arbeit zwischen Strafverfolgung und Opferbedürfnissen am Beispiel des Deliktfeldes der sexualisierten Gewalt gegen Kinder in Deutschland, in: Gysi, Jan / Rüegger, Peter (eds), Handbuch sexualisierte Gewalt, Hogrefe, 271–280.

Poretschkin, Alexander (2020): Verfassungswidriges Adhäsionsverfahren, *Zeitschrift für Rechtspolitik (ZRP)*, 123–124.

Rössner, Dieter (2022): § 395, in: Dölling, Dieter / Duttge, Gunnar / König, Stefan / Rössner, Dieter (eds), Gesamtes Strafrecht Handkommentar, 5th edn., Nomos.

Rostalski, Frauke (2016): Normentheorie und Fahrlässigkeit. Zur Fahrlässigkeit als Grundform des Verhaltensnormverstoßes, *Goltdammer's Archiv für Strafrecht (GA)*, 73–89.

Rostalski, Frauke (2018): Zur objektiven Unmöglichkeit schuldlosen Verhaltensunrechts im Strafrecht, in: Schneider, Anne / Wagner, Markus (eds), Normentheorie und Strafrecht, Nomos, 105–188.

Rostalski, Frauke (2019): Der Tatbegriff im Strafrecht, Mohr Siebeck.

Saliger, Frank (2017): § 78b, in: Kindhäuser, Urs / Neumann, Ulfried / Paeffgen, Hans-Ullrich (eds), Nomos Kommentar Strafgesetzbuch, 5th edn., Nomos.

Schmitt, Bertram (2022): Strafprozessordnung, in: Meyer-Goßner, Lutz / Schmitt, Bertram (eds), 65th edn., C.H.Beck.

Schroth, Claus / Schroth, Marvin (2018): Die Rechte des Verletzten im Strafprozess, 3rd edn., C.F.Müller.

Steinhilper, Gernot (2013): Chapter 5. Disziplinar- und Entziehungsverfahren aus Sicht der Kassenärztlichen Vereinigungen, in: Ehlers, Alexander (ed), Disziplinarrecht für Ärzte und Zahnärzte, C.H.Beck.

Trück, Thomas (2014): § 72, in: Kudlich, Hans (ed), Münchener Kommentar zur Strafprozessordnung, vol. 1, C.H.Beck.

Ullenbruch, Thomas (1998): Verschärfung der Sicherungsverwahrung auch rückwirkend – populär, aber verfassungswidrig?, *Neue Zeitschrift für Strafrecht (NStZ)*, 326–330.

Valerius, Brian (2019): § 395, in: Knauer, Christoph (ed), Münchener Kommentar zur Strafprozessordnung, vol. 3, C.H.Beck.

Valerius, Brian (2019): § 400, in: Knauer, Christoph (ed), Münchener Kommentar zur Strafprozessordnung, vol. 3, C.H.Beck.

Velten, Petra (2020): § 400, in: Wolter, Jürgen (ed), *S*ystematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz, 5th edn., Carl Heymanns.

Velten, Petra / Greco, Luís / Werkmeister, Andreas (2020): § 406d, in: Wolter, Jürgen (ed), Systematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz, 5th edn., Carl Heymanns.

Weber, Klaus (2022): Disziplinarmaßnahme, in: Weber, Klaus (ed), Rechtswörterbuch, 28th edn., C.H.Beck.

Weigend, Thomas (1989): Deliktsopfer und Strafverfahren, Duncker & Humblot.

Weiner, Bernhard (2022): § 395, in: Graf, Jürgen (ed), Beck'scher Online-Kommentar StPO, 43rd edn., C.H.Beck.

Weiner, Bernhard (2022): § 400, in: Graf, Jürgen (ed), Beck'scher Online-Kommentar StPO, 43rd edn., C.H.Beck.

Weiner, Bernhard (2022): § 406g, in: Graf, Jürgen (ed), Beck'scher Online-Kommentar StPO, 43rd edn., C.H.Beck.

Werner, Raik (2022): Nebenklage, in: Weber, Klaus (ed), Rechtswörterbuch, 28th edn., C.H.Beck.