



LAW·COMMISSION

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GERMAN CRIMINAL PROCEDURE

This description was drafted based on observation and interviews during a visit to the jurisdiction in 2010, as well as a review of the relevant English-speaking literature. It will not reflect any legislative or procedural changes since that time.

Introduction

German criminal procedure is largely inquisitorial in nature. German lawyers and judges described it to us as having adversary features, and it is certainly true that there is less focus on the pre-trial stage than, for example, in the Netherlands and France. Nevertheless, the characteristics that we would regard as core to an adversary system are substantially absent.

Like the substantive law, procedural law is codified and described in a fair amount of detail. However, it was apparent from our discussions that practice often deviates from the letter of the procedural code, at least at the level of detail.

Independent prosecution service

There is a prosecution service that is entirely independent of the police and the judiciary. However, it has a similar career path to the judiciary and is regarded as a quasi-judicial authority. Indeed, many prosecutors become judges and it is not uncommon for judges at some time in their careers to become prosecutors.

The prosecution office is hierarchically structured and is responsible to the Ministry of Justice within the particular state. As in other European jurisdictions, the Minister is entitled to give directions to the prosecution office both as to policy and as to prosecution decisions in individual cases. However, it is rare for the Minister to give a direction in an individual case.

Because the prosecutor is regarded as part of a quasi-judicial authority rather than a party to adversary proceedings, he or she is regarded as neutral and objective, and is trusted to weigh up the case for both the prosecution and the defence. In particular, in making decisions he or she is expected to take into account, and to present to the Court, not only inculpatory evidence but also any evidence that might exonerate the accused.

The investigative stage

The role of the police and the relationship between the prosecution and the police

The police, when investigating an offence, are theoretically under the control and direction of the prosecution service. However, in practice the police conduct the vast majority of investigations independently of the prosecutor and present him or her with the completed file only at the conclusion of the investigation.

However, there are two main exceptions to this:

- The police will advise the prosecution of the commencement of an investigation in serious cases and cases involving complex economic crimes. In some of these cases the prosecution will merely have a watching brief. In others, such as very serious crimes like homicide, they will be more actively involved throughout the investigation and may even attend the scene of the crime.
- In any case where the police wish to exercise coercive powers that require a judicial warrant or are seeking the pre-trial detention of a suspect on remand, they must advise the prosecutor, who is responsible for seeking the warrant or detention order.

The so-called “principle of legality” requires the police to investigate all offences that come to their attention. However, in practice some discretion is exercised. In particular, the police may decide not to record a complaint as an offence and may therefore choose not to open an investigation file (that is, they can decide it is not a crime – they have the “power of definition”). Obviously this is more likely to happen when the alleged offence is trivial.

The role of the prosecutor

When the investigation is completed and the file is handed to the prosecutor, he or she must then decide whether or not to prosecute. Again, this decision is primarily governed by the principle of legality. There is thus no general discretion not to prosecute: the prosecution is generally required to proceed with the case if there is sufficient evidence. However, this is tempered by the so-called “principle of expediency”, which permits the prosecutor, even in the face of sufficient evidence, to waive prosecution or to withdraw the charges after they have already been laid in two main circumstances:

- where the offence is a misdemeanour, the offender’s guilt is considered to be of a minor nature and there is no public interest in the prosecution;
- where the offence is a misdemeanour, and both the defendant and the court competent to hold the trial agree to a form of pre-trial diversion (such as payment of a sum of money to a charity or the Treasury, community work, reparation, victim-offender mediation etc.).

Victim-offender mediation (TOR) may also be used in all kinds of cases as an addition rather than alternative to prosecution (see s 155a of the Criminal Code). It may be employed at any stage of the process. Under s 46 of the substantive Criminal Code, the fact that mediation has occurred and has resulted in a mediated agreement may be a ground for discontinuing the proceedings. However, the discontinuance of proceedings would never occur in serious cases such as those involving sexual violation because of the public interest in the outcome. Where the prosecution continues notwithstanding a mediated agreement, the judge will take into account the agreement in determining the sentence, but will only accept it if he or she agrees with it.

The arrest, detention and questioning of the suspect

When a suspect is initially detected for an offence, there is a power for the police to arrest him or her, without a judicial order, under what is called a “provisional arrest”. This power of arrest is slightly more limited than that available in New Zealand: the main grounds upon which it is exercised are that there will be potential prejudice to the process if the accused is not arrested (for example because he or she may flee and thereby delay proceedings); however, secondary grounds for arrest include other factors such as the risk of further offending or police cannot establish the suspect’s identity.

When the suspect is questioned by the police, no video record is taken. This means that, unless there is a subsequent interview of the suspect by the prosecutor, the defendant's statement in the case dossier that goes to the court is a written construction by the police of what the suspect has said to them orally.

The suspect must be told of the right to a lawyer. The lawyer is not automatically State-funded (even during the initial questioning). However, legal aid may be available, although as in New Zealand recompense may subsequently be sought from the defendant.

If the suspect is detained by the police on the basis of an arrest warrant or a provisional arrest and the prosecution want pre-trial detention continued, the suspect must be brought before a judge of the local court on the next day at the latest (within 24 hours). The judge will then determine whether the grounds for pre-trial detention are made out. In the area we visited, this work in the Amstgericht (the District Court) was allocated to two judges, who also dealt with applications for search warrants and the like.

The pre-trial detention hearing does not occur in open court and does not involve the bringing of a formal charge. The judge is merely advised in chambers, in the presence of the parties, what offence the suspect is believed to have committed and the grounds upon which his or her detention is sought. The first time the accused appears in open court, in the presence of the media and public, is at the trial itself. Indeed, if the prosecution does not seek a judicial warrant (for example, for a search) and does not ask for pre-trial detention, the first time the accused will appear before a judge at all is at the trial; all pre-trial matters will be addressed without a court hearing, largely on the basis of the case dossier (see below). The pre-trial judges who deal with the detention and search and seizure decisions are not those who preside at trials – it is believed that trial judges would be, or be seen to be, biased if they had previously signed penal orders in respect of defendants.

Whether or not the suspect has been the subject of an earlier arrest, he or she may be summoned for an examination by either the police or the prosecution during the investigation. However, while the suspect is obliged to attend the examination, there is a right to silence and a privilege against self-incrimination which protects him or her from any obligation to answer questions. He or she also has the right to consult counsel before being examined. Counsel have the right to be present during the examination. As with any initial interview after arrest, the examination is not video-recorded, and any written statement taken is a summary construction of what the suspect says orally.

Time limits

There is no statutory time limit on the period of the investigation. However, if the suspect is remanded in custody, he or she must be released after six months unless the time period is suspended by order of the regional High Court upon application by the prosecutor. If the High Court does order suspension (for example, because of the complexity of the investigation), it must continue to review the case at least once every 3 months thereafter until the case comes to trial. The effect of this time limit is that custody cases are given priority and the substantial majority of them come to trial within 6 months.

The pre-trial stage

If the prosecutor decides to bring charges following the completion of the investigation, he or she files those charges in court by way of a "bill of indictment", together with a supporting case dossier. This dossier contains the statements of all of the witnesses regarded by the prosecution as relevant to the case (including those that might provide exculpatory evidence). It is thus

similar to, but potentially more extensive than, the formal written statements filed by the prosecution in relation to cases proceeding by way of indictment in New Zealand.

In addition to the statement of witnesses that are relevant to a determination of guilt, the case dossier includes information relevant to sentence, such as the defendant's previous conviction list and other background information prepared by court workers (the equivalent of those who prepare our presentence reports). This is because, as discussed further below, the trial does not have separate conviction and sentence stages. Both are addressed in a single hearing, before the court retires to consider them together.

When the case dossier reaches the court, it is put into the hands of a judge. In both the Amstgericht (the District Court) and the Landgericht (the High Court), the judge to whom the trial is allocated as the presiding judge is responsible for pre-trial decisions – other than those relating to pre-trial detention and search and seizure. The role of this judge is pivotal: once the charges are laid in court, he or she is in control of the case and determines whether there is sufficient evidence for the matter to go to trial, and if so what charges are appropriate and what evidence should be called. (However, it is uncommon for judges to suggest that the charge should be amended; those we interviewed estimated that this occurred in only 2% or 3% of cases.) Judges may direct further investigations, including that particular witnesses be interviewed or re-interviewed. The Code also contemplates the possibility that they may conduct some of these further investigations themselves, although that rarely happens. It is, however, common for judges to summon their own experts from a list held by the court.

If the judge decides that there is sufficient evidence for the case to proceed to trial, he or she will advise the prosecution and the defence of this decision and formally “open the case for trial”. This involves setting the trial date and directing the prosecution to summon the required witnesses. The accused has the opportunity to object to the decision and to ask the judge to consider additional evidence. The judge’s decision on the accused’s request is final and is not appealable.

The accused may also request that the judge summon additional witnesses to give evidence at trial or may summon them directly at his or her own expense.

Judges sometimes have case conferences with the prosecution and defence prior to trial in order to narrow down the issues and limit the number of witnesses, although this is more common in the Amstgericht than the Landgericht. There is also a kind of plea bargaining before trial, involving the prosecution, defence and judge, that may result in an amendment to the charges originally laid. Neither case conferences nor plea bargaining obviate the need for a trial itself, since the court must still always be satisfied as to guilt on the available evidence (see further below).

Defence counsel have access to the case dossier. Given that the dossier is not generally held in electronic form, they are also entitled to uplift it, with the exception of exhibits, and take it to their private premises for inspection and copying, unless there is a significant reason (such as prejudice to the case) to refuse to permit them to do so. If the accused is unrepresented, it appears that it is discretionary whether or not the accused is given full access to the case dossier. In practice, he or she will be unless that would be contrary to the interests of justice (for example, because it would lead to tampering with evidence or the intimidation of witnesses).

The trial stage

There are three levels of first instance trial courts:

- a) *The Amstgericht (the District Court)*: This court deals with less serious criminal matters. Where the prosecutor is seeking no more than one year's imprisonment, the case will be heard by a professional judge sitting alone, and the sentence will be limited to the one year threshold. Rape trials may be heard here (minimum penalty is one year) and case will proceed to trial more quickly (4 months instead of one year) but if charges are heard in the Landgericht there is no right to a factual re-hearing (only an appeal on the law). Where the prosecutor is seeking more than one but not more than 4 years' imprisonment, and the prosecutor has chosen to lay the charge in the Amstgericht rather than the Landgericht because of its lesser seriousness, it will be heard by one judge and two lay assessors. Again, the sentence will be limited to the four-year threshold.
- b) *The Landgericht (the High Court)*: This court deals with more serious criminal matters. The case is heard by two professional judges and two lay assessors. Cases must be heard here if the minimum penalty is four years imprisonment.
- c) *The Oberlandesgerichte (the Higher Regional Court of Appeal)*: This court deals with special criminal matters, primarily those involving offences against the State, treason etc. The case is heard by three or sometimes five professional judges; no lay assessors are involved.

Lay assessors are different from jurors in our system. The way in which they are selected differs from one state to another. It is common for them to be selected by a committee upon application for five-year terms and to sit about ten times a year. They play a limited role in the trial itself. For example, they rarely ask questions of a witness, and if they wish to do so some presiding judges will expect that the questions are directed to the witness through them. However, judges and lawyers agree that the lay assessors play a significant role in decision-making and are not unduly dominated by the professional judges. They are regarded as being particularly useful in determining factual issues that depend upon assessments of credibility. Lay assessors have the same voting power and there must be a two-thirds majority decision for both conviction and sentence. Those who we interviewed expressed the view that lay assessors tend to be more pro-conviction in rape cases, although women lay assessors may be less inclined to believe women victims in such cases.

The German system does not recognise the possibility of a guilty plea. Regardless of any admissions made by the accused, either before or at trial, the court must be independently satisfied on the evidence that the accused is guilty of the crime charged. As a result, there is a trial in every case, although its length is obviously dictated by the extent to which the accused disputes the prosecution's version of events.

Although inquisitorial models are often regarded as preferable to adversary models because they involve a search for the truth, this has no basis in fact. A criminal trial in the German system is not concerned with determining whether the truth lies in the complainant's version of events rather than that of the accused; it is rather concerned with whether there is a reasonable doubt as to the accused's guilt. In this respect, its objective does not differ from that of a criminal trial in New Zealand. It merely has a different method of pursuing this objective. So when the participants in inquisitorial models describe themselves as searching for the truth, they are really referring, not to a different objective, but to a different process by which they achieve that objective (that is, a different process by which the evidence is gathered and considered).

As noted above, the trial itself is not divided between the conviction and sentencing stages of the process. It deals with both issues together. As a result, information that, from a New Zealand perspective, is relevant only to sentence is collected both on the case dossier that is

prepared before trial and from witnesses (including the accused) during the trial itself. This includes the defendant's previous convictions. Indeed, during the trials that we observed in Bremen, the judge spent some time asking the accused a large number of questions about their background and personal circumstances. The victims when giving evidence were also asked questions about the impact of the crime upon them, thus providing the information during the trial that we would include in a victim impact statement following conviction. The result, of course, is the large amount of information is presented during the trial that, in the event of an acquittal, is of marginal relevance to the outcome. Some of those we interviewed saw some advantages in drawing a more formal distinction between the trial and sentencing stages.

Both prosecution and defence state what they believe the sentence should be before the court retires to consider the verdict. However, the conflation of the conviction and sentencing stages means that, at least in cases where the accused is denying responsibility for the offence altogether, there is little or no opportunity for defence counsel to make the sort of plea in mitigation that occurs prior to sentence in New Zealand.

The case dossier presented to the court when the charge is laid by the prosecution is read before the commencement of trial not only by the presiding judge but also by any other professional judges involved in the trial. However, the case dossier is not made available to the lay assessors until the commencement of the trial itself. They therefore do not have the same background information (including the previous convictions of the accused) as the judges. However, they are able to glean some of that information by leafing through the dossier quickly during the course of the trial itself.

Notwithstanding the availability of the case dossier, the trial operates on the basis of what is described as the principle of "orality" or "immediacy". That is, the fact-finder needs to be persuaded of the guilt of the accused on the basis of the oral evidence presented in court rather than the material presented in the written statements of witnesses. Written statements cannot be used in lieu of oral evidence except where both the court and the parties agree to permit it in the following circumstances:

- where the witness has died or cannot be examined by the court for another reason within a foreseeable time; or
- where the evidence concerns the presence or level of asset loss; or
- where illness, infirmity or other obstacles prevent the witness from appearing at the hearing for a long or indefinite period; or
- where the witness cannot reasonably be expected to appear at the trial given the distance involved, having regard to the importance of the evidence.

In the event that written statements are used in lieu of evidence, they are read out to the court. If there is an audio-visual recording of the earlier statement, however, that will be played to the court instead.

Nevertheless, the material contained in the case dossier is used by the presiding judge and other parties in questioning, not only when there is an inconsistency with the oral evidence but also more generally. In this sense, the case dossier comprises the starting point of the trial, even though the decision itself must be based upon evidence given orally. Indeed, the case dossier itself is regarded by judges as essential in preparing for the trial. The defence counsel and prosecutors we talked to did not think that this limited the trial to the issues that the judge decides to focus on – judges are obliged to consider all the issues raised by the evidence, and the parties can raise other issues not canvassed by the judge if they choose.

There are a number of features of the way in which evidence is presented in the German system that are markedly different from the procedure followed in common law jurisdictions:

- When a prosecutor commences the trial by setting out the charge and summarising the evidence, he or she outlines not only his or her view of the nature of the offence but also evidence that may exonerate the accused or mitigate the offence. For example, in one of the trials that we observed the prosecutor included in his initial summary the fact that the defendant may have had diminished responsibility as a result of alcohol and cocaine consumption at the time of the offence.
- Evidence is initially presented in narrative (rather than question and answer) form, prompted by an initial question from the presiding judge. Thus the witness is left to recount events in a rather more natural fashion without significant interruption. This is partly because there are few rules as to the admissibility of evidence and therefore less fear that witnesses will present irrelevant or prejudicial material unless guided through the evidence in a controlled way. The trial is also less formal in nature – the witnesses and the lawyers may all approach the judges to discuss aspects of the evidence in the dossier. The police officer in the case we observed did not come in uniform. The witnesses do not take an oath, it being assumed they will tell the truth.
- There is no formal distinction between prosecution and defence witnesses. The same rules (which are relatively few in number) apply to evidence given by all witnesses and to the types of questions that can be asked of them. There is thus no formal distinction between examination-in-chief and cross-examination.
- The presiding judge is in control of the questioning, and always starts that process. Questioning by prosecution and defence usually occurs only when the judge has exhausted all the questions that he or she and any of his or her fellow judges want to ask. Thus the order in which questions are asked is: judge, prosecutor, defence counsel, defendant. However, this is not invariably the case: the parties (especially the defence) have the right to ask questions at any time, although in practice they generally refrain from doing so until the judge has finished.
- For these reasons, questioning by the defence is arguably less confrontational and more neutral than in our system. In particular, aggressive questioning tends to be avoided because it would suggest that the presiding judge in his or her questioning has not done the job properly. Nevertheless, if the credibility of the witness is in issue, vigorous questioning can occur. Indeed, we were told of one case that went on appeal to the Federal Court where defence counsel had questioned the complainant's mother for five days. Moreover, allegedly because of the influence of Anglo-American drama series, it was alleged that defence counsel are becoming more aggressive in their questioning than they used to be. Judges can forbid counsel from asking questions that the judge has already asked. However, they are reluctant to intervene to prevent questions that are in substance the same but being asked in a different way. More generally, they have difficulty in intervening to stop questioning, partly because the absence of elaborate rules of evidence means that they do not have the tools to enable them to do so.
- Unlike cases that are tried by jury in New Zealand, reasons must always be given for the decision as to verdict and sentence. Where there is more than one professional judge, it is usually the practice that the second judge rather than the presiding judge writes the decision. In the Landgericht, the decision is typically lengthy - often between 50 and 100 pages. In the Amtsgericht, it is typically much briefer.

As in our system, the defendant can choose to remain silent both before trial and at trial. He or she can also refuse to identify the issues in dispute. In practice, however, the issues in dispute are almost always evident from the case dossier. Where they are not, they become apparent at the beginning of the trial. That is because, while the defendant can choose when he or she gives evidence, it is the practice that the defendant always goes first in the trial, although he or she also has the opportunity to have the last word in the trial after other evidence has been given. Moreover, defence counsel does not decide whether or not to call the defendant as a witness; the defendant is simply asked questions by the presiding judge and, if he or she wishes to exercise the right to remain silent, must positively take the step of refusing to answer those questions. While defence counsel may intervene to say that the defendant will not answer a question, the dynamics of the situation mean that the defendant (or perhaps more commonly, counsel on his or her behalf) will generally answer. The result is that, if the issues in dispute were not made apparent earlier, they generally become clear at the outset of the trial. The judges we talked to thought it much better to hear from defendants themselves rather than through counsel.

The nature of the trial process means that the defendant (and arguably the complainant) is much more involved in the trial than would generally be the case in New Zealand. Indeed, in the trials that we observed in Bremen, the defendants did a substantial proportion of the talking (although this may have been atypical). Moreover, as in other European jurisdictions the defendant personally is always given the last word in the trial – that is, the defendant is asked by the presiding judge whether there is anything else that he or she wishes to say.

After the delivery of the verdict, both the prosecutor and the defendant has one week to decide whether they wish to appeal against it. The appeal may be against conviction or sentence or both. The defence need not give reasons for a rehearing but this right can be open to abuse as can take a while and then the time delay can be used in mitigation at sentence (i.e. no offending occurred while waiting for re-trial).

Penal order procedure

In relation to offences that do not exceed a specified imprisonment threshold (translated as "misdemeanours"), there is provision for an accelerated procedure. Before the trial, the prosecutor may apply to the judge for a written penal order if he or she does not consider that the trial is necessary given the outcome of the investigation. The proposed penal order may involve a fine, forfeiture, disqualification from driving, or a suspended prison sentence combined with probation. The prosecutor may make a similar application during the trial itself if the defendant's failure to appear at the trial or some other factor constitutes an obstacle to the continuation of the trial.

The application must be refused if there are insufficient grounds for suspecting that the accused is guilty of the offence. The application must also be refused and the matter set down for trial if the judge has reservations about deciding the case without a trial. Otherwise the application must be granted.

If the judge grants the application, the defendant has two weeks following service of the order to lodge an objection to it. Unless the objection relates only to the amount of the fine, the case must be set down for trial upon receipt of the objection. Effectively, therefore, the use of accelerated proceedings is dependent upon the ultimate consent of the defendant.

Protection for vulnerable witnesses

The following protections exist for vulnerable witnesses:

- If there is an imminent risk of serious detriment to the well-being of a witness if that witness were to give evidence in the presence of others at the trial, the court may order that the witness give evidence from another location and that his or her testimony be relayed by audio-visual link if this is available.
- If it is feared that a co-defendant or a witness will not tell the truth when examined in the presence of the defendant, the court may order that the defendant leave the courtroom. However, given the strength of the oral tradition, courts are reluctant to do this and generally do so only if witnesses say that they will not tell the truth.
- Unless the judge is of the view that direct questioning by the prosecution and defence would cause no detriment to the well-being of a witness under the age of 16, they are required to put any questions which they wish to ask through the judge, who is the only one entitled to ask questions directly.
- If it is feared that the giving of evidence in the presence of the defendant by a witness under 16 will cause “considerable detriment to the well-being” of that witness, the court may order that the defendant leave the courtroom:
- If it is feared that the giving of evidence in the presence of the defendant by an adult witness will pose an imminent risk of serious detriment to the health of that witness, the court may also order that the defendant leave the courtroom
- In relation to specified sexual offences and other specified offences involving ill-treatment, the examination of a witness under 16 may be replaced by the showing of a video-recording of the witness’ previous judicial examination if the defendant and his or her defence counsel were given the opportunity to participate in that examination (see s 255a of the Code). Supplementary oral testimony from a witness is still possible.
- A support person may sit with the complainant as a matter of practice but there is no Code provision either way regarding this process.

If the court does order the defendant to leave the courtroom, the presiding judge is required to inform the defendant of the essential contents of the proceedings, including the evidence, that occurred during his or her absence. Under s 247 of the Code, defence counsel is allowed to remain and the defendant can watch the testimony via CCTV or video-link where this is possible.

The role of victims

Various provisions of the Code provide some protection for victims. There are the protections for vulnerable witnesses set out above. There are also provisions, similar to those existing in New Zealand, that require victims to be kept informed as to the progress of the case and, if they have a legitimate interest, to access the prosecution and court files.

However, there are three sets of provisions providing a role for victims that differ from those in New Zealand: the ability for victims to object to a prosecution decision not to lay charges; the ability of victims to lodge reparation claims directly as part of the criminal proceedings; and the Nebenklage procedure.

Objecting to a decision not to lay charges

Section 374 of the Code provides that there are a small number of specified offences entitling the victim to bring a private prosecution without the involvement of the public prosecutor. Apart from that, however, there is no general right of private prosecution.

Instead, if the prosecutor decides not to prefer charges, the victim is entitled to lodge a complaint with the head of the public prosecution office within two weeks of being notified of the decision. If the head of the office dismisses the complaint, the victim may apply to the court for a review of the prosecution decision. The court may request the prosecution to submit its records of the investigation and may ask the accused for a reply to the victim's complaint. The court must dismiss the application if there are no sufficient grounds for preferring charges. Otherwise it must order the prosecution to lay charges. There is no appeal against the court's decision.

It is apparently uncommon for victims to avail themselves of this right.

Lodging a compensation claim

If the victim alleges that he or she has suffered property loss as a result of the offence, he or she is entitled to bring a property claim as part of the criminal proceedings and may have legal representation for that purpose. In that event, the victim and his or her representative may participate in the proceedings, ask questions of witnesses and set out the basis for the claim before the closing addresses by prosecution and defence. The court is then obliged to make a finding as to the claim as part of the overall verdict.

Ordinarily victims bear the cost of their legal representation. However, they are entitled to means-tested legal aid on the same basis as in civil proceedings, and they may recover the costs of their representation (from the defendant) if the request for compensation is successful and the accused is convicted.

The Nebenkläger procedure

In addition to this general right to appear in the criminal proceedings in support of a property claim, the victims of more serious offences (such as serious physical assault, kidnapping and sexual assault) have the more general right to be joined to the proceedings as an "auxiliary prosecutor" or "private accessory prosecutor" by way of the Nebenkläger procedure. This is a long-standing right that was introduced into German criminal procedure as early as 1877, but it underwent a major reform in 1986 that extended it to sexual offences.

If victims avail themselves of the right (to be a Nebenkläger), they are entitled to legal representation (paid for by the state if they cannot afford it) both before and during the proceedings. Through their lawyer, they may examine the case dossier (including the defendant's statement) in advance of trial and suggest further factual investigations; ask questions of witnesses; object to the questions asked by other parties; and make closing statements. They also have a right to be present throughout the trial even before they have given evidence. It is relatively common for victims of sexual assault to exercise this right, but apparently fairly uncommon for victims of other offences to do so. The Nebenkläger sits where the prosecutor does, but the judge can ask the victim (but not his or her counsel) to leave while the defendant gives evidence. Some lawyers' whole practice is as counsel for Nebenkläger, but others will work as defence counsel as well. They are paid 400-500 Euro per day. If it transpires that the alleged victim has made a false complaint, the victim is required to reimburse the state of the cost of the trial aspect of the representation.

Views were mixed as to the benefits of the Nebenkläger procedure. The prosecutors with whom we discussed the matter thought that it is useful backup, because the lawyer for the victim sometimes asks questions that the prosecutor has inadvertently overlooked. The defence counsel with whom we discussed the matter thought that it is useful in cases of admitted guilt, because it enables the prosecution and defence to enter into a compensation contract with the victim's lawyer. However, he thought that if the defendant denies guilt, there are two problems

with the procedure: first, it leads the victim's lawyer to try and act as a more effective prosecutor than the prosecutor and therefore to be unnecessarily aggressive in questioning; and it potentially enables the victim to be apprised of all of the evidence in the prosecution file before giving evidence, thus affecting the reliability and authenticity of his or her evidence. The judges' view was that the procedure greatly complicates trials. One example was provided where the trial involved five Nebenkläger lawyers as well as the prosecutor. All of the lawyers wanted to be much more active in questioning than the prosecutor would normally be, thus having a significant impact on the length of the trial. Some thought it makes the process more adversarial, and that there is more "cross-examination" in sexual cases than there used to be. It is the task of the judge and the prosecutor to object to the questions of defence counsel but some judges are cautious about intervening and may be worried about being appealed. One of the judges we spoke to thought that judges should be able to take care of the needs for victims (although neither judges nor lawyers receive any particular training or supervision to enable them to do this effectively).