

Thank youto allow me to take the floor.

I want to report on a legal institution in German law called „Nebenklage“, which is an important instrument for the victim, as it allows him under certain circumstances to participate in criminal proceedings independently of the public prosecutor.

Let me begin with some general remarks:

The aim of the criminal procedure law is the creation of peace under the law through the diligent pursuit of justice. The state brings the accused to trial. The accused has a right to a fair and due procedure.

Where do we find in this context the injured/ where the victim? The latter also has a right to a fair trial and reasonable treatment. The authorities of the state have the obligation to protect the victims of criminal offences and to respect their concerns.

In particular victims of violence, but not only these often experience a traumatic stress. They suffer diverse forms of physical, psychological and social consequences up to traumasequels.

Until 1986 in Germany only the offenders were in the focus of the judiciary; the victims found no or very little attention. Only the legal institution of the „Nebenklage“ (Private Accessory Prosecution), which was since the introduction of the German Code of Criminal Procedure in 1877 part of our legal system,

stipulated that the victim might require in certain cases a fine from the offender. However this did not have any great implications for the victim.

Only with the Victim Protection Act from 18.12.1986 a new episode of victim protection began in Germany.

The „Nebenklage“ (Private Accessory Prosecution) was redesigned and the legal advisor was introduced.

The procedure for compensation for aggrieved persons was enhanced by the possibility to pronounce basic and partial judgements.

The rights of information and participation of the injured party in the proceedings were extended.

The protection of the personality was enhanced by restricting the right to ask certain questions concerning the identity of the victim and the possibility to exclude the public from the court.

Details:

Let me now go into details of the „Nebenklage“ (Private Accessory Prosecution), its meaning and scope has undergone many changes since its establishment in the German Code of Criminal Procedure in 1877.

The „Nebenklage“ represents an exception to the rules in criminal proceedings in Germany. According to our Code of Criminal Procedure the state i.e. the public prosecutor has to prosecute every criminal offence (Offizialprinzip). However the „Nebenklage“ only permits the prosecution of certain offences, which I shall mention later. The prosecution monopoly of the state and the focus of the criminal proceedings on the perpetrator have as consequence that the

victim only plays a minor role in the proceedings of the criminal court, it regularly occurs as a witness. This is in many cases inappropriate. The victim should get satisfaction for the wrong the criminal has caused. The whole process has an atonement function.

At this stage the “Nebenklage” becomes important!

Whoever became the victim of a crime may under certain circumstances join the criminal proceedings against the perpetrator as co-plaintiff (§ 395 et. seq. CCP). This connection makes sense, because the “Nebenklage” allows the co-plaintiff to participate actively in the proceedings, to contribute in solving the crime and to play a role in the prosecution of the perpetrator. Because unlike in the case the victim does not join the proceedings and has therefore the status of a witnesses, the German Criminal Procedure Code gives the co-plaintiff many legal possibilities. Therefore the co-plaintiff can play an active role and is not merely an uninvolved third party.

Throughout the criminal proceedings the co-plaintiff is in no way partner of the public prosecutor. He has been given procedural rights (§§ 397 – 401 CCP), which normally are assigned to the public prosecutor; however he practices them completely independently. His legal status is that of a party with special rights. He will be given the opportunity to pursue his personal interests on satisfaction in the process. He is, even if he is to be heard as a witness, entitled to be attendant in court throughout the whole trial. However it must be said, that the judges often ask the co-plaintiffs to leave the courtroom when other witnesses or the accused is heard. He also has important rights such as the rejection of judges and experts, requests for evidence and the right to ask questions, to give explanations and he has access to the records. Regardless of the public prosecutor he can appeal against the judgment. In addition, he may claim damages in the criminal proceedings (“Adhäsionsverfahren”).

One can say, that the “Nebenklage” is practiced protection of victims, because she improves the legal possibilities for the injured person in the criminal proceedings. It also gives the injured the opportunity to confront the offender not as a victim but as a plaintiff, which often has the psychological effect of better coping with the crime.

In which cases the co-plaintiff can join the accusations of the public prosecutor?

The German Code of Criminal Procedure provides in §§ 395 – 402 CCP that victims of offences against sexual self-determination (e.g. Sexual child abuse, rape, sexual assault etc.), murder, manslaughter, suspension, intentionally bodily harm, subduction of freedom, kidnapping for extortion, hostage-taking and more recently stalking can act as co-plaintiffs according to the Violence Protection Act. In other unlawful acts such as accidentally injury and offences against the honor (libel, slander etc.) and various crimes against private property (theft, robbery, extortion and robbery of motor drivers) the “Nebenklage” only is possible “.....if for particular reasons , especially because of the serious consequences of the act, this appears to be necessary to safeguard his interests“ (§ 395 para. 3 CCP). Since the reform of the law of copyright and trademark, offences against these provisions can also be prosecuted with the “Nebenklage” (§ 395 para. 1 Nr.6 CCP).

The „Nebenklage“ can not only be brought into action in ordinary criminal proceedings but after the change of § 395 CCP by the 1st Victim Framework Act of 24.06.2004 also in procedures for preventive detention; against juveniles she is no longer generally excluded since the 2nd Law Modernisation Act of 22.12.2006 (§ 80 para. 3 JJG). In this context she is i.a. allowed in cases that deal with crimes against the life, physical integrity or sexual self-determination; against adolescents she is allowed without restriction.

Who is entitled to join the criminal proceedings as co-plaintiff?

Only those in § 395 CCP listed persons are entitled of filing an intervention, which are primarily the directly injured. If by the unlawful act a person has come to death, parents, children, siblings and spouses or life partners can in accordance with § 395 para. 2 S. 1 CCP join the proceedings.

How does the victim become a co-plaintiff?

You do not become automatically a co-plaintiff. The victim must declare in writing to the court, that it wants to join the proceedings as co-plaintiff. For this application a simple letter to the court, which deals with the criminal case, is sufficient. If the office of public prosecution has not yet preferred the charges, the declaration may be sent to the prosecutor's office. However the statement only comes into effect when public charges are preferred. There is no possibility to prefer an „Nebenklage“ on its own. Only when the public prosecutor has put forward a charge, the victim can join the proceedings.

After hearing the public prosecution office the court decides whether a person is entitled to join as co-plaintiff. Against the decision of the court, by which the admission as co-plaintiff is rejected, the victim is entitled to appellate remedies.

The victim may become a co-plaintiff in any stage of the criminal proceedings. Even if the hearing before the court has already begun, that does not preclude the connection.

The public prosecutors office has to give informations about the state of the proceedings, normally on written requests.

To insure that the injured persons become aware of the legal institute of the „Nebenklage“, § 406 h CCP stipulates that the victim is as early as possible informed about his rights as a „Nebenkläger“, regularly by writing and as far as possible in a

language it understands.

The victim may at any stage of the proceedings avail himself of the assistance of a lawyer or be represented by him. The lawyer is entitled to be present at the main hearing of the court. He is to be notified of the date set down for the main hearing (§§ 397,406 g CCP). For particular serious offences the court may on application of the victim assign him a lawyer as counsel. If the victim is not able to pursue its interests and if it has no sufficient funds, the court may also assign a lawyer (§ 397 a CCP). The costs of that lawyer will usually be imposed on the defendant in the case of his conviction (§ 472 CCP). In case the defendant is acquitted, the co-plaintiff has to bear his costs i.a. those of his counsel. In the case the court has assigned a lawyer as counsel, the state bears the costs.

Final remarks