Developments

Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure

By Kerstin Braun[*]

A. Introduction

Historically, victims of crimes were key participants in the prosecution of crimes around the globe.[1] Over the centuries, however, as public police and prosecution service took over the prosecution of criminal acts, the importance of victims in criminal justice systems decreased in common law and civil law countries alike.[2] The victim was sidelined and the victim's role was reduced to that of a witness for the prosecution. As one of the first scholars to comment on the absence of victims from the criminal justice system, William Frank McDonald referred to the victim as "the forgotten man" in criminal procedure.[3]

In the 1970s and 80s, the victims' rights movement and scholarship focusing on victims of crime emerged, pointing out deficits in the treatment of victims by the criminal justice system and challenging the conception of victims as mere witnesses without their own rights in the criminal justice process.[4] The academic debate on victims and their role in the criminal justice system shifted from theory to the adoption of an international instrument. In 1985, the United Nations ("UN") General Assembly unanimously adopted the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*

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[1] *See generally* HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE (2002); *see also* Peter Becker, EINE KURZE EINFÜHRUNG IN DIE DEUTSCHE RECHTSGESCHICHTE 13 (2011).

[2] *See generally* Ludwig Frey, DIE STAATSANWALTSCHAFT *in* DEUTSCHLAND UND FRANKREICH (1850); *see also* Chris Corns, *Police Summary Prosecutions in Australia and New Zealand: Some Comparisons*, 19 TASMANIA L. REV. 280, 288 (2000).

[3] William Frank McDonald, *Towards a Bicentiennial Revolution in Criminal Justice: The Return of the Victim*, 13 AMERICAN CRIM. L. REV. 649, 650 (1975–1976). The term was repeated frequently in subsequent literature. *See generally* JOANNA SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM (1985).

[4] *See generally* M. Ash, *On Witnesses: A Radical Critique of Criminal Court Procedures,* 48 NOTRE DAME LAW. 159 (1972); *See also* WILLIAM FRANK MCDONALD, CRIMINAL JUSTICE AND THE VICTIM (1976); *See also* SHAPLAND ET AL., *supra* note 3.

("Declaration"),[5] recognizing that "millions of people throughout the world suffer[ed] harm as a result of crime and the abuse of power and that the rights of these victims ha[d] not been adequately recognized."[6]

The basic principles of justice contained in the Declaration are designed to assist governments "in their efforts to secure justice" for victims of crime.[7] The basic principle of justice contained in section 6(b) of the Declaration sets out that victims should be able to present views and concerns at appropriate stages of the proceedings where their personal interests are affected. The basic principle, however, specifies that victims should only be granted such participatory rights when victim participation would not violate defendants' rights in the national criminal justice system.

In order to comply with the obligations set out in the Declaration and to allow victims to present their views and concerns, eligible victims in all Australian State and Territory jurisdictions have been afforded the statutory right to submit a Victim Impact Statement (VIS) at the sentencing stage. Generally a VIS is a written statement expressing how the crime has affected the victim. A VIS can be taken into account by the court in formulating the penalty.

Making a VIS, however, is currently not possible for victims in the German inquisitorial system. In Germany in comparison to Australia, eligible victims have the right to participate as Private Accessory Prosecutors, so called *Nebenkläger*, alongside the public prosecutor during criminal proceedings. In this role victims can, for example, question witnesses and request the introduction of evidence. Victims who have suffered financial loss resulting from the criminal act can also make an application to have their civil claim assessed by the judge during the criminal trial, so called *Adhäsionsverfahren* (Adhesion Procedure), and be

[5] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, UN GAOR 40th sess, 96th plen. Mtg., Supp. No. 53, UN Doc. A/RES/40/34 (29 Nov. 1985) annex [herinafter Declaration].

[6] GA Res, 40/34, UN GAOR 40th sess, 96th plen. Mtg., Supp. No. 53, UN Doc A/RES/40/34 (29 Nov. 1985) [hereinafter Resolution]. The Declaration defines victims of crime as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. *See id.* § A1.

[7] Resolution, *supra* note 6, § 3. Germany, in comparison to Australia, is also obligated to implement the victims' right to be heard under art. 10 EU Directive 2012/29/EU of 25 Oct. 2012 in national law. Australia, however, is under no such obligation. This paper therefore focuses on the above-mentioned Declaration as an overarching framework for both States. Although the Declaration is legally non-binding on Member States, a Declaration in UN practice creates a "strong expectation that Members of the international community will abide by it." *See* Memorandum of the Office of Legal Affairs, UN Secretariat, UN ESCOR, 34th session, support no 8, [15], UN Document No E/CN.4/L610 quoted in Dinah Shelton, *Compliance with International Human Rights Soft Law*, 29 STUDIES IN TRANSNATIONAL LEGAL POLICY 119, 126–27 (1997).

heard during the trial in regard to their civil claim.[8] Perhaps based on the assumption that victims have been afforded sufficient participatory rights as Private Accessory Prosecutors and applicants to the Adhesion Procedure, victims in Germany have not been granted the right to submit a VIS during criminal proceedings to express how the crime has affected them.

Over the course of the last decade, however, scholars, including Wemmers, have started to address the absence of VIS schemes in inquisitorial criminal justice systems and begun to contemplate whether they could be beneficial to victims in these systems.[9] In the context of Germany's inquisitorial system, Marlene Hanloser has suggested the introduction of VIS schemes in criminal trials in order to grant all victims the right to be heard by making statements on how the crime has affected them.[10] Against the backdrop of this scholarly debate, this paper analyzes whether and for whom the introduction of VIS schemes in Germany could be valuable. In assessing the suitability of VIS schemes in the German context, this paper focuses on the alleged benefits for victims and the potential risks for defendants' rights. The remainder of this paper is structured into four parts.

Part B analyzes how VIS schemes operate in Australian jurisdictions. This part subsequently considers the possibilities for victim participation in the structures of the adversarial criminal justice system in general and contends that victim participation in adversarial systems without the violation of defendants' rights is possible only to a limited extent.

Part C determines that the structure of the German inquisitorial system generally permits victim participation at trial to a greater extent than the structure of the adversarial system. This part subsequently identifies that while some victims have been granted ample opportunities to present views and concerns in German criminal trials, other victims have no explicit right to do so. These victims could potentially benefit from the introduction of VIS schemes enabling them to present information to the court about how the crime has affected them if they so desire.

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[8] These rights will be discussed in greater detail in part C of this paper. Victims in Germany are traditionally referred to by law as "aggrieved persons." *See* 5th book *Strafprozessordnung* (German Code of Criminal Procedure) ("StPO") entitled "Participation of the Aggrieved Person in Criminal Proceedings." Riess explains that the term "aggrieved person" has traditionally been used in criminal procedure in Germany, while the term "victim" has been introduced and used since the debates on the role of the "victim" in criminal procedure in the mid 1980s in Germany. In his opinion, the term "victim" is related to a criminological-victimological point of view not considering the defendant or the crime but solely the victim. He concludes, however, that it is impossible to separate the terms from each other because the terms both refer to the same subject, and the role of the aggrieved person in criminal procedure cannot be defined without considering the victimologic side of things. *See* PETER RIESS, DER STRAFPROZESS UND DER VERLETZTE - EINE ZWISCHENBILANZ JURA 281, 281–82 (1987).

[9] *See generally* Jo-Anne Wemmers, *Victim Policy Transfer: Learning From Each Other*, 11(1) EUR. J. ON CRIM. POL'Y & RES. 121 (2005).

[10] MARLENE HANLOSER, DAS RECHT DES OPFERS AUF GEHOER IM STRAFVERFAHREN 229 (2010).

Part D examines the risks and benefits associated with the introduction of VIS schemes in the context of the German inquisitorial system. It determines that it is not justified to introduce VIS schemes in German criminal procedure, as the significant risks that could arise for defendant' rights outweigh the questionable benefits for victims.

Part E concludes that the structure of the German inquisitorial trial could generally permit the participation of more, or all, victims, although this is currently not the case. This part contends that before advocating for the introduction of participation schemes foreign to the German criminal justice system, like a VIS scheme, the question needs to be addressed as to whether, and to what extent, already existing victim participation schemes in Germany could and should be modified and expanded to more or all victims of crime.

Before commencing the analysis of alleged benefits and risks arising from the introduction of VIS schemes in Germany, this paper will first consider how VIS schemes operate in Australia and explore the reasons for their introduction in adversarial systems.

B. VIS Schemes in the Australian Adversarial System

As outlined above, eligible victims in Australia can present views and concerns by submitting a VIS.[11] After the defendant has been found guilty and before the sentence is allocated, these statements are presented to the sentencing judge by the prosecution, with copies provided for the defense.[12] The statement can be taken into account by the court in formulating the penalty for the defendant. The legislation on how a VIS must be submitted varies between Australian jurisdictions. However, in most jurisdictions, a VIS can be submitted in writing and also read out in court during the sentencing stage.[13] In all Australian State and Territory jurisdictions, a VIS can contain information on how the crime

[11] *Crimes (Sentencing Procedure) Act* 1999 (NSW) § 26, 28 (Austl.); *Sentencing Act* 1997 (Tas) section 81A (Austl.); *Sentencing Act* 1995 (WA) § 24 (Austl.); *Sentencing Act* 1995 (Northern Territory) § 106A (Austl.); *Crimes Sentencing Act* 2005 (ACT) § 47 (Austl.); *Sentencing Act* 1991 (Vic) § 8K (Austl.); *Victims of Crime Assistance Act* 2009 (Qld) § 15 (Austl.); *Penalties and Sentences Act* 1992 (Qld) § 9(2)(c)(i) (Austl.); *Criminal Law Sentencing Act* 1988 (SA) § 7A. No explicit statutory obligation exists in Federal criminal legislation. In Tasmania, South Australia and the Australian Capital Territory, VISs can only be made for indictable offences or certain prescribed offences. In New South Wales, VISs can only be submitted in case of indictable offences that cause actual bodily harm or death, offences of violence or threatened violence and prescribed sexual offences. In Queensland, a VIS can only be submitted for offences committed or attempted against the person of someone. Only in Victoria, Western Australia and the Northern Territory can victims of all criminal acts submit VISs.

[12] Sam Garkawe, *Victim Impact Statements and Sentencing*, 33 MONASH U. L. REV. 90, 91 (2007).

[13] *Crimes (Sentencing Procedure) Act* 1999 (NSW) § 30A (Austl.); *Sentencing Act* 1997 (Tas) § 81A (Austl.); *Sentencing Act* 1995 (WA) § 25 (Austl.); *Sentencing Act* 1995 (Northern Territory) § 106A (Austl.); *Crimes Sentencing Act* 2005 (ACT) § 50 (Austl.); *Sentencing Act* 1991 (Vic) § 8K (Austl.); *Victims of Crime Assistance Act* 2009 (Qld) § 15, 15A, 15B (Austl.); *Penalties and Sentences Act* 1992 (Qld) section 9(2)(c)(i) (Austl.); *Criminal Law Sentencing Act* 1988 (SA) § 7A (Austl.).

has affected the victim. However, generally it cannot contain any information in regards to what sentence the victim finds appropriate.[14]

Wemmers explains that VISs were introduced for victims in adversarial criminal justice systems, like Australia, to compensate for the lack of victim participation at trial, through acknowledging their victimization and letting them express the consequences of the crime.[15] Victim participation at trial in adversarial criminal justice systems, like Australia, is only possible to a limited extent without violating defendants' rights, due to the bipartisan structure of the adversarial criminal trial.

The adversarial system emphasizes the contesting parties' control of the legal proceedings.[16] In the adversarial criminal trial the parties, namely prosecution and defense, generally take an active role in order to convince the court of certain facts.[17] The characteristic role of the court is generally more passive and focuses mainly on deciding questions of law, including the admissibility of particular evidence, and ensuring that the appropriate trial procedure is followed.[18] Pizzi and Perron elaborate that in this two-sided contest between prosecution and defense, a victim with broad participation rights, like the Private Accessory Prosecutor in Germany, cannot be accommodated.[19] Doak explains that the integration of the victim as a participant in the adversarial criminal trial could set the traditional allocation of roles between state and defendant off balance.[20] The risk exists that victims with broad participation rights could align themselves with the prosecution against the accused due to the limited judicial control in adversarial trials. In that case the accused would have to defend him- or herself against two adversaries. In this situation a fair trial for the accused could no longer be guaranteed. Therefore, the victims' role in adversarial trials is generally limited to that of a witness.

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[14] It appears possible to include a particular sentencing suggestion in VISs in US jurisdictions. *See* GARKAWE, *supra* note 12, at 108. Further, the VIS form in the Northern Territory allows victims to comment on the sentence they find appropriate. *Victim Impact Statement*, DEP'T OF THE ATTORNEY-GEN. & JUSTICE, N. TERRITORY GOV'T, http://www.nt.gov.au/justice/dpp/html/victim/pdf/statement.pdf (last visited August 30, 2013).

[15] WEMMERS, *supra* note 9, at 124.

[16] M. K. Block et. al., *An Experimental Comparison of Adversarial Versus Inquisitorial Procedural Regimes*, 2 AM. L. & ECON. REV. 170, 171 (2000).

[17] MARK FINDLAY ET AL., AUSTRALIAN CRIMINAL JUSTICE 188 (2009); DONALD JAMES GIFFORD, UNDERSTANDING THE AUSTRALIAN LEGAL SYSTEM 94 (1997).

[18] *See Ratten* v. *The Queen* (1974) 131 CLR 510 (Austl.); *See also* FINDLAY ET AL., *supra* note 17, at 188.

[19] *See generally*, W. T. Pizzi & W. Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, STAN. J. INT'L L. 37 (1996).

[20] Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32(2) J. OF L. & SOC'Y 294, 298 (2005).

In an attempt to promote the victim's psychological welfare and to rectify the lack of victims' voice and participation in adversarial proceedings, VIS schemes were introduced in common law jurisdictions.[21] With their introduction it was hoped *inter alia* that this form of involvement at the sentencing stage would end the alienation victims experienced in the adversarial criminal justice system by making them feel more included in the proceedings.[22] Although the introduction of VIS schemes in the adversarial system has been viewed critically by commentators, others describe the VIS schemes as a "benign way of providing victims with the right for input and satisfying their need to be part of the process, without jeopardising the basic principles of the adversary system or compromising the rights of the accused."[23]

Introducing VIS schemes in Germany that allow victims to present views and concerns relevant to the defendant's sentence to the court, however, would only be valuable if victims currently did not already have sufficient opportunities to present views and concerns during the trial and sentencing stage. Whether this is the case will be analyzed in the following part of this paper.

C. Presenting Victims' Views and Concerns in German Criminal Procedure

Baril et. al. have argued that VISs are superfluous in civil law jurisdictions, such as Germany, where victims are formally recognized and already have formal outlets for presenting their views and concerns. The researchers suggest that VISs may only be useful and beneficial in common law jurisdictions where the role of the victim is usually reduced to that of a witness.[24]

The following part of this paper will first analyze whether the structure of the German inquisitorial system generally allows for the formal recognition of victims as participants, as pointed out by Baril et. al. It will subsequently consider whether victims in Germany have been afforded the right to present views and concerns at the trial and sentencing stage. That part concludes by noting that while the German inquisitorial system can generally accommodate victim participation, many victims in Germany have limited opportunities to present views and concerns during the trial and sentencing stage. The introduction of VIS

[21] Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles*, *in* ADVERSARIAL PROCEEDINGS, 40 CRIMINAL L. BULLETIN 483, 483 (2004).

[22] Edna Erez et al., *Victim Impact Statements in South Australia*, Paper presented at INTERNATIONAL VICTIMOLOGY: SELECTED PAPERS FROM THE 8TH INTERNATIONAL SYMPOSIUM: PROCEEDINGS OF A SYMPOSIUM 206 (1996).

[23] Enda Erez, *Victim Impact Statements*, 33 TRENDS AND ISSUES IN CRIME AND CRIMINAL JUSTICE: AUSTRALIAN INSTITUTE OF CRIMINOLOGY 1, 4 (1991).

[24] M. Baril et al., La declaration de la victim au palais de justice de Montreal. Rapport Final (1990), cited in Wemmers, *supra* note 9, at 124.

schemes could therefore prove beneficial for victims who are currently ineligible to present views and concerns in German criminal procedure.

I. Structure of the German Inquisitorial System

In comparison to the adversarial system, judges in Germany exercise tight control over the criminal trial, including the examination of evidence and the questioning of witnesses.[25] It is the judge, not prosecutor or defendant, who is primarily responsible for deciding which witnesses will be heard at trial and how the trial will be conducted. Defense counsel and prosecution only have the right to request additional evidence to be introduced at trial.[26] Therefore, in comparison to Australia, prosecution and defense in Germany play a more subordinate role while the judge dominates proceedings.[27] Kury and Kilchling describe the German inquisitorial system as "vertically structured," meaning that the judge interacts with the participants, in comparison to the adversarial system, which they classify as a "horizontal courtroom action" between prosecution and defense.[28] Due to the tight judicial control over the proceedings, the risk of the prosecution and the Private Accessory Prosecutor aligning and endangering the defendants' right to a fair trial seems less severe in Germany than in adversarial systems, such as Australia. According to Kury and Kilchling the vertical structure in German criminal proceedings allows the flexible and extended participation of victims of crime without endangering defendants' rights.[29]

Having concluded that the structure of the German inquisitorial system generally allows for greater victim participation than the structure of the adversarial system, without endangering defendant's rights, the question arises as to whether all victims in Germany have been afforded participation rights.

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[25] Amalia Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1188 (2005).

[26] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, § 244 (3).

[27] JONATHAN DOAK, VICTIMS' RIGHTS IN CRIMINAL TRIALS: PROSPECTS FOR PARTICIPATION 283 (2005).

[28] Helmut Kury & Michael Kilchling, *Accessory Prosecution in Germany: Legislation and Implementation*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE, INTERNATIONAL PERSPECTIVES 41, 48 (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds., 2011).

[29] *Id.* at 48. Some authors have contemplated whether defendants' rights could be endangered because of the increase in time that is required for the preparation of a defense against the charges brought by the state but also against the submission of the Private Accessory Prosecutor. *See* Christoph Safferling, *The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law*, 11 INT'L CRIM. L. REV. 187, 193 (2011). Yet, the *Bundesverfassungsgericht* (Federal Constitutional Court) seems to find no risks for the defendant's fair trial guarantees inherent in Private Accessory Prosecution. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 7/68, BVerfGE 26, 66, June 3, 1969.

II. Current Possibilities for Participation in Germany

As pointed out briefly above, in Germany, certain victims can present views and concerns by joining the prosecution as a Private Accessory Prosecutor.[30] Victims who participate as Private Accessory Prosecutors are not part of the public prosecution and can exercise their rights independently. Private Accessory Prosecutors or their legal representatives can exercise the following rights at the main trial: The right to be heard at trial whenever the prosecution is heard;[31] to request evidence;[32] to refuse judges in case of partiality;[33] to question the accused, witnesses, and experts;[34] to object to court orders and questions of the trial parties;[35] and to make statements including a closing statement.[36] The victim, as a Private Accessory Prosecutor, has thus been afforded ample opportunities to present views and concerns at trial.[37]

However, not all victims in Germany are eligible to participate as Private Accessory Prosecutors. German law explicitly allows mostly victims of serious crime to participate in such a role.[38] Legislation relating to Private Accessory Prosecution has been reformed numerous times over the past three decades and the catalogue of criminal offences that allow participation in such a role has been extended. Yet, the selection of criminal offences that allow participation is based on the general philosophy that only victims of very serious offences, like sexual offences and violent crimes, should be afforded such rights.[39] Anders concludes that this limitation is founded on victimologic-empirical findings that victims of the above-mentioned serious crimes require particular protection to avoid further traumatization.[40] A victim of other offences not explicitly named in legislation may be

[30] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, §§ 395–402.

[31] *Id*. § 397 (1).

[32] *Id*. §§ 397(1), 244 (3)–(6).

[33] *Id*. §§ 397(1), 24, 31.

[34] *Id*. §§ 397(1), 240(2).

[35] *Id*. §§ 397(1), 242, 238(2).

[36] *Id*. §§ 397(1), 257, 258.

[37] For an overview of the Nebenklage, see generally Kury & Kilchling, *supra* note 28, at 29.

[38] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, § 395(1) (detailing criminal acts that allow participation as a Private Accessory Prosecutor, including sexual offences, murder, manslaughter, and grievous bodily harm).

[39] Ralf Peter Anders, *Straftheoretische Anmerkungen zur Verletztenorientierung im Strafverfahren*, 124 ZEITSCHRIFT FUER DIE GESAMTE STRAFRECHTSWISSENSCHAFT 374, 381, 392 (2012).

[40] *Id.* at 381.

eligible to participate if a court finds that the participation is necessary to safeguard the victims' interests, especially in light of the serious consequences of the criminal act.[41] These victims, however, have no explicit right to participate, and their participation is subject to the court's discretion.[42]

Another avenue for victims to present their views and concerns at trial in Germany is the initiation of an Adhesion Procedure. Wemmers describes the Adhesion Procedure as "a bit of civil law tied onto the criminal justice process."[43] In an Adhesion Procedure the court determines whether the victim has a civil claim against the defendant during the criminal trial. Every person who can claim that they have directly suffered financial loss resulting from a criminal act committed can make an application for this procedure to take place during the criminal trial.[44] During the Adhesion Procedure the victim has the right to be heard and request evidence in relation to the civil claim, if such evidence is relevant for the outcome of the claim.[45] Victims, however, who have not suffered a financial loss resulting from the criminal act or who do not wish to "put a price tag"[46] on the harm they have suffered are ineligible to participate as applicants to the Adhesion Procedure.

While victims as Private Accessory Prosecutors or applicants to the Adhesion Procedure have the right to present views and concerns during the main trial in Germany, victims who are ineligible to participate in these schemes have only limited opportunities to be heard. In Germany, victims without a special role can only present views and concerns at trial in the role of a witness. When testifying as witnesses, victims in Germany have the right to testify without interruption through questions and remarks from the court, public prosecution, and defense.[47] Yet, this does not mean that the victim can freely present

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[41] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, § 395(3).

[42] On the argument that the discretion of the court may lead to a different treatment of similar cases see Guelsen Celebi, *Kritische Würdigung des Opferrechtsreformgesetzes*, *in* ZEITSCHRIFT FUER RECHTSPOLITIK 110, 111 (2009).

[43] Wemmers, *supra* note 9, at 125.

[44] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, §§ 403-406c.

[45] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 2 StR 68/55, NJW 1956, 1767, Sept. 2, 1956; *see generally* Eberhard Siegismund, *Ancillary (Adhesion) Proceedings in Germany as Shaped by the First Victim Protection Law: An Attempt to Take Stock*, in RESOURCE MATERIAL SERIES NO.56 UNAFEI FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS 102, 106 (Hiroshi Litsuka & Rebecca Findlay Debek eds., 2000); Wemmers, *supra* note 9, at 126; Marion E.I. Brienen and Ernestine H. Hoegen, *Compensation Across Europe: A Quest for Best Pratice*, 7 INT'L REV. OF VICTIMOLOGY 281 (2000).

[46] *See* Wemmers, *supra* note 9.

[47] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, § 69(1). Victims in Germany without a special role have certain rights bestowed upon them, such as: the right to receive information on particular events (§406d, 406h StPO), the right to inspect court files under certain circumstances (§ 406e StPO) and the right to be legally represented either as a witness when testifying (§ 406f StPO) or as a victim eligible to participate as a Private Accessory Prosecutor but refusing to do so (§ 406g StPO). However, this paper focuses exclusively on the

views and concerns as a witness. In Germany, the victim witness is to testify on the matter in question.[48] Where the victim witness is not questioned about a specific matter, the victim has no explicit right to address the issue and bring it to the court's attention. Further, where the victim is not required to testify as a witness, the victim has no opportunity to present views and concerns at trial at all.

The above descriptive analysis of the current situation of victims' participatory rights in Germany shows that Baril's et. al. assumption that victims in civil law jurisdictions are formally recognized and can present views and concerns to a great extent does not apply to all victims in Germany.[49] While some victims have a formally recognized status, like Private Accessory Prosecutors and applicants to the Adhesion Procedure, other victims have very little opportunity to present views and concerns during the trial. This suggests that the introduction of VIS schemes could be useful not only for victims in adversarial systems, but also for victims in Germany who are currently unable to present views and concerns in the German criminal justice system.

The following part of this paper examines whether the introduction of VIS schemes in Germany can be justified in light of possible advantages and disadvantages that could arise for victims and defendants from the introduction of such schemes in the German criminal justice system.

D. Problems with Introducing VIS Schemes in German Criminal Trials

When considering the introduction of VIS schemes in Germany, the question arises as to what stage these statements could be integrated into criminal proceedings. The following part of this paper will first analyze the risks and benefits of introducing VIS schemes during the main trial stage and subsequently contemplate the possibility of creating a separate sentencing stage in which VIS schemes could operate.

I. Oral VIS During the Main Trial

In Germany, unlike in Australia, no separate trial and sentencing stages exist. After the trial has been conducted the court returns the verdict and sentence without a separate sentencing hearing. Therefore, in Germany, VISs relevant for sentencing considerations

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right to present views and concerns as a victim at trial and does not explore other victim related rights in Germany. This has been done by others elsewhere. *See* Hans Joachim Schneider, *Die Gegenwärtige Situation der Verbrechensopfer in Deutschland: Eine Wissenschaftliche Bilanz*, 57 JURISTEN ZEITUNG 231 (2002); *see also* Joachim Hermann, *Die Entwicklung des Opferschutzes im Deutschen Strafrecht und Strafprozessrecht- eine Unendliche Geschichte*, 3 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 236 (2010).

[48] STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, § 69(1).

[49] Baril et al., *supra* note 24, cited in Wemmers, *supra* note 9, at 124.

would have to be submitted by the victim during the main trial before the defendant has been found guilty. Because the principles of orality and immediacy apply during the main trial in Germany, meaning that generally all evidence must be presented verbally and cannot be replaced by a written statement, a VIS would have to be submitted orally by the victim.[50] The submission of a VIS in written form, as is possible in most Australian jurisdictions, would be inconsistent with German criminal procedure.[51] For that reason, Hanloser has suggested that VIS schemes in Germany could be introduced by, for example, allowing victims to explain how the crime has affected them before they give testimony as witnesses.[52]

The following part of this paper will first consider whether VIS schemes could generally be embedded in the structure of the main trial in Germany. It will subsequently analyze what risks the introduction of such schemes could have for defendants' rights and conclude that in light of the potential risks for defendants the introduction of VIS schemes at the trial stage in Germany cannot be justified.

1. Emotional Content of VIS in the German Criminal Justice System

VIS schemes in Australia generally allow victims to present their side of the story by stating how the crime has affected them. In the case of deceased victims, family members are able to state what relationship they had with the dead victim and how the crime has impacted the family member.[53] The VIS can take different forms and may even be in the form of a poem or include drawings and photos.[54] Thus, VIS schemes allow victims to present an emotional statement to the court, which could be a cathartic experience for them.[55] Hoyle characterizes the introduction of VIS schemes in common law jurisdictions as an "increased willingness to admit into the criminal process, and into decision-making, emotional

[50] HOWARD D. FISHER, THE GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE: A GENERAL SURVEY TOGETHER WITH NOTES AND GERMAN VOCABULARY 174 (2009).

[51] *See supra* part B.

[52] HANLOSER, *supra* note 10, at 207–09.

[53] *See generally* Tyrone Kirchengast, *Victim Impact Statements and the Previtera Rule: Delimiting the Voice and Representation of Family Victims in New South Wales Homicide Cases*, 24 U. OF TASMANIA L. REV. 114 (2005).

[54] *See Victim Impact Statement*, DEP'T OF THE ATTORNEY-GEN. & JUSTICE, GOV'T OF S. AUSTL., http://www.dpp.sa.gov.au/02/VIS.pdf (last visited August 30, 2013).

[55] Garkawe, *supra* note 12, at 95; Ian Edwards, *The Evidential Quality of Victim Personal Statements and Family Impact Statements*, 13 THE INT'L J. OF EVIDENCE & PROOF 293, 297 (2009).

responses."[56] Booth explains that VIS schemes are intended to give victims space for emotions.[57]

In Germany, sentencing considerations *inter alia* include what effects the crime has had on the victim.[58] It has to be acknowledged, however, that it would be new to German criminal procedure to consider the victims' emotions to the extent they could be included in a VIS. The victims' emotions and, for example, a description of a family member's relationship with a deceased victim or the consequences of a crime in the form of a poem, are currently not admissible in German criminal trials. If a family member of a deceased victim acting as a Private Accessory Prosecutor requested that evidence in regards to their feelings for the deceased victim were to be introduced, the court would deny the application as being legally irrelevant.[59] The same would apply where the Private Accessory Prosecutor sought to introduce a poem expressing their feelings into the criminal trial. Simply because the emotional component of VISs is foreign to German criminal procedure, however, does not mean that emotional statements could not become part of the German criminal justice system in the future. As pointed out by Anders, particularly over the course of the past five years, the German criminal justice system has witnessed a great structural change, possibly opening the door for more structural reforms of the system in the future.[60]

While it is not generally unimaginable that emotional statements could become part of German criminal procedure in the future, section 6(b) of the Declaration explicitly points out that victims' participatory rights should not be introduced in criminal procedure if they are prejudicial for defendants' rights. Whether the right to make a VIS could render violations of defendants' rights in the German criminal justice system more likely is analyzed in the following part of this paper.

2. Potential Risks for Defendants' Rights

If oral VIS schemes were introduced during the main trial in Germany a violation of the defendants' fair trial guarantees could become more likely for the following reasons.

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[56] Carolyn Hoyle, *Empowerment Through Emotion: The Use and Abuse of Victim Impact Evidence*, *in* THERAPETUIC JURISPRUDENCE 249, 276 (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds., 2011).

[57] Tracey Booth, *'Cooling Out' Victims of Crime: Managing Victim Participation in the Sentencing Process in a Superior Sentencing Court*, 45 AUSTL. & N.Z. J. OF CRIMINOLOGY 214, 215 (2012).

[58] STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, § 46(2).

[59] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, § 244(3); Anders, *supra* note 39, at 390.

[60] Anders, *supra* note 39, at 391. When pointing out structural change in German criminal procedure, Anders refers to the introduction of statutory law in regards to plea-bargaining that had been unregulated prior to 2009.

In Australia, VISs are introduced at a stage of proceedings, the sentencing stage, where the defendant has already been found guilty. Thus, in Australia, procedural guarantees such as, for example, the presumption of innocence, do not apply at this stage of proceedings. In Germany, however, VISs relevant for sentencing considerations would have to be introduced during the main trial before the defendant has been found guilty. For this reason, the victims' right to present VIS orally during the main trial could violate the defendant's presumption of innocence and the defendant's right against self-incrimination.[61] Defendants who plead not guilty at trial and defend themselves on this basis or exercise their right to remain silent would be unable to defend themselves properly against the consequences of the crime as alleged by the victim in a VIS.[62] For example, defendants who argue that they have not committed the crime in question would be unable to credibly uphold their innocence while arguing that alternatively, in case the court finds them guilty, the consequences of the crime for the victim were less severe than alleged by the victim in the VIS. However, where the defendant remained silent and/or did not challenge the content of the VIS on the basis of his or her innocence, the statement could be taken into consideration if the defendant was found guilty and the court had to determine a sentence. Hanloser refers to this situation as a "defense dilemma."[63] Ultimately, through the introduction of VIS schemes in German criminal procedure, defendants could be forced to incriminate themselves to subsequently establish a proper and credible defense against the consequences of a crime that the victim claims to have experienced in a VIS.

Due to the structure of the sentencing stage in Australia (separated from the trial stage), compared to that in Germany (one trial encompassing both fact finding and sentencing stage), the victim's right to make a VIS in Germany renders violations of defendants' rights, particularly the right against self-incrimination and the presumption of innocence, more likely in Germany than in Australia.[64] Because of the severe risks arising for defendants' rights, VISs should not be introduced during the main trial in Germany.

Whether a separate sentencing stage should be established in Germany, where VIS schemes could operate, will be analyzed in the following part of this paper.

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[61] For detailed explanations on the right against self-incrimination, *see* Michael Bohlander, *Basic Concepts of German Criminal Procedure - An Introduction*, 1 DURHAM L. REV. ONLINE 1, 2 (2011).

[62] HANSOLER, *supra* note 10, at 223–24.

[63] *Id.*

[64] Generally agreeing that the risks of introducing a VIS before a court reaches a verdict are higher than at the sentencing stage. *See* Hoyle, *supra* note 56, at 259.

II. Victim Impact Statements During a Separate Sentencing Stage

In order to reduce the risks for defendants resulting from the introduction of VIS, Hanloser has suggested dividing German criminal procedure into a two-stage process consisting of a trial and a sentencing phase.[65] In that case, the defendant would have already been found guilty before the victim could make a VIS. The division would therefore avoid a violation of the defendants' right against self-incrimination and the presumption of innocence. While these rights would not be affected by the introduction of VISs during a separate sentencing stage after the defendant has been found guilty, the following part of this paper will address the question as to whether victim input through VISs at a separate sentencing stage has the potential to render violations of other defendants' rights more likely.

1. Risks for Defendants' Rights

Similar to the situation in Australia, the defendant in Germany has the right to receive a sentence that is proportionate to the facts of the case and the guilt of the defendant.[66] Thus the question must be addressed as to whether victim input through a VIS during the sentencing decision could make it more likely for the defendant's right to a proportionate sentence to be violated. This question has been debated heatedly in academic literature in common law jurisdictions in the past. Commentators have argued that emotional and subjective statements by victims take away the objectivity in sentencing.[67] Particularly in regards to the proportionality of a sentence, i.e. that the punishment should fit the crime, it could be argued that victims may exaggerate the effects the crime has had on them in order to achieve a higher sentence for the defendant. In that case, the punishment of the defendant would be disproportionate.[68] According to Philips, more articulate victims could also obtain more severe sentences for defendants than less articulate victims, by simply making and presenting more captivating VISs.[69] On this point, Robinson concludes that the offenders' punishments should depend upon their guilt and not on their "good or bad luck as to the forgiving or vindictive nature" of their victims.[70]

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[65] HANSOLER, *supra* note 10, at 225.

[66] STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBL. II] [FEDERAL LAW GAZETTE], as amended, § 46. For sentencing considerations and proportionality in sentencing in Australia, *see* FINDLAY ET AL., *supra* note 17, at 284–85.

[67] *See, e.g., explanations in* Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements-Implications for Capital Sentening Policy*, 10 PSYCHOL. PUB. POL'Y & L. 492 (2004).

[68] In regard to VISs and proportionality, see generally Mark Stevens, *Victim Impact Statements Considered in Sentencing*, 2 BERKELEY J. CRIM. L., para. 1 (2000).

[69] *See generally* Amy K. Philipps, *Thou Shalt not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997).

[70] Paul H. Robinson, *Should the Victims' Rights Movement Have Influence over Criminal Law Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749, 749, 755-57 (2002).

Proponents of VIS schemes have argued that sentences can actually be more accurate and proportionate when the court is fully informed of the consequences of the crime for the victim.[71] The introduction of VIS schemes, they argue, could therefore make a violation of the sentencing principle of proportionality less likely. It has further been explained by Garkawe that judges are able to discern between evidence that is purely "emotional," and therefore irrelevant in regards to sentencing, and evidence that is in fact relevant to their decision, and will disregard the former.[72]

The limited primary evidence available on the above matter generally does not support the claim that sentence lengths have increased where victims have presented a VIS at the sentencing stage.[73] Thus, it seems possible to argue that victim input through a VIS at a separate sentencing stage does not render a violation of the defendants' right to a proportionate sentence through the sentencing judge more likely. However, the risks for defendants' rights through the introduction of VIS schemes, even at a separate sentencing stage, may be greater for defendants in Germany than in other jurisdictions, like Australia. While in Australia, the sentence is determined in a separate sentencing hearing by legally trained judicial officers,[74] this is not always the case in Germany. For criminal acts that can attract a sentence of up to four years, including sexual crimes and forms of capital crime, "juror-like" lay judges without professional legal training, so called *Schöffen*, form part of the court in Germany.[75] That means that in the German court system, both professional

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[71] *See, e.g.,* J. Chalmers et al., *Victim Impact Statements: Can Work, Do Work (For Those Who Bother to Make Them)*, CRIM. L. REV. 360 (May 2007).

[72] Garkawe, *supra* note 12, at 95.

[73] *See generally* Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545 (1999); E. Erez & L. Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience*, 23 J. CRIM. JUST. 363 (1995); Andrew Sanders et al., *Victim Impact Statements: Don't Work, Can't Work*, CRIM. L. REV. 447 (2001).

[74] FINDLAY ET AL., *supra* note 17, at 262; *Cheung v. The Queen* (2001) 209 CLR 1 (Austl.).

[75] John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 6 AM. B. FOUND. RES. J. 195, 195 (1981); MATTHIAS REIMANN & JOACHIM ZEKOLL, INTRODUCTION TO GERMAN LAW 425 (2d ed. 2005). Lay judges in Germany do not undergo professional legal training. While lay judges receive some introductory training it has been noted that the training provided is not sufficient to equip lay judges for their role. *See, e.g.* Stefan Machura, *Interaction between Lay Assessors and Professional Judges in German Mixed Courts*, 72 REVUE INTERNATIONALE DE DROIT PENAL 451, 473 (2001). For analysis of risks identified for VIS in the German context, *see also* GROßE STRAFRECHTSKOMMISSION DES DEUTSCHEN RICHTERBUNDES (Main Criminal Law Commission of the German Judges Association), STÄRKUNG DER RECHTE DES OPFERS AUF GEHOER IM STRAFVERFAHREN (2010), *available at* http://www.rundertisch-kindesmissbrauch.de/documents/GutachtenDRBStaerkungderRechtedesOpfersaufGehoerimStrafverfahren.pdf.

judges and lay judges form part of the panel of judges deciding matters arising during the main hearing and deliberating as one body on verdict and sentence.[76]

While professional German judges may be particularly trained to differentiate between the relevant and irrelevant content of a VIS, this differentiation may be more difficult for lay judges in regards to a statement intended to allow victims to present emotions. Research in the area of psychology and behavioral economics suggests that an identified victim, that is a victim whose name, habits, likes, and dislikes are known, causes the strong urge in people to help the one victimized.[77] This is often referred to as the "identified victim effect."[78] It seems possible that a VIS, which in some cases contains very personal information about the victim, may make the victim more identifiable to lay judges, and in turn may make them feel as though they need to help the victim by imposing a longer and more disproportionate sentence upon the defendant. While the evidence on the "identified victim effect" and VISs is neither extensive nor conclusive, studies on the impact of VISs on juries in US jurisdictions in the past have suggested that in cases where juries witnessed a VIS, the chance that the defendant received a more severe sentence substantially increased.[79] Thus, the concern exists that lay judges may be influenced by a VIS to a greater extent than professional judges and may not be able to differentiate between relevant and irrelevant information to the same degree as trained professional judges can.

For the reasons discussed above, the introduction of the right to make a VIS in German criminal procedure, even at a newly introduced sentencing stage, has the potential to render violations of the defendants' right to a proportionate sentence by the courts more likely than if victims had no right to present such statements. After having established the risks for defendants, the following part of this paper will determine what benefits VISs, during a separate sentencing stage, could have for victims and, respectively, whether their introduction can be justified.

2. Benefits for Victims

Whether making a VIS can be beneficial for victims has been as debated in common law jurisdictions as the question of whether VISs can cause an increase in sentence length.

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[76] Stefan Machura, *Silent Lay Judges-Why Their Influence in the Community Falls Short of Expectations*, 86 CHI.-KENT L. REV. 769, 769 (2011).

[77] For an overview of studies on the "identified victim effect," *see* Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Captial Decision Making*, 49 CRIMINOLOGY & PUB. POL'Y 129, 138 (2011).

[78] *Id.* at 139.

[79] *Id.* at 153. The more severe sentence referred to in this study was the death penalty.

Proponents of VIS schemes have argued that the opportunity to express their emotions and have their harm acknowledged can reduce or avoid secondary victimization for victims and provide victims with closure.[80] Pemberton and Reynaers maintain that allowing victims to participate by making a VIS may lead to a higher sense of procedural justice. They explain that the feeling of procedural justice will diminish the victims' anger, which in turn can be beneficial for the victims' mental health and recovery.[81] Concurring, Erez, Ibarra and Downs contend that VISs have the potential to support "empowerment, validation, and moving on."[82] Opponents of VIS schemes like Sanders et. al., however, have argued that victims are unlikely to benefit from submitting a VIS. Victims, so the researchers contend, will feel disappointment and frustration when they realize that they have had no influence on the outcome of the sentence. Sanders et. al. emphasize that this explains the low participation rates of victims in VIS schemes.[83]

In contrast to older primary studies, which have found no significant relationship between VISs and victim satisfaction, more recent research seems to suggest a link between making a VIS and an increase of victim satisfaction in the criminal justice system.[84] However, the overall small amount of primary data available on the question of whether making a VIS can be beneficial for victims leaves room for both views outlined above. Even if one assumed, however, that making a VIS can generally be beneficial for victims of crime in common law jurisdictions like Australia, the following part of this paper will explain why these alleged benefits are questionable in a German context.

The right to a fair trial dictates that the defendant must receive a fair opportunity to challenge the factual basis of a particular decision.[85] This right guarantees that the

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[80] Antony Pemberton & Sandra Reynaers, *The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE 229, 232 (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds., 2011).

[81] *Id.* at 240.

[82] Edna Erez, Peter Ibarra & Daniel Downs, *Victim Welfare and Participation Reforms in the United States: A Therapeutic Jurisprudence Perspective*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE 15, 21, 24 (Edna Erez et al. eds., 2011).

[83] *See generally* Sanders et. al., *supra* note 73. An Australian study conducted in Victoria found that only 16 percent of crime victims participated in the Victim Impact Statement scheme in Supreme and County Courts. *See* Diane Mitchell, *Victim Impact Statements: A Brief Examination of Their Implementation in Victoria*, 8 CURRENT ISSUES CRIM. JUST. 163, 169 (1996-1997).

[84] No significant relationship between making a VIS and greater victim satisfaction was found by Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: an Unfulfilled Promise?*, 22 J. CRIM. JUST. 2, 10 (1994); Erez, *supra* note 73, at 550–51; Edna Erez et al., *Victim Harm, Impact Statements and Vicim Satisfaction with Justice: An Australian Experience*, 5 INT'L REV. OF VICTIMOLOGY 37, 51 (1997). In their study published in 2007 on victim reactions to VIS in Scotland, Leverick, Chalmers, and Duff found that victims perceived making a VIS as positive. *See* Chalmers et al., *supra* note 71.

[85] EDWARDS, *supr*a note 55, at 299.

defendant be given the possibility to examine statements, like VISs, that are introduced into the German criminal trial.[86] Further, the general structure of the German criminal justice system obligates the court to examine all evidence placed in front of it by the power of its office, *ex officio*.[87] Thus, the court would be obligated to examine the VIS, even at a newly introduced sentencing stage, and the defendant and prosecution would have to be given the right to subsequently examine the statement. Academic literature on the use of VISs in the Australian setting has clearly identified the need for adequate procedural and evidentiary safeguards to protect defendants.[88] Therefore, in Australian practice, the defendant is accorded the right to cross-examine victims on the content of their VIS.[89]

Because VISs in German criminal trials would be subject to examination by the court, defendant, and prosecution, it is doubtful whether any alleged benefits from making a VIS would remain for victims. As pointed out above, the purpose of a VIS is to allow emotion into criminal proceedings and allow victims to state how the crime has affected them. Questioning the victims' emotions by examining their statement could cause trauma for the crime victim rather than relieve it. Victims could perceive the examination of their VIS by actors in the criminal justice system as questioning their suffering.[90] While in common law jurisdictions cross-examination of victims' VISs do not occur often and therefore the risks for victims may be more limited,[91] it would be significantly different in the German inquisitorial system. As pointed out above, German inquisitorial judges are obligated by the power of their office, *ex officio*, to investigate all evidence put in front of them. For this reason, in comparison to the situation in Australia, the content of the VIS would have to be examined in all cases.

This paper has analyzed the risks and benefits of the introduction of VIS schemes at a separate sentencing stage for victims and defendants in Germany. It has shown that the benefits victims could experience by making a VIS in German criminal procedure are unclear due to the court's obligation and the defendant's right to examine the statement. At the same time, risks remain for the defendant's right to a proportionate sentence due to the participation of lay judges. Based on the questionable benefits for victims and the

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[86] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. II], as amended, §§ 240(2), 244(3)–(5). This right is also constitutionally guaranteed. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. 103(1).

[87] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, § 244(2).

[88] Garkawe, *supra* note 12, at 106–07.

[89] Government of South Australia, Justice Strategy Unit, *Victims of Crime Review* (Report One) 134 (1999), *available at* http://www.voc.sa.gov.au/Publications/Reports/VictimsofCrimeReviewReport1.pdf.

[90] Anders, *supra* note 39, at 390; Wemmers, *supra* note 9, at 127.

[91] E. EREZ ET AL., VICTIM IMPACT STATEMENTS IN SOUTH AUSTRALIA: AN EVALUATION 10 (1994).

risks for defendants' rights, establishing a separate sentencing stage where VIS schemes could operate in Germany is unjustified.

The analysis in part D of this paper has shown that the introduction of VIS schemes in Germany is neither justified at the main trial stage nor at a newly introduced sentencing stage. Such schemes should thus not be implemented in German criminal procedure.

E. Conclusion

This paper has shown that, despite the presumptions of some commentators on victim participation in inquisitorial systems, not all victims in Germany have a formal role in criminal proceedings and can participate actively at trial. Many victims are ineligible to take part in existing participatory schemes. Recent scholarship has called attention to this issue and has suggested the need for VIS schemes to give all victims who so desire the right to be heard and to participate at trial to some degree. However, as this paper has concluded, the introduction of VIS schemes in Germany is unjustified due to the questionable benefits for victims in making such statements and the significant risks that can arise for defendants.

The issue in Germany thus remains: Not all victims can participate and present views and concerns at trial. When contemplating avenues to address this matter it is important to acknowledge, however, that in comparison to the structure of the Australian adversarial trial, the structure of the German inquisitorial system generally allows greater victim participation and is not limited to making VIS schemes available to victims. Therefore, before advocating for the introduction of VIS schemes foreign to the German criminal justice system and designed for a different legal system, the question needs to be addressed as to whether and to what extent already existing victim participation rights in Germany could and should be modified and expanded to more or all victims.

Answering this question in the German context requires addressing the underlying issue of whether it is justifiable that the participation of victims is intentionally reserved for mostly victims of sexual and other violent offences and victims who want to claim financial losses, or whether all victims should have an explicit right to participate, to a certain extent, at trial in a special role.[92] The question becomes particularly relevant in light of the rapidly

[92] Anders, *supra* note 39, at 392. The *Bundesrat* (German Federal Council) in 2009 has already criticized the gradual extension of the listed criminal acts allowing for Private Accessory Prosecution and thus taken the view that not all victims should receive the right to participate. See: BR-Drucks. 178/09 of 03 April 2009, 9-10. Agreeing with this line of argumentation of Safferling, *supra* note 29, at 193. Others have contemplated disestablishing Private Accessory Prosecution in its current form and creating a uniform participation role for all victims regardless of the crime committed against them entailing the right to be present and to be heard but excluding decision-making power. *See* THERESIA HOEYNCK, DAS OPFER ZWISCHEN PARTEIRECHTEN UND ZEUGENPFLICHTEN 206-07 (2005).

evolving human rights' discourse qualifying victims' rights as human rights.[93] This qualification could suggest that the role of victims in criminal procedure can no longer be reduced to that of a witness providing evidence, but that victims, regardless of the criminal offence committed against them, must receive individual and independent standing at trial.[94]

The recent attempts in academic literature to suggest alternative avenues for victim participation in Germany through VISs have shown that the current limitations of victim participation have become a matter of concern in academic scholarship. Therefore, perhaps the time has come to open a public debate on the question of whether and to what extent all victims should be able to participate at trial in order to subsequently identify how this could best be achieved without prejudicing the rights of the accused in the German inquisitorial system.

[93] Sam Garkawe, *Victims Rights Are Human Rights* (paper presented at the 20th Anniversary Celebration of the 1985 UN Victims Declaration, Canberra, Nov. 16, 2005); Michael O'Connell, *Victims' Rights Are Too Often Overlooked as Human Rights* (paper presented at the Human Rights Consultation, Canberra, July 1, 2009); Jo-Anne Wemmers, *Victims' Rights are Human Rights: The Importance of Recognizing Victims as Persons*, *in* TEMIDA 71, 80 (2012), *available at* http://www.doiserbia.nb.rs/img/doi/1450-6637/2012/1450-66371202071W.pdf.

[94] Wemmers bases this right on Art. 6 of the Universal Declaration of Human Rights, *i.e.* the right to recognition as a person before the law. *See* Wemmers, *supra* note 93, at 80. In the German context, *see* Susanne Walther, *Victims' Rights: Procedural and Constitutional Principles for Victim Participation in Germany, in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE 97 (Edna Erez et al. eds., 2011).