

THE VICTIM-PLAINTIFF IN CRIMINAL TRIALS AND CIVIL LAW RESPONSES TO SEXUAL VIOLENCE

ALEXANDRA GOY*

I. THE VICTIM-PLAINTIFF

Introduction

In addition to the courts, the public prosecutor, and the defense attorney, German criminal procedure boasts an institution known as the victim-plaintiff (*Nebenklägerin*). Victim-plaintiffs enjoy independent procedural status in criminal trials and are granted certain defined rights. This status was originally reserved exclusively for victims of more minor offenses such as trespassing, slander, threats, property damage, minor bodily harm, and the like.¹ Prosecutors rarely bring charges in such cases unless there is a public interest in prosecution;² victim-plaintiff status gives an injured party the opportunity to bring the offender to justice by means of a private suit, without the prosecutor's intervention.³ However, it also ensures that such an injured party, who may have an offender punished in this way without the prosecutor's involvement, does not lose his or her legal status should the public prosecutor in fact determine that the public interest is involved and decide to bring charges. Victim-plaintiff status thus maintains the injured party's interest in obtaining justice, which is recognized as legally relevant by the criminal procedure statute.⁴ It gives the private plaintiff the same rights as the public prosecutor.⁵ The Federal Constitutional Court has found the institution of the victim-plaintiff constitutional, holding that the fundamental procedural principles of the right to a defense and a fair trial are not limited by the institution

* Alexandra Goy has practiced law for 22 years; she currently practices in Berlin, with a particular focus on women's legal problems. She was co-founder of the first battered women's shelter in Germany in 1976. Ms. Goy is an editor of the feminist law journal *Streit* and a member of the criminal law commission of the Association of Women Lawyers.

¹ As defined in § 374 of the StPO (Criminal Procedure statute).

² As defined in § 376 of the StPO.

³ Under German law's legality principle, prosecutors are only required to prosecute directly prosecutable, or so-called "official," crimes; offenses under § 374 (1) of the StPO are considered misdemeanors, known as "petition" crimes (*Antragsdelikte*). To initiate prosecution of such crimes, the injured person must make a complaint.

⁴ Section 374 StPO.

⁵ Section 385 StPO.

and that the rights it grants to the injured party do not restrict the defendant's defense.⁶

The Victim Protection Law of 18 December 1986⁷ expanded the rights of the victim-plaintiff and extended the institution's scope to include crimes considered particularly serious, such as sexual abuse, rape, sexual coercion, and grievous bodily harm. Victim-plaintiff status is now seen as an opportunity for injured parties thought to be particularly worthy of protection to pursue justice on their own behalf. Victim-plaintiff rights are also granted to close relatives of murdered persons, including parents, children, siblings and spouses.⁸

In practice, victim-plaintiff status has little relevance in the overwhelming majority of cases. After 1945, it played a significant role in a handful of trials of Nazi war criminals, when close relatives of murdered Jews could appear as victim-plaintiffs. Victim-plaintiff status has also played a role in recent and ongoing criminal trials against former East German political leaders and their accomplices—for example, the trials of East German border guards and of former Communist Party head Erich Honecker.

Feminist lawyers have attempted to improve the evidentiary position of victims using victim-plaintiff status since the mid-1970s. At that time, women's rights activists had taken up the American and British debate on structural violence against women. They created self-help groups, followed by partly state-funded shelters and advice offices for battered women, as well as self-help groups and advice offices for victims of rape and sexually abused girls. As a result of victims' experiences with the judicial system, where they often encountered disbelief on the part of officials, and the large number of dismissals and acquittals in sex crimes cases by prosecutors and courts, women and girls were advised to hire lawyers who would apply for victim-plaintiff status when they brought charges. As co-founder of the first battered women's shelters in Germany, I myself was responsible for many such victim-plaintiff procedures. Detailed reporting, especially in the women's magazines *Courage* and *Emma*, in the 1970s and 1980s led to broad public discussion of the judicial system's tendency to trivialize such cases. The media in general began to offer in-depth coverage of these trials.

Nevertheless, there has been little fundamental change since then in the judiciary's treatment of sex crimes. Then, as now,

⁶ BvergG (constitutional court) decision of 3 June 1969, 1BvL 7/68, published in *NEUE JURISTISCHE WOCHENSCHRIFT* [hereinafter *NJW*] 1423, 1424 (1969).

⁷ BGBl. (Bundesgesetzblatt) I, at 2496.

⁸ Section 395 StPO.

charges in rape cases are dismissed and defendants are acquitted more often than for any other crime.⁹ The number of charges brought, which had risen from the 1970s to mid-1985, has since fallen.¹⁰ In addition, there is a conservative backlash which has contributed to the drop in cases prosecuted for this crime.¹¹ In the following, I will first describe the institution of the victim-plaintiff and then discuss civil-law remedies for victims of sexual violence.

In Germany, any woman who is the victim of a sexual attack can move to be admitted as a victim-plaintiff at the criminal trial. This means she does not merely appear as a witness to answer the questions of other participants in the trial. Instead, as a victim-plaintiff, she may ask questions of the defendant herself, or through a lawyer. She occupies a special position, next to the public prosecutor, as a legal subject with procedural rights of her own. In Berlin, as in many other large cities, police units responsible for sex crimes inform women in writing, at the time charges are brought, of the possibility of moving for victim-plaintiff status and recommend that they do so. Based on their experience with girls and women during criminal trials, lawyers who work with self-help and counseling groups for victims of sex crimes consider victim-plaintiff status indispensable.

As early as the criminal investigation, the victim may engage a lawyer to provide legal counsel during this stage. The lawyer has access to the investigatory files of the police and the prosecution.¹² She may also be present when witnesses are questioned by the prosecutor or the judge within the scope of the investigative procedure. Presence at police questioning requires the permission of the officers involved. The police may also allow other representatives of the victim to be present at the primary, as well as any additional, hearings by the police.

The lawyer charged with counseling the victim-plaintiff has the opportunity to arrange for a hearing of evidence by the prosecutor's office immediately after charges are brought. She can herself move for examination of witnesses.

If the victim is a minor, her parents or guardians engage the lawyer. If the father is charged and the mother refuses to engage a

⁹ *Kritische Justiz* Heft 3, 1993, at 336 ff.

¹⁰ *Id.*

¹¹ SUSAN FALUDI, *BACKLASH* (1991) was published in Germany in 1993, and has been discussed and applied to the German context; however, the concept of a conservative "backlash" had already existed in Germany, as in the U.S., for some time.

¹² Section 385 (3) StPO.

lawyer, application must be made before a guardianship court¹³ to obtain a guardian who will be responsible for engaging a lawyer as counsel to the victim-plaintiff. This is the case if a mother (1) does not believe her daughter, (2) refuses to acknowledge the abuse, and (3) refuses to leave the abuser.

If the victim is not able to pay the lawyer, she may receive a lawyer through "trial-cost assistance"; that is, the state pays for the lawyer, or the costs may be paid back in installments. This is regardless of the fact that the defendant will be required to pay the victim-plaintiff's legal costs if found guilty. Requirements for payment of trial costs were tightened by the so-called Victim Protection Law of 1986.¹⁴ Under § 397 a of the criminal procedure statute, trial costs are paid only where difficult legal and material conditions are present and if the victim, in the opinion of the court, cannot sufficiently protect her interests or should not be expected to do so. The victim-plaintiff cannot appeal a government refusal to pay trial costs.

Since the Victim Protection Law has been in force, courts have tended, more often than before the law went into effect, to point to their "duty of care"¹⁵ when refusing to appoint a lawyer for a victim-plaintiff. This means the victim must bear the costs herself. Even if the convicted defendant is required to pay the victim-plaintiff's expenses, it is often difficult to obtain this reimbursement. If he receives a prison sentence, she must wait until his release, as he will have little or no income while in prison; if he is paroled, she can enforce the judgment only if he is employed and earns wages that can be garnished. In some large cities, therefore, women's counseling groups have started "legal assistance funds" to pay legal costs. The "White Ring," a crime-victims' protection organization, will pay legal expenses under certain circumstances; it also, among other things, organizes recuperation trips for victims to help them gain some distance from the crime.

As victim-plaintiff, the victim has the right to be present at the entire trial, even before her testimony is taken during examination of the defendant. As a witness, however, it is advisable for her to remain outside the courtroom before testifying; this gives her testimony greater evidentiary weight. The lawyer for the victim-plaintiff, however, generally takes part in the trial from the beginning,

¹³ Guardianship courts have jurisdiction, for example, over children neglected by their parents; they can take measures to protect such children. Section 1666 BGB (Civil Code).

¹⁴ See *supra* note 7.

¹⁵ This procedural duty requires the court to ensure a fair trial through fair treatment of the parties to a trial, among other things.

with the same rights as the defense counsel and prosecutor. She may offer explanations and ask questions after the examination of each witness or expert. She can also object to questions by the court or the defense counsel. For example, the victim-plaintiff may object to questions when they involve issues unrelated to the crime that attempt to throw an unfavorable light on the victim. Most important, the victim-plaintiff may make and respond to evidentiary motions by the defense or the prosecution and to any other intended hearing of evidence by the court.

If the victim is examined as a witness, her lawyer has the right to question her. The lawyer may also move at any time to interrupt the trial in order to consult with the victim. She may object that certain questions are inadmissible, such as those involving previous sexual behavior that bear no relationship to the crime. However, this right of objection has been very much weakened by the German Supreme Court; such questions are considered essentially permissible and necessary to determine witness credibility. Only when they are asked primarily to personally attack the witness may she refuse to answer them.

The court, prosecution and defense examine witnesses one after another; there is no such thing as cross-examination in German criminal law. The victim-plaintiff's lawyer has the right to a closing statement at the end of the trial, following the prosecutor's closing statement. She can present and summarize the results of the trial from her point of view and point out any mistaken interpretation of evidence by the prosecution. She may offer advance refutation of defense arguments seeking to prove the witness' supposed lack of credibility, and point out physical or psychological consequences that may be significant in determining the sentence. However, appeals are permitted only of the judgment, not of the sentence.

If the defendant is under eighteen years of age, the victim may not move to be a victim-plaintiff.¹⁶ The Youth Criminal Code's goals of rehabilitation do not allow for this.

Through the institution of the victim-plaintiff, the constant presence of the lawyer is twofold: (1) as an intervening actor in the criminal justice system; and (2) as a provider of psychological support for the victim. As a result, the victim does not feel herself at the mercy of the seemingly impenetrable rules of the legal process. In fact, participants in the trial generally behave differently and less aggressively towards a witness when her lawyer is present.

¹⁶ Section 80 (3) JSG (Youth Criminal Code).

Courts, however, do not like the institution of the victim-plaintiff,¹⁷ since it means the presence of yet another influential participant in the trial. Defense lawyers desiring "optimal" defense of their clients are sometimes also quite disturbed by the victim-plaintiff. These are people who, on the one hand, vehemently defend the rights of the accused, while, on the other hand, completely ignoring the dignity of the witness. They often begin secondary battles involving personal attacks on the victim-plaintiff's lawyer. It was not so very long ago that lawyers who acted assertively on the victim-plaintiff's behalf were discredited as man haters.

Thus the lawyer for the victim-plaintiff may have a difficult time. She must deal with being the most-hated person in the courtroom; often, she is the only one truly interested in revealing the truth of the crime—and in fact actually does so. In view of the small number of cases solved and defendants convicted, in comparison with other crimes, and the tendency of the legal system to play down the significance of sexual violence, one might begin to suspect that sexual autonomy is not seen as equally worthy of protection by the Basic Law (the German constitution) and the criminal code. Moreover, one might doubt that sexual autonomy really is equally protected by the constitution.¹⁸

Even if no motion for victim-plaintiff status has been made, a lawyer for the victim may be present during examination of witnesses. As before, the lawyer has the right of access to the files. In addition, in order to be better prepared for trial, she has the statements of witnesses and the defendant's testimony. When she is present in the courtroom, however, she has no right to intervene, although she may suggest to the court before the start of the trial that the defendant leave the courtroom while the witness testifies.¹⁹ A witness under 16 years of age may be examined in the absence of the defendant if the defendant's presence could create significant problems for the well-being of the witness. Older witnesses may testify in the defendant's absence if it is feared the witness will not tell the truth if the defendant is present.

The victim-plaintiff, whether or not she moves to be a victim-plaintiff, may also move to exclude the public²⁰ if circumstances

¹⁷ Here and in the following, I am speaking from my own observations as a victim-plaintiffs' lawyer. However, these observations can be generalized, and have also been made in many publications by trial observers.

¹⁸ On light punishments for sex crimes compared with crimes against property and a lack of legal remedies against sexual harassment in the workplace, *see* Dr. Harald Homann, 5 ZEITSCHRIFT FÜR RECHTSPOLITIK [hereinafter ZRP] 167 ff. (1995).

¹⁹ Section 247 StPO.

²⁰ Section 171b GVG (Law on the Constitution of the Courts).

from the witness' personal life would be discussed that would violate protected interests if publicly exposed, as long as the interest in public discussion of these circumstances does not carry greater weight. The public may not, however, be excluded against the will of the witness. Whether the victim wishes this generally depends on the spectators; if friends or counselors are present in the courtroom, she may see them as important support and not move to exclude the public. The victim-plaintiff, of course, also has these rights.

Overall, although victim-plaintiff status represents a good opportunity for the injured party to influence the evidentiary process in her favor, and more and more women are making use of it, it is not yet known whether victim-plaintiffs have an effect on actual judgments—for example, whether the presence of a victim-plaintiff leads to more frequent convictions.

II. CIVIL LAW REMEDIES: COMPENSATION AND DAMAGES FOR SEX CRIMES

1. *Criminal Trial*

During a criminal trial, the victim may claim compensation and damages in a so-called adhesion procedure.²¹ When such a claim has been made, the criminal court may immediately require the perpetrator to pay compensation and damages. However, in practice, plaintiffs rarely benefit from this possibility. This is partly because criminal court judges often feel overburdened by such claims; also, defendants generally take them as an opportunity to accuse the victims of bringing charges for purely mercenary reasons. The court has no obligation to decide such a motion; it may reject it on the grounds that it would delay the trial. There is no appeal.

Criminal court judges may also require a defendant to pay compensation and damages as a condition of probation. In practice, however, such payments are usually only symbolic amounts. A judge may also order a convicted defendant to stay away from the victim and her home, school, day-care center or workplace. This happens mainly when the lawyer for the victim-plaintiff makes such a motion.

²¹ Section 403 ff. StPO.

2. *Civil Procedure*

Compensation and damages first require a civil court determination of wrongful behavior.²² Here the victim's position at the trial is very different. Unlike the criminal trial, in which the court must prove guilt based on investigative findings, in the civil trial the victim, as plaintiff, must provide the evidence. The principle of production of evidence²³ applies. The victim cannot be a witness, as she is a party to the suit;²⁴ if there are no witnesses to the crime, she can win the civil suit only if the defendant confesses. But this is the exception. The victim may be examined as a party, but this is also exceptional and rarely happens.²⁵

The civil court may view the criminal record and base its judgment solely upon that record. However, it need not follow the criminal judgment; in civil, as in criminal trials, the principles of immediacy²⁶ and free assessment²⁷ of evidence apply. Through new evidence taking, an outcome must be reached showing that the findings of the criminal court comport with the truth. The opinion must lay out the reasons the court came to the decision that the fact situation portrayed is true. Free assessment of evidence requires an unprejudiced, individual assessment of all circumstances, which must reflect the judgment of the court. This judgment may also take life experience into account. What the court has not experienced, cannot experience, or prefers to ignore will not, of course, enter into the court's judgment. Instead, that judgment is often influenced by ideas, assumptions, and common prejudices and myths. Civil court judges do not differ greatly from criminal court judges in their generally androcentric views.

²² This is required by § 823 II, in conjunction with § 847 of the Civil Code.

²³ Germany's legal system is not adversarial. In criminal trials, the court itself investigates and collects evidence; this is not the job of the victim or the defendant. In civil trials, however, the "production of evidence" rule applies; as in the common-law system, the only facts at issue are those introduced by the plaintiff and the defendant.

²⁴ Germany evidentiary rules for civil trials do not permit a plaintiff to offer her own testimony as evidence of the truth of her claims. Only witnesses, experts and the like are permitted to offer evidence. See *infra* notes 29-31 and accompanying text.

²⁵ Procedural rules for hearing the plaintiff as a party are strictly drawn, so that they have little relevance in practice. Only if the court already believes—on the basis of other evidence, such as witnesses—that the facts presented by the plaintiff are sufficiently probable can it examine the plaintiff as a witness. See *infra* notes 29-31 and accompanying text. In practice, the plaintiff is examined as a party almost exclusively in amicable divorces—that is, when both spouses agree on the facts.

²⁶ Under German civil procedure, judgments may be based only on evidence presented by the plaintiff and defendant at trial; though all parties may refer to the written case files, they are not enough upon which to base a judgment.

²⁷ Free assessment of evidence, a procedural rule defined in § 286 ZPO (Civil Procedure statute), requires that the court decide a case based on its own, independent conviction that a party's claims are true.

Although the civil law consequences are not nearly as drastic as criminal sanctions, civil courts also generally come to "perpetrator-friendly" decisions.

Because the civil court is not bound by criminal court judgments, the same set of facts may lead to opposite judgments. Thus, for example, the Berlin trial court rejected a woman's suit for damages for rape, arguing that the rape had not been proven.²⁸ The criminal court had sentenced the defendant to a two years' suspended sentence. The same witnesses were examined in the civil court as in the criminal court; only the plaintiff and the defendant were not heard. While both the plaintiff and defendant, as parties to the suit, could have been examined by the court for informational purposes at any time, this would have carried no evidentiary weight, as the plaintiff may only be examined as a party in exceptional circumstances.²⁹ For example, if she has no witnesses, the plaintiff may be examined as a party to prove her side of the case.³⁰ However, this is possible only if the perpetrator has confessed; thus the applicability of this provision is limited. Under the rules of civil procedure,³¹ the plaintiff may move to be heard as a party if the defendant agrees, but this rarely occurs.

There is an exception to the civil-law production of evidence principle, but its applicability is almost nonexistent.³² This provision allows the court to examine a party to a suit even without a corresponding motion, in order to eliminate any remaining doubts in the court's mind or if the plaintiff is in extreme evidentiary difficulties. These difficulties must be spelled out by the plaintiff, and the judge(s) must examine whether the facts presented by the plaintiff, including all the evidence (assuming it is accurate), would convince them of the truth of the main issue. Because a typical characteristic of sexual abuse is secrecy and absence of witnesses, which should not become a disadvantage to the plaintiff, it is my opinion that correct interpretation of this provision would make examination of the plaintiff as a party a general rule in cases of sexual violence. The credibility of the party would then have to be assessed according to the same principles as in criminal trials.

However, in practice, the result is very different. In published civil court opinions, examination of the plaintiff as a party was re-

²⁸ The cases cited here and in the following pages are taken from the author's case files.

²⁹ Section 445 ZPO; see *supra* notes 24-25.

³⁰ Section 445 ZPO.

³¹ Section 447 ZPO.

³² Section 448 ZPO.

quired in only one case. No examination was ultimately necessary, because the defendant then voluntarily offered to settle and pay compensation and damages. The plaintiff, who had been sexually abused by her godfather for several years in her youth, had presented, along with the charges, a letter from the godfather with unambiguous content. On the basis of it, the court held there was sufficient probability that the plaintiff's testimony was accurate.

In another case in which the plaintiff had no witnesses and could rely only upon the criminal court record and her examination as a party, the court refused to hear her as a party. It refused to look at the criminal record at all or take any notice of the criminal court judgment, assuming from the beginning that the facts presented by the plaintiff could not justify a judgment of compensation and damages by a civil court. The defendant had been sentenced to fifteen years' imprisonment in secure confinement on ten counts of rape. The civil trial lasted only ten minutes. The court, shaking its head and shrugging its shoulders, rejected a request for trial cost assistance, as the plaintiff could not present the evidence required of her in the civil trial.

This trial contrasted markedly with another trial at which I represented several young people who had gone on a rampage at a youth center. The state of Berlin brought suit against them for damages for the furnishings they had destroyed. To prove their guilt, the district court referred exclusively to the findings in the criminal court decision. It argued that the accuracy of the facts upon which damages were based was proven by the criminal court records.

Thus no limits are set on the court's judgment. Not only is it subject to the general human ability to err, but at times it misses the material truth completely. In conflict regulation between men and women, above all in connection with sexual violence, a court's gender-specific and gender-hierarchical structures occasionally prevail, leading to conscious or unconscious solidarity with the perpetrator.

There is a three-year statute of limitations under the Civil Code³³ on claims for compensation and damages. This time commences either (1) at the time the victim becomes aware of both the damage and the person responsible for compensating her for it, or (2) when it becomes clear to her that sexual abuse was the cause of her later depressions. In ascertaining the statute of limitations for

³³ Section 852 BGB.

abuse cases, the Supreme Court utilizes the same statute of limitations principles as in medical malpractice cases.³⁴

3. *Restitution Claims under the Law on Restitution for Victims of Violent Crimes*

The right to restitution under this law is not a civil but a public law right.³⁵ It should be discussed briefly because it was created to provide victims with rapid, non-bureaucratic aid. There are no published high court opinions on restitution claims specifically for sexual abuse, but a 1984 decision by the Federal Social Welfare Court³⁶ stands as a measure of this right's overall effectiveness.

The case involved a woman who was killed by her partner. Her minor son claimed a bereavement pension. Although the perpetrator had been sentenced to eight years' imprisonment for bodily injury resulting in death, the Social Welfare Court rejected the claim, arguing that compensation of the victim would be unjust; the mother had provoked her own killing by accusing her partner, after he had consumed excessive amounts of alcohol, of lacking sexual prowess, thereby leading him to kick her so hard that her renal artery tore, causing her death. The court added that the mother had endangered herself by remaining with the perpetrator even though he had beaten, abused and choked her almost daily; if she had acted responsibly, she could have avoided her hot-tempered friend by leaving him at any time.

Thus the Social Welfare Court placed responsibility not on the perpetrator, but on the dead woman. This was a flagrant violation of the woman's rights to inviolability of life, human dignity and free development of her personality,³⁷ as well as a violation of Art. 3 (2) of the Basic Law granting women and men equal rights to life.

Another lower court, the State Social Welfare Court of Hesse, did grant compensation to a woman who had also lived in a conflictual relationship with her husband for a long time. It argued that she had not accused him of a lack of sexual prowess, but had merely revealed her intention of breaking up with him and leaving the home.³⁸

³⁴ These principles are found in NJW 2350 (1991).

³⁵ "Public law," in Germany, includes all areas of law where the state is an actor, such as administrative, constitutional and criminal law.

³⁶ 49 BSGE (decisions of the Federal Social Welfare Court) of 3 Oct. 1984, at 104 ff.

³⁷ These rights are granted by Art. 2 (2) (inviolability of life), Art. 1 (1) (human dignity), and Art. 2 (1) (free development of personality) of the Basic Law.

³⁸ See decision of the Hesse District Social Welfare Court of 25 Mar. 1993, in STRETT 160 (1993).

4. *Civil Law Restraining Order*

In principle, it is possible to prevent sexual abuse through a temporary restraining order.³⁹ The trial court is in charge of the issuance of a temporary restraining order. This TRO requires proof through a sworn statement. However, I have succeeded in obtaining temporary restraining orders only in cases involving sexual harassment of a considerably less serious nature, such as telephone calls—for example, in cases of telephone sex, when the caller can be identified.

5. *Assignment of the Home*

Continuing sexual abuse may be most effectively prevented by a court decree requiring the abuser to leave the home. Often, when sexual abuse is exposed the child is removed from the family and sent to a state facility; however, there is now agreement among family-care authorities and the Youth Welfare Office that a child should remain with the rest of his or her family, including the mother and siblings. This requires that the mother be willing to separate from her partner or husband, if he is the abuser. Under the Civil Code,⁴⁰ a wife is granted sole use of the marital home or part of this home if necessary to prevent serious hardship. This provision speaks explicitly only of a just division among the spouses; as a result, the interests of third parties are not to be considered in judges' decisions. This provision is therefore applied restrictively by family courts. One justification for this is the general lack of housing,⁴¹ an argument that has nothing to do with the issue at hand; the provision does not involve the general housing market, but rather regulates the legal consequences for the marital home if the behavior of one partner becomes an unbearable hardship for the other.

According to the courts, the spouse's right to remain in the home requires a minimum level of considerate behavior; alcohol and drug abuse, as well as riotous nighttime behavior and continued violence, are considered unbearable hardships in existing judi-

³⁹ There is no explicit law governing restraining orders for harm to the person; the possibility is derived legally by analogy with § 1004 BGB, which allows such a restraining order in cases of damage to property, taken in conjunction with 823 II BGB (general law preventing invasions of the body).

⁴⁰ Section 1361 b BGB.

⁴¹ The legislature assumes that spouses can be expected to live together up until divorce. In Berlin, at present, petitions by wives that they be granted the marital home if, for example, their husbands abuse them are often refused on the grounds that the husband will be unable to find new accommodations due to the housing shortage in Berlin.

cial decisions—but only to the extent they have been proven to the court's satisfaction.⁴²

The text of the law is explicitly not concerned with the interests of children. There are few published decisions involving child sexual abuse in Germany. This may have to do with the fact that, in many cases, sexual abuse is not made public until after a woman has separated from her husband; if the parents still live together, such abuse claims are made infrequently due to violence and other intimidation by the husband, as well as distrust of the law (i.e., women's realistic fear that they will be unable to prove sexual abuse and that the court will be unwilling to believe their and their children's testimony). Family courts frequently ascribe lower evidentiary weight to mothers' testimony; they are suspected of wrongly accusing their husbands in order to gain advantages in disputes resulting from divorce. This prejudice continues to prevail in the attitudes and decisions of many family court judges, although it has long since been refuted scientifically.⁴³

To improve the situation of children and better protect wives from sexual, psychological and physical violence, some German experts are calling for a change in the law that would grant sole use of the marital home to wives who present facts from which it appears sexual violence against a child, or sexual or physical violence against a woman, could arise.⁴⁴

6. *Amount of Compensation*

The amount of compensation for rape and sexual abuse falls between 3,000 and 40,000 DM. The following examples illustrate such determinations and the way in which courts come to them.

A district court⁴⁵ required a father to pay 10,000 DM in compensation after he had regularly abused his daughter, who was twelve years old at the time the abuse began, on weekends a total of 50 times over two years. Another father was required to pay 20,000 DM to his daughter, whom he had forced under threat of death to tolerate sexual behavior for five years, beginning when she was

⁴² See, e.g., the view of the OLG Düsseldorf (Court of Appeals), in *FAMILIENRECHTSZEITSCHRIFT* [hereinafter *FAMRZ*] 1058 (1988).

⁴³ Jörg Fegert, *Ein Handbuch zu Fragen der Kindes- und Jugendpsychiatrischen und -psychologischen Untersuchung und Begutachtung*, SEXUELL MIßBRAUCHTE KINDER UND DAS RECHT (vol. 2, 1993).

⁴⁴ See, e.g., Alexandra Goy and Professor Michael Coester at the Public Hearing of the Ministry for Labor and Women's Affairs in Berlin on 28 Nov. 1991. The author's statement is published in the transcript of the hearing, *Dokumentation der Öffentlichen Anhörung zur vorläufigen Zuweisung der Ehemwohnung an mißhandelte Frauen und ihre Kinder*, at 30 ff. For Professor Coester's statement, see also *id.* at 40 ff.

⁴⁵ Decision of the District Court of Bonn, in *STREIT* 116 f. (1992).

twelve years old.⁴⁶ A district court granted 30,000 DM to a woman who had been sexually abused and raped almost daily for nine years, starting at the age of eight.⁴⁷ In calculating this sum, the court took into account the pain and suffering caused the woman by her father and the disgust he caused her; to the extent the purpose of compensation is to make amends, the court felt the father's confession at the criminal trial had already taken care of this.

A father was required to pay 40,000 DM after he had abused his daughter starting at age fourteen, deflowered her at seventeen, and forced her to have sex with him for another five years. She became pregnant by her father at age twenty-one. Because he had been sentenced by the criminal court to eight years' imprisonment, it was the district court's view that the woman had received satisfaction and compensation should not be set too high.⁴⁸ In this it was following the logic of the Federal Supreme Court, according to which pain and humiliation ultimately cannot be compensated financially, so that the longer the sentence, the lower the compensation should be.⁴⁹ Punitive damages as permitted in U.S. law do not exist in Germany; under German law, damages in this sense are supposed to compensate only for non-material harm.

Because of the unfavorable evidentiary situation described above, as well as the low compensation, suits for compensation are rare. Generally, victims are happy to have survived the criminal trial and be free of the burdens of further trials.

While feminist lawyers have demanded an expansion of the rights of victim-plaintiffs—for example, an unlimited individual right of appeal for the victim—some lawyers are actually calling for elimination of the institution of victim-plaintiff. Meanwhile, at the moment, political demands to improve the status of the victims in sex crimes trials are focused on the question whether, and under what circumstances, examination of witnesses on video can replace appearances in court.⁵⁰

⁴⁶ Decision of the District Court of Dortmund, *in* STREIT 88 f. (1992).

⁴⁷ See decision of the District Court of Cologne, *in* STREIT 108 f. (1993); decision of the Court of Appeal of Hamm, *in* STREIT 85 f. (1992).

⁴⁸ Decision of the District Court of Cologne, *in* STREIT 114 f. (1992).

⁴⁹ The Supreme Court has since changed its opinion. The length of sentence can no longer detract from the amount of compensation. Supreme Court decision, *in* NJW 649 (1995). However, this has not yet had a positive effect on compensation for sexual harassment or rape.

⁵⁰ See especially DR. ELKE H. MILDENBERGER, SCHUTZ KINDLICHER ZEUGEN IM STRAFVERFAHREN DURCH AUDIOVISUELLE MEDIEN (1995).