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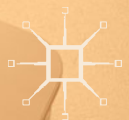
VICTIM PARTICIPATION RIGHTS

Variation Across Criminal Justice Systems

Kerstin Braun



Palgrave Studies in Victims and Victimology

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Dedicated to my father Karl-Heinz Braun

Preface

The so-called rediscovery of the crime victim in many Western jurisdictions in the 1970s and 1980s has resulted in the subsequent emergence of numerous laws and policies focusing on victims and their treatment in the criminal justice system. On the national and international level, multiple strategies have been proposed on how to best enhance the role of victims in criminal procedure. The introduction of information, protection and other service rights for victims has largely been well perceived in many states. However, the idea of affording victims active participation rights during various stages of proceedings in order to improve their experiences has frequently been met with considerable criticism. Concerns raised not only relate to the impact of victim participation rights on defendants' rights but also revolve around the consistency of victim participation with the underlying aims of traditional criminal justice. Nevertheless, many Western governments reiterate that victims need to be reintegrated into the criminal justice system.

Victim-related law reforms occur at ever-increasing intervals in many jurisdictions, resulting in the fast-paced amendment and transformation of existing national laws concerning victims of crime.

Furthermore, as it is up to each individual state to decide what the role of victims should be in its national criminal justice system, approaches to victim participation vary between jurisdictions with different legal traditions and backgrounds. The result is a largely opaque framework on the national level. Only a small number of scholars have examined the particulars of victim participation rights during different trial stages from a comparative perspective. Yet, questions concerning the integration of victims in criminal procedure are of considerable interest both from a theoretical but also practical perspective. This book aims to contribute to filling this research gap and to initiate further academic debate on this topic.

One major goal of the volume is to provide detailed analysis of the scope of victim participation at the pre-trial, trial and post-trial phase in different adversarial and non-adversarial criminal justice systems. These systems include: England and Wales, the US and Australia with a mostly adversarial background; Germany and France, mainly influenced by the inquisitorial tradition; and Sweden and Denmark, which are frequently referred to as mixed adversarial and inquisitorial systems. The point of this exercise is to provide a more holistic understanding of existing victim participation rights in different legal systems during the main procedural stages and thus the role victims have been afforded in criminal justice. This is done in the hope of informing the development of future strategies aimed at enhancing the experience of crime victims. An additional goal of the book is to highlight the way victims' participatory rights are perceived in adversarial and non-adversarial systems. Therefore, a detailed case study is undertaken on the understanding of criminal justice and the victims' role in Germany, a largely inquisitorial system, and Australia, a mostly adversarial system. The findings for the two systems may be indicative of other jurisdictions belonging to either legal tradition. Building upon the analysis, a third goal of the book is to provide insight into what consequences the prevailing understanding of the victims' role in criminal procedure could have for future law and policy reforms in this area. The book ponders whether, at this stage in time, a greater focus on victim protection rather than on active procedural rights could be more beneficial to enhancing the overall experience of victims in the criminal justice system. In this context, the

volume takes a close look at the merits of introducing or expanding legal representation schemes for victims.

While the book is theory based, it is also practical in its application. By providing a detailed comparative analysis of victim participation possibilities at different trial stages in different systems and how such participation is perceived in the national context, the book aims to contribute to a better understanding of the ever evolving and transforming landscape of victims' rights. Furthermore, it provides research on the treatment of victims in different legal systems which may be relevant to those contemplating law and policy reform in this area through a comparative lens. The volume is targeted to the academic audience, as well as practitioners, professionals and law and policy makers interested in the role of victims and victims' rights.

This work has benefitted greatly from my research stay at the Max-Planck Institute for Foreign and International Criminal Law in Freiburg im Breisgau, Germany, and its extensive library collection. I would like to thank Dr. Michael Kilchling, Dr. Johanna Rinceanu and Dr. Gunda Wößner for their hospitality, support, guidance and inspiration. Furthermore, I am grateful to Prof. Paul Cassell for his valuable insights and his patience with my many questions and Associate Prof. Tyrone Kirchengast for his encouragement along the way.

I wish to express my gratitude to my husband Seamus Tovey and our growing family for their patience and support during the time of writing.

Brisbane, Australia Kerstin Braun

Praise for *Victim Participation Rights*

"Victim participation in criminal justice has a long history in different of the world's legal systems but has been comprehensively displaced by state authorities. Kerstin Braun provides detailed analysis of the participatory traces that remain. Her book will be essential reading for those seeking to re-engage with these old ways of doing justice and to re-engineer participatory opportunities for victims into the future."

—Dr. Robyn Holder, *Griffith University, Australia*

"This volume provides a comprehensive insight into the different concepts of victim representation in criminal proceedings. The comparison of model justice systems demonstrates that it is primarily victims who face unequal procedural treatment. For defendants, it makes very little difference whether they are tried in Brisbane or Paris, London or Frankfurt, Chicago or Stockholm: in principle, their procedural standing remains the same. For victims, however, the location of a trial can have a significant effect on their representation. Kerstin Braun's book is

a valuable resource that offers condensed and well-selected information about why this is the case and illustrates ways forward."

—Dr. Michael Kilchling, *Senior Researcher, Max-Planck-Institute For Foreign And International Criminal Law, Germany*

"Kerstin Braun's new book, Victim Participation Rights: Variation Across Criminal Justice Systems, thoughtfully explicates a revolutionary (but often overlooked) recent development in criminal justice systems around the globe: Participation by crime victims in criminal justice processes. As Braun explains, crime victims' voices are increasingly being heard in criminal cases, in systems as divergent as America's, England's, and Australia's. Anyone interested in understanding contemporary criminal justice will find much to learn from Braun."

—Paul G. Cassell, *S.J. Quinney College of Law at the University of Utah, USA*

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Abbreviations

AJA	Administration of Justice Act, Retsplejeloven (Denmark)
Bundesregierung	Bundesregierung der Bundesrepublik Deutschland
CCP	*Code de Procédure Pénale*, Code of Criminal Procedure (France)
Code for Victims	Code of Practice for Victims of Crime (UK) 2013
CVRA	Crime Victims' Rights Act (US)
Declaration	UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in Resolution 40/34
DPP	Director of Public Prosecutions
EU	European Union
EU Directive 2012	EU Directive on Minimum Standards on the Rights, Support and Protection of Victims of Crime
EU Directive on Victims	European Union Directive of the European Parliament and of the Council (2012). 2012/29/EU, 25 October 2012. Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA

GVG	Gerichtsverfassungsgesetz, Court Organisation Act (Germany)
MPC	Model Criminal Code
NSW	New South Wales
NT	Northern Territory
PAP	Private Accessory Prosecutor
Qld	Queensland
RB	Rättegångsbalken Code of Judicial Procedure (Sweden)
Recommendation 85/11	Council of Europe Recommendation R 85/11 on the Position of the Victim in the Framework of Criminal Law and Procedure
SA	South Australia
SPPS	Swedish Prison and Probation Service
StPO	Strafprozessordnung, Code of Criminal Procedure (Germany)
Tas	Tasmania
UK	United Kingdom
UN	United Nations
US	United States
USA	United States of America
USC	US Code
Vic	Victoria
VIS	Victim Impact Statement
VPS	Victim Personal Statement
WA	Western Australia

1

Victim Participation in Criminal Procedure: An Introduction

1 Introduction

During most of the twentieth century, victims of crime played a limited role in criminal proceedings in many jurisdictions.[1] It was not until the 1970s and 1980s that scholars and policy makers started to challenge the diminished role victims held in the justice process (see in general Ash 1972; McDonald 1976; Shapland et al. 1985). Historically, victims had not always had such minimal impact. During the Early Middle Ages, victims of crime played a significant role in the administration of criminal justice by actively participating as private prosecutors (see in general Grakawe 1994, 2003; Kirchengast 2006; Sankoff and Wansbrough 2006). Over the centuries, however, the victim was marginalised from criminal trials in both common law and civil law jurisdictions and the victim's role became mainly that of a witness (Garkawe 2003; Henkel 1937; Hubig 2008; Kilchling 2002; McDonald 1975; Rosenfeld 1900; Wemmers 2009). In this role, victims had little opportunity to present their views and concerns during proceedings and to participate actively at trial unless when testifying. One of the first

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scholars to acknowledge the situation was McDonald (1975, 650) who described the victim as 'the forgotten man' in criminal procedure.[2]

Sometime between the late 1960s and early 1980s, the perception of victims and their needs underwent significant change in many Western states. During this time, scholars first started to notice and address the absence of victims from the criminal justice system and to highlight problems associated with their treatment (Ash 1972; Christie 1977; McDonald 1976; Schneider 1975).[3] Enhanced academic debate on, and increased public awareness of, victims and their role in the criminal justice system contributed to the adoption of an international instrument. In 1985, the United Nations (UN) General Assembly unanimously adopted the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (*Declaration*) in Resolution 40/34,[4] emphasising 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' (General Assembly Resolution 40/34 1985, [2]).

The General Assembly nominated a number of basic principles of justice for victims ('basic principles') that Member States should adopt in order to reduce secondary victimisation,[5] and secure justice and assistance for victims. The Declaration outlines four avenues of redress for victims of crime: access to justice and fair treatment (Declaration ss 4–7), restitution (Declaration ss 8–11), compensation (Declaration ss 12–13) and assistance (Declaration ss 14–17). Many basic principles enshrined in the Declaration are concerned with the provision of 'services' for victims. Such 'service-rights' include treating victims with respect, providing them with information about proceedings as well as the progress of their individual case and offering opportunities to receive reparation from the offender or compensation from the state for losses suffered from a criminal act (Ashworth 2000, 18; Sanders et al. 2001; Groenhuijsen 2004, 63). These 'service-related' basic principles are largely undisputed in Member States. One basic principle contained in Section 6(b) concerning giving victims a voice in the criminal justice system, however, was strongly debated during the drafting of the Declaration. Section 6(b) of the Declaration explicitly sets out that:

> The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

During the drafting process of the Declaration, Member States reacted differently to the proposal of introducing victims' participatory rights in the respective national criminal justice systems. Some Member States were concerned about potential risks for the procedural guarantees of defendants if victims were allowed to present views and concerns.[6] Others argued that victims had not been given the right to present views and concerns in their system in order to protect victims from proceedings which could otherwise be traumatic (Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1985, 157). Despite these concerns, the Declaration was unanimously adopted by the General Assembly in 1985 without a vote and without any reservations by Member States.[7]

2 The Focus on Victim Participation

The question arises why victim participation, as enshrined in Section 6(b) of the Declaration, emerged as an important concept in improving the situation for victims in the criminal justice system. According to the Seventh Congress when drafting the Declaration, one major aim of providing victims with adequate justice mechanisms, including being able to present views and concerns, was to avoid further trauma for victims. The drafters of the Declaration explicitly pointed out that, particularly with regard to criminal proceedings, the lack of suitable arrangements for victims during the trial process could not only lead to the disassociation of victims from the outcome of the trial but could also cause secondary victimisation. It was feared that if victims' views remained irrelevant to the process vigilantism and other undesirable responses could occur (Seventh United Nations Congress 1985, 142).

In light of these considerations, the introduction of Section 6(b) could be seen as an attempt to avoid any further victimisation during criminal proceedings. Additional victimisation could potentially be reduced if victims perceived proceedings and outcomes as fairer due to the possibility of partaking in decision-making processes (Orth 2002, 314). The possibility for victims to present views and concerns could strengthen the victims' perception that they have an important role to play in proceedings (Orth 2002, 321–324).

A second reason for the introduction of Section 6(b) could be assisting victims in obtaining therapeutic benefits, such as closure, through the criminal trial itself. As a consequence of the criminal act, victims can be left feeling unsafe and insecure (Richter 1994, 58).[8] The feeling of insecurity may be reduced through the victims' perception that they play an important part in criminal procedure by being able to make their views and concerns known and by knowing that their views are deemed important (Richter 1994, 62). It has been found that consideration and acknowledgement are factors that can contribute to the healing process of victims and allow them to reach a form of closure (see Burkhardt 2010, 65 for explanations on victims' needs in international criminal court proceedings). During discussions of the Seventh Congress, Member States' representatives pointed out that having confidence in the criminal justice processes was essential for the individual victim but also for the general community to avoid any negative social impact. Furthermore, it was proposed that the lack of suitable participation arrangements for victims during the trial could lead to their 'disassociation' with the outcome of the trial (Seventh United Nations Congress 1985, 143). The above suggests that victim involvement in the process was considered an important concept to reduce victim alienation from the criminal justice system and to ultimately contribute to providing victims with therapeutic benefits.

While the Declaration seems to propose that being heard and being able to express an opinion to a decision maker during proceedings can have a positive effect on victims, very little empirical work is available internationally on whether and to what extent participation can impact a victim's experience in the criminal justice system, and whether it is likely to do so in a positive or negative way (Volbert 2012, 198–199).

Some scholars have turned to procedural justice theory to explain why victims may perceive proceedings as more fair when they are afforded an opportunity to participate (see in general Van Camp and De Mesmaecker 2014). This explanation is based on the understanding that victims may perceive outcomes of particular decisions taken in the criminal justice system as unfair where their expectations are not met (on procedural justice theory, see Thibaut and Walker 1975).[9] This could then lead to secondary victimisation, meaning additional harm sustained through the victims' experiences in the criminal justice system (Orth 2002, 315). As per the theory, however, a person's perception of fairness does not solely depend on an outcome itself but also on other elements in the decision-making process (see discussion in Laxminarayan et al. 2012, 261; O'Hear 2007).[10] One important element for the perception of fairness is whether the people involved in the process are given the opportunity to be heard on the issue in question (Leventhal 1980, 27; O'Hear 2007). It has been proposed that the perception of voice and the possibility to present an issue to authorities can promote the acceptance of decisions as fair, even where these decisions are not favourable to the individual person involved. In regard to victims of crime, this may be the case, for instance, where sentence lengths are shorter than desired by the victim (Erez et al. 1997, 41). The possibility to present views to a decision maker could allow victims to perceive proceedings as fairer and potentially assist in avoiding secondary victimisation even where the outcome is not as they envision (Tyler and Lind 2001, 65). Furthermore, the possibility to be heard could positively impact on the victim's self-esteem and self-reliance and strengthen the perception that they do play an important role in criminal proceedings (Wemmers 1998, 65). It may be reassuring and a positive experience for some victims to know that decision makers value their input in the decision. The possibility to participate, so it is argued, could therefore provide victims with a sense of importance which might have been damaged by the initial experience of the criminal act (Erez et al. 2011, 20). Other scholars rely more on the potentially therapeutic effects trials could have on participating victims and the notion of 'therapeutic jurisprudence' in explaining why victims should have a role in procedure (see in general Wexler 2000; Casey and Rottman 2000). Regardless

of the underlying justifications for victim involvement in proceedings, what exact role victims can play in practice in the national context is up to each criminal justice system to decide.

3 Participatory Rights in National Criminal Justice

Even though the Declaration calls upon Member States to allow victims to present views and concerns, the basic principle is qualified in that such opportunities should only be provided where this form of participation is consistent with the national criminal justice system. It follows that the extent to which victims can participate during domestic criminal trials is up to national law and policy makers to decide and is likely to differ between jurisdictions with different legal systems and traditions.

While in the past calls have been made that victims' participatory rights need to be enhanced in national criminal justice systems, especially those of adversarial nature (see Pizzi and Perron 1996), some scholars suggest that criminal justice processes today may be paying more attention to the needs of victims and are being progressively modified to allow victim involvement at different stages to a greater extent (Kirchengast 2016b, 1). As a result, it may be that criminal justice is currently in the process of transforming by affording victims greater avenues for participation during proceedings (see discussion in Kirchengast 2016b, 3).

To what degree victims can participate in national criminal justice systems is difficult to gauge. Law reform in this area has occurred rapidly in many jurisdictions resulting in the hasty introduction, change and amendment of potential rights. In Europe, such reforms may have been initially driven by the Council of Europe, which has issued numerous victim-related standards since the 1970s including, in the mid-1980s, the non-binding Council of Europe Recommendation R 85/11 on the Position of the Victim in the Framework of Criminal Law and Procedure (*Recommendation 85/11*). This included recommendations for the treatment of victims in national criminal justice systems. With

the turn of the millennium, the pace of supra-national victim standards was accelerated by the European Union firstly with the adoption of the legally binding Framework Decision on the Standing of Victims in Criminal Proceedings in 2001 which, in 2012, was replaced by its successor legislation the EU Directive on Minimum Standards on the Rights, Support and Protection of Victims of Crime (*EU Directive*). As a consequence, especially in Europe, a myriad of national statutes and provisions containing victims' rights has rapidly emerged in an attempt to bring national laws in line with relevant supra-national obligations. Kirchengast (2016a, 79) notes the following in the context of victims' participatory rights at different stages of proceedings in national criminal justice systems:

> There is increased international concern over the role of the victim throughout the phases of the criminal justice process. This includes a concern over the role and participation of the victim in the investigation, the trial, from pretrial through to sentencing and appeal procedures, and the post-conviction phase, including punishment of the offender and parole. While victims have always been concerned with the entire process as relevant to their particular matter, much of the criminal trial has remained hidden from the public gaze of what constitutes the trial process, which has tended to focus on the hearing or jury trial phase alone. Thus, greater concern for the rights and powers of victims across the whole of the criminal trial, writ large, is bringing attention to those parts of the trial that were once identified as of little relevance to the victim.

Given all the political, scholarly and legislative attention victims have received on the national and supra-national level, the situation for victims seems to have changed significantly since the first half of the twentieth century. Being tough on criminals and fair to victims is a political slogan which has been popular with many political parties and Western governments for the past 20 years. These political catchphrases frequently go hand in hand with the enthusiastic promise to reintegrate victims into criminal procedure, perhaps through participation or service rights, although the exact strategy for said reintegration often remains unclear and unaddressed.

This book provides a detailed analysis of possibilities for victim participation in criminal proceedings by considering what rights victims have been afforded in different criminal justice systems during three distinct phases of the criminal trial: the investigation and pre-trial phase, the trial and sentencing phase, and the post-trial phase in light of appeals and early-release decision making. It assesses the availability of selected participatory rights for victims in different jurisdictions with diverging legal traditions and backgrounds. In so doing, it considers the situation in the United States on the federal level, England and Wales, and Australia. These judicial systems are mainly adversarial in nature and their laws originate from common law. Furthermore, it contemplates the participation possibilities in the continental European and largely inquisitorial systems of Germany and France.[11] Lastly, analysis is provided for the Scandinavian countries Denmark and Sweden with their mixed inquisitorial-adversarial systems, whereby the investigation and pre-trial phase is characterised by inquisitorial elements and the trial phase is more of an adversarial nature.

The analysis in this volume seeks to clarify to what extent victims have been integrated as participants into criminal trials at different stages by focusing on available statutory rights.[12] The chapters identify relevant norms and procedures in respective jurisdictions and build on existing (comparative) literature and empirical studies on victims' rights, where available. The assessment of victims' rights is informed by a comparative legal research method focusing on the similarities and differences between the selected criminal justice systems. The purpose of this exercise is to identify whether a holistic strategy for victim participation is traceable in the analysed criminal jurisdictions and to find out what the current status quo of victims' participatory rights is. In this context, the volume also contains a detailed case study on the position of victims, especially in light of national criminal policy, in two countries on either end of the criminal legal-tradition spectrum: Germany, a largely inquisitorial system, and Australia, a mainly adversarial system. The aim is to expose whether criminal trials, in inquisitorial, adversarial and mixed systems, are accommodating victims to a greater extent

when it comes to participation and what potential underlying barriers can be identified in this regard in the national context. The argument is subsequently advanced that at this point in time there may be greater benefit in focusing on less contested and less controversial victims' rights than those associated with active procedural participation, including the better protection of victim witnesses. This is the case, as the possibilities for a successful expansion of victims' participation rights appear currently limited in national criminal justice systems due to various reasons identified in this volume.

What is to follow in this chapter is the introduction of the jurisdictions selected for examination in this volume, including a brief introduction to their criminal justice systems.

4 Introduction to Selected Jurisdictions

4.1 Inquisitorial Systems: Germany and France

Germany and France are both civil law systems originating from Roman law in which the main criminal procedure rules and principles are codified. While few systems appear to remain exclusively inquisitorial or adversarial, criminal procedure in Germany and France remains heavily governed by inquisitorial elements (Hermann 1987, 123; Weigend 2011, 257).[13] Briefly that means that criminal proceedings are not party—but judge dominated. For example, in both Germany and France much of the work in preparation of a trial is carried out by the judge and not the individual parties (in the French context see Steiner 2018, 195). Also, the trial proper and the examination of evidence are heavily judge-led. As a consequence, for example, cross-examinations of witnesses by the parties, which are standard practice in the adversarial context, are the exception in inquisitorial systems (Steiner 2018, 195). Goldstein and Marcus (1977, 247) explain the reasons for the significant involvement of judges in inquisitorial proceedings at the pre-trial stage as follows:

> Inquisitorial theory recognizes that the key to overall judicial supervision is control of the investigation of crime. Unless the judge plays a role in determining how investigations should be conducted, or what charges should be filed, his supervision will be limited to the cases that survive for trial as a result of decisions by others.

A brief general overview of the key aspects of the two criminal justice systems is provided below.

4.1.1 Germany

The Federal Republic of Germany, a federal parliamentary democracy, is located in north-central Europe and, with a population of around 82.3 million, is the most populated EU country (European Union 2018). The German President (*Bundespräsident*) holds the highest office and acts in a representative manner with limited reserve power. The executive power is vested in the cabinet formed by the German Chancellor (*Bundeskanzler*) and other ministers. The German Chancellor acts as head of government thus determining government politics. Parliament, a two-chamber legislature, consists of the elected *Bundestag*, mainly responsible for voting and passing bills, and the appointed *Bundesrat* (comparable to an upper house or second chamber), representing the interests of the federal states. It becomes mostly involved in legislative processes which affect the interests of the states. The state power is divided between the federal level (*Bund*) and the 16 federal states (*Bundesländer*) as per the principles set out in the Basic Law (*Grundgesetz*), the German Constitution. Each federal state has its own state parliament called *Landtag*.

In Germany, the core legislation governing criminal trials is the German Code of Criminal Procedure (*Strafprozessordnung*, *StPO*).[14] Criminal law and procedure fall under federal jurisdiction in Germany and therefore apply equally to all federal states.[15] In addition to the StPO, general guidelines have been issued in order to unify court and prosecution practices in German criminal trials. The StPO is divided into six books, each relating to particular aspects and stages of proceedings. The public prosecution (*Staatsanwaltschaft*) is independent of

the judiciary (Court Organisation Act, *Gerichtsverfassungsgestz, GVG*, s 150) and organised in accordance with the court system into federal and state prosecution services. The investigative work is generally carried out by the police who answer to the prosecution in the context of investigations. Due to its dominant role, the prosecution is often called the master of pre-trial proceedings (*Herrin des Vorverfahrens*). Criminal matters in Germany can be dealt with by the lower courts (*Amtsgericht*), the regional courts (*Landgericht*) or the higher regional courts (*Oberlandesgericht*). Which court has jurisdiction is set out in the GVG. The lower courts usually have jurisdiction if a sentence of less than four years is expected as this is the maximum sentence they can impose. Where the sentence is expected to be less than two years, the matter will be dealt with by a single judge in the lower court. In all other cases, the lower court judge will sit with two lay persons (*Schöffen*) to decide over the case at hand (GVG ss 24–25, 29). The regional court generally has jurisdiction over criminal matters in which the expected sentence is greater than four years and which do not fall under the original jurisdiction of the higher regional court (GVG ss 73–74). A specific chamber of the regional courts, the *Schwurgericht*, comprised of three professional judges and two lay judges, has specifically been vested with the power to decide on serious offences including homicide offences. The chamber and its name, which roughly translates to 'sworn-in court', is a reference to the time during which jurors still took part in German criminal procedure—up until 1924 (Bohlander 2012, 37). The higher regional court in its original jurisdiction is tasked with deciding matters of state security (GVG ss 120–121) including homicide offences if committed in this context.

4.1.2 France

Located in northwestern Europe, the French Republic is the largest country in the EU in terms of area (Pfuetzner et al. 2013, 79). Its population is estimated to be around 67.2 million (The National Institute of Statistics and Economic Studies 2018),[16] making it the second most populated EU Member State (2018). The French system has been

described as a democracy with a semi-presidential system of government. In this system, the President's function is to act as a guardian and to watch over the Constitution and different institutions while having far-reaching powers. The government consists of the prime minister as well as the cabinet ministers. The parliament, which is vested with legislative powers, consists of two chambers, the National Assembly (*Assemblée Nationale*) as well as the Senate (*Senat*).

The Criminal Code (*Code Pénal*) is one of the main sources governing criminal law in France, while the Code of Criminal Procedure (*Code de Procédure Pénale, CCP*) applies to criminal procedure aspects.[17] Chapter 4 outlines the distinction between police investigations and judicial investigation in France in detail. Suffice to say at this stage that investigations in France can be carried out by the police (*enquete policiere*) or there can be, and in certain cases must be, a judicial investigation (*instruction/information judiciaire*). Prosecutions in criminal cases (*poursuite*) are usually initiated by the public prosecutor (*l'action publique*) (Pfuetzner et al. 2013, 87–91). The French court system is divided between ordinary and administrative courts. Criminal courts form part of the ordinary courts. Kirchengast (2016a, 142) describes the structure of the French court system in the following way:

> The criminal courts include the police tribunal, or tribunal de police, which disposes of minor contraventions; the criminal court or correctional court, or tribunal correctionnel, for more serious offences, such as délits, the less serious felonies, and misdemeanours; the assize court, or *cour d'assises*, for the more serious felonies; the appeal court, or *cours d'appel*, which hears appeals; and the supreme appeals court, the court of cassation or *cour de cassation*, for final appeals on questions of law.

4.2 Mixed Criminal Justice Systems—Sweden and Denmark

Together with Norway, which is not analysed in this book, Sweden and Denmark form part of the Scandinavian countries. Scandinavian legal systems have great similarities due to their joint history and culture (Husabo 2010, 20). While France and Germany are classified as

mainly inquisitorial systems, Denmark and Sweden are generally considered mixed criminal justice systems as the investigation phase is distinctly inquisitorial while the trial phase is now defined as adversarial (Cornils 2013, 167; Wergens 2002, 428; Ortwein II 2003, 428). The adversarial aspects of the criminal justice system and the participation of juries were introduced in Denmark in 1916 with the Danish Procedures Act, which came into force in 1919 (Husabo 2010, 21; Anderson 1992, 183). Similarly, in Sweden accusatorial elements were introduced in criminal procedure through the adoption of the Swedish Procedures Act in 1942. In contrast to Denmark, however, lay participation was already possible in Sweden prior to that time (Husabo 2010, 21). Therefore, the main trial features are adversarial, and the trial is seen as a dispute between the state and the defendant (Husabo 2010, 26). Thus, while judges continue to be actively involved in the main trial in Sweden and Denmark (Husabo 2010, 26), the parties play a much greater role especially in relation to introducing and examining evidence than their counterparts in Germany and France (Ortwein II 2003, 429). In addition, similar to Germany and France, Sweden and Denmark are generally associated with the civil law tradition meaning that their legal system is mainly based on written laws enacted by parliament (Ortwein II 2003, 411). The below provides a brief introduction to key aspects of the criminal justice systems in Sweden and Denmark.

4.2.1 Sweden

Located in northern Europe, the Kingdom of Sweden is the EU's third largest country in terms of area (Cornils 2013, 133–134). Yet, its population is estimated at only 10.4 million (Statistics Sweden 2018), making it one of the EU's least densely populated members (European Union 2018). Sweden is a constitutional monarchy with a parliamentary form of government in which the King has an exclusively representative function (Ortwein II 2003, 410). It is divided into 21 counties (*Laen*) with each one having a governor and a county council (Cornils 2013, 137).

In Sweden, criminal law and procedure are governed by a number of laws including the Code of Judicial Procedure (*Rättegångsbalken*, *RB*)[18] and the Swedish Penal Code (*Brottsbalken*).[19] The RB contains procedural provisions for civil as well as criminal proceedings and is supplemented by other laws, including, for example, the law on the treatment of young offenders. The main investigative authorities are the public prosecutor (*Aklagarmyndigheten*) and the police (*Polisen*). While more simple matters are usually investigated by the police, such as traffic offences, public prosecutors can take over investigations where required (Cornils 2013, 138). The actual investigative work, however, remains with the police even where the prosecution takes over. The Swedish court system is made up of three tiers: the district courts (*Tingsrätt*), which are comprised of one legally trained judge in addition to between three to five lay judges; the courts of appeal (*Hovrätt*), comprised of three professional and two lay judges; and the Supreme Court (*Högsta Domstolen*), which consists of five professional judges (Cornils 2013, 140). Most criminal matters are initially heard by the district courts, and appeals against their decisions are dealt with in the courts of appeals.

4.2.2 Denmark

The Kingdom of Denmark is located in northern Europe, bordering Sweden, and has a population of approximately 5.8 million (Statistics Denmark 2018). Consequently, it is one of the least densely populated countries in the EU (European Union 2018). Denmark is a constitutional monarchy with a parliament consisting of one chamber. While the Sovereign reigns, the executive power is vested in ministers. Denmark consists of five regions which each have their own locally elected council (Langsted et al. 2014, 17).

Substantive criminal law is regulated in Denmark by the Danish Criminal Code (*Straffeloven*). In comparison with many other jurisdictions, Danish law does not differentiate between felonies, misdemeanours and contraventions but treats all offences in the same way (Langsted et al. 2014, 18). Rules relating to civil and criminal procedure are set out in the Administration of Justice Act (*Retsplejeloven*,

AJA). The Danish judicial system comprises 24 districts in the first instance (*Byret*) excluding the Faroe Islands and Greenland (Langsted et al. 2014, 17). In addition, two High Courts exist, the Eastern and the Western High Court, which mainly have appellate jurisdiction. The highest Danish court is the Supreme Court. Each judge has the power to deal with civil and criminal matters and no specific criminal courts exist (Langsted et al. 2014, 20). In contrast to many other jurisdictions, the Danish system integrates police and prosecution services. This means that the Police Chief Constable at the police district level is the head of the prosecution. This differs at the regional level, where the regional prosecutor (*Statsadvokaten*) is responsible for jury trials and appeals to the High Court.

4.3 Adversarial Systems

England and Wales, the US and Australia are all considered largely adversarial criminal justice systems. Kirchengast (2016a, 158) comments on the nature of adversarial systems as follows:

> Adversarial systems of justice are characterised by an accusatorial, common law process dependent on the testing of the state or Crown case. This tends to occur through an independent prosecutor, who is briefed by the police, who brings charges against an accused. The accused may remain silent until proven guilty. The accused has the right to counsel in pursuit of the right to test the prosecution case. The defence is not compelled to offer any evidence at trial, although most do so in order to enhance their changes of acquittal.

The below provides a brief outline of the key aspects of the criminal justice systems in Australia, England and Wales and the US.

4.3.1 Australia

Australia, an island continent located in the Southern hemisphere, has a population of approximately 24.7 million (Australian Bureau of