

THE VICTIM IN CRIMINAL PROCEEDINGS: A SYSTEMATIC PORTRAYAL OF VICTIM PROTECTION UNDER GERMAN CRIMINAL PROCEDURE LAW

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I. INTRODUCTION

It is widely believed that the victim of a crime does not have an independent function in a German criminal proceeding. In fact, in the literature on victimology there is talk of the “elimination” of the victim of serious crime from the criminal prosecution process and the replacement of the victim’s interests and needs with the criminal prosecution apparatus.¹ Instead of the emotionally-laden term “victim,” criminal law dogmatism uses “injured party” or “aggrieved party.”² The victim takes on significance in a criminal proceeding primarily as the initiator of the criminal proceeding or as evidentiary material.³ The reason for the “neglect” of victims “as such” established in numerous victimological studies is generally seen in the linking of criminal procedure law to material criminal law that is geared toward the offender and the offence, which places the offender and the establishment of his individual guilt at the centre of the law enforcement authorities’ investigatory process. This concept corresponds to the state’s monopoly over criminal prosecutions. In this respect, § 152 subsection (1) of the German Criminal Procedure Code (*Strafprozessordnung*; hereinafter cited as “StPO”) provides that the public prosecution office is exclusively appointed to file public criminal charges. In principle, the victim does not have any claim for the punishment of the offender. The significance of the state’s monopoly over criminal prosecutions, on the one hand, lies in the need to avoid self-administered justice, and, on the other hand, in guaranteeing a proceeding that takes account of both the public’s interest in criminal prosecution and the individual interests worthy of protection of the persons affected by the criminal prosecution measures, in a reasonable way.

These “less creditable”⁴ findings from the point of view of victim protection exist in contrast to the fact that in a criminal proceeding the injured person as an important figure to be considered is not a new discovery.⁵ In §§ 374 through 406h, the Criminal Procedure Code grants victims their own chapter: “Participation of the Aggrieved Person in the Proceedings”. From a historical point of view, participation of the victim in the criminal proceedings is rather the rule than the exception. Thus, under Germanic law, criminal prosecution was basically in private hands. The Germanic feuding right allowed any free man “to revenge injury to his person, honour, or property with the help of his family when he did not want to take the compensation ordered under the law”.⁶ There is first evidence of state intervention in conflicts between private persons in the early middle ages. Thus, it is written in Article 74 of the Edictus Rothari from 643⁷, which is a part of Langobardic law – famous for its progressiveness – that an aggrieved party who took advantage of compensation (*Wehrgeld*), or whose family did so, in return must refrain from the right of feuding. The right of feuding was to be expressly repressed by this and during the subsequent period

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¹ Sessar, Wiedergutmachen oder strafen. Einstellungen in der Bevölkerung und der Justiz (1992), p. 233.

² Rieß, Der Strafprozeß und der Verletzte – eine Zwischenbilanz, Jura 1987, p. 281; with a view toward the terminology in the European Union, see also Kuhn, Opferrechte und Europäisierung des Strafprozessrechts, ZRP 2005, 125, 126.

³ As to the legal position of the victim under German criminal law: Kilchling, Opferinteressen und Strafverfolgung (1995), pp. 3 et seq.; Berckhauer/Steinhilper, Opferschutz durch Strafrecht und Strafverfahren? – Überblick über die Stellung des Opfers in der deutschen Strafrechtspflege in: Janssen/Kerner (Hrsg.), Das Opfer im Spannungsfeld der Handlungs- und Interessenkonflikte (1985), pp. 81 et seq.

⁴ Hartmann, Staatsanwaltschaft und Täter-Opfer-Ausgleich (1998), p. 15.

⁵ Accord Rieß (fn. 2), 282.

⁶ Grimm, Deutsche Rechtsaltertümer, Volume 1, 4th Ed. 1899, p. 401.

⁷ German edition by Beyerle, Die Gesetze der Langobarden (1962).

became increasingly more limited.⁸ The *Peinliche Gerichtsordnung* (penal code) of Emperor Charles V from 1532 made the prosecution of serious crimes a matter for the state and brought the offender's guilt into the focus of the criminal proceeding.⁹ In inquisition proceedings in the High Middle Ages, the injured party now only had the role of informer. The role of the victim became more and more limited in accordance with increasingly developed state power.¹⁰ It seems remarkable that it was particularly the criminal procedure code of 1877, which developed under markedly authoritarian state conditions, that again gave crime victims more attention by making available institutions such as private prosecutions, private accessory prosecutions, proceedings to compel prosecution, and applications for prosecution.¹¹ To the extent victimology of the 1980s and 1990s complained of the "neglect" of victims in criminal proceedings, it can be explained by the fact that as to later statutory amendments victims' interests barely garnered any more attention and victim protection in criminal proceedings, thus, for a long time was an uncoordinated and inconsistent entity.¹²

The role of the victim of the criminal offence has recently returned to the attention of the legislature.¹³ Thus, the Victims' Compensation Act (*Opferentschädigungsgesetz*) of 11 May 1976¹⁴ ensured benefits to victims of criminal offences or their surviving dependents. The Victims' Protection Act (*Opferschutzgesetz*) of 18 December 1986¹⁵ served to increase the protection of the victim's rights of personality and granted victims rights of participation in criminal proceedings. Through the Act on Combating Serious Crime (*Verbrechensbekämpfungsgesetz*) of 28 October 1994,¹⁶ offender-victim mediation was introduced into the general criminal law as a basis for penalty reduction. Through the Witness Protection Act (*Zeugenschutzgesetz*) of 30 April 1998,¹⁷ provisions were incorporated into the Criminal Procedure Code that serve the prevention of endangerment to witnesses. Through the Act to Embody Offender-Victim Mediation in Criminal Procedure Law (*Gesetz zur strafverfahrensrechtlichen Verankerung des Täter-Opfer-Ausgleichs*) of 20 December 1999,¹⁸ rules were created that are to enable simpler and more frequent use of Offender-Victim Mediation. The Victims' Protection Harmonization Act (*Zeugenschutz-Harmonisierungsgesetz*) of 11 December 2001¹⁹ governs particular witness protection measures such as, e.g., the creation of a new identity. Finally, through the Victims' Rights Reform Act (*Opferrechtsreformgesetz*) of 24 June 2004,²⁰ the procedural and information rights of victims in criminal proceedings were comprehensively increased, burdens from the criminal proceedings for the victim were reduced, and the possibility for claiming and collecting damage compensation from the defendant in the criminal proceedings was improved. Through the draft of a law to increase recovery assistance (§§ 111b et seq. StPO), which is currently in the legislative consultation process, the possibilities for victims to claim compensation for property damage should be improved.²¹

With a view primarily toward offender-victim mediation one can generally speak of a renaissance of the "re-privatization of the conflict" under state supervision, which has recently been developed in German

⁸ More detail: *Schönfeld*, Das Rechtsbewußtsein der Langobarden (1934), pp. 82 et seq.; *von Amira*, Germanisches Recht, Volume II, 4th Ed. 1967, pp. 172 et seq.

⁹ *Ebel/Thielmann*, Rechtsgeschichte, 3rd Ed., pp. 291 et seq.

¹⁰ More detail: *Weigend*, Deliktsoffer und Strafverfahren (1989), p. 93 with additional citations.

¹¹ *Weigend* (fn. 10), pp. 96 et seq.

¹² *Rieß* (fn. 2), 283.

¹³ On the criminal-political development: *Jung*, Zur Renaissance des Opfers – ein Lehrstück kriminalpolitischer Zeitgeschichte, ZRP 2000, 159.

¹⁴ Federal Law Gazette (*Bundesgesetzblatt*; hereinafter cited as "BGBl") I 1976, 1181; additional detail on the legislative process: *Ebert*, Hilfe für Verbrechenopfer – Die Bewältigung einer staatlichen Aufgabe mit dem Gesetz über die Entschädigung für Opfer von Gewalttaten (1981).

¹⁵ BGBl I 1986, 2496; additional detail on the legislative process: *Kaiser*, Die Stellung des Verletzten im Strafverfahren. Implementation und Evaluation des "Opferschutzgesetzes" (1992).

¹⁶ BGBl I 1994, 3186.

¹⁷ BGBl I 1998, 820.

¹⁸ BGBl I 1999, 2491.

¹⁹ BGBl I 2001, 3510.

²⁰ BGBl I 2004, 1354; additional detail on the legislative process: *Hilger*, Über das Opferrechtsreformgesetz, GA 2004, 478; *Ferber*, Das Opferrechtsreformgesetz, NJW 2004, 2562.

²¹ On the problems of the legal situation up until now: *Peglau*, §§ 111b et seq. StPO – Lücken im Opferschutz? wistra 2002, 376.

criminal law. In the following, the position of the victim in German criminal proceedings (Part 1) and the possibilities available to victims for claiming material and immaterial compensation (Part 2) are addressed in detail together with consideration of the abovementioned statutory amendments.

PART ONE: RIGHTS OF PARTICIPATION AND VICTIM PROTECTION

A. The Functional Role of the Victim in Criminal Proceedings

In regard to the functional role of the victim in criminal proceedings, distinctions can be made among the role of the victim as a person filing a report of a criminal offence, as a witness, as a prosecuting party, and as a co-defendant.

1. The Victim as a Person Filing a Report of a Criminal Offence

Pursuant to § 158 subsection (1) sentence 1 StPO, any person can file a report of a criminal offence with the public prosecution office, authorities and officials in the police force, or the local courts orally or in writing. In most cases, criminal prosecution is initiated by the filing of a report by the victim.²² The public prosecution office, which is the lead investigating office under German criminal procedure law, is then obliged to initiate an investigation proceeding and inquire into the facts to the extent there are sufficient actual indications that a prosecutable offence was committed. This principle, which is set forth in § 152 subsection (2) and § 160 subsection (1) StPO and which obligates the public prosecution office to take action, is known as the principle of legality. If after the conclusion of its investigations the public prosecution office concludes that no punishable act took place, that it cannot be proven that the accused committed such an act, that the accused is not guilty, or if it believes that the filing of criminal charges at the court is not necessary – e.g., because the matter only involves a minor criminal offence – it must inform the applicant thereof, indicating the reasons therefor, and inform the applicant, if the person is also the victim of the crime, of the possibility of contesting this decision (§ 171 StPO). The victim then has the option of filing a complaint against the decision of the public prosecution office with the chief public prosecutor (§ 172 subsection (1) StPO). If the complaint is not allowed by the chief public prosecutor, the victim has one month within which to apply for the decision of the Higher Regional Court as to a resumption of the investigation proceedings (§ 172 subsections (2) through (4) StPO). Exceptions are provided regarding this option, for example, when the victim has the possibility of proceeding through a private lawsuit or if the public prosecution office terminated the proceeding based upon the minor nature of the offender's guilt.

Example: The aggrieved party files a report of a criminal offence and applies for prosecution of the accused because he intentionally damaged the aggrieved party's automobile. The public prosecution office terminates the criminal proceeding based upon property damage upon the payment of a monetary condition in the amount of € 300 into the state treasury. The aggrieved party does not have the possibility here to compel the filing of a lawsuit and the carrying out of a main proceeding at court.

In the example described above the aggrieved party is advised to assert his claim for damages through civil law means. However, there was also the possibility of ordering the payment of the monetary condition to the aggrieved party. The decision regarding this is within the discretion of the public prosecution office (§ 153a subsection (1) sentence 1 StPO). An application for prosecution pursuant to § 158 subsection (1) sentence 1 StPO, which gives the injured party the right to be informed pursuant to § 171 StPO and the right to compel prosecution pursuant to § 172 StPO, must be distinguished from the filing of a criminal complaint described in more detail in §§ 77 through 77d German Criminal Code (*Strafgesetzbuch*; hereinafter cited as "StGB") pursuant to § 158 subsection (2) StPO, the provisions of which are a compulsory prerequisite for criminal prosecution as to complainant offences (e.g., §§ 123, 185 and 194 StGB).

2. The Victim as Witness

The aggrieved party of a criminal offence usually has an important role as a witness because he can provide testimony regarding the nature and extent of the damage that occurred and also usually details about the cause of the damage. In Germany, there is a general citizens' duty to make a statement as a witness in a

²² Bock, *Kriminologie*, 2nd Ed. 2000, p. 134 talks of over 90% of cases. However, it must be taken into account that crime reporting behaviour differs considerably among the individual offences, cf. *Berckhauer/Steinhilper* (fn. 3), p. 106.

criminal proceeding.²³ This duty must be seen from the background that it is not only the victim who is damaged by a criminal offence, but also the community as such, which provides protection for its members against attacks by others. Pursuant to § 161a subsection (1) sentence 1 StPO, witnesses are obliged to appear at the invitation of the public prosecution office and to provide a statement about the matter. In the event of unjustified absence or refusal, a coercive fine or coercive detention may be imposed on the witness. In addition, he/she will be billed for the costs arising from his/her absence or refusal (§ 161a subsections (2) and (3) StPO). The same applies to the appearance and testimony of a witness before the court (§§ 51, 70 StPO). On the other hand, there is no duty to appear before or provide a statement to the police. In practice, however, most witness examinations are conducted by officials of the police force, which is better equipped with personnel. Finally, it must be noted that there could be circumstances that justify the refusal of a witness to give a statement. Such “rights of refusal to testify” are governed by §§ 52 through 53a StPO. § 52 StPO grants a right of refusal to testify to close relatives of the accused, § 53 StPO grants one to persons who exercise a profession that is characterized by dealing with confidential information (e.g., attorneys or members of parliament). § 53a StPO grants one to their assistants. The scope of individual rights of refusal to testify are very disputed.²⁴ Of interest in the context of victims’ rights, in particular, is the right of close relatives to refuse to testify pursuant to § 52 StPO. This pursues the goal of protecting witnesses from the conflict of testifying against a close relative and, thus, concurrently serves to protect the family.²⁵ On the other hand, there is often a danger that the social milieu of witnesses will exercise influence over them so that they will exercise their right of refusal to testify.

Example: A young woman is brought to a hospital by relatives; she has serious burns on her arms and upper body and internal bleeding. The relatives tell the doctors that there was an accident at home. Because this information is not reconcilable with the medical findings, the police are informed. During police questioning the young woman admits that she has been agonized and hit by her husband’s family for years. At the later court proceeding, the young woman exercises her right to refuse to testify pursuant to § 52 StPO. Because of this the earlier statement by the witness is also no longer usable.²⁶ The acts cannot be proven, because there is no other evidence.

Because, especially in cases of domestic violence – e.g., physical injuries between spouses, rape within marriage, or sexual abuse of children – experience has shown that the crime victim initially provides a statement to law enforcement authorities regarding the crime but then later relies upon the right of refusal to testify so that the statement can no longer be used, in practice the public prosecution office usually applies for examination of the witness by a judge (§ 162 subsection (1) StPO) in such cases. During the later main proceeding the examination of the judge who had examined the witness regarding the statements made to him is admissible.²⁷ In the Rules for Criminal Proceedings and Proceedings on Regulatory Fines (*Richtlinien für das Straf- und Busgeldverfahren*; hereinafter cited as “RiStBV”) – which is an administrative ordinance for the public prosecution offices – this manner of proceeding is expressly recommended, e.g., as to statements from prostitutes against their pimps (RiStBV No. 248).

3. The Victim as Prosecuting Party

Participation by the victim in the criminal proceedings in which the victim also has an accusatory role is only possible by means of private prosecution or as a private accessory prosecutor in a public prosecution. A private prosecution, which is governed by §§ 374 through 394 StPO, is admissible as to certain crimes that are exclusively listed in § 374 subsection (1) StPO, in which there is no public interest in prosecution because of their minor nature.

²³ Collected Decisions of the Federal Constitutional Court (*Entscheidungssammlung des Bundesverfassungsgerichts*; hereinafter cited as “BVerfGE”) 38, 105, 112.

²⁴ Cf. in detail: *Rengier*, die Zeugnisverweigerungsrechte im geltenden und künftigen Strafverfahrensrecht. Grundlagen, Reformfragen und Stellung im System der Beweisverbote und im Revisionsrecht (1979); *Wolter/Schenke* (Ed.), *Zeugnisverweigerungsrechte bei (verdeckten) Ermittlungsmaßnahmen* (2002).

²⁵ Cf. *Gärditz/Stuckenberg* in: *Wolter/Schenke* (fn. 24), pp. 99, 116 et seq.; *Zöller* in: *Wolter/Schenke* (fn. 24), pp. 325, 332 et seq. each with additional citations.

²⁶ This arises from the teleological interpretation of § 252 StPO; cf. Collected Decisions of the Federal Court of Justice in Criminal Matters (*Entscheidungssammlung des Bundesgerichtshofs in Strafsachen*; hereinafter cited as “BGHSt”) 2, 99; 7, 194, 195; 11, 338, 39; 13, 394, 395; 20, 384.

²⁷ BGHSt 32, 25, 29; 36, 384, 385; 45, 342, 345; 46, 189, 195.

Example: A person files a report of a crime against his neighbour because the neighbour repeatedly insulted and threatened him and trespassed on his property. The public prosecution office referred the case to private prosecution because experience shows that public prosecution is not suitable for resolving lasting disputes between neighbours.

However, the public prosecution office can also file public charges itself as to such crimes (§ 376 StPO) or it can assume the criminal prosecution (§ 377 subsection (2) sentence 1 StPO) when it is in the public interest to do so.

Example: A person filing a report of a crime asserts that his neighbour hit him in the face and broke his nose during a dispute. The brutality of the act and the significant injury to the aggrieved person provide a public interest in prosecution in this case (cf. RiStBV No. 133).

If there is no public interest in prosecution, regarding certain crimes – including trespass, defamation, bodily injury, and property damage – the filing of a private prosecution is admissible only after an unsuccessful attempt at conciliation has been made by a conciliation board (§ 380 StPO). Such conciliation boards are set up by the Land justice administrations – e.g., in Berlin it is the arbitration board.²⁸ In practice, with only a 6% judgment rate, private prosecutions only play a negligible role. To some extent it is ascribed a “solely judicial relief and decriminalization function” through which “more effective legal protection is only feigned”.²⁹

Of far more importance in regard to victim protection is the possibility for participation in the public prosecution as a private accessory prosecutor. The private accessory prosecution, which was originally tied to private prosecutions, was fundamentally reformed by the Victims' Protection Act of 1987, by which the victim was granted extensive powers for action in criminal proceedings, particularly in the sense of “equality of arms”.³⁰ Private accessory prosecutions, which are governed by §§ 395 through 402 StPO are admissible as to certain crimes that seriously affect the victim in his personal sphere. The crimes are exclusively listed in § 395 subsections (1) and (2) StPO. These include, e.g., serious sexual crimes, crimes involving bodily injury, pimping, trafficking in human beings, as well as crimes involving libel or slander, which of course must exhibit a certain severity to justify the filing of public charges. It is noteworthy in this context that crimes under § 4 of the Act on Civil Law Protection against Violence and Stalking (*Gewaltschutzgesetz*; hereinafter cited as “GewSchG”) are also entitled to private accessory prosecution since the Victims' Rights Reform Act of 2004. Of particular importance in regard to these offences is that they are linked to a violation of a civil law protective order.

Example: A woman is harassed by her ex-husband by nightly telephone calls, threatened, and followed on the street. The woman obtains a civil law protective order pursuant to § 2 GewSchG, which forbids her ex-husband from calling or approaching his ex-wife. The ex-husband violates this protective order and, thus, is criminally punishable pursuant to § 4 GewSchG. The woman can join the criminal proceeding as a private accessory prosecutor.

There are currently detailed discussions in Germany taking place about the problem described above under the heading of “stalking” in the public and legal policy arenas.³¹ To improve victim protection, legislative measures, particularly the creation of the crime of “stalking”, have been demanded.

Only those who are directly injured by the crime are entitled to join as private accessory prosecutors. In the case of capital crimes, the close relatives of the deceased victim can also join as private accessory prosecutors. The private accessory prosecutor has a series of rights that were decisively strengthened by the Victims' Rights Reform Act of 2004. Thus, for example, upon application an attorney will be ordered as

²⁸ Overview of Land statutes in *Meyer-Goßner*, StPO, 48th Ed., § 380 margin note 3.

²⁹ *Rieß* (fn. 2), 289.

³⁰ Details on the origins and objectives of private accessory prosecution: *Hinz*, Opferschutz, Genugtuung, Wiedergutmachung, DRiZ 2001, 321.

³¹ Cf. e.g., *Sieverding*, Stalking – Möglichkeiten und Grenzen polizeilichen Managements, *Kriminalistik* 2004, 763; *Hoffmann*, Stalking. Polizeiliche Prävention und Krisenmanagement, *Kriminalistik* 2003, 726; *Ker-bein/Pröbsting*, Stalking, *ZRP* 2002, 76.

legal advisor to the private accessory prosecutor in the case of capital crimes or the crime of trafficking in human beings; in other cases financial assistance for the proceedings will be ordered for calling in an attorney (§ 397a StPO). The private accessory prosecutor also has extensive possibilities for influencing the main proceedings, such as by challenging judges or experts, by exercising the right to ask questions or the right to apply for evidence to be taken, or by the right to make statements (§ 397 subsection (1) StPO).

4. The Victim as Co-defendant

New criminological and victimological studies show that there is no “typical victim” of a crime, but rather, that frequently there is role overlapping between offenders and victims, which indicate both victimogenic and criminogenic lifestyles.³² Thus, it is also important to perceive victims in their role as co-defendant. In this context the general legal principle applies, that no one shall be forced to cooperate in their own conviction (*nemo tenetur se ipsum accusare or nemo tenetur se ipsum prodere*).³³ This idea is accounted for in § 55 StPO, which allows any witness to refuse to provide information in response to questions where the answer could place the witness or a close relative of the witness at the risk of criminal prosecution. The witness himself must recognize whether there is self-incrimination relevance in regard to the questions. His protection in this respect is far behind that of the accused, who has to be examined prior to the conclusion of the investigations (§ 163a subsection (1) StPO), but who has unlimited freedom to make a statement about the matter or not (§ 136 subsection (1) sentence 2, § 163a subsection (4) sentence 2 StPO). Because of the right of the witness to refuse to provide information, it may happen that it cannot be proven that the accused committed the offence, if the victim was involved in the crime and, thus, uses his right of refusal to provide information.

Example: An accused person is suspected of trafficking in human beings and pimping. The prosecution witness is suspected of committing the crime of prostitution in the context of which the accused is under suspicion.

In such cases it is advisable to first conclude the proceedings against the prosecution witness. If a final conviction has been made or the proceedings terminated, she is no longer an accused and must comply with her duty as a witness. A special rule for victims of coercion or extortion is contained in § 154c StPO. If coercion or extortion is committed by the threat of disclosing a criminal offence, the provision allows the public prosecution office to refrain from prosecuting the crime that is threatened to be disclosed if conciliation is not necessary because of the seriousness of the crime. The same applies if the victim’s crime is made known by his report of the coercion or extortion.

B. The Position of the Victim in Criminal Proceedings from a Victimological Perspective

At the outset it was stated that the legislature has recently paid increasing attention to victims as such and has created rules that serve to protect victims in criminal proceedings.

1. Victimization in the Criminal Proceedings

Victimological studies from the 1980s and 1990s show that for the victim of a crime, the criminal proceedings can be a considerable burden. Particularly for victims of violent crimes, serious psychological damage often arises, which in the long term can also contribute to an escalation of problems. It is especially important for crime victims to be taken seriously by the police and before the court. Crime victims often feel themselves patronized by criminal prosecution authorities or treated as a routine case, which leads to feelings of helplessness and weakness.³⁴ Victimology distinguishes in this sense among three levels of victimization: primary victimization comes from being a victim of the crime itself (e.g., through the physical suffering and psychological damage), secondary victimization stems from the reaction of the victim’s social milieu (e.g., suffering from stigmatization, social isolation, or degrading questioning), and tertiary victimization is the assumption and internalization of the role of victim through repeated primary and

³² Bock (fn. 22), p. 135; Kilchling, Empirische Erkenntnisse aus Kriminologie und Viktimologie zur Lage von Opfern, DVJJ-Journal 2002, 14, 15 et seq.

³³ Detail: Verrel, Die Selbstbelastungsfreiheit im Strafverfahren. Ein Beitrag zur Konturierung eines überdehnten Verfahrensgrundsatzes (2001), pp. 269 et seq.

³⁴ Baurmann/Schädler, Das Opfer nach der Straftat – seine Erwartungen und Perspektiven, 2nd Ed. 1999, p. 302.

secondary victimization.³⁵ The repeated confrontation of the victim with the offence and the offenders in the context of police, public prosecution office, and court examinations, as well as questioning in the context of the main proceeding in some cases through numerous court instances, can further secondary and tertiary victimization. There are demands on the part of researchers that – just as offenders are aided in their re-socialization so that future victimizations should be avoided – so must victims receive professional support in their reintegration.³⁶ Both of these aspects – victim protection on the one hand and victim assistance on the other – recently have been increasingly accounted for in German criminal procedure law.

2. Victim Protection in Criminal Proceedings

i) *General duties of protection*

The courts and the public prosecution offices are generally called upon to show consideration for the needs of the victim in carrying out their official duties. On the one hand, this is the product of the idea that the state must protect and respect the human dignity of the victim (Art. 1 subsection (1) sentence 2 Basic Law (*Grundgesetz*) and that the victim, thus, cannot be made into an “object of the criminal proceeding”.³⁷ In § 81d StPO for example, these ideas are implemented in that way, that in the case of physical examinations it must be paid regard to the modesty of the affected party. In addition, the constitutional law principle of proportionality obligates the state to keep the strains associated with intrusions for affected parties to a minimum. This is expressly set forth for the public prosecution office in RiStBV No. 4c. In accordance therewith, the public prosecution office must take into account that the strains arising for the injured party from the criminal proceedings are to be kept to a minimum and that the victim’s needs must be considered in the criminal proceedings. In the main proceeding this is guaranteed by the presiding judge, who is obliged to maintain order during the hearing (§ 176 Courts Constitution Act (*Gerichtsverfassungsgesetz*; hereinafter cited as “GVG”). If participants in the proceedings violate the orders issued by the presiding judge, they can be ejected from the hearing room and a coercive fine or coercive detention may be ordered and immediately enforced (§§ 177, 178 GVG). In addition, the protection of victims in criminal proceedings is also guaranteed by a number of other detailed regulations.

ii) *Control over the right to ask questions*

Victimological studies show that it is especially important for crime victims to be taken seriously as a person in the criminal proceedings. Experience shows that placing the veracity of the victim in doubt and asking disgracing or degrading questions leads to the victim becoming insecure or feeling provoked and may also contribute to an internalization of the role of victim. Control over the right to ask questions by the presiding judge in the main proceeding, thus, has an important role in regard to victim protection. Pursuant to § 68a subsection (1) StPO, questions that could bring dishonour to the witness or his close relatives or that affect the witness’s private life may only be asked when essential to clarification of the matter.

Example: The defendant accused of committing rape admits having been friends with the victim for some time and that they had sexual intercourse by mutual consent several times. In this case, questioning the victim regarding this is essential to clarify whether the sex had taken place by mutual consent.

Pursuant to § 240 StPO, the presiding judge must also allow the public prosecution office, the defendant, defence counsel, and the lay judges to question the victim. However, he can reject unsuitable questions or those that are not relevant to the matter pursuant to § 241 subsection (2) StPO. RiStBV No. 19a contains a special provision for examinations by the public prosecution office during investigations proceedings. In accordance therewith, the victim must be treated with particular empathy and consideration during the examination when it is recognizable that for the victim examination as a witness is associated with significant psychological strain. Moreover, the presence of a trusted person should be allowed when the purpose of the examination is not thereby endangered. During a judicial examination the public prosecutor must pay particular attention that the victim is not subjected to more strain by the questions and explanations of the accused and his defence counsel than must be accepted in the interest of uncovering the

³⁵ Bock (fn. 22), p. 135; detail: Kiefl/Lamneck, *Soziologie des Opfers. Theorie, Methoden und Empirie der Viktimologie* (1986), pp. 170 et seq.

³⁶ Baurmann/Schädler (fn. 34), p. 305.

³⁷ BVerfGE 9, 89, 95; 30, 1, 25; 57, 250, 275; 109, 279, 312.

truth (RiStBV No. 19a subsection (2) sentence 2). Because repeated examination of the victim prior to the main proceeding can lead to significant strain for the victim, this should be avoided whenever possible (RiStBV No. 19a subsection (3)).

iii) Video examination

Through the Witness Protection Act of 1998, the possibility was created in the StPO for examining witnesses at risk on audio-video tape and then introducing these tapes as evidence in the main proceeding. Pursuant to § 58a subsection (1) StPO such recordings should generally take place in the case of persons under 16 years of age who are injured by a crime or when there is concern that the witness will not be able to be examined during the main proceeding and the recording is necessary to the discovery of the truth. Such recordings can be introduced as evidence in the main proceeding under certain – strict – prerequisites, which also apply to the reading out of an examination transcript (§ 255a subsection (1) in conjunction with §§ 251, 252, 253, and 255 StPO). In addition, § 255a subsection (2) StPO allows the examination of a witness under 16 years of age to be replaced by the introduction of the recording of an earlier judicial examination if the defendant and his defence counsel had the opportunity to participate therein. However, this is admissible only as to certain serious crimes, particularly those against sexual self-determination and against life. Above all, video-taping has significant importance in regard to children or juveniles who are victims of sexual crimes.

Example: A woman is accused of having caused the 13 year old son of her friend to have sexual intercourse with her against his will numerous times by threatening him with telling his parents about the incidents. Since it is expected that the victim will not make a statement at the main proceeding in the presence of the defendant and his parents, the judicial examination of the victim is videotaped and these recordings are played back during the main proceeding.

This type of presentation of the evidence is an exception under German criminal procedure law, because under the principle of immediacy evidence that is more factually direct must be used before evidence that is more removed (cf. § 250 StPO).³⁸

iv) Exclusion of the defendant and the public

In practice, criminal prosecutions are not infrequently confronted with the problem that witnesses only testify at the main proceeding in an unclear manner or make statements that deviate from their statements to the police and, thus, the discovery of the truth at the main proceeding is made considerably more difficult. The cause of this behaviour regarding statements often can be traced not only to gaps in memory but also to the fear on the part of the witness of being exposed to reprisals from the defendant and those around him/her as to incriminating statements. This problem is taken into account in § 247 sentence 1 StPO, which allows the defendant to be removed from the hearing room during an examination when there is a fear that a codefendant or a witness will not speak truthfully during his/her testimony in the presence of the defendant. In addition, through the Victims' Protection Act of 1986 the provision was expanded to the effect that removal of the defendant is also possible when it is feared that the examination of a witness under the age of 16 in the presence of the defendant will cause considerable detriment to the well-being of the witness or when there is a serious danger of a detriment to his/her health. Pursuant to § 247a StPO, which was incorporated into the StPO by the Witness Protection Act of 1998, it is also possible to examine the witness outside of the hearing room at another location and to concurrently transmit the audio and video of the testimony into the hearing room if there is a risk of a serious detriment to the well-being of the witness. Pursuant to § 168e StPO a similar manner of proceeding is also admissible in investigation proceedings.

If there could be a risk to the witness's life, limb, or freedom during the main proceeding, the court may also exclude the public from the hearing (§ 172 no. 1a GVG). The exclusion of the public is also admissible to the extent circumstances about the witness's private sphere will be addressed, the public disclosure of which would violate interests of his/her that are worthy of protection (§ 171b subsection (1) sentence 1 GVG). As to the crimes of promoting prostitution, trafficking in human beings, and pimping, RiStBV No. 248 subsection (2) instructs the public prosecutor to work toward the exclusion of the defendant and the public when it is feared that the witness will not speak the truth in the presence of certain persons during the main

³⁸ More detail: *Roxin*, Strafverfahrensrecht, 24th Ed., pp. 335 et seq.

proceeding. These measures are of particular note because the principle that the main proceeding must take place in the presence of the defendant (§ 231 StPO) and the public (§ 169 GVG) is of high importance in German criminal procedure law.

v) *Other rights of the victim*

Through the Victims' Protection Act of 1986 and the Victims' Rights Reform Act of 2004, a series of information and participation rights for the victim were statutorily embodied in §§ 406d through 406h StPO. In particular, pursuant to § 406d StPO, upon application the victim is not only informed of the outcome of the proceedings, but also of whether detention measures have been ordered or ended against the accused or the convicted person or whether first-time relaxation of imprisonment or prisoner's leave have been granted, if the victim shows a justified interest in this information and the defendant or convicted person does not have a prevailing interest against this. Pursuant to § 406e StPO, an attorney may inspect the court files on behalf of the victim, which, e.g., is necessary for the assertion of civil law claims. § 406f StPO allows the victim to make use of the assistance of an attorney in the criminal proceedings or to be represented by one. If the victim is examined as a witness, upon application he shall be allowed to have a trusted person present during the examination (§ 406f subsection (3) sentence 1 StPO). Pursuant to § 406h StPO, the victim shall be informed of his rights by the court.

3. Child and Juvenile Victims

The statutory provisions that serve to protect child and juvenile crime victims in criminal proceedings³⁹ deserve particular attention due to the special protective value of these persons.⁴⁰ The expanded rights in comparison to those of adults as to the introduction of audio-visual recordings for witnesses under the age of 16 (§ 58a subsection (1) sentence 2 no. 1, § 255a subsection (2) StPO) and the correspondingly expanded rights for the exclusion of the defendant and the public (§ 247 sentence 2 StPO, § 172 no. 4 GVG) are addressed above. In addition, there are numerous special provisions in the Guidelines for the Public Prosecution Office that serve to protect children and juveniles.⁴¹ Thus, pursuant to RiStBV No. 19 subsection (1), repeated examination of children and juveniles prior to the main proceeding should be avoided when possible because of the psychological strains for these witnesses associated therewith. Pursuant to RiStBV No. 135 subsection 3, children and juveniles should be examined before other witnesses when possible and, to the extent possible, supervised and cared for in waiting rooms. The background of this provision is that children and juveniles experience particular stress from waiting for their examination. In the case of sexual crimes, RiStBV No. 222 subsection (1) provides that for the examination of children an expert must be called in who has particular knowledge and experience in the area of child psychology. If the person accused of a sexual crime who lives in a household with the victim or has the opportunity to have a direct affect on the victim is set free, pursuant to RiStBV No. 221 subsection (2), the Youth Office must be promptly notified so that necessary measures for the protection of the victim can be taken. The provision in § 26 GVG, which governs the competence of the regional courts in youth protection matters, has significant practical relevance. In accordance therewith a special chamber for youth protection matters at the regional court has competence over criminal offences by adults through which a child or juvenile was injured or directly endangered. Charges should be filed at these courts especially when children or juveniles will be necessary as witnesses in the proceedings. The bundling of competencies should be achieved at these courts in regard to the protection of child and juvenile witnesses – e.g., through the use of video recording technology.

C. Special Witness Protection Measures

In addition to the provisions discussed above, which are primarily aimed at the reduction of the psychological strains on the victim arising from the criminal proceedings and, thus, have a relatively broad

³⁹ Not considered here are protective provisions outside of criminal proceedings, namely those pursuant to the Child and Youth Assistance Act (*Kinder- und Jugendhilfegesetz*); More detail on this: *Stumpf*, Opferschutz bei Kindesmißhandlungen (1995), pp. 72 et seq.

⁴⁰ Cf. in detail on the problem area of child victims: *Kipper*, Schutz kindlicher Opferzeugen im Strafverfahren (2001).

⁴¹ Practical tips in *Blumenstein*, Kindliche Opferzeugen im Strafprozess – unkindgemäße Schicksale und Verfahrensweisen, DVJJ-Journal 2002, 28; *Kilian*, Opferschutz und Wahrheitsfindung – ein Widerspruch?, DRiZ 1999, 256; *Zschockelt/Wegner*, Opferschutz und Wahrheitsfindung bei der Vernehmung von Kindern in Verfahren wegen sexuellen Mißbrauchs, NStZ 1996, 305.

area of application in practice, German law also provides measures for the protection of especially endangered witnesses.

1. Promise of Confidentiality

In order to enable verification of the statements by a witness through bringing in other evidence, the identity of the witness generally must be known to the court. Information regarding the person may not – even upon the existence of the right of refusal to testify – be refused. In exceptional cases, however, the public prosecution office can guarantee the secrecy of the identity of a witness if there is a particular risk situation for the witness. This especially arises in the area of serious crimes, particularly organized crime, illegal trafficking in drugs and weapons, counterfeiting of money, and state security-related offences. The victim's statements are then introduced into the main proceeding by the police officer who had examined the witness. There are several provisions that deal with the problem of confidentiality in certain stages of the criminal proceeding (cf. § 68 subsection (2) and (3), § 161a subsection (1) sentence 2, § 200 subsection (1) sentences 3 and 4, § 222 subsection (1) sentence 3 StPO) and provisions specially designed for the protection of civil servants (§§ 54, 96 StPO) and undercover agents (§ 110b subsection (3) StPO). In practice, however, this manner of proceeding is used with a great deal of restraint. Appendix D to the RiStBV contains detailed guidelines for this procedure.

2. Witness Protection Programmes

In accordance with the case law of the Federal Constitutional Court (*Bundesverfassungsgericht*), witnesses must be protected by the state from danger to life or limb to which they may be exposed through participation in a criminal proceeding.⁴² However, there is also a particularly large state interest in obtaining and maintaining the ability and willingness of important witnesses to testify, especially those from the offender's immediate surroundings. This can only be achieved when such persons are provided effective protection against reprisal.⁴³ This is accounted for in the Witness Protection Harmonization Act (*Zeugenschutz-Harmonisierungsgesetz*; hereinafter cited as "ZSHG") of 2001, through which for the first time a clear statutory basis for witness protection measures was created. Pursuant to § 1 ZSHG, a witness, his relatives, and other persons close to him can be protected when, because of their willingness to testify, they are endangered as to life, limb, health, freedom, or significant assets, they are suitable for witness protection measures, and they agree to such measures. Among others, the witness and his/her relatives may be temporarily given new identities pursuant to § 5 ZSHG. To protect against the danger, at the beginning of the protective measures the person to be protected usually will be removed from their living environment and brought to another location. Additional supporting measures may include psychological care, temporarily securing their livelihood, protective observation, and furnishing documents for their new identity.

⁴² BVerfGE 57, 250, 284.

⁴³ Cf. Federal Parliament (Bundestag) Printed Matter 14/638, pp. 1, 11; 14/6279, pp. 3, 8.