

Vortrag Dubrovnik SS 2013

Legal protection of victims in Germany

0. Begrüßung

Good evening ladies and gentlemen. My name is Mario Nahrwold. I`m professor at the university of applied science in Kiel (Germany) in the department of social work and health. I teach the students the different fields of law, especially in civil and public law, but also in criminal matters. So you see I`m a jurist.

At first I won`t forget to say a special thank you to E. Weitekamp and the organizers who invited me to this course. Everything works fine!

I. Introduction

So let`s start! Today I`ll give you a closer look to the legal protection of victims in Germany. Due to the short time I`ll focus on a brief overview.

At first I have to say that the protection of victims in Germany is not only recognized as a political or moral obligation. From the perspective of the law it is above all a constitutional responsibility for the state to protect its citizens against victimization, if they cannot do themselves. The question is what the state does to reach this aim.

He can do this by pure safety mechanism (like more policeman on the streets etc.), programs for clarification (Aufklärung) but also with legal regulations. This lecture will focus the last point.

II. Protection in all branches of law

Let`s come and see the way of legal protection of victims in Germany. This protection can be found in all three major branches of law, namely the criminal, public and civil law.

1. Protection by criminal law

Let`s start with the most important protection by the criminal law.

This protection takes place on two levels. First it should be aimed through of the provision of the substantive criminal law. Furthermore there are rules of procedural rights of victims in the criminal procedure which should be used to protect them.

a) Substantive criminal law

First I come to the substantive criminal law (in Germany mainly found in the criminal code – StGB) that contains standards which makes certain behaviors against potential victims punishable. According to the preventative purpose of punitive theories in principle any criminal provision which protects personal interests also

serves the protection of victims. From a victim perspective the substantive criminal law tries to avoid a primary victimization.

I'll give you an example.

But we can discuss whether criminal provisions are able to shy away potential perpetrators from committing a crime.

b) Procedural rights of victims in Criminal Proceedings

Now I come to the procedural rights of victims in criminal proceedings. From a victim's perspective these rights basically have the aim to avoid a secondary victimization. These rights can be divided into participation, information and protection rights.

aa) Participation Rights

Let's have a look on the participation rights. There are several roles for the victims to take part in a criminal proceeding. Normally they are only in the role of a witness. In certain cases they can occur as accessory prosecutor, private prosecutor, in an adhesive procedure with a civil action or participate by VOM.

(1) Accessory Prosecutor

What is meant by accessory prosecution. In particular serious crimes victims get real influence in the criminal proceeding. As the name says, this role of the victim depends on a charge filed by the official prosecutor.

Here are some rights of an accessory prosecutor in contrast to the victim who is only a witness without a special role in the criminal process:

- he/she has the right to be present at any time of the trial. In contrast, the victim, who's simply the witness, is only present during the witness examination.
- he/she has the right to ask questions at any time
- he/she can reject judges or experts because they are prejudiced
- he/she has the right to table an application for evidence, which must be followed by the court
- he/she has the right of a closing argument, including proposals of concrete penalties
- if the offender is not convicted he/she can appeal (normally only the right of the prosecutor)

But I have to be honest. This is the theory. In practice the accessory prosecution is often limited by the possibility of the prosecutor to dismiss the offence for lack of evidence or triviality. In this case there are no special participatory rights for the victim because there is no prosecution he/she can join in.

(2) Private Prosecution

Now let's look at the private Prosecution. For less serious offences that primarily violate the interests of individual citizens and not the public's interest, victims have the option to file a private suit. This is relevant, if the prosecutor won't file a charge, because there is no public interest and if the victim wishes to seek reparation through the initiation of a criminal process, he/she has the option in certain cases.

(3) Adhesive procedure

Another special role for the victim is the adhesive procedure. From the victims perspective it is of particular interest, that the offender compensates the damage he has caused. This is actually a question for a proceeding at a civil court because the damage compensation touches the civil law protection for victims (I'll come to this later). So if the offender is not willing to pay the damage the victim has two possibilities:

He/she is able to raise a charge in a separate civil proceeding or he/she files the charge within the criminal proceeding. In the last case the criminal court decides two questions:

1. Is the offender guilty and what is the penalty?
2. How much has he to pay for damage compensation?

This second way has at least three advantages:

1. it prevent that the victim is confronted with the story of the crime he/she suffered from for another time in a separate civil proceeding (beware: there are already enough questions in the several stages of the witness examination at the police, the prosecutor and the court)
2. he/she avoids a different judgment by the civil court (please remember: every court in Germany is independent)
3. this proceeding is simple faster than two proceeding at several courts

The only disadvantage I see is the fact, that the criminal judges are not so familiar with the civil law because they basically deal with criminal law. That could be lead to unwelcome results.

(4) VOM

Another important component for the protection of victims and their participation in the criminal proceeding is the Victim-Offender Mediation (VOM).

With VOM, the victim is in contrast to the simple role as a mere witness, actively involved in the processing of a crime. As a witness without a special role the injured merely provides the role of evidence establishing, who will be released, when he did his testimony. VOM gives the victim the ability to use the criminal proceeding to come to terms with their own victimization and to talk about desires and emotions which move them. Victims can ask important questions such as why, they can find a way for reparation and can confront the offender with what the crime has done to them. On the other hand VOM gives the offender the chance to take on the responsibility of his crime.

The question is, however, how a case results in a VOM. In principle, all parties at any time can initiate a VOM. In order to strengthen the practice of VOM, in 1999 both the prosecution and courts were obliged to consider the possibility of VOM at each stage of the process if there are suitable cases (§155 a StPO). The Problem: Practitioners complains, that even after this law, the potential for the VOM is not exhausted. What do you mean?

It must be noted that under German criminal law in principle any offense is suitable for a VOM.

I think, to strengthen VOM it would be helpful if the legislator creates an enforceable right to carry out VOM if the offender agrees or at least if he forces the court or the prosecutor to give an explanation why they don't encourage VOM in the case (like other countries – e.g. Belgien).

bb) Victims` rights to information

Now I come to the victims` rights to information

The injured has various rights to information in criminal proceedings.

1. First, the victim should be informed whether and for what reason a criminal process has been set against the accused (§172 StPO). In this case he/she has the possibility to force the public prosecutor to file a charge by a suit to a special court.
2. At the victims request, they must be informed on the outcome of the judicial process, loosening of prison rules and release from prison.
3. Injured parties have the right to access the criminal records (§ 406 e StPO).
4. Furthermore they are notified of these and additional rights as early as possible, written in a language they understand.

cc) Protection Rights

Let`s have a look on the protection rights of the victim during the criminal proceeding.

1. Victims may be represented by an attorney or an assistant in the whole process, in particular for interrogation – even by the police (§ 406 f StPO).
2. Victims of particular serious crimes have a right of a special victim attorney at public`s costs (§ 397 a StPO).
3. To protect against secondary victimization through the criminal procedure, the law provides various measures:
 - a) Witnesses can refuse to provide information about their residence or identity, if there is reason to fear that they are at risk (§ 68 II, III StPO).
 - b) In addition, the public may be excluded from all or part of the trial in order to protect the victim's privacy or if their inclusion would otherwise endanger the witnesses body, life or freedom (§172 Nr. 1 GVG).
 - c) The court may remove the defendant for the duration of the examination of the witness from the courtroom if intimidation of the witness is feared (§ 247 StPO).
 - d) In addition, the witness may be questioned during the trial at a different location via video-audio live broadcast if it is feared that the victim`s presence in the courtroom brings serious drawbacks for their welfare (§ 247 a StPO).
 - e) To avoid multiple interrogations, including those conducted by police and prosecution, witness testimonials may also be recorded through video and audio media and be introduced and used as evidence in the criminal proceedings (§ 255 a StPO). This applies in particular to the protection of child and juvenile witnesses (§ 58 a I Nr. 1 StPO).

2. Protection of Victims in Civil Law

So that was the protection of victims by criminal law. At the end of my lecture I`ll make some short notes to the protection by civil and public law.

The civil law the protection of victims in addition to criminal law by allowing claims of the victim against the perpetrator. These claims can be separated in two categories: Claims for compensation and claims for omission (not to do sth.).

a) Claims for Compensation

The claim for compensation includes compensation for damages which lead to intangible losses (medical/treatment costs, repair costs, etc.) or to immaterial damage (compensation for pain and suffering).

These claims are supported by other regulations.

- Contrary to the normal limitation of three years, Compensation claims that are based on injury to life, body, health or freedom filed up to 30 years after the incident (§ 199 II BGB).
- In cases of sexual offenses the run of limitations for claims does not begin until the victims age of 21 (§ 208 BGB).
- In addition it is to a greater extent than usual possible to seize the earned income of the perpetrators to realize the compensation (§ 850 f II ZPO).
- Sometimes it happens, that the perpetrator sells the story of his crime to journalist etc. The Victims Claim Compensation Act grants the injured the right to secure the satisfaction of its claims for damages in the way that the victim has priority access to this money compared to other creditors of the perpetrator.

b) Claims for omission

Let`s see the claims for omission.

Both the criminal law and the compensation for damages deal with the crime for the past. But the victim is often concerned that harm or harassment will not reoccur in the future. To combat especially domestic violence therefore in 2002 the Violence Protection Act was enacted. The act provides for two things:

aa) Protection orders

Firstly, the civil court, can take protection orders at the request of the injured person, which are designed to prevent further injury. Such protection orders come into question if:

- The offender has violated the body, health or liberty of the victim
- The offender has made threats to the victim
- The offender has entered the apartment of the victim
- The offender has unacceptably harassed the victim

In these cases, the court may order that the offender shall refrain:

- From entering the apartment of the victim
- To reside in a certain radius of the apartment
- From visiting specific places/locations/areas, where the victim often stays/frequents
- Connecting to the victim (by phone, internet)
- Meeting the victim

bb) Assign the home to the victim

In addition, the court may order that the offender has to temporarily leave the shared home of the injured person. This applies even if the perpetrator is the owner of the property.

3. Protection of Victim in public Law

Finally, I'll examine how public law can contribute to the protection of victims. As the public law regulates the legal relationship between the citizens and the state, the victim is entitled to protection by the state. This occurs in two ways:

a) Emergency response law

The aim of public protection for citizens firstly is to prevent victimization (primary victimization). Therefore in addition to the abstract substantive criminal law the concrete emergency response law gives the emergency department and police the possibility to deal with dangerous situations even for potential victims to prevent primarily victimization. This law is used to combat possible dangers in advance, before it comes to an injury. Therefore the emergency response authorities can take measures so that actions do not result in injury or harm of any persons.

b) Victim compensation act

If a German citizen, despite all measures to prevent violation becomes a victim of an intentional crime, he/she is entitled to compensation against the state under certain conditions set by the Victims Compensation Act. The victim then receives compensation from the State, due to health and economic consequences, in the form

of reimbursement of the cost for medical treatment and if necessary a damaged pension.

III. Summary

So you have seen, that there are several instruments in german law to protect the victims against primarily and secondary victimization. The legislator steadily increased this protection. The last step on this way is an act enacted since March 2013 to strengthen the rights I mentioned above for victims from sexual abuse, especially if they are childs.