

**VICTIM PROTECTION IN CRIMINAL PROCEEDINGS  
THE VICTIM'S RIGHTS TO INFORMATION, PARTICIPATION AND  
PROTECTION IN CRIMINAL PROCEEDINGS**

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**I. INTRODUCTION**

“In criminal proceedings it’s all just about the offender!” Statements like this - and similar remarks – have been made by the victims of criminal offences over and over again.

Of course criminal proceedings are necessarily oriented towards offenders. Whether a criminal offence has been committed and whether the perpetrator is guilty has to be established in accordance with Rule of Law criteria and provisions. These are core Rule of Law requirements that nobody wants to weaken. However, they are just one aspect of the matter.

It is particularly the case that a social state based on the Rule of Law cannot just confine itself to calling the offender to account – however important that may be. A social state based on the Rule of Law also has the duty of showing concern for the victims of a criminal offence. The victims are not only burdened with the offence; they also face the burden of a criminal trial. Here the victim is once again confronted with the offence. If the victim has to give testimony against the offender in court, he or she will have to face the offender there again. The anxiety and feelings experienced here particularly by the victims of sexual offences or of serious offences involving violence cause great stress. Repressed feelings come to the surface again through being confronted by the offender.

Giving greater weight in criminal proceedings to the victim’s interests and developing their rights has, for a long time now, been the focus of various legislative projects in relation to the German Criminal Procedure Code. This has not, however, always been the case. For a long time it was actually the offender, his rights and his protection that took up the foreground. It has only been since the 1980s with the scientific advancement of victimology – the academic discipline concerned with the victims of crime – that a lively discussion was set in motion regarding victim protection in criminal proceedings. A first important milestone in the course of this discussion was the passage of victim protection legislation in 1986. The discussion that had started continued, and further important legislative projects followed with regard to victim protection.

Today, in the German Criminal Procedure Code, we have a comprehensive set of provisions guaranteeing the rights and the protection of victims in criminal proceedings. Nevertheless, there is a lot that still has to be done. At the moment, a reform of the German Criminal Procedure Code is under way in Germany, and here once again one of the main areas of attention is victim protection.

I would like to outline the measures in German criminal procedure law that relate to the protection of victims and witnesses. I have divided my paper into two parts.

In the first part I will be describing the victim’s legal position. I shall be going into the information and procedural rights of victims during criminal proceedings. Do victims get information on the outcome of the investigation proceedings? Are they informed about the stage proceedings have reached and about the further course of proceedings? Do victims hear anything about the outcome of the court proceedings? Are victims

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allowed to inspect the files? Are victims informed about the offender's custody or release from custody? Are they allowed to be present during the court hearing? Are victims allowed to participate in the proceedings in certain cases?

I would like to answer these questions for you and show what the improvements are that we are aiming at in the framework of our reform of criminal proceedings, especially as regards rights to information.

In the second part I am going to look at the victim's situation as a witness in the proceedings. Are any persons who may be rendering assistance allowed to be present during the examination of the victim? Are victims required to give their personal particulars at the examination? Can a victim be examined by video link? Does the victim have to give testimony in the defendant's presence or in front of the general public? Does the victim have to wait for his or her examination in the corridor outside the courtroom, where he may be exposed to meeting the defendant? You will be hearing the answers to these questions in the second part of my paper.

## **II. PART 1: INFORMATION AND PARTICIPATION RIGHTS OF THE VICTIM IN CRIMINAL PROCEEDINGS**

### **A. Information Rights**

Victims of criminal offences who have laid a criminal information and who want the offender to be called to account obviously want to hear what has happened to their criminal information. In the German Criminal Procedure Code their rights to information are dealt with in various places.

#### 1. Information During the Investigation Proceedings

It is provided by statute that the victim of a criminal offence who has also laid a criminal information will automatically be notified by the public prosecution office when the investigation proceedings are terminated (section 171 German Criminal Procedure Code, Number 89 of the Guidelines for Criminal Proceedings and for Regulatory Fining Proceedings). These Guidelines apply uniformly throughout the Federation. They take the form of directives for action on the part of public prosecutors in normal cases.

#### 2. Information During the Court Proceedings (Intermediate and Main Proceedings)

In regard to the question of what information the victim receives during court proceedings one has to bear in mind that the proceedings are not party proceedings. The victim is not a plaintiff or a party to the proceedings. As a rule, victims are witnesses in the proceedings. If, however, they are not needed in the criminal proceedings as witnesses, the main proceedings not infrequently take place without the participation of the victim of the offence. This may, for instance, be the case where the offender has made a confession.

#### *Notification of the date set down for the main (court) hearing*

For the reason just stated victims are not automatically notified about when the court hearing against the defendant will be taking place. If a victim has not been summoned as a witness, there is basically no obligation to inform him of the date set down for the court hearing. Here the victim is merely able to make a request for relevant information from the court or the public prosecution office. In practice, the court or the public prosecution office will certainly give the victim the information he seeks. But there is no statutory obligation for them to do so.

#### *Information on the stage reached in the proceedings*

There is also no express obligation for the court or the public prosecution office to provide the victim with information on the stage proceedings have reached or on the course of proceedings. However, the victim is free to address the relevant question to the court or to the public prosecution office at any time. The court or the public prosecution office will decide – exercising their duty-bound discretion – on the extent to which information will be given.

#### *Information on the outcome of the court proceedings*

The victim will not automatically be informed of the outcome of the court proceedings. If the victim wants to know anything about the outcome, he will have to make the relevant application to the court. In that case the court will, however, be obliged to give the victim the information (section 406d German Criminal Procedure Code).

### 3. Inspection of Files and Information and Copies from the Files

In principle, the victim is not able to inspect the files himself. The provisions of German Criminal Procedure Code are designed in such a way as to make inspection always take place via a *Rechtsanwalt* – in other words, via a lawyer practising as an attorney.

The reason for these provisions is mainly due to aspects arising under the law of data protection. In a case file one finds a large amount of information concerning not only the victim but also the offender and other people. It is expected of a *Rechtsanwalt*, i.e. a practising attorney, that he or she will deal with caution and in a conscientious manner with the information in the files – by virtue of his being bound by professional ethics. Victims may, however, be given information or copies from the files (section 406e paragraph 5 German Criminal Procedure Code). They will, however, have to address the relevant application to the public prosecution office or the court. The public prosecution office or the court will then decide on this application in the exercise of their duty-bound discretion. A refusal to give information or copies can be contested in court (section 406e paragraph 4 and 5 German Criminal Procedure Code).

Let me give you an example here:

An accident victim wants to have a copy of the sketch made of the accident so as to be able to submit it to the insurance company. The public prosecution office, however, refuses to hand over a copy of the sketch. The victim can now turn to the court and obtain a review of this refusal.

### 4. Information about Release from Custody

Particularly for the victims of sexual offences and of offences involving violence it is important for their own sense of personal wellbeing that they should know whether the offender is at liberty or not. According to law as it presently stands, the victim of a criminal offence can only request the penal institution – in the form of a written application – to state whether the offender is in custody and when his release can foreseeably be reckoned with. This is dealt with in section 180 paragraph 5 of the Prison Act.

The prison authority is, however, not obliged to provide information. In making its decision, it must weigh up the legitimate interest of the victim in obtaining this information against such interests of the prison inmate as are worthy of protection.

The victim can also ask the public prosecution office or the court. They are not obliged to give information. They will decide in the exercise of their duty-bound discretion.

### 5. Reform of the German Criminal Procedure Code

As we see, the rights of the victim of a criminal offence to notification and information have been dealt with only in respect of certain points. But practice shows that the need for information felt by victims of criminal offences is much more substantial. For this reason, the wish for further development of information rights has repeatedly been expressed.

At present, a bill is being drafted to reform the German Criminal Procedure Code. One of the focal points of this envisaged legislation is victim protection. Particular attention is being devoted both to eliminating the deficit with regard to information rights and to taking greater account of the interests of victims. Criminal proceedings are also about victims. They are the ones who suffer. Violation by the offender of their legal positions is what forms the subject-matter of the proceedings. The victims' desire not to be excluded from these proceedings because of lack of information is certainly understandable. That the victims of offences involving violence and of sexual offences want to know whether or not they face the possibility of bumping into the offender in the street is equally understandable.

On this ground it is envisaged that in future victims will be able to obtain the following information upon application:

- Information on the course of proceedings and on the stage they have reached.
- Information about the decision on whether to open the main proceedings.
- Notification of the date set down for the main (court) hearing.

- Information on custody, committal or release, or on relaxation of the conditions under which the offender concerned is being held in prison.

## **B. Proceedings to Compel Public Charges**

Ladies and Gentlemen – as I said just now, the victims of a criminal offence receive notification from the public prosecution office when the proceedings have provisionally been terminated. But what can a victim do if he or she is not satisfied with such termination? Is there any chance of the victim being able to take action against this termination?

The answer to this question will depend on what the reasons are for the public prosecution office's terminating the proceedings.

### 1. Termination for Lack of Suspicion of Commission of a Criminal Offence (Section 170 German Criminal Procedure Code)

If the public prosecution office terminates the proceedings because – in the light of the investigations pursued - there is not sufficient suspicion that the accused committed the criminal offence, the victim can take action against such termination (section 172 German Criminal Procedure Code).

The victim must start by filing a complaint with the public prosecution office. The public prosecution office will then have the opportunity of reviewing the termination once again. If the public prosecution office sticks to the termination, the case will be reviewed by the regional public prosecution office. If the regional public prosecution office also refuses to prefer public charges, the victim can then bring an action before the Higher Regional Court for a judicial review.

### 2. Termination on Other Grounds

In all other cases of termination by the public prosecution office, for example, termination on the ground of negligibility pursuant to section 153 or to section 153 a CCP, there is no provision for a proceeding to compel public charges (section 172 paragraph 2 German Criminal Procedure Code).

This is connected with the intention behind the proceeding to compel public charges. The latter chiefly serves the purpose of securing the principle of mandatory prosecution. The public prosecution office is obliged to prosecute criminal offences and, provided the prerequisites are fulfilled, to prefer public charges. To secure this obligation, provision was made for the possibility of pursuing a proceeding to compel preferment of public charges.

When the public prosecution office terminates proceedings, for example on the ground of negligibility, it regularly proceeds on the basis of the accused's guilt. On the basis of an evaluation of the facts it dispenses, however, with further prosecution of the matter on discretionary grounds.

Example:

A was accused of giving the victim B a slap on the face. The background to this was a dispute between neighbours. A had been until then a respectable person. The public prosecution office terminates the proceedings on condition of payment by A of a sum of money to an association for victim protection.

If in such a case the victim thinks that meeting the condition of payment of a sum of money is too lenient, it is true that he cannot get a court review – as in the case of a proceeding to compel preferment of public charges –but he can indeed file an ordinary complaint with the public prosecution office. If he does so, the public prosecutor will review his own decision. If the latter adheres to his original decision, the regional public prosecution office will review this decision once again. If the regional public prosecution office also does not remedy the complaint, then the proceedings are over. No further court review will take place.

## **C. Rights of Presence During the Main (Court) Hearing**

The question as to what extent a victim is allowed be present during the entire main hearing depends on whether the victim is needed as a witness or not.

If the main hearing is held in public and the victim has not been summoned as a witness, the victim will – like everybody else – have the right to be present during the entire main hearing.

If the victim is needed as a witness in the case, the general provisions shall apply as for all witnesses. This means that the victim is not allowed to follow the proceedings in the courtroom until he or she is examined. Only after his examination will he be allowed to remain in the courtroom if the hearing is being held in public. What lies behind this provision is the fact that a witness should give his testimony uninfluenced by the course the proceedings have taken until he is called as a witness. The sole fact of a victim's status as such does not confer on the victim the right to continuous presence during the hearing.

#### **D. Private Accessory Prosecution**

With regard to a number of offences Parliament has, however, strengthened the legal position of victims. In a private accessory prosecution (sections 395 to 402 German Criminal Procedure Code) a so-called private accessory prosecutor – being a private individual enjoying his own procedural rights – joins the proceedings commenced by the public prosecution office. Private accessory prosecution allows persons who are particularly aggrieved by a criminal offence to participate in the proceedings – for their own satisfaction and also for the purpose of safeguarding their own rights. To make this quite clear, I would like to stress once again that a private accessory prosecutor has an autonomous right of participation, independently of the public prosecution office. Hence he is not a co-prosecutor assigned to the public prosecutor. The private accessory prosecutor can exercise his rights completely independently. But the prior requirement is always that public charges must have been preferred by the public prosecution office since the private accessory prosecutor cannot prefer such charges independently.

##### 1. Who can Join the Proceedings as a Private Accessory Prosecutor?

The question whether a person can be a private accessory prosecutor or not is determined, as a rule, by the criminal offence committed. In particular, it is the victims of a criminal offence

against sexual self-determination (for example, rape, sexual abuse, trafficking in human beings for the purpose of prostitution),

against personal honour (for example insult, defamation),

against physical integrity (for example bodily harm),

against personal freedom (for example hostage-taking or serious cases of deprivation of liberty),

or of an attempted murder or manslaughter

that are entitled to bring a private accessory prosecution.

In cases of completed murder or manslaughter close relatives also have the right to join the proceedings as private accessory prosecutors.

A private accessory prosecution can be conducted by the person entitled to join the proceedings in this function, although he also has the right to be represented by an attorney.

##### 2. What Rights does a Private Accessory Prosecutor have?

As already stated, the private accessory prosecutor is equipped with special rights as a participant in the proceedings:

###### *Right of presence (section 397 paragraph 1, first sentence, German Criminal Procedure Code)*

Unlike the other witnesses, the private accessory prosecutor has the right to be present during the entire court hearing – from the beginning to the end. For this reason, private accessory prosecutors are also summoned automatically to attend on the dates set down for the main hearing.

###### *Right to make applications*

The private accessory prosecutor is able to make his own applications for evidence to be taken at the main hearing. He also has the right to make general applications, for instance an application for exclusion of the

general public and/or for removal of the defendant during the examination of the private accessory prosecutor himself.

*Right to pose questions*

The private accessory prosecutor can address his own questions during the main hearing to the defendant, the witnesses and the experts. When he is being examined himself, he is able to get the court to reject questions posed by the public prosecution office and by the defence.

The private accessory prosecutor also has the right to challenge a judge or an expert, or to object to orders made by the presiding judge.

*Right to submit declarations and to make his own a closing speech.*

One of the core rights of the private accessory prosecutor is the possibility of making declarations during the hearing and of making his own closing speech at the end of the main hearing. In this closing speech the victim is able to present his own view of the case and to make submissions on the points that are important for him.

*The private accessory prosecutor also gets a copy of the judgment and of the reasons given therefor.*

*Private accessory prosecutor's right to seek appellate remedies:*

If the private accessory prosecutor does not agree with a judgment he can file an appellate remedy. The private accessory prosecutor's right is, however, limited in comparison with that of the convicted person and of the public prosecution office. Hence the filing of an appellate remedy is not possible with the objective of getting a different legal consequence or a conviction for a criminal offence that does not entitle the person concerned to join the proceedings a private accessory prosecutor (section 400 German Criminal Procedure Code). What does this mean in precise terms? Ladies and Gentlemen, I would now like to give you a few examples to illustrate this point:

*Example 1:*

The defendant A seriously injured the victim B by stabbing him with a knife and was convicted of causing serious bodily harm and sentenced to a term of 2 years' imprisonment, suspended on probation. B joined the proceedings as a private accessory prosecutor and he does not agree with the level of the sentence imposed. His aim is to have another legal consequence imposed, in other words a higher sentence. He is barred from achieving this objective because of his limited right of application under section 400 German Criminal Procedure Code. Here he will have no chance of taking action against the judgment.

*Example 2:*

The defendant A is accused of having seriously injured the victim B by stabbing him with a knife. The defendant A denies the charge contained in the relevant count in the indictment, and, since the court was not convinced of his guilt, it acquitted the defendant A. The victim B, who joined the criminal proceedings as a private accessory prosecutor, continues, however, to be convinced that A was the offender. In this case B can file an appellate remedy.

*Example 3:*

The defendant A is accused of having seriously injured the victim B by stabbing him with a knife. The court convicts the defendant A of causing serious bodily harm and sentences him to a term of 3 years' imprisonment. The victim B, who joined the criminal proceedings as a private accessory prosecutor, is, however, convinced that A not only wanted to injure him but rather wanted to kill him out of greed, so that this is a case of attempted murder. Here the victim B is not opposed to the legal consequence but to the verdict of guilty of causing serious bodily harm. For this reason, he will have the right to contest the conviction.

*Example 4:*

The defendant A is accused of having seriously injured the victim B on 12 January 2002 by stabbing him with a knife and then, at a later stage on 20 January 2002, of having entered the victim's apartment and of

having stolen valuable items there. The defendant A is convicted of causing serious bodily harm but is, however, acquitted of the theft because it could not be proved that he had committed the offence. The victim B, who joined the proceedings as a private accessory prosecutor, is convinced that A also committed the theft and he wants to file an appellate remedy in this respect. It will not, however, be possible for him to do this. Theft is not an offence that entitles a person to join the proceedings as a private accessory prosecutor. Here, too, section 400 German Criminal Procedure Code limits the right to file an appellate remedy.

### 3. Does a Private Accessory Prosecutor get an Attorney?

Private accessory prosecutors are given an important position under procedural law. Important procedural rights are conferred on them. Only very rarely, however, are private accessory prosecutors trained lawyers, and for that reason they want to avail themselves of the services of an attorney. This desire is entirely understandable. But having an attorney costs money. On the other hand, victims who do not have sufficient financial means must also have the chance to get legal representation by an attorney. German criminal procedure law makes the following provision for private accessory prosecution:

- Legal aid (section 397a paragraph 2 German Criminal Procedure Code)

Victims who are entitled to bring a private accessory prosecution can make an application to be granted legal aid. Legal aid will be granted if:

- the factual and legal situation is complex,
- the victim cannot sufficiently safeguard his or her own interests, or if this cannot reasonably be expected of him, and
- the victim cannot, in the light of his personal and financial circumstances, pay the costs, or can only do so in part, or only in instalments.

Legal aid means that the state pays an advance in respect of the costs for the attorney and for the proceedings. But if the victim cannot – because of his financial situation – pay the attorney, he will not have to pay back the costs arising by virtue of his representation by the attorney as long as there is no change in his circumstances. If the defendant is convicted during the criminal proceeding, the court will then demand payment of these costs from the convicted person.

- Attorney for the victim at state expense (section 397a paragraph 1 German Criminal Procedure Code)

Under certain conditions, the victim can, upon application being made, be assigned an attorney at state expense. Assignment of an attorney for the victim is independent of the victim's income, and the costs never have to be repaid by the victim. Only in cases of grave criminal offences will it be possible to assign an attorney for the victim. This will, for instance, be the case where sexual offences have been committed or where there has been an attempt to commit a homicide offence.

In this connection, it has repeatedly been stressed that also the close relatives of a victim killed through a criminal offence are particularly worthy of protection, and that it is justified here, too, for an attorney to be assigned to the victim. In the course of the reform of the German Criminal Procedure Code, it is precisely this problem that is to be addressed and the victim's surviving relatives are in future to be assigned an attorney.

Legal aid is granted, or an attorney for the victim is assigned not only to private accessory prosecutors who actually join the proceedings. Even before joinder as a private accessory prosecutor, it may be important, already during the investigation, for persons entitled to join the criminal proceedings to take advice from an attorney and then to decide whether they actually also want to join the proceedings. For this reason, on the conditions stated, those entitled to join the proceedings will also get legal aid or an attorney for the victim at state expense irrespective of whether they join the proceedings or not.

### III. PART 2: THE VICTIM'S POSITION AS A WITNESS

The victims of a criminal offence are already under great mental stress because of what happened. During the criminal proceedings they are usually, however, urgently needed as witnesses and, in many cases, they have to go over what they experienced again and again. Even if this is a difficult time for the victim, a state based on the Rule of Law cannot, and must not, dispense with the testimony of witnesses. In a large number of cases it is the testimony of victims that is one of the most important sources of evidence for procuring the offender's conviction.

On the other hand, it is important that victim stress and anxiety be taken seriously in the context of criminal proceedings and for an effort to be made to keep the stress experienced down to a level that is as low as possible.

A victim witness cannot avoid fulfilling his duty to testify. If he is not entitled to refuse to testify he will have to describe what happened to the public prosecution office and to the court again.

In recent years in Germany, and particularly following the Victim Protection Act of 1998, new provisions have been created to protect victims, taking account of the victim's concerns especially in this difficult situation.

#### A. Persons Rendering Assistance

It is often the case that victims will feel the need to take a person whom they trust to their examination. This gives them greater confidence and makes them feel less left on their own. Assistance from a person whom the victim trusts can reduce the victim's nervousness and anxiety during his or her examination.

In section 406f paragraph 3 German Criminal Procedure Code it is therefore provided that the victim of a criminal offence may, if so desired, take a person whom he trusts to his or her examination. This applies to all examinations, irrespective of whether they are conducted by the police, the public prosecution office or the court.

The decision on whether to permit the person the victim trusts to be present at the examination is made by the person conducting the examination. The presence of the person the victim trusts may be excluded if it is feared that the purpose of the investigation will be jeopardised as a result thereof. The decision is not contestable. It was decided to dispense with giving the victim an unlimited entitlement to the presence of the person he trusts. Cases may indeed occur where the presence of such a person can have a detrimental effect on the examination. Such cases may, for instance, arise where a child or a juvenile has been abused by a parent and the former brings this parent to the examination. In such a case it must be possible for the parent concerned to be refused permission to be present at the examination.

The victim may also bring an attorney to examinations conducted by the public prosecution office or the court. The attorney may not only be an emotional support for the victim. He can also exercise certain interests on the victim's behalf. So, for instance, he has the right to object to questions. In addition to this, he can make an application during the court hearing for the general public to be excluded.

Under certain circumstances a attorney can, pursuant to section 68b German Criminal Procedure Code, be assigned at state expense to assist the witness for the duration of his examination by the public prosecution office or the court. Such assignment is geared to protect the witness during his examination and is therefore also limited to this examination. It presupposes that the witness is unable to exercise his rights himself and that interests of his that are worthy of protection cannot be taken into account in another way.

When can cases like this occur?

To illustrate this, I would like to give you an example:

A young woman is repeatedly beaten and abused by her husband. She is frightened because of what happened and under great mental stress. It is feared that she will not be able to exercise her rights, for instance, her right to refuse to testify or her right to object to questions, or it is feared that because of her mental situation she will not, for example, be able to give expression to her wish that the general public be

excluded during the court hearing. Here it may be sensible to assign an attorney to the young woman only in respect of the examination she has to undergo; the attorney can then support and advise her regarding her rights.

## **B. Personal Data on Examination**

Many victims are afraid of giving their personal data at their examination. Especially victims of serious offences involving violence often fear that the offender might find out their address and take revenge.

In principle, at the examination the victim is, however, obliged as a witness to state his first name and family name, age, occupation and place of residence (section 68 paragraph 1 German Criminal Procedure Code). The provision has the object of avoiding cases of mistaken identity, and it is also designed to create a reliable basis for evaluating credibility and enabling the participants to collect information.

There are, however, exceptions to this principle (section 68 paragraph 2 and 3 German Criminal Procedure Code). Where there is reason to fear that the victim or, for example, a relative of the victim might be endangered by the victim stating his or her place of residence, the latter can be kept secret. The legislation makes provision for the option of stating an address where the victim can reliably be reached that is different from the victim's home address. This can, for instance, be a victim's office address or the address of the attorney's office.

In extremely exceptional cases where the witness's life or, for example, the life of his relatives is endangered by disclosure of the witness's personal data, he may also be permitted not to give personal particulars.

## **C. Use of Video Technology**

With the Victim Protection Act of 1998 the use of video technology was regulated for the first time in criminal proceedings. Both the recording of a witness examination on an audio-visual medium and the option of examining a witness by video link were made possible. The object of this legislation was to spare the witness repeated examination or being confronted by the offender.

### 1. Recording the Examination on an Audio-Visual Medium

Section 58a German Criminal Procedure Code regulates the recording of witness examinations on an audio-visual medium and their use in criminal proceedings. On principle, any examination of a witness can be recorded at any stage of the proceedings. It is the person conducting the examination who decides on this in the exercise of his duty-bound discretion.

The examination shall, on principle, be recorded where

- a victim witness is under 16 years of age,
- or there is a fear that the witness cannot be examined during the main hearing and the recording is required in order to establish the truth.

Only under certain conditions can such recording, however, be shown at the main court hearing instead of direct examination of the witness concerned (section 255a German Criminal Procedure Code).

In Germany one of the most important procedural principles is the principle that both the hearing itself and the taking of evidence must take place before the adjudicating court, and that the proceedings have to be conducted orally. This means that in principle witnesses have to be examined personally before the court. Only in exceptional cases can the examination of a witness be dispensed with and the written record of an earlier examination be read out or the audio-visual recording made of such examination be shown. This will, for instance, be the case where the witness has died in the meantime or is ill for a long or indefinite period of time. Also, when all participants (public prosecutor, defence counsel and defendant) agree, such reading out or showing is permitted.

In relation to victims who are in need of special protection it is possible for the video recording to be shown at the main hearing under less strict conditions. In cases of sexual criminal offences or of homicide

attempts on victims under 16 years of age the video recording made of their judicial examination can also be shown if the defendant and defence counsel had the chance of taking part at this examination.

## 2. Examination by Video Link

Furthermore, ever since the Witness Protection Act it has been possible to conduct a so-called examination by video link:

In the investigation proceedings the judge can, pursuant to section 168e German Criminal Procedure Code, conduct the examination of a witness separately from the other participants in the proceedings if there is an imminent risk to the well-being of the witness, which cannot be averted in some other way. There is supposed to be simultaneous audio-visual transmission of the examination to the other participants. The judge remains in contact by telephone or radio so that the defence in particular can intervene in the examination by interposing questions.

As regards the main proceedings, it is section 247a German Criminal Procedure Code that regulates the possibility of examination by video link. In the cases covered here the witness remains in another place during the examination. The court, including the presiding judge and the other participants in the proceedings, remain in the courtroom. They are connected to the witness through a video link. The witness's testimony is transmitted simultaneously to the courtroom. Conducting an examination by video link is, inter alia, permissible where there is an imminent risk – that cannot be averted in some other way - of serious detriment to the well-being of the witness in the event of his being examined in front of those present at the main hearing.

That there should be two different models for the investigation proceedings and for the main hearing was a matter of deliberate choice. This is due to the different stages a case goes through. In relation to the main hearing, having a “split” in the main hearing was dispensed with. Here the court will remain together with the other participants in the proceedings in the courtroom, and the witness is either alone or together with a person rendering assistance in another room. Any other provision would have raised complex questions under criminal procedure law. The principle applying to the main hearing, requiring the uninterrupted presence in one place of those persons who are charged with reaching judgment in the case concerned.

The question whether the judge is to remain with the other participants in the proceedings or in the room where the witness is was indeed the subject of heavy controversy during the discussions on the Witness Protection Act in Germany. Both alternatives certainly have their merits. In the end, however, Germany also followed Great Britain. There the model where the presiding judge does not leave the courtroom and examines the witness by means of an audio-visual transmission has proved its worth over quite a long period of time.

Ladies and Gentlemen, you will certainly be wondering how far video technology has now been implemented in the German courts. I would be happy to be able to give you detailed information but unfortunately this is not possible. At present, there is no statistical material available to me on how often and how successfully video technology has been used in criminal proceedings. One should not forget that the legislation has only been in place for a few years and that courts and public prosecution offices first needed a start-up phase in order to get the necessary technical equipment for their agencies. There has often been criticism to the effect that the application of video technology is still minimal. This criticism is definitely connected with difficulties in adjustment in this area and also with the fact that judges also have to get used to this new technology.

One should not, however, underestimate the effect that a recorded examination of a victim can have on the offender. I believe that particularly with regard to serious offences involving violence and sexual offences, showing the victim's testimony as a witness can have a positive effect on the offender. In this way the offender is already confronted with the victim. This will not be the case with written testimony. Such confrontation may already induce the offender to make a full confession at an early stage and spare the victim further appearance before the court. This has also been confirmed by those involved in the practical application of the law.

#### **D. Exclusion of the General Public**

During the main hearing in court it is possible for the general public to be excluded (sections 171b and 172 of the Courts Constitution Act). Seeing that the presence of the general public in the courtroom is an important procedural principle, their exclusion can be effected only in closely defined exceptional cases. The statutory provision made for these exceptions is conclusive. This may apply when particularly burdensome details of the victim's personal life have to be brought up or where a victim's health, sexual sphere or intimate details of his or her family life are concerned. Exclusion is also possible when there is a threat to a witness's life, limb or personal liberty. It is the court that makes the decision on whether to exclude the general public.

#### **E. Testimony in the Defendant's Absence**

The defendant has a right to a fair trial, guaranteed under the Rule of Law. This also means that he will be present in the courtroom during the entire main hearing and that he will be able to follow the proceedings. However, where there is the risk of a particularly grave threat to, or strain on, a witness, it will be possible to conduct his examination – by way of exception – in the defendant's absence (section 247 German Criminal Procedure Code). Here it will not be sufficient just for the witness not to want to be confronted by the defendant. The court is required to strike a fair balance between the witness's interests and the defendant's rights. In doing so, the court must always bear in mind that the defendant's right to be present is one of his most important procedural rights. But a witness's interests will take precedence in any case where there is the imminent risk of substantial detriment to his health, for instance because of too much emotional strain. Where the witness is under 16 years of age, it will suffice if there is the risk of considerable detriment to his or her well-being.

#### **F. Separate Waiting Rooms in Court**

Victim protection associations have said over and over again that the victim of a grave criminal offence cannot reasonably be expected to face the offender. There were often situations where the victim had to wait for his examination as a witness in the corridor outside the courtroom, when the offender suddenly appeared. This may lead to the situation where victims who are to appear as witnesses will become anxious even before their examination has begun, where they feel uneasy and are worried about having to testify as witnesses. For this reason, a large number of courts have already arranged to have special waiting rooms, for instance Leipzig Regional Court has a nice room specially for children who have been the victims of an offence involving violence. There are toys and books for children there so as to enable small children to relax before their examination and to help them overcome their fear.

Provision is already made pursuant to No. 135 of the Guidelines for Criminal Proceedings and Regulatory Fines Proceedings to the effect that such special waiting rooms should be used. But it is not only the use, it is also the creation of such rooms which is important. For this reason, as part of the reform of the Code of Criminal Procedure, there will be a statutory stipulation for provision of such rooms.

### **IV. CONCLUDING REMARKS**

I have now reached the end of my paper, and I hope I have been able to give you a broad view of the situation of victims under German criminal procedure law. As you will have seen, German criminal procedural law is still not perfect but we are also constantly working on further improvements in the victim's situation.