

# MEASURES TO PROTECT VICTIMS IN GERMAN CRIMINAL PROCEEDINGS

## A SUMMARY WITH SPECIAL FOCUS ON THE KEY POINTS OF THE SECOND VICTIMS' RIGHTS REFORM ACT

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### I. INTRODUCTION

Germany has already legislated a good standard of victim protection. For the past 25 years, legal academics and policy-makers alike have been devoting increased attention to the victim in criminal proceedings. While the United Nations' *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* of 29 November 1985<sup>1</sup> provided vital momentum at the international level, in the course of these developments important legislation has been adopted in Germany. Reference should initially be made to the "First Act for the Improvement of the Standing of Aggrieved Persons in Criminal Proceedings" or the Victim Protection Act (*Opferschutzgesetz*) of 18 December 1986.<sup>2</sup> This was followed by legislation which included the "Act for the Protection of Witnesses in Examinations in Criminal Proceedings and for the Improvement of Victim Protection" or the Witness Protection Act (*Zeugenschutzgesetz*) of 30 April 1998,<sup>3</sup> and the "Act for the Improvement of the Rights of Aggrieved Persons in Criminal Proceedings" or the Victims' Rights Reform Act (*Opferrechtsreformgesetz*) of 1 September 2004.<sup>4</sup> Vital impetus has also been provided by the Framework Decision of the European Union of 15 March 2001 on the standing of victims in criminal proceedings.<sup>5</sup>

Considering the fact that the legal position of victims in criminal proceedings requires constant scrutiny, and that there should be an ongoing assessment of whether any further measures to improve their situation appear advisable, the German Federal Government has recently taken another initiative to further strengthen the legal position of witnesses and aggrieved persons in criminal proceedings. In February 2009, it submitted the "Draft Bill for an Act to Strengthen the Rights of Aggrieved Persons and Witnesses in Criminal Proceedings", or the Second Victims' Rights Reform Act (2. *Opferrechtsreformgesetz*), to the German Bundestag.<sup>6</sup> After passage by the Bundestag, the Act entered into force on 1 October 2009.<sup>7</sup> In the course of the legislative process, several additional measures were taken to improve victim and witness protection.

### II. LEGISLATIVE MEASURES OF THE SECOND VICTIMS' RIGHTS REFORM ACT

#### A. General Aims of the Second Victims' Rights Reform Act

The measures taken with the Second Victims' Rights Reform Act build on the legislative measures taken to date in Germany to improve the level of protection for victims and witnesses. In doing so, the fundamental allocation of roles stipulated in the system of criminal proceedings remains unaffected. Above all, the aim was to achieve practical improvements for the victims of crime without challenging the right of the accused to a fair trial in accordance with the rule of law.

In order to enhance the rights of victims and witnesses of crime in criminal proceedings as appropriate,

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<sup>1</sup> Assembly Resolution 40/43 including Annex.

<sup>2</sup> Federal Law Gazette (BGBl), 1986 Part I, p. 2496.

<sup>3</sup> *Ibid*, 1998 Part I, 820.

<sup>4</sup> *Ibid*, 2004 Part I, 1354.

<sup>5</sup> Framework Decision of the European Union of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Official Journal of the European Communities, L 82/1.

<sup>6</sup> Bundestag Printed Paper 16/12098 (Government Bill).

<sup>7</sup> Federal Law Gazette, 2009 Part I, p. 2280.

and to ensure that their existing rights are enforced more consistently, the Act pursues three central goals:

1. To strengthen the procedural rights of aggrieved persons in criminal proceedings;
2. To strengthen the rights of juvenile victims and witnesses;
3. To strengthen the rights of witnesses.

In the following, referring to the various stages of criminal proceedings, I will examine the current situation in Germany in terms of victim and witness protection, as well as the challenges and problems identified in drawing up the Second Victims' Rights Reform Act and the specific measures taken with this legislation.

## **B. Strengthening the Procedural Rights of Aggrieved Persons in Criminal Proceedings: Measures taken in the Investigation and Prosecution Stage**

### **1. The Standing of Victims as the Complainant Party in Investigation Proceedings**

#### *(i) The Situation before the Second Victims' Rights Reform Act entered into Force*

In accordance with section 158 (1), first sentence of the German Code of Criminal Procedure (*Strafprozessordnung*, StPO), anybody may file information of a criminal offence orally or in writing with the public prosecution office, with authorities and officials in the police force, and with the local courts. In most cases, criminal prosecution is initiated as the result of information filed by the victim.<sup>8</sup> This is followed by the obligation on the part of the public prosecution office, which is the lead investigating agency in German criminal procedural law, to launch investigation proceedings and investigate the factual situation, provided that sufficient actual indications of a crime exist. This principle, which is set forth in section 152 (2) and section 160 (1) StPO, and obligates the public prosecution office to take action, is referred to as the *Legalitätsprinzip*, or the "principle of legality."

After completing its investigations, the public prosecution office considers whether public charges are to be preferred. If it does not prefer public charge, it must inform the complainant of its decision and indicate the reasons therefore. The reasons for not preferring public charges might include:

- No criminal offence has been committed.
- No evidence can be provided that the accused has committed such offence.
- Only a minor offence has been committed and the public prosecution office therefore does not consider it necessary to prefer public charges before a court of law.

Moreover, the public prosecution office must inform the victim of the criminal offence of the possibility of contesting this decision (section 171 StPO). The victim then has the opportunity to lodge a complaint within two weeks with the Office of the Public Prosecutor General against the decision of the public prosecution office (section 172 (1) StPO). If this complaint is dismissed by the Office of the Public Prosecutor General, the victim may move within one month to the Higher Regional Court for a decision on whether to reopen the investigation proceedings (section 172 (2-4) StPO).

These regulations generally apply irrespective of where the criminal offence was committed. This means that even before now, in accordance with section 158 (1) StPO, information of an offence committed abroad could likewise be filed with one of the domestic authorities indicated therein. For example, if the victim files information with the police – as in the overwhelming majority of cases – the latter must forward this to the competent public prosecution office; under its obligation to investigate pursuant to section 160 (1) StPO, the public prosecution office must establish how to proceed with the information, determining in particular whether German criminal law applies to the offence according to the provisions of the General Part of the Criminal Code (*Strafgesetzbuch*, StGB).

#### *(ii) Filing Information of a Criminal Offence committed Abroad under the Second Victims' Rights Reform Act*

Building on the existing legal foundation, lawmakers recognized the additional need for reform in those cases where information is filed in Germany of a criminal offence committed elsewhere in Europe.

A new section 158 (3) StPO makes clear that, for aggrieved persons who have fallen victim to a criminal

<sup>8</sup> Bock, *Kriminologie*, 2nd edition, 2000, p. 134 speaks of over 90% of cases.

offence in another Member State of the European Union, the option exists to file information of this offence in Germany. Furthermore, clear rules are now in place on how to proceed with this information – particularly in which cases it must be forwarded to the competent authorities abroad. There was previously no such regulation in German criminal law. This is significant for the victim particularly in cases where, due to the foreign dimension, criminal proceedings cannot be conducted in Germany.

(a) Duty to forward the information

Section 158 (3) first sentence StPO now stipulates that when an aggrieved person residing in Germany files information with a German law enforcement agency of a criminal offence committed in another Member State of the European Union, which for certain reasons is not prosecuted in Germany, the public prosecution office must forward this information to the agency responsible for criminal prosecution in the other Member State if requested to do so by the person filing the information. This may have a bearing in several scenarios:

- Information must be forwarded in this way when German criminal law does not apply to the offence.

Example: A British citizen residing in Germany files information of a robbery committed against him while on holiday in Spain, and would like this offence to be prosecuted in the United Kingdom. The German authorities are now explicitly obliged to forward the information of this criminal offence to the United Kingdom.

- A need for rules was also seen in cases where a German who has been aggrieved as a result of a criminal offence committed in another Member State wants to file information of this offence, for example, upon his return from holiday. In such cases, according to section 7 (1) StGB, German criminal law applies if the act is a criminal offence at the locality of its commission, or if that locality is not subject to any criminal jurisdiction. With the new rules, the information must also be forwarded if the criminal offence committed in the other Member State is indeed subject to German criminal law, but the public prosecution office has made use of its powers under section 153c (1) first sentence, number 1 StPO to dispense with prosecuting a criminal offence committed exclusively outside the territorial scope of the Code of Criminal Procedure. An obligation to forward information has therefore now been established for this scenario as well.

Example: A German citizen files information of grievous bodily harm committed against his person while on holiday in France. The offence is punishable by both German and French law. However, the German public prosecution office dispenses with prosecution in Germany in accordance with section 153c (1) first sentence, number 1 StPO because the offence has been committed outside the territorial scope of the German Code of Criminal Procedure.

Now the authorities are explicitly obliged to forward the information of this criminal offence to France, if so desired by the person affected.

(b) Requirement of motion

It is stipulated in sentence 1 of the new rules of section 158 (3) StPO that information must be forwarded only if the person filing the information, i.e. the aggrieved person, makes an express motion therefore. This is because, as a rule, it may be assumed that information of a criminal offence will be filed in Germany, and that the intention will be to further pursue prosecution of the offence in Germany itself.

(c) Limitations of the duty to forward

Sentence 2 of section 158 (3) StPO contains limitations of the duty to forward information.

- First of all, limitations apply to the duty to forward events in which both the fact of the offence itself and the circumstances detailed by the aggrieved person when filing information of the offence, which are relevant to its prosecution (e.g. the event of the crime and the evidence available), are already known to the competent law enforcement agencies abroad. In this case, a duty to forward the information nonetheless would entail a wasted effort.

- Furthermore, sentence 2 stipulates that, in the case of minor offences, a duty to forward information exists only if the person filing it was not in the position to file information of the offence in the other state.

Example: If a victim has a piece of costume jewellery with a value of 20 euros stolen abroad, and would have been able to explain the facts of the case to the local police in a comprehensible manner, the German public prosecution office would not be obliged to forward information filed of the offence in Germany to the law enforcement agencies abroad. This is because forwarding this information could entail considerable effort and costs, which in individual cases may not bear any relation to the severity of the offence.

- In the case of serious criminal offences, however, such limitations do not apply. It generally makes sense that in most cases people who have fallen victim to a criminal offence abroad will be somewhat hesitant to file information of this offence in a country where they do not know the language, and are not familiar with the institutions and how they function. It would seem unfair to burden persons who have only just been aggrieved as the result of a serious criminal offence with the additional decision of whether – given their individual case and the scale of the difficulties indicated – they can be expected to file information of the offence on location.

The new rules of section 158 (3) StPO also implement the Framework Decision of the European Union on the standing of victims in criminal proceedings,<sup>9</sup> namely Article 11 (2) thereof.<sup>10</sup>

## 2. Ensuring the Safety and Privacy of Victims and Witnesses

### (i) *The situation before the Second Victims' Rights Reform Act entered into Force*

Many measures have already been taken in Germany to ensure the safety and privacy of victims and witnesses.

#### (a) Witness Protection Harmonization Act

One example is the 2001 Witness Protection Harmonization Act (*Zeugenschutz-Harmonisierungsgesetz, ZSHG*),<sup>11</sup> which for the first time provided a clear legal framework for witness protection arrangements. According to section 1 ZSHG, a witness and his or her family or loved ones, if they are suited to witnesses protection arrangements and they agree to such arrangements, can be protected if, due to their willingness to testify, they are exposed to a threat to life, limb, health, freedom or considerable assets. Section 5 ZSHG stipulates, *inter alia*, that witnesses and their families and loved ones can be provided temporarily with new identities. As a risk-aversion measure, once the protection programme begins persons under protection are regularly removed from their current environment and accommodated elsewhere. Other concomitant measures taken include the provision of psychological care, temporary assistance with living costs, ensuring the security of those subject to protection by keeping them under observation, and the provision of new identity documents.

#### (b) Provision of address details

Privacy protection for victims and witnesses in criminal proceedings is also becoming increasingly important.

Many victims are afraid of giving their personal details when being examined. Especially in cases of serious violent crime, victims fear that the perpetrators might find out their addresses and seek revenge.

Generally, when being examined as witnesses, victims are obliged to state their first name, surname, age, profession and place of residence (section 68 (1) StPO). This serves to avoid mistaken identity. It is also designed to provide a reliable basis to judge credibility and to allow the parties to make inquiries.

<sup>9</sup> Framework Decision of the European Union of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

<sup>10</sup> Article 11 (2), subparagraph 2 of the Framework Decision stipulates in particular that the competent authority to which the complaint is made, insofar as it does not itself have competence in this respect, shall transmit it without delay to the competent authority in the territory in which the offence was committed.

<sup>11</sup> Federal Law Gazette, 2001 Part I, p. 3510.

However, there are exceptions (section 68 (2) and (3) StPO). In order to guard the addresses as well as the personal details of victims and witnesses, the previous law foresaw a range of precautions, providing for a graded system of secrecy options depending on the threat posed. This applied in principle both to witness examinations and the bill of indictment as well as the documents in the files. In practice, however, these rules were rarely followed, above all during investigation proceedings; this led to situations where witness addresses were misused.

Example: While surfing the Internet, an uninvolved witness stumbles upon the websites of right-wing extremist organizations, the content of which is punishable under German criminal law. He reports this to the police. In doing so the witness's address is put on record. The public prosecution office launches investigation proceedings. In being granted access to the files (through a defence attorney), the right-wing extremist organizations learn of the witness's address. The organizations release the address on the Internet with the tip-off: denouncer lives here.

*(ii) Measures to Shield Address Details pursuant to the Second Victims' Rights Reform Act*

The Second Victims' Rights Reform Act maintains the graded system of secrecy options, including the basic obligation for witnesses to provide personal details. However, the system has been better calibrated, and has also been extended as appropriate in order to make it work in practice as well to protect the rights of victims and witnesses.

(a) Witnesses' addresses

Section 68 (2) first sentence StPO preserves the possibility of granting permission to allow witnesses, when being examined, to provide their place of work, or another address at which documents can be served, instead of their "place of residence," i.e. their home address, if there is reason to fear that they or another person will be put in danger by providing the latter. Such a threat may be assumed if a witness or a third party has already been subject to or threatened with attack, or if a threat is perceived based on criminal indications, criminological experience or life experience.<sup>12</sup>

- First of all, the Second Victims' Rights Reform Act has made clear that the legal interests of the witness are at stake.
- The amendment to section 163 (3) StPO has also made clear that the provisions of section 68 StPO, which serve to protect witnesses' address details, must be observed by the police even at the investigation stage. Before now, these provisions applied primarily to the main hearing. In practice, the aim here is to attach greater weight to these provisions, which are in place to protect witnesses but had rarely been followed in practice, as well as to ensure that this information is now protected throughout the entire course of the proceedings.
- Furthermore, the right of witnesses in certain cases not to provide information on their place of residence, as already stipulated in section 68 StPO, has been extended as necessary – also with the aim of protecting witnesses. From now on, this option will also exist when there is reason to fear that the witness will be subjected to improper influence. This has a bearing, for example, in the case outlined above, when a completely uninvolved witness reports offences committed by right-wing extremist organisations that have already engaged in efforts to intimidate.
- These provisions may also have a bearing in stalking cases.

Example: A witness substantiates that testifying as a witness and providing her home address might well result in attempts to influence and harass her if this information is made available during proceedings. The alleged perpetrator, whom she has reported, has previously engaged in stalking and the witness has since moved. Such witnesses will now be given the option of providing e.g. the address of a victim support organization instead of their own. The court can then summon the witness via this address.

- Also, it is now clear that when her or his legal interests are at stake, the victim should be supported in naming an address other than her or his home address at which documents can still be served.

(b) Handling witnesses' data and the right to inspect files

With the second Victims' Rights Reform Act, section 68 (5) StPO now stipulates that when a threat

<sup>12</sup> Meyer-Goßner, *StPO*, 52nd edition, 2009, section 68, margin number 12.



exists, the information provided by witnesses regarding their identity or place of residence may not be made available even following their testimony to those who pose a threat to the witness or victim.

Example: During judicial examination it emerges that the accused has threatened a witness, but does not yet know where she lives. However, she has already provided her address during police questioning. From now on, she is permitted to refrain from providing her address, which means she must be summoned via a victim support organization. Also, the authorities now need to make sure that the accused cannot learn of her home address from inspecting the files. Any enquiries regarding credibility must then follow in the main proceeding.

In cases where there is reason to fear that witnesses will be in danger or improperly influenced, it is therefore justified, considering all concerns worthy of protection, for them not to have to provide their home address. In such cases the justified interest of witnesses in keeping their home addresses secret must generally take precedence over the interests of the other parties in the proceedings in receiving this information.

In addition, it is usually not the witnesses' place of residence that is vital in investigating the veracity of witness testimony, but rather the substance of the testimony itself and the conduct of the witness in testifying.<sup>13</sup> The investigation of the truth is best served when a victim can testify without fear of danger or influence.

(c) Witness's address in the bill of indictment

Corresponding to the measures already described, and with the aim of better considering the personality rights of all witnesses (and not only those in danger), the Second Victims' Rights Reform Act has now made it clear that witnesses' addresses need not be included in the bill of indictment (section 200 (1) StPO). The previous standard practice in Germany was to provide the full addresses in the bill of indictment of witnesses named therein. Several victim support organizations have complained that this automatically reveals the addresses of all witnesses to the accused in every proceeding, since according to section 201 the bill of indictment is to be communicated to the accused.

With the Second Victims' Rights Reform Act, section 200 (1) third sentence StPO now stipulates that the full address need not be stated when naming witnesses in the bill of indictment.

In the overwhelming majority of cases it is not necessary for the defendant to know witnesses' addresses. However, should this be necessary in specific cases for the purpose of verifying credibility, the defendant can obtain this information from the files upon inspection.

3. Providing Information for Victims of Crime

The right of victims to information in criminal proceedings is of singular importance even at the investigation stage. Indeed, people can exercise their rights only if they are aware of them.

(i) *Information Requirements according to the Previous Law*

The formerly applicable law already contained comprehensive information requirements for victims of crime. According to section 406h StPO, victims were to be made aware in particular of the following rights:

- The possibility according to section 406d StPO of being notified, upon application, not only of the outcome of proceedings, but also whether custodial measures against the defendant or convicted person have been ordered or terminated, and whether relaxation of the conditions of detention or leave from detention has been granted for the first time; this applies if the victim can show a legitimate interest in receiving this information and if there is no overriding interest on the part of the defendant or convicted person which constitutes an obstacle to providing such information.
- The possibility as stipulated in section 406e StPO for an attorney to inspect the court files on behalf of the victim, and/or for the victim to himself receive information and copies from the files, which is required e.g. for asserting civil claims.
- The possibility according to section 406f StPO of availing oneself of the assistance of an attorney or of being represented by such attorney in criminal proceedings; or, if being examined as a witness, the

<sup>13</sup> Decision of the Federal Court of Justice, *Neue Zeitschrift für Strafrecht* (NStZ), 1990, p. 352.

possibility that the witness may bring along a person he trusts to the examination (section 406f (3) first sentence StPO).

- The possibility provided by section 403 et seqq. StPO of asserting a claim for damages against the wrongdoer as early as the criminal proceedings stage by means of a so-called “adhesive procedure” (*Adhäsionsverfahren*).

(ii) *Changes to the Provision of Information to Aggrieved Persons with the Second Victims' Rights Reform Act*

The information requirements described above are maintained by the Second Victims' Rights Reform Act and have been further extended as follows:

(a) Further information requirements:

- In addition, a duty to inform victims of a potential entitlement to benefits pursuant to the Victims' Compensation Act (*Opferentschädigungsgesetz*) was adopted. These can be considered if, as a result of the offence, the aggrieved person has suffered serious health damage. Without the relevant information, aggrieved persons are often not aware that the Victims' Compensation Act exists.
- Similarly, section 406h StPO number 4 creates a duty to provide information on the Act on Civil Law Protection against Violent Acts and Stalking (*Gewaltschutzgesetz*) and the possibilities created by this act, which allow the aggrieved person to move for the issuance of an interim injunction to protect against further aggravement.
- Like all other duties to inform, the duty to inform victims of the possibility of receiving help and support from victim support organizations has also been made mandatory. This is because, apart from some exceptions, there is no discernible reason why information should not be provided, particularly since it is clear that no additional effort is required to employ the standard procedure of distributing informational leaflets.
- Since the amendment to section 80 (3) of the Youth Court Act (*Jugendgerichtsgesetz*, JGG) came into force on 31 December 2006, it is permissible in certain cases for a private accessory prosecutor to join the public prosecution against a juvenile defendant, which means information must now be provided regarding section 80 (3) JGG as well.
- With the addition of the wording "in particular" (*insbesondere*) it has been made clear compared with the previous text that in specific cases it may also be necessary to inform aggrieved persons of other possibilities, e.g. accommodation in a women's shelter or applying to prohibit the residents' registration office (*Einwohnermeldeamt*) from disclosing information.

(b) Providing information at an early stage

In particular, it seemed essential to inform victims of their rights as early as possible. In practice, however, this was already being done. But with the amendments in section 406h first sentence StPO, it is now *explicitly regulated* in law that the information required by section 406h StPO must be provided at the earliest possible stage.

(c) Information in writing

Furthermore, section 406h first sentence StPO stipulates that information must generally be provided *in writing* so that it is available to aggrieved persons at all times. This is also necessary because aggrieved persons are often unable to fully grasp the information provided verbally in their pre-trial appointments with the law enforcement agencies – appointments which they often find disconcerting. Since the overwhelming bulk of information is already provided in special leaflets, no major practical changes were needed here.

(d) Information for the aggrieved person in a language he or she understands

Section 406h first sentence StPO stipulates that, to the extent possible, information must be provided in a language that is understandable to the aggrieved person. This requirement is also consistent with the rights enjoyed by defendants in criminal proceedings. It necessitates the translation of the leaflets generally provided to aggrieved persons at least into all “standard” languages. In practice, this reform did not entail a major overhaul in Germany since those leaflets made available to crime victims had already been translated into a great number of the more commonly used languages, including almost all European languages as well as Arabic and Vietnamese.

### C. Strengthening the Procedural Rights of Aggrieved Persons in Criminal Proceedings: Measures taken in Court Proceedings

#### 1. Joining the Prosecution as a Private Accessory Prosecutor

From the point of view of victim protection, it is important for victims to be able to join the public prosecution as a private accessory prosecutor (*Nebenkläger*). Joining the public prosecution as a private accessory prosecutor gives the aggrieved persons named in section 395 StPO comprehensive powers to participate in the entire proceedings starting with the preferment of public charges.<sup>14</sup> Private accessory prosecutors have the possibility of contributing actively to the proceedings and influencing them by means of statements, questions, motions and even appellate remedies.

##### (i) *The Situation before the Second Victims' Rights Reform Act entered into Force*

The participation of a private accessory prosecutor regulated in sections 395 through 402 StPO was permitted in the case of certain serious crimes, an exhaustive list of which could be found in section 395 (1) and (2) StPO. These included not only serious sexual offences, bodily harm, pimping and human trafficking, for example, but also defamation (cases which must, however, demonstrate a certain severity to even warrant the preferment of public charges). The group of individuals entitled to join the public prosecution as a private accessory prosecutor has been gradually extended since the fundamental reform of this right in 1986. As part of this process, the Sixth Criminal Law Reform Act of 28 January 1998<sup>15</sup> and the Witness Protection Act of 30 April 1998<sup>16</sup> added victims of human trafficking and victims of certain cases of sexual abuse. With the Victims' Rights Reform Act,<sup>17</sup> which entered into force on 1 September 2004, the offences stipulated in the Act on Civil Law Protection Against Violent Acts and Stalking were added to the catalogue under section 395 (1) number 1 StPO, and family members of those killed were also given the power to join the public prosecution as private accessory. With the 37th Criminal Law Amendment Act (37. *Strafrechtsänderungsgesetz*),<sup>18</sup> which entered into force on 19 February 2005, victims of other statutory definitions of human trafficking were added to the group of people entitled to join the public prosecution as private accessory prosecutor, as were victims of stalking with the Act to Criminalize Stalking (*Gesetz zur Strafbarkeit beharrlicher Nachstellung*),<sup>19</sup> which entered into force on 31 March 2007.

##### (ii) *Changes introduced by the Second Victims' Rights Reform Act*

As opposed to a further step-by-step expansion of the group of persons entitled to join the public prosecution as a private accessory prosecutor, the Second Victims' Rights Reform Act strives to provide a coherent overall concept and new direction for section 395 StPO. This overall concept was designed to revolve consistently and recognisably around the criterion of protecting those victims who are particularly vulnerable. With this concept, the Federal Government legislative initiative followed the recommendations of academics and practitioners.

##### (a) Legal policy implications

As early as in the 1984 report for the 55th German Jurists' Forum (*Deutscher Juristentag*), which focused primarily on the rights of aggrieved persons in criminal proceedings, it was stated that particularly vulnerable aggrieved persons – above all the victims of serious crimes of aggression<sup>20</sup> – should have direct, priority access to the institution of private accessory prosecutor without problematic auxiliary arrangements.

This concept also formed the general basis for the creation of the 1986 Victim Protection Act.<sup>21</sup> This was why the entitlement to join the public prosecution as private accessory prosecutor was created primarily for persons aggrieved as the result of a serious criminal offence against their highly personal legal interests and who can be considered particularly vulnerable according to criminological and victimological insights.<sup>22</sup>

<sup>14</sup> cf. Meyer-Goßner, *StPO*, 52nd edition 2009, before section 395, margin number 1.

<sup>15</sup> Federal Law Gazette, 1998 Part I, p. 164.

<sup>16</sup> *Ibid*, p. 820.

<sup>17</sup> Federal Law Gazette, 2004 Part I, p. 1354.

<sup>18</sup> *Ibid*, 2005 Part I, p. 239.

<sup>19</sup> *Ibid*, 2007 Part I, p. 354.

<sup>20</sup> Rieß, *Gutachten* 55. *Deutscher Juristentag*, C 85, margin number 123.

<sup>21</sup> cf. Bundestag Printed Paper, 10/5305, p. 8 f.

<sup>22</sup> *Ibid*, p. 11.



Academic studies also confirm that the institution of private accessory prosecutor should be oriented even more consistently towards the *vulnerability* of the victim – where this vulnerability stems in particular from the gravity of the criminal offence, directed against the victim's highly personal legal interests – as well as towards the *consequences* of the offence for the victim. Here, it has been established that for victims testifying as witnesses, apart from the support provided in dealing with the personal consequences, the more severe the injury the more important it is for the victim to be able to influence the course of events in the criminal proceedings.<sup>23</sup>

Further, for quite some time victim support organizations have been calling for other crimes typically involving a particularly serious impact on the aggrieved person, such as robbery, particularly serious cases of coercion and blackmail, as well as aggravated theft, also be included in the group of crimes subject to joinder.

(b) Qualifying for joinder as private accessory prosecutor according to the Second Victims' Rights Reform Act

With the Second Victims' Rights Reform Act these demands have been met for the most part. The power to join the public prosecution as private accessory prosecutor has now been oriented more towards the need to protect those victims who have been particularly seriously affected – above all, victims of serious acts of aggression and sexual crimes.

- This means that certain offences, which cannot typically be classified as serious and which do not entail serious consequences for the victim (such as defamation), no longer automatically entitle the victim to join the public prosecution as private accessory prosecutor.
- On the other hand, a fall-back clause was created, which was designed to give the victims of *all crimes*, especially those against highly personal legal interests – of which some are listed as examples “in particular” – the right to join the public prosecution as a private accessory prosecutor if it appears expedient to do so, particularly on account of the serious consequences of the offence.
- Whether particular reasons exist depends primarily on how serious the consequences of the offence are for the victim. The wording is thus geared towards the former version of section 395 (3) StPO, which gave victims the power to join the public prosecution as private accessory prosecutor in the case of negligent bodily harm if this was expedient i.e. due to the serious consequences of the offence. With the imprecise legal term “particular reasons” (*besondere Gründe*), the goal of continuing to specify the seriousness of the consequences of the act is to underscore that crimes which inflict no serious consequences on the victim do not entail the right to join the public prosecution as private accessory prosecutor.

Example: In average cases of negligent bodily harm in road traffic, the victim is, as before, not entitled to join the public prosecution as private accessory prosecutor if – as is generally the case – he has not suffered serious consequences as a result.

- Serious consequences will be demonstrated in particular if the aggrieved person has endured or can be expected to endure a certain degree of bodily or psychological harm. This may consist of health damage, traumatization or considerable shock. In addition, “particular reasons” may be established, as has been the case so far, if for example the victim has to defend himself against serious accusations of guilt.<sup>24</sup> The provision more thoroughly addresses the vulnerability of victims who have been affected by the serious consequences of a criminal offence against their highly personal legal interests.

## 2. Assistance for Aggrieved Persons: the Situation before the Entry into Force and Reforms of the Second Victims' Rights Reform Act

Aside from joining the public prosecution as private accessory prosecutor, which as stated above is an option available to certain aggrieved persons only, the legal institution of attorney assistance is also important for victims of criminal acts. Even previously, the law stipulated that all aggrieved persons may avail themselves of the assistance of an attorney in criminal proceedings (sections 406f, 406g StPO). The Second Victims' Rights Reform Act has considerably simplified these provisions and thereby made them easier to apply. For example, the law now states expressly and in detail that the counsel of an aggrieved

<sup>23</sup> cf. Kilchling, *Opferinteresse und Strafverfolgung*, 1995, p. 291.

<sup>24</sup> cf. Hilger in Löwe/Rosenberg, *StPO*, 25th edition, section 395, margin number 18.

person with the right to join the public prosecution as private accessory prosecutor is to be informed of the date of the main hearing. Until now, it was only the private accessory prosecutor him or herself who had to be informed. The choices an aggrieved person has in selecting legal counsel have also been extended (section 138 (3), section 142 (1) StPO).

Example: The victim of a criminal offence may now be represented by a trusted person with knowledge of the law, who does not necessarily need to be admitted as an attorney. This representative must, however, be approved by the court beforehand (section 138 (2) StPO).

### 3. Rules on Legal Aid for Victims

Also of great practical significance, especially for joining the public prosecution as private accessory prosecutor, are the provisions of section 397a StPO. Section 397a (1) StPO stipulates the cases in which an attorney is to be appointed free of charge as counsel to the private accessory prosecutor. Section 397a (2) StPO contains the criteria under which legal aid must be provided to the private accessory prosecutor. The provisions of section 397a StPO also apply for the counsel of aggrieved persons when these persons are entitled to join the public prosecution as private accessory prosecutor, but do not wish to join the proceedings as such.

#### (i) *The Situation before the Second Victims' Rights Reform Act entered into Force*

Until the Second Victims' Rights Reform Act entered into force, the provisions of the former Act were relatively confusing due to the many references; likewise, the Act did not seem entirely consistent.

#### (ii) *Changes introduced by the Second Victims' Rights Reform Act*

With the Second Victims' Rights Reform Act the provisions of section 397a StPO were redrafted. In particular, Paragraphs 1 and 2 are of great practical significance.

##### (a) Redrafting of section 397a (1) StPO

The list of criminal offences under section 397a (1) StPO concerning the appointment of a counsel for particularly vulnerable private accessory prosecutors has been made more understandable and has been extended as appropriate.

- Numbers 1 and 2 list criminal offences for which a so-called "victim's attorney" (*Opferanwalt*) must be appointed for the adult victim or his or her family without further requirements and regardless of the victim's or his or her family's financial condition. These crimes include rape or trafficking in human beings for the purpose of sexual exploitation (number 1) and murder/attempted murder (number 2).
- According to the new section 397a (1) number 3 StPO, if they are already affected or are expected to be affected by the particularly serious consequences of an offence entailing serious bodily or mental harm, the victims of other serious crimes of aggression are now given the option as private accessory prosecutor of being assigned a victim's attorney irrespective of the conditions governing legal aid. This does not only cover serious bodily harm, as was the case previously. The crimes of kidnap, abduction, the abduction of minors, deprivation of liberty, kidnapping for extortion and hostage taking are now included as well.
- In section 397a (1) number 4 StPO, the list of offences has been extended for which it is stipulated that a victim's attorney has to be appointed free of charge for children, youths and victims who cannot themselves safeguard their interests sufficiently, or cannot reasonably be expected to do so. The provision has now been expanded i.e. to include cases of abandonment (section 221 StGB) as well as abuse of a position of trust (section 225 StGB), offences against personal freedom, such as human trafficking or taking hostages and stalking (section 232 through 235 StGB, section 238 through 239 StGB), especially serious cases of using threats or force to cause a person to do, suffer or omit an act (section 240 (4) StGB) – which in particular includes forced marriage and forced sexual activity, robbery and blackmail and use of force or threats against life or limb (sections 249 and 255 StGB). The aim of the expansion is to enable appointment of a victim's lawyer free of charge to that specified group of persons who have already been justifiably recognized as particularly vulnerable. According to the new rules, if one of the offences stipulated in number 4 is committed, a victim's lawyer may be appointed without further requirements and irrespective of the financial condition of the affected youth or helpless victim.

(b) Reform of section 397a (2) StPO

The provisions of section 397a (2) StPO, stipulating the conditions which govern the award of legal aid to private accessory prosecutors, were redrafted as well.

In line with the justified demands of victim support organizations, the criterion “if the legal and factual situation is complex” was removed. This stipulation corresponded to the wording in section 140 (2) StPO, which governs the conditions governing the defence required for the accused. A legal and factual situation is considered complex if, from the point of view of the private accessory prosecutor, the facts of the case are extensive, intricate or difficult to clarify; if it appears necessary to bring in expert opinion; if special knowledge is required to assess the facts; if the private accessory prosecutor needs to submit motions for the admission of evidence, or if complicated/contentious legal issues are to be decided (e.g. measures that affect the personal life of the private accessory prosecutor; excluding the public, or removing the accused). In practice, however, this stipulation led to unfairness.<sup>25</sup>

This is because, even in *straightforward* cases where the private accessory prosecutor is equally unable to safeguard his or her own interests sufficiently, or cannot reasonably be expected to do so – for example, if he or she has to deal with the serious consequences of an offence – a right to legal aid should be granted if needed. The current version of these regulations is now based on nothing other than whether the private accessory prosecutor is in the position to safeguard his or her interests and whether this can reasonably be expected of him or her.

Nevertheless, according to the new legislation, those private accessory prosecutors who need it will as, a general rule, still enjoy a right to legal aid where the legal and factual situation is complex, since without the assistance of an attorney in these cases they would likely be unable to safeguard their interests to a sufficient degree.

#### **D. Strengthening the Rights of Child and Juvenile Victims and Witnesses**

For children and juveniles who have fallen victim to a criminal offence or who must testify as witnesses, the situation in criminal proceedings is often particularly difficult. They are still in their development stage, which means that extra care must be taken to shield them from stress. The StPO therefore contains a catalogue of provisions to protect juvenile victims and witnesses. In contrast to the situation with adults, these include, for example, extended powers to institute audio-visual recordings for witnesses (section 58a (1) second sentence, number 1; section 255a (2) StPO), and the extended right to exclude the accused and the general public (section 247 second sentence StPO; section 172 number 4 of the Courts Constitution Act, GVG). Moreover, a multitude of special provisions that serve to protect children and juveniles are in place in the guidelines to be followed by public prosecutors.<sup>26</sup> Thus, according to number 19, paragraph 1 of the Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine (*Richtlinien für das Strafverfahren und das Bußgeldverfahren*, RiStBV), multiple examinations of children and youths prior to the main hearing are to be avoided wherever possible due to the associated mental strain put upon these witnesses. According to number 135, paragraph 3 RiStBV, children and juveniles are preferably to be examined prior to other witnesses, and are to be supervised and cared for in the waiting rooms to the extent possible. For sex crimes, number 222, paragraph 1 RiStBV stipulates that for the examination of children, an expert is to be brought in with special knowledge and experience in the area of child psychology. In the event that a person accused of a sexual offence who lives in the same household as, or is able to exert a direct influence on the victim is released, number 221 paragraph 2 RiStBV stipulates that the youth welfare office (*Jugendamt*) is to be informed immediately so that the measures necessary to protect the victim can be taken.

Until now, however, this protection was only stipulated in Germany for juveniles under 16. With the Second Victims' Rights Reform Act, the cut-off age in the StPO and GVG has been raised to 18 years in line with those limits specified in various international agreements such as the United Nations Convention on

<sup>25</sup> *Ibid*, section 397a, margin number 9.

<sup>26</sup> Practical suggestions in Blumenstein, *Kindliche Opferzeugen im Strafprozess – unkindgemäße Schicksale und Verfahrensweisen*, Journal of the Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen, 28, 2002; Kilian, *Opferschutz und Wahrheitsfindung – ein Widerspruch?*, Deutsche Richterzeitung, 256, 1999

the Rights of the Child<sup>27</sup> or the EU Charter of Fundamental Rights.<sup>28</sup>

### **E. Strengthening the Rights of Witnesses**

The victims of criminal offences must usually testify as witnesses in criminal proceedings as well. They, like all witnesses in criminal proceedings, attend to their civic duty to appear for examination and to testify truthfully. This testimony is usually indispensable for ascertaining the truth. The Second Victims' Rights Reform Act takes account of the important position that witnesses hold in criminal proceedings by paying even greater attention to their personal rights than has been the case so far.

#### **1. Regulating the Duty to act as Witness**

To start with, for reasons of legal clarity and legal security, the generally recognised duty of a witness to testify in court and before public prosecutors was laid down in the law (section 48 (1) StPO).

#### **2. Legal Counsel**

Section 68b (1) StPO provides a statutory basis for the rule that witnesses may call in the assistance of an attorney in all examinations, so long as this does not jeopardize the purpose of the investigation. Beforehand, this right was already guaranteed in Germany on the basis of a decision of the Federal Constitutional Court.<sup>29</sup> But the statute now explicitly clarifies how the right is to be enforced, as well as specifying the grounds for exclusion, based above all on whether the presence of an attorney during the examination would jeopardise the purpose of the investigation.

##### *(i) Grounds for Exclusion*

An attorney can be excluded from an examination if certain facts justify the assumption that his presence would "not merely insignificantly" jeopardize the orderly taking of evidence.

Example: A witness is examined in a fraud case and wishes to bring in an attorney as counsel during the examination. This attorney is suspected of participation in the underlying offence on the basis of certain facts. He or she now can be excluded as counsel from the witness examination.

##### *(ii) Legal Counsel for Particularly Vulnerable Witnesses*

In section 68b (2) StPO the rules governing the assignment of an attorney to assist particularly vulnerable witnesses have been simplified. The only deciding factor now is whether or not particular circumstances prevent witnesses from being able to exercise their rights themselves during examination. If so, they are assigned an attorney for the duration of the examination.

Example: A young woman is repeatedly beaten and abused by her husband. Because of what has happened she is frightened and under heavy psychological strain. Due to her psychological state, there are concerns that she will not be able to exercise her rights; e.g. the right to refuse to give testimony and the right to object to questions, or that she will not be able to voice her desire to exclude the general public from the court hearing. It might make sense in this case to assign the young woman an attorney just for the examination, in order to help and advise her regarding her rights.

##### *(iii) Court Decisions on Negative Decisions by the Public Prosecution Office*

Concomitant to this, the powers of witnesses to bring about a court decision regarding negative decisions by the public prosecution office pursuant to section 68b (1) StPO have been regulated. (Section 161a (3) StPO alongside various subsequent changes.)

Example: A witness whose counsel has been excluded from the examination by a decision of the public prosecution office can apply for a court decision at the court which is responsible for investigating the facts of the case (so-called examining judge).

<sup>27</sup> Federal Law Gazette, 1992, Part II, p. 990.

<sup>28</sup> Official Journal of the European Communities, 18.12.2000, C 364/1.

<sup>29</sup> See for example the decisions of the Federal Constitutional Court, volume 38, page 105.

### III. CONCLUSION

The constitutional order of the German Basic Law (*Grundgesetz*) also obliges state organs to stand in defence of the victims of criminal offences and to respect their needs. This is particularly relevant when children and juveniles fall victim to crime. As the weakest members of society, they require special protection. It also applies for particularly vulnerable *adult* victims of criminal offences, such as those who are aggrieved as the result of sex crimes or serious violent crime. In providing this protection, lawmakers face the challenge of achieving the best possible protection for the victims of crime without obstructing the justified defence rights of the accused in doing so. Any measures to protect victims must be fundamentally compatible with the purposes of criminal proceedings, since state organs are obliged first and foremost to investigate criminal offences and to establish guilt or innocence on the part of the accused in fair proceedings conducted in compliance with the rule of law. Under this premise the aim should be to take the most concrete measures possible: above all, the victims of criminal offences need the best possible protection in practice. With the Second Victims' Rights Reform Act, lawmakers have faced these challenges once again. Specialists in the field and victim support organizations have already voiced their opinion that these challenges have been successfully met.