



**Towards a more responsive victim-centered approach of the criminal justice system
(RE-JUST)**

**National Report Germany
CURRENT PRACTICES IN THE NATIONAL CRIMINAL JUSTICE SYSTEM**

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1. Foreword

This report was written under the framework of the RE-JUST project. In the federal state of Germany, justice is a federal matter; i.e. that in the 16 federal states the states are responsible for legal proceedings including criminal proceedings and therefore for the support of victims. According to Art. 30 and Art. 70 of the basic constitutional law (*Grundgesetz*), this also holds for Internal and Home Affairs, such as the police, which is under the control of the federal state ministries.

Two methods were used to deliver this report. Firstly, a literature review on victim rights and the present situation of victim protection in Germany. Secondly, the evaluation of eight answers to the project questionnaire *Current Practices in the National Criminal System* from three Justice and three Ministries of Interior, one law office and one victim support NGO, which added to the findings from the literature review. This report not only presents national legislation on questions about victim protection, but also describes the legal practice and existing challenges in the granting of victim rights in Germany.

2. National legislation regarding the protection of victims' rights

The national legislation in Germany allows for different legislation for the protection of victims' rights. The handling of victims in criminal proceedings are generally regulated in the criminal procedure code (*Strafprozessordnung* (StPO)), in particular §§ 406d et seq. Furthermore, victim protection and victims' rights are laid down in *leges specialis*, such as the Protection Against Violence Act (*Gewaltschutzgesetz* (GewSchG)), Act on Court Procedure in Family Matters and Non-litigious Matters (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (FamFG)), the third Amendment of the Protection to Victims Act (*Opferschutzreformgesetz*) as well as the law on process support in criminal proceedings (*Gesetz über die psychosoziale Prozessbegleitung im Strafverfahren* (PsychPbG)). In the German

criminal procedural law, the legal institution of the incidental action (*Nebenklage*) offers the damaged party the possibility to participate in the prosecution's charge during the criminal proceeding, §§ 395 et seq. StPO. In addition to the private legal action, the *Nebenklage* constitutes an exception to the valid principle of public prosecution (*Offizialmaxime/Offizialprinzip*) in criminal proceedings. That is why the *Nebenklage* is only permitted in following criminal offences, which can in particular affect the infringed party's private sphere and personality: sexual, defamatory, personal injury, personal liberty and attempted homicide offences. For victims, the *Nebenklage* can be an important instrument, as it enables them comprehensive powers of participation during the whole criminal proceeding. As joint plaintiff (*Nebenkläger*in*), the victim has the opportunity to follow on that his/her¹ personal interests are satisfied in particular through influencing in the criminal proceeding's outcome through active participation, by defending himself against denials or trivialisation of his injuries. The joint plaintiff is not obliged to be present during the main hearing, but has a right to do so and can also appear as witness. Moreover, he also has further rights, in particular information rights on the current status of the procedure, right to the inspection of records, right to question. The following paragraphs stipulate supplementary regulations for the compensation as well as other powers of the injured party. As crime victims are usually also heard as witnesses, the *Strafprozessordnung* grants different protective rights, especially with regard to the hearing. If a victim at the same time is the injured party, his hearing, questioning and other investigative acts need to be performed in accordance to his particular need for protection (§ 48(3) StPO). Further, it is to be examined whether an urgent risk of serious drawbacks for the witness' well-being requires that the hearing of the witness takes place without the presence of entitled persons (e.g. the defendant) (§ 168 e StPO) or that according to § 247a StPO an audiovisual hearing is to be ordered. Pursuant to § 231 StPO, a general continuous present of the defendant during the main hearing exists. An exception of this principle is laid down in § 247 StPO, whereby the defendant has to leave the court room during the hearing, if there are grounds for believing that during the hearing of the co-defendant or witness, he will not speak the truth in the defendant's presence. The same applies for the hearing of a witness under the age of 18, if there are grounds for believing that the presence of the defendant could cause substantial disadvantages for the witness' well-being or when in the hearing of another person the presence of the defendant could cause substantial disadvantages for his health. An important statutory provision for victim protection can further be found in § 171b of the Court Act (*Gerichtsverfahrgesetz* (GVG)), after which the general public is excluded from the main hearing, insofar as personal circumstances of one of the process participants, witnesses or injured parties are revealed, whereby their public discussion would violate protection-worthy

¹ In order to ensure reader friendliness, the text will from here onwards use the masculine form.

interests. This is in particular the case so far as minor witnesses are heard in criminal proceedings against sexual self-determination or life, abuse of children or against personal liberty. The exclusion of the general public is mandatory, when – under the aforementioned conditions – the person, whose area of life is affected, requests it.

With the third victim reform law (*Drittes Opferschutzreformgesetz*), the victim's interests were increasingly focused on and further steps were taken to increase the standard of protection for victims. The reform's greatest achievement is the introduction of the psycho-social process support (*psychosoziale Prozessbegleitung*). Since the January 01, 2017, particularly vulnerable injured parties have the right to professional guidance and care during the criminal proceeding (§ 406 g StPO). The legal implementation of this legal claim was substantiated with the law on psycho-social support in criminal proceedings (*Gesetz über die psychosoziale Prozessbegleitung im Strafverfahren* (PsychPbG)) from December 21, 2015. With the coming into force of this law, Germany implemented the EU Victims' Rights Directive 2012/29/EU. In particular entitled are children and minors, but also adult victims that are victims of violent or sexual offences. According to § 2 PsychBG, psycho-social process support is a particular form of judicial guidance during the criminal proceeding for particularly vulnerable injured parties, during and after the main hearing (see chapter 4).

A form of extrajudicial conflict elimination is the so-called victim-defender mediation (*Täter-Opfer-Ausgleich* (TOA)). Aim and purpose of the TOA are the common efforts to find a compensation between the (alleged) perpetrator and victim, namely beyond a material compensation for the caused damages meaning also an immaterial compensation of the committed and suffered injustice through an assumption of responsibility, on the one hand, and the willingness to such a compensation, on the other hand. The TOA is standardized in §§ 155a, 155b StPO and § 46a of the Criminal Code (*Strafgesetzbuch* (StGB)). According to § 46a StGB, the perpetrator's efforts can determine a reduced sentence.

Preventive victim protection is regulated in the Protection Against Violence Act (*Gesetz zum zivilrechtlichen Schutz vor Gewalttaten und Nachstellungen*; short: *Gewaltschutzgesetz* (GewSchG)). The regulations aim at protecting victims from violent attacks by e.g. invoking a restraining order or force of an injunction to stay away from the victim by the court. The scope of the application of the law does not only entail physical, but also psychological violence such as stalking. Within the scope of the interlocutory proceeding, the court can order a restraining order and injunction to stay away from the victim, which also includes the contacting through means of distance communication devices (§ 1 GewSchG, §§ 214, 49 FamFG). If the perpetrator violates this decision, a criminal proceeding can be initiated or coercive instruments, such as penalty payments or forced imprisonment, can be ordered.

As a result of domestic terror attacks, the German cabinet appointed a Commissioner for Victims (*Beauftragte*r der Bundesregierung für die Anliegen von Opfern und Hinterbliebenen von terroristischen Straftaten im Inland*) in April 2018. Previously, the *Bundestag* – the German Parliament – made it possible for victims of extremist or terrorist crimes to receive *Härteleistungen*, a financial compensation by the *Bundestag* (since 2001). This payment does not constitute a legal entitlement, but a voluntary payment of the state as an act of solidarity.

The latest legal development is the in December 2019 enacted fourteenth social security statute book (*Vierzehnte Sozialgesetzbuch (SGB XIV)*), which inter alia includes the victim compensation law (*Opferentschädigungsgesetz (OEG)*). In line with this law, victims of a violent intentional crime that have suffered damage to their health, can make a claim for compensation (§ 1 OEG). The purpose of the law is to compensate for health and economic consequences. For crime victims offers by the *Landesstiftung Opferschutz* (the individual federal state's foundation for victim protection) are made available. The purpose of these household-budgeted foundations is to support crime victims. On the one hand, support is provided through financial support to crime victims. Hereby the gaps to the statutory victim compensation shall be filled. On the other hand, the foundations can also support victim-witness-support programmes.

With regard to the national legislation and its compliance with EU law, Germany has implemented the EU Victims' Rights Directive 2012/29/EU through the *Drittes Opferschutzreformgesetz*. The Directive entails legal requirements for the protection of victims from all crimes, regardless of their nationality and where the criminal offence was committed. It entitles crime victims the right to information, participation in criminal proceedings, support and protection, etc. In the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz (BMJV)*) report on the implementation of the directive from September 15, 2016, informed that an implementation however was only needed in sub-areas, as a broad spectrum of the victim protecting measures already were in place in the *Strafprozessordnung*. The EU Commission, on the contrary, criticised the lack of implementation in its formal notice from July 2019. The Commission requested Germany to fully implement the EU legal requirements. In particular, the right to information on the rights of victims and the case as well as the right to support and protection, are not implemented. In this regard, further action is required.

3. Legal challenges encountered by victims in accessing the justice system

By way of a preliminary point, some victims are faced with great challenges or barriers in accessing some victim support services in Germany. Unknowingness, insecurity or insufficient information about the German legal system, can decrease the victim's willingness to file a report and can cause fear of sanctions or deportation. In most cases, crime victims are from vulnerable living and life conditions. Either no circle of supporters exists or only limited support by friends and family can be given, especially in cases in which family members or acquaintances are the perpetrators. An additional barrier to accessing support services is the lack of communication for foreign victims. On the one hand, the written information on support services cannot be understood, while, on the other hand, language barriers cause inhibitions and insecurity. A further challenge is the identification of victims on the basis of an irregular residence status. A missing residence status or irregularity can lead to victims not reporting the crime to the police, making their victimhood unnoticed or even leading to criminal investigations against themselves, meaning that support and protection measures are denied.

In order to receive rights and access to support systems, e.g. victim protection by the police or a secured residence permit as witness in a criminal procedure (§ 25(4a) AufenthG²), victims must provide comprehensive information and document evidence, showing that they are victims. This can lead to that not the victims, but the *Staatsanwaltschaft* (prosecution) presses charges on the basis of the available information by making use of the *Offizialprinzip*, § 152(1) StPO³. For example, if a victim of human trafficking for the purpose of sexual exploitation applies for asylum, the case officer of the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge* (BAMF)) must forward the information to the headquarter. These report the matter to the responsible *Landeskriminalamt* (regional criminal investigation office). Regardless of the victim's interest and provided that sufficient information is available, a preliminary investigation can be initiated in cooperation with the local police. In some cases the victims are informed too little about this process or the asylum application is too much at the forefront, so that the contacting by the police may appear intimidating or frightening. In particular, victims of human trafficking or honour crimes take high risks of their life and physical well-being when filing a police report or testifying in court. In part, families in the country of origin are threatened. In Germany, witnesses can be protected through witness protection measures. These can include changing his identity, loss of contact to family and friends as well as change of residence. These measures also have a great impact on the psychological well-

² *Aufenthaltsgesetz* (Residence Act).

³ This means that a criminal proceeding is initiated *ex officio* as public interest. Now it is no longer up to the decision of the victim to decide for or against a police file or rather criminal proceeding.

being of the injured party, especially in cases where there is no support through a help center. Moreover, the access to these protection measures by German authorities in the country of origin are very limited or not possible.

Fear of revenge and shame often complicate access to victims. Help centers face challenges in meeting basic needs as well as in providing support and making referrals.

Both the contacting and investigation by the police as well as the witness' hearing in court can have negative implications for psychological instable or mentally ill persons, especially in cases in which they are not supported by a help center. Through (non-)verbal behaviour by the process participants and investigating authorities, it can come to *secondary victimisation*⁴. This often happens in cases of domestic violence, sexual attacks, forced prostitution, when the question arises why the victim has not freed itself from the situation earlier or why he did not do anything against it. The so-called *victim blaming* can cause tremendous negative impacts on the injured party's psychological stability and therefore also the quality of the witness statement.

Employees of the investigation authorities focus on the investigative process. Experiences show that the victim's mental state is thereby pushed into the background and is not prioritised. Not only the questioning of partially in 'communication untrained' personnel is criticised, but sometimes also no information on possible support and forensic preservation of evidence is given. Further, the other process participants lack acceptance and unknowingness on e.g. the role of the *psychosoziale Prozessbegleiter* (psycho-social support provider).

It can sometimes occur that victims are rejected, when they want to file a police report. Following the police report, they do not receive any information on their case without personal initiative.

A further problem is that it can take a very long time until victims are heard in court, as the judiciary in Germany is understaffed, which can add to the secondary victimisation of victims.

In accordance with § 48 StPO, witnesses are generally obliged to comply with the request to appear in court. A non-appearance can be sanctioned. Not all courts in Germany provide for the possibility of a videoed hearing. Moreover, technical problems can occasionally arise during audiovisual hearings. For police offers, video interviews mean additional time requirements, as all involved institutions and persons need to be available.

⁴ This e.g. can be caused through particular questions, which makes the victim believe not to have acted accordingly, is to blame or even has behaved unlawfully.

For the claim of financial compensation on the basis of the OEG further evidence and requirements also need to be fulfilled. Here there is in many cases the risk of re-traumatisation. In addition to the court procedure, the crime event and its consequences as well as damages need to be described in detail. Occasionally, medical reports are requested. Despite the efforts, it is possible that payments are refused.

4. Judicial practices to protect victims' rights

Germany offers several different protective measures by the police for particularly vulnerable people, including victim and witness protection. Primary point of contact therefore is the BMJV. The need of protection is assessed on a case-by-case basis. The police is subordinate to the *Staatsanwaltschaft* and is responsible for witness protection during the testimony, during the judicial procedure and also for emergency response (§§ 160, 163 StPO). During the criminal investigations (police interrogation etc.), in particular in cases of sex offences, the police offers the possibility on request of the victim that the questioning is done by a police officer of the same sex. According to § 406j StPO the injured party should be informed about their entitlements in writing and if possible, in a language they understand to at the earliest possible stage (§§ 406d-j StPO). If a witness in an individual case is in threat of danger, the victim may be granted to restrict or apart from the provision of his personal data (§ 68(2-3) StPO).

The police and court inform the victim about support services of help centers/victim support services and *psychosoziale Prozessbegleitung* through brochures when filing a police report or in the course of witness court summon (§ 406g StPO). In particular, the nationwide uniform leaflet on the rights of injured parties in criminal proceedings is handed out. Further, the police stations use materials of the Programme of Police Crime Prevention (*Programm Polizeiliche Kriminalprävention* (ProPK)). The measures are offered to the victims independently and only offered after consultation with and on request of the victim. Subsequently, further support is offered in order to enable an uninterrupted supervision of the victim. The measures are carried out upon approval by the responsible *Staatsanwaltschaft* and court. The victim protection representative (*Opferschutzbeauftragte*r*) of the given federal state is responsible for questions and coordination. In addition, the federal government and federal states offer information material, leaflets and assistance online.

People authorised to refuse testimony (§ 52 StPO), but also (initial) witnesses that are willing to give evidence are to be interviewed by the investigating magistrate the earliest as possible in order to enable the testimony to be introduced to the criminal proceeding, if the witness decides to make use of his right to refuse the testimony at a later stage. Witnesses that do not have a right to refuse the testimony are explained that they are obliged to testify.

Some courts have so-called witness chambers. For burdened victim witnesses these rooms can be used as protected and shielded waiting room until their testimony. This is especially useful, when a defendant is not in custody and gang or family members of organised crime groups want to contact the victim in order to intimidate him.

Some measures can be made *ex officio*; e.g. the coordination of a witness assistance, the recording of the judicial questioning and the exclusion of the defendant. For other measures a request by the injured party is needed. According to § 406f StPO, the injured party can be represented by counsel during the hearing. In the § 395 et seq. StPO it is laid down, which persons are entitled to a private prosecution representative free of charge⁵. The lawyer makes an application for a private prosecution representative before the court; upon approval the witness does not need to carry the costs for the incidental action. The so-called lawyer for victims (*Opferanwalt*) takes over the legal advice or rather representation of the joint plaintiff. Additionally, the procedural rights through the private prosecution representative can be granted by request, such as e.g. the inspection of records (§ 406e StPO). The lawyer has the possibility to participate in all trial dates. Thereby, the lawyer is able to inform the witness on the current state of the criminal proceeding. According to § 406d StPO, the victim witness has the right to be informed by filing an own request. The joint plaintiff should focus on respecting and protecting the witness' rights. This e.g. can include the anonymisation of the registration address. If necessary, intimate questions by the process participants, which are not relevant to the procedure, can be averted, so that they do not have to be answered. One example for this is the question on the number of sexual partners.

For particularly vulnerable persons, such as victims of sexual offences, the option exists to file a request for a video-recorded interview (§ 247a StPO)⁶. Hereby the witness testimony is broadcasted by video in the main hearing. This request is granted, if it can be concluded that there is a risk of the witness' well-being. Primarily, it must be examined, if the exclusion of the public or the hearing takes place without the presence of the defendant in line with § 247 StPO, would be sufficient enough in order to protect the witness' well-being.

Specific crime victims also have the possibility to be supported by a *psychosoziale Prozessbegleitung*⁷ prior, during and after the main hearing (§ 406g StPO⁸). Victim witnesses are

⁵ These are amongst others injured parties that are children, minors and also adults that have fallen victim of sexual abuse, sexual harassment, stalking, murder, homicide, bodily harm, abuse, female genital mutilation, human trafficking, labour exploitation, forced marriage, coercion, deprivation of liberty as well as person's whose children, parents, siblings, spouse or life partner has been killed through an illegal act.

⁶ In §24(2) GVG a special worthiness of protection is defined that the questioning of the injured party is associated with an exceptional strain.

⁷ *Prozessbegleiter* usually are social workers that needed to complete a professional training for this qualification.

made aware of the legal situation as well as informed about their rights and obligations. Through this information, the witnesses shall feel prepared and empowered, in order to thereby overcome possible fears, powerlessness and insecurities. Knowledge about the criminal proceeding and the role of the process participants can give security. *Prozessbegleiter* have the possibility to sit next to the *Nebenkläger* during the witness testimony. During the preparation, a relationship has usually already been established, so that an accompaniment to court can give additional stability. After the criminal procedure, supportive measures can be offered, if necessary.

One possibility for compensation is offered by the adhesion procedure (*Adhäsionsverfahren*) (§ 403 StPO). It enables the joint plaintiff to file a request for damage compensation. This procedure can be integrated into the actual criminal proceeding and does not require an additional civil proceeding. The victim can hereby file a request for legal aid, in order not to pay for any additional costs. An application for an *Adhäsionsverfahren* can be made by all injured parties of the criminal offence. For further measures, the particular vulnerability of the injured party is decisive. A further opportunity is the TOA, as described in chapter 2.

In addition, in all federal states there are provisions available on the cooperation between help centres and authorities such as the cooperation decree on the cooperation between the police, prosecution, relevant immigration and social welfare authorities, youth welfare departments, employment agencies, job centres and help centres for the protection of victims of human trafficking for the purpose of sexual exploitation. In line with this decree, the representatives of these authorities meet regularly in order to exchange information about present events, legal amendments and possible problems in their implementation.

5. Final conclusion

The German legislation has increasingly improved and strengthened victim rights as well as the legal basis for a comprehensive protection for victims. Moreover, the acceptance of victim rights has been increased. The EU Victims' Rights Directive still needs to be implemented more comprehensively in Germany. Victim rights seem only to be partially implemented or not used uniformly at all. Further, the given rights are not generally applicable for each victim. This means that victims are only entitled to specific rights e.g., if they are allowed to bring incidental action. Most low-threshold support is mainly provided by NGOs and specialised help centers.

⁸ According to 13. section of the StGB following people are entitled: children, minor and people, who are unable to defend themselves, who are victims of severe sexual- or violent offences or persons, who are victims of severe violent offences, such as e.g. grievous bodily harm, robbery, human trafficking (§397a (1 Nr.5) StPO)) and were below the age of 18 when they filed the police report or are unable to represent their interests by themselves. These persons are to be assigned with a *psychosoziale Prozessbegleitung*. Additionally, there are other group of persons, whereby arbitrary of a particular vulnerability, a *psychosoziale Prozessbegleitung* can be granted.

Framework conditions need to be changed in order to hinder *secondary victimisation*, such as a better equipping of the judiciary and faster court procedures and judgments. The evaluated literature and questionnaires show that there is desire and need for training programmes for the investigation authorities, the extension of claimants for *psychosoziale Prozessbegleitung* etc.

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Bavarian State Ministry of Justice

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Law firm Funk.Tenefelde

Ministry of Justice and Europe Baden-Wurttemberg (Department for Criminal Law and Grace Privilege)

Lower Saxonian Ministry for the Interior and Sport (Department 23 – Crime Control)

Senate Administration for Justice, Consumer Protection and Anti-Discrimination Berlin (Department III C 1)

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