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Victim Protection in Terrorism Proceedings

When I say that victim protection in terrorism proceedings is not the most pressing problem in Germany, I am not talking about Elysian conditions. In abstract, there is a danger, but individual (Police) protective measures are only taken if this danger is concentrated in and on one person and has become concrete. However, these are only a few cases.

I. Description of Responsibilities

The competences in victim protection in Germany are divided - irrespective of the type of criminal proceedings. As far as the protection of a victim in "normal" life is concerned, the Federal and State (Länder) Police are responsible within the legal framework of general danger prevention. In the context of criminal proceedings that are in progress or pending, the victim also plays a role as a witness. The public prosecutor's office and the criminal courts deal with this kind of protection - naturally in cooperation with the competent Police departments.

II. Extra-procedural Victim or Witness Protection

Unlike some other countries, Germany has not set up its own independent witness or victim protection authorities. Witness and victim protection outside of concrete criminal

proceedings is danger prevention. The Federal and State Police forces are responsible for averting public danger.

The Police cannot effectively protect witnesses and victims on their own. They are dependent on the administrative assistance of other authorities. If the protected person needs work, the employment agencies come into play; if it is about his children, the youth and school authorities etc. If a change of name is required, the registry offices are called upon. The list can be continued indefinitely. But the Police authorities have always the lead.

Within the Police, witness and victim protection is the responsibility of separate departments or commissariats, which are strictly separated from those dealing with criminal investigations. Not only the Police personnel are separated, but also the victim protection files (and the related electronic communication). Only the protection department has access to the protection files. Civil servants entrusted with protection tasks are subject to strict confidentiality (cf. § 67, paragraph 1 BBG [Federal Civil Service Act], § 37, paragraph 1, sentence 1, paragraph 3, sentence 1 BeamStG [Civil Service Status Act]). Although they must appear when summoned (by the court), they may (and must) refuse to testify to their protective duties (§ 54, paragraph 1 of the Code of Criminal Procedure). They are not granted the necessary permission to testify by their superior authorities (§ 68 BBG; § 37, paragraph 4 BeamStG). Witness and victim protection files are exempt from seizure (§ 96 sentence 1 Code of Criminal Procedure). This confidentiality is likely to impair the rights of the accused to a proper defence. For understandable reasons, defence lawyers are interested in knowing who the protected person is and where he or she may be. Defence lawyers are also always interested in knowing under what circumstances the victim became protected and whether their defendant is held responsible for this. In the absence of concrete facts, defence lawyers have to rely on speculation, for example that the victim obtained protection by unfair means or that he or she received unfair advantages as a result of being granted protection. The speculation goes so far as to claim that the protection buys a suitable statement from the victim. The protection officer cannot comment on such speculation because he must refuse to testify. If the defence objects to his refusal, the court decides on the legality of the refusal. the

The Police service responsible for protection decides in its own and exclusive competence whether and how protection measures are taken. The judicial authorities involved in criminal proceedings can, if they have reason to do so, suggest protection measures, but they cannot force them, just as the victim concerned has no legally enforceable claim to protection. Victim and witness protection always presupposes that the protected person agrees with and complies with the conditions of protection set by the Police. If he or she fails to do so, protection does not occur. If he or she violates the protection conditions while protection is granted, the Police can terminate the protection measures. The termination of protection is an administrative act open to review by the administrative courts. Administrative court actions for the continuation of protection are not particularly promising, because the Police have an extremely wide scope of assessment as to whether the necessary relationship of trust still exists with the protected person.

The concrete protection programme for victims and witnesses depends on the circumstances of the individual case. The most far-reaching measures are the permanent change of identity of the protected victim and his family, often combined with a change of residence and location. Below this threshold of measures, all variants are conceivable. The victims we are talking about here often do not live in Germany, but in the crisis areas fought over by the terrorists or in a third country. If the victims live in a country of the European Union, the necessary victim protection can be organised in cooperation with the Police or witness protection authorities there. Victim protection from Germany in countries outside the European Union is difficult or even impossible. Often the victim lacks confidence in the reliability of the local authorities. In such cases, victim protection is not feasible. The reason why victim protection fails on the ground is that the local authorities do not have adequate protection programmes. Some foreign authorities are simply unwilling to cooperate and disinterested. The solution to such a dilemma is to bring the victim (and his family) to Germany for protection. The German Police need an objective reason for this, which is usually found in the fact that the victim is needed as a witness in domestic criminal proceedings. In cases of such necessity, the German missions abroad are very willing to cooperate when it comes to issuing the necessary visas.

It has already been said above that witness and victim protection are always a matter of reciprocity. The protected person must fulfil the conditions deemed necessary by the Police - just like any of his family members. The Police witness protection services inform the persons concerned about the changes that will occur if they are accepted into a protection programme. They can be drastic, and they usually are.

III. Protection Measures within Criminal Proceedings

Procedural protection measures are in addition to the general protection measures. The Police protection agencies will request them from the public prosecutor's office in the preliminary proceedings and from the criminal court for the main hearing. Without agreement between all authorities involved, it is difficult to implement protective measures in the trial.

1. Practical Circumstances

This involves seemingly banal, practical matters. For example, how should the protected victim be brought into the court building and the courtroom, and how should he or she leave the building? For the duration of his stay, the question arises whether it is appropriate to accommodate the person in a separate room. In Germany, the larger courts have set up so-called witness care units. These are organs of the administration of justice with trained staff whose task it is to receive witnesses of any kind in need of assistance at the entrance to the court, to accompany them to their examination and, if necessary, to provide them with assistance even after the examination. Whether this support centre can be called in depends on the design of the Police protection of victims. If the Police shield the victim completely, there is no room for judicial witness support. One of the last legal measures to strengthen victims' rights in criminal proceedings was the establishment of psycho-social victim support, which has to take care of victims outside the court and is part of the state social administration. It is associated with the Government's Department for Social Welfare.

Today, victim protection is a matter of self-evidence. Only a few decades ago it was almost an unknown term in criminal proceedings. Victim protection is not only an expression of social state welfare, but it is a human right. It is not only about protecting

the life and physical integrity of crime victims, but also about preventing the victim from being re-traumatised, especially in criminal proceedings. This is a serious appeal to the empathy of judges when confronted with a crime victim.

When it comes to procedural victim protection in the strict sense of procedural regulations, it is primarily the public prosecutors who are called upon, because they have the first contact in the preliminary proceedings. In this initial contact, the victim is to be informed,

- what the criminal proceedings are about,
- what his or her role in the proceedings will be, and
- what rights the victim has in these criminal proceedings.

Transparency and information are essential, as they alleviate the victim's understandable fears. Most of the victims never got in touch with judicial or prosecutorial officials. Victims are inexperienced in procedural matters. They need professional assistance to be able to exercise these rights properly. Therefore, the next early demand is to provide them with legal assistance. This is easily feasible for victims residing within Germany because there are now lawyers in Germany who specialise in victims matters. For victims living abroad, such assistance becomes seriously problematic.

When hearing victims as witnesses, the public prosecutor's office must ensure that, if possible, only one hearing is held. Such a concentration is already required by the prohibition of re-traumatisation; it must also take into account a future main hearing. Interrogations of victims in preliminary proceedings should therefore be audio-visually recorded. In order to be able to use the records later in a main hearing without major difficulties, it is advisable to ask the accused's defence lawyer to join the proceedings at this stage and to give him the opportunity to ask the victim questions. If it appears that the victim is not available for a main hearing, it is advisable to have the victim questioned by the investigating judge. Judicial transcripts are easier to read in the main hearing.

2. Procedural Safeguards in the Strict Sense

In a main hearing it must be decided whether the victim-witness may be present in person and must be questioned (again) personally. This is actually required by the principle of immediacy.

German criminal procedure law considers the victim to be a party to the criminal proceedings and gives him or her all the rights that the other parties to the proceedings also have. The prerequisite for this is that the victim formally joins the criminal proceedings by declaration as a joint plaintiff. In such a case, the victim has

- the right to legal assistance, which may also be provided at state expense,
- to be present at the main hearing; however, there is no obligation to be present,
- to have unrestricted access to the criminal files and evidence before the court,
- to ask questions and file motions in full
 - on taking additional evidence,
 - for the production of own evidence,
 - to legal remedies where procedural law declares such remedies to be admissible also in the case of other parties,
 - to disqualify judges and court experts,
 - on the making of closing submissions and final motions,
- to challenge the final decision.

In accordance with his special position as a victim, criminal procedure law also provides for information rights of the victim in the execution of the sentence. If the prison service of the convicted offender is to be suspended or he is to be released from the penal system, the victim must be informed of this. The victim can comment on the intended measures, but is otherwise not involved in the execution of the sentence and its management.

If the victim is to be questioned as a witness, the questioning must be conducted with special consideration for the trauma suffered by the victim. Does the victim have to testify in person or is it sufficient to read out the minutes of the interrogation or to play back recordings of the interrogation from the investigative proceedings? Since any reading out or playback instead of a personal interrogation affects the principle of immediacy and thus the rights of the accused to a proper defence, the accused and his

defence counsel must agree to their substitution. If the victim is to be heard in person because of the importance of his or her testimony in the main trial, victims perceive the presence of the accused as a burden. In order to enable a comprehensive and truthful testimony, procedural law allows the defendant to be removed from the courtroom for the duration of such a hearing. The German courts shy away from such a drastic measure, as experience has shown that it is a source of legal error. If documents are read out in the absence of the accused, but during the questioning of the victim (e.g. to aid the victim's memory), or if evidence is examined, this evidence must be taken again as soon as the accused rejoins the proceedings. It is not uncommon for a piece of the evidence to be forgotten in absentia and not repeated. Moreover, German courts are aware of the fact that removal is the strongest interference with the defendant's rights of defence. From the perspective of the German criminal courts, removal of the accused is therefore suboptimal.

In order to spare the victim the simultaneous presence of the accused, procedural law opens up the possibility for the victim to be in another place (within the court or elsewhere) during his or her interrogation and for his or her interrogation to be transmitted simultaneously into the hearing room. Also, the victim does not have to testify under his true identity. He may use other pseudonyms if only his real identity is recorded in confidential and not generally accessible files (such files, which are not part of the criminal records, are kept by the public prosecutor's office). If the interest of protection so requires, the voice and appearance of the victim may be distorted by technical means. The place of testimony may be in the court building, but any other place is permissible. The court must of course establish who is at the other place together with the victim in order to exclude any possible influence on the victim. The other place of interrogation may also be abroad. If the victim is questioned abroad by way of international mutual legal assistance, the German judicial authorities are dependent on the consent and cooperation of the local national authorities. Often, however, a victim has mistrust of his or her national authorities and stays away from a hearing. It makes little sense, and may even be counterproductive, to have his or her hearing forced by the national authorities. However, it is just as common that the foreign authorities do not react or that the local law does not recognise audio-visual interrogations. This type of audio-visual interrogation then fails. We do not want to talk about the technical difficulties that may arise.