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Victims of sexual abuse and the call for testimonial justice

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I want to share some of the considerations of an interdisciplinary project focussing on the questions of testimony assessment in cases of sexual abuse of minors. Due to the lack of material evidence in such cases, there often are -one's word against another's situations. In these situations, frequently the question of the victim´s credibility arises. As a consequence, at least in Germany, expert statements and especially if children are involved, so-called Statement Validity Assessment (SVA), conducted by psychologists, are commissioned by the court. In a survey, a considerable number of victims who were subjected to such a credibility assessment reported, among other things, that they had the feeling that they were distrusted and that the assessment had a negative impact on their psychological and physical health; this is particularly the case when the assessment, due to the methodology used at least in Germany, comes to the conclusion, as is not uncommon, that it cannot be ruled out that the victim's statement is not based on what he or she actually experienced. Against the backdrop of the "in dubio pro reo" principle, this has the consequence that the criminal prosecution authorities discontinue investigations in this regard or that the defendant is acquitted.

In this context I do not want to go into the methodological critics of this method of credibility assessment from a psychologist´s view, but to focus on the question to what extent legal rights of victim-witnesses may be negatively affected by such SVAs and what has to be done to prevent the breach of victims´ rights especially in a court trail. This ends up in the call for, as we call it, testimonial justice. Of course, I´m aware that some of the legal considerations, but not all of them, I want to present to you are based on German constitutional law. But I´m convinced that these considerations can easily be transferred to other, not at least anglo-american legal systems since they are founded on very fundamental legal beliefs.

What does testimonial justice mean?

Primarily, it is true that the injured party is in particular a source of evidence, especially from the perspective of criminal prosecution. But when considering the validity of a testimony, it must be taken into account that the ability to communicate verbally and, related to this, to verbalize stressful experiences, varies depending on the victims´ intellectual and developmental prerequisites. To that extent it appears to be epistemically unfair if the knowledge - to which the word "epistemic" refers - of the witnesses due to the SVA method used remains systematically and discriminatorily unheard or misunderstood, and therefore

procedurally invisible, and is exposed from the outset to the unconscious prejudice of not being sufficiently credible. This problem arises particularly when witnesses are due to a mental disorder or for intellectual or other reasons, at times caused by the abuse itself, disabled to produce enough and/or high quality so-called "free text", the basis for a SVA, without possibly suggestive inquiries. The counter-construct is "epistemic (testimonial) or witness justice" (testimonial justice). It aims to ensure that witnesses have a realistic chance in court and other proceedings to be heard effectively and that their testimonies have a fair chance at all to be evaluated as credible.

How can the testimonial justice be founded legally?

First of all, it should be noted that neither the German Federal Constitutional Court nor constitutional law doctrine, with a few exceptions, has yet adequately discussed the constitutional status of the injured party or the victim witness. The basis for a constitutional right to victim-friendly criminal proceedings is the right to effective criminal prosecution. In its more recent case law, our Federal Constitutional Court recognizes a constitutionally guaranteed individual right of a person injured by a criminal act to effective prosecution; however, this (so far) only applies to significant criminal acts against life, physical integrity, sexual self-determination and freedom of the person. The Constitutional Court derives this individual right to effective prosecution essentially as an aspect of the constitutionally founded duties of protection, based on the guarantee of physical integrity (Art. 2 Abs. 1 S. 1 GG) in connection with the protection of human dignity (Art. 1 Abs. 1 S. 2 GG). They oblige the state to protect and promote life, physical integrity, freedom and sexual self-determination of the individual and to protect them from unlawful interference by third parties where those entitled to fundamental rights are unable to do so themselves.

The German Constitutional Court thus creates in substance, albeit in the guise of the constitutional duty to protect, an independent right of certain aggrieved parties to the conduct of criminal proceedings that take account of their punitive needs. This corresponds to the injured party's constitutionally guaranteed entitlement to judiciary, which is derived amongst others from (the principle of) the rule of law. The legal institution of the private accessory prosecution (Nebenklage; §§ 395 ff. StPO), however, proves that injured parties can not only initiate criminal proceedings not pursued by the state (i.e., through proceedings to enforce a complaint). Rather, they can also pursue their need for punishment in addition to the need for punishment asserted by the state (public prosecutor). Although the German Constitutional Court has not yet drawn any general conclusions for the status of injured parties as victim witnesses in criminal proceedings, but its argumentation, that is based on the constitutionally guaranteed right to protection, as described above, does suggest some consequences. For where the statements of victim-witnesses become invisible or irrelevant for criminal proceedings by means of an epistemically unjust approach - also because they are considered implausible as a result of an approach that schematically ignores the communicative characteristics of victims, e. g. in an SVA - the fundamental right

to effective criminal prosecution remains unfulfilled. In the view of the Federal Constitutional Court, this can be interpreted as a violation in particular of the duty to protect personal integrity (Art. 2 Abs. 2 S. 1 GG).

Beyond national constitutional law, and here on site probably even more important are international legal foundations for the demand for testimonial justice. The UN Convention on the Protection of Children and the UN Convention on the Rights of Persons with Disabilities should be mentioned in this context in particular. Art. 19 of the UN Convention on the Protection of Children obliges the contracting states first and foremost to take all appropriate measures to protect children from physical and mental violence and especially sexual abuse. This preventive/protective provision is supplemented in para. 2 by the obligation in repressive means that also effective measures for the investigation and prosecution of conduct harmful to children have to be implemented. It is clear that methods of testimony validity assessment are not compatible with these provisions and cannot stand up in proceedings governed by the rule of law, if on their basis children's statements structurally have a lesser chance of influencing judicial decision-making because they fail to take into account the intellectual and cognitive peculiarities of children. If the content of children's testimonies is not exhausted because the testimonial competence of children in general and traumatized children in particular is not properly appreciated, the goal of effective investigation and prosecution of child-damaging behaviour is missed.

The same applies to the UN Convention on the Rights of Persons with Disabilities, which has been in force since 2009. Due to the broad scope of application corresponding to its objective, one will also be able to regard traumatized victims as covered by it. Above all, the obligations arising from Art. 5 para. 2 and 13 para. 1 of the Convention to respect the best interests of the child and to ensure effective access to the justice system are significant in the present context. However, effective access to the justice system is not already achieved when the court building can be entered without difficulty. Even more important are the possibilities of active and effective participation in the proceedings, i.e. the possibility of actually receiving a judicial hearing. However, this in turn presupposes that the physical and psychological characteristics of the person are taken into account, particularly in the context of the assessment of evidence, and that these are not measured by the standards that apply to non-impaired people; which, incidentally, would again constitute a violation of the principle of equality, namely to treat equal things equally and unequal things unequally.

How can testimonial justice can be achieved?

I think I do not have to explain that I cannot describe in detail here how testimonial justice can be achieved in court trails. For several reasons this has to be subject to further / upcoming discussions. Here I want to make you–adquainted with some first ideas and suggestions especially relating to the aforementioned SVAs.

It is of importance to be aware that the way of achieving testimonial justice may be different for example in criminal and civil trails due to different principles

governing the different type of trials and especially the burden of proof. Here, I want to focus on criminal trails where the principle rights of the defendant / accused, like the „In dubio pro reo"-principle – according to what was said above – has to be balanced with the constitutionally protected rights of the victim-witness.

One of the most important aspects is that in case of an SVA the special cognitive and intellectual abilities of the victim-witness to memorize events in the past and express her- or himself have to be taken into account properly / in an adequate manner. This due to the fact that especially in cases of long lasting, multiple abuse actions it is very hard to remember single acts and to describe them, what leads to the dilemma that the most affected victims have the worst chance to pass the SVA.

Secondly, the victims need obligatory professional assistance while being examined in course of a SVA. This professional assistance can describe the procedure of an SVA to the victim-witness and help to prevent the feeling of not being trusted and in consequence negative impacts on its psychological health, but to feel safe and secure, what will help to improve the quality of the witness´ statement.

Furthermore, victim-witnesses shall not be deprived from therapy before making her or his statement in front of the legal authorities, though – at least in Germany – it is argued that such a therapy may have suggestive impact on the statement and distort it. Against this background it seems preferable to set up a system where victims of sexual abuse first make a statement in front of a specially trained psychologists or psychiatrists short after the abuse happened in order to "freeze the statement" and afterwards if the victim decides to make a denunciation at the legal authorities, perhaps after having started a therapy, to hand over this authentic statement to the law enforcement authorities.

Ultimately, dealing with the question of the validity of statement of victims of sexual abuse in the context with court trails has shown that still a lot of psychological research not has to be done and that an intensive interchange between psychologists and jurists is necessary.
