

The right to protection

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SUPERIOR COUNCIL OF MAGISTRACY OF ROMANIA

JUST/2012/JPEN/AG/2949

‘STRENGTHENING JUDICIAL COOPERATION TO PROTECT VICTIMS OF CRIME’

HANDBOOK

2013-2014



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I. INTRODUCTION TO VICTIMOLOGY AND VICTIMS' RIGHTS (*Suzan Van der Aa*)

'Why in history has everyone always focused on the guy with the big stick, the hero, the activist, to the neglect of the poor slob who is at the end of the stick, the victim, the passivist – or maybe, the poor slob (in bandages) isn't all that much of a passivist victim – maybe he asked for it?' [Hans von Hentig – The Criminal and his Victim – 1948]

The quote above illustrates that, in the past, there was a lopsided focus on the criminal event and the person acting in violation of criminal laws. For centuries, legal philosophers and lawyers have been preoccupied with the principles of criminal law, the criteria for criminalization, and the rights of the defendant; while criminologists typically concentrated on the characteristics of criminals, what caused their criminal propensity and how to prevent crime. Their point-of-departure was always the offender, never the person who suffered as a result of the crime. It was only fairly recent, around the 1940s, that academics also started to take an interest in *victims* of crime and *their* standing in criminal procedure.

The scientific study of crime victims is called 'victimology', after Benjamin Mendelsohn who coined the term in 1947. Comparable to criminology, where the offender plays a central role, the focus of victimologists lies with the victim and the different aspects of victimization. Victimology is:

*'[t]he scientific study of the extent, nature, and causes of criminal victimization, its consequences for the persons involved and the reactions hereto by society, in particular the police and the criminal justice system as well as voluntary workers and professional helpers.'*¹

Some of these aspects – extent, nature, causes, consequences of, and reactions to victimization – will be highlighted in this introduction.² In addition, we will give a brief overview of the major developments that have taken place in the field of victims' rights. For the past few decades have witnessed the transformation of victims who mainly served as witnesses and persons reporting the crime, to persons vested with rights of their own. After playing a marginal role in criminal proceedings for centuries, victims have finally emancipated, and they are emancipating still. So what was it that spurred these developments? And where do victims stand today?

¹ H.J. Schneider, 'Victimological developments in the world during the past few decades I: A study of comparative victimology', *International Journal of Offender Therapy and Comparative Criminology* 45(4) 2001, 449-468. Another definition, proposed by Daigle, defines victimology as: *the study of the etiology (or causes) of victimization, its consequences, how the criminal justice system accommodates and assists victims, and how other elements of society, such as the media, deal with victims* (L.E. Daigle, *Victimology: A Text/Reader*, Los Angeles: SAGE 2012, p. 1).

² Given the limited space this introduction will only scratch the surface of the issues raised above. The interested reader is referred to the ever growing body of victimological literature for further reading.

1. CAUSES OF VICTIMIZATION

One of the first aspects that scholars started to study was the role the victim himself had played in the commission of the crime. Instead of studying the offender in isolation, crime victimization usually involves at least two persons, and the criminal event may be the result of a certain dynamic between these two persons. What personal characteristics and what types of behaviours from the side of the victim influence the risk of falling victim to a crime? Early 'victimologists', such as Benjamin Mendelsohn, Hans von Hentig, Marvin Wolfgang, Stephen Schafer and Menachem Amir, investigated which behavioural, psychological and biological factors determined a person's propensity to crime victimization and how his behaviour related to the degree of culpability in the criminal event ('victim precipitation').

The result was often a typology ranging from victims who were 'completely innocent' to victims who were actually more blameworthy than the person who committed the crime.³ Some of these primary studies had a negative, victim-blaming connotation, suggesting that victims were largely responsible for their own victimization.

Nowadays, victimological studies into the causes of victimization tend to focus more on the concept of 'victim facilitation' – which unintentional actions on the part of a person facilitate in his victimization – rather than the concepts of 'victim precipitation' or 'victim provocation', which suggest blame and responsibility and have a negative undertone. Modern-day studies have largely moved away from investigating the degree to which the victim can be held responsible for his own victimization and have tried to come up with theories that explain victimization without necessarily placing blame upon the victim.

An example of such a theory is the one on *repeat victimization* as proposed by, *inter alia*, Ken Pease and Graham Farrell.⁴ They proved that, contrary to general beliefs, people do not run an equal chance of victimization, but that victims run a far greater risk of becoming victims *again*. In other words, a small proportion of the general public experiences a large proportion of all crimes. This is true for domestic violence, but also for property crimes, such as burglary.⁵ Pease and Farrell discovered, for instance, that a house that has been burgled before is at greater risk to be burgled again. The fact that the burglar knows how to get in and knows what loot will await him can explain the increased risk of re-victimization. He even knows the best time for committing another burglary: After approximately one month the insurance company will have cashed out and most goods will have been replaced by brand new items. In the mind of a burglar, the fact that the burglary succeeded the first time, increases the chance that it will succeed a second time as well. One of the solutions to end this victimization cycle is to concentrate on *victim oriented crime prevention*. Vulnerable

³ For instance, a victim who is victimized during the perpetration of a crime (armed robber who gets shot himself).

⁴ See, for instance, G. Farrell & K. Pease, *Once bitten, twice bitten: Repeat victimization and its implications for crime prevention* (Police Research Group Crime Prevention Unit Series Paper No 46), London: Home Office Police Department 1993.

⁵ It appears that 14% of adults experience about 70% of all self-reported cases of victimization (G. Farrell, 'Multiple victimization: Its extent and significance', *International Review of Victimology* (2) 1992, 85-102.

characteristics of the house – such as poor lighting or lack of an alarm system – need to be tackled to make them less attractive for burglars.

2. NATURE AND EXTENT OF VICTIMIZATION

A second goal of victimologists is to measure the nature and extent of crime victimization in the general (or a specific) population. Crime victimization can be measured in various ways. A first source of information could be the official crime statistics gathered by the police and the criminal justice system. The problem with these data is that they only represent a certain (small) percentage of all the crimes that have occurred in reality. There is a so-called *dark number*: the number of crimes that – due to underreporting or some other reason – do not come to the attention of the police. Furthermore, official crime data seldom contain detailed information on the victims that were harmed by the crime, because this information is less relevant for prosecutorial purposes.

A more accurate and reliable manner to measure crime victimization is therefore to conduct national or international crime victimization surveys and ask a representative sample of the general population directly whether they have been victimized. Although these surveys have their limitations too – victims may, for instance, not be able to recall what has happened to them – but these are less detrimental to the generalizability of the results than official police data.

A first remarkable finding from the numerous crime victimization surveys that have been conducted since the 1960s is that crime victimization is widespread. Research has shown that almost everyone will, at some point during his or her life, become the victim of theft or property damage and that almost all men will have suffered at least one incident of criminal bodily injury.⁶ It turns out that property crimes are more prevalent than violent crimes, with theft being the most common property crime and simple assault the most common violent crime.

Crime victimization surveys also demonstrated that men have an increased risk of falling victim to a violent crime in comparison to women. Only in the case of rape and other forms of sexual violence are women more likely to be victimized. Females were also more likely to be victimized by an intimate partner, while violence perpetrated by a stranger was typically targeted at male victims. Furthermore, teenagers and adolescents run a higher risk of being victimized – which decreases throughout adulthood – and the same goes for inhabitants of urban areas and persons with a ‘risky’ profession (police officers, taxi drivers, prison guards, prostitutes).

Other characteristics linked to a higher risk of crime victimization are related to a person’s behaviour. Spending more hours outside ones’ home, going out at night, frequenting pubs

⁶ Schneider, 2001 (*op. cit.*).

and discos, associating with criminals or engaging in criminal activities yourself are all risk factors that increase the likelihood of ever experiencing crime victimization. These behaviours bear witness of a 'risky lifestyle'.

3. CONSEQUENCES OF VICTIMIZATION

The consequences of crime victimization also form part of the victimological canon. These consequences can broadly be categorized under three headings: physical injury, mental health consequences, and economic consequences.⁷ Physical injuries can vary from light bruises and scratches to permanent disfigurements or even death. Economic costs derive from direct property losses, costs for medical care, legal costs, a reduced ability to earn an income, or immaterial damages such as costs related to pain and suffering or loss of quality of life. Mental health consequences are, for instance, depression, reduction in self-esteem and anxiety, while severe forms of violence can even result in post-traumatic stress disorder (PTSD).

Although crime victimization is commonly associated with trauma and PTSD, victimological studies have shown that most crime victims do not develop this psychiatric condition. The chance that someone develops PTSD as a result of a crime largely depends on the type and seriousness of the crime, the victim's social context, and pre-existing psychological characteristics. Despite the fact that it is normal for victims of severe forms of violence to display symptoms associated with PTSD – such as re-experiencing the traumatic event, avoiding certain places or being overly vigilant – most people do not develop PTSD. Only when these – and other – serious complaints last for more than one month can PTSD be diagnosed.⁸ Most victims, however, are surprisingly resilient and their symptoms usually diminish without professional support. Still the impact of crime in terms of mental and physical health issues and economic costs should not be underestimated. The costs for crime victims are in the order of tens of billions on an annual basis.

4. REACTIONS TO VICTIMIZATION

A final aspect that academics are interested in is the reaction from other people and society at large to victimization. One would suspect that, given the detrimental effects of crime victimization, victims would meet with sympathy and respect everywhere they go. Surprisingly, quite the opposite is true. Many victims are blamed for what happened, their characters and appearances are derogated, and it is often believed that they 'got what they deserved'. The underlying mechanism causing this negative reaction to crime victimization may be the prevalent *belief in a just world*. Melvin Lerner discovered that people generally

⁷ See Daigle (*op.cit.*), pages 71-86. The discussion of other consequences, such as costs to society at large, or to vicarious victims falls outside the scope of this introduction.

⁸ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders (5th)*, Washington 2013.

assume that good things happen to good people and bad things to bad people.⁹ This belief in a 'universal moral balance' is important for people to maintain their own well-being and guide their actions: As long as one acts in accordance to certain moral standards, nothing bad can happen. The victimization of innocent people, however, threatens this 'justice motive' and causes distress. It implies that 'bad' things can happen to 'good' people too.

One of the strategies to restore the belief in a just world is to attribute blame to a person who has suffered from a crime, to derogate this persons' character or to distance oneself psychologically from this person. People's suffering is rationalized on the grounds that they deserve it. The problem is that not only 'ordinary' people share this delusional belief in a just world, but that criminal justice officials may (subconsciously) be guided by this principle as well.

5. VICTIMS' RIGHTS IN CRIMINAL PROCEEDINGS

Historically, victims have had a significant influence on the criminal process. After the collapse of the Roman Empire there was no governmental structure to prosecute criminals from the side of the state. This resulted in the victims playing a central role in the (informal) disposition of crimes. Throughout the Middle Ages the crime was primarily considered a harm against the individual victim, not the state, and justice was distributed on the basis of the eye for an eye principle (*lex talionis*) by the victims or their relatives. It was only after the authoritarian state took over and monopolized the prosecution of crimes that victims came to play a marginal role within the criminal justice procedure.¹⁰ Victims were reduced to mere witnesses and persons reporting the crime, much to the detriment of many of them.

For with the help of victims' studies it was discovered that many victims considered their involvement in the criminal procedure a negative experiences. Factors that negatively impacted the victim were, for instance, being disbelieved by the authorities, being confronted with the offender and being subjected to insensitive questioning or cross-examination. Sometimes these negative experiences were so invasive that victims had the feeling they were being victimized a second time, but this time by the criminal justice system instead of the offender. They suffered from so-called *secondary victimization*: the phenomenon of renewed victimization due to an inadequate response to the primary act of victimization by the criminal justice system.

Victimologists discovered that it was not only the outcome that determined victims' satisfaction with the criminal justice system, but also the manner in which the criminal

⁹ M. Lerner, *The belief in a just world: A fundamental delusion*, 1980.

¹⁰ Although victim involvement in criminal trials diminished over time and although the state became the predominant enforcement agent in Western societies, some countries retained private elements, such as private prosecution. Still this option is mainly reserved for (some) minor crimes.

justice decision came about that was of equal or even more importance to victims.¹¹ Although victims value certain outcomes – such as the arrest or punishment of the offender – the procedure by which these outcomes are obtained matters as well. In fact, they matter so much that factors such as a respectful treatment, a timely supply of information, the provision of support, and a (limited) right to participate can even negate feelings of disappointment when the desired outcome is not met. In other words, even if the offender is not arrested or sentenced, victims may still judge the entire criminal justice trajectory as a positive experience as long as their procedural needs are fulfilled.

From the 1980s onwards, the position of the victims has changed. This change was primarily based on the realization that the crime was first and foremost committed against the victim; any harm done to society at large was of secondary importance. Victims' rights activists furthermore hypothesized that the reintegration of victims into society would benefit from a criminal procedure that would take their needs into account. If victims were allowed to participate in the trial, to receive information, and to be treated respectfully, the criminal procedure could have therapeutic effects, accelerating the healing process and increasing the chances of victims becoming fully functioning members of society again. A final argument in favour of introducing more victims' rights was the fact that the criminal justice system largely depends on the cooperation of the victim. Without victims' willingness to report crimes, much of the crimes would go undetected and the criminal justice system would be unable to function well. It is of the utmost importance to keep victims satisfied with the criminal justice procedure; otherwise they will refrain from reporting crimes in the future.

As a result, many international legal documents saw the light that aimed to improve the victims' position in criminal proceedings. Some examples are: the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Powers (1985), the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (1985), and the European Forum for Victim Services' Statement of Victim Rights in the Process of Criminal Justice (2001).¹² These were, however, soft-law instruments, without binding power upon the participant states. This changed with the coming into force of the EU Framework Decision on the Standing of Victims in Criminal Proceedings in 2001.¹³ For the first time in history, there was a *legally binding* instrument dedicated to victims' rights, prescribing the European Member States minimum norms for victims in criminal proceedings, and other hard law instruments were soon to follow.

¹¹ This is the difference between the distributive justice theory, which holds that outcome is the main determinant of victim satisfaction and the procedural justice theory, which attaches importance to the procedure as well. See, for instance, T.R. Tyler, *Why people obey the law*, New Haven: Yale University 1990.

¹² UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985; Council of Europe Recommendation (1985)11 on the Position of the Victim in the Framework of Criminal Law and Procedure of 28 June 1985; and European Forum for Victim Services Statement of Victims' Rights in the Process of Criminal Justice, September 2001.

¹³ Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/JHA), 15 March 2001.

In many countries, the increased attention for victims within the criminal procedure met with scepticism and controversy at first. Direct and indirect participation of victims was considered problematic, because crimes were still seen as wrongs against the public rather than the individual. Many (defence) lawyers furthermore feared that the newly introduced victims' rights would encroach upon the rights of the defendant, violating his (human) rights, and leading to prejudiced and disproportional judgments.

'Giving victims 'constitutional rights' is a step down a slippery slope to returning our criminal justice system to a time of private prosecutions when personal vengeance ruled the outcome of cases.' [Rachel King]

Although victims' rights are still controversial, nowadays we see that victims' rights are more widely accepted, even up to the extent that some political parties misinterpret the victims' cause to further their own 'law-and-order' agendas. They, for instance, lobby for more severe penalties, claiming that this is what victims want. The downside of this approach is that it gives the false impression that victims' rights and rights of the defendant are a zero sum game: If you introduce rights for the victim, the defendant automatically loses some of his. It gives the idea that there needs to be a balancing act between the rights of the offender and those of the victims, while in reality most victims' rights have no such impact. The defence is not harmed if the victim is treated with respect, offered victim support or being informed. It is only with some – mostly participatory – rights that the needs and rights of the victims need to be carefully balanced against those of the offender.

6. CONCLUSION

Given the fact that victimology is a relatively young study – it only started to take firm root from the 1940s onwards – much progress has already been made. We now know much more about the prevalence, nature, causes and consequences of victimization and the way society views victims. The fact that many victims reported frustration at the handling of their case by the criminal justice authorities has furthermore led to the emancipation of the victim within the criminal procedure. As a result, there have been revolutionary developments in the field of victims' rights over the last couple of decades. Starting from the 1980s, their role in criminal proceedings has significantly grown, and new initiatives to strengthen their position even further are launched at regular intervals. The fact that victim involvement in the criminal process is more and more becoming a reality in many countries means that more and more practitioners working in the field of criminal justice will have to take victims' needs and victims' rights into account in their daily work. This handbook will hopefully provide them with the necessary tools to help them understand some of the basic rights for victims.

II. OVERVIEW OF INTERNATIONAL LEGISLATION ON THE PROTECTION OF CRIME VICTIMS (Tudorel Ștefan)

In the last 30 years, the international community had made efforts to codify principles of justice for the victims of crimes.

1. UNITED NATIONS

United Nations has endorsed a series of principles in the area of victim protection and assistance which are embodied in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Plan of Action for the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.

Some of the principles expressed in these soft-law instruments are incorporated in the provisions of legally binding treaties such as the Rome Statute of the International Criminal Court, the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime, and the United Nations Convention against Corruption.

2. COUNCIL OF EUROPE

The Council of Europe has formulated victims' rights in two kinds of legal instruments. The first one, soft-law measures have played an important role in raising states awareness in the area of victims' rights. The first Recommendation adopted by the Committee of Ministers concerning victims of crime, Recommendation no. R (85) 11 on the position of the victim in the framework of criminal law and procedure was adopted in 1985. Later, the measures were expanded in other non-binding instruments: Recommendation (2002) 5 of the Committee of Ministers on the protection of women against violence; the Guidelines on the protection of the victims of terrorist acts (adopted by the Committee of Ministers on 2 March 2005); Recommendation (2006) 8 of the Committee of Ministers on assistance to crime victims; Resolution No. 1 on victims of crime adopted by the European Ministers of Justice in Yerevan in 2006; and Resolution No. 2 on child-friendly justice adopted by the European Ministers of Justice during their 28th Conference in Lanzarote.

The second one are incorporated in conventions: the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116); the Council of Europe Convention on the prevention of terrorism (CETS No. 196), and in particular its Article 13 on the "protection, compensation and support for victims of terrorism"; the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and in particular its Chapter III "Measures to protect and promote the rights of victims, guaranteeing gender

equality”, Articles 10, 12 and 15; the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (CETS No. 201).

3. EUROPEAN CONVENTION OF HUMAN RIGHTS

The ECHR does not explicitly enshrine victims’ rights, but the ECtHR has integrated them into its jurisprudence in three primary respects. First, it has accorded victims an independent right to a fair trial in certain circumstances. Second, it has incorporated victims’ rights into the proportionality requirement of the defendant’s rights to a fair trial in article 6 ECHR. Third, it has imposed positive obligations on Contracting Parties to ensure that victims’ rights to life in article 2 ECHR, freedom from torture and inhuman or degrading treatment or punishment in article 3 ECHR, and respect for private and family life in article 8.

Art. 2 ECHR

In the case of *Osman v. the United Kingdom* (28 October 1998) Ahmed Osman felt threatened by the behaviour of his teacher. Several incidents were reported and the authorities took measures following these minor incidents. However, a shooting incident led to the death of Ali Osman and the wounding of Ahmed Osman. The Court concluded that the authorities had complied with their positive obligation to protect the physical safety and life guaranteed under Article 2. The police had respected the presumption of innocence and there was no certainty that measures which could have been taken by the police forces (as claimed by the applicants) would actually have produced the needed result.

In accordance with Art. 2 of the Convention, states should carry out an efficient investigation, which means that the general public and the victim's relatives should be able to obtain information on the status of the trial and its result, in a way that guarantees the relatives' legitimate interests, for instance.¹⁴ In practice it means that the victim's relatives should be systematically informed of the progress and the result of the investigation, on the procedural measures adopted during the criminal procedure and on the decisions on sending someone to court or not¹⁵; they should have access to documents during the prosecution and the trial, including to witness testimonies¹⁶; they should have the right to a legal representative¹⁷; they should have the possibility to file new requests regarding the evidence¹⁸; they should have access to the information used during the proceedings.¹⁹

It is against the principles inscribed in Art. 2 that the crime victims or their close relatives should be asked to file an official request in which they should declare that they want to be

¹⁴ *Hugh Jordan v. UK* (24746/94), 4 May 2001, para. 109.

¹⁵ *Gulec v Turkey* (21593/93), 27 July 1998, Reports 1998-IV, para. 82; *Hugh Jordan*, para. 142

¹⁶ *Ogur v. Turkey*, 21594/93, 20 May 1999, reports of judgments and decisions 1999-III, para.92;

¹⁷ *Hugh Jordan*, para. 142.

¹⁸ *Rajkowska v. Poland* (37393/02), 27 November 2007.

¹⁹ *Yvon v. France* 44962/98, 24 April 2003, Reports of Judgments and decisions 2003-V, para. 37

involved in the criminal proceedings, and in the case homicide has been committed, the authorities must involve the victim's relatives ex officio.²⁰

In *Vo v. France* (8 July 2004) the Court, dealing with a case of violation of the right to life (Article 2), due to the *in utero* death of a child due to the negligence of the physician, reaffirmed the positive obligation of states to ensure that their domestic legislation adequately protects the person's rights.

The Court sanctioned again the lack of adequate protection provided by domestic law in the case of *Siliadin v. France* (26 July 2005), where the applicant was fully dependent and required to perform forced labour, without remuneration. It was held that the state had failed to comply with its positive obligation, inherent in Article 2 to secure tangible and effective protection against the practices prohibited by this article and to which the applicant had been subjected, since only a civil remedy had been provided and the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.

In *Kontrova v. Slovakia* (31 May 2007), following the death of the applicant's children at the hands of her abusive husband, the Court noted that the police had failed to adhere to various obligations under national law which existed to ensure the protection of lives. The Court reiterated that the first sentence of Article 2 §1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

In the case of *Dündar v. Turkey* (20 September 2005), following the death of the applicant's son for unknown reasons, the investigating authorities failed to gather the necessary evidence in order to find the perpetrators. The Court concluded that the authorities failed to carry out an adequate and effective investigation of the killing of the applicant's son, as required by Article 2 of the Convention. The Court pointed out that this obligation was not confined to cases where it is apparent that the killing was caused by an agent of the state.

Art. 3 ECHR

In the case of *A v. the United Kingdom* (23 September 1998) the applicant suffered from ill-treatment and violence perpetrated by his stepfather on various occasions. The Court considered that the domestic legislation failed to protect the applicant from inhuman and degrading treatment (Article 3) since the law enabled (the perpetrator) to claim that such a treatment was a "reasonable chastisement".

In the case of *Z and others v. the United Kingdom* (10 May 2001) the local authorities had been aware of the serious ill-treatment of four children over a period of years (from 1987), although they decided only in 1992 to seek care orders in respect of the children. The Court considered that the state failed in its positive obligation to provide the applicants with

²⁰ *Slimani v France* (57671/00), 27 July 2004, para. 44.

adequate protection against inhuman and degrading treatment (Article 3), as despite the abundance of evidence concerning the serious ill-treatment and neglect suffered by the applicants over a period of years at the hands of their parents, and despite the means available, the state failed to take any effective steps or protective measures to bring it to an end.

Art. 6 ECHR

Art. 6 of the Convention is applicable to victims who take part in the criminal trial as a civil party in order to ask for remedy for the damage, even if the remedy is symbolic; the victims who exercise their rights to protect a civil right as the right to good reputation; the victims who take part in the criminal proceedings and do not request remedy for damage, when the remedy is requested in a distinct civil lawsuit.

Art. 6 guarantees to victims and their close relatives the following rights: the right of access to the file and to all documents regarding the crime/crimes committed the right to be heard, the right to receive a motivated court decision.

Art. 8 of ECHR

In *X and Y v. the Netherlands* (26 March 1985) the Court held that the protection provided by the law in the case of the sexual assault on Miss Y was inadequate and ineffective. It noted that the victim was mentally handicapped and unable to file a complaint herself, which she was required to do by law since she was 16 years of age. A complaint was filed by her father but this could not be a substitute to the complaint she should have lodged and in the instant case, no one was thus legally empowered to file a complaint. The Court held that no sufficient means of obtaining remedy were available as the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y was insufficient, that effective deterrence was indispensable in this case and that it could be achieved only by criminal-law provisions, which did not contain any specific provision to the effect that it was an offence to make sexual advances to the mentally handicapped. The Criminal Code thus offered insufficient protection and this absence of adequate means of obtaining a remedy was one of the factors which led the Court to conclude that her physical and moral integrity, as enshrined in Article 8 concerning the right to private life, had been violated.

III. FOCUS ON SPECIFIC VICTIMS' RIGHTS

1. INTRODUCTION (*Tudorel Ștefan*)

Within European Union in 2001, it was adopted the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA, hereinafter: FD)²¹. The FD established basic rights for victims of crime and the Member States had to adapt their legislation in line with the requirements by 2006. Implementation reports published in 2004 and 2009 concluded that the Framework Decision had not been effective in achieving minimum standards for victims across EU.

On 25 October 2012 were adopted the **Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA**.²² The new Directive replaces the 2001 Framework Decision and includes the minimum standards on the rights to access information, support, protection and basic procedural rights in criminal proceedings. The Member States have to implement the provisions of the Directive into their national laws by 16 November 2015. However, if the Member States will not implement the provisions the Directive will be enforceable according to the case law of European Court of Justice. According to the definition in Art. 288 in TFEU, the directives were not conceived to operate automatically on national level. After they are published in the Official Journal of the European Union, they have to be transposed into the member states' internal legal structure, through the adoption of legislation or other measures by national authorities. This means that between the directive and the natural or legal person there is always a national measure, either a national law, technical measures or a national law and technical measures to transpose the directive into national legislation.

If an individual intends to benefit from their rights, he/she does so based on the relevant provisions in the national law. It should not even matter to that particular individual that the provision he/she relies on was not written down originally by the national lawmaker, but it was formulated to adapt EU directive provisions to national legislation.

But what happens if the implementing period provided for in the directive expired and the state has still not implemented the directive, and the directive has more favorable provisions for the law topics than the national legislation in effect? Or if the state implements the directive in due time, but incorrectly?

Not implementing a directive is a violation of the obligations that member states have in accordance with the Treaty and it has a negative impact on the European integration process. A member state that does not implement a directive within the set time limit

²¹ Official Journal L 082 , 22/03/2001 P. 0001 - 0004

²² Official Journal L 315, 14/11/2012, P. 57–73

deprives it of the results that should follow, questions the equality of member states before EU law by rendering the uniform implementation of EU law impossible and generates discrimination between citizens, by not giving them the rights provided for them in the directive.

In trying to overcome this type of obstacles, the Court of Justice of the European Union looked for more means to ensure the directives' efficiency and to act as a stimulus for states to implement directives correctly and in due time, and one of the most important one refers to implementing the doctrine of their direct effect in their case. Thus, the CJEU developed in time and improved the theory according to which if the state does not transpose the directive and the deadline for its implementation has expired or the directive has been implemented incorrectly, the provisions in the directive that provide for rights for the individuals may be recalled directly before the national courts, on condition that they be clear and exact enough, and unconditioned.

If the member state transposed the directive in due time and correctly, it will have effect on individuals through the transposition and implementation measures, and natural persons will no longer need to protect their rights by recalling the directive.²³

The Court asserted clearly the idea representing the basis for the theory created for the directives and which reflects in EU law the continental law principle *nemo auditur turpitudinem suam allegans* or the *estoppel* doctrine in *common law*.

Directives can only have direct vertical effect, not direct horizontal effect

Basing the direct effect theory in the case of directives on the idea of the state's guilt makes it impossible for a direct *horizontal* effect to occur. Since the directive has not been correctly implemented or the implementation deadline has expired and it was the state who should have implemented it, then it would be unfair for the provisions of the un-implemented directive to be used against natural persons. Through the decision in the *Ratti* case²⁴, the Court asserted that a member state that did not adopt the implementation measures required by a directive within the given deadline *cannot oppose on natural persons* the non-fulfilment of their own obligations that were mandatory under the directive. This phrasing suggests that a direct effect is operational in litigations initiated by natural persons against the state, not against other persons.

After the Ratti case, the Court repeatedly specified more clearly that a person may call forth the provisions of a directive if they are exact and un-conditioned, only against the state that did not fulfil its obligations to implement the directive or it implemented the directive incorrectly. As oppose to regulations, directives cannot have direct horizontal effect.

In accordance with the case law of the Court, the directives' provisions may have a direct effect (if they are sufficiently clear, exact and un-conditioned) against the agencies under

²³ Judgment *Felicitas Rickmers-linie KG v. Finanzamt für Verkehrssteuern*, ECLI:EU:C:1982:281, 270/81, para. 23-26.

²⁴ Judgment *Pubblico Ministero/Tullio Ratti*, 148/78, ECLI:EU:C:1979:110.

the authority or the control of the state,²⁵ of financial-tax authorities,²⁶ of local or regional authorities,²⁷ of constitutionally independent authorities whose task is to ensure public order,²⁸ of authorities under the control of the state and whose task is to provide public services.²⁹ We quote the definition that the Court gave in the *Foster* case,³⁰ and which can be used in order to check whether any given entity may be considered a "state":

"From the details listed above we may draw the conclusion that a body which, regardless of its legal form, and in accordance to a law of a public authority, received the task to provide a public service under the control of that particular authority, and which has special jurisdiction in respect to the rules applicable to the legal relations between individuals is included in the category of entities against which one may invoke the provisions of a directive that may have direct effect."

The obligation to interpret internal law consistently with EU law

Another means by which the Court ensures the directives' efficiency is instituting the obligation of the national judge to interpret national legislation from the point of view of the directives. *Von Colson*³¹ was the first case where this obligation was expressly formulated. In the Court's motivation in the above-mentioned case, and in its subsequent case law, a few remarks and conclusions can be highlighted: during the implementation of national law provisions on the implementation of a directive, national courts are obliged to interpret that directive from the point of view of its content and of its purpose. The Court generalized this obligation in time, in the sense that at present, when they have to implement a law on the implementation of a directive, national courts must take into account not only that respective law, but also the series of national law rules, and they must interpret all of them from the point of view of that particular directive, in order to issue a ruling consistent with the aim of the directive³². Still, this obligation to interpret internal law consistently with the directive should be fulfilled by the national court only to the extent to which it is possible to do so and only to the extent to which the national law provides for a margin for appreciation. The principle of interpreting national law consistently with the directive cannot be the basis for a *contra legem* interpretation of national law³³.

In the absence of an implemented law, the Directive cannot determine or affect the individuals' criminal liability if they commit a crime under the non-implemented directive³⁴.

²⁵ Judgment *A. Foster and others v. British Gas plc*, C-188/89, ECLI:EU:C:1990:313.

²⁶ Judgment *Ursula Becker v. Finanzamt Münster-Innenstadt*, 8/81, ECLI:EU:C:1982:7.

²⁷ Judgment *Fratelli Costanzo SpA v. Comune di Milano*, 103/88, ECLI:EU:C:1989:256..

²⁸ Judgment *Johnston v. Royal Ulster Constabulary* 222/84, ECLI:EU:C:1986:206.

²⁹ Judgment *Rieser Internationale Transporte GmbH c. Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag)*, C-157/02, ECLI:EU:C:2004:76.

³⁰ Judgment *A. Foster and others v. British Gas plc*.

³¹ Judgment *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, 14/83, ECLI:EU:C:1984:153.

³² Judgment *Pfeiffer*, C- 397- 403/01, ECLI:EU:C:2004:584.

³³ Judgment *Pupino*, C- 105/03, ECLI:EU:C:2005:386, para. 47.

³⁴ Judgment *Kolpinghuis Nijmegen BV*, 80/86, ECLI:EU:C:1987:431.

Concluding, the conditions that must be met cumulatively for a directive provision to be invoked directly by the parties before a national court, in other words to be effective, are the following:

- the deadline set for transposing the directive into national law expired, and the state did not transpose the directive or transposed it incorrectly;
- the provision is clear, exact and unconditioned by the adoption of measures for implementation;
- the party against whom the provision is invoked is a state.

A directive cannot determine or affect an individual's criminal liability, in the absence of a national law on the implementation of such a directive.

Definitions

“Victim” is a natural person who has suffered harm (including physical, mental or emotional harm or economic loss) directly caused by a criminal offence — regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them . The definition of “victim” also covers family members of the deceased victim, who have suffered harm because of the person’s death directly caused by a criminal offence. The criterion “harm” should be interpreted in the context of the individual emotional relationship and/or direct material inter-dependence between the deceased victim and the relative(s) concerned.

“Family members” are the spouse, the person who is living with the victim in a committed intimate relationship (i.e. same - or different-sex), in a joint household and on a stable and continuous basis, the relatives in direct line (i.e. parents and children), the siblings and dependants of the victim (i.e. other than dependent children). The criterion ‘committed intimate relationship, in a joint household and on a stable and continuous basis’ presupposes close emotional ties and financial interdependence between two persons (as if they were formally married).

Member States may limit the number of family members who may benefit from the rights and to determine which family members should have priority. This is to avoid that the definition gives rise to disproportionate demands on criminal justice actors.

2. RIGHT TO BE UNDERSTOOD AND RIGHT TO INFORMATION (*Tudorel Ștefan*)

Right to understand and to be understood (Article 3 of the EU Directive 29/2012)

1. Member States shall take appropriate measures to assist victims to understand and to be understood from the first contact and during any further necessary interaction they have with a competent authority in the context of criminal proceedings, including where information is provided by that authority.

2. Member States shall ensure that communications with victims are given in simple and accessible language, orally or in writing. Such communications shall take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood.

3. Unless contrary to the interests of the victim or unless the course of proceedings would be prejudiced, Member States shall allow victims to be accompanied by a person of their choice in the first contact with a competent authority where, due to the impact of the crime, the victim requires assistance to understand or to be understood.

The article seeks to ensure that victims, based on their personal characteristics understand and can make themselves understood and that the authorities pro-actively assist victims throughout criminal proceedings. Victims have the right to be accompanied by a person of their choice in their contact with the authorities.³⁵

Victims have been traditionally been considered by the criminal justice system as tools in the quest for a successful prosecution. All the legal instruments already mentioned have highlighted the importance of making room for the full participation of victims in a criminal justice process.

The right to be heard goes beyond giving evidence or being present at a trial as a party or witness. It includes the right to express, beyond a formal statement of the facts that occurred, views and concerns on the impact of the offence, on the way the proceedings are conducted and on the victims needs and expectations. The right is closely linked with other rights provided for by the Directive.

The victim must be allowed to be accompanied by a person for moral support and comfort and the victim should be allowed to choose that person. The authorities may exclude the person of choice in cases of conflicts of interest (if the person is the suspect of crime reported).

The victims of certain crimes such as sex crimes experience difficulties in describing the traumatizing intimate events. This is why describing the crime to a police officer of the same sex as the author of the crime might aggravate the victim's situation. Consequently, the victim should be able to choose the interviewer in terms of their gender.

Right to receive information from the first contact with a competent authority (Article 4 of the EU Directive 29/2012)

1. Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive:

(a) the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;

³⁵ **DJ Justice Guidance Document** related to the transposition and implementation of Directive 29/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereinafter: **EC Guidance Document**), pg.12

- (b) the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;*
 - (c) how and under what conditions they can obtain protection, including protection measures;*
 - (d) how and under what conditions they can access legal advice, legal aid and any other sort of advice;*
 - (e) how and under what conditions they can access compensation;*
 - (f) how and under what conditions they are entitled to interpretation and translation;*
 - (g) if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made;*
 - (h) the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings;*
 - (i) the contact details for communications about their case;*
 - (j) the available restorative justice services;*
 - (k) how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.*
- 2. The extent or detail of information referred to in paragraph 1 may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime. Additional details may also be provided at later stages depending on the needs of the victim and the relevance, at each stage of proceedings, of such details.*

Information is vital to the victim who has to deal with the judicial system for the first time. Few victims have the necessary knowledge to understand the functioning of the judicial system and even fewer have knowledge of their role within this system. Victims do not know where they can receive assistance from, and what it is expected of them, they do not know which are boundaries within which they may manifest their will.

Information can be transmitted both in writing and orally, according to the victim's preference. If there are victims who cannot read, it is necessary that they receive information orally.

An authority may have to communicate with a victim several times or to designate a person with the necessary communication skills to interact with victims that cannot easily understand what is being communicated to them. Any factor that may influence the victim's capacity to understand and to make himself or herself understood must be taken into account and to be included in the individual assessment of the victim, which is discussed in a following Chapter.

The victim's personal circumstances must be taken into account when the victim is informed. Thus the directive includes, apart from nationality and age, other details that should be taken into account when the victim is informed: disabilities, training level,

intellectual and emotional maturity, addiction to the author of the crime, other circumstances such as unemployment, divorce, whether the same person was the victim of other crimes etc.

The victim should participate willingly in the measures typical to restorative justice, which means that the victim should have sufficient information on the risks and the advantages, to make an informed decision. Before adopting such a measure, there are factors such as the victim's age, intellectual or emotional maturity which should be analysed.

The article stresses that the extent or details of information may vary depending on the specific needs and personal circumstances of the victim and the type of crime.³⁶ For instance, in the case of a child victim, the main problem is the accessibility of judicial proceedings. The child is aware of the fact that he/she is taking part in judicial proceedings and is he/she able to understand them? This is why it is necessary that the victim be informed on these aspects by child protection services, social workers and attorneys with experience in working with children. The procedures should be child friendly, which is a challenge within the criminal system, the latter being mainly focused on the adult (when the author of the crime is an adult, and the victim is a child). This might lead to *in camera* hearings, behind closed doors, in order for the child not to be confronted with an intimidating, hostile environment or with an inappropriate environment for the child's age or special hearing rooms for interviewing children, setting a date and time which are appropriate for the child's age and maturity. The proceedings should be audio-video recorded.

Member States should ensure that there are general awareness raising campaigns and that information is available to the general public (leaflets, poster campaigns, and websites) and in places where the victims are likely to go as result of crime: hospitals, housing and employment centres, women's organisations, embassies.³⁷

The provision or sharing of information under this article should not be confused with disclosing information related to the criminal investigation or from the case file.³⁸

Right of victims when making a complaint (Article 5 of the EU Directive 29/2012)

- 1. Member States shall ensure that victims receive written acknowledgement of their formal complaint made by them to the competent authority of a Member State, stating the basic elements of the criminal offence concerned.*
- 2. Member States shall ensure that victims who wish to make a complaint with regard to a criminal offence and who do not understand or speak the language of the competent authority be enabled to make the complaint in a language that they understand or by receiving the necessary linguistic assistance.*

³⁶ EC Guidance Document , pg. 13

³⁷ EC Guidance Document, pg. 16

³⁸ EC Guidance Document, pg.15.

3. Member States shall ensure that victims who do not understand or speak the language of the competent authority, receive translation, free of charge, of the written acknowledgement of their complaint provided for in paragraph 1, if they so request, in a language that they understand.

A victim reporting a crime to the police station should receive a written document which certifies that the victim's deposition has been recorded. It does not only certify the fact that the police recorded the deposition correctly, but also that a case number has been assigned. This way the victim may refer to this file number in order not to repeat the description of the crime when talking to several police officers.

Victims are entitled to make the complaint in a language that they understand. They have the right to get linguistic assistance from authorities free of charge. Linguistic assistance is not similar with the right for translation and interpretation. A victim may be assisted under this provision by a person who speaks his/her language but who is not an official interpreter if this is deemed appropriate by the competent authorities, respecting the proper conduct of criminal proceedings and confidentiality.³⁹ Victims have the right to request a translation of a written acknowledgement, free of charge if they do not understand the language of the document.

Right to receive information about their case (Article 6 of the EU Directive 29/2012)

1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information:

(a) any decision not to proceed with or to end an investigation or not to prosecute the offender;

(b) the time and place of the trial, and the nature of the charges against the offender.

2. Member States shall ensure that, in accordance with their role in the relevant criminal justice system, victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by them and that, upon request, they receive such information:

(a) any final judgment in a trial;

(b) information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification.

3. Information provided for under paragraph 1(a) and paragraph 2(a) shall include reasons or a brief summary of reasons for the decision concerned, except in the case of a jury

³⁹ EC Guidance Document. Pg. 17

decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law.

4. The wish of victims as to whether or not to receive information shall bind the competent authority, unless that information must be provided due to the entitlement of the victim to active participation in the criminal proceedings.

Member States shall allow victims to modify their wish at any moment, and shall take such modification into account.

5. Member States shall ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any relevant measures issued for their protection in case of release or escape of the offender.

6. Victims shall, upon request, receive the information provided for in paragraph 5 at least in cases where there is a danger or an identified risk of harm to them, unless there is an identified risk of harm to the offender which would result from the notification.

The victim should be informed of the activities carried out regarding the case. If the victim is not regularly notified, he/she may be under the impression that nothing is being done and that he/she is not being taken seriously.

Keeping victims informed of the progress of their case is crucial to alleviating mistrust and fear in the system as well as ensuring timeliness in the criminal proceedings.

The right to be informed about the progress of a case begins once the victim gets involved in the justice process and continues in the post-trial phase. To be informed of the progress of the case, including at the stages of pretrial or investigation and post-trial is a crucial prerequisite to the participation of victims in the proceedings and to their right to express views and concerns.

For many victims, making a complaint is a traumatizing event; this is why they need to see that progress is being made in their case: when the perpetrator has been identified and detained, for example.

Due to the fact that victims do not know what information to ask for, the authorities should tell them what information they may receive and should discuss with the victims on when and how they will give information to the victims. Some victims do not wish to keep informed on the perpetrator's release date for example.

Member states should develop procedures to observe the victims' right to be informed. In general, the authority to take the decision also has the responsibility to inform the victim. If the police or the prosecutor's office decides to end the investigation, they should inform the victim on this decision and on the grounds for it. The court should also inform the victim when it closes the case, and the penitentiary services or any other services managing convicts, when they release the convict.

Another option would be that of organizing a one-stop-shop, or a single authority that would provide the victim with the above-mentioned information. The advantage of this option is that the victim will know who to go to for information, but it also has a drawback, because that single authority cannot provide all the information in due time, for instance, or the reason why the Prosecutor's Office decided not to bring the author of the crime before the court.

All the victims must be notified of their right to receive information provided for by the paragraph 1 of article. Once they are aware of such rights, victims can then receive such information if they so request. Only victims with a role in the relevant in the relevant criminal justice system will be notified of the rights provided for by the paragraph 2 of art. 6. Information can be communicated to victim orally or in writing, including through electronic means, to the last known correspondence or e-mail address.⁴⁰

The right to interpreting and translation services (Article 7 of the EU Directive 29/2012)

1. Member States shall ensure that victims who do not understand or speak the language of the criminal proceedings concerned are provided, upon request, with interpretation in accordance with their role in the relevant criminal justice system in criminal proceedings, free of charge, at least during any interviews or questioning of the victim during criminal proceedings before investigative and judicial authorities, including during police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings.

2. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, communication technology such as videoconferencing, telephone or internet may be used, unless the physical presence of the interpreter is required in order for the victims to properly exercise their rights or to understand the proceedings.

3. Member States shall ensure that victims who do not understand or speak the language of the criminal proceedings concerned are provided, in accordance with their role in the relevant criminal justice system in criminal proceedings, upon request, with translations of information essential to the exercise of their rights in criminal proceedings in a language that they understand, free of charge, to the extent that such information is made available to the victims. Translations of such information shall include at least any decision ending the criminal proceedings related to the criminal offence suffered by the victim, and upon the victim's request, reasons or a brief summary of reasons for such decision, except in the case of a jury decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law.

4. Member States shall ensure that victims who are entitled to information about the time and place of the trial in accordance with Article 6(1)(b) and who do not understand the

⁴⁰ EC Guidance Document, pg. 18.

language of the competent authority, are provided with a translation of the information to which they are entitled, upon request.

5. Victims may submit a reasoned request to consider a document as essential. There shall be no requirement to translate passages of essential documents which are not relevant for the purpose of enabling victims to actively participate in the criminal proceedings.

6. Notwithstanding paragraphs 1 and 3, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

7. Member States shall ensure that the competent authority assesses whether victims need interpretation or translation as provided for under paragraphs 1 and 3. Victims may challenge a decision not to provide interpretation or translation. The procedural rules for such a challenge shall be determined by national law.

8. Interpretation and translation and any consideration of a challenge of a decision not to provide interpretation or translation under this Article shall not unreasonably prolong the criminal proceedings.

The article provides a right to interpretation for victims with a formal role in the proceedings, during questioning of the victim and to enable the victim to participate actively in court hearings. In other cases, the need may depend on specific issues and the victim's role in proceedings.

It is necessary for victims from other Member States (e.g. tourists), but also for any other kind of individuals who do not speak the official language of the state where they became crime victims, to be assisted by interpreters, free of charge, whenever they need to communicate with representatives of the judicial system.

Because there's the risk for the victim to know the interpreter in the case of members of small communities of speakers of the respective language, it is preferable that the interpreter be a neutral individual.

Although it is possible that the victim may have basic knowledge of the language of the judicial procedure, the stress that individual is under may make the understanding of the situation more difficult, so it is preferable to use an interpreter.

The translation and interpreting services provided to the victim should not have a lower quality than those provided to the author of the crime. The victim must have the right to appeal against the decision by which interpreting or translation services were disallowed. To allow for translation and interpretation as quickly as possible, competent authorities should establish an operational network of easily accessible translators and interpreters. The competent authorities should provide such services without the request of the victim. Particular attention should be given to the gender of the translator/interpreter in contact with the victim, in accordance with the needs and wishes of the victim.⁴¹

⁴¹ EC Guidance Document, pg. 13

3. VICTIM SUPPORT SERVICES: RIGHT TO ACCESS AND SERVICES PROVIDED (*Ana Castro Sousa/APAV*)

Any of us, at any time, could become a crime victim. (Geis, 1990: 260, cit in Doak, 2014)

Every year, about 15% of European citizens become victims of crime (Rasquete, Ferreira & Moyano Marques, 2014). The aftermath of the crime can be a painful experience, particularly when victims do not know either their rights or where to seek help.

Victims were “*underestimated, ignored and undervalued*” (Walklate, 2007:11, cit in Doak, 2014) for many centuries. With the end of the II World War the awareness regarding crime victims increased, as well as the attention delivered to the most vulnerable elements of society (Doak, 2014; Simmonds, 2009).

In theory, victims are becoming a central concern in the criminal justice system (Doak, 2014). Nevertheless, they remain the powerless part in criminal proceedings (Rasquete, Ferreira & Moyano Marques, 2014); therefore, an extra effort of the Member States is needed in order to enhance victims’ rights.

Direct and indirect victims, revictimization and secondary victimization

When studying victims of crime the first concern is to define who is a victim. In 1985, the United Nations published the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (A/RES/40/34), and provided a broad definition of victims:

“Victims’ means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.

This was a non-binding instrument, nonetheless, the definition of victim of crime given here is wider than the one provided by the FD, that states “*‘victim’ shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State*”.

The United Nations Declaration A/RES/40/34 contains a definition of victim that considers the “*impairment*” of the fundamental rights of the victims, and encompasses the family or

dependents of the direct victim, which is not included in the definition provided by the Framework.

Later, the Directive 2012/29/EU (hereinafter: Directive) presented a wider concept of victim, compared with the one given in the Framework. Not only were the direct victims of crime included, but also family members of the victim. However, the Directive specifies that these members are only those who have suffered harm as a result of a person's death because of a criminal offence. Despite the evolution and the efforts made to encompass other victims, the Directive leaves a blank space for the indirect victims of crime, namely family or friends who have to deal with the consequences that direct victims face, even though they had not experienced or watched the violence themselves.

Thus, thinking of victims is not only looking at the direct person who suffered the crime, but also to the family or friends who have also witnessed the event or suffered its effects. This is called indirect victimization, and it's particularly noticed in homicide cases, where relatives have to deal with the permanent absence of that person as a consequence of a violent crime. This "domino effect" happens again because indirect victims do not know how to cope with direct victims and with their reaction to the crime (Shapland & Hall, 2007).

The phenomenon of re-victimization is a subject to which has been being given increased attention. According to Wolhuter, Olley, & Denham (2009), re-victimization happens when someone is a victim of crime at least twice. Farrell and Pease (1993, cit. in Wolhuter, Olley, & Denham, 2009) and Pease (1998, cit. in Wolhuter, Olley, & Denham, 2009), stood up for that a statistical analysis of the episodes of revictimization may be very useful to develop actions in order to prevent crimes.

However, victims of crime may also face secondary victimization. Victims have to handle with the criminal justice system when reporting a crime. According to Zedner (2002, cit. in Wolhuter, Olley, & Denham, 2009), victims may have to deal with insensitive questioning, delays, lack of information about the process, exclusion of victims from the process, lack of provision of separate rooms for victims and offenders in court, or unexplained decisions of the reasons that ended in a case drop, which can lead to increased suffering. Furthermore, the culture of a criminal justice system worried about catching the offender, as well as the presence of gender, racial or sexual stereotypes are sometimes the reasons for the neglect of victims' needs and rights (Wolhuter, Olley, & Denham, 2009). Additionally, the secondary victimization may be felt when victims face a negative reaction from their social environment or a media invasion, in particular in cases of homicide or sexual violence (Project Victims in Europe, 2009).

The aftermath of a crime: victims' needs and consequences faced

The consequences of crime on direct or indirect victims are numerous and may influence several dimensions of their lives. According, for example, to Shapland & Hall (2007) or Simmonds (2009), victims may experience shock (as a short-term effect), anxiety, sadness,

loss of trust, guilt, fear, anger, depression, sleeplessness, PTSD⁴², memory disturbances, loss of self-confidence, hostility, physical effects caused by psychological conditions (e.g. feeling stomach pain caused by anxiety), loss of energy, muscle pain, headaches or migraines, high blood pressure, or physical injuries in consequence of the aggression, that may be minor or very severe when causing permanent incapacity. Victims may also face social effects, like routine or lifestyle changes (e.g. avoiding some places, namely places where the crimes have occurred), isolation, fear of being alone or insecurity, and/or financial consequences such as property loss, or other emerging losses as a result of the offence (e.g. absence from work due to criminal proceedings' requests).

These consequences do not necessarily happen to all victims and some of them may also experience other consequences not listed above. Age, resilience, maturity, personality, use of weapons to commit the crime, dependency between victim and offender, previous experience of crime or life events can determine the different reactions of victims to the crime they have suffered (Shapland & Hall, 2007; Victim Support Europe, 2013).

Previous research has found that the impact of crime on victims is greater for serious crimes; it was concluded that victims of burglary, rape or child sexual abuse face severe consequences on psychological, emotional, physical and economic levels (Wolhuter, Olley, & Denham, 2009).

Victims' needs may differ depending on the crime, on the victims themselves and also on the support they can get. Victims may need medical assistance, counselling, emotional help, practical and/or financial help, information regarding court and case progress, or compensation claiming. These needs can be immediate and/or long term (Goodey, 2005).

Europe evolution signs: from Framework to Directive

The Framework, as the first European binding instrument concerning victims of crime, appeared as an improvement on their rights, and also on the legal definition of the scope of victim support organizations. Despite the great evolution that was introduced with the Framework, it was only established that victims should receive information, and that victim support services should also assist victims according to their immediate needs, accompany victims, if necessary and possible, during criminal proceedings, and assist victims, at their request, after the criminal proceedings have ended.

The definition of what information should be provided and the immediate needs of victims were, vague. Moreover, the support was limited in time and it could only be provided after the end of criminal proceedings at victims' request. Viviane Reding⁴³ stated⁴⁴, in 2001, that

⁴² PTSD stands for Post-traumatic stress disorder, which is a mental disorder felt by victims of a traumatic event. These victims have to deal with constant re-living of the event, during day or night. Retrieved from <http://psychcentral.com/disorders/ptsd/> (15th October 2014)

⁴³ Viviane Reding was the European Commissioner for Justice, Fundamental Rights and Citizenship, from 2010-2014 and was also the Vice President of the European Commission.

“victims of crime need respect, support, protection and to see that justice is served. That’s why I am putting victims at the heart of criminal justice in the EU by making sure they can rely on minimum rights and support” (Hall & Shapland, 2007, pp.2637-2638).

The Recommendation Rec (2006) 8 of the Committee of Ministers to Member States on assistance to crime victims, *“without discrimination”*, as stated in its Article 2, established some responsibilities, namely the provision of medical, psychological and social support to victims, and also the existence of special measures to vulnerable victims when testifying. It also exhorted Member States to ensure that victims have access to information about the existence of support services, court procedures, protection and legal advice (Article 6). Recommendation Rec (2006) 8 was a non-binding instrument but presented expanded rights compared to the ones established in the Framework.

Innovation was required, and the Directive arose as a breath of fresh air to the previously established. Paragraph 9 of the Preamble states that *“(…) victims of crime should be recognized and treated in a respectful, sensitive and professional manner without discrimination of any kind. (...) Victims of crime should be protected from secondary and repeat victimization, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice”*.

Right to access victim support services (Article 8 of the EU Directive 29/2012)

According to Victim Support Europe, *“all victims of crime, and their families, should therefore be able to access support services in the aftermath of crime”* (Victim Support Europe, 2013, p.18). The aftermath of a crime brings consequences to victims and their relatives, and the support provided by the latter can be very helpful. However, victims may decide not to tell everything about the crime and the consequences felt to close people, and therefore, victim support services may arise as a perfect complement to the informal support.

1. Member States shall ensure that victims, in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings. Family members shall have access to victim support services in accordance with their needs and the degree of harm suffered as a result of the criminal offence committed against the victim.

2. Member States shall facilitate the referral of victims, by the competent authority that received the complaint and by other relevant entities, to victim support services.

3. Member States shall take measures to establish free of charge and confidential specialist support services in addition to, or as an integrated part of, general victim support services, or to enable victim support organisations to call on existing specialised entities providing

Data retrieved from <http://www.epp.eu/commissioner-viviane-reding> (31st October 2014).

⁴⁴ Full quotation can be found at http://europa.eu/rapid/press-release_IP-11-585_en.htm

such specialist support. Victims, in accordance with their specific needs, shall have access to such services and family members shall have access in accordance with their specific needs and the degree of harm suffered as a result of the criminal offence committed against the victim.

4. Victim support services and any specialist support services may be set up as public or non-governmental organisations and may be organised on a professional or voluntary basis.

5. Member States shall ensure that access to any victim support services is not dependent on a victim making a formal complaint with regard to a criminal offence to a competent authority.

Article 8(4) states that victim support services may be delivered by public or non-governmental organizations, working on a professional or voluntary basis. However, Rasquete, Ferreira & Moyano Marques (2014) affirm that victim support services must be independent of the political agenda and of governments, in order to provide a service focused on the victims' interests and needs, in the same way of Victim Support Europe (2013).

The European Union Agency for Fundamental Rights (hereinafter: FRA) research showed that in Bulgaria, Cyprus, Greece, Italy, Lithuania, Latvia, Romania and Slovenia there are not victim support organizations created to help victims of all types of crime. In seven of the Member States - Belgium, Croatia, Czech Republic, Estonia, Hungary, Luxembourg and Spain - there are victim support organizations to help victims of all crimes State funded. Non-governmental organizations with a strong funding of the Member States are present in Denmark, Finland, France, Ireland, Malta, The Netherlands, Poland, Portugal, Sweden and The United Kingdom. Only Austria, Germany and Slovakia have non-governmental organizations which do not rely strongly on Member States funding⁴⁵.

Furthermore, the Directive defines that services must be delivered from the earliest moment possible and, according to Article 8(5), even when victims do not present a formal complaint. Victims may have several reasons for not presenting a complaint, like fear of reprisals, fear of the police's actions, the perception that the crime is not severe enough or the disbelief in the responses of the criminal justice system. Despite the fact of not presenting a formal complaint, these victims face the consequences arising from a crime event and they shall benefit from, the same rights as others do, namely right to information, support and protection (Victim Support Europe, 2013).

According to FRA, Bulgaria, Spain, Hungary, Latvia, Poland and Romania partially provide support not dependent on formal complaint; the other twenty-two Member States provide

⁴⁵ Data retrieved from s (2nd October 2014)

full access to support even to victims that choose not to present a formal complaint⁴⁶. Nevertheless, and following paragraph 63 of the Preamble of the Directive,

“In order to encourage and facilitate reporting of crimes and to allow victims to break the cycle of repeat victimization, it is essential that reliable support services are available to victims and that competent authorities are prepared to respond to victims’ reports in a respectful, sensitive, professional and non-discriminatory manner”.

Paragraph 37 of the Preamble of the Directive defines that the formalisms concerning the access to these services shall be reduced; in fact, those may constitute a barrier to victims, as victims may perceive the existence of these formalisms as something discouraging for their involvement in the support process.

Furthermore, in the same paragraph, relevance is given to the geographical extension of the support provided. A face to face contact is desirable but, if that is not possible, Member States must develop the necessary tools to provide help through online resources or with a national telephone line. In fact, the Commission Decision 2009/884/EC forecasts the creation of an harmonized number to help victims of crime – 116 006 – that must be available 24 hours a day, 7 days a week, with a nation-wide range, in order to provide emotional support, information about victims’ rights and how to claim them, and refer victims to relevant stakeholders.

According to FRA, all twenty-eight Member States have a helpline with national coverage, except for Sweden and Slovenia, who partially fulfil this request. However, only ten Member States have the number 116 006 in use: Austria, Belgium, Croatia, France, Germany, Ireland, Italy, The Netherlands, Sweden and the United Kingdom, whereas this helpline works 24/7 in four of those Member States (Austria, Belgium, Germany and The Netherlands). Nonetheless, Bulgaria, Czech Republic, Denmark, Greece, Hungary, Latvia, Slovakia and Spain have other help lines operating 24/7.

Support from victim support services (Article 9 of the EU Directive 29/2012)

1. Victim support services, as referred to in Article 8(1), shall, as a minimum, provide:

- (a) information, advice and support relevant to the rights of victims including on accessing national compensation schemes for criminal injuries, and on their role in criminal proceedings including preparation for attendance at the trial;*
- (b) information about or direct referral to any relevant specialist support services in place;*
- (c) emotional and, where available, psychological support;*
- (d) advice relating to financial and practical issues arising from the crime;*
- (e) unless otherwise provided by other public or private services, advice relating to the risk and prevention of secondary and repeat victimization, of intimidation and of retaliation.*

⁴⁶ Data retrieved from <http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/complaint> (2nd October 2014)

2. Member States shall encourage victim support services to pay particular attention to the specific needs of victims who have suffered considerable harm due to the severity of the crime. EN L 315/68 Official Journal of the European Union 14.11.2012

3. Unless otherwise provided by other public or private services, specialist support services referred to in Article 8(3), shall, as a minimum, develop and provide:

(a) shelters or any other appropriate interim accommodation for victims in need of a safe place due to an imminent risk of secondary and repeat victimization, of intimidation and of retaliation;

(b) targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling.

Article 9(1) defines which are the minimum services that shall be delivered to those who seek help in victim support organizations. However, we must bear in mind that the provision of victim support services cannot be based on “a set category of needs academically established” (Rasquete, Ferreira & Moyano Marques, 2014, p.127). In fact, support services have to understand the victim as an individual, with different needs and reactions to the crime, as said above and accordingly to Article 9(2). Not only should the personal and environmental characteristics of the victims be taken into account, but also the victims’ wills and choices on what kind of services they need from the victim support organization (Victim Support Europe, 2013). However, those who are “particularly vulnerable” or “who find themselves in situations that expose them to a particularly high risk of harm”, as stated in paragraph 38 of the Directive’s Preamble, shall receive specialist support and legal protection.

The definition of vulnerable victims in 2009 was different across the Member States. According to the investigation of “Project Victims in Europe” (2009), five Member States told that their law did not recognize vulnerable victims but, when evaluating the approach given to child victims, these had, in fact, a specific support, due to the fact that they were seen as vulnerable⁴⁷. Nevertheless, all the Member States had a definition of vulnerable victim based on age. Cyprus, France, Ireland, Luxembourg, Portugal, Slovenia, Spain and Sweden did not consider that handicap victims should be regarded as vulnerable. Less are the Member States which did consider the type of crime as a criterion for a specialized treatment: Estonia, Hungary, Ireland, Lithuania, Malta, Poland and Slovakia.

Following the consecrated on the paragraphs 14 to 18 of Preamble, the Directive considers vulnerable victims children, persons with disabilities, victims of terrorism, victims of gender-based violence and those who suffered a crime in a close relationship (e.g. partner or family

⁴⁷ According to the Handbook of the Project Victims in Europe, “the experts were asked whether the age of the victim, the handicap of the victim and/or the type of crime committed constitutes grounds for them to be considered vulnerable, i.e. in need of specialized treatment.” (Project Victims in Europe, 2007, p. 40)

member). Despite this apparent “ranking” of vulnerable victims, there should not be created a hierarchy among these victims, but, instead, allow all of them to equally benefit their rights (Victim Support Europe, 2013).

Article 9 (3) establishes that, as a minimum, the specialist support services shall develop and provide not only shelters for those victims in need of a safe place due to an elevated risk of revictimization, intimidation and/or retaliation, but targeted and integrated support as well, namely to victims of sexual violence, gender-based violence or violence in close relationships. By “*targeted and integrated*” support, we must deduce that the approach shall be aware of the relationship between victim and offender, the presence of children whilst the occurrence of the crime, the existing or non-existing social network support and all the victims’ personal circumstances. This acknowledgment will probably lead to an accurate and effective support towards the victims needs in a global dimension.

Training of professionals

In order to effectively help victims of crime, to provide a support that they really need and to avoid re-victimization, professionals’ training emerges as an imperative tool (Victim Support Europe, 2013).

Recommendation Rec (2006) 8 stated, in its numbers 12.2 and 12.3, that it is a duty of the States to provide training in order to raise awareness of the crime effects on victims, develop skills and knowledge required either to assist victims or to prevent secondary victimization. Special training should also be delivered to personnel working with vulnerable victims, such as children, domestic or sexual violence victims, terrorism victims or families of homicide victims. Later, the Directive, in its Article 25, established that practitioners should receive adequate training “*to their contact with victims, so that they are able to identify victims and their needs*” (Paragraph 61 of the Directives’ Preamble). This must be delivered to officials that may have to contact with victims within their professional activity (police officers or court staff, for example) and to those who provide support to victim and restorative justice, in order to enable these groups to deal with victims impartially, respectfully, professionally and in a non-discriminatory manner. The Directive states, as well, the need to include in the training of prosecutors, judges and lawyers, both general and specialist training, to increase awareness of the needs of victims.

According to Victim Support Europe (2013), training shall include, as a minimum, subjects as the impact of crime on victims, coping strategies, avoiding re-victimization, secondary victimization, diminishing risk and intimidation and the relevance and availability of victim support services.

Supporting versus protecting victims of crime

Supporting victims of crime is a concept that shall not be interpreted as a synonym of protection of victims of crime. As has been said, Articles 8 and 9 establish the right to

support and minimum services that shall be delivered. In the same Directive, Article 18 states that

“Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimization, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members”.

Support services are vital to empower victims to recovering from the criminal offence, to prevent repeated victimization and to strengthen the victims’ belief in the criminal justice system. In fact, Bradford (2011), while analysing the National Victims Survey for England and Wales, concluded that victims who had contact with victim support institutions had a positive perception of the fairness of criminal justice system, particularly for having someone to listen to their concerns and to take action relating them, in a respectful and dignifying way (Hall & Shapland, 2014).

Endeavouring to reinforce and complement the support delivered to victims it is imperative an effective coordination between victim support organizations, courts and police forces in order to get the adequate protection for victims of crime, to decrease the chances of repeated physical, psychological or emotional harm perpetrated against victims or family members, as follows on the Article 26(2):

“Member States shall take appropriate action (...) aimed at (...) minimizing the negative impact of crime and the risks of secondary and repeat victimization, of intimidation and of retaliation (...)”

Victim Support Europe (VSE)

VSE has done a huge amount to highlight the difficulties that many victims still face in the Europe today and I have been pleased to have played a small part in some of their very successful campaigns.

Alyn Smith, Member of the European Parliament (*Victim Support Europe, 2014, p.14*)

In pursuance of providing victims of crime the support they need, Victim Support Europe (hereinafter: VSE) was born in 1990. This entity *“aims to ensure that every victim in Europe is able to access information and support services in the aftermath of crime, regardless of where the victim lives or where the crime took place. Victim Support Europe also works to ensure that victims are respected, have access to strong rights and are able to make their voice heard throughout the criminal justice process”*. (Victim Support Europe, 2014, p.4)

Currently, VSE is the centre of the network of non-governmental victim support services in Europe. It is composed by 36 member organizations which provide their services in 25 European countries. Organizations can be “full member” or “associate member”. Full members are those which provide a range of general services supporting victims of crime at national level, delivered by trained professionals, to a substantial group of the population,

free of charge, confidential, and which treat the victim with a non-discriminatory manner. Full members are also those which agree generally with VSE's policy, practices, standards and principles. The associate members are those which are concerned about the improvement of victims' rights and status, interested in a field of work associated with crime victims, and are formally constituted and recognized by Council of Europe⁴⁸. VSE has around 3000 staff members, 20000 volunteers, providing assistance to about two million victims of crime each year (Victim Support Europe, 2014).

Portuguese Association for Victim Support (APAV)

Portuguese Association for Victim Support (APAV) was founded in 25th June 1990, following the international concern about victims of crime. In fact, other European support organizations were created, for example, in Germany (1976), in the United Kingdom (1979), with the union of the local associations to form Victim Support, in Ireland (1983) or in the Netherlands (1985) (Hall, 2010 cit. in Doak, 2014).

APAV⁴⁹ is a non-profit organization, a full member of VSE, assisted by volunteers that support victims of crime, their families and friends, providing free of charge, confidential and qualified services, in a personal, sensitive and professional way, on different and complementary levels: a general support which may be emotional and practical and a specific support such as psychological, legal and social – always in a multidisciplinary approach.

The direct support to victims is provided through a geographically extended national network, with fifteen victim support local offices, a specialized unit to support migrant victims, two shelters for battered women and children, one shelter for women victims of traffic of human beings with or without children and a helpline. Regarding the support provided to victims of crime, it is important to highlight that it does not only consists in a crisis intervention, but in a long term support and counselling as well. In 2013, APAV gave support to 11800 new users throughout more than 37000 support meetings⁵⁰, helping victims to handle the impact the crime had on their life's quality and well-being. The support provided, however, does not depend on a formal complaint – APAV supports victims even if they do not want to start a criminal proceeding against the offender.

Beyond the direct support provided to the victim, APAV also contributes to the adoption of laws, regulations and administrative measures to increase the protection and support available to victims of crime in a sense of reducing the victimhood and its effects, raises

⁴⁸ Source: <http://victimsupporteurope.eu/member-organisations/>

⁴⁹ Information about APAV's work, vision and mission can be found at:

http://apav.pt/apav_v2/index.php/en/apav/who-we-are

http://apav.pt/apav_v2/index.php/en/apav/vision-mission

http://apav.pt/apav_v2/index.php/en/apav/our-principles-and-values

⁵⁰ Data retrieved from http://apav.pt/apav_v2/images/pdf/Estatisticas_APAV_Relatorio_Anual_2013.pdf (Portuguese)

public awareness on crime and its effects on the victim, by launching campaigns aimed to different targets, and liaises with international organisations.

Lack of information available to victims and unawareness of their rights before, during and after criminal proceedings is still possibly the most striking obstacle that victims of crime have to face. APAV not only informs victims about their rights and explains victims' major concerns and doubts in a personalized manner, but also deconstructs the often difficult language used in the official communications.

Recently, one of the main instruments created within a project called "Infovictims"⁵¹ is a website which provides information on rights of the victims, the specification and definition of different types of crime and the "who is who" in criminal justice system, gathering the relevant and accurate information in a simple language easily understandable to victims of crime.

Conclusion

Regardless of the possibility of relying on an informal support network, victims of crime may seek help in victim support organizations. However, while some victim support organizations have already decades of experience on delivering their services, others are still starting their activity and tackling initial steps towards the implementation of the rights consecrated on the Directive. Nonetheless, remains a lot of work to do, and efforts shall be made equally by both emergent and more experienced entities.

It is estimated that 75 million people in Europe fall into crime each year as direct victims, however, it is important to highlight that only about 2 million seek help at victim support organisations (Victim Support Europe, 2014). Despite an increased attention delivered to victims' rights and needs, there is still a long way ahead.

According to VSE's manifesto for 2014-2019, "*Europe must ensure that all people affected by crime are given the help they need to deal with any emotional, practical or legal implications*" (Victim Support Europe, 2014 p. 3).

The support provided is understood as something extremely relevant; as a matter of fact, vigorous efforts should be promoted by each Member State under the scope of the European Union, in a sense of a most coherent answer to the needs of victims of crime. Furthermore, the focus should also be extended to the prevention of (re)victimization, and to sensitize citizens on how to deal with victims of crime.

⁵¹ See: http://www.infovitimas.pt/pt_en

4. RIGHT TO BE HEARD (*Daniel Motoi*)

Introduction

The role of the victims in the criminal proceedings has been constantly into the attention of the legislature within the European Union. In the Recommendation⁵² number R (85) 11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure, it was mentioned that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender and that consequently the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim.

In the same act it was recommended to the governments of member states to review their legislation and practice and that it is important to enhance the confidence of the victim in criminal justice and to encourage his co-operation, especially in his capacity as witness and that it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim.

When it comes to the right to be heard and to supply evidence we are talking about one of the most important rights for the victims of crimes because it is in fact the “voice” of the person who has suffered the damage from the crime.

The FD provided in article 3 the right to be heard and to supply evidence for the victims of crimes.

Article 3 from the FD provided that each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence and shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.

As for the Directive 2012/29/EU, the right to be heard is now regulated in **Article 10**, which provides that:

1. *Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity.*
2. *The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.*

The right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing (Recital 41 of the Directive 2012/29/EU).

⁵² Recommendation number R (85) 11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies

The right of child victims to be heard in criminal proceedings should not be precluded solely on the basis that the victim is a child or on the basis of that victim's age (Recital 42 of the Directive 2012/29/EU).

Article 10 from the Directive 2012/29/EU is quite in the same wording as article 3 from the FD, its main purpose being to ensure that victims of crimes are given the opportunity to participate in the criminal proceedings through being heard and providing evidence. It must be highlighted that the Directive leaves room for each national law to determine the procedural rules under which victims may be heard during criminal proceedings and may provide evidence.

The Directive 2012/29/EU also introduces the gender perspective in relation to hearing the victims, as it pays attention to vulnerable groups such as women and children. It states that where a child victim is to be heard, due account shall be taken of the child's age and maturity. With regard to child victims, each national law of the Member States, has its own limit of age that can differ from the one provided by the Directive. This is an important issue for those Member States concerned because in the Directive "child" means a person below 18 years of age. It remains to be seen how the Member States will comply in practice with the Directive in this respect.

The existing possibilities for the victims of crimes to be heard and to provide evidence in the criminal proceedings within the Member States

When looking into the national laws⁵³ of the Member States we can find, along with each of its peculiarities, the possibilities for the victims of crimes to be heard and to provide evidence in the course of the criminal proceedings.

1. In each of the Member States a person who has suffered damage, either because it has been injured or its property has been damaged, stolen, is considered as a general rule a victim of a crime.

The victim can *report a crime* to the police or to the public prosecutor, orally or in writing. There are national laws in which the report of a crime can be made by another person in the name of the victim and also, in serious crimes, the report can remain anonymous. Of course, serious offences can be investigated without the victim's report to police.

In most of the Member States by reporting the crime to the police the victim becomes automatically a party to the proceedings. But, in some Member States, when reporting a crime, the victims have to tell the police or the public prosecutor whether she/he wants to be involved in the criminal proceedings and so register as a victim or a civil party. If not, the victim will only be informed about the court hearings or about the outcome of the investigation or, in some cases it will not be informed at all.

⁵³ Rights of victims of crime in criminal proceedings
- https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-en.do

In almost all of the Member States, the moment when the victim is reporting a crime is not considered a formal hearing and the victim can be heard at a later stage (before or after deciding to start a criminal investigation). But, looking more in detail, in most of the Member States, we can see the victim is not interviewed as soon as possible from the moment it has reported the crime and, in some of the Member States, reporting of a crime itself is considered sufficient in order not to have another hearing of the victim. The victim is summoned for a statement only if the authority in charge decides that it wants additional information from the victim itself. In some Member States the victim has to wait for a decision to start an investigation from the competent authorities which can last even for months and only after this moment the victim can be heard if the judicial authority considers so. And, in some Member States, victims are considered only witnesses, until any official charges are brought against the offender.

When talking about the opportunity to be heard and to provide evidence, it should be kept in mind that the moment when reporting a crime to the police is not fulfilling the true meaning of the article 10 of the Directive 2012/29/EU. This report should not be considered a formal hearing and this should be only the moment when the police and the prosecutor find about a crime. Victim should have the right to be involved in the criminal proceedings, to be heard and to further provide evidence.

The situation of the victim considered just an observer after the moment of making the initial complaint, in some of the legislations, does not fulfil either the requirements of the Directive 2012/12/EU in respect to the right to be heard and to provide evidence.

2. In most of the Member States victim is allowed *to participate in his or her own case (even being without legal status) or by adhering as civil claim* when the victim claims compensation from the offender.

It is known that some of the victims fear from retaliation from the offender or from other persons, and when hearing them they should be ensured of the real protection they can benefit from during and after the criminal proceedings have ended. Usually, in some crimes (e.g. prostitution, trafficking in human beings), victims also often tend to believe that if the other persons discover what they have done they will be treated wrongfully and even blamed for.

When talking again about the experiences that they have went through, victims can suffer from secondary victimization. The repeated exposure of the victim with the offence and the offenders in the context of criminal proceedings, especially in case of repeated (unnecessary) questioning, can lead to further secondary victimization⁵⁴.

That is why, in the Recommendation no. R (85) 11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure it has been provided that at all stages of the procedure, the victim should be questioned in a

⁵⁴ The victim in criminal proceedings: A systematic portrayal of victim protection under German Criminal Procedural Law, Markus Löffelmann, Resource Material Series No.70 p. 37, http://www.unafei.or.jp/english/pdf/RS_No70/No70_06VE_Loffelmann1.pdf

manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians or other persons qualified to assist them.

The Directive 2012/29/EU (**Article 20**) states that, without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

(a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;

(b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;

(c) victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary;

The Directive also takes into consideration the victims with specific protection needs during criminal proceedings. The following measures shall be available during criminal investigations to victims with specific protection needs:

(a) interviews with the victim being carried out in premises designed or adapted for that purpose;

(b) interviews with the victim being carried out by or through professionals trained for that purpose;

(c) all interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;

(d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

During the court proceedings special measures need to be taken with regard to the victims with specific protection needs:

(a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;

(b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;

(c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and

(d) measures allowing a hearing to take place without the presence of the public.

In addition to the measures abovementioned, there are other special requirements in relation to child victims when a hearing takes place.

- in criminal investigations, all interviews with the child victim may be audio-visually recorded and such recorded interviews may be used as evidence in criminal proceedings;

- in criminal investigations and proceedings, in accordance with the role of victims in the relevant criminal justice system, competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from the family;

As for the victims resident in another Member State article 17 of the Directive 2012/29/EU provides that Member States shall ensure that their competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a Member State other than that where the criminal offence was committed, particularly with regard to the organisation of the proceedings.

For this purpose, the authorities of the Member State where the criminal offence was committed shall, in particular, be in a position:

(a) to take a statement from the victim immediately after the complaint with regard to the criminal offence is made to the competent authority;

(b) to have recourse to the extent possible to the provisions on video conferencing and telephone conference calls laid down in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 for the purpose of hearing victims who are resident abroad.

It is important to mention here that prior to any hearing of the victims, Member States shall ensure that those who do not understand or speak the language of the criminal proceedings concerned are provided, upon request, with interpretation in accordance with their role in the relevant criminal justice system in criminal proceedings, free of charge, at least during any interviews or questioning of the victim during criminal proceedings before investigative and judicial authorities, including during police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings.

Member States shall ensure that the competent authority assesses whether victims need interpretation or translation. Victims may challenge a decision not to provide interpretation or translation. The procedural rules for such a challenge shall be determined by national law.

At this moment, in almost all the Member States, upon request or ex officio, an interpreter or translator free of charge is provided when the victim do not speak the official language.

In this case, the interview is held in other language (the victim's mother tongue or other language that the victim understands) than the official language and the judicial authorities are obliged to provide the translation of the interview.

The documents related to the interview will be also translated free of charge. There are also some Member States in which most of the documents from the investigation (or certain

documents, usually, important documents and even evidence) will be translated free of charge and send to the victim (during the investigation or at the end of it).

3. There are legislations in which the victim is no party to the proceedings and in which it can only *participate as a witness* (especially in the legislations in which the offender does not recognise committing the offence).

The position of the victim as witness is in accordance with the conclusions from the preliminary ruling in Katz Case of the Court of Justice of the European Union⁵⁵. The Court of Justice of the European Union has pointed out that Articles 2 and 3 of the FD are to be interpreted as not obliging a national court to permit the victim to be heard as a witness in criminal proceedings instituted by a substitute private prosecution such as that in issue in the main proceedings. However, in the absence of such a possibility, it must be possible for the victim to be permitted to give testimony which can be taken into account as evidence.

Although the decision in the case Katz is based on the FD, its findings are valid also for the article 10 of the Directive 2012/29/EU. In such a position, the victim can provide the judicial authorities with all the information needed about the crime. Of course, in case of a witness, we are talking also about to *the right to refuse to testify* (for example being close relatives of the accused person). It is important to mention here that the witness is heard under oath and he/she cannot refuse to testify and has, in some national laws, to answer almost all the questions, including those private, if the judicial authorities consider them important. In this last case, it should be taken into account that the victim has right to be heard but this cannot be transformed into an obligation to testify and so answer all the questions.

Again, the major risk when hearing the victim as witness is the risk of secondary victimization. That is why the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Also the provisions of the Directive 2012/29/EU mentioned above in point 2 with regard to the number of interviews, the procedure and the protective measures remain valid in the case of the witness.

Even though not party to the proceedings, there are legislations in which victims are allowed to provide information through *submitting a victim impact statement*.

The victim impact statement is considered to be an opportunity for the victim to provide the judge with information in which way the offence has impacted him/her (physical, psychological, emotional or financial)⁵⁶. Through this possibility victims give their account (as they consider it to be the best way) of the consequences of the crime for them personally, without being interrupted or without being questioned.

The VIS is also in accordance with the Directive 2012/29/EU which provides that the right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing (Recital 41 of the Directive 2012/29/EU).

⁵⁵ Judgment *György Katz v István Roland Sós.*, C-404/07, ECLI:EU:C:2008:553

⁵⁶ EC Guidance Document, p. 29

http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf

4. There are legislations in which the victim can participate in the proceedings as *private prosecutor* or *subsidiary prosecutor*.

In the first case, the victim can use the secondary right to prosecute and bring charges for an offence if the public prosecutor has decided not to prosecute or, in case of some less serious crimes, the victim personally lodge a complaint before a court and becomes a private prosecutor. The victim has to prove all the facts essential for a conviction. In the second case, the victim press charges against the offender along with the public prosecutor. In this way the victim participates to the proceedings and has the right to continue the prosecution even if the public prosecutor later decides to withdraw the charges. Both situations are in accordance with the article 10 of the Directive 2012/29/EU and observe the right to be heard and to provide evidence.

In close connection with the right to be heard is also the importance of developing appropriate training for practitioners handling the questioning of victims in the criminal proceedings⁵⁷.

In this sense, article 25 of the Directive 2012/29/EU provides that Member States shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.

In accordance with the duties involved, and the nature and level of contact the practitioner has with victims, training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner.

The Directive also provides that any officials involved in criminal proceedings who are likely to come into personal contact with victims should be able to access and receive appropriate initial and ongoing training, to a level appropriate to their contact with victims, so that they are able to identify victims and their needs and deal with them in a respectful, sensitive, professional and non-discriminatory manner. Where relevant, such training should be gender sensitive. Member States' actions on training should be complemented by guidelines, recommendations and exchange of best practices in accordance with the Budapest roadmap (Recital 61).

In order to encourage and facilitate reporting of crimes and to allow victims to break the cycle of repeat victimization, it is essential that reliable support services are available to victims and that competent authorities are prepared to respond to victims' reports in a respectful, sensitive, professional and non-discriminatory manner. This could increase victims' confidence in the criminal justice systems of Member States and reduce the number

⁵⁷ EC Guidance Document, p. 30

of unreported crimes. Practitioners who are likely to receive complaints from victims with regard to criminal offences should be appropriately trained to facilitate reporting of crimes, and measures should be put in place to enable third-party reporting, including by civil society organisations. It should be possible to make use of communication technology, such as e-mail, video recordings or online electronic forms for making complaints (Recital 63).

Conclusions

Member States (at least) recognize the existing of a victim of an offence according to its internal provisions. But, looking through national legislations it seems like the victims of crimes do not have their important role in the criminal proceedings in the national provisions as it should be.

Once reported the crime, the victims should be entitled to a range of rights, especially the minimum provided by the Directive 2012/29/EU, regardless of the fact if he/she wants to have an important role, like the assistant of the prosecutor or as a civil claimant or he/she wants to participate as a victim with no specific legal status. Paying a fee when making the report to the police, even with the possibility to be later reimbursed by the offender, is not a good practice.

With regard to the right to be heard there are things to be improved in the national legislations. Special attention needs to be given by the systems in which the victim of the crime has no specific legal status and in which, usually, the victim is heard as a witness. In some cases the witness is heard under oath and he/she cannot refuse to testify and has to answer almost all the questions, including those private, if the judicial authorities consider them important. It should be taken into account that *the victim has right to be heard but this cannot be transformed into an obligation to testify* (for example as a witness).

Usually, in most of the Member States the victim is *not interviewed as soon as possible* from the moment it has reported the crime and the reporting of a crime itself is considered sufficient in order not to have another hearing of the victim. The victim is summoned for a statement only if the authority in charge decides that it wants additional information from the victim itself. In some Member States the victim has to wait for a decision to start an investigation from the competent authorities which can last even for months and only after this moment the victim can be heard if the judicial consider so. And, in some of the Member States, victims are considered only witnesses, until any official charges are brought against the offender.

Few of the Member States provide *the possibility* for the victim *to be accompanied by their legal representative and a person of their choice*, and only in some cases the lawyer can be present during the hearing.

As for the *persons with special needs*, each Member States provide different measures of protection when they are to be heard. These persons are defined according to their national

provisions, but in the future it should include *at least* the victims of human trafficking, terrorism, organised crime, violence in close relationships, sexual violence or exploitation, gender-based violence, hate crime, and victims with disabilities and child victims. Not only can the witnesses benefit from the measures of protection but also the victims should be entitled to benefit from them if a risk has been assessed in this sense by the competent authorities.

As regard to *child victims* each national legislations has its own limit of age that can differ from the one provided by the Directive. This is an important issue for those Member States concerned because in the Directive ‘child’ means a person below 18 years of age. It remains to be seen how the Member States will comply in this respect with the Directive.

5. RIGHT TO THE DECISION NOT TO PROSECUTE (Article 11 of the EU Directive 29/2012) (Tudorel Ștefan)

1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

4. Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.

5. Paragraphs 1, 3 and 4 shall not apply to a decision of the prosecutor not to prosecute, if such a decision results in an out- of-court settlement, in so far as national law makes such provision.

The extent to which prosecutorial discretion exists varies among criminal justice systems of members states. In some States, the prosecutor discretions is very limited and the prosecutor, under the principle of strict legality, is required to prosecute every case where there is sufficient evidence to sustain a prosecution. In other States, prosecuting authorities

not only have the discretion to prosecute or not, but also the ability to drop some categories of cases on condition and without convictions, providing the suspected offender agrees.

The exercise of discretion to prosecute depends on a range of factors. The prosecutor must assess the merits of the case relative to the elements of possible criminal offences, or the adequacy and quality of evidence. The exercise of discretion to prosecute or not is onerous as the decision can have serious consequences for the victim. In some states there are no legislative guidelines about charging and a decision is not subject to review.

In other cases, the prosecutor makes the decision not to prosecute because the crime has not been committed, the deed is not a crime, the author of the crime is not liable because of impaired judgment etc.

Anyhow, the victim should not be dependent upon the authorities' will regarding the revision of the decision. The revision of the decision of non-prosecution provided for in the legislation is the victim's right and not a manifestation of the authorities' discretionary will.

The provision of the article is limited to victims with a formal role in the criminal justice system and the procedural rules are governed by the national law. The review of the decision must be carried out by a person or authority other than whoever made the original decision. To exercise the right to a review, victims must receive sufficient information to decide whether to request one.

6. RESTORATIVE JUSTICE. CRIMINAL MEDIATION (*Jorge Jimenez Martin*)

RESTORATIVE JUSTICE

Right to safeguards in the context of restorative justice services (Article 12 of the EU Directive 29/2012)

1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:

(a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

(b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

(c) the offender has acknowledged the basic facts of the case;

(d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

(e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.

Introduction

To discuss Restorative Justice is to discuss new models of justice. Our societies are experiencing periods of dissatisfaction, demanding the strengthening of justice in order to address and deal with the increasingly frequent cases of corruption which each day undermine the confidence of citizens in their institutions.

The modern criminal law system was established on the basic principle of the neutralization of the victim. Compared to the primitive system of self-governing, wherein the punishment was the victim's private right, the modern State assumes a monopoly on violence and establishes that it is the sole party with the legal standing to legislate and administer justice in criminal matters.

In this system, criminal law becomes an instrument for maintaining social order, which has the function of protecting the most basic legal rights through prevention of crimes in order to maintain social harmony. Crime is defined as an abstract conflict between the offender and the law and between the offender and the State. The victim is relegated to being a mere legal abstraction, as the passive victim of the crime. Actual and effective reparation to the victim occupies a subordinate role among the objectives of the legal response to the crime, the punishment. This system, based on the principles and values of a democratic system, such as the principles of legality, proportionality, humane punishments and respecting the offender's rights, has the undeniable advantage of guaranteeing a rational, objective and smooth application of justice, but is also deficient in regard to protecting and recognizing the rights and needs of the victims. The victim feels marginalized and often suffers new losses when dealing with the legal system. This has become known as secondary victimization, which includes all the material and moral damage and losses suffered when dealing with officers of the law, during the criminal proceedings and the legal response to the crime⁵⁸.

Two antithetical trends currently come together in the criminal law system. One that makes security a right and, in this way, encourages a penal populism which makes retribution the defined objective of criminal proceedings; and another that advocates for the articulation of spaces for communication between the victim and the perpetrator, which aids the victim's attempt to obtain reparation for the damage suffered through dialogue and the perpetrator's positive social integration. A significant cultural change is taking place which is

⁵⁸ LOPEZ SAN LUIS, Rocío; ORTUÑO MUÑOZ, Pascual; JIMENEZ MARTIN, Jorge: *"Aportaciones de la mediación en el marco de la prevención, gestión y solución de conflictos familiares"*, AA.VV., ISBN: 978-84-9836-899-4, Editorial Comares, 2011.

moving towards a progressive recognition and protection of the rights and interests of victims, creating support for new models of justice.

Restorative justice, which relies on mediation as a fundamental instrument for its development, is therefore seen as a response to the crisis in the State in regard to the traditional objectives of its right to punish (*ius puniendi*), making it possible for the victims to return to the criminal arena by allocating them a key role within it. The postulates of mediation make it possible to identify its founding philosophy, but they do not enable, however, the institutionalization of a unitary model for development which is applicable to any country or society regardless of the social and political system where it should function. Here lies one of the most fundamental issues. The model of restorative justice functions differently based on the geographic and social reality where it is implemented, producing various operational sub-models.

Models of criminal justice

On the level of concept and application, there are three main models of criminal justice. First, there is the *retributive justice*, which advocates the imposition of a wrong on the perpetrator of the crime which is equal to the wrong caused by the crime (just punishment) and is guided by social order, represented by the State. Second, there is the *rehabilitative justice*, which aims to reintegrate the offender into society by remedying the personal shortcomings and social deficiencies which are evident from the crime. Therefore its priority is the perpetrators, whom it must recuperate for their reintegration into the community under suitable conditions to carry out a life project in compliance with criminal law. Third, as an evolution which integrates these two models, there is restorative justice. Third, as an evolution which integrates these two models, there is restorative justice, which allows the victim and the perpetrator to play an important role in actively determining a legal response to a crime, without neglecting the preventive objectives that the community assigns to criminal law. Therefore, it aims for a legal or criminal response to satisfy the interests of the perpetrator, the victim and society.

For this, it seeks to fulfil a triple function: punitive, rehabilitative and protective.

- a. The *punitive function* seeks to repair the breakdown of social order, confirming the validity of the law. If offenders make it clear to the community that they do not think that criminal laws are a legitimate social guideline for behaviour, the punitive function comes into effect through a criminal sanction, reaffirming that the rules must be respected, while highlighting that it has effective mechanisms to enforce them.
- b. The *rehabilitative function* establishes the conditions for perpetrators to develop a plan for their lives that respects the mandates and prohibitions contained in criminal laws, preventing them from re-offending.
- c. The *protective function* seeks to ensure that injuries suffered by victims are assessed, that their status is recognized, that they are protected from possible subsequent crimes and that the process of devictimization is made easier for them. This entails carrying out

assistance work (medical, psychological, legal), work to gather information so that the victim is actively involved in the criminal proceedings, protective work, which ensures that the aggressor does not target the same victim again, and restorative work, aiming to redress the damage caused to the victim.

In this way, developing these functions, Restorative Justice takes on a victimological role by repairing the harm done to the victim, a rehabilitative role by reintegrating the perpetrator into the community and a peacekeeping role by reaffirming the social utility of criminal laws.

Restorative justice aims to achieve its objectives through the establishment of *victim-offender dialogue space*, a communicative process, which promotes the resolution of the dispute. For this, different approaches are used including restorative circles, sentencing circles, conferences and informal group dialogue, wherein the basic feature is simply the presence of different key members of the community. However, the main instrument that is used is penal mediation.

The current crisis of justice

We are witnessing a crisis in the current justice system. The most notable factors that have influenced the inception and the expansion of restorative justice and specifically mediation, which aims to achieve the voluntary repayment of the damages caused by offenders to their victims, are as follows:

1) *Closer access to justice*: The excessive bureaucracy and formalization of the Administration of Justice is gradually moving it away from society and causing a loss of credibility and trust in the institutions. Thus, through restorative programmes, not only the parties are affected (offenders and victims), but also the community in general will be able to have an active and direct role in legal institutions.

In this case, it should be noted that among the various elements of restorative justice, many of them propose community participation, such as circles or conferences, while others limit it to parties directly affected by the crime, as with mediation, which is always with an impartial mediator. In family conferences (incepted in New Zealand and exported to Australia), offenders and victims, as well as their families and supporting persons for both sides participate in the meetings. The police and social workers can also become involved. In the circles, (originating from the aboriginal communities in Canada), meetings are open to anyone in the community with interests, which entails opening up the conflict to the community with the aim of the community contributing to the agreement. In this sense, community participation in conflict resolution has an essential role in contributing to social order, which enables the use of social resources and encourages society to participate in criminal cases and become responsible in them.

2) *The growing interest in victims and the reparation of the damages caused by crime*: Conventional sanctions have failed to protect victims by ignoring them and instead focusing

on the punishment of offenders. Currently, sanctions contemplate the victimological aspects of crime. A plethora of procedures that seek to compensate the damages caused to the victims of crime at every stage of proceedings: investigation, indictment and enforcement.

Conventional punitive responses ignore the victims' needs, which include not only the economic damage caused by crime but also, and more importantly, the psychological damage arising from their inability to understand the offender's behaviour, the excess of bureaucracy they must face to file a lawsuit and initiate prosecution, and the manner in which they are treated when making a statement in the courts. In short, they feel like victims who have been failed by an offender who committed a crime and by the institutions they turned to for support and protection.

It is crucial to highlight the contribution mediation can make to the victims' satisfaction with the offenders' reparation of the wrongs caused by the crime as well as their satisfaction with the justice system, thereby preventing the secondary victimization caused by the inadequate treatment often given to victims by lawyers, judges and legal actors in general. This is because the victims participate in the solution of the conflict. As mentioned above, their level of satisfaction improves because their views are taken into consideration and they feel as much a party to the resolution of the conflict as those who were not directly involved.

3) Questioning criminal law for its inability to prevent crime: In view of the inability of conventional, punitive criminal law to put a stop to crime and enforce punishment effectively, there are several optional approaches. The most radical line of action is abolitionism, according to which the penal system is misdemeanour, unjust and selective, and therefore should be replaced by informal social solutions. The main drawback to this proposal is that its aims are utopian, given the seriousness of certain types of conduct whose removal from the penal system would be infeasible.

Another criticism is based on an economic analysis of Justice, advocating privatization because it considers that judicial institutions are incapable of resolving conflicts and generate numerous financial costs. It argues that the private sector should enter the justice system but the proposal carries serious risks for fundamental rights and particularly for the principle of equality and legal protection.

Last, other proposals simply defend a reform of the formal system of sanctions by integrating new procedures that would benefit victims and offenders alike. This would be more viable and in accordance with individual rights and guarantees.

4) The search for sanctions that do not dissocialize: Given prison's difficulties and failure to rehabilitate offenders, penal laws seek to create new sanctions that will not repeat the drawbacks to prison while enabling offenders to comply with sanctions intended to help them to avoid criminal behaviour in the future.

To date, imprisonment has failed to contain crime. Beyond the intention to punish, it also causes huge drawbacks, such as the segregation and labeling of those who endure it, as well as huge social and economic costs. For these reasons, any penal procedure intended to replace imprisonment must be considered adequate to protect legal rights; must not cause more damage beyond the offender's punishment; and must not involve a huge economic cost. The alternatives to imprisonment meet all these factors.

In short, the crisis of the legitimation of Criminal Law is caused by an inability to meet the demands of the victims, offenders and the wider community. Therefore, Criminal Law needs to open up to new experiences of out-of-court reparation, without undermining the State's share of responsibility in the solution of conflicts. In other words, the expansion of restorative justice and mediation should not imply privatization of conflict resolution. The State's exclusive authority to punish must be assured with full constitutional guarantees. It is the State's duty to promote mediation and restorative justice in the sphere of crime, provide it with sufficient resources and control it via the courts and the State Prosecutor's Office.

Concept of restorative justice

Zehr⁵⁹ reminds us that restorative justice emerged in the 1970s as an attempt to respond to the frustration experienced by many justice professionals and users of the justice system that, often, the justice system caused more harm than the wrongs it sought to redress or manage⁶⁰. Perhaps to the surprise of his critics and followers, Zehr pointed out that restorative justice is not primarily about forgiveness and/or reconciliation, or about mediation. Rather, it seeks to facilitate a dialogue or meeting. It is not primarily intended to prevent recidivism, nor is there a clear model to follow. Restorative justice is about a set of principles that act as a compass, telling us that it is not designed merely for minor offences and first-time offenders. It is not a panacea, nor does it seek to replace the current legal system, as Zehr sustained in previous works⁶¹. Currently, he does not view restorative justice as the antithesis of retribution.

Restorative justice constitutes an encounter that should follow a series of principles concerning the interests of the victims, the social and structural problems of the offenders and the community context. We are faced with practices or models that could be classified as "totally", "mostly", "partially", "potentially" or "falsely" restorative. From a restorative viewpoint, justice starts with the victims' needs, regardless of whether the offender has been apprehended. One of the main needs is the material and symbolic reparation of the

⁵⁹ ZEHR, Howard. 2002. *The Little Book of Restorative Justice*. Intercourse, PA: Good Books.

⁶⁰ Educated in the Universities of Chicago and Rutgers, Zehr is co-director of the Conflict Transformation Program at Eastern Mennonite University, in the state of Virginia. His extended career in the theory and practice of law has earned him the name of the "grandfather of restorative justice". His publications include monographs on victims and offenders.

⁶¹ ZEHR, Howard. *Retributive Justice, Restorative Justice, alternative justice paradigm*, New Perspectives on Crime and Justice, Akron, PA: Mennonite Central Committee Office of Criminal Justice, September, 16p. 1985.

wrong the victim has suffered. However, if the harm is irreparable, restorative justice can provide "a catalyst and/or a forum for exploring and assigning these needs, responsibilities and expectations" (Zehr). In any event, reparation of an offence always implies an interest in preventing its recurrence, which implies understanding socio-structural and personal factors. The wrongdoer's responsibility is defined as an understanding of the harm caused, without insuperable justifications. In turn, this implies a commitment and participation in the process of justice of the parties involved, and of the community or the social group that is closest — in geographical terms or in values —, without prejudice to the public interest safeguarded by the State. From the viewpoint of procedural justice, this would involve cooperative and integrative processes, the result of which would be agreement rather than imposition, with the limitations that entails.

One of the definitions that was adopted as a working tool in the 10th United National Congress on Crime Prevention and Criminal Justice (Vienna, 2000) was that: "restorative justice represents an approach to solving the problems initiated by a crime, with the involvement of all the stakeholders and the active participation of the State bodies responsible for the investigation of crime"⁶². Restorative justice has the following fundamental objectives:

- To respond to any need — financial, emotional or social — that a victim may have (directly or indirectly, including those who are closest to the victim, who may also be affected); a need that has a causal relationship to the offence.
- Attempt to reintegrate the offender in the community, thus preventing recidivism.
- Ensure that offenders assume responsibility for their actions.

For our purposes, Directive 2012/29/EU indicates that "restorative justice" means "any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party", in which the victim would be: a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; and the family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.

International Instruments – Regulatory Framework

In the sphere of restorative justice, the following texts are worthy of mention:

1) Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe concerning mediation in penal matters, of 15 September⁶³, recognizes not the "right" but the "legitimate interest" of victims to have a stronger voice in dealing with the consequences of their victimization, to communicate with the offender and to obtain apology and reparation. At the same time, it considers that said reparation may further their

⁶² <https://www.unodc.org/unodc/en/crime-congress/crime-congresses-10.html>

⁶³ [http://www.mediacio.hu/files/EU_dok/CoE_R\(99\)19_mediation.pdf](http://www.mediacio.hu/files/EU_dok/CoE_R(99)19_mediation.pdf)

social reintegration. In any event, public and private efforts need to be coordinated and the European Convention of Human Rights should be respected. Paragraph I offers a definition of mediation, which is more limited than the term "restorative justice". Therefore, whether the Recommendation can be applied to other forms of restorative justice is open to doubt. Mediation in penal matters should be a generally available service (3), facilitated by legislation, which, moreover, should define the principles for the referral of cases to mediation and the handling of cases following mediation (6-7). Mediation services should be given "sufficient autonomy" within the criminal justice system (5). In any event, a decision to refer a criminal case to mediation, as well as the assessment of the mediation procedure, should be reserved for the criminal justice authorities (9). There should be time-limits for the referral to restorative justice (16). Mediation services should be monitored by a competent body (21). Mediators should be recruited from all sections of society (22) and their impartiality should be based on the facts of the case and the needs of the victims and offenders (26). The mediator's report should not reveal the content of the mediation sessions, nor express any judgment on the parties' behaviour during mediation (32).

2) Paragraph 2 of **Resolution No 2 of the 26th Conference of European Ministers of Justice, meeting in Helsinki on 7-8 April 2005**, on the social mission of the criminal justice system - restorative justice, considers that it is of great importance for social peace to promote a criminal policy which also focuses on the prevention of anti-social and criminal behaviour, the development of community sanctions, the victims' needs and offender reintegration. Paragraph 3 points out the suffering caused by imprisonment and the burden it causes on society. It also considers that "... community sanctions and measures, as well as restorative justice measures, can have a positive effect on the social costs of crime and crime control" (paragraph 4) and it is "convinced" that a restorative justice approach may better serve crime victims' interests, increase possibilities for offenders to achieve a successful integration into society and enhance public confidence in the criminal justice system (paragraph 5). It is necessary to design particular strategies for vulnerable groups of victims and offenders (paragraph 10). The States agree on the importance of promoting the restorative justice approach in their criminal justice systems (paragraph 15) and invite the Committee of Ministers to support and develop cooperation programmes to promote the widespread application of restorative justice on the basis of Recommendation R (99) 19 (paragraph 21).

3) **Recommendation R (2006) 8 on assistance to crime victims**⁶⁴ is based on a conviction that it is as much the responsibility of the State to ensure that victims are assisted as it is to deal with offenders. With regards to mediation, they should consider the benefits as well as the potential risks, and the States should adopt clear standards to protect the interests of the victims (paragraph 13). Moreover, they should take into consideration the latest state of victimological research available in developing consistent and evidence-based policies (paragraph 17. 3).

⁶⁴ <https://wcd.coe.int/ViewDoc.jsp?id=1011109&>

4) The basic principles on the use of restorative justice programmes in criminal matters were adopted by **ECOSOC Resolution 2002/12**⁶⁵, which is a reflection of the Council of Europe's Recommendation R. (99) 19. The United Nation's text shows more concern for the principle of legality and offenders' rights. Moreover, although the benefits for the victims, offenders and communities are assumed in the Preamble, it recognizes that the use of restorative justice does not prejudice the right of States to prosecute alleged offenders. In addition, no principle shall affect any rights of an offender or victim which are established in national and/or international law (principle 23).

Principle 1 construes that restorative justice programmes means any programme that uses restorative processes and seeks to achieve restorative outcomes. Restorative processes imply any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime (thus, it includes mediation, reconciliation, group conferences and sentencing circles). Generally, they count on assistance from an impartial facilitator who knows the local culture. Restorative outcomes should contain an agreement arising from said participation (reparation, restitution, community work) aimed at satisfying the needs of individuals and groups, the parties' responsibilities and achieving the reintegration of victim and offender.

The process may be carried out at any stage of the criminal proceedings, subject to national law (principle 6). However, it should only be used where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender, who should be able to withdraw such consent at any time. Moreover, agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations (principle 7). The victims and offenders should agree on the basic facts of the case. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings (principle 8). Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process (principle 9). The States should legislate on five aspects: the conditions for referral; the handling of cases following a restorative process; the training and assessment of facilitators; programme management; and rules of conduct (principle 12). Fundamental procedural safeguards should be respected, such as the assistance of legal counsel and, if appropriate, translators; the right of minors to the assistance of a parent or guardian; the right to information; and the right to not be coerced (principle 13).

The States should promote research on and the evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for

⁶⁵ <http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>

all parties. Said studies should guide further policy and programme development (principle 22).

5) Directive 2012/29/EU (see above)

Victims should assume a leading role in the penal process and deserve to be treated in a manner that allows them to recognize that they are moral equals and their right to dignity should always be respected. Nonetheless, the victim's central position and the recognition of said position in the process does not imply that they should be given a decisive role in the enforcement of the criminal sanction imposed, after a fair public trial in which the victim was heard and had the opportunity to defend his or her rights.

Protecting the victim should not be the equivalent of privatizing the sanctioning process. Advocating a new central role for victims should entail the effort of all legal actors to assume a firm victimological attitude. The foregoing is evident in the need to create efficient, comprehensible, direct and humanely sensitive information circles that allow victims to become aware of the consequences of opening the restorative process and the role they will play within it.

The principles of restorative justice

The international community has sought to establish the basic principles of restorative justice in order to attain the objectives pursued in using it. Thus, the following objectives of restorative justice have been put forward⁶⁶:

1. To have offenders assume their responsibility.
2. Promote the victim's recovery.
3. Benefit the criminal justice system and the community as a whole by having all the parties intervene in the search for solutions that promote reparation, reconciliation and calm.

Insofar as the practical implementation of restorative justice should be based on a set of common principles and values of the States with different criminal legislation and proceedings, a series of common principles have been proposed, which include:

- a) Crime is an act that is an attack against human relationships
- b) Victims and community occupy a central position in the administration of justice
- c) The top priority in justice administration processes is to help the victims
- d) The second priority is reintegration into the community, as far as possible
- e) Offenders have a personal responsibility with regards to the victims and the community for the offences they have perpetrated
- f) The experience of participating in a restorative justice process shall enable offenders to improve their competence and understanding
- g) The parties concerned share responsibilities in the restorative justice process, mutually collaborating towards its development

⁶⁶ CAMARENA GRAU, Salvador. *La Justicia Restaurativa*. Máster de Mediación Penal. Universidad de Valencia, 2012.

From a European perspective, the European Union Council Decision of 8 October 2002 stated that restorative justice implies a broad approach in which tangible and intangible reparation of an altered relationship between the victim, community and offender constitutes the overall guiding principle in the criminal justice process. To date, although restorative justice has been evident in various forms of mediation between victims and offenders (victim-offender mediation), family conferencing and other methods are increasingly used. The administrations, police, criminal justice bodies, specialised authorities, victim support services, offender support services, investigators and the wider community all take part in the process.

Thus, the reasons for mediation (as an instrument of restorative justice) would be:

- a) An offence is first and foremost a breakdown in human relationships rather than breaking the law.
- b) Committing a criminal act creates a situation that opens a series of risks and opportunities to remedy the state of things to which the offence had contributed and to repair the consequences thereof.
- c) The priority of restorative actions should be to provide assistance to the primary victim and, secondly, to the secondary victims. It gives offenders an opportunity to improve their involvement in the community.
- d) The principles governing a restorative response to crime are minimal coercion, cooperation, and the re-establishment of human relationships.
- e) Restorative justice seeks to establish a cooperative structure that favours accountability.
- f) Restorative processes are strictly required to ensure stakeholders' freedom to intervene and the voluntary nature of the agreements reached.
- g) The restorative process requires tutored and professionalized steering. Facilitators are key figures in the process. They are unconnected to the offence and the parties and help the latter to prepare the scenario for a potential discussion, explore their ability and willingness to take part in said discussion, and adopt strategies that will enable a discussion to take place that will be satisfactory to everyone concerned.
- h) The restorative agreement that puts an end to the mediation process should contain reasonable and proportionate commitments that respect human dignity.
- i) Frameworks for monitoring and accountability are needed to favour natural communication insofar as this is possible.

Criteria and methods for assessing restorative justice programmes

The assessment criteria commonly used to analyse restorative justice programmes are the following: 1) recidivism; 2) secondary victimization; 3) satisfaction with justice; and 4) the costs for the justice administration.

The most important conclusion to be drawn is that restorative justice works differently on different types of individuals.

Moreover, *recidivism* in violent crimes has clearly diminished, although there are some doubts regarding crimes against property. In general, restorative justice seems to reduce crime more effectively in serious offences with direct victims⁶⁷. In any event, serious studies that would indicate how restorative justice prevents recidivism are needed as most of the offenders who are invited to participate in these restorative projects appear to be in less risk of recidivism to begin with.

With regards to *reducing victimization*, victims clearly benefit from face-to-face mediation. They obtain short-term benefits for their mental well-being, with a reduction in post-traumatic stress symptoms. This has long-term benefits for their health and, therefore, on overall medical costs. On the other hand, if restorative justice diminishes the number of crimes, it can provide a response for victims who do not report a crime and do not cooperate with justice, or when the accused denies the facts or cases are dropped, thereby reducing victimization. For example, when individuals under arrest in New York and Canberra were invited to participate in restorative programmes, restorative justice managed to bring twice and even four times as many cases to justice.

The highly positive results obtained for victims in most cases lead to the conclusion that victims tend to benefit from their involvement in restorative justice programmes when they are given the opportunity. Restorative justice lowers their anger, anxiety and fear of re-victimization. Moreover, it increases their perception of a fair process, a matter to which victims appear to give more importance than the outcomes in terms of economic reparation. Restorative justice even seems to function as a supplement or complement to criminal justice.

The main conclusions of the studies conducted in this regard are the following:

1. Restorative programmes do not fair worse than conventional criminal justice in terms of meeting the needs of victims and offenders and in terms of recidivism.
2. There is a high degree of acceptance of the offender's reparation on the part of victims and communities.
3. Many victims would like to come face to face with the offender.
4. The frequency and severity of the offender's return to crime are lowered.
5. Many victims and offenders would participate in the restorative process, although this would depend on the type of crime, the victims' characteristics and the relationship between them.
6. There is evidence of a reduction in post-traumatic stress in some cases.
7. An improvement is noticeable with regards to the services provided, period of indictment and costs.

⁶⁷ The British Restorative Justice Consortium has compiled several studies in different parts of the world on the effect of restorative justice on recidivism. Although not much data on the methodology are given, they can be accessed online using the following link: http://www.restorativejustice.org.uk/?Resources:Research:UK_2006

8. When victims and perpetrators participate, the agreement and compliance rates are very high.
9. There seems to be no inherent limitations to the type of cases for referral.
10. Restorative justice can be used successfully in cases involving violence.
11. Victims and offenders consider it to be more satisfactory than criminal justice and their satisfaction with the restorative process reaches 95%.
12. Costs are lowered.
13. It is positively valued within the community.
14. There is a very high level of satisfaction among the victims.
15. If they are adequately trained, volunteers can become as effective as professionals when facilitating restorative processes.

Therefore, it is recommended to broaden the programmes in order for victims to encounter minimal barriers to access. Broadening the programmes would involve setting up an institution that would carry out the functions of control, design assessments and plan changes.

The Spanish experience in restorative justice

The implementation of various systems of criminal reparation or mediation, with more or less legislative development, are widespread in European and Latin American countries. Therefore, it is remarkable that in Spain, to date, there have only been experimental programmes conducted with much effort and little legal cover beyond the limited importance given to reparation to victims within criminal proceedings by the Penal Code since 1995. The programmes have managed to promote a culture of mediation and create a network of professionals who work to reach conciliatory agreements. Therefore, it is necessary to reflect on the reasons that have impeded the integration of mediation in Spain's penal system.

From a penal and criminological viewpoint, the main reasons that have contributed to slowing down criminal medication in Spain are the following:

1) *The non-existence of a principle of opportunity* that would enable the State Prosecutor to select cases in accordance with the need to open proceedings for the sake of general interests or to terminate them if an agreement is reached via mediation. Instead, the burden of the principle of legality reserves the exclusivity of marking the direction of proceedings and their punitive consequences to the law, leaving the judicial authority with little room to manoeuvre and preventing the State Prosecutor from refusing to open proceedings when an agreement between the parties has been achieved. Moreover, it does not permit recognition of the decriminalising legal effects of reparation to the injured party, except in crimes of aggression, harassment or sexual abuse when the interests of the victim should be weighed before filing of a lawsuit. This loophole cannot be completely covered by the principle of last resort, whereby Criminal Law is obliged to disregard conduct that is irrelevant due to its insignificance, except in the cases of minor infringements (offences) in

which the State Prosecutor may close a case if there is mediation agreement. Some experiences have demonstrated this, particularly in Catalonia.

2) *The solid implementation of the conventional sentencing system* which delays the adoption of alternatives. Before the Penal Code of 1995, the sentencing system was practically identical to that of the Penal Code of 1944, with a few differences, such as abolition of the death sentence (derogated by Art. 15 of the Constitution). This caused the almost total hegemony of imprisonment with very few possibilities of substitution and suspension. Ratification of the Penal Code of 1995 renovated the sentencing system completely. In addition to eliminating prison sentences of under six months, it introduced new sanctions, such as weekend arrest and community service. It also permitted substitution and suspension, thereby allowing a new reading of the penal system that gave preference to special prevention and care for the victim by mentioning reparation in some criminal proceedings.

The spirit of renewal of 1995 was disturbed by amendments to the Penal Code in 2003, which caused a return to more repressive sanctions, although the protection of victims' interests increased with the requirement to pay civil liability in certain sentences. Notwithstanding that, it cannot be denied that there is little institutional and social trust with regards to crime prevention in Spain because any reform of criminal proceedings that seeks to address the increase in crime or concern for citizen's safety is unilaterally directed towards harsher sentences.

These factors have delayed the arrival of criminal mediation. However, the alternative movement of conflict resolution continues to make headway. Currently, more experiences are gradually being implemented that predict integration into criminal proceedings in the near future. Until recently, mediation is only known in juvenile Criminal Law regulated in Art. 19 of the Organic Law which regulates the Criminal Responsibility of Minors and mainly seeks to benefit juvenile offenders to prevent minors from entering criminal proceedings owing to their criminogenic effects. In addition to the necessary compatibility with penal principles and guarantees, mediation in adult Criminal Law must overcome numerous difficulties imposed by rigid procedures, the State Prosecutor's limited empowerment to close or withdraw, and the punitive, public nature of criminal sanctions based on a mistrust of agreements between the parties because they may mask an undercover privatisation of criminal conflicts.

As a preamble to the potential effectiveness of mediation in Spain's criminal system, let us take a look at mediation in other European countries:

- a) Almost every country implements mediation in juvenile Criminal Law.
- b) Reparation generally acts as a mitigating circumstance in every country.
- c) Mediation is used in some countries to reduce formal criminal proceedings, as a condition for suspending a sentence or granting of probation.
- d) In some cases, State Prosecutors use mediation to dismiss or stay proceedings, although only in those countries where the principle of opportunity is in force.

The differences between these models are relevant because they are not always institutionally enshrined in a law. Sometimes they are only a widespread practice in the Courts. The point at which they are used in proceedings varies: arrest, judgment, sentence or enforcement. The effects, too, are different; they may or may not prevent a trial, but they have beneficial consequences for offenders and victims. The mediators may be volunteers or professionals, and the crimes in which mediation is used also vary. Therefore, the aforementioned classification refers mainly to the effectiveness of criminal mediation that is formally regulated in legal provisions. This does not include those cases in which mediation is conducted informally, with no legal provision, but tutored by jurisdictional bodies. This occurs in Spain, which is one of the last countries in Europe to incorporate criminal mediation.

In Spanish law, a mediation agreement between offenders and victims has little effect in criminal proceedings. Its effectiveness and importance is limited to the following cases:

- a) Reparation of a wrong as a mitigating circumstance set out in Art. 21.5 of the Penal Code, as well as some specific mitigating circumstances in the regulation of certain crimes in the special part of the Penal Code.
- b) Reparation of a wrong as the content of a sentence of community service, stipulated in Art. 49 of the Penal Code.
- c) Substitution of the prison sentence stipulated in Art. 88 of the Penal Code, providing the reparation required an effort.
- d) The possibility of suspending the enforcement of imprisonment stipulated in Art. 80 of the Penal Code, providing civil liability has been paid.

Mediation

Introduction. Origin of Mediation

At this moment we are concerned with a statement of restorative justice, mediation, concentrating on the sphere of criminal jurisdiction. The incorporation of mediation as a new conflict resolution system in Criminal Law, responds to various motives whose common denominator is the overcoming of obstacles that impede traditional justice from being effective and complying with its objectives of equity.

Mediation is developed on three fundamental axes: delegalisation - the law occupies a less central role in the development of a mechanism that should favour negotiation and discussion; dejudicialisation, conflict solution is not necessarily subject to the decision of centralized state justice bodies; and dejuridification, the law, as a closed system of regulations, does not necessarily determine the content of the restorative or repairing agreement.

Amongst other factors that come with the initiation of mediation the following must be mentioned: in first place, the rise of Victimology within the core of Criminology replacing the interest that up to that moment the study of the causes of crime and the characteristics

of the offender had had, and resulting in a greater protection of victims and in improving their relationship with the aggressor; furthermore, in second place, as a statement of the nature of minimum intervention that demands the limiting of punitive intervention to that deemed strictly necessary, opting in the case of that which does not present such a nature for informal solutions, new alternative methods to traditional Justice emerge; and, finally within the sphere of alternatives to punishment, within the discourse of the search for new sanctions before the ineffectiveness of traditional ones and in particular the crisis of imprisonment, new punitive forms are being put forward such as reparation; that is, interest in the victim, the depenalising movement of Criminal Law and alternatives to prison have been determining factors in the development of criminal mediation.

Mediation in terms of a method of conflict resolution wherein two parties in contention voluntarily recur to a third person to reach a satisfactory agreement, is an extra-judicial or different means to legal or conventional paths of resolution of disputes where the aim of the intervention is to punish, which must be creative and motivated by the search for solutions that satisfy the parties' needs without the need to be limited to that which the law strictly stipulates, with the result that it more beneficial for the community in general.

The first experiences of criminal mediation originate in the USA and Canada at the beginning of the 70s⁶⁸. These experiences were transferred to the USA and later in England in 1977, various mediation programmes arose, some directed at young people, others at adults, with these relating to the resolution of neighbourly conflicts and with the aim of avoiding the negative consequences of excessive judicialisation. There are currently mediation programmes that can be applied before, during and after proceedings. In 1985 Holland, Germany and Austria started the first experiences and France did so at the beginning of the 80s, regulating it for the first time via a law in 1993. Belgium, Italy, Poland, Portugal and Nordic countries have also regulated mediation.

Regarding the doctrinal analysis of criminal mediation, it is usually considered that Nils Christie's article "*Conflicts as Property*", published in 1978 in the British Journal of Criminology was one of the first scientific contributions to the new model of Restorative Justice, advocating a solution to criminal conflicts that was an alternative to the traditional criminal system. In his proposal, the parties associated with the conflict become the protagonists and are actively involved in its resolution together with the community, with

⁶⁸ Specifically on 28 May 1974, two youths from Kitchener, Ontario (Canada), admitted they were guilty of causing damages in 22 properties. The parole officer Mark Yantzi, member of the Mennonite Church and responsible for preparing a proposal for sentence, considered the possibility of the youths meeting their victims. With many doubts, he presented the idea to the judge responsible for the case, who immediately told him that this could not be done. The surprise arrived when on reading the sentence he saw that the judge had ordered face-to-face meetings to be organised between the offenders and the victims, with the purpose of talking about the form of restitution. This case marks the beginning of the processes of mediation between victim and offender (VOMP, Victim Offender Mediation Process). These first mediations were carried out in quite an unrefined manner: Mark Yantzi accompanied the offenders, knocked on the door of each victim and once in the dwelling left them to speak and agree on a form of restitution, sitting at the back taking notes. A few months later the youths had fulfilled all of the restitutions. The success of this case brought the Central Mennonite Committee, a pacifist organisation affiliated to the mennonite church, to set up a pilot project called Community Justice Initiatives with the aim of promoting reconciliation between offenders and victims and facilitating the repair of damages caused as a result of the crimes.

the intention of removing lawyers and legal operators labelled with taking advantage of third-party conflicts, which motivated the first legislative reforms and the worldwide appearance of the restorative movement, which in the Criminology Congress in 1993 in Budapest coined the concept of Restorative Justice, as a concept that has been followed up to the present day.

Later the work of Zehr *“Retributive Justice, Restorative Justice, alternative Justice paradigm”*, published in 1985, consolidates the comparison between Restorative Justice and Retributive Justice as two opposing models wherein the evident advantages of the former supplant the latter for the positive results that it reports.

For its part, in the legislative sphere the origin of the repairing systems is in nearly all cases situated in the legal orders in the sphere of Justice for minors, with a few exceptions such as Polish legislation, where the first experiences were with adult offenders in 1997. In this manner the first experiences of criminal mediation were with juvenile offenders such as for example the family group conferences in New Zealand that started in 1980, or the programmes in the United States (1974), England (1990), Finland (1983), Italy (1980), Canada (1991) and Germany (1985) and even Spain which also started with young offenders from 1990 in programmes developed in various Autonomous Regions, especially Catalonia and, later, with its regulation in the Organic Law Regulating Criminal Responsibility of Minors in 2000.

Its appearance in juvenile Criminal Law is associated with the search for sanctions that respond better to the educational objectives within this Jurisdiction, as it does not involve punishing the minor offender with criteria that are merely retributive and connected to material justice, but also with criteria that are preferably connected to special prevention where the aim is to avoid future illegal behaviour and act on the factors that have been allowed to encourage the offence. Because of this conciliation agreement the victim has a large part to play due to its educational nature, representative of the acceptance of guilt and responsibility for the criminal acts perpetrated both before the victim and before society. A second reason that explains its wide acceptance in juvenile Criminal Law is the great flexibility with which it acts within this, as precisely because of its preferential interest in the minor offender, the principles of guilt and proportionality applied to adults make way to the legal choice of the punitive measure most appropriate for the interest of the minor that has offended, without the need to limit it to the seriousness of the crime or the guilt of the individual responsible, which without any doubt has facilitated reparation and conciliation programmes as an ideal and sufficient means that plays a prominent role in the principle of minimum intervention, which is especially sought in youth Criminal Law as it avoids entering into proceedings, limiting it to that which is strictly necessary.

Once mediation in youth justice is consolidated with the guarantee of having obtained great benefits and a high level of satisfaction between the affected parties, its transfer to adult Criminal Law is connected to the verification of its compatibility with criminal principles and guarantees, as adult Justice lacks the flexibility and lack of deformalisation that characterizes juvenile Justice, which makes it difficult to incorporate measures that do not

respond to traditional profiles, but require their accommodation as the opposite would make their application in this punitive sphere unviable.

Concept of mediation

As indicated, mediation is a basic instrument of restorative justice. For the now repealed European Council Framework Decision of 15 March 2001 "mediation in criminal proceedings" is the search, before or during the criminal process, of a negotiated solution between the victim and the perpetrator of the offence, in which a competent individual mediates. The directive substitutes the references to mediation for the wider reference to restorative justice, an expression originating from international case law.

Mediation is defined as a conflict management system in which a *neutral party, with appropriate training, independent of institutional actors* in the criminal process, and impartial, helps two or more individuals implicated in a crime or misdemeanour, as victim and offender, to understand the origin of the conflict, its causes and consequences, to confront their points of view *and create agreements on the mode of reparation*, both material and symbolic.

It is usually centred, substantially, on offences with *defined victims*, in which the interaction between victim and perpetrator is presided over by the *symmetry of forces*, which guarantees a *space of reciprocal freedom*.

The recourse to mediation is discussed in the *criminality of domination*, for example gender-based violence in relationships, and also *diffused or collective criminality*, due to the absence of an individual victim. In this last case some experts have pointed to the convenience of mediation when there is an organization or association that represents victims and that could be a valid interlocutor with the perpetrator.

In this way, a series of requisites would be needed to find ourselves before criminal mediation:

1. In any event it must concern typical conduct, that is an offence classified by the Penal Code, as a crime or misdemeanour in the case of Spain, for example, and which eliminates all solutions negotiated for interpersonal or social conflict that are not legally considered crimes or misdemeanours from criminal mediation. Despite this, there are conflicts that are closely related to crimes and misdemeanours, either because they could be the precursor to one or the other or because their negotiated solution could avoid future crimes and therefore fulfil an essential role in Criminal Law, which is crime prevention.

2. The conflict generated by the perpetration of a crime or misdemeanour can be resolved before or during the proceedings understood in a wide sense, which gives an extensive margin for its fulfilment, as it occurs around proceedings that have been initiated due to the perpetration of an illegal conduct, but enables it to be held before, during or after this, with the possibility of a mediation session before or after the sentence.

3. The perpetrator of the offence and the victim must enter into mediation, as they are the parties in conflict, without the need for any more conditions. Then it may be that the programmes of mediation specifically either do not put limitations on any type of victim

or on the contrary exclude some, for example, those on some programmes for legal persons or minors.

4. Last, mediation must be guided by a competent individual which does not limit the conditions that the mediator must have: he or she can be a specific professional, a police officer or even a judge, with it being essential in any case, despite the definition not being expressly stated in European legislation, that he or she acts in an impartial and neutral manner, that is in a situation that is equidistant from the two parties in conflict.

At the same time, mediation must rest on *four columns*:

1. The consideration of the *victim* as a person able to comprehend, not justify, the illegal act via the hearing of the motives of the offender in a context of emotional calm, and the estimation of the *perpetrator* as an individual susceptible to improvement and responsibility.

2. The implementation of a *space of encounter* between the victim and the perpetrator that facilitates the analysis resulting from what the crime has meant in their life projects.

3. The presence of an *impartial and correctly trained mediator*, charged with creating the right conditions for dialogue between victim and perpetrator. Mediators are key players in mediation, being the person that facilitates dialogue, but *does not resolve the conflict*, whose composition rests on the parties involved. Their qualities must be neutrality, empathy, flexibility and creativity.

4. The construction by the victim and the perpetrator of a response aimed at the right *reparation* of the damage caused, reparation that could be *symbolic* (admission of responsibility and request to apologise to the victim), *beneficial* (carrying out of an activity to the benefit of the victim or third parties) or *material* (payment of an amount of money as compensation).

One characteristic of mediation is that it is cooperative negotiation, as far as it promotes a solution in which both implicated parties earn or obtain a benefit, and not just one of them. That is why it is considered a non-adversary channel, because it avoids the antagonizing winner-loser posture. For this reason, it is also an ideal procedure for the type of conflict in which the opposing parties are obliged or wish to continue the relationship that has united them up to that moment.

For the mediation procedure to be possible it is necessary for the parties to be motivated, because they must agree to cooperate with the mediator to resolve their dispute, as well as respect each other mutually during and after the act of mediation, and respect the agreements reached, which is something that occurs to a high degree, as the agreements are proposed by the interested parties themselves, and they have committed to fulfilling them.

Communication is an essential element in this conflict resolution technique, and we could in fact define the mediation process as consisting in providing the conflicting parties with

quality communicative resources so that they are able to solve the conflict in hand. Throughout the entire process, the parties speak of reproaches, stances, opinions, desires, needs, feelings, and mediators must help them to express themselves in a constructive manner, and to listen, in such a way that the communication established can help them to resolve the conflict.

To favour the implementation of mediation the legislator must focus on objectives: eliminate inconvenient ones that could be contemplated by substantive laws; attribute those effects to the mediation agreement that it would not otherwise have; bring about an atmosphere that favours mediation between parties; and disseminate the culture of mediation.

In the design of mediation, as well as the statute of mediator and procedure, the legislator should also address other circumstances such as:

- Establishing the relationship between mediation and the present or future legal process.
- The relation with precautionary measures and those activities prior to the start of the process or which are urgent in nature such as preliminary proceedings or, in a number of cases, pre-trial evidence.
- The *inter partes* effects of mediation and the mechanism for making the mediation agreement effective.
- The possible challenge to the mediation agreement, both the procedural means and the consequences of the challenge.

In the first place mediation is an alternative to jurisdiction because the parties are not obliged to remain in the process, as opposed to arbitration or the public jurisdictional process. And in second place because in mediation the third party does not impose a solution on the parties, rather facilitates communication. Regarding the effectiveness of the mediation agreement, it derives from the free will of the parties and links them in this measure, and it is not an imposition from the State unlike jurisdictional solutions such as the judicial process or arbitration. In this manner it is closer to a transaction than arbitration.

If it is considered an alternative to jurisdiction it is the equivalent of a trial in terms of effectiveness and quality. On the other hand if it is conceived as an alternative to justice it is something complementary to justice as far as it is inspired by logic, interests and agreements, and alternative and complementary in terms of the decision. If the first conception is opted for the essential criterion is the justice of the solution, whilst in the second case this is secondary and what must be evaluated is the parties' level of satisfaction and the stability of the solution reached, as well as other subjective elements that concur to consider the adopted solution a better alternative to the judicial solution.

Regulation

We should analyse the regulation of criminal mediation that has been carried out from various spheres and legislators:

A. UNITED NATIONS

- The *United Nations Charter, 26 June 1945, Chapter VI, article 34*, reflects “*negotiation, mediation, conciliation, arbitration, judicial settlement, recourse to regional organisms or agreements and other pacific means of choice*” for solving conflicts.
- *Resolution 53/243, of 6 October 1999, on the declaration and programme of action on a culture of peace.*
- *10th Congress on the Prevention and Treatment of Crime, April 2000, Vienna*, which established the need for the *concept of Restorative justice* to be a fundamental element for debates on responsibility and equity regarding offenders and victims in the criminal justice process. This type of justice offered the criminal process an alternative to the established methods of trial and punishment and the whole of society involved in the restorative process.
- *Resolution 55/59 on Action Plan on Restorative Justice.*
- *Resolution 26/1999, of 28 July, on development and implementation of mediation and measures of Restorative Justice in criminal justice.*
- *Resolution 14/2000, of 27 July, on basic principles on the use of restorative justice in criminal matters*, which encourages the exchange and experimentation in the sphere of criminal mediation.
- *Report from the General Secretary of the United Nations Economic and Social Council, of 7 January 2002, on the reform of the criminal justice system: achieving effectiveness and equity. Restorative Justice.*
- *Standards and regulations for crime prevention and criminal Justice, Commission on Crime Prevention and Criminal Justice, 18 April 2002, on Basic principles on the use of restorative justice programmes in criminal matters.*
- *Manual on Restorative Justice Programmes, published by the United Nations in 2006*

B. EUROPE

1. Council of Europe: Recommendations

Various resolutions of the Council of Europe urge member states to incorporate mediation and reparation, as well as recognition of a greater involvement of citizens in judicial proceedings and in the resolution of criminal conflicts that affect them. **Recommendation n^o. R (99)19, on mediation in the criminal sphere:** Considers criminal mediation as a flexible option, based on the resolution of the problem and the implication of the parties, as a complement or alternative to traditional criminal proceedings.

2. European Union

The EU is a firm believer in the use of alternative conflict resolution methods, amongst which mediation is worthy of mention. Thus in the 26th Conference of European Ministers

of Justice, which took place in Helsinki in April 2005, a final document was produced which emphasized aspects that it said were, up to that point, neglected, such as crime prevention, the role of the victim and the repair of damage. The report indicated that the concept of restorative justice could be articulated via mediation between the perpetrator and the victim, on victim support, prevention of recidivism and the re-education of offenders.

Council Framework Decision (2001/220/JHA), of 15 March 2001, relating to the Standing of Victims in Criminal Proceedings.

The Framework Decision explicitly refers to criminal mediation in different paragraphs:

Article 1: It contained the definition of different concepts and specifically defined "mediation in criminal proceedings" in paragraph e), as we have already indicated.

Article 10: In paragraphs 1 and 2 it *urged member states* to drive mediation in criminal proceedings for infringements that in their judgment lean towards these types of measures. States should also be vigilant in order to be able to take into consideration the agreements reached between the victim and the offender with the motive of mediation in criminal proceedings.

This regulation was substituted by **EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012**, which establishes minimum standards on rights, support and protection of victims of crime. This, in article 12 mentioned.

Furthermore, in its [e-justice \(https://e-justice.europa.eu/\)](https://e-justice.europa.eu/) portal, the European Union provides extensive information on the state of mediation in the sphere of the Union and each one of the member states.

In addition, and in the scope of restorative Justice, some bodies promote forums for the dissemination, dialogue and study of mediation. Worthy of special mention is the *European Forum for Victim- Offender Mediation and Restorative Justice*, created in 1999 under the auspices of the European Union Grotius Programme, and which participates in different European programmes that drive Restorative Justice and, furthermore, directs the AGIS programme. (www.euforumrj.org).

C. SPAIN

The situation is not bright. Only the Law on Criminal Responsibility of minors regulates mediation. Currently there is no legal provision in criminal jurisdiction, and even in the law of measures in the fight against violence against women mediation is expressly prohibited in these cases. Notwithstanding this, defenders of criminal mediation and the practices that are being employed in some Autonomous Regions are finding legal comfort via some legal benefits contemplated in the Penal Code. Examples of these are: the mitigating circumstance of repair of the damage; the exemption from criminal responsibility via pardon from the victim in private offences and misdemeanours; the substitution of the prison sentence by a fine or community service; the suspension of the prison sentence for a certain period of time; progression in penitentiary level; and pardon.

Last, special mention should be made of the work carried out by **GEMME, the European Association of Judges for Mediation** (www.gemme.eu). GEMME is an Europeanist European association whose purpose is to promote, from the sphere of the courts of justice themselves, alternative systems of dispute resolution (ADR) and, especially, mediation. It was created in France in 2004. Its promoter and first president was the presiding judge of the French Court of Cassation Guy Canivet. Today there are sections in Germany, Belgium, France, Holland, Italy, Norway, Portugal, Slovenia and Switzerland, and associated members in Great Britain, Greece, Hungary, Poland and Lithuania.

Types of mediation

We can provide a number of classifications of mediation attending to the specific criteria we employ:

- a) Regarding whether it is resorted to voluntarily and spontaneously or by the indications of legal authorities: we will speak about extrajudicial mediation or intra-procedural mediation
- b) Regarding whether it is given by specialist mediation professionals or bodies (private mediation) or by a public entity or body (institutional mediation)
- c) For the goal sought through mediation: we can speak about mediation that facilitates when we are only concerned with managing a problem (more in line with the areas of education and resocialisation), or of mediation that evaluates if its goal is to resolve a specific conflict and avoid the jurisdictional function entering into play
- d) Regarding the relation of mediation with a hypothetical complementary process we can talk about: 1. *extra procedural mediation* when it does not have any temporal relation with a proceedings; 2. *pre-procedural mediation*, when it is linked to the opening of subsequent proceedings; 3. *intra-procedural mediation*, when it is arrived at once proceedings have been initiated, that is the conflict has already been judicialised; 4. *post procedural mediation*, relative to the overcoming of differences put forward in relation to a prior legal resolution
- e) Finally, we can classify mediation in terms of the possibility of it being used or not simultaneously with other resolute methods, in particular the process: from this point of view it is worth talking about complementary mediation when it is appropriate to use either both resolute processes simultaneously or alternative mediation when its use stops the conflict being referred to law courts. In any case the alternative note can also be understood in the sense not as much of impeding the simultaneous access to the proceedings, as of provoking a postponement of the conflict in the jurisdictional channel while waiting for the result of the mediation.

Another means to classify it would be regarding the material sphere to which it is applied, which is why we talk about family mediation, criminal mediation, labour mediation, civil mediation, etc. But this is an evidently secondary criterion in its cataloguing.

We can also classify criminal mediation according to the procedural point in which it is carried out. And we will therefore speak about mediation in the proceedings, in enforcement, and penitentiary mediation⁶⁹.

A. Mediation in proceedings:

It is the most frequent case of criminal mediation, as it is used at the beginning of the proceedings or over the course of their successive stages, which confirms its link to the criminal procedure and all of its guarantees, serving to resolve the positions that present it in terms of an alternative to the formal system.

Depending on the procedural moment where the recourse to mediation is permitted, or where an agreement between the parties has been reached, it can produce one effect or another, to which the sooner it begins the greater the possibilities of avoiding the detriment occasioned by the proceedings, but always with due judicial control. The possibilities are extremely varied, and grouping them succinctly enables the following three to be mentioned:

1. The earliest procedural mediation in the stages of the proceedings, which is most closely connected to the principle of opportunity, and can have two manifestations, either being linked to crimes or misdemeanours that are indictable on the instance of a party, via figures such as prior obligatory conciliation or forgiveness, and the second, for the most minor offences let it be the parties, if they voluntarily accept it, who resolve the conflict; in both cases if the parties reach an extrajudicial agreement the beginning of the proceedings can be avoided, but in order for this to happen it is necessary for the principle of opportunity or the flexibility of the principle of legality to allow it.

2. The second may arise when the proceedings have already been started, whether because it does not concern the conduct previously indicated, because it has not arisen, or there was no possibility of mediation. But in accordance with the nature of the facts and of the parties, if mediation is still admitted and an agreement is reached, it is possible to terminate the proceedings without a pronouncement of the ruling, preventing the continuation of the proceedings and conviction, as long as the procedural system allows this route. Though at this stage consent may be given, if the representatives of the parties decide to through negotiation, even with the recognition of the events on the part of the aggressor, if the victim did not participate it absolutely cannot be considered equal to mediation, although it is possible for prior mediation proceedings (with all of their rules) to subsequently provide consent.

3. The third implies that the parties still have not come to an agreement and therefore the proceedings are still underway, but if in the end an agreement is reached there still remains the possibility of considering it in the guilty verdict via the mitigation of the sentence, its substitution for a lighter sentence, or even the suspension of the enforcement of the sentence imposed, on the condition that the aggressor complies with the agreement.

⁶⁹ CERVELLÓ DONDERIS, María Vicenta. *Características de la Mediación Penal*. Máster de Mediación Penal. Universidad de Valencia, 2012.

In all cases the agreement reached by the parties is not effective immediately and needs to be evaluated by the court, applied in a way which corresponds to the punitive stage the case is in, and necessarily supervised to monitor compliance, since if it is not complied with, this must have an effect on the judicial decision initially made.

B. Mediation in enforcement:

Although this can be mediation in the course of the enforcement of any sentence, it more often occurs when a prison sentence is being served. The most characteristic aspect of this type of mediation is therefore the setting where it is carried out, which includes some important differences:

- the aggressor has already been sentenced and is serving the sentence imposed. Because of this, the problems with the principle of the presumption of innocence disappear, and the recognition of the facts does not serve to collaborate with the Judicial Administration, but it does serve to accept the crime as a sign of social reinsertion.
- though the aggressor has been sentenced, participation in the meetings is completely voluntary, as with all mediation. It is advisable for sensitization treatment programmes with the victims to be included.
- the victim may have lost interest in mediating with his or her aggressor. However, there are occasions where the passing of time may increase the victim's need to receive some kind of compensation for the damage occasioned or to facilitate his or her willingness to participate in the meetings.
- in order for mediation to be fit for purpose, an effort should be made to eliminate the inequalities deriving from the prison situation, hence the advantage of being part of a penitentiary treatment programme freely accepted by the inmate, and of the victim receiving specific preparation.
- at first the environment of the enforcement does not exclude any crime and it is even more common for serious crimes, since less serious crimes are usually subject to procedural enforcement.
- the effects of mediation when the sentence is being served may improve the penitentiary situation of the aggressor and contribute to decreasing the secondary victimization of the victim and to repairing the damages suffered, but they especially contribute to social pacification.
- in recent years prison programmes were being extended to encourage the payment of civil liability arising from the crime to victims.

C. Penitentiary mediation:

In this case, it is a type of mediation that is not criminal in the strict sense because it does not always aim to resolve criminal conflicts, but rather conflicts arising from co-habitation in prison. However, it is closely related because the conflict occurs when a sentence is being served, and furthermore it is normally a conflict that also results in minor criminal behaviour that is attempted to be resolved through dialogue.

This method aims to reach conciliatory agreements in conflicts arising from difficulties in penitentiary co-habitation, since prison is undoubtedly a hostile environment in which offences are magnified with a complex confusion between the aggressor and the victim, which constantly tarnishes prison life with a climate of violence and tension. The advantages that mediation offers to prison life are numerous since it allows the use of dialogue to resolve differences in a neutral context; it helps inmates to take responsibility for their decisions, allowing for better future relationships; it teaches them to perceive and interpret conflicts from other points of view, which helps them to recognize mistakes; this method may be used in other conflicts; and it may make it easier for disciplinary proceedings to be suspended. Agreements resulting from this type of mediation may be taken into account to close disciplinary proceedings or reduce the sanctions imposed, but it especially contributes to stimulating a sense of responsibility and ability for self-control within the penitentiary centre.

All of these types of mediation can be carried out in very different formats. It is appropriate to make a brief reference here to those most widely used in countries with a stronger tradition of mediation:

1. Family group conference: the aggressor and the victim participate in meetings that take place in a specific environment, whether family, school or social.

2. Sentencing circles: these have similar characteristics to the previous one, with the distinguishing feature of greater or lesser control by a judge over the aspects regarding those meetings.

3. Restorative panels: panels comprised of citizens who speak to the aggressor once he or she has accepted responsibility.

4. Community mediation: mediation carried out by entities or centres (schools, neighbourhood centres, etc., called community centres or community boards) in charge of mediation in collaboration with the courts. It involves less institutionalized participation with greater independence from the Judicial Administration, since it acts in a more direct way from the very social fabric where the crime was committed, which makes it easier for the aggressor and the victims to come together and it creates trust in the aggressor towards the social groups that are active in the neighbourhood. All of this is very useful for resolving neighbourly disputes or disputes arising from a lack of social harmony using negotiations, and for avoiding future criminal conduct. Thus, the neighbour-victim understands the offence (to understand does not mean to justify), and takes part in the denouncement of social situations that give rise to it (shortage of street educators in the neighbourhood, lack of social support policies for those most in need). He or she then talks about it to his or her family and other inhabitants of the neighbourhood, and he or she will probably not say things like "justice is a farce", "criminals go in one door and come out another" and "criminals have more rights than victims". The offender puts himself in the place of the victim and accepts responsibility for the events and for turning his or her life around. The group that works in the neighbourhood is no longer considered as "those that help the criminals" but instead they go on to create social networks of solidarity, rapprochement and social dialogue, creating a social fabric that focuses on tolerance, cooperation and non-

violence. With all of this, the State still exclusively retains the power to sanction, but it returns the lead role and the ability to resolve non-serious conflicts to the community within which the offence occurred. In this community model, the neighbourhood and social assistance are the driving forces of the recovery of social dialogue.

5. *Victim-offender mediation (VOM)*: is essential for establishing the terms for reparation or restitution of the effects arising from the attack, which consists of direct communication between the offender and the offended party.

6. *Online Dispute Resolution (ODR)*: essentially consists of using new technologies as support for resolving small conflicts of a mainly financial nature.

Characteristics of criminal mediation

The characteristics of criminal mediation are the following⁷⁰:

- a) *Willingness of the parties*. The mediation process requires the voluntary and informed participation of the victim and the offender. The victim is guaranteed not to be under any kind of pressure, and the accused is guaranteed the possibility of returning to the appropriate stage in the proceedings.
- b) *Free of charge*. The proceedings must be entirely free of charge for the parties due to the public nature of criminal law. The principle of equality is thus safeguarded. Criminal mediation must not be used for purely economic ends or considerations. It is clear, however, that incorporating mediation in the proceedings and bringing it before the Courts and Tribunals entails two essential effects in this sense: firstly, an effect of "*procedural economy*", which in the short and medium term results in undue procedural delays being avoided. This could give way to a cultural change that, stemming from the recognition of dialogue as a basis for social relations and of negotiated solutions as a method of resolving conflicts, will contribute to reducing the levels of litigiousness that afflict our Courts and Tribunals today. Secondly, and deriving from the first one, an effect of an "*economy of resources*", both human and material, of the Judicial Administration; resources which could be used for more pressing or complex objectives.
- c) *Confidentiality*. This needs to be a guiding principle for all mediation and must be applied to all individuals involved; not only to parties, but also to the mediator and the witnesses if they also participate. The climate of discretion that must surround mediation can be seriously disrupted if the information handled is leaked.

The confidentiality of the information obtained in the mediation proceedings shall be guaranteed. The Judge shall have no knowledge of the content of the proceedings, save what is agreed in the final document - the deed of agreement. The use of statements made in the mediation proceedings, or in the deed terminating such proceedings, as evidentiary material in a fundamentally inculpatory sense must only be possible with the consent of both parties. This makes mediation compatible with the right to the presumption of innocence. The mediator may never be called to the proceedings, neither as a witness nor

⁷⁰ JUAN SÁNCHEZ, José Ricardo, *Métodos Alternativos de Resolución de Conflictos*. Máster de Mediación Penal, Universidad de Valencia, 2012.

as an expert, precisely because of this. This possibility was expressly prohibited in, for example, Article 7 of Directive 2008/52/EC: "Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(1) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(2) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation." Under no circumstances must confidentiality provide scope for the concealment of information regarding the infringement of values or rights afforded by law.

d) *Equality of the parties.* The main characteristic of mediation is the equality of the participating parties. This is not formal equality, understood in the sense of recognizing the same possibilities for both parties to formulate allegations and proposals; but rather in the sense that, in order for the mediation model to be a true one, none of the parties should be in an inferior situation (whether financial, emotional, etc.) which may affect their participation in adopting any potential final agreement. In light of this, for authentic mediation, the necessary measures need to be adopted so that, for example, one distorting element of mediation, such as fear of one of the parties or the hegemony of one over another, disappears.

Therein lies one of the most serious obstacles to being able to talk about "true criminal mediation", if it is exploited by the defendant-accused to accept the responsibilities attributed to him/her and demand privileged treatment in return. Similarly, if equality must be a basis for the parties to mutually concede their respective interests in the criminal sphere, a more substantial transformation of said criminal sphere is required - so-called restorative justice? - in order for mediation to fit in more naturally.

e) *Orality:* Dialogue and agreement require mediation to essentially be carried out orally, with writing being reserved for certain procedures, particularly formulating the agreement.

f) *Immediacy or personal participation of the parties:* aimed at preventing the parties from attending the mediation proceedings via representatives or nominated third parties. In the event that there are number of individuals involved in a dispute, they may act via a spokesperson without violating this criterion as long as the whole group is present in the negotiations in all cases.

- g) *Flexibility or informality*: mediation must be exempt from the customary nature of proceedings, which in some way may mean that it is not subject to certain formal requirements or that it is not compulsory for certain steps to be taken in order to achieve its aim.
- h) *Regarding the law*: the result of mediation may not infringe the law. This is the criterion used to require the mediators to have basic legal training.
- i) *Integrity or good faith*: understood as sincere cooperation, rectitude and reasonableness in the conduct of all those involved.

Those involved in criminal mediation

a. The Mediator

The mediator is the key in the mediation process. The first issue that could be controversial is who should assume the role of mediator, and there has been a debate in the doctrine for some time centred on whether the role should be assumed by lawyers themselves or by other professionals such as psychologists, social workers, caseworkers, family experts, teachers, etc.

As a German author has pointed out, the lawyer profession has its very origin in mediation (Hensler), although there is now a certain consensus in establishing clear differences between the role of the lawyer as a mediator and the lawyer as a defence counsel in a trial.

The main responsibilities of the mediator are to carry out a series of assistance activities of a collaborative and cooperative nature with the individuals involved. However, under no circumstances may he or she adopt a decision-making, authoritative or imposing position. In intervention of the mediator has a series of positive effects in terms of bringing the parties together to reach an agreement. Among the main effects we can cite the following:

- Separate the different moods of the opposing parties from the discussion.
- Adopting a position of impartiality or neutrality in the analysis of the dispute.
- Keeping the negotiation alive by avoiding withdrawals that could occur in an ordinary negotiation.
- Confidentiality in the processing and resolution of the dispute.

b. The victim:

The concept of a victim can be wide and include both natural persons as well as legal entities. In fact, the Directive widens this concept to the maximum by extending it to relatives.

In Criminal Law, the word "victim" is used to refer to the passive subject of the crime, i.e. the owner of the protected legal property. It is identified with the injured or offended party. From this perspective, both natural persons and legal entities, the state and even a community can be victims, where the offence affects legal property that is not under individual ownership.

Within Victimology, the doctrine generally uses the notion of victim to refer to natural persons who suffer the negative consequences of the crime.

Nevertheless, there are numerous classifications or categories of victims. The seven different categories of victim made by LANDROVE are interesting:

1. *Passive (or fungible) victims*: also called entirely innocent or perfect victims. Their participation does not lead to the criminal act; the relation between the offender and the victim is irrelevant, in such a way that the victim is interchangeable. In turn, *accidental* and *indiscriminate* victims are differentiated within this category. The first happen to be in the path of the offenders by chance, as is the case, for example, of a customer who is in a commercial or banking establishment when a robbery is being committed, or of a victim of an accident arising from the reckless driving of a motor vehicle. The second type of victim includes an even wider group than the previous one, since there is no link with the offender at any time. A traditional example are terrorist attacks, in which there are often no personal motives against the individual victims which might incite the criminal act, without these people having any kind of relationship with the organization.
2. *Active (or infungible) victims*: play a certain role in the origin of the crime, participating in the criminal dynamic, whether voluntarily or otherwise. This arises in some cases from the victim's lack of foresight (when he or she does not close the property's access points, leaves a valuable item in full view in an open motor vehicle, passes through a troubled neighbourhood during the early hours, etc.). Other times they play a more decisive role, causing the event which occurs as a reprisal or revenge for his or her actions. Furthermore, we talk about *alternative* victims, referring to those who voluntarily place themselves in the position of being the victim, leaving it to chance whether they become the victim or the perpetrator (as occurs in duels). Finally, voluntary victims are those who participate the most, who incite the crime or freely agree to it (euthanasia, murder-suicide, etc.).
3. *Family victims*: belong to the offender's immediate family, and are in an especially vulnerable position due to their co-habiting or domestic relationship with the offender (which in turn explains the high "dark figure" of crimes that occur in this setting). The weakest members of the family are the main passive subjects of physical and sexual abuse in the home: women and children.
4. *Collective victims*: in crimes which injure or endanger certain property of which the owner is not a natural person but a legal entity, community or state: financial crimes, consumer fraud, cyber-crime and other elements of what is usually called white-collar crime. In all of these crimes, the depersonalization, collectivization and anonymity with respect to the relationship between the criminal and the offended party stands out.
5. *Especially vulnerable victims*: those individuals who, for various reasons, have a specific predisposition to become victims. Among these circumstances is age, since it is usually more difficult for children and the elderly to offer effective resistance. Another is the physical and psychological condition of the individual, due to the increased weakness caused by certain illnesses and disabilities; race, which motivates the victimization of

some minorities; and gender, with women generally being the victim of certain crimes which occur in the family or work environment, among others. Even homosexuality is the basis for some offences (blackmail, physical assault, etc.). Furthermore, there are social factors that exacerbate this higher victimization: comfortable economic position, lifestyle, location of the home, dealing with marginalized groups, etc., as well as the inherent risk in exercising some professions (police, security guards, taxi drivers, bank employees, pharmacists, etc.), and particularly working as a prostitute.

6. *Symbolic victims*: some people suffer acts aimed at damaging a certain value system, political party, ideology, sect or family to which the injured party belongs and of which he or she is a representative element. The assassinations of Martin Luther King or Aldo Moro are usually cited as examples.
7. *False victims*: report a crime which did not actually happen. There are two kinds: *pretending* victims, who act consciously, initiating proceedings in order to cause a judicial error; and *imagined* victims, who incorrectly believe (due to psychological causes, or psychological immaturity) that they have been the victim of a criminal act.

c. The perpetrator:

The concept of a perpetrator in mediation must also be flexible, as long as it does not widen the scope of what is punishable. That is, the Penal Code outlines the types of perpetration and participation by virtue of which the criminal conduct committed may be answered for. These are clearly legal concepts that mediation does not have to address since it takes place within a more informal setting, but it may under no circumstances allow an individual who, in accordance with criminal rules, is not responsible for a crime to participate in criminal mediation as the offending party, since its effects are evaluated in the criminal proceedings. If it is advisable to mediate with someone who is not criminally responsible in order to overcome a dispute, other types of mediation must be attempted, such as community mediation. However, if mediation to resolve a dispute arising from the commission of a crime is used, in criminal mediation only those who may be responsible for the crime in accordance with the law should participate.

Proceedings

Mediation does not take place in an essentially customary manner, though it adopts various formats. But the fact that mediation does not exactly follow a formal procedure, unlike for example arbitration and jurisdiction which follow previously outlined procedural guidelines, does not mean that it must not be structured with the aim of working towards resolving the dispute.

In the case of legally foreseen mediation, these structures are determined by the legislator, though in mediation of a more spontaneous nature it is also possible to establish steps to be followed to achieve its aims.

In this sense, three basic or elementary stages are distinguished on a theoretical level:

1. *Pre-mediation* or preparation stage, the essential points of which are agreeing to mediation and appointing a mediator. Some basic rules must also be agreed upon for developing mediation, depending on its format.

2. *Mediation in the strict sense*: the stage in which the mediator must apply all his or her skills and professionalism to reach a solution by facilitating communication between the parties. This stage, in turn, may be structured around initial meeting procedures, hearing the parties' accounts, the setting of an agenda with the points to be addressed, and resolving the problem.

As regards the value of the agreement adopted, in order for mediation to be attractive to the parties in the dispute, it is advisable for that agreement to have some kind of formality which may allow it to fulfil certain purposes in the event of subsequent judicial proceedings. That is, mediation should be carried out in collaboration with the state judicial system, or it really may not be of interest to the citizen.

3. *Post-mediation* or, if appropriate, monitoring compliance with the agreement reached.

In reality, within this idea of flexibility or informality of mediation, it is somewhat inappropriate to talk of "mediation proceedings", but insofar as the different rules on the matter introduce time and material development guidelines for mediation, it is worth accepting this term.

Three models of criminal mediation⁷¹ can be highlighted:

A. Linear mediation:

The "traditional" model intends to objectivise and depersonalize the issue, converting personal positions into conflicts of interests and put forward options which allow an agreement overcoming the dispute - where the parties seek to overcome the current situation by finding a future solution, this is also called the 'linear model' - to be reached. Achieving such an agreement brings the mediation process to an end. This method deals with four basic points in negotiation:

- The *people* - insisting on separating these from the problem, which does not mean disregarding the fact that the parties have diverse perceptions and emotions and that communication is an important element, but the objective must be focused on the *problem*: "confront the problem, not the people". The mediator must be firm with the problems and confront them, and not the people who have them.
- The *interests* - stressing these and not the positions. 'The interests define the problem', while personal positions answer to a host of interests, sometimes shared and sometimes opposing, which only by constantly asking why? and why not? can they be identified with clarity. A future, not a past solution should be sought, and a way of reconciling interests should be found.
- The *options* (in contrast to the positions) will provide a solution to the dispute: it is necessary to invent and work with options that might satisfy both parties, in such a way that they go from protests to proposals. For this, the following should be avoided:

⁷¹ GUARDIOLA GARCÍA, Javier; CARBONELL VAVÁ, Enrique José; LÓPEZ LÓPEZ, Cristina. *Fases de la Mediación*. Máster de Derecho Penal, Universidad de Valencia, 2012.

- premature judgments - one thing is to invent options and another to weigh them up and choose among them; the latter must not burden the former;
 - searches for a single solution - it is about finding as many options as possible, not reducing them to a single one;
 - acceptance that 'there is only so much pie to go round' - there are mutual benefit solutions, it is not about dividing up the crumbs but finding the most satisfactory solution for everyone; and
 - overstating the issue in the very solution to the problem - this is, on the other hand, about finding an easy way to make a decision.
- The *criteria*, which must be objective. Complying with the parties' wishes is, from this model's perspective, a costly solution. Making the solution independent from these wishes will achieve sensible, friendly and effective agreements, and the way to achieve it is to pay attention to objective criteria (legitimate and practical principles independent of the parties' wishes, and applicable to both). This method is intended to objectivise and depersonalize the issue, converting personal positions into conflicts of interests and put forward options which allow an agreement which overcomes the dispute to be reached. In short, it is about establishing channels of communication to reach an agreement. The success of the mediation is therefore centred on reaching this agreement.

B. Transformative mediation:

The "transformative" model focuses on improving and transforming human relations through a social/communicative approach by re-reading the conflict in terms of a crisis in human interaction to deal with people's ability to change the quality of their interaction and to use it to reinforce their self-confidence and openness and responsiveness to the other, regenerating interaction in a constructive, connecting and humanising sense. It is not about resolving the dispute with an agreement, but about transforming the relationship. Transformation is thus considered in two ways:

- Transformation of the way we see ourselves: strengthening ourselves, *empowerment*, awareness of a more solid experience of our own personal worth and of our own ability to resolve difficulties. This involves:
 - a clear understanding of our own goals and interests,
 - becoming aware of the alternatives and of our decision-making power over them,
 - increasing our conflict-resolving abilities,
 - becoming aware of the resources available to us and of their potential,
 - adopting decisions and evaluating arguments, advantages, disadvantages and alternatives.

In short, it is about reinforcing our ability to analyse situations and to make effective decisions for ourselves.

- Transformation of the way we see the other: on our ability to relate, to *recognize*. This involves:

- awareness of our ability to recognize the situation of the party, a real desire to do so, and
- effective execution of this: on a conscious level, in verbal communication, and in the acceptance of the consequences of this approach to overcoming the conflict.

This time it is about reinforcing our ability to see and consider the perspectives of others. To achieve this, it is necessary to make the parties feel like they are the protagonists in the transformation under way and ensure they recognize their contribution, and that the other party recognizes the change that ensues. With this, mediation becomes not so much an instrument to resolve disputes as an element whose potential for transforming the personality of the mediating parties becomes of primary importance.

This is what is thus expected of a mediator:

- To play his or her role and define his or her objectives in terms of empowerment and recognition, defining his or her function to the parties as helping them to reach a clearer understanding of their own interests and options and, if they wish, to understand their opponent better; an agreement is presented as a possible result, but not as the most important objective. A successful session is one that results in a better understanding or greater clarity.
- To insist that the responsibility for the result of the mediation process lies with the parties; he or she should react more than direct, on the one hand empowering the parties - by helping them to feel and be capable of making decisions for themselves - and on the other hand keeping the attention focused on the transformative task. It is his or her responsibility to identify opportunities for empowerment and recognition and to help the parties make the most of them; the responsibility for the results does not lie with the mediator, but with the parties.
- To consciously and decidedly refuse to judge the points of view and decisions of the parties, thereby reinforcing the parties' sense of responsibility. It will obviously not be possible for whomever is mediating to restrain absolutely all judgment, but he or she must be aware of his or her limitations: as a third party, he or she cannot know more about the situation than the parties involved.
- To adopt an optimistic view of the competence and motivation of the parties, which on the one hand will minimize the temptation to intervene by assuming responsibilities in the result of the mediation, and on the other (by seeing them as good people trapped in difficult circumstances) it will help identify and highlight opportunities for empowerment and recognition.
- To allow the parties to express their emotions and to respond to these emotive expressions: emotions often reveal unarticulated fears or beliefs (frustration may be a response to insecurity, fear may reveal a lack of understanding, etc.). The parties must be encouraged to find the source of their feeling, identifying the opportunities to encourage empowerment and recognition.

- To support and encourage the parties' discussions about past events, because the parties' stories reveal the basis of their current understanding and point of view, and therefore reviewing the past usually creates opportunities in the present.

C. Circular mediation:

The "circular narrative" model deals with changing the story that each party has made and to come to agreements as far as possible, reinforcing and facilitating the learning of the functions of the self through a change of situation, context and meanings until legitimate ground can be found for each which may allow a settlement to be achieved from an alternative story which considers those involved to be interdependent co-protagonists.

In this model, the aim of mediation is to reinforce and facilitate the learning of the functions of the self from an understanding based on the Pragmatics of Human Communication, on the General Systems Theory and on Cybernetic concepts, assuming a circular rather than a linear system of causality. It seeks to:

- liberate, stimulate, direct the motivation of the individual to change and
- liberate his or her affective, cognitive and active capacities which allow the individual to resolve the difficulty and find the necessary means to solve the problem at hand.

And for this, it is assumed that, together with feeling, thinking and doing, the construction and recounting of stories characterizes human beings. Because of this, the mediator guides the construction of new narratives which destabilize the stories that do not allow people to grow, and at the same time he or she enables new stories to be constructed where the protagonist is the individual and not the context. Communication is conceived as a whole in which verbal and non-verbal elements play a role. To deal with this, a very different method from that followed in the linear model is used:

- Make the differences bigger: in a dispute arising from conflict, the parties have closed their position. In the exact opposite sense of that postulated in the linear model, it is not about entrenching positions, but to the contrary; the situation should be destabilized so that the parties can find alternatives.
- Legitimize people by granting each person a legitimate place in the situation.
- Change the meaning (for which it is necessary to change the story that the parties have built, by creating an alternative one which may allow all of the parties to see the problem from another perspective).
- Create contexts. Establishing contexts is necessary before being able to formally start the mediation process in the strict sense.

With these foundations, a methodology based on four stages is proposed, preceded by a meeting in which the characteristics of the mediation process will be explained to the parties.

- Joint meeting to provide information on the existing alternatives and on the process, and to establish the rules of the game: confidentiality, taking turns to speak, authorization for all the parties and the mediator to terminate the procedure.

- Individual meeting: the mediator works with each party separately, in one or several sessions to lay out the problem, set objectives and requirements, determine contributions to solve the problem, and, by analysing the rights and attempted solutions, introduce the circularity factor and redefine the objectives. In short, this is in order to ensure that the parties recognize that they are co-protagonists in the conflict.
- Internal meeting (Caucus): the mediation team - the mediator - reflects on and compares the parties' stories to start the construction of an alternative story that takes the interdependence of the parties into account.
- Joint meeting to recount the alternative story and to construct the agreement, hearing the parties - even in their silence - talk about new options and alternatives, discussing the advantages and disadvantages of the various options, generating a common option and putting it in writing.

Fundamentals

Leaving aside procedural questions that could result the use of mediation in criminal proceedings of a State, and focusing therefore on criminal questions, the following observations of interest can be put forward in relation to the elements of crime and punishment:

Is mediation an exception to the general rule that all crimes have a punishment?

It is not, because the definition of crime tells us that all crime must be punishable; in other words, a possible sanction must be assigned to a criminal law, but it is not necessary for this sanction to punish effectively since there may be criminal definitions that prevent it, such as exempting or mitigating circumstances, reasons for suspension, etc. This is the difference between punishable as a possibility for punishment, and conviction as an effectively imposed punishment. This means that there is no criminal conduct outlined in the Penal Code to which the legislator has not assigned any punishment. For this, mediation may enter perfectly into all of the offences that the Penal Code outlines and may be used by Judges and Courts to regulate the application of the punishment or even close the proceedings (if the principle of opportunity exists).

Does mediation is possible in all types of crime?

Mediation in an open system that allows many possibilities must be specified by the States when they regulate it in their Laws. The catalogue that the Council Framework Decision of 15 March 2001 outlined served as a guideline and it absolutely had to be taken as an obligation for or prohibition from allowing it for some offences or others.

In this sense, the judgment of 21 October 2010 the Court of Justice of the European Union (CJEU 2010/308)⁷² indicates that it is for the Member States to choose the offences for which mediation is permitted. The catalogue outlined in the Framework Decision does not even make it compulsory to allow it in these cases. However, the Directive 2012/29 has not established even an indicative list of offenses.

⁷² Judgement, *Criminal Proceedings against Emil Eredics and Mária Vassné Sápi*, C-205/09, ECLI:EU:C:2010:623

What agreement can the parties arrive at?

The Directive 2012/29 does not contain any statement to this effect, and because of this the agreements must be very flexible since both financial agreements for repairing material psychological damages to the victim and symbolic agreements which display restorative behaviour to the victim, which may consist of apologizing or the recognition of the damage occasioned, are appropriate. To this extent, the agreements have no reason to solely benefit the direct victim but may absolutely benefit other indirect, collective or social victims, which is especially appropriate in damages caused to anonymous or collective victims.

What effects can an agreement between the parties have on the sentence?

It is essential that the agreements reached have the legal effects of obligatory compliance, which is why the Directive 2012/29 insists on the need for Member States to ensure that agreements are taken into consideration in criminal proceedings, which may lead to a wide spectrum of possibilities which vary between closing the proceedings and the mitigation, suspension or exemption of the sentence.

Using mediation or another form of restorative justice in the criminal legal sphere thus entails a change in the culture both of society and of the professionals who work in the legal system. Social institutions, such as family, school, or the community, have lost the ability to control conflicts and have delegated the responsibility to impose punishments to the legal system, but the legal system has in turn been making the victims feel doubly victimized, frustrated, powerless and fearful, and the criminal or perpetrator of the offence is far from being rehabilitated or re-educated. The responsibility for resolving conflicts must be returned to civil society.

This brings many benefits:

1. For the victim: it makes the victim participate actively and voluntarily in the resolution of the conflict that affects him or her (always within the legal possibilities). It allows the damages done to him or her to be repaired and his or her personal tranquillity to be recovered.
2. For the defendant: It makes it easier for him or her to be aware of and to take responsibility for his or her own actions and their consequences, as well as providing the possibility of understanding the crime and obtaining the benefits provided for in the Penal Code.
3. For justice: it provides it with a new conception, new forms of criminal responses in an educational sense, promoting attitudes of taking responsibility and reparation. It also allows it to mitigate or change the sentence under the Penal Code.
4. For society: it makes it aware of other ways of reacting to justice, bringing justice closer to the citizens, promoting new ways of resolving conflicts and preventing them from re-occurring or others from arising; it can also bring about a decrease in social unrest. Mediation can be a means of pacifying the conflict because it allows the victim's emotional tension to be alleviated, preventing similar violent events from re-occurring

and, where appropriate, making the aggressor feel less vehemence towards his or her victim. This is because it addresses two fundamental issues: psychological and material reparation for the victim and making the perpetrator responsible. In contrast with the traditional objectives of the criminal justice system, a central concern of restorative justice is that of better attending to the needs of the victim. Needs which are partly material and can be satisfied via restitution, but also emotional needs, such as the recovery of dignity, and social needs, such as the re-establishment of the feeling of security. Furthermore, it attends to the needs of the perpetrator of the crime, giving him or her the opportunity to assume responsibility for his or her actions and to change his or her behaviour. Facing low rates of appreciation and trust that citizens have in Justice, according to surveys carried out in recent years, mediations allows the quality of the criminal justice system to be improved, and perhaps because of this it also improves and is reflected in the way the users of mediation see the Judicial Administration.

7. RIGHT TO LEGAL AID (Article 13 of the EU Directive 29/2012) (Ana Castro Sousa/APAV)

The access to justice is, currently, a fundamental right that every citizen in the world must be able to accomplish. However, due to a lack of economic resources, many citizens are not able, for example, to afford a lawyer or pay justice's fees.

Despite the efforts made to improve fair trial across the European Union (Reding, 2010), it is still imperative to establish common minimum standards. Europe is free of borders, with citizens moving from one Member State to another, either for leisure or work reasons, or even to live out of one's own country. Therefore, it is important to provide European citizens an harmonized criminal justice system, even if citizens fall victims to a crime in a Member State different from the one where they usually live in (Reding, 2010; Buczma, 2013).

Concerns with legal aid began in the "Age of Enlightenment", with the "law for the unprivileged", which aimed to create equal access to justice for all citizens. Previously to the assistance provided by the State, legal aid has been delivered through *pro bono* work. The lack of effectiveness of this kind of legal aid has been surpassed in 18th and 19th centuries, when "law for the unprivileged" became a duty of the State (Gruodytė & Kirchner, 2014).

One of the basic principles of a democracy is to enable all citizens to exercise their rights in an equalitarian way. Hence, right to justice does not constitute an exception and if individuals can not exercise a right due to economic reasons, States have the obligation to ensure access to legal aid (Gruodytė & Kirchner, 2014).

According to Regan (1999-2000, cit. in Gruodytė & Kirchner, 2014), State legal aid can be divided into: 1) "inside" litigation, when help is provided in order to citizens have legal representation, legal advice or duty solicitor services; and 2) "outside" litigation, when for

instance help is provided through information and assistance with documents, letters, telephone calls, or training.

In 2000, the Charter of Fundamental Rights of the European Union (2000/C 364/01), stated, in its Article 47, that “(...) *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*”.

However, it was necessary to assure that every citizen was able to effectively access to justice, and attention should also be directed to crime victims, as they usually are the powerless part in the criminal justice system (Rasquete, Ferreira & Moyano Marques, 2014). The FD appeared as the first “*hard-law instrument*” (Project Victims in Europe, 2009, p.7) at international level, developed concerning victims of crime. However, the Article 6 of the Framework stated that “(...) *legal aid as referred to in Article 4(1) (f) (ii), when it is possible for them to have the status of parties to criminal proceedings*”. This article embodies a huge restriction: only the victims who had the status of parties to criminal proceedings were entitled to legal aid.

Later, Recommendation Rec (2006) 8, in its number 7, defined that victims shall have the right to access, within a reasonable time, legal aid “*in appropriate cases*”. However, this is a concept which may have different interpretations.

Project “Victims in Europe” (2009), based on the implementation of the Framework Decision, have made the synopsis regarding the status of victim support in Europe. On what concerns legal aid, it was possible to assess that the majority of Member States made the legal aid depend on the income of the victim, and that this was the only criterion in some Member States. Others made legal aid available free of charge to victims of some types of crime or to the ones who have the status of parties. Finally, two opposite situations: Sweden and Northern Ireland had free legal assistance to all victims of all types of crimes; on the other hand, Ireland, England & Wales and Malta did not provide free legal aid (Project Victims in Europe, 2009). With these results it was possible to say that, in 2009, the access to justice varied across Member States (Rasquete, Ferreira & Moyano Marques, 2014).

However, the FD had difficulties on its implementation, particularly because there were no obligations imposed to Member States. Therefore, the Directive 2012/29/EU arises as “*potentially the greatest step forward seen so far towards better recognition for the status of victims*” (Rasquete, Ferreira & Moyano Marques, 2014). This Directive brought a new conceptualization of the right to legal aid, with its Article 13, stating that:

Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access to legal aid shall be determined by national law.

If we look across the whole Directive, it appears that all rights are granted to all victims, but, in what concerns the right to legal aid, it is possible to notice that, once again, as it happened before with the Framework Decision, free assistance is available only to victims having the status of parties in criminal proceedings. Despite the lack of economic resources that can be

invoked here, it's imperative to remember that Member States have different criminal procedure systems, in which the understanding of "*status of parties to criminal proceedings*" do have distinct meanings.

In fact, only fifteen Member States consider victims as a *partie civile*: Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Slovakia, Slovenia and Sweden⁷³.

This, ultimately, leads to the existence of clear disparities between Member States in what concerns victims' free access to justice.

Nevertheless, this is not the only entanglement; the fact that access to legal aid shall be determined by national law leaves in the hands of each Member States the possibility to decide under what conditions this assistance shall (or not) be provided.

Therefore, nothing substantial has changed since the Project "Victims in Europe"; there are still huge differences between Member States that can compromise the successful access to justice.

According to the European Union Agency for Fundamental Rights (FRA), only in Austria the victim support services are the main provider of legal aid to victims of crime. Croatia, Cyprus, Denmark, Estonia, France, Ireland, Lithuania, Luxembourg, Malta, Portugal, Romania, Spain, Sweden and The United Kingdom rely mostly on the State the provision of legal aid. The remaining Member States divide the provision of legal aid between State and victim support services.⁷⁴

Despite the differences on the implementation of legal aid across Member States, there are some good practices that must be highlighted. One of them is VICS – Improving Protection of Victims' Rights: Access to Legal Aid. This project aimed to enhance the implementation of the Directive, and one of its objectives was to increase the information available for victims of crime on legal aid, as a means to facilitate the protection of their rights.⁷⁵

Cross-border victims

Cross-border victims have been another key issue for the outcome of a new policy towards victims of crime in Europe. Victims who are immigrant or tourists face additional difficulties, particularly when they are called to participate in the criminal proceedings being held in the Member State where the crime has occurred.

These victims are staying in the place where they have fallen into crime usually for a limited period time and they can't wait for the development of all criminal proceedings, because either of their duties at home, or because they don't want to stay in a country where they

⁷³ Data retrieved from <http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/approaches> (3rd October 2014)

⁷⁴ Data retrieved from <http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/legal-aid> (3rd October 2014)

⁷⁵ More information can be found at <http://www.victimsrights.eu> website.

have fallen into crime, or even because they can't afford the costs of their staying. Other difficulties of the utmost importance such as language barriers may also emerge, which will increase the vulnerability of these victims (Lang, 2010; Gruodytė & Kirchner, 2014). Enhancing this subject, Project "Victims in Europe" (2009) has also concluded that cross-border victims faced some difficulties when they have to participate in the criminal proceedings in the country where the crime has occurred. (Project Victims in Europe, 2009).

When cross-border victims choose to stay in the country where the crime occurred, to follow the proceedings' development, they are likely to be unfamiliar with the criminal justice system of that Member State, as it might be different from the one where they usually live in. Victims whose lack of economic resources compels requesting legal aid will find a deeply variety on the criteria to be entitled to this right across the different Member States.

A cross-border victim, to whom a lawyer free of charge has been designated, may have some difficulties to understand and to be understood when a translator has not been, as well, designated to ensure the effectiveness of the legal aid that should be provided.

Despite the wide range of the article 7 of the Directive, the right to translation of the conversations between the victim and the lawyer isn't clearly consecrated leaving this particular need of the cross-border victim eventually neglected by the Member States, as these excerpts of this article may demonstrate:

- *"(...)at least during any interviews or questioning of the victims during criminal proceedings before investigative and judicial authorities, including during police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings."*;
- *"translations of information essential to the exercise of their rights in criminal proceedings, in a language that they can understand, free of charge, to the extent that such information is made available to the victims"*;
- *"(...) at least any decision ending the criminal proceedings related to the criminal offence suffered by the victim, and upon the victim's request, reasons or a brief summary of reasons for such decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law"*;
- *"victims may challenge of a decision not to provide interpretation or translation. The procedural rules for such a challenge shall be determined by national law"*;
- *"Interpretation and translation and any consideration of a challenge of a decision not to provide interpretation or translation under this Article shall not be unreasonably prolong the criminal proceedings."*

Therefore, free of charge interpretation and translation is available only upon request to victims who do not understand the language of criminal proceedings. Victims should also be entitled with the right to present a complaint in a language that they understand and to be informed on how to access interpretation and translation. According to Victim Support

Europe (2013), the translator should be neutral, having no relationship with the victim or the perpetrator, especially in small communities.

The same article also defines that cross-border victims must be also helped with the existence of audio-visual conferences, for example, when giving evidence to the criminal proceedings. This is a positive measure, as it facilitates the victims' involvement and participation in the criminal proceedings from their country of residence. Paragraph 10 of the Directive's Preamble states that *"this Directive does not address the conditions of the residence of victims of crime in the territory of the Member States. Member States should take the necessary measures to ensure that the rights set out in this Directive are not made conditional on the victim's residence status in their territory or on the victim's citizenship or nationality"*.

According to Victim Support Europe (2013), cross-border victims may claim for the basic right to register a complaint in their country of residence, regardless of the Member State where the crime has been perpetrated, and to be informed on how to report a crime and to claim compensation, which is the applicable criminal justice system, which are their rights and which are the support services available in the country of residence.

FRA states that only Cyprus and Malta do not allow victims to report crimes in their home country if the crime has been perpetrated in another Member State. Also, FRA states that Victim Support Services provide information in different languages, with the exception of Greece, Romania and Slovakia⁷⁶.

Finally, the Paragraph 51 of the Directive's Preamble states that, *"If the victim has left the territory of the Member State where the criminal offence was committed, that Member State should no longer be obliged to provide assistance, support and protection, except for what is directly related to any criminal proceedings (...)"*.

This is not the end of the support and assistance to cross-border victims, who may seek for help provided by the victim support organizations in the Member State where they live. Nevertheless, cross-border victims are entitled to all the support they may need in the country where the crime has occurred, as long as it is related to the criminal proceedings being held in that country.

Taking for instance the example of B., a French citizen, who has been living in Sweden for the last 20 years.

B. travels frequently across Europe due to his professional agenda. One day, during his staying in Italy, when crossing the street, B. was almost run over by C., a careless driver. Tempers have flared and C. punched B. in the face and kicked him repeatedly. B. received medical assistance and has travelled back to Sweden. As B. was in Italy for the first time, he didn't feel comfortable to start a criminal proceeding there.

⁷⁶ Data retrieved from <http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/cross-border> (3rd October 2014)

It would be possible for B. to present a formal complaint in Sweden – home country - as it is in more 25 Member States.

Nonetheless, if B. wants to claim compensation from C., would he be eligible for free legal aid, despite the country where the crime has been committed? The answer would depend on the national law, which may leave the victim unprotected.

Conclusion

The right to legal aid, as it is formulated in the Directive is rather restrictive, not only for being applied solely to victims who have the status of party in the criminal proceedings, but also for being a vague conception. Undeniably, the victims' right to legal aid exists, but Member States are able to decide under what conditions a victim may apply to this right. In fact, some countries do not consider victims as a party in the criminal proceedings, and it would be interesting to know how this fact is circumvented.

Furthermore, the criteria to access legal aid vary frequently from one country to another, depending, for instance, on the type of crime the victim has suffered and on the lack of economic resources. Additionally, these criteria are defined in different ways across the Member States. Besides, only a few of them provide legal aid for victims of all types of crime.

The difficulties on exercising this right are even larger if we consider the delicate position of cross-border victims. In practice, and despite the fact that the Directive also applies to these victims, they find themselves in lack of support or provided with insufficient support given their specific needs, namely legal aid during the criminal proceedings.

Therefore, the European Union should develop efforts to clarify the right to legal aid, particularly for those who are cross-border victims. This right should not be at the lenience of goodwill or good relations between the Member States, but should have a common legal framework feasible by all.

8. COMPENSATION FOR THE VICTIMS OF CRIMES (*Daniel Motoi*)

Right to compensation. Introduction

Compensation for the harm suffered is for the victims of crimes an important concern, as they can see it as a deservedly way to acknowledgement for the harm they have suffered⁷⁷. Compensation comprises also the reimbursement of expenses incurred during the criminal proceedings and the return of the property which is seized in the course of criminal proceedings.

In the recent years the possibilities for compensation for victims of crimes have increased. Compensation for victims of crime is available in various forms throughout the European Union. Victims can either pursue a claim against the offender or they can ask for

⁷⁷ Project – Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union – APAV – Victim Support Europe, 2009, p. 102

compensation by the State. Each Member State has its own system for compensating victims for the damage resulting from crime.

Below, we will address some of the most important legal instruments dealing with the compensation for victims of crimes adopted within the European Union and in the ambit of the Council of Europe, focusing especially on the new provisions provided for in the Directive 2012/29/EU.

a. European Convention on the compensation of victims of violent crimes (Strasbourg, 24.11.1983)⁷⁸

The aims⁷⁹ of the Convention were to have a minimum provisions on the compensation of victims of violent crimes and to give them binding force and to ensure co-operation between Parties in compensation of victims of violent crimes (compensation by the State on whose territory the offence was committed and mutual assistance between parties in all matters concerning compensation).

It was also considered necessary to introduce and develop schemes of compensation for victims of violent crimes by the State on whose territory the offence was committed, in particular when the offender has not been identified or is without resources.

Compensation is paid by the State on whose territory was committed to nationals of the States party to this Convention and to nationals of all members States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed (article 3).

According to the Convention compensation is paid even if the offender cannot be prosecuted or punished (article 2 par. 2). It is one of the main ideas behind the Convention and it has reasons of equity and social security because it protects the victims as the Member State compensates the victim regardless of the situation of the offender.

Although in its Preamble it is mentioned the possibility that the offender has not been identified (or is without resources), in article 2 it refers also to the situation when the offender cannot be prosecuted or punished, which means more than the possibility when the offender has not been identified. So, it also covers the possibility when the offender is known but he cannot be prosecuted or punished (e.g. minors, statute of limitation, the offender died, the mentally ill person, act arising from necessity)⁸⁰.

According to the Convention compensation from public funds is paid if the offences are intentional (not non-intentional), violent (physical or psychological violence – e.g. serious threats) and the direct cause of serious bodily injury or damage to health (both mental and physical). It protects victims of offences against life, physical integrity and health (both mental and physical). Injury must be serious and directly attributable to the crime, a

⁷⁸ European Convention on the compensation of victims of violent crimes (Strasbourg, 24.11.1983)

⁷⁹ Explanatory Report to the European Convention on the compensation of victims of violent crimes (Strasbourg, 24.11.1983)

⁸⁰ Explanatory Report to the European Convention on the compensation of victims of violent crimes (Strasbourg, 24.11.1983)

relationship of cause and effect being proven. The Convention does not cover, for example, slight injuries or injuries not directly caused by the offence, injuries to other interests.

In article 7 it is mentioned that the compensation may be reduced or refused of the applicant's financial situation. It is a rather uninspired provision because the applicant's financial situation has to pay no role in this kind of situations. We are speaking here about victims of a violent crime or the dependants of persons who have died as a result of such crime who should be awarded a fair and appropriate compensation regardless of their financial situation and the Member State should only take into consideration the crime committed and the situations of the victims of such crimes. Of course, these provisions do not prevent Contracting States from paying compensation regardless of the victim's or his dependants' financial situation.

Article 8 allows compensation to be reduced or withheld where the victim is at fault such as the improper behaviour of the victim in relation to the crime (before, during and after the crime) or to the damage suffered (injury or death), membership of criminal gangs or of organizations which commit acts of violence and if compensation would be contrary to a sense of justice or to public policy (*ordre public*). The principles justifying the withholding or reduction of compensation are valid not only in respect of a victim in person but also in relation to dependants of a victim who has died as a result of a violent crime⁸¹.

To avoid double compensation, compensation already received from the offender or other sources maybe deducted from the amount of compensation payable from public funds (article 9).

Where the victim or his dependants received compensation from public funds, their rights against the offender or other sources of compensation (social security, etc.) may, if the domestic law so provides, pass to the State or the compensating authority, which may then take action to obtain reimbursement on that basis (article 10).

b. Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims⁸²

The idea to guarantee to a person the freedom of movement implies also to the protecting of that person from any harm in the Member State. This what the European Court of Justice mentioned in the conclusions of *Cowan v Trésor public - Case 186/87*⁸³ - in respect of persons whose freedom to travel to a Member State, in particular as recipients of services, is guaranteed by Community law. The European Court of Justice stated that State may not make the award of State compensation for harm caused in that State to the victim of an

⁸¹ Explanatory Report to the European Convention on the compensation of victims of violent crimes (Strasbourg, 24.11.1983)

⁸² Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Official Journal of the European Union, L 261/15, 06.08.2004

⁸³ Judgement *Ian William Cowan v Trésor public*, C-186/87, ECLI:EU:C:1989:47

assault resulting in physical injury subject to the condition that he/she has a residence permit or is a national of a country which has entered into a reciprocal agreement with that Member State.

The Council Directive has, along with the European Convention on the compensation of victims of violent crimes abovementioned, the scope of creating a system to facilitate access to compensation of victims of crimes in cross-border situations. The Council Directive 2004/80/EC relating to compensation for crime victims establishes a system of cooperation between national authorities to facilitate access to compensation in cross-border situations. The aim was to ensure appropriate compensation for victims of crime throughout the European Union and to make it easier to seek compensation in cross-border situations. The system operates on the basis of the Member States' schemes on compensation to victims of violent intentional crime, committed in their respective territories.

Article 4 provides that Member States shall ensure that potential applicants for compensation have access to essential information on the possibilities to apply for compensation, by any means Member States deem appropriate.

The idea of the Council Directive was to support the applicant and that the applicant will apply for compensation in his habitually resident Member State, other than the one where the violent intentional crimes has been committed, and so, not obliged to go again in the latter one for this legal procedures. For this, the applicant will be assisted in its actions by the authority/authorities designated to be responsible for assisting the applicant in the Member State where it is habitually resident, who will also send the application in the Member State where the violent intentional crimes has been committed.

In general⁸⁴, Member States transposed the same wording for violent intentional crime and meaning an intentional crime of violence committed against a victim. Usually, compensation is not paid for criminal acts which do not constitute a violent attack on a person's physical or mental health integrity such as unintentional road accident, burglary, fraud, theft, destruction of property.

Member States regulated also that there has to exist a physical or mental health harm as a result of a violent crime. In general, there is no reference on the degree of the physical or mental health harm caused to the victim and this will be assessed only when deciding the level of compensation.

There are no provisions relating to any establishing of the direct link between the violent intentional crime and the injuries produced. Still, the compensation from public funds is usually paid if offences are intentional, violent and the direct cause of serious bodily injury or damage to health. Injury must be directly attributable to the crime, a relationship of cause and effect being proven.

⁸⁴ Information available: http://ec.europa.eu/civiljustice/comp_crime_victim/comp_crime_victim_en.htm and http://ec.europa.eu/justice_home/judicialatlascivil/html/cv_documents_en.htm

The Council Directive does not cover all victims because it refers to the definition of *“the applicant for compensation is habitually resident”* and so it looks, there are excluded those not habitually resident in a Member State of the European Union. There is also no further explanation on the meaning of habitually resident. Despite this incomplete provision, in general, Member States regulated that the only condition for compensation is that of the crime being committed in its territory regardless of the nationality of the victim and of his residence.

Most of the Member States have in general provisions that allow for the victim’s family to be compensated in case of death. While some of the Member States regulated a more strict definition of the relatives of the victim’s which includes only the dependants of the victim’s, others opted for a broader definition including the spouse, children and parents of the victim. There are Member States that compensate even the persons supported by the victim or that would have been supported by the victim. Also, there are Member States that provide that the relatives should have lived with the victim before the death, while others do not impose this obligation.

The Council Directive does not provide anything with regard to the obligation to prior report the crime to the police and if it is necessary to wait the outcome of any police investigation or criminal proceedings before applying for compensation. It is up to each Member State to establish them in accordance with their internal legislation.

As general rule, most of the Member States do not impose this obligation for the victim prior to applying for the compensation. But, still, some of Member States impose that the victim should do everything possible to solve the crime, which, of course, includes reporting the crime. There are some Member States where reporting the crime to the police is compulsory and if no criminal proceedings are in progress, an application for compensation cannot be approved.

With regard to the obligation to prior report the crime to the police, it should be kept in mind that there are some violent intentional offences in which the victim fear to act against the offender (e.g. trafficking in human beings, sexual abuse), so it will be up to the Member States to start an investigation even without the prior report from the victim.

Most of the Member States do not provide the obligation to wait the conclusions of the police investigation or criminal proceedings before applying for compensation. But, in particularly cases, some Member States impose that victim may apply for compensation only once a final judgement or penalty notice is delivered finding the offender guilty or acquitting him on the grounds that he lacks criminal liability. Also, the victim is obliged to report the crime in a time limit, except the case when the victim was impossible to do that due to the physical condition or had a reason for not doing it.

Waiting for the outcome of any police investigation or criminal proceedings before applying for compensation may have the effect of discouraging victim from further applying as it is the possibility to pass the deadline for applications provided in each of the Member States.

In this regard, it should be mentioned that each Member State provides a deadline for applying for compensation in such situations which varies from 2 months up to 3 years from the moment the crime has been committed.

Although the Council Directive does not say anything, compensation is paid even if the offender cannot be prosecuted or punished (the Directive has no provisions in this respect which means that this possibility still is not ruled out).

Member States have in their legal system this possibility but under the condition that it is established that a crime has been committed and it has resulted in the injury of the victim. In this situation some Member States require that the victim will provide evidence, while other have the system in which the facts are established based on the evidence presented by the victim but also from the findings of the law enforcement.

With regard to the level to be compensated most of the Member States provide in their legislation that there is no minimum or maximum level to compensate such victims, while some regulated either a minimum threshold or an upper limit or both of them. Each of the Member States regulated internal systems to calculate the amount of compensation that will be given to the victims of crimes.

In the Council Directive there are no provisions on if the compensation should take into account the applicant's financial situation like in European Convention on the compensation of victims of violent crimes, but it is not a possibility ruled out in practice. It is up to Member States to decide this according to its national laws. Most of the Member States do not take into account the applicant's financial situation when deciding on the amount that will be paid as compensation. Only one country has provisions in this regard and the applicant's financial situation is taken into account when deciding if any compensation is to be paid to the victim.

In this regard, when deciding a fair and appropriate compensation, it should be taken into consideration only the violent intentional crime and the injuries produced to the victim/family members and not the applicant's financial situation.

Also, in the Council Directive there are no provisions if the victim is at fault such as: the improper behaviour of the victim in relation to the crime (before, during and after the crime) or to the damage suffered (injury or death), membership of criminal gangs or of organizations which commit acts of violence and if compensation would be contrary to a sense of justice or to public policy (*ordre public*).

Again, it is up to the Member States to decide this, according to its national laws. Even so, if the victim is at fault, it should be taken into consideration when deciding a fair and appropriate compensation.

All the Member States have provisions that allow the authorities to reduce and even not pay any compensation to the victim if the victim is at fault, or due to the relation between the victim and the offender, the victim's conduct, character or way of life, if the victim has any judicial record. Also, if the victim is convicted of membership of organized crime or if it has

been established that it has exceeded the limits of self-defence compensation may be reduced or not awarded.

In the Council Directive there are also no provisions if compensation already received from the offender or other sources maybe deducted from the amount of compensation payable from public funds or if the victim or his dependants receive compensation from public funds, their rights against the offender or other sources of compensation (social security, etc.) may, if the domestic law so provides, pass to the State or the compensating authority, which may then take action to obtain reimbursement on that basis.

Most of the Member States provide in their national legislation that if the victims receive compensation from other sources or from the offender itself, then the amount awarded will be deducted. Still, there are some Member States that award compensation regardless of any sum received by the victim from other sources. There are also some Member States that have provided the principle of subsidiary in regard to the payment of compensation from public funds.

The Directive does not rule out the situation when the applicant, if not satisfied by the compensation awarded by the Member State, can request any additional compensation from the offender (if, of course, the offender is known).

There are Member States that allow the victim who is not satisfied by the amount received as compensation to participate along with the State in the civil action filed against the offender by the State in recovering the amount paid to the victim.

Also, in some legislations, the victim can bring an action against the offender if is not satisfied by the compensation received from public funds. There are some Member States that regulates the possibility for the victim to appeal against the decision to award compensation, if not satisfied, while others don't provide this possibility.

There are Member States that regulate that the victim will have to provide evidence to support his/her damage while others do not mention anything in this regard and about the procedure to be followed.

In the case that the offender is identified there are Member States that allow the victim the possibility to claim for compensation from the State regardless of the fact if it has brought a civil action against the offender, while others imposed the victim to bring an action against the offender and only if the offender cannot pay for any reason, then the victim is entitled to request for compensation from public funds.

The Council Directive does not provide anything with regard to the procedure to be followed when deciding the compensation for the victims. Although the request for compensation is deriving from a crime, the procedure and the decision given is either civil or administrative not criminal, because, usually, at the moment the claim for compensation is made and in the moment deciding the compensation to be awarded there are no criminal proceedings started or pending.

c. Council Framework Decision 2001/220/JHA of 15 March 2001 on standing of victims in criminal proceedings

The aims of the FD were to approximate the legislation of the Member States concerning the protection of interests of the victim in criminal proceedings and also to ensure that the offender makes reparation for the harm suffered by the victim.

For this, Member States should approximate their laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present.

Article 9 of the FD provided the right to compensation in the course of criminal proceedings. It provided that:

Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner.

Each Member State shall take appropriate measures to encourage the offender to provide adequate compensation to victims.

Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay.

In relation to victims resident in another Member States article 11 provided that each Member State shall ensure that its competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a State other than the one where the offence has occurred, particularly with regard to the organisation of the proceedings.

Each Member State shall ensure that the victim of an offence in a Member State other than the one where he resides may make a complaint before the competent authorities of his State of residence if he was unable to do so in the Member State where the offence was committed or, in the event of a serious offence, if he did not wish to do so.

d. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

Article 16 of the Directive provides **the right to decision on compensation from the offender in the course of criminal proceedings**. It states that:

- 1. Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.*
- 2. Member States shall promote measures to encourage offenders to provide adequate compensation to victims.*

At a glance it looks that the wording in the article 16 of the Directive 2012/29/EU is quite similar to the article 9 of the FD. But, at a closer look, we can see that, different from the FD, in the Directive 2012/29/EU it is mentioned the exception, where national law provides for such a decision to be made in other legal proceedings, whereas in the FD the provision was that except where, in certain cases, national law provides for compensation to be awarded in another manner⁸⁵. The Directive 2012/29/EU is much clear in this respect and it introduces a broader meaning, which now covers, for example, the legal proceedings in which victims cannot and have no need to apply for compensation during the criminal proceedings (usually, the situation of the Common law countries).

Like in the FD the offender (not the State) is the person who will compensate the victim, which means that in the case when the offender, for example is not known, the provisions will not be applicable⁸⁶. Of course, if the victim of crime claims compensation from the offender in a separate civil trial, then again, the provisions from article 16 of the Directive will not be also applicable.

There is no definition on the *reasonable time* but it should mean that the decision on compensation should be taken as quickly as the national law provides for in this respect. We find the term *adequate compensation to victims* in both legal acts with no other further explanation. It is up to the Member States, according to its national laws, to establish guidelines/manuals in deciding a fair and appropriate compensation to be awarded to the victim. For example, the Member State can even settle an upper limit above which and a minimum threshold below which such compensation shall not be granted.

In the Directive 2012/29/EU (and also the FD) there are *no provisions on if the compensation should take into account the victim's financial situation*.

It is up to the Member States to decide this, according to its national laws. It is not a possibility ruled out by the Directive 2012/29/EU, but, it must be kept in mind that, in deciding a fair and appropriate compensation, the applicant's financial situation should not be taken into account.

In the Directive 2012/29/EU there are also no provisions if *the victim is at fault* such as the improper behaviour of the victim in relation to the crime (before, during and after the crime) or to the damage suffered (injury or death), membership of criminal gangs or of organizations which commit acts of violence and if compensation would be contrary to a sense of justice or to public policy (*ordre public*).

It is up to the Member States to decide this, according to its national laws. Even so, if the victim is at fault, this should be taken into consideration when deciding by a judicial authority a fair and appropriate compensation.

⁸⁵ EC Guidance Document, p. 36,
http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf

⁸⁶ EC Guidance Document, p. 36

In the Directive 2012/29/EU there are no provisions if *compensation already received from other sources* (social security, etc.) may be deducted from the amount of compensation payable from the offender.

It is not a possibility ruled out by the Directive 2012/29/EU and it is up to the Member States to decide this, according to its national laws.

At this moment, most of the Member States provide in their national legislation that if the victims receive compensation from other sources, then the amount awarded will be deducted. Still, there are some Member States that award compensation regardless of any sum received by the victim from other sources.

Mechanisms for compensation existing in the Member States

In most of the Member States the claim for compensation is done by means of *partie civile proceedings* joined to criminal proceedings.

The victim claims compensation from the offender in the criminal proceedings, usually during the investigative phase. It is also possible in most of the Member States to claim damages even before the court, but, the time limits in this case, vary from one country to another. Some Member States require the claim to be made before evidence is discussed in court, while others require the claim to be made before a decision is given by the court.

It is important to remember that the claim must derive from the damage suffered for the crime that the offender has been accused of and has been indicted before a court. The joined proceedings are free of charge. Still, Common law countries do not have *partie civile* proceedings and have other compensations schemes. Victims cannot and have no need to apply for compensation during the criminal proceedings. Criminal courts are required to consider ordering an offender to pay compensation to their victim or victims in any case where personal injury, loss or damage has resulted from the offence. The courts are also required to give reasons where they do not make a compensation order in such cases.

This system of compensation is in accordance with the last part of the article 16 (1) from the Directive 2012/29/EU which provides that this decision is made in other legal proceedings where national law provides so.

In most of the Member States it is provided that, even if it is a civil case brought before a civil court, it is possible to participate in the criminal proceedings as a *partie civile* but under the condition that a decision has not yet been given by the civil court.

As for *the person who has the burden of proof* in the joined proceedings, in most of the Member States, the plaintiff is the person who has to bring all the evidence to support his/her claims, based on which the court will later then decide.

There are some Member States in which the civil action brought by the victim is carried out by the prosecutor after the offender has been indicted before a criminal court on behalf of

the States. Civil actions are brought and conducted (*ex officio*) when the injured party lacks the capacity or has a limited capacity to exercise his or her rights.

There are also the inquisitorial systems in which if the evidence is not brought by the claimant, the court may also, in investigating the truth, automatically extend the taking of evidence to all facts and evidence that are relevant for the decision. The courts may also rely on reports from specialists (e.g. forensics, doctors) in order to establish the level of compensation. If the size of the amount claimed cannot be sustained by evidence, the judge must estimate it according to the law.

In the Common law countries the courts will ask the victim for any additional information only if they consider necessary.

In all cases the causal link between the offence and the damage must be proven before deciding on compensation.

The existing measures in the Member States aimed at encouraging the offenders to provide compensation to victims

The Directive expressly provides that Member States shall promote measures *to encourage offenders to provide adequate compensation to victims*. In this regard most of Member States have put in place different safeguards which tend to fulfil this provision⁸⁷.

For example, in some Member States it is possible that the Prosecutor may decide not to prosecute the suspect if the latter meets certain conditions. The first condition to which the offender must submit, which is of direct interest to the victim, is compensation or reparation for the damage. This particular procedure is known as *criminal mediation*. It may only be used for offences for which the Prosecutor does not consider petitioning for more than two years' imprisonment. The procedure takes place before the public prosecutor's office magistrate responsible for criminal mediation. The offender and the victim must reach an agreement on compensation. The agreement is drawn up in a report. If the offender does not fully comply with the conditions set, the victim may institute civil action for damages in the civil courts or file for civil action.

In a suspended sentence *compliance with the order for compensation of the victims* may be a condition of the suspended sentence. In such cases the offender's suspended sentence may be converted into a firm sentence if he/she does not fully compensate the victim.

At the civil party's request or *ex officio*, *sequestration* may be arranged *in order to secure the civil claim*. Sequestration may also extend to assets that are not strictly related to the criminal offence.

There are systems that allow the judge to *require a suspect convicted of a criminal offence to pay the state a sum of money and the victim is entitled to this money*. The Public

⁸⁷ Information on - http://ec.europa.eu/civiljustice/comp_crime_victim/comp_crime_victim_lux_en.htm

Prosecutor's Office is required to enforce this measure. The authority designed with this will collect the money from the offender on behalf of the Public Prosecutor's Office.

Also, the victim could be paid compensation in the form of a *special condition imposed upon the offender by the judge*.

There are legal systems which provide for the obligation to compensate for the damage being *one of the possible penalties*.

The courts may also order *attachment of the penalty to the offender's wages or social security benefits*. In the last resort, the courts can send an offender to prison if he or she defaults on payment.

There are national provisions in which *an order for compensation directs that payment should be made through the court*. The court, in general, has the same power to enforce the payment of compensation as it does the payment of fines. These include, amongst other things, the power to order that compensation be paid by instalments, the power to transfer the order to other courts for enforcement where the offender may reside and also the power where necessary to bring the offender back before the court to explain any default in payment and where appropriate to consider imposing an alternative period of detention or imprisonment.

There are Member States where reparation of damage caused by the offence can be a *mitigating circumstance* in relation to sentence. In others, *release on bail or parole* is conditional on the offender's conduct towards the victim.

Key issue

The abovementioned measures tend to ensure that that victims of crimes, in the course of criminal proceedings, are compensated by the offenders and the offenders are encouraged to provide adequate compensation.

Still, what if *the offender has no possibility to compensate the victim*, in this situation what is to be done for the victim. For example, the victim has a decision awarding compensation but the offender has no possibility to pay by lack of means or for other reasons. How will the victim enforce this decision and obtain the compensation in the end.

This situation cannot be ruled out in practice, where, it is often possible that victims have decisions awarding them compensation for the harm suffered but have no real possibility to obtain the effective compensation from the offender. It is for the victims probably the most frustrating moment, when realizing that he/she cannot obtain, in fact, the acknowledgment and the respect for the harm they suffered.

In this situation, can the State, as a last resort, compensate all the victims for all the crimes, *not only* in the conditions provided for by other legal instruments⁸⁸?. For example, in case of the victims who are residents in another Member States, the solution can be either the European Convention on the compensation of victims of violent crimes (if the conditions

⁸⁸ EC Guidance Document, p. 36-37

provided for in the legal instrument are fulfilled) or the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (if the conditions mentioned in the legal instruments are fulfilled).

In this situation it is possible that the State pays the compensation to the victim and recovers it from the offender at a later stage (e.g. in a different administrative proceeding provided for by national law, such as, the enforcement of the costs paid by the State).

We think here, for example, on the existence of State public funds from which the victims, in the situations in which the offender has no possibility to pay the compensation by lack of means or for other reasons, can be awarded the compensation and then, the State will recover the money paid from the offender when possible in other proceedings.

These funds may imply additional costs for the State and it may be criticism in these regard. The problem could be overcome, for example, by prior collecting data with the judicial decisions awarding compensation for the victims and not enforced by the victims when the offenders had no possibility to pay by lack of means or for other reasons. These data could provide a general overview of the actual costs in these situations and can later be taken into consideration by each Member State when transposing the Directive 2012/29/EU and introducing the abovementioned solution.

It worth mentioning here that there are at this moment Member States in which the State compensates all the victims for all crimes from a public fund specially designed for this purpose.

The State may pay compensation even in advance (or part of the compensation)⁸⁹ from this public fund, but, in this situation, it should be taken into account that, if the offender is not found guilty (for example, a final decision issued by a court or by other competent judicial authority), then, the victim will have to pay back the money received.

This system would be quite similar to the one from the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims in which there is no decision in the criminal proceedings when deciding to award compensation to the victims of crimes in other administrative proceedings (not the criminal proceedings).

We believe that the national laws in which at this moment the victims have a final decision awarding them compensation but cannot enforce it due to the fact that the offenders had no possibility to pay the compensation by lack of means or for other reasons are not in line with the wording and the spirit of the article 16 of the Directive 2012/29/EU. Solutions should be found by the Member States in order to make sure that, in the end, the victims are receiving in fact compensation for the harm suffered, especially when the compensation is awarded through a final judgment or any other similar decision according to each national law.

⁸⁹ EC Guidance Document, p. 36-37

Reimbursement of expenses

When it comes to the compensation of victims of crimes it must be kept in mind that victims of the crimes need to be reimbursed for any additional expenses occurred for the participating in the criminal proceedings. In this sense, **article 14** of the Directive 2012/29/EU provides that:

Member States shall afford victims who participate in criminal proceedings, the possibility of reimbursement of expenses incurred as a result of their active participation in criminal proceedings, in accordance with their role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed shall be determined by national law.

There is another reference to this right in the Directive, specifically Recital 47, which states that victims should not be expected to incur expenses in relation to their participation in criminal proceedings. It states that Member States should be required to reimburse only necessary expenses of victims in relation to their participation in criminal proceedings and should not be required to reimburse victims' legal fees. Member States should be able to impose conditions in regard to the reimbursement of expenses in national law, such as time limits for claiming reimbursement, standard rates for subsistence and travel costs and maximum daily amounts for loss of earnings. The right to reimbursement of expenses in criminal proceedings should not arise in a situation where a victim makes a statement on a criminal offence. Expenses should only be covered to the extent that the victim is obliged or requested by the competent authorities to be present and actively participate in the criminal proceedings.

We can see that, according to the Directive, victims who participate in criminal proceedings have the possibility of reimbursement of expenses incurred as a result of their active participation in criminal proceedings, *in accordance with their role in the relevant criminal justice system*. So, we are not talking in the Directive 2012/29/ EU only about the victims who have the status of parties or witnesses like in the FD but about all the victims who actively participate in criminal proceedings depending on the role attributed by the national law. In this way these provisions are covering the national laws in which victims cannot be party to the proceedings⁹⁰.

In respect to the right to reimbursement of expenses for the victims of crimes two important aspects should be taken into the consideration by the Member States in their national laws: the expenses to be reimbursed and the person responsible to pay them. When it comes to the expenses which are to be reimbursed to the victims of crimes the Recital 47 of the Directive provides that Member States should be required to reimburse *only necessary expenses of victims in relation to their participation in criminal proceedings*

⁹⁰ EC Guidance Document, p. 35

and should not be required to reimburse victims' legal fees and that Member States can impose conditions in regard to the reimbursement of expenses in national law, such as time limits for claiming reimbursement, *standard rates for subsistence and travel costs and maximum daily amounts for loss of earnings*. Of course, each Member States can provide in the national law more expenses that can be reimbursed to the victim as those abovementioned and provided for in the Directive 2012/29/EU.

With regard to the responsibility for refunding the victims' expenses there are for example Member States in which this is done solely by the offender. It is the same way like for the right of compensation in the article 16 of the Directive with the same deficiencies, especially if we are talking about the situation of an offender which is not solvent and who cannot reimburse the victims' expenses.

There are Member States in which the victim is paid by the State immediately after being present in the criminal proceedings and the expenses are recovered at a later stage from the offender.

When dealing with the right to reimbursement of expenses incurred by the victims who participate in criminal proceedings it should be taken into consideration that the participation of the victim is very important and that the minimum costs incurred must be reimbursed as soon as possible. Failure to do this, for the victims (especially in the systems in which the reimbursement is done solely by the offender and he/she is not solvent) will have a twofold effect: they will pay the participating in their own trial and other (possible) victims will refrain from further reporting the crimes and/or participate in other criminal proceedings.

Return of property

Article 15 of the Directive 2012/29/EU deals with the right to the return of property and provides that:

Member States shall ensure that, following a decision by a competent authority, recoverable property which is seized in the course of criminal proceedings is returned to victims without delay, unless required for the purposes of criminal proceedings. The conditions or procedural rules under which such property is returned to the victims shall be determined by national law.

Recital 48 of the Directive provides that recoverable property which is seized in criminal proceedings should be returned as soon as possible to the victim of the crime, subject to exceptional circumstances, such as in a dispute concerning the ownership or where the possession of the property or the property itself is illegal. The right to have property returned should be without prejudice to its legitimate retention for the purposes of other legal proceedings.

This right was also provided in the FD in article 9 par. 3 which stated that unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay.

If we make a comparison between the two legal instruments abovementioned we can see that the wording is quite the same, but some aspects have been added or extracted.

For example, the Directive expressly mentions that the recoverable property which is seized in the course of criminal proceedings is returned to the victims *only following a decision by a competent authority according to each national law*.

In the article 9 par. 3 of the FD we find the word *urgently* which in the article 15 does not appear. But, in the recital 48 of the Directive we find the wording *as soon as possible*.

The two expressions are not the same but both tend to converge to the same idea, that the recoverable property which is seized in the course of criminal proceedings should be returned to victims should be dealt with in an urgent matter in order to compensate the harm produced to the victim.

Only in exceptional circumstances, such as in a dispute concerning the ownership or where the possession of the property or the property itself is illegal, this right should not prevail.

The return of property which has been seized in the course of criminal proceedings must be done *ex officio* or *(at least) at the request of the victim* and as soon as possible.

Of course the victims must be aware of this right and the competent authorities must also provide this information to them as quickly as possible. These proceedings should be criminal ones, because they are deriving from a measure taking within the course of criminal proceedings.

Conclusions

We have seen that Member State have put in place mechanisms to ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender and measures to encourage offenders to provide adequate compensation to victims.

Still, when the offender has no possibility to compensate the victim, due to the lack of means or for other reasons, then the victims are left empty handed, because he/she cannot, in the end, enforce the decision on compensation obtained.

In these situations something needs to be done for the victims in order to fulfil the right to compensation as provided in the Directive 2012/29/EU.

The possibility that the State, as a last resort, compensate all the victims for all the crimes, not only in the cases covered by other legal instruments abovementioned, needs to be

thought over by each of the Member States when transposing the Directive 2012/29/EU in order to have a real, effective and complete right to compensation for the victims of crimes.

Of course, this situation may imply additional financial resources from the State but this situation could and should be overcome. We have to keep in mind that the right to compensation is not only a provision in the legal instruments abovementioned but for the victims a deservedly way to acknowledgement for the harm they have suffered.

Compensation implies also for the victims the right to the return of the property which is seized in the course of criminal proceedings as soon as possible, even ex officio or at least at a request by the victims.

Participating in any criminal proceedings should not incur for the victims any additional expenses and all the expenses made should be reimbursed as soon as possible by the offender or by the State, depending on the situations provided for in each Member State. In this way the victims will not pay the participating in their own trial and other (possible) victims will not refrain from reporting crimes and/or later participate in other criminal proceedings.

9. RIGHTS OF VICTIMS RESIDENT IN ANOTHER MEMBER STATE (Article 17 of the EU Directive 29/2012) (Suzan Van der Aa)

1. Member States shall ensure that their competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a Member State other than that where the criminal offence was committed, particularly with regard to the organisation of the proceedings. For this purpose, the authorities of the Member State where the criminal offence was committed shall, in particular, be in a position:

(a) to take a statement from the victim immediately after the complaint with regard to the criminal offence is made to the competent authority;

(b) to have recourse to the extent possible to the provisions on video conferencing and telephone conference calls laid down in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (1) for the purpose of hearing victims who are resident abroad.

2. Member States shall ensure that victims of a criminal offence committed in Member States other than that where they reside may make a complaint to the competent authorities of the Member State of residence, if they are unable to do so in the Member State where the criminal offence was committed or, in the event of a serious offence, as determined by national law of that Member State, if they do not wish to do so.

3. Member States shall ensure that the competent authority to which the victim makes a complaint transmits it without delay to the competent authority of the Member State in which the criminal offence was committed, if the competence to institute the proceedings has not been exercised by the Member State in which the complaint was made.

Introduction

Many legal practitioners are probably unaware of the key role that cross-border victimization has played in the coming into existence of the EU Victim Directive. If it was not for these victims, the EU Framework Decision on the Standing of Victims in Criminal Proceedings – the Directive’s predecessor – probably would not have made it past the negotiation stage and victims’ rights had largely remained a national affair up to this date. Only by emphasizing the difficulties that people face when they are victimized in a country other than their country of residence, and by linking these difficulties to the free movement of persons, were the European Commission and the Parliament able to convince the Member States of the necessity and legitimacy of EU legislation in the field of crime victimization.

The problem was that before the Treaty of Lisbon, the EU was governed by the three-pillar system, each with a different distribution of competencies between the Member States and Europe.⁹¹ Back then, cooperation in matters relating to crime victimization resided under the third pillar – ‘Police and Judicial Co-operation in Criminal Matters’ – where the mandate of Europe was smallest. Substantive and procedural criminal law is an area where cultural, historical and moral differences are most prevalent, and where Member States are most reluctant to sacrifice their sovereign powers to the European legislator. For this reason, EU legislation in the field of criminal and procedural law was only allowed when an international dimension could be established: Only when the problem could not be solved at the level of the individual Member States was Europe allowed to intervene. The mandate was furthermore limited to substantive criminal law matters only. Criminal procedure was still an area in which the individual Member States – more or less – reigned supreme.

How was it then that the European legislator managed to pass legislation in a field where strictly speaking there was no competence? For the Framework Decision mostly prescribed *procedural* rules that were applicable to *all victims* within the EU, not just the cross-border victims.

The line of reasoning that the European Commission and the Parliament used can be summarized as follows:⁹² Although every person suffers as a result of crime victimization, cross-border victims find themselves in an even worse position than ‘regular’ victims whose victimization is a purely domestic affair. In comparison to these victims, cross-border victims face additional problems when they come into contact with the criminal justice system. They are, for instance, not only unaware of the procedural rules that apply in the country where they fell victim, but often they also have difficulties with the language, with understanding the information that is provided to them and with being understood. On top

⁹¹ These three pillars were: the European Communities, Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters.

⁹² For a more detailed discussion, see Reynaers & Groenhuijsen, who argue that the cross-border victims’ cause was used as a ‘trick’ to pass far-reaching legislation in the field of crime victimization in general and for all victims (M.S. Groenhuijsen & S. Reynaers, ‘Het Europees kaderbesluit inzake de status van het slachtoffer in de strafprocedure: Implementatieperikelen en interpretatievragen’, *Panopticon* (27) 2006, 12-33).

of that, many victims are unable to remain in the country where they were victimized to await the conclusion of the criminal proceedings, because it can take years before these proceedings are finalized. They may even be unable to report the crime to the local police station, because they have to return home again.

The ultimate consequence of this disadvantaged position of cross-border victims was that it could discourage persons to travel or work in another Member State. Afraid of being victimized abroad, and anxious of the complex and cumbersome procedure that might ensue upon reporting the crime to the local police, European residents might reconsider their holiday, work or study in another Member State. This would negatively affect one of the fundamental freedoms of the EU: the freedom of movement of persons. Because of the cross-border dimension, the matter could not be solved on the level of the individual Member States, thereby establishing European competence to intervene.

However, the European Commission and Parliament used the cross-border victimization as a means to not only introduce measures that would enhance the position of these particular victims, but also to improve the position of victims across the board. For allowing cross-border victims more protection than persons who had been victimized in their countries of residence would have had a discriminatory effect on these latter category of victims. If you increase the level of victims' rights, you have to include all victims, not just the ones who fall victim abroad. That is how Europe established its competence to introduce far-reaching and binding rules related to criminal procedure and to all victims.

In this chapter we will analyse Article 17 of the Directive, which is specifically dedicated to cross-border victims, and see if their position has changed in practice as a result of the Directive. Other rights that could be relevant to cross-border victims – such as the right to translation of essential documents or the right to a translator – are dealt with in chapter (...) and chapter (...) and will not be discussed here.

Scope of Article 17 Directive

The rights contained in Article 17 Directive also apply to victims who do not have a *legal* residence status in the EU Member State they live in.⁹³ This is because the Directive applies, regardless of the victim's legal residence status in a certain Member State, on the victim's citizenship or nationality (see Recital 10 of the Directive). It means that Article 17 also protects third country nationals or stateless persons who have been victimized on EU territory. The same goes for persons who were victimized outside the EU whilst the criminal proceedings are taking place within the EU (Recital 13 Directive).

Analysis of Article 17 per paragraph

Article 17 gives the authorities of the Member State in which the crime was committed clear instructions in relation to the reporting of the crime and the hearing of cross-border victims. Article 17 Directive is almost a literal copy of its predecessor, Article 11 FD.

⁹³ EC Guidance Document, p. 8.

Article 17, paragraph 1(a) Directive allows victims to make a statement immediately after they have turned to the competent authorities to complain about the crime. Instead of having to wait for a follow-up meeting during which the official statement is taken down, the competent authorities – usually the police – should take down the victim’s statement or testimony immediately in order to avoid extra work and effort on the part of the victim.⁹⁴ In the case of cross-border victimization, it means that they can return home immediately after having lodged the complaint, without being delayed by the statement. Of course, there are situations in which it can be difficult for the competent authorities to comply with this instruction. Think, for instance, of a victim who only speaks a language for which there is no translator available on such short notice, or of a child victim whose statement is better processed in a child-friendly environment rather than a police station. These, however, will be more exceptional cases, with immediate statements being the general rule.

Article 17, paragraph 1(b) Directive refers to the possibility of being heard with the help of telecommunication measures, such as videoconferencing or telephone. For cross-border victims, this is an important right, given that many of them will have returned to the home country by the time the criminal investigation and prosecution is in full steam. If they would be forced to return to the Member State where the crime was committed in order to be heard, it would place a disproportional burden on their part, especially when multiple sessions are needed to find out what really happened. By allowing them to make statements through a live television link or videoconference from their home country, this saves the victims a lot of time travelling back and forth.

Article 17, paragraph 2 Directive allows victims who were victimized abroad to file a complaint in the Member State they reside in. The victim is only granted this right if he was *unable* to file a complaint in the Member State where the crime was committed or – in the case of a serious offence – if he *prefers* to file a complaint in the Member State of residence. In other words, if the victim suffered from a serious crime, it is irrelevant whether he had the opportunity to file a complaint abroad – only the victim’s wishes matters – but it is up to the Member State of residence to decide which crimes are serious enough to warrant this service.

Article 17 paragraph 3 Directive is an accessory right of the second paragraph. It explains what the authorities of the Member State of residence need to do after the cross-border victim files a complaint with them. As a general rule, they should transmit the complaint without delay to the State where the crime occurred, even if they instigate criminal proceedings themselves.⁹⁵ Strictly speaking, however, they are only obliged to forward the

⁹⁴ This may have an unintended discriminatory effect on ‘domestic’ victims for whom a comparable service is not included in the Directive, at least not explicitly. Still, these victims would probably also benefit from having the opportunity to make their statement directly and not having to return to the police station one extra time in order to have their statement taken down.

⁹⁵ EC Guidance Document, p. 38.

complaint if they refrain from exercising their competence to investigate or prosecute. The rationale behind this exception lies in the prevention of jurisdiction conflicts in cross-border cases.⁹⁶ In order to facilitate this information transmission, the Member States are encouraged to establish networks, especially in the border regions of neighbouring Member States.⁹⁷

Implementation of Article 17 Directive in the EU Member States

Recently, a report was published which compared how all the European Member States had transposed and implemented the provisions of the Directive.⁹⁸ On pages 228 to 233 the implementation of Article 17 is discussed. Although the table on pages 232-233 presents a rather optimistic picture – with practically all Member States indicating that victims can make statements in their country of residence if they are victimized abroad – closer inspection reveals that this may be a misrepresentation of reality.⁹⁹

The United Kingdom is the only Member State that explicitly denies persons who were victimized in another EU Member State the right to make a statement in the UK.¹⁰⁰ Furthermore, although provisions exist that allow the setting up of a live television link for further questioning or testimony, in practice public prosecutors are encouraged to only do this when it is cost-effective. If it is cheaper or more convenient to bring the victim to the UK to testify, they should do so. In other words, it is not the victims' needs that are the decisive factor in these matters, but financial concerns.

As mentioned before, all the other Member States supposedly do offer victims the opportunity to make a complaint in the country of residence. However, if we look at the further explanations given by the national experts, it appears that reality is much more complex. In Bulgaria, for instance, the victim can file a complaint 'through Bulgarian diplomatic missions', but there are no further procedural provisions if the victim is not actually *within Bulgarian territory*.¹⁰¹ A question that immediately springs to mind is how accessible these 'diplomatic missions' are for ordinary cross-border victims who would like to report a crime that took place in Bulgaria. Furthermore, the fact that no additional arrangements are in place for victims outside Bulgaria makes one wonder whether article 17 was really transposed in full.

⁹⁶ EC Guidance Document, p. 38.

⁹⁷ EC Guidance Document, p. 39.

⁹⁸ Centre for European and Constitutional Law, *Protecting victims' rights in the EU: The theory and practice of diversity of treatment during the criminal trial. Comparative report and policy recommendations*, 2014, to be found at: <http://www.victimprotection.eu/>.

⁹⁹ The report was furthermore limited in the sense that not all requirements stemming from article 17 were included. Whether cross-border victims have the right to make a statement *immediately* after they have turned to the competent authorities to complain about the crime (art. 17(1)(a) Directive) was, for instance, not reported.

¹⁰⁰ *Protecting Victims' Rights in the EU* (2014), p. 229.

¹⁰¹ *Protecting Victims' Rights in the EU* (2014), p. 232.

The Netherlands also makes an interesting case study. In contrast to what the report suggests, Dutch nationals who are victimized abroad are in fact barred from reporting the crime to the Dutch police upon their return to the Netherlands. The reason is that the Dutch extra-territorial jurisdiction does not extend to victims, at least not when it comes to ‘ordinary’ crimes. If Dutch nationals fall victim to crime in another country, they will have to resort to local authorities if they wish to have their case prosecuted.

The Estonian system only allows victims to ‘report crimes from their country of residence via e-mail or post to the police’.¹⁰² What is meant here is probably the *Estonian* police. Whether victims can also file a complaint with their local authorities who – in turn – forward that claim to Estonia remains unclear.¹⁰³

These are only three examples where the rights of cross-border victims are probably more limited than the report suggests, but there are many more. Other Member States seem, for instance, to have limited the possibility to file a complaint in the country of residence or to testify with the help of videoconferencing to the *inability* of the victim to do so in the country where the crime took place.¹⁰⁴ Whether victims of serious crimes are also allowed to report if they *prefer* to do so (art. 17(2) Directive) remains unclear. Yet other countries have only reported on the facilitated possibilities for cross-border victims to apply for compensation, without clarifying whether this also impacts the victims’ options to report (on) crimes (that occurred) abroad.¹⁰⁵ Others only refer to the possibility to hear victims *as witnesses* via a live television or telephone link if they are unable to come in person.¹⁰⁶ They keep silent on whether the victims are also allowed to file a complaint in their countries when the crime took place abroad (or vice versa). Finally, there are Member States that have not introduced dedicated arrangements for cross-border victims.¹⁰⁷ Those Member States mostly rely on provisions that apply to domestic victims as well, without recognizing that article 17 of the Directive requires a more active approach.

Of all the rights contained in article 17 Directive, most progress seems to have been made with regard to telephone or videoconferencing (art. 17(1)(b) Directive).¹⁰⁸ However, the fact

¹⁰² See Protecting Victims’ Rights in the EU (2014), p. 230.

¹⁰³ See also the information on Hungary that is similarly limited (Protecting Victims’ Rights in the EU (2014), p. 231).

¹⁰⁴ See, for instance, Lithuania (Protecting Victims’ Rights in the EU (2014), p. 230).

¹⁰⁵ See, for instance, Romania (Protecting Victims’ Rights in the EU (2014), p. 228-229), Cyprus (p. 230)

¹⁰⁶ See, for instance, Ireland or the Czech Republic (Protecting Victims’ Rights in the EU (2014), p. 228), Slovenia (p. 229)

¹⁰⁷ See, for instance, Malta, Poland (Protecting Victims’ Rights in the EU (2014), p. 230), France, Sweden (p. 229)

¹⁰⁸ In the Dutch explanatory report to the concept-bill to implement the EU Directive, the *Staatssecretaris van Veiligheid en Justitie* also mentions that an evaluation revealed that the right to make a complaint in the country of residence had been transposed by very few Member States (see (concept) explanatory memorandum: *Implementatie van richtlijn 2012/29/EU van het Europees Parlement en de Raad van 25 oktober 2012 tot vaststelling van minimumnormen voor de rechten, de ondersteuning en de bescherming van slachtoffers van strafbare feiten, en ter vervanging van Kaderbesluit 2001/220/JBZ (PEU, 14 november 2012, L315)*, p. 32-33).

that this right was already made compulsory by the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000 makes you wonder to what extent victims' needs played a role in the minds of the national legislators. Although cross-border victims can profit from these developments, it could be that they were predominantly motivated by the necessity to facilitate evidence collection and that the underlying rationale was to further prosecutorial concerns, rather than victims' needs.

Conclusion

Looking at the unclear and possibly poor transposal of Article 17 Directive in practice, one cannot help but feel a sense of irony that cross-border victimization, which was once so important in establishing the competence for Europe to regulate in the field of crime victimization, is now one of the issues in which least progress seems to have been made.

The changes that were introduced – the possibility to make a statement through videoconferencing – were also instrumental to law enforcement concerns and not solely inspired by genuine concerns for the protection of victims' rights. The difficulties that cross-border victims faced 14 years ago, when the Framework Decision came into force, are, to a large extent, the same difficulties they are faced with today. By referring to extra-territorial jurisdiction limitations, some Member States still do not allow cross-border victims to report the crime in the Member State of residence, thereby thwarting their access to justice. It was precisely this problem that the EU Commission and the European Parliament intended to tackle with the introduction of Article 17. We can only conclude that their efforts have been of limited avail and that there is still a world to gain when it comes to improving the position of cross-border victims.

10. THE RIGHT TO PROTECTION (*Suzan Van der Aa*)

Introduction

Crime victims who are affected by non-recurrent crimes – a single robbery or assault – are generally not confronted with the same offender again. Apart from the trial, they do not have to dread an encounter with the person who harmed them. This is different for victims of 'course-of-conduct' crimes such as stalking and domestic violence. Due to the repetitive nature of the violence, the chances of repeat victimization by the hands of the same offender are much higher than the chances for the average victim. These victims remain under a constant threat and especially for these victims protection against the offender is of pivotal importance.¹⁰⁹ Victimological research has, for instance, shown that for female victims of intimate partner violence the primary concern in seeking legal intervention was to look for protection for themselves and their children; retributive motives only came second.¹¹⁰

¹⁰⁹ Of course, single-incident victims, such as rape victims, can feel the need for protection against unexpected encounters with their offender as well.

¹¹⁰ In the study of Johnson (2006), for instance, 88% of the female victims wanted protection, against 43% who (also) desired the offender to receive punishment for his actions.

Protection against the offender can be achieved in various ways. Next to the physical incapacitation of the offender – detention or imprisonment – one can also issue so-called *protection orders*.¹¹¹ Protection orders can be defined as:

*Any decision, provisional or final, adopted by a civil, criminal or administrative court or other judicial authority, imposing rules of conduct (obligations or prohibitions) on a person causing danger with the aim of protecting another person against an act which may endanger his life, physical, sexual or psychological integrity, dignity, or personal liberty.*¹¹²

The advantage of a protection order is that it allows the suspect or convicted person to remain outside of prison or a detention centre, while at the same time, it provides victims with the protection they desire most. We will provide more information on protection orders in section 2. In section 3, we will discuss two recently introduced EU instruments on protection orders, namely the European Protection Order Directive, and the Regulation on mutual recognition of protection measures in civil matters¹¹³

Next to protection against the offender, victims are also in need of protection against *secondary victimization* or victimization due to their participation in the criminal procedure. During criminal proceedings, victims can be harmed because they are confronted with their offender again or because the criminal justice authorities treat them with disrespect, but also because of certain characteristics inherent to the procedure as such. If a crime comes to the attention of the police it is, for instance, inevitable that the police interview the victim to find out what actually happened. What should be avoided, however, is that they interview the victim over and over again without an apparent need. The EU Victim Directive provides for four kinds of protection (**Articles 18-24**):

- 1) Protection against contact with the offender
- 2) Protection against secondary victimization in the course of criminal investigations
- 3) Protection against violations of privacy
- 4) Protection for victims with specific protection needs

These four types of protection under the EU Victim Directive and their implementation in practice will be discussed in the following sections.

A final development related to victim protection is the Council of Europe (Istanbul) Convention on combating violence against women and domestic violence, but this instrument will be discussed in a following chapter.

¹¹¹ There are various synonyms for protection orders, such as restraining orders, injunction orders. Throughout this chapter, we will only refer to these orders as protection orders.

¹¹² S. van der Aa, K. Lens, F. Klerx, A. Bosma & M. van den Bosch, *Aard, omvang en handhaving van beschermingsbevelen in Nederland*, Den Haag: WODC 2013, p. 143.

¹¹³ These are Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (Official Journal L338 21/12/2011, P. 2) and EU Regulation No 606/2013 of the European Council and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (Official Journal L 181 29/06/2012, P. 4)

Protection Orders

Protection orders were initially mainly used in divorce proceedings.¹¹⁴ If one of the partners could not accept the divorce or was aggressive for some other reason, the family courts could impose a temporary protection order, ordering the aggressive person to stay away from his or her (soon-to-be) (ex-)spouse for the duration of the proceedings. As soon as the divorce proceedings were concluded, the protection orders usually ceased to exist as well. From the 1970s onwards, civil courts started to apply existing protection orders outside divorce proceedings too, for instance in cases that would nowadays classify as stalking or domestic violence. Within criminal law, the trend soon caught on as well, and countries either introduced separate protection order procedures, or they applied pre-existing measures more often, but this time with the specific aim to protect the victim.¹¹⁵

Many types of orders can fall under the definition of protection order mentioned above. They can range from police orders – the police simply telling the offender to stop stalking – to long-lasting conditions to a suspended sentence. The most common protection orders consist of a prohibition to contact the victim or to be within the victim's vicinity (e.g., the street where the victim lives or works), but more 'exotic' conditions are possible too. Usually these orders are strengthened by some sort of penalty. If the offender violates the order, he can be forced to pay a fine or he can be remanded to (pre-trial) detention again.

If effective, protection orders procure exactly what victims want, to be left in peace, but it is exactly their effectiveness that is contested. The limited studies available report high rates of non-compliance with protection orders. In the study by Tjaden & Thoennes, for instance, 69% of the female and 81% of the male stalking victims who had obtained a protection order against their stalker reported violations.¹¹⁶ Studies by Häkkänen and by Keilitz report lower violation rates of 35%.¹¹⁷ Their respondents furthermore reported a significant decline in the frequency and nature of the violent stalking actions and threats. So the fact that the stalker violated the order does not mean that the protection order was entirely without effect. Overall the studies attribute at least some positive effects to protection orders.

When it comes to protection order legislation, we see large discrepancies between the EU Member States. Despite the fact that protection schemes have never been the subject of careful study, national laws and practices seem widely dispersed.¹¹⁸ Although all Member States allow for criminal protection orders, some of them have only reserved this for the pre- or the post-trial stage, while yet others have introduced quasi-criminal protection order

¹¹⁴ This was the situation in the United States and (some) European Member States at least.

¹¹⁵ See, S. van der Aa, 'Protection orders in the European Member States: Where do we stand and where do we go from here?', *European Journal of Criminal Policy and Research* 2011.

¹¹⁶ P. Tjaden & N. Thoennes, *Stalking in America: Findings from the National Violence Against Women Survey*, Washington D.C.: U.S. Department of Justice, National Institute of Justice 1998.

¹¹⁷ H. Häkkänen, C. Hagelstam & P. Santtila, 'Stalking actions, prior offender-victim relationship and issuing of restraining orders in a Finnish sample of stalkers', *Legal and Criminological Psychology* (8) 2003, 189-206; S.L. Keilitz, C. Davis, H.S. Efkeman, C. Flango, & P.L. Hannaford, *Civil protection orders: Victims' views on effectiveness*, Washington, D.C.: U.S. Department of Justice 1998.

¹¹⁸ See Van der Aa (2012) (*op cit.*).

trajectories that operate outside the realm of criminal law. With some exceptions, civil protection orders are also present but in some Member States they are reserved for a certain type of applicant only (e.g., a person applying for a divorce or victims of domestic violence). The emergency barring order, which has the effect of barring a person from the family home for a limited amount of time, has only been introduced in approximately half the Member States. Despite these differences, there seem to be harmonizing trends at the moment, with Member States introducing more and more possibilities to adopt protection orders.¹¹⁹

The European Protection Order

Another interesting development in the field of victim protection against the offender has been the introduction of the European Protection Order. The problem with the aforementioned protection orders was that they were only effective on the territory of the state which adopted them. This meant that a victim who moved to another Member State, but still wanted the safeguard of a protection order, had to instigate new proceedings and provide evidence as if the previous decision had never been issued. Having to go through new proceedings could, of course, seriously inconvenience the victim, especially since the positive outcome of the second trial was by no means guaranteed.

On the sixth of January 2010, twelve Member States launched an initiative for a European Protection Order (hereafter: EPO).¹²⁰ The initiators felt that protection orders should not be limited to the territory of the state in which the orders were imposed, because that would put victims in a no-win situation: either their freedom of movement was limited or they had to relinquish their protection against the offender. With the introduction of the EPO, victims who crossed borders would no longer have to choose, because their protection orders would be recognized across the European Union.

If a criminal protection order is issued in one Member State ('issuing state'), but the protected person continues to be in danger in the Member State to which he or she wants to move or stay ('executing state'), an EPO can be of help. The procedure for the mutual recognition of national protection orders is based on a simple, three-step approach:

- 1) On the request of the protected person, the issuing state adopts an EPO and forwards it to the executing state.
- 2) The executing state recognizes the EPO.
- 3) The executing state adopts any necessary measure available under its national law in order to execute the EPO and continue the protection of the person concerned.

If possible, the executing Member State has to adopt the exact same protection measure that the issuing state provided for. However, if there is no similar protection order available under its national law, it has to provide the order that would be available under its national law in a similar case and which corresponds, 'to the highest degree possible', to the

¹¹⁹ For the current state-of-the-art, see Van der Aa e.a. (in press).

¹²⁰ For the final version, see Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order, Official Journal L338, 21/12/2011, P. 2.

protection measure imposed in the issuing state (Article 9(2)(2) EPO). In this way, Member States are not obliged to change their national protection order legislation. In other words, the aim of the EPO is mutual recognition, not harmonization.

The EPO, however, only applies to criminal protection orders. Due to the legal basis in the Treaty of Lisbon, the mutual recognition of civil protection orders called for a separate instrument: the 2013 Regulation on mutual recognition of protection measures in civil matters.¹²¹ The civil Regulation has many similarities with its ‘criminal’ counterpart, but there are some distinct differences as well, most notably the fact that the civil orders do not require a mutual recognition procedure, but they are *automatically* recognized in the other Member States.

Both the criminal EPO and the civil EPO have to be implemented on 11 January 2015. How the Member States will implement both instruments and whether they will actually be used in practice is still largely unknown.¹²²

Victim protection under the EU Victim Directive

Under the 2012 EU Victim Directive, protective needs are taken into account in the articles 18-23. Below is a summary account of their content.

1. Right to protection (Article 18 of the EU Directive 29/2012)

Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimization, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.

Article 18 has a wide scope, prescribing protection against various types of victimization. It not only aims to protect victims against re-victimization by the hands of the suspect, but also against renewed victimization as a result of their participation in the criminal procedure.¹²³ These protection measures should not violate (fundamental) rights of the defendant, but the EC Guidance Document warn the Member States to interpret this reference ‘strictly proportionate’. There will not be many situations in which defence rights can legitimately prevail over victims’ need for protection.¹²⁴

¹²¹ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (Official Journal L181, 29/06/2013, P. 4).

¹²² For more information and some critical notes on the EPO, see S. van der Aa & J. Ouwkerk, ‘The European Protection Order: No time to waste or a waste of time?’, *European Journal of Crime, Criminal Law and Criminal Justice* (19), 2011, 267-287.

¹²³ This is, for instance, the case, when the Article refers to ‘secondary victimization’ or protection of the ‘dignity of the victims during questioning and testifying’. More on secondary victimization in Chapter (...).

¹²⁴ EC Guidance Document, p. 40.

Article 18 does not specify the manner in which the Member States are supposed to provide for protection against all these kinds of dangers. In recital 52 of the Directive, interim injunctions and protection or restraining orders are mentioned as examples of said measures, and the EC Guidance Document clarifies that Article 18 requires a ‘holistic approach’ in relation to the range of protection measures needed, ensuring a ‘comprehensive protection’ of the victim. So the ambitions are high, but further guidance on how to attain these goals is not presented, at least not in Article 18.

Some of the measures are elaborated on in the articles 19-23. These are exclusively protective measures *connected to participation of the victim in the criminal procedure* and they are worked out in more detail below (see sections ...). That is not the case for protection orders. What is of interest here is the question of whether Article 18 introduces a legally binding obligation for the Member States to implement protection orders in their domestic legislation.¹²⁵

Protection orders are not mentioned in ensuing provisions so Article 18 and recital 52 are our only sources of information in this respect. However, from the text of recital 52 – ‘measures should be available (...) such as interim injunctions or protection or restraining orders’ – we cannot conclude with absolute certainty that the European legislator intended to force Member States to introduce protection orders in their legal systems: they are only mentioned as examples. The EC Guidance Document, furthermore only *invites* Member States to make criminal, administrative or civil protection measures available to victims.¹²⁶

It is possible that protection orders are only mentioned as an example and that Member States are allowed to choose alternative protection measures instead. If, for instance, a Member State would decide to remand all suspects to preventive custody with an eye on the protection of victims, this particular Member State would act in compliance with Article 18. Instead of introducing protection orders, this Member State has opted for an alternative measure that prevents the suspect from harming the victim again (incapacitation through detention). The problem is, of course, that no Member State would ever choose such a draconian alternative, which, if applied indiscriminately to all suspects, would seriously violate the rights of the defence. If possible, Member States prefer to let suspects await their trial in freedom and Member States are even obliged to do so under international human rights law. In this situation, the only alternative is the adoption of protection orders: the suspect is released before the trial, but only on the condition that he abides by certain behavioural rules. Given the lack of alternative measures to protect the victim, it is safe to conclude that Article 18 indeed prescribes the implementation of protection orders.¹²⁷

¹²⁵ More on protection orders in section (...) below.

¹²⁶ EC Guidance Document, p. 40.

¹²⁷ This assumption only gains strength when we look at pages 40-41 of the EC Guidance Report. There it says that ‘physical protection from intimidation and retaliation includes measures to improve the victim’s feelings of safety and security at police and court premises, *at the victim’s residence and in public* [emphasis added].

A second question relates to the phase of the criminal procedure during which these protection orders need to be available. Should protection measures only be available in the pre-trial or the post-trial stage as well? Given the fact that the Directive as such is limited to the *criminal proceedings* – which end with the final decision – this would mean that post-trial protection orders are not covered. In other words, Member States that have no post-trial protection measures available are not obliged to introduce any. This may not be true for Member States that have thus far managed without protection measures in the *pre-trial* phase. Although the obligation remains implicit, Article 18 does suggest that pre-trial protection orders should be implemented.¹²⁸

2. Right to avoid contact between victim and offender (Article 19 of the EU Directive 29/2012)

1. *Member States shall establish the necessary conditions to enable avoidance of contact between victims and their family members, where necessary, and the offender within premises where criminal proceedings are conducted, unless the criminal proceedings require such contact.*
2. *Member States shall ensure that new court premises have separate waiting areas for victims.*

Having (visual) contact with the offender and his family and friends is often one of the aspects that victims fear most about going to court. The mere idea causes victims distress and many of them appreciate measures that try to prevent any such confrontation. Article 19(1) provides for such measures, not only in court premises, but in ‘premises where criminal proceedings are conducted’, meaning police stations and prosecutor’s offices as well.¹²⁹ Examples of practical measures that can be implemented are: creating separate entrances or waiting areas for victims, limiting the number of people present when the victim has to make a sensitive statement, avoiding the victim having to walk in front of the accused to the witness stand, and a careful planning of appointments of victims and offenders (e.g., summoning them to hearings at different times).¹³⁰ Next to these examples, Member States are encouraged to take ‘as wide a range of measures as possible’ to prevent visual contact between victim and offender.¹³¹

These measures, however, need to be ‘feasible and practical’ as a minimum standard, leaving the Member States a margin of appreciation.¹³² Measures that are disproportionately

¹²⁸ Another interesting point is the fact that, although Article 18 does not harmonise the types of protection orders that should be available, the EC Guidance Document recommends Member States to look to the EPO Directive and the EPO Civil Regulation for guidance as to what should be deemed a minimum (p. 40). The irony here is, of course, that both instruments have no harmonizing goals either, prescribing merely mutual recognition as the means to overcome difficulties in cross-border cases (see section 2 above).

¹²⁹ EC Guidance Document, p. 40.

¹³⁰ See recital 53 Directive and EC Guidance Document, p. 41.

¹³¹ See recital 53 Directive. Other examples are the use of audio-visual evidence or of placing screens between the victim and the offender.

¹³² Recital 53 Directive.

expensive or impractical need not be implemented. The Directive does require new courts that will be built after 16 November 2015 to take all these needs into account and to at least provide for separate waiting areas (Article 19(2) Directive).

3. Right to protection of victims during criminal investigations (Article 20 of the EU Directive 29/2012)

Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

- (a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;*
- (b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;*
- (c) victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary;*
- (d) medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings.*

Article 20 embodies the goal to make interactions with criminal justice authorities ‘as easy as possible whilst limiting the number of unnecessary interactions the victim has with them’.¹³³ In contrast to the FD, this right applies to *all* victims, not just vulnerable ones. By interviewing victims without unjustified delay and by limiting the number of interviews and medical examinations victims are unburdened to the greatest extent possible:¹³⁴ the fewer the interactions with the criminal justice system, and the fewer the bureaucratic burdens for the victims, the smaller the chances of the victim suffering from *secondary victimization*.

One of the ways in which the number of interactions can be limited is by allowing video recordings of the interviews or written statements of the victim to be used in court.¹³⁵ While this is common practice in some Member States, others prefer the actual physical presence of the victim in court. The EU legislator did not mean to impose measures that would go against ‘the rules of judicial discretion’, so Member States are still allowed to maintain their national practices in this respect.

An added bonus of interviewing victims as soon as possible is that the quality of the evidence improves. The information provided by the victim will be more reliable than when there is a lapse of time between the criminal event and the interview. Due to loss of recall, the victim may not remember the event in as much detail as he would have had the interview been conducted more urgently.

The same is true for Article 20(c) Directive which allows victims to be accompanied by two persons: their legal representative and another trusted person. Apparently, countries that

¹³³ Recital 53 Directive.

¹³⁴ A ‘justified delay’ could for instance be when the authorities have to arrange for a translator in case the victim does not speak the native language.

¹³⁵ Recital 53 Directive.

have already implemented such a rule report that this too is beneficial for the quality of the evidence.¹³⁶ The right to have a person present for moral support during interviews or in court is a forceful right, which can only be limited by a reasoned decision. If there is, for instance, a conflict of interests in the proceedings or if there are confidentiality concerns, the authorities may decide to prohibit *this particular person* from accompanying the victim, but the victim retains the right to choose another person instead.¹³⁷

4. Right to protection of privacy (Article 21 of the EU Directive 29/2012)

1. Member States shall ensure that competent authorities may take during the criminal proceedings appropriate measures to protect the privacy, including personal characteristics of the victim taken into account in the individual assessment provided for under Article 22, and images of victims and of their family members. Furthermore, Member States shall ensure that competent authorities may take all lawful measures to prevent public dissemination of any information that could lead to the identification of a child victim.

2. In order to protect the privacy, personal integrity and personal data of victims, Member States shall, with respect for freedom of expression and information and freedom and pluralism of the media, encourage the media to take self-regulatory measures.

Not only the offender and criminal justice authorities can cause secondary victimization. Another source of distress for victims can be the way in which the media portrays them. A negative media reaction may contribute to the psychological complaints of victims. Especially victims in high-profile cases, that attract a lot of media attention, are in need of protection from publicity in the media.

There are various ways in which the privacy of the victim and his relatives can be protected from the press. The Victims in Europe study (2009) identified three:¹³⁸

- 1) Allow for hearings *in camera*
- 2) Restrict the disclosure of information relating to the victim
- 3) Restrict press coverage of cases

Ad 1) Although the criminal trial is in principle open to public, exceptions to this rule are possible for the protection of the privacy of the parties involved in the criminal trial. When there is a risk of humiliation or stigmatization to the victim, the criminal proceedings can be held behind closed doors, without the public or the media being present. Usually it is left to the discretionary powers of the courts to decide upon a hearing in camera, but Member States could consider opening up the possibility for victims to request such a hearing or to make it obligatory for (certain) victims and/or crimes. Due to their particular vulnerability, child victims would specially benefit from such an obligation.

¹³⁶ EC Guidance Documents, p. 42.

¹³⁷ EC Guidance Document, p. 42.

¹³⁸ VinE (2009) pages 90-95.

Ad 2) The disclosure of information relating to the victim can be restricted through: 1) the pre-trial principle of secrecy, 2) a prohibition to reveal the identity of victims in open court, and 3) a prohibition to reveal the identity of the victim to the press.¹³⁹ Some of the measures recommended by the EC Guidance Document also fall under this category.¹⁴⁰

The Directive indicates that there may be circumstances where the child victim could profit from disclosure of information, e.g., in the case of abduction, but these circumstances are exceptional (Recital 54). The rule should be to limit the disclosure of the identity and whereabouts of the victims.

Ad 3) Restrictions on press coverage can first of all be achieved through self-regulatory measure by the media. This is the method that the EU Victim Directive promotes. Other, more intrusive, possibilities are court-imposed restrictions in individual cases or general restrictions through legislation.¹⁴¹ In these matters, a balance needs to be struck between the right to privacy of the victims and their families and the right to freedom of expression and freedom of the media (article 10 ECHR). When one wants to restrict press coverage, one needs to tread on egg-shells and it is for this reason that the European Commission prescribes a ‘cautious approach’ and recommends organizing dialogues with the media first.¹⁴² In addition, it recommends Member States to consider allowing court-imposed restrictions on media reports relating to activities in the court room.¹⁴³

5. Individual assessment of victims to identify specific protection needs (Article 22 of the EU Directive 29/2012)

1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimization, to intimidation and to retaliation.

Article 22 is a new obligation, which was not present in the 2001 Framework Decision. For the first time, the judicial authorities need to assess on a case-by-case basis, the vulnerabilities and needs of each individual victim. For most Member States, this means introducing a new measure in their legal orders. Member States are expected to implement national models (including written guidelines, protocols) to this end.

¹³⁹ VinE (2009), p. 92. With regard to the latter, the VinE study remarks that it is a weaker safeguard for the protection of the victim’s privacy keeping the victim’s identity secret in open court. If the victim’s identity is revealed in open court it will still become known to all the people who attend the trial, thereby increasing the risk of media exposure.

¹⁴⁰ For instance, when it advises Member States to consider ‘proportionate disclosure regulations’; to provide the accused only information about the victim and his personal circumstances that is relevant for the case; to keep detailed descriptions and images of sexual abuse out of the possession of the accused; and to explore how professionals in close contact with the victim, the crime scene or the case file could be guided in their contacts with the media (EC Guidance Document, p. 43).

¹⁴¹ VinE (2009), p. 94.

¹⁴² EC Guidance Document, p. 43.

¹⁴³ EC Guidance Document, p. 43.

The main idea of the individual assessment is to ‘determine whether a victim is particularly vulnerable to secondary and repeat victimization, to intimidation and to retaliation’. This is the first step of the assessment. After the vulnerability of the victim and his specific protection needs are established, the second step is to determine if special protection measures should be applied and what these measures should be.¹⁴⁴ The individual assessment needs to be carried out at the earliest opportunity possible¹⁴⁵ and the Member States are free to decide which authority is best suited to conduct the individual assessments.¹⁴⁶

2. The individual assessment shall, in particular, take into account:

- (a) the personal characteristics of the victim;*
- (b) the type or nature of the crime; and*
- (c) the circumstances of the crime*

3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organized crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.

Another achievement of the 2012 Directive is that it finally sheds some light on the concept of ‘vulnerable victims’. One of the main points of criticism against the 2001 Framework Decision was that it did not provide criteria by which Member States could decide which victim was particularly vulnerable.¹⁴⁷ The Directive has corrected this omission by providing three factors that can help determine the vulnerability of the individual victim: the personal characteristics of the victim; the type or nature of the crime; and the circumstances of the crime (Art 22(2) Directive).

Relevant personal characteristics are, for instance, the victim’s age, gender (including gender identity and expression), ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience of crime.¹⁴⁸ The second criterion (‘type and nature of the crime’) refers to crimes which caused considerable harm to the victim due to their

¹⁴⁴ EC Guidance Document, p. 44.

¹⁴⁵ Recital 55 Directive.

¹⁴⁶ EC Guidance Document, p. 45. They could, for instance, appoint this task to the police, but victim support services are also possible. Member States can even opt to have different authorities responsible during different stages of the procedure.

¹⁴⁷ See, for instance, VinE (2009), p. 38.

¹⁴⁸ See Recital 56 Directive.

severity. Crimes with a discriminatory motive, interpersonal violence, terrorism, organized crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime typically involve victims with specific protection needs as well. ‘The circumstances of the crime’, finally, relate to factors such as whether the victim lives in a high crime or gang dominated area, whether the victim originates from another country than where the crime was committed, or whether the offender was in a position of control.¹⁴⁹

Having one or more of these factors present does not mean that the victim in a particular case is automatically vulnerable, but this possibility should be ‘duly considered’. With regard to the victims that are singled out in paragraph 22(3) Directive, there is a ‘strong presumption that those victims will benefit from special protection measures’.¹⁵⁰

4. For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimization, to intimidation and retaliation. To determine whether and to what extent they would benefit from special measures as provided for under Articles 23 and 24, child victims shall be subjected to an individual assessment as provided for in paragraph 1 of this Article.

With child victims, there is no need for the first step of the assessment: they are automatically presumed to have specific protection needs. The only thing the judicial authorities need to assess is *which* specific protection measures need to be put in place for each particular child.

5. The extent of the individual assessment may be adapted according to the severity of the crime and the degree of apparent harm suffered by the victim.

Article 22 Directive imposes a far-reaching and possibly costly measure, since it involves an individual assessment of *all victims* that come to the attention of the police. But the majority of the victims will not have specific protection needs (think of a simple theft or assault). Based on the severity of the crime and the degree of apparent harm suffered by the victim, the Member States are allowed to introduce a simpler assessment for these cases, while reserving the full-fledged assessment for more serious crimes. In the former case, a simple conversation with the victim could, for instance, suffice, whereas in the latter case, a more formalized procedure including standardized assessment instruments could be appropriate.

6. Individual assessments shall be carried out with the close involvement of the victim and shall take into account their wishes including where they do not wish to benefit from special measures as provided for in Articles 23 and 24.

¹⁴⁹ See Recital 56 Directive.

¹⁵⁰ Recital 57 Directive.

As with the right to information, the victim has the right to opt-out. Victims who, despite their possible vulnerability, prefer not to use the special measures listed below are free to do so. The victim's wishes in this regard need to be respected, unless they would be contrary to the good administration of justice.¹⁵¹

7. If the elements that form the basis of the individual assessment have changed significantly, Member States shall ensure that it is updated throughout the criminal proceedings.

From the moment a case is reported to the police until the final judgment, months or even years may have passed. During that time, there may be new developments in the personal life of the victim affecting his or her vulnerability and protection needs. Paragraph 7 makes sure that Member States keep the individual assessment updated throughout the proceedings. In their national guidelines, Member States need to establish the regularity with which the individual assessments are updated.¹⁵²

6. Right to protection of victims with specific protection needs during criminal proceedings (Article 23 of the EU Directive 29/2012)

1. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22(1), may benefit from the measures provided for in paragraphs 2 and 3 of this Article. A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

(a) interviews with the victim being carried out in premises designed or adapted for that purpose;

(b) interviews with the victim being carried out by or through professionals trained for that purpose; EN 14.11.2012 Official Journal of the European Union L 315/71

(c) all interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;

(d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of

¹⁵¹ EC Guidance Document, p. 45. The good administration of justice could, for instance, require that the interviews are by necessity conducted by specially trained investigators.

¹⁵² EC Guidance Document, p. 46.

the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

(a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;

(b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;

(c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and

(d) measures allowing a hearing to take place without the presence of the public.

After the individual assessment has identified the vulnerability of particular victims (step 1), it is time to assess which protective measures from Article 23 they need (step 2). Whether all the rights enumerated in Article 23 are necessary, or whether the victim should only benefit from a selection of these rights, will be established during that same assessment. The measures in paragraph 2 relate to the *investigation* stage, while the measures in paragraph 3 relate to the *court* stage. These measures are applicable to adult and child victims alike (in contrast to the measures provided for in Article 24, which only apply to child victims).

For some Member States this means a significant adjustment to their national (criminal justice) practices in order to comply with the rights provided for in Article 23 paragraphs 2 and 3. Court and interviewing rooms may need to be adapted and modernized and professionals working with vulnerable victims need to receive specialized training.

Victims can only benefit from these rights if they do not violate the rights of the defendant, the rules of judicial discretion, and the good administration of justice. A final condition that can limit victims' access to these special protection measures is when 'operational or practical constraints' make them impossible.¹⁵³ This latter condition does not mean that Member States are allowed to deny victim's special measures with a general reference to time and money constraints. The situations that the European legislator had in mind here are *exceptional* circumstances in the *individual* case that are of a *temporary* nature and that are *beyond the control* of the authorities (*force majeure*). Think, for instance, of a police officer who is on maternity leave, a strike, a riot or a natural disaster.¹⁵⁴

7. Right to protection of child victims during criminal proceedings (Article 24 of the EU Directive 29/2012)

Member States shall ensure that where the victim is a child:

¹⁵³ Recital 59 Directive.

¹⁵⁴ EC Guidance Document, p. 47.

- (a) in criminal investigations, all interviews with the child victim may be audio visually recorded and such recorded interviews may be used as evidence in criminal proceedings;*
- (b) in criminal investigations and proceedings, in accordance with the role of victims in the relevant criminal justice system, competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from the family;*
- (c) where the child victim has the right to a lawyer, he or she has the right to legal advice and representation, in his or her own name, in proceedings where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility.*

The procedural rules for the audio-visual recordings referred to in point (a) of the first subparagraph and the use thereof shall be determined by national law.

2. Where the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of this Directive, be presumed to be a child.

The rights provided for in Article 23 are only imperatively prescribed in the case of child victims. Of course, Member States are free to introduce them for adult victims as well, but the fact that the young age of the victim is related to an elevated risk of secondary victimization makes special treatment for them a necessity. The EC Guidance Document stipulates that ‘the best interests and needs of the child victim are a primary consideration’. The EC Guidance Document hypothesizes that all Member States already have the necessary structures in place to comply with the measures provided for in Article 23, since these were also included in the Human Trafficking and Child Sexual Exploitation Directives.¹⁵⁵ The only factor that may need adaptation is the scale of these measures in order to cater all child victims. Still, some Member States may have to adapt their procedures and practices or modernize their police, prosecutor and court facilities in order to apply the listed measures.¹⁵⁶

An example of a situation in which there could be a conflict between the holders of parental responsibility and the child is when the parents or guardians are suspected of having committed a crime against the child. In this situation, a special representative and a legal representative should be appointed to the child victim. Whether the same is true, when the conflict of interest is more indirect – think of the situation in which the sibling of the child victim is accused of the crime – is not clear.

Paragraph 24(2) Directive, finally, clarifies that when the age of the victim is unclear, a young victim is given the benefit of the doubt. Some victims may, for example, not have identity papers or birth certificates. If there is reason to believe the victim is below the age of 18 years, the victim will be allowed to benefit from the rights in Article 23.

¹⁵⁵ EC Guidance Document, p. 47.

¹⁵⁶ EC Guidance Document, p. 48. For instance, by setting up a functioning video-conferencing system.

Implementation of Articles 18-23 in the EU Member States

When it comes to the implementation of the Articles 18-23, the transposal in the European Member States appears rather unsatisfactory. Not a single Member State can claim to be fully compliant with the four kinds of protection identified in the first section (against contact with the offender, against secondary victimization, against violations of privacy; specific protection needs for vulnerable victims).

In some Member States, for instance, the measures that aim to protect the victim against confrontations with the offender in court are exclusively reserved for victims that fall within a witness protection program. In other Member States there are no options to prevent (visual) contact with the offender whatsoever, or this possibility is underdeveloped. Especially the lack of separate waiting areas in court premises is flagged as a problem.¹⁵⁷

The right to be protected against secondary victimization is also underdeveloped in many Member States, with legal experts criticizing the frequent delays in the processing time of cases, the practice of cross-examination, and the fact that victims are not allowed to be accompanied by a trusted person.

In comparison, the right to be protected against violations of privacy is more positively evaluated.¹⁵⁸ In many Member States the media have imposed self-regulatory standards, and hearings in camera are also widely available (for some victims at least). One problem is that self-imposed measures do not always restrain the press and when the rules are violated there is a lack of an efficient enforcement mechanism.

Specific protection needs do exist in many Member States, but they are mostly reserved for a limited group of victims only (typically child victims, mentally disabled victims, victims of domestic violence or victims of sexual violence) and do not cover the entire spectrum of victims that the Directive aims for. An individual assessment, especially one that is as comprehensive as the one described in the Directive, is lacking altogether. In general, child victims receive most protection, but even in this regard there is plenty of room for improvement (e.g., the Member States do not automatically apply the favourable rules for child victims in case there is uncertainty relating to the age of the victim).¹⁵⁹

Conclusion

For many victims protection is a primary concern, even more important than the punishment of the offender. It is therefore a positive development that lately there has been an increased attention to victim protection, not only against the offender, but also against secondary victimization in the course of criminal proceedings and against violations

¹⁵⁷ See report Victims Protection (2014), p. 128. Technically speaking, however, only in constructing new courts are the Member States obliged to include separate waiting areas in the design.

¹⁵⁸ Victim Protection (2014), p. 129.

¹⁵⁹ Victim Protection (2014), p. 130.

of the victims' private life. Additional measures have furthermore been introduced to protect victims with special protection needs.

In the area of victim protection against the offender, the most notable change has been the introduction of the European Protection Order and the Regulation on recognition of protection measures in civil matters. Unfortunately, the EPO is based on a special form of mutual recognition, not harmonization. As a result, the Member States are not obliged to adapt their national protection order legislation and the protective gaps that were identified in paragraph 2 will not be remedied as a result of the EPO.

Within criminal proceedings, much progress has been made with the formulation of the articles 18-24 of the EU Victim Directive. Not only in the area of protection against the offender, but also in the other three areas of protection (secondary victimization, privacy, vulnerable victims). Some of the obligations, such as the individual victim assessment, are very ambitious, introducing entirely new features in the national jurisdictions. As appears from the implementation studies, the Member States still have a long way to go before they can claim to have fully transposed the protective obligations deriving from the EU Victim Directive.

IV. VULNERABLE VICTIMS

1. WOMEN AS VULNERABLE VICTIMS (*Suzan Van der Aa*)

Introduction

'Women and children first' is a famous saying often expressed in emergency situations. It appeals to the moral standards of adult males to forsake their own interests for the benefit of female and underage persons, who are generally considered as weaker, more vulnerable, and therefore deserving of privileged treatment. When a boat is on the verge of sinking, when a house is on fire, it is men who are expected to voluntarily and selflessly offer their seats in the lifeboats, to assist women in abandoning the burning premises before saving their own lives, in order to preserve the lives of 'the fairer sex'. These moral standards not only apply to emergency situations. Lately, they have also pervaded the field of victimhood, with more and more scholars, legislators and politicians propagating a so-called 'gender-sensitive' approach to victimization. The underlying rationale is that females who fall victim to certain types of crimes are considered to be more vulnerable than their male counterparts, therefore deserving special consideration that takes their vulnerabilities into account and tries to neutralize their disadvantaged position.

In this chapter, we will explore how the attention for violence against women has increased over the past few decades, how 'violence against women' is defined, and how violence against women has been constructed to qualify as a human rights violation. We will also discuss whether the gender-sensitive approach is justified or whether it constitutes a form of unjustified discrimination against male victims. However, before we get to those normative assessments, we will first briefly introduce the phenomenon of violence against women (hereafter: VAW). What does it entail, what is the extent and nature of VAW, what causes can be discerned, and what are the consequences of this type of violence?

Definition 'violence against women'

Typical examples of VAW are sexual violence, sexual harassment, stalking, domestic violence, forced marriages, female genital mutilation, and human trafficking. The problem is that men can fall victim to typical 'feminine' crimes as well, so how to distinguish the crimes that fall within this special field of victimhood? The definition proposed in several international legal instruments follows a two-tier approach: not only crimes that are inspired by misogynist motives, but also crimes that for some reason have a more serious impact on women victims classify as forms of VAW. Both the CEDAW Convention as the Council of Europe Convention on Violence against Women and Domestic Violence define the concept as:

'Violence that is directed against a woman because she is a woman or that affects women disproportionately.'

The disproportionate impact can be established through prevalence numbers (crimes which are predominantly perpetrated against women) or that carry more severe consequences for female victims once they are perpetrated.

Usually, the classification of crimes as violence against women is accompanied by a gendered analysis of the phenomenon: they are forms of violence against women *perpetrated by men*. Sex inequality and traditional attitudes – women are subordinate to men – lead to the acceptance and tolerance of violence against women. As such they are expressions of discrimination against women and need to be eradicated for this reason (as well). However, as will be discussed later on, the classification of certain types of violence as forms of violence against women is sometimes problematic.

Extent and nature of violence against women

Victimization surveys have shown that violence against women is a pervasive problem, affecting large proportions of the general population. Since the 1970s many countries have conducted large-scale victimization surveys with the specific aim of measuring the extent and nature of violence against women in their countries and the results are invariably high.

The problem with these national victimization surveys is that they do not allow for comparisons *between* countries. Due to differences in the research design, a different sampling method, and varying definitions of the concept VAW, the results are limited to the situation of one country only. The solution for this restricted cross-country comparability of research findings was to conduct multi-country surveys, in which one and the same interview protocol was used in different countries, using comparable sampling methods. The most recent and largest example of such a cross-country VAW survey was the one conducted by FRA in 2014.¹⁶⁰

This study, which involved more than 42.000 female respondents in 28 EU Member States, confirms that VAW is a widespread problem, affecting substantial proportions of the women in the countries studied. Although the numbers on a national level differentiate substantially the aggregated percentages across Europe are shockingly high: more than 31% of respondents indicated they had experienced physical violence since the age of 15; 18% had suffered from stalking; and 11% from sexual violence (of which 5% rape).

Causes of intimate partner violence

As shown by the FRA study, one of the most prevalent types of VAW is intimate partner violence (hereafter: IPV): violence perpetrated by a former or current partner of the female victim. Some prevalence studies have gone beyond a description of the phenomenon of the problem and have tried to investigate what possible causes could lie at the heart of IPV. With the disclaimer that it is very difficult to establish a one-on-one connection between certain risk factors and violence – and that it is often a combination of factors which brings about the violence – the following risk factors have been identified as contributive to the phenomenon of IPV:

¹⁶⁰ See, Fundamental Rights Agency, *Violence against Women: An EU-wide survey: Main results*, Luxembourg: Publications Office of the European Union 2014.

- Controlling and emotionally abusive behaviours of the (ex) partner. If a man, for instance, prohibits his wife to go outside the family home, if he isolates her from family and friends and if he exhibits (extremely) jealous behaviour, these could all be precursors of violence.
- Alcohol abuse. Some studies have found a link between being intoxicated and violence. Alcohol diminishes the self-control and exacerbates feelings of anger.
- Violent behaviour outside the home. If a person displays violent behaviour outside the home, and, for instance, engages in fights with strangers, acquaintances or family members, there is a risk that intimate partners will one day be attacked as well.
- Early childhood experiences of IPV. If the offender or the victim have witnessed or experienced IPV as a child, they have an increased risk of ending up in a violent relationship themselves when they are adults. The childhood experiences have ‘normalized’ the violence, setting the wrong example for the remainder of their lives.

Other risk factors, such as low socio-economic status, young age of the partners, traditional gender role ideology, and a culture that condones violence, may play a role in the violence as well, although their connection to IPV is less well-established.

Victimization studies have also found evidence of the so-called ‘cyclical nature’ of abuse. It explains intimate partner violence with the help of four stages:

- 1) Tension-building phase. In the first stage, the victim can sense tension building up in the abusive partner. Some of the symptoms are verbal abuse, threats and hitting or breaking objects. Usually in this phase, victims walk on eggshells in order to avoid a violent outburst.
- 2) Explosion phase. There is an eruption of sexual, physical, and / or emotional abuse.
- 3) Honeymoon phase. The domestic violence incident leads to a turning point. The abuser feels remorse or guilt and may ask the victim for forgiveness. He may also promise the victim never to hurt her again, seek psychological counselling, etcetera.
- 4) Tension-building again.

The problem is that the violence escalates with each revolution of the cycle. In many cases, without an effective intervention, the violence is destined to get worse over time.

Theoretical explanations for VAW

Academics from different disciplines have tried to explain why violence against women exists. These theories can be subdivided in psychological theories, social-psychological theories and sociological theories.¹⁶¹ Examples of *psychological theories* – which focus on the psyche of individuals – are psycho-analytic theory and social learning theory. The first upholds that some women have particular personality traits that render them particularly vulnerable to abuse (e.g., dependent personality, low self-esteem, or masochism), while some offenders have traits that predisposes them to commit violent acts (e.g., anti-social

¹⁶¹ This is not an exhaustive account of all theories that have tried to explain the root causes of VAW. In this chapter we have only summarized some of the most important ones.

personality). Social learning theory says that violence is learned through experiencing physical abuse or through witnessing violence directed at others. Persons with such experiences learn to accept violence as normal.

Two examples that fall within the category of *social-psychological* theories – with a focus on the dynamics of the interaction between abuser, victim and environment – are individual interactionist theory and social ecological theory. The individual interactionist theory explains violence with the help of the dynamics within a relation. It is not only the abuser who contributes to the violence, but it may be the interaction between the two persons involved that creates tension and increases the risk for abuse. This is, for instance, the case when the abuse happens in reaction to a victim who continually exposes the powerlessness of the abuser. Social ecology theory, on the other hand, points the finger at the direct environment in which the abusive couple functions. Stressors such as social stress, poverty, population mobility and isolation from support systems is more important than individual pathology.

Social cultural theory and feminist theory, finally, are two *sociological* theories that focus on more general social and political conditions as reasons for abuse rather than the individual psyche or the direct environment. According to social cultural theory there are some cultural beliefs, norms and traditions that perpetuate the phenomenon of VAW. A patriarchal society, a dowry system, and women's economic dependence on the male breadwinner could all be explanatory factors. The feminist theory views society as a patriarchal one, where women are subordinate to men. Abuse is seen as an example of institutionalized male power and a means to exercise control over women. In order to diminish VAW, feminist theorists propagate gender-equality.

Consequences of VAW

The increased attention for violence against women has also lead to a better understanding of the consequences that these types of crimes can have on the direct victims, but also on society at large. For the direct victims, physical injury, chronic pain, migraines, depression and even Post-Traumatic Stress Disorder can be the result of experiences of VAW. In addition to the impact on the victim's (mental) health, they may also suffer from anxiety, substance abuse and unemployment.

Next to the individual costs, there are also societal costs, such as the loss of an individual's contribution to society, the costs of providing services to victims, and the burden victims place on public resources, such as the criminal justice system, healthcare agencies, and so forth. Nowadays, VAW is considered a major public health issue, deserving every effort to try to combat these forms of violence.

VAW and the criminal justice system

Historically, certain forms of VAW were seen as a private problem. With the exception of sexual violence perpetrated by a stranger, most forms of VAW did not attract public (law) attention, because that was seen as a violation of the privacy and autonomy of the persons

concerned. Only after extensive lobbying by the women's rights movements, NGO's and victims' advocates this attitude slowly started to change. Recently, governments are increasingly recognizing systemic forms of VAW as an important problem that deserves public attention, that is worthy of criminal prosecution even. In various countries dedicated VAW legislation has been introduced and these initiatives are only expected to increase in the future.¹⁶² The ever increasing popularity of the emergency barring order in situations of domestic violence is but one example of this development (see chapter ...).

Despite the growing acceptance of VAW as a public concern, there are still many problems when it comes to the actual prosecution of VAW. Two pervasive problems are the low reporting-rates with the police and – once reported – the high attrition rates for these crimes of violence. The fact that between 10% and 30% of physical or sexual partner violence is reported the police, makes VAW a severely underreported crime.¹⁶³ This means that in two thirds of the cases, the (most serious incident of) partner violence does not come to the attention of the authorities or other service organization. As a result, the authorities remain unaware of the large majority of violent incidents (*dark number*).

Reasons for not reporting the crime are: cultural and social pressure not to disclose the violence; lack of financial resources to live independently; intimidation by the abuser or fear of retaliation; self-blame, shame and embarrassment; wanting to protect the offender; and negative expectations of the police: victims fear that the police will not think the incident serious enough, that they will be disbelieved, that they will be blamed for the violence, or they fear that the police will not be able to effectively intervene.¹⁶⁴

So reporting the crime can already be a high threshold for victims of VAW. But once the crime is reported, another problem arises: the high attrition rates. Along the criminal justice trajectory of filing a report, starting an investigation, deciding to prosecute, and convicting the offender, many criminal cases 'drop out'. The percentage of cases that end in a conviction is much lower than the percentage of cases that were initially reported to the police. Due to a lack of evidence, diminished mental capacities of the offender, or

¹⁶² In 16 of the 28 European Member States, for instance, special anti-VAW laws have been adopted. The Member States that have introduced dedicated legislation on VAW are: Austria ('Domestic Violence Act', 1997); Luxemburg ('Law on Domestic Violence', 2013); Greece ('Law on Confronting Family Violence', 2006); Slovenia ('Family Violence Prevention Act', 2008); Bulgaria ('Law on Protection against Domestic Violence', 2005); Hungary ('Act on restraining applicable in case of violence among relatives', 2009); Spain (Organic Act on the protection order for victims of domestic violence', 2003; and 'Organic Act Comprehensive Protection Measures against Gender Violence', 2004); Ireland (Domestic Violence Act', 1996); Lithuania ('Law on Protection against Domestic Violence', 2011); Poland ('Act on the suppression of domestic violence', 2005); Belgium ('Law concerning the short term barring order in case of domestic violence', 2013); Germany ('Protection against violence Act', 2001); Portugal ('Law for the prevention of domestic violence and protection and assistance to its victims', 2008); Romania ('Law regarding the prevention and combating violence in the family', 2012); The Netherlands ('Short Term Barring Order Act', 2009); and the Czech Republic ('Act on Protection against Domestic Violence', 2006).

¹⁶³ See FRA Violence against Women survey, 2014, p. 60 (They were inquiring after the most serious incident of sexual and/or physical violence the respondents had experienced since the age of 15).

¹⁶⁴ See, for instance, K. Wittebrood, *Slachtoffers van criminaliteit. Feiten en achtergronden*, Den Haag: Sociaal Cultureel Planbureau 2006, p. 102-103.

prosecutorial discretion many reported cases are dropped before the trial stage or they end in an acquittal. In the course of the criminal procedure, the attrition rates only increase. This is nothing special – it happens with other crimes as well – but the attrition rates for crimes of VAW are significantly higher, especially in the case of sexual violence and rape.¹⁶⁵

VAW as a human rights violation

The most recent debate is whether VAW can be seen as a human rights violation. The status of a human rights violation is important, because if there is a link between VAW and human rights, the states have the obligation to *prosecute* offenders with due diligence, *protect* and assist victims and *prevent* violence (the three Ps).¹⁶⁶

Looking at the plethora of international instruments and statements that deal with VAW and DV it seems as if international bodies have indeed identified VAW as a global human rights concern. However, whether there is a legally *binding* international rule regarding VAW and DV, is less clear.

The UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), for instance, which was adopted by the UN General Assembly in 1979 and aims to eradicate discrimination against women, contains no specific provisions on VAW. So although there is a clear legal norm prohibiting *discrimination* against women, the same may not be true for *violence* against women. Realizing this omission, the CEDAW Committee adopted General Recommendation 19 in 1992 to incorporate VAW into the Convention's framework. It states that the definition of discrimination includes gender-based violence and that signatory states are required to protect women from violence, also by private persons. If states fail to act with due diligence in this regard, they may be obliged to provide compensation to the victim. Despite this explicit acknowledgement of VAW as a form of discrimination, General Recommendation 19 does not impose a *binding* obligation on states. The fact that it does not amend the CEDAW Convention, and that it is only a Recommendation, makes it a soft law instrument. Furthermore, General Recommendation 19 only iterates that states 'may be obliged to provide compensation', it does not express a clear obligation to pay compensation.

The 1994 Declaration on the Elimination of Violence against Women (DEVAW) also firmly expresses that VAW impedes gender equality and that states need to take positive measures to eliminate all forms of VAW, but DEVAW's authority is rather limited as well

¹⁶⁵ See, for instance, K. Daly & B. Bouhours, 'Rape and attrition in the legal process: A comparative analysis of five countries', *Crime & Justice* (39) 2010, pp. 565-650; ; L. Maddox, D. Lee & C. Barker, 'Police empathy and victim PTSD as potential factors in rape case attrition', *Journal of Police and Criminal Psychology* 2010 (DOI 10.1007/s11896-010-9075-6).

¹⁶⁶ See, for instance, L. Kelly, C. Hagemann-White, T. Meysen & R. Römkens, *Realising Rights. Case studies on state responses to violence against women and children in Europe*, UK: Child and Women Abuse Studies Unit, 2011, p. 24; and *Feasibility study to assess the possibilities, opportunities and needs to standardize national legislation on violence against women, violence against children, and sexual orientation violence*, Luxembourg: Publications Office of the European Union, 2010, p. 26.

(only a 'declaration'). This leads us to conclude that, based on international legal instruments on VAW, there is no binding principle of international law prohibiting VAW.

The other three sources of international law – customary international law, general principles of law, and legal jurisprudence – are of no real avail either. In state practice, for instance, there is no evidence of an internationally binding rule either, because at the moment many states still fail to prioritize and combat VAW.¹⁶⁷ And although the European Court of Human Rights determined in the *Opuz*-case, that sometimes the failure of a state to protect a victim against domestic violence can amount to a human rights violation, this cannot be seen as an automatic trigger of horizontal working of human rights or a positive obligation for states in relation to all forms of VAW.¹⁶⁸

As challenges for the implementation of international standards for the safety of victims of VAW the UN Secretary-General identified:¹⁶⁹

- The lack of political will
- Structural imbalances of power (e.g., economic inequalities)
- Cultural and religious fundamentalism
- Controversies over strategies
- Inadequate and uneven data

This state-of-play has led some scholars to believe that, until recently, there was no clear norm under international law, but that there was a norm 'under construction' which prohibits VAW as a human rights violation and imposes a duty on states to protect that right.¹⁷⁰ Until recently, the state responsibility in this respect was unclear. This all changed with the coming into force of the Istanbul Convention on Violence against Women and Domestic Violence¹⁷¹ (see next section).

VAW and the Istanbul Convention

The Istanbul Convention is the first legally binding instrument on the European level with a holistic legal approach to prevent VAW and DV, to protect its victims and punish offenders. It opened for signature on 11 May 2011 and, with the ratification of Malta, entered into force on 1 August 2014. The Istanbul Convention As such it can be appreciated as a very good and laudable development, but there may be some difficulties with the Istanbul Convention nevertheless.

The holistic approach, for instance, will bring along *expensive obligations*. The proper implementation of, for instance, the obligation to finance awareness-raising campaigns (art.13(1) Istanbul Convention); to incorporate measures to promote changes in social and cultural patterns of behaviour of women and men with a view to eradicating prejudices (art.

¹⁶⁷ The 2010 Feasibility study (*op cit.*) also concludes that on the level of the states much work remains to be done (e.g., no national plans of action, problems with protection orders, gaps in legal measures, poor implementation of existing laws in practice, no specialization in police officers, etcetera).

¹⁶⁸ See *Opuz v Turkey* (App No 33401/02) ECtHR (9 June 2009). The case revolved around very severe and systemic forms of domestic violence, resulting in the death of the victim's mother.

¹⁶⁹ Secretary-General, *In-depth study on all forms of violence against women*, 2006.

¹⁷⁰ See, for example, B. Meyersfeld, *Domestic violence and international law*, Oregon: Hart Publishing 2010.

¹⁷¹ Council of Europe Convention on Violence against Women and Domestic Violence, CM(2011)49 final.

12(1) Istanbul Convention); and the promotion of skills among children, parents, and educators on how to deal with information of a degrading content or sexual nature (art. 17(2) Istanbul Convention), can be quite costly. How realistic is it to expect ratifying states to implement all these changes in times of crisis?

Secondly, the Convention may bring along drastic amendments to the states' Criminal Codes. It requires states to criminalize forms of VAW, such as stalking, certain forms of sexual harassment, and psychological violence. Since none of the signatory states has made reservations for these types of behaviours they all need to criminalize them. Some lawyers might object that the principle of criminal law as an *ultimum remedium* (criminalization as a measure of last resort) is violated.

A third objection could be that the Convention promotes a form of discrimination of boys and men that is *unjustified*. Although the Convention recognizes that men can be victims of forms of domestic violence as well,¹⁷² it only *encourages* states to apply the Convention to male victims as well (art. 2(2) Istanbul Convention). States are free to implement gender-specific provisions, even in relation to the criminalization of certain types of violence,¹⁷³ and specialist support services and shelters are especially called for to help *female* victims (art 22(2) and 23 Istanbul Convention).

According to the Convention, special measures to prevent women victims are justified ('shall not be considered discrimination') (art. 4(4) Istanbul Convention), because:

*a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The fact that women experience gender-based violence, including DV, to a significantly larger extent than men can be considered an objective and reasonable justification to employ resources and take special measures for the benefit of women victims only.*¹⁷⁴

Whether the initiators of the Convention are right in their assessment that the privileged treatment of female victims is justified, remains to be seen. One could, for instance, question the proportionality of the measures and the necessity to distinguish between male and female victims, given that – once victimized – they all suffer from the same types of violence. One could also wonder whether alternative solutions – e.g., individual risk assessment or a distinction based on the nature of the relationship between victim and offender – would not lead to more equitable results.

Conclusion

In this chapter, we have discussed the nature, extent, causes and consequences of VAW. We have seen that VAW consists of highly detrimental crimes, affecting large parts of the general population. As such VAW poses a serious threat, not only to the individual victim,

¹⁷² Nota bene, the Convention only seems to acknowledge this when it comes to domestic violence; the other forms of VAW are not expressly linked to male victimization.

¹⁷³ See recital 153 of the explanatory report.

¹⁷⁴ See recital 55 of the explanatory report.

but also to society at large, and it rightfully deserves to be countered by all means possible, including public prosecution.

Over the past few decades, the women's rights movement has succeeded in taking VAW out of the private sphere and placing it high on the political agendas, culminating in the coming into force of the Council of Europe (Istanbul) Convention: the first international legally binding instrument on VAW and domestic violence.

Although the Istanbul Convention is a very laudable initiative, there may be a dark side to the lopsided attention for female victims as well. While the vulnerability of certain victims is self-evident – e.g., in the case of children or mentally disabled victims – the special status of female victims requires some more explanation and justification. After all, why would an adult woman with normal mental capacities be regarded as vulnerable and receive special treatment? How does this relate to the victimization of men?

2. CHILD VICTIMS (*Jorge Jimenez Martin*)

Introduction

In 1989, the United Nations Convention of the Rights of the Child paved the way for the promotion of a child-friendly justice¹⁷⁵. Nowadays, this is one of the most significant priorities of actions performed by the Council of Europe and the European Union according to the different documents and legal instruments that have been analysed in this paper, especially the Directive 2012/92/EU¹⁷⁶.

These actions face several challenges: firstly, the common minimum standards to which the formalities of interviews to child victims and witnesses should be subjected and, secondly, the value of statements given by them in a pre-trial stage of criminal proceedings. We consider that the correct method to face up and to overcome these challenges consists of placing at the same level the rights of defendants and the fundamental rights of children to both dignity and physical and psychological integrity.

This analysis is useful to know what is meant by child victim and international regulation, going to the Council of Europe, the European Court of Human Rights and the Court of Justice of the European Union, in order to analyse the status of the child victim at European level is proposed. Later we will focus on the conceptual framework, the rights of the child victim, in his examination is how and procedural issues which may arise.

Concept of “victim child”

According to the international law, and with the directive 2012/29, “child” means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier (e.g. in certain countries majority is attained at sixteen years).

¹⁷⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

¹⁷⁶ Official Journal of the European Union, 14.11.2012, L 315

The position of the child in the process is marked by two situations indissolubly linked to the ages that are susceptible to cause serious injury: lack of capacity to act and the statement as a part-or victim-witness. In the criminal case has special significance to the second aspect, because of the risk of the child suffering, when explored or questioned, secondary victimization by having to relive the traumatic experience of having suffered or witnessed the commission of some crimes. The probabilities that of that potential risk materializing is very high because fundamental rights that have historically been important to the criminal procedure law were those of the accused, defendant or convicted person. Thus, the prohibition of helplessness and presumption of innocence are the basic parts of a system that has focused on the application of control as effective means available to the State for the prosecution and punishment of offences:

- a) As known, the prohibition helplessness implies that the defendant is given an opportunity to argue, plead and prove what suited to its interests.
- b) In turn, the presumption of innocence is a procedural guarantee referred to the defendant's guilt may be rebutted only when valid evidence has been practiced.

A fundamental right of the accused cannot successfully oppose the interests of the child, which is a general principle of law which should be interpreted in accordance with the rules and rectify loopholes legal presented those presented with. This principle is difficult to define and precision both internationally and nationally, but it is a law, a principle and a rule of procedure.

Article 3.1 of the Convention on the Rights of the Child¹⁷⁷ gives children the right to be considered and take account of their interests in all actions or decisions that affect them, both in public and in private. The "*best interests of the child*" is not a new concept. In fact, predates the Convention and was enshrined in the Declaration of the Rights of the Child, 1959 (para. 2)¹⁷⁸ and the Convention on the Elimination of All Forms of Discrimination against Women (arts. 5 b)¹⁷⁹ and 16, 1d)¹⁸⁰, as well as numerous regional and national legal standards and international instruments.

¹⁷⁷ Article 3.1: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*".

¹⁷⁸ Principle 2: "*The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration*".

¹⁷⁹ Article 5: "*States Parties shall take all appropriate measures: (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases*".

¹⁸⁰ Article 16.1: "*States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*".

Full implementation of the concept of best interests of the child requires adopting a rights-based approach, in which all participants collaborate in order to ensure the integrity physical, psychological, moral and spiritual integrity of the child and promote human dignity.

The Committee on the Rights of the Child, in its General Comment No. 14 (2013)¹⁸¹ on the right of children to have their best interests as a primary consideration, stresses that the interest of the child is a triple concept:

- a) *A substantive right*: the right of the child to their best interests as a primary consideration being evaluated and taken into account when weigh different interests to make a decision on a disputed question, and the guarantee of that this right will be implemented whenever it has to take a decision affecting a child, a group of specific or generic children or children in general. Article 3, paragraph 1, provides an intrinsic obligation for States, is directly applicable (direct applicability) and can be invoked before the courts.
- b) *A fundamental legal principle of interpretation*: if any provision legal more than one interpretation, the interpretation that more effectively meet the interests of the child shall be elected. The rights enshrined in the Convention and its Protocols provide the interpretive framework.
- c) *A procedural rule*: whenever you have to make a decision that affects a particular child at a particular group of children or children in general, the decision-making process must include an estimate of the potential impact (positive or negative) of the decision, the child or children interested. The evaluation and determination of the best interests of the child require procedural safeguards. Moreover, the justification of decisions should make clear that it has taken into account explicitly that right. In this respect, States parties should explain how has been respected this right in the decision, that is, as it was considered the best interests of the child, on what criteria the decision is based and how they were balanced the interests of children from other considerations, whether general policy issues or specific cases.

Directive 2012/29 states in art. 1.2 when of victims who are child, Member States shall ensure that in the implementation of Directive prevails interests of the child and such interest is subject to an individual assessment¹⁸².

Indicates that will prevail sensitive to minor status, taking into account the child's age approach, his maturity and his opinion, as well as their needs and concerns. In any case, the child and his legal representative, if any, will be informed of any action or law specifically focused on the child.

¹⁸¹ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html>

¹⁸² Directive 2012/29, article 1.2: "*Member States shall ensure that in the application of this Directive, where the victim is a child, the child's best interests shall be a primary consideration and shall be assessed on an individual basis. A child-sensitive approach, taking due account of the child's age, maturity, views, needs and concerns, shall prevail. The child and the holder of parental responsibility or other legal representative, if any, shall be informed of any measures or rights specifically focused on the child*".

However, the interest of the child cannot be classified as a fundamental right of the child. By contrast, are fundamental rights of child, as a human being, dignity and physical and mental integrity, and this irrefutable statement, it should be one of its consequences: those fundamental rights must be safeguarded at all stages of criminal proceedings.

The functions proper of this process functions not legitimize any organ, authority or parties involved in it to violate fundamental rights. In any case, could be limited if there is a prior legal authorization based on the principle of proportionality. That means that these fundamental rights of the child should be given the same value as the prohibition of defencelessness and presumption of innocence. And consequently, it will be from this recognition that the acts that the criminal process must be configured.

Regarding the concept of victim, it should be noted that such a concept has been adapted to the times without having come to a universally accepted definition, and other words like "victim of the crime", "offended" or "injured" are used which do not always have an equivalent meaning. In our field, it is only based on the concept that gives Directive 2012/29 Article 2.1, "victim" is the natural person who has suffered damage or injury, including physical or mental injury, emotional suffering or economic loss, directly caused by a criminal offence.

They could even be-if we look at the Directive- relatives of a person whose death was directly caused by a crime and who has suffered damage or injury as a result of the death of that person. Thus, the child victim may be the child who has suffered damage or injury directly, or whatever relative of a direct victim who has died.

The main types of crime or violence may affect children are: sexual, physical or psychological abuse; the negligent conduct of any kind with respect to them (food, medical, health, educational, emotional); sexual and / or labour exploitation; child trafficking; violent behaviour against children; injury; etc.

Regulations under the protection of victims and relevant issues

To analyse the protection of child victims must turn to observe international law that protects them, analysing their protection in the sphere of the United Nations, the Council of Europe and the European Union itself, notwithstanding the peculiarities of its Member States.

A. UNITED NATIONS:

In this area it is essential to refer to two instruments dealing with the position of the child victim or witness in a criminal trial and the rights and powers to them to recognize and safeguard:

- The Convention on the Rights of the Child of 20 November 1989 (CRC), and

- Guidelines on justice for child victims and witnesses of crimes arising from the Economic and Social Council of the United Nations on July 22, 2005¹⁸³.

Through these legal texts is essential to recognize the following rights:

1. The child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child: (article 12 CRC¹⁸⁴) in the second paragraph of Art. 12 provides that the right of children to express their views in all matters affecting them must be ensured, also in the context of court proceedings by granting the opportunity to be heard either directly or through a representative or an appropriate body. The importance of the recognition of this right, called to establish itself as a basic part of the legal status of the child's intervention in the process, claiming greater accuracy of range, as the laxity with which that article is expressed could be counterproductive for effectiveness. Therefore, the Committee on the Rights of the Child in 2009 drew some general comments intended to explain the concrete manifestations of the child's right to be heard by the courts. They are as follows:

First, the acts you must perform the administration of justice in order to ensure the exercise of that right. The systematized into five sections:

1. Preparation, which must be to illustrate the child on the right to express their opinion, the way, the place, the time that the hearing will be practiced and the impact it can have on the final decision.

2. Audience to be carried out not only in court but also to a specialist, being due to run as if it were a conversation, not an interrogation, and excluding external advertising.

3. Evaluation capacity of the child, in order to be able to tell the court if it builds its reasoned opinions and independently.

4. Transcendence Information about the final result of the statements of the child (feedback).

5. Remedies it can bring when the right is violated.

Secondly, the Committee on the Rights of the Child refers to the manifestations of the right to be heard in criminal proceedings where the child is a victim or witness to the events.

2. Right of children to be protected from the damage caused by his involved in criminal process: A of the main concerns, and to avoid it or alleviate it guidelines extra-judicial character exist:

¹⁸³http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf

¹⁸⁴ Article 12: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

- a) As to the first, you are requiring that judge and collaborator or not with the administration of justice, staff specializes and is sensitive to the needs and circumstances of the child.
- b) The judicial character revolve around how to obtain the testimony of the child victim and witness so that a proper balance between the protection of minors, the effective prosecution of crime and the defendant's right to a fair trial is maintained. For this purpose three ends are made to the accompanying appropriate action to achieve them:
 1. The first is to limit the number of interviews, statements and hearings to the strictly necessary. For this recording thereof is proposed.
 2. The second is to avoid direct contact of the child with the accused, so that must be enabled waiting rooms and special exploring
 3. The third and final goal is to encourage the child to testify, including by taking the actions that tend to increase their confidence banning, for example, forms and methods of exploration intimidating.

B. THE COUNCIL OF EUROPE:

The Council of Europe since its inception has provided special attention to children. As noted above, the Council of Europe incorporates their the political initiatives designed by United Nation documents elaborates for the purpose of the criminal proceedings be treated appropriately to the needs and interests of the child victim or witness. It is easy to see the assumption of such a policy in the following instruments:

1. Convention on Action against Trafficking in Human Beings May 16, 2005¹⁸⁵.

From the perspective of procedural law is quite disheartening reading Chapter V of this Agreement, for the "Research, legal action and procedural law," since only includes some statements that simply repeat general principles, without indicating the Member States any safeguards to ensure its effectiveness. The reason for this lies in the profound differences between criminal procedural systems of the Member States of the Council of Europe.

However, the Explanatory Report on the Convention of good practice in some Member States of the Council of Europe, protected by the jurisprudence of the ECHR, should contribute to laying the foundations for the way in which the child has to be explored or collected questioned for their statements may have probative value. One of the good practices in repairing the report is to record video and audio exploration of the child in order to be produced before the court decision maker replaces, thus the appearance of the child in court.

2. Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse¹⁸⁶.

¹⁸⁵ <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>

¹⁸⁶ <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=201>

This Agreement obeys the need for a comprehensive international instrument focused on various aspects of prevention, protection and criminal law in the fight against all forms of sexual exploitation and abuse of children. He had previous jobs that had decisively traced the lines to follow demonstrating that along with measures of substantive law was essential to promote the amendment of the procedural rules of the States.

The Preamble of the Convention two Recommendations of the Committee of Ministers is cited:

a) R (91) 11, adopted on September 9, 1991, on sexual exploitation, pornography, prostitution and trafficking of children and young people:

It is assumed that it applies only to the statements made during the trial. Thus, the measures relating to criminal proceedings, the number 14, to *"provide special conditions in court hearings involving boys and girls who are victims or witnesses of sexual exploitation in order to reduce it includes at least the traumatic effects of such views and to increase the credibility of their statements while respecting their dignity"*.

b) R (2001) 16, adopted on 31 October 2001 on the protection of children against sexual exploitation.

It whether a provision is contained in the sense indicated above, because as number 33 Member States are urged to reduce the number of statements and interviews that are subject child victims and witnesses of sexual exploitation, increasing to while the credibility of their statements.

3. Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010)¹⁸⁷.

These guidelines are to be considered a milestone in the evolution of policies aimed at achieving justice and effective do recognize the rights of the child to the maximum extent possible, overcoming the limitations inherent to the lack or limitation of their legal capacity to act, and taking as reference his personal situation, maturity and discernment. In the words of the Guidelines, a legal system adapted to child, quick, diligent justice that revolves around your needs and interests. Its goal is to achieve that in civil, criminal and administrative proceedings, as well as non-judicial proceedings, which involved a minor will be respected also the dignity, integrity and personal and family privacy, rights and procedural guarantees enshrined in the ECHR.

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¹⁸⁷http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf

administrative proceedings, as well as non-judicial proceedings, which involved a minor will be respected also the dignity, integrity and personal and family privacy, rights and procedural guarantees enshrined in the ECHR.

The principles on which the guidelines are based not represent an absolute novelty in the matter, as reported by the instruments that have preceded it. These principles are: (1) participation, (2) prevalence of less interest over all other considerations, (3) dignity, (4) protection against discrimination, and (5) rule of law. The latter requires that the procedural safeguards that have traditionally been knotted to the status of adult extend to minors. Thus, there can be no doubt those decisions regarding the adoption of a child find their legitimacy in legality, proportionality, presumption of innocence and right to a fair trial.

Thus, it seems appropriate that the interviews were conducted in adapted physical spaces and are recorded in audio and video respecting the contradiction, although advised to avoid contact, confrontation and direct communication between the child and the alleged perpetrator. In turn, the Guidelines are based on the confirmation of an extended police and forensic practice that is useless and that is to ignore the child explore more than one occasion. So it is advised that for the purposes to preserve the welfare of the child and ensure their willingness to testify the explorations are conducted by the same people. It also warns that the number of explorations and their duration are adapted to the age and ability of the child care.

These guidelines also provide issues procedural law and underscore that the court, in the best interests of the child, not just their age, which cannot be erected on a presumption *iuris et iure* to reject his testimony, may be authorized not testify.

On the one hand, openly states that must be allowed to obtain expert evidence before the trial and, secondly, clarification for cases of child victims of sexual crimes are released. The seriousness of these crimes and the deep impression made on the child advise against, for example, that certain circumstances concurring their statements are recorded; turn induce the direct examination by the approach of the questions through an intermediary with specialized training and advocate is replaced methods of assessment of the implemented of the statement of the child to preserve maximum privacy.

C. EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

An examination of the doctrine of the European Court of Human Rights (ECHR) highlights the need to adapt domestic legislation governing those lines. The absence of a reflection on the rights of the victim has been an almost permanent feature in Europe. Its negative effects are felt in an acute legal insecurity with regard to the identification of both material and procedural rights which shall belong to the victim. As it could not be otherwise, these effects reach the child that is explored in criminal proceedings as a victim or witness. Only when such examination is set by the need to respect the fundamental rights of the child increases the likelihood of establishing a solid and coherent system of protection¹⁸⁸.

¹⁸⁸ C-507/10, judgment of 21 December 2011 *Criminal proceedings against X*: Protection of vulnerable persons and hearing of minors as witnesses. Special measure for early taking of evidence: refusal by the Public Prosecutor to request the judge in charge of preliminary investigations to hear a witness

The priority marked by the right to a fair trial recognized the accused and convicted in a criminal proceeding has focused its activity. Indeed, the decisions of the ECHR has inferred that the protection they deserve victims and witnesses are provided in the resolutions of sentenced persons adjudicating claims alleging infringement of their right to a fair trial as a result of the assessment of oral evidence made by the courts. European Court of Human Rights, the ECHR has established a uniform law stating that the admissibility of the evidence is subject to the internal regulation of each of the States, so it is not its role to rule on the relevance, usefulness and validity statements of witnesses¹⁸⁹.

The task entrusted to the ECHR is to analyse whether the process, as a whole, has been processed in accordance with the principles of the right to a fair trial with all guarantees. For the evidence required, such postulates require that the presentation of evidence is carried out with full respect for the rights of defence. This means that the evidence must be practiced at the stage of trial before the trial court, in open court, the defendant being present and questioning witnesses so adversarial.

However, the ECHR admits the existence of exceptions procedural safeguards exposed¹⁹⁰. In this sense, states that paragraphs 1 and 3 d) of Art. 6 ECHR does not require, in any circumstances, the witness should be considered directly by the defence, either by cross-examination or through another method, but what is required is that you give the defendant the opportunity to discredit or contradict the version of events offered by the witness, either at the time of her testimony, and at a later time. It adds that art. 6 of the ECHR does not provide the accused an unlimited right to the witness, who has testified against him, appear in court. The ECHR is not opposed to reproduction in the trial of witness statements made at police headquarters or at the preliminary stage of the criminal process. Now, claims that the assessment of the deciding tribunal of such statements violates the right to a fair trial if the accused has not given him the chance to put questions to the witnesses¹⁹¹.

The cases in which the general rules must yield to the exceptions are specified, for example, crimes against sexual freedom¹⁹². The ECHR recognizes that the criminal proceeding is for the victim a new source of suffering, which increases its negative consequences when it is a child. For this reason, the defendant's right to a full and direct confrontation with the witness finds its counterbalance in the rights recognized and guaranteed in particular, the right to mental and moral integrity.

The weight of this law, considered as an aspect of the right to respect for private and family life enshrined in Art. 8 ECHR legitimates action to be reconciled with the exercise of the

¹⁸⁹ ECHR Case Bönisch vs. Austria, 6.5.1985; ECHR Case Unterperthinger vs. Austria, 24.11.1986; ECHR Case Barberá, Messegué y Jabardo vs. Spain, 6.12.1988.

¹⁹⁰ ECHR Case S.N. vs. Sweden, 2.7.2002; ECHR Case P.S. vs. Germany, 20.12.2001.

¹⁹¹ ECHR Case 2001\881, 20.12.2001; ECHR Case 2002\43, 2.7.2002.

¹⁹² ECHR Case S.N. vs. Sweden, 2.7.2002.

rights of defence. Among these measures, the ECHR should be stresses that specialists (psychologists and psychiatrists) who explore the child, this being one of the parents or a trusted adult and must be recorded interview in audio and video.

In their pronouncements, the ECHR constantly repeated one end to be considered the axis of balance between the rights of the accused and the victim in the criminal process¹⁹³. ECHR says that the defendant's conviction should not be based solely or decisively on the statements of a witness or the findings of an opinion that it was unable to refute.

Otherwise, the right to a fair trial would be harmed. So if the child was credited as a "witness"¹⁹⁴ the accused or defendant must be informed of the date and place where the interview with the child will develop, must be able to follow it avoiding direct visual confrontation, for example from another unit connected to the examination room by CCTV or audio signal circuit, allowing to observe the reactions of the child through a glass-like mirror, and must be able to put to questions by the judge or intermediary during the first interview or after.

Thus, the procedural acts to be adopted by the court and Public Prosecutions are conditioned by the rights of defence of the accused and the presumption of innocence. The influence of these rights is so intense that extends to the interpretation of statements and expressions of will of the accused, charged and convicted later of which could infer a waiver of the right to question witnesses.

According to the ECHR, neither the wording nor the spirit of art. 6 of the ECHR include the possibility that a person waives the guarantees inherent in a fair process. For this reason, the effectiveness of a hypothetical renunciation of entitlement to the opportunity of contradicting a prosecution witness is subject to externalize unequivocally be preserved a minimum of safeguards and not contrary to the public interest.

Ultimately so that waiver of the right to examine the witnesses who testified against him to be effective, the defendant must have been reasonably foresee the legal consequences of his decision.

This last has been demonstrated in ECHR 28.9.2010 (JUR 2010\332112), Case of A.S. vs. Finland¹⁹⁵, wherein, the petitioner had no opportunity to question the witness, stating the court violation of the right to a fair trial The story of the antecedents is very broad although it is notable the following points:

¹⁹³ ECHR Case Barberá, Messegué y Jabardo vs. Spain, 6.12.1988; ECHR Case Kostovsky vs. Netherlands, 20.11.1989; ECHR Case ASCH vs. Austria, 26.4.1991.

¹⁹⁴ ECHR Case 2002\43, 2.7.2002.

¹⁹⁵ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100709#{\"itemid\":\[\"001-100709\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100709#{\)

On suspicion of that his youngest son has been sexually abused, the mother's denunciation to the police and testifies. A month later, in a hospital, performed the first examination of the child, which is directed by a psychologist. The exploration is followed by a one-way mirror by a police officer, the chief of psychology of the hospital and a doctor specializing in child psychiatry. Exploration is captured on video. The suspect is not present, because apparently was not informed. Subsequently two other interviews conducted by the chief of psychology and physical examination are done to the child, and conclude that the story is trustworthy and that the events may have occurred succeed. The studies the results of the physical examination are not mentioned. The psychiatrist draws up a report which states that the facts have caused the child psychological imbalance, have generated confusion, insecurity and anxiety, so that it no longer recommends be explored. The investigation continues and prosecutors accused the suspect of having committed a crime of sexual abuse and present the recording of exploration. Front of the test conducted, the defendant alleges that he has not been given the opportunity to question the child in breach of the regulations. Nevertheless, is not opposed to the recording to be admitted as evidence.

This decision is based on three reasons: first, in the opinion of the psychiatrist not recommended that the child be examined again; the second, that is the only direct personal evidence of the facts and, third, that the recording contains certain absurdities and inconsistencies and also reveals that the child does not declare spontaneously but repeats rehearsed phrases.

The court warns that the applicable law prohibits it to be used as evidence recording the statement of a witness less than 15 years if the defendant has not had the opportunity, to put questions. Notes, however, that the error cannot be remedied and that the reproduction of the recording has taken place with the consent of the accused.

The trial court absolves the accused because none of the evidence collected accredits the commission of criminal acts. The judgment of acquittal was appealed and the court of second instance played back the recording, as requested by respondent as exculpatory evidence. The Supreme Court confirmed the conviction and declared that no breach of the right to a fair trial because the offender did not request at the time an additional exploration of the child, not claimed defencelessness, felt that the video was exculpatory evidence that he did express opinions to the lower courts about the probative value of the video.

Therefore, we can conclude that the guarantee that the defendant has a real opportunity to question witnesses belongs to the area of public interest that transcends the private interests of the accused, that is, is not subject to legitimate defence strategies. This guarantee would then be one of the many elements that contribute to the formation of a "European public order" that emanates from common patrimony of political traditions and ideals of the States party to the ECHR.

D. EUROPEAN UNION

The legal instruments emanating from the European Union seek to configure a legal status of the child victim or witness in criminal proceedings. The rules whose reason for being lies in safeguarding the fundamental rights of the child, preventing once be explored at a preliminary stage of the process, declare again in the oral proceedings, have experienced an important evolution since the adoption of the FD until the adoption of Directive 2012/29/UE.

a) Decisions of the European Court of Justice: differences in the recognition of procedural rights of the child victim.

We have to refer to a well-known and studied judgment: the STJUE 16.6.2005 (ECJ 2005\184)¹⁹⁶, called Case Pupino¹⁹⁷. Even accepting that the relevance should be limited to the specific case and the Italian criminal justice system, has to be considered that the fundamentals of the problem can be extended to the majority of European criminal procedural rules.

1st. The general rule: the statement given during the instruction should generally be repeated in open court to acquire the value of evidence in its entirety" (paragraph 55).

¹⁹⁶ <http://curia.europa.eu/juris/liste.jsf?language=es&num=C-105/03>

¹⁹⁷ CJUE has pending before it criminal proceedings against a nursery school teacher, Ms Pupino, who is charged with having, in January and February 2001, misused disciplinary measures against and injured children entrusted into her care. In August 2001, the Public Prosecutor's Office applied to examine, by the special procedure of recording their evidence beforehand, eight children born in 1996 who are witnesses to and victims of the offences at issue in the criminal proceedings. It argued that, because of the tender age of the witnesses and the resulting inevitable alteration of their psychological state and because of a possible 'process of psychological repression', that evidence could not be repeated at the trial. It also requested that the evidence be taken under protected conditions, that is, in a special facility under conditions which would safeguard the children's dignity, need for privacy and peace of mind, if necessary bringing in an expert in child psychology because of the sensitivity called for by the events in question and their significance and because of the difficulty of relating to the persons to be questioned because of their tender age.

The defence opposed that application since there was no provision for taking evidence in that way in the case of the offences in question. The referring court takes the view that the application by the Public Prosecutor's Office should be rejected, pursuant to the abovementioned provisions of Italian law of criminal procedure, since the recording of evidence beforehand, as an instrument for taking evidence at an earlier stage than the trial, is a procedural mechanism which is absolutely exceptional in character and cannot be used in situations other than those specified by law.

The court is nevertheless of the opinion that the restriction by Italian law of the use of the special procedure for recording evidence beforehand infringes Articles 2, 3 and 8 of the Framework Decision. Minors are always 'victims who are particularly vulnerable' within the meaning of Article 2(2) of the Framework Decision. Special arrangements for the examination of witnesses should therefore always apply, regardless of the offence in question, in order to protect them. The referring court infers from Article 3 of the Framework Decision that repetitions of examinations of victims are, as a general rule, to be avoided because of the psychological stress involved. In view of the particular vulnerability of juvenile victims, it is therefore necessary to derogate from the basic rule that only statements made at the trial have evidential value. The referring court infers from Article 8(4) of the Framework Decision the principle that a court must always have the power to dispense with the hearing in open court if it may have adverse effects on victims as witnesses. Since the referring court wishes to ascertain whether it is possible to interpret Italian law in the light of the Framework Decision, it asks the Court of Justice to rule on whether its proposed interpretation of Article 2(3) and Article 8(4) of the Framework Decision is correct.

2nd. The exception: the National Court must have "the possibility of using, especially for vulnerable victims, a special procedure, the incidence anticipated proof in the law of a Member State and the particular forms declaration, if the proceedings better respond to the status of such victims and is necessary to prevent the loss of evidence, interrogation minimize and avoid adverse consequences for these victims, to testify in open court "(paragraph 56).

Therefore, as stated in paragraph 53 of the judgment, the young children are to be considered "particularly vulnerable" victims, the ruling concludes that the arts. 2, 3 and 8.4 DM 2001/220/JHA are interpreted as meaning that the court must be able to authorize those testify through special forms that guarantee them an adequate level of protection regardless of the type of crime that was committed.

One of the legal consequences of that decision was that the procedures exclusively provided at the time in which he was interposed and decided the question, to explore child victims of offenses against sexual freedom which are to be applied in criminal proceedings followed for the investigation and prosecution of criminal acts that injure other legal rights of minors.

In its judgment the European Court of Justice makes a brief mention of the Charter of Fundamental Rights of the European Union (CFREU). The rules contained in it are primary law and has the right binding legal force. Thus Member States must respect the rights proclaimed in the CRFEU when implementing EU rules (art. 51.1 CFREU). In the context of this study extremely important rights that art. 24 CFREU recognizes children in first and second paragraphs:

"1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

According to the explanations about CRFEU) these rights are based on the arts. 3, 9, 12 and 13 of the Convention on the Rights of the Child.

Combining the provisions of art. Cfreu 24, arts. 2.2, 3 and 8.4 DM 2001/220/JHA and the pronouncements of SSTJUE 16.6.2005 (ECJ 2005/184) and 21.12.2011 (ECJ 2011/427), it is reasonable to hold that child victims and witnesses are holders the following rights:

1. Be heard.
2. To testify
3. Be interrogated as few times as possible.
4. And preserving their physical and moral integrity.

This leads to that the proper procedure to practice examination of children is the incident of early testing, especially in those systems where process is regulated.

As we understand, it is worthwhile emphasizing that recognize rights to child victim in criminal proceedings does not primarily aim to give facilities to testify as having the effect of putting the accused at a disadvantage, undermining irremediably warranty of fair trial and the presumption of innocence. This recognition is an exigency derived from the fundamental rights of the child to dignity and physical and mental integrity¹⁹⁸.

Rights of the child victim

DIRECTIVE 2012/29/EU

Like all victims, the child victim has the following rights regarding information and support:

1. *Right to understand and to be understood:* (Art.3) Member States shall take appropriate measures to assist victims to understand and to be understood from the first contact, ensure that communications with victims are given in simple and accessible language, orally or in writing. Allowing victims to be accompanied by a person of their choice in the first contact with a competent authority, that because is a child, it is essential for them.
2. *Right to receive information from the first contact with a competent authority:* (Art.4) Concerning the type of support they can get, the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures, how and under what conditions they can obtain protection, including protection measures, how and under what conditions they can access legal advice, legal aid and any other sort of advice, how and under what conditions they can access compensation, how and under what conditions they are entitled to interpretation and translation, the available restorative justice services, how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.
3. *Right of victims when making a complaint:* (Art. 5) Member States shall ensure that victims receive written acknowledgement of their formal complaint made by them to the competent authority of a Member State, stating the basic elements of the criminal offence concerned.
4. *Right to receive information about their case:* (Art. 6) The victims must be notified without unnecessary delay of their right to receive the information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered of any decision not to proceed with or to end an investigation or not to prosecute the offender; the time and place of the trial, and the nature of the charges against the offender; any final judgment in a trial; information enabling the victim to know about the state of the criminal proceedings, unless in exceptional

¹⁹⁸ ARMENTA DEU, Teresa: *Code of Good Practice for procedural protection of particularly vulnerable victims*. Editorial Colex, 2010.

cases the proper handling of the case may be adversely affected by such notification. Shall ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention.

5. *Right to interpretation and translation:* (Art.7) That victims who do not understand or speak the language of the criminal proceedings concerned are provided, upon request, with interpretation in accordance with their role in the relevant criminal justice system in criminal proceedings, free of charge, at least during any interviews or questioning of the victim during criminal proceedings before investigative and judicial authorities, including during police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, communication technology such as videoconferencing, telephone or internet may be used, unless the physical presence of the interpreter is required in order for the victims to properly exercise their rights or to understand the proceedings.
6. *Right to access victim support services:* (Art. 8) Shall ensure that victims, in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings. Family members shall have access to victim support services in accordance with their needs and the degree of harm suffered as a result of the criminal offence committed against the victim.

Rights in criminal proceedings:

1. *Right to be Heard:* (Art. 10) Where a child victim is to be heard, due account shall be taken of the child's age and maturity.
2. *Rights in the event of a decision not to prosecute:* (Art.11) **The** victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
3. *Right to safeguards in the context of restorative justice services:* (Art. 12). Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services.
4. *Right to legal aid:* (Art. 13) The victims will have access to legal aid, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access to legal aid shall be determined by national law.
5. *Right to reimbursement of expenses:* (Art.14) The victims who participate in criminal proceedings, will have the possibility of reimbursement of expenses incurred as a result of their active participation in criminal proceedings, in accordance with their

role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed shall be determined by national law.

6. *Right to the return of property: (Art. 15)* Member States shall ensure that, following a decision by a competent authority, recoverable property which is seized in the course of criminal proceedings is returned to victims without delay, unless required for the purposes of criminal proceedings. The conditions or procedural rules under which such property is returned to the victims shall be determined by national law.

Of special importance for child victims is the chapter dedicated to the victims in need of special protection. Are included for all victims the right to protection (Article 18), right to avoid contact between victim and offender (art. 19), the right to protection during criminal investigations (Article 20) and right the protection of privacy (art. 21).

- a. Article 23 states that without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22.1, may benefit from the measures provided for in paragraphs 2 and 3 of this article. A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is a an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

In addition to the measures provided for in Article 23, Member States shall ensure that where the victim is a child:

- a. in criminal investigations, all interviews with the child victim may be audio visually recorded and such recorded interviews may be used as evidence in criminal proceedings;
- b. in criminal investigations and proceedings, in accordance with the role of victims in the relevant criminal justice system, competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from the family;
- c. where the child victim has the right to a lawyer, he or she has the right to legal advice and representation, in his or her own name, in proceedings where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility.

The procedural rules for the audio-visual recordings referred to in point (a) of the first subparagraph and the use thereof shall be determined by national law. Where the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of this Directive, be presumed to be a child.

Conclusions

It is true that the child has been recognized the right to be heard, but its effectiveness is closely linked to the formalities to be met by explorations and even interrogations, to those who it is subjected. Such formalities suggest, as we have seen, three extremes: the activity (subjects who performed the examination, object, content and modalities), time and place.

A previous appearance for a basic criminal procedure adds, for direct links with the principles and concepts that has established itself. This aspect is the legal consequence to be given to fulfilling such formalities, and finds its legitimacy in international and regional instruments to those who we have referred in this work. If no such declaration is to be only one source of evidence obtained lawfully, but also a means of incriminating evidence, the task of the legislature to enact rules providing specialties must meet the exploration of the child, incorporating the derived rules of the rights of defence and the presumption of innocence.

This study has shown that within the United Nations and Council of Europe have formulated seated values and technical guidelines for the purpose that in criminal proceedings the child victim or witness is granted adequate protection. At this point this is, once asserted safeguarding the dignity, moral and physical integrity of the child, appropriate measures should be taken to ensure the defendant's right to a fair trial and to avoid impunity. The regulatory instrument most resolutely hosts the indicated orientation is the Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007. It Member States are urged to dictate standards which offer the child the opportunity to be heard and to provide sources of evidence, noting what is right: limiting the number of interviews to the strictly necessary. To achieve this opts for video and audio recording of the interview and the admission of the recording as evidence.

The European Court Human Rights jurisprudence admits that in criminal proceedings the child victim or witness must not, in any case, directly examined by the defence, but believes that the exploration right, the contradictory character must be preserved, is carried out by specialists and are recorded on video and audio in order to give it probative value.

To our knowledge, the correct study exploring the child victim or witness is produced from the standpoint of fundamental rights of the child, whose recognition and effectiveness cannot be subordinated to the success of the role of criminal sanctioning process.

Understanding that children's rights are not a mere appendix will appreciate that are not in conflict with the rights of the accused, defendant or convicted. Not constitute an obstacle to the exercise of the judicial function. It is not sacrifice the rights of the passive part of the criminal proceedings or to impair the satisfaction of the public interest in the conduct of criminal law. It is, really, to require the Member States to implement all the necessary

means to achieve a fair balance between the rights and interests all converge in criminal proceedings.

3. HUMAN TRAFFICKING (*Daniel Motoi*)

Introduction

Human trafficking is a real phenomenon in the European Union and all over the world and it is very difficult to assess the real proportion of it due to the fact that most of it remains undetected by the authorities or unreported by the victims.

In the European Union this phenomenon has been a constant concern and there were adopted legal policies and legal instruments to effectively address trafficking in human beings such as the Council Framework Decision 2002/629/JHA¹⁹⁹ on combating trafficking in human beings which was replaced by the Directive 2011/36/EU²⁰⁰ of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and the Council Framework Decision 2004/68/JHA²⁰¹ on combating the sexual exploitation of children and child pornography which was replaced by the Directive 2011/92(93)/EU²⁰² of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography.

The concept of trafficking in human beings in the DIRECTIVE 2011/36/EU

In comparison to the Framework Decision 2002/629/JHA on combating trafficking in human beings, the Directive 2011/36/EU is more comprehensive as it is focusing not only on combating trafficking in human beings in terms of offences concerning trafficking in human beings, penalties, liabilities, but also on preventing this phenomenon and on protecting its victims. It has also the aim to amend and expand the provisions of the earlier framework decision.

From the Preamble, the Directive states that trafficking in human beings is a priority for the Union and the Member States and a serious crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union (Recital 1). By defining trafficking in human beings a serious crime and a violation of fundamental rights it is clear that the European Union has reflected the growing concern among the Member States regarding the development of the phenomenon of trafficking in human beings. Member States will also have to fight with the root causes of trafficking and support third countries in developing appropriate anti-trafficking legislation (Recitals 2, 4).

The Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions,

¹⁹⁹ Official Journal L 203 , 01/08/2002

²⁰⁰ Official Journal L 10, 15/04/2011

²⁰¹ Official Journal L 013 , 20/01/2004

²⁰² Official Journal L 335, 17/12/2011

taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof (Article 1).

As seen, the Directive sets *minimum common standards* in this area, but, Member States are able to introduce or maintain favourable standards as long as these standards are, of course, compatible with the Directive.

The Directive has a new approach in regard to this phenomenon, as it takes into account the gender perspective in order to strengthen the prevention of this crime and the protection of the victims thereof. By referring to the gender-specific nature of human trafficking, the European Union and its Member States have recognised the importance of a gendered response to human trafficking. The Directive recognises the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes. For this reason, assistance and support measures should also be gender-specific where appropriate (Recital 3).

It should be mentioned also here that Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims is *complementary* with the Directive 2011/(92)93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, as some victims of human trafficking have also been child victims of sexual abuse or sexual exploitation.

The Directive 2011/36/EU provides in article 2 that trafficking in human beings is the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

The exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur. In the light of the relevant case-law, the validity of any possible consent to perform such labour or services should be evaluated on a case-by-case basis. When a child is concerned, no possible consent should ever be considered valid.

The expression ‘exploitation of criminal activities’ should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.

The definition also covers trafficking in human beings for the purpose of the removal of organs, which constitutes a serious violation of human dignity and physical integrity, as well as, for instance, other behaviour such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings.

The Directive introduces the term of “position of vulnerability” and meaning a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

Member States shall take the necessary measures to ensure that the fact that an offence referred to in Article 2 was committed by public officials in the performance of their duties is regarded as an aggravating circumstance. The Directive provides for other aggravating circumstances when the offence was committed against a particularly vulnerable person, which shall include at least child victims, when committed within the framework of a criminal organisation, when it deliberately or by gross negligence has put at risk the life of the victim or when the trafficking was committed with the use of serious violence or has caused particularly serious harm to the victim.

Member States shall take the necessary measures to ensure that an offence referred to in Article 3 is punishable by effective, proportionate and dissuasive penalties, which may entail surrender. The Member States shall take the necessary measures to ensure that legal persons can be held liable for the offences referred to in Articles 2 and 3 and shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5 (1) or (2) is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and other complementary sanctions. Member States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in Articles 2 and 3. The proceeds from the offences referred to in Articles 2 and 3 could be used to compensate the victims of trafficking in human beings, for example, in the application of the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

Rights of the victims of trafficking in human beings

In the article 11 it is provided that Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in the FD and in this Directive.

As already said, the FD has been replaced by Directive 2012/29/EU²⁰³. Therefore we will refer next to the provisions of the Directive 2012/29/EU that can apply with regard to the rights of victims of trafficking in human beings.

1. Right to non-prosecution or non-application of penalties

²⁰³ Official Journal L 315, 14/11/2012, P. 57–73

Article 8 of the Directive provides that Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in article 2.

Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimization and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in (Recital 14).

From the two provisions abovementioned we see that Member States should have in their legal systems provisions according to which the competent national authorities are entitled not to prosecute or to impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any offence mentioned in the Directive.

The decision not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities is aimed to safeguard the human rights of victims, to avoid further victimization and to encourage them to act as witnesses in criminal proceedings against the perpetrators.

The Directive points out that victims of trafficking in human beings should be protected also from prosecution or punishment for other criminal activities, such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. However, if a person has voluntarily committed or participated in related to the Directive is not excluded from prosecution or punishment.

Member States shall also ensure that investigation into or prosecution of offences referred to in Articles 2 and 3 is not dependent on reporting or accusation by a victim and that criminal proceedings may continue even if the victim has withdrawn his or her statement (article 9 (1)).

By defining trafficking in human beings a serious crime, it means that Member States should provide legislation that enables the competent authorities to investigate or prosecute the perpetrators *ex officio*, not dependent on reporting or accusation by the victim.

The text also provides that criminal proceedings may continue even if the victim has withdrawn his or her statement, situation usually happening because victims fear from retaliation from the perpetrators or from other persons.

Although, not expressly mentioned in the Directive, the term penalties should include not only criminal penalties but also any other administrative penalties²⁰⁴, because all kind of sanctions imposed to the victims of the trafficking in human beings will have the effect to discourage them to report the offence and later, participate as witnesses in criminal proceedings against the perpetrators.

2. Right to assistance and support

Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.

In Recital 18 of the Directive it is mentioned that it is necessary for victims of trafficking in human beings to be able to exercise their rights effectively. Therefore assistance and support should be available to them before, during and for an appropriate time after criminal proceedings. Member States should provide for resources to support victim assistance, support and protection. The assistance and support provided should include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers.

The Directive 2011/36/EU expressly stipulates that assistance and support are provided to (potential) victims even before any criminal proceeding begins. The Directive refers to the reasonable grounds indication for believing that a person might have been subjected to any of the offences referred to in Articles 2 and 3. It is up to the Member States to define and establish, accordingly to their national provisions or jurisprudence, the concept of reasonable grounds indication for believing the a person is a victim or not of trafficking in human beings.

Member States shall also take the necessary measures to have appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.

The Directive explicitly provides that a person should be provided with assistance and support irrespective of his or her willingness to act as a witness and that Member States shall take the necessary measures to ensure that assistance and support for a victim are not

²⁰⁴ Prevent, Combat, Protect Human Trafficking – Joint UN Commentary on the EU Directive – A human Rights-based Approach, November 2011, p. 37

made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial, without prejudice to Directive 2004/81/EC²⁰⁵ or similar national rules. Recover and reflection period means a period in which the victim is given time to think over and to reflect upon what happened and later decide whether he/she will later participate in the criminal proceedings. In this period, the authorities should try not to take any statements from the victims and only provide them with all the assistance and support needed.

In the Directive 2011/36/EU we do not find the provision from the Council of Europe Convention against trafficking in human beings²⁰⁶ (article 13) which states that Each Party shall provide in its internal law a recovery and reflection period of at least 30 days when there are reasonable grounds to believe that the person concerned is a victim of trafficking in human beings. Such a period is considered to be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.

In this period Member States shall take measures to establish free of charge and confidential specialist support services in addition to, or as an integrated part of, general victim support services, or to enable victim support organisations to call on existing specialised entities providing such specialist support. Victims, in accordance with their specific needs, shall have access to such services and family members shall have access in accordance with their specific needs and the degree of harm suffered as a result of the criminal offence committed against the victim.

Victims, in accordance with their needs, shall have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings. Family members shall have access to victim support services in accordance with their needs and the degree of harm suffered as a result of the criminal offence committed against the victim. Member States shall facilitate the referral of victims, by the competent authority that received the complaint and by other relevant entities, to victim support services (article 8, paragraph 1 and 2 from the Directive 2012/29/EU).

Victim support services, shall, as a minimum, provide information, advice and support relevant to the rights of victims including on accessing national compensation schemes for criminal injuries, and on their role in criminal proceedings including preparation for attendance at the trial; information about or direct referral to any relevant specialist

²⁰⁵ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, Official Journal L 261 , 06/08/2004 P. 0019 – 0023

²⁰⁶ Council of Europe Convention on action against Trafficking in human beings, Warsaw, 16.V.2005

support services in place; emotional and, where available, psychological support; advice relating to financial and practical issues arising from the crime; unless otherwise provided by other public or private services, advice relating to the risk and prevention of secondary and repeat victimization, of intimidation and of retaliation. Member States shall encourage victim support services to pay particular attention to the specific needs of victims who have suffered considerable harm due to the severity of the crime.

Where relevant, there should also be provided information on a reflection and recovery period pursuant to Directive 2004/81/EC, and information on the possibility of granting international protection pursuant to Council Directive 2004/83/EC²⁰⁷ of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Council Directive 2005/85/EC²⁰⁸ of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status or pursuant to other international instruments or other similar national rules. Escape from perpetrators means that the Member States provide for measures in order to avoid any future possible contact between the victim and the traffickers and any possible intimidation or retaliation from them or from other persons in close connection with them.

In this sense, article 9 (3) from the Directive 2012/29/EU stipulates that, unless otherwise provided by other public or private services, specialist support services referred to in Article 8(3), shall, as a minimum, develop and provide: (a) shelters or any other appropriate interim accommodation for victims in need of a safe place due to an imminent risk of secondary and repeat victimization, of intimidation and of retaliation; (b) targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling.

The assistance and support measures will be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services, where appropriate.

The assistance to and support for victims are provided also during and for an appropriate period of time after the conclusion of criminal proceedings. By establishing the definition an appropriate period of time after the conclusion of criminal proceedings the Directive has

²⁰⁷ Official Journal L 304, 30/09/2004, P. 12.

²⁰⁸ Official Journal 326, 13/12/2005, P. 13.

recognised that the victims of these offences need more time to recover and escape from their traffickers and other possible retaliation.

The Directive states that, where necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example if medical treatment is on-going due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim's statements in those criminal proceedings.

The Directive only gives some examples in which the assistance to and support for victims should continue even after the conclusion of criminal proceedings, but it is up to Member States to have, based on each case individual assessment, other measures that can be equivalent to the abovementioned.

The Directive also regulates that Member States should provide the victims with durable solutions in order to assure the effectiveness of the assistance and support provided.

3. Right to protection

As for the protection of victims of trafficking in human beings in criminal investigation and proceedings, the Directive 2012/29/EU provides that the protection measures referred to in this Article shall apply in addition to the rights set out in the FD.

It is important that victims of trafficking in human beings receive appropriate protection, inter alia, by having access to witness protection programmes or other similar measures, if appropriate and in accordance with the grounds defined by national law or procedures.

In this regard it should be mentioned that Member States are required to take operational measures to protect victims or potential victims of trafficking in human beings and there will be a violation of Article 4 of the Convention of Human Rights where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from the situation of risk (see case of *Rantsev v. Cyprus and Russia*²⁰⁹).

In this sense, it is vital for the victims to receive a timely and individual assessment in accordance with national procedures, in order to identify the specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings (for example their particular vulnerability to secondary and repeat victimization, to intimidation and to retaliation).

The individual assessment shall, in particular, take into account the personal characteristics of the victim, the type or nature of the crime and the circumstances of the crime. The extent of the individual assessment may be adapted according to the severity of the crime and the degree of apparent harm suffered by the victim. Individual assessments shall be carried out with the close involvement of the victim and shall take into account their wishes including where they do not wish to benefit from special measures as provided for in Articles 23 and

²⁰⁹ ECHR, Judgment *Rantsev v. Cyprus and Russia*, 07.01.2010

24 of the Directive 2012/29/EU and of this Directive. If the elements that form the basis of the individual assessment have changed significantly, Member States shall ensure that it is updated throughout the criminal proceedings. For these reasons it is very important that the authorities are able to identify, as soon as possible, the victims who have been subjected to any of the offences referred to in Articles 2 and 3.

Victims should be offered information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive and in the Directive 2012/29/EU such as: the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures and how and under what conditions they can obtain protection, including protection measures.

Victims should be notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information: any decision not to proceed with or to end an investigation or not to prosecute the offender and the time and place of the trial, and the nature of the charges against the offender.

It is also important that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any relevant measures issued for their protection in case of release or escape of the offender. Victims shall, upon request, receive the information provided for at least in cases where there is a danger or an identified risk of harm to them, unless there is an identified risk of harm to the offender which would result from the notification.

The Directive 2011/36/EU provides that Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources. It is important that persons providing legal counselling should be well trained in order to understand the special position of the victims of such crimes (article 12 par. 2).

The text provides that the legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources. The Directive gives no further explanation in this regard, so, it is up to the Member States to determine how the provision does not have sufficient financial resources is to be interpreted in accordance with its internal laws.

It is important to remember here that most of the victims of trafficking in human beings have no financial resources and they are usually brought and kept in another country against their will, without, of course, any financial resources.

In relation to this, it worth mentioning that article 13 from the Directive 2012/29/EU provides that Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access to legal aid shall be determined by national law.

Victims of trafficking in human beings need special attention and special measures designed to protect them not only from the offenders or from other persons in relation to them but also to avoid secondary victimization need to be taken. Such kind of victims are still vulnerable for a long period even after they escaped from the perpetrators and any procedures that will bring them in the position to experience again the trauma will most probable have the effect of secondary victimization and they should be avoided. The repeated interviews and the visual contact with the perpetrators are to be avoided as much as possible.

Furthermore, the Directive provides that, without prejudice to the rights of the defence, and according to an individual assessment by the competent authorities of the personal circumstances of the victim, Member States shall also ensure that victims of trafficking in human beings receive specific treatment aimed at preventing secondary victimization by avoiding, as far as possible and in accordance with the grounds defined by national law as well as with rules of judicial discretion, practice or guidance, the following: unnecessary repetition of interviews during investigation, prosecution or trial; visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies; the giving of evidence in open court; unnecessary questioning concerning the victim's private life.

One of the protective measures mentioned in the Directive is the witness protection programme but it is up to the Member States to have any other similar measures to protect the victims of trafficking in human beings in accordance with the grounds defined by national law or procedures (e.g. protection of identity, confidentiality of the address, relocation even in another country²¹⁰).

4. Right to compensation

Article 17 from Directive 2011/36/EU provides that Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.

²¹⁰ Prevent, Combat, Protect Human Trafficking – Joint UN Commentary on the EU Directive – A human Rights-based Approach, November 2011, p. 67

Such schemes of compensation should already exist, for example, those established by the European Convention on the compensation of victims of violent crimes (Strasbourg, 24.11.1983), by the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims²¹¹, by the Council Framework Decision of 15 March 2001²¹² on standing of victims in criminal proceedings replaced by the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

If the schemes do not exist then the Member States should establish them. It is up to Member States how they establish these schemes of compensation, but these schemes should cover the situations when, for example, the offender is unknown/unidentified, not prosecuted, not convicted, insolvent and the compensation is paid by the State.

Article 16 of the Directive 2012/29/EU provides the right to a decision on compensation from the offender in the course of criminal proceedings.

1. Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.

2. Member States shall promote measures to encourage offenders to provide adequate compensation to victims.

Article 1 of the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims provides that Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.

Article 4 of the Council Directive 2004/80/EC of 29 April 2004 provides that Member States shall ensure that potential applicants for compensation have access to essential information on the possibilities to apply for compensation, by any means Member States deem appropriate.

It is important to mention here that, when deciding on compensation, the financial situation of the victim should not be taken into consideration.

Also, the Directive 2011/36/EU requests Member States to take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in Articles 2 and 3 (article 7).

In this sense, in combating trafficking in human beings, full use should be made of existing instruments on the seizure and confiscation of the proceeds of crime, such as the United Nations Convention against Transnational Organised Crime and the Protocols thereto, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the

²¹¹ Official Journal, L 261/15, 06/08/2004

²¹² Official Journal, L 082, 22/03/2001

Proceeds from Crime, Council Framework Decision 2001/500/JHA²¹³ of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, and Council Framework Decision 2005/212/JHA²¹⁴ of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

The use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims' assistance and protection, including compensation of victims and Union trans-border law enforcement counter-trafficking activities should be encouraged.

5. Rights of the child victims and other vulnerable victims

a. Right to assistance and support

Children are also victims of trafficking and Member States should provide them with assistance and support in accordance with their age and special needs.

Article 13 of the Directive 2011/36/EU provides that child victims of trafficking in human beings shall be provided with assistance and support. In the application of this Directive the child's best interests shall be a primary consideration. Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance and support in accordance with Articles 14 and 15.

The Directive explicitly mentions that the child's best interests shall be a primary consideration in all the decisions taken in regard to them regardless of the fact that they are decisions taken within the criminal investigations and proceedings or in other administrative procedures.

In the context of this Directive 2011/36/EU, particularly vulnerable persons should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability. When the offence is particularly grave, for example when the life of the victim has been endangered or the offence has involved serious violence such as torture, forced drug/medication usage, rape or other serious forms of psychological, physical or sexual violence, or has otherwise caused particularly serious harm to the victim, this should also be reflected in a more severe penalty (Recital 12). Member States shall attend to victims with special needs, where those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered.

The Directive provides that in case of children an individual assessment of the special circumstances of each particular child victim must be performed to assess the needs and

²¹³ Official Journal L 182, 5/07/2001, P. 1

²¹⁴ Official Journal L 68, 15/03/2005, P. 49

concerns in order to find a durable solution. This assessment should also take into consideration, as much as possible, the child's views, depending of course of the child's age.

Each Member States should have, according to their national laws, procedures in order to individually assess each child victim in order to determine the specific actions that are to be taken. For this, it is necessary that Member States have persons highly trained in order to correctly assess the child victim in order to give specific protection measures.

As a minimum, the individual assessment should cover the physical condition of the child victim and the psycho-social position in order to determine the measures which are to be taken for the child's needs. The measures to assist and support child victims of trafficking in human beings in their physical and psycho-social recovery should be provided not only in the short but also in the long term, which is very important due to the special situation in which the child victims are.

The Directive introduces the concept of durable solution for the child, which should mean that the decision taken in regard to the child needs to cover a long period of time and should be a viable one in terms of respecting the child's views, needs and concerns but also the child's best interests.

Within a reasonable time, Member States shall provide access to education for child victims and the children of victims who are given assistance and support in accordance with article 11, in accordance with their national law.

Access to education for child victims and also for the children of victims who are given assistance and support in accordance with article 11 of the Directive is one important measure which should be taken by the Member States and this should be given within a reasonable time. Within a reasonable time means that Member States should not postponed this measure too long after the individual assessment has been done.

Article 14 par. 2 provides that Members States shall appoint a guardian or a representative for a child victim of trafficking in human beings from the moment the child is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of a conflict of interest between them and the child victim, precluded from ensuring the child's best interest and/or from representing the child.

The guardian or the representative a child victim of trafficking in human beings should act only the child's best interest and should be the person which means that the person will act only to ensure that the decisions taken in relation to the child are respecting the child's views, needs and concerns and that the child is well informed of the decisions taken in relation to him/her. The guardian or the representative also will be present in front of all the authorities where the child needs to be present (if necessary).

b. Right to protection

With regard to the protection of child victims of trafficking in human beings in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, a representative for a child victim of trafficking in human beings is appointed, where, by national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim.

Also, in accordance with the role of victims in the relevant justice system, child victims need to have access without delay to free legal counselling and to free legal representation, including for the purpose of claiming compensation, unless they have sufficient financial resources.

The persons providing free legal counselling and free legal representation, including for the purpose of claiming compensation should be persons specially trained²¹⁵ in working with children and especially with child victims of trafficking in human beings.

The interviews with the child victim need to take place without unjustified delay after the facts have been reported to the competent authorities because that is the moment when the child have all fresh in his/her memory and when the child can explain the facts and any delay will have the risk to compromise the interview. The interview needs to be taken in special premises design for these purposes in order to have a full cooperation from the child victim. Also, the persons taking the interview need to be professionals trained for that purpose because usually children are reluctant to strangers. If there are not well interviewed, the children have the tendency to not tell everything or to add facts. The child needs to have confidence in the person taking the interview and any changing of the person may have the risk of compromising the other interviews. If there are more interviews with the child then there is probably the risk that the child may experience from secondary victimization.

The presence of a person of the child's choice will give confidence to the child and the success of the interview will be much higher. Of course, if a reasoned decision has been made to the contrary in respect of that person, then that person will not be able to participate to the interview.

All interviews with a child victim or, where appropriate, with a child witness, may be video recorded and that such video recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law. The procedural rules for the audio-visual recordings referred to in point (a) of the first subparagraph and the use thereof shall be determined by national law.

Also, in criminal court proceedings relating to any of the offences referred to in Articles 2 and 3, it may be ordered that: the hearing take place without the presence of the public and

²¹⁵ Prevent, Combat, Protect Human Trafficking – Joint UN Commentary on the EU Directive – A human Rights-based Approach, November 2011, p. 80

the child victim will be heard in the courtroom without being present, in particular, through the use of appropriate communication technologies.

In addition, Article 24 from the Directive 2012/29/EU provides that Member States shall ensure that where the victim is a child: in criminal investigations and proceedings, in accordance with the role of victims in the relevant criminal justice system, competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from the family and where the child victim has the right to a lawyer, he or she has the right to legal advice and representation, in his or her own name, in proceedings where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility.

c. Unaccompanied child victims of trafficking in human beings

The Directive 2011/36/EU has separate provisions with regard to the unaccompanied child victims of trafficking in human beings.

In this sense, article 16 provides that Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, as referred to in Article 14(1), take due account of the personal and special circumstances of the unaccompanied child victim.

Member States shall take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child. Member States shall take the necessary measures to ensure that, where appropriate, a guardian is appointed to unaccompanied child victims of trafficking in human beings.

Member States shall take the necessary measures to ensure that, in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a representative where the child is unaccompanied or separated from its family. Also, Member States shall take the necessary measures to ensure that, where appropriate, a guardian is also appointed to unaccompanied child victims of trafficking in human beings.

Prevention and training

Article 18 par. 1 and 2 provide that Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings. Member States shall take appropriate action, including through the Internet, such as information and awareness-raising campaigns, research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of trafficking in human beings.

It is an obligation for the Member States to identify the areas where particularly victims can be vulnerable and to take appropriate measures in order to discourage and reduce the possibility for persons to become victims of trafficking in human beings. Member States should provide in this regard appropriate education and training in order to raise awareness for potential victims of trafficking in human beings.

In preventing this phenomenon Member States are encouraged to cooperate with relevant civil society organisations and other stakeholders, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of trafficking in human beings.

Member States shall take appropriate action, including through the Internet, such as information and awareness- raising campaigns, research and education programmes in order to prevent the trafficking in human beings.

Article 18 par. 3 provides that Member States shall promote regular training for officials likely to come into contact with victims or potential victims of trafficking in human beings, including front-line police officers, aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings.

Appropriate training of the persons in contact with victims and potential victims of trafficking in human beings is one of the most important elements in better understanding the phenomenon and the victims of such crimes.

The persons in direct contact with the victims and potential victims of trafficking in human beings have to know how to approach them and how to listen to them in order to put forward the appropriate measures in relation to them.

Especially child victims of trafficking in human beings are very sensitive and persons in direct contact with them need to understand their situation (both psychical and psycho-social), need to know how to listen to them and so propose the best appropriate actions for them.

Because victims and potential victims of trafficking in human beings are not involved only in criminal proceedings, all the persons in contact with them should have appropriate training in this regard in order to have a better evaluation of them before any measures is taken.

The Directive also mentions that this training should be regular, which means that the persons in contact with victims and potential victims of trafficking in human beings need to have specific training when needed, because we are dealing with a phenomenon in continuous changing and future possible victims.

Conclusions

We have seen that trafficking in human beings is considered a serious offence and the fight against it is a real challenge within the European Union.

The new Directive 2011/36/EU is focusing not only on combating trafficking in human beings in terms of offences concerning trafficking in human beings, penalties, liabilities, but also on preventing this phenomenon and on protecting its victims.

The Directive also introduces a new concept - the gender perspective - in order to provide adequate support and assistance for the victims.

Victims need support and assistance from the authority right from the moment there are minimum grounds to believe they have been trafficked in, and the support and assistance needs to last, in some cases, even long after the criminal proceedings have been ended.

The victims of trafficking in human beings are entitled to a range of rights as provided for in the Directive but also, other legal instruments containing other specific rights, such as the Directive 2012/29/EU, should apply in addition.

V. A DIFFERENT PERSPECTIVE ON VICTIMS (*Kim Lens*)

1. VICTIMS AS EYEWITNESSES: WHAT CHALLENGES DO WE FACE?

“Eyewitness reports have two enemies: Error and deception” (Sporer, 2008, p. 751).

Introduction

Although one might think that eyewitness reports are one of the most powerful sources of information in criminal justice proceedings, sometimes the opposite seems to be true. There are different factors that might explain why eyewitness information is not always as accurate as we think and what challenges we face using (or relying on) these statements.

In this chapter, the following phenomena are touched upon: social influences on memory (the memory conformity effect/collaborative storytelling), memories of (potentially) traumatic events, and lying/deception. At the end of this chapter, a short conclusion will be drawn based upon the existence of these phenomena.

Social influences on memory

Arguing from a social psychological viewpoint, there is one main factor that has been generally neglected in studying the working of our memory: that is, the *social setting* in which our remembering takes place. Previous research has mainly focused on remembering as a process that occurs only *within* the individual, and not *between* individuals (e.g., Roediger et al., 2001). And although everyone would argue that individual remembering is an important aspect in looking at the working of our memory, it is no surprise that social influences might also play an important role.

Memory conformity effect and collaborative storytelling

Previous research has shown that someone’s memory can be influenced by (i.e., adjusted to) that of someone else (e.g., Gabbert, Memon, and Allan, 2003; Roediger, 2001). This phenomenon is also called the ‘memory conformity effect’. An often used example of this phenomenon is the Oklahoma bombing case from 1995. Important information for the criminal case here came from three eyewitnesses who were working at a shop where the suspect rented the truck used in the bombing. The question here was who, if anybody, was his accomplice. Whereas two witnesses initially gave no description of any accomplice, one did by claiming that the man was accompanied by a second man. However, later they too claimed to have seen this second person. Also some months later the man who initially claimed to have seen the suspect enter the shop with a second person, now confessed that he may have been recalling another customer (i.e., no second suspect).

The question here then is, why did all three witnesses describe a second suspect when he actually entered the shop alone? Possible explanations might be found in the experimental studies from Asch (1952; 1956) and Gabbert and colleagues (2003).

Asch (1952; 1956)

Drawing upon a procedure first used by Binet (1900), Asch (1952; 1956) conducted one of the most famous experiments in the field of psychology and law about conformity in perceptual judgments. He had people judge the length of line, making public responses one at the time. In sum, he found that respondents often conform to the erroneous response of the confederate, intrinsically knowing that their response is wrong.

Gabbert et al. (2003)

In an experimental study, Gabbert and colleagues (2003) demonstrated that “a simple discussion between two individuals with opposing viewpoints can alter judgments” (p. 540) in different directions. They conducted an experiment in which they had dyads witnessing the same hypothetical event, but from different angles (i.e., different viewpoints). More specifically, although the sequence of events was exactly the same in both clips, several actions and items were arranged in a way that they could only be seen from one angle, and not from the other (see also practical case nr. 2). In the event, a girl enters an unoccupied university office to return a book. For participants in perspective/angle ‘A’ (but not ‘B’) it was then possible to see the title of the book and to observe that the girl throws a note into the dustbin, whereas for participants in perspective/angle ‘B’ (but not ‘A’) it was possible to see the girl checking the time on her watch, as well as committing a small crime.

That is, the opportunistic crime was presented as sliding a 10 Dollar note out of a wallet and putting it into her own pocket). All other actions and items were common to both perspectives. Shortly after witnessing the video, witnesses were told that they engaged in either a ‘memory discussion’ or in a ‘memory rehearsal phase’, dependent upon the perspective of the condition they were assigned to. That is, participants were asked to either recall the event alone or to recall the event in dyads (i.e., together). Questions were then asked about the specific events and items of the video (i.e., jewellery of the girl and the title of the book) and about the guilt or innocence of the girl of committing a crime. The two main research questions of the experiment were (Gabbert et al., 2003, p. 536-537):

- Do witnesses supplement their own memories of an event with information gained from a co-witness?
- Do the witnesses who have not seen the crime occur come to believe the girl is guilty after discussing the event with a co-witness who has seen the theft (sliding a 10 Dollar note out of a wallet and putting it into her own pocket) take place?

The overall conclusion of this experiment was that “a significant proportion (71%) of witnesses who had discussed an event with a co-witness reported items of information that they had acquired during the course of the discussion” (Gabbert et al., 2003; p. 539). That is, information they had acquired from the co-witness. And maybe even more striking, “60% of participants in the co-witness condition reported that the girl was guilty of a crime they had not actually witnessed taking place” (p. 539). However, this result also occurred in the opposite direction: about one third of all participants who had seen the girl committing the crime reported that the girl was innocent after discussing the event with a co-witness. In other words, these results demonstrate the existence of the ‘memory conformity effect’.

Possible causes?

Different authors argue that a possible cause for the existence of the memory conformity effect is a *memory distortion* (e.g., Loftus and Hoffman, 1989; Wright and Stroud, 1998) or *source confusion* (e.g., Johnson, Hashtroudi, & Lindsay, 1993; Zaragoza and Lane, 1994). With the latter we mean the problem of distinguishing what someone witnessed him/herself or what they might have heard from someone else. Johnson (and colleagues) created a source monitoring framework (e.g., Johnson et al., 1993; Johnson & Raye, 1998) in which they argue that “information from many sources may be used in recall and that, in retrieving information from memory, subjects may recall salient and recent information and misattribute its source to an earlier event” (Roediger et al., 2001, p. 369) (see also: Jacoby, Kelley, & Dywan, 1989). Gabbert and colleagues argue that *social factors* might also play a role in generating this conformity effect: “It is the result of a ‘social’ process, where the co-witness information is given as a response due to ‘normative’ or ‘informational’ influences” (p. 541). Whereas the first refers to an individual’s need for social approval, the latter refers to an individual’s desire to be accurate (see also: Deutsch & Gerard, 1955).

Memory of (potentially) traumatic events²¹⁶

Experiences of (victims as) eyewitnesses are often emotionally ‘charged’. In this paragraph the influence of emotions on our ability to remember certain events will be discussed.

Previous research has often shown that emotional experiences are often better remembered than non-emotional experiences (e.g., Christianson, 1992). This phenomenon can be explained by several factors. First of all, it has been argued that emotionally charged events are often more important and therefore get more attention. Secondly, it has been argued that this process is a consequence of the fact that emotions activate certain ‘emotioncentra’ (and stress hormones) in our brain, that prepare the recipient for potentially dangerous situations. These stress hormones influence both the speed of processing of the information and the specific factors that are given attention to.

But what can be said about (potentially) traumatic events? Is our memory of such events better or worse than our memory of less emotionally charged events? Some scholars and practitioners argue that traumatic events can be perfectly remembered. For example, Elin (1995) argues that “victims appear to have photographic recall of events that happened to them in the past” (p. 238). However, research has continuously shown that, just like ‘normal’ events, our memory of traumatic events can also be distorted. Two of these potential distortion effects are described as ‘commission’ and ‘omission’ errors.

Commissions are *erroneous* (or incorrect) elements in our memory. That is, commissions undermine the accuracy of our memory. Although different studies have shown that our memories of victims of traumatic events are quite accurate (e.g., Orbach & Lamb, 1999; Bidrose & Goodman, 2000), there are also studies that show that traumatic events can fall

²¹⁶ Parts of paragraphs 3 and 4 are derived from the book ‘Reizen met mijn rechter’, Van Koppen et al. - Kluwer (2010).

prey to commission errors. A striking example is the case in which someone who experienced a traumatic event later recalled to have seen himself lying death on the ground (see also Ehlers, Hackmann, & Michael, 2004). Victims who suffer from a posttraumatic stress syndrome are inclined to search for an 'explanation' for what has happened to them (and what caused the trauma). There is evidence that this searching for (external) factors might lead to falling prey to commission errors. Another important factor to take into account is the 'output order-effect', which means that information that is given at the end of a statement is more likely to be erroneous than information that is given at the beginning of the statement. This is an important point to take into account when cross-examining people in judicial proceedings.

Other than commissions, omissions are described as a lack of *accuracy* in our memory. That is, although the memory can be accurate, its completeness is distorted. In comparison to what most lay-people think, a high level of consistency is no guarantee of accuracy. Also consistent statements can be inaccurate. A well-known example of a situation in which omissions can occur is the 'weapon-focus effect'. This effect states that our attention is automatically focused on threatening, central information, for example a weapon. People that have been threatened with a weapon are often perfectly capable of remembering the exact details of the weapon, but are incapable to describe the clothing of the offender. As a result, our memory of the threatening events or aspects may be good whereas our memory of the non-threatening (peripheral) information, for example the appearance of the offender, may be poor.

Lying/deception

During interactions the exchange of information takes place both verbally (the content of the conversation) and non-verbally (e.g., movements of the arms, legs, smiling, speed of voice). Especially in judicial proceedings, it's important to 'judge' the credibility of someone's statements. Previous research has shown that people are inclined to focus on someone's non-verbal behaviour when trying to judge the accuracy of a statement. They argue that, because it is more difficult to control one's non-verbal behaviour than one's verbal behaviour, the first will give away more indications of the accuracy of the statement.

This hypothesis is true in some cases. There are four reasons why people are not (perfectly) capable of controlling their non-verbal behaviour (e.g., Vrij & Winkel in: Van Koppen et al., 2010). First of all, people face *difficulties in controlling, regulating or suppressing* their emotions. Second, people are not *trained* in controlling their non-verbal behaviour. Third, people are not *aware* of their behaviour. And last, people are not capable of being '*silent*' non-verbally.

But the question then is: are there specific forms of behaviour that indicate deception? And if yes, are we capable of detecting these forms? The most straightforward answer to this question is: NO. There is no such thing as a 'deceptive behaviour pattern'. In other words, Pinocchio's nose does not exist. There is no single form of behaviour that is uniquely linked

to deception or lying. However, some forms of behaviour are more or less likely to be shown by liars than by truth-tellers. For example, liars more often (but not always!) speak with a higher pitch of voice and make less hand- and arm movements than people who tell the truth.

There are (at least) three reasons why there are so few objective indicators of deception (see also Vrij & Winkel in: Van Koppen et al., 2010). First, not only liars but also truth-tellers can experience emotions and try to appear reliable. Second, our scoring system to detect deceptive behaviour is not always detailed enough. And third, our behaviour is dependent upon the context in which it takes place (e.g., the difficulty of the lie) and individual characteristics of the liar (see also Vrij, 2000; 2004; 2008 for explanations why people are not good in detecting lies).

Conclusion

As has been shown in this chapter, different factors explain why eyewitness reports are not always as accurate as we might think. These factors can be captured in both personal and social elements. The following phenomena have been touched upon: the memory conformity effect, our memory of (potentially) traumatic events, commission and omission errors and lying/deception. Legal professionals, and other participants in judicial proceedings, should take into account these phenomena, as well as their consequences, when judging the credibility of eyewitness reports.

2. THE VICTIM IMPACT STATEMENT (VIS) AND VICTIM STATEMENT OF OPINION (VSO): WHAT DO WE REALLY KNOW ABOUT THESE VICTIM 'INSTRUMENTS'?

“The effectiveness of delivering a Victim Impact Statement is not such a ‘black and white’ matter as has previously been argued” (Lens, 2014).

Introduction

Although the attention afforded to victims of crime has increased considerably in the past decades (e.g., Groenhuijsen & Pemberton, 2009), the role of the victim in the sentencing process continues to generate controversy among both scholars and practitioners (e.g., Ashworth, 2000; Erez, 1999; Groenhuijsen, 1999; Lens, 2014; Roberts & Erez, 2004; Sarat, 1997). The same applies in particular to the desirability (and effectiveness) of different victim-oriented measures (e.g., Chalmers, Duff, & Leverick, 2007; Lens, 2014; Roberts & Erez, 2010; Roberts, 2009; Sanders, Hoyle, Morgan, & Cape, 2001; Sherman & Strang, 2007), like the Victim Impact Statement (VIS). Although the precise form of a VIS can vary from a written statement that primarily serves a function in awarding compensation to an oral statement that may influence the sentence given to the offender (also referred to as a Victim Statement of Opinion; VSO), all have in common that they allow victims the right to express the harm they have experienced as a part of the court proceedings (Erez, 2004).

More specifically, VISs are written or oral statements made by the victim, in which they express the (financial, social, psychological, and physical) harm they have experienced as a

part of the court proceedings (Erez, 1990; 2004). In a Victim Statement of Opinion, the victim particularly addresses the question of the sentence.

In this chapter, the legal purposes and functions of this class of victim instruments will be presented. These will be related to (and compared with) the victim's perspectives on these functions and purposes. Furthermore, the main theoretical and empirical debates about the VIS will be discussed, as well as the current state-of-art with regard to the empirical studies of the effects of delivering a Victim Impact Statement. The chapter will end with a general conclusion²¹⁷.

Legal purposes and functions: A victim's perspective?

The legal objectives of the Victim Impact Statement are captured in multiple goals. First, it has often been stated that delivering a VIS would contribute to the information provision to the trial judge and other participants in the criminal proceedings. That is, the delivery of a VIS may help judges in imposing a 'just' or 'fair' sentence by taking into account the victim's perspective on the consequences of the crime (e.g., Roberts & Erez, 2004). Some authors even argue that a sentencing decision that does not take into account the experienced consequences of the crime by the victim is incomplete and unfair (e.g., Edwards, 2004). The second and third goal refer to its preventative purpose, which can be both 'general' and 'specific'. General preventative purposes refer to the (re)establishment of societal norms, whereas the latter (specific purposes) refer to the decrease in the relapse risk of the suspected offender. By hearing directly from the victim what the consequences of their crime have been (or still are), offenders would less easily commit another crime in the future. The fourth goal of the VIS refers to the therapeutic effects of delivering a VIS for the victim. By delivering a VIS a victim would more easily recover from the crime (see also Roberts & Erez, 2004 for a more detailed overview of the purposes of the VIS). Hence, the delivery of a VIS is supposed to have therapeutic benefits and to contribute to the emotional healing and recovery process of the victim. As often has been stated by Roberts and Erez, VISs may function as a means to award compensation, to reduce secondary victimization, to facilitate communication with the offender and/or allow the court to consider more closely the human costs of the crime at sentencing (e.g., Erez, 2004; Roberts, 2009; Roberts & Erez, 2010).

However, two important questions must be addressed here. First, do these legal purposes and functions of the VIS correspond with the victims' perceptions of that instrument? And second, what does the empirical research tell us about the actual effects of delivering a VIS on both the victim, the offender, and the criminal justice proceedings more in general?

With regard to the first question, recent research has shown that the legal purposes and functions of the Victim Impact Statement cannot be directly related to the victims' perceptions of that instrument (Lens, 2014). For example, victims often expect their VIS to have an effect on the outcome of the process when this may not actually be the case (e.g.,

²¹⁷ Parts of this chapter originate from the dissertation of Lens (2014) in which different articles are presented that deal with the questions what the effects of delivering a Victim Impact Statement are on both the victim and the criminal justice proceedings.

Edwards, 2001; Lens et al., 2010). A study from Lens and colleagues (2010) has shown that around fifty per cent of all Dutch victims who deliver a VIS stated that one of their motivations was to influence the sentence. However, in the Netherlands the VIS is restricted in the sense that victims are only allowed to speak about the consequences of the crime on their lives, and not about the actual facts of the crime or the desired punishment. That is, influencing the sentence given to the offender is not mentioned as one of the goals in the Explanatory Memorandum of the Oral Victim Impact Statement Act.

With the aim to more specifically unravel the victims' perceptions regarding the purposes (or the consequences) of submitting an oral or written VIS in court proceedings, Lens and colleagues (2010; 2013) conducted an empirical study in which they asked 170 victims of severe violent crimes to rate their perceptions of this victim instrument on a 5-point Likert-scale ranging from 1 (totally disagree) to 5 (totally agree). Here, a distinction was made between impact-related and communicative/expression-related use of the VIS. Example items of the former are: "I expect the VIS to influence the sentence given to the offender" and "I expect the VIS to positively influence my entitlement to compensation". Example items of the latter are: "I expect the VIS to positively influence my emotional recovery" and "I expect the VIS to help me get more understanding from the offender". Moreover, anticipated negative consequences of delivering a VIS were measured. For example, "I expect the offender to get angry at me after delivering a VIS" and "I expect the offender to take revenge after my delivery of a VIS". Results showed that victims' perceptions regarding the purposes and functions of the VIS can indeed be divided into three different components: victims not only perceive the VIS as an instrument to express their feelings and thoughts about the crime, but also as a way to influence the outcome of the criminal proceedings. Moreover, a significant proportion of all victims anticipate negative consequences from delivering a VIS. For example, they take into account the possibility that the offender might want to take revenge on them after having opted for their right to deliver a VIS.

In conclusion Lens and colleagues (2010; 2013; 2014) argue that this discrepancy between the legal objectives and goals of the VIS and the victims' perceptions of that instrument makes "matching" this instrument to the victim's needs and wishes complicated (Lens, 2014). And this matching is particularly important as research has often shown that failing to meet victims' expectations may lead to feelings of disappointment and sometimes even feelings of secondary victimization.

In the next paragraph, the second question will be discussed: What can scientific, empirical studies tell us about the effects of delivering a VIS on both the victim and the legal proceedings? This question will be related to the two main debates regarding the VIS.

(Empirical) debates: VIS highly controversial

The right to submit impact evidence is often labeled as (one of) "the most controversial of procedural victims' rights" (e.g., Dubber, 2002, p. 336; see also Groenhuijsen, 2014; Lens, 2014; Roberts, 2009). Although until recently there was a clear lack of empirical evidence

regarding the effects of delivering a VIS in court, both proponents and opponents were not particularly reticent with giving arguments ‘for’ and ‘against’ when discussing this class of victim instruments (Lens, 2014). Apart from the normative question whether the victim should be given a ‘voice’ during criminal proceedings, two main empirical questions were raised (Lens, 2014). First, does delivering a VIS facilitate emotional recovery of the victim? Whereas proponents of the VIS argue that victims who deliver a VIS would recover more easily from the experienced harm than victims who decline their opportunity to deliver a VIS, opponents argue the exact opposite. The latter argue that delivering a VIS maybe even lead to secondary victimization. And second, does allowing victims to deliver a VIS during the court proceedings lead to a violation of the proportionality principle? In other words, does delivering a VIS lead to inequality in sentencing? In this chapter both debates will be discussed more in-depth and empirical evidence will be presented.

Emotional recovery of the victim?

As stated before in the introduction of this chapter, one of the general goals of the VIS is to contribute to the emotional recovery of the victim. That is, delivering a VIS is supposed to have therapeutic benefits. However, the effectiveness of the VIS to lead to emotional recovery is widely debated at a practical and theoretical level (e.g., Lens, 2014; Pemberton & Reynaers, 2011). Whereas some practitioners and scholars argue that the delivery of a VIS can be effective in helping victims to recover from the crime, others suggest the exact opposite. They argue that the delivery of a VIS can even be counter-productive in the sense that it may lead to secondary victimization. By delivering a VIS, victims would feel victimized for the second time. And this time not by the offender per se, but by the criminal justice proceedings. This duality is exemplified in contradictory statements such as “VIS, don’t work, can’t work” (Sanders et al., 2001) and “VIS can work, do work (for those who bother to make them)” (Chalmers et al., 2007).

According to different scholars (e.g., Lens, 2014; Pemberton & Reynaers, 2011) the debate about the effectiveness of delivering a VIS on the emotional recovery of the victim has been - at least until recently - seriously hampered by a lack of systematic empirical evidence (see also Edwards, 2001; Herman, 2003; Parsons & Bergin, 2010; Roberts, 2009; Roberts & Manikis, 2013). The few studies that examined the effects of delivering a VIS on the emotional recovery of the victim suffered from a number of important limitations (see also Roberts, 2009; Walklate, 2002). First of all, they did not measure ‘therapeutic’ effects but used victim ‘satisfaction’ (or a similar construct) as an outcome measure (see also Edwards, 2001; Erez, 2004; Roberts & Erez, 2004). However, it is impossible to translate either satisfaction or dissatisfaction into therapeutic effects. Second, both critics and proponents have often been inclined to extrapolate from (dis)satisfaction to other consequences, like secondary victimization. This is empirically and practically impossible.

To fill this empirical gap, Lens and colleagues (in press) conducted a study amongst 143 victims of severe violent crimes to unravel the effects of delivering a VIS on their emotional recovery. They conducted a longitudinal study, with two questionnaires (the first one about

two weeks before trial and the second one about two weeks after the trial). This quasi-experimental pre-test/post-test design allowed for a comparison of the victim's situation before and after the trial and between the two subgroups: (1) those who submitted a written or oral VIS, and (2) those who declined their opportunity to deliver a written or oral VIS. The questionnaires contained the following constructs: victim demographics (e.g., age, gender, educational level), features of the crime (e.g., crime type, possible relationship to the offender, time that has elapsed since the commission of the crime), psychological state of the victim (e.g., feelings of posttraumatic stress, feelings of anger, feelings of anxiety), and the victims' perceptions of the VIS (e.g., impact-related use, expression/communicative-related use, and the anticipation of negative consequences of delivering a VIS).

First of all, results indicated that the decision to deliver a VIS results in a highly selective group of participants (Lens, 2013; 2014). Victims who opt for the delivery of a VIS display significantly higher levels of anxiety than victims who decline their opportunity to deliver a VIS, while experiencing significant lower levels of control over their recovery process (see also Lens et al., in press). Moreover, victims who make a written statement display a significantly higher level of anger compared to victims in both the no-VIS and the oral VIS group. Second, results of this study show that delivering a VIS does not give rise to direct 'therapeutic' effects in the sense that it leads to significant decreases in feelings of anger or anxiety (Lens et al., in press). However, feelings of anxiety decrease for victims who experience higher feelings of procedural justice. Also, increasing feelings of control over the recovery process could lead to a decrease in feelings of anger and anxiety as well. Based on these results, Lens (2014) argues that the effectiveness of delivering a VIS in terms of emotional recovery should not be viewed as a 'black and white' issue: The choice to deliver a VIS sets victims apart from those who decline their opportunity to deliver a VIS, and subsequent effects are subtle, differentiated and indirect. She therefore concludes that "as a result, ham-fisted and sweeping statements concerning the effectiveness of VISs are unwarranted" (p. 52).

A violation of the principle of proportionality?

Ever since the introduction of the VIS in court proceedings, people debate whether this victim instrument introduces an irrelevant issue into the sentencing process (Lens, 2014; Lens, under review). That is, critics argue that any weight given to the experienced harm by the victim could lead to disproportionate sentences. They argue that the expression of the suffered consequences by the victim might lead to harsher sentences and/or to a violation of the proportionality principle. As a general rule, academics are highly sceptical, if not outright opposed, to an influence of VISs on the sentencing decision (e.g., Lens, 2014). The main argument here is that delivering a VIS is seen as an attempt to introduce an irrelevant issue into the sentencing of the offender. "Beyond the harm the offender could have foreseen through his actions, it is unclear what bearing the idiosyncratic experience of victims of crime and his or her opinion on the offender's wrongdoing should have on the sentence" (Pemberton, 2014, p.).

However, even as the debate about the effects of delivering a VIS on the emotional recovery of the victim, this debate was also hampered by a lack of empirical evidence (Lens, 2014). Therefore, Lens and colleagues (2014; under review) conducted a study to unravel the effects of delivering a VIS on people's judgments of the offender and the sentencing decision.

They conducted an experimental study amongst 214 students at Tilburg University, the Netherlands. These students were randomly assigned to one of four conditions, defined by a 2 (crime severity: high vs. low) x 2 (experienced harm: high vs. low) factorial design and had to read one of four hypothetical situations in which a victim delivers a VIS during court proceedings. In these four 'scenario's', both the severity of the crime varied as well as the experienced (and communicated) harm by the victim. Participants were subsequently asked to fill out questions about their perceptions and judgments of the victim (e.g., their attitude towards the victim, blameworthiness of the victim), their perceptions and thoughts about the VIS (e.g., believability, general perceptions of this victim instrument), and their perceptions and judgments of the offender and the criminal justice proceedings in general (e.g., blameworthiness of the offender, severity of punishment of the offender).

In sum, the results of this study showed that people's perceptions regarding the offender and the outcome of the trial are more likely to be influenced by the severity of the crime (that is, the type of crime committed) than by the experienced/expressed harm of the crime by the victim through the Victim Impact Statement. That is, in this study no evidence was found for the claim that delivering a VIS leads to a violation of the proportionality principle.

Conclusion

Ever since the introduction of the VIS, this victim instrument has been highly debated. Apart from the more normative question whether victims should be given a voice during the criminal trial, two main empirical questions were raised (Lens, 2014; Roberts, 2009).

The first debate centres on the question whether delivering a VIS would facilitate emotional recovery of the victim, or on the contrary would lead to secondary victimization. The second debate centres on the question whether delivering a VIS would influence the outcome of the trial for the offender. In other words, whether delivering a VIS would lead to a violation of the proportionality principle.

Although until recently both debates about the effectiveness of the VIS were seriously hampered by a lack of empirical knowledge, opponents and proponents were not particularly reticent with giving arguments 'for' and 'against' this class of victim instruments (Lens, 2014). Whereas some argued that "VIS don't work, can't work" (Sanders et al., 2001), others claimed the exact opposite, namely that "VIS can work, do work (for those who bother to make them)" (Chalmers et al., 2007).

In the last few years different studies have been conducted on the effectiveness of the Victim Impact Statement. Overall, it can be stated from these studies that the effects of

delivering a VIS must not be seen as a 'black and white' matter. Lens (2014) argues that "a more heterogeneous approach to the study of the VIS is argued for: The choice to deliver a VIS sets victims apart from those who decline to do so, and subsequent effects are subtle, differentiated and indirect" (p. 109). The heterogeneity in victim experiences, perspectives, and needs should be taken into account to do justice to individual differences between victims and to better adjust these victim instruments to the victim's needs. Moreover, no systematic empirical evidence has been found that delivering a VIS would lead to a violation of the proportionality principle (Lens, 2014; Lens, under review): People's perceptions regarding the offender and their punishment judgments are more likely to be influenced by the severity of the crime (i.e., the type of crime) than by the experienced/communicated harm of the victim through the delivery of a Victim Impact Statement

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VIII. ANNEXES

Presentations of the team of experts