

## 28 THE RIGHTS OF THE VICTIM IN HUNGARIAN CRIMINAL PROCEEDINGS

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### **Keywords**

rights of victims, code of criminal procedure in Hungary, victims in criminal procedure, Directive 2012/29/EU, rights of vulnerable persons

### **Abstract**

In the course of the development of criminal law victims lost their former leading role in the procedure and were pushed to the periphery of justice. Legal experts have come to realize that this tendency is tremendously unfair to the victim. European documents on the legal position of the victims increasingly called the attention of the legislature to the need of bringing about changes. In Hungary, the relevant new law was passed in June 2017. The Code came into effect in July 2018 and confirmed the victim's procedural position. Since July, there are three groups of victims' rights in Hungarian Criminal Proceedings: provision of information and support; participation in criminal proceedings; protection of victims and recognition of victims in need of special protection. In addition to describing the rights, the study also draws attention to the fact in light of the principle that all rights are worth upholding it is not enough to regulate the rights of victims. The study also warns that although the rights of victims are important, we should not forget the guarantees concerning suspects' rights, which must also be ensured.

### **28.1 INTRODUCTION**

In 2017 the Hungarian Government adopted the draft law put forward by the Minister of Justice on the new concept of criminal procedure. The new law was passed in June 2017. The Code came into effect in July 2018 and reaffirmed the victim's procedural position. The rules for vulnerable persons have been given a separate chapter in the new act on criminal procedure, as opposed to incorporating them into various chapters and subheadings. The provisions are founded on a stronger emphasis on individualization and the specific needs of persons requiring special treatment.

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ANNA KISS

Since July 2018, there are three groups of victims' rights in Hungarian criminal procedure, as Table 28.1 shows:

<b>Provisions of information and support</b>	<b>Participation in criminal proceedings</b>	<b>Protection of victims and recognition of victims in need of special protection</b>
<i>(i)</i> Right to understand and to be understood;	<i>(i)</i> Right to make a declaration;	<i>(i)</i> Right to protection;
<i>(ii)</i> Right to receive information from the first contact with a competent authority;	<i>(ii)</i> Right to be heard;	<i>(ii)</i> Right to avoid contact between victim and offender;
<i>(iii)</i> Right of victims when making a complaint;	<i>(iii)</i> Rights in the event of a decision not to prosecute;	<i>(iii)</i> Right to protection of privacy;
<i>(iv)</i> Right to receive information about their case;	<i>(iv)</i> Right to safeguards in the context of restorative justice services;	<i>(iv)</i> Individual assessment of victims to identify specific protection needs;
<i>(v)</i> Right to interpretation and translation	<i>(v)</i> Right to legal aid;	<i>(v)</i> Right to protection of victims in need of special protection during criminal proceedings;
	<i>(vi)</i> Right to reimbursement of expenses;	<i>(vi)</i> Right to the protection of child victims during criminal proceedings
	<i>(vii)</i> Right to the return of property;	
	<i>(viii)</i> Right to decision on compensation from the offender in the course of criminal proceedings	

## 28.2 VICTIM'S ROLES IN THE CRIMINAL PROCEEDING

Hungarian criminal procedure follows three phases: investigation, indictment, and the court proceedings/trial. The criminal procedure in Hungary begins with the investigation of the crime, usually carried out by the police under the supervision of the public prosecutor. When the investigation is over the public prosecutor decides whether charges should be brought and whether the case should be brought to court for trial or – if there is insufficient evidence or if it is established that the offender should not be punished – the case should be closed at this stage. When the case is brought to court for trial, the court examines the evidence collected and decides on the guilt of the defendant.

### 28.2.1 *Who Is a Victim?*

According to the relevant EU Directive, ‘victim’ means a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; 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.<sup>1</sup>

The term ‘injured party’ is used in Act XC of 2017 on the Code of Criminal Procedure. According to Hungarian law, a victim (injured party) is the party whose rights or lawful interests have been violated or jeopardized by the criminal offence. Therefore, according to Hungarian criminal procedure, it is not only a natural person who may be a victim, but also a legal person (e.g. a company). However, Hungarian law does not consider indirect victims (e.g. family members) to be victims. Nevertheless, in the case of the death of the victim the relative in direct line, the brother or sister, the spouse or common-law partner of the victim and the legal representative of the victim may exercise the rights of the victim.

### 28.2.2 *Victim’s Position*

The victim is a many-faceted party. The victim, as the aggrieved party, can assume different positions in the process of the administration of justice. According to their legal position, they can be a ‘simple’ victim, a ‘denunciator’ who reports the crime, a ‘private complainant’, a ‘witness’, a ‘private party’, a ‘private prosecutor’, or a ‘substitute private prosecutor’. According to Erika Róth, the victim is either on the side of the state helping to enforce its criminal claim or acts as its substitute in the criminal procedure.<sup>2</sup>

- i. *Simple victim.* According to Hungarian criminal procedure, the victim’s name in Hungarian is “injured party”, and as such has the right to receive information and protection.
- ii. *Denunciator and private complainant (reporting of crimes).* According to 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-

1 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 2(1)(a).

2 Erika Róth, ‘What is the Real Interest of the Victim?’, in *Special Edition of the Proceedings of Criminology. New Tendencies in Crime and Criminal Policy in Central and Eastern Europe. Proceedings of the 65th International Course of the International Society for Criminology, 11-14 March 2003, Miskolc.* Hungarian Society for Criminology, Biber Publishing House, Miskolc, 2004, p. 396.

ANNA KISS

discriminatory manner. This could increase victims' confidence in the criminal justice systems of Member States and reduce the number 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 organizations. It should be possible to make use of communication technology, such as e-mail, video recordings or online electronic forms for making complaints."<sup>3</sup>

In criminal proceedings, the investigation is based on information about how the offence was committed. This may be data obtained by the investigating authority such as the official, but it may also be data from the report and the private indictment. In Hungary, in most cases the crime is reported by the victim.

- iii *Victim-witness*. Those victims may be heard as a witness, who may have knowledge of the facts waiting to be proven.
- iv *Private party*. The private party is the victim enforcing a civil claim in criminal proceedings. The private party may enforce the civil claim against the defendant, arising out of the offense forming the subject of the indictment.
- v *Private prosecutor*. According to the law in force, the victim can act as a private prosecutor. Unless provided otherwise by the relevant Act, in case of an assault, invasion of privacy, violation of secrecy of correspondence, libel, defamation, and irreverence, the prosecution shall be represented by the victim as a private prosecutor, provided that the offender may be prosecuted upon private motion.
- vi *Substitute private prosecutor*. In criminal proceedings when according to the law the charge shall be represented by the public prosecutor, in case of passivity on the part of the prosecutor, the victim may represent the charge as substitute private prosecutor. The victim can act as a substitute private prosecutor in three instances: if the prosecutor drops the charge; if the prosecutor or investigation officials reject the denunciation; or if the prosecutor or investigation officials terminate the investigation. The victim can be a substitute private prosecutor, or in the case of the victim's death, immediate relatives, the spouse, companion or legal representative can continue with the proceedings. The roots of substitute private prosecution go back to the end of the 19th century. The laws of the time allowed the victim to act as substitute private prosecutor in case of inactivity on the public prosecutor's part.

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3 Directive 2012/29/EU, Recital (63).

### 28.3 VICTIM'S RIGHTS

#### 28.3.1 *Right to Ask for Information*

Victims have the right to ask for information about the justice system, about services available to them, and about the progress made in their case and the status of the person who harmed them. The wish of victims as to whether they want to receive information shall bind the competent authority, unless that information must be provided due to the right of the victim to actively participate in the criminal proceedings.<sup>4</sup>

#### 28.3.2 *Right to Protection*

Victims have the right to have their security and privacy considered, and to receive reasonable and necessary protection from intimidation and retaliation. Victims can ask that their identity not be publicly released. According to the law, in order to protect the life, physical integrity, or personal freedom of the witness, as well as to ensure that the witness fulfils the obligation of giving testimony and to ensure that the testimony is given free from any intimidation, the witness should be afforded protection.

Concerning the confidential treatment of the personal data of a witness (*i*) the court, the prosecutor and the investigating authority proceeding in the case shall ensure that the data of the witness is treated confidentially and may not become known via other data of the procedure; (*ii*) the court, the prosecutor and the investigating authority ensure that the identity of the witness may not become known by way of examining documents suitable for identification; and (*iii*) the confidential treatment of the witness' personal data may only be terminated with the consent of the witness.

From the time of ordering the confidential treatment of the witness' personal data, the copies of documents containing such personal data may only be given to participants in the criminal proceedings without this data. A witness may be declared specially protected in case (*i*) his/her testimony relates to the substantial circumstances of a particularly serious case; (*ii*) the evidence expected by his/her testimony cannot be supplemented; (*iii*) the identity, the place of stay and the fact that he/she is intended to be heard by the prosecutor or the investigating authority is not known by the accused and the defence counsel; (*iv*) the exposure of the identity of the witness would seriously jeopardize the life, health or personal freedom of either the witness or his relatives.

In exceptionally justified cases, the chairperson of the panel of the court proceeding in the case, the prosecutor, or the investigating authority may initiate that the defendant,

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4 See Directive 2012/29/EU, Article 6(4); Act XC of 2017 on the Code of Criminal Procedure.

ANNA KISS

the counsel for the defendant, the victim, other interested parties, the representative of the victim and other interested parties be protected. The request may be submitted to the court, the prosecutor or the investigating authority proceeding in the case, while a verbal request should be recorded in a report.

The president of the court, the head of the prosecutor's office, and the head of the investigating authority or the commander of the penal institution, respectively, may initiate the personal protection of the staff of the court, the prosecutor's office, the investigating authority and the penal institution or another person in connection with the above.

The documents pertaining to personal protection shall be kept together with the documents of the criminal case. With the exception of the decision on the request and initiation, the documents shall be handled confidentially.

The participation of the defendant, victim and witness in the witness protection program specified in a separate act<sup>5</sup> shall not affect their respective rights and obligations related to the criminal proceedings; and in respect of the participants of the program, the provisions of the act shall apply with the following derogation: (i) persons participating in the program shall be summoned or notified by the body responsible for their protection, further, official documents to be served on such persons may only be delivered by the body responsible for their protection; (ii) persons participating in the program shall state their original personal identification data during criminal proceedings, but give the address of the body responsible for their protection as their place of residence or stay; (iii) no one – including the authorities – may be provided with a copy of documents containing the personal data of persons participating in the program and any information regarding such persons, unless they hold the permission of the body responsible for the protection of such persons; (iv) costs incurred in connection with the appearance and participation of persons participating in the program may not be accounted for as costs of the criminal proceedings; (v) the witness may refuse to give testimony regarding data that imply his/her new identity or new place of residence or stay.

### 28.3.3 *Right to Participation*

Victims have the right to present victim impact statements and have them considered. Victims' views about decisions that affect their rights must also be considered.

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5 See Act LXXXV of 2001 on regulations pertaining to victims participating in the witness protection program.

#### 28.3.4 *Right to Seek Restitution*

Victims have the right to have the court consider making a restitution order for their financial losses and to have any unpaid amount enforced through a civil court.

#### 28.3.5 *Right to Interpretation and Translation*

Criminal proceedings are conducted in Hungarian, but victims can use their native, regional or minority language or any other language they choose both verbally and in writing. If the use of their native language would lead to undue difficulties, the use of another language known to them will be prescribed. They are entitled to an interpreter free of charge.

If a person, whose native language is not Hungarian, intends to use his/her native language in the course of the proceedings, or – pursuant to and within the scope of an international agreement promulgated by law – their regional or minority language, an interpreter shall be employed. If the use of the native language involves unreasonable difficulties, the use of another language defined by the person not commanding the Hungarian language, shall be arranged with the assistance of an interpreter.

#### 28.3.6 *Criminal Charges (Reimbursable Victim Expenses)*

In a criminal procedure, the following costs and expenses may be reimbursed: (i) travel and accommodation expenses; (ii) costs of the expert invited by the victim with the consent of the prosecution/court; (iii) expenses of full or partial video or audio recordings of the proceedings/stenography; (iv) expenses for one copy of the case files; (v) communication expenses (phone, fax, post); (vi) representative's fee.

#### 28.3.7 *Applying for Mediation*

The victim may propose at any stage of the proceedings to refer the case to penal mediation if the conditions for such a procedure are fulfilled. Mediation is applied only once in the course of proceedings: for certain crimes against the person, crimes against property or traffic offences, or if the crime is punishable with a maximum of five years' imprisonment; with the victim's and the offender's consent.

The meeting of the perpetrator with the victim can play a significant role in the perpetrator's ability to evaluate the consequence and damage that he/she had caused, while it assists the victim in processing the events and finding peace. While most restorative programs in other countries of Europe take place outside of prison, in recent years there have been many experiments which examined how restorative justice could be implemented

ANNA KISS

within the walls of prisons and whether it is possible to develop a prison regime which is entirely based on restorative principles and values (e.g. the MERESP Project in Hungary).<sup>6</sup>

In the National Institute of Criminology (OKRI) during 2008 and 2009, a focus group project was carried out to examine the lessons of the mediation procedure from the side of the prosecutors' practice.<sup>7</sup> (Mediation, as one of the tools of restorative justice, will be discussed later.)

### 28.3.8 Additional Rights

Should the victim be a minor, they have some additional rights. (i) If the victim is under 14 years of age, they may be heard as a witness only if their evidence cannot be supplemented. He/she may be subjected to confrontation only if this will not cause him/her anxiety; they are to be given special attention by the victim support reference persons operating at county police headquarters and the Budapest police headquarters. (ii) If the victim is under 18 years of age, they have the right to have their parents/legal representatives/custodian present at their interview (the person accompanying the victim is entitled to the reimbursement of the same expenses as the witness). (iii) If the minor is a victim of domestic violence, the minor has the right to be heard in the presence of a psychologist, and at special premises if possible. (iv) If the minor does not have the financial resources to pay for a lawyer, they have the right to free legal representation under all circumstances.

## 28.4 VICTIMS' RIGHTS AFTER THE DIRECTIVE

According to the requirements of the Directive, in 2015 criminal procedural law was modified in Hungary. The following changes were made. (i) In the case of the death of the victim the relative in direct line, the brother or sister, the spouse or common-law partner of the victim, and the legal representative of the victim may exercise the rights of the victim. (ii) The victim is entitled to know whether the defendant is at large or has been released. (iii) The victim is entitled to be represented by legal aid counsel in all criminal proceedings. (iv) The victim is entitled to clear communication both verbally and in writing in all criminal proceedings. (v) The victim is entitled to not meet the defendant if it is possible. (vi) The victim is entitled to not have to repeat the procedural actions related to them if it is possible. (vii) For all victims, it is necessary to examine whether there is a case of special treatment; in the case of special treatment there is a need for greater protection of the victim.

<sup>6</sup> Andrea Tünde Barabás, *Áldozatok és igazságszolgáltatás*, OKRI, Budapest, 2014, p. 166.

<sup>7</sup> Andrea Tünde Barabás, 'Restorative Justice in Hungary: A Rapidly Growing Field of Practice', *Restorative Justice*, Vol. 3, Issue 3, pp. 387-395.



(viii) In the case of a sexual offence, the victim may request to be heard by a person of the same sex as the victim. (ix) In all cases, interrogation of a witness under the age of 14 must be recorded with a video camera. (x) Proceedings involving the victim may include the adult person identified by the victim who emotionally supports the victim. (xi) In the case of a victim requiring special treatment, it is possible to have a closed hearing (ex-camera trial).

#### 28.4.1 *The Victim Has New Rights*

Based on the relevant EU rules, there are new rights of victims in criminal procedures.

- i. *Victim statement.* The legislator, taking into consideration the recommendation of the European Commission on victim protection, created a new legal institution – the victim statement. According to this, the victim is entitled at any time during the criminal proceedings to declare what kind of physical, psychological harm, financial disadvantage they have suffered as the result of the criminal offence, whether they wish that the guilt of the defendant should be declared and the defendant to be punished. As such, the victim statement is a forward-looking opportunity for victims to ensure that their interests are taken into account by authorities, so that proceeding bodies consider them not only as additional actors in the criminal proceedings, but as persons who had suffered harm.
- ii. *Waiver.* In light of the Directive, the new code determines that if the victim no longer wishes to exercise their rights in criminal proceedings, they may make a declaration at any time to this end. Naturally, this statement shall not prevent the victim being questioned as a witness, if it is deemed necessary. Therefore, the victim must still fulfil their obligation to testify and the statement does not exempt them from the obligation to appear in person for certain procedural actions. The victim may revoke the statement at any stage of the criminal proceedings. The text, however, clearly states that if the statement is withdrawn, the victim cannot exercise their rights retroactively. This may namely delay the proceedings.

#### 28.5 RIGHTS OF VULNERABLE PERSONS

The rules for the protection of vulnerable persons have received a separate chapter in the new act on criminal procedure. Earlier, they could be found under various chapters and subheadings. The provisions put an emphasis on aspects of individualization and the individual needs of persons requiring special treatment.

The new act defines those persons that may be the primary recipients of special treatment: the victim, the witness and sometimes the defendant. The act concretely enumerates

ANNA KISS

those cases when it is compulsory for the acting bodies to provide special treatment. In such cases, special treatment is enforced without a separate decision. The code includes the following cases: (i) if the person concerned has not yet reached the age of 18; (ii) they are a disabled person; (iii) they have been the victim of a sexual offence.

There are two groups of measures: the first group contains measures which have the aim of facilitating the proper exercise of the rights of those concerned, as well as to ensure their careful treatment: (i) increased caution when communicating with the person concerned; (ii) increased caution in order to protect the privacy of the person concerned; (iii) the execution of certain procedural acts without delay; (iv) the requirement to avoid unjustified repetition of the procedural act; (v) the carrying out of the procedural act in a room designed for that purpose or in any other suitable place *etc.*

The second group covers protection measures that may in a particular case restrict the rights of other participants in the criminal procedure. These legal tools are restricted to cases where, the participation of the person requiring special treatment in the criminal proceedings threatens their life, physical integrity or personal freedom. These measures may also be geared towards helping the person concerned to exercise their rights and fulfil their obligations without intimidation or influence. Soft measures can naturally also be applied where providing protection becomes necessary.<sup>8</sup>

## 28.6 MEDIATION

Mediation is one of the tools of restorative justice that seeks to resolve the criminal offence as a special conflict. It is not a novel legal institution: it has existed since 1 January 2007. Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings prescribed the introduction of this legal instrument into Hungarian law. The experiences of 10 years since its implementation prove that its application has been successful. The new code reformulated this legal institution; the new provisions followed the tendency of the extension of scope. The legislature kept the basic requirements, at the same time, it introduced significant changes in several aspects.

The goal of the reformulated mediation of the new act on criminal procedure is defined through its purpose. The aim of the institution is to establish an agreement and reconciliation on the basis of the voluntary participation of suspect and victim, promoting also the suspect's future lawful behavior. The mediation process has a desirable reach beyond the criminal proceedings; therefore, the law has extended its application far beyond its earlier scope. Not only active repentance can be applied in the context of terminating substantive

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8 Ákos Kara, *The Rights of the Victim in the New Hungarian Criminal Procedure (Conference Presentation)*, 4th Annual Conference of Balkan Criminology, Budapest, 21-24 September 2017.

punishability or other concessions, but other means as well, as long as the purposes of the mediation process is upheld. It is also an important modification that there is no need to clarify the facts with sufficient certainty for the prosecution because the evidence can be complemented following a possible unsuccessful mediation process. The public prosecution's office can only suspend proceedings within the deadline for the investigation. The public prosecutor may offer the application of a measure or decision before initiating the mediation process. One of the most important issues of the codification process was the shift in the attitude towards the defendant's cooperation. The legislator has set up a new integrated system for the cooperation of the defendant in which the mediation procedure was incorporated. This is the systemic reason why the judge cannot apply mediation in the trial phase.<sup>9</sup>

### 28.7 THE RIGHTS OF THE VICTIM IN EU MEMBER STATES

Three basic models of victim representation can be identified in Europe: the French, the German and the English model.

- i. *The French model.* In those countries which have adopted the French civil party approach, victims are entirely independent of the prosecution and enjoy important procedural rights. These include the right to require the launch of a prosecution or specific investigatory acts by the authorities, access to the dossier, representation through counsel at all hearings and the resolution of claims for civil damages against the defendant by the trial court. This system clearly empowers the victim, who is able to exercise considerable influence over the conduct of proceedings.<sup>10</sup>
- ii. *The German model.* In the German model, the victim plays an active role. In the drama called criminal procedure, they are not only the victim of the crime, but also an actor of the process. In this model, victims of serious crimes are entitled to act as subsidiary prosecutors (*Nebenkläger*) alongside the public prosecutor.<sup>11</sup>
- iii. *The English model.* The English model is called the 'service rights' system. Here, victims are only entitled to information and the right to offer the court a 'Victim Impact Statement'. However, they have no right to determine the course of the procedure, unless they are involved in a private prosecution.<sup>12</sup>

9 Krisztina Farkas, *Az eljárás gyorsításának lehetőségei a német, a svájci és az olasz büntető igazságszolgáltatásban*, PhD dissertation, Miskolc, 2016. See the thesis in English at <http://phd.lib.uni-miskolc.hu/document/22696/17210.pdf>.

10 Richard Vogler & Barbara Huber, *Criminal Procedure in Europe*, Duncker and Humblot, 2008, p. 23.

11 See Michael Kaiser, *Die Stellung des Verletzten im Strafverfahren: Implementation und Evaluation des "Opferschutzgesetzes"*, Freiburg, 1992, p. 53.

12 Vogler & Huber 2008, p. 24.

ANNA KISS

According to Vogler, these different models

“illustrate perfectly the conflicting pressures on the criminal justice reform in Europe. On the one hand the powerful international victims’ rights movement, backed by measures from the Council of Europe and the EU is pressing for an increased participation for victims, whilst on the other hand; the move towards adversariality suggests their restriction to mere service rights.”<sup>13</sup>

### 28.7.1 *Minimum Standards*

To ensure a minimum level of victims’ rights in all Member States, the EU adopted several EU legal instruments setting up common rules aimed at protecting and assisting victims of crime. These are horizontal instruments dealing with victims’ rights in general, more specific instruments governing protection measures and financial compensation to victims of crime and substantive law instruments regarding trafficking in human beings and child sexual exploitation.

Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime ensures that persons who have fallen victim to crimes are recognized, treated with respect and receive proper protection, support and access to justice. The Directive replaces the 2001 Framework Decision<sup>14</sup> on the standing of victims in criminal proceedings and considerably strengthens the rights of victims and their family members to information, support and protection, including victims’ procedural rights in criminal proceedings. The Directive also requires that Member States ensure that officials who are likely to come into contact with victims receive appropriate training regarding victims’ needs. Finally, the Directive encourages cooperation between Member States and coordination of national services’ actions regarding victims’ rights.

EU Member States were to implement the provisions of the Directive into their national laws by 16 November 2015. The EU has adopted two instruments for strengthening the protection of victims of crime that ensure recognition of protection measures issued in other EU countries. These are the 2011 Directive on the European Protection Order<sup>15</sup> and the 2013 Regulation on mutual recognition of protection orders in civil matters.<sup>16</sup> Thanks to these instruments, victims or potential victims can rely on restraint or protection orders

13 Id.

14 2001/220/JHA Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.

15 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.

16 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.

issued in any EU country if they travel or move to another EU country. Both instruments are applicable throughout the EU since 11 January 2015.<sup>17</sup>

The transposition of the Framework Decision into national laws was unsuccessful in many respects, since a number of Member States did not implement it entirely. Nevertheless, they revised and supplemented their criminal procedures and transposed the Directive. Today, we are witnessing common problems in the EU. It is up to national judicial systems to face them and find a solution, including the instrument adopted in 2015, where the Member States reinforced the rights of the victim.

### 28.7.2 *The German and Italian Justice Systems*

Following the presentation of the Hungarian criminal procedure, I would like to present the rights of the victim in the German and Italian justice systems. Germany and Italy belong to the civil law system and as a result, they have common roots and demonstrate several similar and comparable features. There is a close interrelationship between the Hungarian and German legal systems: many Hungarian legal institutions have German roots. An assessment of the Italian criminal proceeding is also important because of the role of the Justices of Peace.

Mediation in its original sense, *i.e.* a proceeding between the offender and the victim to resolve their conflict by a mediation process is possible in the German and Hungarian criminal justice system alike. In the Italian criminal justice system, conciliation occurs in a specific way, by means of a specific legal institution, the so-called Justice of Peace (conciliation).

#### 28.7.2.1 **Germany**

The victim can take part in criminal proceedings as a witness or take on a more active role by formally becoming a private prosecutor or private accessory prosecutor and thus benefit from a variety of rights available to them. As a private prosecutor, they will take the place of the public prosecutor; as a private accessory prosecutor, they will take part in the proceedings alongside the public prosecutor. Victims have the following rights: *(i)* to be informed about their rights in the summons, including the possibility of receiving assistance; *(ii)* to refuse to testify if they are or were married or engaged to the suspect (the same applies to registered same-sex partnerships) or they are the victim's close relative; *(iii)* to refuse to answer specific questions if they might lead to the victim or victim's relatives being prosecuted; questions that might dishonor the victim or pertain to their private life may be asked only if absolutely essential; *(iv)* to be accompanied by a person of trust, unless

<sup>17</sup> See [https://e-justice.europa.eu/content\\_victims\\_of\\_crime\\_in\\_criminal\\_proceedings-66-en.do?init=true](https://e-justice.europa.eu/content_victims_of_crime_in_criminal_proceedings-66-en.do?init=true).

ANNA KISS

that person's presence would jeopardize the purpose of the investigations; (v) to be accompanied by a lawyer, who may be excluded if it makes the hearing of evidence difficult; (vi) to be supported during questioning by a lawyer at public expense in case the victim is unable to exercise their rights on their own; (vii) to have following expenses reimbursed if they apply within three months of their questioning to the authority questioning them: travel costs, expenses incurred, loss of time, disadvantages in housekeeping or loss of earnings (subject to limitations); however, they ordinary police questioning does not give rise to reimbursement claims.

The German term for mediation is offender-victim mediation (*Täter-Opfer Ausgleich*) which is a legal institution applied in both substantive and procedural law, as such, it is the subject of complex regulation. The legislator distinguishes between the offender-victim mediation in its original sense, and reparation in the sense used by substantive law exclusively and the legal conditions for their application. Otherwise, the law defines the same legal consequences for both forms of mediation. The main characteristics of the legal institution in substantive law appear in the effort of the offender to achieve reparation, in the communication process between the offender and the victim, in the redress of the damages caused by the crime and in the order of the three alternatives of fulfilment. Namely, as the case may be, the offender restores the whole damage; they restore it in part or made a serious effort of restoration. The legislator placed reparation outside the framework of the offender-victim mediation, in the course of which it requires that reparation for the offender shall mean a substantive personal fulfilment or a personal renouncement, in addition to the reparation of the damage as a whole or to a substantial degree. The procedural provisions prescribe extra obligations for the prosecution and the court, because they shall examine the possibility of coming to an arrangement between the offender and the victim in each phase of the proceeding. Where such an arrangement becomes possible, they shall try to implement it. In mediation, it is possible not to file formal charges with conditions or to drop the proceeding with conditions, which amounts to an arrangement combined with diversion.<sup>18</sup>

### 28.7.2.2 Italy

The victims play an important role in criminal proceedings. There are a number of rights, which they may exercise in the criminal procedure. They may participate as a victim (offended party) without a specific legal status or play a more active role by officially bringing a civil action against the offender. In Italy, victims have the right: (i) to be informed about their rights; (ii) to receive information relating to the status of proceedings, and of entries in the Official Registry of Reported Offences; (iii) to be informed of a request to

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18 Farkas 2016.

close proceedings; (iv) to receive information about their case; (v) to be reimbursed for the costs of participating in the criminal proceedings; (vi) to be assisted by an interpreter and to the translation of important documents *etc.*

The proceedings before the Justices of Peace is a special legal institution that offers diverse possibilities to dispose of a group of less serious crimes. This procedure can be considered one of the main innovations of Italian criminal law: “a soft and effective criminal law”. On the one hand, it has the goal of reducing the caseload of Italian criminal courts, on the other hand – in the case of the majority of less serious crimes – to create an alternative judicial criminal system. In this procedure, the obligation of conciliation to resolve the conflict between the parties, the alternative resolutions for the disposal of cases and the special sanction system play a significant role. The alternative criminal procedure covers three solutions: the waiver of the criminal claim because of the lack of importance of the crime, the expiry of culpability due to compensation and the conciliation between the parties. In these cases, there is usually no trial, so the procedure may be conducted more rapidly, and courts can be unburdened. Conciliation and compensation often take more time, but since they take place outside the court proceeding, they have an acceleration function as well.<sup>19</sup>

## 28.8 SUMMARY

Recently, the position of the victim has been the subject of an increasing number of surveys. During the course of the development of criminal law, victims lost their former leading role in the procedure, and were pushed to the periphery of justice. Legal experts have come to realize that this tendency is drastically unfair to the victim. To quote the well-known song by the Doors, “they are riders on the storm, swept away by sand.”

It is not easy to understand this, especially when day-to-day criminal chronicles influence us. An increasing number of people fall victim to crime every day, and this experience often has grave psychological, social, and financial implications. In many cases, the administration of justice fails to restore the damage caused by the offence. Victims are severely disregarded during criminal proceedings, and the possibilities for the enforcement of any compensation are very limited. Consequently, the government must provide victims with other types of assistance.

Recently, similarly to the beginning of the 20th century, more and more people have been calling for a restoration of the victim’s proper place and role in the drama we call criminal procedure. This is only possible by expanding the rights of the victim. To address

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19 Id.

ANNA KISS

this situation a rising number of specialists have turned the spotlight on the victims of crime.

Consequently, the question arises: should we restore the former leading role of the victim in the pursuit of crime? By no means. This is not the solution. A solution is only possible if the victim's rights increase, and if guarantees for the enforcement of victims' rights are built into the criminal procedure.

European documents on the legal position of the victim increasingly call attention to the need for bringing about changes in legislation. However, we still have problems concerning the improvement of the victim's situation for several reasons. In the early 90's the aim was to develop jurisdictions which respect the principles of fair trial, and the state was too busy to deal with victim's rights. Later, this aim was replaced by a more practical way of thinking. The new goal was to provide effective justice through faster and simpler criminal proceedings. The situation of the courts of justice, which are at the limit of their functioning abilities, may actually be made easier by rendering the procedures less complicated. But simplification and acceleration of the procedure alone are not enough to ensure effective justice. Legislators should also consider human rights issues, because simplified procedures lacking guarantees do not work out in the long run. Human rights apply not only to the defendant but also to the victim, and most victims are dissatisfied with the performance of law enforcement authorities (police, prosecution, courts). Meanwhile it is very important to maintain that it does not suffice to regulate the rights of victims, because of the principle that all rights are worth upholding. I agree with Erika Róth who warns us of the following:

“Without challenging the necessity of victims' protection and assuring the victims' rights in the criminal procedure and out of it, I would like to emphasize that we should not forget the guarantees concerning the suspects' rights, which have to be accepted as well.”<sup>20</sup>

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20 Erika Róth, 'Position of Victims in the Criminal Procedure in the Context with Requirements of the European Union', *European Integration Studies*, Vol. 9, Issue 1, 2011, pp. 109-120.