European Network of Councils for the Judiciary (ENCJ)

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As delivered

Justice in the EU – from the Citizen's Perspective
Workshop 3: How can Communication between Victims of Crime and the Judicial System in Criminal Proceedings be Improved?

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Introduction

It is a great privilege to have the opportunity of addressing this important workshop as a prelude to the task of formulating the Stockholm Programme.

The rights of the accused in criminal cases are normally set out in well known legal instruments such as Article 6 of the European Convention on Human Rights (ECHR) or in constitutions or basic laws of the Member States. There are understandable reasons why this is so given the long historic development of the rights of the accused in prosecutions by the state where prosecution was used as a means of supporting dictatorship and suppressing liberty

The rights of victims historically had much less attention. Framework Decision of 15 March 2001 (the Framework Decision) was a very significant milestone and victims' rights are properly being given attention in the formulation of the Stockholm Programme. Lawyers too easily forget the importance of the position of the victim during criminal proceedings. However, if one takes the perspective of the general public, particularly the concerns voiced by their elected representatives and the media, it can be seen there is a very strong view that the balance of rights is not correct and the position of victims has not been sufficiently safeguarded.

The challenges we face are three:

(1) Defining the rights of the victim

(2) Ensuring that the rights of the accused and victim are properly counterbalanced

(3) Securing the common attainment of victims' rights

The ENCJ considers that the work in relation to victims must proceed in parallel to the work on the accused's rights. Each is equally important to free movement, public confidence in the systems of justice and mutual confidence between the Member States. It is for that reason that we made clear in the Network's submission in relation to the content of the Stockholm Programme that both aspects should be dealt with.

(1) Defining the rights

Who is a victim?

The first question that arises in dealing with the position of victims is to define what is meant. The Framework Decision defines a victim as someone who has suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State. In many crimes, there will be no dispute as to who is the victim – the person whose house has been broken into or who has been robbed in the street or the passenger injured by a dangerous or drunk driver. However, there are other cases where whether the person who claims to be the victim is a person who has suffered harm as a result of the violation of the criminal law cannot be determined until the conclusion of the proceedings.

This is not an academic question because some take the view that, where there is an issue as to whether the person who claims to have been harmed by a violation of the criminal law has in fact been harmed as a result of a violation, the criminal process should be neutral until the actual position is determined.

A victim for the purposes of the investigation and trial, in my view, is someone who alleges that he or she has been caused harm by a violation of the criminal law. That is because in examining the rights of a person who alleges

he or she has been a victim, it is that person's status as an alleged victim that is most important. It may turn out that the victim has brought a wrong accusation, such as alleging the injuries sustained were the result of an attack when it is eventually determined by the court that the injuries were caused by the other person acting in lawful self defence. That is, of course, relevant to the issue of compensation but is not relevant in the way a victim should be treated in the stages prior to a determination by the court.

As to the vulnerable victim, there are certain victims such as children or the infirm, where it is clear. Beyond that, I agree with the view that has been expressed that it is not possible to define the categories.

The scope of the rights

In formulating the rights of victims, it is essential to take into account the very different procedural systems. I believe that this can be done by looking at the formulation of rights and their enforcement together. It is convenient to consider the rights in respect of the two distinct phases of a criminal investigation and the trial process. I would like to look at 7 aspects covering the entire period from the first point of contact of the victim with the criminal justice system up to the point the case is closed.

(i) The provision of information as to rights and expectations

It is a basic requirement of the rule of law that a victim should know what his or her rights are. As Article 4 of the Framework Decision makes clear, it is essential that at the outset of the investigation the victim is provided with detailed information as to the victim's rights and what the victim can expect throughout the investigation and any subsequent trial. It is obviously important that such information is available in commonly used languages at each police station within the European Union. It seems to us important that such a statement is made available at the time the police officer or other enforcement agency records the complaint or otherwise initiates the investigation. This is a parallel requirement to the letter of rights for the accused and should be developed in parallel.

(ii) The provision of information about the role of the victim in the proceedings

It is also important that there is provision for making sure that the victim understands the importance of the role of his or her evidence in the case and what might happen in the course of giving evidence. This is another aspect of the right to proper information. May I take as an example what happens in systems where the right to confrontation is exercised through cross examination by a defence lawyer; a witness must understand what that entails and the role such an examination will play in the decision of the court. In cases where it is clear that the victim will be subject to a critical examination of the testimony, proper support is the more important.

(iii) The provision of information to enable the victim to make a claim for compensation or bring civil proceedings

In some systems a victim will become a *partie civile;* in other systems this is not possible and the victim will have to bring separate proceedings if there is a prospect of making a financial recovery from the victim. It is important for this reason that the victim has a right to information gathered during the investigation, subject of course to the well recognised exceptions such as information about informants.

(iv) Support and legal advice

The right to assistance and support for the victim and the right to legal advice are distinct. In many cases, particularly where the crime is a more serious one or the victim vulnerable or a child, it is, these days, very difficult to see how a victim can exercise their rights without the assistance of a victim support organisation. That must be particularly important for a person who is in a State that is not his or her own. If the case goes to court, the processes of the court are generally processes where a person who is unsupported is unlikely to do himself justice or feel at the end of the day that justice has been done for him. It is therefore difficult to see how it can be argued that the provision of victim support is not as much a basic right as is the basic right of an accused to legal advice.

Whether such support should extend to the provision of legal advice is a more difficult question. There are many cases where the law enforcement agency can properly be relied upon to provide the necessary legal advice. It is a political question as to whether Member States wish to spend resources on legal advice to victims.

(v) Special rights for the vulnerable

There are clearly some crimes where support is needed from the outset, such as a sexual or violent assault or the victim is vulnerable or a child. It should be made clear in the statement of rights and obligations what the victim is entitled to expect.

There also should be the common acceptance that special arrangements are needed for the vulnerable. Taking and recording the evidence of a child or the victim of a sexual assault is a skilled task; a failure to appreciate that and to adopt a specialised approach may damage not only a successful prosecution but increase the harm that the victim has suffered.

A victim may also be vulnerable in the sense of requiring special protection. For most crimes this is fortunately not necessary; as Article 8 of the Framework Decision provides, the right to protection where there is a danger, should be an absolute right, where the victim is in danger.

(vi) The right to fair treatment

A victim should be entitled to prompt and considerate treatment when the offence is reported; such treatment must take account of the common reaction, such as shock or fear, that a victim suffers.

There is a considerable divergence, because of the historic and legal development of the different systems, in the process by which the evidence of the victim is taken at the investigative stage Although there can for that reason be no uniform standard as to the legal process through which that evidence is to be taken or recorded at that initial stage, there is no reason why there cannot be common standards in relation to courtesy, consideration and

for the provision to all victims of a copy of the evidence that he or she has given.

Similar considerations arise at the trial. A victim is entitled to courteous and fair treatment when questioned.

(vii) The right to an explanation of decision at all stages

In the investigative stage a time will come when the law enforcement agency will make a decision on how to proceed, although the processes will differ from Member State to Member State. It may be a decision to impose upon the defendant a warning or some out of court penalty. It may be a decision to continue with proceedings that will involve a trial, unless the defendant admits his or her responsibility for the crime. It may be a decision not to proceed.

Although it is not possible to provide for an absolute right that a victim must have a part in that decision-making, as procedural differences between the Member States are so considerable, there is no reason why there cannot be a common requirement that the victim is told, in terms readily understandable and wherever possible in person, at the earliest possible opportunity of the decision that has been made and the reasons for such a decision. It is the proper provision of information both as to what is happening and why decisions have been made that is so important to the victim.

As to the next stage, the trial, when the decision is made at the end of the trial and, if it is one that finds that the defendant has committed the crime and a penalty imposed, the position of the victim needs special consideration.

First, if the decision is adverse to the victim, then the victim has a right to be told the reasons why it is that the case has been decided in that way.

Second, if the defendant is found to have committed the crime, then when a court comes to impose a penalty, the victim should be given information about the type and length of penalty a court is likely to impose. This is particularly important given the range of penalties applicable in the different states and

differing practices as to whether a court will take into account either the views of the victim on penalty or the impact the crime has had on the victim or on the community in which the victim lives. Again, the procedural systems vary, but the one thing that should be without doubt is the victim's right to be told how the procedure works and the role, if any, which the victim can play in it.

There is little doubt that a court must take the impact of the crime on the victim and the community into account in assessing the penalty in each case, but it is important that the court explains in terms the victim can understand how it has taken these factors into account. We should never underestimate the importance of a full explanation.

The same must apply if there are appeals. During the appellate stage the victim should be entitled to information as to what the process involves and, at its conclusion, should be informed of its result. Some appellate systems make provision for the attendance, either with a right to speak or without that right, at the hearing of the appeal. Although I do not think it can yet be argued that the victim should have the right to attend with his or her expenses paid, it is in my view important that the victim should understand, if the verdict of a lower court is changed, what the reasons were.

(vi) *The right to a speedy determination*

It is well established and embodied in Article 6 of the ECHR that an accused is entitled to a trial within a reasonable time. It is, however, as important to take into account the position of the victim particularly where vulnerable. Should not the victim also have a right to the timely disposal of the case?

(2) Counterbalancing rights

No rights can be absolute; this is particularly the case in criminal investigations. It is necessary therefore to find a balance between the rights of the accused and the rights of the victim. It is one of the reasons why work on identifying rights that are to be available across the EU must proceed in parallel for the accused and for the victim. One cannot put one set of rights as paramount or look at a criminal justice system as one that either puts the

accused at the heart of the system or the victim at the heart of the system. Both must be equally important. Two examples must suffice.

(a) Giving evidence

The right of the accused to confront witnesses is long established and embodied in Article 6 of the ECHR. What is not as developed is the balance between that right and the rights of a victim who may be in fear of giving evidence or whose vulnerability needs protection. Although it is now accepted that those rights have to be balanced, the process of how this is best done is still being worked out. Surely it is a necessary requirement of the rule of law that the right of a victim who, on objective evidence is frightened of giving evidence in the presence of the accused or his or her lawyer, is entitled to have that evidence considered and evaluated, provided that the rights of the accused can be sufficiently safeguarded? Much more needs to be done to ensure that there is a proper balance between the respective rights. This is where legislative action may produce a more coherent system than that which can be achieved through the development of case law.

(b) The timing of the trial

This is surely important where the victim is a child or there is a sexual assault. For example, a court will always want to ensure that the accused in custody is tried as soon as possible so that if innocent he or she can be released. But is it right always to give priority to such cases in preference to the trial of a serious sexual assault where the accused is not in custody, but the victim is worried and anxious to have the case tried?

(3) Attaining those rights

It is, of course, no use in specifying rights unless there is some proper mechanism of ensuring that victims can in fact obtain the benefit of them. In one sense defence rights are easy to enforce, as if there is a failure it can often lead to the failure of the prosecution because many systems provide that a failure to observe rights brings proceedings to an end. In that sense they are self enforcing.

A failure to observe a victim's rights has no readily available sanction. It seems to me that it must follow that it is the practice and culture of the law enforcement agencies of the State and the judiciary which must play an important role in the protection of such rights. I would therefore in this final part like to address three principal means of ensuring rights are respected – ensuring victims know their rights, the best method of ensuring that law enforcement agencies and the judiciary give effect to those rights and monitoring.

(i) Making rights and obligations accessible

I have already referred to the necessity of a statement of rights. However, it is an unfortunate feature of the development of much law in recent years that it is now highly complex and, given the volume, difficult to find, even for judges and lawyers. Furthermore such rights as exist are not always set out in legislation, but are sometimes contained in what are known as "soft law". By "soft law" I mean codes of practice, common understandings or other procedures which are not founded on clear legislative provisions. Although there is nothing inherently unsatisfactory in "soft law", it makes the task of ascertaining what the rights of victims are and what obligations are owed to them more difficult.

It seems to us, therefore, that just as it is important for the accused when in a Member State which is not the state of their nationality to know what their rights are, it is also important that there should be accessible to victims of crime a clear statement of the rights that they have and the obligations that are owed to them by, for example, the prosecutor or the court, in the course of the action by the state to deal with the crime of which they were a victim. The rule of law demands no less.

(ii) Changing the culture of the criminal justice system

(a) Guidance

As is apparent from what I have already said, much of what is needed to ensure that victims are better treated by the criminal justice system and their rights better respected must turn upon the actions of the actors in the system.

Some are employees of the executive branch of the State, such as law enforcement agencies. Others are part of the judicial branch of the State. I will not enter into the controversy of where prosecutors lie.

It is here that I wish to return to the issue of "soft law". Experience in the United Kingdom has shown that the provision of a code of practice to be followed by the law enforcement agencies has brought considerable benefits, though there may be criticisms of the complexity of some of the provisions of the code. Much of the improvement in the protection of victims' rights depends on changes in culture and an acceptance of the rights which I have spelt out. It must follow that the various law enforcement agencies ought to be able to develop common codes of practice which set out the way in which the basic rights to which I have referred are developed in detail and are adapted as necessary to reflect the different procedures of each Member State.

It is also appropriate to consider whether the judiciary of the Member States should not also develop a common code of practice in relation to the rights of victims some of which I have outlined. The judiciary has a responsibility as one of the branches of the State to ensure that those rights are properly expressed and protected. We should consider the development of a uniform code which could be supplemented by any specific requirements of the different procedural systems in existence in the several Member States.

Whether this is called a code or whether it is guidance, such basic materials should form a core of what a law enforcement agency or the judiciary should do and be the basis upon which training can take place.

(b) Training

I have no doubt that all who are actors in the criminal justice system, including judges must be properly trained to understand fully the position of victims and how to mitigate, through the court process, the effect of the crime on the victim of that crime. Judges must ensure they are aware of the issues in their courts relating to victims (such as delays or lack of separate waiting rooms)

and seek to address them through regular contact with victim support organisations.

Most judges appreciate that giving evidence is a considerable ordeal for a victim, but training is needed to make sure judges know how best to treat victims during the entire court process. It is clearly a right of the victim that he or she should be treated with consideration and courtesy. That should be so, not only in the way the evidence is tested, but in the way the timing of the evidence is arranged and the witness treated whilst waiting. It is sometimes too easy for courts to lapse into running their schedules for the convenience of the lawyers.

I trust that it is now beyond argument that the vulnerable need special consideration. This has long been accepted in the case of children, but the best way of taking a child's evidence is a subject where much still needs to be done; for example, many lawyers still do not understand how to ask questions of a child. Consideration of the position of other vulnerable witnesses is more recent and still being developed. Again training is essential.

(iii) Monitoring the changes

May I mention in a sentence the one further matter that has to be addressed – monitoring the changes and evaluating them – a topic more generally touched on this morning by the President of the Supreme Court of Finland. This requires much further thought, but time does not permit that today.

Conclusion

All who work in the criminal justice system should act together to ensure that both the defendant and the victim are dealt with fairly at all stages. To date, we may not have focussed sufficiently on the position of the victim, and it is that change in focus that we must bring about throughout the European Union by the adoption of the best practices shared between the Member States.