

DIRECTIVE 2012/29/EU OF 25 OCTOBER 2012 ESTABLISHING MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME

Cezary Kulesza

1. Introductory remarks

We can distinguish two basic directions of the European criminal procedures' development: 1/ mutual functional assimilation of those systems and 2/ harmonization and cooperation¹.

The justice systems' natural tendency towards assimilation may be perceived from at least two perspectives: the human rights protection and aspiration for the increasing effectiveness of the justice systems. Undoubtedly, the leading role in the development of the human rights protection in the criminal procedure has been played by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, along with the jurisdiction of the European Court of Human Rights which increased the accused person's rights to effective defence to all the stages of the procedure. Moreover, to a certain extent, the Court started applying the principle of fair trial also to the victim.²

As far as the victim is concerned, the limited decisions of the ECtHR concerning the victim and the fact that the Convention focuses, in principle, on the rights of the defendant demonstrate that the rights of the victims are sometimes sacrificed in the name of narrowly defined cost-effectiveness of the trial. One can mention, for instance, the opinion of S. Waltoś: "One can suspect that the time for revising the European Convention of Human Rights will come. The Convention was devised as a charter protecting the rights of the person against whom the process is conducted and as a noble confrontation with what happens in the world that has been subdued. Today the situation is different. No one doubts now that protection should be extended to cover the rights of the victim in a criminal process. Such regulations are increasingly numerous in contemporary codes of criminal procedure and the time is approaching to properly update the European Convention of Human Rights."³

¹ See C. Kulesza, *Developments of the European Criminal Justice Systems- Defence Perspective* (in:) *Current Problems of the Penal Law and Criminology*, (ed. E. W. Pływaczewski), Warsaw 2012, pp. 317- 318.

² See ECtHR judgments: *Doorson v. the Netherlands* (26 March 1996, para.76 and 71-75) and *Van Mechelen and others v. the Netherlands* (23 April 1997, paras 56-65).

³ S. Waltoś: *Wizja procesu karnego XXI wieku* [A vision of the criminal process of the 21st century], in: *Postępowanie karne w XXI wieku: materiały z ogólnopolskiej konferencji naukowej, Popowo 26–28 października 2001 r.* [Criminal

It should be also noted, that article 6 (1) of the ECHR does not provide any right to judicial proceedings for the victim of an offence as such. However, the Convention does protect the right of any individual to a fair trial of a matter affecting his: civil rights and obligations”, which thus guarantees a right to trial for a person claiming compensation for a criminal offence. Where a States’ legal system allows a combination of the two actions (civil and criminal), Article 6(1) can be properly invoked in joint proceedings.⁴

In contrary to the natural resemblance processes of the European criminal justice systems, harmonization and cooperation of those systems was a top-down process, carried out in a bureaucratic way, by supranational organs: European Economic Community at first and then by European Community.⁵ Legal basis for the legal provisions to be incorporated into the EC primary law for the cooperation of Member States in the field of justice and home affairs was provided by the Treaty of Maastricht (TEU) of 1992. At the beginning, the basic form of cooperation in the frame of the third pillar was created by conventions – international agreements binding Member States. Then, based on the Amsterdam Treaty of 1997, which significantly changed TEU, new legal instruments for the third pillar were introduced: framework decisions and decisions which to a high degree supplanted the conventions.

Framework decisions issued based on the authorization provided by art. 34 (2) (b) TEU, can be looked at, similarly to the resemblance processes described above, from a human rights perspective, perspective of a states’ interests protection including criminal policy and from a perspective of effectiveness increase concerning criminal justice systems.

2. 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 replaced Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82, 22.3.2001, p. 1).

The main goal of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings (Article 1 point 1)

procedure of the 21st century. materials from the Poland-wide academic conference, Popowo 26-28 October 2001], P. Kruszyński, ed., Warsaw 2002, pp. 17–18.

⁴ See ECtHR judgment: *X and Y v. The Netherlands* (1985), 8 EHRR 235

⁵ Compare: S. Waltoś, A. Wąsek, *Harmonizacja prawa karnego w Europie z polskiej perspektywy*, cz. II [Harmonisation of criminal law in Europe from the Polish perspective, part. II], *Palestra* 1997, No. 1–2, p. 12; E. Eser, *Wege und Hürden transnationaler Strafrechtspflege in Europa*, in: *Verbrechensbekämpfung in europäischer Dimension: Arbeitstagung des Bundeskriminalamtes Wiesbaden vom 26.–28. November 1991*, Wiesbaden 1992, pp. 21–53; J.R. Spencer, *Why Is the Harmonisation of Penal Law Necessary?*, in: A. Klip, H. van der Wilt [eds.], *Harmonisation and harmonising measures in criminal law*, Amsterdam 2002, pp. 47–28; O. Lagodny, *Grundkonstellationen des internationalen Strafrechts*, ZStW 1989, Band 101, pp. 987–1011; H. Jung, H.J. Schroth, *Das Strafrecht als Gegenstand der Rechtsangleichung*, GA 1983, pp. 244–246.

According to the title this Directive lays down minimum standards and Member States may extend the rights set out in this Directive in order to provide a higher level of protection.

It is very important to underline, that the rights set out in this Directive are without prejudice to the rights of the offender. The term 'offender' refers to a person who has been convicted of a crime. However, for the purposes of this Directive, it also refers to a suspected or accused person before any acknowledgement of guilt or conviction, and it is without prejudice to the presumption of innocence (preamble, point 15). Such an assumption can be found in both the preliminary provisions of European codes of criminal procedure and in amendments introducing new rights for victims into these codes. For example, the reform of criminal procedure in France in 2000 added a preliminary article to the beginning of the *Code de procédure pénale*, (CPP) setting out guiding principles: the judicial authority ensures that victims are informed and that their rights are respected throughout any criminal process ("*L'autorité judiciaire elle à l'information et à garantie des droits des victims au cours de toute procédure pénale*").⁶

The same article includes one of the guaranties of the accused's right to defence - namely presumption of innocence: "*Toute personne suspectée ou poursuivie est présumée innocente tant que sa culpabilité n'a pas été établie. Les atteintes à sa présomption d'innocence sont prévenues, réparées et réprimées dans les conditions prévues par la loi*"⁷

In German "Draft Bill for an Act to Strengthen the Rights of Injured Persons and Witnesses in Criminal Proceedings", or the Second Victims' Rights Reform Act (2. *Opferrechtsreformgesetz*) of 2009 it was stated that above all, the aim of this act was to achieve practical improvements for the victims of crime without challenging the right of the accused to a fair trial in accordance with the rule of law⁸.

Of note are also opinions in the Polish literature concerning the provision of art. 2 §1 (3) of the Polish Code of Criminal Procedure (CCP) (criminal proceedings must be shaped so as to "take into account the legally protected interests of the victim") that "in the procedural justice concept, the sole objective is to take into account, and not to assure, proper protection of the victim's rights."⁹

As mentioned in the preamble of the Directive, the role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria:

⁶ J.F. Renucci, E.Allain, *Code de procédure pénale*, (ed.48), Paris 2007, p. 11.

⁷ .F. Renucci, E.Allain, *Code de procédure pénale*, pp. 12-13.

⁸ M.Peter, *Measures to protect victims in German criminal proceedings. A summary with special focus on the key points of the Second Victims' Rights Reform Act . The 144th International Senior Seminar. The 144th The Enhancement of Appropriate Measures for Victims of Crime at Each Stage of the Criminal Justice Process Visiting Experts Papers*, Resource Material Sources Nr 81, www.e-bookspdf.org, pp. 125 – 126.

⁹ P. Wiliński, *Sprawiedliwość proceduralna a proces karny* [Procedural justice and the criminal process], in: *Rzeczony proces karny. Księga jubileuszowa Profesor Zofii Świdwy* [Fair trial. Anniversary book for Professor Zofia Świda], Warsaw 2009, p.87.

- 1/ whether the national system provides for a legal status as a party to criminal proceedings;
- 2/ whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness;
- 3/ and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings.

Member States should determine which of those criteria apply to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system (Preamble, point. 20).

The rights and interests of victims of crime can be implemented using two different models: the extension of their rights to participate actively in the process (procedural rights) - "model of procedural rights" or widening of the goals and tasks of the police, prosecutors and courts which are targeted at meeting the needs of victims of crime - "model of services. "First model treats the victim as an entity, which should be given broad powers to pursue their interests in criminal proceedings¹⁰. Service model perceives the victim as a special target group for services and activities provided by the procedural agencies. In a certain range, both models can be used together in various combinations.

Among the rights granted to victims by the Directive the following can generally be distinguished: provision of information and support (chapter 2), participation in criminal proceedings (chapter 3), protection of victims and recognition of victims with specific protection needs (chapter 4). It must be noted, that in the case of strengthening the rights of victims a conflict with the right of the accused to defence may arise. This conflict may be particularly apparent in the model of procedural rights, where the victim may act as a prosecutor (subsidiary or private) or civil plaintiff. Even in countries that have adopted the model of services, conflict can arise between the rights of the accused to a defence and the right of the victim to protection. This problem has been recognized in the art. 23 of the Directive, which states that the right to protection of victims with specific protection needs during criminal proceedings can not prejudice to the rights of the defence. However, in this paper we make a brief analysis of the procedural rights of victims in the justice systems of Germany, Poland, France and England. One can assume that the German and Polish system of criminal process include main elements of the model of procedural rights, in the French system the elements of both models are balanced, and the English justice system adopted mainly services model¹¹.

¹⁰ See J.J.M. Van Dijk, *Victim's Rights: A Right to better Services or a Right to Active Participation*, (in:) *Criminal Law in Action. An Overview of current issues in Western Societies* (J.J.M. Van Dijk, C. Hoffmans, J. Schuttler, S. Stoliwijk – eds.) Arnhem 1986, pp. 251 – 255.

¹¹ Compare C.Kulesza, *The injured person in the Polish criminal proceedings in the light of law and practice of the selected western countries*, Białystok 1995, pp. 157 -199.

German proceedings is ruled by the obligation on the part of the public prosecution office, which is the lead investigating agency in criminal procedural law, to launch investigation proceedings and investigate the factual situation, provided that sufficient actual indications of a crime exist. This principle, which is set forth in § 152 (2) and §160 (1) StPO, and obligates the public prosecution office to take action, is referred to as the *Legalitätsprinzip*, or the “principle of legality.”¹² As stated in the doctrine, this principle is based on the absolute equality of all citizens before the law in criminal matters. However it must be noted, that today in Germany this rule only really concerns crimes (*Verbrechen*) und offences (*Vergehen*) of a certain level of importance. In reality, a development linked to the growth of petty and moderate crime (*Bagatelldelikte*) has gradually replaced the principle of legality with that of discretion to prosecute (*Opportunitätsprinzip*).¹³

After completing its investigations, the public prosecution office considers whether public charges are to be preferred. If it does not prefer public charge, it must inform the complainant of its decision and indicate the reasons therefore. Moreover, the public prosecution office must inform the victim of the criminal offence of the possibility of contesting this decision (§ 171 StPO). The victim then has the opportunity to lodge a complaint within two weeks with the Office of the Public Prosecutor General against the decision of the public prosecution office (§ 172 (1) StPO). If this complaint is dismissed by the Office of the Public Prosecutor General, the victim may move within one month to the Higher Regional Court for a decision on whether to reopen the investigation proceedings (§ 172 (2-4) StPO)¹⁴.

In the German legal system actions such as the private accusation (*Privatklage*) and the subsidiary accusation (*Nebenklage*) open up a wide range (at least theoretically) for the initiative by the victim. From the point of view of victim protection, it is important for victims to be able to join the public prosecution as a subsidiary prosecutor (*Nebenkläger*). Joining the public prosecution as a private accessory prosecutor gives the injured persons named in § 395 StPO comprehensive powers to participate in the entire proceedings starting with the preferment of public charges. Private accessory prosecutors have the possibility of contributing actively to the proceedings and influencing them by means of statements, questions, motions and even appellate remedies¹⁵.

As opposed to a further step-by-step expansion of the group of persons entitled to join the public prosecution as a subsidiary prosecutor, the Second Victims’ Rights Reform Act of 2009

¹² See S. Beukelmann, (in:) *Strafprozessordnung. Mit Gerichtsverfassungsgesetz. Kommentar* (J.P.Graf – Ed.) C.H.Beck, München 2010, pp. 632-633; C. Roxin, B. Schünemann, *Strafverfahrensrecht*, 26 Auflage, C.H. Beck, München 2009, pp.

¹³ R. Juy-Birman, *The German system*, (in:) *European Criminal Procedures*, pp. 308 – 309.

¹⁴ This procedure is called in Germany „Klageerzwingungsverfahren” – C. Gorf, (in:) *Strafprozessordnung*, pp.755 – 762.

¹⁵ M.Peter, *Measures to protect victims in German criminal proceedings. A summary with special focus on the key points of the Second Victims’ Rights Reform Act . The 144th International Senior Seminar. The 144th The Enhancement of Appropriate Measures for Victims of Crime at Each Stage of the Criminal Justice Process Visiting Experts Papers*, Resource Material Sources Nr 81 , www.e-bookspdf.org, p. 132.

strived to provide a coherent overall concept and new direction for § 395 StPO¹⁶. This overall concept was designed to revolve consistently and recognisably around the criterion of protecting those victims who are particularly vulnerable. With this concept, the Federal Government legislative initiative followed the recommendations of academics and practitioners¹⁷.

Subsidiary prosecution is an accessory action, which may be applied parallel to public prosecutor's action, and is applicable to a large number of offences¹⁸. In the case of private accusation, a "private initiative" is (at least in theory) more effective as the action taken by individual then it appears as an autonomous means of seizing the courts. It is worth to underline some risk: the public prosecutor can take over the case from the victim seizing of the court and the accused may counter-claim for damages. The private accusation is, however, extremely limited in its sphere of application private action does not exclude the power of the public prosecutor to drop the case.

In Germany the victim has also the possibility of asserting a claim for damages against the wrongdoer as early as the criminal proceedings stage by means of a so-called "adhesive procedure" (*Adhäsionsverfahren*) provided for in § 403 et seqq. StPO¹⁹.

Polish justice system just like the German one is based on the principle of legality and upholds the model of procedural rights. Therefore, the victim is a party to the preparatory proceedings and during the trial he may exercise the rights of subsidiary prosecutor, private prosecutor or submit a civil action to the court ("adhesive procedure"). The Polish CCP of 1997 compared with the former CCP of 1969 largely removed the unwarranted restriction of rights of subsidiary prosecutor and the civil plaintiff. The CCP guaranteed the victim the right to lodge a subsidiary complaint when the public prosecutor redeemed proceedings. Procedure for bringing such a complaint has been simplified as a result of amendments to the CCP by the Act of 29.03.2007 (OJ No 64 poz.432). amending the Law on the Prosecutor's Office and other laws, in force from 12.07.2007. As a major shift from the previous codification should be considered an introduction of victim-offender mediation to the Polish judicial system., The rank of victim-offender mediation significantly increased after the amendment of 10.01.2003 (Journal Laws No. 17, item 155) came into force²⁰.

The French criminal procedure works on the basis of discretionary prosecution. The public prosecutor has the task to initiate the prosecution (article 31 CPP), and he must evaluate not

¹⁶ B. Weiner, (in:) *Strafprozessordnung. Mit Gerichtsverfassungsgesetz. Kommentar* (J.P.Graf – Ed.) C.H.Beck, München 2010, pp. 1712 – 1720.

¹⁷ M.Peter, *Measures*, p.132

¹⁸ Compare, C. Roxin, B. Schünemann, *Strafverfahrensrecht*, , pp. 474 – 477.

¹⁹ C.Roxin, B. Schünemann, *Strafverfahrensrecht*, pp. 477 – 480.

²⁰ Compare C. Kulesza, *The implementation of European standards on the treatment of victims of crime in the Polish penal law*, (in :) *Position of the victim in criminal proceedings - European standards and national law* / edited by T. Cielecki, J. B. Banach-Gutierrez, A. Suchorska /, Szczytno 2008, pp. 24 -40.

only the legal basis of the case but also the appropriateness - of prosecution²¹. The victim has no official role in the investigation stage. Like any other citizen, he has no rights other than the right to report the offence (in his case the report being called a *plainte*). Even then, the police have no obligation to inform him about the progress of the proceedings²².

Once a prosecution has been formally instituted, the victim plays a more important role in the prosecution. He will be informed by the public prosecutor if the case is dropped (article 40 § 1 CPP); reparation for damage to him may be a condition for the case being dropped; and he plays a major role in the mediation procedure.

The victim of an offence, if he has suffered personal and direct damage (article 2 CPP), may come before the criminal court as a *partie civile*, either by joining in a prosecution already started, or by starting one²³.

In the first situation, he may join in proceedings that are already pending (before the *juge d'instruction* or the court of judgment), in order to demand compensation for the damage done. In the second situation, he may bypass the decision of the public prosecutor not to bring an action, either by complaining of an offence and constituting himself *partie civile* before the most senior *juge d'instruction*, or by directly denouncing the offender before the *tribunal correctionnel* or the *tribunal de police*; however, the victim must pay costs in advance.

The *partie civile* is questioned in the presence of his lawyer, unless he decides otherwise (article 114 CPP)²⁴. The accused and the victim may call on the *juge d'instruction* by written request, accompanied by reasons, that certain investigations be carried out (article 82-1 CPP): for example, interrogation, confrontation, hearing of a witness or *partie civile*, visit to the scene of crime, or production of important objects of evidence. The law of 15 June 2000 also provides that a request of this sort may be formulated by the parties concerning "any other acts which seem to them to be necessary to the discovery of the truth" (article 82-1 CPP). The judge may only refuse this request by an order, accompanied by reasons, delivered at the latest one month after receiving the request²⁵. If the instruction seems unusually long, the *partie civile* may, one year after his constitution as *partie civile*, request the *juge d'instruction* to reach a decision, under the same conditions as the accused (article 175-1 CPP)²⁶.

There are two objectives in bringing a civil action before a criminal court: to obtain a ruling on the guilt of the person and to obtain compensation for the damage suffered. However, the victim's action is not dependent on a claim for damages, and the admissibility of

²¹ J.F. Renucci, E.Allain, *Code de procédure pénale*, p.121.

²² See V. Dervieux, *The French System* (in:) *European Criminal Procedures*, pp.238 – 239.

²³ See M. Chiavaro, *Private parties: the rights of the defendant and the victim*, (in:) *European Criminal Procedures* (ed. M. Delmas-Marty, J.R. Spencer), Cambridge 2008, p. 543 – 544; J.F. Renucci, E.Allain, *Code de procédure pénale* pp.,23 – 37.

²⁴ F. Renucci, E.Allain, *Code de procédure pénale*, pp. 338 -347.

²⁵ V. Dervieux, *The French System* (in:) *European Criminal Procedures*, pp. 242, 250.

²⁶ F. Renucci, E.Allain, *Code de procédure pénale*, pp. 480-483.

the civil action does not automatically imply that damages will be awarded to the victim. On the other hand, compensation of the victim by the criminal court does suppose, as a general rule, the conviction of the defendant. However, the acquittal by the *tribunal correctionnel* or by the *tribunal de police* of a person prosecuted for an offence which does not require proof of intention is no barrier to the court awarding damages (article 470-1 para. 1 CPP as modified by law no. 96-393 of 12 May 1996). More broadly, the defendant is acquitted, if it is clear from the facts that the defendant has committed a civil wrong even if not guilty of the crime for which he has been tried (article 372 CPP; Cass. Crim., 14 January 1981, *Bull.*, no. 24.)²⁷.

In English law the victim, as such, has no right to start a prosecution. However, in principle any citizen (whether personally affected by the offence or not) has the right to institute a private prosecution. The official Committee on whose recommendations the Crown Prosecution Service was created thought that an unrestricted right of private prosecution was incompatible with the new organization that it proposed – but the government of the day thought otherwise, and in the section 6(1) of Prosecution of Offences Act 1985 the right of private prosecution is expressly preserved. However, by section 6(2) the right to bring a private prosecution is subject to the power of the DPP to take it over – and, if he thinks it proper, to discontinue it²⁸. Because of the fact that English criminal justice system works on the basis of discretionary prosecution, the police and Crown Prosecution Service have a lot of possibilities to drop the charges.²⁹

Although private prosecutions in England are now comparatively rare, they are far from unknown – despite the practical difficulties for the would-be prosecutor, which include the risk that the DPP will take over the prosecution and formally end it. Most private prosecutions are brought by those claiming to be the victim of the offence in question, or (in cases of homicide) by their relatives.³⁰

During the investigation, the victim has no rights whatsoever. The *Victim's charter*, a document published by the Home Office, tells them that they can expect the police to keep them informed, but they have no legal right to information. English criminal law, unlike the law of some other countries, does not make it a precondition for the prosecution of certain types of offence that the victim consents. Thus the victim has no legal right to put a stop to an investigation or a prosecution, although in practice the police will often be only too happy to drop a case if the victim have any legal right to insist on the police taking action. To some extent he may be able to put pressure on the police by threatening to bring a private prosecution; but if he does start a private prosecution, he has no right to require the police to share with him the information they have collected.³¹

²⁷ See V. Dervieux, *The French System* (in:) *European Criminal Procedures*, p. 226 – 227; F. Renucci, E. Allain, *Code de procédure pénale*, pp. 775 -777.

²⁸ J.R. Spencer, *The English system* (in:) *European Criminal Procedures*, pp. 152 – 153, 156.

²⁹ E. Matthias, *The balance of power between the police and the public prosecutor*, (in:) *European Criminal Procedures*, pp. 470 – 471.

³⁰ J.R. Spencer, *The English system*, p. 198.

³¹ *R. v. DPP, ex p. Hallas* (1988) 87 CrAppR 340

In practice, an agreement between the victim and the accused can result in the prosecution being dropped. This only occurs, however, where the police and the Crown Prosecution Service are prepared to discontinue the prosecution: in law, the victim has no right to prevent them from continuing with the prosecution even if he or she wishes to put an end to it.³²

If there is a public prosecution, the victim has no right to join in as *partie civile* – and although the courts are obliged to make compensation orders where this is feasible³³, the victim has no formal *locus standi* to ask for one. Against this background there has been considerable pressure in recent years to improve the position of the victim. There is public discussion about the victim as an element to weigh up when deciding on the sentence³⁴.

The resemblance of the European criminal justice systems is accompanied also by the closeness of the concept of crime prosecution accepted in systems declaring to be directed by the rule of the prosecution's legalism and those which for many years have been examples of opportunism. It is a very important issue because, as it is aptly noticed even in Polish literature, in the attitude toward the binding prosecution concept we can find the attitude toward the goals of criminal procedure and its role in the solution of social problems deriving from committed crimes and in the creation of the principles of criminal policy. Observing the evolution of those ideas for example in Germany, France or England, M. Rzewnicka-Rogacka finds legalism and opportunism in prosecution; although they express different ideas of reaction to the crime, they do not remain in a simple relation occurring between the procedural principle and exception from the principle. Their mutual relation is not expressed only in mutual functional antinomy, but it consists in their simultaneous presence in the legal systems of different states, regardless of which of them adopted *in concreto* holds a dominating position. Presently, neither legalism, nor opportunism of the prosecution occurs in a clear form. That is why, the division of the legal systems into continental Europe and common law tradition is not a deciding factor³⁵. The problem of the competition of legalism and opportunism principles is in fact the problem of mutual competition of their advantages and depreciation of the raised disadvantages. Those were the pragmatic aspects which decided that the rules of opportunism spread in continental Europe's countries with legalism tradition and that the opportunism system was not accepted *in corpore* but functional and financial arguments brought a new „softer” face of prosecution's legalism.³⁶

It must be noted, that the degree of recognition given by a legal system to the right of the victim to institute criminal proceedings is not necessarily related or proportional to the ability

³² J.R. Spencer, *op.cit.*, s. 210 – 211.

³³ The Powers of Criminal Courts (Sentencing) Act 2000, s. 130(3), requires the court, when sentencing, to give reasons where it fails to make a compensation order in a situation where it has the power to do so.

³⁴ *R v. Perks* [2000] CrimLR 606; *Blackstone*, paras. D17.1 and E1.12; *Practice Direction (Crime: Victim Personal Statements)* [2001] 1 WRL 2038

³⁵ Compare: M. Rzewnicka-Rogacka, *Oportunizm i legalizm ścigania w świetle współczesnych przeobrażeń procesu karnego* [Opportunism and the legalism of law enforcement in light of contemporary transformations in the criminal process], Warsaw 2007.

³⁶ M. Rzewnicka-Rogacka, *Oportunizm i legalizm ścigania*, pp. 126 – 127.

of the victim to play an active part during the course of prosecution. Thus, more accurate is a statement, that the importance of the role of the victim depends upon the competence of criminal courts to award compensation for harm arising from the offence. A good example is the English system, which gives the victim the widest rights to initiate a private prosecution, but virtually no rights during the public one, and no right – as such – to claim compensation³⁷.

Article 3 of the Directive provides the victim's right to understand and to be understood. 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 (art.4 p.1). Article 4 stipulates the victim's right to receive information from the first contact with a competent authority. Member States shall ensure that victims are offered the information included in this regulation (i.a. how and under what conditions they can access legal advice, legal aid and any other sort of advice) 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.

When reporting a crime, victims should receive a written acknowledgement of their complaint from the police, stating the basic elements of the crime, such as the type of crime, the time and place, and any damage or harm caused by the crime. This acknowledgement should include a file number and the time and place for reporting of the crime in order to serve as evidence that the crime has been reported, for example in relation to insurance claims (Preamble, point. 24)

The Directive requires, that when providing information, sufficient details should be given to ensure that victims are treated in a respectful manner and to enable them to make informed decisions about their participation in proceedings. In this respect, information allowing the victim to know about the current status of any proceedings is particularly important. This is equally relevant for information to enable a victim to decide whether to request a review of a decision not to prosecute. Unless otherwise required, it should be possible to provide the information communicated to the victim orally or in writing, including through electronic means (Preamble, point 26).

The right to information about the time and place of a trial resulting from the complaint with regard to a criminal offence suffered by the victim should also apply to information about the time and place of a hearing related to an appeal of a judgment in the case (Preamble, point 31)

As stated in the Directive, justice cannot be effectively achieved unless victims can properly explain the circumstances of the crime and provide their evidence in a manner understandable to the competent authorities. It is equally important to ensure that victims are treated in a respectful manner and that they are able to access their right (Preamble point. 34). The Directive explains that the right of victims to be heard should be considered to have been

³⁷ M.Chiaavario, *Private parties*, p.544.

fulfilled where victims are permitted to make statements or explanations in writing (Preamble point. 41).

The victim's right to information is particularly important in the jurisdictions that have adopted the model of procedural rights. In Poland, after the amendment of the CCP by the Act of 27 September 2013 (Official Journal of 25 October 2013 - entering into force on 1 July 2015), the code clearly defines and expands the victim's right to information. Due to the need for equal treatment of the parties to the investigation – the suspect and the injured person - the amendment introduced a new § 2 to the art. 300 CCP, which states that prior to the first hearing, an injured person shall be advised to have the status of the party to the preparatory proceedings and on his rights, in particular: to submit requests for procedures in investigation or inquiry or activities and the conditions to participate in these activities, as defined in art. 51, 52 and 315 - 318 CCP, to be assisted by an attorney, to become familiar with the material gathered at the end, as well as on the right specified in Article 23a § 1, 87a and 306 and on the duties and consequences specified in Article 138 and 139. The injured party should be instructed in particular about those rights that are associated with its activity as party to the preparatory proceedings. As indicated in the justification of the draft amendment, the provision does not provide for transfer of information on an injured party to pursue civil claims in criminal proceedings, as well as those associated with obtaining the status of parties to the proceedings (these rights are in fact communicated to the injured party together with the notice of the indictment transfer to court (Article 334 § 2 CCP) or already in course of judicial proceedings³⁸. These instructions shall be given to the injured party in writing. The injured party shall confirm their receipt with his signature. The authority should also give the victim an explicit instruction of the right to be represented by an attorney of his choice, as well as the submission of an request for the appointment of a representative *ex officio*, if he proves in a proper manner that he is not capable of bearing the costs of defence without a detriment to the necessary maintenance of himself and his family.

In Germany, after the amendment of the StPO by the Second Victims' Rights Reform Act (2. *Opferrechtsreformgesetz*) of 2009³⁹, the right of victims to the information set out in par. 406h was significantly enhanced. Para. 406h contains comprehensive information requirements for victims of crime. According to this regulation, victims are to be made aware in particular of the following rights⁴⁰:

- The possibility according to section 406d StPO of being notified, upon application, not only of the outcome of proceedings, but also whether custodial measures against the defendant or convicted person have been ordered or terminated, and whether relaxation of the conditions of detention or leave from detention has been granted for the first time; this applies if the victim can show a legitimate interest in receiving this

³⁸ *Justification*, pp. 27-28 .

³⁹ See: M.Peter, *Measures to protect victims in German criminal proceedings. A summary with special focus on the key points of the Second Victims' Rights Reform Act . The 144th International Senior Seminar. The Enhancement of Appropriate Measures for Victims of Crime at Each Stage of the Criminal Justice Process Visiting Experts Papers*, Resource Material Sources Nr 81 , www.e-bookspdf.org, pp. 125 – 126.

⁴⁰ B. Weiner, *Strafprozessordnung*, pp. 1763 – 1766; M.Peter, pp. 130 – 131.

information and if there is no overriding interest on the part of the defendant or convicted person which constitutes an obstacle to providing such information⁴¹;

- The possibility as stipulated in section 406e StPO for an attorney to inspect the court files on behalf of the victim, and/or for the victim to himself receive information and copies from the files, which is required e.g. for asserting civil claims⁴²;

- The possibility according to section 406f StPO of availing oneself of the assistance of an attorney (*Beistand*) or of being represented by such attorney in criminal proceedings; or, if being examined as a witness, the possibility that the witness may bring along a person he trusts to the examination (section 406f (3) first sentence StPO)⁴³;

- The possibility provided by section 403 et seqq. StPO of asserting a claim for damages against the wrongdoer as early as the criminal proceedings stage by means of a so-called “adhesive procedure” (*Adhäsionsverfahren*);

- Information of a potential entitlement to benefits pursuant to the Victims’ Compensation Act (*Opferentschädigungsgesetz*) was adopted. These can be considered if, as a result of the offence, the injured person has suffered serious health damage;

- Similarly, § 406h StPO number 4 creates on the side of the investigating authority a duty to provide information on the Act on Civil Law Protection against Violent Acts and Stalking (*Gewaltschutzgesetz*) and the possibilities created by this act, which allow the injured person to move for the issuance of an interim injunction to protect against further victimization;

- Like all other duties to inform, the duty to inform victims of the possibility of receiving help and support from victim support organizations has also been made mandatory.

With the amendments in section 406h first sentence StPO, it is now explicitly regulated in law that the information required by section 406h StPO must be provided at the earliest possible stage⁴⁴.

The right stipulated in Art. 11 of the Directive to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts⁴⁵. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority. The right to a review of

⁴¹ B. Weiner, *Strafprozessordnung*, pp.1752 – 1754.

⁴² B. Weiner, *Strafprozessordnung*, pp. 1754 - 1758

⁴³ B. Weiner, *Strafprozessordnung*, pp.1758 - 1763

⁴⁴ B. Weiner, *Strafprozessordnung*, pp. 1763 – 1764.

⁴⁵ See: C. Kulesza, P. Starzyński (in:) *Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime. Commentary* (ed. E. Bieńkowska, L. Mazowiecka), Warsaw 2014, pp. 130 – 140.

a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position (preamble, point. 43)

A decision ending criminal proceedings should include situations where a prosecutor decides to withdraw charges or discontinue proceedings (preamble, point 44)

A decision of the prosecutor resulting in an out-of-court settlement and thus ending criminal proceedings, excludes victims from the right to a review of a decision of the prosecutor not to prosecute, only if the settlement imposes a warning or an obligation (preamble, point 45).

The main regulation concerning victim's access to legal aid is art. 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 right to legal advice is a key issue in procedural rights for victims. A victim who is assisted by an effective lawyer is in a far better position with regards to the enforcement of all his other rights, partly because he is better informed of those rights and partly because a lawyer is able to assist him in ensuring that his rights are respected⁴⁶.

One of the basic obligations of a lawyer is to assist his client, not only in the preparation for the trial itself, but also in ensuring the legality of any measures taken in the course of the proceedings. The question then arises whether the victim's right to the assistance of counsel must be effective? If so, ECtHR case-law relating to the right of the accused to the effective assistance of counsel may be referred to the victim's attorney respectively. According to the ECtHR, legal assistance must be effective and the State is under an obligation to ensure that the lawyer has the information necessary to conduct a proper legal aid.⁴⁷ But effective criminal defence undoubtedly requires not only the right to competent legal assistance. Legislative and procedural context should also be considered, as well as organisational structures, that enable and facilitate effective defence as a crucial element of the right to fair trial. In the European literature an opinion can be found, that it is necessary to approach the assessment of access to effective criminal defence in any particular jurisdiction at three levels:⁴⁸

- (a) Whether there exists a constitutional and legislative structure that adequately provides for criminal defence taking ECtHR jurisprudence, where it is available, as establishing a minimum standard.
- (b) Whether regulations and practices are in place that enable those rights to be "practical and effective.
- (c) Where there exists a consistent level of competence amongst criminal defence lawyers, underpinned by a professional culture that recognises that effective defence is concerned as process as well as outcomes, and in respect of which the perception and experiences of suspects and defendants are central.

⁴⁶ Compare: C. Kulesza, P. Starzyński, (in:) *Directive...*, pp. 200 – 220.

⁴⁷ See referring to the effective criminal defence E.Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in Europe*, Antwerp-Oxford-Portland 2010, pp. 38-44.

⁴⁸ Ibidem, pp.5-6.

According to the European Commission (DG Justice Guidance)⁴⁹ national law must provide for the appropriate legal framework to ensure that victims have the right to legal aid. Member States may define the conditions and procedures for ensuring victims' access to legal aid. However, if a victim has the right to access legal aid under national law, it should at least cover legal advice and legal representation free of charge.

Therefore Member States are invited to consider.

- Specifying in national criminal law legislation under what conditions and circumstances victims are able to access legal aid, bearing in mind the need to ensure equal access to justice and victims' right to a fair remedy⁵⁰.
- Adopting administrative procedures to implement victims' access to legal aid, without excessive bureaucratic requirements. Good practice suggests that application forms for legal aid should be available in a range of different languages, or assistance should be given to victims not speaking the official language of the country but looking to apply for legal aid.
- Ensuring that victims are informed about how and under what conditions they can access legal aid at their first contact with the competent authorities (linked to Article 4, paragraph 1(d)).

But the conditions or procedural rules under which victims have access to legal aid shall be determined by national law. With this regulation is strictly connected art. 14 establishing right to reimbursement of expenses and stating, 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 interpretation of the above mentioned rights we can find in the Directive's preamble which provides, that victims should not be expected to incur expenses in relation to their participation in criminal proceedings. 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

⁴⁹ DG Justice Guidance Document related to the transposition and implementation of 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, European Commission, DG Justice, December 2013, Ref. Ares(2013)3763804 – 19/12/2013, s. 30, http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf

⁵⁰ Member States could draw on the Human Trafficking Directive wording: '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 when the victim does not have sufficient financial resources.'

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 (Preamble, point. 47).

The Polish CCP provides for, that in contrast to the defence, the appointment of an attorney by the injured party is always optional. The doctrine postulates to introduce into the CCP a provision requiring from judicial body (in case of the private prosecution proceedings only by the court) establishment of legal aid in the event of apparent helplessness of the person mentioned in Art. 87 § 1 CCP.

The doctrine and jurisprudence very often encounters the view that the costs and other circumstances of fact cannot restrict the individual's right to fair trial.⁵¹

The most important reasons for the participation of victims' attorneys in criminal proceeding are the following⁵²:

- the reason of expertise - because the attorney has the knowledge and legal experience necessary to conduct the case, and the victim usually lacks such particularly practical skills;
- the reason of mental state - attorney is not involved in the legal defence of their interests, so its relationship to the case is less emotional than the victim's one, which allows him to evaluate realistically the facts and evidence and undertake appropriate action tactics;
- the reason of substitution – an attorney has the ability for substituting his client in situations where he is not able to perform all the steps in the proceedings . Lawyer or legal adviser has better access to the procedural authorities or secretariats of the courts, and his help is particularly important when the victim because of bad health condition is not able to personally perform certain actions;
- the reason of mental help - because an attorney should be in principle a trusted person of the injured party, and to be able to awaken the activity of victims of crime to defend its rights and interests of the process.

An attorney may be appointed by the injured person (so-called agent of choice) or appointed by the president of the court (so-called agent *ex officio*). Power of attorney of choice, given by the injured person, usually comprises contract for appropriate lawyer's or solicitor's services and gives him power of attorney. Power of attorney *ex officio* shall be issued by the president of the court competent to hear the case, when the injured person proves in a proper manner that he is not capable of bearing the costs of defence without a detriment to the necessary maintenance of himself and his family The possibility of establishing a

⁵¹ D. Gil, *Attorney of private prosecutor* (in :) *Proceedings in cases of private prosecution in the Polish criminal proceedings* , LEX 2013.

⁵² See: C. Kulesza, *The role of the attorney in protecting the rights of the victim* (in :) L. Mazowiecka (ed.), *Secondary victimization. Origin, essence and role in transforming crime policy for the treatment of victims*, Warszawa 2012, pp. 118 and 127 – 128 and the literature cited thereof.

representative *ex officio* is called "the law of the poor". As pointed out in the case law, in criminal proceedings for the issue of the establishment of legal aid will prevail only the facts of the financial situation of the parties. The wording of Article 88 CCP indicates clearly that the provisions relating to mandatory defence do not apply to legal aid for victims (decision of the Supreme Court on 5 August 2005, III KK 503/02, OSNwSK 2003, No. 1, pos. 1685).

Therefore, contrary to civil proceedings, an exemption from court costs is not a condition to gain the right to make such a request. It should be added that the application for appointment of a representative *ex officio*, filed in the criminal proceedings by a party other than the defendant (Article 88 in conjunction with Art. 78), is subject to the procedure appropriate to examine the accused's application for establishment of public defender.

The independence of the attorney *ex officio* who is appointed for the subsidiary prosecutor was underlined in the decision of the Supreme Court of 20 November 2011 (II, KZ 63/08, OSNwSK 2008, No. 1, pos. 2339), which emphasized that the victim's lawyer appointed to prepare the appeal is totally sovereign in its assessment of the legal situation of the person he represents. Lawyer's decision is not subject to the court's opinion, and it does not raises the victim's right to appoint *ex officio* of another attorney.

After the amendment of the CCP by the Act of 27 September 2013 (Official Journal of 25 October 2013 - entering into force on 1 July 2015), the Polish model of criminal procedure came significantly closer to the assumptions of the model of "procedural rights". Therefore, the doctrine of the criminal process recognizes an important role of the victim's attorney in the amended CCP⁵³. The reform should involve forcing the activity of the parties at the trial primarily by the amended Article 167 CCP and greater opportunities for discontinuance of the proceedings by the court as a result of the institution to withdraw the complaint.

The new shape of the adversarial principle was introduced by Article 167 CCP which provides that:

- in the main proceedings instituted at the initiative of the parties evidences are carried out by the parties, following their release by the president of the court or by the court. In the event of the absence of the party on the request of which the evidence was admitted as well as in exceptional justified cases, the evidence is carried out by the court within the limits of the evidence thesis. In exceptional justified cases, the court may admit and carry out evidence *ex officio* (§ 1);
- In other proceedings before the court and during preparatory proceedings the evidence shall be carried out by the authority which conducts the proceedings. This does not exclude the right of the party to request the evidence (§ 2).

⁵³ Compare: M. Flis - Świeczkowska, *Strengthening the role of the victim's attorney in the light of the adversarial criminal process*, (in :) *Adversariality in the Polish criminal proceedings* (ed. P. Wiliński), Warsaw 2013, pp. 539 - 553; M. Mańczuk, *The role of the victim's attorney in an adversarial criminal process - due to the background of the draft amendment dated 8 November 2012* (in :) *Adversariality in the Polish criminal proceedings*, op.cit., pp. 651-662).

In the justification of amendment to Article 167 § 1 CCP it was stated that on the one hand it exempts the court from the evidence activity at the main hearing when the prosecutor is passive in this respect. On the other hand, the court in a lesser degree than before will play the role of "a guarantor" to the accused, who - as a party - will take the material burden of proof in a greater extent"⁵⁴. It seems that this statement will equally address the victim, as an active party to the proceedings.

A new approach to Article 14 § 2 CCP required to safeguard the interests of subsidiary prosecutor, which should not be deprived of their rights due to the fact that the public prosecutor withdraws the indictment. Provided, therefore, a design change in Article 54 § 2 CCP, according to which the withdrawal by the public prosecutor of the indictment does not deprive the subsidiary accuser of his rights. The injured person, who previously did not use the powers of the subsidiary accuser will be able to declare that joins to act as the subsidiary accuser, within 14 days of being notified of the withdrawal of the indictment by the public prosecutor. However, a successful subsidiary prosecutor's accession to the proceedings in circumstances stated above as a rule will require assistance from an attorney

Article 370 CPP that was clarified by an amendment will acknowledge the rule stated in Article 167 CCP that the parties take the evidence and should be active in asking questions at the trial. In the cases referred to in the amended Article 391 CCP the court may also read out the testimony of witnesses at the trial primarily at the request of the parties, and *ex officio* only in exceptional and justified cases (Article 167 § 1 sentence 3 CCP) or in the proceedings initiated *ex officio* (Article 167 § 2 CCP). The purpose of the above changes is to ensure that the parties would be more active in the field of evidence, while limiting the activity of the court acting *ex officio*⁵⁵.

It should be noted that, as the defendant, the victim will bear in appeal proceedings the consequences of earlier passivity during the main trial. These consequences may involve a ban to raise in appellate measure that facts of the case were established erroneously. In the light of the new Article 427 § 4 CCP the appellant will not be able to plead that a court missed to take a specific evidence if the party did not submit such evidentiary requests, or a court took an evidence despite the lack of evidentiary requests of a party in the matter or outside the scope of the request. However, according to § 3 of the above provision the appellant may also indicate new facts or evidence, but only if they could not be relied in proceedings before the court of first instance.⁵⁶

⁵⁴ Justification of the draft amendment, the Parliament print No 870 , p 29

⁵⁵ Justification of the project, pp. 87 - 88, See as well: T. Grzegorzczuk, *Situation of the parties to the proceedings in an adversarial hearing in light of the draft amendment to the Criminal Procedure Code of 2012*, (in:) *Adversarial*, op.cit. , pp. 45-56 .

⁵⁶ C. Kulesza, *Adversariality of appeal proceedings in the light of the draft amendment to the Criminal Procedure Code prepared by the Codification Committee of 8 November 2012* (Parliament Print No. 870), (in :) *Adversarial...*, pp. 121 – 137.

The new regulations of the institution of legal aid comprised in Article 87a CCP should also be considered as significant. They provide that:

- at the request of a party other than the defendant who has no attorney of choice in a judicial proceedings, the president of the court, the court or the legal secretary shall appoint attorney *ex officio* (§ 1);
- the provision of § 1 shall be applied *mutatis mutandis* to appoint a representative to perform a particular procedural activity in the course of judicial proceedings (§ 2);
- when serving a notice of the main trial or session referred to in Article 341 § 1, 343 § 5 and 343a CCP, a party shall be advised on the right to apply for attorney *ex officio* and that he may be ordered to pay the costs of attorney *ex officio* depending on the result of the case (§ 3);
- re-appointment of a representative in the manner referred to in § 1 and 2 is permitted only in particularly justified cases (§ 4).

If the principle of adversarial trial leads in Poland to the consistent separation of three aspects of the proceedings: accusing, defending and ruling, and the prosecutors are more inclined to opportunistic practices, the current conflict between the principle of legality and the rights of the victim will weaken. It can therefore be assumed that similar to the defence counsel it may fall to the victim and his attorney in fact to act as Cassandra of rule of law⁵⁷.

⁵⁷ See: C. Kulesza, *Opportunism and the legalism of law enforcement and the victim's rights in the light of the revised penal legislation of 2013*, (in:) *Polish penal process and substantive criminal law in the light of the amendment of 2013. Jubilee book dedicated to Professor Janusz Tylman on the occasion of his 90's birthday* , Warsaw 2014, (in print).