

A Needed Balance Between Security, Liberty and Justice. Positive Signals Arrive From the Field of Victims' Rights

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Abstract

Both authors and NGOs have levelled harsh criticism at developments within the Area of Freedom, Security and Justice. The European legislator is accused of being too keen on the repressive aspect, and too oblivious to respect for civil liberties. As a matter of fact, there are a certain amount of instruments which exist that are aimed at preventing crime while a very limited number are focussed on protecting the rights of the individuals. The purpose of this paper will be to assess the "quality" of the legislation intended to enhance the protection of individuals. The selected field of analysis will be victims' rights, chosen for its strategic role both in building an image of Europe in the international arena, and in relation to the construction of Europe itself, given the important connection with freedom of movement. This paper will demonstrate how the Framework Decision on the standing of victims in criminal proceedings sees the victim more as a crucial tool for law enforcement, than as an individual whose interests needs to be protected. Member States are, in fact, given strong obligations as to the right of participation and to information, while some gaps can be found with respect to the right of protection, the right to reparation, and to receive support. This imbalance is accentuated with respect to cross-border victims. One could then conclude that even in respect of the instruments aimed at enhancing the protection of individuals, some evidence of a repressive aim can be observed. Fortunately, the recent Commission proposal seems to be headed in a different direction. Under the proposal, protection rights would be boosted, and stronger obligations would exist for national legislators as to the creation of support services and the training of professionals. If the spirit of the legislative text is maintained throughout negotiations and in the final texts, and the new institutional features of Lisbon, involving the Parliament in the legislative procedure in former third pillar matters certainly lead one to think so, then this will undoubtedly contribute to correcting the existing imbalance between security and liberty.

I. Introduction

"Who controls the controllers?". By mentioning Bentham's famous question, Heike Jung tries to drive the attention towards the need for a balance between law and order concerns, and the respect of fundamental rights, within the Area of Freedom, Security and Justice¹. Jung's idea of Europe as a real space for European citizens which is governed by the rule of law, and not as a mere cooperation between Member States in the fight against crime, is not recent. As a matter of fact, in 1977, Valéry Giscard d'Estaing spoke of *Espace judiciaire Européen*, and not of an *Espace policier Européen*², revealing the final aim of establishing a equilibrium

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¹ See Jung, "Due Process versus Crime Control – The European Dimension", in *ERA Forum*, Vol, 33, 2002, p. 60

between security and justice aspects. Unfortunately, this result still does not seem to have been fully achieved at present, and the developments in the field of cooperation in criminal matters have been highly criticized for being too keen on the repressive component and too oblivious of the respect of fundamental guarantees. Both NGOs³ and authors in the legal field⁴ have emphasized that the enactment of a significant amount of legislation aiming at preventing and repressing crime has not been accompanied by an equivalent development of protection for individuals involved in criminal proceedings. Indeed, several mutual recognition instruments have been enacted, and also substantive criminal law has been the object of certain harmonization⁵. Conversely, so far, only four instruments aimed at protecting rights and liberties have been adopted: the directive on the protection of personal data⁶, the directive on the right to interpretation and translation in criminal proceedings⁷, the framework decision on the standing of victims in criminal proceedings⁸ and the directive on compensation of victims of crime⁹.

Considering that there is already a very limited amount of legislation protecting freedoms, what becomes crucial is a careful scrutiny of its effectiveness, when one wants to establish which direction Europe is wishing to follow if prioritizing the repression of crime, or if seeking to ensure security but also liberty at the same time. Among the three fields mentioned above, victims' rights provides the most appropriate scope for conducting this analysis for at least three reasons.

First of all, this field requires urgent attention in terms of Europe's image-building in the international arena. As a matter of fact, other international organizations have already adopted several texts on this matter¹⁰, and the theme of victims' rights has been recently placed at the centre of the political and cultural debate at an international level. In this respect, Doak even speaks of a "re-birth of the victim"¹¹ something which Europe needs to be in step with.

² Giscard d'Estaing, Proposition sur la mise en place d'un espace judiciaire européen, Brussels 5 Décembre 1977, available at: http://www.ena.lu/proposition_valery_giscard_estaing_mise_place_espace_judiciaire_europeen_bruzelles_decembre_1977-010006377.html

³ See for instance the criticism advanced by Free Trial Abroad, outlined in Jakobi et al., "Achieving Balance among Liberty, Security and Justice: An Agenda for Europe", in *ERA Forum*, Vol. 33, 2002, p. 87.

⁴ See, among others, Guild et al. (ed), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Ashgate Publishing Limited, Aldershot, 2008, p. 7-9, and Morgan, "Proposal for a Framework Decision of Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union" in *ERA Forum* vol. 4, n. 4, 2003, p. 91-99.

⁵ For an overview on the main texts adept in the field of European Criminal Law see Vermeulen, *Essential Texts on International and European Criminal Law*, Maklu, Antwerpen, 2010.

⁶ Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, 27 November 2008, 2008/977/JHA.

⁷ Directive on the right to interpretation and translation in criminal proceedings, 26th October, 2010, 2010/64/EU.

⁸ Framework Decision on the standing of victims in criminal proceedings, 23rd March, 2001, 2001/220/JHA.

⁹ Directive relating to compensation to crime victims, 29th April, 2004, 2004/80/EC.

¹⁰ See for instance: Council of Europe, European Convention on the Compensation of Victims of Violent Crimes, 23 November 1983, CETS n. 116. Council of Europe, Recommendation (1985)11 on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985. United Nations, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, GA Res. 40/34.

¹¹ Doak, *Victims' Rights, Human Rights and Criminal Justice*, Oxford and Portland, Oregon, 2008, p. 1.

Secondly, safeguarding victims' rights is a particularly important theme for the European construction itself, as it is closely connected to fundamental freedoms. If other aspects, such as the protection of the rights of the defendant are potentially important for building mutual trust between national authorities, victims' rights are crucial for building citizens' trust in other legal systems. Individuals are not motivated to travel and to establish themselves in another member State safe in the knowledge that in the event they wish to commit a crime, they will be prosecuted, with all the procedural safeguards on offer for suspects guaranteed! They are much more reassured by the fact that, should they move abroad, in the event that they are victimized, which is not a statistically remote possibility¹², they can rely on an effective justice system that will take into account their interests.

For these two reasons this is a very strategic field to regulate, and thus the scrutiny on how effectively the European legislator has accomplished this task becomes highly relevant.

Thirdly, from a theoretical point of view, victims' rights are a particularly interesting test area when enquiring into the European legislator's intentions. As a matter of fact, there are several interests at stake, and compromise is not easy. On the one hand, individuals who have been injured have specific needs that deserve to be taken care of. On the other hand, the victim of a crime is also a crucial and essential tool for law enforcement purposes, as it is the victim who is most likely to report the crime, and who probably has the most information regarding the events related to it. When the two interests – gathering information from the injured party for law enforcement purposes, and satisfying all needs of a victimized individual – are conflicting, policy choices have to be made. A scrutiny of these is revealing as to what the priorities of the legislator are, whether these be law enforcement and crime repression, or the protection of the individuals' rights. The aim of this article will be to analyse which inspiring principles have guided the European legislator when regulating in this extremely important field, in order to come to an appreciation of whether the Union is effectively trying to provide a more balanced Area of Freedom, Security and Justice, or if, in fact, it is still stuck in a security-oriented perspective. The specific research question will be: when acting in the field of victims' rights and having to make a policy choice, did the Union endorse a perspective focused on law enforcement or on individuals' rights?

The article will be structured, as follows: The objective of the first section will be a scrutiny of which controversial aspects of victims' needs require the legislator to make a specific choice. The second section will provide a critical analysis of the framework decision on victims' standing, to see how these critical aspects have been addressed in practice by the European legislator. The third section will contain a scrutiny of the recent Commission's proposal, in order to assess whether the same approach is confirmed or overturned.

¹² See the statistics mentioned in the Communication of the Commission on strengthening of victims' rights. (European Commission, Strengthening Victims' rights, 18 May 2011, COM(2011) 274 final).

II. What Problematic Aspects Exist in The Field of Victims' Rights?

The concept of victims' needs is a very heterogeneous and composite one. It encompasses the financial aspects, in addition to those that are emotional, but there is also the mere need of practical and logistic support. This is due to the varying impact offensive behaviour can have on an individual. It might cause economic loss; it might cause moral damage, given the potentially devastating psychological effects of crimes; and it might place the victim in a situation of confusion and disorientation, in which he/she will need support from adequate structures, before and after reporting the crime. Drawing inspiration both from literature on victimology¹³, and from the categories outlined in the Commission's proposal¹⁴, victims' needs can be summarized in six categories¹⁵. The first one, the need of respect and recognition, is a transversal element that needs to be present at all stages of the procedure, and when fulfilling all the other needs. The second, the need for participation¹⁶, is a very broad concept ranging from the wish to control the entire development of the proceeding and thus acting as a party¹⁷, to the exigency to be granted the possibility to intervene and to be heard at least as witness¹⁸, till the very basic need of being recognized as a victim and being treated with dignity and respect¹⁹. The third, the need for information, concerns information about the proceeding itself, and in this

¹³ See, among others, for an exhaustive analysis and classification of the various needs of the victims of crime Doak, *Victims' Rights, Human Rights and Criminal Justice*, Oxford and Portland, Oregon, 2008, and the authors there mentioned. The author proposes a clear and structured classification of victims' needs, and he adopts a commendable universal approach, developing categories applicable both to victims of State crimes, and of private offences, reading victims' rights from a human rights perspective. For further reference, in particular regarding each specific need, see *infra* in this paragraph.

¹⁴ The Commission proposal groups its articles in several chapters, from which we can infer what were the victims' needs considered worthy of protection. The framework decision does not contain titled chapters, however its articles can more or less be ascribed to the same categories, see *infra* paragraph 2. The specific aspect of compensation is object of the directive related to compensation to crime victims, *cit*.

¹⁵ The Commission proposal mentions information and support (Chapter 2), participation (Chapter 3), and protection (Chapter 4). Even if there isn't a specific chapter dedicated to it, there are provisions disseminated in the texts referring to the need of restoration (Article 15 and 11). Moreover, the text mentions as the objective of the directive that the victims are "[...] recognised and treated in a respectful, sensitive and professional manner [...]". (Article 2).

¹⁶ As a matter of fact, both in the framework decision and in the Commission's proposal it is mentioned in the first articles as an objective of the regulation on victims' rights. (Article 1 of the proposed directive, and Article 2 of the Framework Decision).

¹⁷ This is the case in most countries in which civil law systems exists, such as Germany, where the victim can act as a civil claimant, similar to the French or Belgian *Partie Civile* and the Italian *Parte Civile*, but also as an auxiliary prosecutor. See Sanders et al., "The Victim in Court", in Walklate (ed), *Handbook of Victims and Victimology*, Cullompton, Willan, 2007, p. 282-303 and, Henrion, "Y-a-t-il une place pour la victime en procédure pénale allemande?" in Giudicielli-Delage et al., *op. cit.*, p. 25. In Spain, the victim can be a normal accuser, but may also take part in the mediation process. See Tamarit, et al., "Secondary Victimization and Victim Assistance", in *European Journal of Crime, Criminal Law and Criminal Justice*, n. 18, 2010, p. 281. In Poland, the victim benefits from quite substantial participation rights, and may act as a supporting or subsidiary prosecutor, and if the prosecutor refuses to file a claim as a private prosecutor, he/she can then bring adhesive claims and become a civil plaintiff in criminal trials. See Erez, "Victim participation in proceedings and satisfaction with Justice in the continental systems: the case of Poland", in *Journal of Criminal Justice*, vol. 21, 1993, p. 47.

¹⁸ This is the case in common law systems where the victim can never become a party. See Doak, *op. cit.*, p.244-255, and Martini, *La Victime en Angleterre: " Une formidable absence, partout présente"*, in Giudicielli-Delage et al., (ed.) *La Victime sur la scène pénale en Europe*, Puf, Paris, 2008, p. 47.

¹⁹ See Edwards, "An ambiguous participant: The Crime Victim and Criminal Justice Decision-Making", in *British Journal of Criminology*, n.44, 2004, p. 973.

case it is directly connected and instrumental to the right of participation²⁰, as well as other aspects, for instance the release of the accused, and the need *not* to receive any information about the trial in order of avoiding re-experiencing trauma associated with the crime. The fourth, the need for protection, includes the protection of one's physical integrity from subsequent attacks by the offender, of one's image and privacy, and of one's psychological serenity that could be upset by what is called "secondary victimization", caused by the proceedings themselves. As a matter of fact, after primary victimization, a victim could feel a further violation of her/his rights derived from contact with the justice system. Possible causes can be renewed contact with the offender, an outcome of the proceedings perceived to be unjust, such as an acquittal for procedural reasons, or even repeated, harsh and insensitive questioning by the prosecutor²¹. The fifth, the need of support, can be of a logistic nature, for instance on where and how to report the crime; of an emotional nature, for instance help for bearing the psychological stress derived from primary and secondary victimization; of a medical nature, for recovering after the crime: and of financial nature, for sustaining the costs of the proceedings. The sixth one, the need of reparation, has to be understood from a material and financial perspective, and in a social and moral perspective. It means obtaining pecuniary compensation for the damages occurred, but also re-establishing the pre-existing equilibrium in the relationship between the victim and the offender and in the social community, through forms of restorative justice, such as personal or public apologies of the offender, his/her admission of guilt or guarantees of non-repetition²².

The task of the legislator is to create a consistent legal framework in which all these needs are taken care of, and fulfilled. As outlined above, this is far from easy and sometimes policy choices are necessary.

First of all, fully satisfying all needs is not always possible, as they are simply not reconcilable one with the other, and the legislator has to decide to which one to give priority. This holds particularly true for participation and protection exigencies, specifically regarding all that concerns the aspect of questioning and receiving the victim's declarations. Research has shown that the need of being heard and to have some kind of role in the proceedings is so fundamental that it is considered to be as important as obtaining a just outcome²³. Nonetheless, some authors underline that

²⁰ Research has shown that in some cases victims were not able to benefit from fairly articulated framework for participation, simply because they were not aware of them. See the findings of Brewster, M. P. "Legal Help—Seeking Experiences of Former Intimate—Stalking Victims", in *Criminal Justice Policy Review*, n. 12, 2001, p.91-112, and the research conducted in the German and Polish legal system (respectively: Kury et al. (ed.), *Victims and criminal justice. Victimological research: stocktaking and prospects*, Freiburg: Max-Planck-Institut Publication, 1991, p. 265-305 and Erez, "Victim participation in proceedings and satisfaction with Justice in the continental systems: the case of Poland", in *Journal of Criminal Justice*, vol. 21, 1993, p. 51).

²¹ See Orth, "Secondary Victimization of Crime Victims by Criminal Proceedings", in *Social Justice Research*, Vol. 15 n. 4, 2002, p. 312, and Montanda, "Injustice in harm and loss", in *Social Justice Research*, n. 7, 1994, p. 5-28.

²² See Zender, "Reparation and Retribution: Are they Reconcilable?" in *Modern Law Review*, n. 57, 1994, p. 234, Goodey, *Victims and victimology : research, policy and practice*, Harlow, 2005, p. 36-41, and Braithwait, *Crime, Shame and Reintegration*, Cambridge, Cambridge University Press, 1989.

²³ See Kelly, op. cit., and Shapland, op. cit and Wemmers, *Victims of crimes; Victims of crimes surveys; Discrimination in criminal justice administration; Netherlands, WODC-Ministry of Justice, The Hague, 1996.*

becoming a party can become a “burden instead of a bonus”²⁴, as the victim would be further exposed to the attack of the defence counsel, to confrontation with the offender, and will have in a way to re-experience the crime²⁵. Moreover, even if the victim is only summoned as a witness, stress can derive from harsh, repeated, and insensitive questioning²⁶. Since awarding full and extensive participation rights, while at the same time completely eliminating the risk of psychological stress is clearly not possible, a policy choice is unavoidable. However, prioritizing one aspect or the other does not amount to the same thing, as it ultimately gives a different tenor to the legal system’s approach in such matters. Indeed, a system giving privilege to participation rights would show a preference for the dimension in which the private interest of the victim of being heard coincides with the public interest of receiving information for law enforcement purposes. Had this to be foregone to the detriment of the protection from secondary victimization, one could argue that the legislator was keener on what the victim could do for the system, supplying information, than on what the system itself could do for him/her, award protection. Conversely, an ideal legal framework should be flexible enough as to allow every victim to strike a personal balance between the two, deciding on how much to participate, according to the personal level of resistance to psychological stress. Possible equilibrated solutions can be granting wide participation rights, but making participation only voluntary, and providing information on the possible detrimental consequences deriving from it. If the involvement in proceedings is mandatory, for instance it were obligatory to give evidence, then good care should be taken of adequately preparing the victim-witness²⁷, of reducing the stress derived from testifying, for instance resorting to video-conference, or having the interviews conducted by specialized professionals and in predisposed premises, and avoiding harsh cross-examination. Eventually, in the hypothesis in which the risk of victimization outweighs the social benefit of the criminal trial, then the victim should have a specific right to stop and drop the proceedings²⁸.

Secondly, taking care of victims’ needs might sometimes be very costly. In order to minimize the possible further detrimental consequences deriving more in general from contact with justice, it is fundamental that professionals getting in touch with injured parties at any stage, thus policeman, lawyers, judges and prosecutors receive adequate training on secondary victimization, and on how to avoid it. Moreover, victims must be afforded the possibility of relying on effective support services, helping them to deal with the crime right after having suffered the harm, to go

²⁴ Groenhuijsen, “Conflicts of Victims’ Interests and Offenders’ Rights in the Criminal Justice System in Sumner et al., (ed) *International victimology: Selected papers from the 8th International Symposium – proceedings of a symposium held in Adelaide, 21-26 August 1994*, Canberra, Australian Institute of Criminology, 1996, p. 170.

²⁵ See also Schunemann, op. cit., p. 395.

²⁶ This is in particular a concern in common law countries, where the system is greatly based on oral evidence, and thus witnesses have an especially important role. See the study in Angle et al., *Witness Satisfaction: Findings from the Witness Satisfaction Survey*, London, Home Office, 2002 and Hamlyn, et al., *Are Special Measures Working? Evidence from surveys of Vulnerable and Intimidated Witnesses*, Home Office Research Study, London Home Office, 2004.

²⁷ See Ellison, Witness preparation and prosecution of rape, in *Legal Studies*, vol. 27, n. 2, 2007, p. 171-187.

²⁸ This hypothesis finds some support in legal writing. See Orth, op. cit., p. 323, and Schuneman, op. cit., p. 394.

through the proceedings and to recover after the trial has ended. Creating these training schemes, and structure of general and specialist support might be a considerable burden on public expenses. Therefore, the choice the legislator is confronted with is whether to make such an investment or not.

Thirdly, a challenge that is specific to the European legislator is the care of cross-border victims, in other words European citizens who are victimized in a Member State different from the one in which they are resident. In the *Cowan* case, the Court of Justice had established that European citizens could not be discriminated against as regards access to national compensation schemes for crime victims²⁹. However, a non-discrimination approach is not sufficient for foreign victims. As a matter of fact, remaining with the *Cowan* example, an English tourist victimized in Paris, the question might arise as to what would happen if Mr. Cowan was not very fluent in French and not entirely familiar with the French procedure; even if awarded the right of compensation, he might not be able to properly file a claim for obtaining it; what if he wanted to go straight back to London to recover from the accident, while maybe it would be wiser to remain in France, as following the various steps of the compensation procedure from across the channel may prove to be problematic; what if he had sworn to himself to never put a foot again in such an unwelcoming country for British tourists as France, but he was forced to rethink his proposals, when summoned as a witness in the criminal proceedings against his offender? Eventually, what if instead of Mr. Cowan, it was Mrs. Khabir, British citizen of Pakistani origins, who in addition to being robbed had also been sexually assaulted? She might have been very happy to be entitled, as a European citizen, to the right of compensation on a non-discriminatory basis. However, she might have been less happy about having to report the crime to male policemen, in addition to having been interrogated by a male investigating magistrate as to the physical assault simply because in the specific prosecution office there were no female magistrates available. To put it more explicitly, cross-border victims have specific needs that do not necessarily coincide with those of national victims, such as the need for interpretation and translation, and the satisfaction of the other exigencies which they share with national victims but which might be more problematic than for others victims. This is why, specific investment needs to be made into linguistic and cultural training for personnel entering into contact with them, and specialist support facilities and structures involving cultural mediators have to be envisaged. Furthermore, devices for minimizing the higher risk of secondary victimization, such as fast-track procedures for avoiding a prolonged permanence of the victim in the state of victimization, or the effective use of video-conference must be introduced. Eventually, services of restorative justice also have to be rethought, as mediation cannot be based on re-establishing the equilibrium within the community of belonging, which for offender and victim is not the same³⁰. The degree of engagement in this direction is again very revealing. If support and training are costly in general, adding the multicultural and linguistic aspects undoubtedly repre-

²⁹ ECJ, *Ian William Cowan v Trésor public*, 2 February 1989, C- Case 186/87.

sents an extra burden. Moreover, introducing amendments in the structure of the proceedings might be fairly complicated as criminal procedure is traditionally conceived and constructed as something that is essentially national, and provisions regulating it are already the result of a very careful balance between several exigencies, such as repressing crime as well as safeguarding the fundamental constitutional guarantees of the accused. Considering that foreign victims are often victims of minor crimes, such as pick-pocketing and bag snatching³¹, which are not traditionally among the priorities on the law enforcement agenda³², the legislator might be even less motivated to make such an investment. This is why, the (non -) existence of these special facilities demonstrates the (absence) presence of a genuine will to legislate in favour of injured parties.

In the next section, the actual policy choices made by the European legislator in the framework decision on the standing of victims in criminal proceedings will be object of scrutiny, in light of the observations made so far, with the aim of establishing what has been the guiding principle.

III. What Solutions from the European Legislator? The Council Framework Decision on The Standing of Victims in Criminal Procedure

The text of the Framework Decision is rather short. After a 12-recital preamble, the decision consists of 19 articles. There are no subdivisions into categories, albeit a superficial look at the title of the various provisions shows that, at least in principle, all the various needs, outlined above, have been addressed³³. Nonetheless, in order to assess how effectively they have been tackled, and in particular what solutions have been given to the problematic aspects outlined above, closer scrutiny as to the substance of the various provisions is necessary.

The legislator fully acknowledges the possibility that detrimental consequences can derive from participation in criminal proceedings. Recital 5 of the preamble calls for a consistent and comprehensive approach, in order to avoid the risk of secondary victimization. Moreover, the obligation to *support* the creation of conditions for *attempting* to prevent secondary victimization has been imposed upon Member States³⁴. Unfortunately, this affirmation of principle, and this very tame and general prescription are not sufficiently backed by any strong obligations of taking concrete measures in this direction. As a matter of fact, both the right of participation and the right of protection are given a wide scope in the text.

³⁰ On the requirements and complex aspects of mediation, and in particular the relevance for an efficient outcome of belonging to the same community for offender and victim see Doak, op. cit., p. 225, and Braithwait, *Crime, Shame and Reintegration*, Cambridge, Cambridge University Press, 1989.

³¹ See Wergens, *Crime victims in the European Union*, Umeå : Crime Victim Compensation and Support Authority, 1999, p. 450.

³² Ibid. p. 459.

³³ Respect and recognition (Article 2), participation (Article 3, 5, 7), information (Article 4), protection (Article 8), support (Article 6), restoration (Article 9, 10), the theme of cross border victims deserves a specific provision (Article 11), and also the aspect of training of professionals is mentioned (Article 14).

³⁴ Article 15.

However, in those hypotheses in which they might clash, then priority seems to be given to the first.

The victim's role has to be recognized in the proceedings³⁵, and his/ her possibility of being heard and of supplying evidence must be safeguarded³⁶. In order of not depriving this right of its meaning, a broad and extensive right of information is also provided for³⁷. In addition to this, the Framework Decision seeks to eliminate all potential communication³⁸ and financial³⁹ obstacles, so as not to inhibit effective participation.

Similarly, good care is taken of the right of protection. The legislator is very keen on ensuring that the safety, the privacy and the photographic image of the victim and of his/ her family is protected⁴⁰. It is very specific, for example, in prescribing that separate waiting areas for the victim and the offender have to be created within the court's premises in order to avoid contact between the two⁴¹. However, as regards to preventing the possible negative consequences derived from giving evidence, the text is not very incisive. It merely states that the court should enable them to testify in a manner that achieves the objective of their protection⁴², and that questioning has to be carried out only insofar as is necessary⁴³. These are rather vague formulations which do not add much to the previously mentioned obligation of *supporting any attempt* of preventing secondary victimization. In particular, there is no mention of any concrete solution towards a balanced fulfilment of both exigencies of protection and participation. Perhaps, requiring Member States to offer victims the possibility of dropping proceedings would have been an excessive intrusion in the fundamental aspects of their criminal legal systems⁴⁴. However, at least informing the participating victim about the risk of secondary victimization would have been something⁴⁵. In any case, the other gap, such as the absence of measures like video conferencing, or witness preparation programmes, cannot be interpreted as evidence of a general policy of non-inference, and thus explained and justified as such. As a matter of fact, some other prescriptions have been described in a much more detailed way, for instance in the case of cross-border victims⁴⁶. In particular, the fact that the issue of repetitive questioning is poorly addressed is somewhat concerning. Indeed, it has been observed that even if the manner of asking is not in itself harmful, psychological stress can derive from the fact of having

³⁵ Article 2.1

³⁶ Article 3.

³⁷ For all the aspect this right covers see article 4.

³⁸ Article 5 imposes the obligation of minimizing the communication difficulties, to an extent comparable to the measures undertaken for the defendants.

³⁹ Article 6 grants the right to the payment of expenses.

⁴⁰ Article 8.1 and 8.2. See also article 4.3 on the decision to inform the victim of the release of the offender.

⁴¹ Article 8.3.

⁴² Article 8.4.

⁴³ Article 3 second sentence.

⁴⁴ Member States differ substantially as to the role of the victim in the system. See *supra* footnote 17 and 18.

⁴⁵ This information is not mentioned at Article 4.

⁴⁶ Article 11.1 imposes the use of video conference in case of cross-border victims. See also Article 8.3 as an example of detailed prescription where it bind Member States to the creation of separate waiting areas.

to repeat the same statements, at various stages of the proceedings, and thus re-experiencing the trauma several times⁴⁷. This is not an insignificant *lacuna*, as in more than half of EU Member States there does not exist any limit to repetitive questioning⁴⁸, and thus this was a field that definitely needed harmonization. A preliminary conclusion can be that both needs of participation and protection have been fairly addressed, but in the final hypothesis they might clash, namely when the victim is supplying evidence, the legislator is much keener on creating the conditions for receiving useful information, than for protecting the person who is providing it. Therefore, as regards this first problematic aspect, the policy choice is in favour of participation, and thus what is overriding is the law enforcement concern.

Unfortunately, this neglectful approach concerning the protection of victims is also confirmed regarding the necessary but costly support to victims and training of professionals. Indeed, if the obligation is imposed on Member States to *ensure* that victims have access to advice as regards their role in criminal proceedings, and to legal aid under certain conditions⁴⁹, when it comes to support less connected to their participation to the trial, then the language is much more tame. The involvement of victims' support systems responsible for the initial reception, and for assistance throughout the proceedings, must only be *promoted*, and the action of these services, the task of which is very generally framed in providing information and assistance during and after the trial, only needs to be *encouraged*. Similarly, the text only imposes the *encouragement* of initiatives enabling personnel to receive adequate training. In conclusion, it appears that Member States, gathered at the Council, were not really inclined to impose the very strong obligations on themselves of investing finances in structures solely benefitting the private interests of the injured parties.

Concerning the third aspect, the position of cross-border victims, despite the preamble premises, which talks of making allowances for the difficulties a victim residing in a different state than the one in which he/she has been victimized⁵⁰, the Framework Decision does not put in place much positive discrimination. Article 11 binds Member States to make it possible for foreign victims to resort to video conference for witnessing, to decide whether they can make a statement right after an offence has been committed, and in some cases to make a statement before the authorities of the State of residence⁵¹. The understanding of the proceeding by the foreign victim is not specifically taken care of: the only safeguard is a non-discriminatory application of Article 5, and a hope that among the languages “*commonly understood*”, in which the information mentioned in Article 4 has to be

⁴⁷ See APAV, “Project Victim Support: Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union”, Lisboa, 2009, p. 48. (Available: http://ec.europa.eu/justice/news/consulting_public/0053/project_victims_europe_final_report_en.pdf.) (Hereinafter: “APAV Report”).

⁴⁸ Ibidem.

⁴⁹ See article 6.

⁵⁰ Preamble recital 8.

⁵¹ Article 11.1, 11.2.

communicated, there exists that of the victim. Moreover, there are not any special provisions for protecting the foreign victim from secondary victimization, the risk of which is even greater if an individual finds him/herself in a foreign country. Certainly, there is the option of the video-conference. However, if one decides to remain in the State where the crime has occurred, in order to better follow the proceedings, he/she cannot be penalized for this choice. Given that the court environment, and more in general the entire atmosphere is particularly less familiar for a foreigner, then special facilities should be put in place, such as fast track procedures⁵² in order to minimize the psychological stress. Similar consideration should be made as regards the need of support and of restoration. Being victimized in a foreign country is a particularly distressing experience, and thus the need of support is particularly acute, especially considering the language barrier and the possible cultural distance. However, no mention is made of any linguistic or multiculturalism training for police officers or other personnel dealing with the injured parties⁵³. As a consequence the cross-border victim will be less assisted in the moment in which he/she is probably the most disoriented and confused, the initial stage when he/she first gets in touch with the authorities⁵⁴. As concerns the need of restoration, the aspect of compensation is dealt with in the directive on compensation⁵⁵, but as regards the aspect of mediation, addressed by Article 10 of the Framework Decision, again no particular effort is made in order to overcome the difficulties deriving from having to restore equilibrium between two individuals belonging to two different communities⁵⁶.

Briefly, after having ensured that the victim can report the crime in one way or another, and that it has been possible for him/her to share any information he/she has about it, the Council did not include any other particular devices in their favour. Despite the fact that the protection of cross-border victims was supposed to be the “main driver” for the enactment of the framework decision⁵⁷, it seems that not much has been done for them. Probably also in this case, the cost of the desirable measures—both financial and in terms of amendments to a consistent national procedural system—has discouraged Member States from their introduction in the binding text of the framework decision. Once again, the European legislator has

⁵² Relying on fast track procedures was among the recommendations of the Commission in its 1999 Communication. (European Commission, Crime Victims in the European Union—Reflections and Standard of action, 14 July, 1999, COM(1999)349 final, p. 9).

⁵³ This was also a recommendation contained in the 1999 Communication. (Ibidem p. 13).

⁵⁴ Articles 13 and 14, which deal respectively with support to victims and training of professionals, use very tame language. Member States only have to promote or to encourage the establishment of support services and the training of policemen, therefore a further mention to teaching languages or to have some cultural mediators would have not even been that burdensome for Member States.

⁵⁵ Directive relating to compensation for crime victims, 29 April 2004, 2004/80/EC. For a critical view on the effectiveness of this instrument see Blanc, “Vers un Statut Communautaire de la Victime? A propos de la directive 2004/80 du Conseil du 29 Avril 2004 relative à l’indemnisation des victimes de la criminalité”, in *Revue du Marché commun et de l’Union européenne*, n. 496, 2006, p. 195.

⁵⁶ See *supra* footnote n. 30.

⁵⁷ See the statements of the former Swedish commissioner, Anita Gradin, on the fate of individuals victimized abroad, and on the relations with the rights of national victims in Rock, *Constructing victims’ rights; the Home Office, New Labour, and victims*, Oxford, Oxford University Press, 2004, p. 513.

decided not to invest in the genuine protection of victims, when the law enforcement return was not ensured.

The legislative framework described so far does not seem very promising for victims. They are indeed granted some prerogatives, and all of their needs have been at least taken into account. Nonetheless, the Council has decided to impose heavy obligations on Member States only in those contexts in which public and private interests coincide. Saying that individuals' rights have been neglected would be incorrect; a more appropriate analysis would be that they have been effectively addressed, insofar as they were instrumental to law enforcement concerns. Fortunately, even if this is still the text in force at present, there are hopes for an improvement and a change in perspective in the future. As a matter of fact, the Commission⁵⁸ on 18th May, 2011, adopted a proposal for a directive amending the framework decision⁵⁹. The next section will be dedicated to an analysis of the proposed directive in order to see if the Commission has maintained or modified the approach of the Council.

IV. What Solution from the European Legislator? The Commission's Proposal for a Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime

Before looking in detail at the provisions of the proposed text, there are two preliminary observations that deserve to be mentioned. First of all, the title of the text has changed. The framework decision spoke of standing in criminal proceedings, making explicit the intent of regulating the position of the victim insofar as it was connected to the trial. Conversely, the proposed directive focuses the attention on the rights, support and protection of victims as such, without any link to law enforcement activities. This already gives a hint of a change of perspective. Secondly the length of the text has sensitively increased since the number of recitals in the preamble and of articles in the text itself has nearly doubled⁶⁰, and the field of application of the text has also been extended to the family members of victims of crime⁶¹. These two innovations do not represent an improvement in the protection of individuals *per se*⁶². As has been underlined above, the perspective and the ultimate goal underpinning the regulation of victims' rights is what matters. There-

⁵⁸ With the approval of the Treaty of Lisbon, the Commission gains a right of initiative also in the field of judicial cooperation in criminal matters. See Article 82 TFEU, which mentions the ordinary legislative procedure.

⁵⁹ European Commission, Proposal for a directive of the European Parliament and of the Council establishing minimum standards on the rights, protection and support and protection to victims of crime, Brussels, 18 May 2011, COM(2011) 275 final. The Parliament has published its last draft report on 6 March 2012. Draft Report on the proposal for a directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime. Amendment 103-321. 2011/0129(COD).

⁶⁰ The framework decision was composed of 12 recitals and 19 articles; the proposed directive contains 30 recitals and 30 articles.

⁶¹ See article 2.a. ii.

⁶² Some authors even argue that the simple fact of being labeled as a victim can cause secondary victimization. See Schunemann, "Protection of children and other vulnerable victims against secondary victimization: making it easier to testify in Court", in *ERA Forum* n. 10, 2009, p. 388.

fore, it is necessary to first of all confirm that the proposed directive is more oriented towards individuals' rights, and thus an enhancement in quantity corresponds also to an improvement in quality. If that is the case though, the fact that this enhancement in protection interests a larger proportion of persons should also be listed among the improvements.

Concerning the relation between participation and protection rights, it can be observed that both aspects have been sensitively reinforced, however a better balance, than the one existing in the framework decision, has been found. As regards the conditions enabling participation of the victim in the proceedings, the tone remains the same, showing that considerable importance is still attached to this aspect. As before, injured parties have the right to be heard and to supply evidence⁶³, the right to legal aid⁶⁴, and to reimbursement of expenses⁶⁵, they have to be duly informed about their rights⁶⁶, and upon request even about their case⁶⁷, and measures have to be taken to ensure that the victim understands and is understood during the proceedings⁶⁸. There are also some new developments such as the right of being informed of procedures for complaints in the case that rights are not respected, on contact details for communication on the case⁶⁹, and the right to be notified of the possibility that some information is available on request⁷⁰. Moreover, victims can obtain a written acknowledgement of any complaint they might make⁷¹, and they can demand review of any non-prosecuting decision⁷². Briefly, if the victim wishes the criminal proceedings to take place and to give his/her contribution, the proposed directive imposes Member States with the responsibility to create all the conditions for making this possible.

If the aspect of participation has been boosted, fortunately the same can be said for the preservation of victims from secondary victimization. Similarly to the framework decision, the privacy and photographic image of the victim must be safeguarded⁷³, and also his/her safety, by avoiding contact with the offender in the venues where criminal proceedings are conducted⁷⁴. As concerning the sensitive

⁶³ Art. 9.

⁶⁴ Art. 12.

⁶⁵ Art. 13.

⁶⁶ Art. 3.

⁶⁷ Art. 4.

⁶⁸ Art. 5.

⁶⁹ Art. 3.i. and 3.j.

⁷⁰ Art. 4.1.

⁷¹ Art. 8.

⁷² Art. 10.

⁷³ Art. 23.

⁷⁴ Art. 23. Interestingly, as regards the contact between the victim and the offender the proposed directive is less specific than the framework decision. Article 8.3 of the framework decision imposed to progressively create special waiting areas for victims, whereas Article 19 requires Member States to establish the necessary conditions to enable avoidance of contact between victims and accused in particular in venues where criminal proceedings are conducted. Then the means through which this objective can be achieved are remitted to national legislators. A possible explanation for this moving back to a more general prescription could be explained by the very low degree of implementation of the separate waiting areas requirement. Probably given the failed attempt of the Council of prescribing very strict obligations, the Commission decided to step back and rely on a more general but possibly more effective provision. (Only in Spain, Germany and Italy there exists legislative provisions in this respect. See APAV

aspect of the victims' interviews, when they act as a party or as a witness, the proposed text provides for a significantly more enhanced protection framework. Very commendably, the loose requirements of entitling "[...] *victims-particularly those most vulnerable- [...] to testify in a manner which will enable this objective [protection] to be achieved [...]*"⁷⁵ is substituted by detailed provisions identifying who can be considered a vulnerable victim, that is to say children, persons with disabilities, victims of sexual violence, victims of human trafficking, and whomever is judged vulnerable due to his/her characteristics or the nature of the crime⁷⁶, and which possible measures can be taken to protect this category, including the resort to special premises, to specifically trained personnel and to communication technologies, which probably mean video-conference and phone conference⁷⁷. In addition to this, special devices are envisaged for child victims⁷⁸. The important issue of questioning is addressed by specifying that Member States should *ensure* that victims are questioned without unjustified delay and the number of interviews must be kept to a minimum⁷⁹. Furthermore, the protection of the victims' interests has to also be ensured in the context of mediation and other restorative justice services⁸⁰. Eventually, even if it refers to a general duty of informing the victim on the risk of secondary victimization deriving from the entire proceedings, at least the text speaks of informed consent with respect of mediation⁸¹, and it foresees the obligation of providing full information to the victim before letting him/ her challenge the decision of non-prosecuting⁸². In conclusion, even if there is still room for improvement, by including, for instance, witness preparation programmes, it is undeniable that the landscape has changed remarkably. If this is indeed to be the adopted text, and Member States will implement it correctly, it is fair to say that victims in Europe will be put in a better position for striking their own balance between protection and participation, and thus for deciding to what extent to give their contribution to the law enforcement goals, without experiencing excessive detrimental consequences.

Concerning the second aspect, that is to say investing a certain public expense in initiatives aimed at preventing further stress for the injured party, the Commission seems more aware of the fundamental importance of these devices, and thus it is more inclined to bind Member States to their establishment, despite the costs involved. As a matter of fact, with respect to support for victims and to training for professionals, the language has sensitively changed in the proposed text. Member States have to *ensure* that victims have a specific right to access to support services,

Report, p. 97 and followings, and Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) [SEC(2009) 476]).

⁷⁵ Art. 8.4 of the Framework Decision.

⁷⁶ Art. 18.

⁷⁷ Art. 21.

⁷⁸ Art. 22.

⁷⁹ Art. 20.

⁸⁰ Art. 11.

⁸¹ Art. 1.a.

⁸² Art. 10.2.

whose task has been specified and which must include emotional support, advice concerning financial and practical issues, and information on where to find other more specialist support⁸³. Moreover, it also has to be *ensured* that professionals receive general and specialist training concerning the impact that crime has on victims, the risk of intimidation and of secondary victimization and on how to avoid them⁸⁴.

In this very positive scenario, only the position of cross-border victims presents some problematic aspects. As a matter of fact, not only do they disappear from the preamble⁸⁵, and this has a certain symbolic value, but also some aspects have been poorly addressed from a substantial point of view. Foreign victims are still granted the possibility to report the crime in the State of victimization and in the State of residence⁸⁶, as was the case before, in addition to which the right to translation and interpretation is also introduced in the proposed text⁸⁷. As a consequence, they are put in the best position for following the proceedings and giving their contribution. Nevertheless, the other difficulties foreign victims might encounter, in particular their higher risk of secondary victimization, deriving from cultural distance, are actually neglected⁸⁸. There is no mention of possible fast track procedures for individuals who decide to remain in the State of victimization in order to better follow the proceedings, nor of multicultural training for personnel dealing with the injured party, or of the mandatory presence of cultural mediators⁸⁹. Unfortunately, it seems that foreign victims have been judged as only deserving special treatment with respect to their participation, and not to their protection. The only hope is that they might then fall under the category of vulnerable victims, due to an individual assessment as foreseen by Article 18.3 of the proposed text, and thus they will be able to benefit from the special measures mentioned in Article 21. However, it is important to notice that none of the envisaged possibilities is specifically intended to minimize the stress derived from cultural differences.

Despite the lacuna concerning cross-border situations, the text of the proposed Directive presents a completely different approach if compared with that of the Framework Decision. Victims are granted wide participation rights, but still very good care is taken that contact with justice does not have a detrimental effect on them, through limiting the possibility of questioning, and training the persons conducting this questioning and, in general, entering into contact with injured parties, and by making support available throughout the course of the trial period

⁸³ Art. 7.

⁸⁴ Art. 10.

⁸⁵ In the framework decision both recital 4 and 8 mentioned this aspect, while no equivalent formulations can be found in the preamble of the proposed directive.

⁸⁶ Article 16 of the proposed directive reproduces the content of Article 11 of the framework decision, see *supra* par. 2.

⁸⁷ Art. 6.

⁸⁸ Interestingly, cross border victims disappear from the preamble (in the framework decision both recital 4 and 8 mentioned this aspect), and article 16 merely reproduces the content of article 11 FD, thus only taking care of the participation side.

⁸⁹ Interestingly, the Commission had put forth these proposal in a previous communication (see *supra* footnote n. 52), however they seem to have been abandoned in this proposal.

and even after. In light of all this, it seems fair to conclude that an enhancement in quantity, that is to say a greater number of provisions has indeed corresponded to an improvement in quality, as victims are no longer considered to be merely a tool for law enforcement, but also as individuals whose rights and prerogatives must be respected. If this is the premise, then the enlargement of the field of application must only be welcomed. The Commission has undeniably overturned the approach of the Council.

IV. Concluding Remark

In light of the analysis conducted in the previous sections, it seems possible to give a satisfying answer to the research question which was posed in the introduction. The response must be articulated in two chronological moments. When it first addressed the theme of victims' rights, the European legislator, in this case the Council, clearly endorsed a law enforcement perspective, and it interpreted the role of the victim as mainly a very useful instrument in order to achieve the repression of crime. Conversely, in the recently proposed text, the legislator, in this case the Commission adopted a sensitively different approach, showing a greater concern for what were the necessities of the injured parties independently from their contribution to the proceedings, and thus seeing them more as individuals whose rights needed to be safeguarded. What useful information can be drawn from this scrutiny in the strategic field of victims' rights for the broader theme of the protection of rights and civil liberties within the area of freedom, security and justice? If one only looks at the legislation currently in force, then the safeguard of these aspects seems rather unsuccessful if compared with the purposes of preventing and repressing crime. As a matter of fact, as outlined above, the amount of instruments aimed at this second purpose greatly outnumbers those responding to the need to also create an area of freedom and not only of security. Moreover, this article also shows how the limited protection awarded to individuals' rights is not very effective as the ultimate goal still appears to be law enforcement. Given the strategic importance of the area of victims' rights, both for the image of the Union, which needs to keep up with other international organizations, and for its legal construction, seen through the link with free movements, a lacuna in protection in this field is particularly concerning. However, if one also considers the possible future developments then the outlook becomes less depressing. Indeed, the approval of the Treaty of Lisbon has brought a general institutional revolution, and in particular with regard to the field of European criminal law, it has also included the Commission and the Parliament in the legislative process⁹⁰. Besides granting greater democracy and legitimacy to the entire procedure, this has meant and will also mean an improvement in the quality of the texts, content-wise. The analysis of the Commission's text has already shown how the approach is much more human rights oriented than that

⁹⁰ See Art. 82.2 TFEU and Article 294 TFEU

of the Council. The proposal still needs to pass through all the phases of the legislative procedure, however. Nevertheless, there are positive signs that the involvement of the Parliament will ensure at least some of the new developments of the proposal will be maintained in the final directive. In fact, this Institution is known for being particularly attentive to the theme of human rights⁹¹, and it has also underlined several times the specific importance of victims' needs⁹². Moreover, its new joint budgetary powers⁹³ might provide it with greater negotiating power as regards the most costly but fundamental aspects, such as creating special support services, and training programmes for personnel. There are very positive indications from the recently adopted directive on trafficking in human beings⁹⁴, as a confirmation of the added value derived from the inclusion of the democratic organ in the adoption of texts of European criminal law. Similarly to the field which is the object of analysis in this article, trafficking in human beings was initially regulated by a Council framework decision⁹⁵, which has been repealed by a directive adopted on the new Lisbon legal base, thus following the ordinary legislative procedure including also Commission and Parliament. According to the new text now in force, support for victims must be *ensured* before and after the trial, and this is not conditional on the basis of the victim's cooperation in the criminal investigation; moreover, the issue of repeated questioning has been specifically and correctly addressed⁹⁶. The expectation and the wish is that the same will happen for the directive establishing minimum standards on the rights, support and protection of victims of crime, and thus that the approach will be generalized to victims of all crimes, boosting a little further the liberty and the freedom of European citizens, in addition to their security.

⁹¹ See for instance, Resolution of 15 December 2010 of the European Parliament on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI)) and Resolution of 26 November 2009 of the European Parliament on the elimination of violence against women, P7_TA(2009)0098.

⁹² See among the different Parliament resolutions in particular: Resolution of 7 May 2009 of the European Parliament on the development of a European Union criminal justice area, (INI/2009/2012).

⁹³ Art. 314 TFEU.

⁹⁴ Directive on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 5 April 2011, 2011/36/EU.

⁹⁵ Council Framework Decision of 19 July 2002 on combating trafficking in human beings, 2002/629/JHA.

⁹⁶ See Article 11.1, Article 11.3, Article 12.4.a. of the directive 2011/36/EU.