

The Victim of Crime and the Criminal Justice Process

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Introduction

The victim of crime¹ is not an active participant *per se* in the criminal justice system. The victim is effectively a third party whose input to the criminal justice process is confined to that of being an informant² and witness for the prosecution. The right of victims to actively participate in the criminal justice process has conventionally been denied owing to the “public prosecution” model of criminal justice and the need to safeguard the impartiality of the criminal trial.

In recent decades, however, victims of crime have been afforded greater recognition by the criminal justice system.³ In Ireland, the Criminal Justice Act 1993 (“the 1993 Act”), which was, in some measure, enacted in response to several controversial sexual offence cases,⁴ made various changes to the law in relation to the victims of crime, such as the review of unduly lenient sentences, compensation orders for victims of crime and provision for Victim Impact Statements (VIS) to be taken into consideration by the trial court before imposing sentence.⁵ These advancements to the standing of victims were augmented by the Department of Justice Equality and Law Reform’s revised *Victims Charter and Guide to the Criminal Justice System 2001*. Further recognition of victims’ rights at European level was provided by the Council Framework Decision on the *Standing of Victims in Criminal Proceedings 2001*,⁶ applicable to victims of crime within EU Member States. After examining some issues around victims’ rights, this article will review these statutory developments.

Contemporary role of victims

The law has conventionally made a distinction between criminal and civil wrongs. In the civil justice system, it is the victim who decides whether or not to take a civil action against a wrongdoer. This course of action is not applicable in the criminal justice system, where the victim of crime does not have a decisive role as to whether or not a criminal prosecution is instigated against the accused. As the State deemed criminal wrongs to be more important, it assumed the role of prosecutor, with the result that the standing of the victim in the criminal justice system was reduced to that of being, as noted above, an informant and witness for the prosecution.

* The views expressed in this article are those of the author and not necessarily those of the Centre for Criminal Justice.

¹ See generally Quinney, “Who is the Victim” (1972) 10 *Criminology*, 314.

² The victim is an informant in the sense that he/she reports the commission of a criminal offence to the authorities.

³ See generally: Schneider, “Victimological Developments in the World During the Past Three Decades: A Study of Comparative Criminology – Part I” (2001) 45(4) *International Journal of Offender Therapy and Comparative Criminology*, 449; Schneider, “Victimological Developments in the World During the Past Three Decades: A Study of Comparative Criminology – Part II” (2001) 45(5) *International Journal of Offender Therapy and Comparative Criminology*, 539.

⁴ In the case of Lavinia Kerwick who was raped by her boyfriend, Flood J. imposed a suspended sentence of 9 years imprisonment. The victim forfeited her anonymity by going public so as to describe the impact of the crime on her life. This is to be contrasted with the Kilkenny Incest case which involved a girl who was sexually assaulted and raped by her father from 1976 to 1991, where a 7 year term of imprisonment was imposed which was the maximum at the time. Cases such as these illustrate the inequity of sentencing disparity in the criminal justice process.

⁵ Incidentally, s.12 of the 1993 Act also made provision for the increased sentence of offenders convicted of incest.

⁶ 2001/220/JHA; OJ 22.3.2001, L 82/1.

Until the nineteenth century it was the victim who decided whether the offender would be prosecuted. Criminal prosecutions were generally regarded as private proceedings whereby the victim of crime could obtain retribution and restitution against the offender.⁷ However, from the late nineteenth century onwards, the criminal justice system became more organised, with the establishment of a “public prosecution” model of criminal justice, a professional police force and a prison system. The result was that the State assumed responsibility for the prosecution and punishment of offenders.⁸ The transition from private prosecutions to public prosecutions by the State was a gradual one, and it occurred not only as a result of the professionalisation of the criminal justice system but as a consequence of a clear departure from the blood feud,⁹ a mode of justice that had prevailed at common law.¹⁰ The rationale behind such changes was that private individuals should leave the administration of the criminal justice system to specially trained professionals. Christie¹¹ has contended that with the establishment of a formalised criminal justice system, the conflict that previously existed between the victim and offender has been “appropriated” by that system, relegating the role of the victim in the system.¹²

Criminal justice studies have typically focused more on the offender and the cause of crime than on the standing of the victim as a participant in the criminal justice process.¹³ This practice may be disadvantageous to the criminal justice system, as there is a real possibility that victims of crime—if they feel alienated from the process—may become uncooperative in the prosecution of offenders.¹⁴

The victim does retain a very important role in the criminal justice process, however, given that the police¹⁵ are in some measure dependent upon the victim to bring the commission of a crime to the attention of the authorities. Furthermore, while the victim retains the limited right of private prosecutor, indictable offences must be prosecuted in the name of the Director of Public Prosecutions (formerly the Attorney General).¹⁶

Victims’ rights and services

A distinction has conventionally been made between the procedural rights¹⁷ of victims during the criminal justice process and the substantive rights of victims to services¹⁸ either provided by or

⁷ See: Cuomo, “The Crime Victim in a System of Criminal Justice” (1992) 8 *St. John’s Journal of Legal Comment*, 1 at 2–5; Laster, “Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness” (1970-1971) 5 *University of Richmond Law Review*, 71 at 71–80.

⁸ See generally Langbein, “The Origins of Public Prosecution at Common Law” (1973) 17 *American Journal of Legal History*, 313.

⁹ See Holmes, *The Common Law* (Dover Publications, New York, 1991), Lecture I, ‘Early Forms of Liability’, pp.2–3.

¹⁰ For a general overview see McDonald, “Towards a Bicentennial Revolution in Criminal Justice” (1976) 13 *American Criminal Law Review*, 649 at 651–656.

¹¹ Christie, “Conflicts as Property” (1977) 17 *British Journal of Criminology*, 1 at 7–8.

¹² The State has assumed exclusive authority to police and prosecute offenders in order to fulfil its obligation to vindicate the autonomy of its citizens.

¹³ See O’Malley, “Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions” [1993] 3 *I.C.L.J.* 40 at 41–42.

¹⁴ Zedner, *Criminal Justice* (Oxford University Press, Oxford, 2004), p.143.

¹⁵ The police may be proactive whereby they detect crime or alternatively in the case of victims reporting criminal activity to the police, they perform a reactive role in the detection and investigation of crime.

¹⁶ Constitution of Ireland 1937, Art.30.3; Prosecution of Offences Act 1974, s.3.

¹⁷ For further analysis of procedural rights for victims see: Doak, “Victims’ Rights in Criminal Trials: Prospects for Participation” (2005) 32(2) *Journal of Law and Society*, 294; Fenwick, “Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?” (1997) 60(3) *Modern Law Review*, 317.

supported by the State, with more emphasis typically being placed on the provision of services for victims. Ashworth¹⁹ explains that:

“Among the rights to services may be a right to call upon emotional and practical support in the period following the offence; a right to be kept informed and to be treated with respect and sympathy by law enforcement agents during the investigation process; a right to be treated with respect and understanding before and during court proceedings; and a right to compensation for victims of criminal violence ... Of a different nature are procedural rights for victims in the criminal process: such as rights to be consulted on the decision whether or not to prosecute, on the bail-custody decision, on the acceptance of a plea, on sentence, and on parole release.”

In the main, little attention has been paid to the provision of procedural rights for victims of crime. In recent decades, however, due to persistent campaigns by victims’ rights groups, there has been some recognition by the State for the provision of such rights. The result is that victims now have some input into the criminal justice decision-making process.²⁰

There are reasonable arguments, however, for excluding victim participation in the criminal justice process. First, the criminal justice system is founded on the notion of impartiality, *i.e.* the judiciary and the jury must be unbiased in the adjudication process so as to ensure a fair and impartial trial of the accused. Secondly, the application of the constitutional principle of equality²¹ mandates that all victims of crime should have the offences alleged to have been committed against them equally considered by the court. Thus, if the resources of the victim or the victim’s family have a significant impact on the criminal justice process, invidious discrimination could be claimed and consequently render the sentence imposed by the trial court subject to appellate review. Thirdly, the impact of crime on victims will invariably differ according to their various levels of robustness or lack thereof. Consequently, there is a real possibility that some victims may be more inclined to seek vengeance against the offender than others.²² This could result in sentencing disparity where the trial court is unduly swayed by the feelings or robustness of a particular victim, rather than determining the appropriate punishment to be imposed based on the level of blameworthiness of the defendant. The criminal justice process ought to determine the appropriate punishment to be imposed in individual cases according to the general principle of proportionality²³ in the sentencing process, rather than according to a particular victim’s input to criminal justice decision-making, which in itself conflicts with the principle of impartiality mandated by a criminal trial and may introduce a degree of arbitrariness—even vindictiveness—to the criminal justice process.²⁴

¹⁸ For further analysis of services rights for victims see Fenwick, “Rights of Victims in the Criminal Justice System: Rhetoric or Reality” [1995] *Criminal Law Review*, 843.

¹⁹ Ashworth, “Victim Impact Statements and Sentencing” [1993] *Criminal Law Review*, 498 at 499.

²⁰ See Fenwick, “Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?” (1997) 60(3) *Modern Law Review*, 317 at 318.

²¹ Constitution of Ireland 1937, Art.40.1.

²² This being reflected in the Victim Impact Statement tendered to the court.

²³ On the principle of proportionality in sentencing see O’Malley, *Sentencing Law and Practice* (Round Hall Sweet & Maxwell, Dublin, 2000), ch.5, pp. 113–136.

²⁴ The concern here is that victims (or secondary/indirect victims in homicide cases) could potentially make statistically unsupported and emotionally charged claims, which if left unchecked could in time lead to a rebalancing of the criminal justice system. By focusing extensively on the individual victims of crime, the criminal justice system could fail to serve the wider interests of society in the prosecution and punishment of offenders through the process of a fair and impartial criminal trial. Criminal justice policy issues should be determined in the public interest and not according to the personal and private views of the victims of crime, although these must be given due consideration.

Many European states,²⁵ including Ireland, provide various services to victims of crime, including counselling, financial support and compensation. Such services are supported by the European Forum for Victim Services.²⁶ Although there are multifarious substantive and procedural rights to ensure a fair and impartial trial of the accused, the victim of crime has not been afforded comparative rights in recognition of the fact that the criminal offence was committed against him.²⁷ Should victims have a role in deciding, for example, whether to prosecute the accused, the charges that should be brought, whether the accused should get bail pending trial, the sentence that should be imposed and whether parole should be granted.²⁸

On what basis can victims be afforded procedural rights? Do they depend on the “acknowledged reliance of the criminal process upon their participation”,²⁹ or is there some other legal basis? Edwards³⁰ implicitly considers the participatory rights of victims in the criminal justice process as emanating from the concept of citizenship:

“To participate may involve being in control, having a say, being listened to, or being treated with dignity and respect—all aspirations of those within the victims movement; but it may also mean providing information whether one wants to or not.”

It has also been argued that as victims are essentially “consumers of the criminal justice process,” they should expect and demand more from the criminal justice system, including procedural rights.³¹ Zedner³² explains that:

“The reliance of the criminal justice system on the victim has proved a powerful bargaining tool in the recognition of victims’ interest ... Cast in the role of consumer, victims are encouraged to demand better information about the progress of ‘their’ case and insist that their views are obtained and considered when key decisions are made in respect of bail, remand, diversion, and the like.”

The legal basis for the provision of procedural rights for victims remains uncertain and might require an appropriate legislative response. In 2002, Fine Gael introduced a Victims Rights Bill. Although never enacted, this Bill could potentially have formed the legal basis “for the treatment of and rights of victims of criminal offences and of their immediate families in the Irish criminal justice system”.³³

²⁵ Austria, Belgium, Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Luxembourg, Netherlands, Portugal, Slovakia, Sweden, Switzerland, and the United Kingdom.

²⁶ For further details of the European Forum for Victim Services see: <http://www.euvictimservices.org/>

²⁷ See Edwards, “An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making” (2004) 44 *British Journal of Criminology*, 967 at 968.

²⁸ See generally Edwards, “Prisoner Release and Victims of Crime” (2003, May) *New Law Journal*, 692.

²⁹ Zedner, *Criminal Justice* (Oxford University Press, Oxford, 2004), p.146.

³⁰ Edwards, “An Ambiguous Participant—The Crime Victim and Criminal Justice Decision-Making” (2004) 44 *British Journal of Criminology*, 967 at 973.

³¹ See generally Williams, “The Victim’s Charter: Citizens as Consumers of Criminal Justice Services” (1999) 38(4) *The Howard Journal*, 384.

³² Zedner, *Criminal Justice* (Oxford University Press, Oxford, 2004), p.145. A similar sentiment has been expressed by Fenwick, “Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?” (1997) 60(3) *Modern Law Review*, 317 at 319.

³³ Victims Rights Bill 2002, explanatory memorandum. The Bill did, however, contain some radical proposed reforms for victims’ rights, such as to have an input in bail applications, applications for early release and parole, and a provision to have sex offenders named.

The victim of crime, particularly in the case of violent crimes and sexual offences, has a vested interest in the prosecution authorities proceeding with the case against the accused without undue delay. In cases that involve continuous adjournments, the prolonged agony suffered by the victim as a result of the offender's crimes would undoubtedly be exacerbated. The accused may have a vested interest in suspending the prosecution of the charges against him, as the memories of witnesses might fade with time or those witnesses might die or relocate. Furthermore, the victim does not have a right to a speedy trial of the criminal charges against the accused.³⁴ In consideration of the fact that the victim of crime brings to the attention of the authorities the fact that a crime has been committed, should the victim not have *locus standi* to seek a judicial review of the prosecution's decision not to proceed with the criminal trial where a succession of adjournments had been granted? The difficulty with granting such procedural rights to victims is the potential for the eventual development of a tripartite prosecution model: victim, offender and prosecution—a procedure that could be constitutionally questionable.

Should victims have separate legal representation during the course of the criminal trial or would such a provision constitute undue interference with the effective administration of justice? If it was generally the case that victims had separate legal representation,³⁵ then the criminal trial process might be unduly prolonged due to continuous interjections from the victim's counsel. Furthermore, the victim should not *per se* have an input into the criminal justice process until the trial has concluded, as this may prejudice the accused's right to a fair and impartial criminal trial in due course of law. Once the trial has concluded, the victim may submit a VIS to the court for consideration before the appropriate sentence is imposed. Perhaps, however, the victim could be provided with legal advice—though not legal representation³⁶—especially in the case of sexual offences and violent crimes. The legal adviser, although not actively representing the victim of crime during the trial, could offer counsel and explain to the victim the various roles of those in the courtroom and the victim's role in the entire process.³⁷

Shapland, Wilmore and Duff³⁸ conducted a survey of victims in the mid-1980's, tracing selected cases from arrest to conviction. Victims were interviewed at all stages of the process. The results showed that what victims mostly want is compensation for personal injuries or damage to property and, of equal importance, information on the operation of the criminal justice process, *e.g.*, why a particular sentence was passed. Victims of crime generally do not know how the criminal justice system operates and consequently feel alienated. While the requirements of all victims will not necessarily be the same, providing victims with information on the various components of the process—the trial, sentencing, bail, the procedures for appeals and releases, *etc.*—could help to address many other concerns.³⁹ Arguably, the criminal justice system is still fundamentally about victims; it aims to deter people from victimising others and, when this does

³⁴ The accused has an implied constitutional right to a speedy trial in accordance with the provision of Art.38.1 of the Irish Constitution.

³⁵ s.34 of the Sexual Offences Act 2001, amending s.4 of the Criminal Law Rape (Amendment) Act 1981, makes limited provision for the complainant of *inter alia*, rape and aggravated sexual assault, to be legally represented.

³⁶ In *Sentencing Law and Practice, op. cit.*, p.358, O'Malley writes: "Separate representation at the trial, desirable though it might be, would require further statutory, if not constitutional, provisions".

³⁷ In the United Kingdom, the Domestic Violence, Crime and Victims Act 2004 made provision for a range of measures, including the establishment of a Commissioner for Victims and Witnesses to enhance the treatment of victims of crime by the criminal justice system.

³⁸ Shapland, Willmore, and Duff, *Victims in the Criminal Justice System* (Gower Publishing, Aldershot, 1985); see also, Shapland, "Victims, the Criminal Justice System and Compensation" (1984) 24 *British Journal of Criminology*, 131.

³⁹ See Fenwick, "Rights of Victims in the Criminal Justice System: Rhetoric or Reality" [1995] *Criminal Law Review*, 843 at 846–847.

occur, prosecutes and punishes offenders.⁴⁰ However, victims of crime continue to have less input to the criminal justice decision-making process than they would generally like to have.

Prosecution appeals against sentence

The 1993 Act introduced a procedure whereby the prosecution could make an application for the Court of Criminal Appeal to *review* what is deemed to have been an unduly lenient sentence imposed by the trial court.⁴¹ Section 2(1) of the Act provides that:

“If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the ‘sentencing court’) on conviction of a person *on indictment* was unduly lenient, he may apply to the Court of Criminal Appeal to *review* the sentence.” (emphasis added).

This provision is applicable only to trials on indictment and there is no comparable provision for appeals against unduly lenient sentences imposed by a court of summary jurisdiction. The Act goes on to state: “An application under this section shall be made, on notice given to the convicted person, within 28 days from the day on which the sentence was imposed”.⁴² Although this procedure allows for victims, or their families in the case of a homicide, to petition the prosecution authorities to appeal to the Court of Criminal Appeal to *review* an unduly lenient sentence, the sentencing process is exclusively the function of the courts. Nevertheless, this provision may serve to address the issue of sentencing disparity due to the absence of a proper structure for judicial sentencing guidance. Consequently, it might alleviate, to some degree, the grievances of victims where an unduly lenient sentence had been imposed.

Victim Impact Statements

The 1993 Act also introduced a provision for the trial court, before imposing sentence on the defendant, to consider the adverse impact of the defendant’s crimes on the victim in cases involving violence or sexual offences.⁴³ The general policy for the introduction of VIS⁴⁴ was to provide victims of crime⁴⁵ with the right to make a statement to the trial court concerning the impact the crime had upon him/her, such as physical and emotional injuries, economic loss and adverse changes in the victim’s employment situation.⁴⁶ This provision gives the victim a sense of involvement in the criminal justice process; the trial court is taking notice of how they have been affected by the crime. This process may offer atonement to the victim, *i.e.* how the crime

⁴⁰ See O’Malley, “Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions” [1993] 3 I.C.L.J. 40 at 41.

⁴¹ See further: O’Malley, “The First Prosecution Appeal Against Sentence” [1994] 4 I.C.L.J. 192; O’Malley, “Prosecution Appeals Against Sentence” (1993) 11 *Irish Law Times*, 121.

⁴² Criminal Justice Act 1993, s.2(2).

⁴³ Ashworth, “Victim Impact Statements and Sentencing” [1993] *Criminal Law Review*, 498 at 508 writes: “The main advantage of introducing victim impact statements would be to allow victims to have some role in the proceedings against ‘their’ offender, thereby, perhaps improving the victim’s satisfaction and giving the court a more rounded view of the offence”.

⁴⁴ In the United Kingdom a Victim Personal Statement scheme was established by the Home Office in 2001 under the auspices of the *Victim’s Charter* 1996.

⁴⁵ The provision for victim impact statements is appropriately confined to natural legal persons. Artificial legal entities are inherently resilient given that they cannot suffer physical pain and more often than not may recover their financial losses.

⁴⁶ See: Sanders, “Victim Impact Statements: Don’t Work, Can’t Work” [2001] *Criminal Law Review*, 447 at 448–449; Hudson, “The Crime Victim and the Criminal Justice System: Time for A Change” (1984) 11 *Pepperdine Law Review*, 23 at 53.

affected the victim is taken into consideration by the trial court in determining the appropriate sentence to be imposed.⁴⁷ However, while the provision of VIS affords the victim of crime with the opportunity to participate in the criminal justice process to a limited extent, the overall needs of victims of crime, *i.e.* the proper provision of rights and service, must not be neglected.⁴⁸

VIS may be tendered to the trial court in the case of sexual or violent criminal offences⁴⁹ whereby the trial judge shall take into consideration the adverse impact of the offence on the victim, for which the defendant has been convicted, in deciding the appropriate punishment to be imposed.⁵⁰ Section 5(1) of the 1993 Act provides that:

“In determining the sentence to be imposed on a person for an offence to which this section applies, a court shall take into account, and may, where necessary, receive evidence or submissions concerning, any effect (whether long-term or otherwise) of the offence *on the person in respect of whom the offence was committed.*” (emphasis added).⁵¹

The provision thus adopts a narrow definition of the “victim,” excluding, it would appear, such indirect victims as the bereaved relatives of homicide victims. This may necessitate a broader definition, or perhaps interpretation by the courts, of the term “victim” for the purposes of including secondary victims in homicide cases to exercise this provision of the 1993 Act.⁵² The families of the deceased in homicide cases, the most heinous of all criminal offences,⁵³ should be afforded the opportunity to express to the court the adverse effects of the defendants crime on them.

VIS are submitted to the trial court with the objective of influencing the courts determination of the appropriate sentence to be imposed in individual cases. Section 5(3) of the 1993 Act provides that:

⁴⁷ See Edwards, “An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making” (2004) 44 *British Journal of Criminology*, 967 at 976.

⁴⁸ The Law Reform Commission, *Report on Sentencing* (1996), ch.8 “Victim Impact Statements” para.8.6 states: “The protection of the interests of the victim should be a more central concern of the criminal justice process as a whole, not simply the sentencing process. If society is genuinely concerned about improving the lot of victims, more thought should be given to identifying and meeting their specific needs – the need for vindication, for protection, for support, and in some cases for compensation. We should avoid the facile assumption that society’s responsibilities the victim are best discharged through the imposition of heavily retributive sentences”.

⁴⁹ s.5(2) of the 1993 Act. This provision is unduly restrictive in that it is confined to *sexual offences* or offences involving *personal violence*. The scope of this provision should be extended to include other heinous crimes such as home invasions *i.e.* burglaries *etc.*

⁵⁰ The Law Reform Commission, *Report on Sentencing* (1996), ch.8 “Victim Impact Statements”, para.8.1, *inter alia*, reads: “The statement is to enable a judge pass an appropriate sentence which takes into account to an appropriate degree the effect of the crime on the victim and to ensure that where the impact is severe, this is reflected in the sentence”.

⁵¹ s.5(1) however, does not designate an authority to prepare victim impact statements for submission to the court on behalf of victims of crime. Initially, this function was performed by the gardaí at the behest of the prosecution, or by a psychiatrist or psychologist, but is now prepared by the Probation and Welfare Service.

⁵² Spungen, *Homicide: The Hidden Victims* (Sage, New York, 1998), p.9, comments that: “Family members—mothers, fathers, spouses, siblings, children and friends – become victims at the time that their loved ones are murdered. The designation co-victim responds to the need for a term to specify this category of victims. This societal recognition via the term co-victims confirms that a crime has taken place and that the people affected are indeed victims. When referring to a homicide, too many people still operate under the concept that the ‘victim is dead’, without acknowledging all the victims of a homicide”.

⁵³ See Fletcher, *Rethinking Criminal Law* (Oxford University Press, Oxford, 2000), pp.235–236.

“Where a court is determining the sentence to be imposed on a person for an offence to which this section applies, the court shall, *upon application by the person in respect of whom such offence was committed*, hear the evidence of the person in respect of whom the offence was committed as to the effect of the offence on such person upon being requested to do so.” (emphasis added).

The submission of VIS are not mandatory given that s.5(3) uses the phrase “upon application by the person in respect of whom such offence was committed”. The difficulty with this procedure is that the potential for inconsistency in the submission of VIS may result, to a certain degree, in sentencing disparity where some defendants may receive heavier sentences than others in similar circumstances due to the influence of a victim impact statement on the courts determination of the appropriate sentence to be imposed in an individual case.

The principal argument against the provision of VIS is that they may unduly affect the trial court’s determination of the sentence to be imposed in a particular case and that, as consequence, they will ultimately serve to exacerbate sentencing disparity. As a general rule, however, the inclusion of VIS does not *per se* diminish the role of the prosecution and other official agencies in the prosecution of criminal offences, given that it merely provides a mechanism for the victim to express to the court the adverse effects of the defendant’s crimes upon the victim. As this procedure may have an impact on the sentence imposed by the court, however, the victim does effectively have an input into the criminal justice decision-making process.⁵⁴ Thus, the inclusion of VIS may be justified on the basis that they will improve sentencing outcomes, promote efficiency and quality in sentencing and provide therapeutic benefits to victims.⁵⁵

Could the inclusion of VIS legitimise a victim’s expressions of vengeance?⁵⁶ The proper use of VIS, in accordance with the purpose for which they were designed to achieve, will to a large extent depend on whether the objective of the Statement is to inform the court of the victims’ suffering as a result of the defendant’s crimes, or whether it is used by the victim to obtain vengeance against the offender.⁵⁷ One question worth asking is whether the defendant could have an opportunity to challenge the VIS, for example, to cross-examine the victim or produce independent reports that might contradict the victim’s statements about the extent to which he/she has recovered from the crime. Affording the defendant such an opportunity could, however, make the victim an independent participant in the criminal trial, a procedure which could be constitutionally questionable.

⁵⁴ In many U.S. States, sentencing is done by jurors mainly in death penalty cases, where the relatives of the deceased victim may address the court, the purpose being to influence the court to impose a heavier punishment. Perhaps a legal representative should be appointed to assist victims of crime by delivering the victim impact statement in place of the victim, especially in traumatic cases.

⁵⁵ See Edwards, “Victim Participating in Sentencing: The Problems of Incoherence” (2001) 40(1) *Howard Journal*, 39 at 41–44.

⁵⁶ The Law Reform Commission, *Report on Sentencing* (1996), ch.8 “Victim Impact Statements” para.8.2, *inter alia*, reads: “... the victim impact statement might be more trouble than its worth and it also might run counter to the State’s view of the crime. It might reintroduce the view that the victim is entitled to a pound of flesh, a view which goes back to the idea of individual retribution”. See also: Long, “Community Input at Sentencing: Victim’s Rights or Victim’s Revenge?” (1995) 75 *Boston University Law Review*, 187; Sarat, “Vengeance, Victims and the Identities of Law” (1997) 6(2) *Social and Legal Studies*, 163; Hall, “Victims’ Voices in Criminal Court: The Need for Restraint” (1991) 28 *American Criminal Law Review*, 233.

⁵⁷ Trial judges might be well advised to review victim impact statements before they are tendered to the court, so as to ensure that the content of the statement complies with the purpose for which they were intended.

Compensation

As mentioned above, surveys have shown that information and compensation are the two main concerns of victims of crime.⁵⁸ Where should this compensation come from? State-funded compensation schemes are relatively modern. In 1974, the Scheme of Compensation for Personal Injuries Criminally Inflicted was established on a non-statutory basis; the Government is free to curtail the scheme.⁵⁹ It was introduced following the Dublin and Monaghan bombings to provide for out-of-pocket expenses and general damages. The Scheme initially worked well, but due to a budget cutback in 1986 it only covers out-of-pocket expenses and bills; compensation for pain and suffering are excluded.⁶⁰

Section 6 of the 1993 Act introduced a scheme for the provision of compensation from the offender to the victim, although this has not proven to be a very effective provision. Section 6(1) provides that:

“Subject to the provisions of this section, on conviction of any person of an offence, the court, *instead of or in addition to dealing with him in any other way*, may, unless it sees reason to the contrary, make (on application or otherwise) an order (in this Act referred to as a ‘compensation order’) requiring him to pay compensation in respect of any personal injury or loss resulting from that offence (or any other offence that is taken into consideration by the court in determining sentence) to any person (in this Act referred to as the ‘injured party’) who has suffered such injury or loss.” (emphasis added).

A noteworthy aspect of this provision is that a compensation order is made “on application or otherwise,” which implies that the trial court has the authority to make an order for compensation regardless of such a petition being made by the injured party or victim. Furthermore, the court, when making an appropriate compensation order, should take into consideration the means of the particular defendant, or in the case of a juvenile offender, the means of his/her parent(s) or guardian(s).⁶¹ If the court considers that both a compensation order and a fine should be imposed, then the court has a discretion in the determination of the hierarchy of which of these measures should be imposed.⁶² In cases involving homicide, and unlike the situation that pertains for VIS, the dependant of the deceased victim is deemed an “injured party” and may petition the court.⁶³

This provision of the 1993 Act is effectively part of the sentencing process. Consequently, victims of crime may obtain compensation without losing their anonymity.⁶⁴ This anonymity would be lost if a civil action is taken as such cases are usually reported by the media. For example, in the *McColgan* case,⁶⁵ the victims who had been sexually abused by their father

⁵⁸ Shapland, Willmore and Duff, *Victims in the Criminal Justice System* (Gower Publishing, Aldershot, 1985).

⁵⁹ This scheme is funded by the Department of Justice, Equality and Law Reform and administered by the Criminal Injuries Compensation Tribunal.

⁶⁰ The procedure is to apply to the Criminal Injuries Compensation Board with receipts or vouchers for expenses, police reports and so forth; there is no court appearance.

⁶¹ s.6(5) of the 1993 Act.

⁶² s.6(7) of the 1993 Act.

⁶³ s.6(12)(a) of the 1993 Act, *inter alia*, reads: “injured party includes a dependant...of the deceased person concerned”.

⁶⁴ The court may request the Probation and Welfare Service to supervise the payment of compensation from defendant to victim.

⁶⁵ *McColgan v The North Western Health Board and Desmond Moran*, High Court, 1998, cited in Law Reform Commission, *Consultation Paper on The Law of Limitation of Actions Arising From Non-Sexual Abuse of Children* (LRC-CP16-2000), p.10, n.29.

forfeited their anonymity to take a case against the Health Board and their family GP. Details of the criminal trial had not been reported due of the nature of the criminal offences involved.

There are certain drawbacks with the offender-victim model of compensation in that a court order may only be made where the defendant has been convicted, *i.e.* it is part of the part of the sentencing process. However, every criminal offence committed does not necessarily result in conviction, as the offender may not be detected or, if detected, may not be prosecuted. Moreover, many defendants convicted of crimes may not have the financial resources to pay compensation to the victim when an order is made by the court. Indeed, a significant feature of the provision in the 1993 Act is the discretion conferred on the court by the use of the phrase “instead of or in addition to dealing with him in any other way”. This might result in economic discrimination favouring defendants who have the financial means to satisfy a compensation order and, in so doing receive more favourable treatment by the court, such as the imposition of a non-custodial sentence.⁶⁶

European Union standards

EU Member States generally provide some form of services to victims of crime, such as social and psychological services. The most obvious difficulties for those charged with protecting victims’ rights at EU level are language barriers and the fact that potential victims will have different cultural and ethnic backgrounds. Moreover, those victims who return to their home state after a crime committed in another state may encounter procedural difficulties in prosecuting the offender.

With the increased movement between EU Member States, there is greater potential for individuals to become victims of crime in a Member State other than their state of residence. It is estimated that each year over eight million European tourists become the victims of crime.⁶⁷ In response, the European Council Framework Decision on the *Standing of Victims in Criminal Proceedings*⁶⁸ of 2001 aims to harmonize the rights of victims of crime within the Member States. The 2001 Framework Decision provides for certain minimum standards for the treatment of the victims of crime and their families which are applicable in all Member States, and this requires Member States to align their respective criminal procedures in accordance with the Framework Decision.⁶⁹

While the Framework Decision covers a wide range of measures,⁷⁰ the following are perhaps the most relevant in practical terms for the victims of crime within Member States. Article 1(a) adopts a broad definition of victim in the following terms:

⁶⁶ However, in the *People v McLaughlin*, unreported, Court of Criminal Appeal, July 13 2005, Kearns J. stated: “... there is no jurisprudence, principle or practice which renders the payment of compensation to a rape victim inconsistent with the imposition of a custodial sentence. Indeed, it conflicts with and contradicts the express wording of s 6 of the Criminal Justice Act 1993, which states that the discretion to pay compensation may be ‘instead of or in addition to dealing with him in any other way’.”

⁶⁷ Spackman, “Holiday Victims of Crime” (1998, summer) *Victim Support Magazine*, 10–12, cited in Victim Support, *New Rights for Victims of Crime in Europe*, p.4, available at:

http://www.victimsupport.org.uk/vs_england_wales/about_us/publications/new_rights/new_rights.pdf

⁶⁸ (2001)/220/JHA); OJ 22.3.2001, L 82/1.

⁶⁹ Member States were required to modify their respective national legislation before March 2002.

⁷⁰ It made provision, *inter alia*, for greater access to justice for victims of crime, the protection of victim’s rights and recognition of the standing of victims in the criminal justice process and of course the issue of offender-victim compensation.

“‘victim’ shall mean a *natural person* who has suffered harm, including physical or mental injury, emotional or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.” (emphasis added).

This definition of victim is exclusive to natural legal persons—artificial legal entities such as corporations are excluded—which correlates with the purpose for the introduction of victim assistance legislation.⁷¹ Article 2(1) provides that:

“Each Member State shall ensure that victims have a *real and appropriate role in its criminal legal system*. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings” (emphasis added).

Thus, victims of crime should be provided with information about, for example, the role of the judge, jury, prosecution and defence. Article 4(1) also deals with the provision of information to the victim:

“Each Member State shall ensure that victims in particular have access, as from their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection of their interests.”

This would conceivably include issues such as whether a suspect is to be charged and prosecuted, and the subsequent progress of the criminal trial. Article 4(1) goes on to list the basic forms of information such as “the type of services or organisations to which they can turn for support”, “where and how they can report an offence” and “how and under what conditions they can obtain protection.” Article 4(2) requires each Member State to “ensure that victims who have expressed a wish to this effect are kept informed of (a) the outcome of their complaint; (b) the progress of the criminal proceedings against the accused; (c) the court’s sentence”. Article 4(3) requires Member States to “take the necessary measures” to notify the victim when the defendant (convicted and sentenced for crimes against the victim) is released.

Article 9(1) of the Framework Decision makes provision for victims of crime to claim compensation from the offender “in the course of criminal proceedings” except where “national law provides for compensation to be awarded in another manner”. This provision for offender-victim compensation was augmented by the 2004 Council Directive on *Compensation to Crime Victims*⁷² which recognised that victims of crime are entitled to appropriate levels of compensation for the injuries they have suffered because of the crimes committed against them by the defendant, regardless of where the crime was committed within the EU. The 2004 Directive established a system of cooperation between Member States to facilitate access to compensation schemes for victims of serious crime where the offence was committed in a Member State other than the state of the victim’s residence. Each Member State is accordingly obliged to have in place a suitable compensation scheme for victims of crime.⁷³ This is especially important in

⁷¹ An artificial legal entity cannot suffer harm in the same way as a natural legal person, and furthermore, usually recuperates its financial losses.

⁷² Council Directive 2004/80/EC of 29 April 2004; OJ L 261, 06/08/2004 P. 0015-0018.

⁷³ EU Member States are obliged to have established some form of compensation scheme for the victims of crime in fulfilment of their obligations under the European Convention on the Compensation of Victims of Violent Crimes, Strasbourg, November 24, 1983.

consideration that many, if not most, offenders may not have the necessary means to satisfy an award of damages.

Conclusion

Although the official response to the commission of crime is by the State through the prosecution and punishment of offenders, the criminal justice system will fail to do justice unless more consideration is given to the provision of appropriate rights and services for victims of crime. In the light of some recent high-profile case, the approach taken to the victim in the criminal justice system is likely to be subjected to further scrutiny and reform.

The provisions of the 1993 Act allowing for appellate review of unduly lenient sentences and the introduction of VIS seem to lean toward the imposition of heavier sentences on offenders. Such provisions may reflect a general belief that heavier punishments imposed on offenders better serve the interests of victims. While the 1993 Act also provides a mechanism for offender-victim compensation, the imposition of heavier sentences means that the offender may not be in a position to pay compensation. Thus, the offender-victim compensation model, as provided for by s.6 of the 1993 Act, may not be of real merit.⁷⁴

The Council Framework Decision on the *Standing of Victims in Criminal Proceedings* 2001 is innovative as it makes provision for minimum standards for the treatment of victims of crime and their families applicable within the European Union. The various provisions of the Framework Decision will undoubtedly have a fundamental impact for those travelling within EU Member States and will serve to ensure that assistance and support will be available to victims of crime situated in a Member State other than their state of residence.

Whether victims of crime are afforded more procedural rights will largely depend on the effect of such procedural rights on the criminal justice process, which is essentially concerned with the prosecution and punishment of offenders by the State. There is a real danger that affording victims the opportunity to influence the criminal justice decision-making process would result in defendants facing two prosecuting authorities: the State and the victim. This would most likely be constitutionally impermissible. A legislative response to the needs and rights of victims of crime, with the provision of sufficient services for victims throughout the entire criminal justice process, would therefore be a more appropriate response.

⁷⁴ If an offender can afford to pay compensation this may be reflected by the courts with the imposition of a non-custodial or perhaps reduced sentence than those who cannot afford to pay. Although this raises a question of social justice, or perhaps injustice, the policy of the law should be to keep as many people out of prison as possible.