

A new victims' recommendation from the Council of Europe: towards a victim-friendly justice system?

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- ❖ Key issues to be addressed today:
- ❖ What is the history of (general) victims rights instruments in Europe?
- ❖ What can we learn from this history?
- ❖ N.B. much of this history concerns the adventures in victims rights within the European Union → still relevant for Switzerland?

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THE HISTORY OF INTERNATIONAL VICTIMS INSTRUMENTS IN EUROPE

- ❖ 1985-1999: The Prehistory: Before the EU got involved
- ❖ 1999-2010: The Middle-ages: Learning from the 2001 EU Framework Decision
- ❖ 2010-2020: Modernity: The fortunes of the 2012 EU Directive
- ❖ 2020- ? :The Future: The 2023 Victims Recommendation and beyond

3

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The Prehistory: 1985-1999

- ❖ 1985 UN Declaration of Basic Principles for Justice of Victims of crime and abuse of power and Council of Europe Recommendation 1985(11) on the position of the victim within the Framework of Criminal Law and Procedure
- ❖ Similar content: provisions on
 1. Respect and recognition
 2. Receiving and providing information
 3. Legal assistance
 4. Protection
 5. Compensation
 6. Victim support
- ❖ Relevant differences: UN focuses also on “abuse of power”, CofE more extensive on rights in criminal procedure

4

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The Prehistory: 1985-1999

- ❖ N.B. the provisions do not radically alter the criminal justice process
- ❖ Both in international documents and across national jurisdictions, the “emancipation of the victim” is less likely to entail strengthening procedural rights in the criminal procedure
- ❖ Even the appearance that this is the case leads to push-back: see the international discussion about so-called Victim Impact Statements

5

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1985-1999

- ❖ A key theoretical issue?
- ❖ Soft law versus hard law
 - ❖ Declaration/ recommendation are soft law:
 - ❖ Not binding/ compelling MS, do not offer direct legal recourse
 - ❖ Work through moral force/ national actors/ framing of discussion
 - ❖ Convention/ treaty/ framework decision/ directive are hard law
 - ❖ Binding Member states, with forms of (quasi-)legal recourse
 - ❖ Emphasis on wording in hard law, “softer” language?

6

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1985-1999

- ❖ Large scale study by Tilburg colleagues Brienen and Hoegen (2000):
 - ❖ Key finding: tremendous variety across Europe.
 - ❖ Differences in historical position of victims across systems, differences in the way that societal interest in victims may be translated into victims issues
- ❖ Positive feedback-loops in development:
 - ❖ More funding, development of victim support organizations → leads to “victims rights champions” → capitalize on political/ societal will to improve position of victims → in turn leading to more funding again
 - ❖ Availability of quality victimological research → highlights shortcomings, draws attention to victims issues → more funding – also for organizations
!- victimological research

7

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The Middle Ages: 1999-2010

- ❖ EU-Commissioner Grodin and the position of cross-border victims
- ❖ Unequal treatment of those who fall victim to crime abroad?
- ❖ Does this conflict with freedom of travel?
- ❖ Harmonization of position of cross-border victims → but what then of victims in their home country?
- ❖ So the EU Framework Decision on the position of the victim 2001
- ❖ Similar content, some differences
 1. Attention to cross-border victims
 2. Language use offers wiggle room → hard law
 3. “Penal mediation”

8

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1999-2010

- ❖ Optimism and pessimism:
- ❖ Optimism MS:
- ❖ Confident they already met the requirements, one year for implementation
- ❖ Pessimism VS Organisations:
- ❖ Due to the unfounded optimism of MS
- ❖ Due to the language of the provisions in the FD
- ❖ Due to working of FD: transposal, not compliance
- ❖ Due to enforcement mechanism of FD: → national reports to EC, EC cannot check reports
- ❖ BUT....EC report from 2004 extremely negative: no MS has met requirements of FD

9


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1999-2010

- ❖ Working of EU Law:
- ❖ Key: integration through law
- ❖ In single market, mostly through removing legislation, makes it easier to harmonize
- ❖ FD's in criminal law mostly relatively minor and clear issues
- ❖ FD Victims not like that at all → wide swath of criminal procedure, requiring a lot of government action
- ❖ Notion of “worlds of compliance” in following EU regulation
- ❖ Connection between more compliant worlds and stronger victim “ecology”: not harmonisation, but wider gap as improvements concentrate in stronger areas
- ❖ Framework decision works like soft law rather than hard law → makes it more relevant to CofE situation!

10

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 Modernity: 2010-2020

- ❖ Victims in Europe project (2009): confirms position EC, even 8 years later
- ❖ Treaty of Lisbon (2009) → shift in position of justice pillar, explicit mention of EU competence victims
- ❖ 2012 EU Victims Directive
- ❖ Stronger instrument, more details, but stronger language as well
 1. Family members of those bereaved by homicide as victims
 2. Right to judicial review of a decision not to prosecute
 3. Needs assessment
 4. Ambivalence to restorative justice → due to Istanbul convention?

11

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 Modernity: 2010-2020

- ❖ Lessons learned? Still short timeframe (3 years) for transposal
- ❖ Déjà vu in results, see project IVOR
 - ❖ Victims rights champion
 - ❖ Soft law rather than hard law
 - ❖ Importance of implementation over law on the books
- ❖ Within EU one lesson learned:
- ❖ Much more emphasis on implementation:
 - ❖ Guidance document,
 - ❖ EU victims strategy
 - ❖ EC victims coordinator!

12

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Towards the future: the period after 2020

- ❖ 2006 Victims recommendation, somewhat snowed under by FD and Directive
- ❖ 2018 Questionnaire on the Rights of Victims in the Criminal Justice System
- ❖ Concrete proposals to update the 2006 Recommendation - four key decisions:
 1. To elaborate a more detailed text
 2. To draw from current international and regional legal instruments
 3. To strive beyond existing instruments
 4. To focus the Explanatory Report on those provisions that go above and beyond
- ❖ Establishment of a CDPC Working Group on Victims Rights: three meetings
- ❖ Adoption of the Recommendation and extensive explanatory report by the Committee of Ministers of the Council of Europe: 15 March 2023

13

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Some underlying ideas

- ❖ Importance of CofE Recommendation as soft law
- ❖ Attempt to get important notions to improve position into international legislation
- ❖ To help national actors reframe issues: from **why** to **why not?**
- ❖ Also to stimulate EU, in the revision of the Directive and by providing another benchmark
- ❖ Exact wording is less relevant than idea behind provision: it is a recommendation in any case!
- ❖ Extensive explanatory memorandum: to stimulate further ideas in practice

14

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KEY INNOVATIONS

- ❖ Article 3: Access
- ❖ Article 10: Being heard
- ❖ Article 13: Compensation from the offender
- ❖ Article 16: Remedy
- ❖ Article 18: Restoration
- ❖ Article 25: Monitoring and research

15

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KEY INNOVATIONS

- ❖ Article 3. Barriers to access to justice and support
- ❖ 3(1) In order to improve access to justice and encourage victims to contact competent civil, criminal and other relevant judicial authorities and support organisations, states should investigate barriers that prevent victims from contacting those authorities or support services or making a formal complaint and reduce any such barriers to the largest extent possible.
- ❖ Key notion: the largest problem – at least in prevalence/ incidence, concerns lack of access

16

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KEY INNOVATIONS

- ❖ Article 10. Right to be heard
- ❖ 10(3). In accordance with national law, states are encouraged to allow that the provision of evidence can occur on the initiative of the victim and should not be restricted to the obligation to witness during the investigation or the trial.
- ❖ 10(5). In accordance with national law, states are encouraged to ensure that this right to be heard concerns any decision which can be assumed to have a considerable impact on the victims' interests. N.B. this includes prosecution decisions, compensation, protection, referral to restorative justice.
- ❖ Key notion (1): right to be heard beyond witnessing,
- ❖ Key notion (2): right to be heard should apply to any decision with a considerable impact on victims' interests

17

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KEY INNOVATIONS

- ❖ Article 13. Right to compensation from the offender
- ❖ 13(1): **Member States should ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time.** When claiming compensation from the offender in the course of criminal proceedings is irreconcilable with the national legal system, member States should provide for alternative ways through other legal proceedings to structurally safeguard the victims' right to obtain such a decision.
- ❖ Explanatory memorandum 13(3): *"a best practice in this regard is the situation where the State pays the compensation to the victim in advance, and subsequently recovers the advance payment from the offender"*
- ❖ Key notion (1): right to decision on compensation claim within criminal justice
- ❖ Key notion (2): seeking practices to ensure enforcement in reality, rather than on paper

18

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KEY INNOVATIONS

- ❖ Article 16. Right to a remedy
- ❖ 16(2). For the provisions of this Recommendation that are implemented into national law, states should ensure that victims have, where appropriate, access to an effective remedy before competent authorities. The conditions and procedural rules under which victims have access to such a remedy should be determined by national law.
- ❖ Key notion (1): Victims' "rights" do most often not come equipped with a remedy. What happens when they are not enforced?
- ❖ Key notion (2): The lack of remedy relegates the importance of/ attention to the enforcement of victims' rights.

19

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KEY INNOVATIONS

- ❖ Article 18. Restorative justice
- ❖ 18(1). Restorative justice should be a generally available service. Restorative justice services should have sufficient capacity to provide safe and effective services to all victims who may benefit. The type, seriousness or geographical location of the offence should not, in themselves, and in the absence of other considerations, preclude restorative justice from being offered.
- ❖ 18(2). Member States shall ensure that restorative justice providers conform with Committee of Ministers' Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters.
- ❖ Key notion: Access to restorative justice is in the interest of all victims who voluntarily wish to participate.

20

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KEY INNOVATIONS

- ❖ Article 25. Monitoring and research
- ❖ 25(3) Member States should take into consideration the current state of victimological research in developing evidence-based policies towards victims.
- ❖ 25(4) States should encourage all governmental and non-governmental agencies dealing with victims of crime to share their expertise with other agencies and institutions nationally and internationally.
- ❖ Key notion (1): Crucial component of monitoring and research as a means to achieve progress in the development of victims' rights
- ❖ Key notion (2): Vital importance of organizations such as Victim Support Europe and the European Society of Criminology in doing so.

21

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THE FUTURE IS NOW

- ❖ Proposal for a revision of the EU directive in July 2023
- ❖ Follows up on right to a remedy
- ❖ Introduces right to decision on compensation within criminal justice and proposes "payment up front"
- ❖ Less enthusiasm for monitoring/ research
- ❖ Or for restorative justice
- ❖ What will be the next big steps in Switzerland?

22

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❖ Thanks for your attention!

23

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