Victim’s interests in criminal law
and their implementation in the European Union directives

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1. INTRODUCTION

A victim of a crime has been in the shadow of criminal law and criminal proceedings for a relatively long time. The position of an entity whose legal goods were protected by the state and whose legal interests were represented by the public authority, made the victim an ‘object of interest’ or an ‘active evidence’ in criminal law, with a fading voice hidden behind the public interest. This problem was observed by Nils Christie, who presented in his ‘Conflicts as a Property’ a picture of lawyers stealing the criminal case from a victim and treating it as a common good without asking the victim’s position on the issue. Christie’s article, published in 1977, coincided with a critical perception of the actual methods of the reaction to a crime, based mainly on attempts to re-socialize the offender. Those attempts where often criticized as a ‘forced adaptation of a man to live in a state’ or seen as a financial expense inadequate to its effects. It was also noticed that even in the absence of recidivism in case of a particular offender, it is often impossible to say whether this success can be attributed to the act of punishment or whether it was caused by other circumstances. Those aspects led to the conclusion that if we do not know whether under the criminal law it is possible to help the offender, we should at least try to satisfy the victim. But what does the victim of a crime need? And how can we respond to those needs with the criminal law instruments?

2. DIRECT AND POTENTIAL VICTIM

Victims may have a whole range of needs resulting from how an act of crime influenced their life. Criminal law can respond to those needs by stepping back and giving victims space to regulate the consequences of a crime by themselves (but still reserving the use of coercive measures to the state) or by supporting them with a formal reaction seen as just and adequate in a given criminal system. Both solutions can exist simultaneously in one system. Once the criminal law becomes a domain of public authority, it is the state who decides whether to intervene with its instruments or achieve the same goals by supporting the victims passively. Therefore, it is important to determine the needs of a victim in reaction to a crime as well as the aims that should be achieved by their implementation. One should

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2 N. Christie, Conflicts as property, The British Journal of Criminology, 1977, Nr 1, p. 3-5.
3 C. Roxin, Nowe kierunki polityki kryminalnej, Przegląd Prawa Karnego 1990, Nr 4, p. 94, 97.
5 H. Marquardt, O teoretycznym, p. 121-122.
also bear in mind that the aims of the public law, which criminal law is part of, are not only those of the individuals but also those of the society represented by the public authority. Therefore, ‘a victim’ in criminal law may mean not only an individual victim that is a direct victim (they differ from other people influenced by a crime in an indirect way – close family members of injured people\(^7\)), but also a society that is a group of potential victims, who might be disturbed by the information about the crime\(^8\) or as a normative victim, who in the long term may feel the effects of non-compliance of some society members with legal norms\(^9\).

3. AIMS OF CRIMINAL LAW

The aims of criminal law are: to restore justice and to protect legal goods and their disposers by limiting the likelihood of their re-offending by a further crime\(^10\). Both aims can and should be achieved not only by criminal law – different prevention theories are based on the need to influence the minors long before the first symptoms of a tendency to violate the law appear (including even pre-natal prevention by taking special care of pregnant women) or on the influence on the surroundings through specific architectural solutions as well as responding to the first signs of property damage\(^11\). Nonetheless, criminal law with its instruments has its own area to manage: restoring justice with an adequate compensation and protecting legal goods as well as their disposers by refining established and potential offenders from violating legal rules introduced for the common interest\(^12\).

3.1. Restoring justice

Restoring justice with an adequate compensation can be understood in various ways as the expectations of the victims about the appropriate reaction to a crime may differ significantly, depending on the type and circumstances of a crime as well as on the personal attitude to the harm done. In case of damage to property, the victim will most probably expect restitution, whereas in case of personal rights violation, the expectation of retribution may prevail. If the offender is in a close relation with the victim, the victim may prefer forgiveness or retribution, and if he (she) is a stranger – restitution or compensation might be expected\(^13\). On the basis of various victim surveys in different European countries (among others in Poland\(^14\) and Germany\(^15\)) the following expectations of a crime

\(^12\) E. Hryniewicz-Lach, Ofiara w polskim prawie karnym. Interesy ofiary przestępstwa i karno-materiałne instrumenty służące ich zabezpieczeniu, Warszawa 2017, p. 144-152.
victim (both individual and society as a victim) were identified: retribution, which focuses on inflicting the appropriate level of harm on the offender, restitution - addressing the needs of replacing or renewing whatever has been damaged, compensation - where it is not possible to restore what was lost or damaged and forgiveness – after the admission of wrongdoing or demonstration of remorse by the offender. Legal instruments should respond to those expectations and meet victim’s needs, which on legal grounds, transform into victim’s interests. Such interests, on the basis of the aforementioned identified expectations, can be defined as: material and moral compensation. Material compensation refers to repairing the damage and harm done in the way described above as restitution or compensation. Moral compensation can be achieved by retribution based on harm adequate to that suffered as a consequence of a crime (which seems to be the most common task of criminal law), as well as by forgiveness, which shouldn’t be understood as unconditional but as the answer to the offender’s voluntary and serious efforts to satisfy the victim.

a. Material compensation as legally protected victim’s interest

Material compensation to a crime victim seems to be more adequate to civil law which specifies concepts and solutions for a case of a tort. However, its importance in case of damage and harm caused by a crime was determined in victim surveys as a significant element of restoring justice. This led to the recognition of a need for support of victims of crime in the sphere of material

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21 However it should be mentioned that material compensation can have different forms in criminal law. On a base of relation between indemnity and repression it is possible to distinguish such models of material compensation like: split models (process model and “third stream model”), bonding models (model of compensation as penalty and mixed penalty model) as well as participation model (through mitigation of criminal sanctions). Social security law provides also state (material) compensation. More on the models of material compensation: E. Hryniewicz-Lach, Ofiara, p. 239-284.

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compensation. As a result, art. 16 of the Directive 2012/29/EU of the European Parliament and the Council of 25.10.2012 establishing minimum standards on the rights, support and protection of victims of crime (and replacing Council Framework Decision 2001/220/JHA), regulates the right to obtain a decision on material compensation from the offender in the course of criminal proceedings, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings. This regulation confirms that the right of a victim to obtain, in a possibly short time, a decision on material compensation should not be questioned. The victim’s right to material compensation is also supported by the Council Directive 2004/80/EC of 29.4.2004 relating to the crime victims compensation, which refers to victims unable to obtain compensation from the offender, if the offender lacks the necessary financial means or cannot be identified or prosecuted. In such cases compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed (art. 2 of the Directive). However, the particular way of state support must be regulated in an internal legal act of each Member State, which can limit the scope of crimes as well as the amounts paid, and which can introduce specific conditions under which a victim, regardless of the country of origin, may obtain financial support from the state. It leads to the conclusion that the right to obtain a court decision on compensation doesn’t guarantee that the victim will get the execution of such judgement and obtain a financial remedy. This statement is a ground for the concept which was also introduced in art. 16 of the Directive 2012/29/EU, that the Member States shall promote measures to encourage offenders to provide adequate compensation to victims. What is voluntarily paid by the offender to the victim before or during the criminal proceedings, is the victim’s effective gain and a sign that the offender is willing to follow the legal rules and regulations. When the offender doesn’t try to satisfy the victim voluntarily, what the state does first is to intervene with coercion and support (or even execute) the victim’s claims. The mentioned regulations of art. 16 of the Directive show that the material compensation to an individual victim is unambiguously accepted and supported by the European Union.

b. Moral compensation as legally protected victim’s interest

In the concept of restorative justice crime is seen not only as the violation of legal regulation but, primarily, as the violation of interpersonal relationships. The authors of that concept emphasise that such a violation can be cured with a victim-offender reconciliation but also with the punishment by the state, as both methods have a potential of vindication through reciprocity by “evening the score” and in this way, both may effectively right the balance. Since criminal law focuses mainly on the state reaction to the crime understood as a breach of law, it should step back when a victim and an offender are ready to discuss the methods of satisfying the victim’s needs resulting from the crime. This sequence of legal instruments application doesn’t mean that the state gives up reacting to a crime, but it shows the necessity of grading the response to it, by putting first the ethically superior duty to voluntary compensation to the damage caused by a crime, before the application of instruments based on coercion and repression. This concept also creates the change in the relation between a state and a victim from a victim seen as a client represented by the public authority to a victim as a self-
representative of their needs and wishes, supported by the public authority which guarantees the adequate position to a victim in the course of reconciliation with an offender.

Framework conditions for such an approach have been regulated in art. 12 of the Directive 2012/29/UE, according to which the state shall take measures to safeguard the victim from the secondary and repeated victimisation, from intimidation and retaliation, when it provides restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice process have access to safe and competent restorative justice services. Minimal conditions of such services, mentioned in the Directive, are: the victim's free and informed consent, which may be withdrawn at any time (based on their equivalent position to the offender), the offender’s acknowledgement of the basic facts of the case and confidentiality of the discussions in the interests of both parties. Even if the guideline to the Directive states that the introduction of restorative justice services (such as mediation) is not obligatory to the Member States, the regulation of its frames in the Directive shows that the need of a victim to obtain moral compensation from the offender (in the form of an apology or offender’s attempts to satisfy it) is noticed and supported by the European Union. The moral compensation to the society based on voluntary efforts of an offender to satisfy the local society influenced by a crime is a relatively new idea. The European Union considers a crime as the wrong against society and the violation of the individual rights of victims, but at the moment, the offender's activity in this area (the symbolic compensation) is not qualified as a service of restorative justice.

The recognition of victim's interest to punish the offender if their voluntary efforts to satisfy the victim don’t exist or are not seen as good enough in the scope of a crime, seems to be more problematic than the concept of moral compensation through a victim-offender settlement. A penalty is the most common reaction to the crime with instruments of criminal law, accepted also by the advocates of restorative justice. Generally, it is not questioned that only the state is authorized to use repression and coercion built into a criminal response to a crime. The victim may expect a material compensation and moral satisfaction for the harm done, but within the moral satisfaction it is the state that decides what is a just response to the victim’s harm.

The attempts to justify the victim’s claim to punish the offender are still made. The proposals included the indication that if the state monopolized the criminal reaction and ‘stole’ the victim’s conflict with an offender, it should give the victim some chance to influence their decisions in the sphere of criminal reaction, especially if those decisions are aimed, among others, at satisfying their needs arising from a crime. Victim’s right to punish the offender is also derived from the concept of state’s compensation to the victim for not preventing their victimization and is seen as an instrument that should limits further damage which may result from victimisation. The victim’s right to decide about the punishment was also justified by the indication of the state obligation to actively protect the constitutional rights and freedoms of individuals. In case of committing a crime, this obligation means

27 Nr 9 of the preambule of the directive 2012/29/UE.
30 J. Ph. Reemtsma, Das Recht des Opfers auf die Bestrafung des Täters – als Problem, München 1999, s. 23-27. However, the author indicates that for the victim the punishment is not a kind of compensation but limiting the process of victimization.
the duty to mitigate damage by providing the victim with a share in punishing the offender. Finally, the victim’s right to decide about the punishment for a crime was derived from human dignity; ignoring their need for moral compensation was regarded as contrary to respecting the victim as a human. However, regardless of the number of justifications, there was only one conclusion: the victim has an interest in punishing the offender, but no right to influence such a punishment\(^\text{31}\). The victim, like everyone else, has the right to go to court, but not to expect a particular court’s decision\(^\text{32}\). Even if the victim is entitled to appeal from the court sentence about the (mild) penalty, the (appeal) court is the only authority to decide about the just punishment. The victim may sometimes be entitled to decide whether the criminal investigation should or should not take place (in case of crimes prosecuted on application or from private prosecution), but it is still the court that decides about the severity of punishment. Exercising the judicial power by deciding on the penalty in compliance with the criminal law, should be a unique task of an independent court.

The above statement was partly questioned in the context of the victim’s right to be heard regulated in the Council Framework Decision 2001/220/JHA of 15.3.2001 on the standing of the victims in criminal proceedings\(^\text{33}\). In accordance to art. 3 of the Framework Decision, each Member State shall safeguard the possibility for the victims to be heard during the proceedings and to supply evidence. In joint cases of Magatte Gueye (C-483/09) and Valentín Salmerón Sánchez (C-1/10), Spanish Criminal Court of Tarragona asked the Court of Justice of the European Union if the right to be heard meant that the state authorities responsible for the prosecution and punishment were obliged to allow the victim to express their opinion and decide in accordance with the opinion, especially in cases where the judgement may have direct effects on the victim’s life. Mr Gueye and Mr Salmerón Sánchez were convicted of domestic violence crimes in accordance with Spanish law, and the sentences imposed on them included, among other penalties, an ancillary penalty which was a restraining order: 1 000 metres (Mr Gueye) and 500 metres (Mr Salmerón Sánchez), and no contact with the victims for the period of 17 months for the former and 16 months for the latter. Within a relatively short time after the imposition of those ancillary penalties the two offenders resumed living together with their victims at the request of those victims. In the testimony the victims declared that they themselves had consciously and voluntarily decided to live with the offenders, knowing that the two men had been convicted of having previously assaulted them and were the subjects of criminal penalties\(^\text{34}\).

The Court of Justice of the European Union decided in its judgement of 15.09.2011 that although the Framework Decision leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement that objective, this regulation should be understood in procedural way. It means that its provision should give the victim the ability to give a testimony in course of the criminal proceedings which can be taken into account as evidence as well as giving them the opportunity to express their opinion. That procedural right to be heard does not, however, confer any rights on the victim in respect to the choice of penalty form to be imposed on the offender. It is the task of the state to ensure that the criminal law offers protection of the victim’s

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34 Judgement of the Court, point 19.
interests not only as it perceives them but also in other more general interests of the society.\(^{35}\) This statement, which was enclosed into the preamble of the present directive establishing minimum standards on the rights, support and protection of crime victims 2012/29/EU\(^ {36}\), leads to two conclusions. The first conclusion is that the possible victim’s right to decide about the severity of punishment cannot be derived from the procedural right of the victim to be heard. The other conclusion is that the instruments regulated by criminal law, both of retributive and preventive character, due to the load of repression and coercion and the common interest of the whole society they serve, should be of the court’s sole decision. In such a case an individual victim of a crime may be seen as a beneficiary of the court decision, in terms of moral compensation, but not as a co-operative partner of the court when it comes to decide about the punishment. The court, deciding about the penalty, also has to consider the interest of the society in moral compensation and protection of a potential victim, as well as the justified and legally accepted interest of an offender.

c. Victim’s role in criminal compensation

The victim’s position in criminal law in relation to their material and moral compensation interests can be defined as: beneficiary, participant or co-operative partner of the court, participating in the decision about the consequences of a criminal act. The beneficiary of a criminal reaction means that the victim is a passive entity that does not affect the decision on issues that concern them. This role of a victim is most common in criminal law since most of its instruments have repressive or mixed repressive-preventive character and therefore, their implementation is reserved to the state. The victim as a participant of a criminal reaction is an entity that claims in an active way only material compensation instead of pursuing those claims in civil proceedings. This role of the victim is accepted in legal systems that introduce civil law regulation serving material compensation into criminal law. The victim as a co-operative partner of a court to the extent to which the judgement meets their interest or interferes with their freedom means that they can be active also by applying repressive measures.\(^ {37}\) This solution is not supported in the European Union directives of criminal law. The victim may only request an application of a penal instrument once adopted by the court of Member State in another Member State on the basis of internal regulations following Directive 2011/99/EU of the European Parliament and of the Council of 13.12.2011 on the European protection order.\(^ {38}\) However, all the penal instruments regulated in this directive refer to the victim’s protection, not to their moral or material compensation.

As a part of Polish criminal law reform that came into force on 1\(^ {st}\) July 2015, the Polish Parliament tried to increase the victim’s impact on the outcomes of criminal proceedings by enabling them to effectively demand from the court, in selected cases where they were materially and morally compensated by the offender, the discontinuation of the criminal proceedings.\(^ {39}\) However, the impact

\(^{35}\) Judgement of the Court, point 57-62.

\(^{36}\) Point 41 in the preamble of the directive states that the right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing.


\(^{39}\) According to art. 59a of the Polish Penal Code, if the offender, who has not been previously sentenced for an intentional crime involving the use of force, has redressed the damage or compensated for the suffered harm before the start of the trial court proceedings, the criminal proceedings regarding an offence subject to the penalty of deprivation of liberty not exceeding 3 years or an offence against property subject to the penalty of deprivation of liberty not exceeding 5 years, or an offence provided for in art. 157 § 1 (injury lasting more than 7 days), are discontinued upon the victim's motion. However this provision didn’t apply if due to special circumstances the discontinuance of the proceedings.
of that solution could not be examined because of rapid repeal of this regulation by a legal act that came into force on 15th April 2016, adopted by the newly elected Parliament. At the moment the only possible way to influence the criminal court decision by the victim, apart from relatively rare cases when they can decide about not prosecuting the offender, is to create a victim-offender settlement, which can result from a mediation procedure. According to Polish criminal law regulations, when passing a sentence, the court takes into account the positive results of mediation between the aggrieved party and the offender, or any settlement they may reach in the proceedings before the prosecutor or the court. In case of such a settlement, if the court recognizes that even the lowest penalty provided for the offence would be too severe, it may apply an extraordinary mitigation of the penalty and impose a penalty below the minimum statutory sentence, or a less severe type of penalty.

3.2. Protecting legal goods and their disposers

The decision of the Court of Justice of the European Union in joint cases of Magatte Gueye (C-483/09) and Valentin Salmerón Sánchez (C-1/10) stated that only the court, regardless of the individual victim’s expectations, will decide about the punishment even if the applied instruments should serve mainly the victim’s protection. The analysis of the content of the victim’s right to be heard provided by the Court and Advocate General Juliane Kokott40, allowed to observe the growing importance of the victims protection and their possible influence on a criminal reaction. The protection of legal goods in criminal law, which is in fact the protection of their disposers (since legal goods exist in relation to entities) is implemented by preventive-oriented legal instruments. Since nowadays prevention is often seen as the main or even the only acceptable justification of the use of repressive law41 and sometimes is even included as such into criminal codes42, it should refer also to an individual and potential victims of crime. However, prevention in criminal law mostly refers to an identified individual offender or a group of potential offenders building a (relatively small) part of the society which is willing to commit an offense. To broaden the scope of the desirable impact of punishment on the society, apart from the idea of influencing an individual offender in order to stop them from committing further offences (individual prevention), the idea of educating and creating legal awareness of the society by punishing offenders was developed (general prevention)43.

40 According to J. Kokotts’s opinion in the joint cases, in order not to deprive the right to be heard of its practical effect, there must also be the possibility for the victim’s opinion to have an effect on sentencing (opinion in the case available at http://curia.europa.eu/).
42 According to art. 53 § 1 of Polish Penal Code, the court passes a sentence at its own discretion, within the limits prescribed by law, ensuring that the severity does not exceed the degree of guilt, being aware of the degree of social consequences of the act, and taking into account the preventive and educational objectives that the penalty is to achieve with regard to the offender, as well as the need to develop legal awareness in society.
Nonetheless, the desirable impact of the punishment of some individuals on the whole society still puts this society in the position of a group of potential offenders, whereas more common for its members is to be victimized. Even if the punishment is perceived as a social need, the individual victim’s interest and perspective is still missing\textsuperscript{44}. This statement led to the development of the concept of victim’s prevention referred mainly to an individual victim but also including the perspective of the society as a potential victim\textsuperscript{45}.

Prevention understood as protection from different forms of victimisation is without doubt an important need of a person affected by an offence. In Directive 2012/29/EU victimisation appears as secondary and repeat victimisation within the criminal proceedings since the directive focuses on the protection of the victim within its framework\textsuperscript{46}. Therefore, the Directive 2012/29/EU makes the Member States guarantee the certain rights to the victim strengthening their position within the criminal proceedings.

Secondary victimisation can be understood as an inappropriate post-assault behaviour or language of professionals (especially justice system personnel) with whom the victim has contact, further exacerbating their suffering\textsuperscript{47}. To prevent this form of victimisation the Directive 2012/29/EU makes the Member States ensure that the measures which they introduce in the criminal proceedings can protect the victims and their family members from the risk of emotional or psychological harm, and to protect the dignity of the victims during questioning and testifying. The victim’s interviews should be conducted without unjustified delay, the number of victim’s interviews shall be kept to a minimum and the interviews are to be carried out only where strictly necessary for the purposes of the criminal investigation. Medical examinations are also to be kept to a minimum and carried out only where strictly necessary for the purposes of the criminal proceedings. Communication with the victims should be given in simple and accessible language and should take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood. The victims may be accompanied by their legal representative and a person of their choice. The national regulations shall also provide support services in which particular attention is paid to the specific needs of the victims who have suffered considerable harm due to the severity of the crime.

Repeat victimisation is the recurrence of crime against the same target (in the same place or against the same people)\textsuperscript{48}. Protecting victims from being targets of a further crime during the criminal proceedings in the Directive 2012/29/EU takes a form of request for establishing, where the Member States find it necessary, under the national law procedures for the physical protection of the victims and their family members. The Member States shall establish the necessary conditions to enable, where necessary, the restraining orders between the victims and their family members, and the offenders, especially by creating separate waiting areas for the victims. If a victim decides to confront the offender within restorative justice services, the Member States should guarantee that those services are subject to safety considerations.

However, the victim’s prevention as the victim’s interest in criminal law goes beyond the framework of the proceedings and is associated with minimising the negative impact of crime in a broader aspect. When a criminal proceeding ends, the victim should, in cases where the risk of the repeat victimisation occurs, be continually protected with the measures of criminal law. Such a

\textsuperscript{44} T. Hörnle, Die Rolle, p. 951.
\textsuperscript{45} K. Seebmann, Paradoxien, s. 670-676; E. Hryniewicz-Lach, Ofiara, s. 121-126.
\textsuperscript{46} Point 9 and 46, 52-55, 57-58 of the preamble to the directive, art. 9, 12, 18, 22 and 26 of the directive.
solution is provided in the aforementioned Directive 2011/99/EU on the European protection order – but only in relation to the measures already imposed. In accordance with the Directive, the European protection order can be imposed when a protection measure has been previously adopted in the issuing state, imposing on the person causing danger such prohibitions or restrictions as: prohibition from entering certain localities, places or defined areas where the protected person resides or visits; prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means, as well as prohibition or regulation on approaching the protected person closer than a specified distance. The protected person may submit a request for the European protection order issue either to the competent authority of the issuing state or to the competent authority of the executing state. They cannot however, formally cause the primary application of such an instrument under the national law.

As it was mentioned by the Court of Justice of the European Union in the joint cases Magatte Gueye and Valentín Salmerón Sánchez, it is the criminal court that should decide about the necessity of applying the preventive measures, taking into consideration not only the individual victim’s interest but the common (public) interest as well. Still paying attention to the common interest of the whole society by separating the offender from an individual or potential victim for a limited time or permanently, other aspect of victim’s prevention identified by criminologist shouldn’t be put aside The concept of victims’ reintegration refers to the need of restoring the individual victim’s ability to function properly in the society, as they did before the crime and the process of victimisation happened resulting thereof. At the same time one of the important factors created by the instruments of criminal law is the ability to restore the victim’s sense of security and justice through an adequate response to a crime. As it was mentioned above, the victim of a crime needs moral and material compensation as well as ensuring that they will not be victimised again. The court decision, if it finds the offender guilty of a crime, should take those interests into consideration. Their negligence in that field can increase the risk of tertiary victimisation, based on the substantial loss of the victim’s self-esteem, but also leads them to rationalize and justify committing crimes and, in consequence, create erosion in the victim’s value system, directing them to the criminal path (the victim-offender-career). This way protection from victimization turns out to be possible to achieve by satisfying the victim’s interest in moral compensation.

Deciding what criminal reaction would be both adequate for the case and acceptable for the victim is a complex issue that combines the victim’s interest in prevention and compensation, but not unsolvable. Since prevention is an assumption based on predictions about the future and therefore difficult to assess at the moment of punishment, the assessment method should be based on factors relating to the offense already committed. The offence itself is, after all, the reason for the court’s activity and grounds for its judgement. Therefore, a possible assessment method may be the Living-Standard Analysis of Andrew von Hirsch and Nils Jareborg. This method based on the scale referring the art of given intrusion to the objectified damage or hurt incurred by the crime, indicates the adequate severity of the punishment. This model includes four levels of interference with a crime in the victim’s life. The first level is about subsistence which means an infringement in the elementary human capacities to function, necessary to survive. Such an interference requires the most severe reaction. The second level is the violation of legal goods providing minimal well-being, which means

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49 C. Prittwitz, Positive Generalprävention, s. 172.
51 M. Kitchling, Öfferschutz, p. 59.

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the maintenance of a minimal level of comfort and dignity. The third level is about adequate well-being, which enables the maintenance of an ‘adequate’ level of comfort and dignity. The fourth level is about enhanced well-being, a significant enhancement in quality-of-life above the mere ‘adequate’ level. The interference of legal goods on this level justifies reaction in a relatively mild way, especially in the societies where material goods are quite easily available.

The problem of the victim impact statement and individual expectations of a victim about the punishment, were not included in the *Living Standard Analysis*, but proposed to be solved in a reference to a ‘model average person’ who happened to be in the situation of the victim.

4. HOW VICTIM’S INTERESTS REFER TO THE AIMS OF CRIMINAL LAW?

A wide range of procedural rights regulated in the Directive 2012/29/EU indicates that the victim of a crime can have the same guarantee of active participation in a criminal proceedings (apart from some exceptions such as juvenile proceedings) and a relatively inconsiderable impact on the court decision about the punishment. At the moment of judgement a victim is no longer an individual person (or an entity) with an influence on the course of the proceeding, but is a ‘model victim’ whose interest is represented by the state. The victim becomes a neutral witness of a criminal reaction to their own conflict with the offender. Their interest is just one of many factors that the court should take into account, not more relevant than the interests of an offender or than variously and sometimes vaguely understood common (public) interest of the society. That’s how an important circumstance gets lost sometimes – that an individual victim is substantively differently affected by crime than the society.

Since the court reacts to a crime in a way that is most convergent with the aims of criminal law, it is important to state how the compensation and preventive needs of a victim refer to the aims of criminal law, identified as restoring justice and protection of legal goods and its disposers. Firstly, it is important to remember that the victim may be understood as an individual victim and as a potential victim that can be, depending on the case, the whole society or a part of it (local society, work or living environment). Secondly, it is important to notice that both: individual and potential victims need an adequate compensation which restores their sense of justice. Compensation in case of an individual victim can be material or moral, while the society as a potential victim needs only moral compensation. Indemnity is a material compensation. Moral compensation is satisfaction based on

55 Which are: right to understand and to be understood (art. 3), right to receive information from the first contact with a competent authority (art. 4), right of victims when making a complaint (art. 5), right to receive information about their case (art. 6), right to interpretation and translation (art. 7), right to access victim support services (art. 8), right to be heard (art. 10), rights in the event of a decision not to prosecute (art. 11), right to safeguards in the context of restorative justice services (art. 12), right to legal aid (art. 13), right of reimbursement of expenses (art. 14), right to the return of property (art. 15), right to decision on compensation from the offender in the course of criminal proceedings (art. 16), rights of victims resident in another Member State (art. 17), right to protection (art. 18), right to avoid contact between victim and offender (art. 19), right to protection of victims during criminal investigations (art. 20), right to protection of privacy (art. 21), right to protection of victims with specific protection needs during criminal proceedings (art. 23) and right to protection of child victims during criminal proceedings (art. 24).
56 J. Ph. Reentsma, Das Recht des Opfers, p. 9-10.
57 Das Opfer ist nicht jedermann. See: M. Kilchling, Opferschutz, p. 59; C. Prittwitz, Positive Generalprävention, p. 172.

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voluntary efforts of an offender to repair the harm done (by apology to and other activity for the victim, but also by social or charity work). Moral compensation also provides punishment, adequate to the injustice and harm that haven’t been or couldn’t be restored by a voluntary activity of the offender. Both moral and material compensations to an individual victim (in their own interest) and moral compensation of a potential victim (in the public or common interest) can lead to restoring (the sense of) justice. To put it in a nutshell: an adequate compensation should restore justice, and be understood not as an abstract idea, but as the sense of justice of the society and of its individuals.

Criminal law also aims to protect legal goods and their disposers. This protection is not for its own sake, but is to provide an individual victim, directly affected by the crime, as well as the society concerned about the crime committed on its member, with the sense of security. The absolute protection of all legal goods is not possible (since crimes are committed for many different reasons, also involuntarily), but also not wanted since it would hinder the everyday functioning of the society (the risk of everyday life) as well as prevent its development (for example, benefits achieved thanks to medical experiments). Taking this into consideration, crime prevention, as far as it is possible with the help of criminal law instruments, should serve to keep crimes at a possibly low rate and when a crime happens – limit the probability of repeat victimisation of certain person or other target. Such an activity may lead to the increase in the sense of security by an individual victim (for example, by implementing measures that reduce the probability of their contact with an offender) or by the society, including the environment of the victim (for example, by disqualification from driving or from the exercise of specific professions, sometimes even by isolation of the offender for limited time or lifetime). Summing up, the adequate prevention, by protecting legal goods and its disposers, should restore the sense of security of individuals and of the whole society.

5. SUMMARY

The European Union in its Directive 2012/29/EU establishing minimum standards on the rights, support and protection of the victims of a crime, supports victims in realizing their interest for compensation for the damage and harm done as well as put the emphasis on the meaning of their protection from secondary and repeat victimization in criminal proceedings. The regulations on material compensation from the offender indicate that indemnity is an important part of the victim’s recovery from primary victimisation. Since sometimes it is not possible to execute the material compensation from the offender, the European Union supplements the victim’s support in this field in the Directive 2004/80/EC relating to the state compensation to the crime victims.

The question of moral compensation and active participation of a victim in this area is more complex. The European Union in its Directive 2012/29/EU supports the implementation in the national legal systems of the so-called services of restorative justice and determines conditions under which such services can be considered as safe and competent for the victims. The services of restorative justice, based commonly on the offender’s efforts to reach a victim-offender-settlement, create one of the ways to satisfy the individual victim. The other way is the moral compensation through punishment that meets also the needs of the society as a potential victim. This reaction to a

59 In German: Gerechtigkeitsempfinden. K. Seelmann, Paradoxe, p. 671. See also: J. Czapska, Bezpieczeństwo obywateli. Studium z zakresu polityki prawa, Kraków 2004, s. 70-72.

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crime, more common for criminal law, is seen as an exclusive state authority and therefore, is not mentioned in the Directive regulating standards of rights, support and protection of crime victims. Still a punishment seen as an adequate reaction to a crime, taking into account the extent of the harm done to the individual victim, builds an important aspect of a criminal reaction targeted at restoring the individual and the common sense of justice.

The protection from secondary and repeat victimization in the Directive 29/2012/EU refers only to criminal proceedings, as the Directive establishes mainly procedural rights, support and protection of crime victims. On the basis of the right of a victim to be heard, their need to express their concern and expectation on their future protection with instruments of criminal law create an individual victim’s prevention interest – which may have not only positive but also negative aspects (when a victim indicates no need for special protection). The EU-directive 29/2012 recognizes the need to protect an individual victim but again, considers the decision in this case as an exclusive competence of the public authority. Once the decision in the case has been made, the victim is obliged to respect it. However, the victim’s freedom of decision-making about the scope of their protection can still be exercised by deciding if they want to profit from legal instruments adjudicated in one of the EU-countries, also in other the Member States. Such a protection, on the request of a victim, is also possible in accordance with the Directive 2011/99/EU on the European protection order, when criminal proceedings are over.

The formal lack of victim’s influence on the application of penal measures based on repression and coercion, doesn’t mean that the court must not take into account the victim's position in this matter. The need to hear the victim's position despite the lack of such a formal order is derived from interpretation of legal regulations called as ‘friendly to the victim’62. But even in such a case, the court is entitled to act against the clear will of a victim, by invoking the public (common) interest which statues an art of a general clause in criminal law and criminal proceedings.

Including the victim’s interest into the response to a crime is a gradual process, definitely more simple when it is based on instruments of material compensation such as indemnity, derived from civil law. Extending the victim's rights to participate actively in the criminal proceedings doesn’t raise many doubts. The criminal instruments of repressive and preventive character instead are still seen as a state exclusive domain guarded by calling for the need to protect the public (common) interest as well as the one of the offender. The changes in the criminal law and criminal proceedings in the victim's interest have been visible over the years, but the EU directives created in their interest, still preserve the division into private and public law, leaving the victim in the latter, a clearly smaller sphere of decision making. Therefore, it is still impossible to say that the observed changes, using the phrase of Nils Christie, return their stolen conflict to the victim, but at least they recognize the significance of satisfying their interest for the achievement of the criminal law objectives.

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