

ULRR

The victim in law - the emergence of a new juridical subject in the crime conflict

Item Type	Book chapter
Authors	Kilcommins, Shane
Citation	Criminal Law and Practice Review, Liz Heffernan and David Prendergast (eds);2
Download date	2026-04-15 14:23:22
Item License	https://creativecommons.org/licenses/by-nc-sa/1.0/
Link to Item	https://hdl.handle.net/10344/7493

The victim in law – the emergence of a new juridical subject in the crime conflict.

Shane Kilcommins*

There has been growing recognition of the interests and needs of victims in the law arena, where previous emphasis had been predominantly on the rights of the accused and the offender.¹ The result, in Ireland and in other jurisdictions, has been a series of developments which seek to enhance their status in relation to the alleged wrongdoing. Via the deliberative capacity of domestic and EU legislatures drawing upon the (admittedly imperfect) opinion and will formation of its citizens,² together with expansive judicial interpretation of constitutional and convention texts, we are slowly discovering that rights in the criminal process are not confined to an exclusive caste, anchored to a fixed date in history.

All of this impetus is largely inclusionary. The ‘axis of individualisation’³ in the criminal justice process – which for so long was directed only at offenders, the causes of their wrongdoing and their right to protection from the state – has now bifurcated to embrace the multi-faceted experiences of victimhood. This of course disturbs older, hegemonic ways of doing things (an accused/offender-organising logic that infused a police–public interest-prosecutions-prisons model of justice) and the reified, exclusive voices of certain actors that were central to that process (prosecution and defence lawyers, policing authorities, and judges). Its recent emergence must be seen much more as a response to a previous scandalous neglect, as a justified attempt to correct an imbalance in which the victim was constituted as a ‘silent abstraction, a background figure whose individuality hardly registered’.⁴

The purpose of this article is to demonstrate how victims of crime are again being recognised as a ‘community of identity’.⁵ This reshapes the construction and presentation of intersubjective criminal conflict, not least because pluralism

*Professor of Law, University of Limerick.

¹ E O’Hara, “Victim Participation in the Criminal Process” (2005) 13 *Journal of Law and Policy*, 229-245.

² J Waldron, *Law and Disagreement* (1999, Oxford University Press).

³ M Foucault, *Discipline and Punish* (1991 repr, Penguin Books), 60

⁴ D Garland, *The Culture of Control* (2001, Oxford University Press), 179.

⁵ N Rose, *Powers of Freedom* (2008 repr, Cambridge University Press), 135-136.

of this kind generates competing interests, priorities and validity claims in the decision-making process. Momentum of this kind makes it more difficult to rely exclusively on tradition and previously settled conventions of practice. The criminal process is thus slowly moving from a monolithic culture of rights to cultures of rights that reflect ‘multiple identities’ which are deserving of concern and respect.

The dominance of State-Accused relations

Under the pre-modern exculpatory justice system which existed in the seventeenth and eighteenth centuries, where wrongdoing was understood as a personal altercation, victims were given primacy as decision makers. They were, in essence, the principal claims-makers. Their ownership of the alleged wrongs meant that their voices – built largely upon subjective experiences - carried a powerful justificatory force. Personal referents and preferences were actively embraced as a vital currency in criminal relations, one which linked the parties most affected in the conflict to the justice network.⁶

The criminal complex was gradually redrawn in the nineteenth century as a new statist administrative machinery emerged for investigating, prosecuting and punishing crime. Subjects increasingly ceded ‘their authorisations to use coercion to a legal authority that monopolises the means of legitimate coercion and if necessary employs these means on their behalf’.⁷ The penal field dissociated itself from the local, personal and arbitrary confrontations that governed criminal relations in the eighteenth century and became a more depersonalised, rule-governed affair with the State at the centre. Private disputes and vendettas were gradually monopolised by the State apparatus and rerouted into the courtroom. A society in which ‘the law operates more and more as the norm’⁸ slowly emerged – reflecting the ‘public interest’ and the ‘will of the people’ – in which the temptation to commit crime would no longer be countered by a sovereign will to command and a display of terror. When this process was completed, ‘sovereign power was transformed into a public power’.⁹

In distilling the criminal process into a State-accused event, an ‘equality of arms’ framework was created as part of a broader Rule of Law value system.

⁶ See D Hay, ‘Property, Authority and the Criminal Law’ in D Hay et al, (1977) *Albion’s Fatal Tree* (Allen and Unwin), 5-23; P King, “Decision makers and decision-making in the English Criminal Law, 1750-1850” (1984) 27(1) *The Historical Journal*, 25-58; S Kilcommins, “The victim in the Irish criminal process: a journey from dispossession towards partial repossession” (2017) 68(2) *Northern Ireland Legal Quarterly*, 17-37

⁷ J Habermas, *Between Facts and Norms* (2008 repr, Polity Press), 12.

⁸ Foucault, *Discipline and Punish*, 144.

⁹ Garland, *The Culture of Control*, 30.

This addressed the problem of the previously ‘bad economy of power’ which ‘vested too much...on the side of the prosecution... while the accused opposed it virtually unarmed’.¹⁰ Redistributing this economy of power meant an expansion in the exclusionary rules of evidence that could be employed by the defence against the prosecution case,¹¹ clearer and greater obligations imposed on the State to prove its case against the accused, better opportunities afforded to the defence to prepare its case and test the prosecution case, and the removal of any obligation of self-exculpation on the accused.

Even when the case was proved against the accused, he or she was subjected to a new power to punish in which ‘an economy of continuity and permanence ...replace[d] that of expenditure and excess’.¹² Relations between the offence and the offender also became more equalised as a result of the specialised and professionalised knowledge that began to be constructed around the latter. This expertise of the offender has been referred to by Foucault as follows ‘ whole set of assessing, diagnostic, prognostic, normative judgments’ whole set of assessing, diagnostic, prognostic, normative judgments, concerning the criminal have become lodged in the framework of the penal judgment.¹³ Normalisation, regulation, intervention, individualisation, a ‘whole machinery’ of ‘subsidiary authorities’ and experts – probation officers, social workers, educationalists, criminologists, psychiatrists, counsellors, psychologists - generating a ‘corpus of knowledge, techniques, scientific discourses’¹⁴ around the actions of the offender and the readjustment of his or her lifecourse.

A state-accused logic of action thus came to cast a long shadow over criminal process relations in the nineteenth and twentieth centuries, becoming the ne plus ultra for crime conflict resolution. It defined the accused as the primary (exclusive) rights-bearer, with institutional practice heavily coordinated in accordance with this feature. Criminal wrongdoing was increasingly reconstituted as a public matter to be resolved almost exclusively through a dispassionate prosecution process. Localism and personalism, elements cherished under the old order, were actively jettisoned under this modern arrangement.

This new institutional pattern quickly transcended the victim’s interaction with the crime conflict and re-shaped how it was presented, addressed, legitimated and concluded. Within such a depersonalised, bureaucratised system, the victim was displaced, confined largely to the bit-part role of reporting crime and of adducing evidence in court as a witness, if needed at all. In effect, victims of

¹⁰ Foucault, *Discipline and Punish*, 79.

¹¹ JH Langbein, *The Origins of the Adversary Criminal Trial* (2003, Oxford University Press).

¹² Foucault, *Discipline and Punish*, 87.

¹³ *Ibid*, 19.

¹⁴ *Ibid*, 23.

crime thus became non-subjects, disenfranchised and dispossessed of all legal and claims rights. In modernity, the problem of criminal wrongdoing became a rationalised domain of action, a site which actively distrusted and excluded ‘non-objective’ truth claims. The state, the law, the accused and the public interest became the principal claims-makers within this institutional and normative arrangement, an arrangement which would dominate criminal and penal relations for the next 150 years. Victims accordingly were no longer recognised (or recognisable) in the justice system, their non-status and non-presence legitimate and legitimising features of the modern institutional process.

The Re-Emergence of Victims of Crime as Stakeholders

In the last four decades, justice systems are partially being reconstructed again, as they demonstrate an increased sensitivity to the needs and concerns of victims of crime. A ‘vision of the victim as Everyman’ is part of a ‘new cultural theme’,¹⁵ one which is widely represented in social, political and media circles. A number of factors has facilitated this increased awareness of victims in western criminal justice systems.¹⁶

Specific victimological studies became more prominent in the period after the Second World War and began to direct the criminological gaze away from its focus on offenders, towards a typology of victims’ experiences of the wrongdoing. These studies, among others, were important in generating academic interest in victims of crime. They were followed up by the introduction of mass victimisation surveys, commencing in the 1970s in the US before also being employed in the early 1980s in the UK, which among other things drew attention to the under recording of crime, repeat victimisation, fear of crime, and victims’ experiences with various criminal justice agencies such as the police, prosecutors, trial judges, and other court personnel. In the Republic of Ireland, mass crime victimisation surveys only commenced in 1998 with the introduction of a crime segment into the Quarterly National Household survey.¹⁷

The growth in the women’s movement also ‘raised the consciousness of women to the oppression of criminal violence’,¹⁸ facilitating ‘sustained discursive contestation’ about hegemonic views on crime.¹⁹ More specifically, increased

¹⁵ Garland, *The Culture of Control*, 12.

¹⁶ M Maguire, ‘The Needs and Rights of Victims of Crime’ (1991) 14 *Crime and Justice*, 363-433.

¹⁷ For a fuller analysis, see S Kilcommins and L. Moffett, ‘The inclusion and juridification of victims of crime in Ireland’ in C Hamilton et al. (eds.), *Irish Handbook of Criminology* (2015, Routledge).

¹⁸ M Young, ‘Victim’s Rights and Services: A Modern Saga’ in R. Davis, A. Lurigio, W. Skogan (eds), *Victims of Crime*, (1997, Sage, 2nd ed.), 194-210; K Moore Walsh, *Victims’ Rights in Ireland: Influences, Illusions and Impacts*. (2013, unpublished PhD thesis, University College Cork).

¹⁹ N Fraser, ‘Rethinking the Public Sphere: a contribution to the critique of actually existing democracy on the Public Sphere’, in C Calhoun, ed, *Habermas and the Public Sphere*, (1992, MIT Press), 129.

self-activism also ensured that victims of crime became more visible again. In Ireland, the revelations brought about as a result of inquiries over the last two decades into Church sexual abuse and institutional abuse – which occurred in the carceral archipelago that emerged post Independence – is now very much part of the *Zeitgeist*.²⁰ Among other things, it has helped to raise experiences of victimhood in the collective conscience, and awareness of illegitimate and abusive hierarchies of dominance.

Increasing concerns about rising crime rates in western countries from the 1970s onwards, and the perceived failure of correctionalist criminal justice projects to rehabilitate offenders, have also had an impact. It is not surprising, according to commentators such as David Garland, that the ‘aim of serving victims has become part of the redefined mission of all criminal justice agencies’.²¹ This momentum has brought in to vogue the question: ‘What about the victim?’²²

Law as a steerer of reintegration²³

Law has also helped to steer victim reintegration, confirming participation and protection claims for victims, whilst also seeking to secure the fair administration of justice. Considerations of process fairness now include the victim within its conceptual framework. Whilst previously such deliberations were housed within the more remote medium of the ‘public interest’, the courts are now becoming more explicit in specifically identifying victims and competing rights. Of course, the regulation of victim experiences in law necessarily involves a level of abstraction and institutionalisation that never fully captures all of the relevant exigencies. Nevertheless, and despite these shortcomings, increasing juridification of the crime conflict, is helping to overcome the previous ambivalence towards victims of crime.

Domestic

This subtle restructuring of the crime conflict in Ireland is evident, for example, in *Casey v DPP, Ireland and the AG* where Humphreys J. noted that ‘the criminal trial is a mechanism to vindicate the legal, constitutional, EU and ECHR rights of a victim of crime’ (my emphasis).²⁴ Increasingly considerations of process fairness include the victim as a relevant determinant within its

²⁰ M Rafferty and E O’Sullivan, *Suffer the Little Children* (1999, New Island Books).

²¹ Garland, *The Culture of Control*, 121.

²² Maguire, *The Needs and Rights of Victims of Crime*, 368.

²³ An earlier version of this section appeared in S Kilcommins, S Leahy, K Moore Walsh, and E Spain, *The Victim in the Irish Criminal Process* (Manchester University Press, 2018), 52-84.

²⁴ [2015] IEHC 824.

paradigm of reference. In countenancing rights and principles such as bodily integrity, life, privacy, participation and protection within this standard, a more accommodating – albeit challenging and contested – interpretation of fairness is developing, one that is not exclusively dominated by accused considerations. An illustrative example of this more inclusionary interpretation of fairness is to be found in *DPP v Gerald McNeill*, where Denham J noted in the context of a sexual abuse prosecution: “Facing into these types of prosecutions, which were becoming more common, the courts sought to achieve a fair trial with justice for all concerned. Those concerned include the people of Ireland for whom the prosecution is brought, the accused who has the fundamental right of a fair trial, and the victims (my emphasis).”²⁵

This severance of the victim class from more public interest considerations is, it is submitted, more than mere rhetoric. It signifies an important turn in the re-inclusion of the victim, a clear demarcation and express acknowledgement of her autonomous standing as a rights-holder. In addition to providing more significant normative protection, such a phenomenon is also breathing fresh life into aged criminal legal frameworks. Though oversimplified, the distinction between positive and negative rights is a useful heuristic in mapping the evolving journey of victims’ inclusion. Negative rights against the state are primarily vertical – ‘to fend off dangers that can arise in the government-citizen dimension...that is, in the relationships between the administrative apparatus with its monopoly on the means of legitimate violence, and unarmed private persons’.²⁶ Traditional interpretive patterns emphasised the ideological primacy of negative rights in the criminal process by focusing exclusively on the accused’s relationship with the conflict. This relationship was presented as fixed and unalterable, not least because of the immunities granted in constitutional and convention texts. Positive rights on the other hand, which are both vertical and horizontal, ground affirmative claims to action – such as autonomy, life, privacy, bodily integrity, privacy and participation – by an ‘interventionist state that provides infrastructures and wards off risks’.²⁷ The culture of negative rights against the State is thus gradually coming in to contact with a newer culture of positive rights. The latter increasingly challenges the interest positions that the former narrowly protects, demanding recognition of the intersubjective dimensions of the conflict by both the State and the accused.

Two cases in Ireland in the 1980s provide insights into the nascent (and fragile) emergence of a more intersubjective approach to criminal prosecutions. The first case, *People DPP v JT*, has been described by Charleton J as laying ‘the foundation stone of a victim’s charter’ in Ireland’.²⁸ Traditionally, the spouse of

²⁵ [2011] 2 ILRM 461.

²⁶ Habermas, *Between Facts and Norms*, 245.

²⁷ *Ibid*, 247.

²⁸ P Charleton, ‘The victim in Irish constitutional law: a new departure’, (1990) *Irish Law Times*, 140-143.

an accused was not competent to give evidence for the prosecution in a case, except in the case of rape or violence perpetrated on that spouse). This was justified on the basis of marital unity (the law made no distinction between the accused and the spouse) and the importance of preserving marital harmony. The constitutionality of this rule was challenged in this case. The complainant was a 20 year old woman who had Downs Syndrome who alleged that she had been sexually abused by her father. At trial the spouse of the accused and the complainant's mother gave evidence that at the end of a television programme concerning child sexual abuse, her daughter expressed delight that the wrongdoer in the programme was eventually brought to justice. As a result of questioning her daughter on the issue, it emerged that the complainant's father had allegedly perpetrated similar abuses as those illustrated on the programme. The accused was convicted but appealed on the basis, inter alia, that his spouse was incompetent to testify for the prosecution. In upholding the conviction, Walsh J examined the common law rule and declared that its application on the facts of the cases would be in violation of Article 41 of the Constitution which protected family rights. He also noted:²⁹

It could be strongly argued that this rule should no longer be sustained because of the fact that in the modern age with the independence of women, married or otherwise, and the recognition of the equality of men and women, both within and out of marriage, such a distinction could only be regarded as outmoded and unreal.

Section 21 of the Criminal Evidence Act 1992, as amended, now provides that in any criminal proceedings a spouse of the accused is competent to give evidence for the prosecution. Such a spouse, however, is only compellable to give evidence at the instance of the prosecution in the case of an offence which involves violence or the threat of violence to the spouse, a child of the spouse or of the accused, or any person who was at the material time under the age of 18 years, or is a sexual offence alleged to have been committed in relation to a child of the spouse or the accused, or any person who was at the material time under the age of 18 years.

In the *People DPP v Tiernan*³⁰ the Supreme Court was asked to provide guidelines which the courts should apply in relation to sentences for the crime of rape. Though rejecting the idea of guideline judgments, the Court stated that a non-custodial sentence for rape is wholly exceptional.

Finlay CJ noted:³¹

²⁹ *The People (DPP) v J.T.* (1988) 3 Frewen 141 at 161.

³⁰ [1988] 1 IR 250.

³¹ *Ibid*, at 253.

The act of forcible rape not only causes bodily harm but is also inevitably followed by emotional, psychological and psychiatric damage to the victim which can often be of long term, and sometimes of lifelong duration...Rape is a gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights. As such it must attract very severe legal sanctions. They are of such a nature as to make the appropriate sentence for any such rape a substantial immediate period of detention or imprisonment.

He went on to note that neither a victim's previous sexual experience, 'nor the fact that she could be considered to have exposed herself by imprudence to the danger of being raped', could be considered as a mitigating circumstance in any rape.³² Though now obvious, such statements shed light, to some extent, on the embedded nature of State-accused relations. When located in its historical specificity, the judgment can be considered to be very important in setting out guiding principles in relation to sentencing for the offence. In particular, the Court recognised both the seriousness and multiplicity of harms caused by the offence of rape. It also noted that any mitigating factors would be limited in respect of the offence, and that the appropriate sentence will almost always be a substantial period of imprisonment.³³ In doing so, the Court moved the discourse away from an almost exclusive focus on welfarist considerations relating to the offender (particularly the emphasis on mitigating factors) to incorporate more deliberation on the seriousness of the offence, the subjective dimensions of the harm caused, and the extent to which mitigating factors – particularly sexist ones – should be permitted or entertained in respect of the offence.

This increasing accommodation of victims/witnesses in the criminal process is also evident in other areas. The previously fossilised exclusionary assumptions underpinning the perception of some victims/witnesses in our justice system is evident, for example, in the law on the corroboration of sexual complaints. In the past the evidence of a complainant in a sexual offences case required a mandatory warning to the jury on the dangers of acting on such evidence alone. This rule was justified 'by the fear that complaints of sexual offences may sometimes be the product of spite, jealousy, psychological denial of having consented, or a reaction to having been jolted; that women with

³² Ibid, at 255.

³³ For a recent application of the judgment, see *DPP v Glennon* [2018] IECA 211. Despite its influence, the judgment has been criticised for its tendency to essentialise women, and women as victims in particular. It has also been argued that the judgment can be interpreted as engaging in a classifying process in respect of the offence, with forcible rape as the most serious form in any taxonomy. The judgment too, it has been suggested, has a tendency to deny agency to victims, and the language used preserves a patriarchal understanding of the sexual status quo. Liz Campbell, 'Commentary on *DPP v Tiernan*' in M Enright, J McCandless and A O'Donoghue, eds, *Northern/Irish Feminist Judgments; judges' troubles and the gendered politics of identity* (2017, Hart Publishing), 480.

nothing to lose might seek to subject a man of high social standing to blackmail; and that the accusation of rape is easily made, but difficult to defend'.³⁴ More recently, however, these essentialised notions about the traits and motives of sexual complainants have largely been abandoned and the trial judge now has a discretion whether or not to give such a warning to the jury.

The same is true of the traditional common law approach to the previous sexual history of a complainant. Such evidence was previously admissible provided it was relevant. Once relevant, a trial judge was obliged 'to allow unpleasant charges to be made against the complainant in connection with her past'.³⁵ If admitted, such evidence of sexual reputation was employed to cast serious doubt on the trustworthiness of a female complainant, the probative link between sexual reputation and suspicion about the veracity of a complaint being fixed and clear. The destructive assumptions entrenched in the common law—particularly the reinforcement of sexist stereotypes—were thus employed to undermine the credibility of victims as witnesses especially on the question of consent. But the dynamics have changed in more recent times and the Legislature has attempted to counteract such 'folkloric' and sexist assumptions.³⁶

The law on marital rape was also imbued with sexist ideology. A husband was previously exempted from liability for the rape of his wife. This was premised on a rule enunciated by Hale that a husband could not be guilty of rape 'committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.³⁷ The marital rape exemption was abolished in Ireland in 1990.

This more inclusionary approach for witnesses and victims is now to be found in a myriad of disparate issues that arise in criminal law and criminal process jurisprudence including leave for judicial review,³⁸ the defence of

³⁴ J Healy, *Irish Laws of Evidence* (Round Hall, 2005, 157). See, for example, *People Attorney General v Williams* [1940] IR 195 at 200-201.

³⁵ See *People (DPP) v McGuinness* [1978] IR 189.

³⁶Section 1 of the Criminal Law (Rape) Act 1981, as amended by section 13 of the Criminal Law (Rape) (Amendment) Act, 1990 now imposes tighter restrictions that offer victims better protection against unnecessary and distressing information being raised about their sexual histories. No evidence may now be adduced or question asked on cross-examination by the defence about any sexual behaviour of the complainant beyond the circumstances of the alleged offence without leave of the court

³⁷ As quoted in J Temkin, 'Towards a Modern Law of Rape', (1982) 45 *Modern Law Review* at 405.

³⁸ See *Nulty v. Director of Public Prosecutions* [2015] IEHC 758. See also *Irwin v. DPP* [2010] IEHC 232 where Kearns P. expressed the view that applications for leave to seek judicial review involving prohibition of a criminal trial on the grounds of failure to preserve evidence represented a "cottage industry" and, when engaged in as a matter of routine, were "a grave abuse of the legal process" in the light of their effect on the rights and interests of victims.

provocation,³⁹ the inclusion of evidence potentially probative of guilt,⁴⁰ delay in sexual abuse cases,⁴¹ trial prohibition on the grounds of delay,⁴² and the right to have recourse to a criminal trial where there is reasonable evidence and the trial can be conducted fairly.⁴³

It is also evident in the employment of intermediaries,⁴⁴ live television links and video testimony for witnesses and victims of crime;⁴⁵ the abolition of the mandatory requirement on judges to warn juries of the dangers of convicting on the basis of uncorroborated or unsworn victim/witness testimony;⁴⁶ the removal of wigs and gowns when conducting an examination in chief or cross-examination of a child witnesses;⁴⁷ the protection of the identity of victims in sexual offence cases;⁴⁸ reformulations of the definition of consent in sexual offence cases,⁴⁹ separate legal representation for rape victims where an application is made to admit previous sexual history;⁵⁰ the reduction of victim alienation through the use of victim impact statements;⁵¹ the provision of legal aid in limited circumstances;⁵² the ability of the DPP to appeal unduly lenient sentences;⁵³ the provision of reasons for decisions not to prosecute;⁵⁴ and

³⁹ See *People (DPP) v Kieran Lynch* [2015] IECCA 6 para 32-3.

⁴⁰ See Clarke J in *DPP v JC* [2015] IESC 31 where he noted at para. 4.8: “On the one hand is the principle that society, and indeed the victims of crime, are entitled to have an assessment carried out at a criminal trial of the culpability of an accused based on the proper consideration by the decider of fact (be it judge or jury) of all evidence, where that evidence is material to the question of guilt or innocence, is potentially probative of guilt, and is not potentially more prejudicial than probative in the sense in which those terms have come to be used in the jurisprudence. That principle is not, of course, an absolute requirement. However, there is, in my view, a high constitutional value to be attached to ensuring that all potentially relevant evidence, which meets the criteria which I have just sought to define, is considered at a criminal trial.” See also *People (DPP) v Cash* [2008] 1 I.L.R.M. 443 per Charleton J.

⁴¹ See *P.O’C. v. D.P.P.* [2000] 3 I.R. 87, at 105; *II v. GG* (Unreported, High Court, 5th July, 2012).

⁴² See *McFarlane v DPP* (Unrep. Supreme Court, March 5, 2008). In the *People (DPP) v Nash*, [2015] IESC 32 Clarke J noted: ‘The entitlement of a victim of crime to at least have the evidence which suggests that a particular accused may be guilty analysed at a trial and a proper verdict delivered should not be underestimated’.

⁴³ *P.C. v. DPP* [1999] 21R. 25 at 77.

⁴⁴ See section 14 of the Criminal Evidence Act 1992

⁴⁵ See section 13 of the Criminal Evidence Act 1992.

⁴⁶ See s. 7 Criminal Law (Rape) (Amendment) Act 1990

⁴⁷ Section 13 of the Criminal Evidence Act 1992.

⁴⁸ See, for example, section 7 of the Criminal Law (Rape) Act 1981, as amended; section 11 of the Criminal Law (Human Trafficking) Act 2008; and section 252 of the Children Act 2001.

⁴⁹ See section 48 of the Criminal Law (Sexual Offences) Act 2017.

⁵⁰ Section 34, Sex Offenders Act, 2001

⁵¹ Section 5, Criminal Justice Act 1993, as amended.

⁵² See section 26(3A) of the Civil Legal Aid Act 1995, as amended.

⁵³ Section 2, Criminal Justice Act 1993, as amended.

⁵⁴ Traditionally the DPP was under no obligation to give reasons in respect of a decision not to prosecute, as established in cases such as *The State (McCormack) v Curran* [1987] ILRM 225. More recently, however, this ‘special protection’ has been diluted. A ‘Reasons for Decisions’ pilot project, for example, commenced in Ireland in October 2008.

provisions for the payment of compensation to victims in respect of any personal injury or loss caused by a crime.⁵⁵

In more recent years the system has also witnessed a far less rigid approach to the circumstances in which the spouse of an accused is competent to testify for the prosecution in criminal proceedings;⁵⁶ a greater awareness of the reasons why a complainant may not have made a complaint of a sexual offence at first reasonable opportunity but still avail of the doctrine of recent complaint,⁵⁷ a relaxation of the exclusionary rules on opinion evidence in certain circumstances;⁵⁸ the introduction of a provision which make it clear that the absence of resistance by a victim in a rape case does not equate with consent;⁵⁹ the admission of pre-trial statements;⁶⁰ the introduction of measures to restrict unjustified imputations at trial against the character of a deceased or incapacitated victim or witness;⁶¹ the exclusion of persons guilty of murder, attempted murder or manslaughter from taking a share in the estate of the victim;⁶² the introduction of an exception to the rule against double jeopardy when new and compelling evidence becomes available;⁶³ the construction of a more ‘contextualised’ understanding of fairness in historic child sexual abuse cases by, inter alia, no longer aligning delays in prosecuting with presumptive prejudice;⁶⁴ the introduction of bail conditions requiring a bail applicant to refrain from going to specific locations or to meet specified persons; attempts to regulate the disclosure of counselling records;⁶⁵ and, a more secular, intelligibility driven approach to the determination of certain witnesses’ competence to testify at the trial of an accused.⁶⁶ The courts are now also willing to admit background evidence in criminal cases, often to render comprehensible relationship between the accused and the complainant.⁶⁷

Two notable statutes were also introduced in 2017, both of which seek to ensure the better accommodation of victims/witnesses in the criminal process. The

⁵⁵ See section 6 of the Criminal Justice Act 1993.

⁵⁶ See sections 21 and 22 of the Criminal Evidence Act, 1992.

⁵⁷ See *People (DPP) v DR* [1998] 2 IR 106.

⁵⁸ See, for example, section 3(4) of the Domestic Violence Act, 1996.

⁵⁹ See section 9 of the Criminal Law (Rape) (Amendment) Act, 1990.

⁶⁰ See, for example, section 16 of the Criminal Evidence Act 1992.

⁶¹ Section 33, Criminal Procedure Act 2010.

⁶² See section 120 of the Succession Act 1965. See also section 120(4) of the same Act which provides that anyone guilty of an offence against the deceased, or against the spouse, civil partner or child of the deceased punishable by a sentence of two years or more, shall be prevented from taking a share in the estate as a legal right. See also *Nevin and Lavelle v Nevin* [2013] IEHC 80.

⁶³ Part 3, Criminal Procedure Act 2010

⁶⁴ S Ring, S “Analysing Fairness in Context in Historic Child Sexual Abuse Prohibition Applications”, (2013) 23(4) *Irish Criminal Law Journal*, 132-140.

⁶⁵ S Leahy, “The defendant's right or a bridge too far? Regulating defence access to complainants' counselling records in trials for sexual offences,” (2012) 22(2) *Irish Criminal Law Journal*, 34-9.

⁶⁶ See section 27 of the Criminal Evidence Act, 1992.

⁶⁷ See *DPP v Gerald McNeill* [2011] 2 ILRM 461.

Criminal Justice (Victims of Crime) Act 2017 introduces a number of provisions including the right to information which will be provided to victims on first contact,⁶⁸ in relation to investigations and criminal proceedings,⁶⁹ and decisions regarding prosecutions.⁷⁰ Other significant developments in the Act include the requirement that the Gardaí or the DPP are to provide victims with reasons for decisions not to prosecute a crime⁷¹ and the introduction of a process for formally reviewing a decision not to prosecute.⁷² The Act also provides for the protection of victims by, among other things, creating a mechanism for the submission of complaints;⁷³ prescribing the manner in which interviews and medical examinations are conducted;⁷⁴ requiring assessments to determine protection needs;⁷⁵ the employment of protection measures at investigation stage (advice regarding personal safety or the protection of property; safety or barring orders; or applications to remand in custody or to have conditions attached to bail) and court stage (the avoidance of contact between victims and offenders during the course of criminal proceedings);⁷⁶ the broader use of victim impact statements;⁷⁷ and the employment of special measures for a much broader range of offences than currently available at investigation stage (the conduct of interviews by a person of the same sex; the use of specially trained interviewers; the employment of premises designed for the purpose of conducting interviews) and court stage (tv links, intermediaries, screens, and restrictions on questioning about a victim's personal life).⁷⁸ This is a significant extension of the availability of the special measures which are available in the Criminal Evidence Act 1992, which were previously only available for a limited number of offences.⁷⁹

The Criminal Law (Sexual Offences) Act 2017 increases protection for victims of sexual offences including a procedure for regulating the disclosure of counselling records in sexual offence trials;⁸⁰ the use of screens as a special measure for those that are under the age of eighteen and are testifying in a sexual offences trial;⁸¹ and restrictions on the personal cross-examination of

⁶⁸ Section 6.

⁶⁹ Section 7.

⁷⁰ Section 8.

⁷¹ Section 9.

⁷² Section 10.

⁷³ Section 12.

⁷⁴ Section 14.

⁷⁵ Section 15.

⁷⁶ Section 16.

⁷⁷ Section 31.

⁷⁸ Sections 17-21.

⁷⁹ A further extension of the availability of live television link evidence is also included in section 25 of the Domestic Violence Act 2018 which will extend the availability of this facility to victims of domestic abuse in civil proceedings for orders under domestic violence legislation such as barring and safety orders and hearings relating to breaches of these orders.

⁸⁰ Section 39.

⁸¹ Section 36.

witnesses who are under 18 years of age.⁸² A final important development in the Act is the introduction of harassment orders which may be imposed upon convicted sex offenders when passing sentence or at any time before their release from prison. Such orders may prohibit the respondent from communicating with the victim and order the respondent to stay within a specified distance of the victim's home, workplace or any other place frequented by the victim.⁸³

In addition, the boundaries of criminalisation are continually being extended to officially censure forms of conduct that can cause serious harm. These include offences such as harassment, coercion, intimidation, human trafficking, child trafficking and pornography, threats to kill or cause serious injury, threats by phone or text message, endangerment, abduction, staking and revenge porn, withholding information on certain offences against vulnerable persons, reckless endangerment of a child, and the introduction of post conviction orders to protect victims from harassment by offenders. The labelling of misconduct has also been expanded by the abolition of common law defences such as reasonable chastisement and the marital exemption in relation to rape. There has also been legislative and judicial clarification of what constitutes reasonable self-defence in the home. In addition to a broadening spectrum of criminalisation, mechanisms of intervention in harmful contexts have also been provided for in law. These include provisions in relation to child and adult safety in emergency situations; the possibility of using a portfolio of care and supervision orders for children; the availability of protection, safety and barring orders under the Domestic Violence Act 1996; child safeguarding and child harm reporting requirements; broader disclosure requirements; the provision of health services to women who worked in the Magdalen Laundries or similar institutions; the payment of compensation to the victims of uninsured and unidentified motorists as a result of agreements between motor insurance companies and the Minister of Local Government; and protected disclosure of child abuse and wrongdoing in health care settings.

Victims of crime also have recourse to the civil jurisdiction on the courts. Indeed such a pathway is viewed as a necessary pillar in the vindication of an individual's rights. The Irish courts have been expanding jurisprudence in the field in recent years, particularly in relation to appropriate damages,⁸⁴ delays in taking actions,⁸⁵ broader interpretations of vicarious liability for acts of sexual

⁸² Section 36. See also section 16 of the Domestic Violence Act 2018.

⁸³ Section 46.

⁸⁴ See *M.N. v SM* [2005] 4 I.R. 461 at 472. See also *O'Donnell v. O'Donnell* [2005] IEHC 216; see also *L.O'K. v. L.H* [2006] IEHC 393.

⁸⁵ See *Moloney v Kelleher* [2014] IHC 358; *Doherty v Quigley* [2015] IESC 54; *II v GG* (unreported, High Court, 5th July, 2012); *Hayes v McDonnell* [2011] IEHC 530, *Mr C v His Honour Judge Sean O Donnabhain and the DPP* [2016] IEHC 74

abuse,⁸⁶ new torts,⁸⁷ and the admissibility of convictions.⁸⁸ The issue of whether prosecution authorities should enjoy an immunity from suit has also come under closer scrutiny. Traditionally it has been held that the Garda Síochána and the prosecuting authorities of the State did not owe the plaintiff a duty of care in relation to bona fide actions and decisions taken in carrying out their functions in the investigation and prosecution of crime. More recently, the Supreme Court has held that such cases should now be heard at trial.⁸⁹ This was justified on the basis that domestic tort jurisprudence is capable of being tested against the Convention, particularly having regard to whether or not a rule establishing absolute immunity for public authorities is proportionate.

International Legal Instruments

A number of key developments in Europe have also promoted recognition of the needs of victims within criminal justice systems. The impetus provided by the United Nations, the Council of Europe and the European Union has been significant. The European Convention on Human Rights, which Ireland incorporated at a sub-constitutional level in 2003, is increasingly being interpreted in ways that afford rights to victims of crime. It therefore acts as another influential normative framework that seeks to extend the reach of rights in the criminal process to include victims of crime. Though the Convention does not explicitly refer to victims of crime, the jurisprudence of the Court has placed obligations on member states to criminalise wrongdoing, to take preventive operational measures, to protect society from potential dangers, to provide appropriate civil remedies, to investigate and give reasons, and to adequately protect victims and witnesses at various stages in the criminal process. These obligations arise under Articles 2 (right to life), 3 (degrading treatment), 6 (fair trial) and 8 (private life) and have been analysed in a variety of cases. In 1996, for example, the court in *Doorson v The Netherlands*⁹⁰ expanded its interpretation of Article 6, primarily concerned with the rights of defendants in criminal proceedings, to take account of the rights of vulnerable witnesses and defendants. It noted:

⁸⁶ *Hickey v McGowan* [2017] IESC 6.

⁸⁷ *Walsh v Byrne* [2015] IEHC 414.

⁸⁸ *Nevin and Lavelle v Nevin* [2013] IEHC 80

⁸⁹ *Lockwood v Ireland* [2011] 1 IR 374; *L.M. v. The Commissioner for An Garda Síochána, The Minister for Justice, Equality and Law Reform, The Director of Public Prosecutions, Ireland and The Attorney General* [2015] IESC 81.

⁹⁰ [1996] 22 EHRR 330.

It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 [right to a private life]. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. *Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify* (my emphasis).

A series of other obligations and safeguards have been interpreted through the provisions. They include, for example, the requirement that States carry out effective investigations of crime.⁹¹ Effectiveness in this context requires public scrutiny to ensure accountability in practice;⁹² an efficient and independent judicial system;⁹³ the hierarchical and institutional independence of those responsible for the investigation of a crime from those implicated in the events;⁹⁴ prompt responses by the authorities;⁹⁵ the effective implementation of court orders to protect victims;⁹⁶ and a legal and administrative framework that adequately protects rights such as bodily integrity and privacy.⁹⁷

The European Court of Human Rights has also held that the accused's right to disclosure of relevant evidence is not absolute and may need to be weighed against competing interests including the protection of witnesses and the need to uphold individual fundamental rights.⁹⁸ It has also held that personal cross-examinations by defendants should be subject 'to a most careful assessment' given their potential to breach the rights of complainants under Article 8,⁹⁹ and that out-of-court statements may be admitted having regard to the need to 'weigh in the balance the competing interests of the defence, the victim, and

⁹¹ *Mazepa and Others v Russia* (2018) ECHR (15086/07)

⁹² *Hajduova v Slovakia* (2011) 53 EHRR 8.

⁹³ *Opuz v Turkey* (2010) 50 EHRR 28.

⁹⁴ *Perevedentsevy v Russia* (2016) 62 EHRR 16.

⁹⁵ *Kaluca v Hungary* (57693/10).

⁹⁶ *A v Croatia* (2015) 60 EHRR 26

⁹⁷ *Perevedentsevy v Russia* (2016) 62 EHRR 16; *SM v Croatia* (2018) [ECHR] (60561/14).

⁹⁸ *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1.

⁹⁹ *Y v Slovenia* (41107/10).

witnesses, and the public interest in the effective administration of justice'.¹⁰⁰ The Court has also repeatedly emphasised the positive requirement that States take appropriate steps to safeguard the lives of those within its jurisdictions.¹⁰¹

The European Court of Human Rights has also addressed the issue of vulnerability and victimhood in Ireland. Jurisprudence from the Court indicates that there is an enhanced State responsibility to protect children and vulnerable adults that are in the purview of the State and to ensure that the investigation and trial processes for such witnesses are as efficient and protective as possible. In *O'Keeffe v Ireland*¹⁰² the applicant attended a national school in west Cork where she was sexually assaulted on 20 occasions by the Principal in a six month period commencing in 1973. An earlier complaint by a third party relating to the sexual misconduct of the principal had been made to a local parish priest, who acted as the manager of the school, in 1971. This complaint was not reported to the Gardaí, the Department of Education and Science or to any other state authority and was not acted upon by the parish priest. The applicant instituted civil proceedings against the Principal and the Irish State claiming damages for personal injuries suffered as a result of the sexual abuse. In relation to the hearing against the State, the High Court in Ireland held that the State was not vicariously liable for the sexual assaults of the principal. This was upheld on appeal to the Supreme Court. The applicant then took a case to the European Court of Human Rights, arguing that there had been a violation of Art.3 regarding the state's failure to fulfil its obligation to protect the applicant. The applicant also argued that there was a lack of an effective remedy regarding the state's failure in this regard.

Given the fundamental nature of the rights guaranteed by Article 3 and the vulnerable nature of children, the Court accepted that the Irish Government had an inherent obligation to ensure the protection of children from ill-treatment in a primary education context. The key issue was whether the State's framework of laws including its methods of detection and reporting provided effective protection for children attending a national school against the risk of sexual abuse, a risk of which the authorities had or ought to have had knowledge of at the relevant time. The Court held that the Irish state was in breach of Article 3 in not adopting appropriate measures and safeguards to protect vulnerable individuals. These measures should have included effective mechanisms for the

¹⁰⁰ *Al-Khawajah v UK* (2011) ECHR 2127.

¹⁰¹ *Maiorano v Italy* (28634/06).

¹⁰² (2014) 59 EHRR 15.

detection and reporting of any ill-treatment by and to a state-controlled body. The Court also held that the applicant did not have an effective domestic remedy available to her as regards her complaints under Article 3, which resulted in a violation of Article 13 of the Convention.

All of this jurisprudence demonstrates that a literal, formalistic approach to the Convention has been rejected in favour of a broader reading that encompasses principles which command, that ‘rules in the rule book capture and enforce moral rights’.¹⁰³ Such an expansionary interpretation acts as a counterpoint to the hegemonic dominance of state/accused relations and the exclusiveness, in particular, of accused rights as ‘trump cards’.

This concretisation of the rights of the victim found expression in other international instruments. They include the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), and various Council of Europe Recommendations since 1983.¹⁰⁴ The EU first began to consider crime victims in 1999, ultimately leading to a specific Directive.¹⁰⁵ It became operative in participating Member States on the 16th November 2015 and provides legal safeguards around three key themes: information and support; protection and; participation. While the Victim’s Directive is an extremely important measure for victims of crime within the EU, it is just one of a suite of measures which aim to assist and protect victims of crime. In addition to the Victim’s Directive, several measures aimed at specific categories of victims have also been introduced by the EU in recent years. The Directive on Trafficking in Human Beings, adopted in 2011, aims to combat trafficking in human beings and to protect its victims.¹⁰⁶ The Directive establishes minimum standards in relation to criminal offences and sanctions and introduces provisions to strengthen the prevention human trafficking and the protection of victims. In the same year, the Directive on Child Sexual Exploitation, aimed at combating the sexual abuse and sexual exploitation of children and child pornography was adopted. It establishes minimum standards in relation to ‘criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes’.¹⁰⁷

Two measures have also been adopted which enable victims to continue to benefit from protection measures issued in one member state while travelling in or moving to another member state. The first, the Directive on the European

¹⁰³ R Dworkin, *A Matter of Principle* (1985, Harvard University Press)11-12.

¹⁰⁴ More generally, see S Kilcommins, S Leahy, K Moore Walsh and E Spain, *The Victim in the Irish Criminal Process* (Manchester University Press, 2018), 39-43.

¹⁰⁵ 2012/29/EU.

¹⁰⁶ 2011/36/EU.

¹⁰⁷ 2011/92/EU.

Protection Order (EPO),¹⁰⁸ allows victims with a protection order in criminal matters issued in one Member State to request a European Protection Order which applies in other member states. The second, the Regulation on mutual recognition of protection measures in civil matters, enables victims with a civil law protection order to invoke it in another state.¹⁰⁹ Finally, a Directive on compensation to crime victims ensures that victims can access state compensation when they are victims of violent intentional crime and that compensation is accessible irrespective of which state in which the crime occurs.¹¹⁰

Conclusion

Writing victims in to the criminal justice story necessarily creates disturbances and establishes competing tensions. Most commentators would accept that these tensions and disturbances are necessary so as to create a more communicative and accommodating criminal process, one which permits victims to recover, to some extent, their centrality in ‘the conflict’. Juridification of the kind outlined above will undoubtedly impact upon State-accused relations. Synthesising sometimes competing rights and principles in ways that will ensure just and fair decisions will be a challenge. It will require an on-going constructive interpretation of fresh cases that come before the courts. Such interpretation demands both fidelity to existing legal precedents (‘formal’ style reasoning) as well as an acceptance of the innovative possibilities of law and rights (‘grand style reasoning’) given their evaluative aspects and potential for alteration through rules of change.¹¹¹

¹⁰⁸ 2011/99/EU.

¹⁰⁹ Regulation (EU) No. 606/2013.

¹¹⁰ 2004/80/EC.

¹¹¹ HLA Hart, *The Concept of Law* (Clarendon Press, 1961), 63.