

# The enforceability of victim rights - the right of the victim to be informed<sup>1</sup>

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## Abstract

If victims' rights cannot be enforced, victim rights are "paper tigers," nothing but slogans without power. Therefore, it is important to introduce legal provisions that make victim rights enforceable. This research focused on one particular right, on 'victim's right to information.' We concentrate on police response to domestic violence in Korea. We draw conclusions from the European Directive 2012. Our conclusion is: Victims have the right to be informed. To have an enforceable right of the victim to be informed, three prerequisites must be fulfilled: 1. Discretion control of providing information; 2. Institutionalization of speedy notification; 3. Equipment of solid remedies. The authors recommend observing the development in Europe that will have worldwide repercussions.

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## Introduction

In almost all regions of this world, we find victimization by domestic violence, since a long time.<sup>2</sup> Korea and Europe are not exceptions. The victims of intra-family violence started to attract the attentions of the legislators in the last two decades. In Korea, the lawmakers, continuously revised these laws throughout the past ten years. Nevertheless, concerned citizen groups (victim activists or victim advocates) maintain: the reformed laws have fallen short: There is still no adequate victim protection (Chong, 2012, p. 138). The problem of domestic violence still exists. The mere existence of a (particular) law itself and the introduction of victim rights in the usual way do not solve the problems. Usually, the laws establish victim rights but do not give weapons to enforce these rights. Therefore these rights do not have “teeth”, they are a toothless “paper tiger”. To remedy this situation, victim supporters demand: “Make victim rights enforceable.” The laws show mainly the bright sides, the true situation of victim rights is rather bleak: usually, victim rights are just mere slogans without enforceability.

Therefore, it is crucial to develop victim rights which are more than programmatic declarations, and that are enforceable victim rights. The aim of the current research is to find a way to secure the enforceability of victim rights. It would be difficult to examine the current situation efficiently if we would include all possible victim rights in the scope of our research. That would be overly broad. Therefore, for effective diagnosis and analysis, the current research focused on one particular victim right, the ‘Victim Right to Information.’ We focus on police response to the domestic or spousal violence. We deal with the relevant law of Korea. We will look at the European Union and particularly into

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<sup>2</sup> The concept of domestic violence is more comprehensive than that of spousal violence. “Domestic violence” indicates that the family members or the partners are experiencing domestic violence and are living together. Domestic relationships include relationships ended by separation or divorce. “Violence in the marriage” covers *de facto* marriages which are not registered as official marriages as well. In this article, both the terms domestic violence and spousal violence were used interchangeably.

the Directive of 2012. Finally, after reviewing three criteria for securing the enforceability of victim rights, we will suggest some ways to get out of the current stalemate.

### **Discourse of Victim Right to Information**

#### *1. Definition of victim right*

##### CONCEPT OF VICTIM RIGHT

Most developed and developing countries have enacted victim-related laws and proclaimed to have regulated victim rights in these statutes. They follow the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). They deal with the right to be recognized, the right to be heard, the right to participate, the right to restitution, etc. But are these norms really “rights?”. Or are they mere programmatic sentences and desires?

According to Joutsen (2012, pp. 2-4), the term “*right*” means the ability for someone to fulfill his/her needs with the resources given to him/her, exclusively. Accordingly, we define victim rights as “the victims’ ability to meet their needs with the resources given to them.” The meaning of ‘victims’ here is restricted to those who are damaged by crimes. Victim rights can be defense rights (the right to defend oneself against an infringement) or demand rights (the right to request something that the victim did not have before). These are central concepts in the current discussion about enforceability of victim rights in the justice system.

##### CATEGORIES OF VICTIM RIGHTS

Even if the law uses the word “rights,” this is not enlightening. Often these rights are reduced to nothing since violation of the rights results in nothing – neither in a new trial nor claims for damages Kirchhoff (2005, pp. 60-65). These remarks imply that there could be different types of victim rights. Therefore, from a perspective of the enforceability of these rights, we can classify three categories: 1. absolute rights, 2. relative rights, and 3. nominal rights.

*An absolute right* can be asserted toward everyone, such as the “right

of respect for human worth and dignity” and “right of pursuing happiness” in Article 10 of the Korean Constitution. These rights are perceived as “natural rights,” which should be secured regardless of nationality, race, gender, and age.

*Relative rights* can be in effect only through law such as the “right to demand information from the government” or the “right to have seized property returned”. Crucial is whether the victim can use legal remedies to achieve that his right is not violated. If there are remedies, then the right is “enforceable” – the victim can use (legal) force to achieve that the right is respected. Whether such a right is constructed as enforceable or not, depends on the particular legislation of each country. Without legal or institutional ways to enforce this right, the relative right cannot “win the day”. It is merely a relative right.

A *nominal right* seems to be a right at first glance, but it does not have the real efficacy at all in a legal perspective. According to Joutsen (2012, pp. 3-4), it is an “aspirational” right: while such right till now does not exist, we hope that in future it will mature to a right. In this case, we are under an illusion that we have a full-fledged right in front of us. Therefore, such rights might be called “illusionary”.

## 2. *Validity of victim right to information*

Laws often provide a “right to be informed”. Information has to be “provided”. Often it is up to the discretion of the competent authority to give such information. Then we do not have a right in front of us, we deal with a policy rule. Policies are not subject to judicial review even if the official does not follow the policy. The idea behind such a rule is that without information, the recovery of the victim might be seriously impaired. Without information, victims may have reduced the chances to avoid revictimization. The “UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power”(short: UN Declaration) and the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 (short: The Directive) both stress the importance of providing information. Art. 6 of the UN Declaration states that the responsiveness of the judicial and administrative process

should be facilitated by informing victims of their role and the scope, timing, and progress of the proceedings, especially in cases of serious crimes and when victims have requested such information.<sup>3</sup> The Directive in Article 26 prescribes: “when providing information, sufficient detail should be given to enable victims to make informed decisions about their participation in proceedings. The information right in the Directive is a minimum standard that is demanded to be observed by all EU Member States. These rights should be enacted as enforceable rights. That can happen by imposing the legal duty on the responsible officer to give clearly described information and on subjecting violations of this duty to judicial review (Kim 2015, p. 377). This legal obligation must be enforceable – at the end of the day, the authority has to give the information – or it is liable to substitute ensuing damages. Then the victim can enforce the right in front of a court.

Such enforcement mechanisms do not suit all types of information. There are many issues which might be meaningful to inform the victim about. The competent authority then could be inundated with information duties. Such overwhelming inundation might paralyze law enforcement activities. The enforceability, therefore, should be restricted to the information that is necessary to solve the crisis that leads to the involvement of police. Even if the right is enforceable, there is the danger that police corresponds to the duty by delivering this function rather formally: by handing out leaflets and other forms that inform only generally.<sup>4</sup> In such a case, the information right would be jeopardized, and the victim would not even get the minimum information that is needed. The task for the legislator is to find the right balance between helpful concrete, detailed individualized information and the practical demands of the justified bureaucratic proceedings within the criminal justice agency that is charged with giving the information.

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<sup>3</sup> United Nations, General Assembly Resolution 40/34, Article 6(a), <http://www.un.org/documents/ga/res/40/a40r034.htm> (accessed in June 28, 2016).

<sup>4</sup> This is the reason why the European Directive creates the right to understand and to be understood (Art. 3 EU Directive).

### 3. *Definition of victim right to information*

The Korean victim right to information includes the right to submit information which pertains to the case and the right to request necessary information for the recovery from the damage, and for securing one's personal safety. Information rights are a tool to achieve an essential rights such as "human worth and dignity" or the right of pursuing happiness (Art. 10 Korean Constitution Law) or the "right (Art. 3 European Directive).

The European Directive obliges the Member States to ensure that victims are offered – without unnecessary delay – from their first contact with a competent authority information that is substantiated later. This information is regarded essential to enable the victims to access the other rights set out in the Declaration.

The Directive distinguishes between information rights

- (1) from the first contact with a competent authority in the first (initial information rights) (Art. 4 Declaration)

In the first phase of contact with the competent authority, this information pertains to twelve specific detailed areas:

- (1.1) The type of support they can obtain and from whom, basic information about access to medical support, any specialist support including psychological support, and alternative accommodation;
- (1.2) The procedure for making complaints after a criminal offense and their role in connection with such procedure.
- (1.3) How and under what conditions they can obtain protection
- (1.4) How and under what conditions they can access legal advice and how they can take advantage of legal aid mechanisms;
- (1.5) How and under what conditions they can access compensation from the state
- (1.6) How and under what conditions they are entitled to interpretation and translation
- (1.7) How and under what condition the host member state has any procedures, arrangements or measures to protect the interests of the Member State where the first contact with com-

petent authority was made.

- (1.8) Available procedures for making complaints where their rights are not respected by the competent criminal justice authority
- (1.9) Available restorative justice services
- (1.10) Contact details for communication about the case
- (1.11) How and under what circumstances expenses incurred as a result from participation in the criminal proceedings can be reimbursed
- (1.12) Rights to receive information about their case
- (2) Right to receive information about their case (process information rights) (Art. 6 Declaration).

A comparison of the Declaration Rights with the Directive Rights shows that the Directive is much more developed, detailed and clear. The crucial question whether these rights are enforceable or not, cannot be answered by the Directive. The parliaments of the Member States have to decide this. This Directive has to be transformed into the national legislation of the 26 member states. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. The Directive itself cannot change immediately the national laws of the Member States. At the end of the day, these rights are at least justiciable. After the national procedural ways to remedy are exhausted, the European Court of Human Rights in Strasbourg has the jurisdiction in the question whether a Member State has violated individual rights of the victim or not. This right is given independently of compliance to the Directive. The Directive is in force. It gives enforceable minimum standards to comply with. If a member state does not comply, it does not change the validity of the Directive nor the jurisdiction of the European Court of Human Rights. At the end of the day, the court in Strasbourg has to decide whether concrete victim rights are violated or not. (see Lyane Sautner (2014): *Viktimologie. Die Lehre von Verbrechenopfern*. Verlag Oesterreich (in German language). pp. 121f.

As far as can be seen, the Directive is not complied with in all Mem-

ber States. That does not render the Directive to be without effect. For victims, the existence of the jurisdiction of the European Court is a blessing! Its existence is a “Mene Tekel”<sup>5</sup> for non – compliant Member States.

### **Current Situation of Victim Right to Information**

The following section describes how the victim right of information is regulated in the domestic or spousal violence law of Korea . In Korea, the special law of domestic violence is called the “Act on the Special Cases Concerning the Punishment, ETC. of Crimes of Domestic Violence (Act No. 13426 of 2015, hereinafter referred to as Korean Special Law or KSL)”. This law deals with the Right of the Victim to receive information.

Victims need to receive information about where to seek support from the first contact with the competent authority, and they need to receive information about their cases. In KSL, there are eight articles related to the provision of information:

- (1) According to the Article 5(4), the victim is entitled to be notified of *ad hoc measures* under Article 8 in the case of recurrence of violence. It is a duty of police officers to give the information to the victims. But this article does not guarantee enforceability of notifying the victims the information.
- (2) According to the Article 29(3), the victim is entitled to be informed of the judge’s decision about *ad hoc measures*.
- (3) Following Article 30(2), when a judge sets a date for examination and summons the domestic violence perpetrator for issuing *ad hoc measures*, the victim is entitled to receive the information of the date for this event.
- (4) In Article 31, when the date for the examination is changed and the judge summons the domestic violence perpetrator for issuing *ad hoc measures*, the victim is entitled to receive this information.
- (5) According to Article 37(3), when a judge makes a decision not to

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<sup>5</sup> That is mythological warning (Daniel 5 verse 25 of the Bible).

- make a protective disposition’ which is issued for a dangerous perpetrator, the victim is entitled to receive this information.
- (6) when the court decides to take a protective disposition, it shall notify the victim, according to Article 40(4).
  - (7) When the court decides to revise the types of protective disposition, it shall notify the victim without delay, according to Article 45(3).
  - (8) When the court issues a restitution order, it shall promptly send the original written decision in this protection order to the victim(s) according to Article 58(5).

Among these articles, only Article 5(4) obliges the police to offer the necessary information to the domestic violence victims on the stage of initial response. This article states that a police officer who responds to a crime scene shall inform the victim that he/she has a right to apply for ‘ad hoc measure’.

### **Enforceability of Victim Right to Information in Police Response**

#### *1. Korea*

As we see previously, there are many articles in KSL, that deal with the victim’s right to information such as Article 5(4), Article 29(3), Article 30(2), Article 31, Article 37(3), Article 40(4), Article 45(3) and Article 58(5). Among them, only Article 5(4) of KSL is connected to the stage of police response as follows:

A judicial police officer, upon receipt of a report on any of the ongoing crimes of domestic violence, shall arrive at the scene of the crime, without delay, and take the following measures....

4. To notify that victims are entitled to apply for ad hoc measures under Article 8 in cases of recurrence of violence.

This entitlement of the victims is not enforceable. We cannot find any legal ground for victim’s legal standing and remedy. Of course, police seem to have a legal duty to notify the concerned information to the victim, using auxiliary verb “shall”. However, there is no article to impose on the officer an enforceable legal duty of delivering informa-

tion. Moreover, KSL has no regulation for police to inform the victim of the release or custody of the perpetrator in the phase of the police investigation, a right that would be quite crucial for victim protection. Therefore, even if the victim is hurt or the property is damaged due to the omission of officer's notification, the victim cannot claim the infringement of this right.<sup>6</sup> As a result, even if no action of police results in revictimization, the victim cannot claim restitution or compensation because the right is not enforceable. Consequently, we cannot help but conclude that the victim right to information is just nominal right.

### **Securing the Enforceability of Victim Right to Information**

#### *1. Criteria for enforceability of victim rights*

Belo of emphasized that three factors are necessary for the victim rights to be enforceable; (1) standing, (2) remedy, and (3) review (Belo of, 2005. p. 254; Kim, 2015. pp. 385-386).

#### STANDING

"Standing" according to Beloof, means that victims have legal ability to defend themselves against violations of their legally prescribed position in appellate courts if necessary. If victims have a standing, they can vindicate their rights against the judicial officer's behavior through trial or other remedies. The defendants obviously have a standing because when their rights are infringed, they can appeal and seek a remedy on the basis of the Constitutional Law and Criminal Procedure Act. However, although victims' rights are violated, there are many cases in which their appeals are not permitted. In this case, the victim does not have standing.

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<sup>6</sup> There have been some criminal cases in which the court assumed the liability of government when the concerned officer failed to take a proper treatment for victim's personal safety, even though there is no obvious clause to impose the legal duty on the officer (Korean Supreme Court, 2006 da 82649, 2009.9.24; Seoul District Court, 2005 gahap 91894, 2006.4.7). However, these cases are just related to the violation of the governmental duty to secure the citizen's safety, not to the infringement of the victim right to information.

The standing of a victim is closely connected to the official's discretion, remedies and judicial reviews. If the enforceability of a victim's rights largely relies on official discretion, the standing of the victim is not provided. To establish a standing, victims' rights should be legislated with mandatory language. If there is a mandatory language, there is no discretion. As soon as the law permits choice, a standing fails. Therefore, in addition to controlling the discretion of law enforcement officers, the remedy and judicial review should be available for establishing a standing.

#### REMEDY

If a remedy is given, then the victim can appeal to the decision. If victims' rights can be considered as real rights, such as defendants' rights, the remedies of nullifying and reconsideration must be available for victims. For example, the Supreme Court of Arizona in the U.S. vacated a parole board order when a victim had failed to request notice of hearings. This was due to the fact that the state failed to comply with its lawful obligation to inform the victim of the hearing (Beloof, 2005, pp. 301-304). It is a very meaningful case for securing the victim rights regarding the violation of the official duty of information provision. The officials' responsibility to notify the victim of the necessary information is likely to be enacted with discretionary words. Even if the articles are legislated with mandatory language, the court usually rejects the appeal of the victim, for such victim rights are just advisory rights.<sup>7</sup> If the prosecutor could dismiss the victim's request for accusation without proper reasons, the rights of victims would be nullified. Therefore, victims should be able to request a review of a decision not to prosecute, and be granted the right to institute a private prosecution, if the public prosecutor's accusation is not available (Wolhuter, *et al.*,

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<sup>7</sup> Advisory right is the right which the State does not guarantee the implementation by public force. It has the same legal characteristics like nominal rights in the current article. It is fascinating to observe how legal language is twisted to let appear phenomena as its opposite: advisory statements are exactly not rights. The desire is the father of the thought and interests lead to an non-honest parlance.

2009, p. 120).

#### REVIEW

A criminal system should be developed to control judges' abuse of discretion as well. If it fails, the review to secure the victim rights cannot succeed. For this, when the victim-related laws are enacted, the criteria of a judge's decision should be made. For example, the law should compel the judge to permit a submission and to review the special evidence in the course of ruling without rejecting the witness anonymity, hearsay evidence from witness, and pre-recorded testimony (Wolhuter. *et al.*, 2009, pp. 124-125). Witness anonymity is a critical issue for protecting the safety of a witness. Hearsay evidence<sup>8</sup> is necessary also for victim protection because some witnesses are afraid of retaliation, so they dislike making a statement before defendants. Pre-recorded evidence is useful for the protection of sexually abused victims and child victims. In these cases, if the judge does not admit the evidence, then a review of the victims would fail. As a result, the victim right cannot be realized.

#### 2. *Suggestions for securing the enforceable victim right to information*

Criminal suspects and defendants have a right of notice when they are arrested. This is known as the "Miranda Warning" on the legal ba-

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<sup>8</sup> Hearsay evidence is the evidence provided by a witness consisting of a report of something which someone else has said, rather than a statement of something which the witness has actually seen or experienced (<http://www.yourdictionary.com/hearsay-evidence#panel2>, accessed on April 18, 2015). Although it is not admissible generally as evidence, some authors suggest it might be admissible when two requirements are met such as the following: 1) Circumstantial guarantee of trustworthiness, 2) Necessity (J. Lee & K. Cho, 2015. p. 560). When a victim should give a testimony before the offender, they usually want to avoid making a statement before him/her, that because of a fear of retaliation. To solve this problem, the authors suggest hearsay evidence should be admissible for victim protection on the basis of necessity. We do not support this position. It is a typical example of the recognition of alleged victim interests going overboard. There must be developed possibilities to have the victim do the statement and granting their protection.

sis of Criminal Procedure Act and Constitution. As known by the case of *Miranda v. Arizona* in U.S.A., the absence of notification of the Miranda Rights makes the illegally gained information inadmissible in court. When suspects are arrested without the Miranda warnings and police collected the verbal evidence, the evidence cannot be admissible in court. This means that, the suspect right to information is enforceable.

In the same way, the victim right to information must be established as an enforceable right, especially in important cases such as protecting victims' lives. The victim right to information must be accorded the same priority as those of the defendants. All the victims should have right to receive information and explanation about the progress of their cases (Ministry of Justice of Korea, 2009, p. 81).

Of course, all the victim rights to information cannot be enforceable. For example, there are various types of information, that needs to be offered to the victims: (1) which types and contents of support they can obtain, (2) which procedures are necessary for making complaints, (3) how and under what conditions they can receive protection, regarding the securement of personal safety, (4) how and under what condition they can access legal advice, (5) compensation, (6) interpretation and translation, (7) how they can appeal to the decision not to prosecute, (8) explanation about the criminal proceedings of victim's case, including the release or custody of the offender, (9) available restorative justice systems, (10) how they can reimburse the expenses incurred as a result of their participation in the criminal proceedings (referred to Article 4 of the Directive of EU).

However, if a government would legalize all the above items as the types of enforceable rights, it would lead to expenses unbearable for budget and manpower. Therefore, to make the victim rights to information enforceable, focus needs to be brought into the most crucial information. Information that could influence on securing a victim's life and the right to live is as follows:

Information of securing personal safety, guaranteeing the basic living through financial support, and how to take remedies which is es-

essential for the victim's survival.

Korea has already managed a notification system about victim right, offering the information to the victim by the leaflets or oral explanation (Korean Police Agency, 2013, p. 3). However, this victim right to information still depends on the willingness of the officials. Although KSL uses the mandatory term, 'shall,' there are no clauses to ensure enforcement.

Consequently, in the current paper, several suggestions are made to improve the current situation and make the rights enforceable.

#### DISCRETION CONTROL OF PROVIDING INFORMATION

The victim's right to information that could play an important role in protecting the right to victim's life and the right to living should be enacted as a mandatory language that imposes police the legal duty. If a policeman disregards this obligation and as a consequence, victim's life and survival, they should be held liable, criminally or administratively. This policy is closely related to strengthening the victim's legal standing (Belooof, 2005, pp. 277-279). The deficiency of domestic violence victim's standing is caused by the absence of enforceable provisions of victim rights and discretionary provisions of officials who are responsible for victim protection of domestic violence. Therefore, to secure a victim's standing, firstly, the victim rights to information should be enacted obviously in the special laws.<sup>9</sup> Secondly, the law should provide that officials who violate their duty, should be held responsibility for that.

#### INSTITUTIONALIZATION OF SPEEDY NOTIFICATION

It is crucial that the information should be notified rapidly to a vic-

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<sup>9</sup> Belooof and Pugach stated that "If victims were to have standing, US Congress would have to explicitly provide for it subsequently enacted in the form of the US CVRA (Crime Victims' Rights Act in America)". Additionally, they argued that the CVRA replaced illusionary victims' rights with enforceable rights (Belooof & Pugach, 2012, pp. 14-15). That is debatable. Even if it is so, it would not have repercussions to the situation in Korea and Europe.

tim in the police response. The police response to domestic violence has the characteristic of crisis intervention. Revictimization might happen easily by the offender's second attack. To protect the victims effectively, the information about the offender's situation should be intimated rapidly to the victim at the proper time. In spite of that, what kind of information the victim would need and at which moment of the police initial stage the information is to be supplied, have not been yet specified in KSL.

Even though Crime Victim Protection Act of Korea (Act No. 12779 of 2014) contains the clause of providing information to victims (Article 8-2), the clause constitutes just a nominal right or only a victim policy because there is no legal remedy.

In addition, KSL has commissioned the specific ways of notification to the "Regulation of Crime Investigation" but it is not binding to police officer. Therefore, KSL has no obvious articles of regulating notification system for domestic violence victims.

It is especially valuable since it was developed taking into account the issues which are typical for common law criminal justice systems.

Consequently, KSL should have a clear and direct article to offer a victim speedily the necessary information at the proper time. Especially, when the victim would be endangered by an offender's attack, victim must be informed immediately after the offender is released.

#### EQUIPMENT OF SOLID REMEDIES

Belo of (2005) rightly mentioned that, without adequate remedy, victims cannot exercise their rights when prosecutors or trial courts deny them. If the rights cannot be exercised because no remedy exists, then the victim rights become just nominal rights, even if the Article uses the language of victim rights. Remedy is a prerequisite for victim's standing. Without remedy, the victim's standing cannot be established. If a victim's rights are violated, and there is no possibility of judicial review, the rights are nothing but nominal rights. Fortunately, many countries, including Korea, have a judicial remedy system that a petitioner is allowed to appeal it to the appellate court or supreme

court when the lower court misjudge the case. The lawful and proper judicial review of the court is necessary for victims.

Consequently, above all, the legal basis that victims can be protected by intimating them the crucial information should be established with a solid legal device of remedy.

### **Conclusion**

Some conservative people might be afraid of changing the achieved balance between the rights of the state, the rights of offenders and the rights of victims. Developing dogma of enforceability of victim rights, as Belo of postulates, will meet a friendly reception in victim friendly circles. More victim friendly people believe that victims should have a standing in criminal proceedings and that their right to be informed should be enforceable. A rigorous all-round enforceability will bring the danger of jeopardizing the criminal proceedings. Drowning in information obligations, law enforcement will not make any decisions effectively but will drag their feet. That is not in the interest of the victims. We should not stare at the confused development in the US criminal justice system and its developing dogma on the enforceability of information rights. We should just recognize that the situation in the US is moving and at this time does not give a shiny example of where other legal orders should go, even if its proponents decided to silence the development in Europe. The European Directive 2012 is a beacon that illuminates the field of victim rights, by consequently developing the concept from the UN Declaration during the last thirty years. The Member States of the EU have to solve the task of compliance to the Directive. That will determine the discussion in the coming years. The advantage of the Europeans lies in the existence of the European Court of Human Rights. Its jurisprudence will be like a magnet for further developments far beyond the borders of Europe.