



INTERNATIONAL JOURNAL OF
LAW, LANGUAGE & DISCOURSE

VOLUME 6.1 2016

Contents

- Inoue Masako**
1-10 *The Notion of Contemporary Asymmetry and Access to Justice of a Vulnerable Group: Focusing on Domestic Violence Victims in Japan*
- Philip Osarobo Odiase**
11-28 *Reception of the Evidence of Vulnerable Witnesses in Legal Proceedings in Nigeria*
- Tomas Berkmanas**
29-36 *'Doing Sanctions with Words': Legacy, Scope, Fairness and Future (?) of a Reprimand*
- Ulrika Andersson**
37-44 *Communications of autonomy and vulnerability in criminal proceedings*



INTERNATIONAL JOURNAL OF
LAW, LANGUAGE & DISCOURSE

**International Journal of
Law, Language & Discourse**

Volume 6.1 June 2016
Special Issue

Fairness and Communication in Legal Settings (I)

Chief Editor
Le Cheng

Guest Editors
Laura Ervo
Kerstin Nordlöf

The International Journal of Law, Language & Discourse is an affiliated journal of Multicultural Association of Law and Language.

The International Journal of Law, Language & Discourse is an interdisciplinary and cross-cultural peer-reviewed scholarly journal, integrating academic areas of law, linguistics, discourse analysis, psychology and sociology, presenting articles related to legal issues, review of cases, comments and opinions on legal cases and serving as a practical resource for lawyers, judges, legislators, applied linguists, discourse analysts and those academics who teach the future legal generations.

For electronic submission

Chief Editor: Le Cheng (chengle163@@hotmail.com)

Editorial Manager: Jian Li (jianjian_le@hotmail.com)

Production Editor: Jane Lee (ljane@foxmail.com)

Published by English Language Education (ELE) Publishing
A diving of TESOL Asia
A division of SITE Australia LTD
Brisbane, Australia

<http://www.ijlld.com>

© International Journal of Law, Language & Discourse (IJLLD) 2016

This book is in copyright. Subject to statutory exception, no reproduction of any part may take place without the written permission of the IJLLD.

No unauthorized photocopying

All rights reserved. No part of this book may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying or otherwise, without the prior written permission of the IJLLD Press.

ISSN 1839 8308

EDITORIAL BOARD

CHIEF EDITOR

Le Cheng *Zhejiang University, China*

EDITORIAL MANAGER

Jian Li *City University of Hong Kong, Hong Kong*

SENIOR ASSOCIATE EDITORS

Sebastian McEvoy *University Paris Ouest Nanterre La Défense, France*

King Kui Sin *City University of Hong Kong, Hong Kong*

HONORARY ADVISORS

John Adamson *Nigature Prefecture University, Japan*

Roger Nunn *Petroleum University, UAE*

Z.N. Patil *The English & Foreign Languages University, India*

ADVISORY BOARD

Janet Ainsworth *Seattle University, USA*

Susan Berk-Seligson *Vanderbilt University, USA*

Vijay Bhatia *City University of Hong Kong, Hong Kong*

Deborah Cao *Griffith University, Australia*

Winnie Cheng *The Hong Kong Polytechnic University, Hong Kong*

Malcolm Coulthard *Aston University, UK*

Marcel Danesi *University of Toronto, Canada*

Jinbang Du *Guangdong University of Foreign Studies, China*

Jan Engberg *University of Aarhus, Denmark*

Maurizio Gotti *University of Bergamo, Italy*

Lianzhen He *Zhejiang University, China*

Craig Hoffman *Georgetown University, USA*
Christopher Hutton *The University of Hong Kong, Hong Kong*
Kyo Kageura *The University of Tokyo, Japan*
Li Li *China University of Political Science and Law, China*
Jixian Pang *Zhejiang University, China*
Gary Prideaux *University of Alberta, Canada*
Lijin Sha *China University of Political Science and Law, China*
Susan Sarcevic *University of Rijeka, Croatia*
Joseph-G Turi *International Academy of Linguistic Law, Canada*
Anne Wagner *Université du Littoral Côte d'Opale, France*
Zhenhua Wang *Shanghai Jiao Tong University, China*
Catherine Way *University of Granada, Spain*

ARTICLE EDITORS

Phil Cameron *Rowan-Cabarrus Community College, USA*
Carole Chaski *Institute for Linguistic Evidence, USA*
Maria Francisca Carneiro *Federal University of Paraná, Brazil*
Clara Chan *City University of Hong Kong, Hong Kong*
Stanislaw Gozdz-Roszkowski *University of Lodz, Poland*
Pi-chan Hu *Ching Yun University, Taiwan*
Karen McAuliffe *University of Exeter, UK*
Tatiana Tkačuková *Masaryk University, Czech*
Ning Ye *Zhejiang Police College, China*

BOOK REVIEW EDITORS

Uladzislau Belavusau *Vrije Universiteit Amsterdam, Netherlands*
Qing Zhang *China University of Political Science and Law, China*

Contents

1. Inoue Masako

*The Notion of Contemporary Asymmetry and Access
to Justice of a Vulnerable Group: Focusing on
Domestic Violence Victims in Japan* 1-10

2. Philip Osarobo Odiase

*Reception of the Evidence of Vulnerable Witnesses
in Legal Proceedings in Nigeria* 11-28

3. Tomas Berkmanas

*'Doing Sanctions with Words': Legacy, Scope, Fairness
and Future (?) of a Reprimand* 29-36

4. Ulrika Andersson

*Communications of autonomy and vulnerability
in criminal proceedings* 37-44

The Notion of Contemporary Asymmetry and Access to Justice of a Vulnerable Group: Focusing on Domestic Violence Victims in Japan

Abstract: Domestic violence (DV) occurs across the world in various cultures. However, DV is dependent on customs, religion, culture, economic situations, and gender structure. Recently, many countries attempted to prevent or reduce DV through various strategies, including legal measures. The aim of this paper is to re-consider DV cases as a failure of communication between the victims and the legal profession, for example, the judge, secretary and law clerks, in other words, as a problem of access to justice by a group of vulnerable people who are situated in an asymmetrical relationship due to gender structures. We will focus on this new type of asymmetrical relationship (contemporary asymmetry) that comprises the majority of DV cases. The contemporary asymmetric relationship is new and very rigid for the legal system, due to gender structures. It is important that there is a discrepancy or gap between assumptions about this relationship in the modern legal system and the relationship in actual DV cases. There are several principles in a modern legal system involved in dispute-resolution procedures between equal parties; for example, the adversarial system. As we know, DV situations cause victims to suffer a temporary decline in their ability to make judgments. Therefore, it is not suitable (and inadequate) that provisions based on the system of modern law apply to DV cases without considering the relationship of the parties and taking into account the condition of the victim,. Yet, since the contemporary asymmetric relationship is hidden and is hard to understand, in Japan we cannot take this point into account at all. As result, access to justice for DV victims as vulnerable persons is an infringement. This problem that has occurred due to contemporary asymmetry cannot be resolved through a traditional response to older types of asymmetric relationship (traditional asymmetry), such as in the field of labor law or consumer law, because contemporary asymmetry is different from traditional ones. It is necessary to incorporate functions with a new expertise, such as social work in the legal system.

Keywords: domestic violence, gender, social work, vulnerability, access to justice

*Corresponding author: INOUE Masako, Kanagawa University, Japan. Email: yamak220@spa.nifty.com

1 Introduction

DV occurs across the world in various cultures¹ and many countries attempt to prevent or reduce DV through various strategies including legal measures. DV² is violence between

¹ See Watts & Zimmerman 2002, WHO 2005.

² DV can take place in heterosexual, same-sex, and transgender relationships and can also involve violence against the children in the family. In this article, I am focusing on DV cases between partners. It is reasoned that this limitation is due to most partners in DV cases being legally equal but actually are unequal due to gender structures. In violence against children, aged persons, the status of batterers, and victims is legally and actually different. Of course, the latter type violence is also important, and

husband and wife, partners, or lovers in the intimate sphere. In most DV cases, there is an asymmetric relationship (contemporary asymmetric relationship) between the victim and the abuser. This type is new to the judicial system, which has recently³ caused various problems in Japan. In this article, we will point out that the contemporary asymmetry problem is hidden behind several problems in the Japanese DV policy and that this problem is discussed as a failure in communication between the parties and the legal profession; for example the judge,⁴ secretary, and law clerks. In other words, it concerns access to justice by vulnerable people⁴ who are situated in an asymmetrical relationship due to the gender structure. In addition, we will indicate a gap between DV cases and the assumption of the modern legal system as cases involving dispute resolution procedures between equal parties.⁵

2 Domestic Violence in Japan

Before considering the contemporary asymmetry problem, we will briefly sketch DV in Japan as a representative example. In Japan, our recognition that DV is a serious problem and a human rights violation that requires a public response only spread to the general community in the late of 1990s. However, private groups and associations have supported the victims in the 1980s.

Legal correspondence, in particular, has begun since the enactment of the DV Prevention Act (DVPA) of 2001. The DVPA prescribes that DV is not a so-called private matter, such as a quarrel between a husband and a wife. Rather, it is a serious human rights violation that could be a crime, and administrative and judicial authorities must have the responsibility to protect victims and formulate a policy for DV prevention. The DVPA, following three amendments (2004, 2007, and 2014), led to a change in the DV policy in Japan. At least superficially, it seems to be complete.

The court, the police, and governments are deemed to play important roles in dealing with the DV policy. The national government should establish a basic policy concerning measures for the prevention of spousal violence and the protection of victims,⁶ and prefectures should establish their own basic plans concerning the implementation of measures for the prevention of spousal violence and protection of victims within their jurisdiction. The Prefecture also should authorize Spousal Violence Counseling and Support Centers (DV Centers)⁷ that offer consultation or coordination with concerned organizations, provide

in many cases, several types of violence are combined with each other within a family. Particularly child abuse is a very serious problem in Japan. It is quite common that children who witness violence between their parents and who are brought up in a family with constant fights are also themselves victims of domestic violence even if they do not suffer from direct violence.

Also violence against women including violence at the workplace, school, or university in Japan is a serious problem.

³ Exactly, this type of relationship has existed a long time ago. Recently it came to be taken as a legal issue. See INOUE 2012.

⁴ A notion of vulnerability has recently been used very frequently, so it seems that there are confusion in some cases. Here I rely on Fineman's notion. See Fineman 2008, Fineman & Grear 2014.

⁵ The problem with this failure in communication is so important in mediation and other ADR (alternative dispute resolution) procedures. We should critically discuss this in relation to the reduction of excessive judicial functions. However, it is omitted here because of limited space.

⁶ DVPA §2(2)

⁷ DVPA §3(1)

temporary protection for victims, and promote self-reliance in the long term. The court should issue protection orders to prevent harm to the victim's life and body upon petition by the victim.⁸ Those who detect physical spousal violence (including physicians or other medical personnel) should endeavor to notify the fact to the police or DV Centers.⁹ The police and welfare offices should endeavor to take necessary measures.¹⁰

However, it is difficult to say that DV has been reduced in reality. The situation of damage in a survey by the government has changed little since 2006. The number of consultations with DV Centers has increased consistently from 2002 to 2013.¹¹ The number of consultations with the police has also increased.¹² In addition, since 2003, approximately 400–500 women per year leave their own house and receive temporary protection from a spousal violence prevention center, citing violence from the husband as a reason.¹³

Increase in the number of consultations might mean that victims who were previously hiding have now come to the fore due to improvements in DV correspondence. However, given the situation that more than ten people per day are cornered and run away from their ordinary lives, it cannot be said that DV measures in Japan are complete. Moreover, within a few years, in two cases within a few years, despite the system and measures were properly operated and applied by police and public institutions, despite police and public institutions having taken to certain correspondence based on the DVPA, the worst outcome has become a reality: victims are killed by batterers. These facts cases suggest that a qualitative or radical re-review of DVPA is necessary.¹⁴ Japan's DV policy has a critical defect; it is time to return to the issue of ensuring the safety of the victim and to review the entire DV policy in both theory and practice.

3 DV Policy in Japan: Characteristics and Problems in General

We will survey the characteristics and problems¹⁵ of the DV policy in Japan in brief. The most important point here is the DV policy's lack of recognition that a contemporary asymmetric relationship between victims and batterers is common to such problems.

3.1 Delay or Sluggish Progress of Criminal Responses and Revision of Penal Code

The DVPA in Japan is an act specialized to protect victims of DV. This act, with the purpose of the prevention of DV and protection of victims, is composed of two main pillars: administrative responses and protection orders issued by civil courts. However, this Act does not contain the provisions of criminal law. Moreover, the Penal Code did not make the revision that encompasses DV cases.¹⁶ The current Japanese Penal Code was created more than 100 years ago in 1907 when the concept of patriarchy and discrimination against women was still more acceptable.

⁸ DVPA§10

⁹ DVPA§6(1)(2)

¹⁰ DVPA§8, §8–3

¹¹ See <http://www.gender.go.jp/e-vaw/book/images/pdf/stoptheviolence.pdf>

¹² Ibid. Trends in the Number of Consultation to DV Centers.

¹³ Ibid. Trends in the Number of Police Responses on the DV case.

¹⁴ Ibid. Trends in the Number of Temporary Protection for victims in Emergency by DV Center.

¹⁵ See Inoue 2014.

¹⁶ Recently it just began to reform only the provisions on sexual assault.

In many countries the criminal responses are laid out in the core part of DV policy and then combined with civil procedures and the social security system. They are trying to build the corresponding mechanism as a whole. However, in Japan, the important core part is missing.

Of course, even in Japan, punishment under the penal code, such as for assault, injury, or rape, is also applied to DV cases. However, it is difficult to collect evidence because DV is a criminal act that takes place behind closed doors. It is also difficult to take criminal proceedings due to various factors.¹⁷ This is clear from a variety of surveys.¹⁸

In addition, in most DV cases, each action and act of violence is relatively slight. However, the victim suffers from such violence, including psychological, sexual, economic, social control, and other means, repeatedly and for a long period. As result, the victim is heavily and seriously damaged. The current criminal justice system considers and evaluates such continuous and repetitive actions inadequately in terms of the enormity of the situational damage. It is necessary to revise the penal code for such situations.

Such a lack of revision of criminal justice has caused an ambiguity in the social evaluation of perpetrators or batterers. This has caused attacks on the victims in the community and resulted in the victims not receiving administrative and welfare services.

On the other hand, a practical response by police has already begun, but a lack of revision of the penal code is an obstacle for its sufficient development.

3.2 The Insufficiency and Inefficacy of Protection Orders

A protection order is not sufficient to protect DV victims. Moreover, there is no provision of the police, prosecutor, or administrative officers issuing emergency protection orders. Protection orders in Japan belong to civil affairs. However, for its enforcement, the roles of the police and criminal justice are important. Moreover, the evidence needed to issue a protection order is hardly collected by the victim after she/he escapes the violence. To maintain and collect evidence relating to such cases, police officers must take firm roles against violence, and their coordination and cooperation is required.

Therefore a protection order in Japan is inefficient and unsuitable for protecting victims and for their needs, because of (1) the inadequacy of the protection order in both contents and procedure, (2) the weakness of protection order enforcement (3) the deficiency of collaboration with non-judicial professions and organizations, e.g., local government, the medical profession, and private groups to assist DV victims.

3.3 Necessity of Collaboration in Several Legal Fields and Other Professions

DV is a violation of human rights in the field of ordinary life and the damage is wide-ranging. Generally, in a dispute in the field of life, the confirmation of the legal rights and obligations in judicial procedures does not necessarily lead to a direct solution to problems. Victims' problems are comprehensive, for example, ensuring immediate residence, children's education, disease treatment, divorce, child custody, and work in the future. The eventual resolution for victims is to live safely in their community. In contrast, the services that justice

¹⁷ The victim herself feels ashamed of being a victim of DV. She hesitates to lose her child's father to criminals; additionally, she does not want to lose the breadwinner of the house.

¹⁸ Ref. Researching group on legal enforcement 2014. Katagiri 2016.

can provide are partial. This divergence between the comprehensiveness of possible problems and the partiality of the legal service is great and serious. To fill this divergence, it is necessary to collaborate with several legal fields and other professions, and create a mechanism for comprehensive DV measures.

First, it is critical to organize cooperation in crossing the judicial system in the narrow sense of civil, family, and criminal law. In addition, it is important to ensure that welfare systems and welfare policies of the administration cooperate with the judicial system. It is significant to study the return to the legal ideas and principles of each legal field in terms of social visions.

Furthermore, judicial proceedings and the traditional legal interpretations or legal theories, as symbolized in the recovery of infringement profit, are basically past-oriented. In contrast, the means necessary for the victim are future-oriented and aimed at the escape from current danger and rebuilding a future life. This difference is also critical when considering effective DV measures.¹⁹

3.4 Ambiguity over the Responsibility of Public Institutions

The responsibilities of national and local governments have been noted clearly in the DVPA. Nevertheless, there are two problems. First, there is a large difference in concrete measures between local governments because of the abstract provision of the DVPA.²⁰ Second, there is the possibility of assignment to the public institute and private groups. In Japan, prior to the enactment of the DVPA, private organizations conducted victim assistance and have accumulated skills of support. Currently, they are still at the forefront of support and are playing a major role in assisting victims even in urgent or dangerous cases.²¹ Though their activity is indispensable for DV victims in accessing justice, they do not have any status in the legal procedure. Public financial assistance for private associations has improved gradually but is still insufficient and unstable, depending on national and local government budgets. Hence, it is difficult to provide stable support to the victims. We should consider the roles of the public and the private sectors in an appropriate manner while taking advantage of the skills and experience of private organizations.

3.5 Gap between Actual DV Cases and the Assumptions of the Modern Legal System

It is important that the problems caused by the asymmetric relationship lie in common behind these concrete problems. There is a discrepancy or gap between assumptions on relationships in a modern legal system and the relationship in an actual DV case. Generally, some principles based on the modern legal system, for example, in the adversarial system is unsuitable for DV cases due to DV characteristics such as the following: (1) victims suffer continuous violence over a long time period; (2) victims are controlled not only by physical power but also by other means, e.g., psychological, sexual, economic, social, and gender violence. The victim

¹⁹ See *ibid.*

²⁰ The DVPA provide only that Prefectures should create their own DV basic plan as a kind of “administrative plan”. It does not have concrete contents or a kind of national standard. “Administrative plans” are used in the area of land use and planning or public utilities. I think that this method is not suitable DV case which is concerned the violation of human rights.

²¹ Private organizations are in charge of the complex and difficult cases wherein public institutions find it difficult to cope.

has been driven into a situation where he or she cannot make sufficient judgments related to their assets or social situation. There is serious inequality (contemporary asymmetry) between the victim and the batterer; and (3) The damage is so extensive that its problems and consequences relate to various areas, and its influences might last for a long period.²²

This discrepancy results in a communication failure between the parties and the legal profession, and it also interferes with access to justice by vulnerable groups. The problem caused by the asymmetric relationship frequently brings about problems and issues in every field of law, in legal interpretation,²³ in the context of its enforcement,²⁴ and also when we reform the legal system. It is not only criminal law that primarily deals with crime on the street among strangers but also civil law governing the rights and obligations among equal parties (in theory) that could appropriately deal with DV cases. For effective DV measures, it is necessary to eliminate this contradiction. Therefore, we should not only comprise improvements of each provision, but also pay attention to the gap between actual DV cases and the assumption of the modern legal system, including the field of civil, criminal, social security, and administrative law.

4 Asymmetric Relationship Problems and Modern Legal Systems: Traditional Asymmetry and Contemporary Asymmetry

In fact, the problem of asymmetry itself is a fateful or familiar issue for the modern legal system, because it has achieved equality under the law by abstraction from the real attributes of individual human beings. A modern legal system, in theory, is a tool for dispute resolution based on the communication between equal parties. Needless to say, this assumption was meant to overcome a pre-modern society and establish a modern one with equal people as subjects of fundamental rights. In fact, in order to solve the problems caused by this discrepancy or asymmetry, the modern legal system has addressed them in a variety of ways to ensuring a communication between the parties. For example, for labor law, or consumer law, we have invented new notions of legal entities, such as employees/employer or consumers/company, and new legal principles in each field in order that employers or consumers who are in weak positions with limited abilities can use legal services and can communicate with their counterparts. This type of asymmetry could be called traditional asymmetry.

Both asymmetries have caused failures in communication and access to justice for vulnerable groups, but there is an important difference: (1) the circumstances of DV victims are quite varied by case, and we cannot consider them as one type of group or collective person; (2) In the labor and consumer law, the content of legal entities as workers and consumers only a fraction of the reality of the people of the attribute or personality. In contrast, the damage in DV influences the victim's entire life and personality. (3) It is difficult to discuss this issue from an approach as the hierarchical and social status since, in many

²² See Sawada 2006, Walker 1979, and Konishi 2001.

²³ The interviews that I was carried out in 2012, reported the case that with respect to protection orders for the purpose of ensuring safety of the victim, judge extremely passively interpret in action regulation of perpetrators from the point of view of ownership protection. See Inoue 2013a and Inoue 2013b.

²⁴ In the interviews that I carried out in 2013, officials of the court, in order to understand about the status of DV victims is insufficient, to not be the appropriate action, reported cases the victim is unable to use the system that has been set up. See Inoue 2012 and Inoue 2013b.

cases, DV occurs in couples of the same hierarchy.²⁵ (4) The limited ability of self-determination by DV victims is merely temporary and is recoverable with proper care and support. The state is variable and changeable. Therefore, it is not amenable to a fixed identity construction. Therefore, a traditional method is not suitable for and cannot resolve the problems caused by contemporary asymmetry.

If these contemporary asymmetry problems remain neglected, and we easily continue to operate the legal system on self-responsibility and private autonomy, the base principles, then access to justice for the weak or vulnerable persons such as DV victims will be restrained: the legal system and other public institutions cannot function as a mechanism to protect the weak or minorities' rights, which is their proper role. In turn, public sector or public authorities need to intervene much more actively and directly to solve these asymmetric relationships. However, the problem and its solution are not simple.. Direct intervention by the public sector would accelerate bio-politics by state, break the diversity of the intimate sphere, and so, it could be seen to detract from its contemporary significance.

Therefore, we should not simply choose between intervention and non-intervention policies, and we should not consider the binary scheme of rights and welfare policies. Rather, in order to correspond effectively with the various disputes and human rights violations caused by contemporary asymmetry, it is necessary to devise a new legal framework or approach, and to re-examine the existing system from the point of view of the asymmetric relationship. It is not possible to discuss all such points here, e.g., incorporating functions with a new expertise such as social work in the legal system. Social work functions can be allowed to recover DV victims' rights and capacities in the modern asymmetrical relationship as their effectiveness has been previously confirmed in several countries.²⁶

It is more important to note that, by incorporating this new profession into traditional functions, legal professions could change and find a new role that is appropriate to modern society.²⁷ DV is violence in the intimate sphere of ordinary life. Incidentally, human relationships in the intimate sphere are personal with an interest in the specific life and body of each member. Such a relationship is conceptually different from human relations in civil society based on the premise that assumes an equal relationship. The intimate sphere is a kind of intermediate level of organization or group, but it is unlike others because detachment from it leads to significant constraint. By relying on such an intimate-sphere concept, we are able to be relatively free of the Japanese-style modern family that is based on the blood relationship and marriage. We can then look into the reality of DV and expand the scope of discussion to

²⁵ It does not mean that approaches such as class and hierarchy are not necessary, in trafficking cases, for instance, and it may be useful even in other cases. However, I consider that instead of a single element or approach, the gender approach is more appropriate as the complex approach is more effective.

²⁶ For example, in Taiwan, France, and the US.

²⁷ Mekki 2015 is very impressive. She has based her co-work with reserchers on the National report while considering means of action: regulations for perpetrators of such protection order of DV an important example, positioned judicial protection of people with a vulnerability as the new role of the judiciary, which simply does not suffice a barrier-free superficial. Hence, we need to continue to expand the ability to judge. However, in the report, there was no analysis of the relationship between the system of analysis and existing rights of the structure of the vulnerability itself. In none of these analyses, the proposal becomes the first subject of the judicial budget cuts. To clarify such a new role, considering the issue from the standpoint of social theory is essential. For example, gender theory, relationships, and positioning of the vulnerable definition and institutions from the perspective of subaltern theory. Without such a discussion, against the flow of neoliberal reform, it is not possible to continue to achieve this new role. We will discuss the same in another study.

same-sex couples and sexual minority couples (such as the LGBT community) that are outside the framework of the marriage system and difficult to support.

5 Conclusion and Implications: Towards New Role of the Judiciary System on Contemporary Asymmetry Relationship

In Japan, a legal response to DV problems only started in 2001. The special act was equipped with protection orders by the civil court and protection and consultation by administrative bodies. However, even in an urgent case, this is not sufficient. This is mainly because the system lacks important principles such as “The victim’s safety is paramount” and a “No tolerance policy.” Long-term assistance is necessary to reconstruct a life, even as defined within the act, and is quite unsatisfactory (for example, mental care, financial and job support, housing, and so on). DV measures in Japan are designed on the assumption that the victims can escape to a shelter. Therefore, non-typical cases,²⁸ wherein the victims wish to continue living in their own house, cannot be accounted for.

In the acute and dangerous stages, the court should guarantee safety and operate protection and other measures so that victims who have temporarily lost the capacity of self-determination can recover their capabilities. After that, they can decide on various matters such as divorce, child custody, and the settlement of property. It is important to wait for the victim to recover self-determination while ensuring the safety of the victim. The judge and court should take part in new roles so that matters do not become irretrievable or worse for victims using means such as protection orders for correcting or re-balancing asymmetrical relationships²⁹, until the self-determination of victims recovers. With regard to the reconstruction of a future life, the court should take care not only with the procedures for divorce, but also with the issue on the couple’s property, taking into account the asymmetry that exists between the parties.

In other words, the court should play a role to protect DV victims’ rights enough within the contemporary asymmetry relationship and the access to justice is restored. This role is a sort of guardian-ship³⁰ by the court in asymmetry relations. This is different from favoritism or commitment to one of the parties³¹ because of their vulnerability. Also it is different from intervention into the decisions of vulnerable persons, or making a decision instead of her/him. Rather, it is guardianship or assistance for vulnerable persons in order to substantiate their rights to have access to justice.

Such a role is a new judicial service for people with vulnerability, but a superficial or barrier-free measure is not sufficient. This role is different from a method of abstraction from the attributes of a party; also the method of grouping the parties must be performed in a new way, while continuing to expand ability of the judge. It is important that this expansion does not mean a collapse or abandonment of the ideas of a modern legal system. Judges should expand their abilities, but maintain their neutrality as arbitrators, in order to realize an equal

²⁸ Response for non-typical cases could recall the basic and essential question, why victims must escape.

²⁹ Also it is necessary to restrict the transfer of the properties of residence or protect of the rights of residence. In Japan, neither have yet been institutionalized.

³⁰ In general, it is related to concerns with the adversarial system and inquisitorial system. I do not subscribe to a dichotomy, rather the third way.

³¹ This is the same in the policies of the government. Currently in Japan, unfortunately, there is a local government that is reluctant to provide services to DV victims because of the principle of neutrality of the administration.

society while protecting the rights of the minority and vulnerable persons.

It is different from the ability and approach of traditional law. Therefore, co-operation with other professionals would be required. Here it is not possible to discuss all of these issues, for example, incorporating functions with a new expertise such as social work in the legal system. The DV victims' rights and capacities can be recovered by social work functions in the modern asymmetrical relationship. This method has been previously confirmed to be effective in several countries.³² It is more important that, by incorporating this new profession into traditional functions, legal professions could change and find a new function and role appropriate to modern society.

It is essential to clarify such a new role considered from the standpoint of social theory: for example, gender theory, relationships, and the positioning of the vulnerable by definition and institutions from the perspective of subaltern theory. Without such a discussion, against the flow of neo-liberal reform, it is not possible to continue to achieve this new role.³³

Contemporary asymmetrical relationships in DV cases are very individual and, at the same time, comprehensive. These problems require a new, delicate prescription and suggest the need for a new role for the judiciary.

References

- Aiuch M., Inoue M., Ichimori M., Kondou K., & Seki F. 2005. Women in Japan: Change and resistance to change, in *Female Well-Being Toward a Global Theory of Social Change*, eds. Billson J.M. & Fluehr-Lobban C., Zed Books, London, pp. 207–235. (in English)
- Fineman, M. & Grear, A. 2014. *Vulnerability*, Ashgate.
- Fineman, M. 2008. The Vulnerable Subject: Anchoring Equality in the Human Condition, in *Yale Journal of Law & Feminism, Vol. 20, No. 1, 2008*
- Inoue, M. 2007. Violence in the Intimate Sphere and the Role of Judiciary, *Kanagawa Law Review*, 39–1, pp.25–65. (in Japanese)
- Inoue M. 2012, The Role and Functions of Law in Contemporary Asymmetry Relationship, in eds Asakura et al., *Gender and Law vol. 1*, Kajoshupan pp. 98–114. (in Japanese)
- Inoue M. 2013a, Present on DV and Theoretical Issues, in ed. *Researchin group on legal enforcement DV victims can help by law: Crossing Over Legal Fields and International Comparison*, Shojihome pp.11–28. (in Japanese)
- Inoue M. 2013b, Domestic Violence as Violence in the Intimate Sphere, in ed. *Researching group on legal enforcement DV victims can help by law: Crossing Over Legal Fields and International Comparison*, Shojihome pp.66–87. (in Japanese)
- Inoue M. 2014, “The present situation and theoretical issues on DV policy in Japan” *Horistujihou 2014*, 86 vol. 9,(1076)pp.57–62. (in Japanese)
- Katagiri, Y. 2016. ed, *Law and Policy on Domestic Violence in Japan: Realities and Problems*, Kinokuniya. (in English)
- Konishi, T. 2001. *Domestic Violence*, Hakuishu.
- Mekki, S.A. 2015. The lecture on Civil constraints on personal mobility at the XVth World Congress International Association of Procedural Law, http://www.iapl2015.org/uploads/konusma_metinleri/Soraya_Amrani_Mekki/Soraya_Amrani_Mekki.pdf
- Regilience, 2005, *To Harmed You: Respect and dignity on and by me*, Nashinokisha.

³² For example, in Taiwan, France and US.

³³ We should analyze of the relationship between the system of analysis and existing rights of the structure of the vulnerability itself. The none of these analyzes, the proposal is that becomes the first subject of the judicial budget cuts. We will discuss in another opportunity.

- Researching group on legal enforcement, 2014. *DV victims can help by law: Crossing Over Legal Fields and International Comparison*, Shojihome. (in Japanese)
- Sawada, I. 2006. Study on the health status of women who separate because of intimate partner's violence and the long-term influence of violence. <https://kaken.nii.ac.jp/d/p/15592321/2004/3/ja.ja.html> (accessed 10 Sept 2015)
- Walker, L. 1979. *Battered Woman*, Harper & Row.
- Watts, C. & ZIMMERMAN C. 2002. Violence against women: Global scope and magnitude, *The Lancet*, 359 (9313): 1232–1237.
- White paper in Japan 2012 on Gender equality
- WHO 2005, *Multi-Country Study on Women's Health and Domestic Violence Against Women*. <http://apps.who.int/iris/handle/10665/43309> (accessed 10 Sept 2015)

Philip Osarobo Odiase*

Reception of the Evidence of Vulnerable Witnesses in Legal Proceedings in Nigeria

The goal of the Court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.¹

Abstract

Generally, ensuring the quality and accuracy of witnesses' *viva voce* (verbal) evidence in Court proceedings, is central to achieving fairness and transparency in legal proceedings. Incidentally, there are occasions where such witness may be vulnerable witnesses whose quality and accuracy of evidence may be negatively affected due to various inherent variable factors. Under the Nigerian legal system, testimonies of vulnerable persons where relevant and vital are admissible in the Court of law in order to achieve fairness; persons such as children, the aged, mentally disable, physically challenged, intimidated witnesses and victims may be compelled to testify as witnesses in legal proceedings. Section 175 and 176 of the Nigerian Evidence Act 2011 provides for competence and compellability of witnesses including those that may be classified as vulnerable persons to testify where their evidence are relevant, vital or indispensable, and will aid the Court in arriving at a just conclusion. This paper examines the legal framework for receiving testimony of vulnerable and intimidated witnesses in legal proceedings in Nigeria; it interrogates the adequacy of extant provisions.

Keywords: evidence, testimony, vulnerable witness, *viva voce*, competency

*Corresponding author: Philip Osarobo Odiase, Department of Commercial Law, Adekunle Ajasin University, Akungba-Akoko, Ondo State, Nigeria, Email: philiplaw2002@yahoo.co.uk

1 Introduction

Nigeria operates the adversary system of adjudication,² in contradistinction to the inquisitorial system. In the adversary system of adjudication, parties and their lawyers are given ample

¹ Per Madame Justice L'Heureux-Dubé, in *R. v. Levogiannis* [1993] 4 R.C.S. 475.

² *Leaders of Company Ltd. & Anor v Major General Musa Bamaiyi* (2011) 199 LRCN 185.

control over how facts are collected and presented to Court;³ parties generally adduce evidence that are favourable to their position and will weaken the opponent's case, while at the same time suppressing or discrediting unfavourable evidence. Thus a key instrument under the system is *viva voce* testimony in proof or disproof of the facts in issue (Cross and Tapper 1995: 224). The role of the judge in the adversary system is restricted to that of an impartial umpire; holding the balance between the contending parties, without descending into the arena of conflict in order to avoid obscuring his sense of justice; ensuring that the evidence is presented in compliance with laid down rules.⁴ In performing this role, the Court has two basic functions, to wit; reception of evidence, whilst the second is the corollary of the first, which is evaluation and ascription of evidential value to the received facts.⁵ There is no gainsaying that reception of evidence is a very essential aspect of the Court process; it provides the data -that is the facts- which the Court relies on to form its opinion and rationale for its judgement. Thus in order to maintain a minimum standard of fairness, transparency and strengthen the credibility of the justice system, the reception of evidence by Courts is by and large statutorily regulated.

2 Evidence

Nigeria is a Federal-State⁶ (Odiase 2009: 27-42) and under her Federal Constitution, the power to make law with regard to evidence is vested in the Central (Federal) Government.⁷ In exercise of the said power, the Federal Legislature enacted the extant Evidence Act, 2011(Evidence Act). At the moment, the Act is the principal statute regulating the reception of evidence in Nigeria. The Act applies to all judicial proceedings before any Court in Nigeria except that it does not apply to proceedings before an arbitrator(s), a field general Court martial or judicial proceedings in any civil cause or matter before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court, unless if there is any other statute empowering these Courts to enforce any or all the provisions of the Act.⁸ However, whenever these Courts adjudicate on any criminal matter, they are required to observe and adhere to the provisions of the Act.⁹ In addition to its provisions, the Evidence Act allows the reception of any evidence that is made admissible by any other legislation in force in Nigeria.¹⁰

³ In the words of Ogbuagu JSC "... it is implicit in the adversary system of administration of justice which operate, that all material evidence, shall be called by the parties themselves. That the position of the trial Judge, is that of an impartial umpire and he lacks the power to call any witness or evidence without the consent of the Parties. *Marcus Ukaegbu v Mark Nwololo* (2009) 169 LRCN 210 (SC), 253

⁴ *Rabbo Damina v The State* [1995] 8 NWLR(Pt. 415)513

⁵ *Gbemisola v Bolarinwa & Another* (2014) Vol. 234 Law Reports of Courts of Nigeria (LRCN) 137 at 181. Also *G. M. O. Nworah & Sons Co. Ltd v. Afam Akputa* [2010] 3 S.C. (Pt. I) 23

⁶ An arrangement whereby governmental powers within a country are shared between a central government and a number of unit governments. The cardinal principle being the requirement of equality and autonomy of each tier of government and non-interference with the functions of the other. Nigerian Nation federation has three tiers of governments; these are Federal, States and Local governments.

⁷ The legislative powers to make law with respect to 'evidence' is exclusive conferred on the federal legislature (the National Assembly) Pursuant to the combine effect of section 4, item 23 of the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999 as Amended (hereinafter the Constitution), item 23, Part I, Second Schedule

⁸ Evidence Act, s 256.

⁹ *Ibid*, s 256(2)

¹⁰ *Ibid*, s 3. An example of such legislation is the Child's Right Act 2003, Cap C50, LFN 2004 (Child's Right Act), s 160.

A preliminary point to note is the silence of the Evidence Act on the meaning of the term "Evidence". The Act assumes that the meaning is not in doubt and thus commences by stating the nature of evidence that may be adduced in any legal proceedings. It provides "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts declared to be relevant and of no others."¹¹ A painstaking study of this provision reveals that evidence is information that provides grounds for the belief that a particular fact or set of facts is true (Dennis 2010: 3). Strictly, in judicial proceedings, evidence is the information received by the Court from the parties by which any alleged matter of fact the truth of which is in issue is established or disproved.

Such information in proof or disproof of any fact in issue may be presented to the Court as evidence by means of oral, documentary or real testimony; the most preferred being oral testimony. This is because Courts attach high evidential value to *viva-voce*¹² testimony for two reasons. First, in addition to the testimony, it gives the Court opportunity of observing the demeanour of the witness as he testifies, interpret and draw proper inference from the presentation as to the credibility of witness.¹³ Secondly it is the means employed in the presentation of other types of evidence (real and documentary). In recent time in a bid to avoid inordinate delay and expedite proceedings, the civil procedure rules of most Courts of record in Nigeria have introduced what in the Nigerian legal parlance is referred to as "front loading". The effect is that in place of oral examination in chief,¹⁴ most Courts now accept affidavit depositions by witnesses or other such like statements taken under oath; subject to the deponent being made available in Court for *viva voce*¹⁵ cross-examination. Despite this development in the sphere of civil matters, the use of witness testimonies in obtaining accurate and reliable evidence remains vital aspect in achieving fair and transparent trial (Salifu 2015). However, instances may arise (whether in civil or criminal matters) where such witnesses may fall within the category of persons classified as vulnerable or intimidated witnesses.

3 Vulnerable witnesses

At the moment, the term "vulnerable witness" or "vulnerable persons" is not employed in any statute and as such, there is no statutory definition of what category of persons that can be classified as vulnerable witnesses in Nigeria. For the purpose of this paper it will suffice to adopt with slight modification the definition provided by Elliott (1998: 10) that a vulnerable witness is

any witness (whether a victim or not) who is likely to find *testifying before a Court of law*, unusually stressful, upsetting or problematic, because of *his* personal characteristics; the nature of the *issues at stake*; the nature of any evidence *he is* called upon to give at any stage to assist the justice process; the

¹¹ Evidence Act, s 1.

¹² Latin: by voice. Evidence which is given orally to a Court by a witness' word of mouth (as opposed to in writing, such as by affidavit or deposition). See *John Nwachukwu v. The State* (1986) -SC.233/1984

¹³ *Engineer Goodnews Agbi v Chief Audu Ogbah & Ors* [2006]5 S.C. (PT. II) 129

¹⁴ The questioning of a witness before Court by the party who called him. Evidence Act, S 214(1); *Abudu G. Kehinde v. Wahabi Irawo* (1973) All N.L.R 187.

¹⁵ See the High Courts' Civil Procedure Rules and others; *Akpankere Apishe, Kakeme Anekam and Obofire Achike v. The State* (1971) All N.L.R 53

defendant characteristics; any relationship between *him* and the defendant; or intimidation.¹⁶

A similar but more practical definition can be found in various domestic laws of some advanced nations. For example, in Queensland, a vulnerable witness (called special witness) means

- (a) a child under 16 years; or
- (b) a person who, in the court's opinion—
 - (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
 - (ii) would be likely to suffer severe emotional trauma; or
 - (iii) would be likely to be so intimidated as to be disadvantaged as a witness; if required to give evidence in accordance with the usual rules and practice of the court; or
- (c) a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a member of a criminal organisation; or
- (d) a person—
 - (i) against whom domestic violence has been or is alleged to have been committed by another person
 - (ii) who is to give evidence about the commission of an offence by the other person.¹⁷

Suggesting a "test of vulnerability" to assist the Courts in the United Kingdom in declaring a witness as vulnerable, the Advisory Group on Video Evidence¹⁸ suggested that such witness is a person "likely to suffer an unusual and unreasonable degree of mental stress if required to give evidence in open Court, having regard to the witness's age; their physical and mental condition; the nature and seriousness of the offence; and the nature and seriousness of the evidence they are to give." Thus the class of witness considered as vulnerable witness in most countries are children, persons with temporary or permanent disabilities or illnesses, elderly persons, intimidated witnesses (for instance victims of special offences like sexual offence) or a person whose quality of evidence may diminish by reasons of fear or distress in connection with testifying in the proceedings.

In Nigeria, though the term vulnerable witness is not statutory defined and thus absence of legal parameters for the determination of who is one. However, applying the above test, there are some provisions in the country's laws for the reception and treatment of the evidence of persons who may be regarded as falling within the ambit of the above definitions.¹⁹ For the purpose of this paper and taking into consideration the local peculiarities in Nigeria (legal complexity in the field of crime and evidence obtainable in more advanced countries are yet to be transplanted into Nigeria), it will suffice to classify these persons into two broad groups.

¹⁶ Words in italic mine.

¹⁷ Queensland Evidence Act 1977 [as amended by all amendments that commenced on or before 22 October 2015] available at <https://www.legislation.qld.gov.au/legisln/current/e/evidcea77.pdf>, last accessed 8 November 2015

¹⁸ 1989, also known as the "Pigot Report" 1989

¹⁹ For instance Victims and Witnesses (Scotland) Act 2014; See also the Youth Justice & Criminal Evidence Act 1999, as amended s 16 & 17.

First, it is generally accepted that vulnerable witnesses include persons such as children, persons of unsound mind and people living with disabilities such as an imbecile or dumb and deaf or afflicted with any other permanent infirmity of body or mind (in other words, children and vulnerable adults). The rationale for this classification is the general presumption that the ability to give evidence in the open Court by this group of persons is most likely to be diminished by reason of their age, level of intelligence, mental impairment, physical disability or disorder.

The second group arose as a result of the challenges posed by the emergency and prosecution of complex criminal cases like money laundering, organised crime, terrorism (militant groups like Boko Haram and others), high profile corruption cases (in public and private sectors), cybercrimes, sexual crimes, domestic violence and the likes. Key prosecution's witnesses including victims of these crimes are most likely to be confronted with a number of risks to their person; such as threats or actual harm to their person, injury to their financial interest, their property; or/and actual harm or threats against a third party connected to the witness (for example a relative, a friend and so forth). A natural inclination of any human being is that the slightest awareness of any threat or actual danger to himself or relative will in most cases diminish the quality of the witness's testimony or in some cases prompt the witness to withdraw from testifying. This creates another category of vulnerable witnesses who may or may not fall within the parameters of the former group. These are persons who may likely suffer significant risk of harm because they gave or are giving or agree to give evidence in a particular trial; they are commonly referred to as 'intimidated witnesses'.

The reception and evaluation of the evidence of these groups of vulnerable witnesses by Courts in Nigeria raises some fundamental concerns for justice delivery in the country. The first is whether there is any legal test for determining who a vulnerable witness is? As earlier mentioned and without mincing words there is no such test. Other basic issues are the legal criteria for determining the competency of these persons as witnesses? What are the legal measures put in place to ensure the quality and accuracy of the evidence of these persons? The following discussions address the last two questions.

4 Competency of vulnerable witnesses

Generally, evidence may be given in all proceedings before the Courts in Nigeria by witnesses adjudged by Court to be competent. A competent witness is anyone who has personal knowledge of the facts relevant to any fact in issue and is legally permitted to give evidence.²⁰ The competency of vulnerable persons to testify before judicial proceedings is by and large a constitutional issue. The right to freedom from discrimination is guaranteed by the Constitution of the Federal Republic of Nigeria.²¹ Uniquely, unlike other fundamental right in the constitution there is no exception or derogation from the right; in other words freedom from discrimination is absolute.²² However, in the interest of fair trial, the reception of the evidence of these groups either as party or witnesses is statutorily regulated.

²⁰ *J. Elabanjo v Alhaja A. O. Tijani* [1986] 5 NWLR (Pt. 46) 952. Competent witness is a person who can lawfully be called upon to give evidence without any disability on account of the law or is not exempted by the provisions of the law from giving evidence.

²¹ The Constitution, s 42.

²² *Ibid*, s 45; provides exceptions to the rights guaranteed by the Constitution.

Whether a person who is competent to testify will be allowed or can be compelled to do so in any trial will depend entirely on some statutory considerations. It is a truism that every compellable witness or person who may be allowed to give oral evidence in Court is a competent witness; however, it is not every competent witness that is compellable or will be allowed to give evidence (Amusa 2014: 49-53). Statutorily, pursuant to section 175(1) of the Evidence Act, a competent witness can be declared incompetent as a result of his intellectual capacity. Pursuant to the section all persons are presumed "competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."²³ This provision provides for the taking of evidence of children and vulnerable adults. The following discussion is on the class of persons referred to in 175 of the Evidence Act,

4.1 Child witness

For the purpose reception of the evidence of a child, it is important to know the age bracket of persons that may be referred to as child. The Evidence Act is silent on who is a child. However, under the Constitution of the Federal Republic of Nigeria, the age of franchise is eighteen years.²⁴ Contractually, the contractual capacity to contract is the common law age of majority; the age of twenty-one is the age of majority at common law (Sagay 2000: 401-410). From judicial viewpoint, for the purposes of receiving evidence, a child is a person below the age of fourteen (Amusa 2014: 49-53).²⁵ With regard to criminal culpability, the Criminal Procedure Act states that a "child" means any person who has not attained the age of fourteen years" It however defines an "adult" as "a person who has attained the age of seventeen years or over."²⁶ The Child Rights Act a Federal Statute, fix the age of a child at eighteen years.²⁷ The Administration of Justice Act 2015, a statute enacted primarily to facilitate criminal procedure, defines a child as "a person who has not attained the age of eighteen years. The only conclusion that can be reasonably made is that a child in Nigeria is any person that is below 18 years old.

In practice, there is no fixed rule on how old a child must be before he can testify before a law Court; this judgement is left to the discretion of the Court. Statutorily every child is presumed competent to give evidence in any civil or criminal proceedings in Nigeria.²⁸ However, in the reception of the evidence, there is a legal distinction between a child strictly so called and a young person. Thus, pursuant to the provisions of the Evidence Act, a child who has attained the age of 14 years is subject to the requirements of sections 175 of the Act, allowed to give sworn evidence in all cases.²⁹ Whereas, a child who is below 14 years but possesses sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth, is not allowed to give sworn evidence,³⁰ but he is allowed to give unsworn evidence provided that in the opinion of the Court, he is possessed of sufficient intelligence to justify the

²³ Evidence Act, s 175(1).

²⁴ Ss 77(2) and 117(2) of the Constitution of the Federal Republic of Nigeria 1999

²⁵ See *Okon v The State* (1988) 1 NSCC p. 157; *Mbele v The State* [1990] 4 NWLR (pt 145) 484; *Ogunsi v The State* [1994]1 NWLR (pt 322) 583; and *Onyebu v The State* [1995]4 NWLR (Pt 391) 510.

²⁶ Criminal Procedure Act, Cap C41, LFN, S.2(1).

²⁷ Child's Right Act, s 277.

²⁸ Child's Right Act, s 160(1).

²⁹ Evidence Act, s 209(2).

³⁰ Evidence Act, s 209(1).

reception of his evidence and understands the duty of speaking the truth. This is a departure from the position under the repealed Evidence Act,³¹ which allows the evidence of any child who understands the nature of an oath to be taken under oath (sworn) without reference to the child's age. The present position is a disservice to a child witness, because, in criminal trials, the Court cannot convict a defendant on the unsworn evidence of a child unless it is corroborated by some other material evidence in support;³² regrettably, this has in plethora of cases militated against the quest for justice.³³

The age long rationale for imposing these restrictions and requirements amongst others is that adult witnesses are presumed to have the knowledge of the fear and nature of oath-taking and, the essence of truth-telling. Sadly, this presumption does not avail children who are generally believed to be bereft of such knowledge (Dennis 2010: 557-563), hence are not allowed to give evidence on oath (Osadolor 2004: 185). Such evidence if admitted is to be taken with a pinch of salt and only acted upon if corroborated by material independent evidence. Justifying the stigmatization of child's evidence as generally unreliability, Professor Nokes (1963: 513) opines that "Very young children live largely in a world of imagination, and their powers of observation, understanding, memory and expression are rudimentary. Most children are influenced by what they hear from adults, not necessarily by way of deliberate suggestion or instruction." The stigmatization is further fortified because it is traditionally believed that the evidence of this class of persons is prone to fantasy, malice or speculations and that they are more likely to suffer from inability to properly observe and recall (Day 2012). There are also arguments that malice may induce a child to testify against an accused person whose face and physique he dislikes or scares him; that he may assume he experienced, saw or felt something or somebody that was in fact non-existent, or engage in guess work caused by forgetfulness and so forth. However, these arguments are contrary to recent empirical studies suggesting that children evidence was not as unreliable as was traditionally alleged (Dennis 2010: 559). Obviously, the implication of section 209 of the Evidence Act is to statutorily stigmatise the evidence of every child below 14 years as unreliable until corroborated.

In contrast to the above, the Supreme Court of Nigeria has prior to the enactment in plethora of case stated unequivocally, that "competency is not a matter of age but that of intellectual capacity;"³⁴ however, this position is yet to be codified and made part of the written law. Under the regime of the Child's Right Act some progress has been recorded; a deposition of a child's (below or above 14 years) sworn evidence is considered (whether in a civil or criminal matter) as evidence given on oath³⁵ and thus, does not require corroboration. Ultimately, a child's testimony whether sworn or otherwise, before it is received, demands that the competence of the child to give evidence is subjected to the competency tested.

³¹ Evidence Act 1945, Cap E14, Laws of the Federation of Nigeria.

³² Evidence Act, s 209(3).

³³ These may include criminal cases touching on Sexual offences, child abuse, child trafficking, domestic violence against women and children etc. For instance *Clement Obri v The State* [1997] 7 NWLR (Pt.513) 352 S.C. Where an accused was convicted of murder by the two lower Court on the evidence of a small child about 7 years, who was the only eye witness (about six years at the time the offence was committed) but on appeal to the Supreme Court, the judgements of both the High Court and the Court of Appeal were set aside and the appellant found not guilty of the offence charged and was discharged and acquitted.

³⁴ *Onyegbu v The State* (1995) 4 N.W.L.R. (Pt.391) 510 at 529.

³⁵ Child's Right Act, s. 160(2) ; this section of the Act has not been given judicial interpretation.

4.2 Vulnerable Adult Witnesses

This group consists of the aged, persons of unsound mind and people living with other disabilities including the dumb and deaf or afflicted with any other permanent infirmity of body or mind. There is a general misconception that disability denotes ‘unreliability; hence the need to regulate the reception of the evidence of this group (Dennis 2010: 616-617).

The aged

The general presumption is that the power and ability of recall dims with age.³⁶ This presumption seems reasonable because elderly persons (witnesses) become vulnerable (at least in some cases) as a result of mental or physical disabilities/illnesses which are often associated with old age. However, due to the importance of the aged persons in certain cases (Nwadialo 1981: 213) their evidence may be crucial to resolving facts in issues and where that is the situation, he may be called as a witness. For instance in *Prince Yahaya Adigun & Ors v A.G of Oyo State and Ors*³⁷ the matter centred on succession to traditional chieftaincy stool. In resolving the facts in issue, the Court relied on the testimony of on, an old man, aged about 75 years and blind. The Court was of the opinion that these physical disabilities did not detract from the quality of his information because his vocation places him in a very crucial position to understand the facts in issue.

Generally, no matter how old a witness is, he is a competent witness, if he is able to understand questions put to him and to give rational answers to those questions. Where an aged person's ability to testify is challenged or is in doubt, the Courts will be compelled to carry out preliminary test to determine his competence. Once the test is successfully administered on the aged person, he is competent to give evidence whether sworn or unsworn; provided he understood the questions put to him coupled with being able to provide rational answers to same. (Osadolor 2004: 201). Issues of recall and memory loss of aged witnesses could be dealt with in milder cases by the administration of the preliminary test or in complex ones by expert opinion. Even at that, where there is an intelligibly recurrent and comprehensible line of thought in the testimony of aged witnesses, however “patchy” such testimony might be, the Court may still receive it after warning itself of the risk of reliance on it.

Unsound Mind

Generally, every person is, unless the contrary is proved, presumed by law to be sane.³⁸ The law recognizes that even the mentally infirmed have their lucid moments (Boerne 2008: 31), hence section 175(2) of the Evidence Act provides that "A person of unsound mind is competent to testify unless he is prevented by his mental infirmity from understanding the questions put to him and giving rational answers to them." Thus, every person sane or insane is presumed competent to testify. This rebuttable presumption may be displaced where such potential witness suffers

³⁶“How Memory Changes with Age: Symptoms and Information.” Patient Education Centre, Harvard Medical School .<http://www.patienteducationcenter.org/articles/how-memory-changes-with-age/>, accessed 26 June, 2015) Also “Improving Memory: Understanding Age-Related Memory Loss.” Harvard Health Publications. <http://www.health.harvard.edu/mind-and-mood/improving-memory-understanding-age-related-memory-loss> accessed 26 June, 2015.

³⁷ [1987] All NLR, 328

³⁸ *Josephin Ani v The State* [2003] 5 SC (Reprint) 33 at 34

from obvious intellectual incapacity or defective understanding. When such witness is presented to testify, the Court will be compelled to conduct enquiry into his sanity *ipso facto* his competency to testify at the material time. Except under such circumstances, a trial Judge need not carry out an investigation on the mental condition to determine the sanity or insanity of any witness in the absence of any reason or conduct compelling the Judge to suspect that the witness is of unsound mind.³⁹

With regard to reception of evidence, whether the witness is sane or insane is only of consequence or importance at the time he is presented as a witness and throughout the duration of his testimony; his antecedent is of no moment. However, his state of mind as at when he is presented as a witness is a question of fact to be decided by the trial Judge, though sometimes with the aid of medical experts' opinion. The existence of medical certification is not ordinarily a conclusive proof of the state of mind of the witness; it will only aid the Court in reaching a conclusion.⁴⁰ In practice, where proper psychiatric report confirms the fitness of a person of unsound mind to testify, the Courts, subject to administering the competency test, will most likely adjudge him competent and admit the evidence;⁴¹ taking into consideration contemporaneous acts of the witness.⁴² However, in more knotty situations, the Court may have no option than to rely solely on its investigation (Nwadialo 1981: 213); thus witnesses whose disabilities interfere with their capacity to comprehend and manipulate language are at a stark disadvantage in the justice process (Benedet & Grant 2012: 14). Where from investigation, the Court is of the view that the unsoundness of mind is only of a temporary nature and likely to disappear, the Court in deserving cases and in the interest of fairness, may grant a stand down or an adjournment in the case for purposes of receiving such person's testimony at a later time or date, provided it will not work injustice against any of the parties.

Dumb

Where a witness is dumb, subject to preliminary competency test, he is required to give evidence in any manner in which he can make it intelligible; by writing or by signs. Such writing must be written or the signs made in open Court.⁴³

4.3 Administration of Competency test

The rebuttable presumption of competence in section 175(1) of the Evidence Act applies equally to vulnerable witnesses and can only be challenged for any of the reasons stated in the section⁴⁴ and similar provisions.⁴⁵ Thus every vulnerable witness is presumed competent to testify in any legal proceedings until his competency is successfully challenged. Until then, there is no obligation on the Court to inquire into the competency of any witness. In the opinion of Agbaje JSC,⁴⁶ "since all persons are competent to testify, until the competence of a witness is challenged

³⁹ See *Iboko v. The State* (1965) NMLR 384.

⁴⁰ *Augustine Guobadia v The State*, (2004) 2 S.C. (PT. II) 1

⁴¹ *Sule Noman Makosa v The State* [1969] All NLR 355

⁴² See *R.v. Revitt* 34 Cr. App. R 87

⁴³ Evidence Act, ss 176(1) & 209(1).

⁴⁴ *Ibid.* See also *Asuquo Eyo Okon v. The State* (1988) ANLR 173 at 186

⁴⁵ Evidence Act, 176(1).

⁴⁶ *Asuquo Eyo Okon v. The State* (1988) ANLR 173.

for any of the reasons stated in the section, there is in my view no obligation on the Court to determine the competence of a witness to testify."⁴⁷

Procedurally, a challenge of the competency of a witness requires the Court to make a judgment as to whether the particular witness fulfils the statutory criteria. In doing this the Court is not required to exercise its discretion but circumscribed to the express statutory criteria⁴⁸ of deciding whether the witness is prevented from understanding the questions put to him, or he is prevented from giving rational answers to those questions by reason of age, physical or mental state of the witness. The witness need not understand every single question or give a readily understood answer to every question; because many competent able body adult witnesses would fail such a competency test. The Court is expected to dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide comprehensible answers, he is competent. On the other hand, if the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood by the court, he is adjudged incompetent to testify.

While the procedure for determining the competence of a witness is not expressly provided for under the Evidence Act, the ability of the witness is usually ascertained by putting questions which having no bearing to the matter before Court, across to the witness by the Judge. The aim in each case is to determine whether the witness is competent to give evidence in the particular trial. Consequently, the question is entirely witness specific. There are no statutory or practice predefined questions or answers. If the witness answers intelligently, he is presumed to be a competent witness. In other words, there is no general rule except that each witness must be assessed by the Court as to his competency. In the end the decision is a judgement about the individual witness and his competence to give evidence in the particular trial. In doing this the Court is enjoined to distinguish carefully between the issues of competence and credibility this is because the provisions do not require the witness to understand the special importance that the truth should be told in Court. This is because, at the stage when the competency question is being considered, it will be premature to determine whether a witness is or will be telling the truth; the weight to be attached to the evidence is to be considered by the Court in its final judgement.

On the whole, where the Court wrongly disqualifies a witness from testifying, it is a breach of the fundamental human right to fair hearing of the party calling the witness. (Babalola 2001: 456-480) As a result the Courts in most cases are weary of disqualifying witnesses at the stage of administering the competency test. Most Courts at that stage lean in favour of admitting such evidence, while consideration of the evidential value to be attached to the piece of evidence is postponed to and evaluated in the course of delivering final judgement.

5 Availability of testimonial aids

Taking into account the limitations of vulnerable witnesses, it is imperative that in order to ensuring the quality of their testimony appropriate measures are designed and put in place to facilitate and aid them in give full and accurate evidence. Apart from the provisions of the Evidence Act hitherto referred to, which only regulate the reception of the evidence of some specific vulnerable witnesses, there is virtually little or nothing in the *corpus juris* of Nigeria designed to aid vulnerable witnesses in communicating their testimony effectively before the Court and making the process stress free for them. Some of the existing statutory attempts aimed

⁴⁷ Ibid at 186,

⁴⁸ Report of Vulnerable Witnesses & Children Working Group February 2015, Judiciary of England and Wales, 28.

at aiding such witnesses are either too deficient, narrow or have their application restricted to defined offences.

One of such instance is the feeble attempt made under the Administration of Criminal Justice Act with regards to taking the evidence of a child and young person.⁴⁹ The Administration of Criminal Justice Act empowers the Court to exclude all or any person from the courtroom during the taking of evidence of a person who in its opinion has not attained the age of eighteen in "any proceedings in relation to an offence against or any conduct contrary to decency or morality", provided that the excluded person is not a member or officer of the Court; or parties to the case, their legal representatives or persons otherwise directly concerned in the case. Unfortunately, the section is deficient in many aspect; a major deficiency is that the section is not of general application, as it clearly defines the types of offences it relates to and thus too restrictive; secondly, it will exert little or no effect in assisting a child give full and accurate evidence, particularly where either of the parties (who is legally allowed by the section to be in court) is the intimidating factor that makes his giving full and accurate evidence very remote.

Further, this paper is also not oblivious of certain sections of the Evidence Act (though not specifically designed to aid vulnerable witness) which can be invoked or employed to aid a vulnerable witness communicate effectively in the course of testifying. For instance as earlier mentioned, where in the course of testifying an aged witness suffers memory loss or has problem with recall of facts, the provisions of section 239 of the Evidence Act may be invoked if appropriate in the circumstances of the case. The section states that

(1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

(2) The witness may also refer to any such writing made by any other person, and read by the witness within the time mentioned in subsection (1) of this section, if when he read it he knew it to be correct.

The Court in order to ensure justice is done to all the parties may allow the aged witness who is caught in a web of memory loss to refresh his memory and recall whatever forgotten facts of which he has been called to testify by reference to a document earlier written by him and which is relevant to the facts in issue. The snag to this statutory relief is that it is subject to the discretion of the Court to determine whether to or not grant the application. Secondly, the evidential value to be attached by court is dependent on been able to prove that the transaction in the document was still fresh in the witness's memory as at the time he made the writing.⁵⁰ In all these, in the interest of fairness and transparent trial, the law balances the interest of parties by ensuring that any such document used in refreshing memory is produced and shown to the

⁴⁹ Administration of Criminal Justice Act 2015, s.260.

⁵⁰ *R v. Jimo Amoo & Ors.*(1959) 4 F.S.C. 113 at 115; (1959) W.R.N.L.R. 199. See also *Sunday Oyinlola v. Commissioner of Police* (1975) N.N.L.R. 36.

adverse party where the adverse party requires it for cross-examination and tendering same as exhibit before Court.⁵¹

While pockets of statutory provisions which may be invoked to aid the first group of vulnerable witnesses exist here and there within the *corpus juris* of Nigeria, in the case of the second group of vulnerable witnesses it is near non-existence. Similarly, administrative protection of witnesses⁵² in Nigeria is near non-existence and progress towards putting in place a comprehensive witness protection law and functional protection services have been very slow in coming (Kariri 2014). So far, the only attempt at having in place a comprehensive witness protection statute was undertaken via the Witness Protection Programme Bill which originated in the House of Representatives (the lower House of the National Assembly) in 2012. The Bill was passed in June 2015 by the Senate but it is yet to receive the required Presidential assent to enable it become part of Nigerian law.⁵³

At the moment the only outstanding provision that is specifically designed to protect intimidated witnesses is section 31 of the Terrorism (Prevention) Act, 2011. The Act is a specialized and restricted statute designed to prevent, prohibit and combat acts of terrorism in Nigeria. The relevant provision, vests the Court with the discretion on the application of the prosecutor or on the court's own volition, to protect a witness in any proceeding before it relating to offence of terrorism and the Court is satisfied that the life of the witness is in danger. Such measures include keeping the identity and address of the witness secret.⁵⁴ For the purposes of clarity, the Act states that such measures include the holding of the proceedings at a place to be decided by the court: avoidance of the mention of the name and address of the witness in its orders, judgments or records of the case accessible to the public; and issuing of a direction prohibiting the disclosure of the identity and address of the witness; and forbidding the reporting or publishing in any manner of all or any part of the pending proceeding.⁵⁵ In addition, the court may, exclude from the courtroom any person other than the parties and their legal representatives.⁵⁶ Again these measures are not robust enough and its application is restricted to the trial of offences relating to acts of terrorism.

Sadly, as a result of the absence of identifiable witness protection measures, prosecution of certain offences (like corruption, violent and organised crime, etc) have remained inconsistent; producing mixed results. Since successful prosecution of culprit is one of the means of stamping out crimes, having effective witness protection law is imperative in order to obtain accurate witness testimony and reduce avoidable incidences of witnesses withdrawing from testifying due to intimidation or actual harm. This is because witness intimidation has the propensity of discouraging witnesses from reporting crime or coming forward to testify,⁵⁷ and could cause cases charged to Court from being prosecuted speedily, lost or abandoned. At a more general level, it could undermine public confidence in the judicial system and its effectiveness.

⁵¹Section 241 of the Evidence Act 2011. *Owanso Agbeyin v. The State* (1967) N.M.L.R 129, *David Ifenedo v. The State* (1967) N.M.L.R 85 at 88 S.C.

⁵² Witness protection refers to a range of measures, which can be applied at any stage of criminal proceedings, to ensure the safety of witnesses to gain their cooperation in providing testimony.

⁵³ Assent was tacitly denied because of the scandalous process adopted by the Senate in passing the Bill. See Omololu Ogunmade "Senate Mocks Lawmaking, Passes 46 Bills Without Legislation in 10 Minutes", *Thisday* (Newspaper) June 4, 2015, p. 1.

⁵⁴ Terrorism (Prevention) Act, 2011, s.31(1).

⁵⁵ *Ibid* s. 32(2).

⁵⁶ *Ibid* s.31(3)

⁵⁷ Elliot, 179

Further, there is no law in place which specifically prohibits witness intimidation in Nigeria. The only available option is to prosecute offenders under the Criminal Code⁵⁸ for the offence of perverting the course of justice. The relevant section is section 127, it reads, "Any person who attempts, in any way not specially defined in this Code, to obstruct, prevent, pervert, or defeat, the course of justice, is guilty of a misdemeanour and is liable to imprisonment for two years."⁵⁹ The provision is an omnibus one.⁶⁰ In fact, the Federal Supreme Court, in *The Queen v. Ekanem*,⁶¹ a matter dealing with a count under section 126, opined that the phrase 'the course of justice' cover a wider field than the words 'judicial proceeding' and include also the stage between the commission of an offence and the beginning of the prosecution. The offence here is the doing of some act after the commission of a crime but before or during prosecution, which has a tendency and is intended to pervert the administration of public justice and it includes intimidation of witnesses. Considering the prevalence of the crime of witness intimidation, there is a need for a special provision prohibiting and punishing witness intimidation.

6 International Commitments

Nigeria on the international level has entered into various commitments with regards to securing and protecting the rights of vulnerable and intimidated witnesses; the country is a signatory to plethora of conventions, declarations and other international instruments that recognise and protect the rights of the child, the aged, disabled, victim of crime, and the likes. The need to secure the rights of vulnerable witnesses permeates these international legal instruments, policies and declarations. For example, the United Nations (UN) Convention against Corruption⁶², and the UN Convention against Transnational Organized Crime (UNTOC) and its protocols⁶³ require states parties to provide protection and support to witnesses and victims including providing 'effective protection from potential retaliation or intimidation for witnesses and experts who give testimony.'⁶⁴ Similarly, the Convention on the Rights of Persons with Disabilities (UNCPRD)⁶⁵ imposes on state parties amongst others the duty to provide appropriate measure to aid persons with disabilities give full and accurate testimony in Court.⁶⁶ The Declaration on the Basic

⁵⁸ Criminal Code Cap C38, LFN.

⁵⁹ Ibid, s 126.

⁶⁰ See *Joseph Etim Asuquo v The State* [1967] All NLR 132

⁶¹ (1960)5 F.S.C. 14,

⁶² 2004, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf, accessed 4 November 2015.

⁶³ 2004, available at https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THEREOF.pdf, last accessed 4 November 2015

⁶⁴ Convention against Corruption, Art. 34.

⁶⁵ 2006, available at <http://www.un.org/disabilities/convention/conventionfull.shtml>, last accessed 30 October 2015). Article 13 of the Convention is on access to justice, it states that (para. 1) States that "Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages; and (para. 2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

⁶⁶ UNCPRD, Art 13.

Principles for Victims of Crime (DBPVC)⁶⁷ requires state to provide proper assistance to victims of crime throughout the legal process with particular attention given to those with special needs due to disability. In addition, state parties are to ensure the safety of victims and protection of their privacy.⁶⁸

At the regional level, Nigeria is a member of the African Union which has also facilitated series of international instruments recognising and guaranteeing the protection of the forgoing rights. For instance, the African Charter on Human and Peoples' Rights⁶⁹ which Nigerian Government domesticated through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,⁷⁰ enjoins state parties to provide special measures to aid aged and disabled witnesses.⁷¹ Similarly, the importance of effective witness protection in the prosecution of international crimes has also been asserted through the recently amended Statute of the African Court of Justice and Human Rights, and the African Union (AU) Draft Model National Law on Universal Jurisdiction over International Crimes.

On the contrary, the extant domestic legal framework in Nigerian on vulnerable witness when juxtaposed against the backdrop of the various commitments assumed by the country at the international level leaves a lot of gaps between the lofty ideals prescribed by those international legal instruments and actual implementation of their provision at Nigerian domestic level; that is translating the commitment into law and practice in Nigeria.

7 Closing the gaps

From the forgoing, one area in which the Nigerian law of evidence lags woefully behind many advanced legal system is in the sphere of reception of the testimony of vulnerable and intimidated witnesses, particularly with regard to having in place legal measures to aid vulnerable witnesses testify in Court. There may be countless explanation for the existence of this lacuna. One of them is that prior to this time, very little or nothing was known about vulnerable witness and witness intimidation because most of the crimes necessitating the need for such are alien to Nigeria people and culture (these modern crimes are imported from foreign countries). However, awareness of the challenges posed by the problem recently came to the fore as a result of the prosecution of cases relating to the activities of militant groups terrorizing the Nigerian nation (in the Niger-Delta and North-Eastern part of the country)⁷² and other complex crimes.

Towards closing the gaps highlighted in the preceding discussions, it is imperative that certain steps be taken. First, in view of the upsurge of violent and organised crime in Nigeria, it submitted that successful prosecution of culprit will be a key factor in discouraging potential offenders. However, successful prosecution within the context of the adversary legal system

⁶⁷ Available at https://www.unodc.org/pdf/compendium/compendium_2006_part_03_02.pdf last accessed 4 November 2015

⁶⁸ Paragraphs 4-7. See also Belak, B., "Policies and Practices in the Treatment of Vulnerable and Intimidated Witnesses." Being a policy discussion report prepared for the Missing Women Commission of Inquiry February 2012. Available at <http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/RESE-4-Feb-2012-BB-Policies-and-Practices-in-the-Treatment-of-Vulnerable-Witnesses.pdf>, last accessed 4 November 2015.

⁶⁹ Also known as the Banjul Charter Adopted in Nairobi June 27, 1981 Entered into Force October 21, 1986 available at <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> (last accessed 30 October 2015).

⁷⁰ Cap A 9, LFN 2004

⁷¹ Part I, Chapter I, Article 18 para. 4. of the Charter states that " The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs".

⁷² <http://allafrica.com/stories/201305290066.html>

depends on the ability of the prosecutor to present vital evidence in proof of the charge before Court. This in turn depends on having key witnesses (whose safety may be threatened) testify in Court. Thus having a comprehensive witness protection law and programme in place has become a *sine qua non* in order to place before Court full and accurate witness testimony, eradicate high incident of witness withdrawal due to intimidation (Salifu 2015). Such protection should be robust and comprehensive enough to effectively protect the witness prior to, during and after trial; providing for concealment of witnesses' identity, and allowing witnesses to relocate anywhere within and outside the country at government expense.

In addition, provisions should be included in the statute criminalizing and penalizing witness intimidation on the one hand, and on the other, penalizing failure of witness to attend Court, or attending Court and then refusing to answer questions or give false evidence as a result of intimidation. There is no gainsaying that the existence of a comprehensive witness protection measures will engender public confidence in the judiciary and increase the number of witnesses likely to come forward to testify.

Secondly and evidently from the previous sections, all that Nigerian law provides for with regard to the evidence of vulnerable witnesses is the parameters to be employed in determining their competency to testify. Aside from this, there are no special laws or provisions designed to aid a vulnerable witness in giving evidence in the best possible way. Whatever special treatment that is extended to a vulnerable witness in the past and at the moment is subject to the presiding judge's prejudice, discretion and largesse and of course the consent of both parties.⁷³ As earlier mentioned, though there are some sketchy provisions in the Nigerian *corpus juris* designed to provide protection to specified class of vulnerable witnesses, the provisions are seriously deficient in many respects. The deficiencies highlight the need for a coherent approach and predetermined statutorily stipulated procedure to guide the Courts in taking the evidence of vulnerable groups. It is suggested that such special measures or testimonial aid should expressly amongst other provide for:

- Permitting a support person of the witness' choice to be present and to be close to the witness while the witness testifies; the purpose is that the supportive physical presence of a familiar person will provide the vulnerable witness (whilst giving evidence) some measure of reassurance that he is doing what is right.
- Towards facilitating communication between the Court and a witness (ensuring that the communication process is as complete, coherent and accurate as possible), provisions should be made for examination of vulnerable witnesses with communication difficulties through intermediaries trained to facilitate communications without changing the substance of the evidence given. In addition, in the interest of fairness, the expense of procuring the services of these intermediaries should be funded from public fund as this

⁷³ For instance, in the trial of the Boko Haram kingpin, Kabiru Umar, alias Kabiru Sokoto who was sentenced to life imprisonment by an Abuja Federal High Court, the judge allowed the use of identity-protecting measures including the use of masks and pseudonyms to refer to witnesses, and also excluded the public from Court hall. *Punch*, December 20, 2013, <www.punchng.com/news/boko-haram-kingpin-kabiru-sokoto-jailed-for-life/> accessed 24 July 2015. In contrast, due to opposition of defence the judge in trial of Aminu Ogwuche (another Boko Haram member whose trial is still pending), refused to allow witnesses to wear masks or exclude the public from the Court hall; though the Court allowed the use of pseudonyms and cubicles to shield the witness from public viewing. As a result the ruling, some of the prosecution witnesses who requested to be masked refused to testify. See Ade Adesomoju, "Nyanya bombing: AGF office stalls trial of Oguche, others" *Punch* 15 April 2015, <www.punchng.com/news/%E2%80%8Enyanya-bombing-agf-office-stalls-trial-of-oguche-others/> accessed 8 August, 2015.

will guarantee their impartiality and neutrality, and ensure that their primary loyalty is to Court.

- Evidence given in camera; that is the exclusion of members of the public from courtroom. At the moment, under the regime of the Administration of Criminal Justice Act, the Court has the discretion to exclude members of the public from the courtroom while talking the evidence of a child in a trial of an offence against any conduct contrary decency or morality and while dealing with terrorism related offenses. As canvassed earlier, the discretion is too restrictive as it is limited to specified class of offences and witnesses. There is still ample room for enlargement of the Court's discretion by extending the gesture to all classes of vulnerable witnesses and to exercise same in any proceeding where in the opinion of the Judge excluding the public from the courtroom is necessary in order to obtain a full and candid account of the acts complained from the witness.
- Empowering the Court in deserving cases to allow vulnerable witness testify from outside the courtroom or behind a screen or use of other devices where the direction will not interfere with the proper administration of justice. The purpose is to prevent the witness from seeing the defendant whose presence may likely pose some difficulties for the witness in communicating freely and accurately.
- Empowering the Court to place reporting restrictions on the media who might be covering such cases. As noted above, the Court in terrorism related cases is already so empowered. However, there a need to extend it to other crimes. Having provisions of this nature will go a long way in encouraging witnesses as well as victims (whose evidence may have scandalous effect on him; provoke public odium or expose him to greater danger) to give full and candid account of the facts of the case.

On the whole, incidental matters like definition of vulnerability, test for determining who is a vulnerable; stage of the justice processes where protection may be accorded, and who should decides whether a person qualifies for protection as a vulnerable person; the place of the opinion of the witness in deciding whether he is vulnerable; criteria for accessing particular measures (should it be granted as of right or subject to the discretion of the various agencies; etc.

The justification for providing these special measures and testimonial aid for vulnerable witnesses is that failure to recognise and compensate for the inequalities between witnesses seems both inhumane (particularly when this results in stress or trauma for the witness) and unjust (Elliott 1998: 7), and it denies the Court the benefit of being presented with the entire and accurate facts needed to assist the Court at giving just and fair judgement.

8 Conclusions

In Nigeria, reception of evidence by Courts is regulated by the Evidence Act. Section 175 along with other relevant sections of the Evidence Act allows the reception of the evidence of vulnerable witnesses whose evidence ordinarily would not have been heard. Beyond this, there remain ample room for aggressive legislative activities in the sphere of witness protection and special measures to aid children and vulnerable adult witnesses in line with international commitments entered into by Nigeria. The existence of visible witness protection programme and measures to aid vulnerable witnesses give their testimony before Court will, to large extent

encourage potential witness come forward to testify, guarantee the quality of such testimony and promote fairness in administration justice in Nigeria. In the fight against insurgency, corruption, violent and organized crimes it is crucial that the Nigerian government prioritizes having a Witness Protection Law including laws designed to aid children and vulnerable adult witnesses give quality and full testimony in legal proceedings.

References

- Amusa, K.O. 2014, Fact and Fiction about Child's Evidence In Nigeria, *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* Vol. 19, Issue 2, Ver. III, 49-53.
- Babalola, A. 2001, *Law and Practice of Evidence in Nigeria*, Lagos, Sibon Books,
- Belak, B. 2012. Policies and Practices in the Treatment of Vulnerable and Intimidated Witnesses, Being a policy discussion report prepared for the Missing Women Commission of Inquiry February 2012. Available at <http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/RESE-4-Feb-2012-BB-Policies-and-Practices-in-the-Treatment-of-Vulnerable-Witnesses.pdf>, last accessed 4 November 2015.
- Benedet, J., and Grant, I., 2012. Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases, *Osgoode Hall Law Journal* Vol. 50, Issue 1, 1; <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1031&context=ohlj>, last retrieved 16 July 2015.
- Boerner, H. 2008. Moments of Lucidity, *Monitor on Psychology* Vol. 39, No. 10, 31
- Cross, R. & C Tapper. 1995 *Evidence* 8th ed. London: Butterworths.
- Day, N. 2012. Children's Memories: Toddlers Remember Better than you Think. <www.slate.com/articles/life/family/2012/04/children_s_memories_toddlers_remember_better_than_you_think_.single.html> retrieved 26 June, 2015.
- Dennis, I. 2010. *The Law of Evidence*, 4th edn. London, Sweet& Maxwell.
- Elliott, R. 1998. *Vulnerable and Intimidated Witnesses: a Review of the Literature*, available at http://www.popcenter.org/problems/witness_intimidation/PDFs/Elliot_1998.pdf, accessed 13 October 2015
- Kariri, N.J. 2014. Witness protection: the missing cornerstone in Africa's criminal justice systems, Pretoria, Institute for Security Studies, Pretoria, available at www.issafrica.org/iss-today/witness-protection-the-missing-cornerstone-in-african-criminal-justice-systems, last retrieved 24 July 2015.
- Nokes, 1967. *An Introduction to Evidence*.
- Nwadialo, F. 1981. *Modern Nigerian Law of Evidenc*. Benin, Ethiope.
- Odiase, P.O. 2009. "Comparative Analysis of the Use of Residual Clause in the Distribution of Powers in a Federation," Vol. 1, *The Journal of Department of Public Law & Jurisprudence, Faculty of Law, Usmanu Danfodiyo University, Sokoto (JDPLJ-UDUS)*, 27
- Osadolor, F. 2004. *Source Book on the Law and Practice of Evidence In Nigeria* (Daveprints Associate, 2004.
- Pritchard, J (ed). 2009. *Good Practice in the Law and Safeguarding Adults : Criminal Justice and Adult Protection*. London & Philadelphia: Jessica Kingsley.
- Report of the Vulnerable Witnesses & Children Working Group February 2015, Judiciary of England and Wales.
- Sagay, I.E. 2000. *Nigerian Law of Contract* 2nd ed. Lagos, Spectrum Law Series.

- Salifu, U. 2015. Fighting Boko Haram: why Nigeria needs a cohesive witness protection programme, Transnational Threats and International Crime Division, Institute for Security Studies (ISS) Pretoria. <www.issafrica.org/iss-today/fighting-boko-haram-why-nigeria-needs-a-cohesive-witness-protection-programme>, accessed 24 July, 2015.2015.
- Spencer, J.R & M.E., Lamb. (ed) 2012. *Children and Cross-Examination: Time to Change the Rules?* Oxford, UK: Hart Publishing.

‘Doing Sanctions with Words’: Legacy, Scope, Fairness and Future (?) of a Reprimand

Abstract: The paper aims at presenting with the short analytical expose of a phenomenon of a reprimand as a matter of the legal process and, more specifically, the specific – linguistic – way of punishing. The main underlying issue raised in the analysis is the question could we still ‘do sanctions with words’ in law and, especially, the penal one after the critique of the inherence of psychological violence, paternalism and even primitivism in this approach to the process of punishing? Skipping the vast historical background, the research proceeds with more theoretical and relevant today analysis of the linguistic-performativity-rich and persisting ‘reprimandish’ nature of law. The juxtaposition of this nature with the contemporary tendencies of the insisted reforms in the fields of the crime control and the system of punishments allow presenting with the perspective/future of a reprimand as the part of a broader linguistic and educational process/project of changing a criminal and whole society. The research concludes with the underlying idea that the transformation of the system of law and, especially, the field of punishments from affecting primarily the body to affecting primarily the mind requires reconsideration and, in such instances as that of a reprimand, rehabilitation of the overall linguistic performativity of law and its socio-holistic educational role.

Keywords: reprimand, legal sanction, punishment, criminal, linguistic performativity

***Corresponding author: Tomas Berkmanas**, Faculty of Law of Vytautas Magnus University in Kaunas, Lithuania, Email: t.berkmanas@tf.vdu.lt

1 Introduction

In *The Sacrament of Language* Giorgio Agamben writes: “‘political’ curse marks out the *locus* in which, at a later stage, penal law will be established. It is precisely this peculiar genealogy that can somehow make sense of the incredible irrationality that characterizes the history of punishment” (Agamben 2010: 38). From the perspective of Agambenian insights and research it would not be a big historical speculation to state that a reprimand, together with other linguistic performatives as curse (probable predecessor of a reprimand), oath or blasphemy, played an important role in the history of law and, especially, punishment as its solemn tool of power. Linguistic performatives may even stand at the origins of both. They also represent law as fundamentally and originally a matter of language and, we should add, the powerful/violent language.

On the other hand, modern tendencies of the humanization of law made their impact not only to the physical instances of violence in legal proceedings. They have been wiped out not only of any body-impacting cruelties (or physical violence), culminating in the prohibition of the capital punishment; mind-impacting cruelties (or psychological violence) – and reprimand as a legal sanction here stands at the forefront – were affected in the eliminating direction also.

However, two major problems remain today. Firstly, despite the positivistic emphasis on the dependence of law to physical force/violence, law remains the matter of language that

affects and *should affect* our minds and, later, actions *just as language*. Law remains full of linguistic performativity (the focus of the first section of the paper), which is extensively employed/used, even in the field of sanctions/punishments, and which may take various forms, i.e. as negative or positive, weak or strong ones (the focus of the second section of the paper). Secondly and most importantly, the inertia of a body-impact as the essence of punishment is still very strong. It is still usual for the prison to be the place of *simply/only* isolation (i.e. *in corpore*) of a criminal from society where he/she continues and, as some say, even advances in being criminal as a matter of his/her mentality. In addition to that, capital punishment is still popular in society¹, which continues to regard a criminal as an ‘off-cast’ of the remaining ‘good’ society the latter being not responsible for what the former has done. Reconsideration of the phenomenon of a reprimand in this light does not only amount to its certain rehabilitation and reinstatement into the orbit the outcomes of legal proceedings. It also allows making broader insights into the process of the overall mentality-transformation (i.e. that of society and that of a criminal), which is or maybe be initiated by law as a matter of language and linguistic performativity (the focus of the third and concluding sections of the paper).

2 Linguistic performativity and law

If you would read J. L. Austin’s master-peace lectures “How to Do Things with Words”, you would quickly notice the abundance of the references to the field of law. We could even say that this field functions as a perfect generator of the examples of linguistic performativity for Austin and this is because of two reasons. Legal practice (in a very general sense), indeed, is relatively loaded with linguistic performativity. As Austin states, “it is worth pointing out ... how many of the ‘acts’ which concern the jurist are or include the utterance of performatives” (Austin 1975: 19). Furthermore, lawyers are relatively sensitive in relationship to this aspect and, at the same time, to the potentiality of language, and this sense may be ‘deeply’ internal and implicit. To borrow Austin’s example, “in the American law of evidence, a report of what someone else said is admitted as evidence if what he said is an utterance of our performative kind: because this is regarded as a report not so much of something he *said* ... but rather as something he *did*, an action of his” (Austin 1975: 13; italics – Austin). Lawyers also have their own term, ‘operative’, which is nearest to what Austin calls a ‘performative sentence’ (Austin 1975: 6–7). This shows that law in general is not only, as it is written here and there, fundamentally the matter of language and its mastery (Gibbons 1994: 3–4), but also that it is, more specifically, the matter of performative language. Law is a fundamentally linguistic project where the potential of language ‘to do things’ in the Austinian sense is rationally reflected, integrated and, what is the most important, employed.

We could further articulate this insight into (1) a more general and (2) a more specific dimension. Generally we may consider the whole domain of law as a regulator of society to be one big linguistic performative – the function of law as language is to make an impact to society. In this respect in a more postmodern context, we may find the term and reference to the ‘linguistic violence’². However, we may call it ‘[linguistic] violence’, or we may call it ‘[linguistic] societal improvement’, or we may call it very neutrally – just ‘[linguistic] impact’. Thus, it depends on our ethical and critical predispositions and, after a long lingering over and already a fatigue from the postmodern negativity, the time may have come to give some more constructive or, at least, more positive (in the sense of mood) – even if a bit utopian – guidelines. That would constitute the general ‘tonality’ for the further analysis here.

¹ The survey conducted in 2013 showed that 48.3 percent of Lithuanian population are in favor of the reinstatement of the death penalty, 37.2 percent are against that, and 14.5 percent have no opinion (see <http://www.delfi.lt/news/daily/lithuania/apklausa-kokie-zmones-pritariamirties-bausmei.d?id=61667839>).

² There could be many examples of a more or less explicit reference to the “linguistic violence” given here, especially from various postmodern authors.

From the specific point of view, further in the paper we will focus on one specific example of pure legal linguistic performative where law's being allegedly linguistically violent is mostly evident and explicit – reprimand as a legal sanction. But before that, two things need to be said. First, the relation of law and physical violence is not neglected here. Law is an interplay of both – physical and linguistic one – with various versions/possibilities of their interaction in diachronical/historical³ and synchronical⁴ perspectives. Secondly, as Austin points out, linguistic performativity is 'not alone'. It always depends on some factors being more or less logocentric. In order for a linguistic performative to be functional and effective, the conditions of the Austin's doctrine of infelicities have to be satisfied (Austin 1975: 14 et seq.). There are specific requirements to (1) the *procedure* of the utterance as a linguistic performative, to (2) the *person* making the utterance, and, what is most important from the logocentric perspective, to (3) the *thoughts, feelings and conduct* of the persons making the utterance and the persons in relation to whom the utterance is directed. However, despite the obvious importance of the third one, the first two are also very much relevant if we look closer to their descriptions. Austin states that "there must exist *accepted conventional procedure*" and that "the particular persons and circumstances in a given case must be *appropriate*" (Austin 1975: 26 et seq.; 34 et seq.; italics – TB). Phraseology of this kind (especially the first one) is akin to that of H. L. A. Hart where he writes about the internal aspect of law and the rule of recognition (*see* Hart 1997: 88–89, 100). In other words, Austin, similarly as Hart, here articulates the margin between mind and reality. Performative utterance 'alone' – only as a matter of reality – would not reach its aim. In the same way, law being only violent/forceful would not reach its aim and even would not be 'a law'. Finally – a reprimand just as a voice of a person making it is not 'a reprimand'. Logocentric environment or, otherwise, mentality makes it into the one. Here we could pose the question: what this mentality was, what it is and what it should be in order for a reprimand to survive as a legitimate sanction in the contemporary world?

3 Legacy and scope of a reprimand in the XXI century

Two forms/modes of a legal reprimand could be separated: strong and weak. Strong reprimand is, in other words, *pure* reprimand. It is *only* calling/naming a person 'an offender of law' as a sanction and that is sufficient. It is a reprimand as one and only sanction which suffices. Also being public is its (as being a *legal* sanction) one of the most important characteristics⁵: the lack of publicity seriously complicates reaching its aim. Such sanctions were relatively common in Soviet legal systems which were, if we may say so, ultra-social. For example, Article 33 of the Soviet Lithuanian Criminal Code was called 'Public Reprimand' and it was defined as follows: it is "court's publicly declared reprimand to the offender of law and, if necessary, notification of the society in media and by other means"⁶. In the Soviet Lithuania this sanction was imposed in relation to such crimes as deliberate beating the other person and avoiding to take care after your parents (Articles 117 and 126)⁷.

It is also notable that a reprimand as a negative linguistic-symbolic legal sanction used to have its positive counterpart – a sort of so-called 'positive sanction' (e.g., Baublys, et al. 2012: 287; Vaišvila 2004: 271). I.e. from the legal point of view it was (and still is) important not only what a person made bad, but also what s/he made/achieved good and what s/he deserved for that, this way 'sanction' becoming like a prize. In the Soviet law symbolic-

³ Here the most important phenomenon is that of a revolution and the problem what there comes first: purely coercive element or linguistic/psychological/propaganda-style conditioning (*see* Wacks 2012: 157–158, referring to Karl Olivecrona's ideas).

⁴ Especially having in mind the general question which of them – physical or linguistic violence – is the dominating element in law?

⁵ Actually, it remains important also in relation to a weak reprimand.

⁶ *Law of the Soviet Social Republic of Lithuania on the Adoption of the Criminal Code of the Soviet Social Republic of Lithuania*, Official Gazette, no. 18-148, 1961-01-01.

⁷ *Ibid.*

linguistic ‘positive sanctions’ were very popular,⁸ which in itself – as these sanctions were also public events – represented Soviet law as socially oriented. The examples of those were: the so-called ‘red flags that pass from one to another collective/group’ (used in relation to collective positive achievements) or ‘medals’ or ‘desks of honor’ (used in relation to individual positive achievements).



Fig. 1. Desk of Honor in the Soviet Lithuania⁹

But what is important here is the public/social and, also, mentality-related characteristic of a legal system represented by such phenomena. The symbolic prize as a positive sanction presupposes interaction between public/social and individual fields, it represents (or, at least, should represent) some kind of a mentally responsive and, this way, integrated society.

However, same as desks of honor are now completely gone to oblivion from the landscape of Lithuania, pure reprimands as a sort of a legal sanction are also almost completely eradicated from legal codes and laws. The sanctions of the contemporary Lithuanian Criminal Code are: public work, monetary fines, and all those related to the deprivation of freedom (house arrest, arrests, imprisonments, etc.).¹⁰ Even if reprimands still exist, they are usually connected to some kind of a real impact and are not public events. For example, reprimand is still provided in the Lithuanian Labor Code as one of the disciplinary sanctions/penalties for the violation of the work order.¹¹ But, first of all, it is not public, and it is a part of the accumulative form of punishing – if a person receives the second sanction/penalty, then a real sanction could follow, i.e. the employer could terminate the employment contract without any warning.¹²

Also, we should separate ‘reprimand’ from ‘warning’ as a sanction. They are close but different – ‘warning’ is calling a person ‘a bad person’ but *primarily* with a very different goal: not to sanction *in/of itself* but, exactly, to warn that if a violation will be repeated the other form of sanction will follow. This way ‘warning’ contains in itself what may be called a ‘weak reprimand’ and warnings are still often used as sanctions/penalties in Lithuania¹³.

Accordingly, a ‘weak reprimand’ is reprimand ‘not alone’, insufficient as a sanction. Law is full of weak reprimands. Any decision of a court which convicts, which finds a person liable is a weak reprimand as it contains calling a person ‘a bad person’, an offender of law. We may call it ‘reprimandishness’ of law. This character of law has its own separate life – its history, its intensity and its teleology; and today there are two conflicting tendencies related to

⁸ But, of course, not only symbolic positive sanctions were popular; also the physical/real ones were rather usual, as, for example, tax/fees exemptions for the II World War veterans.

⁹ Source: <http://www.anykstenai.lt/foto/?p=11>.

¹⁰ *Law of the Republic of Lithuania on the Adoption and Coming into Force of the Criminal Code*, Official Gazette, no. 89-2741, 2000.

¹¹ *Law of the Republic of Lithuania on the Adoption, Coming into Force and Implementation of the Labor Code*, Official Gazette, no. 64-2569, 2002, Art. 237.

¹² *Ibid.*, Art. 136. Also reprimands in Lithuania still exist in relation to the ethical violations of lawyers.

¹³ Especially in the Lithuanian Code of Administrative Violations (see *Decision of the Supreme Council of the Republic of Lithuania on Coming into Force of the Code of Administrative Violations*, Official Gazette, no. 1-2, 1985, Art. 23 and other articles).

that. (1) Generally, it looks like that the intensity of the reprimandishness of law deteriorates through making the court process more private and closed, and through turning the control of crimes into industry (generally *see* Christie 1999) which, as *industry*, should not be interested in the serious decline of crimes through a serious ‘change of mind’ of criminals and the society in relation to them. (2) On the other hand, tendencies to understand the necessity of the re-socialization of a criminal and attempts to implement that have common accords with the general teleology of the reprimandishness of law – they both have a social focus, they both strive to affect criminal by the use of her/his nexus with society. Further we will focus on the conflict in those two developments and on the potentials of the second one.

4 Could a reprimand be a fair form sanction?

The intensity of the reprimandishness of law deteriorates because reprimand as such is regarded to be an outdated sanction/punishment, representing the paternalistic attitudes in law, the times of the ‘poles of shame’ as a form of psychological torture of a person and a symbolic form of revenge. But are these generalizations correct in a holistic diachronic perspective? The point is that any symbolic sanction should be related to the social mentality of one or another period and, of course, premodernity or early modernity is different. Following the Durkheimian diachronic logics, after humanity started to recognize crime as ‘a crime’ and, this way, stepped into the mode of being *more or less* healthy, it firstly conceived the aim of a sanction to be a vengeance/revenge (Wacks 2012: 168–169). Otherwise it is called ‘qualitative approach’ – sanction/punishment was meant to impress, to be cruel, to make a vengeance and, this way, to expose *as a matter of mentality* our need for that.¹⁴ Later this approach gradually changed to the quantitative one: the crime had to be strictly measured by a sanction and the latter had to have a measurable and theoretical and, if we may say so, socially ‘empty’ form. Impression, cruelty, socially important and, thus, publicity requiring vengeance was no more necessary and acceptable – just imprisonment, deprivation of freedom for the time period measured in relation to the intensity of a crime. This way punishments became weaker (Wacks 2012: 169) and we allegedly became more human.

But what also happened with this development was the loss of the public/social dimension in the domain of sanctions. Not only humanity developed from collectivism to individualism, not only crimes were “reduced more and more to offences against persons” (Wacks 2012: 168–169), but also sanctions/punishments¹⁵ became more and more personal and private, starting from the very moment of their setting in courts. The best example is the tendency to hide the persons involved in the court process, especially by replacing their names with the initial letters in the cases that are solved (i.e. the guilt is proven/disproven) and then declared publicly. This process represents the complete inversion of the reprimandishness of law – nobody should know the persons involved in the case, including the offender of law. But why the society should not know that someone committed a crime? Is it more socially integrating or disintegrating?

Once again, all this is very much related to the social mentality which has been changing (although with a lot of inertia) to a more humanistic one and also, we should add, to some other changes in our environment. Exactly in this context, the above mentioned anti-reprimandish developments in law are, in some sense, unfair. First of all, they are unfair in the times of ultra-publicity and Wiki-leaks, and of the importance of the image of a person¹⁶. We may ask a question: what would be a more severe/proportionate sanction today for a person who has stolen a million of euros – a few years of imprisonment but that nobody knows about that (especially after the release); or, exactly, a public reprimand – making the society know

¹⁴ Probably the best exposition of that could be found in Michel Foucault’s very beginning of “Discipline and Punish” (*see* Foucault 1998: 9–12).

¹⁵ From the moment of imposing a sanction in a court to its actual implementation.

¹⁶ Just a hundred years ago, if a person would go from one country to another probably nobody would know if s/he had made a crime in the former one.

this fact? Of course, it is unfair in this older or more traditional notion of a punishment as either the means of revenge or, even in a more rationalistic perspective, as the sanction proportionate (also in severity) to the crime made.

However, our aim today is not to punish more severely or just *severely*. Here we could remember Bentham: even though being a positivist he favored paternalistic approaches in law and was especially against the lack of publicity of the court process (Wacks 2012: 62–63). Maybe this way he wanted to show that positive law should remain a moral project and moral dimension should be also represented in the process of law. To ‘snap-off’ the period of imprisonment and then to isolate a person from the society is a matter of theoretically-positive law. But then a criminal as a part of the society and the society as a whole also should be affected and this is the domain of practically-positive law. In overly-positivistic modernity we have focused too much in this field to a discipline as such, as an outward/material matter (especially in prisons), and thought that this process somehow will teach and re-socialize a criminal. But what is also important is *changing* a person/criminal mentally (or internally in the Hartian terms) and *this way* making her/im to cease making crimes in the future. That is the goal and only through this s/he could be reintegrated. From the very start the process of justice has to affect the mentality of the criminal in a re-socializing direction. Then we should ask this question: when a person would be more likely to commit a crime once again – when nobody knows about her/is former bad deeds and his collar remains publicly white or, otherwise, if people/society know about that and when s/he has a task to improve her/is image?

On the other hand, society has to treat crimes as a *sad* problem and that is another very important mentality-tied aspect related to the fairness of a reprimandish law – only in the context of such a social mentality it could become fair. I.e. people have to think that it is not bad but sad that people make crimes, that they have to be incarcerated, and so on. Only this way it would become a common problem.¹⁷ In this context some kind of a reciprocal educational process could be discerned – a criminal and the society should, in some sense, educate each other by the criminal reflecting our – the society’s – problem and the society trying to cure it. If the society has this attitude then it could work. In some sense it could be conceived as a return to a qualitative approach, only a very different one – when crime is recognized not exactly as ‘a crime’, as something bad and a personal problem, but as ‘a social illness’ and a common problem. Then a reprimand as a public statement/information that a concrete person has violated law becomes a truly fair sanction.

In other words, there is an essential difference of a sad judge making a reprimand from an angry one making the same. The latter is psychologically violent through the segregation of criminals and social responsibility. Neither the angry judge, nor him/her supporting society accept the responsibility for the crime – only the criminal is considered guilty. The fairness and truthfulness of such approach is, at the very least, debatable. Conversely, the former is not so much violent, as caring – about both the criminal and the society. And if the sadness in such instances becomes the condition of the whole society, then a reprimand could only evoke the responses of societal care and patronage this way losing any violent and unfair characteristics.

5 In lieu of conclusions: the future of a ‘reprimandish’ law

In some sense it is strange – and once again we could remember Bentham – that exactly it was *not* positivism which was against the reprimandish law in the XIX-XX centuries; only because it should naturally favor quantitative (i.e. theoretical, scientific, calculative) approach. But it was more postmodern, realistic trends that criticized it from the negative perspective. Returning back to what was stated at the very beginning of this analysis, this narrative

¹⁷ Crime conceived as a sad problem makes any human sad that a crime has happened and this way feeling responsible for this. Crime conceived as a bad problem makes us seeking for revenge and punishment of those allegedly ‘naturally’ evil that cannot be changed.

represented the system of justice more in a negative light – as a system of repression and violence, from physical to linguistic,¹⁸ from just disciplinary to an industrially developed one¹⁹. In this context the symbol of the reprimand could be loudly and angrily yelling official/judge – that is how s/he reprimands – and the person on the other side is frightened in fear and shivering.

However, the other narrative presented the system of justice more in a positive light. This other narrative could find its traces in liberal ideologies²⁰ and, of course, legal positivism. Nevertheless, this ideological trend is controversial; it is lost between social orientation and individualism, between liberalism and democracy, which, according to Schmitt, are completely incompatible²¹. Also, the problem is that law there is understood as a matter of mind, of the Hartian internality; but, on the other hand, social dimension – as what is outside of the mind – is not completely neglected, especially by the emphasis on the ‘social practices’ as having fundamental/founding/original importance to law (especially *see* Wacks 2012: 83–85). That is the complicity that concerns us here – how to make a nexus between this internal dimension and the external one, how to connect the individual internality and oneness with the externality and massiveness of the multitude and, this way, to make/create *people* (as a matter of common mentality) which from the very beginning was fundamentally *legal* concept? In such a complicated domain of law, a reprimand as a symbolic/linguistic sanction may exactly be the place where this nexus could be, in some sense, made explicit/real and, this way, proven. In other words, reprimand could function only if a person to whom it is addressed contains the authority of law internalized²² and, if we may say so, aligns/changes her/is behavior to the precept of law presupposed by the reprimand. In relation to that, two tendencies are possible/necessary.

First of all, public notification about the crime and the criminal should function *only* as an information that a person/criminal is socially ill and that also the whole society is still ill. Furthermore, this information should be a method to mobilize a person and the society for a change. In other words, reprimand as a *public* statement *ipso facto* presupposes that the society is not passive in relationship to what is said. Then the question is – how it reacts: is it a condemning and revenging reaction and this way the reaction which does not accept its own fault in what has happened?²³ Or is it a reaction which presupposes an attempt to understand what has happened in a socio-holistic legal perspective?²⁴ All this transforms victimology. In other words, in this mentality one-sided victimology loses its sense. A criminal becomes also a victim, ‘a poor man’ (not ‘a bad man’) who has to be helped.

Secondly, public notification about the crime and the criminal should be an integral part – and also exposition of its problem – of a bigger educational process related to the improving of a social corpus. To return to John Austin: he calls the performatives which malfunction ‘unhappy’; not bad, false or wrong but just ‘unhappy’ or, we may add, ‘sad’. Analogously, the crime is the situation which proves that all the grandiose performative inherent in our

¹⁸ Here we could think about Sanford Levinson, Jacques Derrida with Walter Benjamin, Stanley Fish, Scandinavian Realism, and so on.

¹⁹ Michel Foucault and Nils Christie could be mentioned here.

²⁰ As those of Friedrich von Hayek or Karl Raimund Popper.

²¹ It is debatable but still a strong argument (for the good exposition of critique *see* Mouffe 1998: 159–175).

²² It directly relates to the internal aspect of law as articulated by Hart. We could only add that it is *really* better if all or most of the society contains it. This is the condition of a strong reprimand to work. Otherwise, a reprimand would turn only into a judge’s cry of despair. This internalization is one of the most important general aims of education, which *in any of its forms* has the power of aiming at this, even when the person learns math, language, history, chemistry, etc.

²³ In other words, it is the reaction which confronts ‘bad’ criminal on the one side and ‘good’ society from the other side; then, of course, the idea comes that this ‘bad’ criminal should be isolated from what is left ‘good’ as the rest of society. This mentality makes a fracture in the society – two societies in one.

²⁴ It should be mentioned that this kind of socio-holistic legal mentality may already be traditional to the cultures of the Orient this way turning the problem analyzed into an exceptionally Western problem (e.g., *see* Fletcher 1996: 38–40: “neither traditional Japanese nor the language of Talmud had a term for individual ‘rights’. Rights separate the individual from the community; they express a capacity to stand apart from the collective path. Yet the basic idea for law in these cultures stresses the commonality and the cooperative nature of legal experience. ... The Western view that defensive force is justified in opposition to wrongful aggression reflects the more general view that the function of law is to resolve conflict, to provide an abstract medium that sorts out true claims from false. ... In an alternative idea of law, ... expressed in Japanese and Jewish premise of a path traveled together, the fate of one’s neighbor is critically important; the duty to rescue is assumed, for the neighbor is a partner in a common venture”. In other words, in this mentality a criminal would not be separated from the commonality/community and the collective path).

educational system – trying to do things with words and this way to improve (or build-up) our moral caliber in/by families, schools, media, state itself – somehow, in some instance(s), became unhappy/sad, it malfunctioned and did not reach its aim. Then two not-self-excluding strategies of societal healing are possible. First of all, malfunctions in general educational system should be discerned and, if possible, corrected.²⁵

Also sanctions themselves and as a whole should function as a re-educational system. In the contemporary Lithuanian manual of Legal Theory it is written that negative legal responsibility (or delict) “raises two main aims: (1) to protect legal order; (2) *to educate* citizens to *respect* law” (Baublys, et al. 2012: 470; italics – TB). The wording of the second aim is interesting in itself. First of all, the aim is not ‘to force [to respect]’ but ‘to educate [to respect]’; and then not ‘to fear [law]’ but ‘to respect [law]’. Fear of negative consequences/sanctions (as a part of law) does not exactly educate; people *just* fear them. This wording should mean that sanctions *as being imposed* should participate in the educational mission. Returning to a reprimand – either reprimand in a corresponding social environment should be sufficient for that and *thus* turn into a strong reprimand. Or, if it is not enough, then it should become weak and be supplemented by other means of a longer re-educational process together with the deprivation of freedom. I.e. the control of a crime should cease to be focused to the industry of *just* incarceration where criminals are isolated from the society and left to do whatever they like under the rules of the regime of a prison; and having a library there is not enough. If they already not are, prisons should turn into schools with a specific educational regime adapted to those socially ill, making an impact not to their bodies but to their minds and, this way, representing the socio-holistic (or socio-integral) legal mentality of the whole society.

References

- Agamben, G. 2010. *The Sacrament of Language*. Cambridge: Polity Press.
- Austin, J. L. 1975. *How to Do Things with Words*, 2nd ed. Cambridge & Massachusetts: Harvard University Press.
- Baublys, L., et al. 2012. *Teisės teorijos įvadas [Introduction to Legal Theory]*, 2nd ed. Vilnius: Leidykla MES.
- Christie, N. 1999. *Nusikaltimų kontrolė kaip pramonė [Crime Control as Industry]*. Vilnius: Eugrimas.
- Fletcher, G. P. 1996. *Basic Concepts of Legal Thought*. Oxford: Oxford University Press.
- Foucault, M. 1998. *Disciplinuoti ir bausti: kalėjimo gimimas [Discipline and Punish: The Birth of the Prison]*. Vilnius: Baltos lankos.
- Gibbons, J. 1994. Language constructing law. In J. Gibbons (ed.), *Language and the Law*, 3-4. London & New York: Longman.
- Hart, H. L. A. 1997. *The Concept of Law*, 2nd ed. Oxford: Clarendon Press, 1997.
- Mouffe, C. 1998. Carl Schmitt and the Paradox of Liberal Democracy. In D. Dyzenhaus (ed.), *Law as Politics: Carl Schmitt's Critique of Liberalism*, 159-175. Durham & London: Duke University Press.
- Vaišvila, A. 2004. *Teisės teorija [Legal Theory]*, 2nd ed. Vilnius: Justitia.
- Wacks, R. 2012. *Understanding Jurisprudence: An Introduction to Legal Theory*, 3rd ed. Oxford: Oxford University Press.

²⁵ In this context, for example, we could ask: can we ‘play’ with crimes by romanticizing them? As, for example, it was done in such Hollywood movies as “Ocean’s Eleven” or “Ocean’s Twelve”? In some sense, such media phenomena could be conceived as a kind of a propaganda favorable to the industry of crime control which has *no* aim to educate citizens to respect law and this way to reduce the supply of criminals. But criminal is not a romantic personage. S/he is socially ill. This way this media production praises the social illnesses. On the other hand, of course, all this is related to the freedom of speech making it a complicated issue.

Or here we could mention the Norwegian system of the protection of children implemented through the independent organization *Barnevern*. As many Lithuanians immigrated to Norway and there are instances that their children are taken from their families by this organization, this theme attracts a lot of attention in the Lithuanian media and there are a lot of various opinions. One of them could be this one: this system is meant to positively impact the criminal situation in Norway as it represents a radical care about what happens in families, whether the environment therein has no traces of violence which could turn into the roots of later violence after children grow up.

Communications of autonomy and vulnerability in criminal proceedings

Abstract: In some high-profile Swedish cases on violence in intimate relationships, policemen and judges have been blamed for missing important aspects of the victim's vulnerable situation and the ongoing violence, and indirectly causing the death of the women victims. When these types of cases encounter the criminal justice system, two seemingly opposites are confronted: autonomy and vulnerability. In determining whether a penalty should be imposed, autonomy is vital, in the sense that freedom and rationality of the bounded individual is fundamental for criminal responsibility. Violence in intimate relationships, on the other hand, is clearly related to the vulnerability of the individual exposed to the violence. This vulnerability represents something contextual, where power relations are crucial, and is also connected to its structural context. I argue that a move towards a vulnerable subject as a starting point would affect the criminal justice system. This concept assumes a potential for all humans to experience vulnerability during a life span, and does not prevent autonomy. In the judgments explored in this article, this view is already reflected when it comes to the positioning of the defendant, who is seen as highly autonomous, at the same time as his vulnerable situation is taken into account in determining the penalty. However, the communications regarding the victim does not include these nuances. A move towards establishing a more accurate definition of subject in this field of law, the vulnerable one, would emphasize an awareness of a more complex notion of the subject and be more consistent with the embodiment of the everyday individual encounter with the criminal justice system.

Keywords: criminal legal subject, autonomy, vulnerability, communication, violence in intimate relationships

***Corresponding author: *Ulrika Andersson:** Faculty of Law, Lund University, Sweden. E-mail: Ulrika.Andersson@jur.lu.se

1 Introduction

In recent decades violence in intimate relations has garnered considerable attention in both media and legal doctrine in Sweden. The demand for state responsibility and prevention of this violence has been strong and loud, especially in the last five to ten years (e.g., Amnesty 2010) As in many other legal systems, this violence had not been an explicit issue for the criminal justice system until some thirty years ago; until then it was considered more or less a private matter.¹ Gradually the attitude towards public interference in intimate relation has

This article is partly excerpted from Andersson, U. 2016. Harmed selves harming others: A Vulnerability Approach to the Criminal Justice System. In Martha Fineman, Titti Mattsson & Ulrika Andersson (eds.), *Privatization, Vulnerability and Social Responsibility*. Farnham: Ashgate/Gower. Copyright © 2016.

changed, both within and outside the legal system. At the moment public authorities, such as the police, social services and the courts, are being heavily criticized. For example in some high-profile cases policemen and judges have been blamed for missing important aspects of the victim's vulnerable situation and the ongoing violence, thus indirectly causing the death of the women victims. In this article I analyse one of these cases in order to highlight what kind of notion of autonomy and vulnerability that is communicated within the criminal justice system.

When these types of cases encounter the criminal justice system two seemingly opposites are confronted, autonomy and vulnerability. In determining whether a penalty should be imposed, autonomy is vital, in the sense that freedom and rationality of the bounded individual is fundamental for criminal responsibility (Lacey 1998). Violence in intimate relations on the other hand is clearly related to the vulnerability of the individual exposed to violence. This vulnerability represents something contextual where power relations are crucial and is also connected to its structural context (Andersson, 2011, 2009; see also Niemi-Kiesiläinen, 2004; Smart, 1995; Fineman and Mykitiuk, 1994; MacKinnon, 1989). Thus there is a clash between autonomy and vulnerability. I analyse how this clash is communicated in criminal proceedings. I use the concept of the vulnerable subject advocated by Martha Fineman (Fineman 2008). It is used as a theoretical approach as well as a methodological tool.

The vulnerable subject entails both autonomy and vulnerability, so I find it useful to transcend the conflict between autonomy and vulnerability and to study how the notion of autonomy and vulnerability is communicated in criminal proceedings. My aim is to explore the construction of vulnerability and autonomy in relation to the individuals confronting the criminal legal system. As an example in which autonomy and vulnerability are crucial issues, I have chosen a case of lethal violence in an intimate relationship. I analyse the legal treatment of the individuals involved in the four judgments associated with this case, in particular how the individuals' vulnerability is constructed in relation to autonomy, and vice versa.

In the following section, I present my theoretical approach to the criminal legal subject, followed by my analysis of how autonomy, the base of criminal responsibility, and vulnerability, which needs criminal legal protection, is communicated in the analysed judgments. I end up with a discussion on communications of autonomy and vulnerability in criminal proceedings.

2 A vulnerability approach to the criminal legal subject

The traditional notion of the legal subject assumes that this subject is competent, able to negotiate, and can make rational choices. This is also the case with the criminal legal subject, which is supposed to be autonomous, free, and rational – characteristics that form the basis of criminal legal justice, legitimizing its use of repressive power in relation to the individual. There is a difference, however. Free and rational choices are usually respected and have positive connotations in most contexts, because they are based on autonomy and competence in general (see Ramsay, 2012: 94). But within criminal law, making a free choice could also be to act in a way that is condemned by society through criminalization, society's most repressive reaction to its citizens' behaviour. Furthermore, a choice in the criminal legal context usually causes someone else's harm. In other words, criminal behaviour causes vulnerability. Thus there is a link between the autonomous choice of the criminal legal subject to act in a way that causes someone else's vulnerability, and to vulnerability itself. In the

¹ For example, in 1982 the prosecution rule for non-aggravated assault not committed in a public place was changed and indication from the victim or special reason for prosecution in the public interest was no longer needed. This change was of particular importance for the possibility to prosecute violence in intimate relations.

following I will explore this connection between autonomy and vulnerability in the criminal legal process. This is a highly important question, crucial to the notion of the criminal legal subject; it has not been discussed much, although several scholars have highlighted and questioned the traditional notion of the subject in criminal law, as well as in human rights and law in general (See e.g., Grear, 2010; Niemi, 2010; Naffine, 2002; Lacey, 2004; Lacey, 1998; Naffine and Owens, 1997).

As a basis for my analysis, I apply Martha Fineman's theory of the vulnerable subject to the field of criminal legal justice and use it as my methodological approach. Instead of taking for granted the autonomous subject presupposed in criminal law, I question it by using the vulnerable subject proposed by Fineman. It is my intention to transcend the conflict between autonomy and vulnerability mentioned above. The vulnerability thesis was largely developed as a criticism of the notion of autonomy central to the view of the *liberal legal subject* (Fineman, 2004, 2008; see also Fineman and Grear, 2013). Taking as a point of departure the idea that vulnerability should be understood as universal and constant, and as such inherent in the human condition, Fineman proposes that the vulnerable subject should be used as the heart of social and state responsibility. The areas of law she refers to are mainly family law, social law and labour law. Here I make an attempt to use the vulnerable subject as an approach to the criminal legal process. Fineman talks about our personal and social lives being "marked and shaped by vulnerability" and that a "vulnerability analysis must have both individual and institutional components" (Fineman, 2008: 10). I agree with this idea and believe it will help to move away from focusing on individuals to instead putting more focus on institutions (Fineman, 2008: 21). Using the vulnerable subject as a starting point in the criminal process also implies an awareness of power relations, allowing us to take structural factors into account. This might shed some new light on cases and improve the individual's chances of making demands for legal protection. When a specific situation is explicitly connected to structural aspects of power, such as gender inequality, this may have a positive effect on legal practice. The chances of noticing that the individual is vulnerable would also be improved. The following analysis of how vulnerability is handled in relation to lethal violence within the criminal legal process will be an example of how individuals are "positioned differently within a web of economic and institutional relationships" and how our vulnerabilities have great differences at the individual level (Fineman, 2008: 21). The criminal legal process shapes the individuals involved in the proceedings in certain ways. By studying the courts' reasoning and arguing, I analyse how the defendant and the victim are positioned in relation to the courts' interpretations and communications of autonomy and vulnerability.

3 Autonomy and vulnerability in a case on lethal violence

As just discussed, criminal legal responsibility is built upon the autonomy of the defendant (Lernestedt, 2010, p. 37). However, Swedish law does not focus on accountability in the construction of criminal responsibility; anyone who is 15 years old or older could be charged with a crime and held responsible. Instead, questions concerning accountability are relevant in the choice of sanction and the assessment of the penalty. In principle, a severe mental disorder prevents imprisonment (Bennet and Radovic, 2014, p. 7f). This means that issues of mental illness and other vulnerability questions are dealt with in the court's sentencing and can be studied in the judgments. In this chapter, I present four judgments, all of which relate to a very notable Swedish case of a woman's murder. These are two judgments from Malmö District Court, one judgment from the Court of Appeals in Skåne and Blekinge, and one judgment from the Supreme Court of Sweden. The legal treatment of this case and the public

authorities' handling of it in general have been severely criticized.² The criticism has to do partly with questions related to the penalty the defendant should have received or other actions that could have been taken, in light of the defendant's mental status and his ability to control his actions – in other words, his autonomy. In addition, attention has been drawn to the (lack of) protection of the plaintiff and inability of the authorities to recognize her vulnerable situation.

These issues on autonomy and vulnerability are central in the documents and I analyze the courts' communication of how the plaintiff and the defendant are positioned in relation to vulnerability and autonomy. Particularly I study the way the courts reason and argue in their sentencing and assessment of the penalty.

The history of the case was that the woman had been threatened by her husband for some time. They got divorced and in connection with the separation, he was charged and convicted of wrongful detention after having had her locked in the house; he was sentenced to one year in prison. On that occasion he had overpowered her, bound her with handcuffs and cable ties, locked her up and put her on the floor next to the gun cabinet where he kept three rifles. The woman managed to talk herself out of this threatening situation by telling him that she was ready to make another attempt to live with him. The prosecutor in the subsequent trial had asked the court to keep the man in custody until the judgment became final, but the court chose to let him go, while waiting for him to serve his sentence. Two months later, he attacked her again and this time he killed her in front of their children. At this time there was also a dispute over custody of the children. The woman, who had told her friends and family she was certain her ex-husband would kill her one day, had been in hiding in a sheltered accommodation with the two daughters in the central parts of a city in the south of Sweden. The 47-year-old man managed to find out where they lived, and attacked the woman with a bayonet when she and the children came out into the street. The 39-year-old woman was killed by blows to the chest and stomach.

The District Court that decided the first case about unlawful detention did not think the risk that the man would continue to commit crimes against the woman was of such concern that there was reason to keep him in custody, and therefore chose to let him go. No further justification was given. However, the court stressed that the woman's detention was not brief and that the act caused the woman both physical and, above all, mental suffering, and was a violation. Furthermore, there was no reason to suspect that the defendant suffered from a severe mental disorder of such a nature that it would preclude imprisonment (JDC1, 6-7). Accordingly, the court in this first judgment positioned the plaintiff as vulnerable. Her vulnerability was caused by the defendant, who was deemed to have acted completely autonomously. However, in deciding whether she was in a potentially vulnerable situation in relation to her ex-husband after her detention, the court decided that was not the case.

In the murder trial that followed, the defendant admitted to manslaughter; he claimed that owing to the state of his mental health, he had no control of events and was in need of psychiatric care. However, the District Court found the man guilty of murder (JDC2). The core issue in this trial as well as in the higher courts was whether the man should be sentenced to life imprisonment or a fixed-term sentence. The District Court sentenced him to life imprisonment, while both the Court of Appeals and the Supreme Court sentenced him to 17 years in prison (NJA, 2013, s. 376; see also BRÅ, 2014:6).

There are certain circumstances that recur in the courts' argumentation. In all three instances the defendant's *determination* and *accuracy* are stressed. This indicates that in view of the court, he acted autonomously. Furthermore, both the District Court and the Court of

² E.g. <http://www.sydsvenskan.se/opinion/aktuella-fragor/ett-rattssamhalle-kan-inte-tolerera-att-hotade-personer-dodas/> Article in a Swedish newspaper titled in English: A modern state cannot accept that threatened persons are killed.

Appeals found there were no mitigating circumstances in relation to this murder. Instead the vulnerability of the victim is stressed when the aggravating circumstances are described. The Court of Appeals stated:

The deed has been completely unprovoked. As the district court stated, the defendant has shown great cunning by, contrary to a contact prohibition, finding out where the plaintiff and her children lived and identifying their habits. This knowledge has enabled him to commit the murder. The deed was particularly ruthless in that it was directed against a related party. The plaintiff was in a particularly *defenseless position* as a result of the defendant having rushed towards her without warning and overtaken her. The defendant carried out the attack with substantial brutality with a bayonet. The deed was done in a public place. (JCA, NJA 2013 s. 376, 386, emphasis added)

This, the defendant's autonomously committed attack was found to have been aggravated in relation to the plaintiff's vulnerability.

Only the Supreme Court emphasizes both the defendant's autonomy and vulnerability. In the following, where the Supreme Court concludes that the accused was determined to kill the victim, the court establishes the defendant's *autonomy*:

No other conclusion can be drawn other than [the defendant] had *decided* to kill [the plaintiff] (JSC, 13, emphasis added).

The court continues:

The Supreme Court bases this conclusion on the fact that the defendant's conduct was characterized by *speed* and *determination* and that he, when he approached [the plaintiff], had not first tried to start a conversation with her, but instead immediately thrust the bayonet into her body at two vital points and then, seemingly quiet, awaited her death without calling for help (JSC: 13, emphasis added).

In spite of the fact that his acts in the quote above are seen as expressions of rationality, implying autonomy, the court later in the judgment stressed how the defendant has been affected by the divorce that took place earlier, establishing the defendant's *vulnerability*:

The *crisis that he experienced* when [the plaintiff] moved from their home sparked, as has been mentioned in the preceding [], a *deep depression with significant negative consequences* for himself, including losing his job (JSC, 14, emphasis added).

In addition, the fact that despite the prior assessment of rationality and determination, it was proven that the defendant has a disorder that led to his inability to control his actions. All this demonstrates insufficient autonomy:

The defendant's complaint that, due to a *mental disorder his ability to control his actions was impaired*, thus does not appear to be unwarranted. The penalty for the act is thus lower than it otherwise would have been (JSC: 16, emphasis added)

The defendant had to take medication for his mental problems. And the medical treatment that was necessary because of his mental illness "increased" his autonomy, in the view of the court. Thus paradoxically his mental illness not only caused his vulnerability. The Supreme Court:

The medical treatment the accused had undergone the period before the act, according to the statement have been party to that he became more *vigorous and uninhibited*. He was considered to have had a sustained understanding of reality at the time of the deed. (JSC: 15, emphasis added)

Regarding the plaintiff's situation, the Supreme Court emphasized only her vulnerability:

The defendant abused the victim's *defenceless position* and *difficulty in defending* herself. The victim was afraid that the defendant, even though he had a restraining order, would attack and kill her – but she did not think this would happen if the children were present. What the defendant is guilty of is an insidious, public attack on an *unsuspecting person who had no opportunities* to escape (JSC: 13, emphasis added).

It is interesting to note, however, that the plaintiff's vulnerability is not positioned in relation to the defendant's attack on her, or his previous behaviour against her. Instead, she is positioned as being in a defenceless position and as an unsuspecting person herself.

Nowhere in the judgment is the plaintiff's autonomy or potential autonomy communicated.

4 Communications of autonomy and vulnerability in criminal proceedings

Therefore it is obvious that the defendant and the plaintiff are positioned differently in relation to vulnerability and autonomy in these judgments. As for the assessments of the responsibility of the defendant, both autonomy and vulnerability are referred to in the argumentation. As for the plaintiff, on the other hand, only her vulnerable situation is stressed. For example, typical signs of autonomy as her ability to contact the women crisis center and live hidden, at the same time taking care of her children, do not seem to be relevant at all in these criminal proceedings.

This is highly interesting, because at least in theory, criminal legal responsibility is built upon the full autonomy of the defendant. As noted earlier, according to Swedish law, criminal responsibility means that anyone who is 15 years old or older can be charged with a crime. Issues of vulnerability are therefore dealt with when deciding the penalty. This means that issues of mental illness and other vulnerability questions could be discussed explicitly in the judgments. And as I have shown, this is the case in the analysed documents.

It is clear from the analysis above, however, that neither the defendant who is presumed to be autonomous nor the victim who is primarily considered as vulnerable is all that clear-cut. Both parties are imparted with autonomy and vulnerability. One important difference is of course that the victim is preferably constructed as vulnerable in the judgments, whereas the defendant is assessed in relation to both autonomy and vulnerability.

I claim this is deeply problematic, primarily in that it prevents the public authorities from comprehending the vulnerability of the victim. Regarding the defendant, it seems the focus on autonomy in theory does not hinder taking into account issues of vulnerability in practice, at least according to this small study. However, from the perspective of the plaintiff, the singular focus on vulnerability is a severe flaw, and could actually be one of the reasons for the bad decision to not keep the defendant in custody in the first case – something that could have prevented the defendant from killing the plaintiff. I believe that the predominant notion – of the plaintiff being primarily vulnerable, unable of rational and capable decisions – prevents the courts from fully assessing a seriously vulnerable situation such as the one in this case, where the information from the plaintiff herself about her certainty that the defendant was going to kill her was not taken seriously enough. It was as if helplessness and fear were considered part of her everyday vulnerability – or, even worse, that she was not rational enough to perceive a serious threat.

I would argue that a move towards a vulnerable subject as a starting point for the criminal justice system would affect this practice. The vulnerable subject does not entail a helpless individual without capacity to make rational decisions. On the contrary, as mentioned above, the thesis of the vulnerable subject does not stress that vulnerability is an ever-present human attribute. Rather, there is a potential for all humans to experience vulnerability during

a life span. In the judgments explored in this article, this view is already reflected when it comes to the positioning of the defendant, who is seen as highly autonomous while at the same time as his vulnerable situation is taken into account in determining the penalty. However, as shown here, the positioning of the victim does not include these nuances. In my view, a move towards establishing a more accurate definition of the subject in this field of law, the vulnerable one, would emphasize an awareness of a more complex notion of the subject and be more consistent with the embodiment of the everyday individual encounter with the criminal justice system (Gear 2010).

Acknowledgements

This article has been concluded thanks to support from the Swedish Research Council and Åbo University.

References

- Andersson U. 2011. Trafficking in Human beings. Criminal law and Human rights. In *Between resistance and Compliance. Feminist Perspectives on international law*, Sari Kouvo & Zoe Pearson (eds.), 1-27. Oxford: Hart.
- Andersson U. 2011. Violence against women and Criminal Law. In, Eva-Maria Svensson et al (eds.) (In Swedish: Våld mot kvinnor och straffrätt, På vei. Kjønn og rett i Norden), 419-434. Göteborg: Makadam.
- Asp P., Ulväng M. & Jareborg N. 2013. *Bases of Criminal Law* (In Swedish: *Kriminalrättens grunder*. Uppsala: Iustus.
- Bennet T. & Radovic S. 2015. Mentally disordered offenders in Sweden – Factors associated with forensic psychiatric expert opinions regarding understanding and control, In *Forthcoming*.
- Fineman M. A. & Gear A. 2013. (eds.) *Vulnerability. Reflections on a new ethical foundation for law and politics*. Farnham: Ashgate.
- Fineman, M. A. 2008. The Vulnerable Subject. Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism* 20(1). 1-23.
- Fineman M. A. 2004. *Autonomy myth. A Theory of dependency*. New York: The New Press.
- Fineman M. A. & Mykitiuk R. 1994. (eds.) *The Public Nature of Private Violence. The discovery of Domestic Abuse*. New York: Routledge.
- Friedman A. & Parenti C. 2003. *Capitalist Punishment. Prison Privatization and Human Rights*. Atlanta: Clarity Press.
- Gear A. 2010. *Redirecting human rights. Facing the challenge of corporate legal humanity*. Basingstoke: Palgrave MacMillan.
- Lacey N. 2004. Feminist Legal Theory and the Rights of Women. In Karen Knop (ed.), *Gender and Human Rights*. Oxford: University Press.
- Lacey N. 1998. *Unspeakable Subjects. Feminist essays in legal and social theory*, Oxford: Hart.
- Helmersson S. & Jönson H. 2015. The use of ‘empowerment’ among organisations supporting victims of domestic violence in Sweden. *European Journal of Social Work* 18(1). 51-64.
- Lernestedt, C. 2010 *Back and forth. On the individual and the structural in Criminal Law* (In Swedish: *Dit och tillbaka igen. Om individ och struktur i straffrätten*) Uppsala: Iustus.
- MacKinnon C. A. 1989. *Toward a Feminist Theory of the State*. Cambridge, Mass. : Harvard University Press.
- Naffine N. 2002. Can Women be Legal Persons? In Susan James & Stephanie Palmer (eds), *Visible Women. Essays on Feminist Legal Theory and Political Philosophy*. Oxford: Hart.
- Naffine N. & Owens R. J. 1997. (eds.) *Sexing the subject of law*. North Ryde N. S. W. : LBC Information Services.
- Niemi-Kiesiläinen J. 2004. The Reform of Sex Crime Law and the Gender-Neutral Subject. In Johanna Niemi-Kiesiläinen, Anu Pykkänen & Eva-Maria Svensson (eds.), *Nordic Equality at a Crossroads. Feminist Legal Studies Coping with Difference*, 167-194. Aldershot & Burlington: Ashgate.
- Niemi J. 2010. What we talk about when we talk about buying sex. *Violence against Women* 16(2).159-172.
- Ramsay P. 2012. *The Insecurity State. Vulnerable Autonomy and the right to Security in the Criminal Law*. Oxford: University Press.
- Smart C. 1995. *Law, crime and sexuality. Essays in Feminism*. London. Thousand Oaks. New Dehli. : Sage.

Reports

Increased penalties for serious violent crimes. Evaluation of the 2010 sentencing reform. Report from The Swedish National Council for Crime Prevention (In Swedish: Skärpta straff för allvarliga våldsbrott Utvärdering av 2010 års straffmättningsreform) (BRÅ 2014:6).

http://www.bra.se/download/18.12caa4f91440b31239f1c42/1394721496724/2014_6_Sk%C3%A4rpta_straff_f%C3%B6r_allvarliga_v%C3%A5ldsbrott.pdf

Case closed. Rape and Human rights in the Nordic Countries. Summary report, Amnesty International Publications, 2010: <http://www.amnesty.org/en/library/info/ACT77/001/2010> (Amnesty 2010)

Electronic references

<http://www.sydsvenskan.se/opinion/aktuella-fragor/ett-rattssamhalle-kan-inte-tolerera-att-hotade-personer-dodas/> Article published in Sydsvenskan, a Swedish newspaper by district Attorney Ulrika Rogland: *A modern state cannot accept that threatened persons are killed* published June 21st 2012.

Cases

Judgment from Malmö District Court 1, in case B 10428-11 (JDC1)

Judgment from Malmö District Court 2, in case B 1632-12 (JDC2)

Judgment from the Court of Appeals in Skåne and Blekinge, referenced in NJA 2013 s. 376 (NJA 2013 s. 376)

Judgment from the Supreme Court of Sweden, in case B 5613-12 (JSC)

NJA 2013 s. 376 (account of judgments from three instances in the Swedish case report, Nytt juridiskt arkiv avd I, NJA)