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### **VULNERABILITY ASSESSMENT OF PARTICIPANTS IN LITHUANIAN CRIMINAL PROCEEDINGS IN THE CONTEXT OF EU REGULATIONS**

**Rima Ažubalytė**

**Professor**

**Mykolas Romeris University, Faculty of Law (Lithuania)**

**Contact information**

Address: Ateities str. 20, LT-08303 Vilnius, Lithuania

Phone: +370 5 271 4569

E-mail address: rima.azubalyte@mruni.eu

**Jolanta Zajančauskienė**

**Associate Professor**

**Mykolas Romeris University, Faculty of Law (Lithuania)**

**Contact information**

Address: Ateities str. 20, LT-08303 Vilnius, Lithuania

Phone: +370 5 271 4569

E-mail address: zajan@mruni.eu

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#### **ABSTRACT**

Despite the applicable general principles and essential standards provided for in the law, the right of vulnerable persons (i.e. children under 18 years of age and vulnerable adults, for example, adults with mental disabilities) to a fair hearing at different stages of criminal proceedings in the EU is not yet ensured to the full extent. Based on both EU and

Lithuanian legal regulation, this article will review only the principal provisions concerning the allocation of victims, suspects, and accused persons to the category of “vulnerable persons”. Due to the scope of the article, the vulnerability identification procedure falls outside this research.

EU and national legislation suggest that early identification of vulnerability allows for the provision of specific protection measures during criminal proceedings. Analysis of EU and Lithuanian normative acts suggests that minor victims are *a priori* considered vulnerable and specific protection measures must apply in their case. Meanwhile, the vulnerability of adult victims and their specific protection needs are not assessed at any stage of the proceedings in Lithuania, although the Code of Criminal Procedure provides for certain specific protection measures for victims who, due to a public hearing or questioning, may be subject to “psychological trauma or other serious consequences”. Given future EU requirements concerning suspected or accused children and current recommendations concerning the consideration of suspected or accused adults as vulnerable participants of the proceedings, Lithuanian legal regulations in this area must be improved.

#### **KEYWORDS**

Criminal proceedings, assessment of vulnerability, vulnerable victim, vulnerability of suspected or accused persons

## INTRODUCTION

After Lithuania joined the European Union's (hereafter – EU) justice area, the right to a fair trial must take into consideration EU legal regulations. Protection of the rights of the participants in criminal proceedings is one of the main values of the EU, which is important in order to maintain the trust and confidence of Member States in each other's criminal justice systems. The EU has successfully created an area of free movement and residence. However, the increasing use of the freedom of movement and residence has led to increasing numbers of people involved in criminal proceedings while in a Member State other than their place of residence. The Stockholm program<sup>1</sup>, Resolution of the Council of 30 November, 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings<sup>2</sup> and the Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings<sup>3</sup> emphasize the importance of strengthening human rights in criminal proceedings by establishing basic uniform standards covering the right to a fair hearing. European Council Conclusions emphasize the need for further action to "simplify access to justice; promote effective remedies and use of technological innovations including the use of e-justice; continue efforts to strengthen the rights of accused and suspect persons in criminal proceedings; reinforce the protection of victims etc."<sup>4</sup>

The vulnerable participants of criminal proceedings or participants of the proceedings who have specific protection needs are separately distinguished as subjects of the right to legal defense<sup>5</sup>. Despite the applicable general principles and

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<sup>1</sup> *The Stockholm Programme - an Open and Secure Europe Serving and Protecting Citizens* (2010/C 115/01), OJ C 115, 2010 4 5.

<sup>2</sup> *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* (2009/C 295/01), OJ C 295, 4.12.2009.

<sup>3</sup> *Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings* (2011/C 187/01) // [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2011.187.01.0001.01.ENG#ntr5-C\\_2011187EN.01000101-E0005](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2011.187.01.0001.01.ENG#ntr5-C_2011187EN.01000101-E0005) (accessed November 8, 2014).

<sup>4</sup> *The Conclusions of the European Council* (June 26/27, 2014) // [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/143478.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf) (accessed November 8, 2014); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An open and secure Europe: making it happen*, SWD(2014) 63 final // [http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/an\\_open\\_and\\_secure\\_europe\\_-\\_making\\_it\\_happen\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/an_open_and_secure_europe_-_making_it_happen_en.pdf) (accessed November 8, 2014).

<sup>5</sup> The term vulnerable victims was replaced by the notion of victims with the specific protection needs (*Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, OJ L 315, 2012 11 14, Articles 22-24; Sławomir R. Buczman, "An overview of the law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union," *ERA Forum* 14 (2013): 244). The terms "vulnerable victim" and "victim with the specific protection needs" are used as synonyms in the paper.

essential standards provided for in the law<sup>6</sup>, the right of vulnerable persons (i.e. children under 18 years of age and vulnerable adults, for example, adults with mental disabilities) to a fair hearing at different stages of criminal proceedings in the EU is not yet ensured to the full extent, and this might result in a breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (hereafter – ECHR). EU directives adopted in recent years regarding protection of the procedural rights of suspected or accused persons<sup>7</sup> do not provide sufficient guarantees for vulnerable persons to exercise their rights efficiently because they do not take into account the specific needs of vulnerable people. Having made the necessary assessments, the European Commission submitted the Proposal for a directive on procedural safeguards for children suspected or accused in criminal procedure (hereafter – Proposal)<sup>8</sup>, including the Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (hereafter – Recommendation)<sup>9</sup>. The directive establishing minimum standards on the rights, support, and protection of victims of crime (hereafter – Directive),<sup>10</sup> unlike the specific EU legislation, which discusses the needs of victims of specific crime,<sup>11</sup> established common standards for protection of the rights of vulnerable victims of crime<sup>12</sup>. However, the Commission was invited to propose through recommendations practical measures and suggest best practices to provide guidance to member states in the process of dealing with the specific needs of victims.<sup>13</sup>

The above-mentioned legal acts focus in particular on the application of adequate procedural safeguards for vulnerable persons. As regards vulnerable

<sup>6</sup> *Charter of Fundamental Rights of the European Union*, OL C 326, 2012 10 26: 391-407; *European Convention on Human Rights and Fundamental Freedoms*, Official Gazette (1995, no. 40-987); *Convention on the Rights of Persons with Disabilities and Optional Protocol* // <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (accessed November 8, 2014).

<sup>7</sup> *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings*, OL L 280, 2010 10 26; *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings*, OL L 142, 2012 6 1; *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, OL L 294, 2013 11 6.

<sup>8</sup> *Proposal for a directive of the European Parliament and of the Council Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings*, Brussels, 27.11.2013, SWD(2013) 480 final (COM (2013) 8 22) // [http://ec.europa.eu/justice/criminal/files/swd\\_2013\\_480\\_en.pdf](http://ec.europa.eu/justice/criminal/files/swd_2013_480_en.pdf) (accessed November 8, 2014).

<sup>9</sup> *Commission Recommendation 2013/C 378/02 of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings*, OJ C 378, 24.12.2013: 8–10.

<sup>10</sup> *Directive 2012/29/EU*, *supra* note 5.

<sup>11</sup> Sławomir R. Buczman, *supra* note 5: 235–250.

<sup>12</sup> The Directive will not affect provisions contained in other EU acts which address the specific needs of particularly vulnerable victims in a targeted manner (*Communication from the Commission to the European Parliament, the Council the Economic and Social Committee and the Committee of the Regions, Strengthening Victim's Rights in the EU*, COM (2011)274 Final: 3 // [http://ec.europa.eu/justice/policies/criminal/victims/docs/com\\_2011\\_274\\_en.pdf](http://ec.europa.eu/justice/policies/criminal/victims/docs/com_2011_274_en.pdf) (accessed November 6, 2014)).

<sup>13</sup> Measure E: Specific needs of victims. In: *Resolution of the Council on a Roadmap for strengthening the rights and protection of victims*, *supra* note 3.

people, the stipulation, recognized in the legal doctrine that the right of an individual and also (if not more so) the procedural right must be real, becomes particularly important. For example, considering that in Lithuania alone each year 3,000 criminal offences, suspected of being committed by children, of which about 200 are serious crimes,<sup>14</sup> are being investigated, and the victims of crimes are also around 3,000 children,<sup>15</sup> of which about 170 are victims of sexual offences,<sup>16</sup> it becomes clear that assumptions of their rights to a fair trial are extremely important. The right of both the children and other vulnerable participants in the proceedings to a fair trial must not be illusory, but must be a properly realized right – specifically by assessing the vulnerability of individuals and providing additional procedural possibilities.

In Lithuania, more emphasis is placed on the standardization of procedural rights to comply with EU regulations,<sup>17</sup> but systemic analysis of the rights of vulnerable participants of the criminal proceedings within the EU context is not sufficiently addressed.<sup>18</sup>

In order to ensure adequate protection of vulnerable participants of the proceedings, it is important to define the criteria for identification of vulnerability in legal norms properly, to identify the vulnerability assessment procedure with respect to the participant of the proceedings and practically implement it. Based on both EU and Lithuanian legal regulation, this article will review only principal provisions concerning the allocation of victims, suspects and accused persons to the category of “vulnerable persons”. Due to the scope of the article, the vulnerability identification procedure falls outside this research.

<sup>14</sup> 2008 m. – 4325 child suspects; 2009 m. – 4023; 2010 m. – 3586; 2011 m. – 3296; 2012 m. – 3127; 2013 m. – 3126 (*Lietuvos Respublikos prokuratūros veiklos 2013 metais ataskaita [2013 Report of the Activities of the Prosecution Service of the Republic of Lithuania]* // [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=466645&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=466645&p_tr2=2) (accessed November 6, 2014)).

<sup>15</sup> 2006 - 5109 child victims; 2007 - 4571; 2008 - 3720; 2009 - 3222; 2010 - 3019; 2011 - 3234 (*Vaikų, nukentėjusiųjų nuo nusikaltimų, apsauga Lietuvoje. Nacionalinė ataskaita. [The Protection of Child Victims in Lithuania. National Report]* (Vilnius: Paramos vaikams centras, 2013), p. 3).

<sup>16</sup> *Lietuvos Respublikos prokuratūros veiklos 2013 metais ataskaita*, supra note 14.

<sup>17</sup> Linas Belevičius, “Unification of standards of protection of the rights of suspected and accused persons in the European Union,” *Administrativā un Kriminālā Justīcija: Latvijas Policijas akadēmijas teorētiski praktisks žurnāls* (Riga: Latvijas Policijas akadēmijas izdevums) 1(66) (2014); Justyna Levon and Paulius Veršekys, “Įtariamųjų ir kaltinamųjų teisių Lietuvos baudžiamajame procese stiprinimas: perspektyvinė analizė Europos Sąjungos teisėkūros kontekste” [The Strengthening of the Rights of the Suspects and the Accused Persons in Lithuania: a Prospective Analysis in the Context of the EU Legislation]; in: *Lietuvos Respublikos baudžiamojo proceso kodeksui – 10 metų [Criminal Code of Republic of Lithuania - 10 Years]* (Vilnius, 2012); etc.

<sup>18</sup> Rima Ažubalytė and Jolanta Zajančkauskienė, “Credibility of testimonies of vulnerable participants in a legal process: the Lithuanian case”; in: *10 Years in the European Union – achievements, problems and expectations: XV international scientific conference* (Riga: Turība University, 2014); Jolanta Zajančkauskienė, “Speciali pažeidžiamųjų įtariamųjų ar kaltinamųjų apsauga” [Special protection of the vulnerable suspects or of the accused persons]; in: Jonas Prapiestis, et.al. *Globalizacijos iššūkiai baudžiamajai justicijai [Challenges of globalisation to criminal justice]* (Vilnius: Registrų centras, 2014).

In addition to EU norms, the article also relies on the documents of the European Council and case law of the European Court of Human Rights (hereafter – ECtHR) concerning vulnerability of participants of criminal proceedings.<sup>19</sup>

## 1. THE CRITERIA OF VULNERABILITY

Legal instruments for strengthening the rights of vulnerable participants in a legal process are an integral part of the case law of the European Court of Human Rights concerning effective criminal proceedings. The ECtHR held that “<...> ‘effective participation’ <...> presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed”.<sup>20</sup> The right to personally and effectively participate in a trial is one of the constituent elements of the right to a fair trial.<sup>21</sup> The ECtHR case law concerning effective criminal proceedings and compensation of damages to the victim has been so far mainly associated with substantive and procedural violations of Article 2 and 3 of ECHR and in certain cases with violations of Article 8 of ECHR.<sup>22</sup> However, the ECtHR jurisprudence widely advocates for legal safeguards when questioning child victims of offences<sup>23</sup> and the case law concerning questioned children is being shaped by the European Court of Justice (hereafter – ECJ).<sup>24</sup>

This means that a person, irrespective of his age, health, or other characteristics, must understand the essence and process of legal proceedings; otherwise, he must receive assistance.

First of all it is necessary to agree on which individuals are (or can be or must be) considered vulnerable in criminal proceedings. The analysis of EU documents dedicated to strengthening the rights of vulnerable persons in criminal proceedings suggests that in some cases the vulnerability is actually presumed<sup>25</sup> and in other cases it is stated *ad hoc* after personal assessment of the individual participating in

<sup>19</sup> EU regulations rely on Articles 3, 5, 6 and 8 of the ECHR, as interpreted by the European Court of Human Rights, which, in its case-law sets standards on special safeguards for vulnerable persons, in particular children.

<sup>20</sup> *S.C. v. The United Kingdom*, ECtHR, no. 60958/00 (2004), paras. 9-18.

<sup>21</sup> Lijana Štarienė, “Teisės į teisingą teismą, įtvirtintos Europos žmogaus teisių konvencijos 6 str., pobūdis, vieta ir apsaugos lygis kitų konvencijos teisių požiūriu” [The Character, Place and the Level of Protection of the Right to a Fair Court Establishes in Article 6 of the European Convention of Human Rights], *Jurisprudence-Jurisprudencija* 10(88) (2006): 40.

<sup>22</sup> Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), p. 37–38.

<sup>23</sup> *F. and M. v. Finland*, ECHR (July 17, 2007); *A. S. v. Finland*, ECHR (September 28, 2010); *Bocos-Cuesto v. the Netherlands*, ECHR (November 10, 2005); etc.

<sup>24</sup> *Criminal Proceedings against Maria Pupino*, ECR I-5285 (2005).

<sup>25</sup> Sławomir R. Buczman, *supra* note 5: 244; Rianne Letschert and Conny Rijken, “Rights of Victims of Crime: Tensions between an Integrated Approach and a Limited Legal Basis for Harmonisation,” *New Journal of European Criminal Law* Vol. 4, No. 3 (2013): 246.

the proceedings.<sup>26</sup> Certain “vulnerability” criteria may also be identified: (1) specifically properties attributed to the participant in the proceedings, such as age, mental health, and physical health, and (2) situations (objective circumstances) that determine the “vulnerability” of the participant in the proceedings.<sup>27</sup>

## 2. INDIVIDUAL ASSESSMENT OF VICTIMS TO IDENTIFY SPECIFIC PROTECTION NEEDS

In order to treat individuals of the same procedural status differently, the way in which their different status is regulated must be selected: either to agree on an exhaustive list of “vulnerable” participants in the proceedings or specify general criteria on the basis of which the national authorities will decide which participants in the proceedings are vulnerable. Specification of persons, with respect to whom the presumption of “vulnerability” would apply and therefore specific procedural safeguards would automatically apply would formally facilitate the work of competent authorities, but may also lead to excess use of resources in criminal proceedings and to unfounded paternalistic protectionism. The Directive opts for individual assessment of victims. We support the position that this is a better alternative than an exhaustive list of “vulnerable victims”. Such regulation grants fairly wide discretion to national authorities to form the case law for identification of vulnerability on a case-by-case basis.<sup>28</sup> Article 22 of the Directive states that the individual assessment of victims *ad hoc* shall take place to identify whether and what specific protection needs are required: “Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings <...>, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.” It must be emphasized that “individual assessments shall be carried out with the close involvement of the victim and shall take into account their wishes including where they do not wish to benefit from special measures <...>.”<sup>29</sup>

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<sup>26</sup> Directive 2012/29/EU, *supra* note 5, Article 22; Proposal for a directive of the European Parliament and of the Council Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings, *supra* note 8, Article 7; Commission Recommendation 2013/C 378/02, *supra* note 9, Article 4.

<sup>27</sup> Directive 2012/29/EU, *supra* note 5, Article 22; Proposal for a directive of the European Parliament and of the Council Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings, *supra* note 8, Article 2; Commission Recommendation 2013/C 378/02, *supra* note 9, Article 3.

<sup>28</sup> Sławomir R. Buczman, *supra* note 5: 243-244.

<sup>29</sup> Directive 2012/29/EU, *supra* note 5, Article 22 (6).



The literature indicates that vulnerability of victims of crime is determined by the nature of the offence (domestic crimes, sexual offences), objective characteristics of the victim (age, mental deficiencies, physical disabilities), and actual or potential threats.<sup>30</sup> The Directive essentially provides the following assessment criteria: "the individual assessment shall, in particular, take into account: (a) the personal characteristics of the victim, (b) the type or nature of the crime; and (c) the circumstances of the crime".<sup>31</sup>

### 3. THE PERSONAL CHARACTERISTICS OF THE VICTIM

According to the Directive, in terms of personal characteristics, the victim's age and disability determine the vulnerability of victims.<sup>32</sup> Analysis of the norms of the Code of Criminal Procedure of the Republic of Lithuania (hereafter – CCP)<sup>33</sup> and literature suggests that individuals who, because of their age (minors, old people) and physical or mental deficiencies (disabilities) who cannot take full advantage of the victim's rights are deemed to be vulnerable victims.<sup>34</sup>

In evaluating EU legislation concerning the rights of vulnerable victims, it can be said that *de facto* children are considered vulnerable on a *a priori* assumption: it is indicated that it is necessary to "pay special attention to children, as part of the most vulnerable group of victims, and always keep in mind the best interest of the child".<sup>35</sup> Article 22(4) of the Directive establishes that "for the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation"<sup>36</sup>; individual articles in EU legislation are dedicated to additional specific needs of children.<sup>37</sup> In their rulings, both the ECHR<sup>38</sup> and the ECJ indicate that respecting the right to defense of abused children, as the most vulnerable participants in the process, the children must be given an opportunity "to give their testimony in accordance with arrangements ensuring them an appropriate level of

<sup>30</sup> Sandra Walklate, *Handbook of Victims and Victimology* (Portland: Willan Publishing, 2007), p. 287; Jenny McEwan, "The testimony of vulnerable victims and witnesses in criminal proceedings," *Era Forum* 10 (2009): 373-375; Begona Vidal Fernandez "The standing of the Victim in Criminal Proceeding through the European Union": 212; in: Montserrat de Hoyos Sancho, ed., *Criminal Proceedings in European Union: Essential Safeguards* (Lex Nova, S.A.U., 2008).

<sup>31</sup> Directive 2012/29/EU, *supra* note 5, Article 22 (2).

<sup>32</sup> Directive 2012/29/EU, *supra* note 5, Article 22 (3), 22 (4).

<sup>33</sup> Code of the Criminal Procedure of the Republic of Lithuania, Official Gazette (2002, no. 37-1341).

<sup>34</sup> Eglė Matuizienė, *Privataus kaltinimo bylų procesas kaip dispozityvumo realizavimo forma [Private prosecution procedure as a form of implementation of dispositiveness]*, daktaro disertacija (Vilnius: Mykolas Romeris universitetas, 2014), p. 115.

<sup>35</sup> Resolution of the Council on a Roadmap for strengthening the rights and protection of victims, *supra* note 3.

<sup>36</sup> Directive 2012/29/EU, *supra* note 5, Article 22(4).

<sup>37</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335/1, 17.12.2011, Article 19(4).

<sup>38</sup> *F. and M. v. Finland*, *supra* note 23; *A. S. v. Finland*, *supra* note 23; *Bocos-Cuesto v. the Netherlands*, *supra* note 23; etc.



protection".<sup>39</sup> The necessity to identify the age that separates the child from the adult is recognized due to the child's lack of physical and psychological maturity and the need to protect the juvenile against exploitation and harmful effects of his environment.<sup>40</sup> Furthermore, a child may find himself in a particularly vulnerable position, e.g. "the offence was committed against a child in a particularly vulnerable situation, such as a child with a mental or physical disability, in a situation of dependence or in a state of physical or mental incapacity; the offence was committed by a member of the child's family, a person cohabiting with the child or a person who has abused a recognised position of trust or authority".<sup>41</sup> These circumstances are deemed to be aggravating.<sup>42</sup>

An analysis of the norms of the Lithuanian criminal proceedings shows that the legislator also presumes that minors in criminal proceedings are procedurally vulnerable. As a result, laws on criminal procedure provide for a complex of procedural measures, which according to the legislator must "compensate" the presumed vulnerability. These measures mainly relate to the fact that, due to his limited procedural capacity, the minor participant in the proceedings is unable to fully exercise all his rights and fulfil all his obligations.<sup>43</sup>

The CCP of Lithuania also identifies individuals who, because of old age cannot exercise the rights conferred on them by the law. The social group of senior people is characterized by typical physical, intellectual, and psychological changes<sup>44</sup> that lead to greater difficulties than those experienced by other victims participating in criminal proceedings.<sup>45</sup> However, a person's age in itself is not sufficient basis for maintaining that the person is unable to defend his rights; therefore, in each case it is necessary to assess the capacity of an elderly person who fell victim of an offense, and to defend his interests independently.<sup>46</sup> Although the Directive does not mention old age as the basis for recognition of a person as vulnerable, elderly

<sup>39</sup> *Criminal Proceedings against Maria Pupino*, *supra* note 24.

<sup>40</sup> Gediminas Sagatys, *Vaiko teisė į šeimos ryšius. Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos įgyvendinimas Lietuvoje [The right of the child to family relations in the European convention on human rights and in the law of the Republic of Lithuania]* (Vilnius, 2006), p. 21: referring to G. Van Bueren, *The international Law on the Rights of the Children* (Dordrecht, 1995), p. 36-39.

<sup>41</sup> *Directive 2011/93/EU*, *supra* note 37, Article 9 (a) (b).

<sup>42</sup> *Ibid.*, Article 9.

<sup>43</sup> Rima Ažubalytė, Ramūnas Jurgaitis, and Jolanta Zajančkauskienė, *Specifinės baudžiamojo proceso rūšys [Specific types of criminal proceedings]* (Vilnius: Mykolas Romeris universitetas, 2011), p. 227-239.

<sup>44</sup> David J. Hirschel and Karen B. Rubin, "Special Problems Faced by the Elderly Victims of Crime," *Journal of Sociology and Social Welfare* 9 (1982): 358.

<sup>45</sup> *Ibid.*: 364; Jenny McEwan, *supra* note 30: 375.

<sup>46</sup> Jolanta Zajančkauskienė, "Fiziniai ar psichikos trūkumai (sutrikimai): procesinė teisinė samprata ir reikšmė, realizuojant asmens teisę į gynybą" [Physical or mental deficiencies (disorders): procedural legal concept and importance in realising the individual's right to the defence]: 320; in: Petras Ancelis, et al. *Sąžiningas baudžiamasis procesas: probleminiai aspektai [Fair criminal proceedings: problem aspects]* (Vilnius: Indrustus, 2009).

persons subjected to ill treatment by their families are treated as vulnerable in international documents.<sup>47</sup>

The assessment of the characteristics of the victim's mental health and mental state, which may determine his vulnerability, should be based on a unity between the legal and medical criteria.<sup>48</sup> It should be noted that as far as physical deficiencies<sup>49</sup> are concerned, they might also be a barrier to defending the victim's rights. However, any disease or condition due to which the person is identified, for example, as disabled, do not and cannot automatically be the cause of his procedural disability.<sup>50</sup>

Once it is established that due to his health problems and/or socialization difficulties caused by old age or disability or illness, a person is unable to defend his breached interests, the court may allow, according to the law, a member of the individual's family or a close relative to participate in the proceedings as a representative (Article 53(4) of CCP).

#### 4. THE TYPE OR NATURE OF THE CRIME

Another important criterion for assessing the specific needs of victims is the type or nature of the offence against the victim.

Even though the Directive does not provide a presumptive list of vulnerable victims, the categories of victims who might be covered by the category of "vulnerable" are specified<sup>51</sup>: "in this regard, victims of terrorism, organized crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime <...> shall be duly considered"<sup>52</sup>.

These provisions are interpreted in conjunction with the EU documents, which regulate additional procedural possibilities for the victims of particular offences.<sup>53</sup> Victims of such offences as terrorism, organized crime, human trafficking, sexual

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<sup>47</sup> Recommendation No. R (97) 13 of the Committee of Ministers to Member States Concerning intimidation of witnesses and the rights of the defence, Adopted by the Committee of Ministers on September 10, 1997, at the 600<sup>th</sup> meeting of the Ministers' Deputies // [http://www.coe.int/t/dghl/standardsetting/victims/recR\\_97\\_13e.pdf](http://www.coe.int/t/dghl/standardsetting/victims/recR_97_13e.pdf) (accessed November 6, 2014).

<sup>48</sup> Eglė Matuizienė, *supra* note 34, p. 104.

<sup>49</sup> Jolanta Zajančauskienė, *supra* note 46, p. 313-319.

<sup>50</sup> Ruling of Vilnius District Court of November 26, 2008, criminal case no. 1S-945-628/2008; Ruling of Vilnius District Court of November 7, 2013, criminal case no. 1S-923-628/2013; Eglė Matuizienė, *supra* note 34, p. 104-105; Eilīonor Flynn and Anna Lawson, "Disability and Access to Justice in European Union": 39; in: Lisa Waddington, Gerard Quinn, and Eilīonor Flynn, eds. *European Yearbook of Disability Law*, Volume 4 (Cambridge-Antwerp-Portland: Intersentia, 2013).

<sup>51</sup> Sławomir R. Buczman, *supra* note 5: 243-244.

<sup>52</sup> Directive 2012/29/EU, *supra* note 5, Article 22 (3).

<sup>53</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011; Directive 2011/93/EU, *supra* note 37; Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, Official Journal L 164, 22/06/2002: 0003-0007.

violence, exploitation, or hate crime tend to suffer from fear and insecurity.<sup>54</sup> The circumstance that in certain cases the victim may have formally committed acts which may be regarded as crimes must be evaluated, although the EU documents state that Member States shall ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings and on child victims of sexual abuse and sexual exploitation for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Directives<sup>55</sup>. This also increases the victim's sense of insecurity. In recognizing the victim as vulnerable, specific characteristics of the investigation of such criminal activities and particularly the duration of the proceeding must be taken into account. In Lithuania, for example, the average duration of a pre-trial investigation of sexual offence(s) against children in 2013 was 264 days.<sup>56</sup>

## 5. THE CIRCUMSTANCES OF THE CRIME

As stated in the Directive, "in the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable"<sup>57</sup>. In the jurisprudence of the Constitutional Court of Lithuania, the ability to be a private prosecutor-victim is associated with the ability to express one's will in defending one's legitimate interests and/or to perform certain actions (or take other measures) which would be objectively sufficient in order to defend one's interests.<sup>58</sup> Thus, in addition to the personal characteristics of the victim, there are objective factors hindering effective

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<sup>54</sup> Jenny McEwan, *supra* note 30: 375.

<sup>55</sup> Directive 2011/36/EU, *supra* note 53, Article 8; Directive 2011/93/EU, *supra* note 37, Article 14.

<sup>56</sup> Lietuvos Respublikos prokuratūros veiklos 2013 metais ataskaita, *supra* note 14.

<sup>57</sup> Directive 2012/29/EU, *supra* note 5, Article 22 (3).

<sup>58</sup> The ruling of the Constitutional Court of the Republic of Lithuania of 16 January 2006. On the compliance of Paragraph 4 (wording of 11 September 2001) of Article 131 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, on the compliance of Paragraph 5 (wordings of 10 April 2003 and 16 September 2003) of Article 234, Paragraph 2 (wordings of 10 April 2003 and 16 September 2003) of Article 244, Article 407 (wording of 19 June 2003), Paragraph 1 (wording of 14 March 2002) of Article 408, Paragraphs 2 and 3 (wording of 14 March 2002) of Article 412, Paragraph 5 (wording of 14 March 2002) of Article 413 and Paragraph 2 (wording of 14 March 2002) of Article 414 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania and on the petitions of the Šiauliai District Court, the petitioner requesting to investigate whether Article 410 (wording of 14 March 2002) of the Code of Criminal Procedure of the Republic of Lithuania is not in conflict with the Constitution of the Republic of Lithuania, Official Gazette (2006, no. 7-254).

exercise of rights—for example, the inability to obtain the necessary information, dependence on the perpetrator, etc.<sup>59</sup>

The victims of violence in a close relationship are identified as vulnerable in EU documents, while children who are victims of violence in a close relationship are deemed to be particularly vulnerable.<sup>60</sup> We support the opinion that victims of domestic or gender violence are especially vulnerable because they find themselves in a situation of special vulnerability in view of the violent acts of other members of the family group, and because there is a risk of the violent behavior being repeated when the attacker and the victim live in the same home, and because of the habitual economic, social and psychological dependence of the victim in relation to the attacker<sup>61</sup>. The ECtHR has clearly established that domestic violence can constitute a violation of the right to life; the right to be free from torture or inhuman or degrading treatment; the right to respect for private and family life and the prohibition of discrimination (Article 2, 3, 8, 14 of the European Convention on Human Rights). In the case law of the ECtHR on domestic violence the issue was essentially that the criminal justice systems of the States involved had been of an insufficient standard to protect victims of domestic violence.<sup>62</sup>

Lithuania has adopted a special law for solving complex problems of domestic violence;<sup>63</sup> but, according to the empirical study, in practice there is a lack of a systematic approach to the victims of such offences as vulnerable.<sup>64</sup>

The Lithuanian legislator also implementing the provisions of the Directive on trafficking in human beings and Directive on combating the sexual abuse and sexual exploitation of children and child pornography has opted for the principles of individual assessment of victims, stating that certain specific measures of protection shall be applied in cases where due to a public hearing or questioning the victim may be subject to “psychological trauma or other serious consequences”.<sup>65</sup>

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<sup>59</sup> *Ibid.*

<sup>60</sup> Directive 2011/93/EU, *supra* note 37, Article 9 (b).

<sup>61</sup> Begona Vidal Fernandez, *supra* note 30: 212.

<sup>62</sup> Ronagh J.A McQuigg, “Domestic Violence and the ECJ: Joined Cases C-483/09 and C-1/10 Magatte Gueye and Valentin Salmeron Sanchez,” *European Public Law* Vol. 8, No. 4 (2012): 653.

<sup>63</sup> Lietuvos Respublikos apsaugos nuo smurto artimoje aplinkoje įstatymas [Law on protection against domestic violence], Official Gazette (2011, no. 72-3475); Lietuvos Respublikos Vyriausybės nutarimas dėl valstybės smurto artimoje aplinkoje prevencijos ir pagalbos teikimo nukentėjusiesiems asmenims 2014–2020 metų programos patvirtinimo [Resolution of the Government of the Republic of Lithuania regarding approval of the 2014–2020 national programme for prevention of domestic violence and support for victims], Register of Legal Acts (no. 2014-05986).

<sup>64</sup> Nusikaltimų aukų teisių direktyva: naujas požiūris į artimųjų smurto aukas [The Victim's Rights Directive: a New Approach to Victims of Domestic Violence], Žmogaus teisių stebėjimo institutas, Lietuvos Teisės institutas, Lygių galimybių plėtros centras [Human Rights Monitoring Institute, Law Institute of Lithuania, Centre of Equality Advancement] (Vilnius, 2014) // [https://www.hrmi.lt/uploaded/Apzvalgos/Tyrimas\\_auku-teisiu-direkt.pdf](https://www.hrmi.lt/uploaded/Apzvalgos/Tyrimas_auku-teisiu-direkt.pdf) (accessed January 3, 2015).

<sup>65</sup> Lietuvos Respublikos baudžiamojo proceso kodekso 9, 185, 186, 275, 276, 283 straipsnių ir priedo pakeitimo įstatymas [Law on the amendment of Articles 9, 185, 186, 275, 276 and 283 and the annex of the Code of Criminal Procedure of the Republic of Lithuania], Register of Legal Acts (no. 2014-10422); Lietuvos Respublikos baudžiamojo proceso kodekso 9, 154, 186, 280, 283 straipsnių ir priedo pakeitimo

Discretion in determining the consequences allows the individual situation to be assessed in each case. As stated in the literature, "secondary victimisation refers to criminal proceedings as a whole causing mental harm to the victim. But even this definition is too narrow. The victim can suffer financial drawbacks <...>, may be threatened or harmed by the accused, etc."<sup>66</sup> The authors of a study conducted in Lithuania maintain that such phrases as "psychological trauma" and "other serious consequences" mean that the person could take advantage of safeguards only in the cases where it is established that he is likely to suffer a serious damage. Meanwhile, the provisions of the Directive show that safeguards are applied because of the victim's personal characteristics, the nature of the crime, and the relationship between the victim and the accused, rather than because of possible consequences that may be difficult to assess and to foresee. In order to identify specific protection needs and the right to safeguards, it is sufficient that the victim would meet certain criteria proving the victim's potential vulnerability in the proceedings<sup>67</sup>. Indeed, for example, as shown by the case law, young, socially vulnerable people often become victims of trafficking. They are lured by fraud or violence and are usually intimidated or heavily dependent on the accused.<sup>68</sup> So often these objective circumstances should be sufficient for the victim to be able to use specific protection measures, even if there is no evidence that the victim may be subject to psychological trauma or other serious consequences may arise during the proceedings<sup>69</sup>. The selected regulation leaves great discretion for those who apply laws either to recognize or not to recognize the vulnerability, because of the absence of criteria which could determine the need for specific protection measures. However, the Lithuanian legislator does not specify any authority that would assess the probability of psychological trauma or other serious consequences. It is likely that in order to determine whether the victim will experience psychological trauma in the proceedings, the law enforcement authorities should involve experts, which requires additional State's resources. In the absence of the requirement to assess the victim's vulnerability individually, one of the causes of the lengthy duration of the pre-trial investigation, according to the office of the prosecutor, are prolonged psychological and psychiatric examination, the lack of psychologists who could participate in questioning, etc.<sup>70</sup> Due to the failure to resolve legal, organizational and financial issues related to the assessment of the victim's vulnerability, the

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*įstatymas [Law on the amendment of Articles 9, 154, 186, 280, 283 and the annex of the Code of Criminal Procedure of the Republic of Lithuania]*, Register of Legal Acts (no. 2014-03403).

<sup>66</sup> Bernd Schünemman, "Protection of children and other vulnerable victims against secondary victimisation: making it easier to testify in Court," *Era Forum* 10 (2009): 388.

<sup>67</sup> *Nusikaltimų aukų teisių direktyva: naujas požiūris į artimųjų smurto aukas*, *supra* note 64, p. 28.

<sup>68</sup> *Ruling of Supreme Court of Lithuania of November 11, 2014*, criminal case no. 2K-432/2014.

<sup>69</sup> *Nusikaltimų aukų teisių direktyva: naujas požiūris į artimųjų smurto aukas*, *supra* note 64, p. 28.

<sup>70</sup> *Lietuvos Respublikos prokuratūros veiklos 2013 metais ataskaita*, *supra* note 14.

situation might arise where people who are unable to independently exercise their procedural rights and implement their procedural obligations, would be devoid of the opportunity to take advantage of specific protection measures and to defend their rights.

Summarizing the legal premises for identifying the vulnerability of participants of proceedings, we can say that the individual's ability to participate effectively in criminal proceedings can be assessed in view of the objective criteria of age and mental and physical health, and also with regard to the nature and circumstances of the offence against the individual; however, in practice this is quite subjective and difficult to justify.<sup>71</sup>

The Lithuanian legislation regulating the conduct of criminal proceedings currently contains no provisions on individual victim assessment in order to identify especially vulnerable victims which are in need of additional, or special, protection measures as envisaged by the Directive.

It is clear that the obligations States, including Lithuania, "need to fulfil have an even more ambitious level, from setting up extensive victim protection schemes to including new tasks for mainly criminal justice agencies (think of the individual needs assessment)".<sup>72</sup>

## 6. THE CRITERIA FOR ASSESSMENT OF THE VULNERABILITY OF SUSPECTED OR ACCUSED PERSONS

As previously mentioned, despite the applicable general legal standards,<sup>73</sup> the right of vulnerable suspected or accused persons to a fair trial is not ensured adequately in the EU. General standards do not provide sufficient guarantees for vulnerable suspected or accused persons to participate in the proceedings effectively.<sup>74</sup> Therefore, special status must be granted for the protection of the rights of vulnerable suspected or accused persons. In this context, it is understood as a complex of specific measures covering the identification of the vulnerable participant of the proceedings, an opportunity to use legal defense services, and

<sup>71</sup> Eglė Matuizienė, *supra* note 34, p. 108.

<sup>72</sup> Rianne Letschert and Conny Rijken, *supra* note 25: 247.

<sup>73</sup> *Charter of Fundamental Rights of the European Union*, *supra* note 6; *European Convention of Human Rights*, *supra* note 6; *Convention on the Rights of Persons with Disabilities*, *supra* note 6; *Directive 2010/64/EU*, *supra* note 7; *Directive 2012/13/EU*, *supra* note 7; *Directive 2013/48/EU*, *supra* note 7; etc.

<sup>74</sup> "The number of children facing criminal justice is approximately 1.086.000 across the EU, i.e. 12% of the European population facing criminal justice each year. Estimates with regard to vulnerable adults range between 358.000 to 719.000 persons" (*Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a directive of the European Parliament and of the Council Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings*, SWD/2013/0480 final // <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1415469073671&uri=CELEX:52013SC0480> (accessed November 10, 2014)).



other specific measures to ensure effective participation in the criminal proceedings.<sup>75</sup> The main ECtHR principle applied in assessing potential violations of Article 6 of the ECHR in relation to suspected or accused persons who may be considered vulnerable, is based on whether the person could "participate effectively" in criminal proceedings.<sup>76</sup> The ability to "effectively participate" largely depends on the ability of the suspected or accused person to follow the process and to fully participate in it, which may be impaired by his age, physical or mental condition or other disabilities.

## 7. THE VULNERABILITY OF SUSPECTED OR ACCUSED CHILDREN

Children are primarily distinguished as vulnerable suspected or accused persons: "Children are considered vulnerable by definition, due to young age, unfinished physical and psychological development and emotional immaturity".<sup>77</sup> Assessing the main international legal instruments for the protection of the rights of the child,<sup>78</sup> the EU regulations on strengthening the procedural rights of suspected or accused persons<sup>79</sup> and the rules of the Lithuanian criminal procedure governing the procedural position of suspected or accused children,<sup>80</sup> we can conclude that suspected or accused children, like child-victims, are *de facto* presumed to be vulnerable. Basically, suspected or accused children are considered vulnerable. Because of their immaturity, children face difficulties: in understanding what is at stake in a criminal proceeding; in understanding the law and their rights; and in defending themselves; and effectively exercising their rights provided by law. Moreover, children are also vulnerable because of a general imbalance that exists when they face adults with special authority in criminal matters and might have limited and often incorrect knowledge or understanding of criminal courts and their rights in criminal procedures. "Finally, children are further disadvantaged as a large number of them are not only vulnerable due to their young age but also due to

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<sup>75</sup> Jolanta Zajančauskienė, *supra* note 18: 325-338.

<sup>76</sup> *S.C. v. the United Kingdom*, *supra* note 20.

<sup>77</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice*, COM/2013/0820 final // <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0820&qid=1415465203454&from=EN> (accessed November 8, 2014).

<sup>78</sup> The preamble of the 1959 Declaration of the Rights of the Child (which has been taken as basis and further expanded by the UN Convention of the Rights of the Child (Article 40)) reads: "The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection". See also *S.C. v. the United Kingdom*, *supra* note 20.

<sup>79</sup> *Directive 2010/64/EU*, *supra* note 7; *Directive 2012/13/EU*, *supra* note 7; *Directive 2013/48/EU*, *supra* note 7.

<sup>80</sup> Rima Ažubalytė, Ramūnas Jurgaitis, and Jolanta Zajančauskienė, *supra* note 43, p. 227-241.



mental health problems, learning disabilities, learning difficulties and communication difficulties.”<sup>81</sup>

In order to strengthen procedural rights of suspected or accused children, in November 2013 the European Commission made a proposal to the European Parliament and the Council concerning a directive on procedural safeguards for children suspected or accused in criminal proceedings.<sup>82</sup> The Directive would be applied to children under the age of 18 at the time when they are suspected or accused of having committed a criminal offence irrespective of their age during the proceedings and until the conclusion of the proceedings. In addition, if a person becomes a suspected or accused person when that person is above the age of 18, Member States are encouraged to apply the procedural safeguards foreseen by the Directive until the person reaches the age of 21. The age of children shall be determined on the basis of the children’s own statement, checks of their civil status, documentary research and other evidence, if any. If such evidence is unavailable or inconclusive, the age shall be determined on the basis of a medical examination.<sup>83</sup>

According to the Lithuanian Criminal Code, the specific juvenile criminal liability applies with respect to persons who are under 21 years of age at the time of the offense, while Articles 188, 272 and other articles of CCP suggest that in application of additional procedural guarantees only the legal age of majority is important. Specific procedural rules apply to suspects and accused persons under 18 years of age, but it remains unclear whether the suspect or the accused who reaches 18 years of age during the proceedings continues to be the “vulnerable” participant of the proceedings.<sup>84</sup> In view of the research and the provisions of the future Directive, the Lithuanian Code of Criminal Procedure must clearly specify that the persons who were under 18 years of age at the moment when they were suspected or accused of having committed a criminal offense, must, regardless of their age during the criminal proceedings and until the final judgment, be considered vulnerable participants in the proceedings.

## 8. THE VULNERABILITY OF SUSPECTED OR ACCUSED ADULTS

In contrast to the vulnerability assessment of children in criminal proceedings, it is difficult to define the reasons for why suspected or accused adults may be vulnerable. It has been argued that specifying examples of vulnerability criteria in

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<sup>81</sup> *Commission Staff Working Document, supra* note 74.

<sup>82</sup> *Proposal for a directive of the European Parliament and of the Council Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings, supra* note 8.

<sup>83</sup> *Ibid.*

<sup>84</sup> Rima Ažubalytė, Ramūnas Jurgaitis, and Jolanta Zajančkauskienė, *supra* note 43, p. 238-239.

legal acts is not informative and therefore that there should be a clearer definition of which persons, and the cases in which they should be classified as "vulnerable".<sup>85</sup> In this context, mention should be made of the Green Paper from the Commission Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, which includes a non-exhaustive list of "vulnerable" suspects or defendants.<sup>86</sup> Other sources state that the concept of a "vulnerable suspect or defendant" should be understood in broad terms, by providing only certain criteria, on the basis of which a suspected or accused adult person would be considered to be "vulnerable".<sup>87</sup>

After lengthy discussions with stakeholders and Member States, it was decided not to provide a specific definition of vulnerable suspected and accused adult persons, pointing out that such a definition could even be deemed to be stigmatizing.<sup>88</sup> However, it was agreed that specific safeguards are required in criminal proceedings for certain suspected and accused persons, so that they understand their rights and are able to exercise them: "if people do not understand the proceedings or the consequences of actions such as confessing, either because their vulnerability is not identified or because special safeguards are not in place, this leads to 'inequality of arms', which reduces their chances of receiving a fair trial and threatens the integrity of the judicial process".<sup>89</sup> Due to difficulty in identifying a common definition of vulnerable adults, legally binding measures have not so far been taken to protect the suspected and accused adults. On November 27, 2013, the European Commission adopted a Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.<sup>90</sup>

The Recommendation defines vulnerable suspected and accused persons in the proceedings as those, "who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities. In addition, particularly vulnerable suspects and accused persons, i.e.

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<sup>85</sup> Mar Jimeno-Bulnes, "Towards common standards on rights of suspected and accused persons in criminal proceedings in the EU?" *CEPS Liberty and Security in Europe* (February 2010) // [http://aei.pitt.edu/15104/1/Jimeno-Bulnes\\_on\\_rights\\_of\\_suspects.pdf](http://aei.pitt.edu/15104/1/Jimeno-Bulnes_on_rights_of_suspects.pdf) (accessed November 8, 2014).

<sup>86</sup> Green Paper from Commission "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union", Brussels, 19.2.2003 COM(2003) 75 final // <http://www.statewatch.org/semidoc/assets/files/commission/COM-2003-75.pdf> (accessed November 9, 2014): "A non-exhaustive list of potentially vulnerable groups could include: foreign nationals, especially but not limited to those who do not speak the language; children; those who are vulnerable as a result of their mental or emotional state (for instance the mentally handicapped, those suffering from a psychiatric condition such as schizophrenia, persons of subnormal IQ and persons with a disability on the autistic spectrum) Defendants with a low IQ, low reading age or a poor understanding may be more likely to make damaging assertions, including false confessions, at the police interview stage; those who are vulnerable as a result of their physical state (the physically handicapped, including the deaf, those with illnesses such as diabetes, epilepsy, pacemakers etc. and persons with speech impediments, as well as more obviously physically handicapped suspects); persons who cannot read or write and etc."

<sup>87</sup> The Carloway Review, *Report and Recommendations* (November 17, 2011) // <http://www.scotland.gov.uk/About/Review/CarlowayReview> (accessed November 9, 2014).

<sup>88</sup> Commission Staff Working Document, *supra* note 74.

<sup>89</sup> Communication from the Commission, *supra* note 77.

<sup>90</sup> Commission Recommendation 2013/C 378/02, *supra* note 9.

persons who are not able to follow and understand the criminal proceedings are identified.”<sup>91</sup>

Firstly, personal characteristics such as age, physical or mental condition<sup>92</sup> or other disabilities<sup>93</sup> (medical criterion) are identified. The preamble of the UN Convention on the Rights of Persons with Disabilities states that the concept of disability is being developed and is constantly evolving<sup>94</sup>. According to Article 1 of the Convention, “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.” On December 23, 2010, the EU ratified the Convention; therefore the “disability” concept should be interpreted without prejudice to the provisions of the Convention.

Secondly, personal intellectual and volitional capacities, which determine the understanding of the criminal proceedings and/or the ability to effectively participate in it (legal criterion), are identified. This is associated with the category of the procedural capacity, which is not defined in the Lithuanian Code of Criminal Procedure. In scholarly literature<sup>95</sup> the intellect criterion is defined as a person’s ability to understand the nature and importance of both the criminal act and one’s procedural position, whereas the will criterion is defined as the ability to independently exercise one’s procedural rights and duties.<sup>96</sup> Such identification of the legal capacity allow for distinguishing the cases where the suspected or accused person “is able to understand the criminal proceedings”, but “is unable to participate in it effectively” and also situations where a person “is unable to follow and understand the criminal proceedings”.

The Lithuanian CCP contains no provision defining in general terms which suspected or accused adults must (or could) be assigned to the category of the vulnerable participants of the proceedings. However, individual norms of the CCP mention vulnerable suspected and accused persons. For example, CCP distinguishes suspected or accused persons, who due to their “physical or mental deficiencies”

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<sup>91</sup> *Ibid.*

<sup>92</sup> Jolanta Zajančkauskienė, *supra* note 46: 314.

<sup>93</sup> “One in six people in the European Union – around 80 million – have a disability that ranges from mild to severe. Over one third of people aged over 75 have disabilities that restrict them to some extent. These numbers are set to rise as the EU population grows progressively older” (*EU ratifies UN Convention on disability rights* // [http://europa.eu/rapid/press-release\\_IP-11-4\\_en.htm](http://europa.eu/rapid/press-release_IP-11-4_en.htm) (accessed November 10, 2014).

<sup>94</sup> *Convention on the Rights of Persons with Disabilities*, *supra* note 6.

<sup>95</sup> Jolanta Zajančkauskienė, “Prozessuale Handlungsfähigkeit eines Verdächtigen (Beschuldigten)” [Procedural Capacity of a Suspected (Accused) Person], *Jurisprudence-Jurisprudencija* 4 (122) (2010): 245–259.

<sup>96</sup> Jolanta Kanapeckaitė, *Baudžiamasis procesas dėl nusikalstamų veikų, kuriomis įtariami (kaltinami) asmenys su fiziniais ar psichikos trūkumais (sutrikimais)* [Criminal proceedings concerning offenses that a person with physical or mental deficiencies (disabilities) is suspected (charged) to have committed], daktaro disertacija (Vilnius: Lietuvos teisės universitetas, 2004), p. 22–24.

are unable to exercise their right to defense independently (Article 51 (1) and (2) of CCP). This wording is consistent with the category of limited procedural capacity. According to Chapter XXIX, Articles 392-406 of CCP, the person with whose respect coercive medical measures are applied (unable to understand the essence of his actions or control them during criminal proceedings) would be equivalent to an incapacitated person. Based on Paragraph 11 of the Recommendation, the said person would be identified as "extremely vulnerable" in the proceedings. Article 53 of CCP speaks about legal representation of the suspects or accused, who, because of their age, disability, illness or other valid reasons cannot exercise their rights conferred by the law. So individual norms of the CCP in Lithuania "distinguish" vulnerable suspected and accused persons, but fail to identify general vulnerability criteria provided for in the Recommendation.

On the basis of the criteria discussed above, the vulnerability of the suspected or accused person must also be identified and recognized without delay: "<...> Member States should ensure that all competent authorities may have recourse to a medical examination by an independent expert to identify vulnerable persons, and to determine the degree of their vulnerability and their specific needs. <...>" (Article 4 of the Recommendation).

In addition, guidelines are provided in the Recommendation regarding the application of a "presumption of vulnerability in certain cases for persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in the proceedings" (Article 7 of the Recommendation). At this point the wording provided in Article 51(1) and 51 (2) of CCP should be noted, according to which the blind, deaf and dumb are *a priori* identified as vulnerable participants of criminal proceedings, i.e. as those unable to exercise their right to defense independently. However, without having doubts regarding the vulnerability of the blind, deaf and dumb in criminal proceedings, the legislator's position of distinguishing them from other disabled cannot be supported. It is believed that such a wording of the law is discriminatory.<sup>97</sup>

## CONCLUSION

Analysis of EU and Lithuanian normative acts suggests that minor victims are *a priori* considered vulnerable and specific protection measures must apply in their case. However, the vulnerability of adult victims and their specific protection needs

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<sup>97</sup> Jolanta Zajančkauskienė, "Asmens, turinčio negalią, teisė gintis padedant gynėjui" [Disabled Person's Right to Defence with the Contribution of Defence Lawyer], *Societal Innovations for Global Growth: Research Papers* 1(1) (2012): 111-112.

are not assessed at any stage of proceedings in Lithuania, although the Code of Criminal Procedure provides for certain specific protection measures for victims, who, due to a public hearing or questioning, may be subject to "psychological trauma or other serious consequences". It is therefore recommended to supplement the provisions of the Code of Criminal Procedure by providing both individual grounds for assessing the vulnerability of adult victims in line with the criteria set out in the Directive and also the assessment procedures.

Given future EU requirements concerning suspected or accused children and current recommendations concerning the consideration of suspected or accused adults as vulnerable participants of the proceedings, Lithuanian legal regulations in this area must be improved. The following is proposed for the Code of Criminal Procedure of Lithuania:

- to entrench a general norm, according to which the suspects and the accused, who, because of their age, mental or physical disability or any other disability cannot understand criminal proceedings or participate in it effectively, be identified as vulnerable participants in the criminal proceedings;
- to specify that children who on the date when they are suspected or charged with committing a criminal offense and who are under 18 years of age, regardless of their age during the subsequent criminal proceedings and until the final judgment, must be considered as vulnerable participants of the proceedings.

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