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## THE RIGHTS OF VICTIMS OF CRIME – A COMPARATIVE APPROACH

### Abstract

This article analyses the comparative approach regarding the role and the treatment of crime victims in three legal systems: The Common Law adversarial system, the European continental mostly inquisitorial system and the legal system of post-socialist countries. From the literature review and the normative analysis of criminal procedure codes of different countries some interesting conclusions emerge:

1. The role of the crime victim in the criminal procedure of continental countries is well defined and organized. The rights of the crime victim, such as: the right to access to justice, the right to compensation, the right to protection and the right to assistance, all find their particular place in the continental criminal procedure, whether that is a typical inquisitorial or an adversarial one. The victim can be compensated through the civil compensation claim decided within the criminal procedure, they can participate as active subjects of the procedure with specifically defined rights, whereas the examination process of the victim as a witness is supervised by the court and minimizes secondary victimization.
2. Common Law countries have more difficulties arranging a fair treatment of crime victims: they are excluded as active subjects of the criminal procedure (they only appear as witnesses), they cannot be compensated properly within the criminal procedure, they can be subjects of secondary victimization through the aggressive cross-examination process and they are excluded from the plea negotiation process.

Some efforts are made through introducing the Victim Personal Statement and the Compensation Order schemes, however, it shows insufficient.

3. Post-socialist countries are in the process of reforming their legislation regarding the role of the victim but also other issues. They need to combine the best parts of both the Common Law and the Civil Law legal systems in order to have an efficient and fair criminal procedure.

**Keywords:** victim, victim's rights, criminal procedure

## INTRODUCTION

The role of the victim as a passive subject of the criminal act but also of the criminal procedure has historically evolved in a very interesting way: from an active prosecutor in the past, the victim has slowly transformed into a passive and secondary subject whose role is limited in giving testimony as a witness of the crime. However, in the last decades, victim's role has re-emerged. The aim of this article does not consist into providing a historical perspective of the role of the crime victim, but to studying its position in a comparative aspect in different legal systems. Nowadays, certain internationally recognized rights of crime victims such as: the right to compensation, the right to access to justice, the right to protection and the right to special assistance, are interpreted and applied differently in common-law, civil-law and former socialist countries.

In regard to Macedonia, this comparative approach has served as the starting point of the process of reforming the criminal legislation. Thanks to this approach the role and the position of the crime victim has been visibly ameliorated in the new Criminal Procedure Code of 2010. Although there are some contradicting issues in the CPC, reforming the role of the victim is a positive and rare example in the South East European region.

### 1. COMMON LAW COUNTRIES: UK AND USA

The fact that the Victims' Rights Movement occurred and developed first in UK and USA is not a coincidence. By analysing the legislation of these countries a very clear impression arises: the role of the victim in the criminal law and procedure of these countries is extremely limited and it can be said without hesitation that such a position of the victims is inconvenient and in fact very unfair to them. This opinion is shared not only by many authors from the Continent but also by British and American authors. In the conclusions and recommendations of his book dedicated to victims' rights, human rights and the criminal procedure, *Doak* calls for introducing certain elements of the civil law system in the common law one with regard to victims' rights (Doak 2008: 285-292).

One of the most important rights of the victim is **the right to access in criminal procedure**. In the common law system the victim is almost entirely deprived of this right. Doak emphasizes that although this right is guaranteed in international criminal procedures, in the British criminal procedure the victims are merely "normative outsiders to the criminal trial: the showdown between the State and the accused" (Doak 2008: 138). This conclusion derives from the fact that victims in

England and Wales cannot even be present in criminal proceedings, they do not have the right of legal representation nor the right to provide evidence or to question the evidence of the opposite party. Other authors also react to this reality stating that the adversarial system “turns the victims into weapons to be used against the opposite party” (Pizzi 1999: 197).

Taking into account the above mentioned problems researchers call for application of Victim Advocacy Schemes. The main aim of this idea, still developing in England and Wales, is to secure adequate representation of the interests of the victim in criminal trials since the isolation of the victim in regard to law enforcement bodies, is perceived as unacceptable in a contemporary country.

In other common law countries there is a certain system of representing the victim in criminal proceedings. Thus, many federal states in USA recognize the right of the victim to legal representation especially in cases of violent crimes and sex crimes. In this regard 34 states of USA have adopted victims’ rights amendments in their constitutions which guarantee to the victim the right to take part in every phase of the criminal procedure (National Victims’ Rights Constitutional Amendment Passage 2010). There is an evident and continuous increase in the number of states accepting these amendments.

*Wolhuter et al.* explain that in regard to the crime victim, the US implement a different system in comparison to UK, whilst incorporating certain solutions from the civil-law system, although their criminal procedure is a typical adversarial one. Thus USA has adopted a federal law on the rights of victims of crime which guarantees certain rights such as:

- The right of the victim to be consulted before the prosecutor decides whether to press charges or not,
- The right of the victim to be consulted before reaching the decision on plea bargaining (however, it needs to be clarified that the victim does not have a right to veto regarding the plea bargaining decision, however, the victim is also not entirely excluded from this process like in UK),
- The right of the victim to provide a Victim Impact Statement: in US this statement is given orally before the court unlike in UK, and
- Victim’s right to legal representation is a legal right of the victim and efforts are being made for this right to become a constitutional right for the victim (Wolhuter et al. 2009: 183-186).

Legal representation for the victim is also possible in Ireland, but it is limited to victims of violent crimes and those of sex crimes (Doak 2008: 142).

In common-law countries there is an established practice for the victim to present her *Victim Personal Statement* or else known as the *Victim Impact Statement*. The

aim of this instrument is to give the possibility to the court to get to know the victim's perspective. These declarations however, do not have any relevant legal significance since the laws of these countries clearly state that there is no obligation for the courts to take account on these statements. *Sanders and Young* explain that these statements have in most cases shown to be irrelevant and frustrating to the victims (Sanders & Young 2007: 666-667).

In regard to victims' **right to protection** it can be stated that common law countries make serious efforts to implement programs on victim and witness protection regarding certain crimes. On the other hand, with regard to protection from secondary victimisation while examined in court, the cross-examination appears to be a serious problem for the victim. Although this form of interrogation is considered to be the most important asset of the common law criminal procedure; from the victim's perspective it can be intimidating, since the aggressive cross-examination often makes the victim feel like the perpetrator of the crime rather than its victim who becomes discouraged to report the crime while the witness becomes discouraged to report his knowledge of the case (Cutler 1953).

In regard to victim's **right to compensation and remedy**, the adversarial system of common law countries appears as problematic having in mind that in common-law countries there is no *civil compensation claim* within the criminal procedure. *Doak* explains that the victims usually hesitate to use civil suits to claim damages (Doak 2008: 231-232). For this reason, starting from 1973 *compensation orders* are used in England and Wales which appoint that one part of the fine paid by the defendant will be used to compensate the victim. It is far from the best way of ensuring the victim's right to compensation since this right needs to be separately guaranteed, not as a part of the fine that is paid by the defendant. However, full execution of this right in the common law system through the criminal procedure is impossible having in mind the strict division between *tort law* and *criminal law*.

On the other hand, in regard to victim's right to compensation, the common law countries have a special merit. They are the first countries in the world who established an official system of compensating crime victims through a state fund. This is the extra-judicial system of compensating the victim (when compensation from the defendant is not applicable) which is applied in UK since 1964 and represents a historic achievement of Margery Frey – leader of the Victims' Rights Movement (Doak 2008).

*Wolhuter et al.* explain that the British Government has adopted different documents related to compensation of crime victims, however, these documents are in most cases superficial and lack a real legal impact (Wolhuter et al. 2009: 129).

As it can be noticed, the rights of the victims in common-law countries are very limited and need crucial reforms. Therefore, the common law system was not taken

as an example while defining the role and the rights of the victims in the reformed criminal procedure legislation in RM.

## 2. CIVIL-LAW COUNTRIES

In the civil-law legal system the victim has a far more important role regardless of the fact whether the criminal procedure of a certain country is inquisitorial or adversarial. In the continent there is an evidently longer tradition of including the victim as an active subject of the criminal procedure, either as an assistant to the prosecution or as a claimer of the civil compensation claim within the criminal procedure (*Partie Civile*). Certain continental legislations provide a special status for the victim as a procedural party with all the respective rights. In this direction it can be easily noticed that the victim's right to actively participate in the criminal proceedings as well as victim's right to compensation have been developed earlier in the civil-law system. In the recent time, criminal procedure codes of European countries promote separate rights for the victim of crime, in particular the right to protection from secondary victimisation as well as the right to specific assistance. Most of the European countries have inquisitorial criminal procedures which is characterized by *Bacik et al.* as a judge-centered rather than party-centered procedure where the main court session is somewhat more relaxed since most of the work regarding the examination of the evidence has been completed in the investigation stage unlike in the adversarial system where the main court session is more complex and dynamic since it is there where the examination of evidence is done (Bacik et al. 1998: 234). This practice is not very different even in continental countries that have adversarial criminal procedures such as: Spain, Netherlands, Denmark and Portugal. On the other hand, the plea negotiation procedure is not very common in civil-law countries which are more biased to the principle of searching for the material truth.

First, it must be stated that every continental criminal procedure law makes the distinction "victim ⇔ damaged party", which separates the victims that are party to a criminal process from those who are not. In this regard, the German Law on Criminal Procedure (*Strafprozeßordnung*, StPO 1877) differentiates between the victim in a larger sense which includes the victim of every crime (*Opfer*) and the victim in the narrow sense which includes the victim as a damaged party (*Verletzte*). A similar way of differentiating between the roles of the victim is also evident in the criminal procedures of Sweden and Netherlands.

Starting from different names that the victim has in these legislations it can be seen that the civil-law system puts a specific attention upon this subject contrary to

the common law system where such terminological and procedural differences are not common.

In civil law countries, the right of the victim to actively participate in the criminal procedure is ensured as early as the investigation stage. Thus, *Walther* explains that in Germany the victim, regardless of her role as a witness or a separate party, has the right to a legal representative who will protect her rights starting in the investigation stage (Walther 2006: 114). If the prosecutor decides to withdraw from further investigation he needs to inform the victim on reasons of his withdrawal. The victim can complain against the withdrawal of the prosecutor to the higher rank of the Office of the prosecutor and after that to the first and second instances of the court, which represents a very strong mechanism for protecting the victim from the prosecutorial arbitrariness. On the contrary, in Macedonia, in cases when the prosecutor withdraws from his prosecution, the damaged party has the right to appeal only at the higher rank of the Office of the prosecutor. It can be concluded that the law in Macedonia offers limited support for the victim's claim against the prosecutor's decision, moreover, having in mind that it does not provide for a court solution of this issue.

Another very important right of the victim is the possibility to examine the evidence of the opposite party. The damaged party has this right automatically whereas the victim appearing as a witness needs to make a special request in order to make use of this right (article s406e(1) of StPO).

As of the right to compensation, the system of compensation claims within criminal procedures is crucial. This procedure is well established in all European countries (Brienen & Hoegen 2000). Compared to the British system of compensation orders, the civil compensation claim has certain advantages: the compensation order is given by the court regardless of any request from the damaged party, whereas the civil compensation claim is in fact a civil action that is processed within a criminal procedure for which the criminal court decides in a so called adhesive (joined) procedure. This is a better solution having in mind that: 1) the separate civil procedure usually costs more than the criminal procedure and 2) following a separate civil procedure takes more time and energy.

On the other hand, problems that occur in European countries regarding the civil compensation claims are related to the practice of directing these claims to civil procedures most of the time. To avoid that, the Dutch criminal procedure provides that compensation claims should be divided in simple and complex issues, the simple ones should be solved in criminal proceedings whereas the complex ones in a separate civil action (Ellison cited in Wolhuter et al. 2009: 194). There is a similar disposition in the article s406(1) of the German StPO that provides that the criminal court can decide: a) for the entire civil claim, or b) decide on the basis of

the claim or partially accept the claim. A similar solution is accepted in the CPC of RM of 2010.

The adhesive (joined) procedure related to the civil compensation claim is a very rational and humane solution regarding the quest for compensation of the victim, however, better mechanisms should be found for this practice to actually work within the criminal procedure and to stop the practice of automatically redirecting these cases in civil action suits.

The reforms in European legislations of the years 2000 aim to secure better assistance to crime victims including their compensation from state funds and also find better solutions to protect the victim from secondary victimisation using different technological means especially for vulnerable categories of victims. This is a very broad specter of victim's rights in comparison to the common law system, what makes the civil law system visibly more advanced in regard to protecting the rights of the crime victim.

### 3. SOUTH-EAST EUROPEAN COUNTRIES

It is interesting to see the path of the legislative reforms in the SEE region after 1990 when the transition process started. All the regional legislations have undergone a process of different reforms in order to harmonize with European standards accepting elements from the adversarial and reforming their inquisitorial procedures. In comparative criminal law the legal system of post-socialist countries is considered a separate system although in essence it is a civil law legal system. Macedonia was also a part of these reforms undergoing a switch of the entire criminal procedure from inquisitorial to adversarial aiming to make the criminal process more dynamic.

As for the crime victim's position, it is interesting that these legislations did not make the difference "Victim ⇔ damaged party" until recently. Thus the victim could occur as: a) a damaged party with the right to pursue its compensation claim, b) a witness in the criminal process, c) a subsidiary prosecutor who continues the prosecution when the public prosecutor withdraws from the case in crimes prosecuted *ex officio*, d) a private suer for crimes prosecuted through private charges. It must be emphasized that the subsidiary prosecution represented a strong mechanism of control over the work of the public prosecutor as well as a great opportunity for the victim to be involved in criminal proceedings. Taking this into account, it is not by chance that some developed countries of the region, such as Croatia, have continued to use this institute.

The Croatian Criminal Procedure Code was the first in the region to make the



“Victim ⇔ damaged party” distinction, Macedonia soon followed this example with the CPC of 2010. Thus Croatia and Macedonia are the first countries in the region that provide specific rights for the victim in their legislations.

As for the other rights of the victim that are (in)directly included in the legislations of countries in this region the following conclusions can be made:

- *The right to compensation.* If the criminal procedure laws of Croatia, Macedonia, Albania, Kosovo, Bosnia and Herzegovina and Serbia are analysed, it can be seen that the civil compensation claim is the most common form of compensating the crime victim. It needs to be furtherly clarified that all these legislations also provide the possibility of mediation between the offender and the victim for less serious crimes which can also contribute to the compensation of damages.
- *The right to actively participate in the criminal process.* All the above mentioned legislations recognize the prosecutor, the defendant and the possibility to include the subsidiary prosecutor or the private suer as parties in the criminal process. The two latter subjects are not mentioned only in the Bosnian code. It is also characteristic that the Bosnian code was the first in the region to include the plea negotiation process. This was followed by the CPC of Macedonia. The impact of this procedure in the rights of the crime victim needs to be analyzed separately and thoroughly.
- *The right to protection.* All the above mentioned legislations have separate clauses that guarantee the protection of victims, witnesses and justice collaborators. It must be emphasized that some of these legislations also contain clauses on direct and cross examination that are vivid influences from the adversarial procedure.

The reforming process of the criminal legislations of the countries in this region is still ongoing and there is much to be done. It is important that the world trends in this matter, set by Western-European countries and the USA provide better protection for the crime victim.

## CONCLUSION

A general conclusion to be drawn from this short comparative analysis is that the crime victim is far better protected and their role is better defined and organized in the civil-law system which has traditionally promoted some very positive rights for the victim, such as the compensation claim within the criminal procedure, inclusion of the damaged party as a subsidiary prosecutor with clearly defined rights and in

some states with clearly distinct terminology, as well as the careful proceeding of the judicial panel in the process of interrogation of the crime victim.

On the other hand, the common-law system is characterized by a minimal and very limited inclusion of the crime victim. There is an evident trend of ameliorating this position (through Victims Impact Statements and Compensation Orders), however these efforts show to be insufficient because of some typical characteristics of the adversarial criminal procedure that make it hard for the victims to solve some of their problems such as: the lack of the civil compensation claim institute, lack of any kind of subjectivity of the victim, the aggressive direct and cross examination of the victim and the resulting secondary victimisation as well as the total exclusion of the victim from the plea negotiation process.

Post-socialist countries are in the process of building separate systems of treatment of the crime victims although the essential characteristics of the civil-law system have already established a better position for the crime victim in comparison to common-law countries. In this regard, it is very important that the reforms in the legislation of these countries go in line with the global trends of ameliorating the position of the victims of crime.

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