

Well-informed? Well Represented? Well Nigh Powerless? Victims and Prosecutorial Decision-making

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Abstract This article provides a brief overview of the ways in which prosecutors must engage with victims in the course of their work in criminal proceedings and what formal roles victims can assume in criminal proceedings. Besides exploring what rights victims have per se in criminal proceedings, analysis is provided as to what it means to be an additional prosecutor or a private prosecutor in several European criminal justice systems. A brief analysis of the effects these rights and the use of prosecutorial discretion has on victims is provided.

Keywords Forms of victim participation in trials · Victims in criminal proceedings

Up to now, discussion in this report has focussed upon the consequences of developments based upon legal principles within European criminal justice systems or the increasingly flexible forms of defendant/prosecutor interaction within these systems.

This short paper considers a different aspect; namely the standpoint of the victim. It presents data gathered to chart victims' options within the systems studied. Although, in some ways peripheral to the main issues in this wider report, these data are of importance as they are relevant to the way that the needs and rights of victims and the needs and rights of defendants interact with each another.

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A full discussion of the interaction between offenders' and victims' rights is not possible here. The reader could, for example, consult Sanders and Young (2001), who in their 'freedom' model search for a justice model that is both participative and inclusionary for both defendants and victims, or Goodey (2005), who discusses the development of victims statements in court, in the context of recent developments within England and Wales criminal justice.

In the context of this study we have noted that diversionary measures have often been introduced alongside the development of other systems of restorative justice. This is partly because such diversionary measures can more easily be used to facilitate solutions such as mediation, restitution and other forms of restorative justice. Table 8 in Jehle et al. (2008), shows that the use of such conditional disposals has become quite commonplace, for example in the justice systems of Germany, France, Hungary and the Netherlands. However, as Goodey (2005) has shown, restorative justice, although giving the victim a chance to get involved in the justice process, is not necessarily victim-centred and can result in the victim feeling unhappy, e.g., in having too high expectations or in being denied seeing the offender suffer the 'full punishment' that the victim often feels they deserve.

This study and its predecessor conclude that the main reason for the increased use of alternative procedures and case-endings within European criminal justice systems is to improve the efficiency of those systems by saving money on the full court process. This could be regarded as being unfriendly to the victim. It removes the public element of cases brought to trial and thus takes away the possibility for the victim to have "his/her day in court". It also removes the certainty of a public guilty verdict and, at least a part of the social stigma attached to it. Naturally, in how far the system was considerate of victims before such changes remains unclear. The point is that such developments may be classified as even less victim oriented.

Many people would say that the victim gets very little out of such diversionary systems. However, there may be little alternative where a system is unable to deal with the volume of cases and so a *de facto* de-penalisation has been brought about. Whilst true decriminalisation achieves legal clarity a quasi-sanction, or some other "softer" reactions, can be viewed as better for the victim achieving some kind of "punishment" rather than merely paying lip-service to an ideal rarely met where resources are tight. Where diversionary measures are used for victim-inclusive proceedings, this naturally has an entirely different dimension.

A further question relates to whether the victim is aware of his or her rights. Not all jurisdictions have put the same amount of effort into making information available to victims and to the lawyers and community groups that advise them.¹

The issues addressed briefly here could not be explored adequately by the study reported upon in this volume but should be borne in mind when considering its results. Moves towards greater efficiency, especially where they involve less openness and even dealing with the defence have an entirely different meaning from a victim's perspective

Prosecution Services and Victims

Table 1 shows that all the PPSs studied, bar the Spanish and Swiss, have a role in relation to victim's interests. In Switzerland, Hungary, the Netherlands, Poland and Sweden this

¹ In England & Wales, for example, the Crown Prosecutor Service has published a Prosecutor's Pledge detailing the victims' expectations of the CPS. However, there is some evidence that this is not widely read, even by defence lawyers (see http://www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html).

Table 1 The PPS' victim-related role

PPS also active	CH	D	E	EW	F	H	HR	NL	PL	S	TR
Victims' interests		X		X	X	X	X	X	X	X	X
Victims' compensation claim						X		X	X	X	
Compensating victim where offender unknown					X						

amounts to representing the victims' compensation claims alongside the prosecution case during a criminal trial whilst in France this extends to compensating the victim where the offender remains unknown.

More precise information as to what representing a victim's interest means can be seen in Table 2.

Table 2 shows that victims frequently have rights in criminal proceedings which must be managed by the prosecution service; these do, however, vary significantly across Europe. A few of the jurisdictions studied allow a victim (usually limited) access to the case file during the investigative stage, whilst a few more allow access once the investigation is closed and a PPS decision made. This is true for the smaller countries studied and Poland, which thus provide fuller informational rights than the others.

Only Germany and Croatia² do not allow a victim to protest against a drop but only a minority allow an equivalent against a disposal (which must, of course, provide legal certainty for the suspect and it seems this is given priority here).

In the majority of study countries there are certain offences which require victim co-operation for prosecution.

Switzerland and Sweden give victims strong procedural rights with rights to appeal against verdict and sentence whilst half of the other countries provide for a complaints procedure.

As far as informational rights are concerned, there is a strong tendency to provide information about drops, fitting to the right to object to these and thus giving this right meaning. In relation to conditional disposals these become less prominent. Often a victim will be informed about the decision to take a case to court and the charge brought; only Germany, Croatia, Poland and Turkey do not provide the victim with information as to the date and details of the hearing. In a few less study countries does the victim have the right to be informed of the verdict reached but only Spain, England and Wales and France provide (at least in some cases) information about prison release dates.

In England and Wales, Hungary, Poland and Sweden victims have an own right to carry a full trial independently. Rights to claim compensation are wide-spread whilst a right to be represented legally at the trial is only slightly more common than the right to legal assistance.

Special Status Victims

In a significant number of the study countries (Switzerland, Germany, Croatia Poland and Turkey), victims have a right to become additional prosecutors³ alongside the PPS to represent their interests more strongly in court. The rights lent to them as such are shown in Table 3.

² In Croatia a victim may not protest against a drop, but the victim has a right to continue criminal proceedings as an additional prosecutor.

³ This refers to the "Nebenkläger". It is a mechanism by which the victim is represented formally in court and given certain rights to participate in the trial; to present her or his side and accusations against the accused in court.

Table 2 Victims per se have right to

	CH	D	E	EW	F	H	HR	NL	PL	S	TR
View file during invest. stage	X					X ¹	X ²			X ³	
View file when PPS dec. made	X					X ⁴	X	X	X	X	
Protest ag. decision to drop	X	X ⁵	X	X	X	X	X ⁶	X	X	X	
Protest against dec. to dispose				X		X	X ⁷	X		X	
Veto certain disposal forms (please list below)					X ⁸	X ⁹					
Prevent public prosecution (please explain below, e.g. for which offences)	X	X ¹⁰		X ¹¹	X ¹²	X ¹³	X ¹⁴	X ¹⁵	X ¹⁶	X ¹⁷	
Complaint to ombudsman or equivalent			X	X		X		X	X	X	
Appeal against sentence	X		X				X ¹⁸			X	
Appeal against verdict	X		X				X ¹⁹			X	
Be informed that suspect found	X		X		X			X		X ²⁰	
Be informed that case being closed because no suspect found	X	²¹	X	X	X	X	X	X	X	X ²²	
Be informed of decision to drop case on legal grounds (e.g. statute of limit.)	X	²³	X	X	X	X	X	X	X	X ²⁴	
Be informed of decision to drop case on discretionary grounds	X	²⁵		X	X	X	X	X	n.a.	X ²⁶	
Be informed of decision to impose a condition		²⁷	X	X	X	X	X	X			
Insist on full trial			X			X ²⁸			X	X ²⁹	
Demand restitution/ compensation via criminal procedure	X	X	X	³⁰	X	X	X	X	X	X	
Be formally represented during trial alongside Prosecution service	X		X		X	X				X	
Assisted by a lawyer during hearing as witness	X	X				X			X	X ³¹	
Be informed that Charge being brought	X				X	X		X	X	X	
Be informed that Decision to take case to court	X				X	X		X	X	X	
Be informed that Date and details of hearing	X		X	X	X ³²	X		X		X	
Be informed about Verdict	X	³³	X	X		X		X	X	X	
Be informed about Date of prison release			X	³⁴	X ³⁵						

¹ Only documents affecting him/her (during the investigation).

² The inspection of the files may be denied to the victim until s/he has been examined as a witness.

³ With limitations given by Secrecy Act.

⁴ Only documents affecting him/her.

⁵ Where a simple drop in accordance with § 170 II StPO is used, proceedings to force indictment are possible where the applicant is also the victim.

⁶ Victim can assume prosecution by himself or herself (additional prosecutor).

⁷ The State Attorney may render the ruling on postponing the commencement of criminal proceedings (decision to dispose) only subject to prior consent by the victim. The victim can not influence decision to dispose made by the General State Attorney in proceedings against a person who was a member of a criminal organization.

⁸ Mediation is possible only with victim's consent.

⁹ When the PPS wants to prescribe obligations for the suspect and these obligations affect the victim. Mediation is only possible if proposed by the victim or with his/her consent.

¹⁰ In relation to the so-called „pure application offences the victim can prevent prosecution, e.g. for trespassing, domestic and family theft and fraud.

¹¹ Victims can refuse to give evidence, even if the police will give them witness protection because of possible intimidation. In certain cases this can so diminish the PPS case that a conviction is not possible.

¹² Slander and libel (press offences).

¹³ When private motion is necessary (e.g. certain sexual offences, property offences committed by a relative).

¹⁴ Victims may prevent the public prosecution of the offences for which prosecution motion of a victim is required (e.g. Disclosure of Professional Secrets without Authorization, Unauthorized Use of Personal Data, Petty Theft, Transmission of Venereal Disease) - these are generally referred to as application offences.

¹⁵ For some (application) offences a victim complaint is necessary in order to prosecute: some sexual offences, some property offences between close relatives etc.

¹⁶ Application offences.

¹⁷ (Application) Offences prosecutable only on request of the victim, such causing bodily injury, defamation, etc.

¹⁸ The victim may challenge a judgment only regarding the court's decision on the costs of the proceedings, but if the State Attorney takes over the prosecution from the additional prosecutor, the victim may file an appeal for all the reasons for which the judgment may be appealed.

¹⁹ Same as supra note 15.

²⁰ On request.

²¹ Every person reporting an offence is provided with this information even if s/he is not the victim. If the latter wishes to be informed in this manner, s/he must have reported the offence.

²² On request.

²³ as 21.

²⁴ On request.

²⁵ as 21.

²⁶ On request.

²⁷ as 21.

²⁸ Where acting as a substitute prosecutor.

²⁹ If the PP makes decision not to prosecute in court, the victim may take over prosecution.

³⁰ The victim has a right to sue for compensation in the civil courts.

³¹ To be assisted by a lawyer during the trial especially in cases concerning sexual and violent offences. The victim is not heard as a witness in a legal sense, but as the injured party.

³² Victim must receive written notification before trial.

³³ Upon application the victim is to be informed of the result of court proceedings.

³⁴ In more serious cases.

³⁵ For some conditional releases.

In terms of additional rights the status as an additional prosecutor makes little difference in the jurisdictions affected although a victim is quite naturally factually much more likely to be consulted and represent his or her interest as s/he wishes in such cases. This option clearly vanishes for victims who were victimised by offences dealt with by a drop, conditional disposal or alternative procedural form.

Table 4 shows the position of victims bringing a private prosecution.

As Table 4 shows, the majority of study countries (bar the Netherlands and Turkey; Germany, Croatia, Hungary and Poland only for a limited category of offences) allow victims to bring private prosecutions, sometimes only if the PPS has decided not to prosecute. Again in terms of rights there is not usually a major difference in comparison to a victim per se, though naturally it seems highly plausible that a victim trial party is far more likely to assert his or her rights more effectively. It should also be borne in mind, however, that a victim bringing a private prosecution bears the burden (and often the financial risk) of the trial alone and by nature these cases are likely to be ones the PPS or police may well not have devoted a great deal of investigatory resources to.

In **Croatia** the discussion of better treatment of victims and victim's rights is only now beginning, influenced to a great extent by the EU and ICTY. A victim has many of the rights traditional for inquisitorial legal systems (the victim may act as private and additional prosecutor, may apply for civil damages and compensation arising out of the commission of a criminal offence to be judged in the course of criminal proceedings, the victim is entitled to inspect files and objects which are admitted as evidence and so on).

The main reason for the introduction of alternative procedural forms in Croatia was to improve the efficiency of the criminal justice system. Though, for example the PPS may

Table 3 Victims as additional prosecutors have right to

	CH	D ¹	E	EW ²	F	H	HR	NL	PL ³	S ⁴	TR
View file during invest. Stage		X			X ⁵					X	X ⁷
View file when PPS dec. made		X			X ⁶					X	
Protest ag. decision to drop		X								X	X
Protest against dec. to dispose					X			X		X	X
Veto certain disposal forms (please list below)											
Prevent public prosecution (please explain below, e.g. for which offences)		X								X	⁸
Complaint to ombudsman or equivalent									X	X	
Appeal against sentence		X							X	X	X
Appeal against verdict		X							X	X	X
Be informed that suspect found		X								X	
Be informed that case being closed because no suspect found		X								X	
Be informed of decision to drop case on legal grounds (e.g. statute of limit.)		X							X	X	
Be informed of decision to drop case on discretionary grounds		X								X	X
Be informed of decision to impose a condition											X
Insist on full trial										X	
Demand restitution/ compensation via criminal procedure		X							X	X	
Be formally represented during trial alongside PPS		X							X	X	X
Assisted by a lawyer during hearing as witness		X							X	X	X
Charge being brought		X								X	
Decision to take case to court		X								X	
Date and details of hearing		X							X	X	X
Verdict		X							X	X	
Date of prison release											

¹ The right to participate in the trial as an additional pp only relates to certain offences (including bodily injury and rape). An additional pp has various rights within the main hearing, such as the right to apply to have evidence admitted and s/he can appeal independent of the pp, not however in order to have a different legal consequence imposed or to have the accused convicted of an offence for which there are no additional pp rights.

² This is not an English concept.

³ In Poland victims may become additional prosecutors at court level.

⁴ As the victim (per se) - the same notes apply as found in Table 2.

⁵ During judicial inquiry by the EM.

⁶ Before trial when the case goes to court.

⁷ legal counsel may view

⁸ for application offences until 2005

render the ruling on conditional postponing the commencement of criminal proceedings only subject to a prior consent of the victim (art. 175. Code of Criminal Procedure (CCP)). It is to be expected that in the future the interest of the victim will be increasingly taken into consideration when creating alternative procedural forms.

Mediation is not yet available in criminal proceedings except in those against juveniles. Conditional disposals are used extremely rarely - in 2006 in only 0.6% of cases. The number of judgments rendered by examining magistrate at the request of the parties to the investigation is still negligible. No data on private prosecutions is available (see also Turković 2008).

Table 4 Victims as private prosecutors have right to

	CH	D ¹	E	EW ²	F	H	HR	NL	PL ³	S ⁴	TR ¹¹
View file during invest. stage	X		X			X ⁵	X ⁶		n.a.	X	
View file when PPS dec. made	X		X			n.a.	X		n.a.	X	
Protest ag. decision to drop	X			X		n.a.	n.a.		X	X	
Protest against dec. to dispose				X		n.a.	n.a.		X	X	
Veto certain disposal forms (please list below)						n.a.	n.a.				
Prevent public prosecution (please explain below, e.g. for which offences)	X					n.a.	n.a.				X
Complaint to ombudsman or equivalent			X	X		X	X		X	X	
Appeal against sentence	X		X			X	X		X	X	
Appeal against verdict	X		X			X	X		X	X	
Be informed that suspect found	X		X			X	X		n.a.	X	
Be informed that case being closed because no suspect found	X		X	X		X	X		n.a.	X	
Be informed of decision to drop case on legal grounds (e.g. statute of limit.)	X		X	X		X	X		X	X	
Be informed of decision to drop case on discretionary grounds	X			X		n.a.	n.a.		n.a.	X	
Be informed of decision to impose a condition				X		n.a.	n.a.				
Insist on full trial			X	X	X	n.a.			X	X	
Demand restitution/ compensation via criminal procedure	X		X	⁷		X	X		X	X	
Be formally represented during trial alongside Prosecution service	X					⁸	n.a.		X ⁹	X	
Assisted by a lawyer during hearing as witness	X		X			X	X		X	X	
Be informed that Charge being brought	X		X			n.a.	n.a.		n.a.	X	
Be informed that Decision to take case to court	X		X	X		n.a.	n.a.		n.a.	X	
Be informed about Date and details of hearing	X		X	X		X	X		X	X	
Be informed about Verdict	X		X	X		X	X		X	X	
Be informed about Date of prison release				¹⁰							

¹ If the pp does not indict certain offences because s/he sees no public interest in doing so, the victim can indict, in which case s/he has the same rights as the pp.

² This is not an English concept, as the CPS would normally carry out such prosecutions on behalf of the victim. A private prosecution by the victim (or the dead victim's family) is legally possible but it only happens when the CPS has refused to prosecute a case, usually on evidential grounds. The rights of the victim are the same as the rights of any victim and not special because of the private prosecution.

³ Private accusation proceedings.

⁴ As the victim (per se) - the same notes apply as found in Table 2.

⁵ Investigation is very rare in the procedure on private accusation.

⁶ The inspection of the files may be denied to the victim until s/he has been examined as a witness.

⁷ Via the civil courts only.

⁸ The prosecutor may take over the representation of the prosecution from the private accuser during any stage of the proceedings; in such a case the private accuser shall have the rights of the victim. Should the prosecutor later withdraw from the representation of the prosecution, this role shall be taken over by the private accuser once again.

⁹ Usually PPS does not attend in private accusation proceedings before court.

¹⁰ The offences that are concerned here are only of minor nature and therefore will generally not lead to a prison sentence.

¹¹ This status was abolished in 2005

In **England and Wales** the Crown Prosecution Service (CPS) makes it clear what a victim can expect by publishing this on their web site for all to see.⁴ Witness Care Units have been set up in each CPS Area. Every victim is allocated a WCU Officer to take them

⁴ See http://www.cps.gov.uk/victims_witnesses/victims_crime.html#01

through the procedures, make a pre-court visit and answer queries on the court process. A victim can also require special treatment such as: installing screens in the court, giving evidence by CCTV, asking judges to remove their wigs and gowns or asking that the public be excluded. Personal contact, e-mail, letters and texts are used for this as the victim prefers. Special arrangements can be made for domestic violence, hate crime, and anti-social behaviour: e.g. the definitions of violence against women have been widened and details published on the CPS web site⁵. If the victim is hesitant about appearing, the CPS will try to build a case that does not rely on the victim's evidence: e.g. evidence from the scene, 999 calls, accounts by police officers and others. The Ministry of Justice monitors what victims think through ongoing WAVES surveys (see also Lewis 2006).

In **France** a statistical survey was conducted in 2006 by the Ministry of Justice about victims who got a "penal response" (*réponse pénale*) from the criminal justice system in 2005 after reporting a *délit*⁶ of any kind (47.5% property crimes of which 32% thefts, 51% crimes against persons of which 26% assaults). The response to these crimes at CJS level was a court judgment for 52% of the victims⁷, a *composition pénale* (kind of settlement) for 1.5%, a mediation for 9.4% and for 37.2% other alternative disposals, mainly the *rappel à la loi* (a kind of warning) or conditional drop. Since in the latter victims have no active role, it appears that ordinary court proceedings still represent the largest part of the responses giving them an opportunity to be involved in the final decision.

Mediation represents a larger amount only for assaults (18.5%) and domestic quarrels (25.8%). For thefts, the study shows that victims whose cases did not go to court (34%) only experienced other alternative disposals. More precisely, these represent 50% of victims complaining for simple thefts (and getting a response) whereas aggravated thefts mainly go to court (85%).

When a judgment followed their complaint, for all offences (*délits*), victims were present or represented by their counsel at hearings for almost one case out of two (48%), these cases accounting for one out four of the total. Adding mediations for which victims are far more often present, it can be said that roughly one out of three victims getting a "penal response" actually met the offender during proceedings. The same proportion (but not necessarily the same victims) declared in response to the questionnaire that they were requesting damages. This proportion is higher for property crime and there is a correlation between requesting damages and being assisted by a lawyer. For all cases going to court (after complaint of a victim), however, the victim counsel was present during the hearing in only 26.4% of them.

All these results vary significantly among different crimes and according to victims' evaluation of the seriousness of the case. But at least, they show that adapting prosecution decisions to victims expectations is not only a matter of respective amounts in different available solutions: according to the survey, cases going to court are not necessarily those for which victims had the feeling that the offence was serious or quite serious. The distance between victims demand and criminal justice response can also be illustrated by the gap between the number of recorded complaints (3 millions in 2005) and the number of responses (about 200,000) involving the offender (see also Aubusson 2006).

⁵ See, for example, Policy for prosecuting cases of domestic violence CPS web site www.cps.gov.uk/docs/DomesticViolencePolicy.pdf

⁶ *Crimes* and *contraventions* are excluded.

⁷ Victim is the counting unit.

In **Germany** the expansion of diversionary measures can be associated with the discussion of victim's rights in recent years, though the effect upon practice remains limited. The number of cases being referred to mediation is growing (estimated to number between 20,000 and 30,000 a year in 2002 to 2006⁸) and success rates are reported as high⁹. Still it remains an option taken in only a minority of cases (252 635 conditional disposals being imposed in 2004 all together).

The use of an additional prosecutor in proceedings is, however, significant, particularly in relation to more serious offences.¹⁰ References by prosecutors to private prosecution (155508 in 2004) must be regarded more as a dropping measure than a true alternative to trial as only 794 criminal cases were brought to court by anyone other than a prosecutor in that year (see also Elsner and Peters 2006).

The main reason for the introduction of alternative procedural forms in **Hungary** was to improve the efficiency of the criminal justice system. But - in recent years - the interest of the victim was taken into consideration as well, e.g. if the PP postpones the indictment s/he may oblige the suspect to fully or partially compensate the victim for the damage caused by the criminal offence or ensure the compensation of the victim in another way. New rules ensure that the victim shall be involved in case settlement. The Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceeding (2001/220 JHA) has great importance for Hungarian legislation and in academic debate.

When the victim goes to the police station to file a complaint s/he is informed very fairly about his/her rights and possibilities of asking for assistance.

As regards the practice of the PPS, there is no evidence that the main reason of the PP's choice to make a motion for alternative procedure is the interest of the victim. Although under the conditions specified in the Code of Civil Procedure, the civil claim may also be enforced by the prosecutor in practice it happens very rarely, almost never.

In the case of an assault, invasion of privacy, violation of secrecy of correspondence, libel, defamation and irreverence the prosecution will be represented by the victim as a private accuser, provided that the offender may be prosecuted based on a private motion. Although this possibility was limited only to six offences in 2005 12,998 and in 2006 13,587 cases based on private accusation were brought to court (the total number of cases in 2005 was 77,932 and in 2006 75,708 at the court level). Substitute private accusation was and is quite rare. The reason could be that if the case is strong enough to bring it to court, the PPS files an indictment. If the case is weak the victim has almost no tool, no means of evidence to prove the charge. Only one decision of the PP provides a relatively good basis for substitute private accusation: partial omission of the indictment. The prosecutor may, in a decision, omit to indict a criminal offence having no significance for the purpose of liability, due to the commission of another criminal offence of greater gravity and being the subject of the indictment. This fact shall be stated in the indictment and the victim shall be notified. In the decision the prosecutor may inform the victim - among others - that a substitute private accusation may be lodged in respect of the act

⁸ For an overview see Kilchling, M.: Restorative Justice Developments in Germany, in D. Miers & I. Aertsen (eds.): *Regulating Restorative Justice. A comparative study of legislative provisions in European Countries*, Frankfurt 2008 (forthcoming), p. 41/42

⁹ See Kerner, H.-J.: *Tater-Opfer-Ausgleich in der Entwicklung*, Bundesministerium der Justiz, Berlin, 2005

¹⁰ See Niedling, D.: (2005) *Strafprozessualer Opferschutz am Beispiel der Nebenklage*, p. 130–136 and 173–183

which has been partially omitted from the indictment. The number of substitute private accusation is very low: in 2005 only 720 and in 2006 only 638 cases were filed with local courts.

Concerning most alternative procedural forms the motion of the PPS is prescribed as a precondition (e.g. arraignment, waiver of the trial, omission of the trial etc.). In these procedures the substitute private accusation is theoretically excluded because no reason of substitute private accusation may occur (see also Róth 2008).

Since the PPS has the monopoly on prosecution in the **Netherlands**, private prosecution or even victims represented by of additional prosecutors are unheard of. However, decisions to prosecute (or not) can be influenced by the victim. Firstly, there are some offences (like insult or libel) that need a victim complaint in order to prosecute (application offences). But more importantly, a victim can file a complaint against any prosecutor's decision (not to prosecute, to drop or dispose) with a court of appeal.

The standing of the victim in case of a court hearing has improved during the last years. The victim can join the case in order to get financial compensation and has the right, for some serious offences, to issue a statement during trial. Also, when the prosecutor decides not to prosecute but to dispose conditionally, one of the conditions could well be to compensate the victim (see also Blom and Smit 2006).

In **Poland** it was the Code of Criminal Procedure (CPC) of 1997 that introduced new alternative procedural forms such as - inter alia - mediation, conviction without trial, voluntary submission to penalty. A new procedure for victims: subsidiary prosecutorial rights was also introduced. The difference between additional and subsidiary victim's prosecutorial rights should be mentioned here. The additional right to charge can be used by a victim in cases of offences investigated *ex officio alongside* the public prosecutor, whereas the subsidiary right to charge means *instead of* the public prosecutor. The conditions which have to be fulfilled, to give a victim opportunity to lodge a subsidiary act of indictment, makes that right almost useless. In 2005 there were only 152 such cases (out of almost 580 000 total number cases heard), of which in 97 cases courts decided to discontinue proceedings. This means that courts shared prosecutors' opinions of a total lack of evidence; only in 16 cases were offenders sentenced or proceedings conditionally disposed of (statistical data for first instance decisions).

In Polish criminal law a victim has a right to private prosecution only in cases of chosen offences (for example: defamation, insult, infringement of bodily inviolability). This right was used by victims in 8749 cases in 2005.

Another way for victims to influence proceedings is mediation. Successful mediation may lead to a conditional disposal and does lead to discontinuance of proceedings upon private accusation (Article 492 CPC). This type of proceedings is still not frequently used, although the number of mediation cases is growing (from 366 in 1999 to 4 440 in 2005; of the latest number 62% were successful).

The position of victims in Polish penal procedure were under discussion at the time of writing in relation to a new code and - may be even more - after the Code enters into force. By then the Polish charter of victims' rights will be created, the law of public compensation adopted and many programs and organisations focused on different categories of victims started. It seems that all such actions have been beneficial to victims (see also Bulenda et al. 2006).

In **Spain**, mediation is the only form of restorative justice applied to end penal cases instead of court sentencing. Mediation is heavily applied in cases relating to juveniles, but rather unknown in those for adults. The Justice Department of Catalonia, one of Spain's autonomous communities, however, has encouraged the use of this measure, which can be applied for in any case by the offender, the victim, their lawyers, the prosecutor, the judge,

police agents or others involved. As far as victims' awareness of his/her rights is concerned, Spain has a net of offices that provide information to the victim (presently, through telephone lines, pamphlets, etc.).

The victim has the right to exercise his/her own civil action independently of the criminal process in order to enforce a compensation claim, where he/she waives that option, this will, however be represented by the PPS in the criminal courts, alongside the criminal case.

In any criminal case, the victim has the right to bring his/her own private lawyer, who will try the case alongside the prosecutor ensuring more detailed representation. Therefore, there is no risk that investigative resources are reduced, but they may be increased. The term to refer to this kind of party is particular accuser ("acusador particular"): who is considered, a private party. In relation to certain kinds of offences the public prosecutor can not act (application offences against honour, for example) only this private prosecutor can but even when these parties act together as accusing parties with the pp, they may not cooperate (see also Aebi and Balcells 2008).

In **Switzerland** strong efforts have been made to ensure the victim is more strongly considered during criminal proceedings. This relates to „normal“ proceedings because the Victim Assistance Act made additional prosecution the norm removing the possibility of referring the victim and any civil claims to damages to civil proceedings. Considerable efforts are also being made to ensure victims profit from diversionary measures. Thus the Canton Zurich has, for example, introduced a pilot project which allows mediation to be used instead of criminal proceedings. Mediation may be used where:

- The case is concerned with the application offences („antragsdelikte“ those requiring victim application for prosecution), where conflicts have become manifest between the accused and the victim and in which arbitration does not seem hopeless.
- Cases of misdemeanours to be pursued ex officio in which a victim expressing little interest in prosecution may strongly influence the decision to file an indictment or to drop.
- Juveniles are involved.

Experiences in Zurich have been positive; successful mediation was achieved in 90% of cases with the majority of accused and victims expressing satisfaction (see also Gilliéron and Killias 2008).

Unlike in other comparable countries, the position of victims of crime as far as the possibility to get damages in proceedings with an additional prosecutor is concerned has never been a problem in **Sweden**. In the great majority of criminal cases, in which the suspect is found guilty and the injured party has brought an action for compensation, a court decision on damages also results. Thus, the strengthening of the position of victims during the recent decades which can be observed in Swedish law was not motivated just by the mentioned aspect. The reason of some changes which have also influenced the position of the victim was rather an effort to improve the effectiveness of proceedings. For instance, as has already been mentioned,¹¹ the PPS in Sweden has extensive “judicial powers”, that is, the PPS may independently impose a penalty on the suspect by means of a penal order.

¹¹ See Wade et al. (2008)

The regulation of the penal order has been changed in the 90-ties in such a way, that the prosecutor, while imposing a penalty by means of penal order, may decide also on any action brought for compensation if the claim relates to monetary compensation. This means, that the prosecutor has powers to make decisions concerning civil law duties, which must be considered very unusual.

Not even the Mediation Act of 2002 was adopted with a view to the position of the victim. The main reason of the introduction of the law seems to be the potential to influence the offender (see also Zila 2006).

In **Turkey** the victim can participate in criminal proceedings as an additional prosecutor and can appoint legal council who will be paid for by the state. Up until 2005 there were also application offences which could be referred to private prosecution. In 2005 victims were granted more rights: in the investigative stage this concerns information about confiscation, the right to have legal counsel consult the file, to be informed about diversionary measures and to protest against these, to demand a copy of certificates and correspondence from the pp and to have legal representation paid for by the state during this stage as well as to demand copies of correspondence and certificates from the court, to call witnesses, to appeal and to be informed about the trial (see Table 3 and also Hakeri 2008).

Conclusion

Victim's rights vary significantly across Europe but there are fairly strong informational rights and ones to compensation, flanked by stronger rights to see evidence and to participate in proceedings more actively in some jurisdictions. Victims further have the possibility to assume a special status either as an additional prosecutor or as a private one. Private prosecutions are rare across Europe however. This may well indicate that, more often than not, they represent a victim's fight against a prosecutorial drop decision; a last resort to try to bring their case to court. The status of an additional prosecutor may well be regarded as beneficial to victims and the loss of this possibility (because it can only be realised when a full trial takes place) should be considered in evaluating discretionary prosecutorial decisions and those to refer cases to an alternative procedural route.

Where a prosecutor decides to use discretionary powers to impose a condition other than mediation or restitution or to use an alternative, more efficient procedural route, this will lead to victims losing the procedural rights foreseen for them, e.g. during the trial by criminal justice systems. Whilst this paper by no means wishes to assert that traditional trial models satisfy victims needs, one must conclude from the study documented here that those rights foreseen for victims during a full trial are often lost when alternative procedures are used. In as far as those rights are regarded as beneficial to victims, the increased use of prosecutorial discretion and alternative procedural routes must usually be seen to be at victims' cost. There is no question that diversionary measures can be used to increase victim inclusion and thus to better their position. However, as the study shows that efficiency, not victims' interests, are the major driving force behind these changes, one must conclude that usually procedural alternatives lead to the victim being further excluded.

This study has demonstrated that European PPSs are expected to play many different roles and that they are a key institution in providing relief of many sorts. They are certainly a key player in providing information and other services to victims. Given, however, that this study's results are in conformity with prosecution services claims to be over-stretched,

the question is in how far it is reasonable to ask them to perform this number of roles. Can one realistically expect victim friendly prosecution policies?

Victims in Europe on the face of it have a right to be well-informed. Whether and under what circumstances they are well represented by prosecution services using alternative case-disposal mechanisms requires further research, but there are indications that the use of prosecutorial discretion and alternative procedural means, may well be leaving them powerless.

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