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COMPARATIVE APPROACH ON VICTIMS' PARTICIPATION TO CRIMINAL TRIAL

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COMPARATIVE APPROACH ON VICTIMS' PARTICIPATION TO CRIMINAL TRIAL

Alina Gentimir*

Abstract

Currently, both in international jurisprudence, as well as national legislation and doctrine, the main issue regarding the victim is the opportunity to have it as a party in the criminal trial, not only in its civil side. Providing cumulative the purpose of criminal trial to achieve compliance with the procedural safeguards required by human rights field are only two requirements that govern the institution of victim regardless the system which belongs to national laws or the international criminal court it is subordinated.

Keywords:
criminal trial, victims, procedural rights, reparation

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Currently the transformation of Romanian society aims to change the legislation just to meet the trends of certain international and regional organizations, particularly the European Union. The implementation of elements of the community *acquis* has to be supplemented by the changes of some areas of law which are in close interdependence with European Union requirements. So, satisfying the main requirement of efficient operation of justice involves changing laws and the judiciary, and reconfiguration of the criminal procedure law according to the latest developments both in Western Europe to the national laws and existing rules of regional aimed at shaping a *corpus juris* specialized on European Criminal Procedure. However, the regionalization approach to legal institutions of an essential area of law soon would prove ineffective if it is not made an international classification of them.

The new Criminal Procedure Code has caused, as well as numerous previous legislative amendments of Romanian criminal procedure law, many complaints, but positive feedback as well. The fact that one of the key legal institutions - the victim - which was the subject of doctrinal disputes even international, is covered under another legal tradition which it is subordinated, traditionally, the Romanian legislation, calls into question the credibility and transparency of judicial system Romanian.

The legislative process cannot begin than with a comparative analysis of regulation in relation to the victim both nationally and regionally and internationally.

The historical perspective proves that there is no legal system known which has ever denied the right of victims to redress of wrongs (Bassiouni , (2006), :3).

While all existing legal systems in the world deal with the same problems of crimes, no two countries have however chosen the same approach on criminality (Heikkila, (2004),:43). Therefore obviously concerning the status of victims before criminal procedures each legal family has different approaches. In order to understand the differences between these legal families it is necessary to make basic simplifications, especially since the functioning body of international criminal tribunals have been mixture of common law and civil law traditions.

The following paragraphs will outline the major differences between the civil law and common law approaches of the concerned victims' rights.

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Common law, considered a legal tradition having its roots from England since her conquest by the Normans in 1066(Heikkila, (2004), :44) can be characterized as *case based law* in contrary to other legal families. Its procedure is called *adversarial process model* where the defence and the prosecutor battle before an impartial judge under arranged set of complex rules aimed to ensure a fair trial.

Since victims in common law rarely participate in the proceedings, one of the known facts of common law with regard to victims is that it is less victim friendly than the civil law. Victims can participate as witnesses unless either the prosecution or the defence requests. More than this, victims' participation will not be taken into consideration, if the parties choose to disregard them. However, in some stages of the proceedings there are some limited possibilities for victims, such as *victims impact statements* or *victim statements of opinion* which are possible at the sentencing stages of the proceedings.

Reforms recognizing the rights of the victims to be notified and informed during the progress of the proceedings are made in different national legislations as the *Code of Practise for Victims of Crime of 2005*[1]. A detailed enumeration includes the right to be informed if the police decides not to investigate,[2] the right to access information on support services,[3] the right to be informed for specific time limits during the investigation process on the alleged crimes committed against victim,[4] the right to be notified of any arrest without delay[5] and the right to be informed the status of the cases before the courts.[6] The Code contains as well specific provisions on two different kinds of victims' namely *vulnerable* and *intimated* victims.[7]

Concerning victims' role as witnesses, it has to be underlined that the adversarial proceedings can be *witness-hostile*. There is not known any *aggressive cross-examination* of victim witnesses by the defence and

[1] The Code of Practice for Victims of Crime, entered into force in April 2006, available at (www.homeoffice.gov.uk/documents/victims-code-of-practice).
[2] Article 5.2. of the Code of Practice for Victims of Crime
[3] Article *5.3*. of the Code of Practice for Victims of Crime
[4] Articles 5.9-5.12. of the Code of Practice for Victims of Crime
[5] Articles 5.14-5.17. of the Code of Practice for Victims of Crime
[6] Articles 5.18-5.35 and sections 7-8 of the Code of Practice for Victims of Crime.
[7] Article 3.2 :"The Code only applies to direct victims of criminal conduct and expressly states that its provisions do not extend to third parties or indirect victims such as witnesses of violent crimes."

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furthermore the common law criminal proceedings are made of strict rules of evidence. For instance, specifically during the proceedings the strong underlined rights of the accused can be problematic from the witness point of view. On the other hand concerning the protective measures of the accused and witnesses civil law applies different measures than the common law. While some civil law jurisdictions allow protective measures that conceal the identity of the witness from the accused in certain exceptional circumstances, these kinds of protective measures are generally unthinkable in common law jurisdictions.

Another feature of common law is the *plea argument*[8] in which it has been argued that the said institution is victim-hostile. For instance, after the agreement the victims can be aware of the content of it. This can be problematic since the victim, who is not notified about the plea bargain, may view the agreement (bargain) as an invalidation of his/her experience. Particularly if the defendant pleads to a lesser charge that may terminate the rights of the victims since he/she was not aware of it. However, today based on some new developed rules, prosecutor can consult or hear the crime of the victim before the plea agreement.

Concerning the reparation procedure within the common law system it must be noted that victims cannot usually obtain reparation within the criminal proceedings nevertheless in some cases victims may be allowed to have decision on compensation from the judges of criminal court after the conviction of a defendant. According to the common law system there is a distinction between criminal law and torts where the criminal law dealing with public crimes and torts private wrongs. In that sense whether the victim wants to obtain an award should he/she initiate remedy through civil court proceedings (Delmas-Marty, (1995), :132).

Another legal tradition which takes its roots from Europe is continental law or Romano-Germanic law. As common law has different jurisdiction system, *adversarial* system, civil law also traditionally preferred

[8] The definition of Plea Bargain : "In criminal procedure, a negotiation between the defendant and his attorney on one side and the prosecutor on the other, in which the defendant agrees to plead "guilty" or "no contest" to some crimes, in return for reduction of the severity of the charges, dismissal of some of the charges, the prosecutor's willingness to recommend a particular sentence or some other benefit to the defendant […] Reasons for the bargain include a desire to cut down on the number of trials, danger to the defendant of a long term in prison if convicted after trial and the ability to get information on criminal activity from the defendant." Available at (http://dictionary.law.com/definition2.asp?selected=1541&bold)

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to have as a model called *inquisitorial* jurisdiction system where the judge this time is expected to play a central role. Unlike the *adversarial* model there is not so much a competition between the parties during the trial in *inquisitorial* jurisdiction however the judge directs a continuous investigation. In time civil law jurisdictions have added *adversarial* jurisdiction procedures to their system on another note civil law *adversarial* trials do not have the idea that the process should be based on battle between prosecutor and defence.

The most known fact with regard to the victims' role under civil jurisdiction is that generally civil law allows victims to have a significant role before the proceedings. So, victims are authorized to become parties namely as *partie civile* and victims can even claim reparations within the criminal proceedings.

Concerning the procedural role of the victim, the French criminal procedure legislation, member of civil law family, provides that victims have right to make an official report of the crime in order to get the attention of the public prosecutor to initiate the proceedings where appropriate(Guinshard, Buisson, (2009), :587-612); to directly summon the accused before a court regarding certain less serious offences when no public prosecution has been initiated; to register as a *partie civile* (Larguier, (1999), :89). Namely, on such proceedings they become true parties to the case, enjoying the rights equivalent to those of the accused (Jorda, Hemptinne, (2002), :1402).

The Dutch criminal procedure legislation[9], though the victims are not entitled to intervene in proceedings before a criminal court, where the victim may nevertheless join in action by the State Prosecution Service, in order to be arranged to be legally presented by a lawyer and in which he/she have access to certain documents in the case file (Pradel, (2003), :167) .

Another significant national legal norm belonging to Civil Law tradition, the German Code of Criminal Procedure (StPO) allows victims to initiate proceedings "*with a view to compelling a prosecution to be brought*"[10].

[9] Code of Criminal Procedure of The Netherlands, Royal Decree, 4 December 1985, Stb. 465, Articles 12(f)(1) and 12(f)(2) http://www.lexadin.nl/wlg/legis/nofr/eur/lxwened.htm..

[10]Code of Criminal Procedure of Germany (StPO), 395-402, http://translate.google.ro/translate?hl=ro&sl=de&u=http://www.gesetze-im-internet.de/stpo/&ei=3d3bToDWI5La4QSYisHZBw&sa=X&oi=translate&ct=result&resnum=1&ved=0CCIQ7gEwAA&prev=/search%3Fq%3Dstpo%26hl%3Dro%26clien

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The major characteristic of the German system is that the victims are allowed to support the public statement of claim as an auxiliary prosecutor, "*Nebenkläger"* (Hoegen, Brienen, (2000), :363). As soon as the victims application is admitted he/she may act by way of intervention, apply for production of evidence and presented by a lawyer (Delmas-Marty, (1995), :76) .

Beyond the national level of regulation of the rights of victims, the European regional level proves its relevance by timely implementation of instruments that meet a set of general rules.

In 1985 the recommendation of the Committee of Ministers of the Council of Europe on the *Position of the Victim in the Framework of Criminal Law and Procedure*[11] said that victims should have right to (1) obtain information on the outcome of police investigations and of any final decision concerning prosecution, (2) ask for a review by a competent authority of any decision not to prosecute, or (3) institute private proceedings.

The perspective of European Court on Human Rights on the victim whose rights are violated is original because it is interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action[12]. It is realized a classification of victims in direct victims – the ones who are affected directly by an act or omission, potential victims – the persons who cannot complain of direct violation of his/her rights, but he/she can claim the big probability to suffer an violation[13] and, finally, indirect victim – the person who has a personal or specific link with the direct victim[14].

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[11] Available at (http://cm.coe.int/ta/rec/1985/85r11.htm.)

[12] *Gorraiz Lizarraga and others v. Spain,* judgment of 10 November 2004, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699608&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[13] *Klass and others v. Germany*, judgment of 6 September 1978, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695387&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[14] *McCann and others v. the United Kingdom*, judgment of 27 September 1995, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695820&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

The case law of the European Court contains some relevant decisions on victims' right and right to remedy. A suitable sample is offered by the decisions on Article 2 of the Convention, which is about protection of the right to life, where in ECHR imposed the duty to the states in order to prosecute the violations of the right to life. The European judges have an approach on the interpretation of article 2 namely; it is necessary for the said article to have an adequate public scrutiny of the criminal investigation in order to secure accountability in the process and in this regard the European Courts' approach is to involve "the next kin" in procedures to safeguard his/her legitimate interest. Some cases violated article 2 when it did not inform victims or their closest relatives of the state's decision not to prosecute[15].

Geographical hierarchy and regulatory instruments governing the rights of injured point out that the international level through its components - humanitarian law, international human rights law, international criminal law - contains essential and comprehensive regulations on this subject.

Considered a response to the horrors of the atrocities committed during the World War II, the Nuremberg and Tokyo tribunals existed as an imperfection tribunal[16], such as the tribunal failed to provide much guidance for the determination of sentences (Glickman, (2004), :2).

In comparison to these first international criminal tribunals, the victims' before the *ad hoc* tribunals were much more considered because they are primarily focused on the protection of victims such as the holding of proceedings *in camera* (Jorda, Hemptinne, (2002),:1404), non-disclosure to the public of any records identifying the victim, giving of testimony through image or voice altering devices or closed-circuit

[15] Güleç v. Turkey, judgment of 27 July 1998, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=gulec&sessionid=82887849&skin=hudoc-en

[16] International Military Tribunal, 2 Trial of the Major War Criminals Before the International Military Tribunal 98-99 (1947) Robert H. Jackson, the Chief Prosecutor of the Nuremberg Trials stated that: "[t]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated; Ibid, "[…] offering only two provisions: (1) [t]he judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review; and (2) [t]he Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just."

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television and using pseudonyms[17]. It is created victim and witness unit[18] which has to "recommend the adoption of protective measures for victims and witnesses" and "ensure that victims and witnesses receive relevant counselling and support" (Bachrach, (2000), :4).

Additionally, both of the *ad hoc* tribunals do not contain any provision for right to remedy (reparations) except restitution of their (victims) property (Jorda, Hemptinne, (2002), :1391) and also rule which enables the victims seeking compensation to apply to competent national courts[19]. Thus, within the ICTY and ICTR victims were neither allowed to participate nor entitled to receive reparations for the damages suffered from the atrocities perpetrated against them (Mekjian, Varughese, (2005), :15). Lastly, it is not possible for victim to demand to be kept informed of the progress of the proceedings, even if this information is of personal concern to him[20].

So called hybrid courts, The Special Court for Sierra Leone (SCSL), Serious Crimes Panels in the District Court of *Dili* in East Timor, the Regulation 64 Panels in the courts of Kosovo and the Extraordinary Chambers in the courts of Cambodia are an example for having a *mixed compositions* (Cassesse, (2003), :343)[21], consisting international and local judges, have different rules for victims, rules inspired by local legal culture.

So, since the Extraordinary Chambers in the courts of Cambodia will be carried in accordance with the Cambodian Law (a *civil law* tradition) the following question is whether the victims of *Khmer Rouge* have right to participate actively before the trials? Unfortunately the Rules and/or the Regulation of the court still haven t been issued, only

[17] Rule 75 of Rules of ICTY and ICTR. http://www.icty.org/sid/136

[18] Rule 34 of Rules of ICTY and ICTR

[19] Rule 106 of Rules of ICTY and ICTR

[20] The Chamber decided to utilize the services of the Victims and Witnesses Unit, ordering that if a witness wishes to contact the party which called him or her, he or she shall inform the competent staff of the Victims and Witnesses Unit who will then report the matter to the relevant party; Rule 90 of ICTY.

[21] Mixed or internationalized courts/tribunals may have two versions: First they may be organs of the relevant State, being part of its judiciary – this applies to the Cambodian Extraordinary Chambers as well as the courts in Kosovo and in East Timor. Alternatively, the Courts may be international in nature: they may be set up under an international agreement and not be a part of the national judiciary, such as SCSL.

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incidental are made incidental reference to victims' regime (Boyle, (2006), :307)[22].

Since the ICC definition includes not only natural person but also 'organizations' (Timm, (2001), :307), the definition of ICC is much broader than the definitions recognized both in ICTY/ICTR Rules[23] and in Victims Declaration[24]; as such it does not require the victim be a direct target of the crime. That is to say, it covers all persons who have directly/indirectly suffered harm as a result of a commission of any crime under the jurisdiction of the Court[25].

Making correspondence between these two instruments, the conclusion is that the article 6[26] can be completed with article 15 (3) of the Rome Statute which provides victim's representation[27].

Concerning the victims' participation the meaning of current article 15(3), the Rome Statute appears to confirm the proposed interpretation of the victims' right of participation (Donat-Cattin, (1999), :270).

This article provides that the Prosecutor may receive information from victims; as such the information is likely to be vital for the Prosecutor at the preliminary stage which would normally rely heavily on witness testimony (Bergsmo, Pejic, (1999), :369). The relevancy and weight of any information coming from victims is determinate by the Prosecutor and the Pre-Trial Chamber. The provision also clearly

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[22] While the CEC are bound to ensure full respect for the victim's rights under the Cambodian law. The exercise of these rights should be adapted to the context of trials for mass crimes. These principles dictate approaches that the CEC could follow as regards the specific issues of victim participation, representation, protection and reparation.

[23] http://www.uncjin.org/Standards/9857854.pdf

[24] http://www.ohchr.org/english/law/victims.htm

[25] Rule 85 of Rome Statute, http://untreaty.un.org/cod/icc/statute/romefra.htm

[26] The responsiveness of judicial and administrative process to the needs of the victims should be facilitated by:
(a). Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
(b). Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
(c). providing proper assistance to victims throughout the legal process."

[27] http://untreaty.un.org/cod/icc/index.html

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constitutes an additional guarantee of fairness, justice and legal certainty to ICC proceedings. Additionally, the Pre-Trial Chamber is able to rely on an alternative source of information in addition to the Prosecutors' (Hemptinne, Rindi, (2006), :4).

The goal of the participation of victims in the proceedings is to allow them to participate and to present their views and concerns. Based on the compromise the modalities for exercising their right to participate in a given case were left in the hands of the Court. As well, the Rules of Procedure and Evidence determine when and in which manner the victims' right to participate in a particular case. But, the main instrument dealing with participation of victims in the proceedings before the Court remains the prominent UN Resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

As a general conclusion, it is known to this point that national legal instruments have granted victims much more central place than the international law (Bassiouni, (2006), :2). Yet it is the time for international instruments to expand rights of the victims such as participation, reparation and protection. ICC victims' regime is the initiation of recognizing rights of the victims at international level for the crimes committed under the individual responsibility.

The role of victims is crucial for any post-conflict transition since they constitute one of few points of entry from which the effects of justice originate throughout the society (Kuhner, (2004), :1). It was an innovation by the founders of ICC and they assigned victims a key role mindful that international justice will not prevail unless victims are willing participants[28]. The new Court (the ICC) will handle with this innovative challenge in order to restore a new era for the victims of the international crimes within its jurisdiction.

The conflict of the principal legal systems to the international criminal law proceedings and its reflection to the victims' right before the proceedings it is solved in a way since the proceedings before the *ad-hoc* tribunals and the ICC lean towards more of an *adversarial* rather than an *inquisitorial* system (Jorda, Hemptinne, (2002), :1388). There have been still complexities with respect to the role of victims for playing a central role

[28] See Reporters without Borders, "Victims Guide to the International Criminal Court", 2003, p. 7 available at (www.rsf.org).

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before the proceedings in order to reach a much more accomplished justice.

Closing the „circle" of this article, it seems that the editors of the New Criminal Procedure Code[29] adopted features Romanian international, European or national institution of victim. Anglo-Saxon system perspective on the victim was found to be more convincing to meet Romanian criminal purpose. Total abandonment of private prosecution even indirectly by the fact that the injured party is not part of criminal proceedings can only be objectionable, despite the fact that, even if procedural issue as provided in Article 32 paragraph 1 of the New Code of Criminal Procedure has the same rights and obligations of the parties, except certain procedural rights - Article 32 paragraph 2 New Criminal Procedure Code: the right to appeal to a mediator, where it permits; right to propose the use of evidence by the judiciary, to the exceptions and formulate conclusions; right to be informed, within a reasonable, on the prosecution stage, at his express request, provided that indicate an address in Romania, an e-mail address or electronic mail to this information to be communicated; right to request inspection of the files, right to be heard, the right to question the accused, witnesses and experts, the right to be assisted or represented by a lawyer, the right to be informed of his rights, Article 79 of the New Code Criminal Procedure. These rights are joined to the right stipulated by Article 11, paragraph 3, the right to free assistance of an interpreter, as the traditionally regulated at European level only in favour of the defendant. Article 409 D) provides for the right to appeal only in criminal side of the trial for the victim. If he/she wishes to recover material or moral damage, he/she shall constitute as civil party, in the criminal side of the trial she/he can promote appeal only insofar as the solution of this side of the trial influenced the civil side.

Beyond the „procedural forfeiture" of the victim as party frequently justified by procedural vices affecting the efficient conduct of criminal trials and proved to be inadvisable at least in the framework of the plea bargening procedure by the defendant because of his total exclusion within it, insurance regulation and exercise all rights of the victim in this manner satisfy the purpose alleged by the editors of the

29 http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/noulcoddeprocedurapenala/tabid/941/Default.aspx

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New Code: adequate procedural safeguards in line with European Court of Human Rights and European standards in the field of victims' rights.

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