RHETORIC OR REALITY? VICTIMS' ENFORCEMENT MECHANISMS IN ENGLAND AND WALES AND THE UNITED STATES

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TRINITY 2013

ACKNOWLEDGMENTS

I would like to express my immense gratitude to my supervisors, Professors Andrew Ashworth and Carolyn Hoyle for their advice, expertise, knowledge, understanding and patience. These inestimable supervisory qualities were crucial to the development and completion of my project. Further, I would also like to thank Professors Andrew Sanders as well as Lucia Zedner for their guidance and helpful input that have helped the shaping of my project during crucial stages of the doctoral process.

A very warm and special thanks to my mentor and friend, Professor Julian V. Roberts for his inestimable guidance, advice, support and inspiration throughout the years. Not everyone has the chance to have a mentor along the way and I am extremely grateful. He has truly made a difference in my life and I doubt that words can fully convey my immense appreciation.

I am also very grateful to the agencies and individuals that shared their experiences, knowledge and enabled me to have access to invaluable data and information for my research. Without them this research would not have been possible. This includes the Parliamentary Ombudsman in England and Wales, Victim Support England and Wales, the Crown Prosecution Service in England and Wales, Professor Paul Rock and Ian Chisholm. In the United States, a particular thanks to the National Crime Victim Law Institute and the key individuals behind many of the victims' rights reforms that have shared their experiences, including Doug Beloof, Paul Cassell, Steve Twist and Meg Garvin.

I would also like to thank my family – in particular my Mother and Father - for everything they have done for me through my entire life. Their love, sacrifices, hard work and devotion have been essential parts of who I am today. Their unconditional support has given me the physical and mental strength to persevere and complete my doctorate. Without them, this unforgettable and enriching experience would not have been possible. Also, a warm thanks to my brother Tony and cousins Peter and Glikeria that have been there for me and provided inestimable support.

I am also extremely grateful to my close friends, particularly the ones that have become my Oxford family. This includes my friends from the Centre for Criminology, the Sherry Club, Worcester and Wolfson College. You know who you are and I thank you with all my heart. You have given me the strength to finish this project and have been supportive through all the good as well as difficult times. You have made my doctoral experience worthwhile and I cannot thank you enough.

Finally, I would also like to thank the funding bodies that have been incredibly generous with their financial support and have made this research possible, namely the Social Sciences and Humanities Research Council, the Fonds de recherche sur la société et la culture, the Peter Birks Fund, the Modern Law Review, the Canadian Centennial Scholarship Fund (Maple Leaf Trust), the Association des familles de personnes assassinées ou disparues, as well as Worcester College and Wolfson College.

ABSTRACT

RHETORIC OR REALITY? VICTIMS' ENFORCEMENT MECHANISMS IN ENGLAND AND WALES AND THE UNITED STATES

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DPHIL, TRINITY 2013

Recent policies in England and Wales and the United States have recognised for the first time enforcement mechanisms for victims of crime under the Crime Victims' Rights Act (CVRA) in the United States as well the Code of Practice for Victims of Crime in England and Wales (the Code). Although very different from one another, these policies ostensibly aimed to provide a stronger commitment to victims' rights, by recognising an accessible, timely and impartial process that recognises accountability and provides individual remedies in cases of breaches.

This thesis engages in a careful in-depth analysis of these mechanisms and their implementation based on elite qualitative interviews, case law analysis and a multidisciplinary examination of the relevant literature. It argues that on the whole, these mechanisms have presented a number of limitations, and thus in many respects cannot and have not delivered accessible, and timely means to respond to victims' rights breaches. Most importantly, it demonstrates that for certain types of breaches and in certain contextual settings, these mechanisms have recognised only limited or no redress at all for breaches. This research takes the available victims' literature further by arguing that many of these promises have been closer to rhetoric than reality and providing a more nuanced portrait of the substantial difficulties and limitations that relate to these enforcement mechanisms. In effect, these limitations can be understood in light of the nature and structural components of these selected mechanisms, as well as the ways they have been implemented by the main actors involved in these processes and the different contexts under which the different types of breaches take place.

Finally, despite their limitations, when compared to one another, each mechanism can be considered a better option for access, timeliness and redress – depending on context and the type of breach. Following from this analysis, a complementary approach is developed which can facilitate and increase opportunity for redress for a wider range of situations. It is important to bear in mind however the limits of the complementary approach; namely, that it only includes elements inspired from the two mechanisms examined in this thesis and that there are several limitations that relate to transplants and policy transfers.

(Word count: 94,944)

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LIST OF ABBREVIATIONS

CJS – Criminal Justice System

CPS – Crown Prosecution Service (UK)

CVRA - Crime Victims' Rights Act 2004 (US)

DA – District Attorney (US)

DOJ – Department of Justice (US)

DPP – Director of Public Prosecutions (UK)

DWP - Department for Work and Pensions (UK)

GAO - Governmental Accountability Office (US)

JVU – Justice and Victims Unit (UK)

LEAA - Law Enforcement Assistance Administration (1968) (US)

LGO - Local Government Ombudsman (UK)

MADD - Mothers Against Drunk Drivers (US-based Charity)

MP – Member of Parliament

NACRO – UK-based Crime Reduction Charity

NAVSS - National Association of Victims Support Schemes (UK)

NCRS - National Crime Recording Standard (UK)

NCVLI - National Crime Victim Law Institute (US)

NOVA - National Organization for Victim Assistance (US)

NVCAN - National Victims' Constitutional Amendment Network (US)

OFOVC - Office of the Federal Ombudsman for Victims of Crime (Canada)

OVC - Office for Victims of Crime (US)

PASC - Public Administration Select Committee (UK)

PCA - Parliamentary Commissioner Act 1967 (UK)

PO - Parliamentary Ombudsman

SAMM – Support After Murder and Manslaughter (UK Charity)

VIS – Victim Impact Statement (US)

VOCA - Victims of Crime Act 1984 (US)

VPS - Victim Personal Statement (UK)

VRA – Victims' Rights Amendment (US)

VRRA - Victims' Rights and Restitution Act 1990 (US)

WCU – Witness Care Unit (UK)

TABLE OF CASES AND STATUTES/RULES

UNITED STATES

In re Dean, 527 F.3d 391 (5th Cir. 2008)

In re Huff Asset Management Co 409 F.3d 555 (2nd Cir. June 2005)

In re Kenna, 435 F.3d 1011 (9th Cir. 2006)

In re McNulty 597 F.3d 344, 2010-1 Trade Cases P 76,921, C.A. 6 (Ohio) 2010

In re Mikhel v. District Court 453 F.3d 1137 (9th Cir. 2006)

In re Olesen 447 Fed.Appx. 868, 2011 WL 5357631 (C.A.10 (Utah)

In re Olesen No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011)

In re Stewart 552 F.3d 1285 (11th Cir. 2008)

In re Stewart 641 F.3d 1271, 22 Fla. L. Weekly Fed. C 2096

In re Walsh No. 06-4792, 2007 U.S. App. LEXIS 9071 (3rd Cir. Apr. 19, 2007)

Ind. Code Ann. §35-40-1 (2000)

Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1013 (9th Cir. 2006)

Md. Rule 1-326 (2009)

Minn. Stat. § 611A.74 (2000)

Norton v Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)

Omnibus Crime Control Act of 1968

President's Task Force on Victims of Crime, 18 Weekly Comp. Pres. Doc. 522 (April 23, 1982) (Exec. Order No. 12, 360) [*President's Task Force*]

Speedy Trial Act 1974

Tex. Const. Art. 1, §30

U.S. Code, Title 18, § 3771

U.S. Code, Title 42, c. 112, § 10607

U.S. v Monzel 641 F.3d 528, 395 U.S.App.D.C. 162, C.A.D.C., April 19, 2011 (NO. 11-3008, 11-3009)

U.S. v. Atlantic States Cast Iron Pipe Co. 612 F.Supp.2d 453 D.H.J., 2009 (March 23, 2009)

U.S. v. Ingrassia, Not reported n F.Supp.2d, 2005 WL 2875220 (E.D.N.Y. 2005)

United States District Court, D.Utah v. Heaton, 458 F.Supp. 2d 1271 (2006)

United States District Court, E.D.N.Y. v. Ingrassia, 392 F.Supp.2d 493

United States v BP Products North America Inc., Crim. No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008)

United States v. Aguirre-Gonzalez, 597 F.3d46 (1st Cir. 2010)

United States v. Hunter, 2008 WL 153798, at 1 (D. Utah Jan. 14, 2008)

United States v. Keifer, No. 2:08-CR-162, 2009 WL 414472, at 4 (S.D. Ohio Feb. 18, 2009)

United States v. McVeigh, 157 F.3d 809, 814-15 (10th Cir. 1998)

United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011)

United States v. Rubin, 558 F. Supp. 2d 411 (E.D.N.Y. 2008)

United States v. Turner, 367 F. Supp. 2d 319 (E.D.N.Y. 2005)

US v *Avila*, (2012) CR 11-126-PHX-JAT (District of Arizona)

Utah Code Ann. § 77-37-5 (2000)

Victims' Rights and Restitution Act (1990)

Wis. Stat. Ann. §§ 950.08, 950.09 (2000)

UNITED KINGDOM

Code for Crown Prosecutors (CPS Policy Directorate, London, 2010)

Code of Practice for Victims of Crime 2005 (Home Office, London)

Commissioner for Complaints Act (Northern Ireland) 1969

Constitutional Reform and Governance Bill 2009

Data Protection Act 1988

Domestic Violence, Crime and Victims Act 2004

Domestic Violence, Crime and Victims Bill 2003

Gillick v West Norfolk and Wisbech Area Health Authority [1983] 3 WLR 830

Health and Safety at Work Act 1974

Local Government Act 1974

Parliamentary Commissioner Act 1967

Perkins & Ors v R. [2013] EWCA Crim 323 (26 March 2013)

R (on the application of Bradley) v Secretary of State for Work and Pensions [2008] EWCA Civ 36

R (on the application of Bradley) v Secretary of State for Work and Pensions [2007] EWHC (Admin) 242; [2007] Pens LR 87

R v *Director of Public Prosecutions, Ex parte C* [2000] WL 281275

R v DPP, Ex P. Chaudhary [1995] 1 Cr. App. R. 136

R v DPP, Ex p. Manning [2001] Q.B. 330

R v Killick (Christopher) [2012] 1 Cr. App. R. 10 (CA (Crim Div))

R v Killick [2011] EWCA Crim 1608

R v Lambeth, *ex p Crookes* [1997] 29 HLR 28

R v LCA, ex p Liverpool City Council [2001] I All ER 462 (CA)

R v Local Commissioner for Administration Ex p. Eastleigh BC [1988] QB 855

Secretary of State for Employment, ex p. E.O.C. [1994] 2 WLR 409

Secretary of State for Foreign Affairs, ex p. the World Development Movement [1995] 1 All ER 611

Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg [1994] 1 all ER 457

The Commissioner for Complaints (Northern Ireland) Order 1996 (SI 1996/1297, NI 7)

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CHAPTER 1: INTRODUCTION

In common law jurisdictions, criminal proceedings are part of an adversarial model which opposes the state and the defendant. Since the middle of the nineteenth century, victims have mainly played a role as witnesses, as and when needed, without any further role in or legitimate expectations of criminal justice agencies. In recent years however, policies in common law jurisdictions have increasingly brought victims into the foreground through the development of policies that recognize a wide range of rights for victims of crime within the criminal process.[1]

These rights have been divided into two categories, namely service and procedural rights.[2] Service rights are defined as initiatives that aim to provide victims with a better treatment and better experience in the criminal justice system and include for example rights to information/notification about important court dates and about the progress of their case, assistance for vulnerable victims, and compensation.[3] Procedural rights, on the other hand, are more controversial within the adversarial context, since they provide victims with a more participatory role in the decision-making process. They include opportunities to provide information and sometimes their views and opinions to criminal justice agencies and courts on key criminal justice decisions on prosecution, bail/custody, sentence, parole release and

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1 Many have criticized the terminology of 'rights' employed, suggesting that the term should be reserved for enforceable rights with legal remedies. For pragmatic purposes, the term 'rights' throughout this thesis is used in Fenwick's broader sense and includes entitlements, obligations and expectations within policies that are not necessarily legally enforceable. see H Fenwick, 'Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60 MLR 317-333, 318.

2 A Ashworth and M Redmayne, *The Criminal Process, 4th* edn (Oxford University Press, Oxford, 2010) 52 This classification will be used for the purposes of this thesis.

3 A Sanders, 'Victim Participation in an Exclusionary Criminal Justice System' in C Hoyle and R Young (eds), *New Visions of Crime Victims* (Hart, Oxford 2002).

licence decisions, largely by 'victim impact/personal' statements or consultation with prosecutors.

This thesis undertakes an analysis of the rights and enforcement mechanisms available for victims in two specific jurisdictions, namely in England and Wales and the federal jurisdiction of the United States of America. In recent years, as will be seen in greater detail below, researchers and commentators have noted implementation difficulties with policies that preceded the current ones under analysis – highlighting the failure to deliver a number of victims' service and procedural rights. In addition, these policies have also been criticised for failing to provide victims with mechanisms of accountability and redress in cases of breaches despite the discourse of rights and entitlements.

In part to remedy these shortcomings, these jurisdictions enacted for the first time policies that recognise explicit – albeit very different -- mechanisms of accountability for victims, enabling them to bring forward alleged breaches, to obtain an impartial assessment, and to obtain redress in cases of non-compliance. In England and Wales, the enactment of the Code of Practice for Victims of Crime (the Code) has provided victims with a three-tier complaints mechanism with remedial recommendations by the Parliamentary Ombudsman in cases of breaches. In the federal American jurisdiction, the Crime Victims' Rights Act (CVRA) enacted in 2004 has recognised for the first time victim standing in criminal proceedings to assert their rights, as well as appellate court standing to address further breaches of some service and procedural rights and to obtain remedies.

In both jurisdictions, commentators have highlighted the importance of recent policies and their new enforcement mechanisms and contrasted them with previous policies that were

considered to be closer to rhetoric than reality. In America, this reform has been perceived to be 'the cutting edge of the third wave of victims' rights'[4] and described as 'the most robust system of right enforcement for victims seen'[5], as well as 'the CVRA's most important contributions to the advancement of victims' rights'[6] – breaking from previous tradition of rights without remedies.[7] In England and Wales, although victims' rights are not legally enforceable within criminal and appellate proceedings, the detailed obligations coupled with the new complaints mechanism under the Code of Practice for Victims of Crime have been considered to be more robust by commentators who described the Code as 'a stronger, more all-embracing document, than any of the previous victims' charters.'[8] The government at the time went even further and suggested that the new mechanism under the Code changed the status of victims from complainants within the criminal justice system to being an equal participant with rights.[9]

Despite these descriptions, these new mechanisms remain largely unexplored and under-analysed within the literature on victims of crime. It has yet to be determined whether

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4 See D Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' [2005] BYU L. Rev 255 at 343. Accordingly, the third wave of victims' rights recognises standing in criminal proceedings, remedies and a review process transforming victims' illusory rights into real rights. Thus, 'victims defending against a rights violation in trial or appellate courts are full parties to the rights litigation.' (p. 272)

5 M Hall, *Victims and Policy Making: A comparative perspective* (Willan Publishing, London, 2010) 153

6 D E Aaranson, 'New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004' (2008) 28 Pace L.Rev. 623, 662

7 See D Beloof, 'The Third Wave of Crime Victims' Rights' (n 4) 280 for a clear description of several issues related to enforcement in previous legislations, including the former federal victims' rights statute that provided victims with advisory rights. This will be described in greater detail in this thesis.

8 S Walklate, *Imagining the Victim of Crime* (Open University Press, London 2007) 108. In this respect, previous Victims' Charters did not provide victims with such a mechanism. The 1996 Charter provided victims with complaints mechanisms to the agency in breach and the 1990 Charter did not provide any mechanisms. Further contextual details will be provided in chapters 2, 3 and 4 of this thesis.

9 See e.g. Home Office, 'Rebuilding Lives' (Criminal Justice System, Cm 6705 2005); S Walklate, 'Reframing criminal victimization: Finding a place for vulnerability and resilience' (2011) 15 *Theoretical Criminology* 179

like previous policies, the new ones can be considered to be closer to rhetoric than reality. In England and Wales, summary evaluations have shown that the complaints process itself has significant limits for victims, particularly with regard to its accessibility,[10] but nevertheless, researchers to date have not provided a more in-depth examination that also focuses on its implementation, functioning and remedial adequacy for victims. In the United States, although most victims' rights scholars have argued in favour of the new legal mechanism under the CVRA since it recognises legal standing and remedies within the legal process, some limitations have nevertheless been highlighted particularly with regard to the judicial interpretation of the standard of review required when filing a motion for mandamus.[11]

Further, the existing scholarship in both jurisdictions has been limited in great part to a general *normative* stance with regard to the types of enforcement mechanisms that should be provided for victims of crime, without any nuances or consideration about the types of breaches these mechanisms can redress, or the different forms breaches can take depending on specific contexts. In effect, there is a growing tendency in the literature on victims to generally support enforcement mechanisms that operate within legal proceedings and provide legal remedies to victims[12] while rejecting processes outside these proceedings – as the latter

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10 L Casey, Engaging Communities in Fighting Crime, Review (Cabinet Office) June 2008; S Payne, 'Redefining justice: Addressing the individual needs of victims and witnesses' (Victims' Champion Report, London 2009) 34; In addition, it was recently suggested that there was a general lack of awareness regarding this Code. For instance, the Crime Survey for England and Wales asked respondents (both victims and non-victims) whether they had heard of this Code and 19% of victims had heard, in comparison to 15% of non-victims. See: L Freeman, *Support for victims: Findings from the Crime Survey for England and Wales* (Ministry of Justice 2013)

11 For further information on this debate, see P Cassell, 'Protecting Crime Victims in Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Mandamus Provision' (2010) 87 Denv U L Rev 599; Aaronson (n 6) and appellate decisions of the 2nd, 3rd, 9th Circuits, which propose a flexible/appeal standard; and appellate decisions in 5th and 10th Circuits which interpreted the standard of mandamus rigidly as the traditional writ of mandamus in common law tradition. This conflict among Circuit courts has not been resolved yet by the US Supreme Court or Congress.

12 See eg. L Wolhuter, N Olley and D Denham, *Victimology: Victimisation and Victims' Rights* (Routledge, Cavendish 2009) in which the authors argue that standing and enforceable rights in courts, like the CVRA should be adopted in England and add that 'whether or not similar legislation is enacted

would create 'illusory' rights that remain legally unenforceable and without robust remedies.[13]

A. Contribution, Limits, and Aims

In both jurisdictions, there is a clear need for a more in-depth, nuanced and context- sensitive study of these enforcement mechanisms. This thesis proposes to take the available research further by providing a critical and context-sensitive analysis of the recent redress mechanisms for victims in both jurisdictions. Further it provides a reflection on possible improvements that can be made. It situates both developments within their wider cultural contexts and, more specifically, seeks to determine whether these mechanisms have been effective/adequate in reaching their promised aims, namely providing victims with an accessible, impartial and effective mechanism for victims to obtain redress in cases of different types of breaches. These specific aims are also considered throughout this thesis as the main general criteria for

in the UK depends on the existence of the political will to do so, which unfortunately presently appears to be lacking.' (p. 140); M Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan, Cullompton 2009), argues that under a victim-centric approach, victims should be provided with rights enforceable *within* the criminal justice (trial) procedure through the proactive intervention of judges and lawyers that would deal with victim grievances immediately during trials by the bench, as opposed to a lengthy complains procedure initiated after the fact. (p. 210) In cases where victims' rights are breached during that process, he also suggests an appellate mechanism that would only deal with the alleged victims' breach and would provide them with standing to ask for remedies. (p. 211); M Hall, *Victims and Policy Making: A Comparative Perspective* (Willan, Cullompton 2010); J Doak, 'The victim and the criminal process: an analysis of recent trends in regional and international tribunals' (2003) 23 Legal Studies 1-32; J Jackson 'Justice for All: Putting Victims at the Heart of the Criminal Justice?' (2003) 30 Journal of Law and Society, 309-326; D Beloof, P Cassell and S Twist, *Victims in Criminal Procedure* (3rd edn Carolina Academic Press, Durham 2010);

[13] For instance M Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan, Cullompton 2009) and H Fenwick, 'Rights of victims in the criminal justice system: rhetoric or reality?' (1995) Crim.L.R. 843 argue that rights enforceable only through a complaints mechanism external to the criminal process is unsuited to achieve victim centrality and secure real rights, since they fail to provide victims with legal remedies. Similarly, Walklate (n 9) suggested that the Code's new mechanism is merely another false promise made to victims, since contrary to political rhetoric, it does not provide victims with legal rights that can be enforced within a legal setting. Further, Beloof, Cassell and Twist (n 12) have argued that mechanisms that operate outside criminal proceedings/appellate/review – including ombudsmen processes -- are unsuited to provide victims with 'strong' remedies, such as voiding when breaches occur. Essentially, they claim that these mechanisms and remedies are dysfunctional since in most cases they are corrective and thus do not leave victims in a position to exercise their rights.

evaluating how well the two main enforcement mechanisms work. More specifically, accessibility will be examined in light of costs, facility in navigating within the process and timeliness of proceedings. Impartiality in light of the decision-making body's independence and the effectiveness of redress will be assessed in light of the remedy's capacity of setting the victim back to the context prior to the breach or alternatively obtaining compensation for this breach.

The research therefore contributes to the victims' literature on rights and enforcement mechanisms by providing a contextual and grounded analysis of the two main enforcement mechanisms recently enacted in England and Wales and the federal jurisdiction in the United States, respectively the complaints mechanism under the Code of Practice for Victims of Crime and the legal mechanism under the Crime Victims' Rights Act. These two case studies go beyond the law in books and explore the 'law in action' to reveal the ways these specific mechanisms function/operate and to determine whether they deliver and can deliver their purported aims and promises made to victims.

This research does not aim to propose *the* best mechanism, since it recognises that 'one institution is not better than the other *tout court*. At best it may be better regarding a certain function'[14]. Indeed, according to the functionalist approach, a comprehensive evaluation can be impossibly complex, since a single institution may have several different functions[15] and thus it would be difficult to recognise a best institution. In addition, even determining which is better in achieving a certain function has its own difficulties, since both may have different strengths and limitations that can be context-specific/dependent and not

[14] R Michaels, 'The Functional Method of Comparative Law', in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP, NY 2007) 375

[15] Id

easily commensurable. Further, it is worth remembering the limits of such evaluations and the dangers of proposing abstract models of enforcement without taking into account the cultural contextual differences that may render a policy's receptivity and implementation quite different between jurisdictions.[16] Due to time and space constraints, this project has not analysed all available mechanisms in other jurisdictions and therefore it would be going beyond the data to suggest a best mechanism at this stage.

With these limitations in mind, the project situates these policies within their different cultural contexts, outlines the difficulties with implementation and criticisms associated with previous policies and seeks to explore the central hypothesis of this thesis: whether the aims and promises made to victims about the new redress mechanisms set up under the Code and the CVRA have been delivered and whether they are even capable of delivery by the mechanisms set up to do so. It also takes these findings one step further and provides reflections about possible improvements that take into account the different contexts related to breaches as well as the identified effective aspects of both mechanisms. In brief, this research aims to answer the following questions:

1. What were the main policy rationales/aims behind the development of the two main enforcement mechanisms under analysis?

2. Have these mechanisms achieved those aims and what are some of their limitations?

[16] Even functionalist comparativists have recognised similar context-specific caveats. For instance, see M Rheinstein, 'Teaching Comparative Law' (1937), *University of Chicago Law* Review, 5, at 618, in which the author suggests that 'the discovery that the social function X is well served by institution A in country I, while the apparently equal function X' is badly served by institution B in country II, is far from impliedly advocating the abolition of B and adoption of A in country II. Apart from the fact that the similarity of X and X' may be superficial, there may be numerous reasons rendering A unsuited and making the preservation of B desirable for country II. 618; For more details on legal transplants see M Graziadei, 'Transplants and Receptions', in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP, NY 2007)

- Are these mechanisms accessible, timely and objective for victims of crime?
- Do these mechanisms provide adequate remedies in cases of breaches of rights?

3. Based on the findings in both jurisdictions, what are some of the improvements that can be made to increase their chances of achieving these aims?

Research findings on these two mechanisms add to the existing victims' literature by providing information about their functioning and their practical implementation for victims of crime, as well as provide reflections about improvements and the importance of context sensitivity. This study therefore provides a more detailed and grounded approach of these specific enforcement mechanisms, which in turn will allow a greater engagement with the wider general normative claims made in some of the victims' literature identified above.

In addition, this research also generates findings and promotes reflections that may be useful for future policies that relate to the enforcement of victims' rights and the recognition of remedies. Although the conclusions of this research are relevant within the specific jurisdictions analysed, the findings and arguments generated may to some extent be helpful for other common law jurisdictions that may be tackling issues of enforceability and aiming to develop new enforcement mechanisms. Indeed, despite its limitations, the functionalist evaluating and model-building approach can aim to develop a general best practices model which might have cross jurisdictional support and as such build on studies in other countries to draw out certain guiding principles.[17] As highlighted by comparativists, the functionalist method can show alternatives and provide some information -- thereby greatly improving

[17] Rheinstein, n 16

policy decisions.[18] As previously mentioned, many jurisdictions are currently integrating changes and reflecting on new enforcement mechanisms for victim[19] and therefore this method could, to some extent, provide a way forward for this form of model building, similar to the Model Penal Code or the EU Directive for Victims of Crime. It is worth noting however that although research findings can to some extent inform and improve policy decisions in other jurisdictions, careful consideration of the differences in legal and cultural backgrounds is paramount, since legal transplants and transfers will usually take different shapes and forms depending on specific culture.

B. Choice of field

Before examining the specific methodology employed for this research, it is worth specifying some of the choices that were made for this research.

- Why were two common law jurisdictions selected?

[18] Michaels, n 14

[19] For instance, in Canada, there is currently an initiative to create a Federal Victims' Bill of Rights and as part of the process, the creation of new enforcement mechanisms is currently being looked at and discussed among the different policy-makers. See discussions with the Ministry of Justice in Canada held in Spring 2013. Similarly, in England and Wales, in July 2012, the Government announced that it would undertake a review of the Victims' Code to consider how it can be improved. A recent draft was published and a public consultation session on this draft was held in April 2013. During the consultation period, the Ministry of Justice in England and Wales welcomed comments with regard to the problems that relate to the current complaints process and improvements were considered to be important. See: https://consult.justice.gov.uk/digital-communications/code-victims-crime for further details.

As Nelken highlights, some places are more relevant than others for their contribution in clarifying issues in certain areas of comparative criminal justice.[20] For the purposes of this research, England and Wales and the Federal American jurisdiction have been selected over a civil law country for their similarities within the common law world with regard to their criminal justice system, the historical role of victims as mere witnesses, and their fairly recent policy changes. Further, and most significantly, those jurisdictions were selected for their recent enactment of new explicit enforcement mechanisms for victims of crime that remain in great part unexplored and thus can be considered a substantial gap in the current literature. They both aimed in many respects to recognise accountability for victims of crime and provide them with independent mechanisms to respond to breaches of rights by recognising individual redress.

- Why the Federal American jurisdiction instead of another American state?

Units of comparison are often nation-states mainly for reasons of convenience.[21] In the context of a federation like America, however, units of comparison can also be the federal jurisdiction or one of its constitutive states. Challenges arise when considerable variations exist between states, especially when the area examined falls primarily within state jurisdiction. In this research, due to space and time constraints, it is virtually impossible to look at all American states to contrast the developments of rights and enforcement mechanisms. Moreover, since many cultural variations exist between these units, the selection of only two jurisdictions was made to avoid over-generalisations and to facilitate a deeper analysis of the mechanisms in place within specific contexts. A deeper examination of

[20] D Nelken, *Comparative Criminal Justice : Making Sense of Difference* (Sage, London 2010) 28

[21] Nelken (n 20)

the federal context will capture more nuances and will allow more attention to context. Restricting the study to the federal context and enforcement policy towards victims' rights is justified by the victims' movement's primary focus at the national level which, for various reasons, resulted in critical developments at the federal level. Further, the focus on the federal level over state policies can be justified on the basis that the federal initiative has been described as the most robust in the common law world with regard to its enforcement mechanisms[22] and was meant to be a model-framework for American states to follow.

- Why the choice of these specific enforcement mechanisms?

Both selected mechanisms were first time initiatives that were presented as powerful reforms that would offer victims different means of accountability by which they could report alleged breaches and obtain remedies if breaches were found. Hence, the 2006 Code of Practice for Victims of Crime in England and Wales recognised for the first time an explicit informal mechanism by which victims can have their complaints against criminal justice agencies for breaches under the Code investigated and obtain recommended redress by the Parliamentary Ombudsman. In the Federal American jurisdiction, the 2004 Crime Victims' Rights Act provided for the first time what was meant to be a robust legal enforcement mechanism, since it recognised victim standing to assert their rights and breaches in criminal proceedings (district court) and ultimately the ability to file a mandamus action to the appellate court for breaches. Both mechanisms are considered to be very different from one another, as one operates within legal proceedings and the other can be considered an informal mechanism that operates outside of such proceedings. Although these mechanisms were both meant to operate as responses to breaches, their operational and remedial differences are

[22] Hall (n 5)

worth looking at as they can reveal strengths and limitations for victims that decide to use them.

C. Methodology

In order to fulfill the various aims of this study and respond to the proposed research questions, a mixed methodology is used which includes a comparative component, interviews with elites and, finally, traditional library-based documentary/doctrinal research.

1. Comparative component: understanding context and achieving distancing between both jurisdictions

Although this thesis is not purely comparative, its first part is contextual and essentially uses a *comparative* method based on the information gathered within documents, legislative history and the available scholarly literature to place the reader in the different contexts that developed in both jurisdictions with regard to victims.

Concern with history, culture and social structure is considered crucial by comparativists to illuminate dissimilarities and to sharpen contrasts[23], which in turn is useful to achieve distancing between jurisdictions. Indeed, *distancing* is an essential element for comparativists, and some purely procedural comparative legal works are criticised for

[23] Indeed, Dubber highlighted the importance of these elements by suggesting that 'comparative criminal law without history makes no more sense than comparative criminal law without sociology, and notably criminology, economics, politics or culture.' See: M Dubber, 'Comparative Criminal Law', in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP, NY 2007)

ignoring this perspective.[24] Since this thesis mainly focuses on enforcement mechanisms and their processes, achieving a certain level of distancing by bearing in mind that these policies have evolved and were shaped within different contexts is fundamental for two main reasons, namely to avoid falling into the trap of ethnocentricity and idealization of the foreign country's approach towards certain models[25] and most importantly to recognise the limitations of legal transplants and policy transfers.

In this respect, as will be seen in greater detail in chapter 7, comparativists suggest that differences in context are important to bear in mind, since they can represent a limit to legal transplants, even within common law traditions. [26] Indeed, a policy that works or operates in a certain way in one jurisdiction may not reproduce similar results, or even be possible in other jurisdictions due to cultural/contextual differences. The different contexts between jurisdictions outlined in these chapters will therefore be important elements when examining different enforcement mechanisms, their successes and limits for victims of crime, as well as reflections about the transferability of their stronger features. This highlights the dangers and limitations of the 'best law' or 'best mechanism' approach to comparative law, often linked to the functionalist method of comparison mentioned above. Hence, this thesis does not suggest that either mechanism explored should be transplanted in other common law systems without bearing in mind the potential difficulties shaped by different contexts.

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24 L Zedner, 'Comparative research in criminal justice' in L Noaks, M Maguire and M Levi (eds), *Contemporary Issues in Criminology* (University of Wales Press, Cardiff 1995); L Lazarus, *Contrasting Prisoners' Rights* (OUP 2003)

25 Id

26 T Jones and T Newburn, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy* (Open University Press 2007); M Graziadei, 'Transplants and Receptions' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 470; P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; P Legrand, 'The Same and the Different', in S Berman and M Wood (eds), *Nation, Language and the Ethics of Translation* (Princeton University Press 2005).

Finally, in order to make sense of contextual elements in a foreign jurisdiction like the US, a mix of what Nelken describes as 'virtually there' as well as 'researching there' approaches[27] have been used, which essentially involve being in direct contact with informants in their own society by engaging in discussions with academics and experts that specialise in the area and have played a determinant role in policies. This was achieved through the network of academics and legal experts that I have contacted over the years in the US while working on victim-related issues. In addition, the visiting researcher programme at Harvard Law School enabled me to spend a term in the US and discuss with professors that have had a more direct experience within that jurisdiction with policies, political and historical realities. For the context in England and Wales, I adopted the 'living there' approach by living in England for four years and participating in the general life of the country and as suggested by Nelken even an active consulting/critical role in relation to the criminal justice system itself. In this respect, I have participated in various meetings and consultations that relate to the development of policies and enforcement mechanisms related to victims' rights.

2. Empirical component: understanding the 'law in action'

The second part of the dissertation examines and evaluates the two enforcement mechanisms selected by essentially using mixed methods which comprise elite interviews, a 'law in action' approach, as well as a library-based research.

[27] Nelken (n 20)

As suggested by Örücü, when examining legal provisions it is certainly not enough to rely on law in the books. Some effort must be made to talk to those in touch with the 'law in action.'[28] Bell likewise suggests that some empirical component to research is required to understand how certain legal rights/mechanisms work in different jurisdictions.[29] Similarly, Harding and Leyland highlight the need, when it comes to evaluating the recent trend toward constitution-making, to examine how constitutional provisions operate in practice (or, as often, not put into practice).[30] These methodological suggestions have been particularly useful and integrated throughout my research. Thus, semi-structured expert interviews with staff at MPs' offices, as well as the Parliamentary Ombudsman, were conducted in order to understand the process on the ground and examine how they operate in practice. Additionally, for the American federal component, case law on remedies under the CVRA was analysed to determine their availability and limitations in practice. Informal discussions have also been undertaken with legal experts and scholars[31] listed below.

a) American interviews/discussions:

In the Federal American system, key elites with expertise on victims' rights and the Crime Victims' Rights Act are few – particularly the ones with experience that relates to the implementation of the CVRA's legal enforcement mechanism under analysis. Since many of

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28 E Örücü, 'Developing Comparative Law' in E Örücü and D Nelken (eds), *Comparative Law* (Hart, Oxford 2007), ch 19

29 J Bell, 'Administrative Law in a Comparative Perspective' in E Örücü and D Nelken (eds), *Comparative Law* (Hart, Oxford 2007), ch 13, 20

30 A Harding and P Leyland, 'Comparative Law in Constitutional Contexts' in E Örücü and D Nelken (eds), *Comparative Law* (Hart, Oxford 2007), ch 14, 316

31 Engaging in dialogue with foreign scholars, officials and politicians is considered a way to talk to those in touch with the 'law in action'. See D Nelken and E Örücü, *Comparative Law: A Handbook* (Hart Publishing, Oxford 2007) 20

them were also involved in legislative drafting and were influential forces in policy-making, they have been interviewed about the context and some of the legislative choices that were made with regard to these recent victim-related policies. These individuals were identified in primary and secondary materials and, after some discussions, they were able to refer me to other specific individuals that have an expertise in that area, known as the 'snowballing' method. Further, to increase the reliability of the information provided, I tried as much as possible to ensure that these interviews were part of a triangulation strategy, along with other primary and secondary sources.[32]

For practical and financial reasons, most interviews were conducted by telephone (Skype) since interviewees were geographically dispersed in different states.[33] I also used a Skype recorder for most interviews for transcription purposes. Further, for some communications, particularly for follow-up questions, I used e-mail since a number of questions came to mind as I was doing research and this was a quick and effective way to obtain some responses particularly related to the process by members of busy elites. Hence, Morrissey highlights the importance of flexibility and accommodation when conducting interviews with these types of elites[34] and I quickly realised that the use of e-mail was an effective way to manage new questions that were prompted by previous answers. In addition, I met face-to-face with some experts at various conferences and events, including at the World Society of Victimology, which allowed further related discussions on the legal enforcement process in a more informal setting.

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32 D G Lilliker, 'Interviewing the Political Elite: Navigating a Potential Minefield' (2003) 23(3) *Politics* 207-214

33 N Stephens, 'Collecting data from elites and ultra elites: telephone and face-to-face interviews with macroeconomists' (2007) 7(2) *Qualitative Research*, 203-216 suggests that this is a considerable advantage and justification of telephone interviews.

34 C Morrisey, 'On Oral History Interviewing' in L A Dexter (ed.) *Elite and Specialised Interviewing* (Northwestern University Press, Evanston IL 1970)

Semi-structured qualitative interviews was selected as a method for several reasons. First, by using this method I made sure that all necessary topics and themes were discussed, while allowing adequate space for the interviewees to bring up issues they may perceive as important.[35] Second, due to the lack of visual communication when conducting telephone interviews there was a need for increase clarity and articulation, which can be facilitated by choosing semi-structured interviews. As Stephens recommends when referring to telephone interviews:

> the interviewer may wish to consider using a slightly more structured interviewing approach, with a number of questions written in advance to ensure they are clearly spoken and direct the respondent accurately (…) Of course only a proportion of questions can be prepared in advance as many will only become apparent in the interview situation as the respondent's account unfolds.[36]

Interviews/discussions with the following experts on these laws, policy consultants, and victim legal representatives have been undertaken. In this thesis most names have been omitted in certain passages, since some expressed their desire to maintain anonymity.

- Chair of the 1982 President's Task Force for Victims of Crime, former Assistant Attorney General of the United States, current Superior Court judge in Contra Costa County in California, Guest Lecturer at the National Judicial College.

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35 The strengths and weaknesses of the semi-structure interviewing method is discussed in greater detail in a number of papers, including A Coffey and P Atkinson, *Making Sense of Qualitative Data* (SAGE, USA 1996); C Warren, 'Qualitative Interviewing' in J Gubrium and J Holstein (eds.) *Handbook of Interview Research: Context and Method* (SAGE, USA 2002)

36 N Stephens, 'Collecting data from elites and ultra elites: telephone and face-to-face interviews with macroeconomists' (2007) 7(2) *Qualitative Research*, 203-216, 211. It is worth nothing that this is one of the rare academic texts which explores the telephone interviewing method of elite samples.

- Director of the National Crime Victim Law Institute (NCVLI), participated at some of the policy discussions and helped draft the CVRA; experienced in training lawyers and litigators on CVRA cases.
- Former director/creator of the NCVLI, current professor at Lewis & Clark specialising on victims' rights, main drafter and participant of CVRA debate and talks with senators; author of various scholarly work on victims' rights and enforcement; legal representative of victims.
- Former district court judge, lawyer and experienced victim litigant of the CVRA; current law professor specialising in criminal law and victims' rights, author of scholarly work on victims' rights.
- Main drafter, negotiator of the Victims' Rights Amendment, legal participant in the debates and discussions with senators about the CVRA; Pro bono victim legal representative and Director of the Arizona victims' clinic.
- Director of Victims' law clinic.
- Two Harvard Law School professors with experience in criminal law

b) English interviews/discussions:

The information and available data in England and Wales that relate to the Code's complaints mechanism's implementation are limited and thus it was necessary to rely on the following experts to obtain the required data:

- Parliamentary Ombudsman's Office

The collation of data for the empirical component includes the completion of nine interviews/correspondences by electronic mail between October 2009 and July 2010 with two members of the Parliamentary Ombudsman's office, namely a representative of the legal team and a Public Affairs Analyst. A jurisdiction adviser was also consulted by the Public Affairs Analyst for certain questions. These interviews were semi-structured and began with a series of precise questions about the functioning and quantitative information regarding the complaints that gave rise to further and follow-up queries. These follow-up exchanges took the form of informal discussions that allowed me to access additional information on the practicalities of the process, understand its functioning and purposes as well as collate quantitative data to allow an evaluation and analysis of the process. Finally, in 2012, after a second Freedom of Information request, I was also able to obtain data about the specific redress that was recommended by the PO as well as the outcomes of these recommendations.

This research contains limits due to confidential data protections that cannot be shared or made available to the public. The Parliamentary Ombudsman is subject to the Data Protection Act and a statutory bar[37] which prevents the release of information obtained by the Ombudsman, or officers acting on her behalf, in the course of or for the purposes of an investigation. Nevertheless, I was able to obtain relevant quantitative data following two separate Freedom of Information requests to the Parliamentary Ombudsman's office, respectively in 2009 and 2012, but was unable to view the complaints or obtain any information that would allow me to identify the complainants.

- Members of Parliament/MP assistants

[37] See section 11 of the Parliamentary Commissioner Act 1967

Due to confidentiality restrictions, I was unable to identify or receive any information about specific MPs that filed a complaint with regard to the Code, but in 2011, I expanded my MSt research and sent out letters and e-mails to a wide range of randomised MPs or their assistants to ask them about the MP filter process. From the individuals contacted, fourteen responded. I was able to conduct telephone interviews with three MPs who dealt with complaints under the PO process -- including a member of the Justice Committee – as well as eleven Parliamentary assistants and Parliament researchers that were specifically in charge of applying the MP filter. Furthermore, for triangulation purposes and to complete some information, I asked several MPs/assistants the same questions.[38] Moreover, I also collated and relied on secondary sources, namely governmental and non-governmental reports as well as historical documents to partially verify their claims, as well as to discover and understand the objectives and the functioning of the MP filter.

- Crown Prosecution Service (CPS)

Further, since the start of my MSt, I attempted to contact the Crown Prosecution Service (CPS) and victim/witness care units to inquire on their handling of internal complaints, but was unable to conduct interviews due to their time restraints and unavailability for research purposes. The CPS, however, was able to provide me with information and written guidelines that they are instructed to follow when they receive internal complaints by victims of crime. Further, I was informed that complaints are not collated within a national database and thus it is impossible to obtain information on the

[38] See P H J Davies, 'Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of the Intelligence and Security Services' (2001) 21(1) *Politics* 73-80 and Lilliker (n 32) which highlight that interviews must be part of a triangulation strategy. They suggest that a good practice is to require at least two independent verifications before treating a fact gleaned with real confidence.

number of complaints filed, the nature of these complaints or their outcome.[39] Despite these limitations, the information collated sheds some light on this specific internal mechanism's functioning.

Finally, for the contextual component of this thesis, I arranged a meeting with Professor Paul Rock, whose research presents a thorough contextual portrait of victims' rights and policies. Professor Rock discussed his research with me, and put me in contact with key players behind victims' rights policies, including influential members of Victim Support as well as one of the main victim policy and enforcement advisers who I met on several occasions in order to understand some additional elements related to the choice and aims of enforcement mechanisms.

3. Library-based research component

In addition, this research uses a traditional black letter law component to analyse both mechanisms. This includes the collation and analysis of the various legal/ policy documents; namely, primary legal sources (laws, statutes, guidelines/ codes, policy debates, court decisions, governmental reports), as well as secondary sources, including criminal law, victims' rights law, administrative law and criminological/ victimological literature.

More specifically, the analysis of court cases is a principal methodological component to this research that enables the understanding of the law in action and its operation in a

[39] See e-mail communication with Crown Prosecution Service, March 20, 2012.

specific jurisdiction.[40] This method will be particularly useful to analyse the judicial remedies provided under the CVRA. Hence, in order to understand the successes and limits of these remedies for victims of crime, I collated and analysed district and appellate court cases under the CVRA -- from its enactment in 2004 until 2011. Only cases that specifically address remedies will be analysed and provided as illustrations to substantiate and highlight some of this mechanism's successes and limitations.

D. Structure of thesis

This thesis is divided into two sections. The first section which includes chapters 2 and 3 is contextual and provides background on victims' rights in both jurisdictions. It aims to achieve distancing by undertaking a comparative examination of the wider historical and political contexts under which victims' rights and enforcement mechanisms developed in both jurisdictions. Chapter 3 also explores some of the implementation difficulties that were raised by some critics and were part of previous policies. Along with providing an understanding of the different backgrounds that can explain some of the differences between rights and enforcement, this section also emphasises some contextual differences that are important to bear in mind when reflecting on possible improvements and proposing an enforcement possibility based on several features of various models that operate in both jurisdictions.

The second section is the core of the thesis since it analyses the two enforcement mechanisms. It encompasses chapters 4, 5 and 6, as well as the concluding chapter 7. Chapter 4 specifically examines the two different enforcement mechanisms and their aims for victims

[40] E Örücü, 'Developing Comparative Law' in E Örücü and D Nelken (eds), *Comparative Law* (Hart, Oxford 2007), ch 2, 61 in which Örücü highlights that a degree of law in action is present when primary sources of law include court decisions.

of crime in these jurisdictions. Chapters 5 and 6 are meant to determine whether to date they have met those aims and whether they are, in fact, capable of meeting them. Hence, they analyse some of their strengths and limitations by specifically focusing on whether the new mechanisms are accessible, objective and most importantly provide adequate remedies for victims of crime in different circumstances that relate to breaches. Finally, the analysis of these mechanisms and some of the research findings enables a wider concluding discussion in chapter 7 that discusses and suggests possible improvements and reforms that can be developed in a way that recognises the importance of cultural context as well as context based on the nature and circumstances of breaches.

CHAPTER 2: CONTRASTING THE FORCES BEHIND THE EMERGENCE OF THE VICTIMS' MOVEMENTS IN AMERICA AND ENGLAND AND WALES

In the past few decades, the victims' movement has continuously evolved in America and in England and Wales, resulting in numerous policies, legal responses and debates on the role of victims in the criminal justice system. In order to understand why different policies and legislative measures regarding the role of victims in the criminal justice system and the enforcement mechanisms were adopted, it is fundamental to examine and contrast the forces that drove the movement in these two jurisdictions.

This chapter traces the early developments of the victims' movement in order to understand the different approaches between England and Wales and the United States. Thus, it attempts to clarify the choices and foundations behind the different policies and mechanisms by exploring political, social as well as cultural differences pertaining to the early development of the victims' movement. Understanding the differences in contextual and institutional settings which led to recent schemes and policies adopted in England and Wales and the United States is fundamental for achieving 'distancing' between these two jurisdictions. As suggested by Lazarus,[41] distancing can be achieved by understanding why a certain jurisdiction evolved in a particular way instead of another. This chapter does not intend to be exhaustive by analysing *all* factors and differences, but rather explores the most influential ones and the extent to which there was variation between these jurisdictions during the movement's early developmental period (1960s-1980s). Although this thesis primarily evaluates and reflects on the possible future development of effective enforcement

[41] L Lazarus, *Contrasting Prisoners' Rights* (OUP 2003)

mechanisms, the jurisdictional differences are imperative to bear in mind, as they may prove to be obstacles to proposed changes and place limitations on new policies related to victims within these two jurisdictions.

The first section of this chapter describes the emergence of the victims' movement in the United States by considering the forces behind it, the methods that were used, as well as their goals. The aim of this section is to provide a descriptive account of the victims' movement in its early stages (1960s, 1970s, and 1980s) within the broader cultural context at the time. By examining the evolution that took place over these earlier years, it brings into focus the historical, political and social context in which the victims' movement in the US arose. This section contains much more background and historical descriptive information than the second section as it intends to provide an overview of the American system to achieve distancing for readers from a different legal culture. The information was obtained from interviews with early participants in the movement, governmental documentation, reports and historical secondary sources.

The second section examines the movement's development in England and Wales during that same period (mainly the 1970s and 1980s) by explicitly contrasting its main influences with those on the American movement, as detailed in the first section. The information obtained on the English jurisdiction derives from certain government documents, but also draws on secondary sources and the detailed work of Professor Paul Rock. This historical analysis is relevant to the rest of the dissertation since it contributes to achieving distancing between both jurisdictions as well as clarity on why certain approaches to victims' rights and enforcement developed in one jurisdiction but not in the other, or, alternatively, developed differently. This distancing provides the reader with a better understanding and

appreciation of the different approaches adopted by these jurisdictions throughout the thesis and highlights the different contexts under which victims' rights and enforcement mechanisms developed in both jurisdictions; contexts that should be borne in mind by those responsible for policy development.

A common historical background

The role of victims in England and Wales and the United States emerged from the same historical background, and can be traced back to early 13th century societies, which later evolved and developed under a system of common law.[42] Despite these similarities, this chapter provides a brief overview of how the role of victims first developed, evolved and was shaped differently by culture in the jurisdictions under review in order to lay a foundation for the rest of the thesis.

A. The victims' movement in America (1960's-1980s)

Several elements have contributed to the emergence of the victims' movement in America. The following section examines the most influential factors and forces behind this movement, the way they developed and their aims until the 1980s. These elements and forces include the development of victimology; the increase of crime rates; the Federal Government's early and continuous intervention in crime, which includes victim policies; and the feminist movement and grassroots victim organisations. These forces developed in parallel and created strategies to achieve their goals which will be explored below.

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42 For a more detailed account of victims' role throughout history see: S Shafer, *Victimology: The Victim and His Criminal* (Reston Publishing, Reston 1977); J Hagan, *Victims Before the Law – The Organizational Domination of Criminal Law* (Butterworths, Toronto 1983)

1. The early developments of the victims' movement (1960-1970)

a) The worldwide development of victimology

Little attention had been paid to victims of crime since the middle of the 19th century, but the the early development of victimology as a social science brought the victim to the forefront of criminological study. The very first writings about the victim appeared in early criminological works by Beccaria (1764), Lombroso (1876), Sutherland (1924), and Hentig (1948), but the modern study of victimology as a science, can be traced to the end of the Second World War, to the seminal works of Beniamin Mendelsohn in 1937 and 1940 - where the word 'victimology' originated[43] - and to his 1956 publication, which defined the term 'victimology'.[44] This new theoretical and empirical approach began by exploring relationships between victims and offenders and identified victim typologies based on characteristics that may increase a person's risk of victimisation.[45] The development of victimology in the United States coincided with the increase in crime rates in the 1960s as well as the creation of the Welfare State. The study expanded to include victimisation surveys and other aspects of crime victims and victimisation, notably theoretical and critical victimology[46] and, later on, the exploration of the psychological impact of crime on victims,

43 B Mendelsohn, 'Methods to be used by Counsel for the Defense in the Researches made into the Personality of the Criminal' (1937) *Revue de droit pénal et de criminologie*, France, August-October; B Mendelsohn, 'Il Stupro dentro la Criminologia' (1940) *Giustizia Penale*, Italy.

44 B Mendelsohn, 'Une nouvelle branche de la science bio-psycho-sociale, la victimologie' (1956) *Etudes Internationales de Psycho-Sociologie Criminelle*, July-September

45 See for e.g. B Mendelsohn, 'Une nouvelle branche de la science bio-psycho-sociale, la victimologie' (1956) *Etudes Internationales de Psycho-Sociologie Criminelle*, July-September, at 23; H von Hentig, 'Remarks on the Interaction of Perpetrator and Victim' (1941) 31 J. Crim. L, Criminology & Police Sci. 303

46 E Viano, 'Victimology: The Development of a New Perspective' (1983) 8(1-2) *Victimology* 17; R. I. Mawby and S Walklate, *Critical Victimology: International Perspectives* (Sage, London 1994) 7-22

and the exploration of healing and coping strategies.[47] These strategies included greater compensation by the Welfare State, therapeutic services and programmes, restitutive measures, as well as participation and input within the criminal justice process.[48] In America, the importance of feminist theory and research on rape and domestic violence were among factors that can be considered catalysts for experimental programs in prosecutors' offices. Arguably, the focus of social sciences on victims and victimisation as well as the research and development towards more 'compassionate' approaches contributed to, and framed, among other factors, the image of the victim and ultimately its development into policy.

b) The Federal government's early, substantial and continuous intervention in responding to crime

Many factors have played a crucial part in the development of the victims' movement in America, one of them being the federal government's early, substantial and continuous intervention in the politics of crime since the 1960s.[49] During that period, the increase in crime rates – particularly the frequency of violent offences -- ultimately caused a new interest in the pursuit and prosecution of crime and victimisation. The fear of crime was slowly emerging and thus political forces felt a need to mobilise around the 'war against crime'[50]

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47 See e.g. R F Kidd and E F Chayet, 'Why Do Victims Fail to Report? The Psychology of Criminal Victimization' (1984) 40 J.Soc. Issues 39; D J Kilkpatrick and Randy K. Otto, 'Constitutionally Guaranteed Participation in Criminal Justice Proceedings for Victims: Potential Effects on Psychological Functioning' (1987) 34 Wayne L. Rev. 7, 9-20, 26

48 D P Kelly, 'Victims' Perceptions of Criminal Justice' (1984) 11 Pepp. L. Rev. 15; Ezzat A. Fattah, 'Toward a Victim Policy Aimed at Healing, Not Suffering in Victims of Crime' (1997) in Robert C. Davis et al. (eds) (2nd edn, Sage 1997) 257

49 J M Mastrocinque, 'An Overview of the Victims' Rights Movement: Historical, Legislative, and Research Developments' (2010) 4(2) *Sociology Compass* 95

50 E J Epstein, *Agency of Fear* (Putnam, New York 1997); M D Dubber, *Victims in the War on Crime* (NYU Press 2002)

and on the side of crime victims.[51] In the context of this 'war', and in order to respond to this growing crime rate, President Lyndon B. Johnson created the President's Commission on Law Enforcement and Administration of Justice in 1965 to examine both the extent and causes of crime and ways to address it.[52] Thus the first national household victimisation survey was established under this Commission in 1966 and revealed that the estimated crime rates were substantially higher than the ones reported by the Uniform Crime Reports.[53] This survey revealed that a significant percentage of crime victims did not report their victimisation to the police.[54] The Commission's final report brought victim-related issues to the forefront, not only by addressing the higher rate of crime revealed by the survey, but also by attempting to understand the reasons behind the low crime reporting rate.[55] It was necessary to find a way of addressing victims' losses and needs for services in order to get more victims to report and cooperate with the justice system as witnesses.

Among its proposals, the Commission proposed the introduction of a supplementary system of victim compensation, where the government would provide payment to the victim for unrecovered losses. Since securing compensation required victims to report crimes, this system was perceived as a vehicle to involve victims more directly in the criminal justice

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51 J Simon, *Governing through Crime* (OUP 2007) 91

52 P Tobolowsky, *Crime victim rights and remedies* (2nd edn, Carolina Academic Press, Durham 2010) 7; M R Rand, 'The National Crime Victimization Survey at 34: Looking Back and Looking Ahead' in Mike Hough and Mike Maxfield (eds), *Surveying Crime in the 21st Century: Commemorating the 25th Anniversary of the British Crime Survey* (Criminal Justice Press, Monsey NY 2007); The president frequently expressed solidarity with victims of crime and voiced his concern about the harm and the necessity to put an end to it. See: Simon (n 51) 91

53 Tobolowksy (n 52) 7

54 A Karmen, *Crime Victims: An Introduction to Victimology* (6th edn, Thomson Wadsworth, Belmont CA 2007)

55 M J Hindelang, 'Victimization Surveying, Theory and Research' in Hans Joachim Sneider (ed) *The Victim in International Perspective*, (de Gruyter, 1982)

system.[56] Based on the federal Commission's report, states began to explore the idea of restitution as well as compensation.[57] Compensation programmes were 'among the first tangible responses to the renewed concern about crime victims during this period.'[58]

- *LEAA and the law and order agenda*

Further, this report resulted in the creation of the Law Enforcement Assistance Administration (LEAA) in 1968, which received substantial funds – primarily through block grants[59] by the federal department -- to pursue research, fund and advise programmes developed to reduce and prevent crime.[60] Research in victimology sponsored by this agency influenced the government's response in facilitating the victim's experience in the process.[61]

Also inspired by social science studies, which suggested that 'the largest cause of prosecution failure was the loss of once-cooperative witnesses who simply stopped helping a justice system that was indifferent to their most basic needs',[62] LEAA decided to inject

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56 MA Young, 'Victim Rights and Services: A Modern Saga' in Robert Davis, Arthur J Lurigio and Wesley G. Skogan, *Victims of Crime* (2nd edn, Sage, Thousand Oaks CA 1997)

57 For instance, California became the first state to establish victim compensation in 1965, followed by New York, Hawaii, and Massachusetts. At first, in the America, state compensation was conceived as a welfare programme to help victims in financial need. By 1979, 32 States had established compensation programmes which were not only need-based, but provided to all victims.

58 Tobolowksy (n 52) 8.

59 Initially, Johnson's funding approach rested on creating direct circuits between the federal governments and the community but under Nixon's 'New Federalism', the block grand approach was adopted which channelled the federal government funding back to the traditional approach of funding state governments through their executive branch. For more details on the executive's empowerment through state grants, see Jonathan Simon, *Governing through Crime* (OUP 2007) 94.

60 L Glenn, *Victims' Rights: A Reference Handbook* (ABC-CLIO, Santa Barbara CA 1997); Tobolowksy (n 52)

61 see e.g. M Bard and D Sangrey, *The Crime Victim's Book* (Basic Books, NY 1979).

62 F Cannavale, *Witness Cooperation* (Heath and Co., Lexington MA 1976); The rise of victimology coincided with the political law and order agenda at the time, which was used and eventually funded to advance the criminal system's aims. As part of the New Deal, there was a governmental emphasis on

significant funds in programmes to help victims in court. It was also discovered that victims suffered from 'secondary victimisation' and without victims reporting their crimes and testifying, prosecutions would be hindered.[63] Financial resources were therefore directed at finding ways of encouraging victims to report and cooperate with the justice system as witnesses. LEAA's arguments, which initiated and greatly influenced the victims' movement, portrayed victims as innocent and vulnerable individuals, forgotten and re-victimized by insensitive, bureaucratic and busy criminal justice professionals that went about their jobs ignoring victims' needs and feelings.[64]

To increase victim cooperation, LEAA funded victim and witness assistance programmes within local prosecutors' offices and law enforcement agencies. Thus, government agencies within states began to re-evaluate their victims' services and demonstration projects emerged in New York and Arizona in 1974 that aimed to provide better notification and support to victims and witnesses once criminal prosecutions had been initiated. These victim/witness programmes borrowed ideas about services from grassroots programmes but were based within criminal justice institutions. For instance, prosecutor-based staff within prosecutorial offices received training in crisis intervention, and some offered on-scene crisis services to victims whether or not there was an arrest and prosecution.[65]

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solving social problems by considering research. For more information on the New Deal see Simon (n 51)

63 M Knudten, R Knudten and A Meade, *Will Anyone Be Left To Testify? Disenchantment With The Criminal Justice System* (LEAA, U.S. Dept of Justice, Washington 1978).

64 See foreword to Robert Rosenblum and Carol Blew, *Victim/Witness Assistance*, LEAA, Washington, 1979, p.i.

65 J Rench, *Oral History Project* (Interview Transcript: http://vroh.uakron.edu/transcripts/Rench.php 2003) accessed 1 April 2011.

Jo Kolanda, victim/witness assistance demonstration programme director, drawing on her personal experiences, suggested that it was not uncommon for victim groups to use political tactics and adopt a law and order discourse to gain attention and funding from the LEAA. Additionally, it was not unusual for prosecutorial offices to hire non-lawyers and non-bureaucratic agitators that would invest themselves in the cause and find creative ways to attract funding and assist victims. As part of an interview with the Oral History Project in 2003[66], Kolanda, who initially worked in Project Turnaround, a demonstration programme, and was then hired by the Deputy DA in Wisconsin as a victim/witness assistant, describes the way she lobbied for funds in 1975:

> Well, it was a law and order kind of era and I learned immediately that that was the hook that we were gonna use because as soon as you said "We're here to do good things for victims", people's eyes glazed over and they wanted you to go away. And so one of the first political lessons I learned, because the first thing you had to do back then was become political, I learned that the only way people would keep listening to me was to say, "We're here for a law and order reason. We, [sic] if you treat victims and witnesses well, prosecutors can successfully prosecute criminals."[67]

Police departments were also afforded grants by LEAA based on psychiatric research[68] that suggested that law enforcement officers were in the position of doing the most harm or the most good in their immediate response to victims of crime.[69] Most programmes began making referrals to social services and victim compensation programmes as well as

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66 This project was completed by Justice Solutions and the NOVA under funding from the Office for Victims of Crime, U.S. Department of Justice in 2002. Jo Kolanda, *Oral History Project* (Interview Transcript: http://vroh.uakron.edu/transcripts/Kolanda.php 2003) accessed 1 April 2011.

67 Kolanda (n 66).

68 M Symonds, 'The "Second Injury" to Victims', L. Kivens ed. *Evaluation and Change: Services for Survivors*, Minneapolis Research Foundation, Minneapolis, MN, 1980

69 M Young, 'A History of the Victims Movement in the United States', *131st International Training Course Visiting Experts' Papers*, (Resource Material Series No. 70 http://www.unafei.or.jp/english/pdf/RS_No70/No70_08VE_Young1.pdf) accessed 2 April 2011

victim notification schemes. LEAA continued to promote victim assistance through its state block grants, and the National DA Association as well as the American Bar Association established committees on victims to assist in the dissemination of information about the need for victim assistance nationwide. Notification slowly developed from merely informing victims about their next court date, to the establishment of on-call systems, and eventually obtaining and considering victims' views on bail determinations, continuances, plea bargains, dismissals, sentences and restitutions.[70]

c) Feminism and the development of victims' grassroots movements

Feminism was another central force that led to the development of the victims' movement in America. Leaders in the women's movement – often victims of sexual crimes and domestic violence themselves -- focused on the system's poor response towards the treatment of sexual assault victims, and eventually victims of domestic violence. These groups insisted on these women's lack of status by portraying them as vulnerable, powerless and without influence.[71] Vulnerability itself provided a powerful image of the victim. They heavily relied on volunteers in the absence of resources and in the late 1970s, along with victim grassroots groups became more organised.

Janice Rench, … part of the Oral History Project interviews, described this period as a 'time of excitement, it was a time of passion … And so it was the victims themselves, I believe that really started this field and certainly it was the sexual assault field in the

[70] Remedies related to the right to notification will be seen in chapter 6.

[71] Young (n 56) 196; Tobolowsky (n 52) 8.

seventies that did it.'[72] As a result of this advocacy, the first rape crisis centre was created in 1972 as well as the first rape crisis hotline, and a task force to research battering in 1976.[73]

In the United States victims themselves contributed to the early development of the victims' movement. The politically mobilised victims tended not to be victims of misdemeanours such as theft and other petty crimes, but mainly victims of violent crimes. Victim grassroots groups began networking at the local level in the early 1970s; including, Families and Friends of Missing Persons (1974) and Mothers Against Drunk Drivers (1978). They were generally very passionate and comprised survivors of crime, family members, victim service and support providers, as well as victim advocates with great power that fought for legislation in several states.[74] They did not shy away from the media and were very vocal with their experiences, keeping in mind that if they were to make things better for other victims, their own experiences could not be private motivators of their campaigns, but rather public events. Mobilising the public around these issues was an imperative aim to secure change. This was achieved by giving a face to victims through real life personal examples[75] and galvanising emotions around their experiences. As clearly stated by Russell a few years later, 'things don't really happen in the system unless you personalize it, and demonstrate how much difference it makes in the lives of victims.'[76]

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72 Rench (n 65).

73 Glenn (n 60), 16, 54.

74 For example, they were the forces that drove New Mexico legislation in 1976 that recognised victim compensation in that state.

75 For example, one of MADD's founders' infant was left quadriplegic after a drunk driver hit her and became the poster child for this organisation.

76 T Russell, Task Force Roundtable, *Oral History Project* (Interview Transcript with Terry Russell: http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php 2003) accessed 1 April 2011.

Most of these grassroots movements had different aims and targeted specific groups of victims, but generally called for better treatment of victims by criminal justice agencies, and equal rights with the defendant. Some have even argued that the rise of these grassroots movements may be understood as a dialectical response to the rights recognised under the Warren Court[77] and the campaign for prisoners' rights that waged in the 1960s and 1970s.[78]

The creation of the National Organization for Victim Assistance (NOVA), a private non-profit organization, by its founding director Marlene Young in 1975 helped to consolidate the purposes and goals of the victims' movement and provide a resource for training victim service providers, voicing victims' concerns and providing greater assistance for victims of crime.[79] NOVA could be considered the umbrella organisation for the victims' rights movement. This organisation was formed by a group of the country's leading activists for victims' rights at the first national conference on victim assistance, which was sponsored by LEAA and held in Fort Lauderdale in 1974. NOVA's initial contribution was to promote networking as well as organise and sponsor national conferences to promote victim assistance and training opportunities to individuals working with victims of crime.[80]

Conferences played a very significant role in the movement's growth by assembling individuals from all over the world to discuss research findings and to advocate policies for victims of crime. I, the idea behind the UN Declaration was also conceived at a victimology

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77 See L Henderson, 'The Wrongs of Victim's Rights'(1999) 37 *Stanford Law Review* 937.

78 See M Gottschalk, *The Prison and the Gallows : The Politics of Mass Incarceration in America* (Cambridge University Press: Cambridge 2006)

79 Young (n 69) 73; It described itself as an 'organization of victim and witness assistance programs and practitioners, criminal justice agencies and professionals, mental health professionals, researchers, former victims and survivors, and other committed to the recognition and implementation of victim rights and services.' (http://www.trynova.org/about/).

80 Conferences organised by NOVA started in1976 and took place every year thereafter.

conference.[81] As Rock points out, 'It is as if each conference confirmed the advancing maturity of the discipline. More important, perhaps, each conference affirms the viability of victimology, its sheer capacity for survival.'[82] This statement can be extended to suggest that each conference affirms the viability of the victims' movement and the desire of victim advocates to meet, regroup and discuss ways to advance the victim agenda.

Having rapidly progressed through the 1970s, the victim movement was marked by tensions and turbulence at the end of the 1970s, in great part due to the 'waxing and waning of federal financial support'[83] for victim programmes. As national priorities shifted, Congress ended its funding to LEAA at the end of the decade and thus, stable funding for victim programmes became elusive.[84] Victim organisations often competed over the limited available funds and many conflicts arose between programmes and organisations for victims that were driven by grassroots energy and the ones that operated within criminal justice institutions.[85] The goals and aims defended by these programmes were different, and some grassroots movements began doubting whether prosecutors and law enforcement agencies were really working in the interests of victims or merely advancing their own interests. As summarised by one of the leaders of the victims' movement,

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81 Irvin Waller made possible after a conference organised by NOVA's former director, Marlene Young For more details on this account see: I Waller, *Oral History Project* (Interview Transcript: http://vroh.uakron.edu/transcripts/Waller.php 2003) accessed 1 April 2011.

82 P Rock, *A View from the Shadows: The Ministry of the Solicitor General of Canada and the Justice for Victims of Crime Initiative* (Oxford, Clarendon Press 1986) 102

83 Young (n 56) 197

84 According to personal communications with Steve Derene, Executive Director of the National Association of VOCA Assistance Administrators, many reasons explained the end of LEAA grants, including the abuse of funds on hardware and victim/witness assistance units. LEAA transformed into broader criminal justice initiatives under the original Omnibus Crime Control Act of 1968 which was later combined with the war on drugs to become what is today the Edward Byrne grants. LEAA's equivalent today is the Office of Justice Programs.

85 Young (n 56) 197

> Many felt that there was an inherent conflict between the goals of prosecutors or law enforcement officers and the interests of victims. Some sought legal changes in the system, whereas others felt that change should take place through the formulation and revision of policies and procedures.[86]

Opposition outside the movement was also present among critics that philosophically disagreed with the movement's advocacy for institutionalised victims' services. According to these critics, the establishment of professional victim service providers would create dependency, distance victims from their own social networks, create unmet expectations and frustrations among victims, enforce victim stereotypes, and interfere with the healing process.[87]

The significant financial loss many programmes faced, coupled with the external and internal oppositions served as a reminder of how tenuous the movement's gains had been. Several programmes closed, but despite its internal conflicts, struggles and external opposition, the movement survived and grew stronger in the 1980s, in great part due to victims' vocal grassroots groups[88], their passion, and vocation to the cause – often long unpaid hours -- as well as the public awareness and general support they attracted. As previously mentioned, their depiction of crime victims as 'ideal victims' and their treatment by the justice system helped gain general support from the public at large, as well as state and federal governments.

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86 Young (n 56) 194-195

87 Tobolowsky (n 52) 9

88 These groups include Parents of Murdered Children (1978), Mothers Against Drunk Driving (1980), the National Coalition Against Domestic Violence (1980) and the Victims' Assistance Legal Organization (1981). For more details on this account see Glenn (n 60).

2. Growth and influence of the victims' movement in the 1980s

In the 1980s, the victims' movement made significant progress on three fronts: public policy, programme implementation, and public awareness. In addition to the public support it obtained, the movement evolved well beyond its grassroots, and became sufficiently vocal to influence governments, legislatures and members of the public.

Thus, victim organisations led strong campaigns and informed the public about the importance of state action to guarantee victims' rights. Through their campaigns, they convinced state officials that state action through legislation was necessary to ensure the institutionalisation of victim assistance. California became the first state to establish funding within legislation for victim assistance in 1980 and that same year, being influenced by victim advocates, Wisconsin became the first state to pass a victims' bill of rights. According to victim groups, the only way victim services in DA offices would survive and be taken seriously would be to be backed by a statutory authority. A freshman representative in Wisconsin was inspired by a victim advocate and managed to pass the first law.[89] Chapter 3 will examine in greater detail the proliferation and rationales behind legislation in the United States.

NOVA also continued its meaningful campaign and the growing demand for victim participation within the criminal justice system was integrated into a new policy platform on victims' rights. The federal government endorsed the victims' movement when President Ronald Reagan proclaimed the first National Crime Victims' Rights Week in 1981 and, more importantly, when he established the President's Task Force on Victims of Crime in 1982.

[89] For more details on the movement behind the Wisconsin bill of rights, see Kolanda (n 66).

The Task Force was a turning point in the victims' rights movement and provided a contemporary framework for the development of policy, programmes, and protocols as well as moulding issues that still influence and frame the debate today.

a) The Federal government's Task Force on Victims of Crime and its powerful contribution to victims' rights

- Rationales and aims

In 1980, America witnessed a rising record of violent crimes which triggered a powerful law and order response along with increased interest in victims by the federal government. Following an earlier study under the Reagan Administration by the Violent Crime Task Force of 1981, it recommended a follow-up study specifically to focus on victims' needs, concerns and rights. Accordingly, catalysts of the task force, Frank Carrington[90] - a leading victim advocate, who became one of the members on of the Task Force and Presidential Counsellor, and Edwin Meese, convinced Ronald Reagan of the need for an in-depth look at crime victims' experiences. Consequently, the Presidential Task Force for Victims of Crime was established in 1982 and comprised various professionals.[91]

They conducted 187 interviews in six regional hearings, which included victims of crime across the United States, victim organisations such as NOVA, as well as professionals

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90 See S Twist, *Oral History Project* (Interview Transcript: http://vroh.uakron.edu/transcripts/Twist.php 2003) accessed 1 April 2011. Carrington – an entrepreneur of this Task Force - advocated for fundamental reforms in the criminal justice system so it would become more victim-centred and was considered the driving force behind the establishment of the President's Task Force on Victims.

91 The Task Force comprised of a practicing attorney, a prosecutor, two directors of non-profit victim assistance legal organisations, a police chief, a criminal psychologist, and educator, a state Attorney General, a state Supreme Court Assistant, and a clergy member, all of whom were leaders and innovators in their respective fields.

working with them, in order to understand their experiences and the ways victims were being treated by the system. Interestingly, most victims that mobilised themselves and participated in these hearings were victims of violent crimes rather than of misdemeanours and petty crimes.[92]

The broad range of perspectives and professional backgrounds of the Task Force members contributed to the examination of victims' treatment and recommendations that not only affected the legal system, but also other organisations; namely, hospitals, schools and the mental health community. Hence, the aims of the Task Force were diverse. Interviews conducted with individuals that had an determinant role on the Task Force suggested that they started working on the Task Force with a *presumption* that victims were badly treated by the system[93], while others had a more nuanced view and considered the Task Force's aims to be exploratory. For instance, Lois Haight, the Task Force's chair, and a prosecutor at the time, suggested that '[i]t wasn't a total understanding that they were treated badly, we just had to find out. It was very exploratory. How were they being treated and then what would we recommend given our findings?'[94]

Larger contextual aims are also relevant to consider. At a period when violent crimes reached a peak, the Task Force was in great part created to advance prosecutorial interests in the prosecution and conviction of defendants, as well as ensuring the victims collaborated with the prosecution. Thus, Miller, one of the Task Force members, suggested that

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92 Telephone interview and e-mail follow-up with Lois Haight Harrington, Chair of the President's Victims' Task Force.

93 K Eikenberry, Task Force Roundtable, *Oral History Project* (Interview Transcript with Kenneth Eikenberry: http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php 2003) accessed 1 April 2011.

94 Haight (n 102); Further, in a personal conversation with Lois Haight on 10 July 2011, she confirmed that the Task Force was an exploratory undertaking.

> [i]t was a practical exercise I think because from a prosecutorial advantage point it became evident that many cases were being lost due to reticence of participation of witnesses and victims, and the exercises we went through established why that they were treated impersonally, that they were given less rights than the defendant and they felt disenfranchised from the system. So I think that the review enabled us to ascertain (1) where the problems were and (2) how to correct them.[95]

Others seemed to suggest that the Task Force had a more victim-centric approach which aimed to propose recommendations directing at repairing the harm done and preventing secondary victimisation by the system.[96]

The results obtained by the Task Force members helped shape certain problems and influenced subsequent discourses and rationales behind victim-related policies. These results can be classified as the following: (1) the discovery of victims' mistreatment and secondary victimisation by the criminal justice; (2) the discovery of defendants' greater rights and the need to rebalance the system; (3) the need for constitutional protection against the state.

- Victims' mistreatment and secondary victimisation

Victims' treatment by the criminal justice system became the leading rationale and discourse referred to by the Task Force to promote victims' rights, suggesting that victims were discouraged from participating within the process and re-victimised by the system.[97] Accordingly, their findings suggested that as mere witnesses they were treated 'impersonally'

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95 R Miller, Task Force Roundtable, *Oral History Project* (Interview Transcript with Robert Miller: http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php 2003) accessed 1 April 2011.

96 Russell (n 76)

97 M Robertson, Task Force Roundtable, *Oral History Project* (Interview Transcript with Marion Robertson: http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php 2003) accessed 1 April 2011.

and as 'inanimate objects to be present to say their piece and to then be removed from the process'.[98] The information they relied upon to reach these conclusions came directly from victims themselves, which had a significant and compelling impact on the members of the Task Force.[99] According to the Task Force members, hearing directly from victims had an significant impact on the members and their perception about victims' treatment. As stated by Meese, 'Usually recommendations can get kind of legalistic in what's being suggested but by having the statements in many cases of victims it gave a lot of punch to the report and that's why I think this report was so well received.'[100] Testimony came also from NOVA as well as other groups that worked in favour of victims. Many of the members suggested that the poor treatment suffered by victims was more widespread than imagined. One of the interviewees of the … explained that 'the stark reality of secondary victimization shocked every member of the Task Force: the fact that victims were badly treated by the system, their lack of rights, the system's poor understanding of the impact of crime, and the absence of victim services'[101] were all elements used to mobilise the movement and argue that 'they had to be treated with respect, involvement and certainly with tremendous input for the system to be effective as well as basically just to give them the rights that they should be in an hour able to obtain.'[102]

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98 Miller (n 95): Even Eikenberry confirmed that while he was a deputy prosecutor he was insensitive to victims who he prepared as witnesses, trying to toughen them up.

99 The fact that these findings came directly from the mouths of the victims made all the difference in the world according to Edwin Meese and Russell (n 76); According to personal communication with Lois Haight on 10 July, 2011, thousands of victims came forward at these hearings held across the US on a voluntary basis. NOVA played an important role in finding these victims and informing them about these interviews.

100 E Meese, Task Force Roundtable, *Oral History Project* (Interview Transcript with Edwin Meese: http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php 2003) accessed 1 April 2011.

101 M Hook and A Seymour, *A Retrospective of the 1982 President's Task Force* (Office for Victims of Crime, December 2004)

102 LH Herrington, Task Force Roundtable, *Oral History Project* (Interview Transcript with Lois Haight Herrington: http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php 2003) accessed 1 April 2011.

- Rebalancing the system and constitutional protection against the state

Another significant conclusion reached by the members of the Task Force that influenced the victims' *rights* discussion as well as the victims' movement for years to come was framing the issue in terms of rebalancing the system in favour of the victim who did not benefit from equal rights with the accused. For some members, there was a need to afford victims participatory rights within the criminal process to provide them with an equal status to defendants. For example, Eikenberry, Attorney General and member of the Task Force at the time, clearly stated that 'my personal motivation was that we needed to upgrade the legal status of victims and rebalance the whole system so that there was a similar focus for victims as was already granted to defendants.'[103] He added, 'Likewise, the victim in every criminal prosecution, shall have the right to be present and heard at all critical stages of judicial proceedings.'[104] The 'likewise' referred to due process safeguards that protected the accused under the sixth amendment of the US Constitution. Thus, according to the Task Force's members, if due process was afforded to the defendant, victims had to be provided with rights as a means to protect them from the state. 'I personally believe that the Task Force mission was learning about how out of balance the system was and what could be done.'[105]

Additionally, based on the rationale that victims should have equal rights with the defendant and in order to ensure that judges are presented with all relevant elements at sentencing, the Task Force also recommended the re-integration of victims into the

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103 Eikenberry (n 93)

104 *Id*

105 Stanton Samenow, Task Force Roundtable, *Oral History Project* (Interview Transcript with Stanton Samenow: http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php 2003) accessed 1 April 2011.

sentencing process. Thus, in its final Report, the Task Force recommended the introduction of victim impact statements (VIS) to be taken from victims and provided to judges prior to sentencing. The Report stated:

> Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized.[106]

This recommendation was very influential and was quickly integrated into American law. The opportunity to present a VIS continues to be a meaningful right for victim rights advocates, which will be examined in greater detail in chapter 3.

- Constitutional protection against the State

Additionally, this Task Force was among the first bodies to suggest that victims' rights should be constitutionally recognised within the American Constitution.[107] Heavily based on the civil rights discourse, as a reference to defendants' rights, victims were also portrayed as individual citizens that needed protection from governmental abuses. Thus, it was argued by the Task Force that 'government must be restrained from trampling on the rights of individual citizens. Victims of crime have been transformed into a group oppressively burdened by a system designed to protect them.'[108]

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106 United States Federal Government, *Presidential Task Force on Victims of Crime Final Report* (Report, 1982) 76.

107 The victims' movement's struggle to pass a Constitutional amendment will be examined in greater detail in chapter 3.

108 United States Federal Government, *Presidential Task Force on Victims of Crime Final Report* (Report, 1982) 114

According to Eikenberry, judges, professors and legally trained professionals that testified before the committee were in favour of the constitutional amendment and testified about its effectiveness. It was argued that such an amendment would have a positive impact on all areas that required change for victims and because of its symbolic significance it would ensure effective implementation. Within the Task Force, however, there were various opinions on the VRA's necessity. Lois Haight Harrington was originally against it since she believed that state and local governments should have the opportunity to put the Final Report recommendations into action before any federal imposition.[109] However, several years later, she became a strong supporter of the VRA since states and local governments have not respected many of the Task Force's recommendations. In an interview, she stated that 'continuances are granted and victims are *not* informed. Cases go forward and victims have no input into sentencing. Many judges are not sensitive to victim issues, and law schools do not teach victims' rights. Nor do doctors, nurses or members of the other allied professions learn about victims'[110] These recommendations that focused on criminal proceedings were very influential and contributed to the shaping of information and participatory rights in current federal and state legislation in America.

- Task Force recommendations, strategies and collaborations

Following the hearings, the Task Force issued 68 recommendations in its Final Report for action to the Federal Government in five different areas; namely, 1. executive and legislative action at the federal and state levels; 2. proposed federal action; 3. proposed action for

109 Harrington (n 102)

110 *Id*

criminal justice agencies (police, prosecutors, judiciary, parole); 4. proposed action for other organisations including hospitals, ministry, the Bar, schools, mental health community as well as the private sector; 5. proposed amendment to the Federal Constitution.

Similar to the strategy used by victim organisations, Haight highlighted the importance of attracting media attention around the Task Force to publically expose the system's imbalances towards victims.

As a result of the Task Force's recommendations there have been significant changes in policy, programs, and practices at the federal, state and local levels. Notably, the Office for Victims of Crime (OVC) was created in 1983 to represent the interests of victims within the US Department of Justice. Lois Haight Harrington, who directed the Task Force became assistant Attorney General of the United States in charge of the office of Justice Program in establishing the OVC within the Justice Department and attracted substantial grants.[111] It worked closely with outside groups, particularly with NOVA to implement the Task Force's recommendations. For instance, the passage of the Victims of Crime Act (VOCA) in 1984 was a vital collective effort and substantive means for the government to fund victim services through fines and fees levied against federal criminal offenders. VOCA funds in 1985 were given to states, training programmes for justice professionals were developed and disseminated widely, and standards for victim programmes were introduced across the nation. OVC and NOVA's collaboration contributed to the creation of the OVC/NOVA Model Victim Assistance Programme Brief (1986/1988) which served as a model for programmes by articulating eight basic services that programmes across states should provide to victims. States were therefore moving quite fast towards the institutionalisation of victim assistance

[111] Russell (n 76).

through funding legislation. Thus many victim witness programmes became institutionalised and state prosecutors relied heavily on their staff. The institutionalisation of victim programmes added an element of stability and importance to the movement; however it is important to add, for the purposes of the following comparative analysis, that some victim movement's veterans –who have fought passionately for the victims cause -- fear that the 'routine' operations of many victim service agencies will turn yesterday's advocates into tomorrow's bureaucrats.[112]

B. Contrasting the early development of victims' movements England and Wales with the United States (1970s-1980s)

1. Contrasting victims' interests groups

In the United States, the victims' movement emerged from a spontaneous mobilisation of victims themselves – often of violent crimes -- that shaped into local grassroots organisations to provide help and support for victims of crime. The movement took form from the strong pressure of victim lobbies towards governments, coupled with the politics around the 'war on crime' that enticed the federal government to focus on victims in order to win their collaboration with the criminal justice system. State-funded programmes and legislation were therefore adopted early on and a rights-based discourse became prominent.

By comparison, in England and Wales, the movement emerged in response to perceived victims' needs. England was one of the first countries to introduce state

[112] Kolanda (n 66).

compensation for victims in 1964 after pressures since the early 1950s by individuals like Margery Fry.[113] Despite this early state-funded development, no other significant victims' movement in England and Wales managed to attract public funds by the Home Office until the movement gained credibility in the mid-1980s. The movement was formed by voluntary organisations that were for years excluded from the criminal justice system. NAVSS (National Association of Victims Support Schemes) is the focus of this discussion since it became the leading victim charity and remains influential today. It is worth noting that NAVSS's whole ethos was very different from the U.S. organisations described above. NAVSS was solely concerned to defend what it regarded as the interests and integrity of all victims – without emphasising victims of violence -- and has a much more reactive than proactive agenda.

The following section suggests that the movement in England and Wales took much longer to develop than its American counterpart and evolved differently due to variances in composition, approaches and aims. Contrasting the English victims' movement's evolution with the United States is an essential aspect of analysis that facilitates the understanding of why rights as a concept were not accepted in official circles until fairly recently in England and Wales, as well as why victim participation in the American criminal justice system is accepted in the Federal jurisdiction and most states. The following section is divided into a series of themes which can be contrasted to help explain differences in the movements' composition, aims and approaches. Table 1 (below) provides a summary of these differences which are discussed and evidenced to a greater degree in this section.

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[113] P Rock, *Helping Victims of Crime – The Home Office and the Rise of Victim Support in England and Wales* (Clarendon Press 1990)

Table 1: Contrasting victims' interests groups in both jurisdictions

Victims' interests groups	**United States (Federal Context)**	**England and Wales**
Composition	- Spontaneous mobilisation - Victims of violent crimes in criminal proceedings - Grassroots, lay persons	- Professionals (probation officers, penal reformists) - All victims (including less serious crimes) and not just in criminal proceedings
Ethos	- Law and order context and discourse to be taken seriously by government - Missionaries / vocation - Focus on victim participation in criminal proceedings - Zero-sum game with defendant and 'rebalancing' criminal proceedings - Blame/protection from the system and criminal justice agencies for secondary victimization	- Victims' service interests, independent of government interests and criminal justice politics - Profession instead of mission - Conciliatory with defendants (restorative justice; probation experience) - Collaborative with criminal justice agencies for acceptance
Means	- Public engagement and media - Vocal and personalisation of experiences; anecdotal evidence	- Shy away from media and public participation to avoid the arousal of emotions and fear - Discrete, professionalism and collaboration

a) Composition

As highlighted in table 1, in England and Wales, all initiatives, starting from the ones present in the fifties, originated from the penal reform movement. Thus, most of the early pioneers were probation officers with professional experience with the penal system and the criminal justice system in general. For instance, in the fifties and sixties, penal reformers drove policy

behind criminal injury compensation.[114] Similarly, in the early seventies, victim policies around compensation orders, community service and reparative justice were driven by members of the penal reform community (often the probation service) that had an interest in facilitating mediations between offenders and victims. Finally, even NAVSS, the movement's main organisation, was shaped by Helen Reeves, appointed as full-time employee organiser, whose prior professional experiences as a probation officer influenced her views and approach towards the victims' movement.[115]

i- Professionals

Further, as summarised in table 1, unlike in the United States, the English movement's early developments did not emerge from a spontaneous mobilisation of mainly victims of violence, but by professionals and experts in the field of criminal justice that worked for years with offenders. Former probation officers, they became part of the voluntary sector and members of the main victim organisation in England and Wales and perceived their role as a profession rather than a mission. Their background as probation officers explained in part their refusal to frame the issue as a zero-sum game between the rights of victims and offenders and the importance of maintaining their professional and political independence to ensure victims were not used as instruments of a governmental agenda.

ii- Maintaining independence

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114 For instance, Margery Fry, the leader behind the criminal injury compensation was one of the creators of the Howard League for penal reform.

115 NAVSS in England first started as part of NACRO, an offender rehabilitative charity, and was serviced by people with NACRO affiliations. It eventually evolved as National Association, independent charity under NAVSS establishing that it was 'politically and practically separate from work with offenders.' For more a detailed historical analysis, see P Rock, 'Governments, victims and policies in two countries' (1988) 28(1) Brit J Crim 44, 63

To maintain its independence from governmental agencies, NAVSS avoided any affiliations with any criminal justice agencies. For instance, NAVSS did not exist to increase the reporting of crime for systemic purposes and thus did not then supply services to the courts or to the prosecutors' offices. It was fundamental that its aims remained independent and strictly focused on victims' needs. This is quite contrary to many organisations in America, where members often left the voluntary sector to work within criminal justice agencies in the hope of achieving recognition and change. As suggested by Kolanda, a political law and order discourse would often be adopted to facilitate collaboration between victims' organisations and criminal justice agencies.

Additionally, because of NAVSS's position - which seemed to reconcile victims and offenders' interests - the organisation struggled at first to sustain its main goal as the defence of victims' interests and not victim-offender mediation initiatives.

b) Approaches and aims

i- Imagining the victim

Contrary to the American approach inspired by the feminist movement, where the archetypal victim was a raped and battered woman victimised by patriarchal violence, the archetypal victim in England and Wales was the more common gender-neutral burglary or robbery victim. Feminist organisations in England were not influential in the victims' policy-making process and were distrustful of leadership and politics. In addition, because of their radicalism, governments rarely engaged with these groups regarding policy reforms. The

approach of English feminism avoided the terminology of victims and victim-blaming but often promoted a 'radical separatism that [made] transactions with men difficult.'[116] Men were excluded from participating in many organisations and policy-makers worked independently from the women's movement. Because of this approach -- considered to be radical by leading victim organisations in Britain, '[f]eminism has been unseen, unheard and impotent in the bureaucratic circles where victims have been discussed.'[117]

As a result, many changes to rape and battering policies were driven in England and Wales by men and women who did not identify themselves as feminists.[118] The treatment of rape was brought to the attention of both public and policy makers after the scandal caused by Roger Graef's television programme on the Thames Valley police force's treatment of rape victims, which brought about significant changes to the policing of rape across England and Wales. Furthermore, some of the misogynist utterances of judges on contributory negligence by complainants and the need to protect otherwise praiseworthy men also were elements that put the treatment of rape victims onto the political agenda.[119]

Stemming from the rejection of the 'misery of the vulnerable'[120], NAVSS's approach to helping victims was based on a philosophy of coping with crime[121] and the possibility of

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116 Rock (n 115) 58.

117 Rock (n 115) 83.

118 Feminist academics also had an important influence as well as Rape Crisis Centres, but unlike the United States, feminism was not as accepted in policy circles.

119 Z Adler, *Rape on Trial* (London, Routledge 1987)

120 Rock (n 115) 85. This philosophy depicts victims as vulnerable and powerless.

121 H Reeves, 'Coping with crime: victim support' [1984] *Christian Action Journal* 26

resilience.[122] The English approach was less about offering care and compassion, and primarily focused on healing and reparation. The aim was to ease them away from their victimisation to avoid it becoming a part of their permanent identity – a view espoused within the American context. The 'ideal' and vulnerable victim was a 'hypothetically-conceived [entity] whom [a] lobby wished to see compensated.'[123]

ii- Strategic approaches

As highlighted in table 1, during that period in England and Wales, the victims' movement understated its influence and remained discrete. It did not engage in political agitation and espoused calm professionalism, free from public participation, political positions in the criminal justice system and the arousal of emotions. Unlike the American approach, the movement in England and Wales avoided media attention and the personalisation of particular victim experiences that raised public emotions[124] and political militancy. As summarised by a report of the 1989 NAVSS conference,

> We are faced with the fundamental problem that, as an organization, we are committed to reducing the effects of crime, and yet have a great anxiety that, by involving the press and media, we may be increasing public fear and alarm.[125]

In England and Wales victims were mute, invisible and unorganised for a significant period of time. They were not approached by government personnel and never engaged in policy.

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122 S Walklate, 'Reframing criminal victimization: Finding a place for vulnerability and resilience' (2011) 15 *Theoretical Criminology* 179

123 D Miers, *Responses to Victimisation: A Comparative Study of Compensation for Criminal Violence in Great Britain and Ontario* (Abingdon, Professional Books 1978) 86

124 I Loader and R Sparks, *Public Criminology?* (Routledge 2010)

125 Victim Support, 'The Media: Free, Responsible, or Both?', *Victim Support,* 35 (Sept. 1989) 9.

'They were to become a working projection of the politics of penal reform, a figment of the reforming imagination, shaped by the concerns and purposes of their creators.'[126]

- *Approaches towards criminal justice professionals*

The organisation used a collaborative technique towards criminal justice agencies by which it avoided engaging in criticism of the police, probation services and courts in order to maintain diplomatic relations to secure resources, victim referrals and support from the system. This approach was also explained by the organisation's desire to distance itself from the law and order approach defended by the American victims' movement, as well as the antagonist view towards the offender. Moreover, the uneasiness felt by the police about being monitored was also a reason the organisation chose to maintain a collaborative approach instead of a confrontational one. New policing initiatives also contributed to this collaborative approach, as community policing developed and became closer to members of the community, including victims of crime. As previously suggested, the victims' movement in the United States adopted a different approach towards criminal justice agencies. Most organisations, including NOVA and SAMM, as well as political bodies such as the members of the President's Task Force, denounced the secondary victimisation suffered by victims at the hands of indifferent criminal justice agencies.

Professionalism by victim groups was seen as a positive trait by criminal justice agencies in England and Wales, which facilitated collaboration with the Home Office. During that period in England and Wales, a small and intimate circle of trusted professionals with

[126] P Rock (n 113) 88

multiple affiliations was making criminal justice policies.[127] After having demonstrated professionalism and good relations, NAVSS became trusted and eventually became part of that intimate circle, maintaining ties with members of parole services and participating in policy meetings between these organisations. The same people, whether in probation circles or victim groups were seen in different settings that could seem functionally and ideologically incompatible with one another. These individuals would shape the system and eventually integrate victims into other parts of the criminal justice system.

This approach was contrary to the one adopted in the United States where, once victim/assistance programmes demonstrated their efficacy, prosecutors' offices and police usually sought non-professionals as part of their victim assistance programmes because of their different, less bureaucratic approach and their facility to agitate for change and attract funds from politicians.

- *Approaches towards offenders*

Additionally, a notable approach taken by NAVSS is that it avoided commenting on the politics and policies regarding criminal justice to distance itself from the politics of punishment towards offenders. As Maguire and Corbett put it, 'unlike many of the victim initiatives in the United States… Victims Support Schemes … had no political aims or "hidden agendas". They took little interest in the offender, the court process, or the sentences passed. Their primary objective was very simple: to act as a "good neighbour", or perhaps a "good Samaritan", to people who had suffered at the hands of a thief or an assailant.'[128] Their

127 Rock (n 115) 89.

128 M Maguire and Corbett, *The Effects of Crime and the Work of Victims Support Schemes* (Aldershot, Gower 1987) 2.

approach with defendants and offenders was therefore neutral and in great part influenced by their previous work with offenders.

This is not to say that there was not a minority fringe that espoused different views. For instance, the representatives of rape crisis centres were considered disreputable by NACRO. They showed a marked animosity to the police and followed a private separatist politics of feminism. Some also seemed to incarnate the latent vigilantism feared by professionals[129] and were seen as elements to avoid.

2. Contrasting state responses

Victim grassroots organisations in America mainly developed and evolved in a context where the Federal Government was interested in the politics of crime and the collaboration of victims within the process. Thus, the victim movement in America emerged in great part from a governmental response to high levels of crime followed by a political law and order agenda. From its very early days, money was made available by the State to support victim programmes that shared similar aims with the system in helping the reporting of crime to facilitate convictions. Compensation, for instance, was seen as a way to get victims to collaborate with the system by reporting crime in order to receive financial help. From a political standpoint, victims and criminal justice were interesting topics that rallied both political parties.

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[129] Rock (n 115) 88-89.

Until about 1986 the politics of victims in England and Wales had no distinct identity and was slow to form in part because the state took much longer to respond, create and fund new victim programmes, policies and initiatives.

Various factors can arguably account for the slow progression. First, as already explained, NAVSS was discrete in its early stages and its aims and composition were different from American organisations. NAVSS was not critical of criminal justice agencies and did not stir popular uprising towards state actors. Other factors, explained below, include the differences in government aims, differences in decision-making participation and the fear for untested change.

a) Differences in government aims

During the 1970s and early 1980s – at a time of economic austerity -- the government had different priorities; namely working towards attaining cuts in public expenditure and reforms towards a less costly penal system. Thus any victim-based initiative had to be connected to these aims. This can explain why initiatives like victim/offender reconciliation that would facilitate the diversion of offenders instead of imprisonment attracted state attention. Organisations like NAVSS that aimed to provide help and support for victims however, struggled for some time to be invited into the criminal justice arena since they did not fit into the traditional state penal reform agenda.

b) The state's decision-making and external participation

During the 1970s-1980s, the Home Office was known for not engaging with the public or with any outsider group regarding policy decisions. Instead it occasionally consulted experts for any reform that was about to take place and, as Rock rightfully stated, 'The Home Office engages in proportionately fewer formal deliberations. It incorporates the wishes of its constituencies at a distance, surmising their probable responses in its assessment of the "political environment"'.[130] In the United States, public participation and consultations especially on victims' issues was important and the framing of policy became predominantly political, heavily influenced by public opinion. The next chapter will examine in greater detail how legislative measures and policies regarding victims were heavily influenced by public engagement in the United States.

Policy reforms were decided by the highest ranks in government, namely senior administrators and politicians. Outsider influence was limited. In the mid-1980s most knowledge and decision-making remained behind closed doors. Thus, it is not surprising that during that period the Home Office did not include victims in the decision-making process. Additionally, it is worth remembering the initial perception of victims as vigilantes and reactionaries that would obstruct the decision-making process. Victims were considered a group that had to be appeased and thus government reformers refrained from asking them about their needs to avoid awakening their emotions. For instance, the movement for criminal injuries compensation was a creature of lawyers, penologists and criminologists, not of victims.[131] Victims were not consulted; it was assumed that all they wanted was financial compensation for the harm done to them.

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130 Rock (n 115) 71.

131 English penal reformer Margery Fry initially suggested the idea that the state should provide financial reimbursement to victims of crime for their losses in 1957. Welfare measures and programmes for victims were enacted in 1964 -- earlier in England than in the United States.

This provides a contrast to the context in America where some decisions were made after consultation with victims who were perceived as sympathetic figures. For instance, the Task Force for Victims of Crime discussed above, listened to victims' stories about their experiences with the system and took evidence from various victim organisations that were not primarily composed of professionals. In the United States, criminological research projects were welcomed and funded by the various Task Forces. In addition, members of the Task Force considered outsider views, including those of victims who chose to mobilise themselves – mostly victims of violent crimes. This undoubtedly had a different impact and impression on decision-makers such as the members of the Task Force. The general public was also informed of the results and invited to play a role in the framing of certain problems and suggestions for change. Elias notes that in the United States, many victim programmes have emerged without having asked victims their own preferences and needs[132]; however governmental engagement with victims was more frequent at that time in America than it was in England and Wales.

i- The state's reluctance for untested change

Ministers and civil servants in England and Wales were hesitant to embark on any untested reform and preferred approving change that had already been tested and maintain it. Providing victim support was a new untested measure seen as a strange initiative for the Home Office, which was accustomed to more traditional elements of penal reform, namely reforms regarding police powers, prison conditions and sentencing. Additionally,

[132] R Elias, *The Politics of Victimization* (New York, OUP 1986) 188.

conservative critics feared that providing victim services and support would distract agencies from the traditional business of the criminal justice system.

Further, the state in England and Wales did not include the voluntary victims sector within governmental agencies. Thus, it did not want to interfere with the voluntary sector's spontaneity and avoided the bureaucratisation of the local voluntary sector occupied by victims. Conversely, in the United States there emerged a strong inclination to include the voluntary victims sector within governmental agencies to modify the treatment of victims within the system and advance state interests in the prosecution of crime. The victims' movement and support evolved under the careful management of officials in the United States, which was not the case during its development in England and Wales.

ii- Towards progressive trust between victim organisations and the government

Governmental groups and victim organisations evolved independently from one another and were not necessarily aware of each other's work and aims. This explains the fact that meetings and communication among government, victim organisation members and the public were rare. As described by Rock, 'There has been much talk about poor communication and about lack of consultation. Invitations have not been issued to attend conferences when people thought they should have gone. Much has developed in fog, bodies and movements being barely discernible to different participants, understated and difficult to decipher.'[133] Thus, since the Home Office's approach was reactive rather than proactive, for many years, it did not see fit to fund or initiate a framework of conferences, meetings, working parties and task forces, characteristic of the American government during the early

[133] Rock (n 115) 79.

days of the movement. 'Indeed, their gestures were so mild, unaccompanied by substantial action, or expenditure that until the end of 1986 when the Home Secretary committed his dept to appreciable expenditure on victims support schemes, outsiders have been a little bewildered by their ambiguity'[134].

In time, however, NAVSS's presence, approach and professionalism justified its involvement within the criminal justice system. This trust among participants provided this organisation with a more determinant role and establishment as an independent actor within the criminal justice process. Having built trust and credibility, a wider and stronger collaboration emerged with the Home Office. This was reflected by the preparation of Home Office funded research projects and their participation in conferences, where members of various esteemed bodies, such as the Association of Chief Police Officers and the Association of Chiefs of Probation were to meet and exchange. This meaningful collaboration with these various agencies slowly eased senior officials' fears of vigilantism and 1986 was a crucial moment that marked the collaboration between Victim Support and the Home Office for the years to come. That year trust and collaboration effectively materialised between the Home Office and Victim Support by the Home Office's announcement in the 1986 Conservative Party Conference that a massive increase in Home Office funding for victims support schemes would take place from an average annual payment of £150,000 to £3,000,000.

Conclusion

In conclusion, the victims' movement in the two jurisdictions emerged in very different contexts and thus evolved and adopted different aims and approaches. In the United States,

134 *Id*

the larger social context was driven by a law and order approach, following the significant increase in crime. Additionally, research and surveys suggested that many crimes were left unreported and convictions were lost because of a low victim involvement. Policies, task forces, funds and research were focused on finding ways to facilitate victim collaboration within the process. The first victims' organisations arose out of spontaneous local efforts of volunteers – mainly comprised of violent victims of crime -- that wanted to provide help and support for victims and arrived from the margins. They were quickly submersed in the politics of crime and efforts were made to collaborate with the criminal process. Many members of these organisations were not criminal justice professionals and started working within criminal justice agencies to provide support for victims and witnesses once they reported their crimes. These groups were vocal and attracted media and public attention. They also portrayed victims as being vulnerable and mistreated by a system that should instead be helping them. Further, these organisations as well as the Task Force, who mainly heard testimonies from victims of violence -- often compared their status in the criminal process with the offender's status and rights to suggest that they were excluded, suffered inequalities and needed similar recognition to defendants. They became a strong lobby that primarily focused on victim participation in criminal proceedings and attracted significant funds from the state, especially when working towards law and order aims.

In contrast, in England and Wales, the larger social context was driven by penal reform and the government was not interested in diverting attention to topics that did not fit in the bigger priorities of the moment. At a time of financial austerity, it was crucial to obtain cuts in public expenditure and devote their attention to these issues. The Home Office operated differently and was not so interested in outsider input, especially not from non-professionals. Additionally, the fear of the victim vigilante espoused by certain organisations

was a factor that contributed to the slower reaction and trust provided by the English government. Unlike in the United States, victim organisations failed to find a partner early on during their emergence. The leading victim organisations were also composed very differently and had different approaches and aims than their American counterparts. The process did not arise from spontaneous local grassroots groups mainly formed by victims, but primarily by professionals who worked with offenders in probation services. Thus, their approach towards offenders and their comments on the work of criminal justice agencies were very different and less adversarial than their American counterparts. They were discrete and did not engage in the politics of the 'vulnerable' to describe victims of crime. This approach in the English context had long-lasting consequences. With time, they were able to establish their credibility, their independence, and develop good relations with criminal justice agencies and eventually attract significant funding from government.

CHAPTER 3: CONTRASTING THE DEVELOPMENT OF VICTIMS' RIGHTS AND POLICIES IN TWO JURISDICTIONS

This third chapter's main aims are three-fold. First, it provides an overview and contrasts the different conceptualisation of rights found within victims' rights legislation and policy documents that developed in the 1990s until the adoption of the Crime Victims' Rights Act (CVRA) in 2004 and the Code of Practice for Victims of Crime in 2006. Second, it compares the different contexts and elements that gave rise to these policies in both jurisdictions during that period. The following analysis uses a comparative methodology which begins by describing the American experience, followed by a comparison that provides the necessary distancing between both jurisdictions. Finally, chapter suggests that the policies that preceded the current Code of Practice and the CVRA have generally failed to meet their main aims, and have therefore been described by the relevant victims' literature as misleading and criticised for their undelivered promises regarding victims' rights. Understanding the different contexts under which the different conceptualisation of rights in the different policies under analysis developed and evolved, as well as their criticisms is fundamental to consideration of new enforcement mechanisms and partial policy transfers between different jurisdictions.

A. The status of victims in the American Federal process: Towards the recognition of independent bearers of participatory rights

The following section addresses the legislative evolution that led to the adoption of the CVRA. It highlights the conceptual and historical differences behind the development of

victims' rights under the Code and the CVRA as well as the limitations and problems that relate to these policies.

1. The development of federal victim legislation that preceded the CVRA and its limitations

As described in chapter 2, the President's Task Force of 1982[135] marked a significant moment for the victims' rights movement in America and was a significant driver of reform towards participatory rights within legislation. Following the Report's recommendations, Congress passed the first federal victims' rights legislation in 1982, entitled the Victim and Witness Protection Act, which gave victims a wider role in the criminal justice process by recognising the right to make a victim impact statement at sentencing and the right to restitution. Further statutes were enacted to protect victims' rights; namely, the Victims of Crime Act of 1984, the Victims' Rights and Restitution Act of 1990, and various others. These statutes mainly provided victims with procedural rights within the criminal process, following the Task Force's conclusions and recommendations, laid out in chapter 1, about the need to rebalance the criminal justice system and reintroduce the forgotten victim into the process. The Task Force's conclusions regarding secondary victimisation, the recognition of victims' interests in the process, and the essential role of victims in the reporting of crime and providing evidence were key drivers of these legislative reforms.[136] In addition, as will be seen below, problems with implementation and breaches that relate to victims' rights were determinant for reform and evolving policies.

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135 *President's Task Force on Victims of Crime*, 18 Weekly Comp. Pres. Doc. 522 (April 23, 1982) (Exec. Order No. 12, 360) [*President's Task Force*].

136 It is worth noting that similar reforms have also taken place at the state level, where states have recognised the rights of victims in legislation following the Task Force's influence.

The available research on the issue of policy implementation and victims' rights breaches remains limited and to some extent, outdated. Anecdotal evidence is more readily available and frequently invoked to illustrate instances of secondary victimization in which victims were mistreated by the system or ignored by criminal justice agencies and courts.[137] In addition, research evidence, albeit limited, has also influenced the recognition of policies on rights and remedies. For instance, a study conducted in 1998 suggests that many of these rights were breached by criminal justice agencies -- highlighting certain problems with compliance and their implementation. Further, this study found that victims' rights were generally more likely to be respected in states with strong statutory and state constitutional protection of victims' rights than states that do not formally recognise such protections.[138] In addition, researchers have found that in many instances non-white victims were less likely to be provided those rights.[139]

The policy which preceded the CVRA, the Victims' Rights and Restitution Act of 1990 (VRRA) is worth examining in greater detail, since its criticisms by the victims' rights movement were instrumental in the policy propositions and reforms that followed. The VRRA aimed to create a comprehensive list of service and procedural rights; namely, the right to 'be treated with fairness and with respect for the victim's dignity and privacy, to 'be

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137 See the CVRA's Congressional debates which have brought forward illustrative examples of breaches: 150 Cong. Rec. 22 April 2004: S4263. For instance, this includes the 1977 murder case of Preston, where the state of Florida informed her parents that they would not be notified of criminal proceedings in the case, because the state, and not the family, was being considered the victim of the crime. Moreover, the Gillis case in 1979, where victims were not notified of the arraignment as well as other critical proceedings in the murder of their daughter. In addition, they were not allowed in the courtroom. Further, the Lynn case was meant to illustrate the long delays and continuances that victims 'suffered through' during the case, as well as the fact that he was not allowed to make a sentencing recommendation for his wife's murderer.

138 Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services in the 21st Century,* NCJ 170600 (Washington, DC: US Department of Justice, Office of Justice Programs, 1998), https://www.ncjrs.gov/ovc_archives/directions/pdftxt/direct.pdf (accessed April 2011)

139 National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights* (June 5, 1997);

notified of court proceedings,' to 'confer with [the] attorney for the Government in the case' and to attend court proceedings. Despite these sweeping rights, it has been argued that the VRRA was never successfully integrated into the federal criminal justice process mainly because it was virtually unknown to even the most experienced federal judges and criminal law practitioners because of its codification in Title 42 of the United States Code, which dealt with 'Public Health and Welfare' instead of being included in the *Federal Criminal Code and Rules*.[140]

Moreover, this legislation did not recognise standing for victims to enforce their rights and therefore was heavily criticised for its legal unenforceability and failure to provide redress when a right has been breached. More specifically, the Oklahoma City bombing case (*McVeigh*[141]) put this legislation to the forefront and provided ammunition for the victims' rights movement by highlighting its legal limits with regards to enforceability. In this case, the Court issued a ruling precluding any victim who wished to provide victim impact testimony at sentencing from observing any proceedings in the case. Essentially, in this case, federal evidence rules allowed judges to exclude material witnesses from trial proceedings to prevent them from changing their testimony. Without any inquiry on the issue, this rule was automatically applied and thus each victim had to choose between providing a victim impact statement (VIS) or attending proceedings. Following this ruling, victims filed a motion asserting their own standing to raise their rights under the VRRA (right to be present), and in the alternative, seeking leave to file a brief to be considered as *amici curiae*. The court denied

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140 For further details on this see Paul G. Cassell, 'Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision' (2010) 87 Denv. U.L.Rev. 599.

141 United States v. McVeigh, 157 F.3d 809, 814-15 (10th Cir. 1998) and P Cassell, 'Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment' (1999) Utah L. Rev. 479 which discusses this decision.

their motion asserting standing to present their own claims and allowed them only to file as *amici curiae*. The victims filed a petition for writ of mandamus seeking review of the district court's ruling, as well as a parallel appeal in the Tenth Circuit because procedures for victims' appeals were unclear. This was rejected on the basis that victims lacked standing under the Constitution since they had no 'legally protected interest' to be present at the trial, and therefore, suffered no 'injury in fact' from their exclusion from proceedings.[142]

The decision in this case was perceived as a significant limitation on the rights of victims, and the legislation was considered by many to be a weak instrument with false promises of rights, since they were not legally enforceable in cases of breaches. Paul Cassell, professor of criminal law and victims' rights expert, went on to describe this outcome as '[t]he prime illustration of the ineffectiveness of the VRRA.'[143] Others have critically suggested that victims' rights are only respected when they coincide with the state's interest in prosecuting crime[144] and that victims were used to empower the state and serve the crime control model.[145]

2. The struggle for a Federal Constitutional Amendment

Since the President Task Force's recommendation to amend the Constitution, the possible victims' rights amendment (VRA) was not further mentioned until NOVA put the issue back on the agenda in 1986. However, it was only in 1995 that victims' advocates, mainly led by

142 *McVeigh,* 106 F.3d at 334 (per curiam).

143 P Cassell, 'Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision' (2010) 87 Denv. U. L. Rev. 599

144 Susan Bandes, 'Victim Standing' (1999) Utah L.J. 331, 334.

145 See e.g. Lynne Henderson, 'The Wrongs of Victim's Rights' (1985) 37 Stan. L. Rev. 937, 945-948.

the National Victims Constitutional Amendment Network (the Network), and its Chief Counsel, Steve Twist, decided that the time was right to press for a federal constitutional amendment after statutory protections like the VRRA failed to guarantee the implementation of victims' rights. Indeed, during an interview with Twist, it was stated that the movement agreed to wait before proposing a VRA to see whether other means, statutes, or state constitutions would provide adequate relief for victims in cases of breaches. Realising that victim participation and violations were manifest despite constitutions and statutory provisions, the movement decided that it was time to introduce the VRA as a possible solution. Supporters of this amendment also included a number of law professors, some judges, the National District Attorneys Association, law enforcement agencies, victim organisations – including NOVA and MADD - and politicians from all sides of the political spectrum – but predominantly conservative.[146]

Victim advocates supporting this measure remained visible and vocal, but their reasons diverged and they were thus unable to reach a consensus.[147] Their rationales varied from suggesting that a constitutional amendment could accomplish changes in attitudes by criminal justice agencies to the robust remedies the enforcement of rights may create. As suggested, previous federal statutes have 'frequently fail[ed] to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference,

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146 For a list of all supporters see NVCAN/NAVCAP website: http://www.nvcap.org/endorse.htm

147 R Mosteller, 'Victims' Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefiting the Prosecution' (1998) 29 St Mary's L.J. 1053: Mosteller has divided the supporters of the victims' rights amendment into three categories according to their basic aims. The first category is referred to as the 'participatory rights' dimension, which includes supporters who seeked to guarantee participatory rights in a governmental process, namely the right to be present and to be heard in the criminal justice process. The second category referred to as 'prosecutorial benefit' which includes proponents who were more generally animated by a pro-prosecution, law and order and anti-defendant perspective on criminal law, criminal procedure, and sentencing. Finally, the third category identified as the 'Victim Protection and Aid' dimension is not necessarily for a constitutional amendment but supports greater protection and support for victims by the government.

[or] sheer inertia'[148] and therefore a more robust measure was needed for these rights to be taken seriously. Further, one of the leading constitutional scholars in the United States, Professor Lawrence Tribe of Harvard Law School, has argued in favour of this amendment, indicating that victims' rights were human rights and therefore should be recognised within the American Constitution to ensure their higher status and enforceability:

> I've been very reluctant to see the Constitution amended. I'm one of those people who thinks it should be amended only in very rare circumstances, but we're dealing here with a fundamental principle of human rights, unlike just a policy preference, and we're dealing with something that isn't just a wish list … We're dealing with a thing that can be written, and it has to be written with care so that it is enforceable in a practical way, without distorting the structure of our government or trampling on other people's rights. So I do think it belongs in our fundamental national law.[149]

Other arguments included the previously mentioned movement's support for 'rebalancing the process' by drawing parallels with defendants' rights and suggesting that victims should be placed on an equal footing to ensure equal protection of their rights. In effect, some influential victims' organisations would also go further and defend a law and order approach that would empower the prosecution by arguing that the constitutionalisation of these rights would be essential to ensure that defendants' rights do not conflict with the rights of victims. For instance, National Victims' Constitutional Amendment Network (NVCAN) suggested that

> Until victims' rights are recognized in the U.S. Constitution, they will always be subject to the rights of the accused. The defendant's constitutional right to a

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148 Laurence H. Tribe and Paul G. Cassell, Op-Ed., *Embed the Rights of Victims in the Constitution: A Proposed Amendment Protects Victims, Without Running Roughshod over the Rights that Are Due the Accused,* L.A. Times, July 6, 1998, at B5.

149 See http://www.pbs.org/newshour/bb/law/june96/victims_rights_6-25.html; R. Bajaras and S. Nelson, 'The Proposed Crime Victims' Federal Constitutional Amendment: Working Towards a Proper Balance' (1997), 49 Baylor L.R. 1.

> fair trial has been used to deny victims the right to be present; the defendant's right to be free from cruel and unusual punishment has been used to deny victims the right to be heard at sentencing; the criminal's right to equal protection has been used to deny victims the right to be heard at parole hearings. There will be no equal treatment of victims until they are given equal rights. Victims' rights must be given constitutional standing in order to be effective.[150]

Hence, on April 22, 1996, during an election year, the first attempt to enshrine victims' rights in the federal constitution was a bipartisan effort sponsored by Senators Kyl (Republican, Arizona) and Feinstein (Democrat, California) with the backing of President Clinton by the introduction of Senate Joint Resolution 5.

In the United States the passage of a constitutional amendment is a very complicated process which requires the acceptance of 2/3 of both houses of Congress. Having failed to pass the first time in 1996, further resolutions followed in 1999 and 2003. According to the Senate Reports, the 2003 amendment officially aimed to 'restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birth right of every American at the founding of our Nation.'[151]

The subsequent resolutions, however, contained modified versions that reduced the nature and scope of the rights protected, as well as governmental obligations, in order to reach a compromise. Hence, these changes had the effect of diminishing service rights and prioritising procedural rights. For instance, the 1996 draft spoke of the 'right to be informed of and given the opportunity to be present' whereas the 1999 and 2003 drafts spoke of the right 'not to be excluded'. Further, the 1999 draft protected a positive right, spoke of victim

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150 National Victims' Constitutional Amendment Network, Background Kit 9 (April 1998)

151 S. Rep. No. 108-191, at 1-2 (2003) and S. Rep. No. 106-254 (2000)

participation in plea negotiations and left remedial relief to the judiciary, whereas the 2003 draft protected negative rights, did not mention the plea resolution process and limited the available remedies by prohibiting the reopening of the accused's trial in cases of rights violations. These changes suggest that public officials wanted to reduce their positive obligations,[152] did not want to be held liable for damages and did not want to allow the reopening of the accused's trial in cases of rights violations.[153] Protections related to defendant's rights were also added to appease many opponents. This amendment nevertheless remained very controversial and the subject of powerful debate.[154]

While the Victims' Rights Amendment always had strong support in Congress, from the President and the Attorney General, the crime victims' rights movement was unable to secure the required 2/3 vote in both houses of Congress to move forward with the amendment. The main opposition was powerful and included most members of the legal community, namely defence attorneys, judges and most of the academy that mainly opposed this measure for its possible effects on defendants' rights.[155] Additionally, this amendment instigated debates regarding federalism. A federal amendment to the constitution to include victims' rights was seen as an intrusion of federal power in state affairs.[156] Proponents of the

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152 Mosteller (n 147) 1057-1060.

153 For a more extensive analysis on the debate and compromises regarding the Victim Rights Amendment, see S Twist, 'The Crime Victims' Rights Amendment and Two Good and Perfect Things' (1999) Utah L. Rev. 369; K Kalaher, 'The Proposed Victim's Rights Amendment: Taking a Bite Out of Crime or a Dog With No Teeth?' (1998) Seton Hall Legisl. J. 317; Robert P. Mosteller, 'The Unnecessary Victims' Rights Amendment' (1999) Utah L. Rev. 443.

154 Mosteller (n 147) argues that there has been an ideological shift that advantages the prosecution instead of victim participation between the 1996 and 1999 amendment. Additional articles have been written on the VRA. For a thorough discussion and arguments both for and against this proposition, see three collections of articles published by the Pepperdine Law Review (1983-1984, Volume 11, Symposium and 1989, volume 17) and the Utah Law Review (1999, Number 2, Symposium).

155 See eg Susan Bandes, 'Victim Standing' (1999) Utah L. Rev. 331; Susan Bandes, (1989) 'Taking Some Rights Too Seriously, the State's Right to a Fair Trial, 60 S. Cal. L. Rev. 1019, 1048-1050.

156 Cassell, 1999 Utah L. Rev.

amendment on the other hand, saw this as an opportunity to increase uniformity of victims' rights in America.

In April 2004, temporarily[157] conceding that the amendment was only supported by the majority in Congress, as opposed to the necessary 2/3 vote in both houses of Congress, victims' rights advocates suggested, within the following forty-eight hours, a compromise by means of a statutory federal victims' bill of rights which included enforcement mechanisms. Thus, one of the CVRA's limitations is that it only applies to federal criminal proceedings. Due to its limited applicability, according to Cassell, there is still interest in a constitutional amendment that would apply to all states, but the political climate is not favourable in Congress, due to other more pressing issues.[158] However, one of the statute's aims is to serve as a model framework for other states to follow. If legal enforceability is not achieved in every state, advocates have expressed their plan to continue working on the passage of a constitutional amendment.

3. The Crime Victims' Rights Act: Statutory History and legislative content

a) The CVRA's history and enactment[159]

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157 The victims' movement conceded that this may be temporary if problems with enforceability and implementation continue.

158 Communications with Professor Paul Cassell who is the Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law, University of Utah) 10 July 2009

159 Chapter 4 provides more details on legislative intentions and the rationales behind the CVRA's enforcement mechanisms.

In 2004, Congress passed the CVRA with near universal congressional support, essentially as a compromise between victims' rights advocates, who had fought for nearly a decade to pass a constitutional victims' rights amendment, and opponents of the proposed amendment.

> After eight years of work on the Federal constitutional amendment, supported by President Bush and the Attorney General, we were able to schedule … the constitutional amendment for floor action today. [But] knowing we would not have the 67 votes to pass it, we decided it was time to get something tangible in a statute to protect the rights of victims, and accompanying it could be a modest appropriation of money to help actually support these victims in court when that was necessary and called for. We believed despite the potential that it would not serve adequately, it was time to try something, to be successful, and to at least move the ball forward.[160]

Since Congress rushed to pass this popular legislation,[161] the legislative history behind the CVRA is limited to only two floor statements by the statute's sponsors - Senators Dianne Feinstein and Jon Kyl.[162] In addition, its drafters changed their approach since the VRA and focused specifically on targeting prosecutors and courts instead of defendants. More specifically, it made clear that courts and prosecutors must avoid 'whittl[ing] down or marginaliz[ing] victims' rights' and 'treat victims of crime with the respect they deserve and … afford them due process.'[163] Contrary to their approach they made sure to note however that the rights accorded to victims under this law 'do not come at the expense of defendant's [sic] rights.'[164]

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160 Steve Twist, *Letter sent to leading representatives of the crime victims' movement*, April 28, 2004.

161 Doug Beloof, one of the main legal consultants that was part of the negotiations and helped prepare the draft of the CVRA suggested that after knowing that the VRA would not pass, senators that co-sponsored this act wanted to move very fast to avoid losing ground. It was suggested that strategically, it was important that minimal debate would be made on this proposition to move faster and be adopted.

162 Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1015-16 (9th Cir. 2006); Erin C. Blondel, 'Victims' Rights in an Adversary System' (2009) 58 Duke LJ 237, 256.

163 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

164 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

i) Content

As a result of the failed attempt to adopt the constitutional amendment, the CVRA's content reads more like an amendment than a statute with vague statements of rights and no discussion on their implementation.[165] This vagueness contrasts with the English detail found in the Code of Practice, as will be seen in the following section and despite the presence of service rights, mainly aimed at protecting victim participation in the criminal process. Eight substantial rights are recognized for victims of crime, some of which can be classified – according to Ashworth's classification -- as service rights, but most can be considered to be procedural rights. These rights include: the right to be reasonably protected from the accused, the right to be notified of public proceedings, the right not to be excluded from public proceedings, the right to be heard at designated proceedings, the right to proceedings free from unreasonable delay, the right to confer with prosecutors, the right to restitution and the right to be treated with fairness and respect for their dignity and privacy. Additionally, the CVRA provides funding for victims' legal services. On the contrary, it will be seen below that the Code of Practice in England and Wales mainly includes service rights. Procedural rights are generally less frequent in that jurisdiction and mainly found in other documents or schemes, including the Code for Crown Prosecutors, the Direct Communication with Victims scheme and the Victim Personal Statement scheme.

More significantly, and contrary to the previous VRRA and the English approach, seen below that merely rely on the 'best efforts' of prosecutors, the CVRA recognizes for the first time a legal enforcement mechanism that allows standing for victims to enforce their

[165] Blondel (n 162)

rights as well as legal remedies when violations are found by courts – as will be seen in greater depth in chapter 4.[166] Further, similarly to the English managerialist experience, described below, but with some notable differences, the CVRA also promulgated procedures to promote compliance by requiring the designation of an administrative authority within the Department of Justice to receive and investigate complaints. Consequently, the Office of the Victims' Rights Ombudsman was created to receive and investigate complaints filed by crime victims against Department of Justice employees that violated or failed to provide the rights established under the Act. This mechanism does not provide victims with a legal enforcement mechanism for redress or any means for victims to obtain individual redress, but it can nevertheless recommend a range of disciplinary sanctions to the head of the office of the Department of Justice. This statute has been evaluated by the United States Government Accountability Office, which prepared a report to congressional committees in order to measure its success before deciding whether or not to continue militating towards a federal amendment.[167]

Similarly to the English Code, the CVRA's legislative history and language suggest that the status of the victim is recognised even if there are no charges brought by the government.[168] This entitles victims to benefit from the CVRA once they have reported the

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166 See the Crime Victims' Rights Act, of 2004, 18 U.S.C. § 3771. The remedies created by this law include motions for relief, writ of mandamus, the reopening of a plea or a sentence when participatory rights have been denied but do not provide grounds for a new trial nor a cause of action for damages.

167 United States Government Accountability Office Report to Congressional Committees, *Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act,* (December 2008): Among other findings, this report found that victims were not aware of the mechanisms of enforceability in cases of breaches; For more information on this statute, see J Wood, *The Crime Victims' Rights Act of 2004 and the Federal Courts* (Federal Judicial Center Report: June 2008); P Cassell, 'Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act' [2005] Bringham Young University Law Review 835.

168 18 U.S.C. **§** 3771(e); In 2011, the Justice Department's Office of Legal Counsel released a legal opinion and thus the Department took the position that CVRA rights do not apply until prosecutors formally initiate criminal proceedings, by filing a complaint, information, or indictment. (See: US

crime. However, unlike the Code in England, which emphasises positive obligations and targets specific criminal justice agencies within the criminal process, the CVRA mainly guarantees vague participatory rights during criminal justice proceedings. For instance, in the American context, victims have to be notified of proceedings, but it is not clear which agency has a specific duty to implement this right during the different stages of the process. The CVRA focuses mainly on victim participation in criminal proceedings after charges are brought by the government and does not provide any details on how governmental agencies should recognise victims' rights when prosecutors have not yet brought criminal charges. Hence, this Act was incorporated into the Federal Rules of Criminal procedures in April 2008, and thus is meant to be followed by all judges and practitioners in federal criminal proceedings.

At the federal level, most service rights – particularly information provisions -- are found in the *U.S. Code*, Title 42, c. 112, § 10607. They designate responsible officials to provide victims with services and list several information duties officials have to victims. The framing of these rules is very similar to the Code of Practice in England and Wales. Also, they both explicitly forbid legal causes of action for victims in the event of failure to provide information and comply. Finally, according to Beloof, it is questionable whether these administrative laws can be enforced by an individual under the Administrative Procedures Act and the Supreme Court opinion of *Norton v Southern Utah Wilderness Alliance*, 542 U.S.

Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Acting Deputy Attorney General: The availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, Dec. 17, 2010 (publicly released on May 20, 2011), available at 2010 WL 6743535). Hence, the CVRA was not meant to be applied to pre-charging rights, contrary to what has been decided by courts and stated by the co-sponsors. For further details on the current debate about whether the CVRA includes victims' rights prior to any charges being brought forward by the prosecutor, see: P Cassell and N Mitchell, 'Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed' (2013) Journal of Criminal Law and Criminology (forthcoming).

55 (2004).[169] Thus, unless they are also protected by the CVRA, contrary to the Code of Practice, if breached, these rules do not seem to enable any process for redress for victims.

B. Contrasting victims' rights: The managerial ethos and predominant service, consumerist and non-legal approach to victims' 'rights' in England and Wales

The following sections examine and illustrate in greater detail the ways in which these Charters have conceptualised victims' rights as well as the different criticisms that have been made of these different policies.

In England and Wales, for reasons outlined in chapter 1, reforms and policies regarding victims' rights started later than in the United States and were shaped differently – taking a different direction and philosophy. Victim Support, the country's leading victims' non-profit organisation, became influential and benefited from Government reforms in 1986, and from, in particular, a significant increase in funding. Further, another significant initiative undertaken by the then Conservative Government was the establishment of Victims' Charters in 1990[170] and its reformed version in 1996.[171]

The creation of Charters emerged in a period of increased marketisation of public services and thus was part of a wider renewed government drive towards developing business models of economy and efficiency in public administration and monitoring public

169 See e-mail communication with Doug Beloof, March 16, 2011

170 1990 Victims' Charter (Home Office, London)

171 1996 Victims' Charter (Home Office, London)

expenditure.[172] As will be seen below, the notion of services and needs has been at the centre of this approach to 'rights' in both the 1990 and 1996 Victims' Charters, and continues to be the dominant ethos in the current Code of Practice in England and Wales. Hence, contrary to victims' constitutional struggle in the United States – where victims were considered bearers of individual rights and were meant to be active participants in criminal proceedings -- independent of prosecutors to enforce their rights - victims' 'rights' in England and Wales were predominantly based on services and portrayed victims as consumers of these services, rather than independent participants.[173] It is mainly at the turn of the century that the discourse surrounding victims' rights slowly began to focus on victim participation, which included culture changes within the Crown Prosecution Service's (CPS).

Finally, these policies were criticised by the existing literature on victims for being misleading and for undelivered promises to victims regarding the implementation of their rights. In addition, they were also criticised for being presented as 'entitlements' and services for individuals, but have effectively failed to provide any mechanisms of accountability and redress when breaches occur.

1. The First Victims' Charter: services and limitations

172 See R Mawby, 'Public sector services and the victim of crime' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing 2007) 526. For instance, the Citizen's Charter became the initial document that symbolised the charter philosophy, which essentially modified the existing welfare model between citizens and public services and transformed it to a business-like dualistic relationship between service providers and the consumer. See: G Drewry, 'Mr Major's Charter: empowering the consumer' (1993) P.L. 248

173 For instance, Edwards identifies different forms of victim participation and highlights that merely receiving information An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *British Journal of Criminology* 96

Following research on victims' needs and the failure of criminal justice agencies to meet those needs[174], the Conservative government, adopted in 1990, for the first time a Victims' Charter declaring that it was 'a Statement of the Rights of Victims of Crime' that 'sets out – for the first time – how the victims of crime should be treated, and what they are entitled to expect.'[175]

This first document referred to four key 'rights', namely and predominantly the right to receive information; the right to make a statement about the effects of the crime; the right to be treated with respect and sensitivity in court and the right to emotional and practical support. This acknowledgment of victims' rights found further support in the Courts' Charter. In fact, these two Charters were linked to the Citizens' Charter in 1994 through the leaflet *Victims of Crime,*[176] and therefore ended up sharing its obscure legal status.

Despite the fact that the right to receive information in the 1990 Charter was considered to be the most important provision, it has nevertheless been criticised by some within the academy for being incomplete, unknown to most victims and the public and unclear to criminal justice agencies. It is stated that 'the police should aim to ensure that [the victim] is told of significant developments in the case, particularly if a suspect is found, if he is charged or cautioned, if he is to be tried.'[177] It was therefore argued that this entitlement remained incomplete regarding information on post-trial releases and pre-trial hearings, with

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174 M Maguire and T Bennett, (1982) 'Burglary in a Dwelling: The offence, the offender and the victim' *Cambridge Studies in Criminology* 49; J Shapland, J Wilmore and P Duff, *Victims in the Criminal Justice System* (Gower, Aldershot 1985)

175 1990 Victims' Charter (n 170) s. 2.

176 Home Office, 'Victims of Crime', White Paper (Cm 1599, 1991). The entitlements set out at 9-21 of the 1990 Victims' Charter were linked to the Citizen's Charter in 1994 through the leaflet *Victims of Crime* (published by the Home Office J052992NJ 9/94).

177 1990 Victims' Charter (n 170) 9

the exception of bail hearings. Further, the leaflet that accompanied the Charter was incomplete since it only referred to some of the information entitlements instanced by the Charter and required the victim to seek further information.[178] Although the Charter was supposed to be distributed to several bodies, in practice this did not occur and very few individuals were aware of its existence.[179] Finally, it failed to clearly describe who was responsible for informing victims at each stage of the criminal process, which resulted in much confusion among the various service providers.[180]

Most importantly, the terminology of rights/entitlements used in the first Victims' Charter has also been criticised by researchers. It was argued that this instrument did not effectively provide victims with 'entitlements' and legal rights[181] and seemed to be written for service providers instead of victims. Indeed, Fenwick argued that the scheme was 'seriously misleading'[182] as it conveyed the impression of a commitment to victims' rights without clearly specifying what they were, and creating no legal standing to enforce these 'rights'. Although measures were developed to assess the efficacy of this instrument -- including consumer surveys charting victims' and witnesses' experiences as well as evaluation of services to measure whether or not these standards were attained -- this Charter provided no remedies for victims through courts or grievances when its provisions were breached. This was a significant departure from general Charter practice, which usually

178 Fenwick, 'Rights of victims in the criminal justice system' (n 182).

179 P Rock, *Constructing Victims' Rights: The Home Office, New Labour, and Victims* (Clarendon Press, Oxford 2004)

180 ibid; Victim Support, 'The Victims' Charter', (Home Office, December 1990)

181 See R Mawby, 'Public sector services and the victim of crime' in S Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing, Cullompton 2007); R Mawby and S Walklate, *Critical Victimology: international perspectives* (Sage, London 1994); B Williams, 'The Victim's Charter: Citizens as Consumers of Criminal Justice Services' (1999) 38 *The Howard Journal* 384-395

182 H Fenwick, 'Rights of victims in the criminal justice system: rhetoric or reality?' (1995) Crim.L.R. 843, 852

provided citizens with a grievance procedure and it was therefore argued by critics that in the context of managerialism and productivity, this charter was used by government to promote results by its agencies in order to monitor their spending.[183] Complaints were only possible in relation to mistakes in the conduct of court business under the Courts' Charter and the Parliamentary Commissioner for Administration was not mentioned as a complaint handler.

2. The Second Charter

The 1996 Victims' Charter comprised three sections, namely the services victims should expect to receive from service providers, the information about different stages of the process and the complaints process available to them. This document was more detailed than its predecessor and was meant to focus more on the victim than the service provider.[184] Its main focus remained on service rights, particularly information, but added for the first time provisions that create an ambiguous VPS regime.

a) Increase in services and implementation difficulties

The 1996 Charter also predominantly emphasised service rights and indeed one of the most significant aspects of this Charter was its aim to provide victims with more accessible information:

> [Y]ou can expect a crime you have reported to be investigated and to receive information about [significant developments in your case] … the police will tell you if someone has been caught, cautioned or charged … [and on request]

183 Id

184 Rock, *Constructing Victims' Rights* (n 179).

you will be told about any decision to drop or alter the charges substantially. You will also be told the date of the trial and the final result.[185]

This promise to victims was shored up by several other documents that required criminal justice personnel to inform victims about the progress of their case.[186] Court staff had to explain the necessity of delays and the procedural process,[187] and in cases of violent and sexual crimes the victim was to be informed of the sentence as well as release decisions.[188] In addition, the police's responsibilities increased and were described in more detail. 'One-stop shops' were also created for police to provide victims with up to date information on the progress of their case - information about the charges, trial, outcome of proceedings and sentences - and help them to complete their personal statements.

One of the main difficulties that could explain the implementation difficulties of this right was that criminal justice agencies tended to have different responsibilities at different stages of the criminal process and clear information was not easily collated. In addition, as Fenwick argued, 'although the right to information is probably one of the more clearly established service rights, it is still in its infancy: the Charter appears to promise more than is currently likely to be delivered, especially in relation to post-trial information.'[189] In this respect, academic research has demonstrated that despite the importance of information

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185 1996 Victims' Charter (n 171) at 2

186 Home Office, Circulars No 20/1988 and No 60/1990.

187 1995 Courts' Charter (p.10)

188 See 1994 Probation Circular entitled Probation Service, *Contact with Victims and Victims' Families* (PC77/1994)

189 See H Fenwick, 'Procedural "Rights" of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60 *Modern Law Review* 317, 325 in which the author notes that the Home Office, 'Contact with Victims and Victims' Families', Probation Circular (PC77/1994) limits its application to victims of violent and sexual crimes.

rights, their implementation remains patchy, with the Charter failing to deliver some of the basic services promised to victims.[190]

b) Development of victim personal statements and its distancing with the American concept

The 1996 Charter also recognised procedural 'rights' for victims by means of a Victim Personal Statement (VPS) to 'explain how the crime has affected [them], and [to have their] interests to be taken into account' within the criminal justice system.[191] Police were required to ask victims about their fears of re-victimisation and collate details about the extent of their 'loss, damage or injury'. The concept of a 'victim personal statement' was first mentioned in England and Wales by Victim Support in its 1995 report, as part of its policy that victims should receive, and have an opportunity to provide information.[192] This concept was adopted to distinguish the English scheme from 'victim impact statements' in the United States that

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190 For instance, Shapland has argued that even after twenty years of initiatives, service providers are still not providing victims with basic and uncontroversial services with the result that victims are still 'left out in the cold'. See: J Shapland, 'Bringing Victims in from the Cold: Victims' Role in the Criminal Justice' in J Jackson and K Quinn (eds), *Criminal Justice Reform: Looking to the Future*, *conference report* (Institute of Criminology and Criminal Justice, Queen's University, Belfast 2003) Similarly, a study conducted by Hoyle et al. on the 'One-Stop Shop' which was designed to inform victims of serious offences under the 1996 Charter found that only three-quarter of victims were informed about the scheme by the police, and of those who used the service, significant proportions were not provided with information about their case, in part due to poor communication between the CPS and Crown Court that were meant to provide the information to the police who in turn were meant to transmit it to the victims. See: C Hoyle, E Cape, R Morgan and A Sanders, 'Evaluation of the One Stop Shop and Victim Pilot Statement Projects' (Home Office, London 1998). Further, although the British Crime Survey may not be the best indicator of actual breaches, it is noteworthy that only 29% of victims had said they had been kept very well or fairly well informed in 2000: See L Sims and A Myhill, *Policing and the public: findings from the 2000 British Crime Survey, Research Findings No. 136* (Home Office, London 2001) (cited by Shapland, 2003)

191 1996 Victims' Charter (n 171) 3

192 For example, in its policy paper, Victim Support, 'The Rights of Victims of Crime', Policy paper (London, 1995) the organisation identified five key rights and need, including the right 'to receive, and have an opportunity to provide information, notably on the progress of their case and to explain the financial, physical and emotional effects of the crime. This information should be considered whenever decisions are made about their case'

are associated with giving victims the right to express to the court orally an opinion about appropriate sentencing. Further the statement in America is prepared with the assistance of the prosecuting authority and is to be taken into account only during the sentencing of the offender, which was not what was envisaged in the English experience. There was a clear desire by policy-makers to avoid the victim impact statement regimes that have evolved across the United States and which have attracted much controversy and criticism.

The information contained in the VPS was meant to serve broader aims than the scheme in the US, namely informing service providers and decisions-makers including the police, the CPS, magistrates and judges at various stages of the criminal process about victims' needs and fears.[193] Initially, however, it was unclear whether these statements were also meant to inform sentencing decisions. Victim Support favoured a scheme with wider aims under which the statement would be made at an early stage in the case and taken into account during prosecution and bail decisions as well as informing the police in establishing victims' needs for information, compensation and protection during all stages of the process.[194] Others, however, thought that it should only be used at sentencing.[195] The exact role and function of the VPS regime remained somewhat ambiguous, but pilot projects were nevertheless set up to implement the Charter's commitment.[196] The VPS programme was

193 1996 Victims' Charter (n 171) at 3; see J Roberts and M Manikis, *Victim Personal Statements at Sentencing: A Review of the Empirical Research* (London: Office of the Commissioner for Victims and Witnesses of England and Wales, 2011

194 Victim Support, 'The Rights of Victims of Crime', Policy paper (London, 1995); Helen Reeves and Peter Dunn, 'The status of crime victims and witnesses in the twenty-first century' in A Bottoms and J V Roberts (eds), *Hearing the Victim*, *Adversarial justice, crime victims and the State* (Willan Publishing, Cullompton 2010).

195 The police and the CPS had not recognised any other use for the statements prior to sentence and many had not even read them.

196 For problems regarding the first analysis of these pilot projects see Morgan and Sanders 1999; also, during the drafting of this thesis, the court of Appeal in England and Wales recognised for the first time unequivocally in 2013, that the VPS should be considered as evidence at sentencing. Its role in England and Wales has therefore evolved increasingly from a more service-oriented institution to a more

rolled out nationally in 2000 and despite this more service-oriented approach to the VPS, Reeves and Dunn highlighted that the press presented the VPS as a development in the adversarial and procedural system allowing victims to have a say in the punishment of their offender and have a right to be heard in court.[197]

c) Mechanisms for grievances and enforceability: a non-legal approach to rights

Further, it was only under the 1996 version of the Victims' Charter that a general grievance procedure was recognised for victims. It established that they can complain internally about service providers to the agency in breach - the police, the CPS, Crown Court, judges, Victim Support etc. - and described how to complain when Charter standards had not been met.[198] However, if victims needed to complain in relation to mistakes in the conduct of courts, the grievance procedure was found in the Courts' Charter.[199] The term 'rights' was studiously avoided following criticisms that the 1990 Charter misled and confused victims by raising and then failing to meet their expectations.[200]

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procedural role within sentencing. (see Perkins & Ors v R. [2013] EWCA Crim 323 (26 March 2013).

197 H Reeves and Peter Dunn, 'The status of crime victims and witnesses in the twenty-first century' in A Bottoms and J Roberts (eds), *Hearing the Victim: Adversarial justice, crime victims and the State* (Willan, Devon 2010). In England and Wales, VPS are generally written instead of oral statements.

198 1996 Victims' Charter (n 171) s 13-16. Complainants were required to exhaust local procedures before approaching higher authorities and there was no separate independent process to deal with these complaints. There was no suggestion about addressing these issues to councillors or members of parliament. The White Paper states that the grievance procedure can include compensation provided to victims. Further, contractual and quasi-contractual sanctions could have been provided to certain parts of it (at 46); For more details, see G Drewry, 'Mr Major's Charter: Empowering the Consumer' (1993) PL 248

199 See the 1995 Charter for Court Users (Home Office, London) 18. An explanatory leaflet on the complaints process should be available in Crown Court offices.

200 See e.g. Fenwick, 'Rights of victims in the criminal justice system' (n 182) 852.

Despite the Charters' prescriptive language, this instrument possibly had some quasi-legal status,[201] but it clearly did not have full legal status.[202] For years, the possibility to judicially review certain provisions under the 1996 Charter remained unclear and ambiguous. Fenwick, who studied the possible enforceability of the previous charters, suggested that judicial review was conceivable. In other words, a victim would be able to challenge a decision taken by the CPS or police on the basis that the guidelines provided in the Victims' Charter were not respected.[203] However, the Court in *R v The Director of Public Prosecutions Ex p. C*[204] rejected the victim's application to judicially review the prosecution's decision on the basis that at the time, under the Code for Crown Prosecutors and the Victims' Charter, there was no general duty for prosecutors to consult with victims.

In this case, the victim alleged sexual assault by various individuals. The prosecutor decided to discontinue the prosecution without informing or consulting the victim, who found out about this when her family contacted the police to complain about a breach of bail conditions. The Applicant therefore sought a mandamus to revise the decision by a different office or alternatively a declaration by the Court that the Applicant had been entitled to consultation before discontinuance. Despite expressing empathy about the apparently unfair

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201 "[Q]uasi legislation" in administrative law refers to rules not directly enforceable in civil or criminal proceedings. Nevertheless, within quasi legislation, there are various degrees of influence towards the executive: G Ganz, *Quasi-legislation: recent developments in secondary legislation* (Sweet & Maxwell, London 1987)

202 See Fenwick (n 189), which argues that even if the Victims' Charter is linked to the Citizen's Charter, this does not change the former document's legal status.

203 See Fenwick, 'Rights of victims in the criminal justice system' (n 182); in her article Fenwick refers to discussions in *Gillick v West Norfolk and Wisbech Area Health Authority* [1983] 3 WLR 830 concerning judicial review of non-statutory guidance contained in departmental circular. Further, she suggests that the group Victim Support might have standing to mount these challenges; see the following decisions that suggest that the group might have sufficient interest: *Secretary of State for Employment, ex p. E.O.C.* [1994] 2 WLR 409; *Secretary of State for Foreign and Commonwealth Affairs*, ex p. Rees-Mogg [1994] 1 all ER 457 and *Secretary of State for Foreign Affairs, ex p. the World Development Movement* [1995] 1 All ER 611

204 *R* v *Director of Public Prosecutions, Ex parte C* [2000] WL 281275

treatment of the victim, the Court decided to reject the application for judicial review on the basis the governing law in June 1998, as well as the settled policy under the Code for Crown Prosecutors at the time did not create general duties to consult victims of crime about the decision whether or not to prosecute. Remarks by Lord Justice Rose illustrate the injustices and powerlessness that result from unenforceable victims' information rights when service providers are in breach of their obligations, as well as the lack of effective complaints mechanisms that aim to provide individual redress for victims in cases of breaches. He states:

> It is extremely regrettable that the Applicant was not informed by the Crown Prosecution Service or the police of the decision not to proceed with her case, and that she learnt of that decision by other means. Common courtesy, the June 1996 explanatory memorandum in relation to the Code of Practice for Crown Prosecutors, the Victim's Charter at the time and, subsequently, the Glidewell Report on the Crown Prosecution Service, all point to the desirability that a complainant (particularly as young as this complainant) should be informed about a decision whether or not to prosecute. This does not mean, however, that, in light of current practice when this decision not to prosecute was made, this complainant was entitled to be specifically consulted about the decision not to continue before that decision was made. Whether, particularly in the light of recommendations 29 and 35 in the Report of the Stephen Lawrence Inquiry, the Cps Code of Practice and/or the Victim's Charter merit amendment is another matter not for the determination of this Court. What to my mind is plain, is that the decision not to prosecute in this case was not only not perverse in the Wednesbury sense, but it was properly reached in accordance with the practice and policy at the time.[205]

For the Court, the policies at the time created no obligations on the part of service providers to consult victims and were therefore treated as mere suggestions for good practice. Further, despite a breach of the duty to inform victims, no argument or ruling was made for a declaration that this right was not respected. Similarly, the motives and outcomes in the American case of *McVeigh* – previously mentioned -- reflected this approach and the lack of legal enforceability and remedies regarding victims' rights. Despite the different nature of

[205] ibid par. 32

rights and duties upon criminal justice members, courts in both jurisdictions decided that these instruments were not meant to provide standing and legally enforceable rights for victims of crime – leaving them without redress. Thus, neither instrument aimed to create obligations or recognise any consequences towards service providers.[206]

In brief, the previous Victims' Charters were merely manuals for good practice with rather vague provisions regarding their enforceability. Since they were associated with the Citizen's Charter, the new managerialist and pragmatic philosophy behind them seemed to recognise accountability through the operation of market forces and therefore promoted a consumerist ethos. Victims were presented as consumers of state services, suggesting a contractual relationship between the State and its agencies (service providers). Evidence suggests that these Charters were used by the central government to monitor the agencies in order for them to be more cost-efficient and productive.[207] Indeed, Williams stated that 'the Victim's Charter offers a method of holding criminal justice agencies more accountable to central government priorities, and gives individual victims responsibility for policing the process.'[208] In effect, customer surveys became even more significant measures of accountability used to monitor the quality and satisfaction of services received by victims from service providers and their compliance with Charter standards.[209] Thus, with the development of key performance indicators and reports as a means to calculate efficiency, justice agencies were placed in a position whereby they must justify their budgets by taking

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206 Many service rights in America are still based on this premise, see the unenforceable *U.S. Code*, Title 42, c. 112, § 10607 previously mentioned.

207 Williams (n 181).

208 ibid 393

209 Williams (n 181); Mawby (n 181).

into consideration the satisfaction of victims as consumers of their services, instead of merely relying on statistics and clear-up rates.

Further, behind the portrayal of victims as consumers, lies the notion of empowerment by choices. The consumer-based approach has had some positive effects for victims - namely setting up a system for monitoring service providers - but unlike consumers, victims did not benefit from a free market of choice and no competitors were available as alternative service providers within the criminal justice system. Most members of the academy have criticised this Charter arguing that the consumerist approach empowers the central State who can be seen as

> controlling the public services and the professionals working within them. Indeed, far from diminishing the power of central government to determine the extent and character of service provision offered to citizens, the reforms associated with the Charter have often increased it.[210]

In addition, Goodey has noted that although the Charter was presented as 'a statement of service standards for victims of crime' and dropped the explicit language of 'rights', it did *imply* that victims have rights that correspond to the standards of service described in the Charter. Indeed, she also stated that this Charter did not provide much by way of change in regards to its promises since it 'not only failed to establish the victim as a consumer with incumbent rights but it also fails to establish the victim as a citizen with substantive rights, … and therefore is misleading in terms of what it can deliver.'[211]

Consequently, despite Charter promises regarding victims' empowerment as consumers, it was argued that in reality they had no access to a marketplace of choices,

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210 ibid 387

211 J Goodey, *Victims and Victimology: research, policy and practice* (Pearson Longman, Harlow 2005) 131

typically had insufficient information due to the poor delivery and problematic implementation of these services, and no effective complaints process or remedies to hold the responsible agencies to account when they failed to deliver the services.

3. Victims' rights at the turn of the century: The development of a new 'rights' discourse based on the notion of accountability and legal resistance

At the turn of the century and prior to the adoption of the Code in 2006, a number of socio-political factors contributed to framing the rights of victims and their enforcement in England and Wales which eventually led to the current victim-related policies, particularly the Code of Practice for Victims of Crime. Not claiming to be exhaustive, the following section examines some of these factors. It aims to provide a greater understanding of the different historical and political contexts that shaped the ways in which victims' 'rights' and policies have been conceptualised in England and Wales and contrasts this approach with the different factors in the United States. On the surface, victim participation in the criminal process related policies in England and Wales has been described as a straightforward example of Americanizing punitive tendencies of victims' rights and rebalancing the criminal process.[212] However, it is clear that the story is more complicated than this – and is one in which complex relationships between different actors at the local, national and global level shape domestic penal policy in distinctive ways. Although this section - which contrasts both jurisdictions - is not meant to be exhaustive, it draws a picture of these contextual differences that are imperative to bear in mind, particularly when reflecting on the obstacles that relate to the development of new policies and policy transfers.

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[212] See eg. D Garland, The Culture of Control (University of Chicago Press 2001) which makes a generalised account of victims' rights that describe victims' rights as a law and order endeavour which does not do justice to the complexity and contextual nuances within these jurisdictions, particularly in England and Wales.

As highlighted above, the numerous academic criticisms of the 1990 and 1996 Charters, namely the difficulties that related to implementation of services, the criticisms around the language variations between rights and standards, as well as the issues with ineffective mechanisms for redress were significant elements that contributed to the call for change. In addition, as noted by Rock, the politics of race and gender also had a role to play in highlighting the mistreatment of victims by criminal justice agencies and developing policies to improve victims' treatment, services and accountability within the process.[213]

The section below examines in greater detail some additional elements that have contributed to the development and framing of rights and policies in England and Wales and contrasts them with their evolution in America. This combination of factors includes Victim Support's influence within the national and international context, the new discourse surrounding rights and public accountability, as well as the strong opposition in place by the legal community.

a) Victim Support England and the international context

Victim Support has also been a meaningful player at the national and international level which has shaped the definition of these rights. Despite its earlier reluctance to comment on the criminal justice system, it began campaigning for the recognition of legislation as well as for detailed and enforceable rights and redress for breaches by a Commissioner for Victims of

[213] The recommendations of the 1999 report of the Macpherson Inquiry on the racist murder of Stephen Lawrence focused on the mishandling of cases and the police's disrespect towards certain victims of crime. Further, the report Home Office, 'Speaking up for Justice' (Home Office, 1998) stimulated new measures for vulnerable and intimidated witnesses, mainly of domestic violence, and sexual assault.

Crime, whose remit would not only cover victims within the criminal process, but also victims who did not get into the system.[214]

For example, its policy paper, *The Rights of Victims of Crime*[215] published in 1995 established victims' needs and influenced the establishment of certain rights contained in the 1996 Charter as well as some of the ideas within the current Code of Practice for Victims of Crime. It identified victims' rights and needs including: (1) to receive respect, recognition and support; (2) to receive, and have an opportunity to provide information, notably on the progress of their case and to explain the financial, physical and emotional effects of the crime. This information should be considered whenever decisions are made about their case; (3) to be protected in any way necessary; (4) to receive compensation, and most importantly (5) to be free of the burden of decisions relating to the offender.

The fifth element defended by Victim Support made clear that the state is responsible for dealing with the offender and decisions related to this should not be the victim's responsibility.[216] This element was a notable departure from the approach taken by American victims' organisations, who supported the idea that victims should be able to voice an opinion on the way the offender should be dealt with by the system.[217]

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214 Victim Support, 'Victim Manifesto 2001, http://www.victimsupport.com/~/media/Files/About%20us/Manifesto%202001/2001%20Manifesto.ashx (accessed 06/09/11)

215 Victim Support, 'The Rights of Victims of Crime', Policy paper (London, 1995)

216 That is a position which it still maintains (see: http://www.victimsupport.com/About%20us/What%20we%20do/Five%20basic%20rights) Further, the organisation also unsuccessfully resisted the idea, enacted in Domestic Violence, Crime and Victims Act 2004, of a victim fine surcharge payable by the offender to a victims' fund. Its argument was that the surcharge would further alienate the offender from the victim.

217 An illustration of these differences can be found in the VIS/VPS scheme mentioned above.

Further, Victim Support was in favour of recognition of statutory rights for victims[218] but, contrary to American organisations, was against the recognition of victim standing within criminal proceedings to assert these rights and obtain redress in case of breaches.[219] These notable differences can be explained, in part, by the origins and values espoused by these organisations, examined in chapter 1 and can to some extent account for the different approaches in policies found in both jurisdictions.

Victim Support's stance against victim standing in criminal proceedings was also influential in the international context, since the organisation was heavily involved in the drafting of the European Framework Decision. It is worth noting that the pro-victim policy developments in the European Union, which included the *European Framework Agreement on the Standing of Victims in Criminal Proceedings* played an influential role in England and Wales as it added weight to the imperative to improve the experiences of victims and witnesses in the criminal justice system. Unlike the previous recommendations made by the Council of Europe or UN declarations, a framework decision binds all those to whom it is addressed. It is therefore highly relevant in the political domestic context.[220]

Victim Support ensured that a common law perspective was also reflected in this Framework Decision, particularly since most participants represented civil law countries that

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218 Id.

219 See previous chapter for further details on victim organisations; Further, in America victim organisations mainly campaigned for policies that affected victims in criminal justice system which was not necessarily the case of Victim Support. It aimed to cover issues related to the wider population of victims that did not get into the system.

220 The *Framework Decision* contains communication safeguards, specific assistance to victims, penal mediation for victims and also refers to victims having 'a real and appropriate role in its criminal system' (art 2(1))

recognised standing for victims as *partie civile*.[221] Thus, Victim Support voiced its objection to standing rights within the criminal trial and these views have been reflected in policies adopted at the turn of the century, notably the current Code of Practice.

b) Government officials and reports: the development of a new discourse around victims' rights and public accountability

In England and Wales, the Labour Party, its advisers, the Justice and Victims Unit (JVU), as well as the Glidewell and Macpherson reports have been influential in the emergence of a new discourse around victims' rights and public accountability at the turn of the century,[222] which to some extent opened the debate around procedural rights, enforcement mechanisms and redress.

As the 2001 general election loomed, committees and Ministers of the Labour Party, including the Justice and Victims Unit (JVU), began to exert more pressure to place victims at the 'heart' or the 'centre' of the criminal justice system. Many discussions around those notions were therefore undertaken and as Rock suggested

> very disparate passages of talk and writing about victims in the Government of England and Wales came in 2001 to converge and combine to form what could be treated by officials as a critical mass that required ordering and reconstruction as a Victims' Bill of Rights that was later reincarnated as a proposal for a Victims and Witnesses Bill and, finally, as a Domestic Violence, Crime and Victims Bill that was announced in the Queen's Speech of 26 November 2003.[223]

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221 See H Reeves and K Mulley, 'The new status of victims in the UK: Opportunities and threats', in A. Crawford and J. Goodey (eds.) *Integrating a Victim Perspective Within Criminal Justice: International debates*, Ashgate, Aldershot, 2000, p. 130

222 Rock, *Constructing Victims' Rights* (n 179) 568

223 ibid x (preface)

Further, similar to the rhetoric employed in America, the notion of rebalancing the criminal justice system surfaced in discussions about a role for the victim in the adversarial system. Thus, the prospect of recognising legally enforceable rights became a more realistic possibility in this government's agenda, which contributed to 'the construction of new formal identities for victims'.[224] These disparate discussions were mainly brought forward in 2000-2001 by Ian Chisholm, head of the Justice and Victims Unit (JVU) at the Home Office in the context of the Victim's Charter review and can be summarised as follows:

> While it would be far simpler administratively to regard the review of the Charter as a straightforward redrafting exercise of the current document, we would recommend a rather more ambitious approach. (…) In our view there are two options to consider. The first is to legislate to provide enforceable rights for victims, to make it clear what they could expect from the criminal justice system and, further, what penalties could be levied against those agencies which failed to deliver in individual cases. However, to broker this with the three main players in the victims' field – the police, the Crown Prosecution Service and the courts – would not be easy, and inevitably and immediately issues about resources would be raised … The other clear disadvantage of the legislative route is the length of time it would take… The second option may therefore be both more attractive and pragmatic. This would consist of an overarching 'Bill of Rights', highlighting perhaps 8-10 key rights to which victims should be entitled. This would be backed up by a more comprehensive document breaking down each of the 'rights' into a number of sub-headings.[225]

Previous governmental trust and unquestioned support towards criminal justice professionals gave partial way to some recognition of public accountability within the criminal justice process. Moreover, this gave rise to a discourse similar to that in America, reflecting the increasing distrust felt towards criminal justice agencies with regards to meeting victims' needs and maintaining public confidence in the system. Thus, Rock documents in his

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224 ibid (preface)

225 'Victim's Charter – Review: Involvement of Victims in Criminal Legal Proceedings', 15 June 2000.

research on the Home Office and victim policies that it was necessary to confer rights on victims precisely to confirm a role in criminal justice that judges were not prepared to recognise. In other words, the need for a statutory instrument with legally enforceable rights, like the Victims' Bill of Rights was claimed to be essential to ensure that lawyers and judges take their duties towards victims seriously. He suggested '…one of the difficulties is getting the judiciary and bar, legal profession, to take all this seriously but if you put things on a statutory basis, they're forced to do something.'[226]

A JVU officer also contributed to this new conception of victims' rights by suggesting that the Unit wished to involve victims more formally in criminal proceedings and was even prepared to propose a

> fairly radical [consultation] paper which might include reference to the introduction of Victim Advocates (with a right of address to the court) or a change in the role of the CPS… Ideally we want to ensure that victims have better opportunities to both give and receive information, and feel that they have better access to justice. At the same time we need to ensure that the rights of offenders are unaffected.[227]

This new role was also reflected in the Lawrence Steering Group's consultation paper[228] that began to circulate in the summer of 2000 on the role of victims entitled 'Formal Involvement of Victims in Criminal Legal Proceedings.' This document started by an unusual discourse in England which highlighted the imbalances within the criminal process between victims' rights and those of defendants'. In his remarks about this paper, Rock suggested that

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226 Rock, *Constructing Victims' Rights* (n 179) 496

227 Rock, *Constructing Victims' Rights* (n 179) 538 in his interview: 'Review of the Victim's Charter/Victims' Rights', JVU, September 2000.

228 This consultation paper was brought forward following the Stephen Lawrence Inquiry which explored the relationship between victims and criminal justice agencies as well as public confidence in the criminal process.

what was 'new and radical was the consideration of a gamut of new formal roles for the victim'[229] which included the possible recognition of auxiliary or assistant prosecutors. Hence, this would recognise additional service and procedural rights related to legal proceedings, namely being informed about the dates of proceedings, putting questions to witnesses directly or indirectly through the prosecutor; bringing evidence into the proceedings and making statements to the court.

Following these developments, and shortly before the May 2005 General Election, the Home Office announced that it would introduce a Victims' Advocate Scheme to provide legal representation during the trial for victims of homicide, rape and domestic violence. The pilot projects that ran in 2006[230] contained features that favoured procedural rights within proceedings and thus increased the similarities with the American experience. Indeed, this pilot recognised limited standing in specific circumstances for victims in the criminal process by introducing victims' advocates that were meant to enhance pre-trial support, facilitate the oral delivery of Family Impact Statements, and provide up to fifteen hours of free personal and social legal advice, excluding advice about the trial.

Further, in England and Wales, some reports were also instrumental in achieving cultural change among Crown Prosecutors, with regard to their relationships with victims.[231] These changes started in the 1990s with a focus on service rights and gradually included procedural related reforms that mainly focused on the decision to prosecute.

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229 Rock, *Constructing Victims' Rights* (n 179) 530

230 A Sweeting et al, *Evaluation of the victims' advocate scheme pilots* (Ministry of Justice, 2008) http://webarchive.nationalarchives.gov.uk/20110201125714/http://www.justice.gov.uk/publications/research-victims-advocate.htm

231 M Hall, 'The relationship between victims and prosecutors: Defending Victims' Rights' (2010) Crim L R 31; D Jones and J Brown, 'The relationship between victims and prosecutors: defending victims' rights?' (2010) 3 Crim L R 212

The Glidewell and Macpherson reports highlighted the importance of prosecutors ensuring effective victim services[232] and establishing a more positive relationship with the general public to increase public confidence. In effect, based on the notions of accountability and public confidence, the CPS agreed with these suggestions and the new processes for informing victims of prosecutorial decisions were integrated into the 2001-2002 CPS Direct Communication with Victims scheme. These service rights were also reproduced in both the Prosecutor's Pledge published in 2005 and the Code of Practice in 2006.

Finally, in 2000 in light of these reports, the Code for Crown Prosecutors was reviewed and for the first time, procedural rights that had an impact on the prosecutorial decision-making process were included. In this respect, victims' interests and views were recognised as relevant elements that needed to be taken into account when prosecutors applied the public interest test to decide whether to prosecute or not.

As described in detail in chapter 1, the Home Office in the 1970s and 1980s avoided the decision-makers and feared their participation in the criminal process. In the 1990s, discussions about victims' role and their treatment within the criminal process started emerging, and the Home Office mainly constructed victims as consumers of services by criminal justice agencies. At the turn of the century, the Home Office under the Labour Government adopted during its internal meetings a victims' rights discourse that was

232 For instance, in 1998, the Glidewell report into the CPS suggested that the CPS should be directly responsible for informing victims of prosecutorial decisions instead of police as suggested in the 1996 Charter, on the basis that police often did not understand the decisions that were reached. In addition, this report also emphasised the importance of recording reasons in decisions not to prosecute and recommended that for certain serious offences, meetings between victims and prosecutors should take place. Similarly, the Macpherson Report that looked into the death of Stephen Lawrence also suggested that the CPS should have a positive obligation to always notify victims and their families of a decision to discontinue criminal proceedings. See: The Stephen Lawrence Inquiry – Report of an Inquiry by Sir William Macpherson of Cluny. Cm. 4262 (1999).

substantially closer to the American experience by increasing its focus on victim participation and procedural rights within the process. Thus, the discussions about adopting an overarching Bill of Rights or enforceable legal rights, the introduction of Victim Advocates, and prosecutorial guidelines that included procedural rights were all elements that existed in the American experience for years and were being very recently discussed by the Home Office and gradually introduced in England.

Despite these parallels, notable differences remained between these jurisdictions, which according to the comparative literature on policy transfers discussed above, are worth bearing in mind by those charged with developing new policies or considering policy transfers across these different contexts. Political interest and involvement in the American victims' rights movement has been stronger, publically debated and driven and started much earlier than most political discussions on victims' rights in England and Wales. Further, as will be seen below, the victims' rights opposition has been much stronger and more influential in England and Wales than in America and is also an important element to take into account when reflecting on possible reforms and policy transfers, as will be seen in chapter 7.

c) The influential and robust victims' rights opposition

Another distinct element in the English experience is the extent to which the victims' rights opposition has influenced victim related policies in England and Wales. The Home Office's discussions and enthusiasm regarding most proposed procedural rights was heavily criticised and quickly halted by strong opposing views mainly held by the legal community on the basis

that recognising legally enforceable rights for victims would conflict with the defendants' rights, and would present substantial, unnecessary and wasteful costs for government.

Rock suggested that if the Lord Chancellor's Department and the CPS had responded positively to the draft of the review of the Victim's Charter/Victims' Rights about having a more formal role within the process, No. 10 Downing Street would have gone forward with the proposition. Instead, the Director of Policy at the CPS, along with his colleagues and the Lord Chief Justice at the time, expressed their opposition with regards to the enactment of procedural rights and particularly with their legal enforcement.[233] According to them, the State was solely in charge of the prosecution and consequently victims should not be provided with any role or any procedural rights within the criminal process.

Further, an official of the Criminal Justice Division of the Lord Chancellor's Department criticised the potential recognition of enforcing victims' rights stating that in order for them to be real rights that are taken seriously, they would need to be accompanied by remedies if breached. He also suggested that remedies would not necessarily have to be enforced through the courts, but that they had to be available and would encroach on the rights of defendants as well as the independent state.[234]

The Lord Chancellor also expressed strong criticism of the Lawrence Steering Group's paper, mentioned above, on the basis that rights for victims would be costly and unnecessary. Finally, he highlighted his concerns about importing measures from different

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233 Rock (n 179)

234 Id, 535

jurisdictions such as auxiliary prosecutors – suggesting that they would be inappropriate for this country's system.

Additionally, in 2001, the Government commissioned a Review of the criminal justice system by Lord Justice Auld which ruled out the idea of victims having a more active role in the criminal justice system.[235] In his report he examined the models of representation in Continental Europe and found that victims were no better served by procedures in these countries. Indeed, he suggested that victims were far more likely to receive compensation in the UK where a claim is made on their behalf by the prosecutor and the debt is enforced by the court than in jurisdictions such as France where victims have procedural rights to speak in court about their compensation claims.

Consequently, within this context, as a pragmatic compromise between the service standards of the 1996 Charter – also supported by the victims' rights opposition – and the possibility of recognising 'fully fledged rights', the Home Office decided to enact for the first time a statute for victims. This was later complemented by a Code of Practice that mainly included services for victims and the appointment of an Ombudsman to consider complaints in cases of breach. An in-depth analysis of this enforcement mechanism will be provided in the following chapters.

Similarly, in America victims' rights initiatives were subject to severe criticism by members of the legal community. As highlighted earlier, the failure of the Victims' Rights constitutional amendment was in great part attributed to this influential opposition. The legal

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235 Lord Justice Auld, 'Review of the Criminal Courts of England and Wales' (Report, 2001) http://www.criminal-courts-review.org.uk (accessed May 2010)

opposition in America however, was divided. Whilst some members of the legal community were against such rights, other powerful and esteemed members of the legal community were in support of a more robust approach to victims' rights within proceedings. For instance, a number of legal professors and practitioners were in favour of this approach and were meaningful drivers and legal advisors behind the constitutional amendment as well as the CVRA. Further, the US Attorney General, and most district attorneys were in favour of victims' participatory rights within the criminal justice system which was not the case for the rest of the legal community. On the contrary, in England and Wales, despite changes in culture within the CPS, this organisation was to some extent much more in line with the rest of the legal community on the question of victim involvement in criminal proceedings.

4. Introducing the current Code of Practice: consumers' needs at the heart of the system?

a) The Code's applicability and limits

As a product of the historical and political contexts outlined above, in November 2003, a new omnibus Act was introduced into the House of Lords - the *Domestic Violence, Crime and Victims Bill*. The breadth of this legislation in relation to victims of crime was without precedent in England and Wales, and the Code of Practice for Victims of Crime – a quasi-statutory instrument - issued under this Act, perpetuates the predominant service mentality in England and Wales by including the minimum level of services that victims are meant to expect from various service providers. The Code is a much more comprehensive document than its predecessors with regard to the information they should expect to receive and indicates the crucial place of public sector agencies in providing victims with services. These services include information victims are entitled to receive within certain timeframes, which

highlight the continuing longstanding presence of a managerial and predominant service rights ethos. Further, due to the robust resistance mentioned above, this current Code 'stopped short of establishing statutory rights to services for victims'[236], but recognised for the first time a mechanism for victims to bring their complaints to their MP and the Parliamentary Ombudsman (PO) in case of dissatisfaction with the internal review process.

Further, the Code adopts a broad definition of 'victims' by defining them as 'any person who has made an allegation to the police, or had an allegation made on his or her behalf, that they have been directly subjected to criminal conduct under the National Crime Recording Standard (NCRS).'[237] Services are therefore clearly provided to victims from the moment they make an *allegation* to state authorities.[238] The Code includes only *direct* victims, not indirect victims such as witnesses or family members, unless the victim has died as a result of the alleged criminal conduct and a family member is designated the victim's family spokesperson.[239]

b) An increased approach to services, individual rights and the Code's limitations

Despite the managerialist and consumerist influences that remain present in the Code, the consumer-based approach has slowly been more inclined towards bringing the private individual and specific interests to the forefront, making it increasingly difficult for the

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236 A Ashworth and M Redmayne, *The Criminal Process, 4th* edn (Oxford University Press, Oxford, 2010) 54

237 Code of Practice for Victims of Crime 2005 (Home Office, London) s 3.1

238 Whilst victims of road traffic offences are included in the Code's definition of victims, as well as alleged victims of racial and homophobic insults, the Code does not apply to victims of regulatory offences, and explicitly excludes criminal conduct which arises from incidents in the workplace under the Health and Safety at Work Act 1974.

239 Code of Practice for Victims of Crime 2005 (Home Office, London) s 1.6 and 3.4

criminal justice system to treat individuals as undifferentiated cases. Hence, a more flexible service is demanded by the consumer, with individualised needs being taken into account.[240] Indeed, the new Code recognises that every victim deals with crime and the process differently and therefore an evaluation of their status should be done on a case-by-case basis. For example, in its introduction, the Code states that 'support needs to be timely and of sufficient quality to meet the individual needs of every victim'.[241] Further, when determining whether a victim can be qualified as vulnerable or intimidated, in order to ensure the quality of evidence during proceedings, the victim's views are taken into account among other factors.[242] Allowing the victim to express her needs can certainly facilitate the process and increase its accuracy. The Code also recognises that victims' status as vulnerable or intimidated can change during the investigation for many reasons and therefore should be adapted if and when circumstances change. In addition, in order to properly assess their individual needs as witnesses, the Witness Care Unit (WCU) must conduct a 'full needs assessment' with all victims in cases where a not guilty plea is entered.[243]

In terms of procedural and participatory rights, it is significant to note that the Code does not reproduce the Victim Personal Statement (VPS) scheme mentioned in the 1996 Charter, despite its nationwide introduction in 2001. The absence of participatory rights can to some extent suggest that less commitment was afforded to the recognition of remedies in case of breaches, in part due to the powerful legal opposition and controversy described above. Further, unlike the CVRA, the Code does not recognise consultation duties towards

240 N MacCormick and D Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish', in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (OUP, Oxford 1998)

241 Code of Practice (n 237) s 1.6

242 ibid s 4.8

243 ibid s 6.2

criminal justice agencies and participatory rights are not incorporated in any rules of criminal procedures as is the case in the United States. Thus, in England, criminal justice agencies are invited to consider victims' participatory right, but are not included in legally enforceable legislation.

In England, some procedural rights were nevertheless recognised in policies, schemes and pledges that operate on a 'best efforts' basis and provide no enforcement mechanisms in cases of breaches. The Code of Practice for the Crown Prosecution Service at that time had recognised certain participatory rights with prosecutors, but remain legally unenforceable within criminal proceedings and the possibility to judicially review these decisions remains a rarity and in many respects unclear.[244]

Similar criticisms that were made towards previous Charters can to some extent be said to apply to this Code. Indeed, the consumer-based approach present in the previous Charters remains in this Code and also employs a rhetoric of choice and empowerment that gives victims, for instance, the possibility to opt out anytime from receiving services,[245] but limits some of the information transmitted to them, as well as their ability to seek services from different providers.[246]

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244 See K Starmer, 'Finality in criminal justice: when should the CPS reopen a case?' (2012) 7 Crim L R, 526 who notes this judicial rarity. At the time of drafting this thesis, the appellate court in Killick [2011] EWCA Crim 1608 confirmed the importance of recognising a victim's right to internally review the decision not to prosecute. This certainly highlights England's approach to enforcement through favoured by mechanisms outside the judiciary, as opposed to the American Federal's approach which favours legal enforcement by the judiciary.

245 Code of Practice (n 237) s. 3.8

246 For instance, the possibility of making a victim statement is not mentioned, representing a significant departure from the previous Charter

Further, the Code does not provide victims with legally enforceable rights and contrary to the previous charters does not directly use a language of entitlements. Despite this improvement however, the 'rights'/entitlement discourse is reproduced in various related documents – perpetuating some of the Charters' criticised elements.[247] Hence, this unclear and misleading terminology is exacerbated by service providers that use the terms 'legal rights'[248] and 'legal rights to appeal'[249] to describe victims' entitlements under the Code.

Finally, although little research has looked at this Code's implementation, recent studies reveal certain difficulties with the delivery of some of these services.[250] Victim

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247 For e.g. see Home Office, 'The Code of Practice for Victims of Crime'(19 October 2005) <http://www.civilrenewal.communities.gov.uk/documents/victims-code-of-practice> accessed 10 May 2010; the official governmental services website has a headline entitled 'Your rights as a crime victim' and cites the Code; See also Home Office, 'Victims' rights' http://tna.europarchive.org/20100413151441/homeoffice.gov.uk/crime-victims/victims/victims-rights/ accessed 23 February 2011; Directgov, 'Your rights as a victim of crime' <http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/VictimsOfCrime/DG_184573> accessed 10 May 2010; Finally, the guide for victims which accompanies the Code also clearly states that victims have 'rights' under the Code, see: Home Office, 'The Code of Practice for Victims of Crime: A guide for victims' (July 2009) <http://www.cjsonline.gov.uk/downloads/application/pdf/2009-07-29Guideforvictims.pdf> accessed 10 May 2010

248 See the Victim Support website, Victim Support, 'Your rights as a victim' <http://www.victimsupport.org/Help%20for%20victims/The%20criminal%20justice%20system/Victim%20rights> accessed 23 February 2011

249 The CPS which is a legally trained agency surprisingly creates even more confusion by suggesting that 'For the first time victims are also given the legal right to appeal should they feel that any agency hasn't met their obligations' see CPS, 'Code of Practice for Victims of Crime' <http://www.cps.gov.uk/derbyshire/casework/the_code_of_practice_for_victims_of_crime/> accessed 23 February 2011, but then suggests that a failure to comply with the Code does not of itself give rise to any legal proceedings but complaints can be made. See CPS 'The Code of Practice for Victims of Crime – Crown Prosecution Service Operational Guidance' <http://www.cps.gov.uk/legal/v_to_z/victims_code_operational_guidance/> accessed 23 February 2011.

250 For instance, the CPS's direct contact policy that is also in the Code was audited by the CPS Inspectorate in 2007 and found that compliance had been rather patchy, especially in some areas, to which the CPS headquarters' highlighted that they 'shall try harder': See J Spencer, 'The victim and the prosecutor' in A Bottoms and J Roberts (eds), *Hearing the Victim* (Willan, Devon 2010). More recently, Victims' Champion, Sara Payne interviewed hundreds of victims as well as service providers and concluded that the delivery of the right to information contained in the Code remains patchy. In this respect, victims have not received the information they have been entitled to receive about an investigation or court case. She adds that a large number of police officers were not aware of the extent of information and that the lack of information adds to victims' worries and adds an additional burden to the stress experienced by victims. Finally, she adds that the new Code sets out timescales for information to be disseminated from agency to victim but this obligation is not being met. See: S

Support has also recently suggested that these implementation difficulties represent 'a widespread failure to meet the requirements of keeping victims informed set out in the Code of Practice for Victims of Crime'.[251] Although further research should be undertaken in this regard, this thesis focuses primarily on the new complaints mechanism and its available redress for breaches and therefore the following chapters examine in greater detail the new processes in both jurisdictions as means to address implementation problems.

Conclusion

In conclusion, this chapter has shed light on some of the dissimilar historical and political contexts, as well as the legal and policy developments that have marked the federal system in America and England and Wales from the 1990s until the enactment of the policies under analysis. Further, this chapter has also specifically highlighted the different conceptions of rights in both jurisdictions as well as the available research that has been part of this wider context and has revealed implementation difficulties, as well as criticisms associated with these policies in both jurisdictions.

Indeed, whilst victims' rights groups in the federal US jurisdiction focused on constitutionalising victims' rights and policies depicted victims as independent bearers of

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Payne, 'Redefining justice: Addressing the individual needs of victims and witnesses' (Victims' Champion Report, London 2009) 6, 7. Further, despite the Code's duty to keep victims informed and updated about their case, the evidence suggests that despite some efforts to keep victims informed, victims' information needs often go unmet and affects their wellbeing as well as their confidence and engagement with the police and the wider criminal justice system. More specifically, a Victim Support survey with victims found that victims are only kept updated about what is happening in their case in around half of all reported incidents. In around a third of reported incidents the victim hears nothing more from the relevant authorities after first contact with police when they report the crime. See: Victim Support, *Left in the dark: Why victims of crime need to be kept informed* (London, 2010) Similar results have been noted in the British Crime Survey in 2008-2009 which suggested that in only 55% of cases police kept victims well informed of the progress of their investigation. This survey was used since in latter responses questions related to victim information were not asked.

[251] Victim Support, *Left in the dark: Why victims of crime need to be kept informed* (London, 2010)

participatory rights, in England and Wales, victim related policies in the 1990s focused on victims as consumers of services with minimal participation in criminal proceedings and generally their interests were filtered by prosecutors in these proceedings. Further, although the climate at the turn of the century was more receptive to discussions around including victims in the criminal process, similar to the US experience, legal resistance was less divided and more powerful in England and Wales and thus has acted as a considerable obstacle to more sweeping changes in victim-related policies.

Finally, based on the available research on implementation, it is clear that the rights contained in previous policy documents promised more than they could deliver and, indeed were often honoured only in the breach. In addition, some of these previous policies have been criticised within the literature for being misleading in terms of the responses they can provide when breaches take place.

Having provided this background which effectively creates distancing between the jurisdictions and highlights the difficulties with the main policies, the next section of the thesis specifically focuses on the two main redress mechanisms that have been recognised for victims of crime in each jurisdiction, namely the PO complaints process in England and Wales and the CVRA's legal enforcement mechanism in the Federal American system. Hence, it specifically examines their main aims and analyses their implementation in order to determine whether these goals have and can be met. It then proposes preliminary suggestions and reflections about ways that they can be improved.

CHAPTER 4: THE NEW WAVE OF POLICY AIMS AND PROMISES FOR VICTIMS: THE INTRODUCTION OF ENFORCEMENT MECHANISMS UNDER THE CRIME VICTIMS' RIGHTS ACT AND THE CODE OF PRACTICE FOR VICTIMS OF CRIME

This fourth chapter explores the different purported aims and promises that were made to victims in both jurisdictions related to the new enforcement mechanisms under the Code of Practice for Victims of Crime (the Code) and the Crime Victims' Rights Act (CVRA). Essentially, these mechanisms were presented as novel victim-focused measures that would provide individual victims for the first time with accessible processes to bring forward breaches and obtain remedies in cases of breaches by criminal justice agencies. Although both mechanisms are very different from one another and aim to address different types of breaches, this chapter suggests that they were portrayed as having imperative components/features that would render these processes and remedies adequate and effective for victims of crime. Indeed, it was suggested that these processes would be accessible, rapid, objective (particularly in England and Wales) and provide adequate and effective remedies for victims. This thesis depicts a more nuanced picture and argues that the general structure of these mechanisms as well as their implementation have in many respects failed to deliver these promises.

A. Aims and promises behind the legal enforcement mechanism under the CVRA

As seen in chapter 3, in the United States, the main struggle for years was aimed at achieving the constitutionalization of victims' rights by way of a Victims' Rights Amendment (VRA). After this unsuccessful initiative, proponents of this amendment settled for a Federal statutory

compromise – the CVRA – which was greatly based on the VRA, recognising victims' participatory rights and most importantly providing victims with enforcement mechanisms and remedies within the criminal process in cases of breaches. Although statutory rights were not considered as robust and effective as constitutional rights[252], and despite the compromising context surrounding its adoption, without evidentiary basis, the CVRA's legal enforcement mechanism was nevertheless portrayed by the movement and legislative spokespeople[253] as a ground-breaking and novel response to breaches of victims' rights. More specifically, as seen below, this new law aimed to create a legal enforcement mechanism that would provide victims with: (1) an effective remedial solution to address previous legislative flaws; (2) the possibility of access via self-representation and financial resources to legal representatives; (3) a timely process for quick redress; (4) a mechanism that recognises victim standing and accountability towards government and the judiciary through individual redress.

Two new distinct and very different enforcement mechanisms were created for victims under this law, namely (1) a District Court Action, which consists of an action for relief in the criminal court which can be reviewed in the appellate court via a mandamus action and (2) a complaints mechanism through the Office of the Victims' Ombudsman in Washington DC. Arguably, the first mechanism was portrayed as more meaningful, generated unanimous support of its drafters and was portrayed as more effective in achieving accountability and remedies for victims of crime. This section will therefore focus on the

252 Reservations were made by the co-sponsors of this law with regards to the law's efficacy for legislative victims' rights, as opposed to a reform that would place these rights on a constitutional level. The potential that it would not serve adequately was even mentioned and considered the statutory nature of rights to be a test before re-attempting the constitutional route. See 150 Cong. Rec. 22 April 2004: S4266.

253 This information was revealed through discussions with the main legal advisers behind the CVRA, as well as Senate statements as part of Congressional records that preceded the CVRA's passage.

aims and promises made to victims regarding this first mechanism. Throughout, this thesis, it will be argued that in many respects the promises made have failed to be delivered, due to their structural limitations and operation on the ground.

1. The legal enforcement mechanism: A novel and effective 'remedial' solution to past legislation

Legal standing in district and appellate courts was claimed to provide victims with 'real rights' by means of an enforcement process that provided remedies to breaches. For years, previous legislation was criticised for failing to provide victims with a set of real legal rights with a vehicle to obtain remedies when breached. As seen in chapter 3, the *McVeigh* case highlighted the weaknesses of previous legislation and has been frequently used in the victims' literature to stress the importance of providing victims with a justiciable route for redress to ensure that rights are not illusory.

In this respect, bi-partisan co-sponsors of this legislation, namely senators Feinstein and Kyl, backed by individuals that were part of the victims' movement,[254] hoped for an effective enforcement vehicle that would provide redress for victims at all court levels. Hence, senator Feinstein highlighted that '[t]hese procedures, taken together, will *ensure* that the rights defined in the first section are not simply words on paper, but are meaningful and functional.'[255]

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254 The legal advisers that advocated for the CVRA and VRA were also part of the legal community – most of them were law professors and practitioners writing on victims' rights issues and advocating for legally enforceable rights with remedies.

255 150 Cong. Rec. 22 April 2004: S4262

Further, she promised that 'three critical components' were recognised for the first time in this legislation, namely rights, remedies and resources, which were described as a 'formula for success' and suggested that 'this law will work, and hopefully become the model for our States.'[256]

Having spoken to the legal advisers and specialists of the CVRA, who were also influential in tailoring the Victims' Rights Amendment (VRA), it is clear that recognising standing in criminal proceedings as a mechanism to assert rights to bring forward breaches and obtain remedies was non-negotiable for them as well as for the movement. Indeed, it was considered the only available option to *effectively* protect victims' rights within the criminal process and obtain remedies in cases of breaches. Further, it was suggested in discussions with Adviser 1, that all other enforcement alternatives on their own – such as a victims' ombudsman - would not be sufficient to provide adequate relief in cases of breaches and thus were considered 'inadequate to really protect the rights of the victim, in the same sense that the rights of defendants are protected ... in the criminal case.'[257] Accordingly, '[t]here was really no dispute or negotiation about the grounds of standing, it was just a given. There was no dispute about it – there are other mechanisms that other people like, but not to the exclusion of standing just as an addition, but I don't think anyone in the movement here

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256 150 Cong. Rec. 22 April 2004: S4262 although it is not the main focus of this thesis, it is also worth noting that despite hope expressed towards becoming the model of US States, the enforcement mechanism's impact was limited. The impact was meant to be quick, as the CVRA originally proposed partial funding to states with substantially equivalent laws to encourage them to develop legal enforcement mechanisms and maintain their implementation. As Adviser 3 suggests in previous discussion, 'the idea was get your law to look as good as the Feds and then you'll get some funding.' There has been some progress, but not as quick as expected initially, due to the lack of funding. Currently, eleven states have followed the Federal example and provide standing to crime victims to seek legal redress for a violation of their rights, namely Arizona, Indiana, Maryland, Michigan, Nevada, South Carolina, Texas, Utah, Oregon, California and currently Illinois is in the process of legislative votes.

257 Communication with Adviser 1, the main legal Adviser of the VRA propositions, the CVRA and victim legal representative, October 21, 2011

opposes or had ever opposed the idea of victim independent enforcement.'[258] This adviser also insisted on the fact that this mechanism was the closest they could come to protecting victims' rights in a similar way to defendants' rights.[259] Similarly, according to Adviser 3, this legal enforcement process 'was chosen because it looked like the best vehicle at the time, I don't know whether it would still be or not in hindsight.'[260] Hence, the fact that there was no disagreement within the victims' rights movement between the legal advisers and co-sponsors of this legislation regarding the efficacy of the legal route of enforcement as the most robust means to enforce victims' rights and obtain redress, explains in part the optimistic discourse surrounding those measures for victims of crime. It will be seen in this thesis that the legal route of enforcement is not necessarily an adequate solution for all types of circumstances and breaches.

The CVRA's legal enforcement mechanism was presented as the principal element of this statute[261], since it recognised for the first time a new and promising solution for 'fixing the problem with earlier laws'[262], namely the lack of enforcement mechanisms and remedies in cases of victims' rights breaches.[263] Considerable emphasis was placed on the novel approach taken by this legislation and failures of previous laws were illustrated in great detail with anecdotal evidence. For instance, it was argued that if this new law had been in place at

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258 Communication with Adviser 1, the main legal Adviser of the VRA propositions, the CVRA and victim legal representative, October 21, 2011

259 Communication with Adviser 1, the main legal Adviser of the VRA propositions, the CVRA and victim legal representative, October 21, 2011

260 Communication with Adviser 3, October 3, 2011

261 150 Cong. Rec. 22 April 2004: S4261

262 150 Cong. Rec. 22 April 2004: S4262

263 For instance, Senator Kyl stated that the enforcement of rights was the most important provision in the act – since it was contrary to old legislation that did not provide legal standing to file an action when breached. 150 Cong. Rec. 22 April 2004: S 4266.

the time of the aforementioned *McVeigh* case, victims and their families would have had standing in district court to bring forward their breach and obtain a remedy. It suggested that 'the District Court judge, armed with the standing provision of this bill, perhaps would have reached a different result during the trial.'[264] Further, if this motion was declined, they would have the possibility to bring forward a mandamus motion and receive a timely ruling on the merits from the Courts of Appeals. This inevitably suggests that an accessible and effective mechanism has been created for victims' breaches that can solve the problems with previous legislation –namely the lack of standing and the lack of remedies. Standing in the district court and appellate court was therefore unrealistically portrayed as an accessible process for victims that would have most likely provided a different outcome for them.

Hence, it becomes quite clear that the decision to choose this specific mechanism was not based on evidence-based research that showed the efficacy of this recourse for victims. Instead, it mainly relied on anecdotes and the *McVeigh* decision, in which a victims' right had been breached without any remedies available. It was suggested by policy-makers that the situation would have been different if a legal enforcement mechanism had been available to enforce victims' rights when breached. During Congress debate there were no nuances or discussions about whether the proposed legal enforcement mechanism would be effective for all types of breaches.

Despite no robust evidence-based research at hand, the terminology of efficacy was often used by legislative spokesmen to highlight the adequacy of this mechanism for victims of crime. For instance, the legislation's sponsors referred to legal standing and the mandamus

[264] Cong. Rec. 22 April 2004: S4261

process offered to victims as being 'appropriate' for victims.[265] Senator Feinstein, co-sponsor of the CVRA, summarises the new mechanism's effectiveness and ability to repair previous laws as follows:

> [s]ome have said that current law is adequate (…) but prior laws did not have the critical combination of rights and remedies that we now offer (...) In fact, a number of victims' rights laws have been passed (…) All of these laws represent a step in the right direction. But they are not enough. They don't really work to protect victims' many had hoped. Why is this? I believe it's because they fail to provide an *effective procedure* for victims to assert standing and vindicate their rights. The bill before us builds on these earlier attempts, and goes one very important step further - linking rights to remedies, and I hope, *fixing the problem* with earlier laws.'[266] and further 'one of the problems with existing Federal law the Tenth Circuit Court of Appeal noted did not grant the victims the standing to sue. So that had to be corrected here.[267]

Chapters 5 and 6 will demonstrate that indeed it was quite precipitate and unrealistic to claim that victims would necessarily have access to an effective process that would finally provide redress in cases of breaches, particularly in the context of legal inaccessibility pervading the legal system in America, and the ability of this mechanism to provide redress for certain types of government victims' rights breaches. Indeed, chapter 5 illustrates that this process is hardly accessible for victims in America, and chapter 6 illustrates through certain cases this new mechanism provides limited or no remedies at all for certain types of victims' rights breaches and thus on the whole fails to deliver some of its main aims.

2. <u>The creation of an accessible legal process for victims</u>

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265 Legal standing and mandamus mechanisms offered to victims were described to victims by the legislation's sponsors as being 'appropriate' for victims;

266 Cong. Rec. 22 April 2004: S4262

267 Cong. Rec. 22 April 2004: S4266

The legal enforcement mechanism was presented and considered to be a vehicle under which victim self-representation or legal representation were both available options for victims to make submissions regarding their rights and obtain relief within the district court and appellate proceedings. It was stated, 'a crime victim may *choose* to enlist a private attorney to represent him or her in the criminal case – this provision allows that attorney to enter an appearance on behalf of the victim in the criminal trial court and assert the victim's rights.'[268]

In addition, hiring legal representation or benefiting from legal assistance programmes was presented as a new, empowering, and more promising means to access the legal enforcement mechanism and obtain remedies. It was suggested that access to this mechanism would be made possible by the number of governmental financial resources that were provided for victim legal representation. Hence, this law was praised for providing one of three 'critical components' that would ensure a 'formula for success', including resources to facilitate victim legal representation within the process. It was stated that

> These institutions are key to the success of this legislation, for this is how victims' rights will be really asserted and defended – by lawyers, standing up in court, and explaining to judges and prosecutors what the law means, and how it applies in the case at hand. Rights and remedies need articulation to work, and this money will help make that happen.[269]

Although its co-sponsors were explicit about not being able to provide legal representation to all victims of crime, they nevertheless emphasised the amounts that would be allocated for victim legal representation to suggest that this was all part of a formula that would be successful in the recognition of real legal enforceable rights for victims. Hence, a

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[268] 150 Cong. Rec. 22 April 2004: S4269

[269] 150 Cong. Rec. 22 April 2004: S4262

total of $51 million over five years was authorised for crime victim assistance grants administered by the Department of Justice to establish and maintain legal assistance programs throughout the nation. More specifically, $7 million were offered to the Office of Victims of Crime for the National Crime Victim Law Institute to provide grants and assistance to lawyers to help victims of crime in court.[270]

In chapters 5 and 6 of this thesis, it will be shown that these aims expressed by these policy-makers underestimated the real difficulties behind access to legal representation. Over the years this law's legal enforcement process has to some extent proven to be inadequate for victims, since evidence suggests it is hardly accessible due to a combination of scarce resources and limited availability of legal representation. Hence, it is clear that this process creates a number of additional legal complexities that render it impenetrable for individual victims without legal representation.

3. The creation of a timely process with rapid remedies for victims of crime

This mechanism was also meant to offer a *timely* process to explore breaches as well as *rapid* relief for victims in the event of breaches. Hence, according to Adviser 2, it was important to select a legal enforcement mechanism that would provide a quick process and an *accelerated review* for crime victims' rights breaches in both district and appellate courts. [271] Further, it was also imperative to select a process that would be meaningful and rapid for victims to stop the encroachment of their rights early on and obtain *rapid relief* as soon as the encroachment

[270] 150 Cong. Rec. 22 April 2004: S4267

[271] In effect, it was made quite clear by various advisers and creators of the CVRA, that the selection of the mandamus process at the appellate level, instead of any other mechanism was justified on the basis of its rapidity for victims. For instance, the action of mandamus was described by Adviser 3 as a 'really fast appeal track or appellate review track' and considered by the movement to be the 'fastest way to get appellate relief.' See Communication with Adviser 2, October 1, 2011

was discovered. As stated by Adviser 3, who was present towards the end of the drafting process, 'the mandamus provided an opportunity for the equivalent of an interlocutory appeal before the case was over.' and 'because of the way mandamus was written we could put in these *expedited timelines* and not be bound by other timelines in the federal system.'[272]Accordingly, statutory provisions made clear that the district court must take up and decide any motion 'forthwith'[273] including appeals that should be decided 'forthwith within 72 hours after the petition has been filed.'[274]

In Congress, the sponsors of this bill promised a new mechanism that would provide a timely process and remedies for victims. For instance, the sponsors made clear by referring to the failure of past legislation in *McVeigh* that victims would now have access to a rapid mandamus process under the CVRA. Hence, it was argued that despite the rejection of a district court action, under this mechanism, victims would nevertheless have been able to 'avail themselves of the mandamus proceeding to get a *timely* ruling on the merits from the Courts of Appeals.'[275] Hence, the promise of a timely interlocutory process, could not have been expressed in clearer terms which can certainly create high hopes and expectations for victims of crime. Co-sponsor Feinstein articulated this promise made to victims in the following terms:

> This provision ensures that crime victims have standing to be heard in trial courts so that they are heard *at the very moment* when their rights are at stake

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272 Communication with Adviser 3, October 3, 2011; The fast track time schedule required that the appellate court take up and decide the case within seventy-two hours after a petition has been filed; a stay of continuance of proceedings had to be up to five days while the appeal was being heard.

273 Communication with Adviser 2, October 1, 2011.

274 S. 3771 (d)(3) of the Crime Victims' Rights Act.

275 150 Cong. Rec. 22 April 2004: S4261

> and this, in turn, forces the criminal justice system to be responsive to a victim's rights in a *timely way*.[276]

Chapter 5 will demonstrate that it was quite hopeful and precipitous to claim that victims would necessarily have access to a rapid mandamus process before the Appellate Court. It was also premature to suggest that the provision on enforcement would ensure that victims' rights and remedies are offered in a timely way. Evidence collated through interviews with victims' rights legal experts and case law about the practice on the ground will therefore illustrate that for various reasons, the legal enforcement process – including remedies – can be long, particularly in cases where mandamus actions are filed.

4. The creation of an adequate tool to achieve accountability by redress

The new legal mechanism was also presented as a process that would provide victim standing to ensure accountability from government agencies (the prosecutor) and judges with regard to implementation and compliance. Hence, victims were promised that this vehicle would enable them to have their personal rights brought forward to a court, independent of the prosecutor, and provided with remedies in cases of breaches.

a) Victim standing in criminal proceedings and courts as protectors of victims' rights

The relationship between victims and government, often embodied by the prosecutor takes a dual form under the CVRA's enforcement mechanism. While it is made clear by the CVRA's co-sponsors that victims can expect prosecutors to act as enforcers of victims' rights

[276] 150 Cong. Rec. 22 April 2004: S4269

when their interests in the process are aligned,[277] this policy goes one step further and recognises personal rights to victims – independent of prosecutors -- to ensure adequate enforcement and respect of rights when their interests are different. It was made clear that in all cases, government cannot compromise or co-opt a victim's right and that victims have independent standing to enforce their rights.

Hence, contrary to the English experience, and in a way never before seen in common law jurisdictions, the CVRA co-sponsors made clear that victims' rights need to be protected against government abuse in criminal proceedings, and in order to do so, it was essential that these rights were considered *personal* to them. It was suggested that Government cannot always be relied upon to bring forward victims' interests and at times can be responsible for breaches. In this respect, numerous examples were provided through anecdotal evidence presented in greater detail in the previous chapter, to highlight cases in which the government was responsible for breaching victims' rights, without any consequences/remedies.

It operates under the premise that victims are vulnerable in comparison with Government in criminal proceedings and that consequently their rights are meant to be defended by the judicial branch *sua sponte*[278] or raised by the victim's own initiative. Without victim standing and remedies, rights would in a number of cases be ignored or

277 Indeed, the co-sponsors of this law highlighted that: 'at times, the Government's attorney may be best situated to assert a crime victim's rights either because the crime victim is not available at a particular point in the trial or because, at times, the crime victim's interests coincide with those of the Government and it makes sense for a single person to express those joined interests.' 150 Cong. Rec. 22 April 2004: S4269 In most common law jurisdictions, including in England and Wales, the victim does not have a separate voice in proceedings and is heard through prosecutors. For instance, under the Code for Crown Prosecutors, prosecutors have a duty to offer assistance to the sentencing court in reaching its decision as to the appropriate sentence by drawing the court's attention to various factors, including any Victim Personal Statement. (11.1 b). Unlike victims under the CVRA, the VPS model in England and Wales does not provide them with standing to present their statement in court.

278 Although this thesis focuses on mechanisms triggered by the victim to obtain relief in cases of breaches, under the CVRA the courts were also meant to verify that victims' rights are respected and thus protect victims' rights *sua sponte*.

breached and would therefore remain meaningless. As suggested during Congressional floor statements the rights proposed are

> deeply rooted concepts in the United States of America. This country is all about fair play and giving power to the powerless in our society. It is about recognizing the values of liberty of the individuals against encroachment of the Government. Fair play for crime victims, meaningful participation of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process – these are consistent with the most basic values of due process in our society.[279]

Courts were therefore meant to protect victims whether *sua sponte* or when raised by the victim's own initiative in order to ensure respect and protection against governmental interference.[280] Hence, this legal enforcement mechanism is heavily based on the notion of American distrust of Government – a concept deeply rooted in the American culture[281]-- which can, in great part, explain the development of this type of mechanism of accountability and redress for federal victims of crime. Victims were therefore promised personal rights, which gives them, at least in theory, the ability to decide whether to enforce them or not through legal standing 'regardless of whether the prosecution is already asserting the same rights on their behalf.'[282]

On the ground however, it will be illustrated in chapter 5 that representation for individual victims is hardly accessible and therefore creates a substantial gap between the

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279 Cong. Rec. 22 April 2004: S4264

280 In the spirit of protecting victims' rights by obtaining legal standing and redress independent of prosecutors, courts were designed as enforcers of victims' rights and were meant to ensure that 'rights in this law be afforded and to record, on the record, any reason for denying relief of an assertion of a crime victims' (Cong. Rec. 22 April 2004: S4269)

281 R Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, Cambridge 2001)

282 Cong. Rec. 22 April 2004: S4269

recognition of personal legal standing with effective remedies and their implementation in practice. Arguably, as will be seen in greater detail in chapter 6, limited access and redress in certain cases of prosecutorial breaches create serious doubts about their ability to deliver these fundamental aims to victims.

b) The mandamus action: recognising judicial limits and breaches

Under the CVRA, standing in appellate courts was also meant to be possible by mandamus review of lower court decisions. Accordingly, this mechanism provided victims with a system of checks and balances to appeal the decision made by lower courts and obtain relief in cases of possible error. This process clearly recognised the limits of lower courts and highlighted the importance of rectifying errors, even when made by the courts. As previously stated, for the advisers and co-sponsors of the CVRA, the mandamus action was chosen as an enforcement mechanism because it was considered at the time to be the best available process to respond quickly to judicial breaches and provide remedies for victims.

Co-sponsors of this legislation described the judicial scrutiny provided by this mechanism as being 'as important as the initial assertion of victims' rights.'[283] The terminology used to describe this process was powerful and promising, suggesting guarantees, and employing mandatory language to describe the role of appellate courts. For instance, to justify its importance, it was stated that

> [w]ithout the right to seek appellate review and a *guarantee* that the appellate court will hear the appeal and *order relief*, a victim is left to the mercy of the very trial court that may have erred. This country's appellate

[283] Cong. Rec. 22 April 2004: S4270

> courts are designed to remedy errors of lower courts and this provision *requires them* to do so for victim's rights.[284]

Victims were therefore given the possibility to '*immediately appeal* a denial of their rights by a trial court' and it was emphasised that the court '*must* rule forthwith.' Finally, it was stated that victims would be able to have denials of their rights reviewed at the appellate level, 'and to have the appellate court take the appeal and order relief.'[285]

These statements are clear in terms of legislative intent, suggesting that the new mechanism *guarantees* an automatic appellate hearing and adequate relief in case of judicial error/breach. Chapter 6 illustrates that this promise has not been delivered to victims. More specifically, it is shown that not all victims' rights guaranteed under the CVRA have been provided with relief when breached, and that the standard of review related to mandamus cases is not as automatic or mandatory as was suggested by the law's sponsors. Indeed, the standard of review retained by the Circuit Courts varies greatly and is inconsistently applied between the different Circuits.

The standard of review of the mandamus action under the CVRA is currently under debate in America. Although the term 'mandamus' in the statute suggests that it is a discretionary writ with its own standard of review, the language and promises made by the sponsors of the bill generally invoke a general appellate standard with less stringent evidentiary requirements. Thus, the term 'mandamus' retained by the advisers and co-sponsors created a litigious and unclear situation. One of the advisers highlighted that it was a highly litigated matter and 'was chosen because it looked like the best vehicle at the time, I

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284 Cong. Rec. 22 April 2004: S4270

285 S10912 October 9, 2004

don't know whether it would still be or not in hindsight.'[286] Similarly, Legal Adviser 2 suggested that the term mandamus reflected a technical drafting problem which could have been avoided by articulating the standard of review more clearly.[287] As will be seen in greater detail in chapter 6, the appellate courts are divided on this interpretation and have not yet adopted a consistent approach to the necessary standard.[288]

To summarize, several aims were expressed by the co-sponsors of this statute to victims about the purported role, features and aims of the new legal enforcement mechanism that include (1) a stronger and more effective remedial mechanism; (2) resources and access for victims; (3) a timely process and quick remedies; and (4) an adequate tool to achieve accountability by government and the judiciary through individual redress to victims. In addition, it is important to note that the decision to select this mechanism was not evidence-based. This chapter provides essential detail for the remainder of this thesis which argues that to date, these aims have in many respects and in various situations failed to be delivered for different reasons – limiting the process efficacy and adequacy for victims of crime.

B. Promises and aims behind the complaints process under the Code of Practice for Victims of Crime in England and Wales

286 Communication with Legal Adviser 3, October 3, 2011

287 Communication with Legal Adviser 2, October 3, 2011

288 For further information on this debate, see P Cassell 'Protecting Crime Victims in Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Mandamus Provision' (2010) 87 Denv U L Rev 599; D E Aaranson, 'New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004' (2008) 28 Pace L.Rev. 623, 662 and appellate decisions of the 2nd, 3rd, 9th Circuits, which propose a flexible/appeal standard; and appellate decisions in 5th and 10th Circuits which interpreted the standard of mandamus rigidly as the traditional writ of mandamus in common law tradition. This conflict among Circuit courts has not been resolved yet by the US Supreme Court or Congress.

In England and Wales, Rock has thoroughly researched the policy-making behind the Code's complaints mechanism and provided a thoughtful and detailed account of the various meetings that led up to these decisions.[289] The following section draws on part of his work, as well as official policy documents to understand the rationales behind the choice of this specific complaints process. Its aims were varied, and similar to American experience, this new mechanism was meant to be adequate and effective for victims to bring forward their breaches and obtain redress. Hence, these policies aimed to provide victims with an accessible, objective and timely mechanism that would enable adequate victim redress in the event of breaches. This section suggests that some of these promises were hyperbolic, misleading and ignored the mechanisms' structural limits, while others have failed to be implemented on the ground, as will be illustrated in greater detail in subsequent chapters.

1. The Code's complaints mechanism: Another product of compromise

Although explained in greater detail in chapter 3, it is worth briefly reminding the reader of the political decision-making context within which the Code of Practice for Victims of Crime and its complaints mechanism were made. From late 1999 and early 2000, the prospect of an considerable policy development on victims was beginning to be considered across related sectors of Government. One of those new long-term strategies included the review of the 1996 Charter. Consultation seminars were organised by the Director of Criminal Policy at the Home Office, Sue Street, with Ian Chisholm, that notably related to improving the treatment of victims, providing information at each stage of the process and dealing with the question of rights, service standards, enforcement mechanisms, and the possibility of a revised charter.

289 P Rock, *Constructing Victims' Rights: The Home Office, New Labour, and Victims* (Clarendon Press, Oxford 2004) 539; Home Office, 'Criminal Justice: The Way Ahead' (Cm 5074, February 2001)

In the Spring of 2000, as the 2001 general election loomed, Ministers generated further pressure to place victims at the 'heart' of the criminal justice system. A seen in chapter 3, this was also influenced by the European Framework Decision and the consultation paper commissioned by the Stephen Lawrence Steering Group about victims' rights, standing and legal representation entitled 'Formal Involvement of Victims in Criminal Legal Proceedings' (February 2000), which described the rationales behind rights and enforcement mechanisms in similar terms as its American counterpart. Thus, it framed the issue in terms of an imbalance of criminal proceedings and provided analogies between the rights of defendants and victims with regards to legal standing and representation in criminal proceedings.

In this context, the consultation paper on the *Victim's Charter* written by the Victims Steering Group in August 2000, suggested that the Government would be open and welcomed comments about the idea of providing victims with justiciable rights and the possibility of undertaking *civil action* to sue criminal justice agencies and receive compensation if they are not met. Thus, as stated by Rock at this stage, 'the emphasis shifted from a simple revision of the Charter to the possibility of something more substantial, perhaps even a Victims' Bill of Rights.'[290]

Following New Labour's reelection in 2001, the team was replaced, but nevertheless continued consultations on a new Charter. Legal advisers argued that direct recourse to the courts would be unprecedented and generally discouraged this approach. The New Home

[290] Rock, *Constructing Victims' Rights* (n 289) 527; Chisholm suggested that criminal justice agencies were more confident about the services they were capable of delivering and thus suggested that rights should either be legally enforceable with sanctions, or there should be a 'Bill of Rights' which would provide key rights as entitlements for victims.

Secretary, David Blunkett was therefore less inclined to recognise legally enforceable rights for victims than his predecessor and as a result of compromise, it was agreed during the second meeting of the Victim's Charter Review working Group in January 2002 that a redress mechanism through the Parliamentary Ombudsman process would be recognised.

It was also decided that the Home Secretary, in consultation with the Lord Chancellor and Attorney General, would issue for the first time a statutory code of practice for victims, to be binding on criminal justice agencies.[291]

2. The emphasis on impartiality

During the first meeting of the Charter's Implementation Group in October 2001, it was unclear which form the proposed Victims' Ombudsman or Commissioner would take. However, after a meeting between the Home Office, the Cabinet Office and the Parliamentary Commissioner for Administration (Parliamentary Ombudsman or PO)[292], the dual aim of the Victims' Ombudsman was set aside based on insufficient guarantees of impartiality. Thus, according to the PO, the Charter review's Victims' Ombudsman proposition was a hybrid creation which was quite contrary to the Government's own June 2000 review of public sector ombudsmen.[293] Thus, recommendation 6.15 of this Review

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291 According to Paul Rock this was not accepted by many CPS officials. Accordingly one of them stated at the meeting that accompanied the consultation that pressure should not be applied to 'an independent prosecuting authority' See Rock, *Constructing Victims' Rights* (n 289) 555

292 Currently, this Ombudsman is referred to the Parliamentary and Health Service Ombudsman which provides a service to the public by undertaking independent investigation into complaints that government departments, a range of other public bodies in the UK, and the NHS in England have not acted properly or fairly or have provided a poor service.

293 Rock, *Constructing Victims' Rights* (n 289) 553

(2000) (Colcutt Review)[294] stated that 'An ombudsman's function must remain grounded in addressing injustice caused [to] *sic* an individual and own-initiative investigation appears inconsistent with impartiality.' In other words, the Parliamentary Commissioner suggested that the proposition to have the Victims' Ombudsman's role as champion of victims was incompatible with the notions of impartiality and neutrality as well as the adjudicative functions proper to an Ombudsman. In January 2002, he stated:

> It would be impossible both to be a champion of a particular group and accepted as an impartial investigator of disputes between members of that group and other persons or organisations.[295]

Additionally, the Parliamentary Commissioner in these discussions suggested that the Victims' Ombudsman would encroach on existing terrain already occupied by him and other public sector ombudsmen as independent investigators into complaints towards public administrators and public services. Essentially, to avoid *losing terrain* and to *ensure impartiality*, the PO was designed by the government to handle victims' complaints over the Victims' Ombudsman.[296]

Following these discussions, the Home Secretary had to agree that a Victims' Ombudsman would be developed in line with agreed principles and terms of the Colcutt Review. Hence, at the second meeting of the Victims' Charter Review Working Group in January 2002, the Home Secretary announced that the victims' ombudsman/commissioner's

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294 P Colcutt and M Hourihan, 'Review of the Public Sector Ombudsmen in England: A Report by the Cabinet Office', (Cabinet Office, April 2000) [Colcutt Review] This Review proposed the restructuration of the Ombudsman system in England and Wales, the separate Ombudsmen was meant to be replaced by a single omnipotent entity the 'collegiate structure' to which the public would have direct access through a single route of complaints and victims would be able to approach the Ombudsman through that single route instead of a dedicated Victims Ombudsman.

295 Rock, *Constructing Victims' Rights* (n 289) 553

296 Home Office, 'Justice for All' (Cm 5563, 2002) 37

model was clearly inconsistent with the implementation of the Colcutt Review, intended to become law in 2003-2004.[297] An ombudsman/commissioner whose role would be to investigate complaints and champion victims' interests would be in direct contradiction with Recommendation 6.15, on the importance of impartiality. Hence, in the spirit of impartiality, the Parliamentary Ombudsman was chosen to temporarily take responsibility for enforcing the victims' Code of Practice until the Colcutt Review became statute and a 'resilient and flexible' single collegiate entity – as recommended by the Review -- would take over under that statute.[298] Hence, similarly to the US approach, it becomes clear that to a great extent, the selection of this specific mechanism was not based on any clear evidence of efficacy, but on other interests and compromises.

The Parliamentary Ombudsman was created in 1967 to investigate impartially into alleged maladministration, as stated:

> The Parliamentary Commissioner's [or Parliamentary Ombudsman] investigations, far from replacing these traditional procedures, would provide the backbench Member with a new and powerful weapon which, until then, neither he individually nor the House collectively had ever possessed that is the possibility of a through and impartial investigation into alleged maladministration. The knowledge that this new servant of the House was there, with the power to go wider and further than anyone except the Comptroller and Auditor General, should surely put heart into those backbenchers who felt that they counted for little more than lobby fodder.[299]

Impartiality was therefore considered a crucial component of the Ombudsman process that was explicitly provided for the first time to respond to victims' breaches. It was therefore

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297 Rock, *Constructing Victims' Rights* (n 289)

298 Rock, *Constructing Victims' Rights* (n 289) 556

299 R Gregory and A Alexander, 'Our Parliamentary Ombudsman Part I: Integration and Metamorphosis' (1972) 50 *Public Administration* 313, 324-325 This statement was made by Richard Crossman, member of the National Executive Committee of the Labour Party in 1966.

a clear change from previous policies under the 1990 and 1996 Victims' Charters discussed in chapter 3, which would only provide victims with the ability to bring forward a complaint to the agency in breach without any clear or explicit recourse to an independent body.

The importance of impartiality was brought forward and emphasised notably in the White Paper *Justice for All*,[300] which greatly contributed to the Code's enactment. It stated that a 'completely independent' Parliamentary Ombudsman would be responsible for handling victims' and witnesses' complaints placed by victims and witnesses who were not satisfied that the Code had been followed. Clear promises and hopes were therefore expressed regarding this mechanism's ability to provide an independent Ombudsman process for victims of crime.

Despite the importance attributed to impartiality however, this feature strictly focuses on the Parliamentary Ombudsman as an independent assessor of complaints. This specific focus, however, fails to take into account the wider Parliamentary Ombudsman process as a whole, which also includes the internal complaint to the agency allegedly in breach and particularly the Member of Parliament (MP) filter that is a mandatory preliminary stage related to the PO process. When considering these additional components, particularly the MP filter, it becomes quite clear that the promised feature of impartiality within this process has limits and consequently does not adequately deliver its promise of independence. In effect, as will be seen in greater detail in section 5, the MP filter's political nature can become a barrier for victims for various reasons, which can undermine the process' objectivity and accessibility. In addition, during the preliminary stages of the process, under

[300] *Justice for All*, (n 296) 48 was published in 2002 and suggested that victims should be at the heart of the system and aimed to rebalance the system in favour of victims, witnesses and communities. It proposed a new office for Commissioner for Victims and Witnesses, a National Victims Advisory Panel a right to complain to the Parliamentary Ombudsman and a new Code of Practice for Victims.

which victims must address their complaint to the agency in breach, victims must go through various internal filters within the agency complained about, which inevitably confines victims to partial bodies for a good part of the process. This can also be a substantial limit to the promise of impartiality that was made to victims about the Ombudsman, which arguably also includes preliminary non-objective stages within the wider process.

3. The promise of a novel and effective improvement on past policies

Similarly to the enforcement reform under the CVRA, the new mechanism in England and Wales under the Code of Practice for Victims of Crime was presented in official documents as an effective tool and a considerable improvement on previous mechanisms available for victims to respond to victims' service rights breaches – particularly information breaches - by criminal justice agencies. Hence, in the White Paper *Justice for All*, it was stated that it would 'introduce a right of complaint to the Parliamentary Ombudsman for victims and witnesses who are not satisfied that the Code has been followed.'[301]

In effect, it was made quite clear by the policy-makers in the *Justice for All* White Paper that this mechanism was part of a wider solution to improve victim confidence in the system and ensure greater collaboration between victims and the criminal justice system. More specifically, it was portrayed as a solution to fulfil several undelivered promises, namely breaches of information rights by criminal justice agencies. As seen in section 3, breaches of information rights in England and Wales were considered to be significant flaws that were to some extent documented in the victims' literature, as seen in the introductory

[301] *Justice for All*, (n 296) 37

chapter above. Hence, this suggested that despite the importance of information rights for victims, they were nevertheless often kept in the dark and not informed about the progress and dates of their case by criminal justice agencies. The new enforcement process was presented as a concrete solution that would enable victims for the first time to bring their alleged complaints of breaches forward to a separate mechanism for investigation and redress if breaches were found. It was therefore highlighted in the consultation paper that

> In recent years we have embarked upon far reaching reform of the CJS. There has been increased investment in and priority given to improving the experience of victims in the CJS. In this section we outline some of the key improvements we have made.[302]

Thus, this new process was described as one of the 'key improvements' made by the government to improve victims' previous poor experiences in the criminal justice system and considered to be a 'far reaching reform of the CJS.'[303] Evidence throughout this thesis will illustrate that contrary to this very broad and hyperbolic description, this reform has, at this stage, been less far reaching than suggested.

4. Aiming for a quick and accessible process for victims of crime

The Parliamentary Commissioner (Parliamentary Ombudsman) [PO] is an English body created under the Parliamentary Commissioner Act 1967 (the Act) [PCA] which gives MPs access to an 'independent and authoritative investigator' in order to protect the citizen

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302 Home Office, 'Rebuilding Lives' (Criminal Justice System, Cm 6705 2005) 6

303 See Id; Further, as many commentators in the area have previously noted, such promises can be quite confusing for individual victims, considering that this mechanism and its remedies operate outside the criminal justice process and therefore the connection between this mechanism's consequences and its far-reaching promises towards the criminal justice system may not be accurate.

efficiently from executive maladministration which results in injustice.[304] It was also designed to provide informal, rapid and easy redress for grievances.[305]

Since the adoption of the Domestic Violence, Crime and Victims Act 2004 and the Code of Practice for Victims of Crime, special provisions have been added to the 1967 Parliamentary Commissioner Act 1967 (PCA)[306] to create a separate remit for complaints under the Code. The PCA's remit was therefore extended and adapted to the specificity of complaints raised by victims in the context of executive breaches by criminal justice agencies under the Code. This separate remit for victims was suggested by the Parliamentary Ombudsman since the term 'maladministration', used under the Act's general remit, was rather vague and it was unclear whether a breach under the Code could be interpreted as maladministration.[307] Consequently, this separate remit under this Act specifically refers to *breaches* to the Code of Practice for Victims of Crime instead of maladministration. In addition, complaints under the Code's special remit are handled by a specific and specialised team within the PCA's office to ensure the adequate handling of these complaints that require specific knowledge, training and expertise about the Code.[308]

Although officials recognised the specificity of complaints under this Code by creating a special remit for these types of complaints, the Code's remit under the PCA continues to rest on broadly the same principles, structure and functioning as other types of

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304 Home Office, 'The Parliamentary Commission for Administration', White Paper (Cmnd 2767, 1965)

305 T Endicott, *Administrative Law* (2nd edn, OUP, 2011) 472

306 See Parliamentary Commissioner Act 1967, s 5(1B)(a).

307 Ombudsman Communication with jurisdiction adviser, June 2, 2010

308 Rock, *Constructing Victims' Rights* (n 289) 559 refers to an e-mail conversation with a Grade 7 officer at the Home Office dated August 21 2003.

complaints to the PO, and thus aimed to provide a rapid and informal mechanism for redress. Further, MPs continue to be a central and mandatory element of this procedure and are the only ones with direct access to bring complaints to the PO.

Despite this mandatory requirement, official documents that introduced the new complaints mechanism under the Code of Practice for Victims of Crime failed to mention the MP filter and other mandatory stages of the process – depicting the PO process as directly accessible, straightforward and rapid as follows:

> If victims feel that they have not received the level of service set out in the Code, they will be able to take their complaint to the Parliamentary Ombudsman (…).[309]

Similarly, the CPS has also failed to specify that victims should complain to their MP if they remain dissatisfied after having taken their complaint to the agency accused of breaching the Code.[310]

Contrary to the quick and directly accessible process depicted in these statements, the data collated for this research and analysed in chapter 5 suggests that the MP filter is heavily enforced by the PO, and thus will not consider any complaints being directly brought forward by individual victims. The data also suggests that the MP filter acts as a barrier for a number of complaints that are rejected and returned for the failure to be sent by an MP.

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309 *Rebuilding Lives*, (n 302) 7

310 http://www.cps.gov.uk/legal/d_to_g/direct_communication_with_victims_/#JR Under the Code of Practice for Victims of Crime.

Finally, as will be seen in chapter 5, complaints are declined for investigation for a number of reasons– some of which are purely procedural. This raises serious doubts about whether this new mechanism has indeed been accessible and straightforward for individual complainants.

In brief, many of the main policy documents that introduced this new and promising mechanism as accessible and rapid have failed to take into account the earlier mandatory stages and structural components, that in practice have rendered the process cumbersome, largely inaccessible and lengthy for victims (discussed in greater detail in chapter 5).

5. Promises of redress for victims of crime

In addition, this mechanism's ability to provide redress for victims was a crucial feature that needed to be distinguished from the previous existing situation in which the process and any possible remedies were considered internally within the agency allegedly in breach. This section outlines this novel aim and suggests that this mechanism was presented in a way that overemphasized the types of redress available for victims and more specifically, their legal enforceability.

The types of redress available for victims under this mechanism included apologies, explanation and compensation. The latter was mentioned in official documents despite earlier concerns expressed by the PO. In effect, according to communications with the jurisdictional adviser at the PO office, I was informed that prior to the official introduction and selection of this mechanism, the Home Office approached the PO's office in January 2002 about the review of the former Victims' Charter and proposed Ombudsman role. One key concern that

was highlighted at the time by the PO was the original Home Office plan to include in the PO legislation under the special Victims' Code remit, something about compensation for breaches under the Code. The PO's concern was that this might have suggested that monetary compensation could be expected for breaches of the Code which the PO thought would not be able to deliver, and might cause unrealistic expectations for victims of crime. They considered that redress for a breach under the Code was more likely to take the form of apologies or explanations, and perhaps changes to procedures. Where monetary redress was given, it was likely to be a small sum to acknowledge fault and resulting stress.

Although the language varied between the different documents and statements, redress was initially presented as a guarantee, despite it being a discretionary recommendation by the PO.[311] In addition, this mechanism was presented as being legally enforceable, with additional means of redress when in fact this has not been the case. For instance, it was suggested that it was an appeal to the PO when rights have not been met by the different government agencies. Indeed, when introducing the Code during its enactment, the Criminal Justice Board also presented this process as an appeal by suggesting that 'victims will have a right of appeal to the Parliamentary Ombudsman if they feel their rights under the Code have not been met.'[312]

Further, the CPS's reference to this mechanism suggests that it provides a legal right to appeal by suggesting that

311 The terminology used by the Home Office in *Justice for All*, (n 296) 48, is the strongest with regard to its guaranteed promises made for victims as it describes the PO process as being able to 'ensure redress' for victims. The wording in *Rebuilding Lives,* (n 302) 7 is more accurate as it suggests that the PO's redress recommendations are merely recommendations and not legally enforceable.

312 http://webarchive.nationalarchives.gov.uk/20100419081707/lcjb.cjsonline.gov.uk/cheshire/home.html

> for the first time victims are also given the legal right to appeal should they feel that any agency has not met their obligations. If any victim feels that they have not received the level of service they are entitled to under the Code, and are dissatisfied with the response to their complaint, they can take their case to the Parliamentary Ombudsman via their MP.[313]

To obtain more details on this legal right to appeal I contacted the CPS Strategy and Policy Directorate and was informed that the term 'appeal' did indeed refer to the Parliamentary Ombudsman process. It also highlighted that although the Code is a statutory commitment, it does not of itself provide victims with a legal right of appeal. Hence, it was made clear that the CPS's promise to victims is misleading, suggesting more in terms of remedial possibilities than it can actually deliver.

C. Distinguishing two regimes: contrasting the main characteristics behind the complaints process under the Code of Practice for Victims of Crime in England and Wales and the legal enforcement mechanism under the CVRA

In order to understand the chosen mechanisms, table 2 below, employs a number of theoretical concepts that were developed in the administrative law and the victims' rights literature that best describe the main differences between both mechanisms in terms of philosophy and structure.

313 http://www.cps.gov.uk/thames_chiltern/victim_and_witness_care/the_code_of_practice_for_victims_of_crime/

Table 2: Distinguishing two regimes: contrasting the main characteristics behind the complaints process under the Code of Practice for Victims of Crime in England and Wales and the legal enforcement mechanism under the CVRA

Characteristics	**PO process in E&W**	**Motion in criminal proceedings & mandamus**
Role	Predominantly problem-solving and system fixing	Problem solving
Operating model	Investigative	Adversarial
Legal force	Limited binding (recommendations)	Binding
Style of control	Cooperation and explanatory	Coercion
Branch	Executive and Parliamentary	Judiciary
Model	Non-punitive and punitive	Mainly punitive

First, the administrative law literature on enforcement has suggested that mechanisms can be described as accomplishing two distinct roles, namely problem solving and system fixing.[314] The problem-solving role refers to models that allow for redress of individual grievances, as opposed to the system fixing models that monitor the quality of administrative action and look for ways to improve the system. The former model focuses more on the individual, whilst the latter emphasizes its decisions towards the government agency whose actions are under review. Both mechanisms under analysis in this study can be primarily classified as problem-solvers, since the decision-makers do not instigate investigations and instead, these mechanisms are triggered by individual grievances. However, to a limited extent, the English PO model can also be classified as a system fixer, since it can also propose systemic remedies to remedy breaches. Indeed, as will be seen in chapter 6, both complaints that reached the PO's investigatory stage were not only remedied with individual-based redress, but also with systemic remedies.

[314] S Aufrecht and G Brelsford, 'The Administrative Impact of the Alaskan Ombudsmen' in GE Caiden (ed), *International Handbook of the Ombudsman (Country Surveys)* (Greenwood Press, Westport 1983) 237

In addition, a notable difference between both mechanisms can be seen in the way they both operate on the ground. As highlighted in this research, the PO mechanism operates within an investigatory framework that examines in greater depth the way an agency has acted. On the contrary, the courts under CVRA's remedial mechanism operate within an adversarial context. This operating method limits the information available for decision-makers, since most of it relies upon what is brought before the decision-maker. In this respect, the courts are not provided with adequate powers and tools to conduct more exhaustive investigatory type of inquiries. As highlighted in this study, it was made clear that during the investigatory stage, the PO can have access to a number of documents and information related to the agencies, which is not the case for courts.

Moreover, both mechanisms are very different with regards to their legal force. The administrative theory on enforcement has highlighted that decisions can be legally binding or not. Although the PO's recommendations are meant to be followed, the Pensions case analysed in detail in chapter 6 illustrates that the PO's decisions remain recommendations and are not legally binding like courts. Courts, on the other hand, have several statutory powers to enforce their decisions and the possibility to sanction parties that fail to implement these decisions.

Further, the Anglo-American literature on administrative control has classified mechanisms by their different styles of control that represent two extreme positions on a

continuum, namely the "coercive" and "cooperative" control.[315] Within a coercive style of control, the outcomes are solely produced by the controlling institution, which unilaterally imposes its decisions on the government agency concerned. This is a form of top-down approach where the controller or decision-maker acts as the "superior" of the agency in question and when the agency fails to implement those decisions, it is considered to be disobedient and sanctions can ensue. On the contrary, "cooperative control" of administrative action supports the idea that an outcome is the product of communication and negotiations between the controller and the controlled. Both the controlling institution (or the decision-maker) and the government agency concerned can be considered as two different subsystems, or social spheres, each with its own reality, language and rationality[316] and thus decisions can only be effective by understanding the other system through discussion and communication. Arguably the evidence suggests that the PO model would fit more into the "cooperative control" model since discussions and communications take place throughout the different stages of the process. For instance, the PO's internal resolution process, the MP process (in theory), as well as the PO's findings, recommendations and report all include dialogues between the different parties throughout the process and explanations. Indeed, even in cases where there is a failure to comply with the PO's findings, the PO can present a report before Parliament which also engages a discursive process through parliamentary methods. On the contrary, court decisions as a means of resolving violations under the CVRA can be considered a more "coercive" form of control since this model does not leave much room for communication and discussion once the conflict reaches that stage and a judgment needs to be rendered. Nuances can be made however, since as will be seen in chapter 7, when examining the work of victims' rights legal clinics, there is an element of discussion and

315 M Hertogh, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23(1) *Law & Pol'y* 47

316 R Cotterrell, *The Sociology of Law: An Introduction* 2nd ed (London, Butterworth 1992) 65; G Teubner, *Law as a an Autopoietic System* (Oxford, Blackwell 1993)

conflict resolution that is sometimes attempted before reaching a stage where the action is brought before the courts.

Finally, both mechanisms can also be distinguished by the constitutional branch they are part of and are meant to serve. The PO model is predominantly meant to act as a servant to Parliament. Indeed the MP filter is run by a Member of Parliament and the PO is also meant to report to Parliament in cases where departments in breach fail to comply with its recommendations. Although most of this model is grounded within the parliamentary branch, the PO model's first stage, namely the internal resolution process to the relevant agency is part of the executive branch since most of them are part of government. Hence, this process is very different to the CVRA's enforcement mechanism which is entrenched within the judiciary branch and thus operates and reasons differently.

In addition to the characteristics provided by the administrative law literature, the victims' rights literature has also developed two new models of victims' rights that facilitate the philosophical understanding of both enforcement mechanisms. Hence, adding to Packer's due process and crime control models,[317] Roach developed two new criminal justice models that have included crime victims and potential victims, namely the punitive model and the non-punitive model.[318] The former recognizes the criminal sanction as a way to control crime, whilst the latter stresses crime prevention and restoration as fundamental rationales.

317 H Packer, 'Two Models of the Criminal Process' (1964) 113 *U PA L Rev* 1

318 K Roach, 'Four Models of the Criminal Process' (1999) 89(2) *Journal of Criminal Law and Criminology* 671

Classifying the recent enforcement initiatives strictly within one model is not realistic and therefore inspired by Packer's original warning, Roach also highlights that any actual system of criminal justice is bound to reflect aspects of all models. Bearing this in mind, it is nevertheless possible to predominantly situate the mechanisms under analysis in one of the identified models.

Arguably, for a number of reasons outlined below, the CVRA's legal enforcement initiative can partly fit into Roach's victims' rights punitive model. Indeed, the punitive model places the criminal justice system under constant pressure to improve itself and aims to encourage victims to report their crimes, prevent re-victimization within the criminal process, and respond to high level of victimization. Under this punitive model, and contrary to Packer's crime control model, the work of police and prosecutors is subject to scrutiny not only from the accused, but also from victims and their representatives. In addition, victims and their supporters request for standing in criminal proceedings as well as victims' bills of rights and claims to constitutional security in response to both crime and the state's treatment of crime victims. Further, similarly to the crime-control model, the punitive model includes interests (professionalized interests in crime control and victims' advocacy groups representing victims who have experienced the most serious crimes) that have emphasized the idea that criminal sanction controls crime. Although the enforcement mechanism under the CVRA does not strictly emphasize the idea of criminal sanction, Congress debates and interviews with policy-makers throughout this research illustrate that many of Roach's punitive model's characteristics are found within this initiative. For instance, chapter 3 has outlined in greater detail some of the rationales behind the CVRA and its enforcement mechanism, including the need to prevent secondary victimization within the criminal process, the hope to constitutionally protect victims' right from the state's treatment of

victims, the scrutiny behind the work of police and prosecutors and the importance of recognizing standing for victims in criminal proceedings. In addition, as highlighted throughout this research, the emphasis on the criminal sanction as a way to control crime was also illustrated by the robust forms of remedies available for breaches related to punishment and sanctions. Indeed as developed in chapter 6, robust remedies were available for breaches of the right to be heard at sentencing as well as breaches that relate to restitution. The focus on restitution and reparation, however can also arguably fit into Roach's non-punitive model that focuses on healing the harm done to victims.

In contrast, the enforcement mechanism under the Code of Practice in England and Wales takes less of a punitive perspective, focusing less on sentencing and outcomes of criminal proceedings and more on the needs of victims for services that do not conflict with the accused's due process protections. The Code and its mechanism focus on healing, compensation and the needs of victims in terms of services more than their rights within criminal proceedings. Indeed, there are several service providers listed under the Code that offer varied services that not only focus on the criminal justice process but also continue once criminal proceedings have ended. Despite this rapprochement with the non-punitive model, the English approach also includes elements that are part of the punitive model by stressing the utility and importance of criminal proceedings and criminal sanctions. In addition, the services listed in the Code are generally only available for victims that have collaborated with the system by reporting their crimes to authorities and thus have engaged with the criminal process. In this regard, the presence of these components suggests that the English approach expands into Roach's punitive victims' model. Despite this reality however, unlike the CVRA's mechanism, the English experience does not go insofar as recognising victim

standing in criminal proceedings for breaches of victims' rights related to sentencing and therefore its focus on punishment is much less present.

Conclusion

In conclusion, despite the fact that they are rooted into different philosophical traditions, operate very differently and within different forums, this chapter demonstrates that new remedial schemes were developed in both jurisdictions without evidence-based research to support their efficacy. In effect, in both jurisdictions the choice of mechanisms was heavily based on political compromise without much discussion, research or reflection on whether the implementation of these mechanisms have worked or presented limitations in different contexts and for different types of rights. These mechanisms in the US and England and Wales nevertheless aimed to include relevant components and features that would render these processes and remedies adequate and effective for victims of crime. In brief, these mechanisms were portrayed as improvements on previous mechanisms and were meant to achieve efficacy in delivering adequate redress, accessibility, objectivity and a rapid process. The next chapters examine these mechanisms and their implementation in greater detail and suggest that to a certain extent they have failed to deliver and in various situations are incapable of delivering some of these main goals.

CHAPTER 5: CIRCUMVENTING OBSTACLE COURSES: THE BARRIERS TO JUSTICE FOR VICTIMS IN THE US AND ENGLAND AND WALES

Overview

As seen in chapter 4, in the United States and England and Wales, these new policies were meant to provide adequate and effective mechanisms to bring complaints about breaches forward and obtain redress. More specifically, the enacted mechanisms were portrayed as having essential features that would render the process adequate for victims, including accessibility, timeliness, objectivity, and adequate redress. This chapter demonstrates by means of an empirical enquiry, as well as primary and secondary sources, that despite their accessible aims, the chosen mechanisms of accountability are in many respects ill-suited and ineffective for individual victims. In effect, when analysing these mechanisms by examining the aims described in chapter 4, these mechanisms and their implementation have proven to be largely inaccessible, lengthy, complex, and have given rise to a number of inconsistencies during their implementation. Chapter 6 will complete this analysis by arguing that the remedies available also presented their share of inadequacies and limitations for victims of crime.

More specifically, the research demonstrates that the legal enforcement mechanism in America under the CVRA is lengthy and complex and consequently, access to this process is heavily reliant upon the availability of legal representation. Despite this reality, legal representation generally remains costly and unavailable and this creates a significant accessibility barrier to this process for a number of victims. In addition, even when they do

receive pro bono legal assistance, victims' interests may not always be best advanced, due to the litigation methods adopted by some victims' pro bono lawyers that aim to advance the wider victims' movement, as well as their lack of experience and training. This can result in protracting an already long process and creating additional unmet expectations for victims. Finally, this process has given rise to a number of inconsistencies, particularly in its application by legal advocates and the judiciary. In England and Wales, access to the Code's complaints process has also proven to be, to a certain extent, ill-suited and ineffective for victims, namely due to its structural cumbersomeness, complexities and length, its inconsistent application by MPs, as well as its lack of objectivity at various stages of the process, including the internal review by agencies in breach, and the MP stage of the process. However, it will be seen in chapter 7 that despite its accessibility limitations and process-related difficulties, this mechanism nevertheless remains more accessible than the legal process under the CVRA.

A. The CVRA's enforcement mechanism: A process with significant obstacles for victims of crime

This section argues that in America, the legal process under the CVRA has failed to deliver its fundamental expressed aim made to victims, namely to provide them with a straightforward, quick, accessible and consistent process that allows them to bring forward their alleged breaches and obtain redress, independent of prosecutors.

Before starting the analysis, it is useful to provide some data on the number of motions filed under the CVRA in the District Courts. According to a relatively recent

Government Accountability Office's (GAO) study completed between 2004 and 2008, there have been relatively few oral or written motions.[319] Indeed, a total of forty-nine motions (written and oral) were made since the CVRA's enactment. Twenty-eight of these motions were filed by victims or victims' attorneys and twenty-one by a prosecutor on behalf of victims. In addition, twenty-seven petitions for writs of mandamus were filed in the court of appeals. Although this study listed various reasons that can account for the low numbers[320], the inaccessibility of this process for individual victims represents another obstacle that can partially account for some of these results. This is particularly likely in cases where victims do not have access to legal representation and wish to bring forward independent motions from prosecutors under the CVRA.

1. The CVRA's legal enforcement mechanism: A lengthy and complex process that necessitates legal representation

Although the CVRA was presented as an expeditious and straightforward process by which victims can represent themselves during proceedings[321], in reality, the process can be quite

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319 In a recent study conducted by the US Governmental Accountability Office in 2008, the GAO collated data on the number of times the CVRA rights were asserted in District Courts and Courts of Appeals between its enactment in 2004 and 2008. It highlighted its concerns following a relatively low number of oral or written motions. See United States Government Accountability Office (GAO) Report to Congressional Committees, *Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act* (December 2008)

320 Id: Following communications with victim attorneys and federal judicial officials, the GAO gave several potential reasons for the low number of victim motions, including victims being satisfied with how they were treated, victims being intimidated by the judicial process or too traumatized by the crime to assert their rights. However, the most frequently cited reason was the lack of awareness of this mechanism. Their completed survey also suggests that 134 of the 236 victims who responded regarding the filing of motions reported that they were not aware of their ability to file a motion in district court to assert their rights, and 48 did not recall whether they were aware.

321 See section 18 U.S.C. § 3771 (d) (1) which states that 'The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a)).

long and complex, requiring victims to obtain effective and specialised legal representation in order to have access to this process.

First, the CVRA's enforcement process has proven to be lengthy for victims of crime. Legal motions under the CVRA are generally made in writing[322] and the process unfolds with a *full round of briefings*.[323] Specifically, the victim sends a motion for relief and the defence can file a responsive brief[324] to which the victim then replies.[325] Hence, standard practice in most cases includes at least these three pleadings before the judge renders a decision.

If a motion for relief is not granted, victims can choose to seek a mandamus by filing another motion to the appellate court. Although the mandamus action was presented as a form of quick interlocutory appeal in floor statements and conversations with some of the drafters – it nevertheless entails further delays, particularly where a case is returned to the district court for reassessment. The following examples are not exhaustive, but are useful to illustrate that contrary to its purported aims, the CVRA's legal enforcement process can be quite lengthy for victims, particularly when a mandamus motion is filed.

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322 Although victims can and have asserted their rights orally, according to Garvin, this process is unusual and even when it occurs, it is usually followed up with a written motion.

323 Communication with Meg Garvin, Director of the NCVLI, October 3, 2011; August 16, 2012.

324 However, according to some clinic directors, defense attorneys will most likely accede to the victim's attorney's request when faced with a well-documented, detailed, and well-researched brief rather than attempt to make a response if unfamiliar with the law. See R Davis, J Anderson, J Whitman and S Howley, 'Securing Rights of Victims: A Process Evaluation of the National Crime Victim Law Institute's Victims' Rights Clinics' (RAND, 2009) 80.

325 See Davis and al.(n 324); Also, when victim representatives within these clinics find out about a potential victims' rights potential violation, they may place a call to the criminal justice official to see whether the issue can be easily remedied and thus if remedied at that stage the process can be quite expedient.

For instance, in *Re Dean*[326], the victims filed a motion in November 2007 in the district court to have a plea agreement rejected following the failure to consult and notify victims of this agreement. Following a court rejection, the victims filed a mandamus motion in February 2008 with numerous briefings to dispute the standard of review. The appellate court rendered its decision six months later, in May 2008, rejecting the mandamus, but stating that the district court would fully consider the victims' objections and concerns in deciding whether the plea agreement should be accepted. The case was brought back to the district court where victims were heard and the final decision was rendered in 2009 – almost two years after the first victims' motion was filed. Further, in *In re* Kenna[327], the victims filed a petition for mandamus following the district court's refusal to listen to them during sentencing. Instead of taking seventy-two hours as required by law, the mandamus process took over six months, and was granted with apologies by the Ninth Circuit Court for the long delay that was added to the process. The overall process went on for a longer period, since having granted the mandamus, the Circuit Court ordered that the district court should determine a proper remedy following a timely motion filed by the victims within fourteen days. Moreover, as will be seen in greater detail in section 5, the *Antrobus* case, which lasted over a year, also illustrates the significant delays delivered by this process. Finally, a number of mandamus cases have taken longer than the seventy-two hours fixed delay under the CVRA – further delaying an already lengthy process.[328] Hence, while courts have criticised

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326 See e.g. *In re* Dean, 527 F.3d 391 (5th Cir. 2008)

327 *In re Kenna*, 435 F.3d 1011, 1017 (9th Cir. 2006)

328 See e.g. U.S. v. Monzel, 641 F.3d 528, 395 U.S.App.D.C. 162 in which these delays were caused by the complexity of the case that involves various statutes and the conflicting views among circuits. *In re* Kenna, 435 F.3d 1011, 1017 (9th Cir. 2006);

Congress for imposing unrealistic delays on courts[329], there are also grounds for criticising Congress for having made promises to victims that cannot be delivered.

Further, this enforcement process has proven to be complex for victims and therefore necessitates legal representation. Meg Garvin, a legal expert on this mechanism and current Director of the National Crime Victim Law Institute (NCVLI), suggests that as with defendants' rights, victims' rights would be 'utterly meaningless' if they did not have a lawyer, since the legal vocabulary employed for CVRA motions is specialised and very different to ordinary everyday language. She concludes that 'there is no way a victim can do it – especially a victim who is in trauma, there is no way.'[330] The series of interviews conducted for this study also confirmed that it is impossible for victims to represent themselves before the courts due to the *complexity* of procedures, as will be seen below. Hence, they must necessarily have recourse to legal representation either through pro bono legal services – generally provided by clinics or individual pro bono lawyers – or through the payment of private lawyers.

Even the mandamus process -- which as seen in chapter 4, was presented as a form of quick interlocutory appeal according to floor statements and conversations with some of the drafters -- presents its share of complexities. For instance, according to Garvin, in order to present a motion for relief or a mandamus, it is crucial to frame the legal issue correctly,

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329 In the case of *In re McNulty*, 597 F.3d 344, 2010-1 Trade Cases P 76,921, C.A. 6 (Ohio) 2010, the court stated: "We would like to express our frustration that Congress has permitted the courts only 72 hours in which to read, research, write, circulate, and file an order or opinion on these petitions for a writ of mandamus. Especially in cases such as this, where the law is relatively new and untested, both litigants and future courts would benefit from additional time to prepare a clear and well-reasoned decision."

330 Communication with Meg Garvin, Director of the NCVLI, October 3, 2011

specify who it is issued against, and respect the timelines provided under the law.[331] She adds that 'the clock starts running very quickly, so there are definitely some procedural hurdles' and highlights that in order to make a defendable case, it is also important to be aware of the debate around certain jurisprudential issues, like the standard of review regarding the mandamus action, which would not be known to most victims.

Consequently, presenting a motion for relief in criminal proceedings as well as filing subsequent mandamus writs often amount to complex, elaborate and lengthy procedures with quite limited timescales in which to complete them. It also requires a good understanding of this area of law in order to navigate the process – which is generally provided by lawyers specialising in the area of victims' rights. In addition, the overall legal enforcement process can be very long for victims. These elements constitute significant barriers to self-representation and thus the process has not always been accessible, timely, and straightforward. Instead the process has proven to be lengthy, complex, and requiring legal representation. Further, as illustrated below, the requirement of legal representation and its unavailability for most victims creates a further barrier to access for victims.

2. The CVRA's legal enforcement mechanism: An hardly accessible process for victims of crime

The following section suggests that the legal enforcement process contains significant accessibility barriers for victims of crime, primarily due to two elements, namely (a) the significant legal costs associated with legal representation under the CVRA and the limited

[331] Garvin specified that some challenges must be made very quickly by victims. For instance, if the process around the plea agreement is challenged, the victim only has about 10 days to do it.

funding available for pro bono representation and (b) the case selection method focused on achieving legislative gains for the system and victims' rights movement.

a) The legal costs of legal representation and limited pro bono funding: accessibility barriers to the enforcement process

During the CVRA's enactment, the Federal government recognized the importance of, as well as the financial difficulties related to, legal representation of victims in the criminal justice system and consequently included congressional funding for pro bono legal representation as part of the law.[332] These funds were allocated as part of a five year Federal Demonstration Project following a grant from the Federal Department of Justice, the Office for Victims of Crime and the Office of Justice Programs to the National Crime Victim Law Institute (NCVLI) – a national non-profit legal advocacy organisation based at the Lewis & Clark School of Law.

With this grant, the NCVLI created a number of state and federal victims' rights clinics across the nation[333] which remain the principal source of free victim legal representation under the CVRA. The NCVLI provides training for these clinics and promotes awareness, education, and the enforcement of victims' rights in the criminal justice system as

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332 A grant of $7 million was offered for 2005 and $11 million annually for 2006-2009.

333 Initially in 2004, five new clinics were created and one pre-existing clinic received direction and funds from the NCVLI as a response to the fact that many victims failed to receive their rights under law despite various victims' rights that were emerging in legislation and constitutions. In 2005-2006 three additional pro bono clinics were launched under the Demonstration Project, bringing the total number to eight clinics. That same year the NCVLI received a new grant from OVC for the Victims' Rights Enforcement Project to expand three of their legal clinics into appellate federal courts, increase training and technical assistance to these clinics and other participants in the federal criminal justice system. The number of clinics reached twelve in following years. (see https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_ncvli/) and http://issuu.com/ncvli/docs/volume2

a way to change the legal culture in favour of respecting victims' rights and avoiding breaches.[334]

In recent months however, Congress has increasingly cut its funding to these clinics. As a result, many clinics have stopped providing legal representation to victims for the enforcement of their rights.[335] Currently, only six of these clinics nationwide are open for victims' rights enforcement.[336] This will inevitably have detrimental consequences for victims by severely limiting their access to pro bono representation and hence the legal enforcement mechanism.

Further, Paul Cassell who has litigated a number of pro bono cases related to victims' rights and enforcement mechanisms confirms victims' limited access to this mechanism without pro bono representation. In fact, he suggests that legal fees are generally quite high for most procedures and without free legal representatives, victims' chances of bringing forward a motion in cases of breach is nearly impossible. In effect, in America, access to courts and legal representation has generally been limited and particularly costly for individuals.[337] Limited access to legal representation and enforcement mechanisms is no exception for victims of crime under the CVRA, particularly following governmental cuts to

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334 Different models of clinics exist – varying from those housed within victim-service programmes to those located within a law school or within a full-service law firm, see Davis and al.(n 324)

335 Following these funding cuts, six clinics had to stop providing legal representation related to the enforcement of victims' rights. See P Cassell, 'The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis' (2012) 5(2) *Phoenix Law Review* 312

336 These clinics include Colorado, Maryland, Oregon, Utah, New Jersey and Arizona. Despite remaining available for free legal services regarding the enforcement of victims' rights, it has been reported that Utah's clinic is also experiencing severe difficulties. See http://www.ksl.com/?nid=148&sid=20730846

337 See R Kagan, 'Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry' (1994) 19(1) *Law & Social Inquiry* 1-62 and R Kagan, 'Adversarial Legalism and American Government' (1991) 10 *Pol'y Analysis & Mgmt* 309 in which the author provides examples and suggests that 'adversarial legalism' in the United States entails substantial costs, which often frustrate aspirations for justice and social welfare.

victim representation. While pro bono mechanisms have allowed court representation for some, its limited availability renders access to the process impossible for most.

Further, the situation related to access will most likely worsen outside locales where victims' clinics operate. Indeed, an evaluation of clinics revealed that in normal circumstances, it is difficult for a small-budget victims' rights clinic to represent cases from all over the state, and thus clinic caseloads are in many cases concentrated in the locale where the clinics operate.[338] A fortiori, in times of budgetary cuts this reality may worsen and result in increased inaccessibility for victims including those closer to the locale where clinics operate.

b) Legal advocacy in the selection of pro bono cases: the emergence of additional accessibility limitation for victims of crime under the CVRA

As previously highlighted by legal experts in the area, pro bono representation is the only way for most individual victims to gain access to the legal enforcement mechanism under the CVRA. However, since clinics and free legal services are limited, pro bono services cannot be offered to every victim who makes a request, and thus a selection of cases has to be made. How are these cases selected?

Not all victims' clinics[339] and pro bono attorneys across the country use similar criteria for selecting the cases they take on to represent. While a considerable degree of variation exists, a certain approach was expressed through discussions with victim

338 Davis and al. (n 324) 50

339 Id. Some clinics tend to be more issue-focused, focusing on particular rights issues, while others are client-focused which seem to be more in line with individual's needs in a particular case.

representatives and outlined in existing studies, which may create an additional accessibility limitation for a number of victims. Hence, it was highlighted that a number of clinics and victim representatives select and accept cases based on the merits of the case, their novelty, and most importantly, on the consequences that the case may have for the victims' rights cause.[340] This arguably reduces the availability of pro bono representation for victims without the necessary financial means and for those that may experience rights violations that do not include any elements of novelty or do not have a jurisprudential impact for the wider victims' rights cause.

For example, the Arizona clinic, which has represented victims under the CVRA, usually selects cases based on whether they can be used to further victims' rights issues in significant ways.[341] In addition, following further communications with a clinic director, it became clear that case selection in his clinic was based on their merit, cases that involve more serious crimes, and specifically, they 'look for cases that might make appellate law'. Hence, it was suggested that 'by establishing law this way we multiply our effects on more than the individual case we are litigating'. It was highlighted, however, that this does not impede access for someone who truly needs help.

Similar views were expressed by independent pro bono lawyers suggesting that they also select victim pro bono cases based on their systemic impact. Contrary to a more nuanced approach developed by some clinics, the approach of pro bono representatives in this study was to take on cases with the potential to advance the movement and refer other cases to other sources. A victims' rights independent pro bono lawyer noted

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340 Communication with Meg Garvin, Director of the NCVLI, October 3, 2011.

341 Davis and al. (n 324) 47

> when I am contacted by a victim, I try to determine whether the case has important systemic issues or whether it is just an individual victim who has a case-specific problem. If it is the latter, I try to refer them to other attorneys or clinics who can help. If their case has broad application, particularly a chance to go to the appellate courts, then I try to work on it.[342]

Whilst systemic change through litigation is considered a prominent feature of lawyering in America as well as an influential instrument for change and social engineering[343], this approach can create further barriers for victims in need of free legal representation, whose rights may have been breached, but who nevertheless do not have a ground-breaking novel case for litigation. Hence, in a process with limited pro bono availability, this case selection method reduces the available pool of needs-based pro bono representation for victims and consequently creates further accessibility limitations for individual victims.

3. Pro bono representation under the CVRA and its additional barriers for victims within the process

Further, even in cases where victims have access and are selected to receive pro bono representation, their interests are not always best represented within the legal process. These situations are rather infrequent, but when they occur, they tend to create additional barriers to a process that is already lengthy and hardly accessible for victims, as seen above. These barriers generally occur in the following scenarios illustrated below: (a) cases in which pro bono lawyers consider themselves advocates for the movement and primarily aim to achieve

342 The expert interviewed preferred to remain anonymous.

343 Kagan (n 337) 32-33 provides numerous examples of lawyer-dominated advocacy organizations which have filed innumerable lawsuits, appeals etc. to extend welfare rights, tenants' rights, women's rights and rights of other groups – and suggesting that many have been successful.

systemic/legislative changes by court litigation; and (b) cases characterised by the inexperience and lack of training of some pro bono lawyers. These scenarios can conflict with the interests of victims, by creating additional delays to a process that is already lengthy, as well as creating unrealistic expectations for victims.

First, and most importantly, in cases where lawyers consider themselves advocates for the victims' rights movement, their interests may at times differ from those of individual victims.[344] For instance, contrary to victims' individual interests, NCVLI and several of the clinics have suggested in a study that 'a courtroom loss can be a win for the movement, because it often provides a concrete example of why current victims' rights legislation is not working.'[345] Following such a loss, clinics would often meet and inform victims' advocates of identified problems related to victims' rights laws in order to strategize about advocating for legislative fixes for these issues. In this respect, lawyers may be willing to take on litigation despite little chance of success in order to advance the victims' rights agenda, which may not necessarily be in the best interests of the individual victim since it may create unrealistic hopes and expectations. Further, according to this aim, some lawyers may choose the litigation method instead of other possible methods of resolving conflict based on its possible impact on the wider victims' rights movement.[346]

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344 The idea that litigation can effect social change for group interests remains popular in American legal culture. Some have argued that public interest litigation has proven difficult to square with the structural and especially the ethical culture of the adversary system. See e.g. D. Bell, Jr, 'Serving Two Masters Integration Ideals and Client Interests in School Desegregation Litigation, 85 L.J. 470 (1976) which highlights that lawyers litigating school desegregation cases after Brown v Board of Education often failed their ethical obligations to their clients by considering long-term social policy goals rather than individual immediate needs. For a more specific analysis of legal realism and victim see E Blondel, 'Victims' Rights in an Adversary System' [2009] 58 Duke L.J. 237.

345 Davis and al. (n 324) 81

346 For instance, when faced with breaches of victims' rights, the South Carolina clinic has often used a diplomatic/non-confrontational approach with prosecutors in breach to quickly remediate the situation, similar to the first step of the complaints process under the Code of Practice in England and Wales. Although in some cases this has been proven to be quicker and more effective for victims, this decreases the possibility of creating case law that furthers the victims' rights movement and produces

Similarly, as noted previously, when legal advocacy for systemic change is at the forefront of victims' rights cases, the desire to advance this movement is generally made by accepting and focusing on novel legal cases that are likely to reach the appellate courts and make an meaningful impact as a legal precedent. This approach identified by several legal representatives may result in further delays for victims.

Hence, often in such cases lawyers have used a method of aggressive litigation that generally translates into an escalation of responses and multiple motions and procedures. Although this may be useful for the victims' movement, it can nevertheless result in longer delays and uncertainties for individual victims involved in the process. Hence, the length, number of proceedings and resources invested in many of these cases can be disproportionate to the outcome sought for individual victims in a specific case and can arguably create additional delays to an already lengthy process. This reality is at odds with what was promised to victims, notably a timely and simple process to bring forward breaches and obtain redress and review.

Several CVRA cases have been selected to illustrate the length and complexity of procedures, as well as the number of responses undertaken by legal advocates under the CVRA.[347] For instance, in the *Antrobus*[348] case, after filing the initial district court motion which was rejected, the victims' representative filed *four separate actions* to the Tenth

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systemic changes. There is an ongoing discussion between the NCVLI and the clinics on the merits of the diplomatic approach versus the use of aggressive litigation. See Davis and al. (n 324) 47

347 These cases were taken pro bono.

348 *In re Antrobus*, 563 F.3d 1092 (10th Cir. 2009); *Antrobus*, 519 F.3d 1123 (10th Cir. 2008) in this case the litigation involved Ken and Sue Antrobus who claimed they had a right to be heard by presenting a VIS at the defendant's sentencing who had illegally sold the murder weapon that was used. They also filed a motion.

Circuit, in an effort to have the district court rulings reviewed on their merits.[349] They also filed two additional motions to the district court, which were also rejected and followed by two additional mandamus actions.[350] Although not part of the enforcement process, the *Antrobus* case also used a separate procedural vehicle, namely an appeal to the Tenth Circuit of the district court's first decision, which after months of litigation was dismissed, since victims do not have standing to bring a post-judgment direct appeal in a criminal case. After having spent over a year litigating this case, from December 13, 2007 until early 2009 and having made four separate trips to the Tenth Circuit, they remained unsuccessful. The district court highlighted the number of proceedings and significant delays caused by the various motions, stating that 'this court will not entertain repeated motions on the same issues, when the effect of those motions [is to] delay sentencing that is set to proceed.'[351] In addition, the Tenth Circuit court in this matter also alluded to the number of proceedings, stating that 'district courts and prosecutors must become sensitive to Congress's new demand that victims have a seat at the table. At the same time, all litigants have to be aware of the constraints associated with efforts to relitigate issues repeatedly'.[352]

More recently in *Avila*[353], the Government and the Terrys (alleged victims) presented a full round of briefings and one full round of supplements on the issue under dispute, but both parties expected the Court to take additional evidence, which delayed the process. More

349 A petition for panel rehearing with a suggestion of rehearing en banc was filed following a mandamus rejection by the Tenth Circuit, which was in turn rejected.

350 A motion for reconsideration of the district court's denial of the motion for production of a report was also separately filed after the district court's denial.

351 See district court decision: United States v. Hunter, 2008 WL 153798, at 1 (D. Utah Jan. 14, 2008).

352 Id

353 *US* v *Avila*, (2012) CR 11-126-PHX-JAT (District of Arizona) In this case, the alleged victims (the Terrys) filed a motion in a district court to obtain the status of victims and thus the recognition of their rights under the CVRA, contrary to the Government's claims regarding their status of direct and proximately harmed victims.

specifically, the parties delayed the ruling by suggesting that they had additional evidence that they wished to present, but that they were holding back until the Court made preliminary rulings on whether they needed more evidence. Accordingly, the Court clearly stated that its ability to rule had been hampered and it would no longer accept this 'procedural posturing'. It limited their rounds of briefings for the additional future evidence to one final opportunity to elaborate on their positions, without the possibility of seeking further briefings or hearings. It also outlined a schedule with directives to ensure that the ruling on the motion under the CVRA was rendered 'forthwith' and without further delay.

Further, despite the fact that victims clearly have no right to a direct appeal to challenge district court orders, victim representatives have attempted to change the law by filing such appeals, which inevitably necessitate additional proceedings and create further delays. Hence, as seen in *Antrobus* and several other cases, victim lawyers have filed motions for direct appeals along with their mandamus petition and have asked to consolidate both proceedings.[354] Evidently, this creates further delays and courts have not accepted such procedural claims, since the CVRA does not provide a mechanism for victims to directly appeal district court orders.

In brief, in order to make a systemic impact in the area of victims' rights, victims' rights lawyers have often brought cases before appellate courts by filing mandamus actions. In such cases, there have often been important legal challenges and debates with courts and opposing parties, which inevitably lengthen the legal enforcement process.

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354 See e.g. *In re Andrich,* 668 F.3d 1050, 11 Cal. Daily Op. Serv. 14,491; *In re Antrobus,* 519 F.3d 1123, 1125 (10th Cir. 2008); U.S. v Monzel, 641 F.3d 528, 395 U.S.App.D.C. 162, C.A.D.C., April 19, 2011 (NO. 11-3008, 11-3009)

In addition, another significant barrier that is worth mentioning briefly is the inexperience and lack of expertise and training of a number of legal representatives. Hence, even when victims are legally represented when navigating the enforcement process, the ability to navigate may be limited by the lack of training and expertise of some representatives. Indeed, since this area of victims' rights is now fairly complex and rarely taught in law schools, a great deal of training and expertise is required by the representatives and clinics when taking on enforcement cases. In effect, when receiving pro bono legal representation it is possible that legal counsel representing the victim does not have specialised knowledge of this complex area of law, which may also create further barriers to the process for individual victims. Indeed, after several years of experience and lessons learnt on the ground, NCVLI and most clinic directors have realised the consequences that result from a lack of specialized knowledge in victims' rights cases. For instance, they have highlighted that pro bono help by clinics that hire law students or non-specialized pro bono independent lawyers to take on pro bono victims' rights cases in their clinics is not as promising as they once thought.[355]

As a result, due to the number of legal complexities, costs, and the specific limitations of victims' rights litigation - often driven by legal advocacy - only limited and specific categories of victims can have access to this mechanism. These categories include (1) the limited number of victims whose cases have been selected for pro bono representation by either victims' rights clinics or victims' rights litigants[356] -- bearing in mind the limits of pro bono representation; and (2) the very few who have substantial financial means and can

[355] Davis and al. (n 324) 77

[356] Numbers are very low as not many victims' lawyers are able or willing to take on pro bono work for victims of crime.

afford to pay for legal representation.[357] Additional categories of victims may also have access to this mechanism without having to pay for legal representation in cases where judges[358] or prosecutors[359] take the initiative to bring forward a victim's breach. This situation however remains heavily dependent on the agency's good-will to raise and bring forward the breach.

Hence, these limitations to the enforcement process suggests that the aim of providing victims with an accessible mechanism to address their breaches has been limited. More specifically, the process was presented as a means to protect victims' rights from governmental (judicial and prosecutorial) violations by allowing victims to independently file motions and have standing to review court decisions. Instead, it provides limited access to victims alleging state breaches by prosecutors, and thus its use can arguably favour victims alleging breaches that are in line with prosecutors' interests.[360] Inevitably, this will create considerable disparities between the violations that are reported and obtain redress, and the ones that never surface due to inaccessibility barriers.

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357 Also figuratively described as members of the 1% of the American population by Cassell in previous communication.

358 This includes cases in which victims' rights breaches were discovered and addressed *sua sponte* by the court. Notable examples include *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005) and *U.S. v. Ingrassia*, Not reported n F.Supp.2d, 2005 WL 2875220 (E.D.N.Y. 2005) in which the district court in both cases inquired about whether victims' right to notification has been breached after noticing their absence at the hearing.

359 Victims who share similar interests with the prosecutor in criminal cases may have him litigate and assert their rights and alleged breaches in court.

360 This feeds in with the argument articulated by S Bandes, 'Victim Standing' (1999) Utah L. Rev. 331 which suggests that the victim initiatives that have been successful have only been those that advance the prosecution's own agenda.

4. The legal enforcement mechanism under the CVRA: an inconsistent process that creates uncertainties

Finally, it is worth mentioning that this legal mechanism has given rise to numerous inconsistencies within the process that can create further confusion and uncertainties for victims. These inconsistencies are (a) legal professionals are quite inconsistent with the violation cases they decide to enforce and do not usually follow any clear or consistent criteria for selection; and (b) appellate courts do not use the same criteria and standard of review to determine whether to provide a writ of mandamus for victims of crime.

First, when they are not legally represented by a private lawyer, it is often impossible for victims to know in advance whether they will have access to the mechanism in the event of breaches, due to the inconsistencies that take place within this process. Under the CVRA, breaches can be brought forward by judges *sua sponte*, by prosecutors, or victims (or their representatives). When a breach occurs, it cannot be ascertained whether the judge will address a breach *sua sponte* (not all of them do), whether prosecutors will share the same interests as victims in a given case and therefore be willing to bring the breach forward, or whether pro bono lawyers or clinics will accept to represent their case if they need legal counsel. As previously noted, not all victims' rights clinics and independent pro bono litigators use the same criteria to select their cases. This gives rise to a number of inconsistencies regarding the type of cases/victims that get selected for representation. While some focus on a wide range of victims' rights violations, others tend to focus on the impact that the case can have on the legal system. In the latter scenario, it is also difficult for victims to determine whether they have a novel and ground-breaking case which would arguably increase their chances of receiving pro bono representation and access to the enforcement

process. In brief, these inconsistencies can be confusing and create disparities among enforcement cases which would inevitably increase the layer of the process' complexity for victims.

Second, appellate courts have also contributed to the creation of inconsistencies within this process – particularly with their contradictory decisions related to the standard of review that governs the mandamus process. As mentioned earlier, a significant element of discord among the different circuits is the standard of review for granting a writ of mandamus when trial court's order reflects an abuse of discretion or a legal error. It remains unclear whether the mandamus standard is discretionary or mandatory in cases of abuse of discretion or legal error – although to some degree the more strict and traditional standard has been used. Some circuits have applied an ordinary appellate standard[361] which basically suggests that appellate courts must issue the writ whenever they find that the district court's order results in an abuse of discretion of legal error. Contrarily, a number of other appellate courts have applied the traditional standard of review of a writ of mandamus under the CVRA.[362] However, in the *In re Andrich* case, the Ninth Circuit noted the inconsistency and reviewed the petition for writ of mandamus under both standards.[363] In two other cases however the courts did not specify which standard of review it used but nevertheless granted the

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361 See *In re* Dean, 527 F.3d 391 (5th Cir. 2008) (per curiam); *In re* Kenna, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re* W.R. Huff Asset Mgmt., 409 F.3d 555, 563 (2d Circ. 2005); *In re Stewart,* 552 F.3d 1285, 1288 (11th Cir. 2008); See unpublished decision *In re* Walsh, No. 06-4792, 2007 U.S. App. LEXIS 9071 (3rd Cir. Apr. 19, 2007).

362 *In re Acker,* 596 F.3d 370, 372 (6th Cir. 2010); *In re Dean,* 527 F.3d 391, 394 (5th Cir. 2008); *In re Antrobus,* 519 F.3d 1123, 1125 (10th Cir. 2008); *In re Olesen,* 447 Fed.Appx. 868, 2011 WL 5357631 (C.A.10 (Utah); *In re McNulty,* 597 F.3d 344 (6th Cir. 2010); U.S. v Monzel, 641 F.3d 528, 395 U.S.App.D.C. 162, C.A.D.C., April 19, 2011 (NO. 11-3008, 11-3009)

363 *In re Andrich,* 668 F.3d 1050, 11 Cal. Daily Op. Serv. 14,491

mandamus.[364] This inconsistency not only creates uncertainty within the process but also generates further litigation and longer delays for victims of crime in enforcement cases.

Summary

To summarize, a number of elements impede and limit delivery of an accessible process for individual victims. These elements include the length and complexity of the process which requires legal representation, the limited funding and availability of legal representation, the limitations related to specific pro bono representation practices that may not adequately serve victims, and the inconsistencies created within the context by legal professionals. It is safe to say, that contrary to the initial aims expressed by the policy-makers behind this mechanism, this process does not provide victims with an accessible, quick, and consistent mechanism for redress.

[364] *In re Stewart,* 552 F.3d 1285 (11th Cir. 2008); *In re Stewart,* 641 F.3d 1271, 22 Fla. L. Weekly Fed. C 2096

B. The Complaints Process under the Code of Practice for Victims of Crime: Navigating a cumbersome process full of pitfalls

Although both mechanisms under analysis are very different from one another, the process in England and Wales has also proven to contain a number of considerable barriers for victims of crime.[365] The following analysis suggests that contrary to the description of mechanisms made to victims, the Code's complaints process is to some extent ill-suited and provides limited access for victims of crime due to its length, complexities, objectivity barriers, and inconsistent application.

1. The process is action: data and findings

The number of complaints received by the Ombudsman provides some indication of the mechanism's limited accessibility for victims. This section draws on data collated from communications with the Ombudsman, as well as a successful Freedom of Information Request obtained in 2010.[366]

Since the Code came into force in April 2006, few studies have been undertaken and the data remain very limited, particularly regarding the complaints process. In order to assess the types of cases that have been referred to the Parliamentary Ombudsman, nine

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365 For further analysis of this mechanism, see M Manikis, 'Navigating through an obstacle course: The complaints mechanism for victims of crime in England and Wales' (2012) 12(2) *Criminology and Criminal Justice* 149-173.

366 The content of these complaints is confidential and could not be released, since investigations must be conducted in private and remain subject to a statutory bar contained in the Parliamentary Commissioner Act 1967 (the Act). The effect of this statutory restriction renders this information inaccessible even under the Freedom of Information Act 2000. While this imposes limitations on empirical research, the Ombudsman was able to provide data on the determinant elements of this mechanism.

interviews/correspondences by electronic mail were conducted with the Ombudsman. The data provided by her office build on the results of reports carried out by the Cabinet Office and the former Victims' Champion.[367]

Concerns have been raised regarding the low number of complaints under the Code received by the Ombudsman in the past few years.[368] In 2007, the PO's *Annual Report* records that three complaints about the police and two about the CPS have been received by the Ombudsman. Further, the report states that 'we lack any firm evidence to suggest why the volume of complaints has not been as high as expected'[369] The following year's *Annual Report*[370] lists only two complaints received under the Code, both about the National Probation Office, with identical results recorded in the 2009 *Annual Report*[371].

These concerns were further highlighted in former Victims' Champion, Sara Payne's report, which stated:

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367 L Casey, 'Engaging communities in fighting crime: Crime & Communities Review' (Cabinet Office, June 2008); S Payne, 'Redefining justice: Addressing the individual needs of victims and witnesses' (Victims' Champion Report, London 2009)

368 H Reeves and Peter Dunn, 'The status of crime victims and witnesses in the twenty-first century' in A Bottoms and J Roberts (eds), *Hearing the Victim: Adversarial justice, crime victims and the State* (Willan, Devon 2010)

369 Parliamentary and Health Service Ombudsman (2007) 'Annual Report 2006-2007: Putting principles into practice' (The Stationary Office, London 2007) <http://www.ombudsman.org.uk/improving_services/annual_reports/ar07/> accessed April 2010

370 Parliamentary and Health Service Ombudsman, 'Annual Report 2007-2008: Bringing wider public benefit from individual complaints' (The Stationery Office, London 2008). <https://www.ombudman.org.uk/pdfs/ar_08.pdf> accessed April 2010.

371 Parliamentary and Health Service Ombudsman, 'Annual Report 2008-2009: Every complaint matters' (The Stationery Office, London 2009) <http://www.ombudsman.org.uk/pdfs/ar_09.pdf> accessed April 2010.

> Where the Victims' Code does apply, the available statistics paint a worrying picture. Only 46 complaints have been received by the Parliamentary Ombudsman since the inception of the Code in 2006. A significant number of these (precise figures are not available) were rejected on the basis that the local complaints procedure had not been exhausted, or for other reasons.[372]

At the time of writing, similar results were obtained by the Parliamentary Ombudsman's office after filing a Freedom of Information request. The data received are illustrated in Table 3 and explained below.[373]

Table 3. Case outcomes received by the Parliamentary Ombudsman from April 2006 July 2010

Table 1. Case outcomes received by the Parliamentary Ombudsman from 1 April 2006 until July 2010

48 closed without investigation		2 accepted for investigation	
Out of remit	16	Discontinued	1
Premature (local)	8	Upheld complaint	1
No MP referral	13		
Closed after withdrawn/referred back to complainants	6		
(eg. Failure to return after being told to get an MP referral)	(4)		
General discretion to decline	5		

Source: M Manikis, 'Navigating through an obstacle course: The complaints mechanism for victims of crime in England and Wales' (2012) 12(2) *Criminology and Criminal Justice* 149-173, 159

Between April 1 2006 and July 2010 only fifty complaints relating to the Code were received by the Ombudsman. Only two of these have been accepted for investigation, one of which was discontinued, while the other was fully upheld. Due to the privacy of this investigation, in 2010, I was unable to receive further information on the case that was upheld or the follow-up and remedies that were suggested by the Ombudsman. However, following a

372 Payne (n 367) 34

373 This data comes directly from communications I have had with the Ombudsman's office and should therefore be reliable. Source: Manikis (n 365) 159

new Freedom for Information request filed in 2012, I was able to obtain more details regarding this upheld complaint, as well as another upheld complaint within this process that will be explored in greater detail in chapter 6 on remedies.

The remaining complaints were closed at the enquiry stage for various reasons: Sixteen complaints (33%) were rejected because they were 'out of remit', in other words an investigation was declined because the body complained against or the action complained about fell outside the Ombudsman's jurisdiction. Eight complaints (17%) were rejected because they were judged 'premature' - the local complaint resolution process was not exhausted (all internal review steps to the concerned agency must usually be met before the Ombudsman can consider a complaint). Further, the Ombudsman noted that '[a] number of cases are closed because the complainant failed to obtain a referral from an MP when advised that such a referral was required.'[374] Four complaints (8%) have been denied and closed because the complainant contacted the Ombudsman directly without previously obtaining an MP referral and did not return to the Ombudsman after being told they needed an MP referral within three months.[375] Six complaints (13%), including the four closed for failure to obtain an MP referral, were closed after being withdrawn/referred back to the complainants.[376] Finally, five (10%) were declined after the Ombudsman used his general discretion, for reasons previously explained.

Further, the information provided on the mode of delivery used by complainants to contact the Ombudsman suggests that most complaints were made by victims directly to the

374 See Ombudsman Communication, 22 December 2009

375 See Ombudsman Communications, 28 October 2009, 22 December 2009 and 19 July 2010.

376 See Ombudsman Communications, 28 October 2009, 22 December 2009

PO without referring them first to their MP. Indeed, table 4 highlights that only sixteen complaints were referred by an MP, while the rest of the thirty-four complaints were initially made without the required MP referral by e-mail (twelve), by letter (five), and by telephone (nine). In eight cases information about the mode of delivery was unavailable (see table 4 below).[377] This highlights the extra obstacle that the MP filter represents for a number of victims.

Table 4: Complaints without MP referral received by the PO

Table 2. Complaints without MP referral received by the Parliamentary Ombudsman from April 1 2006 until July 2010

Total complaints made initially without MP referral	34
E-mail	12
Letter	5
Telephone	9
Information unavailable	8

Source: M Manikis, 'Navigating through an obstacle course: The complaints mechanism for victims of crime in England and Wales' (2012) 12(2) *Criminology and Criminal Justice* 149-173, 160

Based on the results and data obtained from this study, this section explores the different stages of the process and reveals some of the access impediments for victims of crime.

2. The internal process: complex, long and limiting objectivity

First, as described in chapter 5, the complaints mechanism under the Code requires victims to address their complaints to the agency in breach, which in itself is quite complex.

[377] See Ombudsman Communications, 22 December 2009 and 19 July 2010; Source: Manikis (n 365)

Referring to the complexity of this complaints mechanism, Casey, the former victims' commissioner in England and Wales stated that

> For victims who feel that the Criminal Justice System has not treated them as it should, there is a complex process for raising their concerns. In the first instance, they themselves must work out which particular agency they feel has let them down and complain to that agency. There could be up to 10 criminal justice agencies involved with a case but it is up to the victim to work out who has let them down, without recourse to any statutory help to navigate the complaints process. This is in sharp contrast to those accused of crime, who if their case is serious, can often acquire legal aid to pay solicitors throughout the process.[378]

The considerable variability in internal complaints procedures across the different agencies and locales is also a significant problem for victims under this mechanism.[379]

The Code is a lot clearer than its predecessors in identifying the agencies' duties. However, for someone who is not legally trained or familiar with the terminology, it may not be easy to identify the agencies responsible to perform certain duties and the ones that have not met their obligations.[380]

The picture is further confused in those cases that have involved breaches by more than one agency.[381] The Ombudsman noted that sometimes two or more agencies are involved in breaches. For example, five complaints concerned the actions of the CPS and the police. In such cases, the complaints process is hard to navigate, particularly in the first stage as this requires that the victim identifies and approaches the *relevant* agency. In cases where a

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[378] Casey (n 367) 15

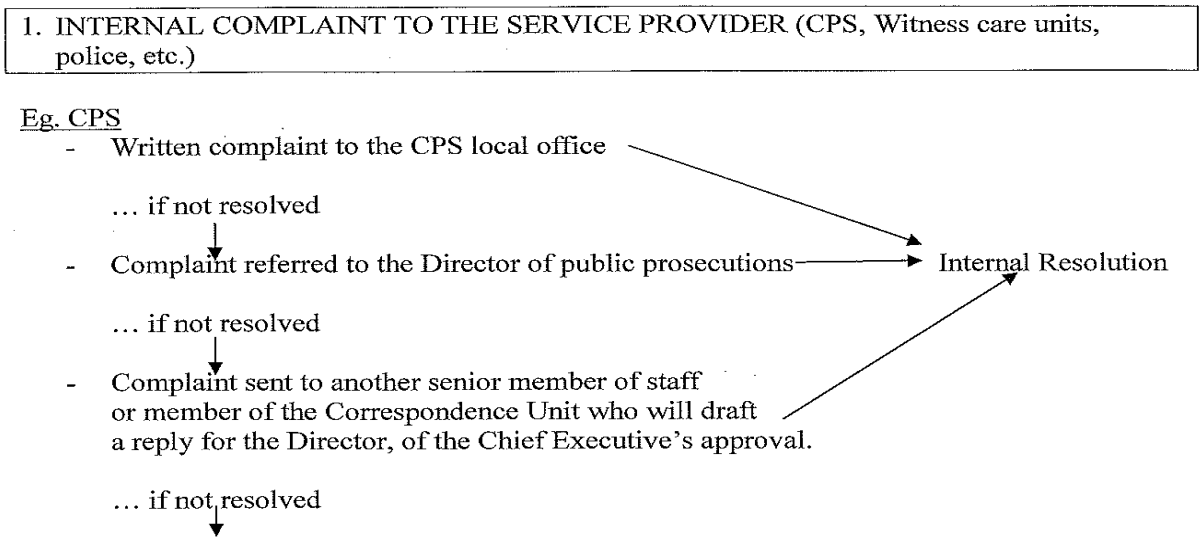
[379] Payne (n 367)

[380] Id

[381] Casey (n 367)

number of agencies have breached their duties, it can take considerable time for victims to contact all the relevant agencies, or even identify and make the links between the various agencies that should be sharing information and duties. Unlike a legal claim in which many agencies can be listed when it is not clear which particular one breached its duty, this complaint mechanism requires from the very beginning of the process the specific identification of the agency at fault.

Further, once the identification process is completed, victims will have to exhaust all internal recourses to the identified agency, which can be a significant barrier for victims.[382] For the purposes of this study, the CPS's procedure for internal complaint (described below) is used to illustrate the number of internal steps required that must be completed prior to sending the complaint to the MP and finally reaching an objective body represented by the Ombudsman. The figure below facilitates the understanding of the process:



382 Hence, according to the collated data, eight complaints over a total of fifty were rejected because they were judged 'premature' – as victims had failed to exhaust the local complaint resolution.

In brief, if a victim wishes to complain about the way her case has been handled by the CPS, the Code requires that she should start by writing to the CPS office that originally dealt with it and include as much information as possible related to the case. The CPS has tried to reduce the length of this process by committing itself to respond to complaints within three working days of receipt of the letter. If it cannot send a full reply within that time, it will acknowledge receipt of the letter and aim to provide victims with a full reply within ten working days. If the victim remains dissatisfied with the CPS's local office reply, she is advised to contact the Chief Crown Prosecutor for the Area. Complaints that cannot be resolved at an Area level should be referred to the Director of Public Prosecutions or Chief Executive who will consider whether to send that complaint to another senior member of staff, or to a member of the Correspondence Unit who will draft a reply for the Director, or the Chief Executive's approval. In cases where the victim still remains unsatisfied, she can continue the process by sending her complaint to the Member of Parliament (process described below).

Hence, the internal complaints process remains for some time within the remit of the agency alleged to have breached the Code and therefore does not provide outside scrutiny by an impartial observer. A victim who has to file her complaint to various sub-departments in that agency may be under the impression that this lengthy process lacks objectivity and decide to discontinue her pursuit of this complaint. Further, even if a particular agency takes steps to speed up its own internal review process, overall the process remains lengthy and is usually started after criminal proceedings have ended. Hence, the CPS's internal complaints guidance specifically states that their Correspondence Unit does not usually consider any

complaints that relate to an ongoing case, since this may interfere with court proceedings. Generally, victims in these circumstances will therefore have to wait for the criminal process to be over before launching a complaint, instead of receiving a response to their needs more quickly and efficiently.

3. The MP filter and its barriers for victims of crime

Members of Parliament (MPs) have historically played an important role in handling individual complaints and protecting citizens' rights from the Executive -- a practice in place with the MP filter. Further, a subsidiary reason provided by policy-makers for the MP filter was, where reasonable, to avoid an overload of cases received by the Ombudsman.

Today, the presence of the MP filter remains a structural component of the Code's complaints process and according to the Parliamentary Commissioner Act (s. 5(1) (1A)), the Parliamentary Ombudsman can only consider a complaint referred by an MP, thus preserving Parliament's primacy. This structure remains controversial and it has recently been suggested by the Ombudsman that 'the anachronistic barrier to citizen access it now represents outweighs its symbolic value.'[383] In addition, Sir John Foster, one of the filter's few opponents in 1966, rightly predicted the outcome of this process by qualifying the MP filter as 'rather needless waste'.[384] In effect, the data collated and described below confirms this prediction and suggest that this filter represents in many ways a significant obstacle for victims of crime who wish to complain about a breach under the Code. First, it is a needless structure that lengthens the process and is cumbersome; second, it favours and creates a

383 A Abraham, 'The Ombudsman and the Executive: The Road to Accountability' (2008) *Parliamentary Affairs* 537

384 Standing Committee B, 3 Nov. 1966, c. 123-4.

number of inconsistencies in its application by MPs; third, it acts as a barrier to direct communication, and lastly, it politicises the process for victims of crime.

a) The MP filter: a needless and cumbersome structure that lengthens the process for victims

To determine the role and functioning of the MP filter in the context of victims' complaints, I contacted MPs and their assistants. I was given access to interview three MPs – including a member of the Justice Committee - and eleven MP's assistants[385], who were assigned the task of operating the MP filter, which is mainly done through the completion of a form that details the complaint and the redress sought. Although none of them had experience with the MP filter for a complaint under the Code of Practice,[386] they were nevertheless aware of the MP filter process and its application in other areas, which they confirmed would be applied the same way in cases where victims of crime were the complainants under the Code.

Following discussions and data collated on this procedure, it was made clear by the MPs and their assistants that the filter is a needless structure for victims that lengthens the process and creates additional accessibility barriers. These discussions revealed a 'minimal interventionist' approach by MPs and their staff, suggesting that the filter is generally overlooked, in the sense that complaints in the specific constituencies I refer to were

[385] The selection between MPs or their assistants was made on the basis of their experience/role with this process. In other words I spoke to the person within the office who was the most familiar with the process and was responsible for dealing with these complaints. These results may not be representative of all MPs offices, considering the size of the sample, but are still noteworthy for the purposes of this research since barriers and limitations to this process have been revealed by the interviewees in the specific constituencies explored.

[386] Due to the confidentiality of complaints, this information was unavailable from the PO's office.

generally sent off to the PO without much filtering or attempts to resolve the issues with the agencies. They all suggested that the filter was mainly used to ensure that previous steps were taken by the victim to resolve the issue with the agency prior to sending the complaint to the PO. Some stated that the filter was pointless, since MPs do not actually have a word to say on the case itself and mainly just look at whether the first step of trying to resolve the issue with the agency in breach was exhausted before signing the complainant's form.[387] Further, one of the interviewees described the MP's role as being mainly to 'refer and not get involved' and being 'more of a postal service than anything else… they're like a post bag to the executive or the PO'. Moreover, a staff member in charge of the MP filter process stated that the filter can be time-consuming for the MPs office, since it requires MPs to physically sign the form every time. It was highlighted that this process can be quick if the MP is present to sign the form, but some MPs are often away from their offices – particularly in the summer -- and yet must still sign the form despite the fact that someone else in the office generally examines whether the complainant exhausted the previous internal procedure. This inevitably causes unnecessary delays to complainants who often have to wait before having their complaint sent to the Parliamentary Ombudsman.

Only two interviewees suggested that in a few cases they had tried to resolve complaints by calling the agency complained about, but this was very rare and usually unsuccessful in the context of the PO process. Most complaints received by MPs were signed and sent to the PO. Finally, the MP's 'minimal interventionist' approach related to the filter was highlighted by an MP who revealed that he generally signed complaints forms to the PO, even in cases where he did not agree with the complainant after undertaking a brief investigation and talking to the agencies towards which the complaints were addressed. In

[387] See Communications with MPs and MPs' assistants.

such cases, where complainants are not satisfied with the department's response, the MP stated that even if he did not think a complaint was legitimate, but was not unreasonable, he nevertheless signed the complaint and sent it to the PO. The same MP also affirmed that the only form he refused to sign was a form with vexatious comments and racist remarks that was clearly being used for purposes other than addressing a legitimate complaint. Most MPs and assistants confirmed this approach and suggested that even when they did not agree with the substance of the complaint, their role was to make sure the complainant had exhausted the internal process and simply to transfer the complaint to the Parliamentary Ombudsman, since according to one assistant responsible of complaints, 'victims have a right to bring any complaint to the Parliamentary Ombudsman.'[388]

Hence, instead of expediting cases, the filter can accurately be described as a needless structure that lengthens the process and makes it cumbersome for victims of crime. For instance, it seems quite clear that the MP filter essentially performs a verification that will inevitably be performed again at a later stage by another body, namely the PO. As illustrated above, when reaching the Parliamentary Ombudsman stage, a preliminary assessment takes place, which is meant to verify, among other elements, that the internal process has been exhausted. Further, despite the mandatory filter requirement, the data collated under the Code of Practice shows that many victims still send their complaints directly to the Ombudsman who ends up returning their complaints in order to obtain an MP referral. Results from the data collated have shown that as many as *thirty-four* out of a total of fifty complaints were initially addressed directly to the Ombudsman without an MP referral and were sent back to

[388] See Communication with MP's assistant.

complainants.[389] This clearly confirms the MP filter as a needless structure for victims of crime.

The data also suggests that this filter is not just a needless structure, but can also discourage and impede a number of victims from pursuing their complaints to the MP. For instance, thirteen complainants decided not to bring their complaint to the MP and four complaints were closed because they were not returned with an MP referral within three months. The presence of attrition is quite concerning, since not many complainants use this mechanism in the first place and from the ones who do, many are sent back because they have not been referred by an MP, and some never return. The PO explained that

> [w]here complainants come to us without a referral, we inform them about the requirement. Some complainants then come back to us with an MP referral, others don't … If they do not get an MP referral then the complaint is closed as withdrawn.[390]

Many reasons can explain the fact that some complainants do not come back with a referral. It may be that the MP refuses to provide a referral (which is extremely unlikely to due to the MPs role highlighted above which is essentially to verify that the internal process has been exhausted), or that victims may not want the MP's involvement in the process. Finally, they may decide to abandon the process because it is complex and lengthy.

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389 See Communication with the Parliamentary Ombudsman's office – 28 October 2009; 19 July 2010

390 See Communication with the Parliamentary Ombudsman' office – July 14, 2010 and July 19, 2010

b) The MP filter as an accessibility barrier to direct communication

Moreover, the MP filter creates a significant barrier to *direct communication* between victims and the Ombudsman. Communication with complainants during a hearing is a fundamental step to understanding and resolving complaints in order to achieve justice. When complaints have to be passed on by an intermediary, important elements may get lost in the process and the victim may feel further excluded from another process. The Ombudsman confirmed these concerns in a wider context and stated that 'the Ombudsman has regularly called for the removal of the MP filter in her speeches and articles because of the barrier it puts in place between the Ombudsman and the citizen.'[391] Similarly she suggested that 'when it comes to the practical relationship between the Ombudsman and the aggrieved citizen, the MP filter does rather interpose an unhelpful barrier and threatens to undermine the investigative and adjudicative authority of the Ombudsman.'[392]

As previously mentioned, under section 10(2) and 10(2A) of the PCA, after completing her investigation, the Ombudsman must disclose the report with her findings to the Department whose actions have been investigated as well as to the MP who referred the complaint. Complainants and victims of crime can therefore be excluded from this since there is no statutory requirement that the findings be made available to them. As Kirkham states

> because the ombudsman process leads to the complainant losing control of his or her complaint once it has been submitted to the ombudsman (…) it seems highly probable that this level of disconnection with the resolution of the

391 See Communication with the Parliamentary Ombudsman's office – February 8, 2010

392 A Abraham, 'The Ombudsman and the Executive: The Road to Accountability' (2008) *Parliamentary Affairs* 537

> complaint heightens the frustration of complainants who do not succeed through the ombudsman route.[393]

For victims of crime this disconnection can have significant consequences considering they usually launch a complaint because they claim to have been excluded from the criminal justice process. This form of re-exclusion can certainly add insult to injury.

c) The MP filter and the politicisation of the complaints process: a barrier to objectivity, accessibility and consistency for victims of crime

Moreover, the MP filter can in many respects politicise the complaints process and impede the process' efficacy and adequacy for victims by adding further barriers to accessibility, objectivity, and consistency for victims of crime. To demonstrate this reality three main points are argued, first, this process may create a barrier for victims who do not share their MP's political affiliation; second, complaints to the MP filter are subject to MP's individual agendas and priorities which can cause inconsistencies within the process, and third, this process is heavily reliant on the political reality experienced by individual MPs which can also create inconsistencies and access barriers for victims.

First, this process may create a barrier for victims who may not share their MP's political affiliation. Legally, it is not quite clear whether victims must direct their complaints to their own MP or whether they have the freedom to choose any MP. Whilst the PCA does not require victims to address their complaints to their own MP, Parliamentary protocol dictates that Members of Parliament can only deal with issues on behalf of their own constituents', which suggests that victims may not have a choice and may have to proceed via

[393] R Kirkham, 'Explaining the lack of enforcement power possessed by the ombudsman' (2008) 30 J.Soc.Wel.& Fam.L. 253, 260

their own MP. Indeed, discussions undertaken with ten MPs and their assistants, as well as the language used in e-mail auto-responses by over thirty MPs[394], confirmed that in practice, they will not deal with issues that are not from their own constituents. This can be limiting victims' access to the process when they have contacted another MP to deal with their complaints instead of their own.

Further, this can also be limiting for victims that may want to address their complaints to an MP who has argued for victims' rights on a number of issues. In addition, this MP filter may become a permanent barrier for victims who have complaints but who wish to remain apolitical and avoid MPs. For example, some victims have privacy concerns and may not want to expose their complaints to an MP who is a public figure and may not be seen to be discrete.

Second, complaints to the MP filter are subject to MP's individual agendas and priorities which can inevitably cause inconsistencies and different treatment for victims. Hence, the MP filter politicises the complaints process and can entice Members to act as victim champions or exacerbate the actions of members who have already taken on the role of victim champions. For instance, MPs with a victim-oriented agenda can therefore devote substantial resources to equipping their staff and attempt to resolve certain types of complaints or sign forms quicker, while others may have different political priorities and therefore spend much less time, or resources, on a given complaint. Inevitably this can create significant disparities between victims based on their location as well as inconsistencies within the process based on the political affiliation of their MP.

394 See auto-responses e-mail from Members of Parliament.

Further, although most MPs that I have contacted support a non-interventionist approach when applying the MP filter, very few have nevertheless attempted to communicate with the agencies in breach before sending the victim's complaint to the PO. This suggests that the MP filter process leaves room for a considerable degree of variation which heavily depends on the perception of the individual MP who handles the complaint. Perceptions can therefore vary with regards to their role, as well as their commitment to victims. Hence, to some extent this has created inconsistencies within the process.

Finally, this process is heavily reliant on the political reality experienced by individual MPs which gives rise to a number of inconsistencies within the process and may create additional accessibility limitations for certain victims. For instance, the Ombudsman stated in her appearance before the Public Administration Select Committee (the Committee), that when Parliament dissolves prior to the General Election, there will be a period of at least five weeks during which individuals will not be able to bring their complaints due to the absence of MPs to refer their complaint. This period is certainly even longer in constituencies with new Members who are unfamiliar with the Ombudsman system, since they need time to arrange an office that can handle this casework.[395] In effect, one of the MPs I spoke to, confirmed this problem, and highlighted that as a newly elected MP he has been struggling a lot with the process and finds it very confusing. He complained about the lack of training and briefing they receive on the PO process. For this reason, the Committee suggested the removal of the MP filter in its report entitled *Parliament and the Ombudsman*.[396]

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395 See Public Administration Select Committee, 'Work of the Ombudsman in 2008-2009' (HC 122, Q 66, November 5 2009); Public Administration Select Committee, 'Parliament and the Ombudsman', Report 2009-2010 (House of Commons, London 9 December 2009)

396 Public Administration Select Committee, 'Work of the Ombudsman in 2008-2009' (HC 122, Q 66, November 5 2009)

The combination of these complex structural components and the way they operate on the ground is likely to discourage victims from taking their complaints further. The very low number of complaints received by the Ombudsman – as illustrated above – can suggest in part and among other factors[397] the need for a more simple complaints and remedial mechanism that takes into account the interests and needs of victims. In addition, it is necessary to bear in mind that when a complaint reaches the specific Parliamentary Ombudsman component, it will undergo preliminary assessments to ensure that minimal elements have been met, including the exhaustion of the internal resolution process. Hence, since MPs and their assistants have generally revealed that the MP filter is there to determine whether the internal resolution process has been exhausted, one cannot help but wonder why the MP filter is still in place. Although surveys have shown 'almost universal dissatisfaction'[398] with the MP filter in other areas and made recommendations for its removal, this structure remains in place and also hinders the Code's complaints process. As suggested by Payne, 'considering the enormous numbers of victims who become engaged with the criminal justice system each year it is inconceivable that the small number of complaints received by the Ombudsman is due to a near universal satisfaction amongst victims with the service received from the various criminal justice agencies.'[399]

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397 Hence, just like the American experience, complainants lack of awareness of this process which can also account for this low number and suggests the importance of dissemination. Indeed, it was recently suggested that there was a general lack of awareness regarding this Code. For instance, the Crime Survey for England and Wales asked respondents (both victims and non-victims) whether they had heard of this Code and 19% of victims had heard, in comparison to 15% of non-victims. See: L Freeman, *Support for victims: Findings from the Crime Survey for England and Wales* (Ministry of Justice 2013)

398 P Colcutt and M Hourihan, 'Review of the Public Sector Ombudsmen in England: A Report by the Cabinet Office', (Cabinet Office, April 2000) [Colcutt Review] 20; PASC, 2009a, 2009b)

399 S Payne, 'Redefining justice: Addressing the individual needs of victims and witnesses' (Victims' Champion Report, London 2009)

In brief, the process under the Code was portrayed as accessible, objective, quick and informal,[400] but this analysis reveals that mainly due to its structural components, as well as its implementation on the ground, the process has proven to be long, overly complex and insufficiently accessible for victims of crime. Further, despite expressed hopes of delivering an objective process, the MP filter, as well as the internal resolution process that are integral parts of the complaints mechanism to the PO, have limited the process' overall objectivity. Hence, the numerous barriers in the way of navigating the complaints process have resulted in undelivered promises.

Conclusion

In conclusion, contrary to promises made to victims, this analysis reveals that both processes contain a number of different barriers that limit the process' efficacy. These barriers include accessibility limits and significant procedural and structural delays and complexities within the process. Whilst most barriers seem to be structural in England and Wales (MP process and cumbersome steps to reaching the PO), they are mainly financial and procedural in the United States. In addition, in both systems victims may also be confronted with a level of politicisation in the process' implementation – resulting in additional barriers, including additional delays, inconsistencies and a lack of objectivity within the process. As illustrated, the American pro bono advocacy system can in some scenarios be specifically focused on obtaining legal gains for the wider movement, and thus engage in methods that create further delays and inconsistencies for victims within the process. Similarly, in England and Wales, the MP filter's application can also be influenced by political considerations – giving rise to inconsistencies and considerable challenges for the process' overall objectivity. In brief, both

[400] Home Office, 'The Parliamentary Commission for Administration', White Paper (Cmnd 2767, 1965)

mechanisms and their process have presented a number of barriers for individual victims and as a consequence fail to deliver critical elements that were promised to victims.

Despite the limitations unveiled about the PO's complaints process, on the whole this mechanism includes a number of features that render it more accessible for victims than the CVRA's legal mechanism. Indeed, the process is generally clearer, less formal, requires less technical language and written legal procedures than the CVRA's legal mechanism. In addition, the PO process has the critical advantage of not requiring any legal costs during most of its stages, including when a complaint is brought forward to an MP.[401]

On the contrary, as illustrated in this chapter, the Federal American legal mechanism comprises a number of complexities associated with judicial proceedings and requires significant funds to enable legal representation for guidance and navigation throughout proceedings. Indeed, the CVRA's procedural complexities require legal representation for accessing this process, but private lawyers tend to be expensive and pro bono legal representation is rarely available and often aims to advance wider systemic interests. Chapter 7 will draw on some of these findings to propose improvements to both mechanisms as well as suggest possible elements of a mechanism that can attempt to overcome or minimise the difficulties mentioned in this chapter.

401 Of course, as seen previously, in the rather rare instances in which recommendations are not taken on board by the criminal justice agency in breach, victims can judicially review the decision which renders the process more complex, costly and requires the presence of a lawyer to represent the complainants.

CHAPTER 6: REMEDIES AND THEIR LIMITATIONS FOR THE VARIOUS TYPES OF VICTIMS' RIGHTS BREACHES UNDER THE CRIME VICTIMS' RIGHTS ACT AND THE CODE OF PRACTICE FOR VICTIMS OF CRIME

Redress for victims whose rights under the CVRA or the Code had been breached was a central aim of the schemes in both the U.S. and England and Wales. As we have seen in previous chapters, the schemes operate very differently. This chapter explores how, in each jurisdiction, the scope of redress for victims has operated in practice and argues that, despite the high hopes expressed by policy-makers in both jurisdictions, both mechanisms have to some extent fallen short. It will be seen that this is partly due to the very nature of the mechanisms themselves and their inability to redress certain types of rights, as well as the ways these schemes have been interpreted by the relevant courts and the PO.

The following analysis explores the scope of redress and limitations by mainly focusing on the different types of rights breaches, the context in which they were brought forward and their enforceability. In effect, the CVRA case law analysis on remedies between 2004 and 2012 illustrates that a number of types of rights protected under this statute that have been breached are only partially remedied or left without any remedies. In addition, adequate redress is not available for breaches unrelated to criminal proceedings or those brought forward at the end of criminal proceedings. In England and Wales, an analysis of the Code's remedial implementation since its enactment in 2006 suggests that the available remedies generally address certain breaches adequately, but can be limited for several other

forms. Finally, the analysis proceeds with a case study that illustrates some of the possible limitations to compliance and redressing breaches in that jurisdiction.

A. The CVRA's legal enforcement mechanism and its remedial limitations

Despite the importance of providing effective remedies for victims, the CVRA contains a number of statutory and judicially-created remedial limitations that create doubts about this mechanism's ability to adequately provide redress for all types of rights guaranteed by the statute. These limitations include (1) victims' inability to bring forward a cause of action in order to obtain damages for victims' rights violations; (2) limited or unavailable relief for certain types of breaches of rights; (3) the traditional mandamus standard that limits the availability of redress for certain types of breaches; and (4) non-existent redress for breaches discovered after criminal proceedings.

1. The statutory unavailability of action for damages for individual redress

First, in order to preserve governmental immunities against legal actions, the CVRA explicitly states that victims cannot bring forward a cause of action in order to obtain damages for victims' rights violations.[402] As will be illustrated in the case law analysis below, the unavailability of a compensatory and prospective form of remedy is particularly problematic and antithetical to the CVRA's main individual remedial aim -- as it leaves certain types of breaches of rights without remedies. For instance, in *Rubin*[403] (see below for

402 Crime Victims' Rights Act 18 U.S.C. § 3771. (d)(6);

403 *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008). Although the CVRA could have technically provided legal exceptions to these immunities, the main legal advisers behind this new scheme informed me that they preferred focusing their efforts for reform on remedies related directly within criminal proceedings.

further analysis) the court made clear that certain types of breaches can only be remedied prospectively. Since obtaining a compensatory form of redress is the only way to remedy certain types of breaches, its unavailability under the CVRA creates a situation where certain rights are left without redress. Hence, contrary to some of the victims' literature that claims that compensation/damages is an inferior and dysfunctional remedy since it does not leave victims in a position to exercise their rights,[404] this chapter illustrates that in some instances and for certain types of breaches, compensatory redress remains the *only* available and effective remedy, and thus its importance should not be undermined.

2. Remedial variation: From robust remedies for certain breaches to no remedies for others

Although all rights were described as important and remediable by the CVRA's drafters, a statutory and case law analysis of the available remedies and their implementation reveals a contrast: much stronger and more adequate remedies for breaches are recognised for most victims' procedural rights, whereas for various service rights breaches, remedies have generally been limited or inexistent.

a) The general availability of robust remedies for most procedural rights breaches

The CVRA recognises robust remedies for most breaches of procedural rights. Indeed, section § 3771. (d)(5) states that victims can make a motion to re-open a plea or sentence if their right to be heard or their right to restitution have been breached as follows:

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404 D Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' [2005] BYU L. Rev. 255; Beloof et al (n 406).

> **Limitation on relief.—** In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—
>
> (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
> (B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and
> (C) in the case of a plea, the accused has not pled to the highest offense charged.
>
> This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.[405]

Beloof et al[406] have generally described the possible voiding of procedure as the only 'superior remedy' available as it enables victims to exercise their rights retroactively in a re-hearing. Indeed for certain specific procedural rights breaches, namely the right to be heard and the right to restitution, the CVRA recognises retroactive and complete redress following a mandamus motion made by the victim that places the victim back to the initial stage prior to the breach's occurrence. This provides victims with an opportunity to exercise their rights within the criminal process.

In effect, as will be seen in greater detail below, in most cases related to breaches of procedural rights, including victims' right to be heard at sentencing, as well as their right to restitution, Circuit Courts have been more inclined to accept mandamus petitions. Further, where a district court denies a motion made under the CVRA to afford to victims allocution rights at sentencing, district courts have been directed to postpone finalising sentencing long enough for a mandamus petition to be filed and decided.[407] As is clear below, a court has

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405 Crime Victims' Rights Act 18 U.S.C. § 3771. (d)(5)

406 D Beloof, P Cassell and S Twist, *Victims in Criminal Procedure* (3rd edn Carolina Academic Press, Durham 2010).

407 U.S. v. Atlantic States Cast Iron Pipe Co. 612 F.Supp.2d 453 D.N.J., 2009. March 23, 2009.

even applied a less stringent mandamus standard – which facilitates the victim's ability to obtain such remedy. However, for other types of breaches under the CVRA, including service rights, it will be illustrated in section b), below, that the statute does not recognise such robust remedies and mandamus is much harder to obtain – particularly when the breach relates to government agencies.

For instance, in *Kenna*[408], a case where a victim's right to be heard at sentencing was breached, complete redress at sentencing was recognised. This robust retroactive remedy was granted following a successful mandamus motion in which a less stringent standard of review was used than the one used in traditional mandamus proceedings. In this criminal fraud case, the trial court judge denied the victim's right to be heard at sentencing under section § 3771. (a)(4) of the CVRA. Following the district court's alleged breach, the victim Kenna and a few others, filed a petition for a writ of mandamus to the 9th Circuit which was granted. In this respect, the court stated that victims do not need to overcome hurdles typically faced by petitioners seeking mandamus review of district court determinations and that instead, the Appeal court must issue the writ whenever it finds that the district court's order reflects abuse of discretion or legal error under the CVRA. The Court granted the petition for writ of mandamus and held that the district court *erred* in refusing to allow Kenna and other victims to speak at the defendant's sentencing hearing. It referred to the legislative history which revealed 'a clear congressional intent to give crime victims the right to speak at proceedings', and found that the victim had an indefeasible right to speak similar to a criminal defendant's right of allocution. To remedy this breach, it remanded the case to (1) allow the victim to file a motion to the district court to vacate the defendant's sentence and (2) conduct a new sentencing hearing if that motion was granted. It highlighted that the only way to remedy this

408 *Kenna v. U.S. Dist. Court,* 435 F.3d 1011, 1013 (9th Cir. 2006).

right was to vacate the sentence and hold a new sentencing hearing in the district court. Hence, the court in *Kenna* recognised the importance of a robust remedy for this type of breach and facilitated its implementation by using a less stringent standard of review for the mandamus process.

Further, victims have also benefited from robust remedies in cases involving breaches by courts of their right to restitution under section § 3771. (a)(6), even if a traditional mandamus standard was retained. For instance, in *Monzel*,[409] the defendant pled guilty to possession of child pornography and one of the images included "Amy" who subsequently sought $3.2 million in restitution from the defendant. The district court instead awarded $5,000 in restitution, and acknowledged that was less than the harm the defendant had caused to the victim. The victim through her attorney challenged the award on a petition for mandamus.[410] The Circuit Court highlighted the circuit split on the mandamus standard and decided to opt for the traditional mandamus standard that required the petitioner to show a clear and indisputable right to relief, that the district court had a clear duty to act, and that no other adequate remedy was available. Despite the use of this more stringent standard, it found that Amy was entitled to relief since she had a right to full and timely restitution as provided by law, and that the district court had a corresponding duty to direct the defendant to pay the full amount of her losses under the 18 U.S.C. § 2259. The court found that in this case the victim did not demonstrate the existence of proximate causation for all of her losses and thus was not entitled to the full $3.2 million. Nevertheless, the Court stated that 'A district court cannot avoid awarding the full amount of the victims' losses simply because the attribution analysis is difficult or the government provides less-than-ideal information.' Accordingly, the

409 *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011).

410 The victim also appealed the decision, but the court rejected her appeal on the basis that a victim has no right to directly appeal a criminal defendant's sentence.

court decided to grant the victim's petition in part, and remanded the case to the district court to 'consider anew the amount of Amy's losses attributable to the defendant's offense and order restitution equal to that amount.'

Most recently in *in re Amy*,[411] another case of child pornography, a district court denied the victim's request for restitution of $3,367,854, and consequently the victim petitioned for a writ of mandamus. After further litigation, the appellate court decided to hear the case *en banc*[412] and also used the traditional standard of review related to mandamus to reach its decision. It highlighted that only exceptional circumstances amounting to a judicial usurpation of power would justify the invocation of the extraordinary remedy of mandamus. In this respect, the court found that the mandamus criteria were met since the victim (1) was denied her right to restitution; (2) had no other means for obtaining review of this decision and (3) had an indisputable right to restitution. Hence, the court provided relief by vacating the sentence and remanding the evaluation to the district court.

i- Limited relief for breaching the victim's right to consult with prosecutors

Despite a robust remedial approach taken for most procedural rights violations -- namely the right to be heard at sentencing[413] as well as the right to restitution, redress for breaches of victims' procedural right to consult with prosecutors has been more limited due to judicial deference towards prosecutors.

411 *In re Amy Unknown*, - F3d -, No. 09-31215, 2012 WL 4477444 (5th Circ. Oct. 1, 2012) (en banc).

412 A rehearing *en banc* refers to a hearing before the entire court, rather than just a three judge appellate panel. This takes place rarely – usually in cases of exceptional importance.

413 As stated by Giannini, under the CVRA, robust redress for victims' right to be heard is not available in cases where a victims' right to be heard during parole and release have been breached. See MM Giannini, 'Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victims' Right to be Reasonably protected from the Accused' (2010) 78 Tenn.L.Rev. 47-104.

In *Heaton*[414] the district court provided robust redress for the prosecutor's failure to consult with the victim. In this case the judge refused to grant a government's motion for dismissal of charges until government had consulted with the victim. Indeed, it was suggested that the government's reasons for dismissal had to be made in light of the victim's rights under the CVRA. The government was therefore directed to provide a basis for its motion within fourteen days of the date of this order, including the victim's views on the dismissal.

On the contrary, *In re Dean*[415] illustrates the district and appellate courts' failure to remedy the victims' right to consult with prosecutors under section § 3771 (a)(5) of the CVRA. In this case twelve victims of a deadly explosion at an oil refinery owned by the defendant objected to the government's request that the court both accept the defendant's guilty plea regarding violations of the federal *Clean Air Act* and impose the stipulated sentence. Along with comments on the inadequacy of the proposed sentence, the victims also raised the issue that the plea should be rejected because the agreement was reached in violation of the victims' rights to confer with the prosecution and to be treated with fairness, as guaranteed by the CVRA. The district court concluded that the government should have specified the reasons why it did not notify victims about this potential plea agreement and show that it considered and rejected other alternatives to notifying victims. However, it suggested that the 'asserted CVRA violations are not in themselves a basis for rejecting a plea agreement'[416] and thus did not reject the plea agreement or order any other form of relief to remedy this specific breach.

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414 *United States District Court, D.Utah v. Heaton,* 458 F.Supp. 2d 1271 (2006).

415 *In re Dean,* 527 F.3d 391 (5th Cir. 2008) and see related case: *United States v BP Products North America Inc.,* Crim. No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008).

416 Id.

Following the district court's refusal to reject the plea agreement or to provide victims with another form of relief, the victims petitioned the Fifth Circuit Court for a writ of mandamus.[417] They argued that the government's failure to consult with the victims prior to reaching the agreement or to provide them with notice of the plea violated their rights under the CVRA. The Circuit Court concluded that the traditional mandamus standard applies when reviewing such petition and highlighted that 'although the district court, with the best of intentions misapplied the law and failed to accord the victims with the rights conferred by the CVRA, the mandamus standard is not satisfied.'[418] More specifically, the court suggested that the relatively small number of victims should have been notified of the ongoing plea negotiations and given the opportunity to confer with the government before a plea was negotiated. It therefore found that there was a statutory violation, but nevertheless declined to order any remedies for the district court's error and prosecutorial breaches. This could have included reversing the order and suggesting that the current plea agreement not be accepted – highlighting that the parties proceed as they determine so long as it is done in a way that respects crime victims' rights. Instead it expressed its confidence that 'the conscientious district court will fully consider the victims' objections and concerns in deciding whether the plea agreement should be accepted.'[419]

Pursuant to the Fifth Circuit Court of Appeals' instructions, the district court noted that victims were not afforded their rights under the CVRA and as hoped by the Circuit Court, considered their objections in deciding whether the plea should be accepted. It noted

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417 *In re Dean,* 527 F.3d 391 (5th Cir. 2008).

418 Id.

419 Id

that the violations under the CVRA did not merit a rejection of the plea because nothing in the record supported the conclusion that the outcome would have differed if victims had conferred with the government prior to the agreement.

Essentially, this case illustrates the district and appellate courts' failure to remedy prosecutorial breaches, namely the government's failure to notify and give victims the opportunity to confer with it before a plea was negotiated. Further, it is also relevant to add that the right to consultation under the CVRA provides victims with a distinct right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached, which was clearly left without redress when breached in this case. Indeed, the appellate court in this case recognised the clear distinction between these two types of rights, agreeing with the victims that their participatory impact on the plea agreement 'can be substantially less where, as here, their input was received *after* the parties reached a deal'.[420] However, instead of redressing this specific breach, the appellate court mentioned its hope that victims' views and interests would be heard in the court hearing, which in effect, is in itself a separate right protected by the CVRA and thus fails to redress the specific breach at play.

In addition, in this case, the appellate court's decision to use a much more stringent mandamus standard than that in *Kenna* creates an additional limit to this mechanism's remedial potential and highlights the court's deference when it comes to providing remedies for this type of breach by government, as well as court errors. In effect, the use of the traditional stringent standard suggests that despite the presence of a judicial error,[421] which

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420 Id

421 This term refers to a mistaken conclusion as to the content of a legal standard that the authority has to apply in a case.

amounts to a victims' rights violation by the district court, the appellate court should refuse to provide mandamus. Hence, the district court's failure to remedy the government's breach is considered to be a legal error – a misinterpretation of the law - rather than a usurpation of power and is therefore left without redress.

b) The limited or unavailable remedies for breaches of service rights

Contrary to procedural rights, victims' service rights are unrelated to the decision-making process and therefore cannot affect the outcome of criminal proceedings. Hence, the robust remedy of re-opening and voiding proceedings is not available for service rights breaches under the CVRA. In addition, as seen earlier, the CVRA does not provide a possibility for victims to obtain damages or any form of compensatory payment for any breaches of rights, which creates further remedial barriers – particularly for certain service rights breaches, as will be seen below.

Other than these limitations, the CVRA does not provide further guidance to courts and therefore remedies for service rights breaches are left to the court's discretion. Although this flexibility can allow judges to consider victims' different needs and provide them with remedies adapted to context, a number of CVRA cases illustrate the limitations and inadequacies of this mechanism to remedy certain types of service rights breaches. Indeed, breaches of rights by the judiciary within the criminal process are easier to remedy with this mechanism than other types of breaches that remain partially remedied or without remedy due to judicially-created and statutory limitations.

Service rights under the CVRA can be divided into two categories of rights, namely process-related rights[422] (in other words, rights that are related to criminal proceedings) and rights that are unrelated to criminal proceedings.[423]

The following analysis specifically refers to cases related to breaches of victims' rights to notification as well as rights to proceedings free from unreasonable delay to illustrate that redress under the CVRA has been limited or unavailable to remedy these process-related breaches. In addition, the unavailability of adequate redress is a reality even more pronounced for breaches unrelated to the criminal process.

i- Breaches of process-related service rights and limited redress

In cases of process-related service rights breaches, courts have generally invoked three main justifications to limit redress. First, they have concluded that these rights are not as important within criminal proceedings as substantive rights and that, on balance, recognising more robust remedies for these types of breaches may create considerable strain or disruption to the criminal process, particularly towards defendants' rights. Second, courts have noted that certain process-related breaches can only be remedied prospectively and therefore due to the unavailability of damage claims, the CVRA does not equip victims and judges with the right tools to claim or provide adequate redress. Finally, as will be seen in greater detail in section

422 The "process-related" category includes a number of notification breaches, including breaches of victims' right to reasonable, accurate, and timely notice of any public court proceeding, as well as breaches of victims' notification of their rights. It also includes victims' right to proceedings free from unreasonable delay.

423 The category of breaches "unrelated to the criminal process" includes victims' right to be reasonably protected from the accused outside of criminal proceedings, the right to 'reasonable, accurate, and timely notice of any parole proceeding, involving the crime or of any release or escape of the accused' and in cases unrelated to the process, the right to be treated with fairness and with respect for the victim's dignity and privacy.

6, in mandamus cases, Circuit Courts have also been inconsistent in their interpretation of the mandamus standard and have generally adopted a more traditional interpretation in cases where service rights have been into play – inevitably limiting any potential of redress and generally reaffirming their deference towards government-related breaches.

- *The right to not be excluded from public court proceedings and adequate redress*

Although this section is chiefly meant to illustrate that certain rights under the CVRA are left without redress, it is worth highlighting that this is not the case for every type of right. Indeed, when examining redress for the right to not be excluded from public court proceedings, the following decision suggests that this right can be adequately remedied within the criminal process.

Thus in *In re Mikhel*,[424] the trial court held that the deceased victim's family members would be excluded from criminal proceedings until called as witnesses. The US petitioned for a writ of mandamus ordering the district court to allow the victims to be present pursuant to section § 3771 (a)(3) of the CVRA. The appellate court noted that because the trial court excluded the victims without determining whether the victims' testimony would be materially altered if they were allowed to be present, and failed to consider any reasonable alternatives that would allow victims to attend the hearing, the ruling had to be reconsidered in light of the criteria provided by the CVRA. The appellate court therefore granted the petition, in part, directing the trial court on remand for reconsideration by the district court to determine

[424] *In re Mikhel v. District Court,* 453 F.3d 1137 (9th Cir. 2006)

whether clear and convincing evidence proves that the victim-witnesses' testimony would be materially altered if they were allowed to attend the trial in its entirety.

This case suggests that this type of right violation can, in similar circumstances, generally be adequately remedied when breached by the district court. In effect, mandamus as a remedy is recognised despite the application of a stringent mandamus standard, since this type of breach by the trial/district court is considered an usurpation of power by the court which failed to apply the law – and thus does not involve prosecutorial breaches.

- *The limited redress under the CVRA for certain process-related breaches: the right to notification and the right to be free from unreasonable delay in criminal proceedings*

In contrast, cases have revealed different remedial limitations for breaches of service rights that create duties upon criminal justice actors, particularly governmental bodies. To illustrate this reality, the following section focuses on breaches of notification rights and the right to be free from unreasonable delay in criminal proceedings.

Further, in cases of notification breaches related to criminal proceedings, courts have emphasised the 'procedural'[425] (process-related) nature of these rights -- as opposed to substantive rights – as a justification for diminishing their relevance in the criminal context as well as their remedial importance.

425 The American judiciary uses this term to refer to process-related rights. This terminology should not be confused with the category of 'procedural rights' described by Ashworth and referred to throughout this thesis.

For instance, in *Turner*,[426] the district court found *sua sponte* a breach of the victims' right to notification and attempted to provide an adequate remedy for the situation despite the fact that this was not a breach raised by victims on applications for relief. In this case, the court asked the prosecutor whether the victims had been notified of the proceedings. It was noted that the victims had not been given specific notice of the first two proceedings as required by section § 3771. (a)(2) of the CVRA. The court could have ordered an adjournment that would have enabled prosecutors to inform victims of previous proceedings and allowed victims to participate immediately at that stage. However, it decided to proceed with the case, but ordered the government to provide a written summary or transcript of the proceedings to any victim who was denied notice. It also ordered that the prosecutors make it clear to the victims that they would be allowed to address the court with respect to whether the decision the court made in their absence should be reconsidered. Notification was also directed with respect to *future* proceedings. The court noted that it did not endorse this alternative remedy as a routine substitute for conducting proceedings without notice to victims. However, since 'the result of a proceeding conducted in the victims' absence is one that does not appear to jeopardize any *substantive* as opposed to *procedural* (process-related) rights', the relief ordered was found to be preferable to an adjournment order that would have placed victims closer to the situation prior to the breach, but would have nevertheless interfered with the criminal process and defendants' rights.[427] In effect, the court highlighted that an adjournment as a remedy would have required further incarceration of the criminal defendant without a substantive ruling on whether there exists conditions of release that satisfy the requirements of the *Bail Reform Act.*

426 *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005).

Similarly, in *Ingrassia*,[428] the magistrate judge was meant to recommend whether to accept the defendants' plea. It found that the government failed to notify victims of public court proceedings required under the CVRA. As a remedy to address the failure in this case to timely and accurately notify victims, the judge recommended[429] that the district court can accept each guilty plea and approve each defendant's separate agreement only after the government has provided affirmative notice by first-class mail or other reasonably equivalent method to all identified victims. The required information was elaborate and included the release status of each defendant, the sentencing date set for each defendant and the victims' right to be heard with respect to the court's acceptance of the pleas and approval of the plea agreements. In a subsequent hearing in this case, the district court as well as the government agreed with this recommended remedy and thus agreed to take all of the curative measures recommended by the magistrate judge.[430]

Although some relief was recognised in *Turner* and *Ingrassia*, cases suggest that for other forms of notification breaches – namely the failure to notify victims about their rights – no remedy has been recognised. For instance, in *Rubin*,[431] a securities fraud case, the district court found that upon a detailed evaluation, the victims' right to notice of rights had been violated by the government, but nevertheless failed to provide any remedies. To justify the failure to provide a remedy, the court stated that

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428 *U.S. v. Ingrassia,* Not Reported in F.Supp.2d, 2005 WL 2875220 (E.D.N.Y.).

429 District judges can assign to magistrate judges additional duties. In this case the district judge assigned a felony guilty plea allocution to a magistrate judge with the consent of the defendant. After the referral of the plea allocution, the magistrate judge reports to the district court and recommends whether to accept the guilty plea. The recommendation on whether to accept the plea is a dispositive issue, and any objections to the recommendation are subject to de novo review by the district court. The district court is not required to review conclusions made by the magistrate court which no objections are addressed.

430 *United States District Court, E.D. N.Y. v. Ingrassia*, 392 F.Supp.2d 493.

431 *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008).

> the failure of the government to satisfy the affirmative obligation under the CVRA as well as its understanding with the trial court to notify movants of the existence of their CVRA rights promptly can be neither explained nor condoned (…) given the lack of any violation of movants' *substantive* enumerated CVRA rights, the Court perceives the government's misstep on notice as the sort that is remediable only *prospectively* and not retrospectively.

The court added that the only type of relief that could have been provided for this violation was an action for damages against the government for its failure to notify victims. However, it noted that Congress had not given any indication that it intended the CVRA to waive sovereign immunity and allow such damages and thus no prospective redress was available for this type of breach.

Similarly, in *In re Dean*[432] which also relates to victims' right to notification, the district court held that the government should have specified the reasons why it did not notify victims and show that it considered and rejected other alternatives to notifying victims. It nevertheless suggested that the 'asserted CVRA violations are not in themselves a basis for rejecting a plea agreement'[433] and thus did not provide any relief for the government's failing to notify victims about discussions preceding a plea agreement.

It appears that many notification rights are process-related as opposed to substantive and are therefore considered to be of secondary importance in criminal proceedings. These process-related rights may not always be best remedied in criminal proceedings, particularly when they come into conflict with other preponderant interests particularly defendants'

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[432] *In re Dean,* 527 F.3d 391 (5th Cir. 2008) see related case: *United States v BP Products North America Inc.,* Crim. No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008).

[433] Id.

rights. As seen in *Turner*, a more robust form of redress for breaches of notification rights would have resulted in a longer incarceration for the defendant on bail, and thus was not an appropriate remedy. Further, in *Rubin* since the right to notification was not a substantive right within criminal proceedings and damages as a remedy were not available, the court did not provide any redress for this breach.

Further, the decision in *Rubin* also illustrates that contrary to certain other rights protected by the CVRA, the legal mechanism under this statute does not provide adequate remedies for breach of a victim's right to proceedings free from unreasonable delay, since it can only be remedied prospectively. In *Rubin*, the movants claimed that the numerous delays that occurred for the convenience of either the government or the defendant breached their CVRA right under section § 3771(a)(3). More specifically, they suggested that the delays injured them financially with a decline in the value of the object of the restitution claim, the Omni stock. The court highlighted that other than conferring participatory rights on victims, this new Act did not add any additional substantive rights than those recognised to the defendant and the government under the *Speedy Trial Act*.

Most importantly, the court highlighted an additional remedial limitation for this type of breach by noting the impossibility of going back to the stage prior to this breach to remedy the situation. Redress was only possible for future breaches. It stated as follows:

> to the extent that any past delays in the proceedings took place, the horse has already left the barn. Going forward, though, movants will be heard on scheduling and the Court will continue its efforts to prevent any future unreasonable delay.[434]

[434] *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008).

Although the Court did not find any breaches based on the fact that the delays incurred were reasonable, it nevertheless highlighted the CVRA's remedial limitations for this type of breach by stating that 'in any event, even if some of the delay in prosecution was unreasonable, since Congress could have but did not provide an action for monetary damages, there is no practical remedy for any harm flowing from past delay'.[435] In brief, considering the fact that it is impossible to go back to the stage prior to this breach, this type of breach can only be remedied *prospectively* by monetary compensation which is explicitly unavailable under the CVRA.

Further, in *In re Olesen*,[436] the defendant was convicted of murder and sentenced to death. The victim Olesen brought forward a motion for dismissal against the defendant's *habeas corpus* action in the district court alleging unreasonable delay in violation of his rights under section § 3771(a)(3) of the CVRA following a nine and half year delay in this *habeas corpus* action. The district court denied the claim without providing any reason for its decision. The victim petitioned the court to obtain mandamus relief and following the application of the traditional stringent standard of review the Circuit Court declined the motion suggesting that mandamus is a 'drastic' remedy that is 'to be invoked only in extraordinary situations'[437] that amount to a judicial usurpation of power. The claimant must therefore show that his right to the writ is clear and indisputable, and not merely prove that the district court erred in ruling on matters within its jurisdiction.

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435 Id

436 *In re Olesen*, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy).

437 Citing *In re Antrobus*, 519 F.3d at 1124 (quoting *Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34 (1980) (per curiam)).

The court recognised that the delay was too long, that it was not caused by the victim, that the victim had asserted his rights several times, and had suffered prejudice as a result of the lengthy litigation. Despite these findings, the court recognised that the defendant's due process right to have his *habeas corpus* case heard prevailed and highlighted the likelihood that under the present briefing schedule the *habeas corpus* action would soon be concluded with a final ruling by the district court. Hence, despite this delay the victim did not have access to a remedy for this breach. In brief, this case highlights the real difficulties in providing adequate remedies for this type of breach within criminal proceedings while ensuring that other interests in the process, including the defendants' due process right is not violated. As will be seen in section 3, below, this case also reaffirms the principal difficulties that a traditional mandamus standard creates for obtaining remedies when breaches have occurred.

ii- Breaches of service rights unrelated or minimally related to criminal proceedings and their limited redress

Although this thesis focuses more on rights related to the criminal process, it is worth mentioning that the CVRA co-sponsors have expressed aims of protecting and remedying rights that are unrelated or minimally related to the criminal process. As listed above, they include a wide array of rights, including the right to be reasonably protected from the accused, the right to 'reasonable, accurate, and timely notice of any parole proceeding involving the crime or of any release or escape of the accused' and in certain cases, the right to be treated with fairness and with respect for the victim's dignity and privacy outside criminal proceedings. Finally, these breaches can also include rights that victims may have

before the filing of a criminal charge by prosecutors, including notification about criminal investigations.[438]

Indeed, in a recent article which specifically analyses this right to protection under section § 3771(a)(1) of the CVRA and its enforcement, Giannini provides a number of different reasons that explain why this right's enforcement is limited and argues that its current drafting provides victims with an illusory right that cannot be enforced under the CVRA's legal enforcement mechanism.[439] Its drafting suggests that it provides victims with an affirmative right to receive direct protection by the government from the accused. Arguably, it is too broad and disconnected from the criminal process to ensure adequate enforcement and redress within criminal proceedings. Although enforcement cases related to this right have not been brought forward, it is not clear how adequate remedies can be crafted for this type of breach within the actual CVRA remedial remit.

Similarly, for breaches of notification rights unrelated to the criminal process, such as the right to be notified about investigations before any formal charges are made[440], the right

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438 For instance, it was seen that victims were provided with individual redress for breaches of the Code, including HM Courts and Tribunals Service's failure to take contact telephone numbers so the victims as witnesses are able to leave the court precincts and be contacted when needed, as well as the Probation Service's failure to inform victims at key stages in the offender's sentence (move to a lower category prison etc.).

439 For more details see Giannini (n 413) in which the author argues that this right needs to be re-written in order to emphasise the victim's participatory role in the criminal process rather than promising a direct outcome. She argues that a current right to protection cannot be realistically enforced due to constitutional limitations. Indeed, courts generally fail to recognise a constitutional duty on the government to protect its citizens from the private harm of others (affirmative obligation); and the principle of sovereign immunity prevents any actions to recognise liability for state failure to protect citizens.

440 At this point in time, there is even a debate about whether the CVRA even includes rights before formal prosecutorial charges are made. For more information on the debate on whether the CVRA includes rights before criminal charges are filed, see: P Cassell and N Mitchell, 'Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed' (2013) Journal of Criminal Law and Criminology (forthcoming). The authors of this article argue that victims have important rights at stake in the criminal justice process, even before prosecutors formally file criminal charges and that the CVRA covers these rights.

to timely notice of parole proceedings, release or escape of the accused after criminal proceedings, the CVRA does not offer adequate redress and thus has arguably created illusory rights without remedies despite the CVRA's drafters' explicit intent to do otherwise. Rights to notification in general also involve an affirmative obligation on the part of the government to provide information to victims, but the principle of sovereign immunity has also prevented any recognition of liability and damages for the failure to inform victims. As seen above, breaches of notification rights related to criminal proceedings benefit from limited remedy in part due to their prospective nature, but can technically give rise to adjournments that will minimise any future breach of information within the criminal process. In the case of information unrelated to the process it may be more difficult to bring forward such breaches, due to their further irrelevance in criminal proceedings. As illustrated above, courts have hesitated to provide redress for certain breaches related to the criminal process, notably when they are considered to be minimally relevant to the criminal process. *A fortiori*, these hesitations and remedial limitations are more prominent in cases of breaches of rights unrelated to criminal proceedings.

3. The standard of review in mandamus cases: inconsistencies and an additional remedial limitation for certain breaches

To date, Circuit Courts have inconsistently applied the standard of review in mandamus cases. This has led to confusion regarding the nature of the remedy which varies between an interlocutory appeal and a traditional writ of mandamus.[441] Hence, this situation is contrary to

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441 Appellate decisions of the 2nd, 3rd, 9th Circuits propose a relaxed appellate standard of review specifically for victims under the CVRA. For instance, the 2nd Circuit in *In re Huff Asset Management Co,* 409 F.3d 555(2nd Cir. June 2005) made it clear that this mandamus is not discretionary by stating

the principle of legal certainty in judicial proceedings and a decision by the Supreme Court or legislative amendments by Congress would be a welcome step towards clarity and consistency. In recent years, however, Circuit Courts have generally applied the traditional mandamus standard and thus this precedent seems likely to remain.

The traditional mandamus sets the bar high and includes a number of hurdles for the petitioner, since the writ is considered to be discretionary and requires the petitioner to ask permission to be heard and demonstrate (1) the presence of a novel and significant question of law; (2) the inadequacy of other available remedies; and (3) the presence of a legal issue whose resolution will aid in the administration of justice.[442] Further, if permission is granted, the standard of review is set high and requires victims to show that the right to the writ is 'appropriate under the circumstances'[443] as well as 'clear and indisputable.'[444]

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that a 'petitioner seeking relief pursuant to the mandamus provision set forth in s 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus.' and thus have a right to appellate review unlike petitioners who have to ask permission to be heard. It then used a more relaxed standard than the traditional mandamus, namely the standard of 'abuse of discretion' to review the district court's action. Similarly in *Kenna*, the 9th Circuit used a relaxed appellate standard and reasoned that the court need not apply the traditional mandamus standard, but instead the 'active review of orders denying victims' rights claims even in routine cases'. On the contrary, appellate decisions in the DC Circuit (*US v. Monzel)*, 5th Circuit (*In re Amy; In re Dean)* and 10th Circuit (*In re Olesen)* have interpreted the standard of mandamus rigidly as the traditional and discretionary writ of mandamus in common law tradition. The 9th Circuit originally applied an appellate standard in *Kenna*, but revisited its initial position in *In re Mikhel* by adopting a traditional mandamus standard. This conflict among Circuit courts has not been resolved yet by the US Supreme Court or Congress. For further discussion related to this debate, see the normative stance in favour of a relaxed appellate standard of review: P Cassell, 'Protecting Crime Victims in Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Mandamus Provision' (2010) 87 Denv U L Rev 599; D E Aaronson, 'New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004' (2008) 28 Pace L.Rev. 623, 662; P Cassell and S Joffee, 'The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act' (2010) 105 *Northwestern University School of Law Review Colloquy* 164; S Joffee, 'Validating Victims: Enforcing Victims' Rights Through Mandatory Mandamus' (2009) 1 Utah L Rev 241. For arguments in the literature in favour of a traditional mandamus standard, see: D Levine, 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution' (2010) 104(1) Northwestern University Law Review 335.

442 *In re Huff Asset Management Co,* 409 F.3d 555(2nd Cir. June 2005)

443 See eg *In re Dean,* 527 F.3d at 394 in which the court found the writ of mandamus was not appropriate under the circumstances, since the victims were notified – albeit much too late in the process – and were allowed to participate in the hearing. Hence, the application of this stringent standard creates a

Essentially, by adopting the traditional standard, mandamus becomes a remedy that is only available in exceptional cases and thus courts will proceed with great deference before granting this form of relief. Mere error, or even gross error in a particular case, does not suffice to support the issuance of this writ. As stated by Levine, the only way this standard can give rise to a successful mandamus petition is when district courts have ignored the procedural requirements of the CVRA without explanation.[445] Similarly, in the case of *in re Dean*[446] previously analysed in section 2.a and 2.b)i), even though the Circuit Court found that the district court's explanations for endorsing the government's decision to deny victims' rights to notification and consultation did not pass muster,[447] it denied relief on the basis that the decision to grant mandamus is largely prudential and 'not appropriate under the circumstances'. The traditional mandamus standard espoused by Levine and applied by the Circuit Court in *In re Dean* suggests that any explanation by the agency in breach – whether unreasonable, incomplete or implausible would suffice to refuse the granting of a mandamus.

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situation where victims are not provided with any redress for the failure to notify and consult victims *prior* to the agreement.

444 For instance in *In re Olesen*, although there were delays and prejudice caused to the victim by the lengthy litigation, the Circuit Court could not conclude that the victim had a 'clear an indisputable right to the granting of the motion to dismiss' since the prejudice and delay cannot overcome the defendant's due process right to have his habeas case decided and there was a likelihood that under the schedule that this action would soon be concluded by a final ruling by the district court.

445 D Levine, 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution' (2010) 104(1) Northwestern U. L. Rev. 335, 357.

446 *In re Dean,* 527 F.3d 391 (5th Cir. 2008).

447 The Circuit Court found that in this case it was not reasonable for the government and court to justify the failure to consult and notify victims on the basis that this was 'impracticable', since there were 'fewer than two hundred victims, all of whom could be easily reached' and 'there was never a claim that notification itself would have been too cumbersome, time-consuming, or expensive or that not all victims could be identified and located.' (p. 395) Hence, even though the Circuit Court found there was an abuse of discretion and misapplication of the law by not recognising that the victim was notified much too late in the process and thus not allowed substantial and meaningful participation at the plea hearing, a mandamus was not 'appropriate under the circumstances' since it remained confident that the district court would take this into account and carefully consider the victims' objections and briefs as it proceeds, and relief was denied.

This suggests that contrary to the drafters' intent of providing remedies to breaches of rights - discussed in greater detail in chapter 4[448] - these agencies benefit from a quasi-unlimited discretion which diminishes victims' chances of obtaining redress even in clear cases of abuse of discretion or legal error by government and courts. Indeed, as illustrated above, the application of a traditional standard of review has given rise to remedial limitations and rights without remedies, particularly in cases in which breaches are initially caused by governmental bodies – suggesting judicial deference toward government (in)action.[449] Indeed, this standard prevents redress in several cases, including when governments have breached victims' rights and district courts have erroneously failed to provide redress for these governmental breaches. In such cases, the judicial decision is considered to be erroneous rather than an abuse or usurpation of power and therefore mandamus is denied.

4. An additional remedial limitation under the CVRA: breaches brought forward at the end of criminal proceedings

The recognition of remedial mechanisms that operate within criminal proceedings can benefit victims who discover and raise breaches at an early stage within the process, as it allows them to suspend the criminal proceeding and have their motion heard before the end of the

[448] As seen in chapters 3 and 4, the *McVeigh* case is a significant contextual element to consider when examining legislative intent, since it influenced the adoption of the CVRA. Indeed, the judicial decision in McVeigh was not reviewable precisely because victims had no standing, despite the poor reasons behind not allowing victims to provide VIS. Hence, it was recognised in debates that the CVRA was enacted to remedy such violations that can be considered an abuse of discretion.

[449] For instance, as highlighted previously, although the circuit courts made errors by not addressing/explaining the breaches in *In re Olesen,* or remedying breaches by governmental bodies in *In re Dean*, the mandamus motions were denied after applying a stringent standard and consequently victims' rights violations by governmental bodies as well as district courts were left without remedies. This standard is not as limiting when victims' rights breaches originate from the courts. See for instance, in *United States v. Monzel*, *In re Amy Unknown,* and *In re Mikhel* mandamus was granted for breaches by the district court despite the application of a traditional mandamus standard.

relevant proceeding. Although chapter 5 illustrated that proceedings may be long and complex, courts in some instances can provide relief within these proceedings and victims do not have to wait until the end of proceedings to obtain relief. For instance, in certain cases of notification failures, the possibility of obtaining redress at that stage can allow a partial remedy for such breach and prevent as well as monitor future breaches. An example of this can be found in *Turner* in which, following notification breaches, the judge ordered that part of the remedy would be to ensure that victims were notified of future proceedings and that they were provided with transcripts of hearings that they missed due to notification failure. Further, this mechanism that operates within criminal proceedings has allowed certain victims to retroactively exercise certain types of rights before the end of the process and ensure that breaches are completely remedied. Earlier cases presented above, namely *Kenna*, *Monzel* and *in re Amy* provide further illustrations.

For breaches of rights related to criminal proceedings, the CVRA's remedial mechanism only operates within the confines of criminal proceedings: this can have benefits for breaches discovered and brought forward during these proceedings, but can also create remedial limitations and inadequate redress for breaches that are discovered at a later stage. Beloof et al argue that the mootness of rights can be a severe impediment for victims' rights and remedies[450] and in this respect, this analysis of the CVRA does indeed suggest that this mechanism suffers from this significant limitation.[451]

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450 Beloof et al. (n 406).

451 The CVRA does provide victims with a mechanism to bring their breaches forward to a victims' Ombudsman, but this mechanism is not aimed at providing any redress for victims. Instead, it is meant to have a systemic impact towards the agency in breach. Hence the remedies provided are not aimed at victims, but rather aim at providing disciplinary measures towards authorities in breach.

For instance, in *In re Allen*,[452] the court highlighted that other than the time limit that applies to re-open a plea or sentence, there is no deadline for victims to draw attention to breaches, except that it must be within the criminal proceedings, which excludes breaches discovered afterwards. Further, in cases of breaches related to pleas or sentences, the limitation regarding redress is even more restrictive, since certain breaches cannot be remedied unless they are asserted within these specific proceedings. For instance, in *US v. Keifer*,[453] although the victim was denied her right to be heard during the plea, the court could not grant her the remedy to re-open the plea since the victim asserted her right only after the proceeding had ended. Similarly, in *Ingrassia,*[454] the magistrate judge confirmed this limitation by stating that 'if and when a plea is accepted and sentence is imposed, any victim who has been denied notification may thereafter have no effective way to vindicate her rights.'[455] Hence, when discovered after certain stages of proceedings, the right to notification as well as the other rights under the CVRA can remain without redress – effectively limiting the key remedial aims expressed by the CVRA's main drafters and legal advisers.

Further, in *US v. Aguirre-Gonzalez*[456] victims tried converting an appellate challenge into a mandamus action under the CVRA. This request to accept the conversion and hear this mandamus motion was denied because two years had passed after sentencing, and consideration of the petition on the merits 'would be fruitless in light of the CVRA's express concern for finality in criminal sentencing orders.'

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452 *In re Allen,* No. 12-40954 (5th Cir. Sept. 6, 2012) (per curiam order).

453 *United States v. Keifer,* No. 2:08-CR-162, 2009 WL 414472, at 4 (S.D. Ohio Feb. 18, 2009).

454 *U.S. v. Ingrassia,* Not Reported in F.Supp.2d, 2005 WL 2875220 (E.D.N.Y.).

455 Id. par. 21

456 *United States v. Aguirre-Gonzalez*, 597 F.3d46 (1st Cir. 2010).

The established principle of finality in sentencing is challenged by some of the aforementioned cases. They illustrate the tension between providing victims with redress in cases of breaches under the CVRA's legal enforcement mechanism and respecting the principle of finality of pleas and sentences, particularly in appellate criminal proceedings. Indeed, although this is not expressly mentioned in these cases, this rests on the notion that the defendant's interests may be affected if placed in a state of limbo in which he does not know what will happen, and can eventually face again the incredible power of the state. When certain breaches are not raised at a certain stage during proceedings and instead raised at a later stage, with a request to re-open the previous stage of the process, this can impede the course of the criminal process. This shows the limits of the CVRA's legal mechanism within criminal proceedings as well as the judiciary's restraint in providing victims with redress under these circumstances. For these reasons, it may be worth pushing this analysis further in chapter 7, by suggesting preliminary thoughts about features that can be part of a more comprehensive mechanism for redress that would among other things, minimise some of its effects on criminal proceedings.

Summary

In conclusion, although the CVRA drafters had hoped for a solution that would provide adequate and effective remedies for all rights under the CVRA, this analysis suggests that the CVRA's legal remedial scheme has not fully lived up to its promise. In effect, cases illustrate that courts have generally remedied breaches of procedural rights, while breaches of service rights have been left with limited or no remedies. More specifically, district courts have not provided redress for certain service rights breaches, notably when breaches of rights are

considered to be process related rather than substantive and when enforcing them would result in a greater disruption of defendants' substantive rights. Cases have also revealed that certain rights can only be remedied prospectively and thus the statutory failure to recognise damages for these breaches has also resulted in the creation of rights without remedies. More generally, cases have also illustrated that when Circuit Courts have applied a traditional mandamus standard in cases of governmental breaches, these types of breaches have been left without redress. Finally, this legal mechanism has also revealed a number of limitations for redressing breaches of rights unrelated to criminal proceedings or discovered or raised after criminal proceedings.

B. The PO redress process in England and Wales: adequate redress for certain breaches and the limitations of remedial recommendations

As stated in chapter 4, policy-makers in England and Wales highlighted that the Code's mechanism would ensure adequate and effective redress for breaches. The following section is divided into three parts and argues that redress under this Code is not guaranteed and can be limited for different types of breaches. First, it examines the different forms of redress available and their limitations for victims of crime. Second, it explores the persuasive nature of this mechanism to determine whether the Code's remedial recommendations have been implemented and finally it illustrates some of the scheme's limitations when remedial recommendations are ignored by the bodies in breach.

1. Available redress for victims under the Code and the scheme's limitations for certain types of breaches

Contrary to the approach taken under the CVRA, the Code in England and Wales protects a much wider range of service rights shaped as obligations held by government agencies. The Code includes both types of service rights: rights unrelated[457] and related[458] to criminal proceedings. Contrary to the American approach, it also provides victims with a complaints process for individual redress outside of criminal proceedings and does not create any duties upon judges.

In order to recommend redress, the Parliamentary Commissioner Act 1967 (the Act) provides for an in-depth investigation by the PO upon complaints of governmental maladministration and breaches under the Code which can help unravel detailed information about the precise way certain services were delivered.[459] Its extensive powers have been described as follows:

> The Parliamentary Commissioner's [or Parliamentary Ombudsman] investigations, far from replacing these traditional procedures, would provide the backbench Member with a new and powerful weapon which, until then, neither he individually nor the House collectively had ever possessed that is the possibility of a through and impartial investigation into alleged maladministration. The knowledge that this new servant of the

457 These rights are varied under the Code and include for instance duties upon police to provide victims with information about the available support services, as well as information about the investigation stage such as notification about arrest, bail and decisions regarding charges. They also include duties upon the Criminal Injuries Compensation Authority to provide information to victims about the Criminal Injuries Compensation scheme and an explanation about any decisions made under that scheme.

458 For instance, these rights are drafted as duties upon the joint Police CPS Witness care Units and include duties to notify victims about the date of all criminal court hearings, the outcome of pre-trial hearings, verdict of trial and sentences. Further they also include duties by prosecutors to provide victims with information and in some cases explanations about charges and decisions made by the CPS related to criminal proceedings.

459 See s. 7(2) of the Act which provides the PO with a very wide discretion to conduct investigations as she sees fits.

> House was there, with the power to go wider and further than anyone except the Comptroller and Auditor General, should surely put heart into those backbenchers who felt that they counted for little more than lobby fodder. [460]

Indeed, this process can be compared to continental inquisitorial systems, where judges have very broad powers to conduct investigations. The PO can require witnesses to attend meetings, conduct examinations that take place under oath, and compel the production of documents more expansively than the powers recognised to courts. Indeed, in previous communications with the PO, it was suggested that this inquisitorial investigative technique has allowed the ombudsman to collate in depth information on the organisations and the ways they have administered matters in the circumstances of an alleged breach. It was noted that without such comprehensive information, the different levels of systemic and individual redress as provided in both remedied complaints, seen below in greater detail, would not have been possible.

Following this thorough investigation, if the PO finds a breach under the Code, she can *recommend* a range of redress/remedies to the agency in breach of service rights. Remedies for these breaches include:

- an apology, explanation, and acknowledgement of responsibility;
- reviewing or changing a decision on the service given to an individual complainant; revising published material; revising procedures to prevent the same thing happening again; training or supervising staff; or any combination of these;
- financial compensation for direct or indirect financial loss, loss of opportunity, inconvenience, distress, or any combination of these. [461]

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460 R Gregory and A Alexander, 'Our Parliamentary Ombudsman Part I: Integration and Metamorphosis' (1972) 50 *Public Administration* 313, 324-325 This statement was made by Richard Crossman, member of the National Executive Committee of the Labour Party in 1966.

461 For further details see, Parliamentary and Health Service Ombudsman, 'Principles for Remedy', <http://www.ombudsman.org.uk/improving_services/principles/remedy/index.html> (accessed April

a) Limited robust redress for breaches related to criminal proceedings

Under the Code, the PO must aim as much as possible to provide robust redress by restoring the complainant to the position she would have been in if the breach had not occurred. Indeed, when proposing a remedy, the PO's underlying principle is to

> ensure that the public body restores the complainant to the position they would have been in if the maladministration or poor service had not occurred. If that is not possible, the public body should compensate them appropriately.[462]

Achieving this aim may however be more difficult in cases of service rights breaches related to criminal proceedings, notably rights to notification about court proceedings and rights to adequate facilities during criminal hearings. In effect, contrary to the CVRA's approach,[463] the Code does not provide redress within criminal proceedings, and therefore can normally only be triggered at the end of these proceedings[464] or in a parallel process of judicial review while criminal proceedings are still in progress.

2010) This document also provides a way to calculate financial loss, as well as interest rests to payments.

462 Ibid.

463 See the aforementioned cases of *Turner* and *In re Mikhel.*

464 For instance, to ensure these rights do not affect or delay criminal proceedings, the prosecutors' complaints guide/leaflet specifically states that 'Where a complaint relates to ongoing criminal cases, we may only be able to provide limited information. We reserve the right not to deal with a complaint in relation to an ongoing case if it might prejudice the proceedings.' See CPS, 'Feedback & Complaints' (June 2013) 3; This information was confirmed by prior communications with a contact in the CPS office.

Victims' lack of standing in criminal proceedings diminishes their chances of preventing and monitoring future breaches within these proceedings or obtaining interlocutory relief closer to the moment of discovery. They can nevertheless complain of the failure to accord them a right through the process of judicial review to require an authority to perform a positive action following a failure to fulfil its duties under a statute. However, since this is an independent procedural mechanism that operates outside of criminal proceedings, contrary to the CVRA's legal mechanism, it does not adjourn the criminal process in order to remedy breaches related to the criminal process more rapidly and effectively. Indeed, judicial review as an independent remedial process can take time and therefore the criminal process may have ended or reached a subsequent stage that renders the issue moot or irremediable within criminal proceedings. Hence, for the aforementioned breaches related to criminal proceedings, victims may be better served with the CVRA's scheme since it would enable them to raise certain breaches within the criminal process and often obtain an adjournment which would increase their chances of obtaining more adequate and robust remedies within these proceedings.

b) Financial compensation: An essential remedy for certain types of breaches

Contrary to the CVRA which failed to provide remedies for a number of service rights breaches,[465] the PO's aforementioned underlying principle encourages compensatory redress in cases of breaches that cannot be remedied by placing the victim in her initial position had the breach not occurred. Hence, compensation as an alternative redress by the PO offers a

[465] As seen above, examples of rights with limited robust redress in America include victims' right to protection, right to be free from unreasonable delay during proceedings, certain types of notification rights and breaches discovered at the end of the criminal process. In the English model these breaches include certain forms of notification failures, but also types of rights unrelated to criminal proceedings, including breaches of rights related to the initial police investigation, criminal injuries compensation schemes, and certain probation services.

precise focus on the specific breach and can hold governmental bodies directly to account towards victims instead of merely focusing on future breaches or not offering any redress at all. The limited complaints related to redress[466] illustrate the aforementioned points on the remedial relevance of compensation for certain service rights breaches as well as the Code's remedial limitations for some breaches of rights related to criminal proceedings.

At the time of writing, there have been just two complaints–in 2010 and 2012 – that have been accepted for investigation and were upheld with a report with recommendations for redress.[467] It is therefore impossible to know at this stage how much these remedies reflect the way in which the PO will remedy future breaches, or the way in which governmental bodies will comply with these recommendations. At present, the positive record of redress and compliance provide reason for cautious optimism.

In the first case, the PO's remedial recommendations specifically address HM Courts and Tribunals Service's failure to comply with their duties under paragraph 8.4, 8.7 and 8.8 of the Code. These breaches include: (1) the failure by the court staff to provide victims with a separate waiting area and a seat in the courtroom away from the defendant's family or friends (8.4); (2) the failure to take contact telephone numbers so the victims as witnesses are able to leave the court precincts and be contacted when they are needed (8.7); and (3) the failure to ensure that there is an information point where all victims in criminal

466 An earlier Freedom of Information request was made in 2009 in order to obtain information on the redress provided for the complaint that was upheld, but was unsuccessful due to confidentiality safeguards following the very low number of successful complaints that may have facilitated identification. I filed another one in 2012, and was finally able to obtain up to date data from this request.

467 Access to these complaints was unavailable by the PO, since it may enable identification of the people who brought the complaints to this office.

proceedings in respect of relevant criminal conduct can find out what is happening in their case while it is being heard in court (8.8).

Recommendations for redress made by the PO for these breaches included a combination of individual and systemic redress in both cases. As individual remedies for this case, the PO recommended an apology to the victim and £5,000 for the three breaches by HM Courts and Tribunal Service and their poor complaint handling. The systemic remedial recommendation for this breach included a recommendation that the body in breach creates an action plan that was directly linked to the identified breaches and have a plan about how they would prevent breaches from happening in the future.

In the second case, the PO's investigation considered paragraphs 10.2-10.6 and found that HM Prison Service and the Probation Service failed to comply with paragraph 10.6 of the Code. This section creates duties to inform victims outside criminal proceedings and reads as follows:

> 10.6 The Probation Service shall also provide the victim with any other information which it considers appropriate in all the circumstances of the case. Generally, victims will be given information at key stages in an offender's sentence, for example, a move to a lower category prison or a temporary release from prison on license.

Similarly in the second case, the PO also recommended individual redress, namely an apology and £1,000 in compensation for the breach by HM Prison Service and the Probation Service. On a systemic level, it was recommended that the agencies in breach provide staff with appropriate training and guidance on prompt and efficient complaint handling.

The compensatory and systemic redresses selected to remedy these breaches within these two complaints suggest that under the Code's mechanism, it is not possible to restore the complainants to the position they would have been in if the breaches had not occurred. In such cases, compensation is recognised as an alternative and adequate remedy for certain breaches that could have otherwise been left with no redress.

For instance, in some cases involving service rights related to criminal proceedings, such as the failure of court staff to provide victims with a seat in the courtroom away from the defendant's family and friends, the lack of standing in criminal proceedings, the limited effect of judicial review adjournment of criminal proceedings and the limits of the PO's remit in criminal proceedings prevent any redress within criminal proceedings. Hence, although not ideal in this context since legal redress in criminal proceedings may be more robust, compensation appears to be the only available remedy for this type of breach in this jurisdiction.

In addition, similarly to the American context analysed above,[468] there are certain breaches of rights that can only be remedied prospectively and therefore compensation is the only possible means of redress for victims. For instance, as illustrated in the two complaints under the Code, when victims fail to be informed about the progress of criminal proceedings, important dates related to these proceedings, or when court services fail to accommodate witnesses, retrospective relief may not be possible and these rights often become moot.

[468] As seen above, the CVRA includes rights that can only be remedied prospectively, including the right to proceedings free from unreasonable delay (see eg *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008); *In re Olesen*, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy)) and the right to security, since it is not possible to go back to the state prior to breaches in order to provide retroactive redress. In addition, breaches of information rights can, in certain circumstances, be included in this category, particularly when victims find out about the relevant information after the time at which they were meant to be informed. (See *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008); *In re Dean,* 527 F.3d 391 (5th Cir. 2008))

Compensatory payment recommended by the PO is therefore an crucial remedy to allow individual redress and promote accountability by government agencies in breach.

c) A more flexible timescale for raising breaches and obtaining redress

Finally, this type of mechanism enables victims to obtain remedies for breaches under the Code even after the criminal process has ended, as long as the complaint is made to the MP within twelve months from the moment the alleged breach is discovered. Even at a later stage, the PO has discretionary powers to exceptionally waive this requirement and hear the complaints. In effect, under this mechanism victims' remedies can have a wider reach and are not driven or limited by rigid legal deadlines found in legal mechanisms such as the CVRA.

2. The analysis of remedial compliance under the Code

The PO's office confirmed that the executive bodies in both cases complied with the PO's recommendations relatively quickly after receiving the report.[469] Indeed, in the first case related to breaches by HM Courts and Tribunal Service, the complainant received an apology and compensation within two weeks of the body receiving the PO's final report. The body in breach also provided the PO with a satisfactory action plan within three months of them receiving their final report.

In the second case related to the breach by HM Prison Service and the Probation Service, the victim received an apology and compensation within three months of the body

[469] See Freedom for Information request received in August 2012.

receiving the PO's final report. The body in breach took longer to comply with the systemic recommendation of training/guidance for its staff, but nevertheless worked with the PO during a time of structural change to embed the Ombudsman's Principles into its complaint handling which lasted twelve months.

Hence, this specific, but limited data, suggests that, at present, once the complaint finally reaches the remedial stage, the department in breach generally complies with the PO's findings and recommendations. These results under the Code are in line with previous studies on enforceability and compliance that have shown that persuasive remedial models, such as various ombudsmen are usually successful and taken seriously by governments that have generally complied with their findings.[470] Not all ombudsmen models are the same and some are more successful than others, but positive results have generally been noted.[471]

In England and Wales, research on the PO demonstrates that the government usually accepts and acts upon the PO's reports and findings.[472] To facilitate compliance, ombudsmen often engage in discussions and cooperation with the executive more frequently than courts during the decision-making process.[473] In effect, the administrative law literature on ombudsmen suggests that the PO is found to be the most convincing Ombudsman in England

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470 See e.g. M Hertogh, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23 *Law and Policy* 47. This study is preliminary and states that more empirical needs to take place to evaluate this hypothesis, but suggests that the policy impact of the courts and the Ombudsman is directly related to their style of control and the Ombudsman as a persuasive model seems to be more successful with regards to its implementation.

471 For instance, Hertogh (n 470) analysed several annual reports by the National Ombudsman, and concluded that over 90% of the National Ombudsman's recommendations, relating to the executive branch, are complied with.

472 R Kirkham, 'Explaining the lack of enforcement power possessed by the ombudsman' (2008) 30 J.Soc.Wel.& Fam.L. 253, 260; Public Administration Select Committee, 'Parliament and the Ombudsman', Report 2009-2010 (House of Commons, London 9 December 2009).

473 Hertogh (n 470)

and Wales since it must report to the Public Administration Select Committee (PASC), which is claimed to be the most independent minded of all Parliamentary Committees.[474] As will be shown below, the PO may also engage within the political process to secure accountability and redress.

Despite the very high success rate of public administration compliance with the PO's findings and recommendations[475] -- including the two related to the Code -- there have been cases in which the department in breach failed to comply with the PO process. The next section illustrates this with a case in which this has occurred, and highlights the remedial process complainants had to pursue via their MP in order to maximise their chances of obtaining remedies. More specifically, this case illustrates the real difficulties and remedial limitations for complainants when agencies in breach fail to comply with the PO's recommendations.

3. The limits of the PO's persuasive methods and their impact on redress

As previously emphasised, the types of redress the PO recommends can to some extent remedy certain types of breaches under the Code when criminal justice agencies are compliant. However, the PO's recommendations have been ignored by some departments in the past, illustrating the limits of the mechanism's ability to redress breaches. In these situations, the PO can normally engage the Parliamentary mechanism and recently it appears

474 Kirkham (n 472).

475 For instance, data provided in 2010-2011 suggests that more than 99% of the remedial recommendations for remedy made by the PO were accepted by the body complained about. (see Parliamentary and Health Service Ombudsman, Annual Report 2010-2011, 15.

that complainants can now apply to judicially review the decision.[476] The following section illustrates the limits of both avenues in providing effective or indeed any redress for complainants.

a) Parliament as a limited and partial institution for redressing breaches under the Code

As a 'servant to Parliament'[477], the PO can choose to bring unremedied breaches before Parliament. This process becomes Parliamentary business and involves laying before each House of Parliament a *special report (ad hoc* report) upon the case.[478] In turn, Parliament is meant to consider the action that should be taken and a Select Committee can be created to help Parliament bring Ministers into account. In this respect, the Ombudsman is Parliamentary not just in name – and not just in having the MP filter – but also by its process.

Since the PO's findings and recommendations are not legally binding, the PO scheme heavily relies on democratic/Parliamentary persuasion to promote compliance. Hence, the Ombudsman's power to submit reports to the democratic assembly triggers a process that places the Ombudsman's findings into the public realm which can create political pressure on the public body to comply with the Ombudsman's findings. This process also heavily relies

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476 Contrary to what was decided in *R (on the application of Bradley) v Secretary of State for Work and Pensions,* [2008] EWCA Civ 36, it has been argued that judicial review by complainants should not exist in such instances. The matter should strictly be disputed before the House of Commons, and in the Public Administration Select Committee of the House, since the PO's findings of fact and the department's response can be scrutinized in this arena. (See: T Endicott, *Administrative Law* (2nd edn, OUP, 2011) 487

477 R Gregory and A Alexander, 'Our Parliamentary Ombudsman Part I: Integration and Metamorphosis' (1972) 50 *Public Administration* 313, 324-325 This statement was made by Richard Crossman, member of the National Executive Committee of the Labour Party in 1966.

478 s. 10(3) (3)(A) PCA

on Parliament's opinion, which can have a significant influence on the government's decision.

Parliament must therefore choose a persuasive political technique, referred to as 'constitutional arrangements'[479] in order to remedy the injustice. These arrangements are listed in paragraph 4 of the White Paper and include Parliamentary Questions, Adjournment Debates and Debates on Supply, correspondence with Ministers, and the ability to bring citizens' grievances to Parliament, where Ministers can be held accountable individually and collectively with the Government.[480]

Thus, following the Ombudsman's report for unremedied breaches, the normal parliamentary practice is for the Public Administration Select Committee (PASC) to review the Ombudsman's report and develop an independent opinion as to its validity. It can therefore follow up the PO's report, liaising with the government and inform Parliament on governmental implementation – a clear sign that the Ombudsman process is grafted on to the British parliamentarian tradition.[481] This scheme based on persuasion has been successful in most cases and generally produces good results with regards to compliance with the Ombudsman's findings and recommendations.[482] PASC's opinion however, just like the Ombudsman's, is not binding and has been ignored on some occasions by the government

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479 Home Office, 'The Parliamentary Commission for Administration', White Paper (Cmnd 2767, 1965) par. 4.

480 ibid par. 4.

481 P Giddings, R Gregory, V Moore and J Pearson 'Controlling Administrative Action in the United Kingdom: the Role of the Ombudsman and the Courts Compared' (1993) 59 Intl Rev Admin Sci 291

482 Kirkham (n 472).

over the last few years.[483] PASC is only granted the power to examine the PO's reports and to report to the House, which can ultimately determine the matter by way of *resolution*. This process' objectivity however can be questioned, since the House of Commons is politically dominated by the government and can therefore take a party line in favour of the government. Further, even PASC's objectivity can be questioned since as a Parliamentary structure it is made up of a majority of government representatives.

The PO has also suggested that in some cases these constitutional arrangements do not achieve justice for individual complainants. For instance, after one of her special reports[484] failed to be implemented, she commented on the Parliamentary debates:

> There was a debate in the House, apparently secured with some difficulty, where clearly, members were subject to party political pressure through the whips system, and I am not saying that everybody voted on that basis but that was there, that was part of what was going on, and the Government was able to act as judging its own cause. What I then see, and I think citizens at large see, is no visible distinction between Parliament and government.[485]

Accordingly, whilst political pressure can be a positive incentive to influence governments in favour of victims in some cases, reliance on the political sphere to ensure

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483 For e.g. see *R (on the application of Bradley) v Secretary of State for Work and Pensions,* [2008] EWCA Civ 36; Parliamentary and Health Service Ombudsman, 'A Debt of Honour' (Draft report to the Permanent Secretary of the Ministry of Defence, January 2005). In this case, the PO sent a draft report to the Permanent Secretary of the Ministry of Defence after failing to comply with its recommendations. For further examples, see the six cases mentioned in Endicott (n 305) 483

484 See eg Parliamentary and Health Service Ombudsman, 'Injustice unremedied: the Government's response on Equitable Life' (HC 435, The Stationery Office, 5 May 2009). This report to Parliament criticised the Government for rejecting several of her findings of maladministration and injustice. Parliament decided to respond to this by several parliamentary debates on this issue, but no substantive motion has been debated and no decision has been reached. The Ombudsman criticised this outcome – as being influenced by political pressure in favour of the status quo to protect the government.

485 See Public Administration Select Committee, 'Parliament and the Ombudsman', Report 2009-2010 (House of Commons, London 9 December 2009) 4-5.

compliance can be problematic since decisions are often subject to party political pressures in favour of the government.

Further, the Parliamentary arena and the existing 'constitutional arrangements' are not effective forums and instruments to provide individual remedies to victims for Code breaches by government agencies. MPs are not necessarily equipped to deal with individual grievances related to victims of crime, as they are more experienced in raising Parliamentary Questions, dealing with systemic issues and raising a matter on the adjournment. In this respect, Gregory and Alexander have adequately stated that 'no one takes a grievance to his MP so that it may be made the subject of a Question in Parliament.'[486] This may be particularly true for victims of crime since the nature of their individual complaints can often contain private elements that relate to the criminal process that they may not wish to have shared before Parliament. As Lord Justice Wall opined in the *Pensions* case, the applicants' 'remedy is political, not juridical'.[487]

b) Illustrating the limits of the PO's recommendations: The Pensions case and judicially-created uncertainties and barriers to redress

The Ombudsman's reports have, as a matter of convention, usually been agreed upon and implemented by government. However, contrary to convention, the government in *R (on the application of Bradley) v Secretary of State for Work and Pensions*[488] adamantly disputed the

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486 R Gregory and A Alexander, 'Our Parliamentary Ombudsman Part I: Integration and Metamorphosis' (1972) 50 *Public Administration* 313, 331.

487 Pensions (n 483) at 141.

488 Ibid

PO's findings and recommendations and thus failed to implement them. Although this case is unrelated to the Code, its reasoning is applicable to all PO remedial cases.

The *Pensions* case gave rise to much media attention and arose from complex facts. For the purposes of this thesis, the case is briefly summarised. Litigation started after over 125,000 pensioners lost all or part of their investments in final salary schemes. A complaint was referred to the PO which alleged maladministration by the Department for Work and Pensions (DWP). The Ombudsman was asked to investigate this complaint and hold the executive -- the Secretary of State of Work and Pensions (Secretary of State) -- accountable. She released a report on March 15, 2006, entitled *Trust in the pensions promise: government bodies and the security of final salary occupational pensions*, in which she concluded that governmental maladministration was a significant factor that contributed to these substantial losses. The report blamed the government for potentially misleading investors by providing inaccurate and incomplete official information about the security of final salary schemes. In the PO's view this failure to properly inform the complainants went against basic principles of good administration and the DWP's own standards on information provision – preventing them from making informed decisions about their pension schemes. It also found that the DWP's decision to amend the calculation scheme failed to ensure that all relevant considerations were taken into account and irrelevant factors ignored. Consequently, the Ombudsman *recommended* that the government should pay, or at least arrange for the payment of, meaningful compensation to these investors that would cover not only the financial loss suffered by these individuals but also for the outrage, distress, anxiety and uncertainty that was caused as a result. The government refused to follow these recommendations and made it clear that it would not implement them, suggesting that the Ombudsman's recommendations were merely optional. It held the view that the official

information was not misleading, and that the scheme members would not have saved themselves billions by making different investments if the information provided had been more complete.

In response to this, the PO used the Parliamentary process described above and laid an adverse report before Parliament under section 10(3) of the Act and attended the PASC for discussion. The PO highlighted her disapproval of the government's response and motives which was agreed upon by the PASC. It highlighted that 'we are disappointed that the Government has chosen to act as judge on its own behalf by rejecting and qualifying a number of the Ombudsman's findings.'

Meanwhile, the complainants applied for judicial review to the High Court to determine whether the executive's decision to dismiss the Ombudsman's findings and recommendations was justified. The legal status of an Ombudsman's findings had received very little attention in courts and the law did not provide any clear guidance on this issue. The High Court upheld the complainant's claims and quashed the government's rejection of the Ombudsman's central findings. Having relied on previous case law on quasi-judicial bodies in the public sector, the court concluded that the Ombudsman's findings – as opposed to its recommendations[489] – should be treated as legally binding unless they can be 'objectively shown to be flawed or irrational, or peripheral, or there is genuine fresh evidence to be considered.'[490] This standard would have ensured that public bodies take the PO's reports seriously and would have rendered them much harder to ignore.

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489 The PO as well as the Courts distinguished between the PO's findings and its recommendations.

490 *R (on the application of Bradley) v Secretary of State for Work and Pensions* [2007] EWHC (Admin) 242; [2007] Pens LR 87, at [58]

However, the government appealed this decision and in a judgment rendered on February 2008, the Court of Appeal decided that the Ombudsman's findings were not binding on the Secretary of State – the Government or any Minister. More specifically, the Court rejected the notion that the PO's findings could benefit from a presumption of legal authority, stating that the High Court judge erroneously relied on case law regarding quasi-judicial bodies as well as the regime that covers the Local Government Ombudsman in England (LGO). The Court of Appeal held that there are significant differences between these two ombudsmen, namely that the PO scheme under s. 10(3) of the Act provides a process by which the PO could request that Parliament scrutinises the government's response to the office's report, which has no equivalent under the LGO scheme.

The Court added that the Secretary of State is entitled to reject a finding of maladministration and prefer its own conclusions if there are rational grounds for supporting them.[491] Hence, for the first time, a court recognised that public bodies are not entitled to dismiss without good reason the *findings* of the PO and established a test which as follows: 'the question is not whether the defendant himself considers that there was maladministration, but whether in the circumstances his rejection of the Ombudsman's findings to this effect is based on *cogent* reasons.'[492]

The emphasis is therefore not on the quality of the PO's report, but rather on the *rationality* of the government's response. The Court held that it is not necessarily unlawful for a public authority to reject the Ombudsman's conclusions, even if those conclusions were

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491 To reach this conclusion, the Court mainly examined the legislator's intent when introducing the Parliamentary Commissioner Act 1967[491] (the Act) and referred to the White Paper and ministerial statements reported in Hansard.

492 *Pensions* (n 483) at 72.

rational. The judges held that it is in the parliamentary arena that a minister must justify a decision not to give a remedy recommended by the PO, and that a minister might lawfully give, as part of that justification, reasons for rejecting the PO's findings of maladministration. Nevertheless, the Court quashed the minister's response for being unlawful, on the ground that no reasonable Secretary of State would have *rationally* disagreed with the PO's findings.

To some extent, this decision seems to limit the government's decisional discretion to reject the Ombudsman's findings. The standard to measure the rationality of the government's response, however, is not clear. The effect of this decision has yet to be seen, since the standard of review has not been clarified,[493] but in practice it may not change much, because as long as the government has a valid reason it can justify its rejection of the Ombudsman's findings. Indeed, as Kirkham et al remark, even if 'a public body may be burdened by an ombudsman finding that it fundamentally disagrees with, it can choose not to implement the ombudsman's recommendations if it concludes that they are politically or economically unrealistic.'[494] This leaves considerable leeway for departments to find rational grounds that support their decisions to ignore compliance with the remedies recommended by the PO.

Finally, the appellate court's decision to distance itself from the lower court decision which had adopted a similar standard to the one used in the LGO scheme adds an additional difficulty in securing redress, since it requires victims to judicially review the government's

493 The Court stated that 'cogent' and rational motives have to support the Minister's decision, but has not seriously considered and discussed the standard of review that should be applied to governmental rejections of Ombudsman findings. For further commentary on this topic see: J Varuhas, 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?' (2009) 72(1) MLR 91.

494 R Kirkham, B Thompson, T Buck 'When putting things right goes wrong: enforcing the recommendations of the ombudsman' (2008) PL 510, 527.

decision when it fails to comply with the PO's findings – undermining to some extent the PO's authority and adding the complexities of litigation. On the contrary, the LGO model makes it harder for the executive to avoid compliance, since the burden would be on the executive agencies to challenge the PO's decision. In brief, despite being infrequent in practice, the standard of review adopted by the appellate court coupled with the presumption of non-legal enforceability creates more opportunities for government agencies to avoid remedial compliance with the PO's recommendations and consequently leave victims' rights breaches without redress.

Thus, despite the Code's findings and general studies that have shown that mechanisms based on persuasion -- rather than coercion -- can be influential in securing compliance and redress, it is important to note the limitations of the process.

Conclusion

In conclusion, the above analysis suggests that contrary to promises and remedial aims supported by policy-makers, both mechanisms have presented various remedial limitations for different rights and in certain contexts. More specifically, in the United States under the CVRA, a statutory and case law analysis reveals that for most breaches, particularly those affecting certain types of service rights as well as those discovered once the criminal proceedings have ended, the CVRA's legal mechanism falls short of providing victims with adequate or any form of remedy. This has also been the case when the traditional mandamus standard of review is retained by appellate courts, since it has limited the process' ability to provide redress for breaches by governmental bodies.

In England and Wales, the redress mechanism under the Code has also proven to have specific limits particularly for providing robust remedies for breaches related to the criminal process. However, contrary to the CVRA, the PO under the English scheme can recommend compensation as possible redress for service rights breaches that cannot be remedied by placing victims in the initial situation prior to their breach. Finally, although executive compliance with the PO's recommendations is generally high and thus victims can generally rely on this mechanism, its legal force and the way it has been interpreted by courts in the *Pensions* case can generate uncertainties and situations in which victims' right breaches are left without remedies.

CHAPTER 7: TOWARDS MORE EFFECTIVE RESPONSE(S) TO BREACHES OF VICTIMS' RIGHTS: THE RECOGNITION OF A COMPLEMENTARY AND FLEXIBLE APPROACH TO ENFORCEMENT

As argued throughout this thesis, the schemes in both England Wales and the Federal American jurisdiction to some extent fall short of ensuring accessible, timely and effective redress for breaches that relate to the different rights they aim to protect and remedy. Based on these findings, this chapter begins by proposing some changes that can be made to improve the existing schemes.

Further, despite the mechanisms' current limitations and the fact that on the whole there is not one "best mechanism" available, this chapter suggests that the development of a complementary approach to enforcement that combines judicial and informal non-judicial mechanisms similar to the ones explored in this thesis, can be more flexible and context sensitive and thus increase the chances of achieving the main enforcement aims expressed by policy-makers, namely providing victims with an accessible, timely and objective mechanism that allows for redress in cases of breaches. It also examines some of the difficulties that relate to this approach, including its limitations and the fact that each of its components developed in a specific cultural context, as seen in chapters 2 and 3, which can impact the way certain elements of this approach can develop and be implemented within different contextual settings.

A. Improving the current mechanisms of redress in both jurisdictions

1. Improving the informal PO model

a) Towards a more accessible and objective redress mechanism for victims

Changes to the current Parliamentary Ombudsman (PO) scheme in England and Wales can be made in order to address some of the difficulties and limitations related to access, timeliness and objectivity identified in previous chapters.[495] More specifically, these changes should focus on the complex and rather long navigation process, including the complexities that relate to the internal complaints process as well as one unnecessary and cumbersome structure: the Member of Parliament (MP) filter.

First, the internal complaints stage, which is the initial stage of the PO process, has presented complexities that can limit accessibility and timeliness. More specifically, as seen in chapter 5, this stage of the process requires victims to identify the specific department(s) in breach and file separate complaints to all department(s) allegedly in breach. This was found to be particularly confusing and complex for victims[496] – and to some degree can be considered an obstacle to the process. Hence, one way of improving access at this level would be by increasing awareness of its existence, but also by having all service providers

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495 Although there are various ways of thinking about possible changes, the following section suggests a few starting points for a more accessible and comprehensive approach to enforcement. It does not claim to be exhaustive.

496 See S Payne, 'Redefining justice: Addressing the individual needs of victims and witnesses' (Victims' Champion Report, London 2009) 33 in which the Victims' Champion Sara Payne's consultation and discussions with victims which revealed that victims had trouble identifying the specific agency in breach.

including criminal justice agencies, Victim Support and the PO guide victims to the right agency in cases where victims come before them and have reached the wrong service provider. This collaboration would facilitate the identification of the department(s) in breach and facilitate referral to the alleged agency in breach for internal resolution.

Second, and most importantly, to render the process quicker and more accessible, the MP filter's existence would have to be reconsidered, since it currently lengthens the process, limits its objectivity and does not seem to add any benefits to the handling of complaints.

Indeed, as seen in chapter 5, historically since the PO's creation in the 1960s, the MP filter has been deeply embedded in serving political interests. The filter was therefore seen as a means to protect the MP's role as a champion of individual grievances. Earlier discussions reflected the worries that the Ombudsman would undermine the MPs' traditional role and their relations with the public. It was feared that by giving citizens direct access to the Ombudsman they would not write to their MP and would by-pass the parliamentary institution. The position and importance of MPs was at risk and backbenchers needed to legitimise their role by increasing their power and influence. Hence, it is made quite clear that the priority of this filter was to legitimise the MP's role instead of improving the complaints process by making it more accessible and rapid for complainants.

For these reasons, the MP filter's removal would not impair the process and on the contrary would enable victims to bring their breaches forward and have them addressed more quickly and directly by the PO.[497] Indeed, the data collated in chapter 5 illustrated that thirty-

[497] A similar suggestion for removal was made by the Public Administration Select Committee (PASC), see Public Administration Select Committee, 'Parliament and the Ombudsman', Report 2009-2010 (House of Commons, London 9 December 2009). Further, in previous communication with the PO office, 'the Ombudsman has regularly called for the removal of the MP filter in her speeches and

four complaints were sent directly to the PO instead of referring them to the MP and in some cases complainants failed to follow up after being told they needed to address their complaint to their MP first. A possible reform related to the MP filter would therefore limit the amount of complaints that are referred back to complainants by the PO for not having been sent to the MP in the first place and would therefore reduce the attrition rate that follows this type of refusal.

Additionally, the removal of the MP filter can also enhance the process' objectivity and increase operational consistency by diminishing MP local and political differences that are based on different political priorities and local experiences as MPs. This process would not require an entire cultural shift and can be easily achieved through the legislative process.[498]

Finally, in cases in which the simplified internal resolution process has been completed without a successful outcome for victims, victims would be able to address their complaints directly to an independent body, very similar in nature and function to the PO that would prioritise individual redress for victims over remedies of a systemic nature.[499]

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articles because of the barrier it puts in place between the Ombudsman and the citizen.' (See Communication with the Parliamentary Ombudsman's office – February 8, 2010). However, until this day the MP filter still remains and continues to be a barrier to access for a number of complainants.

498 Indeed, in its report PASC has highlighted that 'as a matter of urgency', a single clause to the Constitutional Reform and Governance Bill could easily achieve the removal of the MP filter. See PASC (n 497) 4.

499 This would be contrary to other models of ombudsmen that are primarily systemic and therefore not adequately tailored or have enough experience with individual redress. In this respect, it is imperative for a mechanism to afford primarily importance to remediating breaches for the individuals involved instead of aiming for more systemic aims. In the United States the Victims' Ombudsman has a systemic mandate and therefore expanding this body's remit to include individual redress for individual breaches would be a possible reform suggestion.

b) Improving the PO redress process: Clarifying the standard of review in cases of non-compliance

Although government failure to comply is quite exceptional since the PO as a 'servant to Parliament'[500] can report to Parliament and is therefore considered to be a highly regarded institution with strong persuasive abilities, it nevertheless remains a possibility that can limit the effectiveness of this mechanism.

When government fails to comply with the PO's findings and reports, contrary to the Local Government Ombudsman's (LGO) findings which are binding upon local authorities[501], these findings do not benefit from a presumption of enforcement[502], however complainants can address any failures to comply before Parliament and PASC. Further, since the recent *Pensions* case,[503] judicial review has been an additional route that victims can access in order to claim relief in cases of non-compliance. Since reports and recommendations by the PO are not legally binding, the burden to judicially review the department's failure to comply rests on the individual victim instead of requiring government to review the decision if it disagrees with the PO's recommendations. This reality coupled with the current vague and unclear standard of review seen previously in the *Pensions* case provide much leeway for government agencies to justify non-compliance of PO

500 R Gregory and A Alexander, 'Our Parliamentary Ombudsman Part I: Integration and Metamorphosis' (1972) 50 *Public Administration* 313, 324-325

501 See *R v Local Commissioner for Administration Ex p. Eastleigh BC* [1988] QB 855. This presumption rests on government agencies and thus requires them to judicially review the LGO's findings in matters where they disagree with its findings.

502 In England and Wales, the *R (on the application of Bradley) v Secretary of State for Work and Pensions,* [2008] EWCA Civ 36, 139 case confirmed that the LGO's findings upon local authorities are binding, provided they are made within law. The Court decided that 'if a local authority wishes to avoid findings of maladministration made by the LGO, it must apply for judicial review to quash the decision.'

503 Id

recommendations and thus can leave breaches under the Code without redress, contrary to the policy makers' purported goals.

Hence, a clearer standard of review would not only provide more clarity for all parties involved, but would also provide fewer possibilities for government agencies to avoid compliance on the basis of justifications that may often vary due to the unclear standard in place.

2. Adjusting the CVRA's legal enforcement mechanism

Even though this chapter essentially argues in favour of a complementary approach to enforcement, it is worth highlighting some of the elements within the existing CVRA's legal enforcement process that can be improved in order to maximise its chances of meeting its main aim: providing individual redress to victims.

a) Accessibility and navigation

Although access has been considered a significant obstacle to triggering the CVRA's legal enforcement mechanism, there have nevertheless been cases where victims' motions were filed pro bono or by private lawyers that resulted in successful, albeit lengthy procedures.

As argued in chapter 5, since this model heavily relies on the power of lawyers and pro bono legal representation, legal clinics would need additional funds to offer adequate training and representation for victims to access this process. Further, to facilitate access to this process, pro bono clinics and lawyers can adopt a more needs-based approach instead of

primarily focusing on the systemic impact of decisions on the victims' rights movement as a whole.

It is worth noting that this instrumental lawyering model which relies on individual court cases to achieve systemic legal and social change is part of the American legal culture[504] - referred to as 'adversarial legalism' by Kagan. Thus, deep structural and cultural changes would have to take place in order to change this mentality which lies behind the victims' pro-bono selection process. In addition, the process' costliness and procedural complexities are also features of the adversarial model controlled by lawyers and would also require a number of 'structural changes or large, nonincremental changes in legal rules'[505] to diminish its impact. As Kagan notes, these deep cultural changes are not about to take place in the near future due to the current political climate and the actors in place that wish to maintain the status quo. This suggests that reforms to the current legal model that would render the legal process more accessible for individuals would be very difficult to achieve.

b) Remedies: towards clarity and wider redress

As seen in chapter 6, the mandamus standard of review under the CVRA has been inconsistently defined and applied by the different Circuits and remains subject to debate within the academy. Contrary to the principle of legal certainty in judicial proceedings, this

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504 R Kagan, 'Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry' (1994) 19(1) *Law & Social Inquiry* 1-62

505 These changes would include a stronger role and authority of government – substituting social insurance programs for tort litigation, shifting control from juries and lawyers to judges or other adjudicators, shielding governmental agencies from challenge in court (…) He adds that in order to do this effectively there would need to be adequate funding, staff and respect towards governmental bureaucracies, police departments, and courts. Further, in order to persuade individuals to surrender their right to sue in exchange for better social insurance or regulation, those programs must also have adequate funds, staff, and respected. (See R Kagan *Adversarial Legalism* (Harvard University Press, Cambridge 2001) 242-243 for greater details.)

situation gives rise to inconsistencies and creates a process that serves very different functions and aims depending on the standard chosen by the courts. Hence, a decision by the Supreme Court or legislative amendments by Congress would be a welcome step towards clarity and consistency.

In recent years, however, Circuit Courts have generally applied the traditional mandamus standard and thus this precedent seems likely to remain.[506] This standard can only be met in extraordinary circumstances, where victims can prove that an usurpation of power by the district court has taken place.[507] In addition, it takes a clear and indisputable right to the granting of the motion to dismiss, as well as judicial satisfaction that the writ is appropriate under the circumstances.[508] Essentially, by adopting the traditional standard, mandamus becomes a remedy available only in exceptional cases and courts will proceed with great deference before granting this form of relief.

A more relaxed standard that provides crime victims with redress - at least in cases of abuse of discretion (if not in cases of errors) - would be more aligned with the drafters' intent[509] that aimed to increase this mechanism's ability to remedy breaches of rights and hold governmental bodies and judges accountable for breaching victims' rights – whether it

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506 For instance, the Circuit Court in *In re Olesen* felt bound by precedent in the decision made in the same circuit in *In re Antrobus,* 563 F.3d 1092, 1097 (10th Cir. 2009) which opted for the traditional standard of review despite the 'good arguments [that] can be made in support of the view that a more easily satisfied standard should be applied to the CVRA mandamus petitions.' Further, the 9th Circuit that had originally applied an relaxed appellate standard in *Kenna*, revisited its initial position a few years later in *In re Mikhel* and adopted a traditional mandamus standard.

507 *In re Olesen*

508 As seen in section A above, as an additional element in *In re Amy Unknown*, - F3d -, No. 09-31215, 2012 WL 4477444 (5th Circ. Oct. 1, 2012) (en banc), the court also considered whether the petitioner had no other means to attain the desired relief.

509 See 2nd and 9th district court decisions; Paul Cassell, 'Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision' [2010] 87 Denv. U. L. Rev. 599.

be for abusing their discretion or usurping their powers in the context of victims' rights. Further, this more relaxed standard does not interfere with prosecutorial and judicial discretion, since it is considered to be deferential in nature.[510] For instance, in *In re Huff Management*,[511] even though the Circuit Court applied the standard of abuse of discretion and highlighted that the CVRA was not meant to apply a stringent mandamus standard, it nevertheless rejected the mandamus petition on the basis that the district court did not abuse its discretion in approving the settlement agreement between the Government and the defendants.

Finally, it is worth mentioning that even if a more relaxed standard of review was consistently applied, the CVRA's legal mechanism of redress would still include a number of the various limitations illustrated throughout this thesis and thus, a complementary mechanism that includes similar elements with a non-judicial PO component would be a welcome step to increase the chances of redress for these other types of breaches.[512]

B. Developing a complementary and flexible approach to enforcement

The complementary approach proposed in this chapter is mainly based on some of the findings identified throughout this thesis and does not claim to provide the best or only available approach. As will be seen in section D. of this chapter, there are other existing

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510 D Levine, 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution' (2010) 104(1) Northwestern U. L. Rev. 335.

511 *In re Huff Asset Management Co,* 409 F.3d 555(2nd Cir. June 2005)

512 In cases where breaches are initiated by government agencies, the PO would arguably be able to suggest compensation or other forms of redress where abuse of discretion is found, but not remedied due to a stringent standard of review.

enforcement mechanisms in other jurisdictions that have not been the object of this study but may also contain useful and effective elements to enforcement.

Despite these limitations, however, the comparative law literature under a functionalist approach has highlighted the importance of comparative work for model-building and developing best practices. As will be seen in this section, the implementation of such models may vary between jurisdictions due to differences in culture, structure and political influences. This remains the main criticism of comparative law as a method for model-building. However, despite these limitations, outlining evidence-based best practices like it was the case for the Model Penal Code in the United States or the EU Directive on Victims' Rights can be a useful starting tool to develop victims' rights in common law jurisdictions while bearing in mind their standardizing limitations.

1. The coexistence of ombudsmen and legal actions

The complementary approach[513] suggested in this chapter argues in favour of a coexisting judicial mechanism similar to the CVRA and non-judicial mechanism similar to the PO process, in order to facilitate and increase access as well as redress for victims. The coexistence of these components has been recognised within the public law literature, which can facilitate implementation.

First, although statutes that create rules for ombudsmen suggest that the ombudsman should be used as a last resort when the complainant does not have any other remedy in court,

513 It is important to note that this approach does not aim to create or propose the recognition of new rights or duties that are currently not available in the both jurisdictions. It is merely a possible guide to enforcement for rights that have already been recognised.

these statutes also recognise an exception when there are particular circumstances that suggest that resorting to a court would not be reasonable.[514] A narrow interpretation of this rather vague exception would suggest that it is generally unreasonable to expect an individual to engage in stressful, lengthy and expensive litigation to gain access to the free ombudsman process with its investigative powers to government information.[515] This interpretation arguably aligns with the ombudsman's informal approach to access and provides a context under which victims would be able to benefit from a more flexible and complementary scheme for accessible and more adequate redress.

Similarly, courts in both jurisdictions under analysis have the discretion to decline permission to seek judicial review on the basis that there is another means to attain the desired relief.[516] Courts, however, have usually encouraged and even required complainants to use ombudsmen rather than courts when possible.[517]

Hence, even though the law on this matter is subject to interpretation, it recognises a flexible approach by which an ombudsman can start an investigation even when complainants can obtain another form of redress through judicial relief by courts.

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514 See eg s 5(2)(b) of the Parliamentary Commissioner Act 1967; s 26(6) of the Local Government Act 1974

515 This relaxed approach of the PO has generally been supported by T Endicott, *Administrative Law* (2nd edn, OUP, 2011) as well as the Ombudsman in the 'Debt of Honour' investigation. It was also endorsed in the leading judicial decision on this point *R v LCA, ex p Liverpool City Council* [2001] I All ER 462 (CA) in which the appellate court held that even though the complainants could seek judicial review, it was not reasonable to expect them to, because they were unlikely to have the means to fund such review and the PO's investigative powers would uncover what really went on as opposed to the evidence that could not have been obtained in judicial review proceedings.

516 Id; *In re Amy Unknown*, - F3d -, No. 09-31215, 2012 WL 4477444 (5th Circ. Oct. 1, 2012) (en banc) in the United States.

517 See eg *R v Lambeth*, *ex p Crookes* [1997] 29 HLR 28 which highlighted that 'any complaint of injustice resulting from maladministration, dressed up in the language of procedural irregularity for the purposes of judicial review, ought initially to be directed to the local government ombudsman'(39).

It is important to bear in mind, however, that when complainants are successful in pursuing an action in judicial review, they cannot additionally file a complaint to the ombudsman in order to request additional personal redress, such as a recommendation for compensation for loss. Hence, for victims who seek compensation from criminal justice agencies in breach it may be more strategic to start with the ombudsman process or choose judicial review when they are certain that it will be the best route to obtain the desired redress.

Finally, in cases where victims choose to start with the process of judicial review or a motion to the district court seen under the CVRA and fail to obtain redress for some of the reasons and limitations related to the legal enforcement mechanism, the ombudsman process can be a useful alternative for redress, since its restrictions are very different to the ones in a judicial process.

2. The choice between the two components

In certain cases, as illustrated in table 5 below, the better option between complaining to the ombudsman and launching an action within criminal proceedings can to some degree be clear. Indeed, depending on the victim's situation, the type of breach as well as the circumstances under which this breach occurs and is discovered, one mechanism can generally be better than the other in terms of facilitating access, timeliness, and obtaining redress. Further, the complementary and alternative approach can to some extent be a more comprehensive solution, since it can increase victims' chances of obtaining redress by the ombudsman in specific cases, including in cases where certain breaches cannot or have not

been redressed by courts due to the limitations and different interests within criminal proceedings.

As seen in chapter 6, it is not always clear whether the courts will provide remedies for breaches – particularly when doing so might affect other interests and cause a strain on the criminal process, including defendants' rights. This decision is heavily based on judicial discretion and therefore it cannot always be clear whether victims will obtain redress even when breaches are found. In such cases, it may be best – when possible – to start by bringing an action within criminal proceedings and if unsuccessful, using the Ombudsman process as an alternative approach in case courts decline to provide redress for a clear breach.

Table 5: Ombudsman or legal mechanism within criminal proceedings? Choosing between two mechanisms of redress

<table>
<tr><th>Ombudsman</th><th>Legal mechanism in criminal proceedings/ mandamus</th></tr>
<tr><td>Context under which victims do not have access to legal representation</td><td>Context under which victims have access to legal representation</td></tr>
<tr><td>Breaches of rights unrelated to criminal proceedings
(eg. Right to protection; right to notification unrelated to criminal proceedings)</td><td rowspan="3">Breaches of rights related to criminal proceedings and discovered during criminal proceedings that do not create a strain on criminal proceedings and defendants' rights (eg. Notification, right to be heard, right not to be excluded from proceedings, right to be seated far from defendant etc.)</td></tr>
<tr><td>Breaches of rights discovered at the end of criminal proceedings</td></tr>
<tr><td>Breaches of rights considered to be a strain on criminal proceedings and defendants' rights.</td></tr>
<tr><td>Breaches of rights that can only be remedied prospectively</td><td>Breaches of rights that can be remedied retrospectively</td></tr>
<tr><td>Breaches of rights by the government, the executive and other government agencies</td><td>Breaches of rights by the judiciary and in some instances by government</td></tr>
</table>

The following sections a) and b) explain this table in greater detail. Based on some of the findings analysed in previous chapters, these sections suggest that each mechanism – the PO complaints mechanism as well as the CVRA legal enforcement process - can be the better option between the two depending on the circumstances and the specific type of breach at play. These different circumstances and types of breaches described in the table above are examined in greater detail below.

a) The importance of a non-judicial ombudsman component for redress

This first section argues that in certain circumstances an informal mechanism similar to the PO process[518] is a better recourse than the legal mechanism in the CVRA since the evidence gathered throughout this research suggests that it can be considered (i) to be a more accessible option for most victims and (ii) to have better chances of obtaining redress for certain forms of breaches that occur in specific circumstances related to these breaches.

i- <u>The PO informal non-judicial process: a more accessible, quicker and less procedurally complex option for victims than the CVRA's legal mechanism</u>

[518] As it stands, the American context under the CVRA does not recognise an informal structure for individual redress. An initiative to implement such scheme as part of a complementary approach to enforcement would inevitably be different than the current English PO model that does not exist in America. In this respect, it is important to bear in mind that recommendations made by an informal body may have a different persuasive force and its implementation on the ground may operate very differently. Hence, as highlighted in the comparative law literature, it cannot be stressed enough that even if they have many commonalities, similar legal schemes transferred or proposed in other jurisdictions may not evolve and operate the same way due to cultural, structural and institutional differences. For instance, Zedner warns against the existing difficulties that relate to legal transfers and how they may operate very differently in different cultural contexts, see L Zedner, 'Comparative research in criminal justice' in L. Noaks, M. Maguire and M. Levi (eds), *Contemporary Issues in Criminology* (University of Wales Press, Cardiff, 1995) ch. 2

First, an informal non-legal process like the PO mechanism can become a useful alternative for victims who may not have sufficient funds to hire legal representation, and thus in most cases would not be able to access the legal process.

Despite the limitations unveiled about the PO's complaints process, on the whole, this mechanism includes a number of features that render it more accessible and less complex for victims than the CVRA's legal mechanism. Indeed, the process is generally clearer, quicker[519], less formal, requires less technical language and legal procedures than the CVRA's legal mechanism. Moreover, the PO process has the crucial advantage of not requiring any legal costs during most of its stages, including when a complaint is brought forward to an MP.[520]

On the contrary, as illustrated in greater detail in chapter 5, the Federal American legal mechanism comprises a number of complexities associated with judicial proceedings and requires significant funds to enable legal representation throughout the course of proceedings. Indeed, the CVRA's procedural complexities require legal representation but private lawyers tend to be expensive and pro bono legal representation is rarely available and often aims to advance wider systemic interests.

519 It is worth noting that investigations by the PO can nevertheless take some time. The Debt of Honour investigation exceptionally took two years before completion, since for various reasons, government departments took months before providing certain files. In 2007-2008, 87% of PO reports were completed within 12 months. (See Endicott (n 515)) This number has been on the rise and the latest report for since March 2012, the average time of completion is 152 days. See PHSO, 'Moving forward' (London, Annual Report 2011-2012).

520 Of course, as seen previously, in the rather rare instances in which recommendations are not taken on board by the criminal justice agency in breach, victims can judicially review the decision which renders the process more complex, costly and requires the presence of a lawyer to represent the complainants.

Since the aforementioned features can prevent a number of victims from accessing the process, it may be worth developing a mechanism similar to the existing PO scheme in England and Wales as a complementary or alternative model to the judicial scheme within legal proceedings. This informal enforcement scheme would therefore enable unrepresented victims who may not have sufficient funds to hire legal representation to bring forward their breaches free from the substantial legal costs normally associated with legal proceedings.

ii- The PO non-legal process: A more adequate redress mechanism in certain situations and for certain types of breaches

This research has illustrated in chapter 6 that the mechanisms in place in both jurisdictions present a number of remedial limitations. Despite these limitations, the PO's ability to recommend compensation as a form of individual redress is arguably one of its leading strengths -- as it remains the only effective remedy for certain types of breaches. Indeed, cases that relate to the CVRA's legal enforcement mechanism have shown that a number of breaches have been left without redress, in part due to the unavailability of this form of remedy. Hence, contrary to some of the victims' literature that claims that compensation is an inferior and dysfunctional remedy since it does not leave victims in a position to exercise their rights,[521] this section suggests that in some instances and for certain types of breaches, compensatory redress remains the only available and effective remedy, and thus its importance should not be undermined.

[521] D Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' [2005] BYU L. Rev. 255; D Beloof, P Cassell, S Twist, *Victims in Criminal Procedure* (3rd edn Carolina Academic Press, Durham 2010)

This highlights the importance of an informal process similar to the PO model that can recommend individual redress, including compensation. Hence, a complementary approach that includes a similar informal process can certainly increase the chances of providing redress for victims for a number of breaches, including the types of breaches described below.

- *Breaches unrelated or minimally related to criminal proceedings*

As seen in chapter 6, breaches of rights that operate outside criminal proceedings or that are unrelated to the criminal process are generally best remedied by a mechanism that has a wider reach outside of such proceedings. These typically include breaches of victims' right to protection and certain types of notification rights that do not relate to criminal proceedings described in chapter 6. These breaches can also include rights that victims may have before any prosecutorial charges are filed, including notification about criminal investigations before the filing of a formal criminal charge.[522]

Indeed, this suggests that a scheme like the PO process which has a wider remedial remit outside proceedings and recognises compensation as redress can improve victims' chances of obtaining redress for these types of breaches.[523] On the contrary, as seen above, the CVRA includes some of these rights but when breached, they are generally left without redress due

[522] For more information on the debate on whether the CVRA includes rights before criminal charges are filed, see: P Cassell and N Mitchell, 'Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed' (2013) Journal of Criminal Law and Criminology (forthcoming).

[523] For instance, it was seen that victims were provided with individual redress for breaches of the Code, including HM Courts and Tribunals Service's failure to take contact telephone numbers so the victims as witnesses are able to leave the court precincts and be contacted when needed, as well as the Probation Service's failure to inform victims at key stages in the offender's sentence (move to a lower category prison etc.).

to the judicial mechanism's limited remedial reach that also fails to include damages as a prospective method of compensatory redress.

- *Breaches discovered at the end of criminal proceedings*

As seen in chapter 6, the moment when a breach is discovered and brought forward can have a significant bearing on the potential for obtaining redress in both jurisdictions. The PO mechanism in England and Wales does not depend on criminal proceedings and therefore it enables victims to file complaints related to the criminal process twelve months or more from the moment the alleged breach is discovered even when criminal proceedings have ended.

On the contrary, as illustrated in chapter 6, CVRA cases reveal that various breaches are left without redress when discovered at the end of criminal proceedings, based on the principle of finality of proceedings[524] and appeals in criminal proceedings.[525] This effectively renders such CVRA breaches irremediable in these circumstances.

A complementary model that includes an informal complaints process similar to the one in England and Wales and can recommend compensation would not only respect finality as an esteemed principle in criminal proceedings, but would also provide victims with a chance of obtaining redress from the government agencies in breach when courts refuse to provide redress on the basis of finality or when they fear disrupting the course of the criminal process, as seen in previous chapters.

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524 *U.S. v. Ingrassia,* Not Reported in F.Supp.2d, 2005 WL 2875220 (E.D.N.Y.) in which the magistrate held that when a plea is accepted and sentence is imposed, any victim who has been denied notification may thereafter have no effective remedy to vindicate her rights.

525 See eg *In re Allen,* No. 12-40954 (5th Cir. Sept. 6, 2012) (per curiam order); *United States v. Aguirre-Gonzalez*, 597 F.3d46 (1st Cir. 2010);

- *Breaches of rights that on balance would be considered to be a significant strain on criminal proceedings and defendants' rights*

Previous chapters illustrate that many breaches of service rights – with some exceptions -- are best redressed with the Code's informal complaints mechanism to the PO. Indeed, as seen in chapter 6, since process-related service rights do not generally impact on the decision-making process in criminal proceedings, the recognition of remedies for these process-related breaches has generally not been considered as crucial. In effect, contrary to procedural rights that can generally affect the outcome of criminal proceedings – including rights to restitution and certain rights to be heard – the legislator has not deemed necessary to explicitly provide robust redress for process-related rights that would place victims in a position to exercise their rights. Moreover, in many cases, courts have also used their discretion to partially redress or refrain from redressing these breaches on the basis that this would create a strain on the criminal process and defendants' rights, in comparison to its importance for victims and the criminal process.[526]

A more comprehensive remedial scheme that would include compensatory redress by a mechanism similar to the PO process in England and Wales would therefore facilitate and increase the chances of victims obtaining redress for these types of breaches in circumstances where on balance preventing the disruption of the criminal process and protecting defendants' rights are more important elements than victims' enforcement and redress in criminal

[526] *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005): in this case the court refused to provide an adjournment of proceedings since it would disrupt the process as well as defendants' rights; *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008); *United States v BP Products North America Inc.,* Crim. No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008); *In re Olesen*, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy).

proceedings.[527] In this respect, in cases where judges refuse to grant mandamus actions, or any relief for a motion brought forward in criminal proceedings, the victim would at least have an alternative process available through an ombudsman that could indeed recommend individual redress without creating a strain on criminal proceedings.

- *Breaches that can only be remedied prospectively*

As seen above, due to the nature and context under which they operate, several breaches of rights can only be remedied prospectively. In such circumstances, a compensatory – instead of retroactive -- form of redress would often be the only possible means for victims to obtain redress. Hence, as seen in chapter 6, the CVRA's lack of compensatory redress has left these types of breaches without redress, whereas the experience under the Code's mechanism in England and Wales -- where the agencies found to be in breach complied with the PO's compensatory recommendations -- has shown its ability to effectively redress these types of breaches. In this respect, a mechanism similar to the Code's that provides compensatory relief would therefore be more effective to remedy these types of breaches, particularly when no other form of remedy is available.

- *Breaches by prosecutors, the executive and other government agencies*

Arguably an informal non-judicial process similar to the PO process in England and Wales can be considered a more adequate response for redressing breaches by the executive than a legal mechanism that operates like the CVRA.

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527 The aim of this thesis is not to develop a test to balance these types of rights with defendants' rights or the system's interests. For a discussion of a proposed test developed in the victims' rights literature see the freedom approach developed by Sanders in A Sanders, R Young, M Burton, *Criminal Justice* (4th edn OUP, Oxford 2010)

First, as seen in England and Wales, the PO process enables a much more thorough investigation and discovery of information upon complaints of governmental maladministration and breaches than an adversarial court-based mechanism like the CVRA's. Hence, as suggested by the PO, the investigatory approach can increase the chances of discovering and understanding governmental breaches, which may in turn facilitate the crafting of adequate remedies for the victims.

Second, the previous chapter has illustrated the remedial limitations and impediments that relate to the CVRA's legal redress mechanism when breaches have involved government agencies. Thus district courts have in some instances been reluctant to provide redress for breaches caused by the executive and Circuit Courts have generally interpreted the required standard of review for mandamus in the traditional, stringent fashion. Hence, in most cases, they have exercised more judicial discretion to deny relief – effectively leaving victims without redress.[528]

Since appellate courts have shown reluctance to provide relief notably for district court errors – in cases of misapplication of the law, or abuse of discretion -- victims in these circumstances may be best served by an alternative mechanism of redress similar to the PO process which uses a persuasive method of redress towards government agencies in breach[529]

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528 See eg *In re Dean,* 527 F.3d 391 (5th Cir. 2008); *In re Olesen*, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy).

529 Indeed, in the two complaints under the PO process related to the Victims Code, redress was provided for breaches by governmental entities. Further the literature on persuasive methods such as ombudsmen processes suggests that in most cases these entities have been successful at persuading the executive in complying with their recommendations, see eg M Hertogh, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23 *Law and Policy* 47. And more specifically on the PO experience, see R Kirkham, 'Explaining the lack of enforcement power possessed by the ombudsman' (2008) 30 J.Soc.Wel.&

instead of a coercive method. Hence, this complementary approach would enable victims to initiate a complaint to an independent body - similar in nature to the PO process – in instances where a government body failed to respect victims' rights, or when a court refused to provide redress for the government breach due to the misapplication of the law or abuse of discretion, since these instances are indeed considered breaches of rights.

b) The importance of a legally-based component to facilitate redress for certain types of breaches

As shown in chapter 5, the CVRA's legally based mechanism is a less than fully accessible process and a relatively limited means of redress due to its legal costs, procedural complexities, and limited reach, when compared to the PO process, in terms of the types of breaches it can redress. Nevertheless, some victims have managed to access this process and successfully obtain robust or partial redress for specific types of breaches illustrated in cases in chapter 6 and summarised below. Hence, a complementary approach to enforcement that includes a legal mechanism similar to the CVRA model can increase the chances of redress for these types of breaches.[530]

i- Breaches of rights related to criminal proceedings

The analysis in chapter 6 suggests that many types of procedural rights violations under the CVRA are best redressed within criminal proceedings, since they directly operate within this

Fam.L. 253, 260; Public Administration Select Committee, 'Parliament and the Ombudsman', Report 2009-2010 (House of Commons, London 9 December 2009)

530 Although this scheme may be best placed to remedy certain procedural rights violations, the aim of this chapter is not to suggest that the same types of procedural rights should be recognised in England and Wales than those that exist in the United States under the CVRA.

context and have the ability to inform and possibly impact the decision-making process.[531] Indeed, in cases of procedural rights breaches that relate to criminal proceedings under the CVRA -- including breaches of rights to restitution and breaches of the right to be heard -- analysed in greater detail in section 6, the CVRA has explicitly recognised robust redress that has voided criminal proceedings and has allowed a rehearing for victims to exercise the right that had been violated.

Further, some cases have also illustrated that certain types of service rights breaches discovered at an early stage of their occurrence can be partially remedied with little disruption to criminal proceedings. For instance, this has been the case with certain types of breaches of the right to information, such as the cases of *Turner* and *Ingrassia*, analysed in greater detail in chapter 6, section 2.b)i) in which the court found a way to partially remedy the breach by crafting a remedy that would minimally disrupt the process. This solution, when raised early on in the process, can also facilitate the monitoring of breaches in future criminal proceedings.

Similarly, under the Code of Practice, certain types of breaches of rights that relate to the criminal process may benefit from an optional legal mechanism that operates within criminal proceedings – provided it caused a minimal disruption to the process. For instance,

[531] Not all jurisdictions recognise that the right to be heard is meant to inform decision-makers and is considered relevant evidence at sentencing. (see J Roberts and M Manikis, *Victim Personal Statements at Sentencing: A Review of the Empirical Research* (London: Office of the Commissioner for Victims and Witnesses of England and Wales, 2011) In jurisdictions where procedural rights, such as the right to be heard is mainly meant to provide therapeutic relief for victims and inform the sentencing decision, without having a direct impact on its severity, robust redress in cases of breaches may not be considered to be as useful in proceedings. For instance, in cases where judges fail to provide redress in criminal proceedings when members of the court process, namely prosecutors or lower court judges fail to allow the victim to provide a VPS for therapeutic aims, the possibility to make a complaint to an independent body similar to the PO process may be considered the only adequate route for victims to obtain a form of remedy. Hence, the rationale of this right can be a significant factor that can help determine the best means of enforcement. Recently, even the court of appeal in England and Wales has recognised VPS as evidence at sentencing. (see Perkins & Ors v R. [2013] EWCA Crim 323 (26 March 2013) However, it has yet to be seen whether enforcement and redress in criminal proceedings will be recognised in the event of breaches.

as mentioned above, the right to a separate waiting area or seats further from defendants can be raised and remedied rather quickly at that specific moment within the criminal process, if noticed early on, instead of victims having to contact the responsible body outside proceedings, or potentially having to wait for the process to end through compensation by the PO. Further, when discovered early on, certain breaches of information or notification rights that relate to the criminal process would also benefit from a mechanism similar to the CVRA's process.

ii- Breaches that can be remedied retrospectively

As evidenced in chapter 6, the CVRA has provided robust redress for several procedural rights violations that operate within criminal proceedings, including for breaches of the right to restitution and the right to be heard within proceedings. This has been achieved through the remedy of voiding previous proceedings that have breached victims' rights and placing victims in a position prior to the breach in which they are able to exercise their rights.

However, as noted earlier, not all types of breaches can benefit from retrospective relief. As seen under the CVRA, the nature of the rights that were breached and circumstances under which they occur have often made retroactive redress impossible or inapplicable following judicial or statutory restraint. This raises the importance of adopting a complementary approach to enforcement that allows more flexibility in terms of redress and can remedy a wider range of situations and types of breaches. This would undoubtedly help achieve the main aim of these schemes, namely their remedial potential for individual victims.

iii- Breaches by the judiciary and recognising judicial accountability

As seen in chapter 4, achieving accountability and obtaining remedies for breaches of rights caused by the judiciary have been determinant functions and aims behind the enactment of the CVRA's legal enforcement mechanism.[532] The experience under the CVRA illustrates that provided victims can access the process, the legal enforcement mechanism within criminal proceedings can remedy certain breaches caused by the judiciary. Indeed, mandamus actions under the CVRA have illustrated that judicial decisions and proceedings can be overturned, voided and reheard when judges breach certain rights[533] – or exceptionally when judicial errors occur.[534]

In addition, these motions within criminal proceedings usually give rise to an interlocutory intervention and adjournment of the criminal process to remedy the breaches prior to the continuance of proceedings.[535] Without this possibility, most breaches of rights

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532 Despite these aims, victims cannot obtain compensation and damages for breaches by the judiciary under the CVRA due to sovereign immunity and the doctrine of separation of powers. D Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' [2005] BYU L.Rev. 255. Accordingly, judges are shielded by this immunity and cannot be sued for most types of rights violations – a situation that is unlikely to be modified.

533 *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011). *In re Amy Unknown*, - F3d -, No. 09-31215, 2012 WL 4477444 (5th Circ. Oct. 1, 2012) (en banc): In these cases related to victims' right to restitution, mandamus actions were successful and allowed a review of district court decisions that had breached victims' rights by failing to act according to the law on restitution; In addition, in *In re Mikhel v. District Court,* 453 F.3d 1137 (9th Cir. 2006) the appellate court granted the mandamus petition since the trial court breached victims' right by excluding them from criminal proceedings without determining whether their testimony would be materially altered if they were allowed to be present, and failed to consider any reasonable alternatives that would allow victims to attend the hearing in light of the criteria provided by the CVRA.

534 In *Kenna v. U.S. Dist. Court,* 435 F.3d 1011, 1013 (9th Cir. 2006), the Circuit Court used a less stringent standard of review which resulted in providing a remedy to a judicial error made by the district court judge. However, since courts have had a tendency to use a stringent standard, it is doubtful that this mechanism would be an adequate mechanism of redress for legal errors and abuse of discretion: see eg *In re Dean*.

535 See eg *U.S. v. Atlantic States Cast Iron Pipe Co*. 612 F.Supp.2d 453 D.H.J., 2009. March 23, 2009 which confirmed that where a district court denies a motion made under the CVRA to afford allocution

caused by the judiciary would possibly remain without redress, since they would become moot if proceedings were not interrupted.

On the contrary, in England and Wales, the Code does not create duties upon the judiciary and the PO process is limited to maladministration and breaches by governmental agencies. The PO as a 'servant to parliament' and other non-judicial administrative bodies are part of separate branches and thus have not been given powers to enforce and remedy breaches of rights caused by the judiciary.[536] Nevertheless, judicial guidelines have been enacted, but are dispersed in various documents that do not recognise explicit mechanisms of redress in cases of breaches.[537] In such cases, victims may have access to judicial review, but this process is independent of the criminal process and therefore, contrary to the CVRA's mechanism, may not be able to provide redress.[538] Indeed, legal redress through judicial review of lower court decisions cannot adequately redress most breaches of rights related to criminal proceedings unless they recognise the possibility of adjournments like the mechanism under the CVRA.[539]

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rights at sentencing, the district court should *postpone* completing the sentencing long enough for a mandamus petition to be filed and decided.

536 This limitation has specifically been highlighted by Hall in relation to the Code's PO complaints process in England and Wales. He has argued that due to judicial independence from the executive, the Code should not be extended to include judicial duties, but instead a code of judicial ethics should be enacted to publicise the standards expected by judges without interfering with judicial independence, see M Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan, Cullompton 2009) 210 This solution is problematic however, since the Code of judicial ethics would not provide individual redress for victims. Judicial appeals and possibly reopening proceedings seems like a more adequate response for individual victims' rights.

537 J Roberts and M Manikis, *Victim Personal Statements at Sentencing: A Review of the Empirical Research* (London: Office of the Commissioner for Victims and Witnesses of England and Wales, 2011)

538 Until now, there have not been any cases of judicial review brought forward under the VPS scheme or the Code that relate to victims. In addition, there would be no possibility of compensation since victims would need a cause of action in order to claim for compensation in a case for judicial review.

539 For instance, the possibility of judicially reviewing a decision not to hear victims at sentencing can be problematic if these proceedings are not in turn adjourned, since in most cases these rights may become moot once the process has ended.

This section suggests that the CVRA's legal mechanism is in some instances better equipped to deal with breaches by the judiciary that take place in criminal proceedings than the current mechanism in place in England and Wales.

In brief, these results underscore the benefits of a wider complementary approach to remedial schemes that includes a legal enforcement mechanism similar to the one under the CVRA, in order to increase the chances of victims obtaining redress when certain types of breaches occur, including some breaches caused by the judiciary. However, as will be seen in the next section, there are several caveats and difficulties that need to be kept in mind.

C. Some difficulties and limitations related to the proposed complementary approach

1. Difficulties related to access and predictability

This approach which includes similar components to the ones analysed in both jurisdictions can present difficulties, notably regarding access and predictability. Hence, it may not always be clear for victims which component is best suited to respond to their specific circumstances and thus some may need either external help from an expert, or a clear explanation within the policy to understand how to navigate the process. This also highlights the importance of a flexible approach, as suggested in section B of this chapter, that enables victims to choose between both approaches. Further, in some of the cases mentioned above - where victims may choose between the two components and when judicial discretion comes into play - it may often be unpredictable and confusing for victims to choose between the two.

In addition, in order to avoid some of the limitations identified in chapters 5 and 6, the features of the proposed complementary approach would ideally have to include the reforms suggested in section 7 of this chapter. As noted in that section, however, these proposed reforms and adjustments to the existing mechanisms would include their share of complexities and limitations.

2. Policy transfers, transplants and legal culture: institutional and legal structures as barriers to this process

Building on the comparative law literature which identifies some limitations of policy transfers and receptions, this section suggests that the complementary approach may not be integrated as easily in the two jurisdictions (or any other jurisdiction) due to the contextual and cultural differences between these jurisdictions. Each mechanism is shaped and implemented within a specific cultural context, and thus the direct transfer of one mechanism or elements of a mechanism in a different jurisdiction will not necessarily operate the same way or produce similar outcomes.

Indeed, as seen in chapters 2 and 3, there were several cultural, institutional and legal differences between the ways in which policies developed in both jurisdictions and as noted by Newburn et al 'such differences are important because they highlight the constraints and limitations to policy transfer, and the continued importance of domestic influences'[540] These authors also add that 'differences in political institutions, legal traditions and bureaucratic cultures between jurisdictions have played a key part in shaping differences in policy

[540] T Jones and T Newburn, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy* (Open University Press 2007) 65

outcomes.'[541] Similarly, Zedner has also emphasised the dangers and limitations of policy-oriented comparative research, arguing that 'without proper regard for the social body in which apparently attractive procedures or institutions operate, the attempt to transplant may prove fatal.'[542] Accordingly, when looking to transfer new policies in different jurisdictions, it is important to be wary of the local social body, as well as political and legal traditions which make certain policies possible.

Legrand adopts a more radical approach throughout his work and argues that 'the transplant' cannot survive the change of context.[543] The essential point in his argument is that the law is a product embedded in the specific culture of the local actors, often very different from the culture that produced the imported law. For Legrand since law does not seem to have a determinate content apart from a given culture, it cannot have the same content outside the community that first establishes it and therefore the term legal transplant should not even be used. Graziadei clarifies that Legrand's approach does not suggest that the law has no determinate content apart from a given culture, but rather that the meaning of law is not fully determined, and that each interpreter will influence how it is understood. He states that 'consequently, although the meaning of law, like any other cultural element, may be manipulated, rearranged, transformed, and distorted as it is passed on, the transmission of law from one culture to another can still take place.'[544] The term adaptation is used to denote the

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541 Id

542 L Zedner, 'Comparative research in criminal justice' in L. Noaks, M. Maguire and M. Levi (eds), *Contemporary Issues in Criminology* (University of Wales Press, Cardiff 1995) ch. 2

543 Legrand has written a number of contributions on legal transplants. Some illustrations of this point include P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; P Legrand, 'The Same and the Different', in S Berman and M Wood (eds), *Nation, Language and the Ethics of Translation* (Princeton University Press 2005).

544 M Graziadei, 'Transplants and Receptions' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 470

process of transformation and in certain respects this can either increase the functionality of the import or render it not functional at all. Hence, some denote resistance to the import while others can result from quirks of history. As suggested by Granziadei, 'any innovation faces challenges by forces that may resist change. In the world of law, just as in the physical world, there is no action without reaction.'[545]

In addition, Graziadei criticises the approach taken by scholars that believe in the coherence of law by suggesting that certain transplants can be considered a 'fit' between the transferred law and the local context. According to this view of coherence, elements of the law have more chances of being effectively transplanted when they are connected with their place of origin.[546] They also seek coherence by dividing the world into separate legal families and legal traditions and suggest that transplants between those similar families/traditions are a better fit. For instance, it is commonly assumed that the law governing contracts is rather easily transplanted while law related to more cultural matters like family or succession law, is more resistant to reception. For Graziadei, this vision is not realistic and pays insufficient attention to the reasons why transplants succeed or fail. He provides wider contextual reasons and grounds that can explain failure, and most importantly opposition by vested interests that would be adversely affected by legal change. Further, he suggests that it is useful to examine how transplants occur and the actors who effect them.[547]

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545 Id 465

546 See the seminal work of O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1972) 37 *MLR* 1.

547 Indeed, who these actors are affects what is transplanted and based on studies of legal transplants the author argues that networks of individuals and sub-communities have a conspicuous part in the diffusion of legal models across the world. For instance, he suggests that the role of university teaching in the production and diffusion of legal innovation has been historically prominent.

This literature highlights some of the real challenges in policy transfer and reception and how cultural context is a fundamental element. Bearing this literature in mind, it is worth noting that the proposed complementary approach would certainly meet a number of these identified obstacles and challenges, particularly since it retains elements from both jurisdictions that developed and evolved in very different contexts, as seen in chapters 2 and 3.

a) Challenges regarding the implementation of a legal enforcing component within criminal proceedings

At present, the contextual analysis in chapters 2 and 3 suggest that the political and legal culture in England and Wales does not provide fertile ground for direct victim participation and standing in criminal proceedings and thus a complementary approach to enforcement that includes a component within criminal proceedings seems very unlikely to succeed, due to the lack of actors that can affect such changes and more significantly the vivid opposition and vested interests that would be adversely affected by such a legal change.

Indeed, as seen in greater detail in chapter 2, unlike the United States where the victims' rights movement was driven early on by grassroots organisations, government initiatives, as well as part of the legal community, in England and Wales, discussions about victims focused chiefly on victims' services and were mainly driven by Victim Support, which was wary of the US approach to victim inclusion in the criminal process. In England and Wales there were also very few discussions about direct victim participation within criminal proceedings and these initiatives were halted very quickly by the fierce opposition and powerful resistance of the legal community, including the judiciary and prosecutors who

feared the consequences of victim involvement on the role of prosecutors, but mainly on defendants' rights. Finally, unlike the U.S. rights discourse and legal enforcement mechanisms that were partially supported and driven by several very engaged university professors, in England and Wales the discussion surrounding victims' rights and enforcement was not really driven by any members of the academy. On the contrary, scholars that wrote on victims' rights issues were generally wary of victim involvement in the criminal process and generally warned of its dangers. This resistance has been quite powerful and effective and raises serious doubts about the development, scope and receptivity of such rights and a legal enforcement component within criminal proceedings in this jurisdiction.

Even if put back on the agenda, the substantive policy changes associated with victims in the criminal process would most likely be opposed and reshaped by domestic influences. As seen, while the initial proposals on enforcement were considerably less intrusive in criminal proceedings than the CVRA, they were nevertheless also weakened by a combination of opposition from the legal community and other interests at stake such as the PO's jurisdiction on government breaches.

Further, it is worth highlighting that even in the United States where the movement has been stronger and more vocal, resistance has been felt by those tasked with the implementation of the laws, namely the judges. Indeed, chapter 6 suggests that in several cases, judges have used the CVRA's rather vague clauses and their discretion to avoid legally enforcing some of the Act's provisions and providing redress to victims.[548] Hence, considering the limitations of this legislation in a jurisdiction with a stronger victims' rights

[548] For instance, in mandamus cases, it was seen that most courts have used the vague terminology of the CVRA and adopted a strict definition of the term mandamus. Further, it was seen that in some cases of conflicting rights and criminal justice principles, judges have used their discretion to not provide any redress.

movement and more dedicated networks of individuals to the development of legally enforceable rights, it is reasonable to suggest that its implementation would be even more problematic in a jurisdiction like England and Wales where the movement is less developed and the legal opposition much stronger.

Moreover, historical constitutional structures have been defining elements of each culture and therefore policies that borrow elements from other jurisdictions may be difficult to adopt, accept and implement similarly within different cultures. Hence, traditionally in England and Wales, conflicts between citizens and government were mainly brought forward and handled by MPs who could pursue the matter and obtain accountability by bringing these complaints before Parliament, instead of having most conflicts resolved by the judiciary in an adversarial legal setting like it has been the case in the United States. In this respect, the constitutional context in the United States is very different to the one in England and Wales. Judges in the United States are considered the guardians of the Constitution and fundamental individual rights, whereas in England and Wales, the role of the judiciary, as highlighted by Lazarus, has been more ambivalent and limited in order to avoid trespassing on Parliamentary sovereignty.[549] These differences in the constitutional setting, recognition of different rights and the role of courts are reflected in the presentation of victims' rights and the selected enforcement mechanisms in both jurisdictions. Hence, one must bear in mind these differences and possible obstacles when considering policy transfers and legal transplants.

Finally, despite these substantial challenges to victims' rights and enforcement within criminal proceedings, it is worth noting the mentality and cultural changes experienced by the DPP and CPS over the years. Although victims are not provided with independent rights as is

[549] L Lazarus, *Contrasting Prisoners' Rights* (OUP 2003) 190

the case under the CVRA, the evolution of the CPS's mentality,[550] including the recognition of prosecutorial duties towards victims , the recognition that the CPS can be fallible and the need for accountability have been significant changes for victims and with time and adaptation, it may well be that legally enforceable mechanisms similar to the CVRA's may at some point in time find their way within criminal proceedings as a way to hold prosecutors and judges legally accountable towards victims.

b) Challenges regarding the implementation of an ombudsman component within the complementary approach in the U.S.

It is difficult to determine whether the context under which victims' rights and enforcement mechanisms developed in the United States and are currently developing, would be favourable to an ombudsman component similar to the PO in England and Wales as part of a proposed complementary approach. It is worth bearing in mind that the notion of an ombudsman is not foreign to the United States. Indeed, there are different types of ombudsmen that exist in that jurisdiction and most importantly a Victims' Ombudsman was even created as part of the CVRA.[551] This ombudsman, however, is very different to the PO

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550 For more details on the evolving relationship between victims and prosecutors, see M Hall, 'The relationship between victims and prosecutors: Defending Victims' Rights' (2010) Crim L R 31; D Jones and J Brown, 'The relationship between victims and prosecutors: defending victims' rights?' (2010) 3 Crim L R 212; K Starmer, 'Finality in criminal justice: when should the CPS reopen a case?' (2012) 7 Crim L R, 526; M Burton, 'Reviewing Crown Prosecution Service decisions not to prosecute' (2001) Crim L R 374. Further, see discussion about fallibility and the possibility to review prosecutorial decisions not to prosecute, see Killick [2011] EWCA Crim 1608. Finally, the new proposed Code of Practice's draft will include the victim personal statement regime. Unless another enforcement regime becomes part of these initiatives following the consultation period that is taking place at the moment of drafting this thesis, it is likely that this codification will make no changes to the current scheme. It will nevertheless be interesting to follow to see how the PO complaints process may work in terms of remedying possible breaches related to that regime.

551 As seen in chapter 3, the Office of the Victims' Rights Ombudsman was created to receive and investigate complaints filed by crime victims against Department of Justice employees that violated or failed to provide the rights established under the Act. The Ombudsman can recommend a range of disciplinary sanctions to the head of the office of the Department of Justice, but does not provide individual redress for victims of crime.

in England and Wales -- as it does not aim to provide redress for individual breaches, but rather takes on a more systemic approach with disciplinary sanctions towards criminal justice agencies in breach. Further, it does not benefit from years of tradition and respect and is not vested as a political tool implemented in a Parliamentary constitutional setting, which as seen in chapter 6 can encourage persuasion as well as compliance with its findings and redress recommendations by criminal justice agencies found to have breached victims' rights.

An added difficulty to the implementation of this approach in the American context is that, as seen in chapter 3, the main network of individuals – including lawyers and law professors -- behind the CVRA's legal enforcement mechanisms in the United States perceived the ombudsman model to be a much weaker approach than any legal enforcement mechanism within criminal proceedings and therefore focused their energy on legal enforcement mechanisms that provide victim standing in courts. Indeed, when interviewed and prompted about ombudsmen as a model for redress, one of the leading drivers behind the CVRA's legal mechanism expressed his reservations in the following terms:

> There are a variety of mechanisms like that, unfortunately the problem is that they provide no relief to the victim in the case where the victims' rights are denied, so from that standpoint they are inadequate to really protect the rights of the victim, in the same sense that the rights of defendants are protected. If you think about the enforcement of defendants' rights, they are not done through Ombudsmen or through some administrative mechanism, they are done in the criminal case.[552]

Hence, since ombudsmen are not considered as robust and effective as legal standing within proceedings, it is unlikely that this community of individuals would push forward or focus its efforts on strengthening and implementing this type of non-legal mechanism by reforming it

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[552] See communication with one of the main legal advisers of the CVRA.

to provide individual redress for victims. The American over-reliance on litigation is epitomised by the movement's concentrated efforts toward litigation and the primacy of legal challenges as the sole means for victims to obtain individual redress. The several problems with the CVRA's legal enforcement mechanism pointed out in this thesis reveal that this approach is not sensible and instead suggests that efforts should focus towards a multi-faceted approach, which includes legal and non-legal mechanisms, in order to facilitate the provision of individual redress for victims of crime when their rights have been found to be breached.

These difficulties however may be easier to overcome than the ones related to implementing the complementary approach in England and Wales, since there is already a form of ombudsman to deal with victim-related issues in that jurisdiction and the main drivers behind enforcement are not adamantly opposed to the ombudsman model, as long as there is a legal enforcement mechanism to ensure adequate and robust redress within criminal proceedings.[553]

D. Other enforcement mechanisms available in common law jurisdictions and the importance of future research related to enforcement

Responses to breaches of victims' rights vary significantly between jurisdictions. To date, most common law jurisdictions have created mechanisms that generally aim to provide systemic responses to breaches in order to improve the system without much emphasis on providing individualised redress for victims that have experienced breaches. The two

[553] For instance, during an interview with one of the CVRA's main drafters, it was suggested that there were other mechanisms that the drafters were interested in, but 'not to the exclusion of standing in criminal proceedings just an addition'. In addition, see Senator Leahy's complementary interest in ombudsmen in Congressional Records, Senate, April 22, 2004, S 4272.

jurisdictions selected for this thesis both mainly aimed to adopt novel solutions for redress that recognised individual redress for victims in cases of breaches. Although this thesis does not examine existing mechanisms in other jurisdictions due to time and space constraints, the following section provides reflections about some additional illustrative models of responses to breaches that can be worth analysing in future research in order to determine their limitations and whether they include elements that may be useful to add to the complementary approach of enforcement. These mechanisms have been divided into two categories, namely legal responses to breaches – implemented and enforced by the judiciary – and non-legal responses to breaches implemented by bodies outside the judiciary branch.

1. Legal responses to breaches enforced by the judiciary:

In common law jurisdictions, the recognition of legal responses and standing for victims before legal courts to enforce their rights and obtain remedies in cases of breaches remains exceptional. Having analysed the CVRA's model of legal enforcement, the following section briefly overviews other possible models of legal enforcement by the judiciary that may be worth exploring further in future research.

a) Action for damages

To date, there are no common law jurisdictions that have recognised victim standing to file separate motions for damages to remedy victims' rights breaches.[554] Without undertaking an

[554] Legislations and codes generally prohibit legal actions for damages against criminal justice agencies in breach; Arizona remains one of the only jurisdictions that has recognised victims standing to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim's rights under the law, State constitution and any implementing legislation or court rules. See Arizona Rev. Stat. § 13-4437(1)(B).

in-depth analysis of this mechanism, it is worth pointing out some possible strengths and difficulties that relate to this mechanism.

Similarly to the PO model analysed in greater detail in this thesis, this type of action is compensatory in nature and has therefore also been classified as an 'inferior remedy' by some victims' rights scholars, since it cannot be enforced within criminal proceedings. As argued in this thesis, a compensatory component like the PO scheme or an action for damages should not be considered an inferior remedy, since in certain situations and for certain types of breaches, compensation as a form of redress can be the only or best available mechanism to provide victim redress.

However, a complementary ombudsman model, similar to the PO scheme, would arguably be a more accessible mechanism for redress than a civil action for damages. Indeed, since actions for damages operate in court proceedings, they may present similar limitations to the ones that relate to the CVRA's legal enforcement mechanism, seen in chapters 5 and 6, including the need to hire legal representation in order to navigate the legal system, bring forward their rights, assess the damages and obtain remedies.

This difficulty was brought forward by the Lord Chancellor who suggested that legally enforceable rights for victims in courts would be costly, unnecessary and wasteful since it would create 'a new category of litigation calling for legal aid and highly attractive to civil rights lawyers who would be enthused by opportunities to assert deficiencies in the criminal trial process… There should be no legally enforceable right to representation for

victims…I am opposed to victims being 'consulted' about decisions on cases…'[555] Hence, the Lord Chancellor was not only opposed for practical reasons, but also believed that legally enforceable rights were undesirable on the basis that their recognition would provide victims with direct participation in proceedings and enable them to monitor the criminal process. Although the Lord Chancellor was right to suggest that the recognition of legally enforceable rights for victims can be costly since victims would need to hire legal representation and would be eligible for legal aid in certain cases, claiming that it is unnecessary and wasteful can be debated. The recognition of legally enforceable rights outside criminal proceedings that would enable an action for civil damages to obtain a compensatory form of redress may not be as effective as a non-legal process like the PO model, but unlike the Lord Chancellor's view, it cannot be said to be unnecessary and wasteful. Although this recognition would indeed create an additional category of litigation for civil rights lawyers 'who would be enthused by opportunities to assert deficiencies in the criminal trial process', this process would provide scrutiny that can shed light and reveal certain defects that relate to prosecutorial and judicial action, behaviour, as well as processes by which unlawful decisions are made within the criminal process. Hence, this would enable a form of oversight to verify that victim-related policies and practices are observed and accounted for with remedies when they fail to be observed.

An ombudsman model as opposed to a legal action for damages would however, enable a more in depth investigation into the alleged executive branch's violation and thus may include more adequate recommendations for redress. Moreover, since ombudsmen's recommendations do not benefit from a presumption of legal enforceability and usually adopt a discursive and cooperative approach with the parties rather than a coercive one, enforcers

[555] P Rock, *Constructing Victims' Rights: The Home Office, New Labour, and Victims* (Clarendon Press, Oxford 2004) 535

may be encouraged to exercise less restraint when deciding and crafting remedies without fearing any encroachment on executive powers.[556] In a similar vein, Beloof highlights that the typical violators of victims' rights -- prosecutors and judges -- are generally shielded by sovereign immunity and therefore would not be able to get sued for damages for most rights breaches. He further adds that even if such monetary damages were available, amounts for violations of rights would often be symbolic and may be hard to quantify.[557]

b) Judicial review of prosecutorial decisions

Further, even if victims do not have personal rights and standing in criminal proceedings to legally enforce their rights, in certain jurisdictions, they can judicially review decisions made by prosecutors. For instance, in England and Wales, judicial review of prosecutorial decisions to require the CPS to reconsider its own decision, is an available mechanism for victims in certain instances, particularly for procedural rights breaches under the Code for Crown Prosecutors when decisions have been wrongfully made. This includes cases in which victims seek to challenge a decision not to prosecute.[558] Although this judicial method remains exceptional and is not exclusive to victims, a recent Court of Appeal decision reconfirmed its availability and most importantly specifically highlighted that victims have a right to seek

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556 Indeed, as suggested by Hertogh in the administrative law literature, ombudsmen have more leeway to consult with administrative officials to find out what the practical consequences of an intended recommendation may be and in that sense can recommend more realistic remedies than courts that are generally more coercive in nature and have less flexibility to discuss with the parties. See M Hertogh, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23 *Law and Policy* 47.

557 D Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' [2005] BYU L. Rev 255 at 343. For instance, in a case where a right to be heard at sentencing is breached, it is not clear whether the measure of damages would be the possible increase of punishment or the lost opportunity to be heard. It is likely that if the latter is the retained measure, this would eliminate or, at least reduce the damages award.

558 See eg R v DPP, Ex P. *Chaudhary* [1995] 1 Cr. App. R. 136; R v DPP, Ex p. Manning [2001] Q.B. 330.

review (by means of complaint to the agency in breach or judicial review) of a decision not to prosecute as this type of decision is in reality a final decision for a victim.[559]

For breaches related to the victim personal statement scheme and other pledges, it is not clear whether victims have any mechanisms to challenge breaches and obtain redress other than possible internal complaints to the agencies in breach. Since these "rights" are not specifically listed in legal or quasi-legal documents, and thus no explicit enforcement process is provided, it may well be that they are mere suggestions and guidelines without any form of legal redress. Further, as mentioned above, even if judicial review was an available option, its effect can be limited in cases of breaches related to criminal proceedings since these separate proceedings cannot be adjourned – and thus can often proceed without a chance to remedy the process, and eventually only leave victims with prospective and possibly compensatory types of breaches that can only be remedied with specific types of remedies.

c) Standing and legal enforcement within criminal proceedings

In terms of legal enforcement by the judiciary, the most illustrative jurisdiction remains the United States. In this respect, although the federal constitutional initiative failed to pass in the United States, several states have constitutionalised victims' rights and some have – based on the CVRA's enforcement model - legislatively recognised victim standing in criminal proceedings in order to enforce victims' rights and seek redress in cases of breaches.[560]

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559 See R v Killick (Christopher) [2012] 1 Cr. App. R. 10 (CA (Crim Div)).

560 See Ariz. Rev. Stat. §§ 8-416, 13-4437 (2000); California Const. Art I, sec. 28 (c); Fla. Stat. Ann. § 960.001(7) (2000); Ind. Code Ann. §35-40-1 (2000); Tex. Const. Art. 1, §30.

Others have not gone as far, and instead have recognised partial legal standing by prosecutors and other victim advocates. See eg Ala. Code § 15-23-83 (2000)(Attorney General or district attorney); Ariz. Rev. Stat. §§ 8-416,13-4437 (2000)(prosecutor, at the request of the victim); Tex. Const. Art. 1, Sec. 30 (prosecuting attorney); and Alaska Stat. § 24.65.110 (2001) (victims' advocate has a general ability to advocate for the victim in an ongoing criminal case); Conn. Gen. Stat. §§ 46a-13c, 13g (2001) (the

The constitutionalisation of victims' rights in America is considered by most American victims' rights advocates to be the most effective and robust mechanism for enforcing victims' rights. As seen in chapter 3, this approach is based on the perception that victims' rights would be taken more seriously and thus would be prone to fewer violations by criminal justice agencies and the judiciary if they were enshrined in a constitution. It was also suggested that constitutionalising rights would provide victims with more robust and effective remedies than including them within legislation.[561]

To date, there is no evidence or research available that supports the view that the constitutionalisation of rights renders victims' rights and their remedies more robust than legislative initiatives like the CVRA. In fact, even when constitutionalised, many state constitutional provisions expressly prohibit damages and therefore it is worth wondering whether constitutionalisation is the way forward to the recognition of redress. Further, despite the constitutionalisation of rights, some judges risk placing similar limitations to the CVRA's legal enforcement due to the nature of certain types of breaches and their legal enforcement effect on criminal proceedings – including process' efficacy and defendants' rights. Finally, unless legislation explicitly recognises standing and remedies in cases of violations, the mere constitutionalisation of rights may not make much difference in cases of breaches. More research in that direction would be warranted and as an extension to the findings of this thesis, it would be relevant to analyse the implementation of rights and enforcement mechanisms in these other jurisdictions that have recognised legal standing to determine how

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Victim Advocate can file a limited special appearance in court to advocate victims' rights.). Md. Rule 1-326 (2009)

561 See M Manikis, *Towards the constitutionalization of victims' rights?* (2010) Osgoode Hall Law School, LLM dissertation, for more illustrations and examples related to the constitutionalisation of victims' rights.

they compare to the experiences under the CVRA's enforcement and redress. To date no research has looked extensively at models in other American jurisdictions.

2. Responses to breaches outside the judiciary

Most common law jurisdictions have opted for responses to breaches outside the judiciary. As mentioned above, these bodies have mainly aimed to provide systemic responses instead of individual redress for victims and therefore remain unsatisfactory for individual victims.

In America – as with most criminal justice matters - there is huge variation across states. Most states have not taken the CVRA's legal standing route and instead have opted for non-legal mechanisms by creating entities, such as ombudsmen, victim advocates, committees or boards to receive and investigate complaints made by crime victims.[562] Few states give the investigatory agency the ability to impose sanctions on the agency that has breached a victim's right.[563] Others have adopted measures that either expressly deny remedies for the violation of victims' rights or remain silent on the possibility of enforcement without expressly forbidding it.

Further, it is important to note on a preliminary basis, that unlike the PO mechanism which requires victims to start by sending their complaint to their local MP, these

562 See e.g. Colo. Rev. Stat. §§ 24-4.1-117.5, 24-4.1-303 (2000) (Victims' Rights Coordinating Committee which investigates, resolves and refers violations to the Governor who must ask the Attorney General to bring an injunctive action); Minn. Stat. § 611A.74 (2000) (Crime Victims' Ombudsman who investigates complaints and provides liaison between victim and agencies); Utah Code Ann. § 77-37-5 (2000) (Local Victims' Rights Committees in each judicial district can organize a hearing and publish findings); Wis. Stat. Ann. §§ 950.08, 950.09 (2000) (the Crime Victims Rights Board reviews, provides findings, and can make reprimands, seek injunctive relief in court and bring civil actions to assess civil forfeiture for victims).

563 See e.g. the Crime Victims Rights Board in Wisconsin under Wis. Stat. Ann. §§ 950.08, 950.09 (2000)

mechanisms usually recognise direct access to the enforcer, which can, *a priori*, suggest a more accessible process.

Each model will be briefly described and analysed in order to determine whether or not it can be appropriate for victims of crime when service providers – criminal justice agencies - fail to respect their duties towards victims. The models currently available in common law jurisdictions have yet to be analysed and therefore, studies on the law in action would be useful.

a) Internal review process (executive)

Within this model of enforcement, victims' allegations of breaches remain within the executive process and are reviewed by individuals that are already part of that statutory agency. Examples of this model include the previous charters in England and Wales. The current Code has an internal review element, but as seen, complaints can be brought to the MP/PO if victims are not satisfied with the internal review. As previously stated, this specific mechanism seems to lack independence and external scrutiny since the complaint is examined by agencies and members in the same department as the person towards whom the complaint is addressed. Sometimes this type of mechanism allows for successful redress by encouraging discussion and communication between the aggrieved individual victim and the agencies in breach, which can, of course, help resolve the conflict. However, because this method often involves the recognition of errors or systemic problems within the organisation, service providers do not always have the proper incentive to respond to victims' needs or provide individual forms of redress for victims.

b) Independent structures: other models of Ombudsmen (and administrative review boards)

Ombudsmen and administrative boards in most countries where there is a constitutional separation of powers between the legislative, the executive and the judiciary, can generally only make unenforceable decisions towards the executive's actions. However, as previously suggested, some ombudsmen – like the PO - can seek judicial review when the government refuses to comply with their findings, while others automatically benefit from a presumption of legal enforceability which facilitates the implementation of their decisions. Further, some enforcement bodies mainly aim to provide victims with individual redress, while others focus on providing systematic redress, which can be limiting for individual victims of crime. The following section provides a short analysis of some of the different types of non-legal enforcement bodies, including some that provide individual redress and others that mainly aim to provide systemic redress in cases of breaches. In addition, it is important to bear in mind that further research is necessary to determine what is effective for victims and can be part of a more encompassing, context-sensitive and comprehensive model of redress.

i- <u>Individual redress and the status of decisions</u>

In England and Wales, the *Pensions* case confirmed that individuals can directly address their complaints to the Local Government Ombudsman (LGO) and that its findings upon local authorities are binding, provided they are made within law. The Court decided that 'if a local authority wishes to avoid findings of maladministration made by the LGO, it must apply for

judicial review to quash the decision'.[564] The burden is therefore not on the individual to apply for judicial review if the government ignored the LGO's findings, but rather the government to review the decision if it disagrees with it and does not want to avoid compliance.[565] The authority of the Ombudsman's scrutiny in such cases is justified by the objectivity and independence of its decisions.[566]

Further, unlike most ombudsmen statutes in the United Kingdom that are silent on the legal status of an ombudsman's report, the Commissioner for Complaints in Northern Ireland is supported by a specific legislative provision on the matter that provides strong enforcement powers.[567] Thus, the Commissioner's findings are binding on the court 'unless the contrary is proved' and consequently the report should be enforced in court. Further, as a remedy based on the Commissioner's report, courts have the power to award damages in all circumstances.[568] Despite these binding findings on the executive, that have similarities with the coercive mechanisms used by courts, the Commissioner has not reported any major concerns with his relationships with local authorities as a result of its similarities with legally enforceable mechanisms.[569]

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564 *R (on the application of Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, 139.

565 See also decision in *R v Local Commissioner for Administration Ex p. Eastleigh BC* [1988] QB 855.

566 It is also worth nothing that the PO was designed to address victims' complaints, because of its objectivity and independence. Consequently, its decisions should have the same authority as the LGO, but this is not the case.

567 This provision is present mainly due to the specific sectarian divisions in Northern Ireland. See Kirkham, Thompson and Buck 'When putting things right goes wrong: enforcing the recommendations of the ombudsman' (2008) PL 510.

568 The Commissioner for Complaints (Northern Ireland) Order 1996 (SI 1996/1297, NI 7) arts 16 and 18. Originally an Act of the devolved Northern Ireland Parliament, the Commissioner for Complaints Act (Northern Ireland) 1969, s. 7. This power has not been used since 1985 following the passage of legislation dealing with these issues in court.

569 Kirkham (n 529).

In addition, a non-legal mechanism of complaints has been adopted in Wisconsin, US which enables the Crime Victims Rights Board (the Board) to provide redress to victims of crime when their right to information has been breached and can impose consequences on the offending agencies. Thus, in its findings, the Board can make reprimands, seek injunctive relief in court and bring civil actions to assess civil forfeiture for victims.[570] To date there have not been any studies that have analysed this model despite their eventual contribution in the area of enforcement.

For victims of crime that wish to address a complaint against a service provider to obtain individual redress, it would most likely be easier for them to benefit from a presumption of legal enforceability, especially if decisions are rendered by an objective body that hears all parties involved and can generate reliable findings. Hence, at initial glance, models like the Local Government Ombudsman (LGO) or the Ombudsman in Northern Ireland as well as the Board in the state of Wisconsin seem to provide a robust enforcement process for victims, whilst still providing the advantages of non-legal dispute resolution mechanisms.

Although this analysis is preliminary and a more in depth research would be needed before reaching any definitive conclusions, it may be that decisions with a stronger degree of enforceability can be more effectively implemented by the executive and would prevent situations like the *Pensions* case where the executive decided to ignore the PO's findings without any rational justification. As stated by the Select Committee 'There would be no point in having an Ombudsman if the Government were to show disregard for his Office, his

[570] Wis. Stat. Ann. §§ 950.08, 950.09 (2000)

standing as an impartial referee, and for the thoroughness of his investigation.'[571] Hence, in future research, it would be interesting to explore whether such models of enforceability facilitate redress for complainants since in such models, the executive has less leeway to ignore the decision-makers' findings. In brief, the process would be more direct for victims – enabling them to directly file their complaints to the decision-maker - quicker, fairer and would facilitate redress by ensuring that the government responds to findings.

ii- Systemic redress

In addition, it is worth noting that most ombudsmen in common law jurisdictions adopt a systemic approach to redress which does not recognise individual redress for victims of crime in cases of breaches. For individual victims this can be quite limiting since it can effectively leave them without redress.

For instance, as previously mentioned, the CVRA also includes a Crime Victims' Rights Ombudsman established by the Department of Justice to receive and investigate complaints made by victims of federal crimes against any employee of the Department of Justice who violated or failed to provide victims' rights under the CVRA. The aims of this process can be found on the Ombudsman's website which clearly states that 'the complaint process is not designed for the correction of specific victims' rights violations, but is instead used to request corrective or disciplinary action against Department of Justice employees who may have failed to provide rights to crime victims'.[572] In this respect, it investigates the

571 Public Administration Select Committee, 'The Channel Tunnel rail Link and Exceptional Hardship – The Government Response' (HC 819, Session 1994/95) 1

572 http://www.justice.gov/usao/eousa/vr/ (02/05/2013)

allegations in the complaint to determine whether 'best efforts' were taken by the employee to respect victims' rights and can decide to exercise disciplinary sanctions if that has not been the case. Although corrective and disciplinary measures against agencies in breach may have a dissuasive impact upon these agencies, this approach – contrary to the PO in England and Wales – is not meant to provide any individual redress for victims and therefore is not a satisfactory mechanism for individual victims of crime. Additionally, research on this mechanism suggests that there is a lack of independence within the complaints' investigation process which could potentially compromise its impartiality.[573]

Similarly, in Canada, the Office of the Federal Ombudsman for Victims of Crime (OFOVC) is a legislative Ombudsman that is also mainly meant to address systemic issues and intervenes to suggest systemic redress. Individual complainants can nevertheless address their complaints directly to the ombudsman, but contrary to other ombudsmen, the Office's mandate is not recognised in statute. For this reason, this Ombudsman does not have any legislative powers to conduct formal investigations, including compelling the attendance of witnesses, conducting witness examinations under oath, compelling the production of government documents and entering government premises for investigation and inquiry. Hence, this process works on a voluntary basis through informal and collaborative channels and relies entirely on stakeholders' cooperation. This can be quite problematic for victims, since this process does not recognise individual redress, cannot undertake formal investigations, and any discussions or findings can be ignored without any possibility to review the decision.

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573 See United States Government Accountability Office, *Report to Congressional Committees*, 'Crime Victims' Rights Act Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act', December 2008. For instance, the investigators were located in the same office with the subject of the investigation. In addition, in some instances, research found that the DOJ victim complaint investigator has been the subordinate or peer of the subject of the complaint.

In brief, although the proposed complementary approach is limited, as it only suggests components studied in greater detail throughout this thesis, it would be very useful for victims' scholars to undertake further research on enforcement that would add to the existing knowledge by suggesting additional elements and ways to increase the chances of victims obtaining redress in cases of breaches.

CONCLUSION

In the last few decades, a number of developments related to victims' rights have rapidly emerged in England and Wales and the United States. Although the forces behind these developments have faced a number of challenges, their composition, philosophy, and aims have been very different in both jurisdictions which can explain in great part the different directions and forms that policies surrounding victims' rights and enforcement mechanisms have taken. In effect, in the United States, victims' organisations arose in the 1970s out of spontaneous local efforts of volunteers that mainly included victims of violent crimes. Their philosophy was predominantly rooted in Roach's victims' rights punitive model. Indeed, they were quickly submersed in the law and order politics and together with the President's Task Force on Victims of Crime (1982) emphasised the victim's role in criminal proceedings – suggesting that they were excluded and mistreated by criminal justice agencies, suffered inequalities, and needed similar recognition to defendants within these proceedings. In contrast, in England and Wales, the main victim organisation did not arise from spontaneous local grassroots groups of victims, but was created by professionals who worked with offenders in probation services. Hence, their approach towards offenders and their comments on the work of criminal justice agencies were much closer to Roach's non-punitive model of victims' rights by being less adversarial and mainly focused on victim services rather than victim participation in criminal proceedings. Further, governments at the time feared the more active role of victims in criminal proceedings, developed earlier on in the American approach, and therefore concentrated their efforts to develop service rights policies rather than participatory rights in criminal proceedings.

Throughout the 1990s, new victim-related policies developed in both jurisdictions. In the federal US jurisdiction they mainly focused on constitutionalising victims' rights and legislative policies that depicted victims as independent bearers of participatory rights in criminal proceedings. In England and Wales, victims' rights were mainly focused around services, but at the turn of the century the political climate was more receptive to discussions around including victims in the criminal process. Legal resistance, however, was more powerful in that jurisdiction and thus has acted as a powerful obstacle to victim procedural rights in criminal proceedings. In addition, throughout the years, the various victim-related policies, including the previous charters and legislations, have faced a number of challenges, including resistance by different forces and criticisms that highlight certain difficulties that relate to compliance as well as the lack of enforcement mechanisms to provide individual redress for victims.

As a response to some of these difficulties and criticisms, policy makers in both jurisdictions created new policies that included different types of rights and for the first time, new mechanisms that were meant to provide individual redress for victims in the event of breaches. They were portrayed as improvements on previous policies and were meant to be accessible, objective and rapid processes that would provide adequate redress in the event of breaches. Despite these similarities, the philosophies and operational models behind both regimes have been different. Indeed, as seen in greater detail in chapter 4, the CVRA's philosophy remained much closer to Roach's punitive model of victims' rights than the Code of Practice's regime. Indeed, Congress debates and interviews with policy-makers conducted for this research suggest that some of the punitive model's characteristics, including the prevention of secondary victimization, the hope to constitutionally protect victims' rights

against the state and the accused and recognizing standing and robust remedies related to sentencing.

In contrast, the enforcement mechanism under the Code of Practice in England and Wales fits more into Roach's non-punitive model, since the approach focuses less on sentencing and the outcomes of criminal proceedings and more on offering a number of services to victims that do not have an impact on the accused's due process protections. Despite this predominantly non-punitive approach, some elements align with the punitive model, including the emphasis on reporting crimes in order to benefit from services and the importance of criminal proceedings and criminal sanctions.

Further, these two mechanisms operate very differently. Whilst the CVRA's enforcement process is based within an adversarial setting and renders mainly legally binding decisions through coercive methods by the judiciary branch, the enforcement regime in England and Wales mainly relies on investigative techniques by the executive branch (internal process) or Parliamentary branch (PO) and favours cooperation and explanations as a means of enforcing its decisions.

The research reported here aims to fill the existing research gap in the victims' rights literature on enforcement and redress. The little existing literature has generally made normative comments about the primacy of legal mechanisms like the CVRA and criticised the non-legal route by claiming that it is inefficient and merely symbolic. This thesis responds to these claims and adds to the knowledge in the area by analysing and evaluating both mechanisms and how they have been implemented in practice. It argues that in many

respects, these aims have not been met, which can be illustrated by the fact that the process' accessibility, timeliness, objectivity as well as effective redress for victims have been limited.

More specifically, this analysis reveals that both processes are less than fully accessible and generate considerable procedural and structural delays and complexities within the process. Whilst most barriers seem to be structural in England and Wales, and include the MP filter's cumbersome process, as well as the complex prior stages of review, in the United States, these barriers are mainly financial and procedural. In addition, in both systems victims may also be confronted with a level of politicisation in the process' implementation – resulting in additional barriers, including additional delays, inconsistencies in implementation and a lack of objectivity within the process. As illustrated, the American pro bono advocacy system can in some scenarios specifically focus on obtaining legal gains for the wider movement, and thus engage in methods that create further delays and inconsistencies for victims within the process. Similarly, in England and Wales, the MP filter's application can also be influenced by political considerations – giving rise to inconsistencies and considerable challenges for the process' overall objectivity. In brief, both mechanisms and their processes have presented a number of barriers for individual victims and as a consequence have to a certain extent failed to deliver elements that were promised to victims.

In addition, both mechanisms were meant to provide victims with individual redress in the event of breaches. The analysis in chapter 6 reveals that the CVRA's remedial scheme has not fully lived up to its promise, since redress has for certain types of breaches been limited and unavailable in other contexts. More specifically, in the United States, a statutory and case law analysis of the CVRA's legal mechanism reveals that for most breaches, particularly those affecting certain types of service rights – including process-related

breaches or those that may disrupt the criminal process - as well as those unrelated to criminal proceedings or discovered once criminal proceedings have ended, the CVRA and its judicial interpretation fall short of providing adequate or any form of relief. This has also been the case when courts have used the traditional mandamus standard of review in appellate court cases to review certain decisions, since it has limited the process' ability to provide redress for a number of breaches. In England and Wales, redress under the Code has also proven to have its limitations, particularly for failing to recognise robust redress for breaches related to the criminal process. However, contrary to the CVRA, the PO has the advantage of having the remit to recommend compensation as possible redress for service rights breaches. This can be particularly useful for the types of breaches that cannot be remedied by placing victims in the initial situation prior to the breach, or in circumstances where remedying the breach would cause a heavy strain on the criminal process or the defendant. Finally, although executive compliance with the PO's recommendations is generally successful, its legal force and the way it has been interpreted in some instances can generate uncertainties and situations in which victims' rights breaches are left without redress.

Further these research findings add to the victims' literature mentioned in chapter 2, which has highlighted that past victims' initiatives were much closer to rhetoric than reality.[574] Indeed, this study illustrates that the presence of rhetoric remains. Although not

[574] See eg in the United States: P Cassell, 'Protecting Crime Victims in Federal Appellate Courts : The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision' (2010) 87 Denv.U.L.Rev 599 ; S Bandes, 'Victim Standing' (1999) Utah L.J. 331 ,334 ; L Henderson, 'The Wrongs of Victims' Rights' (1985) 37 Stan. L. Rev. 937, 945-948. Further, the victims' rights literature in England and Wales has also noted that rhetoric has also been part of past policies. See eg H Fenwick, 'Procedural « Rights » of Victims of Crime: Public or Private Ordering of the Criminal Justice Process ?' (1997) 60 *Modern Law Review* 317, 325 ; J Shapland, 'Bringing Victims in from the Cold : Victims' Role in the Criminal Justice' in J Jackson and K Quinn (eds), *Criminal Justice Reform : Looking to the Future, conference report* (Institute of Criminology and Criminal Justice, Queen's University, Belfast 2003)

all,[575] it appears that some failures of the law in action could have been anticipated by law-makers and thus this suggests that to a great extent these new policies could be considered much closer to rhetoric than reality. For instance, when looking at the experience in the US, law-makers were aware that legal actions such as motions in federal courts and mandamus would require substantive funds and legal representation. Since the financial sums provided for the new enforcement initiative were relatively modest, rhetoric was quite evidently present. In addition, the consequences and limitations of using the term mandamus as a mechanism could have arguably been anticipated by law-makers and therefore its remedial effects were overemphasised. Similarly, in England and Wales, policy-makers could have also anticipated the MP filter to be a needless structure that causes delays and to some extent impedes the process. The same is true for limitations of 'consolatory' (as opposed to compensatory) payments as remedies available under the ombudsman process as well as the PO's limitations in terms of enforcing its decisions towards governmental departments. In this respect, a number of these findings would suggest that the experience in both jurisdictions is better represented by the concept of rhetoric than reality.

A number of changes can be made in both mechanisms to reduce the existing gap between rhetoric and reality. As suggested in chapter 6, the PO process in England and Wales can be improved, notably by increasing awareness of the mechanism, but also by having all service providers guide victims to the agency in breach to facilitate internal resolution process. In addition, and most importantly, in order to render the process quicker and more accessible, the MP filter's existence would have to be reconsidered, since as illustrated above, it currently lengthens the process, limits its objectivity and does not add any benefits to the

[575] Arguably, many of the elements that relate to legal action on the ground - including practical actions and strategies undertaken by the actors implementing these policies could not have been anticipated by law-makers. Law on the ground which includes for instance specific decisions about remedies by decision-makers could not have been anticipated with much precision and thus it would be difficult to conclude that this was closer to rhetoric than reality.

handling of complaints. Finally, a clearer standard of review for reviewing decisions in cases where government fails to comply with the PO's findings and reports would be warranted.

In the United States, the CVRA's enforcement mechanism would also benefit from a number of changes, including additional funding for legal representation to enable accessible representation in the process and a clearer mandamus standard of review that allows remedy in cases of abuse of discretion instead of only being available for cases of usurpation of power by the district court.

Finally, despite these limitations and with the aforementioned changes being introduced, when compared to one another, each mechanism can be considered a better approach – depending on the circumstances that relate to the victim, as well as the type of breach. Following from this analysis, and contrary to the victims' rights literature which prioritises legal enforcement mechanisms, a complementary approach inspired by both mechanisms can be developed which would provide victims with access to different mechanisms that are more tailored to their specific context and type of breach. Hence, this would facilitate and increase opportunity for redress for a much wider range of situations.

For instance, in a context under which victims do not have access to legal representation, the Ombudsman process would be considered a better option. Further, as illustrated in this research, the best approach between both models would heavily depend on the type of breach. Hence, due to the limited remedies available under a legal enforcement mechanism that operates within criminal proceedings and mandamus, the Ombudsman process would generally be best in a number of circumstances, including in cases of breaches of rights unrelated to criminal proceedings, breaches discovered at the end of these

proceedings, breaches of rights that can only be remedied prospectively, breaches that are considered to be a strain on the criminal process and defendants' rights, as well as in most cases of breaches by the government. In other cases, as highlighted by the research, a legal enforcement mechanism would generally be the best option. This includes breaches related and discovered during criminal proceedings that do not create a strain on defendants' rights, as well as most breaches by the judiciary and breaches of rights that can be remedied retrospectively.

It is important to bear in mind however that this complementary approach includes elements and research findings from different jurisdictions and as highlighted by the literature on comparative law and policy transfers, one cannot simply include these elements into another system without taking into account the different cultural and contextual settings in both jurisdictions as well as their limitations and difficulties with regards to implementation and adaptation within the different cultural settings. Finally, this complementary approach is also limited since it only includes elements from the two main policies examined in this thesis. In future research, it may be worth analysing additional responses to breaches adopted in different jurisdictions – some of which have been outlined in this thesis -- in order to learn from their experiences and determine whether such models can provide additional elements to include in a complementary approach.

REFERENCE LIST

Aaranson D E, 'New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004' (2008) 28 Pace L.Rev. 623

Abraham A, 'The Ombudsman and the Executive: The Road to Accountability' (2008) *Parliamentary Affairs* 537

Adler Z, *Rape on Trial* (London, Routledge 1987)

Ashworth A, and M Redmayne, *The Criminal Process, 4th* edn (Oxford University Press, Oxford, 2010)

Aufrecht S, and G Brelsford, 'The Administrative Impact of the Alaskan Ombudsmen' in GE Caiden (ed), *International Handbook of the Ombudsman (Country Surveys)* (Greenwood Press, Westport 1983) 237

Bajaras R, and S. Nelson, 'The Proposed Crime Victims' Federal Constitutional Amendment: Working Towards a Proper Balance' (1997), 49 Baylor L.R. 1

Bandes S, 'Taking Some Rights Too Seriously, the State's Right to a Fair Trial' (1989) 60 S. Cal. L. Rev. 1019

Bandes S, 'Victim Standing' (1999) Utah L. Rev. 331

Bard M, and D Sangrey, *The Crime Victim's Book* (Basic Books, NY 1979)

Bell J, 'Administrative Law in a Comparative Perspective' in E Örücü and D Nelken (eds), *Comparative Law* (Hart, Oxford 2007)

Bell, D Jr, ‘Serving Two Masters Integration Ideals and Client Interests in School Desegregation Litigation, 85 L.J. 470 (1976)

Beloof D, ‘The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review’ [2005] BYU L. Rev 255

Beloof D, P Cassell and S Twist, *Victims in Criminal Procedure* (3rd edn Carolina Academic Press, Durham 2010)

Blondel E C, ‘Victims’ Rights in an Adversary System’ (2009) 58 Duke LJ 237

Burton M, ‘Reviewing Crown Prosecution Service decisions not to prosecute’ (2001) Crim L R 374

Cannavale F, *Witness Cooperation* (Heath and Co., Lexington MA 1976)

Casey L, ‘Engaging communities in fighting crime: Crime & Communities Review’ (Cabinet Office, June 2008)

Cassell P, ‘Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment’ (1999) Utah L. Rev. 479

Cassell P, ‘Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims’ Rights Act’s Mandamus Provision’ (2010) 87 Denv. U. L. Rev. 599

Cassell P, ‘Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims’ Rights Act’s Mandamus Provision’ [2010] 87 Denv. U. L. Rev. 599

Cassell P, 'Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act' [2005] Bringham Young University Law Review 835

Cassell P, 'The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis' (2012) 5(2) Phoenix Law Review 312

Cassell P, and N Mitchell, 'Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed' (2013) Journal of Criminal Law and Criminology (forthcoming)

Cassell P, and S Joffee, 'The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act' (2010) 105 Northwestern University School of Law Review Colloquy 164

--, Charter for Court Users (Home Office, 1995)

--, Code of Practice for Victims of Crime (Home Office, 2005)

--, Code for Crown Prosecutors (CPS Policy Directorate, London, 2010)

Coffey A, and P Atkinson, *Making Sense of Qualitative Data* (SAGE, USA 1996)

Colcutt P, and M Hourihan, 'Review of the Public Sector Ombudsmen in England: A Report by the Cabinet Office', (Cabinet Office, April 2000) [Colcutt Review]

Cong. Rec. 22 April 2004: S 4266-S4270

Cong. Rec. 9 Oct 2004: S10912

Cotterrell R, *The Sociology of Law: An Introduction* 2nd ed (London, Butterworth 1992) 65; G Teubner, *Law as a an Autopoietic System* (Oxford, Blackwell 1993)

CPS, ‘Code of Practice for Victims of Crime’ <http://www.cps.gov.uk/derbyshire/casework/the_code_of_practice_for_victims_of_crime/> accessed 23 February 2011

CPS, ‘The Code of Practice for Victims of Crime – Crown Prosecution Service Operational Guidance’ <http://www.cps.gov.uk/legal/v_to_z/victims_code_operational_guidance/> accessed 23 February 2011

Davies P H J, ‘Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of the Intelligence and Security Services’ (2001) 21(1) Politics 73-80

Davis R, J Anderson, J Whitman and S Howley, ‘Securing Rights of Victims: A Process Evaluation of the National Crime Victim Law Institute’s Victims’ Rights Clinics’ (RAND, 2009)

Directgov, ‘Your rights as a victim of crime’ <http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/VictimsOfCrime/DG_184573> accessed 10 May 2010

Doak J, ‘The victim and the criminal process: an analysis of recent trends in regional and international tribunals’ (2003) 23 Legal Studies 1-32

Drewry G, ‘Mr Major’s Charter: Empowering the Consumer’ (1993) PL 248

Dubber M D, ‘Comparative Criminal Law’, in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP, NY 2007)

Dubber M D, *Victims in the War on Crime* (NYU Press 2002)

Edwards I, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44 British Journal of Criminology 96

Eikenberry K, Task Force Roundtable, *Oral History Project* (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php accessed 1 April 2011

Elias R, *The Politics of Victimization* (New York, OUP 1986)

Endicott T, *Administrative Law* (2nd edn, OUP, 2011)

Epstein E J, *Agency of Fear* (Putnam, New York 1997)

European Union, *European Framework Agreement on the Standing of Victims in Criminal Proceedings* (Council Framework Decision 2001/220/JHA of 15 March 2001)

Fattah E A, 'Toward a Victim Policy Aimed at Healing, Not Suffering in Victims of Crime' (1997) in Robert C. Davis et al. (eds) (2nd edn, Sage 1997)

Fenwick H, 'Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60 MLR 317-333

Fenwick H, 'Rights of victims in the criminal justice system: rhetoric or reality?' (1995) Crim.L.R. 843

Freeman L, *Support for victims: Findings from the Crime Survey for England and Wales* (Ministry of Justice 2013)

Ganz G, *Quasi-legislation: recent developments in secondary legislation* (Sweet & Maxwell, London 1987)

Garland D, *The Culture of Control* (University of Chicago Press 2001)

Giannini M M, 'Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victims' Right to be Reasonably protected from the Accused' (2010) 78 Tenn.L.Rev. 47-104

Giddings P, R Gregory, V Moore and J Pearson 'Controlling Administrative Action in the United Kingdom: the Role of the Ombudsman and the Courts Compared' (1993) 59 Intl Rev Admin Sci 291

Glenn L, *Victims' Rights: A Reference Handbook* (ABC-CLIO, Santa Barbara CA 1997)

Goodey J, *Victims and Victimology: research, policy and practice* (Pearson Longman, Harlow 2005)

Gottschalk M, *The Prison and the Gallows : The Politics of Mass Incarceration in America* (Cambridge University Press: Cambridge 2006)

Graziadei M, 'Transplants and Receptions' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008)

Gregory R, and A Alexander, 'Our Parliamentary Ombudsman Part I: Integration and Metamorphosis' (1972) 50 *Public Administration* 313

Hagan J, *Victims Before the Law – The Organizational Domination of Criminal Law* (Butterworths, Toronto 1983)

Hall M, 'The relationship between victims and prosecutors: Defending Victims' Rights' (2010) Crim L R 31

Hall M, *Victims and Policy Making: A comparative perspective* (Willan Publishing, London, 2010)

Hall M, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan, Cullompton 2009)

Harding A, and P Leyland, 'Comparative Law in Constitutional Contexts' in E Örücü and D Nelken (eds), *Comparative Law* (Hart, Oxford 2007)

Henderson L, 'The Wrongs of Victim's Rights'(1985) 37 Stanford Law Review 937

Herrington L H, Task Force Roundtable, *Oral History Project* (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php accessed 1 April 2011

Hertogh M, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23 Law and Policy 47

Hindelang M J, 'Victimization Surveying, Theory and Research' in Hans Joachim Sneider (ed) *The Victim in International Perspective*, (de Gruyter, 1982)

Home Office, 'Criminal Justice: The Way Ahead' (Cm 5074, February 2001)

Home Office, 'Domestic Violence' (Circular No 60/1990)

Home Office, 'Justice for All' (Cm 5563, 2002)

Home Office, 'Rebuilding Lives' (Criminal Justice System, Cm 6705, 2005)

Home Office, 'Speaking up for Justice' (Home Office, 1998)

Home Office, 'The Code of Practice for Victims of Crime: A guide for victims' (July 2009) <http://www.cjsonline.gov.uk/downloads/application/pdf/2009-07-29Guideforvictims.pdf> accessed 10 May 2010

Home Office, 'The Code of Practice for Victims of Crime'(19 October 2005) <http://www.civilrenewal.communities.gov.uk/documents/victims-code-of-practice> accessed 10 May 2010

Home Office, 'The Parliamentary Commission for Administration', White Paper (Cmnd 2767, 1965)

Home Office, 'Victims of Crime' (Circular No 20/1988)

Home Office, ‘Victims of Crime’, White Paper (Cm 1599, 1991)

Home Office, ‘Victims’ rights’ http://tna.europarchive.org/20100413151441/homeoffice.gov.uk/crime-victims/victims/victims-rights/ accessed 23 February 2011

Hook M, and A Seymour, *A Retrospective of the 1982 President’s Task Force* (Office for Victims of Crime, December 2004)

Hoyle C, E Cape, R Morgan and A Sanders, ‘Evaluation of the One Stop Shop and Victim Pilot Statement Projects’ (Home Office, London 1998)

Jackson J, 'Justice for All: Putting Victims at the Heart of the Criminal Justice?' (2003) 30 Journal of Law and Society, 309-326

Joffee S, ‘Validating Victims: Enforcing Victims’ Rights Through Mandatory Mandamus’ (2009) 1 Utah L Rev 241

Jones D, and J Brown, ‘The relationship between victims and prosecutors: defending victims’ rights?’ (2010) 3 Crim L R 212

Jones T, and T Newburn, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy* (Open University Press 2007)

Kagan R, ‘Adversarial Legalism and American Government’ (1991) 10 Pol’y Analysis & Mgmt 309

Kagan R, ‘Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry’ (1994) 19(1) Law & Social Inquiry 1-62

Kagan R, *Adversarial Legalism: The American Way of Law* (Harvard University Press, Cambridge 2001)

Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1972) 37 MLR 1

Kalaher K, 'The Proposed Victim's Rights Amendment: Taking a Bite Out of Crime or a Dog With No Teeth?' (1998) Seton Hall Legisl. J. 317

Karmen A, *Crime Victims: An Introduction to Victimology* (6th edn, Thomson Wadsworth, Belmont CA 2007)

Kelly D P, 'Victims' Perceptions of Criminal Justice' (1984) 11 Pepp. L. Rev. 15

Kidd R F, and E F Chayet, 'Why Do Victims Fail to Report? The Psychology of Criminal Victimization' (1984) 40 J.Soc. Issues 39

Kilkpatrick D J, and Randy K. Otto, 'Constitutionally Guaranteed Participation in Criminal Justice Proceedings for Victims: Potential Effects on Psychological Functioning' (1987) 34 Wayne L. Rev. 7

Kirkham R, 'Explaining the lack of enforcement power possessed by the ombudsman' (2008) 30 J.Soc.Wel.& Fam.L. 253

Kirkham, Thompson and Buck 'When putting things right goes wrong: enforcing the recommendations of the ombudsman' (2008) PL 510

Knudten M, R Knudten and A Meade, *Will Anyone Be Left To Testify? Disenchantment With The Criminal Justice System* (LEAA, U.S. Dept of Justice, Washington 1978)

Kolanda J, *Oral History Project* (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/Kolanda.php accessed 1 April 2011

Lazarus L, *Contrasting Prisoners' Rights* (OUP 2003)

Legrand P, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 111

Legrand P, 'The Same and the Different', in S Berman and M Wood (eds), *Nation, Language and the Ethics of Translation* (Princeton University Press 2005)

Levine D, 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution' (2010) 104(1) Northwestern University Law Review 335

Lilliker D G, 'Interviewing the Political Elite: Navigating a Potential Minefield' (2003) 23(3) Politics 207-214

Loader I, and R Sparks, *Public Criminology?* (Routledge 2010)

Lord Justice Auld, 'Review of the Criminal Courts of England and Wales' (Report, 2001) http://www.criminal-courts-review.org.uk (accessed May 2010)

MacCormick N, and D Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish', in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (OUP, Oxford 1998)

Maguire M, and Corbett, *The Effects of Crime and the Work of Victims Support Schemes* (Aldershot, Gower 1987)

Maguire M, and T Bennett, 'Burglary in a Dwelling: The offence, the offender and the victim' (1982) Cambridge Studies in Criminology 49

Manikis M, 'Navigating through an obstacle course: The complaints mechanism for victims of crime in England and Wales' (2012) 12(2) Criminology and Criminal Justice 149-173

Manikis M, 'Towards the constitutionalization of victims' rights?' (2010) Osgoode Hall Law School, LLM dissertation

Mastrocinque J M, 'An Overview of the Victims' Rights Movement: Historical, Legislative, and Research Developments' (2010) 4(2) Sociology Compass 95

Mawby R I, and S Walklate, *Critical Victimology: International Perspectives* (Sage, London 1994)

Mawby R, 'Public sector services and the victim of crime' in S Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing, Cullompton 2007)

Meese E, Task Force Roundtable, *Oral History Project* (Interview Transcript with Edwin Meese: http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php 2003) accessed 1 April 2011

Mendelsohn B, 'Il Stupro dentro la Criminologia' (1940) *Giustizia Penale*, Italy

Mendelsohn B, 'Methods to be used by Counsel for the Defense in the Researches made into the Personality of the Criminal' (1937) *Revue de droit pénal et de criminologie*, France, August-October

Mendelsohn B, 'Une nouvelle branche de la science bio-psycho-sociale, la victimologie' (1956) Etudes Internationales de Psycho-Sociologie Criminelle, July-September

Michaels R, 'The Functional Method of Comparative Law', in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP, NY 2007) 375

Miers D, *Responses to Victimisation: A Comparative Study of Compensation for Criminal Violence in Great Britain and Ontario* (Abingdon, Professional Books 1978)

Miller R, Task Force Roundtable, *Oral History Project* (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php accessed 1 April 2011

Morrisey C, 'On Oral History Interviewing' in L A Dexter (ed.) *Elite and Specialised Interviewing* (Northwestern University Press, Evanston IL 1970)

Mosteller R P, 'The Unnecessary Victims' Rights Amendment' (1999) Utah L. Rev. 443

Mosteller R, 'Victims' Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefiting the Prosecution' (1998) 29 St Mary's L.J. 1053

National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights* (June 5, 1997)

National Victims' Constitutional Amendment Network, Background Kit 9 (April 1998)

Nelken D, and E Örücü, *Comparative Law: A Handbook* (Hart Publishing, Oxford 2007)

Nelken D, *Comparative Criminal Justice : Making Sense of Difference* (Sage, London 2010)

Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services in the 21st Century,* NCJ 170600 (Washington, DC: US Department of Justice, Office of Justice Programs, 1998) https://www.ncjrs.gov/ovc_archives/directions/pdftxt/direct.pdf (accessed April 2011)

Örücü E, 'Developing Comparative Law' in E Örücü and D Nelken (eds), *Comparative Law* (Hart, Oxford 2007)

Packer H, 'Two Models of the Criminal Process' (1964) 113 *U PA L Rev* 1

Parliamentary and Health Service Ombudsman (2007) 'Annual Report 2006-2007: Putting principles into practice' (The Stationary Office, London 2007) <http://www.ombudsman.org.uk/improving _services/annual_reports/ar07/> accessed April 2010

Parliamentary and Health Service Ombudsman, 'Annual Report 2007-2008: Bringing wider public benefit from individual complaints' (The Stationery Office, London 2008). <https://www.ombudman.org.uk/pdfs/ar_08.pdf> accessed April 2010

Parliamentary and Health Service Ombudsman, 'Annual Report 2008-2009: Every complaint matters' (The Stationery Office, London 2009) <http://www.ombudsman.org.uk/pdfs/ar_09.pdf> accessed April 2010

Parliamentary and Health Service Ombudsman, 'Annual Report 2010-2011' (The Stationery Office, London 2011)

Parliamentary and Health Service Ombudsman, 'Injustice unremedied: the Government's response on Equitable Life' (HC 435, The Stationery Office, 5 May 2009)

Parliamentary and Health Service Ombudsman, 'A Debt of Honour' (Draft report to the Permanent Secretary of the Ministry of Defence, January 2005).

Parliamentary and Health Service Ombudsman, 'Principles for Remedy' (Report) <http://www.ombudsman.org.uk/improving_services/principles/remedy/index.html> (accessed April 2010)

Payne S, 'Redefining justice: Addressing the individual needs of victims and witnesses' (Victims' Champion Report, London 2009)

Probation Service, *Contact with Victims and Victims' Families* (Probation Circular PC77/1994)

Public Administration Select Committee, 'Parliament and the Ombudsman' (House of Commons, London 9 December 2009)

Public Administration Select Committee, 'The Channel Tunnel rail Link and Exceptional Hardship – The Government Response' (HC 819, Session 1994/95)

Public Administration Select Committee, 'Work of the Ombudsman in 2008-2009' (HC 122, Q 66, November 5 2009)

Rand M R, 'The National Crime Victimization Survey at 34: Looking Back and Looking Ahead' in M Hough and M Maxfield (eds), *Surveying Crime in the 21st Century: Commemorating the 25th Anniversary of the British Crime Survey* (Criminal Justice Press, Monsey NY 2007)

Reeves H, 'Coping with crime: victim support' [1984] Christian Action Journal 26

Reeves H, and K Mulley, 'The new status of victims in the UK: Opportunities and threats', in A. Crawford and J. Goodey (eds.) *Integrating a Victim Perspective Within Criminal Justice: International debates*, Ashgate, Aldershot, 2000

Reeves H, and P Dunn, 'The status of crime victims and witnesses in the twenty-first century' in A Bottoms and J Roberts (eds), *Hearing the Victim: Adversarial justice, crime victims and the State* (Willan, Devon 2010)

Rench J, 'Oral History Project' (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/Rench.php accessed 1 April 2011

Rheinstein M, 'Teaching Comparative Law' (1937), University of Chicago Law Review, 5

Roach K, 'Four Models of the Criminal Process' (1999) 89(2) *Journal of Criminal Law and Criminology* 671

Roberts J, and M Manikis, *Victim Personal Statements at Sentencing: A Review of the Empirical Research* (London: Office of the Commissioner for Victims and Witnesses of England and Wales, 2011)

Robertson M, Task Force Roundtable, *Oral History Project* (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php accessed 1 April 2011

Rock P, *Constructing Victims' Rights: The Home Office, New Labour, and Victims* (Clarendon Press, Oxford 2004)

Rock P, 'Governments, victims and policies in two countries' (1988) 28(1) Brit J Crim 44

Rock P, *A View from the Shadows: The Ministry of the Solicitor General of Canada and the Justice for Victims of Crime Initiative* (Oxford, Clarendon Press 1986)

Rock P, *Helping Victims of Crime – The Home Office and the Rise of Victim Support in England and Wales* (Clarendon Press 1990)

Rosenblum R, and Carol Blew, *Victim/Witness Assistance* (LEAA, Washington, 1979)

Russell T, Task Force Roundtable, *Oral History Project* (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php accessed 1 April 2011

S. Rep. No. 106-254 (2000)

S. Rep. No. 108-191 (2003)

Samenow S, Task Force Roundtable, *Oral History Project* (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/TaskForceRoundtable.php accessed 1 April 2011

Sanders A, R Young, M Burton, *Criminal Justice* (4th edn OUP, Oxford 2010)

Shafer S, *Victimology: The Victim and His Criminal* (Reston Publishing, Reston 1977)

Shapland J, 'Bringing Victims in from the Cold: Victims' Role in the Criminal Justice' in J Jackson and K Quinn (eds), *Criminal Justice Reform: Looking to the Future*, *conference report* (Institute of Criminology and Criminal Justice, Queen's University, Belfast 2003)

Shapland J, J Wilmore and P Duff, *Victims in the Criminal Justice System* (Gower, Aldershot 1985)

Simon J, *Governing through Crime* (OUP 2007)

Sims L, and A Myhill, *Policing and the public: findings from the 2000 British Crime Survey, Research Findings No. 136* (Home Office, London 2001)

Spencer J, 'The victim and the prosecutor' in A Bottoms and J Roberts (eds), *Hearing the Victim* (Willan, Devon 2010)

Starmer K, 'Finality in criminal justice: when should the CPS reopen a case?' (2012) 7 Crim L R, 526

Stephen Lawrence Inquiry – Report of an Inquiry by Sir William Macpherson of Cluny. Cm. 4262 (1999).

Stephens N, 'Collecting data from elites and ultra elites: telephone and face-to-face interviews with macroeconomists' (2007) 7(2) Qualitative Research, 203-216

Sweeting A et al, *Evaluation of the victims' advocate scheme pilots* (Ministry of Justice, 2008)http://webarchive.nationalarchives.gov.uk/20110201125714/http://www.justice.gov.uk/publications/research-victims-advocate.htm

Symonds M, 'The "Second Injury" to Victims', L. Kivens (ed.), *Evaluation and Change: Services for Survivors* (Minneapolis Research Foundation, Minneapolis, MN, 1980)

Tobolowsky P, *Crime victim rights and remedies* (2nd edn, Carolina Academic Press, Durham 2010)

Tribe L H, and P G Cassell, Op-Ed., 'Embed the Rights of Victims in the Constitution: A Proposed Amendment Protects Victims, Without Running Roughshod over the Rights that Are Due the Accused', *L.A. Times* (July 6, 1998)

Twist S, 'The Crime Victims' Rights Amendment and Two Good and Perfect Things' (1999) Utah L. Rev. 369

Twist S, *Letter sent to leading representatives of the crime victims' movement* (April 28, 2004)

Twist S, *Oral History Project* (Interview Transcript 2003) http://vroh.uakron.edu/transcripts/Twist.php accessed 1 April 2011

United States Federal Government, *Presidential Task Force on Victims of Crime Final Report* (Report, 1982) 76

United States Government Accountability Office (GAO) Report to Congressional Committees, *Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act* (December 2008)

US Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Acting Deputy Attorney General: The availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, Dec. 17, 2010 (publicly released on May 20, 2011)

Varuhas J, 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?' (2009) 72(1) MLR 91

Viano E, 'Victimology: The Development of a New Perspective' (1983) 8(1-2) Victimology 17

Victim Support, 'The Media: Free, Responsible, or Both?', Victim Support, 35 (Sept. 1989)

Victim Support, 'The Rights of Victims of Crime' (Home Office, 1995)

Victim Support, 'The Victims' Charter'(Home Office, December 1990)

Victim Support, 'Victim Manifesto 2001' http://www.victimsupport.com/~/media/Files/About%20us/Manifesto%202001/2001%20Manifesto.ashx accessed 6 September 2011

Victim Support, 'Your rights as a victim' http://www.victimsupport.org/Help%20for%20victims/The%20criminal%20justice%20system/Victim%20rights accessed 23 February 2011

Victim Support, *Left in the dark: Why victims of crime need to be kept informed* (London, 2010)

--, 'Victim's Charter – Review: Involvement of Victims in Criminal Legal Proceedings' (15 June 2000)

--, 'Victims of Crime' (Home Office, September 1994)

Victims' Charter (Home Office, 1990)

Victims' Charter (Home Office, 1996)

von Hentig H, 'Remarks on the Interaction of Perpetrator and Victim' (1941) 31 J. Crim. L, Criminology & Police Sci. 303

Walklate S, *Imagining the Victim of Crime* (Open University Press, London 2007)

Walklate S, 'Reframing criminal victimization: Finding a place for vulnerability and resilience' (2011) 15 Theoretical Criminology 179

Waller I, 'Oral History Project' (Interview Transcript) http://vroh.uakron.edu/transcripts/Waller.php 2003 accessed 1 April 2011

Warren C, 'Qualitative Interviewing' in J Gubrium and J Holstein (eds.) *Handbook of Interview Research: Context and Method* (SAGE, USA 2002)

Williams B, 'The Victim's Charter: Citizens as Consumers of Criminal Justice Services' (1999) 38 The Howard Journal 384-395

Wolhuter L, N Olley and D Denham, *Victimology: Victimisation and Victims' Rights* (Routledge, Cavendish 2009)

Wood J, *The Crime Victims' Rights Act of 2004 and the Federal Courts* (Federal Judicial Center Report: June 2008)

Young M A, 'Victim Rights and Services: A Modern Saga' in Robert Davis, Arthur J Lurigio and Wesley G. Skogan, *Victims of Crime* (2nd edn, Sage, Thousand Oaks CA 1997)

Young M A, 'A History of the Victims Movement in the United States', *131st International Training Course Visiting Experts' Papers*, (Resource Material Series No. 70 http://www.unafei.or.jp/english/pdf/RS_No70/No70_08VE_Young1.pdf) accessed 2 April 2011

Zedner L, 'Comparative research in criminal justice' in L Noaks, M Maguire and M Levi (eds), *Contemporary Issues in Criminology* (University of Wales Press, Cardiff 1995)