

# Comparison of the Provisions of the Austrian and German Criminal Procedure Laws on Victims with the Hungarian Legislation<sup>1</sup>

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*ABSTRACT Victims are necessary participants in the criminal process, but until the 20th century they were marginalised. Since then legislators have recognised the importance of victim protection. The Council of Europe and the European Union are also striving to regulate victims' rights and to establish minimum standards, naturally with special emphasis on the rights and protection of the most vulnerable victims. The preamble of the Hungarian Criminal Procedure Act treats the increased protection of victims and the enforcement of their rights as a priority objective. In my study, I will compare the provisions of the Hungarian Criminal Procedure Act with the provisions of the Austrian and German laws on victims. I have chosen these two countries for the comparison because the Hungarian legal system, due to its historical traditions is the closest to them. I believe that it is primarily the practice of these two countries that should be examined and compared with Hungarian legislation.*

*KEYWORDS Criminal Procedural law, victim's rights, Austrian - German - Hungarian law, comparative law*

## 1. Introduction

With the abolition of private revenge, the state has taken over the task of justice and law enforcement. At the same time, the rights of the victim were gradually pushed into the background, and Criminal law, which had become a public law, no longer approached its proceedings from the point of view of the injured party, but rather aimed to punish the perpetrator and set an example.

In the 20th century, it was recognised that the participation of the victim was necessary for the success of criminal proceedings, and the need to codify and extend their rights was expressed. Particular attention must be paid to the interests of victims in the legislative process, since their representatives are unable to sit on codification committees, even though it is their rights that

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<sup>1</sup> „Supported by the ÚNKP-23-III-2 New National Excellence Program of the Ministry for Culture and Innovation from the source of the National Research, Development and Innovation Fund.”

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require justice. The focus on victims' rights is based on the recognition that the active participation of victims in criminal proceedings contributes to their success.

Recommendations and directives have been issued under the auspices of the Council of Europe and the European Union to ensure that victims in different countries are subject to uniform minimum standards. Each country has its own rules governing these rights and therefore the concept of victim is not uniform. In my study, I would like to present the provisions of the Austrian, German and Hungarian Criminal Procedure Acts concerning victims, as well as the directives adopted by the European Union.

## 2. The rise of victim rights

In the early days, the role of the victim was paramount, as there was no criminal justice, and the era was characterised by private revenge. This meant that those who had been wronged retaliated without restraint.<sup>2</sup> Later, with the development of tribal life, this was transformed into blood revenge, and it was no longer the victim as an individual who retaliated, but the whole tribe or clan, and so the institution of private justice was created.<sup>3</sup> Blood vengeance was later replaced by the talio principle, or 'an eye for an eye, a tooth for a tooth', which led to the institution of redemption.<sup>4</sup> The right of asylum, which developed in canon law, meant that the victim could no longer persecute the perpetrator who had fled to a convent or church.<sup>5</sup>

Under the principle of *compositio*, initially the victim received property compensation from the offender, and then the king received part of this, marking the transition from Criminal law to Public law.<sup>6</sup> In Greek and Roman law, the victim had the right to bring charges against the alleged offender and the court acted on this basis, a pure principle of accusation. Here, the public nature of the offence was secondary, the primary aim being to obtain satisfaction for the crime committed against the victim.<sup>7</sup> In the case of more serious crimes, the victim was not only representing his or her own interests, but also the interests of the state, i.e. the public interest.<sup>8</sup>

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<sup>2</sup> Livia Gergi-Horgos, "A közzvad kialakulásának jogtörténeti áttekintése a *ius puniendi* állami monopóliummá válása folyamatában," *Büntetőjogi Szemle*, 2014, (<https://ujbtk.hu/dr-gergi-horgos-livia-a-kozzvad-kialakulasanak-jogtorteneti-attekintese-a-ius-puniendi-allami-monopoliumma-valasa-folyamataban>.)

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Jenő Balogh, *A sértett fél jogköre a büntetőjogban* (Budapest: Pallas Irodalmi és Nyomdai Részvénytársaság, 1887), 31.

<sup>6</sup> Balogh, *A sértett fél jogköre a büntetőjogban*, 12.

<sup>7</sup> Gergi-Horgos, "A közzvad kialakulásának jogtörténeti áttekintése a *ius puniendi* állami monopóliummá válása folyamatában".

<sup>8</sup> *Ibid.*

With the awakening of the state, the private nature of Criminal law disappeared and turned into Public law. The role of the victims was relegated to the background, and often the criminal proceedings were conducted and justice was served without regard to them.<sup>9</sup>

The protection of victims and the regulation of their rights have a short history.<sup>10</sup> In the 20th century, there was a need to change the role of the victim in criminal proceedings and to develop his rights, since by then the compensation of the victim was no longer the aim of criminal sanctions, the victim appeared as an outsider in the justice system.<sup>11</sup> It was realised that victim participation in criminal proceedings was essential for the successful fulfilment of the role of law enforcement and justice. Victim-centred justice can be successful in reducing crime.<sup>12</sup> It does not pay to look at the victim of crime as a source of evidence.<sup>13</sup> Victims' representatives do not sit on codification committees, still ignoring their interests is dangerous.<sup>14</sup> However, the rights of victims must be safeguarded in such a way that the right of defence of the accused is not unfairly infringed,<sup>15</sup> and there is a risk of weakening the position of the prosecution if there is excessive solidarity with victims.<sup>16</sup>

Directive 2012/29/EU, which replaced Framework Decision 2001/220/IB and was drafted by the European Union and adopted in 2012, aims to ensure that victims of crime receive adequate information, support and protection and are able to participate in criminal proceedings.<sup>17</sup> Nevertheless, it is difficult to verify the objective pursued by the Directive and the effectiveness of the provisions adopted cannot be measured.<sup>18</sup>

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<sup>9</sup> Balogh, *A sértett fél jogköre a büntetőjogban*, 11.

<sup>10</sup> Erika Róth, "Position of victims in the criminal procedure in the context with requirements of the European Union," *European Integration Studies* 9, no. 1 (2011): 109.

<sup>11</sup> Károly Bárd, "Alkalmazott" viktimológia Észak-Amerikában," *Magyar Jog*, no. 1 (1984): 21.

<sup>12</sup> Bárd, "Alkalmazott" viktimológia Észak-Amerikában," 24.

<sup>13</sup> Anna Kiss, "A sértett jogainak erősítése a hazai és a német büntetőeljárás összehasonlításának tükrében," *Rendészeti Szemle*, no. 6–7 (2006): 114.

<sup>14</sup> Bárd, "Alkalmazott" viktimológia Észak-Amerikában," 27.

<sup>15</sup> Kiss, "A sértett jogainak erősítése a hazai és a német büntetőeljárás összehasonlításának tükrében," 115.

<sup>16</sup> Károly Bárd, "A vádlottak jogai és az áldozatok érdekei – megteremthető a harmónai?," *Belügyi Szemle*, no. 5 (2014): 15.

<sup>17</sup> Balázs Lencse, "A büntetőeljárás törvény egyes sértettekre vonatkozó rendelkezéseinek módosítása az Európai Unió áldozatvédelmi irányelvének tükrében," *Büntetőjogi Szemle*, no. 1–2 (2016): 52.

<sup>18</sup> Róth, "Position of victims in the criminal procedure in the context with requirements of the European Union," 111.

### 3. The concept of victim

The Austrian Strafprozeßordnung (hereinafter: StPO.) uses the term "Opfer", while the German StPO. uses the term "Verletzte". The law on the reform of victims' rights adopted by the German Federal Parliament in 2004 uses the term "Opfer", which shows that in Germany, just as in Hungary ("victim" – "victimised"), two different terms are used, separating the two categories, unlike in English.

Both the Austrian and German concepts of victim differ from the Hungarian Criminal Procedure Act, but for different reasons.

According to Section 65 of the Austrian StPO, not only persons whose rights or legitimate interests have been directly violated or endangered by a criminal act are considered victims, but the concept also extends to indirect victims, namely victims under the Hungarian Victim Protection Act. This means that in Austrian law a wider range of persons are granted victim rights in criminal proceedings than in Hungarian proceedings.

The definition of victim in Directive 2019/29/EU is partly narrower than the definition of victim in the Hungarian Criminal Procedure Act, since it excludes legal persons from the scope of victims, and only the natural person is considered as a victim who is the victim of the crime (as in the German and Austrian StPO.). On the other hand, the Directive defines the scope of natural person victims more broadly, since all natural persons who have suffered harm, in particular physical, mental (emotional) or economic loss as a direct consequence of a criminal offence, are considered victims, as is the Austrian concept.<sup>19</sup>

Section 373b of the German StPO.<sup>20</sup> considers the same group of persons to be victims as Section 50. of the Hungarian Code of Criminal Procedure<sup>21</sup>, but there is an important difference between the two concepts. The German legislation refers to offences which have been finally adjudicated and presumed with regard to the presumption of innocence. The purpose of this concept is to enable the victim to exercise his rights in criminal proceedings as soon as possible and to ensure that the presumption of innocence is not violated.<sup>22</sup> I find it interesting that of the three laws, only the German one considers it important to create a concept that is also consistent with the presumption of innocence.

Hungarian law explicitly mentions non-natural persons in the concept of victim, while this is not the case in the other two countries.

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<sup>19</sup> Vid. Directive 2012/29/EU Article 2(1)(a).

<sup>20</sup> "For the purposes of this Act, injured persons are those who, as a result of the act, its commission imputed or legally established, have been directly impaired in their legal interests or have suffered direct damage."

<sup>21</sup> "The victim is the natural or non-natural person, whose right or legitimate interest was directly violated or endangered by the crime."

<sup>22</sup> Ulrica Hochstätter, *Die Fragen der Opfer im Strafprozess – Bedürfnisse und Erwartungen im Kontext der strafverfahrensrechtlichen Bewältigung* (Wiesbaden: Springer VS Wiesbaden, 2023), 6.

## 4. Victim positions

Similar victim positions appear in the criminal proceedings of all three countries, however, there are legal institutions that cannot be observed everywhere. At the same time, with regard to all three countries, it can be said that the injured party who participates in the proceedings as a private party has the most rights.

### 4.1 Private accuser

All three laws regulate the cases when the victim acts independently without the participation of the prosecutor in his own interest, as a private prosecutor (“Privatankläger”). Laws allow this only for specific offences, typically for those of a less serious and more personal nature. Each law requires the victim to file a so-called private prosecution, which must meet the requirements of an indictment filed by the prosecutor.<sup>23</sup>

Both German and Austrian StPO. regulates the institution of the subsidiary private prosecutor, but this means something different in the two countries. In German law, a victim acting as a subsidiary private prosecutor (“Nebenkläger”) can participate in the proceedings alongside the prosecutor, as a quasi-assistant prosecutor.<sup>24</sup> This legal institution, foreign to Hungarian law, is meant to ensure that the victim can actively participate alongside the prosecutor.<sup>25</sup> Furthermore, it gives the victim the opportunity to take personal action against attacks on his person, honour, and reputation, and to contribute to the completion of the procedure.<sup>26</sup> This active participation means that you can make evidentiary motions, ask both the defendant and the experts participating in the procedure questions, and raise objections to questions.<sup>27</sup>

In Austrian law, the subsidiary private prosecution (“Subsidiarankläger”) means that the victim can maintain the indictment withdrawn by the prosecutor, but this is only possible if he participates in the proceedings as a private party<sup>28</sup>. This legal institution is equivalent to the Hungarian substitute private prosecution procedure. This legal institution seeks to counterbalance the prosecutor’s overriding powers<sup>29</sup>, and its goal is to eliminate mistakes that

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<sup>23</sup> Vid. German StPO. Section 374-394.; Austrian StPO. Section 71.; Hungarian Criminal Procedure Act Section 53., Section 767-782.

<sup>24</sup> Vid. German StPO. Section 395.

<sup>25</sup> Anna Kiss, “A sértett eljárásjogi helyzete néhány európai államban,” *Kriminológiai Tanulmányok*, no. 44, (2007): 230.

<sup>26</sup> Károly Bárd, “Az áldozatok jogállása a nemzeti es a nemzetközi büntetőeljárásban,” in: *Gályapadból laboratóriumot*, eds. Péter Hack, Eszter Király, Korinek László, and Paty András (Budapest: ELTE Eötvös Kiadó, 2015), 6.

<sup>27</sup> Hochstätter, *Die Fragen der Opfer im Strafprozess – Bedürfnisse und Erwartungen im Kontext der strafverfahrensrechtlichen Bewältigung*, 89.

<sup>28</sup> Vid. Austrian StPO. Section 72.

<sup>29</sup> 42/2005. (XI. 14.) AB decision.

adversely affect the interests of the injured party.<sup>30</sup> It creates a basis for the victim to go to court if he or she disagrees with the prosecutor, even though he or she has no constitutional right to have a criminal act that violates or threatens his or her rights or legitimate interests judged by a court. On this point, the Hungarian Constitutional Court refers to the German practice, according to which, even in private criminal proceedings, the victim has no fundamental right to assert a claim for criminal prosecution by the State.<sup>31</sup> As it is necessary that the indictment and the motions are prepared in a professional manner, Section 788 of the Code of Criminal Procedure makes legal representation mandatory in the proceedings of a supplementary private prosecution. In several decisions, the Hungarian Constitutional Court has addressed the question of who can be a substitute private prosecutor. The starting point for this question is the concept of the victim, which is why it is particularly important that the legislator should provide a clear definition which does not lead to the development of contradictory case law.<sup>32</sup> The institution of a substitute private prosecution is a corrective instrument. The possibility of its use, and thus the existence of victim status, must always be assessed on an individual basis, bearing in mind that the victim has no substantive right to punish the perpetrator.<sup>33</sup>

#### 4. 2 Private party (“Privatbeteiligter”)

In the Anglo-Saxon countries, it is not possible to judge a public or private case in one procedure, that is, the application of the adhesion procedure against the countries of the continent is excluded.<sup>34</sup> Under the Greek Penal Code, an offender who, after unlawfully taking or stealing something, voluntarily returns it before being questioned as a suspect, is no longer punishable.<sup>35</sup>

The adhesion procedure was introduced for the sake of quick reparation, taking into account the pereconomical aspects. According to Flórián Tremmel, the third argument for expediency, in addition to ensuring the action of the victim as a private party, is to avoid conflicting decisions on the same case. Furthermore, jurisprudence considers it an important reason for the criminal court's verdict establishing guilt to be the basis of the private action, so it is more advantageous to decide on a civil claim in this procedure as well.<sup>36</sup>

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<sup>30</sup> 14/2002. (III. 20.) AB decision.

<sup>31</sup> 1/2015. (I. 16.) AB decision.

<sup>32</sup> Vid. 3207/2016. (X. 17.) AB Order, 42/2005. (XI. 14.) AB decision.

<sup>33</sup> 3014/2013. (I. 28.) AB Order.

<sup>34</sup> Zita Fejesné Varga, “A büntetőeljárásban érvényesített polgári jogi igény megjelenése a perújítás intézményében,” *Büntetőjogi Szemle*, no. 1 (2017): 35.

<sup>35</sup> Gábor Botos, “A polgári jogi igény érvényesítésének egyes kérdései a büntetőeljárás folyamán,” *Belügyi Szemle*, no. 7–8 (1996): 44.

<sup>36</sup> Csongor Herke, “A polgári jogi igény,” in *A kriminálpolitika és a társadalmi bűnmegelőzés kézikönyve*, eds. Andrea Borbíró, and Klára Kerezsi (Budapest: Fresh Art Design Kft, 2009) 125.

All three laws regulate the possibility for the victim to claim damages for the harm suffered as a result of the crime in the framework of criminal proceedings, the so-called adhesion procedure. The concept of private party is almost identical in all three laws,<sup>37</sup> but the German StPO. is more detailed and specifies that they can only assert a claim to property which has not yet been adjudicated.<sup>38</sup> All three laws provide for the possibility of claiming, in addition to pecuniary damage and non-pecuniary damage, i.e. compensation for damage. The private party has additional rights compared to the victim who is marginalised and sunk in the role of witness, and is considered a victim in a special situation.<sup>39</sup> All three laws regulate the rights of the private party separately, which are additional rights compared to the ordinary victim (e.g. the right to appeal against a civil claim).

#### 4. 2. 1 Directive 2004/80/EC

The preamble of the Directive states that in order to achieve the removal of obstacles to the free movement of persons and services between Member States, it is essential to regulate measures at EU level to help victims of crime to obtain compensation.

The former Framework Decision 2001/220/JHA and Article 16 of the current Directive 2012/29/EU also allow victims of crime to claim compensation from the offender in criminal proceedings. In this context, the preamble to Directive 2004/80/EC also aims at “ensuring that victims of crime in the European Union are afforded fair and appropriate compensation for the damage caused to them, regardless of where the crime was committed within the European Community (Union).”

The directive creates a system of cooperation between the member states that facilitates access to compensation for victims of crimes in the case of cross-border situations. The basis of the system is the domestic damage mitigation rules operated by the member states, which apply to violent crimes intentionally committed in the territory of the given member state. (Article 12) The system is relevant in the event that “the perpetrator does not have the necessary means to fulfil the court decision ordering compensation, or because the perpetrator is not known or cannot be held responsible.”

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<sup>37</sup> Hungarian: “A private party is a victim who asserts a civil claim in court proceedings, even if he or she has declared his or her intention to do so before the charge is brought.” Austrian StPO.: “Any victim who declares to participate in the proceedings in order to seek compensation for the damage or harm suffered.”

<sup>38</sup> “The injured person or his or her heir may assert against the accused in criminal proceedings a pecuniary claim arising from the criminal offence that belongs to the jurisdiction of the ordinary courts and has not yet been brought before the courts elsewhere, in proceedings before the Local Court without regard to the value of the matter in dispute. The same right is also available to others who assert such a claim.”

<sup>39</sup> Tünde Majoros, “Bűnös vagy felelős? Polgári jogi igény érvényesítése a büntetőeljárásban,” *Advocat*, no. 1–2 (2018): 10.

But how do these systems work? The most important rights of victims in this regard is to be able to submit their application in the organization of their place of residence. (Article 1) On the other hand, the obligation to pay bears the responsibility in the area on which the proceedings are based. (Article 2) During the procedure, if the decision-making authority deems it necessary, it is also possible to interview the applicant, witnesses and experts, even with the help of the supporting authority by telephone or using video conferencing, yet a direct interview can only take place on a voluntary basis. (Article 9) During the procedure, the application is submitted, as well as the decision of the decision-making authority is communicated by using a form that complies with the directive. (Article 14)

Court practice on the Victims of Laws Relief Directive highlights that the provisions of this directive are additional to the national relief system. It is out of scope if the place of sacrifice is in the member where the violations or negligent rights. The draft of the original directive not only regulated cross-border legal access to victims' harm mitigation, but wanted to set general minimum standards for victims' rights, however, this section did not achieve adequate support. The CJEU states that in order to achieve the goal of Directive 2004/80/EC, it is necessary for each facility to have its own system that provides compensation for victims of intentional violence in the area. They have a wide range of maneuvers to build the system, according to the EUB, their task is to guarantee fair and adequate compensation, that is, the given system should reasonably contribute to the reparation of the damage suffered by the victim. Ultimately, it is the responsibility of the national courts to ensure compensation in an appropriate manner, for which, according to the CJEU, the adhesion procedure acts in particular.<sup>40</sup>

## 5. Victim's rights

All the legislation I have examined provides the same rights to victims:

1. right to information
  - a. about their rights and obligations
  - b. on the subject and course of the procedure
  - c. clearly
2. right to inspect documents
3. right of representation
  - a. legal representative
  - b. helper
4. special protection/treatment
  - a. age, mental and health status, the nature of the right, the circumstances of the commission
  - b. gentle interrogation
  - c. participation of a confidential person

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<sup>40</sup> Case C-129/19.



5. closed hearing
6. asserting a civil claim.

Although the rights of victims are constantly expanding, the possibility for the victim to take action is widening, but even under the current rules he or she does not have the substantive right to enforce the state's criminal claim. Under the right of access to the courts, a victim can file a complaint, a private prosecution, act as a private prosecutor in cases provided for by law, or as a substitute private prosecutor, but they do not have the right to have the accused convicted by the court. Judging is still a state task, which can be forced not even by the victim.<sup>41</sup>

The Court of Justice of the European Union (hereinafter: CJEU) treats the right of victims as a special right to testify and to have their evidence taken into account.<sup>42</sup> In addition, the CJEU considers it important that court proceedings do not necessarily have to take place, but that Member States help to facilitate the use of mediation.<sup>43</sup> All three laws place great emphasis on the possibilities of settlement between the accused and the victim, bearing in mind that the best solution for the victim is to have the proceedings completed as soon as possible and to be compensated for the damage.

The CJEU has ruled in several judgments that ensuring the proper participation of the victim in criminal proceedings is only possible with full respect for the right of defence of the accused. Victims' rights must not prejudice the procedural rights of the accused, maintaining equality of arms is of paramount importance.<sup>44</sup> The practice of the European Court of Human Rights (hereinafter: ECHR) also points in this direction. According to the ECHR, the right of the accused to an adequate defence, the interests of the victims and the public interest in the administration of justice must be weighed in the criminal proceedings.<sup>45</sup>

## 6. Summary

Examining the provisions on victims in Austrian and German Criminal Procedural law, it can be concluded that these countries have both undergone

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<sup>41</sup> 3104/2018. (IV. 9.) AB Order.

<sup>42</sup> C-105/03. Maria Pupino – Judgment (Grand Chamber) 16 June 2005.és C-38/18. Massimo Gambino, Shpetim Hyka vs. Procura della Repubblica presso il Tribunale di Bari, Ernesto Lappostato, Banca Carige SpA and Cassa di Risparmio di Genova e Imperia – Judgment (First Chamber) 29 July 2019.

<sup>43</sup> C-205/09. Emil Eredics and Mária Vassné Sápi - Judgment (Second Chamber) of 21 October 2010.

<sup>44</sup> Róth, "Position of victims in the criminal procedure in the context with requirements of the European Union," 118.

<sup>45</sup> C-38/18. Massimo Gambino, Shpetim Hyka vs. Procura della Repubblica presso il Tribunale di Bari, Ernesto Lappostato, Banca Carige SpA and Cassa di Risparmio di Genova e Imperia – Judgment (First Chamber) 29 July 2019.

the paradigm shift that has occurred in our country too, where the protection of victims and the enforcement of their rights is becoming increasingly important. The three laws provide the same rights to victims, the main reason for this is that each country has designed the victim's rights following the provisions of Directive 2012/29/EU, with special attention to victims requiring special treatment.

One of the main differences between the laws is in the definition of the victim. It can be seen that there is no uniform concept used by all countries, each legislator emphasizes something different.