Federalism and Victims' Rights in Canada

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Introduction

Federalism in Canada and its effect on the development of rights is an area that spans across disciplines and contexts, including the development of victims' rights. This paper discusses federalism, dual jurisdiction in criminal matters and its impact on rights in Canada, with the aim of informing the development and implementation of victims' rights and enforcement (remedial) mechanisms in this jurisdiction. It also compares these dimensions in other jurisdictions, namely the United States as a federalist country and the European Union, to highlight the ways that federal entities and similar institutional arrangements have contributed to the implementation of victims' rights as well as their enforceability. Finally, concluding remarks are made about the ways that Canadian federalism can be compatible with rights and incorporate lessons from national and international experiences in order to advance the implementation of victims' rights and remedies.

This report is divided into three parts. Part I summarizes federalism and the division of powers in Canada, followed by a description of federalism and victims' rights in Canada. It then proceeds by specifically discussing the evolving co-existence of rights and federalism in criminal justice and in other contexts with their mutual strengths and limitations. Part II examines the context and relationship between the different levels of governance in other jurisdictions, including within the United States and the European Union with regard to the implementation of victims' rights. Finally, Part III discusses specific lessons and limitations from these experiences that are applicable in the context of Canadian victims' rights.

Part I: The relationship between federalism and the implementation of rights in Canada

1) Division of powers in criminal justice matters in Canada

Canada as a federation has recognized a constitutional division of powers between the federal and provincial governments, including in matters of criminal law and criminal justice, determined by the *Constitution Act, 1867.* Specifically, section 91(27) grants to the federal government authority over "the criminal law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal matters", while section 92(14) grants the provincial governments authority over the administration of justice in the province. In short, the federal government has jurisdiction to determine what amounts to a crime and how crimes are to be investigated and tried, while provincial governments can set up the system in and by which they are investigated and tried. In this sense, the division of responsibilities can be complex and sometimes overlaps.

In matters of policing, both federal and provincial governments have established police forces to investigate crimes. Provinces have some municipal police forces, and Ontario and Quebec also have provincial police forces. The Royal Canadian Mounted Police (RCMP) generally fills the gaps wherever another police force does not operate and also investigates certain offences under specific statutes. In terms of prosecutions, the federal Attorney General, through the Public Prosecution Service of Canada (PPSC),[1] prosecutes all offences in the territories, while in the

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[1] The PPSC is a quasi-independent body responsible for the AG of Canada.

provinces, it has delegated most of its authority to prosecute to the provinces.[2] This results in most criminal prosecutions being conducted by provincial prosecutors (Penney, Rondinelli & Stribopoulos, 2011, p. 441). Specifically, provincial attorneys general have delegated to Crown Attorney's offices (or Crown counsel) responsibility for the prosecution of almost all offences under the *Criminal Code,* RSC 1985, c C-46 (Code), while the PPSC is responsible for the prosecution of most non-Code offences, including those under the *Controlled Drugs and Substances Act,* SC 1996, c 19.

2) Federalism and victims' rights in Canada

Although criminal law and the creation of crimes is a matter of federal jurisdiction in Canada and in theory there is a central criminal justice system, provinces under the *Constitution Act, 1867* have jurisdiction and regulate most aspects that relate to the administration of justice. This dual (concurrent) jurisdiction in matters of criminal justice thus enables each province to have its specificities in matters that relate to the administration of criminal justice. As will be seen throughout this report, this dual jurisdiction can give rise to some ambiguities in criminal justice, including in the area of victims' rights, which is a procedural matter that also touches upon aspects of the administration of justice.

The development of victims' rights in Canada was in great part inspired by the 1985 *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Declaration), which includes a number of guiding principles for member states to abide by in order to respect the interests of victims in the criminal justice system. These include interests in information, participation by expressing their views and concerns at the different stages of the criminal justice process, and the interest in protecting of their safety and privacy in the criminal justice context. The Declaration also recognizes an interest to reparation from the offender as well as compensation from the state. Since the Declaration is a guiding instrument for member states, it allows flexibility by being drafted in abstract and general terms "to accommodate the differences across legal systems" (Wemmers, 2012, p. 76). In this sense, it does not include precisions about which specific state agencies are responsible for the implementation of these interests as rights and remains silent on any potential enforcement mechanisms that might be relevant for member states to adopt in their respective jurisdictions in the event that breaches occur.

As will be seen, this is a different approach to the one taken with the European Union Directive on Victims (Directive) which although it recognizes the specificity of its member states, it nevertheless provides some guidance on enforcement mechanisms that relate to prosecutorial discretion, including the recognition of a victims' right to review prosecutorial decisions not to prosecute.

Canada was inspired by this Declaration for its internal policies that protect victims' interests. In 1988, the Federal-Provincial-Territorial Working Group published the *Statement of Basic*

[2] Further, the Supreme Court of Canada has ruled that while Parliament has exclusive authority under s. 91(27) of the *Constitution Act* to prosecute *Criminal Code* (and other federal) offences, it may delegate this power to the provinces. See *Canada (Attorney General) v. C.N. Transportation Ltd.,* [1983] S.C.J. No. 73. As will be discussed below, some authors have challenged the Supreme Court's view that prosecutions were under federal jurisdiction under the *Constitution Act*, suggesting that provinces were initially understood to have this jurisdiction.

Principles of Justice for Victims of Crime (Statement) which recognized general and abstract principles, similar to the Declaration, that also did not specify any enforcement mechanism in the event that state agencies failed to respect these principles. Most provinces decided to follow suit and adopt legislation inspired by these statements and declarations through legislation, often referred to as Victims' Bill of Rights. Most of these laws however, remained quite vague and fell short of recognizing any enforcement remedies in the event of breaches of these interests. Manitoba was the only province that introduced a provincial victims' statute – with a more thorough description of rights that designates specific criminal justice agencies that are responsible for each duty.[3] Manitoba and British Columbia also recognized a complaints process for victims in cases of breaches.[4]

At the federal level, the protection of rights was much slower, and although some rights started to be recognized within the *Criminal Code*,[5] and the *Charter of Rights and Freedoms*, there was no comprehensive legislation, like the one in Manitoba, that recognized victims' rights. The federal government could have followed Manitoba's path by adopting a similar comprehensive legislative document and set the example for the rest of the provinces, but it took longer, and instead, introduced the *Canadian Statement of basic Principles of Justice for Victims of Crime* (2003), which resembled the Statement.

It is only in recent years that the federal government introduced the *Federal Victims' Bill of Rights* (VBR), an improvement to previous Statements and Declarations. Indeed, it specifies specific rights and its application to victim interactions with investigators, prosecution, and correction services, but is not as clear, specific, and comprehensive as the legislation in Manitoba, which specifies which state agency is responsible for fulfilling specific duties. The VBR also includes a reference to an internal complaints process within the federal agency in breach, followed by a complaints process to a Federal Victims Rights Ombudsman in case of breaches. This form of redress is also similar to the administrative complaints process adopted earlier by Manitoba and British Columbia. The initial redress stage which refers to bringing complaints to the agency in breach remains limited and legislation would benefit from explicitly stating which specific bodies are responsible for remedying breaches, as well as the possibility for seeking review to the courts in case of certain breaches.

While an abstract formulation within international guidelines, such as the UN Declaration can be seen as a way to accommodate the many different criminal justice systems found within the Member States, an equivalent rationale at the national or provincial level is less justified in a federalist nation like Canada, where federal/provincial state entities operate within the same common legal tradition in matters of criminal law/justice and particularly in matters that relate to the enforcement, state accountability and redress for state failures and breaches that relate to

[3] Manitoba *Victims' Bill of Rights*, S.M. 1998, c. 44.

[4] Manitoba *Victims' Bill of Rights*, S.M. 1998, c. 44 creates an administrative complaint process which allows the victim to file a complaint with the Director of Victim Services. British Columbia's *Victims of Crime Act*, R.S.B.C. 1996, c. 478, s. 12, also allowed for complaints to be made to the Ombudsman except in respect of matters falling within prosecutorial discretion.

[5] For instance, the victim impact statement (VIS) regime in Canada, which afforded the right for victims to participate in sentencing was first introduced in 1988 under section 722 of the *Criminal Code* and was modified afterwards.

rights.[6] Indeed, instead of slowing down the development of rights and remedies, federalism can be used as a tool to offer clear and minimal protections of rights and enabling state accountability. To do so, legislative documents that relate to victims, either provincial or federal, can be made clearer and provide specific redress mechanisms to incentivize the development of such minimal protections and duties across the country.

Although victims' rights in Canada are for the most part not recognized as constitutional rights,[7] there are lessons that can be drawn from the experience of constitutional rights, concurrent (dual) jurisdiction and federalism that can be useful in the development of victims' rights and remedies in the context of a federation. The following section discusses this experience to suggest that minimal protections with remedies can be accomplished within a federal structure in matters of concurrent jurisdiction like victims' rights.

3) Federalism, dual jurisdiction and the minimal protection of constitutional rights

In Canada, when certain rights were initially afforded constitutional status under the *Canadian Charter of Rights and Freedoms*, a common normative assumption was that aspects of federalism would give way to a minimum uniform and centralized protection of rights between provincial and federal levels of government in matters of dual jurisdiction since the protection of fundamental rights from state abuses or state failures across the country was seen as a shared value that needed to be respected across the country. This was in part due to the *Canadian Charter of Rights and Freedoms'* drafting which stated that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" (s.52(1)). This statement was seen to have a centralizing effect, suggesting that the Charter is supreme and binding not just for the federal government but also for the provinces[8] and that the effect of this new catalogue of fundamental rights "substantially restricted the autonomy of the provinces to entrench their own fundamental rights" (Palermo and Kössler, 2017, p. 331).

Before then, provinces were almost completely free to amend their provincial constitutions under section 58-90 of the Constitution Act 1867. By contrast, amendments according to section 45 of the Constitution Act 1982, are subject to the federal standard of fundamental rights. With these changes, the Supreme Court was given a central role in the development of rights as the "ultimate interpreter" (Palermo and Kössler, 2017, p. 332) that ensures compliance that this standard is enforced in cases where conflicts arise between federal or provincial law and the Charter.

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[6] Federal diversity might be limited in such instances, but diversity might be more important value in the context of certain rights such as those that relate to education, language, and religion than in matters of criminal justice which are already quite centralized and heavily rooted in common law tradition even in Quebec.

[7] As highlighted by Barrett (2008), the *Charter of Rights and Freedoms* has been expressly referenced in several amendments and judicial interpretations of the Criminal Code that are aimed at facilitating the testimony of sexual assault complainants as well as the protection of their privacy interest in third party records. There is recognition that sexual assault complainants have their interests in equality and privacy protected under the Charter.

[8] An exception to this is the Notwithstanding Clause under section 33, which allows them to declare a provincial law as operative even in the fact of a conflicting Charter provision for certain rights. Exceptions to the applicability of section 33 are democratic rights (sections 3-5), mobility (section 6). Constitutional scholars had also suggested the Charter's natural momentum was towards centralization because "where guaranteed rights exist, there must be a single national rule" Peter Hogg, "Federalism Fights the Charter" in David Shugarman and Reg Whitaker, eds., *Federalism and Political Community* (Peterborough: Broadview Press, 1989), 250; Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal: McGill-Queen's University Press, 1995), 134.

Most concerns relating to this centralizing approach's impact on federalism and provincial autonomy did not materialize. Indeed, there is evidence that suggests that federalism and its values -- notably provincial autonomy and diversity – can in many ways align and contribute to a greater protection of rights rather than halting them. The Charter and federalism can be considered a push forward for ensuring a minimal protection of rights across the country, especially in jurisdictions where governments have been slow to recognize certain rights. In this sense, it is understood as a floor rather than a ceiling, offering the possibility for legislatures to be creative and recognizing greater rights protection should they choose to do so.

This reconciliation between federalism, which values diversity and autonomy within regimes, with a minimal protection of rights can be seen in the way that federalism has the potential in some contexts to contribute to greater innovation and influence in the recognition and protection of rights.

This was the case in the context of equality rights and the recognition of sexual orientation as a prohibited ground of discrimination as part of equality. In this context, Quebec was the first Canadian jurisdiction to include sexual orientation as a prohibited ground of discrimination in its *Charte des droits et libertés de la personne* in 1977, seven years before the Canadian government expressed the belief that sexual orientation was encompassed by section 15 of the Charter and committing to take measures to ensure this protection (Hurley, 2003). This was an innovative protection at the time that started with Quebec's human rights legislation, and eventually was recognized as a Charter protection under section 15's equality clause that impacted the rest of the provinces. This protection was affirmed in 1992 when the Ontario Court of Appeal, in *Haig v. Canada (1992)*, ruled that the absence of sexual orientation from the list of proscribed grounds of discrimination under the *Canadian Human Rights Act* violated section 15 of the Charter. As a remedy, it decided to 'read in' sexual orientation into the Act. The federal government decided not to appeal this decision and indicated that it would be applied throughout Canada. This eventually gave rise to Parliament enacting amendments under the Act in 1996, to include sexual orientation among the list of prohibited grounds of discrimination, aligning with most provinces and contributing to the *Vriend v. Alberta (1998)* decision which also "read in" sexual orientation as a prohibited ground of discrimination in the Alberta legislation.

This example illustrates the way that federalism and provincial autonomy can contribute to a greater protection of rights, enabling provinces to experiment and develop innovative recognitions that expand rights protections to wider categories of citizens, which can eventually influence and be incorporated across the country.

In addition, the reconciliation of rights and federalism can be seen in the context of conduct by public (state) officials in criminal justice. In this area, the Supreme Court has developed an "implicit federalism" approach (Kelly, 2001) that recognizes the development of centralized rights that create general duties towards state officials across the country that also enable and depend on the ability of the provinces to determine independently the content of services that relate to the implementation of these rights. This can be seen notably in matters of concurrent power/jurisdiction held between the federal government and provinces in policies that relate to

both criminal procedure (criminal rights) and the administration of justice (implementation of these rights).

Decisions that illustrate this concurrent jurisdiction and the implicit federalism approach, can be seen in the informational component of the right to retain and instruct counsel without delay of section under 10(b) of the Charter. Within this context, a Charter claimant can win a constitutional challenge and obtain remedies for a breach of rights by a public official while advancing an implicit federalism discourse that recognizes the autonomy and discretion of provinces.

In the seminal case of *R v. Brydges (1990)*, the Supreme Court ruled unanimously that the failure of police to inform the accused of legal aid resources in Manitoba violated section 10(b) of the Charter. This decision resulted in a requirement for police in all jurisdictions across the country to update the information component of section 10(b) to include reference to Legal Aid and duty counsel services available to those who cannot afford a lawyer. In this decision, the Court adopted an implicit federalism approach by suggesting that the information component of section 10(b) was nevertheless determined by the existing legal aid and duty counsel services in each specific jurisdiction, which allows for provincial variation at the discretion of provincial governments.

In *Prosper*, *Matheson,* and *Latimer,* the Supreme Court clarified the important question as to whether or not provinces have been placed under a constitutional duty to provide free and immediate, preliminary legal services, referred to as *Brydges* services or duty counsel services.[9]

In R v. *Matheson (1994)*, at the time, the province of Prince Edward Island had no provincial *Brydges* duty counsel services available and therefore the Court found that the police had complied with the informational requirements by informing the individual of his right to retain and instruct counsel and his right to apply for legal aid.

Similarly, in *R v. Prosper (1994)* the Court denied the existence of a substantive constitutional obligation on the provinces to provide free and immediate preliminary legal advice under section 10(b) and specified that this is in part because of the financial burden that such an obligation would place on provincial governments: "the fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to expend public funds on the provision of a service is, I might add, a further consideration which weighs against this interpretation."(p. 267). Further it was made clear that "an effective duty counsel does not need to be an elaborate one and need not consist of anything more than a basic service accessed by dialing a 1-800 number." (p. 265). Finally, in *R v. Latimer (1997)*, the Court concluded that the approach that emerges from these cases is that the nature of the information provided pursuant to section 10(b) depends on the actual services available in each federal jurisdiction.

This approach provides space for provincial variation in legal aid plans and, thus, does not set a country-wide constitutional standard for the provision of these services. In this sense, the existence and content of a duty counsel system are left to the discretion of provincial governments.

[9] This service is also typically referred to as 24-hour on call duty counsel service or free and immediate preliminary legal advice. It differs from legal aid.

Some might argue that this approach to federalism can limit the implementation of rights, since it allows flexibility within the provinces and relies on provincial responsibility and funding for the administration of justice in the specific way this right might manifest itself in different jurisdictions. While this can be a limitation, this approach can also propel innovation and experimental programs among regimes and inspire other jurisdictions to follow suit.

Further, this approach also places minimal procedural requirements on the police across jurisdictions under s 10(b) of the Charter to inform individuals of these existing services. In this sense, this right recognizes that police discretion can be limited by placing certain obligations on them across the country when services are indeed available. Several decisions have discussed this minimal police duty under 10(b) to inform individuals of the availability of specific legal aid resources (*R v. Bartle*, 1994; *R v. Cobham*, 1994; *R v. Wozniak*, 1994). *Wozniak (1994)* is a representative decision in this regard, in which Ontario had established a toll-free number that detainees could use outside of normal working hours to access free legal advice. The police informed the accused of the availability of legal aid Ontario, but did not refer to this number, which was found to be an inaction which violated section 10(b). This decision resulted in expanding the information component of 10(b) to include whatever system for free and immediate, preliminary legal advice exists in the jurisdiction at the time of detention and how such advice can be accessed. Similarly to *Brydges*, this case took the claimant's rights seriously with remedies while also respecting federalism by reflecting the province's existing legal aid plan. Systemically, however, this decision has limitations since it did not lead to uniformity in provincial legal aid plans.

In the context of victims' rights, this analysis suggests that in matters of dual jurisdiction, the constitutionalization of rights can be a useful tool to set minimal protections and duties towards criminal justice state agencies. However, since most of victims' rights are not constitutionalized, these minimal protections would not necessarily apply across the country and there is a risk that some jurisdictions may be slower to recognize robust protections of rights, as seen above.

Nevertheless, the federal government and provinces can set a leading example by developing clear rights and remedies that can help achieve a minimal informational and participative protections as a model for the other structures of government (federal or provincial) to follow suit. Indeed, within this perspective, federalism can and should be considered an important guiding tool for offering a realistic model or point of reference premised on the same legal tradition for the rest of the provinces to follow-suit. The modelling can also be inspired by a province that is particularly advanced in recognizing and protecting victims' rights by offering robust and efficient remedies to their violation.

An important caveat, however, can be seen in the flexibility federalism provides to provinces in the implementation of service rights, which might heavily be dependent upon the funding they can obtain. This would indeed be the case with victims' rights to information, where provinces would have discretion to implement services that relate to the information as they see fit, which may be more or less protective of victims' rights.

4) Prosecutorial discretion and federalism

Another consideration with federalism and victims' rights is the division of powers and dual jurisdiction that relates to prosecutorial discretion. As discussed above the VBR provides a set of obligations towards criminal justice agencies, including prosecutors in federal matters, and as part of a delegated dual jurisdiction in matters of prosecution, prosecutors across provinces can implement their own guidelines and remedies in cases of non-compliance.

The VBR stops short of recognizing remedial review processes that relate to decisions about prosecutions, contrary to the approach of victims' rights adopted in England and Wales.[10] This is a very different approach to the redress mechanisms of private prosecutions, judicial review and the internal administrative review, namely the Victims' Rights to Review Scheme (VRRS) implemented in England and Wales.

In Canada there has been preliminary discussions by various stakeholders that certain review processes would advance the rights and remedies of victims while allowing for greater prosecutorial accountability (Office of the Federal Ombudsman for Victims of Crime, 2020; Manikis, 2015). Nevertheless, Canada has insulated prosecutorial discretion from review much more thoroughly (Baker, 2017; 2017; *R v. Anderson*, 2014; *Nelles v. Ontario*, 1989)[11] than in England and Wales (Manikis, 2015) and thus it remains to be seen whether this response would ever be adopted.

If adopted, it would raise considerations related to federalism, again based on the dual jurisdiction of criminal justice between the creation of crimes and criminal procedure (federal) and the administration of criminal justice (provincial). One of these important dimensions would be whether provinces would have the legal authority to implement a practice of non-enforcement of a Criminal Code offence, which could be an obstacle to the potential interest of victims in seeing offences prosecuted.[12]

Determining whether provinces have the legal authority to implement a practice of non-enforcement of a Criminal Code offence is a question that remains open and subject to competing views.[13] This ambiguity stems from the legal debate about whether prosecutorial powers are under

[10] The abuse of process doctrine under the *Charter of Rights and Freedoms* regulates these matters in Canada and it is not clear whether this limited avenue would be open to victims of crime.

[11] In Canada, prosecutorial discretion has been described as "sacrosanct" in nature and as a "relatively unchecked and unsupervised discretion" as it is subjected to judicial review only when exercised maliciously or when it is in breach of its constitutional obligations. In England and Wales judicial review and thus prosecutorial accountability is much wider and includes instances in which victims can judicially review decisions not to prosecute.

[12] While this might not be the case for all crimes, for certain offences, victims may have an interest in prosecutions going forward.

[13] For instance, while Sossin (2015) argues that "a provincial government may oppose a parliamentary amendment to Canada's Criminal Code… its law enforcement officials must still enforce that law". This view is based, in part on historical comments that stated that "the determination of what is crime and what is not and how crime should be punished" should be assigned to federal government as uniform law "would weld us into a nation". On the other hand, Carter (2007, p. 163) has argued that provinces could forego prosecution of a law and "distance themselves from politically unpopular or expensive federal criminal law initiatives". This view is complemented with Justice Dickson's dissent in (*R v Westmore*, 1983) which supports provincial autonomy on the basis that historically the administration of justice was a local matter that "perpetuated and carried forward into the Constitution through section 92(14)". Similarly, and based on a premise of checks-and-balances approach to federalism, Baker (2017) suggests that the provinces have a least a concurrent constitutional power over the prosecution of criminal law offences, and a concomitant power to choose not to prosecute a validly enacted federal law as a means to protect liberty. This view

the 1867 Constitution, constitutionally federal and provinces benefit from delegated authority or whether they were provincial. Indeed, while an approach that considers that provinces have traditionally held constitutional power over prosecutions as part of the 1867 Act, would support the possibility for provincial non-enforcement of the Criminal Law, the Supreme Court has leaned towards the view that prosecutions were understood in this Act as a matter of federal powers and have been since delegated to the provinces. While this delegation allows for discretionary decisions made by provincial prosecutors on a case by case basis, a provincial non-enforcement policy would be seen as an interference over federal jurisdiction.

This dominant view would suggest that federalism in this context would generally not be an obstacle to the enforcement of criminal law and therefore victims would not be limited by provinces (and provincial prosecutors) who decide not to enforce the prosecution of crimes on the basis that this is a matter of provincial jurisdiction. In the event that provinces did decide to apply a non-enforcement policy, victims would have the possibility to seek review of this policy on the basis that it is *ultra vires* and that it impedes Parliamentary supremacy in the enactment of crimes.

Part II: Comparative perspectives and the impact of federalism and federal-like structures on victims' rights and remedies

1) The United States, federalism and victims' rights and remedies

Victims' rights in the United States have also developed as part of a federal system, but in which states have greater jurisdiction in matters of criminal law (Baker, 2017). Indeed, in the United States, federalism recognizes state court sovereignty over state criminal processes. "Absent powers reserved to the federal government or barriers within the Federal Bill of Rights, state legislatures and state citizens are free to enact laws on modern victims' rights." (Beloof, 2007, p. 1147). Although in *Linda R.S. v. Richard D* (1973) the Supreme Court held that citizens do not have rights in state criminal processes that did not exist at common law, it did acknowledge that judicially cognizable rights for victims can be legislated. The Court articulated that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." (p. 617 footnote 3). As highlighted by Beloof (2007, p. 1148), by analogy, state legislators can also enact victims' rights accompanied by victim standing.

In great part, this reality is premised on the idea that the states are closer to citizen needs and in the importance of state experimentation. Initially, like Canada, in the context of victims' rights, the "states have met felt needs by engaging in experiments providing more, rather than less protection than found in the Federal Constitution for civil liberties of victims." (Beloof, 2007, p. 1147). These protections however, overwhelmingly failed to recognize remedial mechanisms for victims in cases of breaches of rights.

Similarly to Canada, the constitutionalization of rights in the United States has given rise to fundamental rights being aligned across the various levels of government. In the context of the Bill

suggests that federal and provincial jurisdictions have this task and non-enforcement of criminal laws is seen as liberty enhancing and "cannot be liberty-reducing". This statement can be challenged when looking at the historical nature and rationales of private prosecutions, which sees this right as citizen liberty to ensure the enforcement of laws when the state fails to do so.

of Rights, the Supreme Court has played an important role in interpreting the Constitution in a way that applies to the various levels of government.

The discussion and debate regarding federalism and victims' rights has been more prominent in the United States, since the proposition of an Victims' Rights Amendment (VRA) to the US Constitution to protect victims' rights and offer them remedies has featured into the victims' rights literature.[14] The aim was for a minimal protection of rights and remedies to apply across the country to federal and state criminal justice systems. From a federalism perspective, it was argued that without an amendment, states would not be able to give full effect to their policy decisions to protect the rights of victims (Cassell, 2012).

The VRA proposals gave rise to several concerns, including some that relate to federalism. Some have argued that "the VRA would infringe on the rights of the States" (Cassell, 2012, p. 346) by leading to a federal court supervision over the states. As a response, Twist and Seiden made clear that some guidance would not be exceptional, particularly in matters of criminal procedure. Indeed, it was suggested that "few areas of the law have been more fully occupied by the federal government than the law of criminal procedure through the US Supreme Court's interpretation of the U.S. Constitution and the incorporation of the Bill of Rights into every State's justice system." (Twist & Seiden, 2012, p. 227). As examples, they discuss several defendants' rights protected by the Bill of Rights in which the Supreme Court has given guidance that applies across the country, namely the right to a speedy trial, the protection against self-incrimination, and the application of the exclusionary rule as a remedial mechanism. Cassell has highlighted that although a VRA would extent basic rights to crime victims across the country, there would be room for states to determine how to accord those rights within the structures of their own systems and can be drafted in ways that can accommodate legitimate local interests (Cassell, 1999). Similarly to the Canadian context, this can suggest that matters that relate to fundamental rights need to be minimally protected and this can be done by the role of the Supreme Court which ensures that all legislation in the land respect the Bill of Rights,[15] but with leeway offered to the states to decide contextual dimensions related to their implementation.

Others who have opposed the VRA worried that it would end experimentation and wider protections by the states on matters related to victims' rights. Indeed, one of the advantages of federalism, as highlighted above, is that the various levels of government can undertake pilot-projects and test various dimensions of the implementation of rights (Solimine & Elvey, 2015). An important response to this concern is that even with the VRA, states would have the space to experiment, since the VRA, like the Bill of Rights, would be considered "a floor – not a ceiling – for victims' rights" (Cassell, 2012, p. 318). In other words, states would adding and to the rights set out in the VRA or rendering them more robust.

Another concern regarding the VRA was that the amendment would be an unfunded mandated by the government, particularly as the VRA did not delineate the source of funding for its

[14] Several attempts were made to amend the US Constitution to include victims' rights. The VRA was initially proposed by the Report of the President's Task Force on Victims of Crime in 1982.

[15] It was also reminded by Twist & Seiden (2012) that the fundamental purpose of federalism was not to enshrine state sovereignty for itself, but predominantly as a means of securing liberty from encroachments of the federal government on the liberty of the people.

requirements. These concerns can affect aspects of federalism, since such amendments can have minimal impact on the federal budget, considering crimes of violence rarely are federally prosecuted, however it is not clear who would bear the costs for state compliance, ultimately suggesting that this amendment may be an unfunded mandate on the states (Schwartz, 2005). A response to this by proponents of the VRA is that most of the rights proposed are not a program but rather limitations on the state from proceeding with a criminal matter considering the victim (Twist & Seiden, 2012). It is argued that the only right with fiscal consequences is the right to notice and each state would be able to determine how to provide notice. These costs are already covered by the established Crime Victims Fund (42 U.S.C, 2006, s.10601). Accordingly, the rest of the rights, which are mainly participative, are considered not to impose additional costs to the system.

For many reasons, the VRA was placed on hold and proponents of this approach rallied their efforts around a federal legislation, the Crime Victims' Rights Act 2004 (CVRA) (18 U.S.C, 2004, s. 3771) which resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than the VRA. Significantly, this federal legislation provided a judicial enforcement regime that grants standing to crime victims to enforce their rights in criminal proceedings and appeal a violation of their rights immediately after the violation occurs to federal appellate courts.

The intention was that the federal legislation would serve as a model for reform of the criminal justice legal culture in the fifty states, particularly with regard to offering standing and remedies for the enforcement of these rights. While the influential success of this initiative is debated,[16] several states have followed that path (Schlam, 2015), which suggests that in the United States, federalism is not considered an obstacle to the advancement of victims' rights and their remedial mechanisms. On the contrary, it can be an influential mechanism that provides a roadmap for the rest of the government structures to follow more robust initiatives. This is particularly true if this aim is taken seriously by using the federal spending power to give States proper incentives to meet uniform national standards, as highlighted by Judge Orenstein (Proposed Constitutional Amendment, 2003).

Specifically, following the CVRA, several state jurisdictions were inspired by this trend and have expressly recognized victim standing at both trial and appellate level to vindicate rights in their constitutions or statutes. Two states had earlier granted similar standing to victims through constitutional amendments, namely Oregon (Or. Const.) and California (Ca. Const) in 2008. Most recently, New Jersey amended its state constitution in 2012 to provide for victims' rights around the same time as did Illinois in 2014, which initially did not expressly provide for victim standing to enforce their rights. Specifically, New Jersey (Crime Victims Bill of Rights NJSA, 2012) voters gave crime victims standing for this purpose, and for the same reasons similar changes have taken place in Illinois (Resolution Constitutional Amendment, 2014). Finally, as indicated by Cassell and Garvin, most recent amendments include Florida (FLA. CONST. art. I, § 16(c), 2020), which

[16] Despite the CVRA and legislative protections, there are still breaches of rights and therefore some proponents of the VRA have continued to militate towards that path, see: Twist & Seiden (2012). Some have also suggested that just as much state policies may have positive effects in the protection of rights, they can at times spark "races-to-the-bottoms among states, which suggests that interstate collaboration is appropriate on an issue, or that a national resolution is beneficial" (Solimine & Elvey, 2015, p. 924).

recognizes standing for victims to enforce their rights and "in expanding constitutional protections for victims may set an example for other states." (p. 136).

2) The European Union and the implementation of victims' rights and remedies

Although the European Union (EU) is not part of a federalist arrangement,[17] like it is the case of Canada and the United States, there are similarities and lessons that can be mutually drawn from these different types of arrangements. Indeed, the EU is understood as a political regrouping that includes several European countries (Member States) which are meant to share certain common values and integrate them within their policies and laws. As part of these values, the protection of political democratic values and rights, as well as fundamental human rights are included, which over the years, have extended to the protection of victims' rights.

An important development in this regard includes the enactment of the EU Directive on Victims (Directive) which sets out minimum standards on the rights, support and protections of victims. It aims to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. It has played an important role in the recognition of victims' rights and remedies across the EU. Specifically, Member States are meant to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive.

Although this Directive is meant to provide minimal guidance, it also recognizes that legal traditions can vary considerably between jurisdictions, which includes the role procedural role of victims in criminal proceedings. This suggests that the implementation of these articles can have some variability, yet its influence has been significant across the EU.

Indeed, a study from the European Parliamentary Research Service (EPRS) (European Parliamentary Research Service, 2017) on the Directive has assessed its implementation and overall suggests that the Directive has been successful in its objective of bringing about a more victim-centred approach in criminal proceedings and the exercise of rights of victims throughout the EU. Several additional studies and reports have been published in this area and specifically highlighted the failures by some state agencies, such as prosecutors to implement some of these rights (Policy Department for Citizens' Rights and Constitutional Affairs, 2018; Milquet, 2019; European Union Agency for Fundamental Rights, 2019).

Although the Directive does not mention specific remedies for the violation of rights, section 47 of the EC Charter of Fundamental Rights of the EU (Charter) and article 19 of the Treaty on European Union recognize a right to an effective remedy before a tribunal, which according to a recent report from the EU Agency for Fundamental Rights (2019) (report) applies to victims' rights under the Directive, since it forms part of the law of the Union.[18]

[17] Guidance document related to the transposition and implementation of the Victim's Rights Directive (issued in December 2013)

[18] "[Article 47] applies to the single and concrete rights under the Victims' Rights Directive, which forms part of "the law of the Union". Whenever a victim can argue that one of the numerous rights under the directive is violated, the victim has the right to an effective remedy before a tribunal and fair trial rights in the proceedings.", European Union Agency for Fundamental Rights, 2019, at 33.

According to article 47 of the Charter, victims must have effective remedies available to them in two distinct scenarios:
(1) if there is not a thorough and effective investigation or prosecution;
(2) when their rights to participate in the investigation or in the court proceedings (procedural rights) under the Charter or the Directive are not respected.

Scenario (1) is recognized under Article 11 of the Directive and therefore Member States have to ensure that victims have the right to a review of a decision not to prosecute, procedurally determined by national law. The report (2019) highlights that several countries under analysis have such review mechanisms in place in national legislation, but also suggest that there are different limitations imposed when exercising such remedies.[19]

In England and Wales, in addition to judicial review, victims now have the possibility to first address a request for review to the CPS as part of the Victims' Right to Review Scheme (VRRS). This relatively new mechanism is in great part the result of the EU Directive's influence on providing minimal standards which include access to review mechanisms to have decisions not to prosecute reviewed. Specifically, the Directive was referenced in R v. *Killick* (2011), a decision in which the Court of Appeal reaffirmed that there is a right by interested persons to seek judicial review of decisions not to prosecute and that it would therefore be "disproportionate for a public authority not to have a system of review without recourse to court proceedings" (para 48). It was therefore made clear that a victim should not have to seek recourse to judicial review since in can be cumbersome and that it must be for the DPP to consider a way in which the right of a victim to seek review can be made the subject of a clearer procedure and guidance with time limits. As a response to this decision and to give effect to the principles laid down in Article 11 of the Directive, the CPS set out the VRRS scheme since 2013 which sets out guidance on how victims can give effect to their right to seek a review of certain decisions taken by the CPS (Crown Prosecution Service of England and Wales, 2013, 2020).

For scenario (2), the report, which interviewed practitioners in some of the jurisdictions under analysis mentions that these types of remedies are lacking due to either national legislation shortcomings or remedies that exist in the law but not used in practice. Practitioners in Austria, nevertheless reported that if participation rights are violated, victims, in comes cases, would challenge the final judgment. This report concludes that victims' participation rights will materialise in practice only when practitioners treat them as legally binding, and effective remedies back them up.

Part III: Concluding remarks and recommendations encouraging the protection of rights and remedies under a federal structure

Several conclusions and recommendations can be made in the context of victims' rights and remedies, drawn from analysis above, which discusses the experience on rights and federalism in different contexts and across jurisdictions that adopted federal-like structures.

[19] For instance, in an interview with German practitioners, they highlighted that they are particularly concerned that jurisprudence is placing increasing restrictions on victims' means of challenging a decision by the public prosecutor to discontinue the proceedings.

First, the Canadian experience highlights the ways that rights and federalism are not in conflict with each other and federalism can be a useful driver of social change and greater rights protections across the country.

This can be seen with constitutionalized rights in the context of criminal justice that create minimal duties towards state officials across the country, while recognizing that their implementation can be left to the autonomy of the province. This autonomy is compatible with rights when these rights-protecting documents are understood as creating floors not ceilings and therefore enable and encourage legal entities to offer additional and innovative rights and experimental programs and services that relate to the implementation of these rights. Experience has shown that for some types of rights that require accompanying services, funding would also be more important than for others, since their effective implementation would rely on these services being made available. For instance, similar to the experience of defendants' rights, those would be particularly important for informational rights where government officials, or legal aid counsel, would have duties to inform victims of certain aspects that relate to their case.

In the context of victims' rights in Canada, however, most rights are not constitutionalized. Short of constitutionalization, statutes can neverthtless be enacted and federalism should still be seen as an enhancer to rights -- offering minimal rights and remedies to victims across the country with opportunities for experimentation to enhance rights, rather than limiting or slowing down their development.

Indeed, Canada can look at the experience in other jurisdictions in matters of victims' rights and remedies, where federalism and similar structures have shown to serve as a baseline and potential enhancing model for the rest of the national jurisdictions to follow-suit.

Specifically, in the United States, the federal experience has offered comprehensive enforeable rights with robust remedies to victims of crime at the federal level under the Crime Victims' Rights Act. This legislation as part of federalism, has served as an inspiration for several states that have followed-suit with the implementation of robust enforceable rights with remedies, notably, Illinois, Oregon, California, New Jersey, and Florida.

Similarly, the experience with the EU Victim Directive has also shown that a federalist-like structure can be a driver for change that can serve as a guiding remedial model for the protection of victims' rights and prosecutorial accountability. For instance, the experience in England and Wales has shown that the remedial mechanism that consists of reviewing prosecutorial decisions not to prosecute were influenced in part by the EU Directive's requirement for implementing accessible forms of review.

Second, in Canada, the federal government can implement comprehensive rights, similar to those in Manitoba, with robust remedies, including review mechanisms under the Victims' Bill or Rights which would serve as a model for the rest of the provinces. This can include standing in criminal proceedings, such as the mechanism available for victims under the American CVRA. It can also include enforceable prosecutorial guidelines that are subject to judicial review and internal administrative review mechanisms available in prosecutorial offices that relate to decisions about prosecutions. Federalism should not serve as a reason for limiting remedial possibilities since as

seen, it can work as an enhancer in matters of rights rather than a race to the bottom. Further, in contexts where a crime is created by the federal jurisdiction, there are reasons to believe that the duty to prosecute should be seen as a matter of federal jurisdiction that provinces need to respect and subject to judicial review.

Judicial and administrative reviews as types of remedies for victims' rights violations have been slow to develop in Canada, in part because of the quasi-absolutism of prosecutorial discretion and the non-legally binding prosecutorial guidelines. This quasi-absolutism is in great part maintained by the courts in Canada, which heavily differs from the EU Directive and the Court of Appeal's approach in England and Wales which reaffirmed that there is a right by interested persons to seek judicial review of decisions not to prosecute and that it would be "disproportionate for a public authority not to have a system of review without recourse to court proceedings" (R v *Killick*, para 48). Comparative analyses on these specific aspects would be warranted as an additional step to developing victims' rights in Canada.

Overall, federalism should be seen as a compatible and enhancing structure with the protection and implementation of rights and state accountability. Indeed, it can be seen as a structure that enables more localized services and experimentation to flourish. For these reasons, instead of acting as a race to the bottom in terms of victims' rights, the Federal government and the provinces can use this structure as a way to reinforce and encourage the minimal protection and implementation of creative remedies. For this to succeed, it is also important that initiatives, especially at the provincial level, be followed with adequate funding to ensure that accessible services can be delivered by the relevant state agencies.

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