Evaluating Challenges to Decisions Not to Prosecute: Do the Victims' Right to Review, Judicial Review and Private Prosecutions Provide a Coherent and Principled Framework?

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Abstract

The Victims' Right to Review (VRR) was introduced in 2013. It provides a new mechanism through which victims can challenge decisions not to prosecute alongside the established routes of judicial review and private prosecutions.

This thesis evaluates the extent to which these mechanisms, individually and collectively, provide victims with a coherent and principled framework for challenging decisions not to prosecute.

The VRR is a simple, convenient mechanism which may improve victims' perceptions of procedural fairness and provide an appealing alternative to judicial review. However, its utility is significantly limited by a narrow definition of 'victim' and the rigid qualifying criteria that confine this mechanism to non-prosecutions. It offers victims only limited opportunities to participate in the pre-trial stage of the prosecution process.

The requirement that victims use the VRR to challenge decisions not to prosecute limits access to judicial review thereby protecting the public prosecutor from the independent and transparent scrutiny of judicial review. Private prosecutions are of limited value to victims as they are procedurally onerous and are fundamentally undermined by the CPS policy of applying the Code for Crown Prosecutors to private prosecutions.

Individually, the VRR, judicial review and private prosecutions each have some value for victims, but they all have significant limitations. Collectively, they do not provide victims with a coherent and principled framework for challenging decisions not to prosecute. The VRR should be both expanded to include a wider range of cases and reformed to encourage victims to make representations creating a more meaningful right of review for victims whilst continuing to protect the rights of defendants. The right of private prosecution for ordinary citizens, in contrast, should be abolished because it has the potential to conflict with the rights of defendants and the public interest.

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Chapter 1 - Introduction to the thesis

1.1 Introduction

This thesis examines the ways that aggrieved victims of crime may challenge a public prosecutor's decision not to prosecute. This research evaluates the Victims' Right to Review (VRR), judicial review and private prosecutions individually, and collectively, against the set criteria of accessibility, participation, accountability and outcomes. These mechanisms differ in the extent to which they allow victims to participate in the criminal justice system and the degree to which they hold the public prosecutor to account. Although each of the mechanisms are of some value to victims, I argue that the law and policy in this area do not provide victims with a coherent or principled framework of rights. I will argue that the rights of victims to challenge prosecutorial decisions should be developed further to strengthen the victim's position in the prosecution process whilst ensuring robust safeguards for defendants and the wider public interest.

1.2 Background – decisions to prosecute and victims

Since the Prosecution of Offences Act 1985 came into force the vast majority of criminal prosecutions in England and Wales have been brought by the Crown Prosecution Service (CPS). As a result, the role of the prosecutor has been taken over by the State from individual victims who, prior to the creation of police forces and subsequently the CPS, would have brought prosecutions themselves. Although the right to bring a private prosecution remains, these are rarely brought by individual victims of crime. Therefore, victims have largely been marginalised from public prosecutions, generally being relegated to the role of witnesses. Until the case of *Killick* led to a third way that such decisions could be challenged, the only options

available to a victim aggrieved by a decision not to prosecute were to apply for judicial review or bring a private prosecution.[1]

In *Killick*, the Court of Appeal confirmed that victims have an inherent right to have a decision not to prosecute reviewed and that there were deficiencies in the CPS system for handling requests for review: 'As a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance.'[2] The court invited the Director of Public Prosecutions (DPP) as head of the CPS to re-examine the procedure by which victims could seek a review of decisions not to prosecute indicating that it should be separate to the complaints system for dealing with issues relating to the service provided by the CPS. Thomas LJ stated that a right of review 'is an integral part of the exercise of a prosecutorial discretion.'[3] As a result of *Killick*, the CPS implemented the VRR which is an internal CPS scheme that allows victims to request a review of a prosecution decision not to prosecute.[4]

The objective of this research is to examine the three mechanisms by which victims can now challenge decisions not to prosecute which are capable of resulting in a prosecution: private prosecutions, judicial review and the VRR. There are other ways in which aggrieved complainants can express their dissatisfaction with decisions not to prosecute including bringing a claim for damages against the CPS under section 8 of the Human Rights Act 1998.[5] Complainants may also apply for financial compensation from the Criminal Injuries Compensation Authority as an acknowledgement that they have suffered harm as a result of a crime.[6] Alternatively, they may register a complaint through the CPS Feedback and Complaints policy.[7] Families may also seek a conclusion of unlawful killing at an inquest as was the case

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[1] *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10
[2] ibid [48]
[3] ibid [57]
[4] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS, 2016)
[5] See *D v Commissioner of Police of the Metropolis* [2018] UKSC 11, [2018] 2 WR 895 and *NXB v CPS* [2015] EWHC 631 (QB)
[6] Gov.uk, <www.gov.uk/government/organisations/criminal-injuries-compensation-authority> accessed 23 May 2021.
[7] Crown Prosecution Service, 'Feedback and Complaints Policy' (CPS February 2019)

following the death of Ian Tomlinson and other cases in which wrongdoing on the part of the authorities has been alleged.[8] Potentially, an aggrieved complainant could also take the law into their hands by committing a criminal act against the person that they believed responsible for committing an offence against them.[9] However, these forms of 'challenge' are not capable of directly leading to a reversal of a decision to prosecute. Therefore, the scope of this research has been limited to the VRR, judicial review and private prosecutions.

The thesis evaluates the three mechanisms individually, and examines the extent to which they collectively provide victims with a coherent and principled framework for challenging decisions of the public prosecutor not to bring proceedings. These rights of review are then set in the wider context of an evaluation of the impact of the review mechanisms on the defendant and the public interest. The next section of this introductory chapter provides an overview of the relevant literature to show where there are currently gaps in our knowledge that this thesis will fill.

1.3 Conceptions of victimhood

There is no single, fixed legal definition for the term 'victim'. Although legal definitions do exist, victimhood is arguably more of a social construction than a legal one. As Rock states, there is a 'conceptual void' in terms of victim definition[10] and that victimhood is 'an *identity*, a social artefact' which depends on interpretative process by those directly and indirectly involved in the case.[11] Even though particular interpretations of victimhood are used in international and domestic legislation, the

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[8] Paul Lewis, 'Ian Tomlinson unlawfully killed, inquest finds' *The Guardian* (London, 3 May 2011) <www.theguardian.com/uk/2011/may/03/ian-tomlinson-unlawfully-killed-inquest> accessed 23 May 2021

[9] See David Miers, 'Taking the Law into their Own Hands: Victims as Offenders' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000)

[10] Paul Rock, 'On Becoming a Victim' in Carolyn Hoyle and Richard Young, *New Visions of Crime Victims* (Hart, 2002) 13

[11] ibid 14.

concept remains nebulous in that it relies on interpretation in the particular circumstances of the case or situation.[12]

There is also extensive academic literature on the nature of victimhood which identifies that there are conflicting interpretations on what amounts to victimhood.[13] It has been argued that victimhood can be contested with disagreement about whether a particular individual should be labelled as a victim.[14] Christie's concept of the ideal victim forcefully demonstrates that victimhood may depend on the presence of particular attributes that leads third parties to recognise their victim status.[15] The converse of the concept of the 'ideal victim' is that of the non-ideal victim. A good example of the 'non-ideal' victim is those involved in prostitution.[16] Matthews argues that although they are high risk of victimisation, prostitutes may not be seen as suitable victims.[17] There is evidence that the authorities have accepted prostitutes as victims in certain situations and that there is an increasing view that they are victims; an example of the aftermath of a series of prostitute murders in Ipswich when there was recognition that they needed support rather than punishment.[18] Fattah has argued that socially excluded groups in society are at greater risk of becoming a victim of a crime, yet do not attract public sympathy in the same way as some 'valued' groups would.[19] Fattah contends that the public and authorities may be indifferent and unsympathetic to violence against 'devalued' citizens. He argues that this can affect both the determination of the authorities to find the offender and the severity with which they are ultimately punished.[20] Carrabine describes this phenomenon as a 'hierarchy of

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[12] See for example: Domestic Violence, Crime and Victims Act 2004, s 52.
[13] For an overview, see: Ross McGarry and Sandra Walklate, *Victims: Trauma, Testimony and Justice* (Routledge 2015) 7–10.
[14] David Miers, 'Positivist Victimology: A Critique – Part 2: Critical Victimology' (1990) 1 International Review of Victimology 219
[15] Nils Christie, 'The Ideal Victim' in Ezzat Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Macmillan 1986).
[16] For other examples see: Sandra Walklate, Defining Victims and Victimisation in Pamela Davies, Peter Francis and Chris Greer (eds), *Victims, Crime and Society: An Introduction* (2nd edition, Sage Ltd 2017) 30.
[17] Roger Matthews, 'Female Prostitution and Victimization: A Realist Analysis' (2015) 21(1) International Review of Victimology 85
[18] Baroness Jean Corston, *The Corston Report* (March 2007) i
[19] Ezzat Fattah, 'Violence against the Socially Expendable' in Wilhelm Heitmeyer and John Hagan (eds) *International Handbook of Violence Research* (Kluwer, 2003) 767
[20] ibid

victimization' in which some categories of victim are treated more seriously than others.[21] He suggests that these groups are '"over-policed" as problem populations but "under-policed" as victims.'[22]

Strobl argues that acquiring victim status depends on both self-identification as a victim and social recognition as a victim.[23] If an individual identifies themselves as a victim, but then is not recognised as such by others they become a rejected victim. Strobl states that this could be because 'the sufferer's personal characteristics or the circumstances of the harmful incident may disqualify him or her from the victim role' or his 'involvement in illegal activities'.[24]

1.3.1 The requirement of harm

Most constructions of victimhood require an element of harm as a prerequisite. Hall notes in his comparative study across nine common law jurisdictions that there is a 'growing tendency to define victims by reference to the harm they endure.'[25]

Harm is a familiar concept in discussions of criminalisation in the substantive criminal law.[26] One of the main proponents of the harm principle, Joel Feinberg, identifies three constructions of harm. The first is derivative harm, where ones interest is harmed by the offender causing damage to his property.[27] He describes the second sense of harm as 'the thwarting, setting back, or defeating of an interest.'[28] He further states that an individual's interests, 'consist of all those things in which one has a stake' and a third party can 'invade' these interests putting them in a worse position.[29] The third

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[21] Eamonn Carrabine, *Criminology: A Sociological Introduction* (Third edition, Routledge 2014) 157.
[22] ibid 158.
[23] Rainer Strobl, 'Constructing the Victim: Theoretical Reflections and Empirical Examples' (2004) 11 International Review of Victimology 295, 296
[24] ibid 296.
[25] Matthew Hall, Victims and Policy Making: A Comparative Perspective (Willan Pub 2010) 30.
[26] For an overview, see Jeremy Horder, *Ashworth's Principles of Criminal Law* (8 edition, OUP Oxford 2016) 59–100.
[27] Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford University Press 1984) 32–33.
[28] ibid 33.
[29] ibid 34.

category is based on the notion of the offender wronging another by violating another's rights even though harm may not have been caused.

Stewart argues that a rights-based approach, separate to the harm principle, could be extended to attribution of victimhood: the victim would be able to claim victim status if his rights had been violated.[30] The difficulty with this approach is determining which rights should be protected in this way. Regardless of the theoretical justification for criminalization of this conduct, the reality is that they do exist as criminal offences and so there is an acceptance within the criminal law that some offences do not require proof of harm, such as all inchoate offences. However, these crimes are not necessarily victimless: the charge or indictment is likely to particularise an identifiable individual as the victim of the offence (such as the owner of the property which the defendant attempted to damage).

1.3.2 A working definition of victimhood.

Despite the contested nature of victimhood, it is important to have a working definition as a normative anchor for the evaluation of the review mechanisms. Strobl's typology will therefore be adopted as a way of measuring the constructions of victimhood embedded within the individual review mechanisms.[31] On the basis of this model, attribution of victimhood depends on both self-identification by the victim and social recognition. This system of categorisation provides a useful foundation for evaluating the review mechanisms as it distinguishes between 'actual' victims, 'designated' victims and 'rejected' victims. 'Actual' victims both self-identify as victims and are recognised as such by society. Designated victims do not identify themselves as victims, but are recognised as such by society. Rejected victims are those individuals who self-identify as victims, but are denied victim status by society.

This working definition will also take into account both harm-based and rights-based constructions of victimhood. This allows a distinction to be made between those

[30] Hamish Stewart, 'The Limits of the Harm Principle' (2010) 4 Criminal Law and Philosophy 17.
[31] Strobl (n 23)

mechanism which adopted a narrow approach to victimhood which is based on the requirement of harm and those which would allow victim status as a result of an infringement of or threat to the rights of the individual concerned. This working definition based on Strobl's categorisation system and the harm/rights-based distinction will have significance when the accessibility of the individual review mechanisms are analysed in chapters three, four and five.

1.4 Review of the literature on challenging decisions to prosecute

There is not a large body of literature on the review of decisions not to prosecute, the vast majority of which is doctrinal in nature. However, the theoretical analysis of Manikis and the empirical research of Iliadis and Flynn will be discussed first as these pieces are particularly pertinent to the focus of this thesis; thereafter key pieces of doctrinal research will be discussed.

1.4.1 Theoretical analysis

The work of Marie Manikis uses judicial review and the VRR to develop theoretical modelling of victim participation. Manikis' modelling is based on Edwards' typology of victim participation in the criminal justice system which will be used in this thesis to conduct an analysis of participation through the review mechanisms.[32] Edwards outlines four participation types the first three of which are non-dispositive: expression, information-provision and consultation. The fourth category is control which is dispositive.[33] Manikis utilises the VRR to propose an additional category of participation based on the role of victims as agents of accountability.[34] Manikis' rationale for this amendment is that victims have a 'monitoring and oversight role to

[32] Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 Brit J Criminol 967.
[33] ibid 975.
[34] Marie Manikis, 'Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process' [2017] PL 63.

ensure that errors are discovered and accounted for.'[35] Manikis concludes that the VRR is inherently punitive as it can 'only be used to increase prosecutions and punitiveness' and that the VRR 'tends to favour crime control and punitivity towards the offender over accountability towards state actors.'[36]

Manikis subsequently uses the review mechanisms of judicial review and the VRR as an example of victim acting non-punitively to propose a new model of criminal justice based on victims 'advancing non-punitiveness, penal parsimony and moderation.'[37] The focus of Manikis' work is theoretical modelling of victim participation, not the finer detail of the review mechanisms.

1.4.2 Empirical research

Iliadis and Flynn have produced the 'first socio-legal analysis of the VRR' which is, in fact, the only empirical research to date on the VRR.[38] The focus of this research is whether victims' procedural justice needs are met by the VRR and consists of interviews conducted with eleven criminal justice and victim support professionals as well as examining some of the data available on the use of the VRR. Although valuable, one of the limitations of this research is that a small number of professionals were interviewed and not victims who had experienced the VRR. This research does not examine the case law that has emerged as a result of the VRR. In addition, the authors suggest that the VRR is 'theoretically accessible for all crime victims' without offering a detailed analysis of the qualifying criteria or the definition of victimhood on which the scheme relies. Iliadis and Flynn's primary criticism of the VRR is that the level of accountability and procedural justice that it offers is undermined by the

[35] ibid 67.
[36] ibid 79–80.
[37] Marie Manikis, 'A New Model of the Criminal Justice Process: Victims' Rights as Advancing Penal Parsimony and Moderation' (2019) 30 Criminal Law Forum 201.
[38] Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims' Right to Review Reform' (2018) 58 Brit J Criminol 550, 551.

lack of an external element.[39] They posit whether greater independence could be achieved by cases being scrutinised by a multi-agency panel.[40]

The authors conclude that the VRR has 'benefited victims by giving them a voice, a level of validation, and some control, even if the review did not alter the outcome of their case.'[41] However, this does not take into account the very limited opportunities under the VRR for victims to make representations or to participate any further than to request a review of a decision. Iliadis and Flynn argue that the VRR can provide the opportunity for the victim to achieve procedural and substantive justice with increased transparency in prosecutorial decision-making.[42]

1.4.3 Doctrinal research

In contrast, Dyke adopts a more 'black letter' approach providing a largely descriptive overview of challenging decisions to prosecute in which he describes the restrictive approach taken by the courts and the effectiveness of the VRR.[43] Dyke summarises the judicial review cases which were heard prior to the VRR coming into force demonstrating that the courts took a restrictive approach to reviewing decisions not to prosecute. He also discusses some of the early case law concerning judicial review of prosecutorial decisions including challenges to the VRR. The article highlights that although the test under the VRR is whether the original decision was *wrong*, when the VRR decision is scrutinized by way of judicial review the victim would need to satisfy the court that it was *Wednesbury* unreasonable.[44]

Dyke compares this to the unduly lenient sentence procedure where anyone can request that the Attorney General refer a case to the Court of Appeal. Dyke concludes that the VRR has been effective at 'channelling' away from the expense of judicial

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[39] ibid 562, 566.
[40] ibid 563.
[41] ibid 557.
[42] ibid 556.
[43] Thom Dyke, 'Who Will Guard the Guardians? Challenging the Decision to Prosecute' (2017) 22 JR 124.
[44] ibid 135.

review proceedings and that possible future reforms could include amending the test for standing to request a review and placing the scheme on a statutory footing.[45]

Elsewhere, I have taken a broader perspective by offering a comparative analysis of the implementation of the VRR in England and Wales, Scotland and Northern Ireland to identify a number of differences and make proposals for improvement to the VRR.[46] This article compares the schemes across four key areas: the definition of victim; scope of the schemes; the review process; outcomes. This analysis reveals that the definition of victim used is broadly similar, with some differences, across all three jurisdictions being based on the requirement of harm. The analysis of the scope of the schemes identifies that the VRR qualifying criteria are comparatively narrow. The article also scrutinises the review process in terms of the procedural requirements and the test used during the review process.

Rogers discusses the decision to prosecute in the context of human rights specifically referring to the case of *Da Silva v UK*.[47] He discusses whether the evidential test is arbitrary and argues that the VRR adds legitimacy to the test as it allows requests for merits based reviews and so reduces the scope for incorrect decisions not to be challenged. Rogers further states that the VRR 'probably assures… the compatibility of the "realistic prospect of conviction test" with any victim's rights that arise under the Convention.'[48] Rogers identifies that the VRR potentially fills the gap prior to its inception when the only options for victims were judicial review or to contact the CPS for an informal review.[49] This article is also important as it touches upon both the VRR and judicial review as ways of challenging decisions not to prosecute conceding that judicial review is of limited value in most cases.

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[45] ibid 142.
[46] Stephen Colman, 'A Comparison of the Implementation of the Victims' Right to Review in England and Wales, Scotland and Northern Ireland' [2018] Crim LR 365.
[47] Jonathan Rogers, 'A Human Rights Perspective on the Evidential Test for Bringing Prosecutions' [2017] Crim LR 678.
[48] ibid 692.
[49] ibid 693.

One of the earliest articles on the VRR was written by the then DPP, Keir Starmer. He considers both the VRR and judicial review have tempered finality in criminal justice to ensure the correct decision in individual cases.[50] Starmer also identifies other 'adjustments' to the principle of finality some of which are used as a basis of comparison with the review mechanisms in chapters seven and eight of this thesis.[51] The focus of this article is on the principle of finality rather than the detail of the individual review mechanisms.

There is limited literature which focusses on judicial review of decisions not to prosecute. The majority review the early cases which established that decisions of the CPS were amenable to judicial review.[52] This thesis attempts to fill this gap by specifically examining judicial review of decisions not to prosecute alongside the alternatives of the VRR and private prosecutions.

Similarly, there is limited current literature on private prosecutions in England and Wales.[53] Most of the recent publications focus on the value of private prosecutions for fraud and intellectual property offences and is not directly relevant to private prosecutions brought by victims.[54] There was also a flurry of case notes following the Supreme Court decision of *Gujra*[55] that endorsed the more restrictive CPS policy on private prosecutions.[56] The most significant article is by de Than and Elvin who argue

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[50] Keir Starmer, 'Finality in Criminal Justice: When Should the CPS Reopen a Case?' [2012] Crim LR 526, 530.
[51] ibid 530–533.
[52] Peter Osborne, 'Judicial Review of Prosecutors' Discretion: The Ascent to Full Reviewability' (1992) 43 NILQ 178; Christopher Hilson, 'Discretion to Prosecute and Judicial Review' [1993] Crim LR 739; Mandy Burton, 'Reviewing Crown Prosecution Service Decisions Not to Prosecute' [2001] Crim LR 374.
[53] For a discussion of the historical development of private prosecutions see: Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan 2006) 23–78.
[54] Chris Lewis and others, 'Evaluating the Case for Greater Use of Private Prosecutions in England and Wales for Fraud Offences' (2014) 42 IJLCJ 3; Matt Bosworth, 'Time to Adopt a Private Prosecution Policy? Private Prosecutions Are Taking off as a Useful Way to Protect Your Brand & Products' [2018] NLJ 14; Rupert Wheeler, 'Private Prosecutions in Financial Crime: A Novel Solution?' (2019) 34 JIBFL 56; Gwilym Harbottle, 'Private Prosecutions in Copyright Cases: Should They Be Stopped' [1998] E.I.P.R. 317.
[55] *R (Gujra) v CPS* [2012] UKSC 52, [2013] 1 AC 484
[56] Kumaralingam Amirthalingam, 'Private Prosecutions and the Public Prosecutor's Discretion' (2013) 129 LQR 325; Findlay Stark, 'The Demise of the Private Prosecution?' (2013) 72 CLJ 7; Rona Epstein, 'Private Prosecutions' (2013) 177 Criminal Law and Justice Weekly 345.

that private prosecutions should be subject to reform.[57] The authors discuss *Gujra* and a Crown Court copyright case and then review the main arguments for retaining and repealing the right of private prosecution, concluding that 'there are compelling arguments against leaving private prosecution in its current form in England and Wales.'[58] In particular, they argue that the need for private prosecutions has 'very much diminished' as the VRR and judicial review provide alternative means of challenging decisions not to prosecute.[59] They also note that the CPS is better placed to conduct prosecutions independently and dispassionately without the potential conflict of interest that private prosecutors may have.[60] The authors also argue that the existing mechanisms for controlling private prosecutions are inadequate and should be reformed.[61]

Campbell et al broaden the discussion further by describing the three review mechanisms alongside one another.[62] Although this provides a useful overview of the different ways that victims may challenge decisions not to prosecute, it does not offer a comparison between them or the extent to which they provide victims with a coherent framework of rights. The authors do, however, note that the CPS is subject to both internal and external forms of accountability which go wider than methods of reviewing decisions not to prosecute, such as accountability to the Attorney General, HMCPSI and the Justice Committee of the House of Commons.

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[57] Claire de Than and Jesse Elvin, 'Private Prosecution: A Useful Constitutional Safeguard or Potentially Dangerous Historical Anomaly?' [2019] Crim LR 656.
[58] ibid 675.
[59] ibid 666–667.
[60] ibid 667–669.
[61] ibid 679–683.
[62] Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edition, Oxford University Press 2019) 223–234.

1.5 Objectives of this study and contribution to the literature

1.5.1 Research questions

This thesis seeks to answer the following research question: **To what extent does the law and CPS policy in England and Wales provide victims of crime with a coherent and principled framework for challenging decisions not to prosecute?**

In order to provide a comprehensive answer to this question the following sub-questions are addressed:

1. **Do the mechanisms of the VRR, judicial review and private prosecutions provide victims with principled and coherent rights to challenge decisions not to prosecute?**
2. **To what extent do these rights of review encroach on the rights of the defendant and the public interest?**

1.5.2 Hypotheses

This thesis will test the hypothesis that the review mechanisms have expanded victim participation to the detriment of the rights of the defendant and the wider public interest. The rationale for testing this is that public prosecutions are part of the adversarial criminal justice system which is based on a contest between the State and the defendant. Increasing the involvement of victims risks de-stabilising this adversarial structure. Essentially, this research will explore whether increased victim participation through the review mechanisms amounts to an unjustifiable encroachment on the rights of defendants and the State acting in the public interest. This issue is central to the issue of whether the review mechanisms are a coherent and principled framework.

A linked hypothesis is that the review mechanisms do not provide a coherent and principled framework for victims to challenge decisions not to prosecute. All three

mechanisms have developed largely independently of one another rather than as part of a systematic and organised process.

1.5.3 Contribution to the literature

The contribution of the research is that it provides the first detailed interrogation of the three principal ways in which victims can challenge decisions not to prosecute and sets that discussion in its wider context by examining the extent to which these rights of review impacted on the rights of defendants and the public interest.

This thesis adds to the existing literature in the field by providing the first systematic analysis of the three key mechanisms by which a victim may challenge a prosecutorial decision not to prosecute. This research evaluates the VRR, judicial review and private prosecutions as potential remedies for aggrieved victims both individually and then collectively against four criteria: **accessibility**, **participation**, **accountability** and **outcomes**. There is limited literature which compares all three mechanisms due to the recent development of the VRR. By evaluating them against the same criteria, this thesis goes further than to simply consider each mechanism in isolation; it assesses critically the extent to which they work together to provide a coherent framework for victims taking into account the other interests in prosecutions, the defendant and the public interest. Established criminal justice models are used to identify the values underpinning the review mechanisms and evaluate whether they can be justified in the contemporary criminal justice system.

My research provides the first in-depth analysis of the VRR. It critiques the restrictive qualifying criteria and the narrow definition of victimhood incorporated into the scheme showing that it provides a limited interpretation of the requirement to provide victims with a right of review and that it does not cover the full range of decisions that could be included within it. The thesis also makes specific proposals for reform of the VRR to increase its effectiveness as a means of challenging decisions for victims and to offer greater protection to defendants who are potentially at risk of being prejudiced by a decision not to prosecute being reversed.

The analysis of private prosecutions alongside the other review mechanisms contributes to the debate on whether private prosecutions should be abolished. The use of the criteria demonstrates that allowing victims such extensive participatory rights cannot be justified as they potentially undermine the rights of the defendant and the wider public interest.

1.6 Methodology and thesis overview

The thesis is structured into two parts: the review mechanisms and the wider context.

The methodology adopted differs for the two parts of the thesis and is set out below. Traditional doctrinal analysis is combined with the application of established theoretical models to evaluate the rights of review mechanisms. With the exception of a small amount of secondary data, the research does not use qualitative or quantitative methods.

1.6.1 Part A: The review mechanisms

Chapter two

This first chapter provides an overview and context of the VRR. The first section of this chapter introduces the background to the VRR. This is followed by an overview of the key elements of the scheme including eligibility for review, the structure and scope of the scheme and the test applied during the review process. This chapter then situates the VRR in its wider context of the pre-trial stage of the prosecution process.

Chapters three, four and five

Chapter two is followed by a chapter on each of the three mechanisms: VRR (chapter three), judicial review (chapter four) and private prosecutions (chapter five). Each of the mechanisms are evaluated against the criteria of **accessibility**, **participation**,

accountability and **outcomes**. These chapters predominantly assess each mechanism on an individual basis and offer conclusions on how accessible they each are, the level of participation they provide victims and the extent to which they are able to hold public prosecutors to account for their decisions, together with an indication of their potential to result in a prosecution.

A doctrinal approach is adopted to analyse the legislation, cases, policy documents and relevant scholarly commentary to examine the mechanisms. The aim of this methodology is to produce a 'synthesis of various rules, principles, norms, interpretive guidelines and values' to evaluate whether the law is coherent or justified as 'a segment of the law as part of a larger system of law.'[63] Essentially, the research is analysing whether there is a coherent 'system' to the ways in which victims can challenge decisions not to prosecute.[64] To bring a sense of structure and clarity, these mechanisms are then each evaluated against the four criteria of accessibility, participation, accountability and outcomes.

The criteria are set out in more detail in the introduction to the first part of the thesis. However, in brief, the criteria and their significance are as follows. Accessibility is an important consideration because if there are insurmountable barriers to victims successfully using the mechanisms then their intrinsic value is diminished. The criterion of participation is evaluated using Edwards' model of victim participation to distinguish between different levels of participation of expression, information provision, consultation and control.[65] Accountability is examined using the theoretical model developed by Mark Bovens.[66] The final criterion of outcomes focuses on the potential outcomes offered by each of the mechanisms and whether they are able to provide a meaningful end result for victims.

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[63] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 84.
[64] Shane Kilcommins, 'Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 9.
[65] Edwards (n 5).
[66] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 ELJ 447.

Chapter six

Chapter six is a thematic analysis chapter which draws out and expands on the findings of the previous chapters by identifying four key themes which emerge from the evaluations of the individual review mechanisms. The themes that are identified are: procedural barriers, the public/private nature of the review mechanisms, the ultimate decision-making authority, and procedural justice.

1.6.2 Part B: The wider context

In this part, the discussion broadens from focussing on the detail of the individual review mechanisms to the impact of rights of review more generally.

Chapter seven

Chapter seven examines whether the rights of defendants have been compromised as a result of increased participatory rights on the part of victims. This chapter uses doctrinal analysis to examine how defendants may challenge review decisions both within the processes and through the trial process by using the doctrine of abuse of process. This chapter also compares other prosecution rights of appeals as a way of analysing the review mechanisms and proposes further safeguards which could be introduced into the VRR to further protect defendants' rights.

Chapter eight

Chapter eight explores the concept of the public interest and how this is impacted on by the review mechanisms. This chapter opens with a discussion of relevant theoretical perspectives on the concept of the public interest, then uses other appeal mechanisms to illuminate the relationship between the review mechanisms and the public interest.

Chapter nine

The final chapter uses theoretical modelling to evaluates the review mechanisms in the criminal justice system using established criminal justice models. A number of different models are used as prisms to evaluate the review mechanisms and how they fit within the criminal justice system. These models are introduced below.

1.6.3 Overview of the criminal justice models

Herbert Packer's crime control and due process models, 'represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process.'[67] They are not alternative models of criminal justice, but sets of values which co-exist in the criminal justice system and represent the 'normative antinomy at the heart of the criminal law.'[68] Packer recognises that the utility of these models is that they allow us to identify where on the scale between these two extremes our current practices are as well as enabling us to identify 'the direction and thrust of current and foreseeable trends.'[69] Essentially, they also represent the tension between justice for individual defendants and an efficient prosecution system for suppressing crime.

Packer depicts the crime control model as an assembly line the objective of which is to efficiently suppress crime with a 'premium on speed and finality.'[70] There is a preference within this model for cases to be disposed of quickly with the facts being established in the police interview rather than in court proceedings. Cases are processed through routine procedures with the factually innocent being 'screened out' at an early stage and the guilty efficiently processed through to sentence with only

[67] Herbert Packer, *The Limits of the Criminal Sanction* (University Press 1989) 153.
[68] ibid.
[69] ibid.
[70] ibid 159.

minimal opportunities to challenge the process. This value system is based upon the need to control a high number of criminal cases with low levels of resources.

By contrast, the focus of the due process model is a complex set of values which include ensuring reliability in the fact-finding procedures, equality and protecting the presumption of innocence. Packer describes this model as like an obstacle course with the prosecution having to negotiate various 'quality control' measures to obtain a conviction.[71] These measures would include compliance with the rules of obtaining and admitting evidence, jurisdictional and time limitation issues.

Packer's dichotomy can loosely be seen as a contest between the State prosecutor and the individual defendant. The lack of recognition of victims as having a significant role in the system has been described as a 'significant drawback' albeit an understandable one as there was little discussion of the role of the victim at the time of Packer's work.[72]

However, a number of scholars have developed theoretical models to either supplement Packer's original paradigms or as alternatives to them which do take into account the potential for victim participation. These include Beloof's 'victim participation model', Roach's 'punitive' and 'non-punitive' models, and Sebba's 'adversary-retribution' and 'social defence-welfare' models.[73] These models provide useful tools for evaluating the extent to which the review mechanisms are victim-oriented procedures and will be considered in depth in chapter nine.

As the review mechanisms all facilitate some level of victim participation in criminal justice, there could be a tendency to assume that they could all be comfortably located within these victim-oriented models rather than the original crime control or due

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[71] ibid 163.
[72] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th ed, Oxford University Press 2010) 41.
[73] Douglas Evan Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' [1999] Utah Law Review 289; Kent Road, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice'* (University of Toronto Press 1999); Leslie Sebba, 'The Victim's Role in the Penal Process: A Theoretical Orientation' (1982) 30 American Journal of Comparative Law 217.

process models. However, the examination of the review mechanisms will show that although there are some superficial associations between the VRR and these victim-oriented models, the VRR has been subsumed into the crime control efficiency agenda. As error correction and victim-rights are not the primary drivers of crime control this conclusion initially appears illogical. However, it will be argued throughout this thesis that there are significant limitations to the VRR as a means of facilitating victim participation in the prosecution process and that, in reality, the VRR can be seen as protective of the public prosecutor by appeasing aggrieved victims and diverting them away from the courts.

1.6.4 Summary of overall argument

Although each of the three mechanisms are of some value to victims, they do not amount to a coherent and principled framework for challenging decisions not to prosecute. The VRR is a simple and convenient mechanism which may be superficially appealing to victims. However, its value is heavily undermined by its narrow definition of victimhood and its rigid qualifying criteria. Furthermore, it offers only limited opportunities to victims to participate in the process.

As the expectation is that victims utilise the VRR as the primary means of challenging decisions not to prosecute, the scheme has the effect of diverting victims from the more independent and transparent mechanism of judicial review. As a result, the VRR is not as victim-oriented as it would initially appear and has become a 'crime control' device protecting the CPS from other forms of challenge. However, both the VRR and judicial review can be properly accommodated within the current adversarial system as means of fault correction without significantly compromising either the rights of defendants or the public interest. This thesis identifies a number of measures which should be incorporated into the VRR to further reduce the risk of defendants' rights being undermined by the review process.

Private prosecutions are a poor fit within the contemporary criminal justice system which is based on adversarial contest between the defendant and the State. The right of victims to bring private prosecutions should therefore be abolished or reformed to

ensure greater oversight by the public prosecutor to prevent the conflict with defendants' rights and the public interest.

Introduction to Part A – The Review Mechanisms

This part of the thesis will focus on the individual review mechanisms both individually and collectively to show that although they each have some merit, they all also have their own limitations. Additionally, they do not provide a coherent, seamless framework of rights for victims.

The first chapter in this part will provide an overview and contextualise the VRR in terms of the participatory role of the victim. It will set out the overall structure and key provisions. The second section of that chapter will then situate the VRR in the pre-trial stage of the prosecution process. The following three chapters will then evaluate each of the primary review mechanisms against four criteria: **accessibility**, **participation**, **accountability** and **outcomes**. This will bring to the fore the differences, benefits and shortcomings of each mechanism as well as enabling comparisons to be drawn. An overview of each of the four criteria is provided below.

The final chapter in this part, chapter six, will expand on some of the themes that have emerged from the evaluations of the individual mechanisms to draw conclusions about the collective value of the review mechanisms.

Accessibility

As each of the three mechanisms have, to some extent, procedural requirements to be followed and entry requirements to be met, the logical starting point is to examine 'entry' into that mechanism. Therefore, the first criterion evaluates the accessibility of each of the mechanisms.

This thesis will interpret the concept of accessibility broadly; it is not limited to the initial engagement with the remedy, but how easy and attainable it is for victims throughout the whole process of using the particular mechanism. The discussion of accessibility in relation to each remedy includes who may engage the remedy:

whether it is limited to the direct victim of an offence or whether it can be used by a wider group of potential complainants. It considers the procedural complexity and requirements of using the remedy both in terms of legal requirements and practical limitations, such as whether legal representation is likely to be required. This research discusses the link between different conceptualisations of victimhood and accessibility as a particular route of challenge can become more or less accessible depending upon the definition of a victim that is applied.

Participation

Traditionally, victims of crime have very limited participation rights in criminal proceedings. Victim participation and the extent to which it should be accommodated in an adversarial system between the State and the defendant is controversial. Because of this, participation is regularly discussed in relation to victims in criminal justice in a number of contexts such as domestic abuse, sentencing and victim personal statements.[1] As explored in chapter nine, scholars have produced theoretical models to measure victim participation in the criminal justice system.[2]

Therefore, this criterion evaluates the extent of victim involvement in each review mechanism. This includes a discussion of whether this participation is ongoing or transitory and whether it takes place outside the criminal justice process.

Participation is measured with reference to the victim participation model developed by Edwards.[3] As shown below, this model is structured around two broad types of

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[1] Ian Edwards, 'Victim Participation in Sentencing: The Problems of Incoherence' (2001) 40 Howard Journal of Criminal Justice 39; Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65 MLR 834; J Wemmers, 'Victim Participation and Therapeutic Jurisprudence' (2008) 3 Victims & Offenders 165; Christine M Englebrecht, 'Where Do I Stand?: An Exploration of the Rules That Regulate Victim Participation in the Criminal Justice System' (2012) 7 Victims & Offenders 161.

[2] Douglas Evan Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' [1999] Utah L.Rev. 289; Leslie Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press 1996); Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (University of Toronto Press 1999).

[3] Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 Brit J Criminol 967.

participation, dispositive and non-dispositive. Dispositive consists of participation where the victim has control of the decision-making. By contrast, the non-dispositive type is further sub-divided into three categories: consultation, information-provision, and expression.[4]

Table 1: Four different participatory roles for victims (from Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967)

	PARTICIPATION TYPE	OBLIGATION ON CRIMINAL JUSTICE DECISION-MAKER	OBLIGATION ON VICTIM
DISPOSITIVE	CONTROL	to seek and apply victim preference	non-optional supply of preference; victim is the decision-maker
NON-DISPOSITIVE	CONSULTATION	to seek and consider victim preference	optional supply of preference
	INFORMATION-PROVISION	to seek and consider victim information	non-optional supply of information
	EXPRESSION	to allow victim expression	optional supply of information and/or expression of emotion

[4] ibid 975.

Manikis has proposed an additional category of participation to specifically recognise the involvement of victims in requesting reviews of prosecutorial decisions.[5]

Table 2: A new form of participatory role for victims (from Marie Manikis, 'Expanding Participation: victims as agents of accountability in the criminal justice process' [2017] PL 63)

	Participation type	Obligation on Criminal Justice decision-maker	Obligation on Victim
Non-dispositive	Accountability	To seek and consider victim request to review	Non-optional supply of request to review if possible flaw/error has been identified

Accountability

This criterion examines the extent to which the review mechanisms have the potential to hold the prosecutor to account for the exercise of his discretion. The existence of the discretionary powers of officials in public bodies has long been recognised and indeed accepted as a positive feature of official authority.[6] However, those who exercise discretionary power need to be accountable in some way to ensure that decisions are not made arbitrarily. In view of the centrality of discretionary power to decisions not to prosecute, the evaluation of the review mechanisms as accountability mechanisms is justifiable.

The work of Mark Bovens is used to describe and evaluate private prosecutions, judicial review and the VRR as accountability mechanisms in the context of decisions not to prosecute. Bovens identifies the key characteristics of accountability as the relationship between the actor and a forum, an obligation on the actor to explain and justify his conduct, the power of the forum to pose questions, pass judgement (for

[5] Marie Manikis, 'Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process' [2017] PL 63.
[6] Denis James Galligan, Discretionary Powers: A Legal Study of Official Discretion (2011) 2.

example, approve or criticise the official's actions or decision) and the potential for the actor to face consequences.[7] If some, or all, of these characteristics are not present it may be that the particular process does not amount to an accountability mechanism; Bovens suggests that in those circumstances the procedure could be alternatively categorised as participation, responsiveness or transparency.[8] After determining that the procedure is an accountability mechanism, the 'type' of accountability can be categorised based on either the nature of the forum, the actor, the conduct or the nature of the relationship between the actor and the forum (the obligation).[9] The nature of the forum could be political, legal, administrative, professional or social, for example. Categorisation according to the nature of the actor would be, according to Bovens, be corporate, hierarchical, collective or individual. The nature of the conduct would be either financial, procedural or a 'product'. The nature of the obligation could be classified as either vertical, diagonal or horizontal.

Bovens then proposes that accountability mechanisms can be analysed and evaluated against one or more perspectives: the democratic perspective, the constitutional perspective or the learning perspective. The democratic perspective is concerned with the scrutiny of executive action by elected bodies. Alternatively, the constitutional perspective involves analysing the 'checks and balances' of executive power. The focus of the learning perspective is to use accountability as a means of developing the learning of the executive branch to improve future conduct.[10] Potentially, the constitutional and learning perspectives are the most relevant to challenges to prosecutorial decisions. Bovens provides some evaluative questions which could be used to evaluate specific mechanisms. These include whether the forum has sufficient investigative powers and the incentives to engage the actors in the review process as well as whether they have appropriate sanctions to punish and deter executive misconduct. A relevant question from the learning perspective is the robustness of the

[7] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 ELJ 447, 452.
[8] ibid 453.
[9] ibid 461.
[10] ibid 462–466.

forum including whether it is 'safe' enough minimise the growth of defensive practices.[11]

In the assessment of accountability consideration is also given to whether the forum is internal or external. Mulgan has distinguished between internal and external forms of accountability and suggested that the 'core accountability' involves external scrutiny that includes a dialogue between the parties with forum asserting authority over the body being held to account as well as the power to impose sanctions.[12]

Wright and Miller have argued that there is an accountability deficit in prosecutorial discretion that has not been adequately addressed with most jurisdictions relying on either electoral accountability or systems of internal review.[13] Toole identifies accountability measures in Australia in relation to prosecutorial decision-making, many of which would be relevant to England and Wales: the use of guidelines and policies, hierarchical prosecution structures, judicial mechanisms and the political accountability of the Attorney General to parliament.[14]

Links have also been made between participation and accountability by the development of a model of citizen participation in public accountability based on Bovens' model of accountability.[15] Although this model is not used in this research to evaluate the review mechanisms as, unlike Edwards' model, it is not specific to criminal justice, it does highlight the relationship between participation and accountability. As discussed above, Manikis' work also specifically links participation through challenging decisions not to prosecute with accountability.[16]

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[11] Mark Bovens, Thomas Schillemans and Paul Hart, 'Does Public Accountability Work? An Assessment Tool' (2008) 86 Public Administration 225, 231–232.
[12] Richard Mulgan, '"Accountability": An Ever-Expanding Concept?' (2000) 78 Public Administration 555, 555–556.
[13] Ronald F Wright and Marc L Miller, 'The Worldwide Accountability Deficit for Prosecutors Prosecutorial Power: A Transnational Symposium' (2010) 67 Washington and Lee Law Review 1587.
[14] Kellie Toole, 'The Decision to Prosecute - The Accountability of Australian Prosecutors' in Victoria Colvin and Philip C Stenning (eds), *The Evolving Role of the Public Prosecutor: Challenges and Innovations* (Routledge 2019) 234.
[15] Bodil Damgaard and Jenny Lewis, 'Accountability and Citizen Participation' in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), 'Accountability and Citizen Participation', *The Oxford Handbook of Public Accountability* (Oxford University Press 2014).
[16] Manikis (n 5).

Therefore, the use of both participation and accountability are valuable criteria for evaluating the review mechanisms.

Outcomes

The final criterion is 'outcomes' which is used to review the potential for the review mechanisms to result in a meaningful outcome for victims. There would be little value in victims embarking on a process that did not have any potential to provide a remedy. I consider what outcomes or remedies each route can offer the aggrieved victim. This includes whether a successful outcome would have the potential to result in a prosecution. Alternatively, whether it is more likely to result in the original decision being returned to the public prosecutor for further review. This criterion examines critically whether the review mechanisms provide routes to substantive justice for victims in terms of outcomes or merely pyrrhic victories.

Chapter 2 - Overview and context of the Victims' Right to Review

2.1 Introduction

This chapter will introduce the Victims' Right to Review (VRR) scheme, the CPS internal mechanism by which aggrieved victims can apply for review of decisions not to prosecute in cases that meet certain criteria.[1] This will provide the foundation for the next chapter which analyses the VRR in more detail against four criteria. The VRR is a recent addition to the options available to victims of crime who wish to challenge a decision either not to prosecute or to terminate proceedings. It was launched following the Court of Appeal decision in *Killick,* which the court held that victims of crime have a right of review to challenge prosecutorial decisions to terminate proceedings.[2]

The first section of this chapter will set out the background to the VRR that developed as a result of *Killick.* The VRR is intended to give effect to the principles of review set out by the Court of Appeal following the court's indication to the DPP that he should introduce a review procedure. The VRR also purports to implement Article 11 of the EU Victims' directive.[3] The VRR guidance states that: 'The scheme gives effect to the principles laid down in *Killick* and in Article 11 of the European Directive.'[4] The second section of the chapter will provide an overview of the VRR focussing particularly on the circumstances that need to be present to permit a victim to engage the scheme in relation to a decision of the public prosecutor. The third section of this chapter will situate the VRR in the context of the pre-trial stage of the

[1] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS 2016)
[2] *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10.
[3] Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L315/57 (Victims' Directive) Art 11.
[4] CPS, VRR (n 1) [6]

prosecution process to show that victims are gradually accruing procedural and service rights although these may be motivated by factors other than simply a desire to increase victim participation in the criminal justice system.

2.2 *R v Killick* and the background to the VRR

In February 2006, the three complainants who all suffered from cerebral palsy made complaints to the police of sexual assault and rape by Christopher Killick. The defendant was arrested and interviewed by police in April 2006. The matter was then referred to the CPS in May 2006. The initial advice given by the CPS in October 2006 was that no further action should be taken against Mr Killick as there was insufficient evidence for a realistic prospect of conviction. The CPS conducted a second review of the case after the police requested that the decision be reviewed. The reviewer applied the test for judicial review, namely whether the decision was a reasonable decision for the prosecutor to make.

The complainants' solicitors wrote to the CPS to request a further review of the case through the CPS complaints procedure. This resulted in the case being further reviewed by the CPS in July 2009 who confirmed the decision to take no further action. During this period, the CPS also instructed independent counsel to provide an opinion on the case. He agreed that a prosecution should not be commenced. The complainants sent a judicial review pre-action protocol letter in September 2009 which resulted in the case being referred to the DPP's Principal Legal Advisor for a third tier review under the CPS Complaints and Feedback policy. This review concluded that the previous decisions were wrong. The CPS therefore advised the police to issue a summons for Mr Killick for offences under the Sexual Offences Act 1956. The defence application for the case to be stayed for abuse of process was unsuccessful.[5] Mr Killick was convicted after a jury trial of two of the three counts on the indictment and was sentenced to a term of imprisonment.

[5] Abuse of process will be discussed further in chapter 7.4 in relation to the rights of the defendant.

Killick appealed his conviction to the Court of Appeal and the case was referred to the full court on three points of appeal:

1. Whether the judge's decision to allow the matter to proceed and to dismiss the application for a stay for abuse of process was wrong;
2. Whether fresh evidence should be admitted under section 23 of the Criminal Appeal Act 1968
3. Whether the conviction was unsafe in all the circumstances.

The first of these points is most relevant to the development of the VRR. The Court of Appeal considered whether the representations that had been made to the appellant that no further action was to be taken amounted to an abuse of process. They referred to the case of *R v Abu Hamza* that held that there would only be an abuse of process when an unequivocal representation had been made to the defendant that he would not be prosecuted and the defendant had relied on that representation to his detriment.[6] In *Killick*, the first representation was an email from the investigating officer to the defence solicitors in June 2007. However, the Court of Appeal concluded that the solicitors would have been: 'well aware of the rights of the complainants to seek a review.'[7] The court indicated that the solicitors should have advised the appellant of this. Other representations made during the case were also discounted on the basis that the appellant's solicitors were aware that a further review had been commenced and they had not been notified to the contrary.

This case highlighted a deficiency in the way in which the CPS dealt with requests from complainants for decisions to be reviewed. Requests for review of decisions were routinely dealt with under the Feedback and Complaints Policy. The court distinguished between a 'complaint about service' and a request to have a discretionary decision reviewed.[8] The current version of the policy clearly sets out

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[6] *R v Abu Hamza* [2007] QB 659
[7] *Killick* (n 2) [44]
[8] ibid [50]

that victims seeking reviews of decisions should refer to the VRR, but at the time of *Killick* this distinction did not exist.[9]

The court stated that complainants have an inherent right to request a review: 'As a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision…'[10] The court also referred to the right then expressed in Article 10 of the Draft EU Directive on establishing minimum standards on rights, support and protection of victims of crime dated 18 May 2011[11] (this right is now contained in Article 11 of Directive 2012/29/EU).[12] The court urged the DPP to review the procedure by which victims seek a review of these types of decision suggesting that it should be separate to the complaints system for issues relating to the service provided by the CPS: 'it must be for the Director to consider whether the way in which the right of a victim to seek a review cannot be made the subject of a clearer procedure and guidance with time limits.'[13] Thomas LJ further stated that 'it is an integral part of the exercise of a prosecutorial discretion'.[14] In response, the DPP issued interim guidance in June 2013 with a consultation period that ran until September 2013.[15] Final guidance was then issued and came into force in July 2014.[16] The VRR guidance was revised in July 2016.[17]

The Right to Review is one of the rights contained in the Code of Practice for Victims of Crime (the Victim Code) which is now placed on a statutory footing under sections 32 and 33 of the Domestic Violence, Crime and Victims Act 2004.[18] Decisions not to prosecute made by the police are subject to a right of a review by the individual police

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[9] Crown Prosecution Service, 'Feedback and Complaints Policy' (CPS February 2019) [1.4]
[10] *Killick* (n 2) [48]
[11] ibid [49]
[12] Victims' Directive, Art 11
[13] *Killick* (n 2) [57]
[14] ibid [57]
[15] Crown Prosecution Service, 'Victims' Right to Review Interim Guidance' (CPS 2013)
[16] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS 2014)
[17] CPS, VRR (n 1)
[18] Ministry of Justice, 'Code of Practice for Victims of Crime' (October 2015) (Victim Code) 22-23

force in accordance with the procedure adopted by the National Police Chiefs Council.[19]

As mentioned briefly above, the VRR also purports to implement Article 11 of the Victims' Directive. Article 11(1) states: 'Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.' This makes clear that it is for Member States to implement their own review mechanism in accordance with national laws. Each of the three jurisdictions in the UK has done so. This general right is supplemented by Article 11(3) which requires that victims are 'notified without unnecessary delay of their right to review, and that they receive sufficient information to decide whether to request a review.' Article 11(4) permits the review to be conducted by the same prosecuting authority as conducted the original review if it is the highest prosecuting authority within the Member State's legal system.

There is very little detail in the Directive of the scope of the right to review. This has been left to the individual Member States to determine.[20] Article 11(5) specifically excludes decisions to use an out-of-court disposal from the right to review. This exclusion is also contained in Recital 45. Recitals 43 and 44 are also relevant to the right to review. Recital 43 limits the right of review to the decisions of 'prosecutors and investigative judges or law enforcement authorities such as police officers, but not to decisions taken by the courts.' Recital 44 simply states, 'A decision ending criminal proceedings should include situations where a prosecutor decides to withdraw charges or discontinue proceedings.'[21] Having set out the background, the next section of this chapter will provide an overview of the key provisions of the VRR.

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[19] Association of Chief Police Officers, 'National Policing Guidelines on Police Victim Right to Review' (2015)

[20] It is difficult to predict what effect, if any, the UK's withdrawal from the EU will ultimately have on these provisions. However, as the VRR is part of domestic law and it would perhaps be difficult to justify repealing it.

[21] For a discussion on the implementation of Article 11 in Germany, Italy, France and Croatia, see: Ante Novokmet, 'The Right of a Victim to a Review of a Decision Not to Prosecute as Set out in Article 11 of Directive 2012/29/EU and an Assessment of Its Transposition in Germany, Italy, France and Croatia' (2016) 12 Utrecht Law Review 86.

2.3 The Victims' Right to Review - An Overview

This section of the chapter will develop the preceding background to the VRR by providing an overview of the scheme in relation to the following areas: eligibility to use the scheme; the scope of the scheme; and the structure of the scheme including the test applied during the review process. An important aspect of the scheme is who is eligible to use it and will be discussed first.

2.3.1 Eligibility to use the VRR

The VRR defines a victim as: 'a person who has made an allegation that they have suffered harm, including physical, mental or emotional harm or economic loss which was **directly** caused by criminal conduct.'[22] This is based on the general definition adopted by the criminal justice system in England and Wales from the Victim Code, but adapted so that an allegation of harm is sufficient. The current version of the Victim Code states that a 'victim' is 'a person who has suffered harm, including physical, mental or emotional harm or economic loss which was **directly** caused by criminal conduct.' This definition is then extended to 'close relatives' of 'a person whose death was directly caused by criminal conduct.'[23] Domestic legislation in England and Wales does not provide a definition of victimhood. Although section 32 of the Domestic Violence, Crime and Victims Act 2004[24] puts the Victim Code on a statutory footing it does not provide a statutory definition of victimhood.[25]

This definition also broadly mirrors that in the Directive: 'a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence.'[26] It also includes family members of a

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[22] CPS, VRR (n 1) [14]
[23] Ministry of Justice, Victim Code (n 18) [1]
[24] Domestic Violence, Crime and Victims Act 2004, s.32(2)(a)
[25] Section 52(2) gives a more basic version of the definition of 'Victim' by simply stating that it is a 'victim of an offence' or 'of anti-social behaviour', but this only applies to sections 48-51 which are concerned with the appointment of a Commissioner for Victims and Witnesses.
[26] Victims' Directive, Art 2(1)

person who has died as a result of a criminal offence.[27] The VRR guidance expands the definition to include families of deceased victims and those that have a disability or cannot communicate, and parents of child victims.[28] The Code also provides for businesses the inclusion of which extends the scheme considerably as this could include corporate victims as well as individuals who have a business that has been affected.[29] However, as will be discussed in the next chapter in relation to accessibility, this is only one construction of victimhood that limits the scheme to those 'victims' who come within this relatively narrow definition.

2.3.2 Scope of the VRR

The VRR enables individuals who come within the definition of a victim to apply to the CPS for review of 'qualifying decisions'. The VRR applies to decisions that resulted in the charges relating to the victim being brought to an end either at the pre-charge stage or post charge. The scheme can potentially apply whether the termination is by way of discontinuance notice, withdrawal of charges, offering no evidence, leaving charges to lie on file or, at the pre-charge stage, a formal advice of no further action.[30] However, the remit of the scheme is narrower than it would first appear as a number of exclusions apply reducing the range of cases that could amount to qualifying decisions. Paragraph 11 specifically excludes certain types of decision from the scheme.[31]

Firstly, the VRR does not apply to decisions made prior to the 5 June 2013. Secondly, the CPS scheme does not apply to decisions made by the police (even if the CPS has been consulted, but has not formally made the charging decision). The scheme is therefore limited to reviews of CPS decisions and therefore decisions made by the police cannot be appealed to the CPS using the CPS VRR scheme. Thirdly, cases where charges are brought in respect of some of the allegations or against some of the

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[27] Ministry of Justice, Victim Code (n 18) [23]-[25]
[28] ibid [26]-[27]
[29] ibid [28]
[30] CPS, VRR (n 1) [9]
[31] ibid [11]

suspects do not qualify. For example, if the victim had made allegations of assault and rape, but only the assault allegation had been prosecuted the victim could not use the VRR to challenge the decision not to prosecute the rape. Similarly, where the victim reported being assaulted by a group, they could not use the VRR to challenge the decision to prosecute only *some* of the suspects. This exclusion was challenged by way of judicial review in the case of *Chaudhry*.[32] This and other exclusions are more controversial and will be considered in the next chapter under the criterion of accessibility.

Fourthly, the VRR also does not cover situations where charges have been altered or reduced, but proceedings involving the victim still continue. This would exclude situations where either the prosecution decides to proceed with lesser charges that those originally taken to court or where the defence have offered lesser charges which have been accepted by the prosecution. In the same way, the scheme will not apply in cases where some charges are left to lie on file and are not proceeded with. If the case is dealt with by way of an out-of-court disposal, such as a caution or conditional caution, the case is specifically excluded from the scheme. Understandably, perhaps, the final category covers the situation where the victim requests that the proceedings are stopped or withdraws their support for them; the victim cannot withdraw their support and then challenge the decision not to prosecute. Therefore, the scheme is only available if the victim comes within the definition and is seeking the review of a qualifying decision, namely one that is not specifically excluded.

2.3.3 Structure of the VRR

The right to use the scheme is triggered by notification from the CPS that a decision not to bring proceedings or to bring the proceedings to an end has been made. This notification should inform the victim of their eligibility to use the VRR.[33] The guidance states that the request for review should 'ordinarily' be made within five

[32] *R (AC) v DPP* [2018] EWCA Civ 2092
[33] CPS, VRR (n 1) [17]-[18]

working days of the notification although the guidance goes on to state that the request can be made up to three months after the notification.[34]

The guidance establishes a two-stage system of review: 'Local Resolution' and 'Independent Review'. The local review is conducted by the team that made the decision and must be completed before the request can progress to an independent review.[35] The second stage is conducted by the 'Appeals and Review Unit' (or the Chief Crown Prosecutor for the team that made the decision where the case relates to a decision to offer no evidence). The 'Local Resolution' stage acts as a filter 'aimed at helping victims to understand the decision taken by providing additional information and provides the CPS with the opportunity to look again at the decision and to establish whether it was correct.'[36]

In the event that the local stage does not resolve the matter by either the prosecutor deciding to prosecute or the victim accepting the decision, the case proceeds to the 'Independent Review' stage either as a result of a request from the victim or referral by the CPS where the victim has previously had an explanation and it is felt that the victim will not benefit from further correspondence.[37] The CPS Appeals and Review Unit normally conducts the second stage. The exception is where no evidence has been offered to the charge as this amounts to an acquittal and therefore a further prosecution could not take place; the Chief Crown Prosecutor for the CPS unit that made the decision reviews these cases.[38]

The guidance establishes the nature of the review and the test to be applied by the reviewer:

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[34] ibid [20]
[35] ibid [25]-[28]
[36] ibid [24]
[37] ibid [27]
[38] ibid [36]

> The reviewer must conduct a re-review of the case afresh, and in order to overturn a decision not to prosecute they must be satisfied:
>
> - That the earlier decision was wrong in applying the evidential or public interest stages of the Full Code Test…; and
> - That for the maintenance of public confidence, the decision must be reversed.[39]

The test essentially requires the reviewer to re-review the case to determine whether the initial application of the evidential and public interest stages of the Full Code Test were correct followed by the additional 'maintenance of public confidence' requirement. Consequently, a prosecution does not automatically follow a review decision that the original decision was wrong.

The next section will review the role of the victim in the criminal justice system in order to place the VRR in its wider context.

2.4 The Role of the Victim in the pre-trial stage

This section of the chapter will set the VRR in the wider context of the victim's participatory role in pre-trial stage of the prosecution process. The police and prosecutors largely control this stage of the process and the decision whether to prosecute, with victims rarely participating beyond reporting potential offences and providing witness statements. However, this analysis will identify the VRR as another development in the gradual expansion of victims' procedural and service rights in the criminal justice process.

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[39] ibid [34]

2.4.1 The pre-trial stage

The decision whether to prosecute will be made by either the police or the CPS on the basis of the two-stage test in the Code for Crown Prosecutors.[40] If the evidential stage is met, the prosecutor must consider the public interest stage. This includes 'the circumstances of and the harm caused to the victim' and the prosecutor is required to take into account 'the views expressed by the victim about the impact that the offence has had.'[41] Therefore, at most there is consultative participation at this stage if the decision-maker is considering taking no further action on the basis of public interest considerations. There is, however, no requirement to consult the victim on the evidential stage. If the police decide to divert the matter from court, the victim may have an opportunity to participate as part of a community resolution.[42] Victims may also be involved through conditional cautions although victims may not be supportive of these causes of action and may seek to challenge them.[43]

Beloof argues that the victim has a 'de facto veto' over whether a prosecution is brought in that they can 'maintain complete control over the process' by not reporting a potential offence to the authorities.[44] Although the victim's failure to report an offence would effectively prevent a criminal investigation and prosecution in some situations, this is not always the case.[45] Third parties may report offences which may be investigated and prosecuted against the wishes of the victim. For example, high rates of victim withdrawal in domestic abuse cases has led to reliance on 'victimless' prosecutions.[46] CPS policy indicates that the authorities will seek to build a case

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[40] Crown Prosecution Service, 'Code for Crown Prosecutors' (CPS October 2018) [4.1]-[4.14]
[41] ibid [4.14]
[42] For an example of a scheme that incorporated victim involvement see Mark Manning, 'Evaluation of Enhanced Triage – Can a Welfare Approach to Young Offenders Make a Difference?' (Fundatia Romania de Maine 2017) <http://icesba.eu/ocs/index.php/ICESBA2017/icesba2017/paper/view/154> accessed 11 December 2017.
[43] Crown Prosecution Service, 'Adult Conditional Cautions (The Director's Guidance)' (CPS April 2013)
[44] Douglas Evan Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' [1999] Utah Law Review 289, 306.
[45] For a discussion of under-reporting see: Roger Tarling and Katie Morris, 'Reporting Crime to the Police' (2010) 50 Brit J Criminol 474.
[46] Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65 MLR 834.

'without the complainant's active participation' by gathering other evidence that could lead to a prosecution.[47]

The acceptance of pleas by the prosecution is another area of potential conflict between the victim and the public prosecutor.[48] The defendant may plead guilty to a different offence to that originally charged. Ultimately, the decision whether to accept the offer of a guilty plea is one for the public prosecutor as they are permitted to accept alternative pleas provided that they would allow a court to 'pass a sentence that matches the seriousness of the offending'.[49] However, prosecutors are required 'where possible' to take into account the views of the victim, or in appropriate cases the views of the victim's family, when deciding whether it is in the public interest to accept a guilty plea.[50] Although this acknowledges the interest of the victim in the decision, it does not give the victim any right to be involved in the decision. This situation is also expressly excluded from the VRR.

A similar situation may arise if the prosecution were to accept a guilty plea on a limited basis when the defendant was prepared to accept some of the allegations against him, but not the full extent of the victim's allegations. The court should hold a Newton hearing to determine the factual basis for sentencing if the two accounts are so different to make a material difference to sentence.[51] This emphasises that the objective of a Newton hearing is to facilitate an appropriate sentencing, not to vindicate the victim. A Newton hearing would at least allow the victim to put forward their account to enable the court to decide which version to accept. If not, the defendant would be sentenced on their version of events. If either the prosecutor accepted a version of events that the victim did not perceive as accurate or if the court declined to hold a Newton Hearing, this could result in the victim feeling frustrated

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[47] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' <https://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors> accessed 12 January 2018.
[48] Samantha Fairclough and Imogen Jones, 'The Victim in Court' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Second edition, Routledge 2017) 213.
[49] CPS, Code for Crown Prosecutors (n 40) [9.2]
[50] ibid [9.5]
[51] *R v Newton* (1983) 77 Cr App R 13

that the defendant was being sentenced on a different factual basis to what the victim had originally alleged. Again, the victim would not be able to use the VRR to challenge either the acceptance of the basis of plea by the prosecution or the outcome of the Newton hearing.

Even if the defendant pleads guilty to the allegations in their entirety, the victim may still not agree with the prosecutor's presentation of the case. Unless the court has heard evidence, it is the responsibility of the prosecutor to summarise the prosecution case for the court.[52] This summary may not include what the victim deems to be the most pertinent parts of the case and, of course, is dependent on the quality of the original police statements on which the prosecutor will rely.

As well as these limited rights of consultation, 'service' style rights have been conferred on victims at the pre-trial stage to improve their experience of the criminal justice system through the Victim Code. The police are required to provide a written acknowledgement that a crime has been reported, provide a clear explanation and information about the procedure. Regular updates are required including explanations of decisions not to prosecute. An assessment of the victim's needs should also be conducted.[53] The victim should also be offered the opportunity to make a Victim Personal Statement (VPS).

There is, therefore, evidence of victim participation during this stage, primarily by making an allegation and being consulted by the public prosecutor in relation to the assessment of the public interest or acceptance of pleas. The VRR provides an additional way for victims to be involved in this critical decision-making stage. The level of victim involvement compares quite favourably to the extent of procedural rights in the trial stage which is the most staunchly adversarial part of the prosecution process.

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[52] Criminal Procedure Rules, SI 2015/1490 r 25.16 (3)
[53] Ministry of Justice, Victim Code (n 18) [19]-[21]

2.4.2 Trial and post-conviction

The trial is a contest between the prosecution and the defence to determine the guilt of the offender. As a result, the victim is marginalized from the process and reduced to the status of a witness. As Doak has identified, there are structural barriers to victim participation beyond that of an individual witness in the trial process and 'radical reform' would be required to accommodate the victim within the current model.[54] These barriers are not as prominent in the pre-trial stage. Victim-oriented reforms to the trial stage are largely confined to 'service' rights which take a protective stance towards victims of crime although many of these provisions are equally available to other witnesses.[55] The restrictions on cross-examination by defendants in person are particularly relevant to victims as are the limitations on cross-examination of rape complainants in relation to their previous sexual history.[56] These changes to the trial process have been supported by a number of entitlements under the Victim Code such as 'needs assessments' and services at court such as separate entrances and waiting areas.[57]

There is evidence of reforms within the trial stage which at face value appear to be victim-oriented, but on closer analysis are perhaps pursuing a different agenda. The Criminal Justice Act 2003 brought about large-scale change to the criminal justice system in a number of key areas. According to the White Paper that preceded these reforms, they were purportedly to 're-balance' the system in favour of victims.[58] On a superficial level, changes to the rules of evidence to allow hearsay evidence and to admit the bad character of defendants do appear to be in support of victims. However, when the entirety of the Act is considered the overall package of reform is more indicative of an attempt to dilute the rights of the defendant in pursuance of crime

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[54] Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 Journal of Law and Society 294, 297–298.
[55] The Youth Justice and Criminal Evidence Act 1999 introduced a range of measures to assist vulnerable and intimidated witnesses to give their evidence such as the use of video link technology, screens and intermediaries.
[56] Youth Justice and Criminal Evidence Act 1999, ss 34-43.
[57] Ministry of Justice, Victim Code (n 18) [2.14]-[3.3]
[58] Home Office, *Justice for All* (Cm 5563, July 2002)

control rather than to improve the victim experience. A significant part of the Act was concerned with a new sentencing regime together with new defence disclosure duties, trials without juries and a change to the double jeopardy rule. Jackson has argued that these measures reduced the rights of defendants without significantly increasing the rights of victims.[59] This perhaps suggests that scrutiny of reforms to other areas of the process, such as the VRR in the pre-trial stage, is justified as the rationale for implementing them could be more complex than it would first appear.

There are also examples of apparently victim-focused reforms in the post-conviction phase for which there may be alternative rationales for. Since 2001, the victim of a crime has had the opportunity to participate in the sentencing process by submission of a VPS. The right to make a VPS is currently contained within the Victim Code and allows the victim to explain the impact of the offence on them.[60] The Victim Code emphasizes that it is the victim's choice whether they make a VPS and whether they wish to read it to the court.[61] Court of Appeal guidance states that the VPS 'gives victims a formal opportunity to say how a crime has affected them' and that 'The court will take the statement into account when determining sentence.'[62] This is clearly relevant to the court's assessment of harm and could potentially be referred to by the sentencing judge in their sentencing remarks.[63] The Practice Direction specifically states that: 'The VPS and any evidence in support should be considered and taken into account by the court, prior to passing sentence.'[64] However, 'the court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim.'[65] It is also clear, however, that the victim does not have carte blanche to say whatever they wish in their VPS and there are a number of procedural safeguards to ensure that the VPS does not have a detrimental impact on

[59] John D Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice?' (2003) 30 Journal of Law and Society 309.
[60] Ministry of Justice, Victim Code (n 18) [21]
[61] ibid.
[62] Criminal Practice Directions [2015] EWCA Crim 1567 VII F1
[63] Criminal Justice Act 2003, s 143.
[64] Criminal Practice Directions [2015] (n 62) F3
[65] ibid.

either the rights of the defendant or the decision of the court. In *Perkins* the court emphasized that the statement should not include opinion on what sentence should be passed.[66] It has been argued that the VPS is not justified on any aspect of sentencing beyond addressing compensation and reparation.[67] Ashworth has argued that criminal offending should be prosecuted and sentenced on the basis of the public interest and that the victim's interest is only part of the public interest.[68] He has also raised concerns that victims are used 'in the service of severity' to increase sentences and 'in the service of offenders' to fulfil restorative justice aims.[69] Perhaps similar arguments could be made in respect of the VRR; that its objective could be to pacify disgruntled victims and to increase confidence in the criminal justice system.

2.5 Conclusions

This chapter has introduced the background and key provisions of the VRR and set it in the wider context of the role of the victim. From this preliminary overview, a number of potential issues are apparent which are relevant to the usefulness of the VRR for victims of crime, such as eligibility to use the scheme, the related definition of victimhood, the exclusion of particular cases and the nature of the test applied when reviews are conducted.

This chapter has also identified that the VRR is most relevant to the pre-trial stage of the prosecution process and is consistent with victims gradually accruing procedural rights in stage of the process. In particular, it has the potential to increase the victim's participation in the pre-trial stage of the prosecution process as one of a number of apparently victim-oriented reforms that is changing the role of the victim in criminal justice. This theme of participation will be developed further in the next chapter when

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[66] *R v Perkins and others* [2013] EWCA Crim 323, [2013] 2 Cr App R (S) 72
[67] Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000) 199.
[68] Andrew Ashworth, 'Victim Impact Statements and Sentencing' [1993] Crim LR 498, 503.
[69] Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Crawford and Goodey (n 67) 186.

the VRR will be evaluated against the four criteria one of which is participation showing that the extent of this participation is perhaps less extensive than it could be.

The VRR will now be evaluated against four criteria in the next chapter.

Chapter 3 - An evaluation of the Victims' Right to Review scheme as a method of challenging decisions not to prosecute.

This chapter evaluates the VRR against the four criteria established in the introduction to this part of the thesis of accessibility, participation, accountability and outcomes. This will enable conclusions to be drawn as to the usefulness of the VRR for victims of crime. Essentially, the VRR is superficially beneficial in that it is flexible, simple to use and has the potential to reverse a decision not to prosecute. However, it only applies in very limited circumstances as the eligibility and qualifying criteria are restrictive filtering out a proportion of cases. The provisions of the VRR also limit the extent of victim participation through the scheme to essentially requesting a review rather than allowing a meaningful dialogue or encouraging representations. In the event that a decision under the scheme is favourable to the victim, a prosecution will not automatically follow. The following two chapters will then evaluate the alternative mechanisms of judicial review and private prosecutions against the same criteria to allow an analysis of the extent to which they provide a coherent framework of rights.

This chapter will be structured around the four criteria with accessibility being examined first followed by participation, accountability and outcomes.

3.1 Accessibility

Firstly, the VRR scheme will be examined against the criterion of accessibility to answer the following question: **to what extent is the VRR appropriately accessible?** In order to evaluate usefulness of the VRR we need to consider whether it is accessible to those who may wish to use it. The concept of accessibility will consider external factors that may prevent victims from invoking the review mechanism as well as the procedural aspects that may restrict its use. One central

restriction on who can access the scheme is the particular harm-based construction of victimhood that excludes potential victims who fall outside its definition. This issue will be discussed first followed by the specific exclusions to the scheme.

3.1.1 The harm-based construction of victimhood

As was set out in chapter one, victimhood is a social construct which may be shaped by the particular context, policy objectives and interpretation by citizens and criminal justice officials. The Victim Code definition of a victim is predicated on the requirement of direct harm which potentially excludes some individuals: 'a person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct.'[1] Earlier editions of the VRR guidance used this Victim Code definition verbatim.[2] However, the current VRR definition is: 'a person who has made an allegation that they have suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct.'[3] This is a valuable amendment for victims as there is no longer a requirement of actual or proven harm; the victim is eligible to use the VRR if they have made an *allegation* of harm. However, the definition is still predicated on the requirement of harm in that the victim has to assert that they have been harmed directly by the offence. The use of 'including' also suggests that it is possible that harm could be caused in other ways although it is unclear what this could be. Some of these categories are also quite vague; 'emotional harm', for example, is quite a difficult condition to define.

Having such a rigid requirement of harm may mean that some individuals will be denied victim status because they do not fulfil the harm requirement either because they have not claimed that they have suffered loss as a result of the criminal act or because their suffering has been construed as not falling within the definition of harm under this particular construction of victimhood. Although, in reality, this is unlikely

[1] Ministry of Justice, 'Code of Practice for Victims of Crime' (October 2015) (Victim Code) [4]
[2] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS 2014) [14]
[3] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS 2016) [14]

to affect a huge number of potential victims, there are situations where this could be relevant. For example, a complainant in an attempted theft allegation would not ordinarily have sustained any physical, mental or emotional harm by the incident and, by virtue of the fact that it was an attempt, would not have suffered any financial loss. Similarly, a complainant who was threatened with physical violence would only qualify for victim status under the definition if they claimed that they had suffered either mental or emotional harm which depending on the facts of the case and the fortitude of the victim they may not have done. The individuals in these examples would conventionally be treated as victims of crime, but could be excluded for not conforming to the particular construction of harm used by the Victim Code and the VRR. The VRR, perhaps inadvertently, differentiates between substantive offences and various forms of inchoate liability including attempts, conspiracies and offences of threatening to commit a particular act, such as threats to kill[4] and threats to destroy or damage property.[5]

The limitation of this harm-based approach is demonstrated by offences under the Public Order Act 1986 which would not normally result in the complainant qualifying as a victim of the offence unless they claimed that they had suffered direct harm as a result. A good example of this would be the application for judicial review brought by Gideon Falter of the CPS decision not to prosecute Jeremy Bedford-Turner for offences of racial or religious incitement under the Public Order Act 1986 in relation to a speech which contained potentially anti-Semitic remarks.[6] The claimant initially attempted to challenge the decision by using the VRR and was precluded from doing so on the basis that he did not suffer direct harm despite the fact that he was Jewish and was present at the time of the speech. Permission was granted by Haddon-Cave J on the basis that there was an arguable case that the CPS had interpreted the definition of 'victim' too narrowly and that it was 'wrong to conclude' that the claimant 'did not suffer "direct harm".'[7] This case did not reach a full hearing as an order was agreed between the parties that the original decision would be quashed and the case further

[4] Offences Against the Person Act 1861, s 16.
[5] Criminal Damage Act 1971, s 2.
[6] *R (Gideon Falter and Campaign Against Antisemitism) v DPP* (QB, 6 March 2017)
[7] ibid [14]-[15]

reviewed by the CPS.[8] Individuals who are present at the scene of a crime, but who did not suffer direct harm, are just one of the categories of potential 'victims' who are excluded from the scheme. Such a narrow construction of harm could deprive the individual of rights under the VRR. Essentially, individuals would be denied victim status by the restrictive criteria of the VRR. However, if a rights-based definition, such as that proposed by Stewart, were to be adopted such individuals would acquire victim status.[9] This concept should be incorporated into the VRR definition to ensure potential victims are not refused victim status purely because they have not sustained harm despite their rights having been infringed.

The above discussion of harm has highlighted how there are issues of interpretation and subjectivity into who is attributed victim status; this is not limited to the requirement of harm. Potential users of the VRR may not self-identify as victims or may not be recognised as victims by the CPS and refused use of the scheme as a result. Nils Christie's notion of the 'ideal victim' is relevant here.[10] He identifies a number of attributes that are representative of the 'ideal' victim and the 'ideal' offender. The notion of the victim being vulnerable and undertaking a 'respectable' project for which he or she could not be blamed are all features which make the victim 'ideal'. In the context of the VRR, 'ideal victims' are those less likely to be denied access to the VRR. For victims attempting to use the VRR this may mean that prosecutors are less likely to accept their request for review if their allegation of harm falls outside the categories of harm set out in the VRR or if the alleged harm is not *directly* caused by the criminal conduct. This could result in the individual being treated as an indirect victim which are generally not covered by the VRR; this will be explored below.

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[8] *R (Gideon Falter and Campaign Against Antisemitism) v DPP* (QB, 6 March 2017) Agreed Order
[9] Hamish Stewart, 'The Limits of the Harm Principle' (2010) 4 Criminal Law and Philosophy 17.
[10] Nils Christie, 'The Ideal Victim' in Ezzat Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Macmillan 1986) 17.

3.1.2 Indirect victims

Indirect victims of criminal offences are not eligible to use the VRR unless they are the family of a deceased victim, representing victims with a disability or a victim who is injured to the extent that they cannot communicate.[11] The inclusion of relatives of deceased victims is limited to circumstances where the death was 'directly caused by criminal conduct.'[12] Therefore, if there is no causal link between the alleged criminal conduct and the death, the family would not be able to engage the VRR. This could exclude cases, for example, where the defendant was prosecuted for minor motoring offences, but not for causing the death of the victim although there is an argument that this should come within the 'allegation' of harm. Similarly, the family of a direct victim may suffer harm themselves as a result of what happened, but would not be able to engage the scheme.

Likewise, the definition does not recognise the concept of the community victim. For example, members of a community which has been affected by anti-social behaviour or environmental crime would not be able to challenge a decision not to prosecute the offenders unless they could demonstrate that they had suffered harm caused directly by the criminal conduct.

The requirement of direct harm is also problematic as a result of the causal element embedded within the definition; in order to be classified as a victim under the VRR, the harm has to have been caused by the criminal conduct. Causation is a complex area.[13] The decision not to prosecute may be linked to evidential difficulties proving causation. If the prosecutor's initial decision were that there was insufficient evidence to prove causation, this may also potentially exclude the victim from engaging the VRR on the basis that to be able to use the scheme the harm has to have been caused to the victim by the criminal conduct. Although the CPS may not interpret the criteria

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[11] CPS, VRR (n 3) [14]
[12] ibid
[13] See: Alan Norrie, 'A Critique of Criminal Causation' (1991) 54 MLR 685; Erik Witjens, 'Considering Causation in Criminal Law' (2014) 78 JCL 164.

of the VRR this rigidly in practice, this analysis does highlight the extent of the deficiency of using a definition of victimhood that is constructed in this way.

A number of academic commentators have highlighted how the impact of crime can reach beyond direct victims to indirect victims. Spalek describes primary, secondary and tertiary victims as an alternative to the direct/indirect classification. The term secondary victims is used in this context to describe those who are 'indirectly harmed, as in the case of the significant others of murder or rape victims.' Tertiary victims 'include a wider circle of people who may be affected by a particularly shocking event.'[14] Spalek emphasises that these categories are not hierarchical and it is possible that secondary and tertiary victims may suffer more harm than primary victims in certain circumstances.[15] Spalek illustrates the notion of indirect harm with the concept of 'spirit injury' where in the context of racist or sexist abuse, 'the wider audience of people, who may not directly be victimised in this way, but who nonetheless are indirect victims because their subject positions link to aspects of society that denigrate parts of their self-identity.'[16] Also in the context of hate crime, Iganski and Lagou have developed the concept of 'vicarious harm' where those that have the same identity as the primary victim suffer harm.[17] Iganski describes 'waves of harm' generated by hate crimes which spread out from the primary victim to the victim's group within and beyond his neighbourhood to other targeted communities to the 'core of societal values.'[18] Walklate develops the notion of 'shared indirect victimisation' further by citing the impact that serial killers such as Ian Brady, Myra Hindley and Harold Shipman had on their local communities.[19] Shapland and Hall outline the effect of indirect victimisation on employees, owners and customers of businesses as

[14] Basia Spalek and Jo Campling, *Crime Victims: Theory, Policy and Practice* (Palgrave Macmillan 2006) 12.
[15] ibid 13.
[16] ibid 88.
[17] Paul Iganski and Spiridoula Lagou, 'Hate Crimes Hurt Some More than Others: Implications for the Just Sentencing of Offenders' (2015) 30 Journal of Interpersonal Violence 1696.
[18] Paul Iganski, 'Hate Crimes Hurt More' (2001) 45 American Behavioral Scientist 626.
[19] Sandra Walklate, 'Defining Victims and Victimisation' in Davies, Francis and Greer (n 23) 40–41.

well as families of homicide and sexual assault victims, children of burgled households and that these effects 'may also ripple out through the community.'[20]

Another related limitation is that organisations that represent the community, or groups of the community, would be denied victim status. Charitable bodies such as support organisations for rape victims would not be able to engage with the criminal justice process within the ambit of a 'victim' as defined by the Victim Code, but could have a strong nexus to the offence through the individuals that they represent. Similarly, organisations which act on behalf of society at large, such as the NSPCC or RSPCA, would not be able to engage with the criminal justice system in the capacity of a victim. The requirement that harm must be caused directly by the offence has the effect of filtering out potential claimants of victim status limiting the rights offered by the Victim Code to a closed category of primary victims.

3.1.3 Other types of direct victims

The construction of victimhood under the VRR could be expanded to include other types of primary victim and not be limited to conventional direct victims. Businesses are able to use the VRR. However, as we have seen with natural persons, the fact that a business falls within the specific definition of victimhood, does not automatically mean that an entity will recognise its validity as a victim. Allegations of harm to businesses is likely to be based on economic loss rather than the other and, depending on the circumstances of the case, it might be difficult to argue that this was directly caused by the criminal conduct. There may be a number of different of layers of 'victimhood' within businesses. In many businesses it would be the owners who would suffer financially as a result of a crime against the business. In more complex business structures, loss could also be suffered by shareholders, employees and consumers both in terms of their experience on the day of the offence if they were

[20] Joanna Shapland and Matthew Hall, 'What Do We Know about the Effects of Crime on Victims?' (2007) 14 International Review of Victimology 175, 179; See also: Katie Long, 'Community Input at Sentencing: Victim's Right or Victim's Revenge?' (1995) 75 Boston University Law Review 187.

present and any consequent price increases.[21] As Johnston points out: 'The problem with this stereotype is that it treats businesses as things and forgets that in reality they consist of people.'[22] Although insurance may be in place to indemnify the business, this can result in increased premiums, the cost of which is likely to be passed on to consumers.[23]

Another potential expansion of the concept of the primary victim would be to extend it to include the State or public sector as a victim. In her discussion of corporate crime, Croall identifies a number of potential victims which include 'crimes against the government' from tax evasion or fraud against public bodies such as the NHS.[24] In a similar way, there is a case for arguing that communities directly affected by environmental crime should lead to the attribution of victim status.[25] Property owned by communities and charitable organisations could also come within the definition of a primary victim although they are not individual natural or legal persons or businesses.

A generous interpretation of the VRR could be that the definition is deliberately narrow to focus the scheme on genuine victims rather than allowing third parties, such as campaigning organisations and community groups, to use the scheme to contest decisions which they are not directly affected by. A more cynical interpretation would be that the VRR provides the bare minimum that was required to appease victims whilst keeping the scheme within tight parameters. It may be that the VRR will evolve over time and that the requirements of who can engage the scheme will broaden to permit a larger number of potential victims to request a review. This could develop in a similar way to the extension of Victim Personal Statements to Community Impact

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[21] For a discussion of the ideal victim in the context of businesses, see: Matt Hopkins, 'Business, Victimisation and Victimology' (2016) 22 International Review of Victimology 161.
[22] Valerie Johnstone and others, 'Crime on Industrial Estates' (Home Office Police Department 1994) 54
[23] Dave Whyte, 'Victims of Corporate Crime' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan 2007) 452.
[24] Hazel Croall, 'Victims of White-Collar and Corporate Crime' in Pamela Davies, Peter Francis and Chris Greer (eds), *Victims, Crime and Society* (SAGE 2007) 84.
[25] Matthew Hall, 'Environmental Harm and Environmental Victims: Scoping out a "Green Victimology"' (2014) 20 International Review of Victimology 129.

Statements.[26] The availability of the scheme is further restricted by the exclusions to the qualifying criteria that determine whether a case is eligible for review under the scheme.

3.1.4 Exclusions from the VRR

The restrictive criteria for what amounts to a qualifying decision is, perhaps, the most striking limitation of the VRR. The guidance initially appears to cover a wide range of situations as it states that the right to request a review arises in relation to decisions not to bring proceedings and all the main methods by which proceedings can be terminated. However, these 'qualifying decisions' are immediately heavily restricted by excluding a number of situations from the scope of the VRR in paragraph 11. Some of these exclusions are inevitably more controversial than others and these will be discussed below.

Retrospective Application

It is perhaps understandable that the scheme is not retrospective as it could be argued that this would cause undue fairness to defendants as they would not have been aware of the possibility of review at the time of the original decision. The scheme only applies to decisions made on or after 5 June 2013.[27] The police and CPS 'Child Sexual Abuse Review Panel' attempts to fill this gap within the VRR by reconsidering child sexual abuse allegations which were determined prior to the 5 June 2013 along similar lines to the VRR.[28] This remit of the panel is limited to sexual offences against children and provides an additional opportunity to challenge the decisions in these types of historic offences. The scheme is an exception to the general rule that decisions that pre-date June 2013 cannot be reviewed. As well as highlighting one of the limitations of the VRR, the implementation of a scheme that does have

[26] *R v Skelton* [2014] EWCA Crim 2409, [2015] 1 Cr App R (S) 34
[27] CPS, VRR (n 3) [11(i)]
[28] Crown Prosecution Service, 'Child Sexual Abuse Review Panel' (CPS, 2013)

retrospective application creates inconsistency between the different types of offences as other equally serious allegations cannot be reviewed.

Non-CPS decisions

The CPS VRR only applies to decisions made by the CPS; it does not extend to decisions to take no further action made by the police (or other investigating authorities). The guidance states that requests for review of police decisions must be directed to the police.[29] Therefore, it is not possible to use the scheme to challenge a police decision not to prosecute. The police retain the power to decide whether charges should be brought in respect of less serious offences and retain a discretion not to refer the matter to the CPS for a charging decision in relation to more serious matters if they believe that the evidence does not pass the Full Code Test for submission.[30] Although the victim is able to approach the police to challenge the decision, the fact that eligibility to use the scheme depends on the identity of the decision-maker reduces the value of the scheme to victims. There is no guarantee how robust the scheme offered by an individual police force will be and it is likely to have a one-tier structure with the review being conducted by a police officer rather than a lawyer.[31] There is therefore the potential for an element of inconsistency between schemes. The existence of more than one scheme also has the potential to confuse victims and could become a further barrier to challenging a decision.

[29] CPS, VRR (n 3) [11(ii)]
[30] Crown Prosecution Service, 'The Director's Guidance on Charging 2013' (Fifth edition, May 2013) [4] (issued under s.37A of the Police and Criminal Evidence Act 1984.)
[31] See for example, the Metropolitan Police VRR: <www.met.police.uk/advice/advice-and-information/acr/vrr/victims-right-review-scheme/> accessed 6 September 2020.

Other charges and suspects

The third category excludes cases where charges are brought in respect of some allegations or some possible suspects. Essentially, this means that if the victim's grievance is that the charges do not reflect the full extent of their allegations either in terms of what happened or who was involved, the VRR cannot be used to challenge this.[32] This is clearly a substantial limitation of the scheme. The guidance is therefore drafted on the basis of a very narrow interpretation of Article 11 that requires Member States to ensure that victims have the right to a review of a decision not to prosecute. The scheme only permits a victim to request a review if there has been no prosecution; it is not sufficient that there has been no prosecution for the offence alleged by the victim. For example, the victim may have made an allegation of robbery and the defendant has been prosecuted for an offence of theft arising out of the same allegation. This would be specifically excluded from the scheme and so the victim would be unable to use the review process.

The lawfulness of paragraph 11(iii) was challenged in *Chaudhry* by way of judicial review proceedings.[33] The claimant challenged the decision of the CPS not to prosecute her sister-in-law for her alleged involvement in the abduction of the claimant's children. The claimant had attempted to use the VRR, but was prevented from doing so by the restriction in paragraph 11(iii) as another suspect had been prosecuted in relation to the allegation, namely the claimant's former husband who had been convicted of child abduction. The claimant applied for judicial review on the grounds that the CPS had incorrectly applied the VRR and, in the alternative, that the VRR guidelines were unlawful and contrary to Directive 2012/29/EU. Specifically, it was argued that the CPS had fettered its discretion by interpreting paragraph 11 (iii) as an absolute bar to reviewing the decision. However, the appellant's case was undermined by the fact that the CPS had conducted an ad hoc review of the case despite the apparent exclusion under paragraph 11. Additionally, a

[32] CPS, VRR (n 3) [11(iii)]
[33] *R (Chaudhry) v DPP* [2016] EWHC 2447 (Admin)

footnote was added to paragraph 11 in the 2016 revision of the VRR guidance that provided a discretion to depart from the paragraph 11 criteria in exceptional cases which states, 'there may be very exceptional circumstances in which cases that fall within the exceptions of paragraph 11 may nevertheless be considered for inclusion in the VRR scheme…'[34]

The Divisional Court held that neither the original form of paragraph 11 or the amended 2016 version were unlawful and the criteria as to when an exceptional review should be conducted were sufficiently transparent and not arbitrary. Neither the Divisional Court nor the Court of Appeal accepted the argument that Article 11 and the common law entitled victims to a general right of review with the Divisional Court stating that such an extensive right of review 'would both significantly undermine operational prosecutorial discretion and have potentially serious resources implications for the CPS.'[35] The court was essentially stating that the independence and function of the public prosecutor would be undermined by victim having a right to challenge operational decisions such as which suspects should be prosecuted and which should not. Arguably, however, allowing victims to request a review in such circumstances would not compromise the independence of the prosecutor nor undermine their constitutional function as the review only entitles the victim to a review of the decision, it does not entitle them to a prosecution.

The victim appealed to the Court of Appeal. Her grounds of appeal were that Article 11 of the Directive entitles victims of crime a review of a decision to prosecute and, in the alternative, that the VRR was unlawful.[36] The appeal was dismissed with the court stating that, 'the Divisional Court's reasoning readily withstands scrutiny.'[37] The court did not accept that Article 11 afforded victims a general right of review and took the view that Member States had a wide margin of appreciation as to how to implement the scheme dependent upon the role of the victim in the individual criminal

[34] CPS, VRR (n 3) [11 fn 2]
[35] ibid [46]
[36] *R (AC) v DPP* [2018] EWCA Civ 2092, [2019] 1 Cr App R 12
[37] ibid [35]

justice system.[38] The Court of Appeal particularly focussed on the principle that offences that have allegedly been committed jointly should be jointly tried and that delaying cases to give victims a right of review in such cases 'would pose a major risk to the administration of justice.'[39]

The courts have therefore endorsed the narrow interpretation of the right to review adopted in the VRR. The VRR excludes a number of types of potential cases from the scheme to the extent that it is not accessible to a proportion of victims who may wish to use it to challenge a decision not to prosecute. It seems unlikely that this is what the Court of Appeal intended in *Killick*. Indeed, the guidance states that grievances that do not fall within the scope of the VRR will be dealt with under the CPS Feedback and Complaints Policy.[40] This is exactly what had happened in *Killick* and what the court had been critical of when they stated: 'This was not "a complaint" about "service" by the CPS, but a request to have the discretionary decision to prosecute reviewed.'[41] Therefore, this part of the qualifying decisions criteria significantly undermines the value of the scheme as it has the potential to preclude victims with a legitimate grievance from accessing the scheme. Similarly, it seems illogical that a case cannot be reviewed under the scheme in respect of a particular suspect simply because someone else has been prosecuted. No prosecution is taking place in relation to that individual and essentially it is a final decision for the victim in respect of them.

A similar situation that is not covered is where some charges are terminated, but others continue. This means that the victim cannot use the scheme to challenge the decision not to continue with particular charges when other charges relating to the victim are continuing. Therefore, to use the scenario referred to above, if the robbery charge were to be discontinued and the theft were to continue, the victim would not have any redress through this mechanism. Even though it is a final decision in relation to the robbery, that is not sufficient to engage the right of review. The scheme under the Lord Advocate's Rules in Scotland provides a better approach: decisions are excluded

[38] ibid [42]
[39] ibid [52]-[54]
[40] Crown Prosecution Service, 'Feedback and Complaints Guidance' (CPS February 2019)
[41] *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10 [50]

from the review process when a charge is stopped or amended in respect of the victim only if another 'substantial and significant' charges continues.[42] Although a definition of what may constitute 'substantial and significant' is not provided by the rules, there would be a stronger argument in the robbery scenario described above, for example, that the theft is not 'substantial and significant' in the context of a robbery allegation. The incorporation of this qualification into the VRR would widen the remit of the scheme and make it available in a proportion of cases where some charges were terminated and others were to continue. In a similar way, the VRR does not apply to situations where the initial charge or charges are 'substantially altered' provided proceedings involving the same victim continue.[43] Therefore, if the robbery charge referred to above were amended to one of theft, the VRR could not be used by the victim to challenge the decision to do so.

Out-of-court disposals

The VRR does not apply to cases that are finalised by way of an out-of-court disposal.[44] This is perhaps unsurprising in view of the fact that such decisions are excluded under the Directive. This means that even though the decision to utilise an out-of-court disposal has effectively closed off the possibility of a conviction in respect of the allegation made by the victim, they cannot challenge that decision using the VRR. In reality, the decision is a decision not to prosecute, but one where the suspect will receive a caution or conditional caution instead of the case continuing to court. *Jones v Whalley* highlighted that the issuing of an out-of-court disposal is a decision with which the victim may well take issue and may wish to challenge the decision.[45] As will be discussed in the next chapter, the only way to challenge the decision to caution would be by judicial review proceedings.

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[42] Crown Office & Procurator Fiscal Service, 'Lord Advocate's Rules: Review of a Decision Not to Prosecute – Section 4 of the Victims and Witnesses (Scotland) Act 2014' (2015) 2
[43] CPS, VRR (n 3) [11(vi)]
[44] ibid [11(viii)]
[45] [2006] UKHL 41, [2007] 1 AC 63. Discussed in detail in Ch 5.3.1 in relation to private prosecutions.

Other prosecutorial decisions

As the VRR only covers cases where the proceedings are terminated, it is of no value to a victim who wishes to challenge the way in which a particular case has been prosecuted. It does not enable them to challenge the selection of charges or tactical decisions as to what evidence to rely on. One particular area that has the potential to cause tension between the prosecutor and the victim is the acceptance of pleas or bases of pleas. This could happen either by the prosecution accepting reduced charges, such as a guilty plea to sexual assault on an indictment for rape or by the prosecution accepting a particular defence basis. A defence basis of plea would be one that differed to the prosecution version of events and could result in a lesser sentence albeit to the same charge.[46]

The fact that the VRR is not available in such a wide range of potential areas of contention with victims is arguably inconsistent with other CPS policies and guidelines. The Code for Crown Prosecutors states that when considering whether an offer of pleas is acceptable they should take into account the views of the victim or his family where appropriate.[47] This is further supported by the Farquharson guidelines that emphasises the importance of consulting with the victim and explaining any decisions to them.[48] These guidelines were originally published in 1986 and set out the role of prosecuting advocates and specifically referred to the need to take into account the views of the victim when applying the public interest test. These policies emphasise the importance of consulting with the victim and taking their views into account, yet the victim cannot challenge a decision not to do so through the internal review mechanism. This potentially leads victims towards judicial review as an alternative way of challenging such a decision.

[46] For Court of Appeal guidance, see: *R v Underwood* [2004] EWCA Crim 2256
[47] Crown Prosecution Service, 'The Code for Crown Prosecutors' (CPS October 2018) [9.5]
[48] Farquharson Guidelines [6]-[6.10] Available at: <www.cps.gov.uk/legal-guidance/farquharson-guidelines-role-prosecuting-advocates> accessed 30 December 2018

A comparison of the right to review mechanisms in Scotland and Northern Ireland highlights some of the limitations of the model adopted in England and Wales.[49] Although narrowing the remit of the review scheme by excluding certain types of case is used in both the VRR and the scheme in Scotland, the scheme implemented in Northern Ireland does not appear to have any exclusions or qualifications. The Public Prosecution Service (PPS) guidance states: 'Any victim of a crime reported to us by the police or other statutory authority can apply for a review of a decision by us not to prosecute.'[50] This suggests that the scheme in Northern Ireland is more accessible, however, this may be due to the lower case load and may subsequently be revised as a result of the influence of the other schemes.[51]

Although the VRR clearly has rigid entry criteria which very much limits the availability of the scheme to potential applicants, it is accessible in the sense that it is simple to request a review: there is no prescribed form for requesting a review and the victim could simply send an email or make a telephone call. The guidance states: 'The only action a victim need take is to notify the CPS of their request for review' and that they can then 'make contact by their preferred means.'[52] In this sense, the VRR compares favourably to the schemes in Scotland and Northern Ireland as both require that requests be made in writing which may be a deterrent for some victims. However, there is also evidence from the CPS Inspectorate that there is 'inconsistent understanding and application' of this part of the policy and that some victims are being required to request a review in writing.[53] One clear benefit, however, is that there is no cost or fee incurred by the victim in requesting a review and there is no requirement to seek legal advice. This is one of the strengths of the VRR over judicial

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[49] For examination across the three jurisdictions, see: Stephen Colman, 'A Comparison of the Implementation of the Victims' Right to Review in England and Wales, Scotland and Northern Ireland' [2018] Crim LR 365.
[50] Public Prosecution Service for Northern Ireland, 'Review of a Decision Not to Prosecute' (2017) 2
[51] The number of files submitted to the PPS in 2019-20 was 43,332 – see Public Prosecution Service for Northern Ireland, 'Annual Report and Accounts 2019-20' (2020) 12. The CPS had 458,059 cases before the magistrates' court for the same period. See Crown Prosecution Service, 'Annual Report and Accounts 2019-20' (2020) 30
[52] CPS, VRR (n 3) [19]
[53] HM Crown Prosecution Service Inspectorate, 'Victim Liaison Units: Letters sent to the public by the CPS' (November 2018) [6.6]

review and private prosecutions both of which are likely to require legal advice and representation and the cost element could deter victims from using those mechanisms.

Communication with victims

This analysis of the VRR does, however, pre-suppose that the victim has been properly informed of the decision in the case and advised of the existence of the VRR together with instruction on how to request a review. The guidance states that victims will be notified of the nature of the decision and, if it meets the qualifying criteria, advise them that they are entitled to apply for a review and provide 'sufficient information' to allow them to decide whether they wish to apply for a review and how they can request one.[54]

The CPS Victim and Witness Survey published in 2015 suggests that a significant number of victims may not receive an explanation for charges being altered or dropped. The survey found that only 58 per cent of victims recalled receiving an explanation where charges were dropped and only 63 per cent where charges were altered.[55] Victims were also asked about the clarity of the explanation given to them with only 47 per cent of victims in cases where charges were stopped reporting that the explanation given to them was very clear.[56] The significance of this is that the quality of the explanation for altered or dropped charges may influence whether the victim decides to challenge the decision in some way.

Participants in the survey were also questioned specifically about the VRR. It revealed that 10 per cent of victims who felt that the decision to stop charges was unfair went on to request a review under the scheme.[57] Of those that felt the decision unfair and did not request a review, 49 per cent said that they did not know how to. Therefore, the survey does highlight a degree of dissatisfaction about dropped charges and that there is an appetite for challenging decisions using the scheme. However, it also

[54] CPS, VRR (n 3) [17]-[18]
[55] Crown Prosecution Service, 'CPS Victim and Witness Survey' (September 2015) [38]
[56] ibid [39]
[57] ibid [40]

highlights the variable quality of the explanations given to victims both by way of explanation for the decision and also how to engage the VRR.

There is further evidence from HM CPS Inspectorate that some letters to victims regarding the VRR continue to be poor quality.[58] It revealed that there was no reference to the VRR in 8.6 per cent of letters written to victims when there should have been; it was also incorrectly offered in 19.4 per cent of letters.[59] As a previous report commented: 'If the victim is not informed of this right in the VCL letter, and if the victim does not read the CPS Feedback and Complaints leaflet which informs them of this right, the opportunity to challenge any decision made is lost to them.'[60] A 2018 report also found that only 32.9 per cent of a sample of local resolution letters gave the victim a clear legal explanation for the decision and only 80.3 per cent correctly explained the next stage of the VRR process.[61]

Both the Victims and Witness Survey and the Inspectorate reports demonstrate that a proportion of potential applicants for a review under the scheme are not being properly informed of its existence or how to go about requesting such a review. This is clearly a significant barrier to accessibility as aggrieved victims will not request a review under a scheme if they are not aware that they are entitled to do so. Although clearly some will conduct their own research or indeed write a letter of complaint to the CPS which may result in it being directed to the scheme, there will be others who do not take any action due to lack of awareness of their right to request a review. This issue is addressed in the government's Victims Strategy which states that 'we will improve how we communicate to victims, explaining how victims can access the right to review scheme in a much clearer and simpler way' and that this will include the introduction of a 'national quality assurance process.'[62] This perhaps represents a recognition that

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[58] HM Crown Prosecution Service Inspectorate, 'Victim Communication and Liaison scheme: letters to victims' (October 2020)
[59] ibid [5.22]
[60] HM Crown Prosecution Service Inspectorate, 'Communicating with Victims' (January 2016) [17]
[61] HM Crown Prosecution Service Inspectorate, 'Victim Liaison Units: Letters sent to the public by the CPS' (n 53) [6.30]
[62] Ministry of Justice, *Victims Strategy* (Cm 9700, 2018) 31-32

victims' access to the VRR is undermined by the quality of the explanations of decisions not to prosecute and lack of information about the scheme.

Time limits

A linked barrier to accessibility is the tight time limits for requesting a review. The guidance states that a request should 'ordinarily be made within 5 working days of receipt of the notification of the decision.' However, the following sentence creates a 'long stop' date: 'a request can be made up to three months after the communication of the decision to the victim.'[63] It is unclear in what circumstances the three-month time limit will apply rather than the five day period. These time limits do not allow the victim much time to deliberate whether to seek a review or not and the time pressure could rush the victim into a snap decision that they later regret. It could also prevent a victim obtaining legal advice on whether to challenge the decision. Although the time limit does not start running until the notification that the case has been terminated has been received, the quality of the notification may affect how easily the victim can reach a decision as to whether they wish to seek review of the decision. Clearly, the imposition of a time limit could be justified on the basis that there is a need to take into account the needs of the suspect. If the VRR were open-ended, it would mean that a suspect would never know when he was no longer at risk of the decision being reversed and a prosecution being commenced.

Therefore, in terms of accessibility the gateway to the VRR is not a wide one: the qualifying criteria are restrictive and only permit a request for review in very limited circumstances. Situations which one would expect such a scheme to cover are not, in fact, covered. The scheme is essentially limited to those victims whose case has been not prosecuted in its entirety. The definition of victimhood adopted by the VRR also serves to limit the availability of the scheme further and excludes those that do not come within the narrow definition provided by the Victims' Code. This construction could be redefined to include a wider range of potential victims including indirect

[63] CPS, VRR (n 3) [53]

victims such as community victims and those who have been exposed to a criminal act, but not necessarily harmed by it. This would allow those who are relegated to witnesses to criminal behaviour, such as Gideon Falter, to access the scheme.

However, on a positive note, if a victim's case does fall within the criteria, there are few formal, procedural requirements for the victim to comply with. They can simply request a review by their preferred means and then await a response. Potentially, therefore, the VRR is an easy to use route for challenging a decision provided the applicant is eligible to use it and the case falls within the criteria. The next criterion will develop this analysis further by exploring the extent to which the VRR enables victims to participate in the prosecution.

3.2 Participation

The second of the four criteria is 'participation'. This criterion will essentially address the following question: **to what extent do victims have a meaningful participatory role?** As outlined in the introduction to this part, there are different forms of participation, including those categorised by Edwards in relation to decision-making in the criminal justice system.[64] The VRR necessarily involves a participatory relationship between the CPS and the victim as the victim has to initiate the process by requesting the review. Although it is inevitable that the CPS would not give full control to the victim, this criterion will evaluate the nature of that participation as to be meaningful it should facilitate more participation than simply to allow the victim to emote about the decision.

The analysis against this criterion will show that the VRR provides only a relatively passive form of participation representing very little engagement for the victim. It is possible to distinguish between the different stages of the victim's involvement. Firstly, the victim has to trigger the review mechanism by making a request and as this

[64] Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 Brit J Criminol 967.

decision falls within the control of the victim, this is the highest level of participation in the process. Secondly, beyond triggering the process there is limited opportunity for the victim to enter into a meaningful dialogue with the prosecutor about the decision. Thirdly, the victim is the passive recipient of the decision whether to change the original outcome. Additionally, the participation that they do have through the review process is actually outside the court proceedings.

As has been discussed above in relation to accessibility, the onus is on the victim to request the review of the case if they wish to do so. The only action that the victim needs to take is to request the review; they do not have to provide reasons for the request or to put forward an argument as to why they believe the decision is wrong.[65] Under the previous version of the VRR, the victim did not have the opportunity to present new information or to put forward reasons why they felt that the matter should be prosecuted. Prior to the 2016 revision, the terms of the VRR specifically excluded the reviewing prosecutor from considering anything other than the information available at the time of the initial review. The VRR guidance stated: 'A victim wishing to raise new evidence/information should do so with the investigating officer, not the reviewing prosecutor.'[66]

The 2016 guidance is an improvement on the earlier versions as it no longer expressly prohibits the victim from submitting additional information and does not prohibit the prosecutor from considering it.[67] However, it does not encourage or invite victims to submit new information or evidence; the way in which the guidance is drafted does not invite victims to enter into a dialogue. Although the expectation is not that the victim will make representations to the CPS, clearly some will do so. In the case of *Monica*, solicitors for the victim had made detailed submissions to the reviewer in advance of the review decision being made.[68]

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[65] CPS, VRR (n 3) [19]
[66] CPS, VRR (n 2) [31]
[67] CPS, VRR (n 3) [31]
[68] *R (Monica) v DPP* [2018] EWHC 3508 (Admin), [2019] Cr App R 28 [13]

The court recognised in *FNM* that the VRR provides an opportunity for victims to make representations under paragraph 42 by indicating that issues raised by victims will be addressed.[69] However, the court stopped short of ruling that the DPP was under a duty to invite representations or that the process should be delayed to allow victims to make representations.[70] In any event, it is unclear how much weight will be placed on such submissions and the guidance does not confirm that such representations will be taken into account during the review process.

The CPS VRR contrasts with the scheme in Scotland which states that the reviewer will, 'obtain any further information which is required in order to make the decision' and the victim is specifically invited to submit any further information that they wish to take taken into account when they request the review.[71] The Northern Irish scheme provides an even more victim-centred approach by distinguishing between victims who have additional information to be taken into account and those that those that do not. If the victim submits new information, the decision is returned to the original decision-maker, otherwise it is reviewed by a different prosecutor. There is then the additional benefit that if the new material does not persuade the original prosecutor to reach a different decision, the case is then passed to a different prosecutor for a further review.[72]

Iliadis and Flynn state that the VRR 'arguably responds to victims' procedural justice needs by enabling victims to have their voices heard.'[73] In a similar way to potential therapeutic effects of making a VPS, the VRR potentially provides the victim with an outlet for any negative feelings that they may have about the decision; it could perhaps assist them in achieving closure on the basis that they have attempted to challenge the

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[69] *R (FNM) v DPP* [2020] EWHC 870 (Admin), [2020] 2 Cr App R 17 [45]
[70] ibid [46]-[47]
[71] Crown Office & Procurator Fiscal Service, Lord Advocate's Rules: Review of a Decision Not to Prosecute (n 42) 4-5
[72] PPS, Review of a Decision Not to Prosecute (n 50) 5
[73] Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims' Right to Review Reform' (2018) 58 Brit J Criminol 550, 556.

decision.[74] It may also reassure victims that the decision is sound as it provides a way in which the victim can have the decision checked.

However, in reality, the VRR does not proactively encourage the victims to make representations about the case or enter into a dialogue with the prosecutor who will be reviewing the case. The VRR represents very little opportunity for the victim to actively participate in the review decision although potentially it could result in the original decision being changed; the victim's role is limited to triggering the process. The guidance does acknowledge that a victim may 'give reasons for requesting a review', but it states that those issues will be addressed after the decision has been made as part of the communication of the final decision.[75] The approaches in Scotland and Northern Ireland are more conducive to a dialogue between the victim and the prosecutor as both schemes recognise that the victim may wish to submit additional information.[76] This approach would have the potential to increase victim participation and ultimately satisfaction with the VRR.

Manikis argues that the VRR provides a form of participation which involves victims acting as 'agents of accountability' in relation to prosecutorial decisions. Her proposed amendment to Edwards' model of participation propounds a new category of participation: Accountability.[77] Although this analysis is useful in that it recognises the empowerment of victims to challenge prosecutors and to hold them to account, it places obligations on both the prosecutor and the victim that are not currently contained within the VRR. Under Manikis' model, the prosecutor would be under an obligation to 'seek out and consider the victim's position' and the victim would be required to 'examine the decision made' and to 'seek a review if they believed an error was made.' These obligations stretch far beyond the current parameters of the VRR

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[74] Edna Erez, 'Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000) 167.
[75] CPS, VRR (n 3) [42]
[76] PPS, 'Review of a Decision not to prosecute' (n 50) 5; Crown Office & Procurator Fiscal Service, *Lord Advocate's Rules* (n 42) 4-5
[77] Marie Manikis, 'Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process' [2017] PL 63.

and would take the nature of the victim's participation to a much higher level on that they would be under an obligation to act rather than being entitled to if they wished to do so. Additionally, on this interpretation, the reviewer would be under an obligation to actively seek the views of the victim on the decision rather than simply reviewing whether the decision was correct. Therefore, this account of the VRR does not reflect the reality of the victim's participation under the scheme which is arguably more peripheral.

The VRR process takes place after the decision has been made and therefore after any proceedings have been brought to an end. In fact, the decision in *Hayes* confirms that it is not possible to request that a review takes place after the decision to terminate a case has been made, but prior to the proceedings being formally brought to an end.[78] What limited involvement the victim does have as a result of the VRR is not part of the criminal proceedings. In the event that the challenge is successful and a decision made to prosecute, the victim would have no further participation as a result of engaging the mechanism: the victim returns to the role that they would ordinarily have in a prosecution; there is no enhanced status or ongoing involvement as a result of applying for a review.

Because the victim's actual role in the VRR process is so minimal, there is perhaps less opportunity for a meaningful dialogue about the case or even to vent their feelings about the way in which the case was handled as part of their involvement in the scheme. In the event that the application is successful, a victim eligible for an enhanced service under the Victims' Code will be entitled to 'increased support' throughout the VRR process and 'offered the opportunity to discuss the outcome of the review.'[79] However, this is after the review has taken place, so could be seen as little more than a token gesture.

Therefore, the VRR offers very much a passive form of participation: the victim is entitled to request the review provided the case and the 'victim' fit the criteria, but

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[78] *R (Hayes) v CPS* [2018] EWHC 327 (Admin), [2018] 2 Cr App R 7
[79] CPS, VRR (n 3) [63]

their involvement largely ends at that point. On Edwards' model of victim participation the victim's use of the VRR's amounts to only 'expression' or 'information provision'; it clearly does not go as far as 'consultation' as the victim's preference is not sought and their views if they do put them forward are not taken into account. The VRR provides a basic mechanism by which the victim can request that a second lawyer checks the original decision provided the case is a qualifying decision. This topic will be explored further in relation to the criterion of decision-making accountability.

3.3 Accountability

The VRR is potentially a means of challenging the decision of the public official, namely the public prosecutor, who made the decision not to prosecute. The VRR will be evaluated as a method of holding the public decision-maker to account by analysing it against the key characteristics of accountability mechanisms identified by Bovens.[80] The following question will be addressed: **to what extent is the VRR an effective mechanism for holding the public prosecutor to account?**

As explained in the previous chapter, the VRR is an internal review mechanism implemented by the CPS following the *Killick* judgment. Applying Bovens' criteria, the VRR could arguably be classified as an accountability mechanism; although are features which suggest that the argument is not particularly compelling. The VRR provides a two-tier structure of review consisting of 'local resolution' and 'independent review.'[81] Therefore, the 'forum' is different for the second stage and perhaps more remote from the original decision-maker than at the local review stage in that it is conducted by a specific unit of the CPS which deals with appeals rather than mainstream casework. However, the extent to which the VRR requires the decision maker to explain and justify his decision appears to be limited. The VRR guidance suggests that the review is conducted on the papers without any contact

[80] See the introduction to this part for a more detailed overview of Bovens' framework.
[81] CPS, VRR (n 3) [22]-[31]

between the original decision-maker and the reviewer. Even if the reviewer were to ask questions of the original decision-maker on occasions, there is no requirement to do so within the guidance. The decision maker is not required to explain or justify his decision other than he will have conducted a written review when he applied the Code for Crown Prosecutors.

The reviewer undertaking a review of the case under the VRR scheme does form a judgment as to whether the original decision is wrong as this is the test that is applied under the VRR.[82] The main consequence of the scheme is that the decision not to prosecute may be reversed which clearly could be described as a consequence for the CPS in its institutional role as the public prosecutor rather than as consequence for specific individuals within the organisation. However, there are no obvious consequences for the original decision maker as a result of their decision being judged as wrong. The guidance does state that 'Where lessons can be learned from the outcome of a VRR request, the CPS will make the necessary changes to guidance, process or practice to reduce the likelihood of the situation arising again.'[83] Although the guidance does not give further details, this could include some kind of feedback, re-training or disciplinary sanction in relation to the individual who made the decision. This suggests that the learning perspective is the most relevant 'evaluation perspective' for the VRR although there is some evidence from a recent CPS Inspectorate report to suggest that this is not happening consistently across CPS areas; one area was 'cascading lessons learnt from VRRs and complaints', but the majority were not.[84] As the independent reviews are conducted by a different CPS unit there is perhaps less opportunity for action to result from the reviewer concluding that the original decision was wrong.

There is also the risk that the existence of the right of review fosters a more risk-averse culture in the CPS with cases being taken to court rather than running the risk of the case being reviewed at the instigation of the victim. Although this may sound

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[82] ibid [30]
[83] ibid [51]
[84] CPS, Victim Liaison Units: Letters sent to the public by the CPS (n 53) [6.5]

appealing, it could result in evidentially weak cases, or those with questionable public interest status, being prosecuted. The impact of the VRR on the CPS working culture is an area which could be the subject of future empirical research.

Although the review process involves legal decisions, the VRR is more of an administrative, rather than a legal, type of accountability. The accountability process runs vertically through the CPS hierarchy rather than involving any external legal element. It is clear that the relationship between the decision-maker and the review body is not an independent one in the true sense; this will become more obvious when judicial review is examined in the next chapter. The review is still conducted by the CPS itself and despite the fact that is labelled as an independent review, it is not truly independent. The decision is not made completely at arm's length as it is still from within the CPS hierarchy. The two-tier structure may be of some reassurance to victims that a close colleague of the original decision-maker is not conducting the review.

The fact that the CPS is adjudicating on requests for review of its own decisions is not in conflict with the comments of the Court of Appeal in *Killick* and complies with Article 11 of the Victims' Directive. Article 11(4) states that 'where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.'[85] There remains, however, a risk of actual or perceived bias. The victim as an outsider to the CPS is unlikely to be aware of the proximity or otherwise of the Appeals and Review Unit to the original decision-maker. From their perspective the review is being considered by the same organisation as made the original decision. Other commentators have also noted that the scheme lacks true independence.[86]

The case law from the rule against bias in the context of judicial review suggests that the appearance of bias may be sufficient to undermine the fairness of the hearing. For

[85] Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L315/57 (Victims' Directive) Art 11.
[86] Iliadis and Flynn (n 73); Thom Dyke, 'Who Will Guard the Guardians? Challenging the Decision to Prosecute' (2017) 22 Judicial Review 124; Manikis (n 77).

example, in *R v Bow Street Metropolitan and Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* the proceedings were re-heard after it was established that Lord Hoffman had connections with Amnesty International and there could be a public perception of bias.[87] In *Porter v Magill* the House of Lords established the following test: whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility of bias.[88] Although this would be a difficult test for the applicant to overcome without some evidence of bias in the particular case, it does highlight a potential shortcoming of the scheme: the aggrieved victim, and perhaps the wider public, may feel that the review may be less than a full and rigorous review of all the evidence. Similar concerns have been raised in respect of prosecutors and police officers sitting on juries.[89] Although these cases were not successful, the prosecutor or police officer would have been one person on a jury of twelve whereas with the VRR there will be only one reviewer - from the same organisation as the original decision-maker.

Therefore, although there may not be the basis of a legal challenge to the CPS adjudicating on the reviews, perhaps this is an area where the VRR could be improved. If the scheme is truly about improving victims' rights and increasing their levels of satisfaction with prosecution decision-making, incorporating a fully independent stage, perhaps limited to particularly sensitive or serious cases, may serve to increase public acceptance of the scheme. This could perhaps take the form of a third tier to the VRR that would only be available when the first two tiers had reviewed the case and confirmed the original decision. There is at least one precedent of a review being conducted externally under the VRR in that a review of the DPP's decision not to prosecute the peer Lord Janner was conducted by an independent barrister who reversed the decision.[90] Although this was perhaps an exceptional case in view of the amount of media attention that it attracted and the fact that the original decision not to

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[87] [2000] 1 AC 119
[88] [2001] UKHL 67, [2002] 2 AC 357 [102]-[103]
[89] *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2676 and *R v Khan (Bakish Alla)* [2008] EWCA Crim 531
[90] David Barrett, 'Publish review of Janner case, CPS told, as chief refuses to quit; About-turn on decision to take peer to court has left prosecutor's reputation in tatters, say critics' *The Daily Telegraph* (London, 30 June 2015) 8

prosecute was made by the DPP personally, this does show that an external element would be a possibility and would perhaps lend more legitimacy to the scheme in terms of public confidence. In principle, an external element to the scheme would not need to be restricted to reviews of decisions made by the DPP, although this could be one benefit of such an amendment. The inclusion of an independent element to the VRR is not, however, straight-forward.

A difficulty with incorporating an external element to the VRR is caused by the particular constitutional position of the CPS as the national prosecuting service. As outlined in the introductory chapters, Parliament has delegated this role to the CPS under the Prosecution of Offences Act 1985. There is no higher prosecutorial body in England and Wales. There are limited possibilities as to who could conduct an additional layer of independent review if one were to be created. Perhaps the most obvious choice would be for this to come within the role of the Attorney General and his office as the DPP is 'superintended' over by the Attorney General.[91] It is the Attorney General who appoints the DPP and who can assign any additional functions to him. This supervisory role could therefore be extended to include an independent dimension to the VRR. The Attorney General's office has a casework aspect to their work in that they make referrals to the Court of Appeal under the unduly lenient sentences provisions, advise on contempt of court cases and deal with consent to prosecute where required by statute amongst other areas of law.[92] Clearly, there would be resourcing implications, but perhaps this would be weighed off by the reduction in work for the CPS. This is perhaps a way in which the Attorney General could effectively oversee the work of the CPS and gain an insight into their casework.

Other options for an independent layer would be HM CPS Inspectorate, a bespoke body specifically for VRR adjudications or a panel of independent barristers. This role does seem to be outside of the remit of the Inspectorate whose function is not really to review specific cases with a view to changing the outcome. An independent

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[91] Prosecution of Offences Act 1985, s.3.
[92] Attorney General's Office, 'About us' <www.gov.uk/government/organisations/attorney-generals-office/about> accessed 12 December 2020

body would realistically need to be established by statute which seems unlikely when the VRR is not itself on a statutory basis.

Referral of appropriate cases to the independent bar, as in the Janner case, would be a possibility. However, there would need to be some degree of regulation in terms of the selection of barristers and the extent of their role over and above their professional obligations. This could, perhaps, take a similar format to the advocate panels established by the CPS for the selection of barristers as agents for different levels of prosecution cases.[93] Barristers would need to apply for inclusion on the panel demonstrating evidence of a sufficient level of expertise and experience. There could be a grading system so that certain barristers could be allocated to certain types or seriousness of case. For example, only barristers experienced in conducting rape trials would be allocated VRR referrals involving allegations of rape. Such a model would not include one clear, identifiable body being responsible for this new tier of review potentially introducing a degree of uncertainty and inconsistency.

Other jurisdictions offer some useful alternatives. As has been shown by reference to Scotland and Northern Ireland, Article 11 of the Directive has been implemented differently in other jurisdictions. This is also the case outside the UK. Novokmet has analysed the position in a number of Member States.[94] The decision not to prosecute may be reviewed by the court in Germany and Italy. In Germany this is on the application of the victim whereas in Italy the court reviews all decisions not to prosecute. Novokmet describes the Italian system as a 'special form of judicial review' that is conducted by the judge of preliminary investigation.[95] This system, however, could not easily be transposed from an inquisitorial system to an adversarial one. The first instance criminal courts in England and Wales are not normally called upon to review evidential decisions, the role of the judge being different in civil jurisdictions. This role may be more suited to the High Court jurisdiction although it

[93] Crown Prosecution Service, 'Advocate Panels' <www.cps.gov.uk/advocate_panels> accessed 12 December 2020
[94] Ante Novokmet, 'The Right of a Victim to a Review of a Decision Not to Prosecute as Set Out in Article 11 of Directive 2012/29/EU and an Assessment of its Transposition in Germany, Italy, France and Croatia.' (2016) 12(1) Utrecht Law Review 86
[95] ibid 95.

would seem to overlap with judicial review proceedings. The extent to which the High Court essentially conducts an independent review through judicial review will be explored further in the next chapter. An obvious difficulty would be, however, the conflict with the doctrine of separation of powers. The court would essentially be undertaking a function which has been allocated to the executive by Parliament. As will be set out in the next chapter, the higher courts have been very reluctant to substitute the public prosecutor's decision with their own.

An independent element could improve a further shortcoming of the scheme. Currently there are no real opportunities for the victim to discuss the decision with the reviewer. The review is generally based on the same material that the original decision maker had before them and there is no provision to allow the victim to make representations to the reviewer or to discuss the case with them. Victims who are entitled to an enhanced service (as set out under the Victim Code) are entitled to enhanced support throughout the process and an opportunity to discuss the outcome after the review.

It seems likely that the lack of an opportunity to discuss the case with the review prior to the review decision being made is as a result of concerns that it could undermine any subsequent prosecution were the review to be successful. The CPS guidance on pre-trial witness interviews highlights how carefully managed any discussions with witnesses prior to a trial need to be.[96] The linked Code of Practice states: 'Prosecutors must not under any circumstances train, practise or coach the witness or ask questions that may taint the witness's evidence.'[97] The Court of Appeal has also provided guidance on the risks of contamination inherent in discussing the evidence in a case with a witness.[98] This risk of allegations of contamination could be reduced by any interaction regarding the case being conducted by an individual or body independent from the prosecutor. Perhaps the safest course, however, would be to permit only

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[96] Crown Prosecution Service, 'Pre-Trial Witness Interviews - Guidance for Prosecutors' <www.cps.gov.uk/legal-guidance/pre-trial-witness-interviews-guidance-prosecutors> accessed 12 December 2020

[97] Crown Prosecution Service, 'Pre-Trial Witness Interviews: Code of Practice' (CPS 2008) [7.1]

[98] *R v Momodou* (Practice Note) [2005] 2 All ER 571

representations from the victim prior to the review decision, rather than allowing them to enter into a dialogue with the prosecutor.

Another important issue is the degree of public accountability for the decision. The VRR scheme operates outside the criminal justice process and is essentially a private matter between the victim and the CPS (with the proposed defendant not being informed that the review is being conducted). Ordinarily there is no public element to the process. High profile cases, such as those involving celebrities or politicians, attract media interest whereas less topical ones would not do so. The private nature of the VRR process means that cases that are reviewed in this way have limited opportunity to influence future cases (except perhaps if a learning point was identified by the CPS and formed the basis of future training or changes to procedures). There is no precedent value in VRR decisions and indeed they do not result in a growing body of case law. Indeed, they may have a negative effect on the potential generation of case law under other review mechanisms. For example, the analysis of the judicial review case law demonstrates that there has been a greater willingness in the courts to quash decisions not to prosecute. However, with the implementation of the VRR there is a clear expectation that this is the primary route for challenging the decision with judicial review only being available in exceptional situations. This highlights perhaps how, in one sense, the VRR is a private, rather than public, accountability mechanism.

On one level, the VRR does hold the public prosecutor to account as it provides a checking mechanism in respect of the original decision: the review compels the CPS to review whether or not the decision was wrong. However, it does not subject the original decision to public scrutiny in an open, independent forum in the way that judicial review does. A successful VRR would vindicate the victim's belief that the decision was wrong, but it has little impact on future cases: each case is dealt with on an individual basis with no body of case law being developed by the decisions. The extent to which the VRR is capable of delivering the outcome sought by the victim is discussed below.

3.4 Outcomes

This criterion addresses the question: **does the VRR provide meaningful and satisfactory outcomes for victims?** As part of this, the available data on the VRR will be reviewed as to whether it is being used by the public and the extent to which it has resulted in a prosecution despite an earlier decision not to prosecute.

The VRR does provide a way in which the victim can seek to challenge a decision not to prosecute which could result in a prosecution being brought. The *Killick* case highlighted the need for such a mechanism and led to its foundation. The Court of Appeal commented that the right of the victim to apply for review of the decision was 'an integral part of the exercise of prosecutorial discretion.'[99] The VRR therefore formalised into a policy the approach taken by the CPS in *Killick*: it provides a mechanism whereby a review of whether the decision not to prosecute was wrong can be requested by the victim and may ultimately result in a prosecution. Until the implementation of this policy, the only options for victims were judicial review or to bring a private prosecution supplemented by simply being persistent in their complaint to the CPS in the hope that someone would look at the decision again.

Therefore, at a very superficial level the VRR does provide a potential remedy; it provides a new route that was not previously available. However, as set out above, it can only be used in a limited range of situations. If the decision does qualify for the scheme and the reviewer concludes that the original decision was *wrong*, there is the potential for a prosecution to follow. However, this is not automatic.

Firstly, if the original decision resulted in no evidence being offered at court, it would not be possible to re-commence criminal proceedings as the earlier dismissal of the charge would amount to an acquittal. If proceedings were subsequently recommenced on the same charge, the defendant would be able to plead *autrefois acquit*. Similarly, a prosecution would not be possible if the offence was time-barred. Therefore, in such

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[99] *Killick* (n 41) [57] (Thomas LJ)

a situation the outcome for the victim is limited to an acceptance that the original decision was wrong and potentially an apology.[100] The *Hayes* the Divisional Court took the view that such an outcome still amounted to an effective right of review and did not leave the victim without satisfaction.[101]

The guidance acknowledges that there is balance to be struck between the rights of the victim and the rights of the defendant, but on occasions it may be appropriate to bring proceedings despite an earlier indication to the defendant to the contrary.[102] Once the reviewer has concluded that the original decision under the Full Code Test was wrong, to bring a prosecution they also have to be satisfied that: 'for the maintenance of public confidence, the decision must be reversed.'[103] The 'maintenance of public confidence' test incorporated in the VRR is vague and no further details are given in the VRR guidance as how this will be assessed. Therefore, reference has to be made to the Code and the guidance on 'Reconsidering a Prosecution Decision' for further details of the test.[104]

The actual guidance specifically refers to section 10.2 of the Code for Crown Prosecutors and the VRR. It provides some guidance as to the assessment of whether a prosecution should be brought to maintain public confidence. The guidance states that, 'A careful balance must be struck between providing certainty to the public in our decision-making and not allowing wrong decisions to stand.'[105] The guidance sets out the different aspects which need to be 'weighed' which broadly falls into two categories, ensuring justice in individual cases and maintaining public confidence in prosecutorial decision-making. Therefore, this conflict is central to the decision whether to bring a prosecution and whether individual justice outweighs public confidence depends on the circumstances of the individual case. However, as the guidance says that it will only be in 'rare' cases that the decision will be overturned,

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[100] CPS, VRR (n 3) [47]
[101] *Hayes* (n 78) [54]
[102] CPS, VRR (n 3) [32]
[103] ibid [33]
[104] Crown Prosecution Service, 'Reconsidering a Prosecution Decision' <www.cps.gov.uk/legal/p_to_r/reconsidering_a_prosecution_decision/> accessed 3 October 2020
[105] ibid

it would appear that public confidence is prioritised over justice in individual cases. This perhaps suggests that decisions will only be overturned when the risk of reputational damage to the CPS is greater from not overturning the decision than from not doing so. The incorporation of the public confidence element to the VRR's decision-making process gives the impression that the scheme is not entirely concerned with the interests of victims, but at least partly focused on preserving the reputation of the CPS, and the criminal justice system more widely, in the eyes of the public. These tensions between the competing interests in the criminal prosecution of the victim, the defendant and the public interest will be considered fully in chapters seven and eight.

An important part of the analysis of the VRR as a remedy for aggrieved victims is therefore whether it is capable of achieving the outcome that they are seeking. By requesting a review, it seems likely that their ultimate aim is to persuade the CPS to instigate a prosecution. Essentially, a three-stage test is applied to cases that meet the qualifying criteria consisting of the standard Full Code Test together with the 'public confidence' element. If these are all met a prosecution will follow.

The CPS provides statistics on the number of reviewable decisions and the number of requests received.[106] From this data it has been possible to calculate the number of successful VRR requests annually and is presented in tabular form below.

[106] Crown Prosecution Service, 'Victims' Rights to Review Data' <www.cps.gov.uk/publication/victims-right-review-data> accessed 3 October 2020

Table 3: VRR requests and successful outcomes

(1) Year	(2) No of reviewable decisions	(3) Total VRR appeals received	(4) Upheld at Stage 1	(5) Upheld at Stage 2	(6) Total upheld	(7) % of appeals upheld out of reviewable decisions	(8) % VRR requests successful
2018-2019	94,727	1930	152	53	205	0.22	10.62
2017-2018	91,133	1956	136	42	178	0.2	9.1
2016-17	103,113	1988	122	15	137	0.13	6.89
2015-16	115,941	1809	123	65	188	0.16	10.39
2014-15	126,589	1674	137	73	210	0.17	12.54
2013-14	113,952	1186	114	48	162	0.14	13.66

The data shows that although only a relatively small number of requests are received each year, the number of requests is gradually rising despite a reducing overall case load. The percentage of requests that are successfully averages at around ten per cent with most of these being upheld at the local resolution stage.

The notes on the 2014-2015 data sheet suggest that where the appeals are categorised as upheld, this means that the decisions were found to be wrong *and* a prosecution was required to maintain confidence. A request under the Freedom of Information Act 2000 has provided further details of the 162 successful appeals between June 2013 and March 2014.[107] At the time of the FOI disclosure, out of the 162 decisions, 66

[107] CPS, FOI request Disclosure Reference 24/2014 <www.cps.gov.uk/freedom-information> accessed 15 July 2016

related to cases that were ongoing. 72 cases had been finalised in the CPS records, but 53 of those resulted in a conviction. Therefore, a significant number of successful VRR requests resulted in a conviction. Overall, the statistics shows that a reasonable number of victims do engage the scheme and it can successful for a proportion of them.

3.4.1 Challenges by the defendant

Another factor affecting whether the VRR is capable of providing a useful remedy for the victim is whether the prospective defendant will be able to successfully challenge the VRR decision. In *S v CPS* the defendant applied for judicial review of a VRR decision to prosecute him after he had been notified that no further action would be taken against him in respect of a rape allegation.[108] It was argued that the CPS conclusion that the earlier decision not to charge was wrong was *Wednesbury* unreasonable and that the CPS should have to prove beyond reasonable doubt that the original decisions was either wrong in law or *Wednesbury* unreasonable.[109] This argument as to what test should be applied was rejected by the court which stated: 'the Guidance is a lawful policy, faithfully reflecting the Directive and the approach identified in *Killick*.'[110] Although judicial review of the decision was potentially available to the claimant, the court also found that the decision by the reviewer was not unreasonable.[111]

The claimant further argued that the decision was contrary to natural justice as he had not been allowed to make representations as part of the review process. The court also rejected this submission as the guidance only permitted the reviewer to consider the evidence that was available to the original decision-maker.[112] However, it may now be possible to argue this point further in view of the fact that the latest version of the VRR no longer imposes such a restriction on the reviewer.

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[108] [2015] EWHC 2868 (Admin), [2016] 1 WLR 804
[109] ibid [18]
[110] ibid [19]
[111] ibid [23]
[112] ibid [17]

Another argument put by the claimant was that the prosecution should have enquired as to whether the potential defendant had acted to his detriment before a charge was authorised. The court did not accept that this amounted to grounds for judicial review, although this point could be argued as part of an abuse of process argument.[113]

The case of *L v DPP* was also referred to.[114] This concerned an application for judicial review of a decision not to prosecute. The court emphasised the expectation that aggrieved victims use the VRR before considering judicial review, but then went on to state: 'if there has been a review in accordance with this procedure, then, it seems to me, that the prospect of success will, as I have said, be very small.' The court in *S v CPS* recognised that judicial review may be the only way of challenging an unsuccessful VRR request. However, in relation to a successful VRR which the defendant wishes to challenge the court stated that: 'the trial process provides the protection that the law affords to those charged with crime.'[115]

Therefore, the High Court has indicated that there is nothing inherently unlawful about the VRR guidance and was satisfied that it is consistent with the Directive and the *Killick* judgment. In light of this judgment, it is going to be extremely difficult for the party that is being prosecuted following a VRR decision to overturn that decision by way of judicial review. If undue unfairness has been caused, perhaps by him acting to his detriment in relying on the indication that he would not be prosecuted, that will be a matter which should be challenged through the trial process. The impact of rights of review on the rights of defendants will be examined in more detail in chapter eight.

The finality of a VRR decision is also demonstrated by *R (Ram) v CPS* where the claimant applied for judicial review of a VRR which had upheld the decision to discontinue a private prosecution brought by the claimant.[116] The claimant had brought a private prosecution against his former partner for perverting the course of

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[113] ibid [28]
[114] [2013] EWHC 1752 (Admin)
[115] *S* (n 108) [28]
[116] [2016] EWHC 1426 (Admin)

justice after he was unsuccessfully prosecuted for harassing her. The VRR reviewer had been satisfied that the evidential limb was met, but concluded that the public interest limb was not. The claimant put four grounds forward. The first concerned whether the reviewer had properly applied the Code for Crown Prosecutors. The second whether the reviewer had properly applied the relevant CPS offence specific guidance. The third ground was whether the public interest ground was properly applied. The final ground was whether the decision was irrational. The Divisional Court rejected all four grounds.

However, this case demonstrates how the issue of whether there are grounds for a successful judicial review still has to be decided on a case-by-case basis. It is not inevitable that the court would refuse an application for judicial review of a VRR decision: it very much depends, as always, on the substance and quality of the decision that the reviewer has made. The claimant had argued that the reviewed had placed too much wait on the status of the claimant's wife as a victim. The court response emphasised the importance attached to the role of the prosecutor:

'In my judgment that submission really demonstrates that this is an area, once one considers matters such as weight to be given to evidence, where it is entirely within the discretion of the particular prosecutor what conclusion is reached, provided that the correct test are applied. That is precisely the sort of situation in which one reasonable prosecutor might reach one conclusion, whereas another might reach another conclusion, but that is not a basis for this court intervening or in any way impugning the decision.'[117]

Therefore, there is a possibility of a VRR decision not being a final outcome. It could be subject to judicial review proceedings. This could be a challenge by the prospective defendant of the decision to prosecute him or by the victim following an unsuccessful VRR. Although the courts' stance to date demonstrates a reluctance to intervene in prosecutorial discretion exercised under the scheme, that does hinge on the decision

[117] ibid [31]

being made in a procedurally fair way and being capable of being justified if the reasonableness of the decision is challenged.

3.5 Conclusions

The VRR was introduced to fill a gap in the CPS procedural framework identified by the Court of Appeal in *Killick.* It also provides a review mechanism to meet the requirements of Article 11 that had to be implemented by Member States by 16 November 2016.[118] Superficially, it would appear that the initiative could only improve victims' rights and their ability to challenge prosecutorial decisions effectively. The VRR provides a free and simple procedure for victims to request reviews of decisions that does not require them to articulate the reasons for their dissatisfaction with the decision or put forward arguments why the case should be prosecuted. However, on closer analysis, the VRR is not quite as valuable as it would first appear. The analysis of accessibility has shown that although the mechanism is simple to use, it is only available in very limited situations; there are many circumstances where a victim may legitimately wish to challenge a prosecutorial decision and the VRR would not be available to them. The analysis of the restrictive qualifying criteria demonstrates that the scheme is only really of value when no prosecution has been brought. If other charges or suspects have been prosecuted, the mechanism is unlikely to be available. It is clear that both the CPS and the courts have resisted a more general right of review.

This does not mean that the VRR is of no value as if the case meets the criteria, the VRR does provide a way for victims to hold prosecutors to account for their decisions. The victim is a catalyst for triggering a re-review of the original decision. However, the victim does not get the opportunity to participate to any great extent either by entering into a dialogue on the case or by being involved in the review process; indeed, the scheme actively discourages such involvement. Victims would benefit from

[118] Victims' Directive (n 85) Art 27.

greater clarity about whether they are entitled to make representations and the extent to which they will be taken into account.

Potentially the VRR provides a form of accountability albeit of an internal, administrative nature rather than through the more formal, external legal mechanism of judicial review proceedings. A sense of hierarchy does exist in that decisions are reviewed by a specialist unit or Chief Crown Prosecutor level. However, the VRR arguably provides a more private, opaque form of accountability in that the reasons behind the decision are not fully interrogated and the victim does not get the opportunity to enter into a dialogue with the CPS regarding the decision. The most the scheme does, therefore, is to provide a checking mechanism that may identify, and possibly remedy, some erroneous decisions. This is made clear by the first stage of the test that is applied under the guidance: whether the original decision was wrong.

Although there is some evidence that the VRR is being successfully invoked by victims, it would perhaps have a greater sense of legitimacy if an independent element were incorporated. The review is conducted by the same body that made the initial decision, behind closed doors. The fact that the review is conducted by a different department or individual may be of little reassurance to the aggrieved victim. A third, more independent, tier to the process could improve the VRR as a robust review system that could be done in a way which avoids undermining the separation of powers. This is particularly important when there is the clear expectation from the courts that the aggrieved victim uses the VRR rather than apply for judicial review. The next chapter will examine judicial review as a mechanism for challenging decisions not to prosecute.

Chapter 4 - An Evaluation of Judicial Review as a method of challenging decisions not to prosecute.

4.1 Introduction

This chapter will build on the previous VRR chapters by introducing judicial review as an alternative way in which victims can challenge decisions not to prosecute. Judicial review is the traditional method of challenging decisions not to prosecute and has increased in importance for victims of crime in recent years. However, this has been curtailed to some extent by the advent of the VRR. The first section of this chapter will provide an overview of judicial review in the context of decisions not to prosecute both in relation to the traditional grounds of judicial review and under the Human Rights Act 1998. The discussion of the traditional grounds will also show the importance and impact of prosecution policies on judicial review including the VRR guidance. The second section will then evaluate the usefulness of judicial review against the same criteria used in the previous chapter of accessibility, participation, accountability and outcomes.

This evaluation will show that judicial review is an accountability mechanism that does have the potential to compel the prosecutor to reconsider their decision. However, in order to reach this point the claimant has to negotiate a complex and legalistic procedural framework and put their case to a court which takes a restrictive approach to such applications. Although judicial review does allow victims high levels of participation, a satisfactory outcome is not assured and even if the court is satisfied that the original decision was unlawful, the court is likely to simply quash the decision remitting the matter back to the CPS for further consideration.

4.2 The development of judicial review of decisions not to prosecute

An application for judicial review is the traditional route for challenging the decision of a public body or decision maker and is not unique to public prosecutors. If the source of the body's power is statutory, the body is likely to be susceptible to judicial review. The source of the power is not the only factor and it has been established that if the 'body in question is exercising public law functions, or if the exercise of its functions have public law consequences' that may be sufficient to make its decisions susceptible to judicial review.[1] The Crown Prosecution Service is a statutory body created by the Prosecution of Offences Act 1985. As the CPS is concerned with the exercise of discretionary power conferred by statute to prosecute criminal cases on behalf of the state, it is inconceivable that anyone would argue that it could not, in principle, be amenable to judicial review.[2] Indeed, as discussed below, there are a series of authorities that a decision not to prosecute can be subject to judicial review proceedings. The application for judicial review is therefore more likely to be defended, and potentially refused, on the basis that the applicant does not have sufficient grounds or that the decision should be challenged by an alternative mechanism, such as the VRR. Judicial review is a remedy of last resort and as such there is an expectation that the applicant has exhausted alternative remedies before commencing court proceedings.[3]

The discussion which follows on grounds of judicial review in relation to decisions not to prosecute will show that the courts have adopted a restrictive stance to such applications both before and after the implementation of the VRR. Judicial review has developed as an accountability mechanism for exceptional cases rather than as a routine course of action for challenging decisions not to prosecute. This restrictive approach will be discussed further in the second section of this chapter where judicial review is evaluated against the criterion of accessibility.

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[1] *R v City Panel on Takeovers and Mergers ex parte Datafin plc* [1987] QB 815, 847
[2] Prosecution of Offences Act 1985, s 3.
[3] Civil Procedure Rules, Pre-Action Protocol for Judicial Review, para 9.

4.2.1 Judicial Review: The Traditional Grounds

In the 'GCHQ' case Lord Diplock described the grounds of judicial review under three heads: illegality, irrationality and procedural impropriety.[4] As judicial review develops on a case by case basis, these grounds are not static and may expand or develop in the future. As set out below, there is now an additional ground of infringement of human rights including proportionality as an emerging head of review.[5] These broad headings are a convenient way of categorising the different types of grounds for judicial review. Illegality essentially concerns the correct interpretation and application of a decision-making power. Irrationality describes what has become known as '*Wednesbury* unreasonableness'[6] – described in *ex parte Smith* as taking a decision 'beyond the range of reasonable responses'[7] - with procedural impropriety relating to compliance with what were once known as the rules of natural justice, but which we now tend to think of as 'procedural fairness' and rules against bias. These broad grounds are relevant to judicial review of decisions not to prosecute although the courts have set out specific potential grounds that are particularly relevant to challenges to prosecutorial discretion.

Judicial review was used to challenge decisions not to prosecute since before the creation of the CPS when the police were the primary prosecutors. One of these earlier cases, which provides a useful starting point chronologically, is *R v Commissioner of Police of the Metropolis ex parte Blackburn*.[8] The applicant sought judicial review of the respondent's policy of not enforcing the provisions of the Betting, Gaming and Lotteries Act 1963. Although the court did not make an order against the Commissioner as by the time of the hearing he had revoked the policy, this case is significant as it marked the beginning of the courts being receptive to applications to intervene in decisions not to prosecute. Lord Denning MR stated that 'there are some

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[4] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411
[5] *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591
[6] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
[7] *R v Ministry of Defence ex parte Smith* [1996] QB 517, 554
[8] [1968] 2 QB 118

policy decisions with which, I think, the courts in a case can, if necessary, interfere' giving the example of a chief constable directing that no one would be prosecuted for theft of goods of less than £100 on that basis that 'he would be failing in his duty to enforce the law.'[9]

Subsequent judicial review proceedings brought by Mr Blackburn in relation to the Commissioner of Police's failure to prosecute under the Obscene Publications Act 1959 also failed on the basis that the Court of Appeal did not accept that it was a proper case for the court to interfere with the discretion of the police.[10]

As the *Blackburn* cases pre-dated the creation of the CPS, the cases concerned judicial review of police policy decisions and although unsuccessful did confirm that such decisions could potentially be subject to judicial review. Subsequently the courts had to determine whether decisions of the CPS should be amenable to judicial review. This issue was considered in *R v Chief Constable of Kent and CPS ex parte L* which concerned applications for judicial review of CPS decisions not to discontinue prosecutions against two youths who had been charged by the police.[11] The court concluded that as ultimately it was a CPS decision as to whether the case proceeded, the CPS was the prosecuting body who should be subject to judicial review with Watkins LJ stating: 'if judicial review lies in relation to the current criminal proceedings… it lies against the body which has the last and decisive word, the CPS.'[12] The role of the police was reduced at that time to initiators of criminal proceedings in that they had the power to charge suspects without reference to the CPS, but beyond that point it was within the discretion of the CPS as to whether the case continued or was discontinued. The court held that the decision of the CPS could be susceptible to judicial review where the decision related to a youth and was in contravention of settled policy. However, both applications were refused on the basis that the discretion had been properly exercised.

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[9] ibid 136.
[10] *R v Commissioner of Police of the Metropolis ex parte Blackburn (Albert Raymond) (Order of Mandamus)* [1973] QB 241
[11] (1991) 93 Cr App R 416
[12] ibid 425.

The Divisional Court considered the susceptibility of the CPS to judicial review specifically in relation to decisions not to prosecute in the seminal case of *R v DPP ex parte C*.[13] This was an application for judicial review of the DPP's decision not to prosecute the applicant's husband for an offence of buggery under section 12 of the Sexual Offences Act 1956. The court held that the decision of the DPP was unreasonable in that it failed to properly consider all possible offences and lines of defence. As a result, he had not properly applied the evidential sufficiency stage of the Code for Crown Prosecutors. The decision was set aside and then remitted back to the DPP for further consideration.

Kennedy LJ confirmed that the power to judicially review decisions not to prosecute should be used 'sparingly.'[14] This case is significant because the judgment then sets out the three circumstances when the court could review a decision not to prosecute: Firstly, because of some unlawful policy; secondly, failing to act in accordance with the Code or settled policy; thirdly, the decision was *Wednesbury* unreasonable.[15] Although not specifically mentioned, presumably it would also be possible to argue the decision was unlawful as a result of a procedural impropriety such as bias. The effect of this judgment was to clearly establish the approach of the High Court to intervening in prosecutorial discretion: the court would be unlikely to entertain an application unless it fell within the three categories. This case remains influential and was cited in the more recent cases of *L v DPP*[16] and *R (S) v CPS*.[17]

The decision not to prosecute following a death in prison custody whilst the deceased was being restrained was quashed by the court in *Manning*.[18] The decision not to prosecute was challenged on the grounds that it was irrational in light of the evidence and the inquest jury's verdict of unlawful killing; that the CPS had failed to properly apply the Code; and that the DPP was under a duty to give reasons – particularly as a

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[13] [1995] 1 Cr App R 136
[14] ibid [139]-[140]
[15] ibid [141]
[16] [2013] EWHC 1752 (Admin)
[17] [2015] EWHC 2868 (Admin), [2016] 1 WLR 804
[18] *R v DPP ex parte Manning* [2001] QB 330

result of the right to life under Article 2 of the ECHR. The court held that the review was not 'an objective appraisal' of the prospect of success and the prosecutor applied 'a higher test than that laid down in the Code.'[19] This underlines the centrality of the Code test: the decision is liable to be quashed if the evidential and public interest stages of the Code are not properly applied.

The correct application of prosecution policy including the Code is central to judicial review of decisions not to prosecute. If the prosecutor has properly applied relevant prosecution policies and complied with the Code, the court is unlikely to interfere with the decision unless it can be shown that the decision was unreasonable. If a decision is *Wednesbury* unreasonable, it is likely that the Code or policies would not have been properly applied. The role of prosecution policies will be examined in more detail below.

An alternative ground for judicial review is to argue that the prosecutor made an error of law although this could be framed in terms that the evidential stage of the Code was not properly applied or that the decision was unreasonable. An example of a case involving an error of law is *R v DPP ex parte Jones* where the prosecutor had misunderstood the legal test that would be applied by the court basing his decision on a subjective test for gross negligence manslaughter rather than an objective one.[20] As a result, Buxton LJ concluded that the relevant law had not been properly addressed by the prosecutor and quashed the decision not to prosecute.[21] In the more recent case of *R (Purvis) v DPP* the court held that the prosecutor had made an error of law by incorrectly applying the evidential stage of the Code; the prosecutor had incorrectly concluded that there was not sufficient evidence for a realistic prospect of conviction for perverting the course of justice.[22] The court also held that the decision was *Wednesbury* unreasonable in that the prosecutor had decided that it was not in the public interest on the facts of this case to prosecute a serving police officer when there was evidence that he had lied on oath. These cases highlight how an application based

[19] ibid [42]
[20] [2000] IRLR 373
[21] ibid [55]-[57]
[22] [2018] EWHC 1844 (Admin), [2018] 2 Cr App R 34

upon the grounds that the decision was wrong in law and incorrect application of the Code for Crown Prosecutors can potentially result in the decision being quashed. The Code is fundamental to the decision-making process and, together with relevant prosecution policies, is likely to shape the exercise of the prosecutor's discretion. Therefore, the importance of prosecution policies (including the Code) and their relevance to judicial review applications will be explored further after an examination of judicial review on human rights grounds.

4.2.2 Judicial Review: Human Rights Grounds

The Human Rights Act 1998 has expanded the traditional grounds of judicial review as an aggrieved victim may bring a claim for judicial review on the basis that their human rights have been breached. This is potentially relevant to review of decisions not to prosecute. Under the Human Rights Act 1998 public authorities are under an obligation to act compatibly with the European Convention on Human Rights (ECHR).[23] As the CPS is the public prosecutor, it is clearly a public authority for the purposes of the Act as its 'functions' are 'of a public nature.'[24]

Those who claim to have been subjected to an unlawful act can bring an application for judicial review on the grounds that their rights have been infringed provided they are the victim of the alleged breach.[25] It has been established in both the UK courts and in Strasbourg that to rely on Convention rights in legal proceedings the claimant must be directly affected by, or that they run the risk of being directly affected by, the unlawful act or decision.[26] This should not pose a problem for individuals challenging a decision not to prosecute, although generic campaigning organisations may be refused standing. Victim status is made out not because they are the victim of a criminal offence, but because they are victim of the State's failure to protect or make

[23] Human Rights Act 1998 (HRA 1998) s 6(1).
[24] ibid s 6(3)
[25] ibid s 7(3)
[26] *Lancashire County Council v Taylor* [2005] EWCA Civ 284, [2005] 1 WLR 2668, 2677; *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin), [2016] PTSR 405, 425.

good a breach of their human rights. One benefit of a human rights claim to victims is that the time limit is one year from the date of the act complained of.[27]

In terms of specific grounds, case law has established that particular Convention rights are especially relevant to decisions not to prosecute. The European Court of Human Rights has held that Members States are under a positive obligation to effectively and proactively investigate and prosecute crimes and a failure to do so might constitute a freestanding breach of Articles 2, 3 and 4 (and potentially Article 8), depending on the nature of the crime alleged. These positive obligations have been established by a series of cases from Strasbourg and the domestic courts. The first in the line of cases was *X and Y v Netherlands* in which the court held that the victim's Article 8 rights had been breached as a result of the Dutch criminal law not allowing the prosecution of a male who had sexually assaulted a sixteen-year-old who lacked capacity to make her own complaint. The court stated that, 'there may be positive obligations inherent in an effective respect for private and family life.'[28] This concept was developed further in the cases which followed.

Osman v UK involved a claim that the applicant's rights under Articles 2, 6 and 8 had been breached by the failure of the UK authorities to protect the applicant and his family from a stalker which ultimately resulted in the shooting of two family members (one of which was fatal).[29] The claim was essentially that the police had failed to take proper steps to protect him and his family and that the law did not provide a remedy in tort because case law had established that the police did not owe a duty of care to individual victims in such circumstances.[30] Although the court did not find breaches of Articles 2 and 8 on the facts of this case, the case did establish the principle that Member States were required to undertake an effective investigation into allegations that an individual's rights under Article 2 have been breached.[31] Although this case did not involve a claim against the public prosecutor, arguably the principle could

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[27] HRA 1998, s 7(5)
[28] (1985) 8 EHRR 235 [23]
[29] (2000) 29 EHRR 245
[30] *Hill v Chief Constable of West Yorkshire* [1989] AC 53
[31] *Osman v UK* (2000) 29 EHRR 245 [90]

include an obligation to prosecute individuals who had ended or put someone's life at risk. The courts have subsequently upheld judicial review applications on the basis that the failure to prosecute amounted to an infringement of the victim's Convention Rights.

One such case is *R (B) v DPP* which is significant in that the Administrative Court held that the decision to offer no evidence in relation to a serious assault because the prosecution had received a medical report which stated that the victim had a history of mental health problems was not only irrational, but also a breach of the victim's Article 3 rights.[32] The victim stated that he was humiliated by the decision not to prosecute and felt like a second-class citizen. The court concluded that to decide not to prosecute for such reasons would place vulnerable victims outside the protection of the criminal justice system and allow them to be assaulted without the risk of prosecution.[33]

In *MC v Bulgaria* the court held that the State had been in breach of both Articles 3 and 8 by having criminal law provisions which failed to effectively investigate and prosecute offences of rape.[34] This was a rape case in which the authorities discontinued the case because of a lack of evidence of active force by the victim. The court specifically referred to the requirement to effectively prosecute: 'States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.'[35] Challenges to the decision not to prosecute on human rights grounds are not limited to Articles 2 and 3 as the subsequent case of *Waxman* demonstrates.[36] This claim for judicial review of a decision not to prosecute two allegations of breach of Restraining Order was found to be an infringement of the claimant's rights under Article 8. The court stated: 'the state owed her [the claimant]

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[32] [2009] EWHC 106 (Admin)
[33] An example of a civil claim for damages for failing to prosecute where the court held that there had been no breach of Art 2 see: *NXB v CPS* [2015] EWHC 631 (QB)
[34] (2005) 40 EHRR 20
[35] ibid [153]
[36] *R (Waxman) v CPS* [2012] EWHC 133 (Admin)

a duty to take proper measures to protect her and was in breach of its duty in failing to pursue the prosecution.'[37]

The relationship between human rights and the decision to prosecute in England and Wales was recently considered by the European Court of Human Rights in *Da Silva v UK*.[38] The applicant was challenging the decision not to prosecute individual police officers in relation to the shooting of her cousin (Jean Charles de Menezes) in a suspected terrorist attack at Stockwell underground station in London. She argued that the UK was in breach of its positive obligations under Article 2 to conduct an effective investigation and prosecution when following an investigation by the IPCC, the CPS decided not to prosecute by applying the Full Code Test from the Code for Crown Prosecutors. The applicant challenged the lawfulness of the public prosecution system in England and Wales and argued that the failure to prosecute amounted to a breach of Article 2.[39] Specifically, she argued that the evidential test in England and Wales is too high and should include the hearing of oral evidence to assess the honesty and credibility of the witnesses.[40]

Although there have been occasions when the court has identified 'institutional deficiencies' in the prosecutorial system that could breach Article 2, the court was of the view that the decision could be made by a public official provided the process was independent and objective.[41] The court concluded that the setting of a threshold evidential test such as the one within the CPS code came within the margin of appreciation accorded to individual Member States.[42] Clearly different tests are in use in different jurisdictions with some states having the decision made by a judicial figure rather than a prosecutor. The court was ultimately of the view that there had been no breach of Article 2.[43]

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[37] ibid [24]
[38] (2016) 63 EHRR 12
[39] *Da Silva v UK* (2016) 63 EHRR 12 [191]
[40] ibid [196]-[197]
[41] ibid [261]-[262]
[42] ibid [267]
[43] ibid [288]

Overall, these cases highlight that the human rights ground is emerging as a way of challenging prosecutorial discretion.

4.2.3 The Significance of Prosecution Policies

As has been shown above, prosecution policies are central to the decision-making process and therefore are often central to an application for judicial review of a decision not to prosecute. This section will examine the role of prosecution policies generally before considering the impact of the VRR on challenging decisions not to prosecute by way of judicial review.

Two of the three grounds established in *ex parte C* relate to prosecution policies, namely either that the policy is unlawful per se or the decision maker has not acted in accordance with a settled policy.[44] Not acting in accordance with a policy could also lead to an argument that the decision was *Wednesbury* unreasonable. The case of *Purvis* is an example of the second and third grounds: the prosecutor had applied the Code to the facts of the case, but the court decided that it was unreasonable to conclude that a prosecution was not in the public interest on the facts of the case.[45] The remainder of applications are likely to be based on claims that either the law has been incorrectly applied to the case or that the decision is based on an incorrect assessment of the evidence. Even then it is likely that the grounds will be articulated in such a way to suggest that the prosecutor has not properly applied the evidential stage of the Code for Crown Prosecutors. Again, *Purvis* is a relevant example. The prosecutor had wrongly concluded that there was insufficient evidence to prosecute perverting the course of justice.

The Code is not the only relevant policy. In cases where there is a victim, there is also likely to be at least one relevant policy. There are, for example, prosecution policies on Domestic Abuse, Racist and Religious Hate Crime, Mentally Disordered Offenders and Rape. Historically, prosecution policies were not publicly available and there was

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[44] *R v DPP ex parte C* [1995] 1 Cr App R 136
[45] *R (Purvis) v DPP* [2018] EWHC 1844 (Admin)

concern that this could have an impact on proper accountability.[46] The majority of policies are now publicly available on the CPS website which will make it easier for potential claimant to identify the relevant policy and form a view whether it was appropriately applied in their case.[47]

The use of policies and guidelines to shape decision-making is not unique to the CPS and has been subjected to public law challenges in a range of contexts. The *British Oxygen Company v Board of Trade* case established that it is permissible to have a policy in place to guide discretion, but it must not be so rigid to preclude the consideration of individual cases that may justify departure from the policy.[48] To adopt such a policy would amount to a fettering of discretion. This point was argued in judicial review proceedings in the context of prosecutorial discretion in *R (Robson) v CPS* when a prosecutor refused to consider a conditional caution in a criminal damage case because the CPS guidance on adult conditional cautions appeared to preclude such a disposal in cases that came within the broad definition of domestic abuse.[49] The CPS conceded that the guidance was being operated as an inflexible rule. However, the court did not declare the policy as unlawful, but rather quashed the decision on the basis that the prosecutor had interpreted the guidance inflexibly and as not permitting exceptions.[50]

These cases illustrate how an inflexible policy or rule that does not allow the circumstances of individual cases to be taken into account can result in the decision being quashed. However, it is also possible for a challenge to be brought on the basis that a particular policy has not been properly complied with.[51] The doctrine of legitimate expectation may be used as grounds for judicial review when the decision

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[46] See Julia Fionda & Andrew Ashworth, 'The new code for Crown Prosecutors: Part 1: Prosecution, accountability and the public interest' Crim LR [1994] 894, 902

[47] Crown Prosecution Service, 'Prosecution guidance' <www.cps.gov.uk/prosecution-guidance> accessed on 12 December 2020

[48] [1971] AC 610

[49] [2016] EWHC 2191 (Admin), [2018] 4 WLR 27

[50] ibid [45]

[51] For a discussion of the potential conflict between the no fettering rule and legitimate expectation, see: Aileen McHarg, 'Administrative Discretion, Administrative Rule-Making, and Judicial Review' (2017) 70 CLP 267.

maker has failed to follow particular procedures in the decision-making process. This could be where a particular policy exists and there is an expectation that it will be followed.[52] Breach of legitimate expectation on the basis of departure from established policy should be distinguished from substantive legitimate expectation where the claimant has relied on a specific representation made by a public body.[53]

Failure to follow established policy was successfully argued in *R (Guest) v DPP* where a decision to issue a conditional caution was challenged the victim of a serious assault on the basis that the decision was contrary to the Code for Crown Prosecutors and the DPP's guidance on conditional cautions.[54] The court held that the decision was 'fundamentally flawed' as the both the evidential and public interest stages of the Code test were met and the severity of the alleged offence justified prosecution rather than disposal by way of a conditional caution.[55] To issue a conditional caution in respect of this offence was held to be contrary to the guidance in a number of respects: firstly, the guidance did not permit a conditional caution for such a serious offence, secondly, it was not a 'appropriate and proportionate response' and the victim was not involved in the decision making process.[56] Although the Supreme Court has ruled that equal treatment is not a separate head of review in domestic law, it did accept that it is part of the application of rationality.[57] Therefore, if a particular case is decided differently to similar cases there would be an argument that the decision was irrational.[58] However, decision-makers cannot be required to check every similar case before making a decision and the court has recognised that two different decisions on the same facts could still be reasonable.[59]

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[52] For example: *R v Secretary of State for the Home Department ex parte Khan* [1984] 1 WLR 1337
[53] *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213; Paul Craig and Soren Schonberg, 'Substantive Legitimate Expectations after Coughlan' [2000] PL 684.
[54] [2009] EWHC 594 (Admin), [2009] 2 Cr App R 26
[55] ibid [42]-[44]
[56] ibid [45]-[47]
[57] *R (Gallaher Group Ltd) v Competitions and Markets Authority* [2018] UKSC 25, [2019] AC 96, 115
[58] For a review of reasonableness, see: Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 CLP 131; Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2020) MLR (forthcoming)
[59] Hayley T Hooper, 'From Early Resolution to Conceptual Confusion: *R (on the Application of Gallaher Group Ltd) v The Competition and Markets Authority*' [2019] PL 460, 467.

Therefore, the application of prosecution policies arguably offer fertile ground for challenging a decision not to prosecute if it can be shown that either a policy was not properly applied when it should have been or that it has been applied so rigidly that account has not been taken of a potential exception to the general policy. Despite the plethora of different prosecution policies and guidelines, not all offences are covered by offence-specific policies. More often the policies are more generic and offer guidance in relation to specific types of crime such as Hate Crime, or guidance in dealing with particular offenders or victims. An example of a policy that has attracted a significant amount of academic discussion is the prosecution policy on assisted suicide.

This policy was as a result of the House of Lords decision in the 2010 case of *Purdy*.[60] Mrs Purdy claimed that the offence of Assisting Suicide under section 2(1) of the Suicide Act 1961 engaged Article 8 of the ECHR and that compliance with article 8(2) required an offence-specific policy from the DPP in order that she was able to make an informed decision as to whether her husband would be prosecuted for assisting her. She argued that the Code for Crown Prosecutors was too vague for this purpose. The House of Lords granted a mandatory order that DPP publish a policy setting out the factors that will be taken into account when assessing the public interest of prosecuting such a case. The academic discussion regarding this policy highlights some of the potential problems with prosecution policies which could be relevant to policies more generally.

Rogers has argued that publishing an offence-specific policy which suggests non-prosecution in certain circumstances offends against the rule of law as it could be seen to override the will of Parliament.[61] An application for judicial review could be made on the grounds that the decision was *Wednesbury* unreasonable as a result of an irrational conclusion based on the absence or presence of relevant factors.[62] Rogers argues that there may also be difficulties if the policy were amended: A defendant

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[60] *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345
[61] Jonathan Rogers, 'Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation' [2010] Crim LR 543, 554
[62] ibid 556

may make his decision based on one policy, but then the decision whether to prosecute decided on the basis of a different policy. Defendants could then potentially argue breach of legitimate expectation. Heywood identifies that there is a tension between certainty and discretion: certainty was what Mrs Purdy was seeking, but the risk is that the policy will rigidify prosecutorial discretion in future cases.[63] Nobles and Schiff have argued that the policy has virtually introduced a right not to be prosecuted.[64] Decision-making under the policy is, however, structured around the assessment of factors for and against prosecution and therefore does not provide an absolute guarantee that a prosecution would not be brought in specific cases. The difficulty is perhaps that the very nature of the offence in question may mean that a potential defendant takes a carefully considered approach weighing up the likelihood of prosecution on the basis of the factors identified in the policy. As a result, it is possible that a relatively accurate prediction as to the likely decision could be made in advance of the act taking place. It is of note, however, that this is a rare type of offending and so the concerns about this particular policy arguably are not applicable to other prosecution policies.

The aim of prosecution policies is to increase consistency of decision-making. However, they do need to be flexible enough to take into account cases that do not fit neatly within them. There are clear risks associated with them such as the tendency to apply them too rigidly potentially causing injustice. Alternatively, the prosecutor may be faced with an argument that the policy generated an expectation that an offence would be dealt with in a particular way and that the decision should be quashed. This discussion will now be developed specifically in relation to the VRR.

4.2.4 The Impact of the Victims' Right to Review

The VRR is a policy of particular relevance to applications for judicial review of decisions not to prosecute as it provides an alternative means for victims to challenge

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[63] Rob Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) 21 KLJ 425, 435
[64] Richard Nobles and David Schiff, 'Disobedience to Law – Debbie Purdy's Case' (2010) 73 MLR 295

prosecution decisions. As the VRR is specifically designed for victims to request a review of a decision not to prosecute, it should have the effect of reducing the number of applications for judicial review. In addition, this section will show that the courts have indicated that the existence of the VRR will reduce the likelihood of permission being granted.

As set out in chapter two, the CPS introduced the VRR following the case of *Killick* in which the Court of Appeal indicated that victims should have a means of requesting a review of decisions not to prosecute.[65] As a result, the CPS implemented the VRR scheme that applies to qualifying decisions made on or after 5 June 2013. It is clear from cases that have followed *Killick* that the courts have adopted an even more restrictive approach to applications for judicial review as a result.

An early indication of the approach to be taken by the court was given in the case of *L v DPP* that was decided in March 2013 shortly before the VRR was published.[66] Sir John Thomas said that even prior to the VRR grounds for judicial review would be 'very narrow' and referred to the three grounds set out in *R v DPP ex parte C* of unlawful policy, failing to act in accordance with a set policy, and unreasonableness.[67] He further stressed the importance of the 'constitutional position of the Crown Prosecution Service as an independent decision maker' and that the courts had adopted a 'very strict self denying ordinance.'[68] He then stated that when a review has been undertaken under the VRR, 'proceedings for judicial review to challenge the decision will be more difficult to advance' because 'the CPS will have independently reconsidered the position'.[69] The court emphasised that the VRR should be engaged before judicial review proceedings were commenced and that the courts should not entertain applications that had not gone through the VRR first.[70] A subsequent judicial review application would need to show how the VRR decision fell within one of three grounds set out in *ex parte C*. The court also raised the possibility of costs being

[65] [2011] EWCA Crim 1608; [2012] 1 Cr App R 10
[66] [2013] EWHC 1752 (Admin)
[67] ibid [4]
[68] ibid [7]
[69] ibid [10]
[70] ibid [12]

imposed against unsuccessful claimants where an inappropriate challenge had been brought.[71]

This approach has been followed in a number of cases that came before the courts after the VRR came into force. The cases discussed here are those which particularly illuminate the relationship between the VRR and judicial review. The judgment of *L v DPP* has been cited in subsequent judicial review cases which have post-dated the implementation of the VRR. For example, in *R (D) v DPP* after quoting Sir John Thomas's comments that the prospect of success in judicial review proceedings will be very small in light of the VRR, Gross LJ stated that the court will 'proceed with caution' as 'there will already have been a VRR scheme review and the decision not to prosecute is vested in the prosecutor not the Court.'[72] In *R (S) v CPS* the court outlined the approach to be taken to applications for review of VRR decisions.[73] This case concerned judicial review of a decision to prosecute an offence of rape following a VRR request. The court indicated that the potential grounds of challenge would be 'narrow.' In the absence of either an unlawful policy or failing to act in accordance with an established policy, the court would have to be satisfied that the reviewer had acted unreasonably. In *S* the court concluded that it had to decide whether the 'decision was one that was open to the reasonable prosecutor.'[74]

The difficulty in persuading the court that a decision was unreasonable is highlighted by *R (Oliver) v DPP*, a death in custody case where the claimant was challenging the CPS decision not to prosecute the custody sergeant for gross negligence manslaughter.[75] The initial decision not to prosecute had been confirmed through the VRR. Both CPS decisions were also supported by an opinion from leading counsel. In his judgment, Davis LJ specifically referred to the fact that the decision whether to prosecute had been considered by two specialist prosecutors and approved by two leading counsel.[76] Although this in itself would not prohibit the decision being

[71] ibid [18]
[72] *R (D) v DPP* [2017] EWHC 1768 [25]
[73] [2015] EWHC 2868 (Admin), [2016] 1 WLR 804
[74] ibid [19]
[75] [2016] EWHC 1771 (Admin)
[76] ibid [58]

quashed on review, the VRR process does potentially add weight to the initial decision not to prosecute when subsequent reviewers have reached the same conclusion. If the review decision agreed with the original decision and a number of prosecutors have been involved in the process, it is arguably going to be more difficult to satisfy the court that no reasonable prosecutor could have reached that decision. Similarly, in *John-Baptiste* there was a division of views on whether there was a realistic prospect of conviction the Divisional Court dismissed the claim for judicial review on the basis that both views were rational.[77]

It is clear, therefore, that the VRR will have a significant impact on the approach taken to applications for judicial review of decisions not to prosecute. Although essentially the same grounds exist as previously, the judicial approach appears to be that if cases have been reviewed under the VRR this should be sufficient and the courts should only interfere in exceptional circumstances. This will be explored further in relation to accessibility in the next section where the criteria will be applied to judicial review as a means of challenging prosecutorial decisions.

4.3 Application of the criteria

This section will develop the examination of judicial review as a method by which a victim can challenge a decision not to prosecute by evaluating it against the four criteria: accessibility, participation, accountability and outcomes. This will build the foundation for the thematic analysis of the three mechanisms of VRR, judicial review and private prosecutions in chapter six.

As in the previous chapter, participation will be measured against Edwards' model of participation and the assessment of accountability will use Bovens' work as a framework for evaluating the extent to which judicial review can hold prosecution decision makers to account. Outcomes will evaluate the extent to which judicial

[77] *R (John-Baptiste) v DPP* [2019] EWHC 1130 (Admin)

review is capable of bringing about a prosecution although it is accepted that this is not the outcome that every victim is seeking by challenging a decision not to prosecute.

4.3.1 Accessibility

This criterion will address the following question: **to what extent is judicial review appropriately accessible?** It will be argued here that judicial review is a largely inaccessible course of action for the majority of victims due to its complexity. Although it is a common law remedy, its procedure is regulated by legislation in the form of the Senior Courts Act 1981 and Part 54 of the Civil Procedure Rules. The Pre-Action Protocol for Judicial Review must also be complied with. As will be shown below, there are extensive procedural requirements that the victim would need to navigate in order to bring a claim and it is almost inevitable that a potential claimant would need legal advice.

Judicial review is a remedy of last resort and would not be an appropriate route where there was an alternative available. The Pre-Action Protocol states that it may only be used where 'there is no right of appeal or where all avenues of appeal have been exhausted.'[78] The protocol emphasises engagement with alternative dispute resolution that would include complaints mechanisms, mediation and other out of court settlements. Clearly, the Victims' Right to Review is the most relevant alternative and, as set out in the previous section of this chapter, the courts have an expectation that this is pursued before judicial review proceedings are brought.[79] The VRR is not available in all cases, but where the case is eligible under the scheme this would in reality be a barrier to judicial review. There are other expectations under the protocol such as the requirement to send a letter before claim that sets out the basis of the claim allowing the potential defendant the opportunity to respond and potentially resolve the matter without resorting to court proceedings.[80]

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[78] CPR, Pre-Action Protocol for Judicial Review para 2
[79] See for example: *L v DPP* [2013] EWHC 1752 (Admin) and *R (D) v DPP* [2017] EWHC 1768 (Admin)
[80] CPR, Pre-Action Protocol for Judicial Review paras 8-12

There are also onerous requirements associated with the process of issuing a claim which are contained within Part 54 of the CPR and the supplementary practice directions.[81] These include requirements to incorporate certain mandatory information including the legal basis of the claim and remedies sought together with a 'detailed statement of the claimant's grounds for bringing the claim' and written evidence in support.[82] This in itself makes judicial review inaccessible for many unrepresented victims; access is guarded by numerous procedural requirements that require expertise in the relevant law and procedure. If the victim successfully issues the claim, they would then have to obtain permission from a single judge in the Administrative Court for the claim to proceed.[83] At this stage, the claimant would need to persuade the judge that they had standing to bring the claim, it was brought in time and that they had an arguable case to proceed to a full hearing. The permission stage, therefore, filters out those claims that are deemed to be without merit, out of time or brought by someone who does not have sufficient interest in the decision.

In the majority of cases brought by victims, standing is not likely to be an issue. The legislation states that leave should only be granted if 'the applicant has sufficient interest in the matter to which the application relates.'[84] Most victims are going to be arguing that they have standing on the basis of their personal rights and interests in the matter, namely that they were the victim of the offence which the public prosecutor has decided not to prosecute.[85] Family members of deceased victims are also likely to be granted standing.[86]

The position is more complicated when it comes to individuals or groups beyond the conventional victim. Although there is not a rigid definition of who can be granted

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[81] CPR, Practice Directions 54A, 54C and 54D.
[82] CPR 54.6 and PD 54A 5.6-5.7
[83] Senior Courts Act 1981, s 31(3)
[84] ibid
[85] Cases such as *R v DPP ex parte C* [1995] 1 Cr App R 136 could be cited as an authority that a victim has standing.
[86] See for example: *R (John-Baptiste) v DPP* [2019] EWHC 1130 (Admin) and *R (Oliver) v DPP* [2016] EWHC 1771 (Admin)

standing in relation to applications based on the traditional grounds of judicial review, the more remote the applicant from the offence which the CPS declined to prosecute the less likely standing would be granted for judicial review. Wider constructions of victimhood such as indirect victims and unconventional direct victims, such as community victims, are less likely to be able to successfully bring proceedings. Unless they can demonstrate a connection with the decision, members of the community in which the alleged offence occurred are likely to be refused standing on the basis that they have no more interest in the case than anyone else.[87]

However, there are cases where standing has been granted to pressure and public interest groups. These could be groups that represent individual or groups of victims. If a group was supporting a particular victim, then standing should not be an issue. Standing may be granted on a similar basis to in *ex parte Greenpeace* in which the court granted permission to bring judicial proceedings to Greenpeace on the basis that they were a respected campaigning body with a significant number of supports in the UK and internationally and, most importantly, 2500 supported in the Cumbria area.[88] In *ex parte World Development Movement* standing was granted to challenge the decision to challenge the decision to provide funding for a power station in Malaysia.[89] In this case, one of the factors taken into account by the court was the absence of anyone else who could bring proceedings. If there are no other potential claimants, then the court may be more willing to grant standing.

Therefore, if an individual or group, other than a conventional victim, were to attempt judicial review of a decision not to prosecute, the court would be likely to take into account whether there is a more suitable claimant. An example of this is the 'black cab rapist' case in which the Mayor of London was refused standing to challenge the decision of the Parole Board on the basis that he was in 'no different position from

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[87] *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses* [1982] AC 617 and *R v Secretary of State for the Environment ex parte Rose Theatre Trust Company Ltd* [1990] 1 All ER 754. Although see also *R v Somerset County Council ex parte Dixon* [1998] Env LR 111 and *Walton v The Scottish Ministers* [2012] UKSC 44.
[88] *R v HM Inspectorate of Pollution ex parte Greenpeace (No 2)* [1994] 4 All ER 329
[89] *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386

any other politician, or indeed any member of the public.'[90] The court emphasised that the Secretary of State and the victims of the offences would be 'obviously better placed challengers.'[91] Therefore, if the victim was not engaged in the process and a pressure group, such as an anti-domestic abuse organisation, wished to challenge the decision not to prosecute, they may well be refused standing.

It is, therefore, not automatic that standing will be granted and although the courts are adopting a more flexible approach to standing, the courts are likely to look at the issue of standing in relation to the case as a whole and whether it represents a point of wider public interest. If the claim is based on human rights grounds, the application would need to be made by the victim of the decision as the 'applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of the act.'[92]

A further obstacle for victims is that applications need to be made in a timely manner. Applications must be made 'promptly' and 'in any event no later than 3 months after the grounds to make the claim first arose.'[93] Although the court has a discretion to extent the time limit, the courts have taken a restrictive approach to this and in the absence of good reason, leave is likely to be refused.[94] This requirement of timeliness restricts accessibility as an aggrieved victim may not appreciate the urgency of bringing the matter to court. The tight time limits create a pressure on the victim to decide what action to take without delay and then put it into action. The time limit could have a knock-on effect on the quality of the application that is made and therefore reduce the chances of permission being granted.

The third element considered at the permission stage is whether the applicant has an arguable case. Essentially this is an initial assessment of the grounds of review and the likelihood of success. The difficulty for the victim is that their disagreement with

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[90] *R (D and another) v Parole Board* [2018] EWHC 694 (Admin), [2019] QB 285, 321
[91] ibid
[92] HRA 1998, s 7(3)
[93] CPR 54 r 5(1)
[94] *R (Gerber) v Wiltshire Council* [2016] 1 WLR 2593

the decision not to prosecute needs to be recast into public law terms. Unlike the VRR, it is not sufficient to argue that the prosecutor's decision is wrong; the claim needs to be articulated in terms of established grounds of judicial review. As has been shown in section one above, the grounds are narrow and the courts have adopted a restrictive stance towards such applications over a period of time; this has narrowed further following the implementation of the VRR.

If the claim is to be based on the failure to apply a particular policy or the misapplication of the policy, this will be difficult to argue without detailed reasons as to how the decision was reached. Similarly, in relation to irrationality: without the detailed reasoning of the prosecutor, it would be more difficult to show that the prosecutor's decision is unreasonable. Although the CPS is under an obligation to give reasons for its decision to victims, the quality of the reasons given is variable.[95]

In the event that leave is granted at the permission stage, the claimant has to prepare for the substantive hearing. As well as a number of procedural requirements, such as providing paginated bundles and skeleton arguments, the claimant needs to be able to articulate his claim in oral argument. This requires more detailed submissions on the grounds than were set out at the permission stage. Without legal representation, this is likely to be a particular challenging part of the process. The victim is likely to be against an experienced and qualified opponent in an area of law where decisions are not easily predictable.

Whether the victim can be legally represented is likely to depend in many cases on the availability of public funding to finance the proceedings. Potentially civil Legal Aid is available for judicial review.[96] However, this is subject to a merits test: the Legal Aid Agency would have to be satisfied that the prospects of success are at least moderate.[97] This would rely on the assessment of the case by the legal practitioner who was to represent the applicant. There have been attempts recently to reduce the

[95] HM Crown Prosecution Service Inspectorate, 'Communicating with victims' (2016)
[96] Legal Aid, Sentencing and Punishment Act 2012, s 9 and sch 19(1)
[97] Civil Legal Aid (Merits Criteria) Regulations 2013, SI 2013/104

availability of public funding for judicial review claims by shifting the risk on to the legal representative that they may not be remunerated for work undertaken prior to the permission stage if leave was not granted. Although this was itself successfully challenged by judicial review, it does show an appetite on behalf of the government to reduce funding in this area and it will not be easy to overcome the strict financial and merits criteria.[98]

Notwithstanding the onerous requirements of judicial review, a number of applications for judicial review appear to be brought each year. A request under the Freedom of Information Act 2000 revealed that the CPS was party to 102 sets of proceedings in the Administrative Court in 2011-2012 (either as claimant, defendant or an interested party) peaking at 156 cases in 2014-15 and reducing down to 64 in 2017-18.[99] It is suggested that a significant proportion of these are likely to be challenges to decisions not to prosecute. It is also quite likely that the overall reduction in the number of cases is at least partly as a result of the availability of the VRR.

Therefore, judicial review is a relatively inaccessible way of challenging a decision not to prosecute. There are a number of procedural requirements as well as practical considerations which may mean that this is a less appealing option than the VRR.

4.3.2 Participation

The second criterion is that of participation; the question is addressed here is: **to what extent do victims have a meaningful participatory role?** Traditionally the victim has very limited participation rights in the criminal justice process. The highest points of participation are, however, the pre-trial and post-conviction stages with the victim being relegated to the role of a witness during the trial phase. This is largely as a result of the adversarial model on which the criminal justice system in England and Wales is based. This section will show that judicial review proceedings do accord

[98] *R (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin)
[99] Response from CPS Information Management Unit to request under the Freedom of Information Act 2000 reference 8488 (30 May 2019)

participation rights to victims although these rights take place outside the prosecution process.

The parties to the criminal prosecution are the State and the defendant; the victim is not a party although the victim's interests are accommodated in a number of specific ways such as having the opportunity to make a VPS or by participating in a restorative justice part of a sentence. Judicial review proceedings are the obverse of criminal proceedings: they are a public law action between the victim and the State. The suspect in the criminal proceedings becomes an interested party in the judicial review proceedings. Judicial review is not easy to locate in terms of the categorisation of the proceedings. There is case law that establishes judicial review proceedings are distinct from private law proceedings.[100] The issue is, therefore, whether judicial review of the decision not to prosecute is part of the prosecution process.

Whether judicial review is a criminal or civil matter was considered by the Supreme Court in *R* (*Belhaj) v DPP*.[101] The court decided that judicial review of a decision not to prosecute was a 'criminal cause or matter' for the purposes of section 6 of the Justice and Security Act 2013. This would determine whether or not the 'closed material procedure' could be used to prevent the disclosure of classified documents on which the decision not to prosecute was based. Lord Sumption JSC, in giving the majority judgment, referred to the 'extensive criminal jurisdiction by way of review' of the High Court and its 'supervisory jurisdiction over the criminal process.'[102] The majority was of the view that judicial review 'cannot be regarded as an inherently civil proceeding' and that 'it is an integral part of the criminal justice system.'[103] However, the dissenting judgment of Lord Lloyd-Jones JSC stated that judicial review proceedings 'are, at least, one remove from a criminal cause or matter and the court is performing the function of determining the legality of the conduct of the decision maker.[104]

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[100] *O'Reilly v Mackman* [1983] 2 AC 237 and *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624
[101] [2018] UKSC 33, [2018] 3 WLR 435
[102] ibid [16]
[103] ibid
[104] ibid [57]

From the perspective of an analysis of participation, it is perhaps possible to reconcile these judgments. Whether or not judicial review of a decision not to prosecute is a criminal or civil matter, the reality is that the judicial review proceedings are separate, or collateral, proceedings to the criminal prosecution of the suspect. However, they do accord the victim participation rights in relation to a key stage of the criminal process, namely the decision to prosecute. Judicial review allows the victim the opportunity to plead their case to the High Court in a way that they would not ordinarily be allowed to do either by making representations to the police or the CPS prior to a charging decision being made or as part of the VRR process. In the event that the application is successful, the court is likely to quash the decision and remit it back to the CPS for further review. In such circumstances, the victim's involvement will have been central to the course that the case has taken and prosecution again becomes a possibility. Without the victim's involvement, the case would have concluded.

Judicial review attributes party status to the victim for the determination of the issue before the court, namely the lawfulness of the decision not to prosecute. The nature of this participation is that it is intense and extensive. The victim, perhaps through his representatives, has to challenge the reasons behind the decision using established public law grounds. The previous discussion of accessibility highlighted the procedural and substantive complexities of bringing an action for judicial review and the high levels of involvement that are required of the party to successfully pursue such a claim.

The application of Edwards' model of participation to judicial review suggests a high level of participation akin to consultation in the non-dispositive category.[105] However, it is not an easy fit as the victim is going further than simply supplying their preference; they are attempting to enforce their view that the decision not to prosecute should not stand. One clear characteristic of this participation, however, is that it is transitory.

[105] Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 Brit J Criminol 967, 975.

The victim's party status remains until the High Court has determined the outcome of the judicial review proceedings and it then ceases with the victim returning to their previous non-party status with no long-term consequences in terms of their participation in any future prosecution.

Therefore, participation through judicial review is in excess of the level of participation ordinarily accorded to victims within the criminal justice process. But it is limited to the judicial review proceedings and ends abruptly once the issue before the High Court has been determined. This analysis will be developed further in the next section where the criterion of accountability will be considered.

4.3.3 Accountability

The third criterion is that of accountability. **To what extent is judicial review an effective mechanism for holding the public prosecutor to account?** This analysis will show that judicial review is a legal form of accountability mechanism which has a number of characteristics which indicate that it should be an effective method of holding prosecutors to account. However, in practice, case law suggests that applications for judicial review are rarely likely to succeed.

In an article published in 1994 after the release of the third edition of the Code for Crown Prosecutors, Fionda and Ashworth recognise that actions for judicial review could be a source of external accountability for the CPS.[106] Burton concludes that the *Manning* case brought hope that the courts would review individual decisions not to prosecute, but also comments: 'The level of accountability to the court for decisions not to prosecute is likely to remain low.'[107]

A closer examination using Bovens' characteristics does reveal that judicial review proceedings are a form of accountability mechanism. Firstly, the formal nature of the

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[106] Julia Fionda and Andrew Ashworth, 'The New Code for Crown Prosecutors: Part 1: Prosecution, Accountability and the Public Interest' [1994] Crim LR 894, 900.
[107] Mandy Burton, 'Reviewing Crown Prosecution Service Decisions Not to Prosecute' [2001] Crim LR 374, 383.

relationship between the CPS and the High Court is such that the court is in the position of dominance over the CPS and is ultimately the decision maker. As it has clearly been established in case law that the court has a power to judicially review decisions of the public prosecutor, the CPS is in the position that it has to explain and justify its conduct to the court. The CPS will submit evidence in the form of affidavits and the court would then have to decide whether or not it is persuaded by the justifications that have been put forward. Judicial review remains an adversarial rather than inquisitorial process so the conventional position is that it is actually the other party (the claimant) that will be challenging the decision of the CPS rather than the judge. They are doing so by virtue of the fact that they have brought the proceedings and by arguing through submissions that the decision was unlawful. However, in reality, the judiciary do challenge the representations of the defendant as part of the judicial review process by the questions that they put to the defendant. The court is then in a position to pass judgment and to determine whether or not the decision should be allowed to stand. This includes a power to impose a sanction, which in all likelihood is to quash the decision and remit it back to the CPS for further review.

As the forum is the High Court, judicial review is a form of legal accountability with a 'vertical' form of obligation between the CPS and the court. Judicial review clearly comes within Bovens' 'constitutional perspective' with the court providing a checking mechanism on the actions of the CPS as part of the executive. The legal and hierarchical nature of judicial review as a form of accountability mechanism means that the courts clearly do have sufficient powers to investigate the actions of the CPS as well as to be able to impose appropriate sanctions. The CPS would be under a legal obligation to comply with the judicial review process. Judicial review also provides an external and independent model of accountability which inherently has a level of dialogue between the parties. Judicial review proceedings bring an element of public scrutiny and accountability in that they are in open court and can be reported in both the media and the law reports.

Therefore, judicial review clearly does have the potential to hold the public prosecutor to account over a decision not to prosecute.[108] The High Court has the power to quash unlawful decisions compelling the CPS to reconsider their decision. However, it will only do so in a relatively narrow range of situations that limits its usefulness to the aggrieved victim. Arguably, therefore, the level of accountability offered by judicial review remains low. This is largely because of the very narrow circumstances in which a court will review a decision (as outlined in relation to accessibility) with relatively poor prospects of success often relying on the court finding that the decision was unreasonable. To bring about any degree of accountability, the claimant will need to establish that the decision was unlawful on public law grounds.

4.3.4 Outcomes

The likelihood of a meaningful outcome is an important criterion to consider when evaluating the usefulness of a particular course of action for victims. Therefore, the question addressed under this criterion is: **does judicial review provide meaningful and satisfactory outcomes for victims?** Victims who are challenging decisions not to prosecute by way of judicial review are likely to be seeking a prosecution. Therefore, this section will consider the extent to which judicial review could lead to a prosecution.

In general terms, if an application for judicial review is successful a number of remedies are potentially available to the court. Quashing Orders, Mandatory Orders and Prohibiting Orders have replaced the old prerogative orders of Certiorari, Mandamus and Prohibition.[109] The court can also make declarations and injunctions as well as order damages or restitution.[110] However, in applications for review of decisions not to prosecute or to terminate criminal proceedings, the course taken by the courts has been to quash the original decision and to remit the decision back to the public prosecution for reconsideration.

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[108] Such as in *R (Torpey) v DPP* [2019] EWHC 1804 (Admin)
[109] Senior Courts Act 1981, s 29
[110] ibid s 31

The CPS exercises statutory powers as the public prosecutor and is part of the executive branch of government. Although the courts will quash unlawful decisions, they will not go as far to substitute their own decision for that of the prosecutor. This distinction has been made in a number of the authorities.[111] For example, after quashing the decision not to prosecute in *Manning*, the court confirmed that the decision would not require a prosecution, but 'require reconsideration of the decision whether or not to prosecute.'[112] On a related point, the court has regularly emphasised that it is not the function of the court to decide who should be prosecuted and for what offence: 'The court should not, however, be drawn into examining the decision in the same way in which it might analyse a judicial decision against which it was considering an appeal on the merits.'[113]

In theory, the fact that the High Court has quashed the decision not to prosecute as unlawful should be a powerful incentive for the CPS to review the case again and reach a different decision. However, as the purpose of judicial review is to examine the lawfulness of the way in which the decision was made rather than the merits of the actual decision, it is quite possible that a subsequent review of the decision by the CPS after the original decision has been quashed may still result in the same outcome, but with the decision being made in a lawful and procedurally fair way. The rationale for the first decision may have been flawed, but following further analysis after the judicial review proceedings the conclusion may ultimately still be that the case does not meet either the evidential stage or the public interest stage of the Code for Crown Prosecutors.

The *Treadaway* case is a useful illustration of how difficult it can be to get a decision not to prosecute overturned.[114] Treadaway was convicted of robbery and conspiracy to rob in 1983. In 1994 he successfully brought a civil claim against the police for

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[111] *R (Robson) v CPS* [2016] EWHC 2191 (Admin), [2018] 4 WLR 27 and *R (Torpey) v DPP* [2019] EWHC 1804 (Admin)
[112] [2001] QB 330, 350
[113] *R (F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581 [584]
[114] *R v DPP ex parte Treadaway* (QBD, 31 July 1997)

assault on the basis that he was tortured whilst in custody. The Court of Appeal quashed his conviction as unsafe in November 1996 on the basis of the judgment of McKinnon J in the civil proceedings. The DPP decided that there was not a realistic prospect of conviction in respect of the police officers both after the High Court judgment and after the Court of Appeal quashed the conviction. Treadaway applied for judicial review of the decision not to prosecute on the basis that the Code for Crown Prosecutors had been breached and that the decision was perverse. Essentially the applicant argued that the prosecutor had not taken sufficient account of the judgment of McKinnon J in the civil claim in which he heard evidence from both sides and determined that the police had assaulted Treadaway. In his judgment, Rose LJ commented that although the decision of the High Court judge in the civil proceedings was not binding on the DPP, it required 'a most careful analysis if a decision not to prosecute was to be made.'[115] The court concluded that it did not receive such an analysis and therefore quashed the decision not to prosecute and remitted the decision back to the DPP for reconsideration.

Therefore, despite the fact that the applicant had been awarded damages in the linked civil case and his conviction had been quashed as unsafe, the most that the court would do on judicial review was to quash the decision not to prosecute and to remit the case back to the DPP. Although the judgment of Rose LJ does essentially demand a robust analysis of the decision in the civil case when deciding whether there is sufficient evidence to prosecute, it cannot guarantee that such a prosecution would be brought. Where there is a civil judgment such as this in the claimant's favour, however, it must be a highly compelling factor when deciding whether to prosecute. Burton refers to the *Treadaway* case commenting that it will be easier to bring a challenge on the basis of an incorrect application of the evidential test when a tribunal has previously considered the evidence.[116]

The cases consistently demonstrate that the Administrative Court will only sparingly use its powers to quash decisions not to prosecute. When they do so, the judges are

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[115] ibid 6
[116] Burton (n 107) 380

deferential to the fact that Parliament has delegated the power to exercise prosecutorial discretion to the DPP and that they should not substitute their own decision for that of the prosecutor. The most that the victim can realistically hope for is that the decision is quashed and remitted back to the CPS for further review with trenchant criticism of the original decision that may inform the future decision.

It could be argued, however, that some grounds border on a review of the substance of the decision rather than being limited to the procedural regularity of the decision. If the victim has persuaded the court that the original decision was irrational, for example, it is arguably going to be more difficult for the prosecutor to reach the same decision on re-review without unless he is able to reach the decision in a way that could not be construed as unreasonable. If a central tenet of irrationality was that the prosecutor did not place sufficient weight on a particular piece of evidence or the like and this omission is not repeated on review, then it may be that the prosecutor could achieve the same outcome without being at risk of a further adverse outcome from the High Court. Similarly, if the proceedings were brought on the grounds that the victim's human rights had been breached, depending on the precise nature of the claim it may be difficult to further justify a decision not to prosecute.

Therefore, even if the victim can successfully negotiate the procedural complexities of bringing an application for judicial review and can persuade the Administrative Court that the decision was unlawful in some way, it is only a partial remedy. Although the original decision not to prosecute is likely to be quashed it, it does not mean that a prosecution is inevitable. In their reconsideration of the decision, it is quite possible that the CPS will still decide not to prosecute.

4.4 Conclusions

The courts have consistently indicated that judicial review of decisions not to prosecute should be used sparingly and as a last resort.

The case of *R v DPP ex parte C* is a central case that defined the circumstances in which the courts can review the DPP's decision not to prosecute. This is limited to three situations: an unlawful policy, failing to act in accordance with a settled policy or a perverse decision. *Manning* clarified this further in that the decision not to prosecute must be based on an objective assessment of the evidence. The test applied by the courts is not whether the decision was correct, but whether it was reasonable. Prosecution policies are likely to be central to any such claim: whether the policy is unlawful per se and whether it was properly complied with. Applications are likely to be argued on the basis that the prosecutor has not properly considered or applied the publicly available policy. However, as the discussion of the policy on assisted suicide has highlighted, this is not an easy task. The policies tend to be widely drafted and subject to interpretation. The policies normally emphasise the importance of considering the individual circumstances of the case. Provided the individual decision-maker makes it clear that they are applying the relevant policy and justifies their decision by reference to the policy, it would be hard to challenge the decision.

Post *Killick*, with the implementation of the VRR, the courts are likely to adopt an even more restrictive approach with the deterrent of costs in favour of the CPS for inappropriate applications.[117] This is consistent with the general onus on settlement rather than litigation that pervades the judicial review framework. The victim would need to demonstrate that they attempted to resolve the matter without court proceedings in accordance with the pre-action protocol; the VRR is now likely to be viewed as the primary remedy that should be utilised before resorting to judicial review provided the decision qualifies under the scheme.

If an application were to proceed, the victim would have to negotiate the procedurally complex and legalistic requirements of such a claim. It many cases publicly funded legal representation may not be available. Therefore, the victim would have to be able to articulate their claim both orally and in writing that the decision was amenable to

[117] *Killick* (n 65)

judicial review on one of the tightly defined grounds. It is, therefore, not an easily accessible remedy.

However, if a claim is pursued it does afford the victim a high level of participation. It involves the victim engaging directly with the authorities and holding them publicly to account. The judicial review action becomes a contest between the victim and the State with the court as the forum to adjudicate the outcome. The defendant of the original or future prosecution is on the periphery as an interested party. This is very different to the conventional position of the criminal prosecution where the victim's role is limited to that of a witness. It is also more than a private law conflict between the victim and the defendant from the criminal proceedings. Judicial review is a public law action, which if successful, could result in the court imposing a sanction against the CPS. Although this is likely to be Quashing Order, it still has the potential to put pressure on the public prosecutor to review the decision and possibly bring a prosecution.

A central limitation of judicial review is that the courts have been very careful to ensure they do not usurp the role of the public prosecutor and will not substitute its own decision. At the point that the decision is quashed and remitted back to the CPS, the victim's participation is curtailed; they are returned to the limited role that they had prior to proceedings being issued.

The successful victim has, therefore, compelled a further reconsideration of the case, but cannot compel a positive outcome. It is still quite possible that the public prosecutor will conclude that a prosecution should not take place, albeit the reasons may be significantly different to the previous decision. Therefore, judicial review is an important remedy for victims. However, it is unlikely to be the remedy of first choice as it can be seen as convoluted, possibly impenetrable, with only low prospects of success which is qualified by the fact that it will not reverse the decision not to prosecute only force the prosecutor to conduct a further review of the case.

Chapter 5 - An evaluation of private prosecutions as a method of challenging decisions not to prosecute.

5.1 Introduction

This chapter will examine the right of victims to bring a private prosecution and evaluate its usefulness and value as a means of challenging a decision by a public prosecutor not to bring a prosecution. The first section of this chapter will provide an outline of the historic development of private prosecutions up to and beyond the enactment of the Prosecution of Offences Act 1985. Section two will then evaluate the value of the right to bring a private prosecution in view of the existence of a national prosecution organisation against the four criteria of accessibility, participation, accountability and outcomes.

This chapter will show that although the right of a citizen to commence a private prosecution remains, it is of minimal value to a victim of crime as a means of challenging the decision of the public prosecutor. It is not an accessible route for victims as it essentially requires them to prosecute the case themselves (either personally or through a legal representative) and there are a number of barriers that they would have to overcome to successfully prosecute. However, the most compelling reason why it is of limited value is because it can so easily be defeated by the decision of the public prosecutor to take over the prosecution and discontinue it. This has been reinforced by the decision of the Supreme Court in *R (Gujra) v Crown Prosecution Service.*[1] This decision has meant that the circumstances in which an aggrieved victim could bring a private prosecution are so narrow that the value of it as a remedy is negligible.

[1] [2012] UKSC 52, [2013] 1 AC 484

Although bringing a private prosecution does accord the victim high levels of participation in the proceedings, this would only be the case if the public prosecutor did not take over the prosecution to either conduct it himself or to discontinue it. Arguably, such high levels of involvement for a victim is inappropriate as it essentially allows the victim to control a criminal prosecution which could undermine the rights of the defendant. Potentially, an evidentially weak case could be taken to court by a private prosecutor causing needless anxiety and distress to the defendant to result ultimately in an acquittal.

The chapter will, therefore, conclude that the right of a private citizen to bring a private prosecution is of intrinsically limited value to victims of crime as a way of challenging decisions not to prosecute. Private prosecutions do not provide a coherent way of holding the public prosecutor to account because they are so easily overcome by the public prosecutor who can overrule the decision of the private prosecutor and terminate the case and because, in reality, they do not amount to an accountability mechanism.

5.2 The development of private prosecutions

Historically, private citizens brought all prosecutions. In the early nineteenth century there were no organised police forces covering England and Wales with policing developing in a fragmented way across urban and rural areas.[2] Therefore, it was the responsibility of the victim to bring a prosecution if he wished to do so. Although as a result of industrialisation during the eighteenth-century property owners grouped together into prosecution associations in response to growing levels of crime.[3] Police forces became more organised throughout the 1800s culminating in the County and Borough Police Act 1856 which required all counties to maintain an organised police

[2] David Bentley, English Criminal Justice in the Nineteenth Century (The Hambledon Press 1998) 4-7
[3] Mark Koyama, 'The Law & Economics of Private Prosecutions in Industrial Revolution England' (2014) 159 Public Choice 277

force. As a result, prosecutions gradually became conducted by the police, although this was by practice and convention rather than any legislative change.[4]

The office of Director of Public Prosecutions (DPP) was established by the Prosecution of Offences Act 1879. However, as Edwards identified, the DPP only conducted the prosecution in a minority of cases with majority being brought by police forces.[5] The DPP only accepted cases of 'importance or difficulty.'[6] The majority of prosecutions were therefore brought by the police until in 1962 the Royal Commission on the Police recommended that the practice of using police prosecutors ended and that all forces considered introducing prosecuting solicitors' departments.[7] A further Royal Commission in 1980 identified that prosecutions were either conducted by county prosecuting solicitors or private practitioners instructed by the police.

This Royal Commission was established to examine the investigation of offences and prosecution of offenders.[8] Part II reviewed the arrangements for the prosecution of criminal offences. The report stated that the arrangements: 'defy simple and unqualified description.'[9] The Commission noted the lack of uniformity across the country with a mixture of prosecuting solicitors departments and privately instructed solicitors conducting the prosecutions. The report also observed that the relationship between the Chief Constable and the prosecuting solicitor was one of client and solicitor.[10] The police were not obliged to seek legal advice from the prosecuting solicitor and even if they did so, they were not obliged to follow it. Ultimately, the decision whether to prosecute was one for the police and not the legal advisor.

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[4] Andrew Sanders, 'Prosecution Systems' in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (OUP 2002) 149
[5] J Edwards, *The Law Officers of the Crown* (Sweet & Maxwell 1964) 336. Edwards states that in 1960 the Director only prosecuted in 525 of 1,044,833 cases in the magistrates' courts and 1505 out of 30,591 cases in the Assizes and Quarter Sessions.
[6] ibid 370.
[7] HMSO, Royal Commission on the Police: Final Report (Cmnd 1728, 1962) [380]-[381]
[8] HMSO, Report of the Royal Commission on Criminal Procedure (Cmnd 8092-I and II, 1981)
[9] ibid [6.1]
[10] ibid [6.4]-[6.5]

The Commission noted that a high proportion of acquittals in the Crown Court were either ordered or directed by the judge without the case ever reaching the jury.[11] The statistics for 1978 indicated that 43 per cent of acquittals were because the prosecution were unable to adduce sufficient evidence for there to be a case to answer.[12]

The Commission recommended a 'statutorily based prosecution service.'[13] This would continue to be locally based and would conduct all criminal cases charged by the police. The Commission's vision was that the point of charge would be the dividing line of responsibility between the police and the prosecutor. The Commission also recognised that different evidential standards were applied across the country. The DPP's department had a higher test than many other prosecutors: whether or not there is a reasonable prospect of conviction. The Commission recommended that this test should be extended to all cases.[14] The combination of low evidential thresholds for prosecution and the fact that the decision whether to prosecute was made by the police, rather than a lawyer, could have been responsible for the high number of evidentially weak cases being prosecuted before the Crown Court.

The report noted that prosecutions brought by private citizens were rare and questioned whether the argument that the power to bring a private prosecution was a fundamental right of the citizen was justified.[15] The Commission recommended that private citizens should be required to apply to the Crown Prosecutor prior to bringing proceedings who would apply the same test as for public prosecutions. There would be a right a right of appeal to the magistrates' court against the decision of the Crown Prosecutor.[16]

However, the government established an interdepartmental working party which led to a government white paper that recommended that the Philips Commission's proposals on private prosecutions were not followed stating that there was 'no

[11] ibid [6.17]-[6.18]
[12] ibid [6.18]
[13] ibid [7.4]
[14] ibid [8.8]
[15] ibid [7.47]
[16] ibid [7.50]

sufficient justification' for limiting the right to bring a private prosecution and it was retained in the legislation that followed.[17]

The Prosecution of Offences 1985 established the CPS as the national public prosecuting body in England and Wales. Section 6 of the Act specifically preserved the right to bring a private prosecution subject to the power contained within section 6(2) to enable the DPP to take the prosecution over:

> (1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
> (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.

Although the CPS can use this power to take over and prosecute the case, it may also be exercised in combination with the power in section 23 of the Act to discontinue the prosecution. Therefore, a fundamental issue for the private prosecutor is the circumstances in which the CPS will seek to adopt the prosecution and potentially terminate it. As neither the legislation nor the Code for Crown Prosecutors specifies the circumstances when the CPS should consider taking over the prosecution or the criteria to be applied, reference needs to be made to the relevant prosecution policy.

As will be explained below, the policy changed significantly in 2009 when the test to be applied by the Crown Prosecutor would be the same test that is applied to public prosecutions. Prior to 2009, the test applied in relation to private prosecutions was substantially different to that applied in respect of proceedings brought by the CPS.

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[17] Home Office and Law Officers' Department, *An Independent Prosecution Service for England and Wales* (Cmnd 9074, 1983) [11]

R v DPP ex parte Duckenfield clearly sets out the pre-2009 position.[18] This case concerned the private prosecution of two police officers from the Hillsborough disaster. The claimants sought judicial review of the DPP's decision not to take over the prosecutions and discontinue them. The approach taken by the DPP at that time was set out in the judgment of Laws LJ: 'The C.P.S. will take over a private prosecution where there is a particular need for it do so on behalf of the public' namely '*there is clearly no case to answer'* as such a prosecution would 'be an abuse of the right to bring a prosecution' or '*the public interest factors tending against prosecution clearly outweigh those factors tending in favour'* as this would be *'clearly likely to damage the interests of justice'*.[19] In correspondence cited by Laws LJ the CPS indicated that it would apply a different evidential test in relation to private prosecutions and that a private prosecution could continue even though it would not pass the evidential stage of the Code for Crown Prosecutors.[20] Laws LJ was satisfied that the policy of applying the 'no case to answer' test to private prosecutions rather than the higher 'realistic prospect of conviction' test was lawful and indeed indicated that it would be inappropriate to apply the same test across all prosecutions as this would mean that 'the DPP would stop a private prosecution merely on the ground that the case is not one which he would himself proceed with' which 'would amount to an emasculation of section 6(1) and itself be an unlawful policy.'[21]

The issue of which test should be applied came to a head in 2009 when the DPP changed his policy to apply the same test for private prosecutions as was applied in public prosecutions.[22] This policy remains in force. In relation to taking over private prosecutions and discontinuing them, the current policy states: 'A private prosecution should be taken over and stopped if, upon review of the case papers, either the evidential sufficiency stage of the public interest stage of the Full Code Test is not met.'[23]

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[18] [2000] 1 WLR 55
[19] ibid 63.
[20] ibid 64.
[21] ibid 68.
[22] Crown Prosecution Service, 'Private Prosecutions' <www.cps.gov.uk/legal-guidance/private-prosecutions> accessed 13 December 2020
[23] ibid

Therefore, this change of policy has had a profound effect on the individual's right to bring a private prosecution. Whereas previously the CPS would only take over the prosecution and discontinue it on evidential grounds if there was not a case to answer, under the amended policy they would do so if the public prosecutor's assessment of the evidence was that there was not a realistic prospect of conviction. The 'no case to answer' test is applied by the courts at the close of the prosecution case and is based on *R v Galbraith*: the court has to be satisfied that there is a *prima facie* case, there must be sufficient evidence on which a properly directed jury could reasonably convict.[24] The 'realistic prospect of conviction' test is a higher test as this is based on the Crown Prosecutor's overall objective assessment of the evidence and includes any defences put forward and their likely impact on the trial.[25] The lawfulness of this policy subsequently came before the Supreme Court and the decision has become a considerable obstacle for private prosecutors.

The appellant in *Gujra* applied for judicial review of the decision of the DPP to take over and discontinue the private prosecution that he had brought against two men that he alleged had assaulted him.[26] The issue for the Supreme Court was whether the use of the 'realistic prospect of conviction' test under the 2009 policy was lawful and rational in view of the right to bring a private prosecution under section 6(1) of the Prosecutions of Offences Act 1985.[27]

The Supreme Court dismissed the appeal with Baroness Hale and Lord Mance JJSC dissenting. The appellant argued that the policy was unlawful as it undermined the right to commence a private prosecution that was specifically preserved by section 6(1). It was argued that the right of private prosecution was firmly established and of constitutional importance. The appellant's submission was that the correct test to be applied by the DPP was the 'no case to answer' test. The *obiter* comments in the judgment of Laws LJ in *Duckenfield* were relied upon in which stated that 'it would

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[24] [1981] 1 WLR 1039
[25] Crown Prosecution Service, *The Code for Crown Prosecutors* (CPS October 2018) [4.6]-[4.8]
[26] *Gujra* (n 1)
[27] *Gujra* (n 1) 485

not be right for the DPP to apply across the board the same tests' and to do so would 'amount to an emasculation of section 6(1) and itself would be an unlawful policy'.[28] Lord Wilson JSC gave the leading judgment and after outlining the facts of the case he tracked the history of private prosecutions noting that a power to take over a private prosecution was first conferred by section 2(3) of the Prosecution of Offences Act 1908 and that case law had established that this included a power to discontinue.[29] Lord Wilson was of the view that the realistic prospect of conviction test was much more relevant as it focuses on whether the prosecution is likely to result in a conviction rather than whether it is likely to survive a submission of no case to answer.[30] He gave four additional reasons in favour of the 2009 policy. Firstly, Parliament did not limit the discretion contained within section 6(2). Secondly, the object of the Prosecution of Offences Act 1985 reflected the Philips Commission's conclusion that there was a lack of consistency in prosecutions. Thirdly, prosecutions which lack a reasonable prospect of success draw inappropriately on the resources of the court. Fourthly, defendants would have a legitimate grievance if they were prosecuted for an offence which would not meet the evidential test of the public prosecutor.[31] Lord Wilson also observed that decisions not to prosecute are amenable to judicial review. He concluded that the policy was lawful and did not frustrate the policy and objects of section 6(1).

Lord Neuberger also observed that the power in section 6(2) is unfettered.[32] He also preferred the Full Code Test as to apply the same test to both private and public prosecutions would lend consistency which was the aim of the 1985 Act which was approved by the Philips Commission. Lord Neuberger also made the point that it is logical to have the same test for private and public prosecutions as there could be a situation where the DPP took over a private prosecution with a view to continuing it, but subsequently decided to terminate the proceedings by applying the Full Code Test. He also referred to other relevant factors that would apply to private as well as public

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[28] *Duckenfield* (n 18)
[29] *Gujra* (n 1) 492
[30] ibid 498
[31] ibid 499
[32] ibid 501

prosecutions such as unfairness to defendants, costs and confidence in the criminal justice system.[33]

Lord Kerr's analysis was that a discretionary power was conferred on the DPP by section 6(2) and it was permissible for him to implement a policy as to how that discretion would be exercised. The Act does not specify when that power should be exercised or the test to be applied. Parliamentary intention could therefore have been that the same test be applied across both public and private prosecutions.[34]

Lord Mance delivered the first dissenting judgment in which his view was that the DPP's policy 'exceeded his properly interpreted power' and undermined the right of private prosecution.[35] Lord Mance essentially submitted that the previous test had a sound historical and constitutional basis. He referred to the speeches of Lord Wilberforce and Lord Diplock in *Gouriet*, the provisions under the previous Prosecutions of Offences Acts, the views expressed to the Philips Commission by the then DPP and the judgment of Laws LJ in *Duckenfield.* He described private prosecutions as 'a type of democratic long-stop or safety valve.'[36] Although this clearly pre-dates the Victims' Right to Review scheme which now provides an alternative way of challenging decisions not to prosecute. Lord Mance agreed that the right of access to justice through section 6(1) is a constitutional principle which section 6(2) 'cannot have been intended to make ineffective or subvert.'[37] His view was essentially that the new policy reduced the value of private prosecutions to situations where the private prosecutor was allowed to continue by the CPS or as a way of stimulating the CPS into action and that it effectively imposed a consent requirement on all offences brought by a private prosecutor.

In the second dissenting judgment, Baroness Hale's opening remarks were that she did not accept that Parliament intended to allow the DPP to reduce the right of private

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[33] ibid 502
[34] ibid 507
[35] ibid 517
[36] ibid 515
[37] ibid 515

prosecution 'almost to vanishing point.'[38] Baroness Hale also analysed the differences between the two tests. In particular, she referred to *R (B) v DPP*[39] where the 'bookmaker's approach' to applying the evidential stage of the Full Code Test on the basis of probability of a conviction was criticised and a merits-based approach was suggested as more appropriate.[40]

In her judgment, Baroness Hale also referred to the possibility of a different prosecutor reaching a reasonable, but different, conclusion that there was a realistic prospect of conviction. She commented that the decision as to whether the case should continue is effectively left to chance as to which prosecutor reviews the case. In those circumstances, it is difficult to justify the case not being allowed to proceed. Baroness Hale also drew a parallel with judicial review on the grounds of challenging the reasonableness of the prosecutor's decision which she describes as 'not a good enough safeguard'.[41] Judicial review on this basis would only succeed if the decision was unreasonable in the *Wednesbury* sense and it is quite possible that the court would conclude that the decision not to proceed was just as reasonable as an alternative decision to allow the case to continue.

Despite the dissenting judgments, *Gujra* has established that the DPP's 2009 policy on private prosecutions is a lawful one. As discussed below in relation to accessibility, the case has potentially created an insurmountable barrier for many potential private prosecutions. It is possible that the DPP could change his policy: either reverting to the 'no case to answer' test or implementing a different test. However, such a decision could leave the DPP at risk of further judicial review proceedings if he were to adopt a policy which was inconsistent with the tests set out in the Code for Crown Prosecutors.

It also seems unlikely that the courts would be persuaded to distinguish *Gujra* if the issue was the lawfulness of the DPP's policy. Although potentially the Supreme Court

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[38] ibid 520
[39] [2009] 1 WLR 2072
[40] *Gujra* (n 1) 521
[41] ibid 522

could depart from its own decision, it is hard to anticipate a situation on the same point where the court would be prepared to reach a different decision.[42] Therefore, although on preliminary analysis, the value of private prosecutions as a remedy for victims of crime wishing to challenge decisions not to prosecution has diminished significantly since the change in CPS policy, private prosecutions do arguably retain some value in other circumstances. There is growing support for the use of private prosecutions by commercial and regulatory organisations to combat complex fraud or intellectual property matters.[43] These cases are not mainstream criminal cases and perhaps benefit from the expertise of specialist prosecutors rather than being channelled through the police and the CPS with more conventional prosecutions.[44] For some time, the RSPCA and other similar bodies have routinely used private prosecutions to bring criminal proceedings.[45]

In the next section of this chapter the value of private prosecutions to victims will be evaluated against the four criteria that were used to evaluate the VRR and judicial review.

5.3 Application of the criteria

The previous section has provided an overview of the legal landscape of the right of private prosecution. This section will evaluate private prosecutions as way for victims to challenge decisions not to prosecute against the criteria of accessibility, participation, accountability, and outcomes.

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[42] *Austin v Southwark London Borough Council* [2010] UKSC 28, [2010] 4 All ER 16

[43] Chris Lewis and others, 'Evaluating the Case for Greater Use of Private Prosecutions in England and Wales for Fraud Offences' (2014) 42 International Journal of Law, Crime and Justice 3

[44] Although the Justice Committee has recently heard evidence in relation to private prosecutions following the referral to the Court of Appeal by the CCRC of a number of private prosecutions brought by the Post Office: Justice Committee, *Oral evidence: Private Prosecutions: safeguards* (2020-21, HC 497)

[45] See for a more recent example: John Spencer, 'Professional Private Prosecutors and Trouble on the Trains' [2018] Archbold Review 4

This analysis will show that the right to bring a private prosecution now represents very little value for victims. Although it facilitates high-level participation, which is approaching control, within the criminal justice process for the victim with the potential for the defendant to be convicted, it is a largely inaccessible remedy. This inaccessibility flows from a number of factors, not least the DPP's policy on private prosecutions and the decision in *Gujra.* The effect of this is that it is ultimately highly unlikely to achieve a substantive favourable outcome for the victim or to hold the public prosecutor to account.

5.3.1 Accessibility

The concept of accessibility will be interpreted broadly showing that there are substantial barriers to bringing a successful private prosecution. The following question will be addressed: **to what extent are private prosecutions appropriately accessible?** The most fundamental obstacle is the power of the DPP to take over private prosecutions and apply the Full Code Test to them terminating them if the CPS decides that there is insufficient evidence or that a prosecution is not in the public interest. However, there are a number of other barriers including the consent requirements for certain offences, standing in the Crown Court and pragmatic issues such as lack of knowledge, expertise and the prospect of a costs order.

The impact of the decision in *Gujra* should not be underestimated.[46] The Supreme Court's endorsement of the DPP's post 2009 policy as lawful has severely restricted the value of the right of private prosecution preserved in section 6(1) of the Prosecution of Offences Act 1985. The previous position set out in *Duckenfield* meant that the public prosecutor was less likely to intervene in a private prosecution than under the current policy.[47] The fact that the DPP would not prosecute a particular case, did not necessarily mean that he would prevent a private prosecutor from doing so.

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[46] *Gujra* (n 1)
[47] *Duckenfield* (n 18)

However, the application of the evidential and public interest stages of the Full Code Test to private prosecutions essentially means that all prosecutions are measured against the same standard. In the majority of cases, a victim is only likely to consider bringing a private prosecution when the authorities have indicated that they are not bringing proceedings themselves or proceedings were commenced and subsequently terminated. In serious cases, such as murder, manslaughter, serious assaults and sexual offences, the decision not to bring proceedings is likely to have been made by the CPS. Therefore, if an aggrieved victim then launches a private prosecution that is subsequently brought to the attention of the CPS, the application of the Full Code Test in respect of the private prosecution is likely to reflect the decision not to bring proceedings made previously unless there has been some change in the evidence. This was demonstrated in *Campaign Against Antisemitism v DPP* when a private prosecution was brought in response to a decision of the CPS not to prosecute an individual under section 5 of the Public Order Act 1986.[48] The prosecution was subsequently taken over and discontinued by the CPS on the basis that it did not meet the evidential stage of the Full Code Test. The claimant's application for judicial review on the grounds that the CPS decision not to prosecute was irrational was also unsuccessful as the court concluded that the decision of the CPS that the prosecution was not likely to succeed was not unreasonable. This decision reinforces the difficulties in using private prosecutions as a means to challenge the discretion of the public prosecutor.

It was also held in *Thakrar* that although a decision to take over and discontinue a private prosecution is amenable to judicial review, the refusal of permission cannot be appealed to the Court of Appeal.[49] The court applied the decision in *Belhaj* that such a decision would be excluded under section 18 of the Senior Courts Act 1981 as a 'criminal court or matter.'[50] Therefore, the private prosecutor is limited to challenging the decision in the Divisional Court.

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[48] [2019] EWHC 9 (Admin)
[49] *R (Thakrar) v CPS* [2019] EWCA Civ 874, [2019] 1 WLR 5241
[50] *R (Belhaj) v DPP* [2018] UKSC 33, [2019] AC 593

It is possible for decisions to take no further action to be made by the police rather than the CPS either because a case did not meet the evidential threshold for referral to the CPS or because it is a less serious offence. In those circumstances, the first review by the CPS would be when the Full Code Test was being applied to the private prosecution. This is a situation where the right to bring a private prosecution may retain some value for the victim. Commencing a private prosecution would be a way of triggering the CPS into reviewing the evidence and potentially taking the case over and continuing it. As there is no right of appeal to the CPS of a police decision to take no further action, this would be a useful mechanism for instigating a review by the CPS. Although the victim could request a review under the individual police force's VRR scheme, this would still only result in a further review by the police and not referral to the CPS. A private prosecution following a police decision not to prosecute could compel the CPS to review the case with the possibility that they would take it over and prosecute it.

A further potential benefit of bringing a private prosecution is that it allows the victim to have the case reviewed at a higher level within the CPS hierarchy than an ordinary referral from the Police. The 2009 policy states that the reviewing lawyer's decision must be endorsed or ratified at Chief Crown Prosecutor (or Deputy Chief Crown Prosecutor or Head of Division level) and is overseen by the Special Crime and Counter Terrorism Division to ensure that the policy is complied with.[51] As a result, the case would potentially receive a more rigorous review in these circumstances due to the degree of scrutiny that the decision is likely to be subjected to. Arguably, it is a more difficult decision to terminate proceedings that have already been commenced than to advise that no further action should be taken on a case that has not yet been charged.

In addition to situations where the case does not meet the Full Code Test, the policy refers to circumstances 'which would be damaging to the interests of justice if the private prosecution was not discontinued.'[52] The examples given include private

[51] CPS, Private Prosecutions (n 22)
[52] ibid

prosecutions that would interfere with other prosecutions or investigations or situations where the prosecution is deemed vexatious. A further example in the policy is where the defendant has been issued with a simple or conditional caution in accordance with the appropriate guidelines or policy. This final example highlights a further complication which could raise a barrier to a private prosecution: The defendant has already received an alternative out-of-court disposal arising out of the same allegation. This issue is illustrated by *Jones v Whalley* where a private prosecution was initiated against the defendant when he had previously been issued with a simple caution by the Police for the same offence.[53]

The defendant successfully argued abuse of process in the magistrates' court and the proceedings were stayed. Mr Jones appealed the magistrates' court decision by way of case stated to the Divisional Court who allowed the appeal and remitted the matter back to the magistrates' court. However, the Divisional Court granted leave to appeal to the House of Lords. The House of Lords upheld the decision of the magistrates' court and stated that the appropriate course of action would be for the appellant to challenge the police decision to caution by way of judicial review before commencing a private prosecution. This was set out in the judgment of Lord Bingham: 'If Mr Jones had legal grounds for attacking the police decision to caution Mr Whalley, he could apply for judicial review to quash that decision. If successful, the slate would be clean… and Mr Jones would be free to prosecute.'[54] However, in *Lowden* the court limited this barrier to private prosecutions to situations the terms of the caution specifically stated that the offender would not face any criminal proceedings.[55]

The consequence of these decisions is that the private prosecution is an even more inaccessible remedy when the prospective defendant has been cautioned or conditionally cautioned for an offence arising out of the incident for which the victim wishes to prosecute when the caution specified that criminal proceedings will not be brought. Before he can bring a private prosecution, he needs to successfully bring a

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[53] [2006] UKHL 41, [2007] 1 AC 63
[54] ibid 72.
[55] *R (Lowden) v Gateshead Magistrates' Court* [2016] EWHC 3536 (Admin), [2017] 4 WLR 43

claim for judicial review to quash the original police decision. This means that two separate sets of proceedings are required and that if the judicial review is not successful, an attempted private prosecution is likely to fail either by the defendant arguing abuse of process or by the CPS taking over the proceedings and discontinuing them. If the judicial review proceedings were successful, it is not guaranteed that the public prosecutor would conclude that the Full Code Test was met and could adopt the proceedings and discontinue them after the time and expense of the judicial review proceedings had already been incurred. Leigh has argued that the logical extension of *Jones v Whalley* is that a private prosecutor would have to judicially review a public prosecutor's decision to discontinue a case before bringing proceedings himself.[56] In any event, if the CPS has previously discontinued the same case, it seems unlikely that they would subsequently conclude that the case met the Full Code Test and that the private prosecution should continue.

Consent requirements

A further barrier to bringing a private prosecution is that for a significant number of offences there is a requirement to obtain the consent of either the DPP or Attorney General.[57] The list of offences for which there is a statutory consent requirement is long and illogical: it was described by the Law Commission as 'haphazard' as the regime lacks clear principles and consistency.[58] The Law Commission recommended the consent provisions be retained for three categories of cases: those where a defendant's rights under the ECHR could be violated, those involving issues of national security or some other international element and those where there is a high risk of abuse by private prosecutions being permitted where the proceedings could cause irreparable harm to the defendant.[59] There are, however, a number of offences which an aggrieved victim may wish to bring a private prosecution for. Examples

[56] Leonard Leigh, 'Private Prosecutions and Diversionary Justice' [2007] Crim LR 289, 292
[57] The CPS legal guidance provides a list of relevant offences: Crown Prosecution Service, 'Consents to Prosecute' <www.cps.gov.uk/legal-guidance/consents-prosecute> accessed 13 December 2020
[58] Law Commission, *Consents to Prosecution* (Law Com No 255, 1998) [4.16]-[4.23]
[59] ibid [1.24]

include child abduction,[60] child neglect,[61] corporate manslaughter,[62] offences contrary to the Health and Safety at Work Act 1974 following industrial accidents[63] and theft of spousal property under the Theft Act 1968.[64]

Although these requirements make the procedure for commencing a private prosecution more onerous as consent would need to be obtained from the Attorney General or DPP (whichever the statute requires) prior to commencing proceedings, it could be argued that the 2009 policy potentially imposes a consent requirement on all private prosecutions as cases will only proceed if a Crown Prosecutor determines that they pass the Full Code Test provided that the defendant refers the private prosecution to the CPS for review. The 2009 policy states that if a private prosecution requiring DPP consent passes the Full Code Test it will be taken over by the CPS; if it fails, consent to prosecute will not be given.[65]

Bringing the prosecution

The private prosecutions policy also outlines the general position that a private prosecutor would not be entitled to access case material in the possession of the CPS.[66] The policy refers to *R v DPP ex parte Hallas* in which a mother sought judicial review of the DPP's refusal to disclose to her evidence in relation to a road traffic collision in which her son died on the basis that there was no right of access to such material.[67] The CPS legal guidance indicates that the material would be disclosed if it is in the interests of justice, but this is not likely if the case has been reviewed previously and did not pass the Full Code Test; a 'possible exception' is where the private prosecutor has additional evidence which combined with the CPS could mean there is sufficient evidence.[68]

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[60] Child Abduction Act 1984, s 5.
[61] Protection of Children Act 1978, s 1(3).
[62] Corporate Manslaughter and Corporate Homicide Act 2007, s 17.
[63] Health and Safety at Work Act 1974, s 38.
[64] Theft Act 1968, s 30(4).
[65] CPS, Private Prosecutions (n 22)
[66] ibid
[67] [1988] 87 Cr App R 340.
[68] CPS, Private Prosecutions (n 22)

Therefore, the private prosecutor is at a distinct disadvantage compared to the public prosecutor who does have access to all the material gathered during the police investigation. This would include the unused material retained in accordance with the Criminal Procedure and Investigations Act 1996 as well as the evidence. Although in a commercial context, *R v Zinga* illustrates how a private prosecutor may still need the investigative resources of the police and if these are not forthcoming, the private prosecutor will be disadvantaged.[69] In *Zinga*, Virgin Media brought a private prosecution and reached an agreement with the Metropolitan Police that they apply for a search warrant and arrest the defendant as well as conduct a financial investigation into his assets in order that Virgin could pursue confiscation proceedings under the Proceeds of Crime Act 2002 post-conviction.

If a victim wishes to bring a private prosecution, he needs to lay an information for a summons or warrant under section 1 of the Magistrates' Court Act 1980. This is not an automatic process and a formal application does have to be made which can result in a refusal as the court does have a gate-keeping role to play. The general principle is that the court should issue a summons, but there are authorities for not doing so where it would be vexatious or improper.[70]

The judgment of Silber J in *R (Charlson) v Guildford Magistrates' Court* sets out the principles that the magistrates' court should apply when considering such an application.[71] Firstly, the magistrates should not require special circumstances before they grant an application where the CPS has previously discontinued proceedings. Secondly, the court should consider a number of factors such as whether the offence is known to law, the essential ingredients are present, whether it is time-barred, whether the court has jurisdiction, whether any statutory consents to prosecute have been obtained and any other relevant facts.[72] The judge did not elaborate on what

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[69] [2014] EWCA Crim 52, [2014] 1 WLR 2228
[70] *R v (Belmarsh Magistrates' Court) ex parte Watts* [1999] 2 Cr App R 188 and *R v West London Metropolitan Stipendiary Magistrate ex parte Klahn* [1979] 1 WLR 933.
[71] [2006] EWHC 2318 (Admin), [2006] 1 WLR 3494
[72] ibid 3500.

could be considered as coming within the 'other relevant facts' category. Silber J did state that where the CPS are still proceeding the court should: 'in the absence of special circumstances be slow to issue a summons.'[73] This means that the court is unlikely to permit the victim to commence a private prosecution if the public prosecutor is already conducting one. It may well be that this would be for a lesser charge than that which the private prosecutor was seeking to issue proceedings for. The Administrative Court has quashed decisions to issue summonses for private prosecutions where there has been insufficient judicial consideration of whether the essential elements of the offence are present and whether or not the allegation is vexatious.[74] A high profile example is the attempted private prosecution of Boris Johnson for misconduct in public office where the Administrative Court quashed the decision of the District Judge to issue a summons on the basis that the decision not to find the prosecution vexatious was flawed having reviewed the social media activity of the private prosecutor which suggested that the prosecution was politically motivated.[75]

Similarly, the fact that the public prosecutor has decided not to prosecute a particular case may mean that the court refuses to issue a summons applied for by the private prosecutor. In *R (Kay) v Leeds Magistrates' Court* the court held that the private prosecutor and his legal representatives are under a duty to disclose information to enable the court to decide whether the application is vexatious, an abuse of process or improper.[76] This would include details of any allegations made to the police and other decisions made by the public prosecutor. This is also required by the Criminal Procedure Rules.[77] Therefore, if the police or the CPS have previously determined that no further action should be taken in respect of the allegation or a prosecution was terminated, it is quite possible that the court will refuse to issue a summons for a private prosecution.

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[73] ibid
[74] *R (DPP) v Sunderland Magistrates' Court* [2014] EWHC 613 (Admin)
[75] *R (Johnson) v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin)
[76] [2018] EWHC 1233 (Admin), [2018] 4 WLR 91 [22]
[77] Criminal Procedure Rules, r 7(2) (6)(b)(ii)

In the event that the court does accede to the application for a summons, unless the private prosecutor is legally represented, he will have to negotiate the procedural intricacies of the criminal justice system which has the potential to make the process inaccessible to the lay person. The private prosecutor will need to comply with the obligations imposed by the Criminal Procedural Rules and to make and respond to any applications for bad character, hearsay or special measures in the prescribed form within the required time limits as well as complying with any other directions set by the court including those relating to disclosure issues.

The private prosecutor has a duty to comply with both the statutory disclosure regime under the Criminal Procedure and Investigations Act 1996 and the common law duty of disclosure under *ex parte Lee.*[78] The prosecutor is required under section 3 of the Act to disclose to the defence any unused material which 'might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused.' The concept of unused material is not something that a lay person would likely be familiar with, but could have a huge impact on the trial if the obligations under the act were not complied with. It is quite possible that the victim may have material in their possession that they are not relying on as part of their case, which may meet the criteria for disclosure. For example, they may have statements or records of conversations with third parties which support the defendant's version of events rather than that put forward by the prosecution. The private prosecutor also needs to be able to respond to applications for disclosure by way of a Defence Statement or a defence application for disclosure of unused material made to the court under section 8 of the Act. The nuances of the disclosure regime are complex to even experienced prosecutors with disclosure failures being linked to miscarriages of justice.[79] The disclosure of unused material is a potentially impenetrable area to the lay private prosecutor and another reason why legal representation is likely to be needed.

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[78] *R v DPP ex parte Lee* [1999] 2 All ER 737
[79] Ian Dennis, 'Prosecution Disclosure: Are the Problems Insoluble?' [2018] Crim LR 829

Prosecutions brought by aggrieved victims or their families are likely to be for serious offences which are either indictable-only or will be determined as not suitable for summary trial. They will therefore be sent to the Crown Court for trial. As trials on indictment are brought in the name of the Crown, the aggrieved victim acting in person may have difficulty obtaining standing to prosecute in person in the Crown Court. This issue was considered in the first instance decision of *R v George Maxell (Developments) Ltd* where a private prosecutor was refused standing to prosecute in person.[80] In explaining his decision the judge stated that the prosecutor was not a litigant in person as 'once the indictment was signed the proceedings thereafter continued in the name of the Sovereign.'[81] The judge further commented that unless he was legally represented or the prosecution was taken over by the DPP the prosecution would fail for want of prosecution.[82] This issue was also aired in *R v Southwark Crown Court ex parte Tawfick* in which the Divisional Court dismissed an application for judicial review of a Crown Court decision to refuse a private prosecutor rights of audience on the basis that the court did not have jurisdiction to deal with the matter as it related to a trial on indictment.[83] The *obiter* comment was made that the court may be able to exercise the discretionary power to grant rights of audience under section 27(1)(c) of the Courts and Legal Services Act 1990.[84]

Clearly there is no guarantee that the discretion would be exercised in favour of the private prosecutor. In *Tawfick*, the trial judge expressly found that he would not have done so.[85] Buxton, writing extra-curially, has argued that all prosecutions in the Crown Court should be conducted by counsel and judges should not exercise the discretion to grant private prosecutors rights of audience.[86] His rationale for this is that prosecutors should not have a personal interest in the case and have the training and professional insight that private individuals are likely not to have.

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[80] (1980) 71 Cr App R 83
[81] ibid 86.
[82] ibid
[83] Lynne Knapman, 'Trial – Courts and Legal Services Act 1990 s.27 – private prosecution – victim of alleged offence may appear as advocate' [1995] Crim LR 658
[84] The relevant power is now Legal Services Act 2007, Sch 3, para 1(2) (b).
[85] Knapman (n 82)
[86] Richard Buxton, 'The Private Prosecutor as a Minister of Justice' [2009] Crim LR 427

Disincentives to bringing a private prosecution

As well as the difficulties that a victim may encounter in preparing and bringing a private prosecution, there are a number of other risks that may deter a private individual from bringing a private prosecution. The Law Commission identified the cost of bringing a prosecution, lack of investigative resources and the risk of liability in tort as possible practical constraints when they examined the private prosecutions in the context of the consents regime.[87] The issue of cost is likely to be a deterrent and possibly a barrier for some aggrieved victims considering a private prosecution. Even in the event of a successful prosecution, they may not recover all of the costs that they have incurred. The fear of a civil claim being brought against the victim for malicious prosecution following an unsuccessful prosecution may also serve as a deterrent.[88] Additionally, there is the risk of a costs order being made against the private prosecutor as happened in *R (Haigh) v City of Westminster Magistrates' Court* where a private prosecutor unsuccessfully challenged by way of judicial review the decision of the magistrates' court to order substantial costs against him on the basis that the application for summons constituted an unnecessary or improper act resulting in the other party incurring costs.[89] Although the court did recognise that the costs provisions must not be abused so as to 'have a chilling effect' on private prosecutions, the reality is that this does remain a possibility.[90]

The High Court indicated in *Holloway* that private prosecutors have an obligation to conduct an objective analysis of the evidence to determine whether there is a realistic prospect of conviction and failing to refer the matter to the authorities or to take legal advice may 'give rise to an inference that a private prosecutor was determined to go ahead regardless of the prospects of success.'[91] The possibility of a costs order therefore represents a real risk to the private prosecutor if the court subsequently

[87] Law Commission, *Consents to Prosecution* (n 57) 4.8-4.11
[88] See John Murphy, 'Malice as an Ingredient of Tort Liability' (2019) 78 CLJ 355
[89] [2017] EWHC 232 (Admin)
[90] ibid [37]
[91] *R (Holloway) v Harrow Crown Court* [2019] EWHC 1731 (Admin) [20]

concludes that a case was pursued which did not reach the required evidential threshold.

Therefore, although there can be some value in private prosecutions for victims this is only likely to be in quite limited circumstances as a mechanism for triggering the CPS into reviewing a case which no further action has been taken by the police. As a result of the DPP's 2009 policy, private prosecutions have largely been cut off as a potential remedy for an aggrieved victim. The victim is likely to be considering pursuing such a remedy because the authorities have decided not to prosecute themselves. Therefore, even if the private prosecutor is able to collate enough evidence to have a case and be able to persuade the court to issue a summons, it is likely that if the matter were referred to the CPS by the defendant the Full Code Test would not be met. As a result, the CPS would be likely to exercise the power to take the prosecution over under section 6(2) of the Prosecution of Offences Act 1985 and then discontinue it under section 23 or 23A. As will be apparent from the above analysis of accessibility, private prosecutions inevitably involve a high degree of participation on the part of the aggrieved victim of crime that will be examined in the next section.

5.3.2 Participation

The following question will be addressed under this criterion: **to what extent do victims have a meaningful participatory role?** The victim can experience a high level of participation in the criminal justice process through a private prosecution because they are the decision-maker and have conduct of the prosecution. Unusually, it is initially the victim as the private prosecutor who makes the decision to prosecute although ultimately the decision whether to convict will be one for the court. The victim of crime becomes a party to the prosecution contrary to the general position in the adversarial system where the prosecution is a contest between the State and the defendant. However, as a result of the power to take over and continue (or discontinue) a private prosecution, the public prosecutor is not entirely excluded. Potentially the public prosecutor may participate by exercising his discretion to take the case over and to apply the Code test to it. In the event that he does so, the public

prosecutor then replaces the private prosecutor and so the prosecution remains a two-party contest.

Participation is a way of measuring the extent to which the victim is involved in the prosecution process. A victim normally has very low-level participation in prosecutorial decision-making. When the prosecution is brought by the public prosecutor, the victim's views tend to be taken into account in relation to certain decisions, such as the public interest and the acceptance of pleas, but they are just one of a number of factors.[92] A private prosecution clearly engages the victim in higher level participation. On Edwards' model of victim participation, a private prosecution is likely to be the only way that a victim could participate to a degree approaching 'control'.[93] The proceedings are launched by the victim who becomes the prosecutor; if he opts not to be legally represented, he will be the person presenting the case in court. However, as the public prosecutor retains discretion to take the prosecution over, the private prosecutor does not retain complete control of the prosecutorial process.

Unlike other ways of challenging a decision not to prosecute, the private prosecution brings the victim directly into the criminal justice process as a party to the proceedings rather than collateral to it. The private prosecution potentially means that the victim is in control of the prosecution against the defendant; they have the decision-making power to decide which charges should be brought and how the case will be conducted in court. For example, the victim can decide what evidence will be adduced and whether evidence such as bad character should be relied upon. Although this demonstrates the high level of control the victim can potentially have over a private prosecution, they do not control whether the defendant is convicted as this remains a matter for the court.

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[92] CPS, Code for Crown Prosecutors (n 25) [4.14]
[93] Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 Brit J Criminol 967, 975

The arguments in favour of such high-level participation arise out of the perceived constitutional importance attached to the right of a citizen to bring a private prosecution. This right was specifically preserved by Parliament in section 6(1) of the Prosecution of Offences Act 1985 so there was a clear parliamentary intention to retain it. The right to bring a private prosecution was debated in the House of Lords when the Prosecution of Offences Bill was passing through Parliament. Lord Elton described the right of private prosecution as 'an important safeguard'.[94] In the same debate, Lord Renton suggested that it is 'one of our fundamental rights and freedoms that there should be the right of prosecution as a safeguard against concealment or abuse by authority…'[95] However, not all of their Lordships held such positive views about the value of private prosecutions. Lord Wigoder felt that it should not be abolished, but stated: '…I still believe it to be, a very important freedom for the individual, even if very often it is for a highly eccentric individual.'[96] Lord Hutchinson was more critical of the decision to retain it describing it as an 'anachronism' and a 'nuisance'.[97]

The judgments of Lords Wilberforce and Diplock in *Gouriet* are often cited in favour of the retention of the right of private citizens to bring private prosecutions.[98] Lord Wilberforce stating that the right to bring a private prosecution 'remains a valuable constitutional safeguard against inertia or partiality on the part of authority.'[99] Lord Diplock described it as 'a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.'[100] The *Gouriet* case did not concern a private prosecution or a challenge to the right to bring such a prosecution. It was an appeal to the House of Lords arising out of the decision of the Attorney General not to bring a relator action for an injunction against the Union of Postal Workers who had indicated that their members would refuse to handle mail for South Africa for one week as a protest against

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[94] HL Deb 29 November 1984, vol 457, cols 1013-25
[95] HL Deb 29 November 1984, vol 457, col 1013-25
[96] HL Deb 29 November 1984, vol 457, cols 1037-69
[97] ibid
[98] *Gouriet and others v HM Attorney General* [1978] AC 435 (HL)
[99] ibid 477.
[100] ibid 498.

apartheid. The concept of private prosecutions was used as an analogy as both situations involved a private individual bringing an action that would normally be brought by the authorities.

More recent judicial support for private prosecutions can be found in the dissenting judgments in *Gujra.*[101] Baroness Hale attached great importance to the right of private prosecution as a safeguard for the victim against the decision of the public prosecutor not to bring a case. She argued against the dilution of the right by the 2009 policy: 'This is to leave the victim… to the chance of which among many no doubt entirely reasonable prosecutors handles her case.'[102] Baroness Hale is of the view that judicial review is not an adequate remedy as providing the decision taken by the prosecutor is a reasonable one, it is unlikely that there would be grounds to bring a successful claim. The shortcomings of a test based on reasonableness has been discussed in the previous chapter on judicial review. Baroness Hale's judgment goes to the heart of the effect of the 2009 policy: 'Now that the new policy has effectively removed it [the right to private prosecution], the victims of crime will have little prospect of challenging the prosecutor's decisions.'[103] These comments pre-date *Killick* and the VRR. This would suggest that the period between the implementation of the new policy on private prosecutions in 2009 and the VRR coming into force in 2013 was a period when there was very little opportunity to challenge decisions not to prosecute; judicial review was the only real option.

However, the importance attached to the right of private prosecution by the judiciary is not universal. In his judgment in *Jones v Whalley,* Lord Bingham commented: 'The surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest.'[104] A strong argument against private individuals having the power to commence a criminal prosecution relates to the lack of control, consistency or certainty as to when such a prosecution could be brought.

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[101] *Gujra* (n 1)
[102] ibid 522.
[103] ibid 522.
[104] *Jones v Whalley* (n 53) 73

Unlike the public prosecutor, there is no overarching test that the private prosecutor must apply in relation to either the evidence in the case or the public interest.

Private prosecutors are not constrained by guidelines or policies that lend a degree of consistency and certainty to potential defendants as to whether or not they are to be prosecuted. Essentially, the power is one that could be used arbitrarily subject only to the rules of criminal evidence and procedure which might ultimately see the case dismissed by the court. However, this would be after the defendant has been brought to court and endured many months of anxiety. Although participating by bringing a private prosecution may be of psychological or emotional benefit to the victim, this does not mean that a prosecution unsubstantiated by the evidence can be justified. The Philips Commission identified the need for consistency across prosecutorial decision-making and recommended that private prosecutors should be subject to a requirement to obtain permission from the public prosecutor in order to commence proceedings.[105]

This line of reasoning is also evident from the judgments of the majority in *Gujra.* Lord Wilson, for example, referred to the Philips Commission's recommendations and the object of the Prosecution of Offences Act 1985 to introduce consistency in decision making.[106] The Code for Crown Prosecutors was established under section 10 of the Act as a means of introducing a test to be applied in all cases as a way of introducing a degree of standardisation in criminal prosecutions. Private prosecutors are not bound by any such test.

As set out earlier in this chapter, there are numerous prosecution policies and guidelines covering a wide range of offences and circumstances. These policies shape the exercise of the discretion delegated to the public prosecutor by the Prosecution of Offences Act 1985. Although they should not be too restrictive, case law has established that it is permissible for public bodies to have policies to guide them in their decision-making.[107] Such policies facilitate like cases being dealt with in a

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[105] Report of the Royal Commission on Criminal Procedure (n 8) [7.50]
[106] *Gujra* (n 1) 499
[107] *British Oxygen Co Ltd v Board of Trade* [1971] AC 610

similar way and therefore fairness to defendants. A private prosecutor could consider any such policy, but would not be bound by or indeed required to take it into account when making a decision as to whether to bring a prosecution. Although they will be considered by the public prosecutor in the event that the case is reviewed in order to decide whether it should be taken over by the CPS. Buxton goes further than to highlight that private prosecutors are not constrained in their decision making by policies or guidelines. He refers to the role of the prosecutor as a 'Minister of Justice' exercising independent judgement over a case with no personal interest in the case whereas a 'private prosecutor will almost by definition have a personal interest in the outcome of the case' as they will be bringing the case 'as an extension of a personal dispute with other individuals or with officialdom; or an interest group dedicated to suppression of particular forms of allegedly criminal conduct.'[108]

Stark argues that whether or not there is a criminal prosecution should not depend on who the complainant is and that 'an experienced prosecutor is the most sensible candidate' to assess the case.[109] As well as the applying the Code for Crown Prosecutors, the public prosecutor will need to take into account relevant prosecution policies and guidelines which the private prosecutor is not required to do. Young and Sanders describe public prosecutors as being subject to a number of ethical codes such as professional codes of conduct, the Code for Crown Prosecutors and the Attorney General's guidelines on prosecution.[110] They also refer to the statutory obligations imposed by the Criminal Procedure and Investigations Act 1996 and the Criminal Justice Act 2003.[111] The accused is protected to some extent by the requirement for the prosecutor to comply with these various obligations and policy considerations and if he fails to do so he could render himself liable to judicial review.[112] The same would not apply to the private prosecutor. By contrast, the recently formed Private Prosecutors' Association has published its own voluntary Code for Private Prosecutors

[108] Buxton (n 85) 427-428.
[109] Findlay Stark, 'The Demise of the Private Prosecution?' [2013] CLJ 7, 9
[110] Richard Young and Andrew Sanders, 'The Ethics of Prosecution Lawyers' (2004) 7(2) Legal Ethics 190, 193
[111] ibid 195
[112] ibid 203

which its members have committed to complying with.[113] This includes the client relationship, disclosure and other matters which could be contentious. This Code, of course, only applies to the group of professionals and academics who belong to the organisation and perhaps highlights the disparity between public prosecutors and the majority of individuals bringing private prosecutions as victims of crime.

A further consideration is that the victim prosecuting in person is going to have to undertake a number of potentially conflicting roles in the trial process. If he does not have a legal representative he will be both the advocate as well as a witness in the case. This will make the examination-in-chief and cross-examination processes difficult for the defendant and the court as there could well be a blurring of evidence with speeches and submissions. A further tension could be the victim having to lead evidence from other prosecution witnesses.

Therefore, in theory at least, the level of participation in the prosecution process for a victim bringing a private prosecution is unsurpassable. However, if the prosecution is brought through a legal representative, this participation may be reduced to some extent. It is clear, however, that there are a number of challenges to the justifications for a private individual having a right to bring a criminal prosecution.

Despite this apparent empowerment to allow the victim to bring his own prosecution and to be the decision-making force behind it, the reality is likely to be somewhat different. The victim can make the decision to prosecute, but it will be subject to the decision of the Crown Prosecutor assessing the case if the matter is referred to him under the 2009 policy. The terms of that policy mean that the likelihood of intervention is high and that public prosecutor's decision-making will ultimately prevail over that of the private prosecutor. This tension between the private prosecutor and the public prosecutor will be highlighted further when the next criterion of accountability is considered.

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[113] Private Prosecutors' Association, 'Code for Private Prosecutors' (PPA July 2019)

5.3.3 Accountability

This discussion of accountability will focus on the following question: **to what extent are private prosecutions an effective mechanism for holding the public prosecutor to account?** The application of Bovens' key characteristics of accountability to private prosecutions shows that they are not an effective way of holding prosecutors accountable and are arguably not an accountability mechanism at all. The criminal prosecution is brought by the victim against the defendant; the public prosecutor is not a party to the proceedings and so the prosecutor is not properly before the court as the accountability forum. There is, therefore, no obligation on the public prosecutor to explain his rationale for not prosecuting the matter himself to the court. The court has no power to require the public prosecutor to explain or justify his conduct or even to answer questions as the public prosecutor is not a party to the proceedings. Indeed, he may not even be present in court when the case is being heard. Therefore, on Bovens' criteria, private prosecutions in themselves do not amount to a formal accountability mechanism. Consequently, it is more appropriate to categorise private prosecutions as a form of participation or a procedural right than as an accountability mechanism. Nonetheless, bringing a private prosecution could bring about certain effects which could cause the prosecutor to bring proceedings or hold the prosecutor to account by publicly condemning the decision not to prosecute.

It is possible that the public prosecutor will exercise the power in section 6(2) of the Prosecution of Offences Act 1985 to take the prosecution over. This may mean that a CPS representative would be present in court to assess the nature and conduct of the case in order to decide whether to exercise that power. If the proceedings are taken over and continued by the public prosecutor, the private prosecution has effectively challenged the decision and stimulated the public prosecutor into action. This may particularly be the case if the original decision to take no action was made by the police independently. It is also possible that the proceedings will have had the effect of reversing the decision not to prosecute. However, this is now unlikely, as under the current policy the public prosecutor will apply the same test as he would have previously applied when deciding not to prosecute. Perhaps the decision to bring a

private prosecution may have had the benefit of new evidence that was not available at the time of the original decision not to prosecute.

There have been a number of high-profile private prosecutions that have attracted media attention. This could be seen as holding the public prosecutor to account through the publicity attached to it. Examples would be the private prosecution that followed the investigation into the murder of Stephen Lawrence in 1993[114] or the prosecution of former police officers connected to the Hillsborough tragedy.[115] Private prosecutions can also be politically motivated.[116] Sanders et al highlight the symbolic value of a private prosecution: 'they can shame those responsible and highlight the suffering of the victims and their families' and they 'become part of the campaign against the wider social or political problems that caused the tragedies in the first place.'[117] The possible effects of bringing a private prosecution will be examined in the following section in relation to outcomes.

In the event that the public prosecutor does take over the prosecution and discontinue it, the victim could then consider holding the CPS to account by challenging this by way of judicial review or by requesting a review under the VRR.[118] Although as we have seen in chapters three and four, these are likely to be unsuccessful.

5.3.4 Outcomes

The final criterion is 'outcomes' which addresses the following question: **do private prosecutions provide meaningful and satisfactory outcomes for victims?** The central theme to be considered here is the nature of the outcome if the victim were to successfully bring a private prosecution. An important issue for a victim considering

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[114] See *R v Dobson* [2011] EWCA Crim 1256, [2011] 2 Cr App R 8.
[115] *Duckenfield* (n 18).
[116] Examples include: *R (General Abdulwaheed Shannan Al Rabbat) v Westminster Magistrates' Court* [2017] EWHC 1969 (Admin) and *R (Johnson) v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin)
[117] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edition, OUP 2010) 433
[118] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS, 2016) [32]

challenging decision not to prosecute would be whether this course of action would be capable of resulting in a prosecution.

In terms of outcomes, a private prosecution has the potential to achieve the same outcomes as a public prosecution. If the prosecution were allowed to continue, the defendant could be convicted by the court of the offence charged. To some extent, the identity of the prosecutor would be irrelevant to the magistrates or jury ultimately hearing the trial. Indeed, if the private prosecutor instructed a legal representative to conduct the case in court, the bench or jury may not appreciate that they were hearing a private prosecution. If the private prosecutor were to act in person (provided they were able to persuade the judge to grant them rights of audience in the Crown Court), it may be clearer to the tribunal that this was a private prosecution if the individual was not legally qualified. This would particularly be the case if they were also giving evidence on behalf of the prosecution.

However, it is not possible to argue that it is more likely that a defendant would be acquitted in a private prosecution were the case allowed to proceed to a full trial. If the defendant were to be convicted, the court would have all the same sentencing options as for a public prosecution and the same range of ancillary orders would be available. The private prosecutor could apply for orders such as costs, compensation and Restraining Orders in the same way as a public prosecutor.

Therefore, although a private prosecution is a largely inaccessible remedy for many victims of crime and not an easy course of action to take, it does have the potential to achieve the same outcome as a public prosecution. However, the numbers of private prosecutions brought by private individuals appears low. A request under the Freedom of Information Act 2000 revealed that between September 2017 and August 2018 the CPS received only 40 notifications of private prosecutions.[119] Furthermore, a number of these notifications relate to offences which are unlikely to have been brought by a victim of crime such as animal welfare and trademark matters. Therefore, this does

[119] Response to request under Freedom of Information Act 2000 reference 8533 from CPS Information Management Unit dated 12 July 2019.

suggest that the take up of private prosecutions by victims is low although there are no official statistics available. Perhaps for the reasons set out in this chapter, it is not likely to be a course of action that appeals to the majority of victims of crime.

It may also be that the majority of victims are not seeking to instigate a prosecution themselves. To some extent, this chapter has pre-supposed that victims would wish to pursue a private prosecution as a remedy for their dissatisfaction with a decision not to prosecute. The previous two chapters have reviewed the VRR and judicial review which both provide ways of compelling the public prosecutor to take the case to court; a private prosecution involves the victim bringing the proceedings themselves which may not appeal as a result of the some or all of the issues explored in this chapter.

5.4 Conclusions

The right to bring a private prosecution is a historic right that still exists today albeit in a substantially reduced form in terms of prevalence and significance. However, the right of a private citizen to commence a private prosecution was specifically preserved by Parliament and therefore remains as a potential remedy for an aggrieved victim of crime. Although opinions vary on whether it should remain in its current form, it has been described as a safeguard against inaction on the part of the public authorities.

The level of participation provided by a private prosecution is unparalleled for the victim of a crime. However, although it is theoretically possible for an individual victim to prosecute a case through to trial (and sentence in the event of a conviction), it is now unlikely because of the reasons set out above under 'accessibility.' In particular, the DPP's 2009 policy on private prosecutions and the *Gujra* decision that endorsed it.[120] The private prosecution is always vulnerable to challenge by either the public prosecutor applying the Full Code Test or the court applying the 'no case to answer' test at the end of the prosecution case. The spectre of costs may also provide a significant deterrent.

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[120] *Gujra* (n 1)

Therefore, to some extent the right to commence a private prosecution has been reduced to a symbolic right for victims. Although the right still exists, in reality, the aggrieved victim is unlikely to be able to exercise that right unrestrained. They are likely to be in a different position to some other private prosecutors, such as those representing wider societal interests such as the RSPCA or those representing commercial interests like in *Zinga.*[121]

The victim is likely to be pursuing the matter because they are dissatisfied with the decision made by the authorities; if they are bringing a prosecution to attempt to overcome an earlier decision not to prosecute or to terminate proceedings, this is likely to fail. Their attempt at participation will effectively be 'trumped' by the public prosecutor who can extinguish the prosecution and therefore end their participation in the matter. Generally, a private prosecution will offer little in terms of holding the public prosecutor to account for their decision. The exception to this is in high profile cases which may result in media criticism of the CPS decision not to bring a prosecution.

The other point to note, of course, is that even if the victim is permitted to continue to prosecute the case to conclusion, the ultimate decision as to guilt or innocence is not within the victim's control. This will be a matter for the jury or bench of magistrates as in any other prosecution.

The next chapter will explore the findings these individual analyses of accessibility, participation, accountability and outcomes thematically across the three review mechanisms of the VRR, judicial review and private prosecutions. This will allow an overall evaluation of the adequacy and coherence of these methods as a framework for challenging decisions not to prosecute.

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[121] *Zinga* (n 68)

Chapter 6 - A Thematic Comparison of the Review Mechanisms.

6.1 Introduction

This chapter will build upon the preceding three chapters which evaluated the individual review mechanisms of the VRR, judicial review and private prosecutions against the criteria of accessibility, participation, accountability and outcomes. This chapter will report on the findings of these chapters by identifying and exploring key themes which have emerged from the evaluations of the individual mechanisms. This analysis of these collective themes will show that the issues relating to the review mechanisms are more complex than the examination of each individual mechanism reveals. In particular, the VRR provides a form of internal complaint procedure for victims as an alternative to court proceedings. An initial impression of the VRR is likely to be that it is a victim-focussed measure which can only be beneficial to aggrieved victims of crime. However, on closer analysis there are perhaps wider public policy reasons for encouraging victims to use this route rather than the alternatives. Victims are being actively pushed in the direction of the VRR both by prosecution policies and the courts. It will be argued, therefore, that the VRR could be interpreted as having a negative impact on the ability of victims to challenge decisions not to prosecute by diverting them from the courts to a private and less transparent form of dispute resolution.

The analysis of these themes will enable a comparative assessment of the three mechanisms to show that whilst there are respective advantages and disadvantages of each, they do not form a coherent framework of rights for victims. The mechanisms provide more of a patchwork of potential courses of actions for the victim of crime with some overlaps and some gaps.

This chapter is, therefore, structured around four collective themes that have become apparent from the examination of the individual mechanisms against the criteria. The

evaluations of accessibility and participation led to the identification of procedural barriers as a theme. The themes of the public/private nature of the review mechanisms and the ultimate decision-making authority are largely drawn from the evaluation of accountability. The evaluation of participation also highlighted procedural justice as a theme warranting further analysis. Each section of this chapter will focus on a particular theme: the first section will concentrate on procedural barriers; the second section will focus on the public/private nature of the review mechanisms; the third section will examine the ultimate decision-making authority; finally, the fourth section will consider issues of procedural justice.

6.2 Procedural barriers

Examination of the individual review mechanisms against the criteria of accessibility and participation highlighted that for each there are procedural rules and requirements which may restrict victim engagement with the mechanisms. This section will be further broken down into three categories of procedural barriers: standing, procedural complexity and the impact of prosecution policy. This analysis will show that the VRR has fewer formalities to be complied with compared to the procedurally burdensome court-based mechanisms. The effect of these procedural barriers is to channel victims away from judicial review and private prosecutions towards the VRR. One barrier that is inherent in the VRR, however, is the restrictive standing criteria which significantly limits the availability of the VRR.

6.2.1 Standing

Standing was a major component of accessibility in the VRR and judicial review chapters. Neither judicial review nor the VRR have automatic eligibility and the victim must establish that they have 'standing' to use these mechanisms to challenge a decision not to prosecute. There are no statutory eligibility requirements placed on the victim who wishes to bring a private prosecution, although there are a number of other considerable obstacles to pursuing private prosecutions including the consents

regime and the power of the public prosecutor to take over the prosecution.[1] If the private prosecutor could not show a real connection with the case, the likelihood of it being taken over and discontinued would potentially be greater.

The standing requirements for judicial review do not only apply to challenges to prosecutorial discretion, but to all applications for judicial review. Potentially, it would be easier for the victim of crime to successfully establish standing in judicial review than it would to meet the eligibility requirements of the VRR which is based on a particular conception of victimhood premised on the requirement of harm. In judicial review proceedings it should be relatively simple for most victims of crime to persuade the judge at the permission stage that he had a personal or direct interest in the case. In contrast, the victim using the VRR may be excluded from using the scheme because they were unable to show that they had alleged that they had suffered harm as a direct result of the criminal conduct. The position is even more complex when the eligibility of individuals or groups who are not direct victims of the crime is considered. As the connection between the victim and the original criminal conduct reduces, the less likely it is that the victim would be able to establish standing for judicial review or successfully engage the VRR.

As was shown in chapter three, the construction of victimhood can be much wider than the conventional primary victim. Although families of direct victims are likely to be accommodated if the primary victim is deceased or unable to challenge the decision themselves, a wider range of indirect victims may not be. The notion of community victims or those that identify with the primary victim in a way that creates a nexus between the harm committed against the individual and this wider group are currently unlikely to be considered eligible for either judicial review or the VRR. Therefore, it is clear that both judicial review and the VRR take a restrictive approach as to who can use these mechanisms to challenge decisions not to prosecute as there are formal eligibility requirements which distinguish between different types of victims admitting some and excluding others.

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[1] See Ch 5.3.1 – Accessibility

This narrow construction of victimhood is one of the key shortcomings of the VRR and an area which should arguably be considered for reform in the future to allow a wider range of victims to engage the mechanism.[2] Compared to judicial review, the criteria for qualifying as a victim are quite rigid. At least with judicial review, the potential claimant can argue their case to the court at the permission stage whereas the VRR uses a more 'tick box' approach to deciding whether the individual complainant meets the requirements of victimhood or not. Standing is not the only impediment to using the review mechanisms as all the routes have a number of procedural complexities which may deter victims from using them.

6.2.2 Procedural complexities

It is clear from the analysis of accessibility that the court-based mechanisms of judicial review and private prosecutions are inherently more procedurally onerous than the administrative mechanism of the VRR. As victims are a party to court proceedings in judicial review claims and private prosecutions, there are complex procedural requirements that must be complied with such as the relevant rules of court, disclosure and admissibility of evidence and strict time limits in relation to the filing of particular documents.[3] From the victim's perspective, this high degree of formality is likely to compare unfavourably to the VRR inevitably deterring some victims. There is empirical evidence that lay people can feel excluded from the legal process in the courtroom environment; this could act as a further deterrent.[4] By contrast, there are very few procedural requirements or formalities to the VRR and it is clearly a much less burdensome process which would make it appealing to victims.

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[2] In a similar way that Victim Personal Statements have been expanded to include Community Impact Reports: *R v Skelton* [2014] EWCA Crim 2409, [2015] 1 Cr App R (S) 34

[3] See Accessibility in ch 3.1, 4.3.1 and 5.3.1

[4] Amy Kirby, 'Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts: A Question of "Court Culture"?' [2017] Crim LR 949; Jessica Jacobson, Gillian Hunter and Amy Kirby, 'Structured Mayhem: Personal Experiences of the Crown Court' (2015) <http://criminaljusticealliance.org/wp-content/uploads/2015/11/Structured-Mayhem1.pdf> accessed 22 November 2020.

The demanding procedural requirements of both judicial review and private prosecutions means that a victim is almost inevitably going to need to engage legal advice and representation if they wish to pursue these routes. This has clear costs implications.[5] On the other hand, the VRR was specifically designed to be used by victims in person without legal representation. Clearly, one of the greatest strengths of the VRR is the simplicity and flexibility of the requirements that it imposes on the victim.

These characteristics are representative of the advantages and disadvantages of litigation and alternative dispute resolution (ADR) more generally. One of the clear benefits of alternative methods of resolving disputes is the lack of procedural complexity and the potential to resolve the matter relatively inexpensively without the need for legal representation. The VRR can perhaps be viewed as akin to ADR in that it is presented as a direct alternative to court proceedings. However, it does not involve the degree of negotiation and the potential to reach a settlement compared to some of the conventional methods of ADR. Nonetheless, it exists as an out-of-court mechanism which is a direct alternative to court proceedings. There is a clear drive to use alternatives to judicial review both from the general principles of the Civil Procedure Rules and the pre-action protocol for judicial review.[6] Although there has been some reluctance to use such alternatives in public law disputes, the courts have clearly indicated that ADR should be considered.[7]

Specifically in relation to challenges to decisions not to prosecute, the courts have indicated an expectation that the VRR be used prior to judicial review proceedings both ahead of the implementation of the VRR[8] and subsequently.[9] In *L v DPP*, the court recognised the importance of the CPS implementing a review procedure and 'no judicial review should be brought until the CPS has had an opportunity of conducting

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[5] Alex Mills, 'Reforms to Judicial Review in the Criminal Justice and Courts Act 2015: Promoting Efficiency or Weakening the Rule of Law?' [2015] PL 583
[6] CPR r 1.4 and Pre-Action Protocol for Judicial Review para 9
[7] *R (Cowl and others) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803 and *R (S) v Hampshire County Council* [2009] EWHC 2537 (Admin)
[8] *L v DPP* [2013] EWHC 1752 (Admin) [11]
[9] *R (S) v CPS* [2015] EWHC 2868 (Admin), [2016] 1 WLR 804, 812

a further review under their Victim right of review procedure.'[10] Sir John Thomas went on to emphasise that 'if there has been a review in accordance with this procedure, then, it seems to me, that the prospect of success will, as I have said, be very small.'[11] The court also indicated that in the event that judicial review proceedings were initiated before a VRR review, proceedings could be adjourned pending the outcome of the VRR process.[12] The court also referred to the possibility of costs being ordered against victims who had unsuccessfully sought judicial review following a VRR decision.[13] This approach was also taken in subsequent cases including *R (D) v DPP* where Gross LJ indicated that the courts would 'proceed with caution' on challenges on public law grounds such as irrationality where a case has previously been considered under the VRR scheme.[14] It is also apparent from the judgment in *Oliver* that challenges on grounds of irrationality will potentially be more difficult to pursue as a result of the VRR process as the decision will have been considered by a number of prosecutors before reaching the court.[15] The stance of the Administrative Court has, therefore, been that the VRR should be the primary method of challenging such decisions with judicial review being used as a last resort.

6.2.3 Impact of prosecution policy

Prosecution policies can themselves be barriers to accessibility for victims who are seeking to challenge decisions not to prosecute using any of the three mechanisms.[16] The VRR is itself a prosecution policy and arguably has an effect on the desirability and viability of bringing a claim for judicial review as well as determining whether a victim is able to engage the VRR itself.

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[10] *L v DPP* (n 8) [12]
[11] ibid [13]
[12] ibid [14]
[13] *L v DPP* (n 8) [18]
[14] *R (D) v DPP* [2017] EWHC 1768 (Admin) [25]
[15] *R (Oliver) v DPP* [2016] EWHC 1771 (Admin) [58]
[16] See for example: Crown Prosecution Service, 'Mental Health: Suspects and Defendants with Mental Health Conditions or Disorders' <https://www.cps.gov.uk/legal-guidance/mental-health-suspects-and-defendants-mental-health-conditions-or-disorders> accessed 22 November 2020.

Victims are potentially being funnelled through the VRR rather than having the matter litigated in court by way of judicial review. There is an argument, therefore, that the VRR is itself acting as a barrier to victims bringing judicial review proceedings to challenge decisions not to prosecute. This is perhaps suggestive of the more general criticism that ADR can potentially act as a barrier to the courts and justice. Genn has noted the official pressure to divert parties away from the civil courts towards other methods of dispute resolution with court proceedings being used as a last resort.[17] The author observes that ADR was promoted as a central feature of the civil justice reforms and that this coincided with major changes to public funding under the Access to Justice Act 1999.[18] Bondy has alluded to the financial benefits of cases being referred to ADR rather than court proceedings which could also suggest an incentive for both public bodies and the courts to nudge potential claimants in the direction of alternative methods of resolution.[19] This is not a new phenomenon with Sainsbury arguing in relation to social security claims that internal reviews were faster and cheaper.[20] It has also been suggested that internal complaint handling procedures are a way of 'protecting adjudicative machinery' from large numbers of complaints[21] and that 'a common way to ration judicial review is to require applicants to exhaust alternative remedies' first.[22] Indeed, it can be a specific strategy of defendant public bodies to use the lack of engagement with alternatives as a way of arguing against permission being granted.[23] Findlay has also commented that a 'defendant may well have its own complaints system in place which may be cheaper and easier for it to operate.'[24] In *L v DPP* the court specifically referred to the fact that judicial review cases 'consume considerable resources from the CPS.'[25] There are other benefits for the CPS for

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[17] Hazel Genn, 'What Is Civil Justice for - Reform, ADR, and Access to Justice Representing and Contesting Ideologies of the Public Spheres: The Architecture of Justice' (2012) 24 Yale Journal of Law & the Humanities 397
[18] ibid 401–403.
[19] Varda Bondy, 'Who Needs ADR' (2004) 9 JR 306, 307
[20] Roy Sainsbury, 'Internal reviews and the weakening of social security claimants' rights of appeal' in Hazel G Genn and Genevra Richardson (eds), *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Clarendon Press ; Oxford University Press 1994)
[21] Carol Harlow and Richard Rawlings, *Law and Administration* (3rd ed, Cambridge University Press 2009) 449–450
[22] ibid 456.
[23] Andrew Lidbetter, 'Strategy in Judicial Review for Defendants' (2007) 12 JR 99, 101
[24] James Findlay, 'Defending Judicial Review Proceedings: Tactical Issues' (2005) 10 JR 27, 31
[25] *L v DPP* (n 8) [18]

victims to be channelled through the VRR rather than applying directly for judicial review.

The VRR enables the CPS to revisit the original decision and provides an opportunity to correct it. Additionally, if the reviewer agrees with the original decision, a further, perhaps more comprehensive review can be written up which could be more resilient to any subsequent applications for judicial review. As the courts have indicated that judicial review of decisions following VRR would rarely be successful, the VRR provides the opportunity to ensure that there is less likelihood of such cases being granted leave for judicial review. Potentially, therefore, although the VRR has provided a simple and informal method of challenging a decision not to prosecute, it has also reduced accessibility to judicial review. This should be viewed in the wider context of government proposals to reduce the availability of judicial review which were implemented in part by the Criminal Justice and Courts Act 2015. The government had proposed a number of reforms to tackle the increase in applications for judicial review including changes to standing, costs orders and provisions for claims based on procedural defects which would not have made a difference to the outcome.[26] Although following consultation, the changes to standing were not pursued, other provisions were implemented including the requirement on the court to refuse relief where it appears that it is 'highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.'[27] This may also be considered at the permission stage and is mandatory if requested by the defendant.[28] There were clear efficiency and resourcing considerations behind these reforms with the Secretary of State for Justice stating, 'too often cases are pursued as a campaigning tool, or simply to delay legitimate proposals. That is bad for the economy and the taxpayer, and also bad for public confidence in the justice system.'[29] These reforms have been criticised as weakening judicial review and the protection of the rule of law.[30] Perhaps this provides an insight into other

[26] Ministry of Justice, Judicial Review: Proposals for further reform (Cm 8703, 2013)
[27] Criminal Justice and Courts Act 2015, s 84(1)
[28] ibid, s 84(2)
[29] Ministry of Justice, Judicial Review: Proposals for further reform: The Government response (Cm 8811, 2014) 3
[30] Mills (n 5) 593–594.

drivers for the establishment and promotion of the VRR beyond the interests of victims.

As well as providing the CPS with an opportunity to conduct a more robust review, the VRR provides the CPS with an appealing way of responding in the media to complaints about decisions not to prosecute. Comments made by the CPS in such cases routinely refer to the fact that the original decision not to prosecute has been verified through the VRR and found to be correct in an attempt to provide a level of reassurance that robust procedures are in place to ensure that decisions not to prosecute are correct.[31]

Clearly, the VRR is not the only prosecution policy which has an impact on the victim's ability to challenge such decisions and all three of the individual mechanisms are affected. Since the inception of the CPS in 1986, a raft of prosecution policies and legal guidance have been produced ranging from the Code for Crown Prosecutors to policies which guide decision-making on specific types of offending and particular issues including those which relate to victims and witnesses.[32] The Code for Crown Prosecutors is the most significant and is relevant to all decisions to prosecute as well as to all three methods of challenging decisions not to prosecute.

As was shown in chapter five, the right of a victim to bring a private prosecution is heavily curtailed by a combination of the CPS policy on private prosecutions and the Code for Crown Prosecutors. Despite the fact that the prosecution is being brought on a private basis, the CPS retains a power to take over, and possibly discontinue, the prosecution if the public prosecutor concludes that the full code test is not met. This approach has been endorsed by the Supreme Court.[33] Therefore, the prosecution policy of the CPS has effectively undermined the Prosecution of Offences Act 1985 which specifically preserved the right of private prosecution.[34] As a result, the

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[31] See for example: Hannah Dawson, '"Police won't arrest man who raped me – even though he confessed": Woman, 41, waives her right to anonymity to condemn CPS' *Daily Mail* (London, 20 May 2019) 5

[32] Andrew Sanders, 'The CPS - 30 Years On' [2016] Crim LR 82

[33] *R (Gujra) v CPS* [2012] UKSC 52, [2013] 1 AC 484

[34] Prosecution of Offences Act 1985, s 6(1)

victim's power to bring a prosecution is potentially more severely restricted than the potential to apply for judicial review or for review under the VRR.

The existence of prosecution policies is also particularly relevant to the viability of judicial review proceedings. On one hand, it could be argued that the increase in prosecution policy could provide more scope for judicial review claims as the courts have consistently indicated that they would be prepared to review decisions based on unlawful policies or where the prosecutor has not followed settled policy.[35] If the prosecutor has departed from the relevant policy without good cause, the decision may be more susceptible to judicial review. On the other hand, the policies can be used by the public prosecutor to defend his decision against judicial review and any allegations that the decision is wrong. Policies can be drafted to reduce the risk of challenge by listing the factors to be taken into account without guidance as to how the different factors should be prioritised and by emphasising the importance of assessing the merits of the individual case. As a result, this can insulate the CPS from allegations of fettering discretion or breaches of legitimate expectation. A careful balance has to be struck when such a policy is drafted as if it is too prescriptive in how discretion should be exercised, it could be claimed that the policy fetters the discretion of the decision-maker and that they did not assess the merits of the individual case and did not consider potential exceptions to the general policy. Similarly, a victim could also claim that an inflexible policy generates the expectation that discretion would be exercised in a particular way. One clear example of this approach is in relation to the application of the public interest stage of the Full Code Test which provides questions which prosecutors should consider when assessing the public interest together with a list of factors to be taken into account in relation to each one. However, the Code specifically states that, 'The weight to be attached to each of the questions, and the factors identified, will also vary according to the facts and merits of each case.'[36] A further example of this concerns the VRR itself where the guidance has been amended to include a footnote to paragraph 11 that indicates that a case which would ordinarily be

[35] See *R v DPP ex parte C* [1995] 1 Cr App R 136 and *L v DPP* (n 5)
[36] Crown Prosecution Service, 'Code for Crown Prosecutors' (CPS 2018) [4.12]

excluded from the VRR may be reviewed under the policy in exceptional circumstances.[37]

The policy on assisted suicide provides an example in the context of a particular type of offending. In relation to the public interest stage of the Full Code Test, reviewing lawyers are required to take into account public interest factors in favour of, and against, prosecution. However, the guidance also indicates that 'each case must be considered on its own facts and on its own merits.'[38] Such policies have in themselves been criticised as undermining the democratic process with the public prosecutor effectively deciding when to enforce the law.[39] It has also been argued that prosecutorial working practices may develop that may be inconsistent with the prosecution policy, such as the practice of routinely applying for witness summonses to compel victims to give evidence in domestic abuse cases when the policy requires a more considered analysis on a case by case basis.[40]

These policies are also relevant to the VRR as whether or not the original decision was wrong will be determined taking into account the relevant prosecution policies. Additionally, the VRR is itself a prosecution policy and one which limits the availability of the right to review. As was shown in chapter two, the scope of the VRR is determined by whether a case falls inside or outside the policy, namely, whether it falls within one of the excluded categories such as where other charges are continuing or where charges were brought against other suspects.[41] To a large extent, therefore, the CPS is determining the accessibility of the review mechanism as it is the policy which determines which cases will be accepted for review; the institution that controls access to the review mechanism is the one that the victim is attempting to challenge. Potentially, the reach of the VRR could be widened or narrowed in the future as the CPS desires perhaps based on factors such as the number of judicial review

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[37] Crown Prosecution Service, 'Victims' Right to Review Guidance' (July 2016) [11]
[38] Crown Prosecution Service, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (CPS 2010) [39]
[39] Sanders (n 32) 94–95.
[40] Antonia Porter, 'Prosecuting Domestic Abuse in England and Wales: Crown Prosecution Service "Working Practice" and New Public Managerialism' (2018) 28 Social & Legal Studies 493
[41] CPS, VRR (n 37) [11]

applications against decisions which currently fall outside the VRR criteria. For example, if a number of applications for judicial review were pursued based on decisions to accept lesser charges, the DPP could decide to widen the scope of the criteria to allow such cases to be reviewed under the VRR potentially limiting the number of applications for judicial review.

It is clear that as the VRR does not cover a range of decisions which an aggrieved victim may wish to challenge, judicial review is of residual value in that it may be possible to use it to challenge those decisions which are excluded from the VRR. Examples could include decisions to caution, accept a particular basis of plea or plea to a lesser charge, or to prosecute some suspects and not others. Additionally, judicial review can be used to challenge the lawfulness of a particular policy in a way that the VRR could not. Although the courts have indicated that judicial review of decisions not to prosecute will only be allowed sparingly, the courts have not limited themselves by rigid criteria in the way that the VRR has. However, applications for judicial review do have to be based on specific grounds which will be considered further in the next section.

Therefore, there are clearly significant procedural barriers which must be overcome if the victim is to successfully initiate a challenge to a decision not to prosecute; this is without examining the substance of the challenge. Specific rules on standing restrict the use of the mechanisms whereas the complex procedural formalities of bringing judicial review proceedings or private prosecutions are likely to have a deterrent effect on victims. Prosecution policies also have a huge impact on restricting which mechanisms victims are able to use in particular circumstances and whether they are likely to be successful. The VRR policy determines the availability of the VRR as well as potentially having a chilling effect on challenging decisions by judicial review. The viability of private prosecutions is heavily influenced by a combination of the CPS policy on private prosecutions and the Code for Crown Prosecutors. These discussions will be developed further in the next section by an analysis of the transparency and independence of the review mechanisms.

6.3 The public/private nature of the review mechanisms

A further identifiable theme from the reviews of the individual mechanisms is the difference between the public and private nature of the review mechanisms; this was particularly apparent from the examination of accountability which considered the nature of the forum conducting the review. The values of transparency and independence are central to this discussion. Whether the mechanism is transparent is determined by whether the process takes place in the public domain and the availability of information and reasons relating to the decision. The independence of the mechanisms also relates to the location of the review mechanism and its proximity to the original decision maker. The literature on accountability in the introduction to this part identifies the nature of the forum as being of central importance.[42] This raises a number of issues including the independence of the reviewing body and whether it is internal or external to the original decision maker, whether it offers legal or a form of administrative accountability together with the transparency of the process. In essence, it will be argued that although judicial review and private prosecutions are more transparent as they are open and public procedures, the transparency of each is heavily affected by the degree to which the reasons and information behind the original decisions are disclosed to the victim. Similarly, the court-based mechanisms are more independent as the review process is conducted outside the CPS.

6.3.1 Transparency

A strength of the court-based mechanisms is that they place the grievance in the public domain where there is the potential for media coverage and reporting in the law reports. This has the potential to generate a degree of public scrutiny and to develop a body of precedent for future cases. The VRR, by contrast, takes place behind closed doors. Although written reasons should be provided after the review has taken place, these are unlikely to include the level of detail that would be observed by the case being argued in court. There is no opportunity for the victim, or anyone else, to be

[42] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal 447

present when the case is being decided and so there is no way of knowing what factors were in reality considered and the degree of weight attached to individual points. Therefore, the level of public scrutiny is much lower. Although it is possible for VRR cases to be reported in the media, this will depend on the newsworthiness of the case and cannot be guaranteed. The provision of the VRR therefore represents a shift from public to private form of accountability as the result of the VRR potentially restricting the accessibility of judicial review.

Another identifiable aspect of transparency is the impact of the provision of information by the public prosecutor. The evaluation of private prosecutions has highlighted the difficulties that a private prosecutor may face in gaining access to case material in the possession of the authorities despite the fact that they will be required to serve evidence on the prospective defendant and to comply with disclosure obligations. In any event, the victim will need sight of the case papers in order to determine whether to bring a private prosecution. In a similar way, victims considering judicial review will need to have details of the reasons behind the decision not to prosecute in order to assess whether any public law grounds can be established. This would be particularly relevant to a potential challenge on grounds based on how a policy had been applied or where unreasonableness may be argued. This links to a more general theme in administrative law, concerning the extent there is a duty on decision makers to give reasons for their decisions. Although there is not a general duty to provide reasons, it can be required in certain situations, particularly those which are adjudicative in nature.[43] It has been further established that the CPS is under a duty to give reasons in relation to death in custody cases[44] and the CPS has now adopted a general approach of communicating reasons not to prosecute to victims.[45] However, the evidence from the CPS Victim and Witness Survey and the investigations of HM CPS Inspectorate is that these communications are not sent in

[43] *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 53; *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71, [2017] 1 WLR 3765; *Dover District Council v Campaign to Protect Rural England (Kent)* [2017] UKSC 79, [2018] 1 WLR 108.
[44] *R v DPP ex parte Manning* [2001] QB 330
[45] Crown Prosecution Service, 'Victim Communication and Liaison Scheme' <www.cps.gov.uk/legal-guidance/victim-communication-and-liaison-vcl-scheme> accessed 10 April 2019.

all cases that they should be and the quality of those communications may not include adequate explanations for decisions.[46]

Although the victim does not have to establish grounds or justify the decision to request a review under the VRR, the provision of information from the public prosecutor is relevant to whether the victim is aware of his rights under the scheme and whether he chooses to exercise them in a particular case. Chapter three identified that there is some evidence that victims are not being properly made aware of their right to request a review under the VRR and so, to some extent, the VRR is affected by an erratic approach to providing information in a similar way to the other mechanisms.

Clearly, the flow of information from the public prosecutor is highly relevant to the accessibility of each of the three review mechanisms and is an area which should be focussed on in order to improve the experience of victims and their ability to challenge decisions not to prosecute. Decisions not to prosecute are not the only area of criminal justice where the provision of reasons to victims has been fundamental and recently subject to challenge. The recent judicial review brought by two rape victims of the decision of the Parole Board to release a prisoner has demonstrated the increased recognition of the interests of the victim in decisions which were previously considered off limits and that a blanket prohibition on releasing information was not justifiable.[47]

6.3.2 Independence

The VRR and judicial review contrast strongly in terms of the decision-maker's independence. Despite the second tier of the VRR being labelled as 'independent', it is clearly an internal review mechanism as the process takes places within the same institution that made the initial decision although it is conceded that there may be a

[46] Crown Prosecution Service, 'Victim and Witness Satisfaction Survey' (2015) 38-40 and HM CPS Inspectorate, 'Victim Communication and Liaison Scheme: Letters to Victims' (October 2020)
[47] *R (D and another) v Parole Board* [2018] EWHC 694 (Admin), [2018] 3 WLR 829

degree of separation between the reviewer and the original decision-maker. Judicial review does provide independence in the sense that the court is conducting the review and, as will be discussed later in this chapter, is part of a different element of the separation of powers. Private prosecutions are hard to position in terms of independence as although the proceedings are brought independently of the original decision maker, the CPS retains a power to take the prosecution over. As a result, the level of independence would be compromised as the final decision on whether to continue the prosecution would be made by the public prosecutor who made the original decision not to prosecute. The public prosecutor retains a high level of control over both requests for review under the VRR and private prosecutions although the way that this lack of independence manifests itself differs between the two mechanisms. Despite the second tier of the VRR being labelled as 'independent', it does not claim to be an external process whereas, initially at least, private prosecutions do not appear to involve the CPS at all. Clearly, the reality is different and the victim's decision to prosecute could be overruled by the CPS, the organisation which made the initial decision that the victim is attempting to challenge.

6.4 Nature and basis of the ultimate decision-making authority

Many of the above points in this chapter have alluded to the significance of who makes the ultimate review decision. This section will consider the grounds and scope of the individual review mechanisms before showing that the VRR is arguably an appeal mechanism rather than a form of review. This will lead on to an examination of the identity of the ultimate decision-maker which, in reality, means a discussion of the extent to which the CPS as public prosecutor controls the final decision. This will show that the CPS controls the review of decisions within all three mechanisms to some extent. This is greatest in the VRR as the decision-making power never leaves the CPS, but the CPS also asserts considerable power in relation both judicial review and private prosecutions with the decision whether to prosecute ultimately returning to the CPS at some point.

6.4.1 Grounds and scope of the review mechanisms

In order to successfully apply for judicial review, the claimant has to articulate their challenge within established public law grounds. There is no generic 'unfairness' category or a way of requesting that the court review a decision on the basis that it is incorrect. Unless the proceedings are based on the grounds that a particular policy is unlawful or was not properly applied, the decision is likely to be challenged on the basis that it was unreasonable. Compared to the test applied under the VRR of whether the original decision was correct, this is a more difficult ground to establish as Baroness Hale has highlighted in relation to the reasonableness test, 'Just as a reasonable prosecutor could take the view that the case should proceed, a reasonable prosecutor could take the view that it should not.'[48] This view was echoed in the Divisional Court in *D*: 'if the decision is one as to which reasonable prosecutors may disagree, the possibility of any public law challenge succeeding is dramatically reduced.'[49]

In contrast, there is no requirement under the VRR that the victim establish any grounds for review, provided the case is a 'qualifying decision' under the terms of the policy. The availability of the VRR as a new mechanism for challenging decisions not to prosecute can be seen, on one hand, as beneficial to victims: it provides a simple mechanism by which they can request the decision be reviewed without the burden of establishing grounds for judicial review. Similarly, a private prosecution does not require specific grounds to be established. However, as we have seen above the accessibility of this route of challenge is severely restricted in other ways.[50]

6.4.2 The nature of the process: Review or appeal?

This thesis has categorised private prosecutions, judicial review and the VRR as different review mechanisms, but there are differences between them that suggest that

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[48] *R (Gujra) v CPS* [2012] UKSC 52, [2013] 1 AC 484, 522
[49] *R (D) v DPP* [2017] EWHC 1768 (Admin) [25]
[50] See Ch 5.3.1 - Accessibility

they could be classified differently as either an appeal or a review mechanism. Therefore, this section will explore how the three alternatives could be more appropriately classified showing that the VRR is arguably an appeal process rather than a review mechanism. As will be discussed below, this classification is relevant to the nature of the outcomes offered by the individual mechanisms.

Judicial review has been described as exercising a supervisory function based on its inherent jurisdiction rather than an appellate one.[51] The focus of this supervisory jurisdiction is generally on the legality of the decision and the decision-making process rather than the substance of the decision.[52] The court is unlikely to substitute its own decision in such circumstances. In contrast, an appeal can involve the re-hearing of evidence and concentrates on the merits of the case with a view to potentially substituting a different outcome.[53]

Despite its name, therefore, the VRR has features which suggest that it would be more accurately labelled as a 'right of appeal' rather than a 'right of review.' Firstly, the VRR involves a *de novo* assessment of the case in which the decision maker decides whether the original decision was wrong, which is akin to the re-hearing of evidence. If the reviewer concludes that the original decision is wrong, there is the potential to overrule it and substitute their own decision which may result in a prosecution being brought. The fact that the test applied is whether the original decision was wrong is also indicative of an appeal process rather than a review as it goes to the substance or merits of the original decision. The decision-maker is essentially re-assessing the evidence in the case and re-applying the Code for Crown Prosecutors to determine whether the decision was correct. One factor that is contrary to the argument that the VRR is an appeal rather than a review is the lack of independence in that the decision is being made internally by the CPS albeit by a specialist unit in the second stage. Normally an appeal is conducted by a different entity, for example, a higher level of

[51] Paul Craig, *Administrative Law* (Eighth edition, Thomson Reuters, trading as Sweet & Maxwell 2016) 5
[52] *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, 1173
[53] *General Medical Council v Michalak* [2017] UKSC 71, [2017] 1 WLR 4193

court.[54] However, overall the VRR has certain characteristics which are indicative of an appeal procedure rather than a review.

Judicial review, in contrast, is largely focussed on the lawfulness of the decision and the decision-making process. Clearly, there are arguments that certain grounds are more indicative of a review on the merits such as irrationality or breach of substantive legitimate expectation.[55] However, judicial review has other attributes that differentiate it from an appeal procedure. Firstly, the judicial review jurisdiction has developed incrementally through the common law, not as a result of a specific policy or statutory provision whereas appeals tend to have a statutory basis. Secondly, in the event of a successful judicial review of a decision not to prosecute, the court will inevitably not substitute its own decision. The most likely outcome is that the decision will be quashed and then remitted back to the CPS for further consideration.[56]

These distinctions are arguably rooted in the constitutional position of the courts and the separation of powers. The unwillingness of the courts to substitute their own decision for that of the prosecutor stems from the limits imposed on the courts by the separation of powers. Although there is a strong argument that pure or complete separation does not exist in the UK, there is evidence of 'partial' separation of powers where the three branches of government provide 'checks and balances' on each other to prevent the concentration of power and the potential for the arbitrary exercise of power.[57] Judicial review is arguably one of these checking mechanisms and creates an 'acceptable' tension between the courts and the executive regarding whether the executive is acting lawfully.[58] However, there are limits as to how far the courts are prepared to intervene in the decisions which are within the remit of the executive. As explained by Lord Brightman in *Evans*, there is a risk that the court may be 'guilty of

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[54] Michael Harris, 'The place of formal and informal review in the administrative justice system' in Michael Harris (ed), *Administrative Justice in the 21st Century* (Hart 1999) 43–44
[55] *R v North and East Devon Health Authority ex parte Coughlan* [2000] 2 WLR 622
[56] Senior Courts Act 1981, s 31(5).
[57] Eric Barendt, 'Separation of Powers and Constitutional Government' [1995] PL 599, 608–609
[58] Harry Woolf, 'Judicial Review - the Tensions between the Executive and the Judiciary' (1998) 114 LQR 579, 580

usurping power' if they were to impose their own decisions on the executive.[59] As a result, therefore, the separation of powers has led to judicial restraint in judicial review proceedings. The courts have accepted that in certain circumstances, Parliament or the executive is the more appropriate decision-maker. Laws LJ has explained in the Court of Appeal that 'greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure' and that where the decision-maker is 'exercising a power conferred by Parliament, a degree of deference will be due on democratic grounds.'[60] Although the concept of deference is not universally accepted[61], essentially the courts are aware of the limitations imposed by the allocation of particular functions of government and for the courts to substitute their own decision would amount to a breach of the separation of powers.

In the context of decisions not to prosecute, this explains why the courts have been unwilling to mandate that a prosecution should be brought, citing that they should respect the 'constitutional position of the Crown Prosecution Service' by adopting a 'very strict self denying ordinance.'[62] The court alluded to the doctrine of separation of powers when it stated that it is for 'good and sound constitutional reason that decisions to prosecute are entrusted under our constitution to the prosecuting authorities.'[63] This deference for the public prosecutor as the decision-maker is central to the limitation of judicial review as a remedy. At most, the courts are prepared to quash a decision not to prosecute where it can be established that it was made unlawfully. This will be a rarity and will not result in the courts replacing the public prosecutor's decision with their own. This is a key characteristic of a review mechanism compared to an appeal procedure.

Therefore, in terms of outcomes, the VRR is designed as a means for a victim to appeal a prosecutorial decision not to prosecute where the case is re-assessed independently

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[59] *Chief Constable of The North Wales Police v Evans* [1982] 1 WLR 1155,1173
[60] *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, 765
[61] *R (Prolife Alliance) v British Broadcasting Corporation* [2002] EWCA Civ 267, [2004] 1 AC 185, 240 (Lord Hoffman)
[62] *L v DPP* [2013] EWHC 1752 (Admin) [7]
[63] ibid [6]

of the original decision and has the potential to be reversed. This process takes places with the CPS itself. Judicial review, by contrast, provides a partial remedy in that it has the potential to lead to the decision being quashed by the courts, but it will then return back to the CPS for a further review. Although it might be more difficult when the decision was quashed on grounds which border on a merits-based review, it is possible that the CPS may on a reassessment of the case reach the same decision as previously, but in a procedurally correct way. Private prosecutions cannot easily be categorised as either an appeal or review mechanism as the victim is essentially bringing the proceedings themselves as an alternative to requesting a review of the decision from either the CPS or the courts.

6.4.3 Ultimate decision-making

The discussion of the nature of the review processes explains why there is a general resistance to the removal of prosecutorial decisions from the public prosecutor in favour of either the courts or a private individual. Parliament has allocated the prosecutorial function to the CPS as part of the executive branch of government. Although the courts are willing to review decisions to made by the prosecutor, and quash them if appropriate, they are not willing to substitute their own decisions as to do so would be to overstep the lines drawn by the separation of powers doctrine. Therefore, in the context of the review mechanisms, much of the decision-making power in relation to prosecutorial decisions remains with the public prosecutor. That power never leaves the CPS in relation to the VRR. The power exercised by the private prosecutor to bring proceedings can be re-claimed by the public prosecutor once he is notified of the case and there is little that the private prosecutor can do to prevent it. Even decisions made by the court by way of judicial review are vulnerable as in the majority of cases the most that the victim can hope for is that the decision will be quashed by the courts, but this is likely to result in the case being remitted back to the CPS for further review. However, if the decision is quashed on substantive rather than procedural grounds, there is less likelihood that the prosecutor could make the same decision as previously.

6.5 Procedural justice

The fourth theme to be examined is that of procedural justice and arises from the criterion of participation in the previous three chapters. This theme is linked to, and builds upon, the previous three themes. In particular, issues of independence and transparency of the decision maker are central to victims' perceptions of procedural fairness. Procedural justice is particularly relevant as it addresses the extent to which opportunities to challenge decisions increase victims' confidence in, and satisfaction with, the prosecution process. After a brief overview of the key principles of procedural justice theory, this section will review the extent to which the review mechanisms offer victims a degree of procedural justice by giving them a voice and participation rights in the prosecution process. This analysis will show that although all three review mechanisms have the potential to satisfy the victim's procedural justice needs, the VRR offers less than the other two mechanisms as it provides fewer opportunities to have a voice and to participate in the process. Private prosecutions and judicial review, by contrast, have the potential to offer more as a result of the victim being able to argue their case before the neutral forum of the court.

Tyler argues that people are more supportive and deferential to procedures that they perceive to be fair.[64] Tyler identifies four procedural justice principles which people take into account when evaluating whether a particular procedure is fair: voice ('the opportunity to tell their side of the story'), the neutrality of the forum, respect (by the authority) and trust (in the authority).[65] He argues that people value having a voice in the decision making even if it does not result in the outcome that they are seeking. Lens et al refer to early procedural justice research focussing on influencing the outcomes of procedures and Tyler's later work which 'emphasises that people's motives for participating in such a procedure are more often defined in terms of participation as such: expressing one's arguments and point of view has its own

[64] Tom Tyler, 'Social Justice: Outcome and Procedure' (2000) 35 International Journal of Psychology 117, 121
[65] Tom Tyler, 'Procedural Justice and the Courts' (2007) 44 Court Review 26, 30

important function.'[66] This links to some of the victimological research that suggests that victim participation in a process that is perceived as being procedurally fair can be beneficial to the victim.

Wemmers and Cyr have analysed the extent to which victims wish to participate in criminal justice using procedural justice theory.[67] The authors state that there are two aspects to procedural justice: decision control and process control with the latter being the more important to victims.[68] Process control is about having a voice in the decision-making process. The concept of procedural justice is based on the perceived fairness of the procedures. The authors state: 'Victims place great emphasis on having a voice in the process, and having their voice heard. They want recognition, respect and consideration' but also that, 'the majority of victims clearly felt that decision-making power should remain in the hands of authorities.'[69] It has also been argued that imposing too much responsibility on victims has to become a burden on them.[70]

Research suggests that neutrality influences perceptions of procedural fairness; people believe that procedures are fairer when, 'authorities are following impartial rules and making factual, objective decisions.'[71] The relationship between the individuals and the authority is central to whether the authority is trusted. Similarly, if people feel that they are being treated with dignity and respect, this also contributes to the perception that they are being dealt with fairly. Laxminarayan explores the concept of trust in legal systems further arguing that it is vital for fostering victims' cooperation and can result from perceptions of both procedural justice and outcomes.[72] She argues that there is a link between trust and acceptance of the authority of the legal system: if a

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[66] Kim Lens and others, 'Delivering a Victim Impact Statement: Emotionally Effective or Counter-Productive?' (2015) 12 European Journal of Criminology 17, 21
[67] Jo-Anne Wemmers and Katie Cyr, 'Victims' Perspectives on Restorative Justice: How Much Involvement Are Victims Looking For?' (2004) 11 International Review of Victimology 259
[68] ibid 262.
[69] ibid 268.
[70] Helen Reeves and Kate Mulley, 'The New Status of Victims in the UK: Opportunities and threats' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000).
[71] Tyler (n 64) 122.
[72] Malini Laxminarayan, 'Enhancing Trust in the Legal System through Victims' Rights Mechanisms' (2015) 21 International Review of Victimology 273

victim trusts the system because they feel that they have been dealt with fairly, they are more likely to accept the decision.

A prominent theme to emerge from the evaluation of the review mechanisms in relation to participation was the extent to which the individual mechanisms give victims a voice in challenging decisions not to prosecute. It is clear that neither the VRR nor judicial review give victims much in the way of a voice in the criminal justice system itself. Both mechanisms allow the victim to challenge a decision not to prosecute, but this challenge is collateral to the criminal prosecution itself. In each of these methods, the victim is in a contest against the state in the form of the public prosecutor, not against the defendant in criminal proceedings. It is, in fact, only a private prosecution that offers this opportunity.

Judicial review arguably affords the victim a greater opportunity to express themselves than the VRR as the victim does at least have the opportunity to argue against the decision not to prosecute, albeit that this is likely to be through a legal representative and is likely to be an argument regarding the decision making process rather than the nature of the original criminal conduct. Indeed, it has been argued that the opportunity to participate is a 'defining characteristic of court and tribunal hearings.'[73] The VRR is little more than a trigger for an internal checking mechanism which, if engaged, requires the CPS to scrutinize the original decision to verify whether it is correct. As was explored in the evaluation of the VRR in chapter three, the process does not encourage a dialogue or promote the idea of the victim submitting further evidence or information to persuade the prosecutor to reach a different conclusion. At most, victims may decide to submit representations of their own volition which may or may not be taken into account.

Procedural justice has been considered specifically in relation to the Victims' Right to Review process by Iliadis and Flynn who interviewed professionals who work with

[73] Roy Sainsbury, 'Internal reviews and the weakening of social security claimants' rights of appeal' in Genn and Richardson (n 20) 301.

victims about the scheme.[74] They argue that although the VRR engages both procedural justice ideals and substantive ideals, it 'remains limited in its capacity to fully attend to victims' procedural justice needs.'[75] Their conclusions are that the VRR has a number of limitations that reduce the potential procedural justice benefits of the scheme. They suggest that the VRR does give victims an opportunity to have their voices heard, to exercise a degree of control over the process and to receive more information about their case.[76] The VRR certainly does appear to recognise the victim's interest in the prosecution and to provide a new opportunity for victims to be involved in the decision-making process. Participants suggested that the VRR did give victims a voice in the process even if ultimately the request for review was not successful by providing a 'platform to voice their concerns' and 'some sense of empowerment and control.'[77] However, it is clear from the analysis of the VRR in chapter three that the extent of the dialogue is limited and a considerable number of potential users of the procedure are excluded from it by the restrictive criteria. Therefore, it would appear that there is some evidence that the VRR generates a perception of giving victims a voice and involving them in the process, when the reality is perhaps somewhat different. Even if victims do make extensive unsolicited representations regarding the decision not to prosecute, it is difficult to know the extent that those representations were considered by the reviewer and whether they had any bearing on the outcome. Arguably, therefore, there are similarities between the VRR and VPS schemes. Both claim to promote the interests of victims and allow them a voice in a particular part of the prosecution process, but it could be argued that neither actually provide as much as they appear to offer. This issue also links to whether victims feel that they are being treated with dignity and respect as even though the procedure acknowledges, to some degree, their interest in the decision, this is not followed up by allowing them to participate in a meaningful way.

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[74] Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims' Right to Review Reform' (2018) 58 Brit J Criminol 550
[75] ibid 551.
[76] ibid 556.
[77] ibid 557.

One potential benefit of engaging the VRR is that it may result in the victim receiving more information about the decision not to prosecute including more extensive reasons. However, although beneficial to individual victims, this should have been provided at an earlier stage as a result of the CPS obligations under the Victim Code and the requirements of the internal policy on communicating with victims which both require the CPS to communicate the reasons for a decision not to prosecute to the victim.[78] Therefore, although the reasons given for not prosecuting might be more detailed under the VRR, this not the main purpose of the scheme.

The two key aspects of procedural justice are 'decision control' and 'process control' with the latter involving the victim having a say in the decision-making process. Arguably, however, the VRR in particular does not provide the victim with sufficient involvement in either respect as they have control over neither the decision or the process. Judicial review conceivably does allow a degree of process control as it is a mechanism which is particularly geared towards protecting the integrity of the decision-making process rather than the decision itself. Ultimately, however, the decision itself will be made by the courts (whether the original decision not to prosecute is unlawful) and then the CPS (the new decision on remittal).

Iliadis and Flynn maintain that the VRR offers increased accountability and transparency with the potential to increase victim satisfaction. However, they do question the effect of the lack of independence when the review is conducted by the same institution that made the initial decision and note that the law may be perceived by some as a closed environment.[79] The notion of the neutrality of the forum could be considered in terms of the identity of the decision-maker and their independence. It is clear that the court is likely to be viewed as a more neutral forum than a second decision-maker from within the CPS, even if they are from a different internal unit. It is also evident that even if the process is successful, both mechanisms ultimately return the decision whether to prosecute to the CPS. In the case of judicial review, the court

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[78] Ministry of Justice, *Code of Practice for Victims of Crime* (2015) [2.2] and CPS, 'Victim Communication and Liaison Scheme' <www.cps.gov.uk/legal-guidance/victim-communication-and-liaison-vcl-scheme> accessed 26 September 2019

[79] Iliadis and Flynn (n 74) 562.

is likely to remit the case back to the CPS for further review after quashing the original decision. As the VRR is a process internal to the CPS, the review decision will have remained with the CPS throughout.

The extent to which private prosecutions may meet the procedural justice needs of victims is quite different to the VRR and judicial review. In contrast, a private prosecution does facilitate a much higher level of control over the actual prosecution with the victim essentially having conduct of the prosecution. The private prosecution, by its very nature, grants the victim party status in the prosecution itself through to sentencing (providing that it is not taken over) in a way that neither the VRR nor judicial review can. At most, the VRR and judicial review result in a temporary increased level of involvement focused on the decision whether to prosecute. Once this decision has been reviewed, perhaps in favour of the victim, the victim returns to their ordinary level of involvement in the criminal prosecution which largely involves participation as a witness providing evidence for the State. Providing the private prosecutor can avoid an intervention by the CPS, they have a greater degree of control over how the case is conducted subject to the various decisions imposed by the court during the criminal justice process.

Private prosecutions allow victims to express their account of the original allegations in the neutral forum of the first instance court. Although this may be channelled through their advocate, this route does allow their story to be told in largely the same way as if a public prosecution had been brought. However, these procedural justice benefits can be brought to an abrupt end if the CPS intervenes and takes the prosecution over. At this point, the CPS arguably becomes the forum and the victim's voice is lost with the decision being made by the public prosecutor as to whether the case should continue. This would inevitably engender a certain lack of trust and confidence as the CPS is the body which the victim was attempting to challenge by bringing the prosecution.

Therefore, all three mechanisms are capable of meeting the victim's procedural justice needs as the victim may perceive that they have been granted an effective right to influence the decision even if the reality is that it is not as extensive as it first appears.

Although it is not possible to rank the three mechanisms in terms of which best meets procedural justice objectives as this may depend on the particular circumstances of the case, potentially private prosecutions offer the highest levels of procedural justice in that they permit such high levels of participation and 'voice' in the neutral forum of the trial court. However, this has to be balanced against the strong possibility of the victim's case being taken over by the prosecution causing a sharp decrease in victim satisfaction. Although the VRR may give the perception of meeting procedural justice aims, this is heavily reduced by the limited opportunities for victims to make representations and the fact that the review takes place within the CPS itself. Therefore, judicial review is likely to engender higher levels of procedural justice as a result of the increased levels of participation and expression in the neutral forum of the High Court the independence and transparency of which should generate feelings of trust.

6.6 Conclusions

This chapter has explored some of the broader themes exposed by the three previous chapters on the individual mechanisms for challenging decisions not to prosecute. This thematic analysis has examined four inter-linking themes which illuminate the wider context in which the individual mechanisms operate. There is a clear distinction in terms of formality between the procedurally heavy and complex court-based mechanisms and the simplicity of the VRR. The VRR can be viewed as a convenient and appealing form of internal complaint mechanism or ADR which victims are able to engage to challenge decisions not to prosecute as an alternative to bringing legal proceedings. Therefore, on one level these internal and external mechanisms complement one another with the expectation that the internal route is exhausted before the external route is pursued. However, the VRR and judicial review are not a perfect fit; judicial review does not provide a third tier to the VRR as the standing requirements and entry criteria are different. Judicial review also provides a residual route for decisions which are excluded from the VRR such as decisions to caution or to prosecute one suspect and not another.

This thematic analysis has also shown that the victim's choice of mechanism is not completely unfettered. Victims are being driven away from judicial review and private prosecutions towards the VRR by a combination of CPS policy and recent judicial decisions. The VRR does appear to offer a simple, accessible method of challenging a decision not to prosecute which could incentivise victims to view it as the preferable option. The approach of the courts towards applications for judicial review of decisions to prosecute in light of the VRR also has the real potential to divert victims from the public and independent forum of the courts towards the private, internal appeal mechanism of the VRR. The prosecution policy on private prosecutions has also meant that these are less viable then previously with the court endorsing the CPS approach of reviewing private prosecutions in the same way as public prosecutions. This should all be viewed in the wider context of recent attempts to reduce recourse to the resource-intensive court system towards a more financially sustainable alternatives.

The VRR does appear to generate a public perception which appeals to procedural justice norms on a superficial level as if the process is carefully managed it can lead to victims believing that they have been allowed to assert a level of control over their case and to express their views on whether a prosecution should be brought. However, the reality is not as positive if the VRR is viewed as protecting the CPS from more intrusive and expensive forms of public scrutiny by reducing the likelihood of successful judicial review proceedings by offering victims a right to request an internal review which does not include the right to participate on any meaningful level in the review process. Additionally, the VRR process allows the CPS to conduct a stronger, more resilient review of the case to further insulate it from judicial review proceedings as well as allowing the CPS to respond to grievances aired in the media about decisions not to prosecute by stating that the case has been reviewed through the VRR process which has concluded that the original decision was correct.

Overall, therefore, victims are presented with a 'patchwork' of ways of challenging decisions not to prosecute rather than a coherent system. The VRR does not fully tessellate with judicial review as internal and external mechanisms would normally be expected to. The third option is for the victim to prosecute the matter themselves as a

private prosecution, but these are heavily undermined by the amount of control over them that the CPS continues to possess.

This chapter has focussed on the review mechanisms from the victim's viewpoint. In the next part, the three review mechanisms will be examined from the perspectives of the defendant and the public interest.

Introduction to Part B – The Wider Context

The chapters in the previous part of this thesis focused predominantly on the rights of review from the victim's perspective. The focus of this part will be on the interests of the defendant and the public interest. Although there is growing recognition that there are three interests in a criminal prosecution, victims do not have full party status and the current adversarial system is based on a contest between the State and the defendant.[1] The first two chapters in this part will, therefore, consider the impact of permitting victims to have rights of review on the other two interests in a prosecution: the defendant and the public interest. For ease of reference, this will be structured in two separate chapters although these two interests are connected. There are areas of considerable overlap as well as areas where the two interests diverge. Each of these two chapters will draw on analysis of other prosecution rights of appeal to show that rights of review provide a necessary and appropriate form of fault correction that can be reconciled with the rights of the defendant.

Chapter nine will use established criminal justice models to situate the review mechanisms in the wider criminal justice process.

[1] *R v B* [2003] EWCA Crim 319, [2003] 2 Cr App R 13, 27 (Lord Woolf); *Attorney General's Reference (No 3 of 1999)* [2001] 1 Cr App R 34, 483-484 (Lord Steyn); *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10 [48].

Chapter 7 - An examination of the extent to which the rights of review encroach on the rights of the defendant.

7.1 Introduction

This chapter will focus on the rights of review from the defendant's perspective as in order for the rights of review to be principled and coherent, they need to adequately take account of the rights of defendants. Although allowing victims to have rights of review would initially appear to be against the interests of defendants as decisions not to prosecute could be reversed, it is submitted that the rights of review do not heavily compromise the rights of defendants. This is, however, in part because defendants have very few substantive rights in this area. Although defendants cannot generally be prosecuted for the same offence twice, there are exceptions to this, and this right is no longer unqualified. The defendant does not have an absolute right to finality as this principle has been eroded by other more radical reforms such as the exceptions to the double jeopardy rule. The rights of review are a less extreme qualification to this principle as they generally take place in the pre-trial stage and do not result in a re-trial following acquittal or conviction.

Defendants also have limited rights to challenge the decision-making process of the review mechanisms. The courts have taken a restrictive approach to the extent to which defendants can challenge reviews of decisions not to prosecute outside the trial process; they have been excluded from making representations through the VRR process and have limited opportunities to contest the decision through judicial review. It will be argued that defendants should be afforded greater opportunities to make representations as part of the VRR on the basis that they should have a right to be heard as a party directly affected by the review process in the same way that they have third party rights in judicial review proceedings.

A central right of defendants in criminal proceedings is the right to a fair trial. However, in the vast majority of cases this right would not be undermined by the rights of review. The reviews relate only to the decision whether to prosecute and defendants are protected by the same rules and safeguards at trial as other defendants. A potential exception to this is if the defendant has been placed at a material disadvantage by the right of review which could result in him not having a fair trial. The communication of a decision not to prosecute to a defendant will inevitably generate the belief that the matter is at an end and will not be prosecuted. Although the reversal of the decision may cause inconvenience, anxiety and frustration, in the vast majority of cases the defendant's right to a fair trial would not be compromised. However, there may be a minority who would suffer a degree of detriment as a result of the representation that they will not be prosecuted. This could, perhaps, include the loss of evidence or making admissions which were subsequently relied upon by the prosecution. Defendants who believe they have been prejudiced by the review decision are likely to have to rely on the doctrine of abuse of process to challenge the decision. However, the requirements of the doctrine are strict and case law is not in the favour of a defendant unless they can show that there has been a breach of promise which has compromised the right to a fair trial. Circumstances which fall short of these requirements are unlikely to result in a stay of prosecution. The risk, therefore, is greatest to those defendants who have not appreciated that there is a possibility of review and have relied on the indication that they will not be prosecuted. A comparison with other appeal mechanisms will stress how the VRR in particular should be reformed to incorporate additional safeguards to protect defendants to reduce further the likelihood of such circumstances arising. This would include allowing defendants to make representations as part of the VRR process.

The first section of this chapter will provide an overview of defendants' rights that are relevant to victims having rights of review. The second section will explore the extent to which defendants are able to challenge decisions to prosecute outside the trial process. The third section will then focus on abuse of process as the primary way of contesting decisions within the trial process. The fourth section will concentrate on the conflict with the private prosecutor. The fifth section will compare other appeal mechanisms to argue that additional safeguards should be incorporated into the VRR

to reduce the possibility of defendants being disadvantaged by the process which could undermine their right to a fair trial.

7.2 The rights of the Defendant

The defendant has a range of specific rights relating to particular parts of the prosecution process. These include rights in relation to bail, the prosecution evidence, disclosure and many others. However, the most relevant rights are the right not to be prosecuted for the same offence twice and the more nebulous principle of finality. The discussion below will show that the rights of review do not breach the right not to be prosecuted for the same offence twice and that the principle of finality is not absolute. Therefore, the principle of rights of review does not undermine the rights of the defendant. However, clearly there is the potential for such rights to have an impact on defendants which may ultimately result in them arguing that their right to fair trial has been undermined.

7.2.1 The principle of finality

A central aspect of the principle of finality is the *autrefois* doctrine. The defendant is entitled to plead *autrefois acquit* if he had previously been acquitted of the same offence or *autrefois convict* if he had been convicted of the same offence on an earlier occasion.[1] These principles are further supported by the courts staying prosecutions as an abuse of process when the *autrefois* principles do not technically apply because the charges are different, but the proceedings arise out of substantially the same facts.[2] However, the *autrefois* pleas only apply when the defendant has either been acquitted or convicted of a charge. The ECHR also protects those accused of crimes from being tried or punished twice.[3] Again, this right would only be engaged when the defendant

[1] *Connelly v DPP* [1964] AC 1254 and *R v J* [2013] EWCA Crim 569, [2014] QB 561
[2] *R (SY) v DPP* [2018] EWHC 795 (Admin), [2018] 2 Cr App R 15
[3] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art 4 of Protocol 7

has been 'finally acquitted or convicted.'[4] This also means that prosecution appeals would not infringe the right. Additionally, the article also permits cases to be reopened on the basis of new evidence or if there was a 'fundamental defect in the previous proceedings.'[5] Although this right has not yet been ratified by the UK, it is important to take it into account as it may be ratified in the future.[6] In the context of rights of review, the majority of the reviews will take place in the pre-trial stage before such a determination has been made. Therefore, on this basis rights of review do not breach either the *autrefois* rule or Article 4.

Furthermore, the principle of finality has been significantly weakened by the reforms contained in Part 10 of the Criminal Justice Act 2003 which allows re-trials for serious offences following acquittal and is an exception to the rule against double jeopardy.[7] There are also other forms of prosecution appeal which qualify the finality principle such as re-trials for tainted acquittals and the provisions on terminating rulings.[8]

In essence, the defendant does not have a right to absolute finality. There is a legal basis to the principle originating from the *autrefois* doctrine, but this is qualified and has clearly been diluted by other prosecution rights of appeal. Allowing reviews of decisions not to prosecute are a less radical encroachment on these principles and there are no realistic grounds for arguing that such rights of review are fundamentally incompatible with the defendant's rights. However, it is still possible that an individual defendant's right to a fair trial could be compromised by a specific review decision; this would depend on the individual facts and circumstances of the case.

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[4] ibid Art 4(1)
[5] ibid Art 4(2)
[6] See the Council if Europe website: <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/signatures?p_auth=YvNLAydl> accessed 13 December 2020
[7] Criminal Justice Act 2003, ss 75-84.
[8] Criminal Procedure and Investigations Act 1996, ss 54-57 and Criminal Justice Act 2003, Pt 9

7.2.2 The right to a fair trial

The right with overarching relevance to the prosecution process is the right to a fair trial under Article 6 of the ECHR.[9] However, the focus of this right is the trial process itself and whether defendants receive a fair and public hearing by an independent tribunal. There are rights in Article 6(3) for suspects while they are being questioned and are under investigation, that is pre-charge, not simply for those who stand trial. None of those five separate rights, nor the case law that expounds upon them, confer any right on a suspect/defendant not to have victims seek review of a CPS decision not to prosecute. The trial process remains the same regardless of whether the decision was made following a request for review. The prosecutor is not making a 'determination' of either the defendant's civil rights or his criminal liability; this will be as a result of an adjudication by the trial court. The prosecutor's decision is an exercise of his discretion as to whether the defendant's case should be prosecuted, he is not making a decision as to whether he is criminally liable.[10]

However, the defendant also has a common law right to a fair trial which is protected by the abuse of process doctrine. There are two broad categories of abuse: the first is where the defendant cannot have a fair hearing; the second is where the integrity of the criminal justice system would be undermined.[11] Essentially, the defendant would apply to the court for a stay of proceedings on the basis that he cannot receive a fair trial. However, the defendant would need to establish specific grounds. In the context of rights of review this is likely to be on the basis of breach of promise or delay. Abuse of process will be discussed in detail in the third section of the chapter.

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[9] For a detailed discussion of Article 6 case law and principles, see Tom Barkhuysen et al 'Right to a Fair Trial' in Pieter van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights* (Fifth edition, Intersentia 2018). Although the ECHR case law is clear that implicit in Article 6 is the right of access to a court (in order once there to have a fair trial), this does not imply a right for victims to institute criminal proceedings: *Helmers v Sweden* (1991) 15 EHRR 285 [29] though in *Assenov v Bulgaria* (1998) 28 EHRR 652 [107]-[113] Article 6(1) was held to be applicable but only because civil proceedings were dependent on criminal charges having been instituted.

[10] By contrast, a prison governor's decision that a prisoner had committed a disciplinary offence does engage Art 6: *Ezeh v UK* (2004) 39 EHRR 1

[11] *R v Crawley* [2014] EWCA Crim 1028, [2014] 2 Cr App R 16 [17]

Abuse of process can only be argued once proceedings have commenced. Therefore, a defendant may wish to contest the request for review by making representations as part of the decision-making process or externally through the courts. This will be discussed in the next section.

7.3 Challenging the rights of review outside the trial

The rights of review may have a significant impact on the defendant as they have the potential to reverse the decision that has been made by the CPS not to bring proceedings or to terminate existing proceedings. It is, therefore, inevitable that defendants may wish to contest the request for review or to make representations as to the outcome. This could be either as part of the particular review mechanism being used or by challenging it externally through the courts. This section will show that the defendant has very limited rights to argue his case from within the VRR process or by applying for judicial review of the decision to prosecute. Defendants generally have to rely on the trial process which in the vast majority of cases means contesting the allegation at trial in the ordinary way. For some, where they can show that the right to a fair trial has been compromised by the review decision, they will be able to rely on the doctrine of abuse of process on the basis that the prosecution has reneged on its earlier decision not to prosecute.

7.3.1 Challenges within the review mechanisms (internal)

Overall, defendants have limited opportunities to oppose the review process within the processes themselves; this is particularly the case in relation to the VRR. Despite its close connection to the adversarial process, the VRR does not require the CPS to notify the defendant that a request for review has been made by the victim. Furthermore, it was made clear in *R (S) v DPP* that the defendant is not entitled to make representations to the CPS in relation to the review decision. This was justified by the court on the basis that the review only considered the same evidence as the

original decision-maker.[12] The 2014 edition of the VRR guidance stated that, '[t]he reviewing prosecutor will only take account of information available at the time the qualifying decision was made.'[13] However, the most recent edition of the VRR guidance omits this particular sentence and simply states that the reviewing prosecutor will review the case afresh.[14]

This restriction on the defendant making representations is no longer justified, particularly in view of the fact that victims clearly do make representations as part of the VRR despite not being required, or encouraged, to do so.[15] This point is more compelling following confirmation in *R (FNM) v DPP* that the victim has an opportunity to make representations as part of the VRR and that they will be taken into account in the review process.[16] The court stated that paragraph 42 of the VRR guidance gave 'the complainant a fair opportunity to make representations and to have them taken into account by the decision-maker…'[17] Although the court would not go as far as to find a duty on the DPP to positively invite representations, this did confirm that that victims have a route to submitting information or arguments directly to the decision-maker. Although it does not automatically follow that defendants should have the same rights as victims, there is an argument that the VRR is an administrative decision-making process which has a direct impact on the defendant and as such he should be permitted to make representations when victims, as third parties, are allowed this opportunity.

The prosecution process generally, and trials specifically, are structured around a contest between the prosecution and the defence with both sides having a right to make representations at the various stages. The defendant has clearly established rights to make representations in relation to these key stages, such as bail,[18] venue[19] and

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[12] *R (S) v DPP* [2015] EWHC 2868 (Admin), [2016] 1 WLR 804, 810.
[13] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS 2014) [31]
[14] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS 2016) [31]
[15] See for example: *R (Monica) v DPP* [2018] EWHC 3469 (QB) [12]-[13]
[16] [2020] EWHC 870 (Admin)
[17] ibid [45]
[18] Criminal Procedure Rules, r 14.2(1)
[19] Magistrates' Courts Act 1980, s 19(2)(b).

sentencing.[20] As was noted above, Article 6 also provides specific rights in relation to the defendant while still a suspect under investigation having an opportunity to prepare his case, defend himself, call witnesses and to challenge prosecution witnesses.[21] Defendants also have the right to make representations through appeal processes. Therefore, to confer on a defendant, as this thesis argues should be the case, the right to make representations as part of the review mechanisms falls within a conceptualisation of such a right as being integral to the fairness of the process.

There is further support for this argument in the case law on the right to a fair hearing. Although it is not argued here that defendants should be entitled to an oral hearing, the argument being made herein is that they should have a right to make representations on the basis the VRR decision has the potential to have a clear impact on them as the person directly affected by it.[22] The counter - that the defendant did not have a right to make representations at the point of charge, so should not be permitted to make them at the review stage - is undermined by the reality that they will have had an opportunity to respond to the allegations as part of the investigative process; the review decision has the potential to take into account new information, so the defendant should also be allowed the opportunity to make representations. In judicial review proceedings the victim would be the claimant with the DPP as the defendant, but the suspect in the criminal allegation would be an 'interested party' and would have the opportunity to make representations to the court.[23] Therefore, if the defendant is entitled to participate in judicial review proceedings, logically he should be allowed to have the same rights in the internal mechanism. This would be in keeping with the spirit of the rights to participate as part of a fair trial under Article 6.

This refusal by the CPS and the courts to allow the defendant a voice in the VRR process could lead to defendants challenging VRR decisions by judicial review

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[20] Sentencing Council, 'General Guideline: overarching principles' <www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> accessed 17 December 2020

[21] ECHR, Art 6(3) (b)-(d).

[22] *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560; *R v Secretary of State for Home Department ex parte Al-Fayed (No 1)* [1998] 1 WLR 763

[23] See for example *Monica* (n 15).

proceedings. However, the courts have made a distinction between challenges by defendants to decisions *to* prosecute and decisions *not to* prosecute brought by third parties, rejecting the former on the basis that there is an alternative remedy available for defendants who can challenge the decision through the trial and appeal processes. The issue of whether the High Court was the appropriate forum to challenge decisions to prosecute was considered in *Pepushi*[24] where the principles set out in *Kebilene* were followed.[25] The court stated that 'save in wholly exceptional circumstances' decisions to prosecute should not be made by way of applications for judicial review and that defendants should 'take the point in accordance with the procedures of the Criminal Courts.'[26] In certain circumstances there may be clear advantages for the defendant of challenging the decision to prosecute by judicial review rather than relying on the trial process. For example, in *Robson* the defendant challenged the decision to prosecute her rather than offer a conditional caution on the basis that the prosecutor had unlawfully applied the policy.[27] The trial process would not have been an effective forum for defending the case as the defendant had made admissions to criminal damage. There have been other occasions when defendants have sought to challenge the public interest aspect of the decision to prosecute.[28] As well as challenges to the public interest stage of the decision to prosecute discussed above, there are other reasons why a defendant may attempt to contest the decision through judicial review rather than relying solely on the trial process. Reasons could include where the defendant wishes to challenge the lawfulness of the prosecution policy or to avoid the scrutiny of the trial process.[29]

A similarly restrictive approach has been adopted by the courts in relation to applications for judicial review of decisions to prosecute following a successful application under the VRR. *S* concerned a rape allegation which was initially not

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[24] *R (Pepushi) v CPS* [2004] EWHC 798 (Admin)
[25] R v DPP ex parte Kebilene [2000] 2 AC 326
[26] *Pepushi* (n 24) [49]
[27] *R (Robson) v CPS* [2016] EWHC 2191 (Admin), [2018] 4 WLR 27
[28] See *R (O) v DPP* [2010] EWHC 804 (Admin); *R (E) v DPP* [2011] EWHC 1465 (Admin), [2012] 1 Cr App R 6
[29] For discussion, see: Jonathan Rogers, 'Judicial Review of Decisions to Prosecute' [2017] Archbold Review 7.

proceeded with, but the decision reversed and proceedings brought as a result of a successful VRR request.[30] The court took the same approach as in cases challenging decisions to prosecute stating, 'the trial process provides the protection that the law affords to those charged with crime' indicating that the defendant could challenge the prosecution by an abuse of process application or if the issue were an evidential one, by dismissal proceedings or by making a submission of no case to answer at the end of the prosecution case.[31]

Although it is tempting to argue that defendants should have the same rights as victims, the two groups are fundamentally different. Campbell et al rightly emphasise the importance of relying on unprincipled concepts of balance to justify procedural rights; the existence of particular rights for one group should not automatically result in another group having equivalent rights.[32] Defendants are parties to the criminal proceedings whereas victims have limited rights within the criminal justice process itself. As victims are unable to contest the decision through the trial process, the courts have been more willing to consider judicial review of decisions *not* to prosecute. Therefore, although there appears to be a disparity, the courts have used judicial review as a way to allow victims to challenge decisions which directly concern them, but which they would not be able to challenge in the criminal courts due to their lack of party status.

In summary, there is limited scope for defendants to contest decisions to prosecute through the review mechanisms themselves. Defendants are essentially excluded from the VRR and the courts have rarely entertained applications for judicial review of decisions to prosecute as a result of a VRR decision or otherwise. The VRR should be amended to allow defendants to make representations in response to the request for review on the basis that they are directly affected by the review and should not be excluded from the process. Defendants may have some opportunity to respond to a victim's application for judicial review of a decision not to prosecute them, but this

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[30] *R (S) v CPS* [2015] EWHC 2868 (Admin), [2016] 1 WLR 804
[31] *R (S) v CPS* [2015] EWHC 2868 (Admin), [2016] 1 WLR 804, 812
[32] Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edition, Oxford University Press 2019) 42–44.

would be limited to responding to the victim's claim that the decision was unlawful. Accordingly, unless judicial review is exceptionally available, the defendant will need to rely on contesting the decision in the criminal courts.

7.4 Challenging the decision in the criminal courts: Abuse of process

There is little that the defendant can do to contest the review procedure through the VRR or judicial review. The defendant's primary way to challenge the reversal of a decision not to prosecute is by arguing that the review decision is an abuse of process. However, as will be set out below, the authorities are very much stacked against a defendant seeking to argue that the prosecution should be stayed for abuse of process as the result of a successful VRR request. If this is not successful, the defendant can still plead not guilty and contest the matter at trial having the same protections as any other defendant in a prosecution.

Abuse of process allows the courts to halt a prosecution using its inherent powers to regulate and safeguard its integrity.[33] Two broad categories of abuse of process have emerged from the case law, the first of which is concerned with whether it is possible for the defendant to have a fair trial; the second relates to the overall integrity of the criminal justice system and whether the defendant should be tried at all.[34]

7.4.1 Breach of promise

The most relevant ground or type of abuse of process in these circumstances is likely to be breach of promise on the basis that the prosecution has reneged on a previous indication that the defendant would not be prosecuted. Breach of promise potentially engages both types of abuse of process: it may no longer be possible for the defendant to have a fair trial as a result of his reliance on the promise not to prosecute and it may be 'morally questionable' to prosecute him in light of him being informed that he

[33] *R v Beckford* [1996] 1 Cr App R 94, 100
[34] *R v Crawley* [2014] EWCA Crim 1028, [2014] 2 Cr App R 16, 219-220

would not be prosecuted.[35] There are a series of authorities which set a high threshold for cases where it is alleged that the prosecution has been brought in breach of a promise not to. The case of *Dean* concerned a 17-year-old who was given assurances by the police over a five-week period that he would not be prosecuted in connection with a murder case, but treated as a prosecution witness. The court held that 'a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process.'[36] However, the case was described as 'quite exceptional' and the court was arguably persuaded partly by the defendant's young age and the period of time over which he had been led to believe that he would not be prosecuted.[37] In *Townsend* the court distinguished between situations where the defendant had not changed his position as a result of being treated as a prosecution witness and those where he was prejudiced as a result of the prosecution's actions. In this case, the defendant was held to have been seriously prejudiced by the service of his prosecution witness statement on the co-defendant.[38] It has also been held to be an abuse to go back on a statement made before the court that the prosecution would offer no evidence when there was no change of circumstances justifying the change of decision. Arguably, the fact that the representations were made in front of the judge substantially lead to the finding that the decision was an affront to justice.[39]

In *Abu Hamza*, having reviewed the above authorities, the Court of Appeal concluded that there were two elements to ground an argument of abuse of process on the basis of breach of promise: an unequivocal representation that the defendant will not be prosecuted and detrimental reliance on that representation by the defendant.[40] This essentially means that the defendant must have been unambiguously informed that he would not be prosecuted and as a result the defendant has relied on that statement to his disadvantage. A classic example of this would be where a defendant has made admissions to an offence as a result of assurances that he would be a prosecution

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[35] Andrew Choo, 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited' [1995] Crim LR 864, 867
[36] *R v Croyden Justices ex parte Dean* [1993] QB 769, 778
[37] ibid 779.
[38] *R v Townsend* [1997] 2 Cr App R 540, 552
[39] *R v Bloomfield* [1997] 1 Cr App R 135
[40] *R v Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659, 674

witness and would not be prosecuted. This was held not to have been the case in *Abu Hamza* as the court concluded that an earlier decision by the police not to prosecute in relation to a number of items seized from the defendant could not amount to an 'unequivocal assurance' that he would not be prosecuted in the future and that there was no evidence that he had relied upon it.[41] Understandably, Ormerod suggests that the indication given by the police did appear to be 'an explicit assurance' that he would not be prosecuted. Ormerod also observes that this category of abuse of process is grounded on the concept of 'detrimental reliance' which is narrower than 'legitimate expectation' as the defendant needs to show that he has changed his position to his disadvantage as a result of the representations which have been made to him.[42] In *Gripton*, the court held that there was not an abuse in circumstances where there had been an unequivocal representation, but the appellant had not changed her position as a result and was, in fact, unaware of the representation.[43]

The principles of *Abu Hamza* are relevant to an abuse argument on the basis of breach of promise as the result of a successful VRR as the defendant has generally not been induced into changing his position as a result of the actions of the authorities. By contrast, the cases of *Dean* and *Townsend*, for example, arose in the context of the prosecutions of individuals who had been assured that they would be prosecution witnesses. In *R v AJ*, the Court of Appeal observed that *Abu Hamza* 'is not a binding rule, but it remains a valid observation and not a bad rule of thumb.'[44] The court concluded that the ultimate question was whether 'the prosecution was an affront to the integrity of the criminal justice system.'[45] As a result, even if there has been a representation that the defendant will not be prosecuted on which he has relied, the court may refuse to stay the proceedings if it is not of the view that a trial would amount to an affront to the criminal justice system. It may be that the court would conclude, as it did in *R v AJ*, that the issues in dispute should probably be determined as part of the trial process.

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[41] ibid
[42] David Ormerod, 'Case Comment: R v Abu Hamza' [2007] Crim LR 320, 324
[43] *R (Gripton) v CPS* [2010] EWCA Crim 2260
[44] *R v AJ* [2019] EWCA Crim 647 [51]
[45] ibid [98]

The approach of the courts to abuse arguments made in respect of reversals of decisions not to prosecute was first set out in *Killick* which resulted in the VRR in the first place. In *Killick* the Court of Appeal considered whether prosecution as a result of a request for review of the decision not to prosecute by the victim was an abuse of process. The court concluded that neither of the two communications sent by the police indicating that no further action would be taken against the appellant amounted to an unequivocal representation. The court also stated that the appellant's solicitors would have been aware of the possibility of a review as the Code for Crown Prosecutors states that in certain circumstances it may be appropriate to re-start a prosecution. The court also made it clear that the prosecution has a duty to review decisions if the complainant requests one for a number of reasons. Firstly, as it is possible to judicially review decisions not to prosecute, it would be 'disproportionate for a public authority not to have a system of review.'[46] Secondly, the decision is 'in reality a final decision for a victim' and the police have a right of review under the charging guidance.[47] Thirdly, the court also referred to the right of review under Article 10 of the then draft EU directive establishing minimum standards on the rights, support and protection of victims of crime.[48] Additionally, on the facts of *Killick*, the appellant does not appear to have suffered any prejudice as a result of the representations.

It would be very difficult for a defendant to successfully argue for a stay of prosecution on the basis that the prosecution had breached a legitimate expectation by reviewing a decision not to prosecute. In addition, it would be exceedingly difficult to argue abuse on the second ground, namely that the integrity of the criminal justice system had been undermined by a decision to prosecute following the review of a decision not to prosecute. This ground is predicated on some kind of misconduct on the part of the prosecution; Rogers states that this ground depends on the identification of one of four types of impropriety: misconduct, manipulation of process, malice or

[46] *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10, 132
[47] ibid 133; CPS, 'Charging (The Director's Guidance)' (2013, fifth edition) [23]
[48] *Killick* (n 44) 133

frustration of legitimate expectation.[49] Frustration of legitimate expectation could encapsulate a breach of promise, but it would be difficult to argue that the prosecution had acted with impropriety when the reversal of a decision to prosecute was based on established policy such as the VRR. The prosecution would inevitably argue that the defendant was on notice of the possibility of a review, particularly if he had the benefit of legal advice. Rogers accepts that a key consideration is whether the defendant would have been in a position to foresee that the original decision may be changed.[50] Essentially, abuse of process should only be utilised when there is impropriety affecting the fairness of the trial, rather than being used as a routine response to the reversal of a decision not to prosecute.

As the VRR becomes more firmly embedded in the criminal justice system it is likely to become increasingly difficult to argue that the review of a decision could amount to an abuse of process under the second head of abuse (integrity of the criminal justice system) in the absence of impropriety on the part of the prosecution. Firstly, it would be difficult to show that an unequivocal representation had been made. Secondly, the defendant would need to show that the integrity of the criminal justice system had been undermined. This is particularly the case in view of the approach of the courts in recognising the value and importance of the VRR. Thirdly, in *S*, the Divisional Court held that the CPS was not required to inform the defendant of the VRR request or offer him an opportunity to make representations.[51] The prosecution authorities can also ensure that notifications of decisions not to prosecute or to terminate proceedings are sufficiently carefully worded to ensure they do not amount to an unequivocal representation that the defendant will never be prosecuted. Indeed, any correspondence should specifically refer to the victim's right to request a review of a decision and the possibility that the original decision could be changed.

An alternative approach would be for the defendant to argue that the first head of abuse is engaged, namely that it is no longer possible for him to have a fair trial as a result

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[49] Jonathan Rogers, 'The Boundaries of Abuse of Process in Criminal Trials' [2008] CLP 289, 292
[50] ibid 307.
[51] *R (S) v CPS* (n 31) 810

of his reliance on the representation that he would not be prosecuted. The defendant would still have to overcome the requirement that the assurance that he had been given was unequivocal and it is submitted that in the vast majority of cases where a review has taken place the defendant will not have acted to his detriment as a result of being informed that he was not being prosecuted. However, there remains an argument that some of the authorities, such as *Bloomfield*, support the case for upholding abuse of process without the requirement of prejudice, particularly where the representation not to prosecute has been made before the court.[52] The court reached a similar decision in *Smith* where the prosecution had agreed in court to dispose of the case by way of a restraining order on acquittal, but then reneged on the agreement at the next hearing.[53] Although the defendant in *Smith* had not really changed his position as a result of the prosecution's retraction, he had been deprived of the opportunity initially offered to him. However, *Bloomfield* and *Smith* pre-date the VRR and a decision to prosecute on the basis that the original decision had been reviewed as a result of a request made by the victim could potentially justify such a change of decision. The Court of Appeal has also indicated that the courts did not intend to create 'a comprehensive binding rule' in either *Bloomfield* or *Abu Hamza* and that the courts are 'concerned with considerations of fairness' and 'must be free to respond to the circumstances of each case.'[54] Therefore, abuse of process arguments are unlikely to be successful on the basis of breach of promise unless there has been an unequivocal representation followed by an element of detrimental reliance that also amounts to an affront to the integrity of the criminal justice system on the basis of *R v AJ*.[55] However, if that representation is made in front of the court, the possibility of success is perhaps increased on the basis of *Bloomfield* and *Smith*.

7.4.2 Delay

Another potential abuse argument would be based on delay. Again, the authorities suggest that such an application would rarely be successful. The Court of Appeal has

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[52] ibid
[53] *R (Smith) v CPS* [2010] EWHC 3593 (Admin)
[54] *Gripton* (n 43) [27]
[55] *R v AJ* [2019] EWCA Crim 647

held that a stay should only be granted on this ground in 'exceptional circumstances' and the defendant must establish on the balance of probabilities that he would suffer serious prejudice as a result of the delay and would not be able to have a fair trial.[56] The Court of Appeal has also emphasised the importance of not eliding the principles of abuse of process with whether there is a case to answer or whether the conviction would be unsafe.[57]

A particularly relevant 'delay' case in relation to the review of decisions not to prosecute is *R v LG* where the prosecution contested the trial judge's decision to stay the prosecution on grounds of delay after the decision not to prosecute had been reversed following a complaint to the IPCC.[58] As a result, the case involved issues of both delay and breach of promise. The court concluded that the was no evidence that the integrity of the criminal justice system had been jeopardised and as such the second limb of abuse of process was not relevant. The issue was therefore whether the defendant would be able to have a fair trial. The court recognised that for a stay on the basis of delay to be justified, there would need to be evidence that the defendant had suffered prejudice as a result.

R v LG is analogous to decisions made under the VRR as the reversal of the decision not to prosecute was triggered by the complaint made by the victim's family. The case illustrates how an abuse of process application is likely to depend on whether the defendant has been placed at a disadvantage by the review of the decision not to prosecute to the extent that he cannot have a fair trial. The defendant would need to persuade the court that he had suffered 'serious prejudice' to obtain a stay for delay or 'detrimental reliance' if he were arguing breach of promise. As in *R v LG*, both grounds could be argued together as circumstances which amount to 'serious prejudice' for delay may also amount to 'detrimental reliance' for the purposes of breach of promise. Potentially the two arguments could strengthen one another, the longer the delay the more likely the defendant may suffer detriment as a result of his

[56] *Attorney General's Reference (No 1 of 1990)* [1992] QB 630, 643-644
[57] *R v F* [2011] EWCA Crim 1844, [2012] QB 703, 721
[58] [2018] EWCA Crim 736

reliance on a representation that he will not face proceedings; although it will remain difficult to establish that the defendant has been disadvantaged to the extent that it is not possible to have a fair trial.

A situation with potentially more traction would be that the defendant had been informed that the original decision had been reviewed under the VRR and the decision not to prosecute had been upheld. If he were then to be prosecuted (as a result perhaps of a successful judicial review), he may then be able to put forward a more convincing argument that he had received an 'unequivocal representation' that he would not be prosecuted. He would, however, still have to prove that he had relied on that representation to his detriment. It may be possible to prove this if, as a result of the VRR outcome, the defendant had disposed of certain evidence that he would wish to rely on at trial, for example.

7.4.3 Justifications for a restrictive approach to abuse of process

Despite the expectation that the defendant relies on the abuse of process doctrine to resist decisions to prosecute, the requirements of arguments based on breach of promise or delay are demanding and likely to be insurmountable in most cases. However, such onerous requirements are justifiable. The doctrine protects those defendants who have genuinely been disadvantaged and their right to a fair trial compromised by the improper actions of the prosecution. However, it should not permit the doctrine to be used to thwart a legitimate prosecution merely as a result of the amount of time that has elapsed since the original decision or because the prosecution has changed its position on prosecution as a result of a lawful request for review.

The doctrine does, and indeed should, provide a residual safeguard against the defendant's right to a fair trial being compromised by a review decision; it provides a means for the defendant to argue that it is no longer possible for him to receive a fair trial as a result of the review process and the courts should be prepared to consider the circumstances of the individual case to determine whether the rights of the defendant have been unfairly breached. Hypothetical situations where this could happen would

be where the review has taken place after the expiry of the published time limit or where the prosecutor has conducted an ad hoc review outside the parameters of the VRR.

Therefore, it is right that the doctrine of abuse of process should only cover exceptional situations. On the basis of the current authorities, it protects the defendant in situations when their fair trial rights have been compromised by the prosecution indicating that they would not prosecute and the defendant has relied on this to the extent that he would be disadvantaged in a subsequent trial. In other situations, such as where no real detriment has been suffered, the defendant retains the standard safeguards that are built into the trial process as would any other defendant. For example, he can still contest the admissibility of evidence, cross-examine witnesses and make a submission of no case to answer. Furthermore, the defendant is still able to maintain his not guilty plea and contest the matter at trial. The burden of proof requires that the prosecution prove the case against the defendant in the same way as if he had been prosecuted as a result of the original decision. These safeguards are sufficient provided the defendant has not been prejudiced by the review process. To mitigate the risk of such prejudice, additional safeguards will be identified in the final section of this chapter which should be incorporated into the VRR process to increase the protections given to defendants.

7.5 Conflict with the private prosecutor

The contemporary criminal justice system is traditionally based on a two-party contest between the State and the defendant. The review mechanisms do recognise to some extent the interest of victims and facilitate them asserting their views on whether a prosecution should proceed (even if these views are not proactively invited by the prosecution). In the case of private prosecutions, the decision to prosecute has been made by the individual victim without the requirement to objectively appraise the evidence or to act in the public interest. As a result, private prosecutions clearly do have the potential to conflict with the interests of the defendant. This was particularly the case before the DPP's change of policy on private prosecutions. However,

defendants do not have a right not to be prosecuted apart from perhaps on the basis that they have a legitimate expectation that the DPP will apply the Full Code Test to private prosecutions as per the policy.

As was identified in chapter five, private prosecutions allow victims to have high levels of participation and control of the conduct of the prosecution. The risk to the defendant is that this would have the potential to introduce arbitrary decision-making by victims who have not conducted an objective analysis of the evidence and are potentially emotionally attached to the case. A private prosecutor may not have reviewed the case in the same way as a public prosecutor whose discretion is structured by prosecution policies and guidance aimed at ensuring that prosecution decisions are consistent, evidence-based and in the public interest. Therefore, there must be legitimate concerns about the extent to which private prosecutions could undermine the interests of defendants. From this perspective, the DPP's policy that private prosecutions will be reviewed against the Code for Crown Prosecutors using the same test as for public prosecutions is justified. This policy brings an element of consistency to prosecutions and potentially addresses the concerns that arbitrary decision-making by victims bringing private prosecutions could undermine the rights of the defendant. The application of the Full Code Test ensures that a benchmark evidential standard is met and that the defendant is not prosecuted in evidentially weak cases.

7.6 Comparison with other appeal mechanisms

This section will identify safeguards from other appeal mechanisms that could be incorporated into the review mechanisms to protect defendants from the risk of being placed at a disadvantage by the rights of review which could lead to their right to a fair trial being compromised.

The principal impact of the review mechanisms on defendants is that they qualify the principle of finality as defendants can no longer completely rely on confirmation that they will not be prosecuted. The discussion of abuse of process has shown how

defendants cannot be confident that the courts would grant a stay of prosecution on the basis of breach of promise or delay. There is a risk, therefore, that in a limited number of cases that the defendant could be disadvantaged by the victims successfully having a decision not to prosecute reviewed. Rights of review are not the only circumstances in which a previously concluded decision is re-opened and reversed; the prosecution have a number of specific rights of appeal that can have this effect. These prosecution rights of appeal show that there are a number of additional protections that could be incorporated into the VRR, in particular, to preserve the rights of the defendant.

7.6.1 Time limits and notice requirements

Of particular relevance to the issue of finality is that the majority of prosecution rights of appeal require compliance with strict notice requirements and time limits. The prosecution may appeal to the Crown Court a decision of the magistrates' court to grant bail provided they give oral notice of appeal to the court that granted bail followed by service of a written notice within two hours on both the court and the defendant.[59] Similarly, in order for the prosecution to challenge a judge's terminating ruling, the prosecutor must indicate their intention to appeal immediately or request an adjournment to consider whether to appeal.[60] Appealing a magistrates' court decision by way of case stated to the High Court or challenging an unduly lenient sentence in the Court of Appeal both have to made within 21 or 28 days respectively.[61] Challenges to terminating rulings and unduly lenient sentence applications both require leave of the court.[62] The point that can be drawn from this is that appeal mechanisms which have the potential to set aside previously 'final' decisions generally have strict time limits and require notice to be given to the defendant in the event that the prosecution wish to exercise these rights. There are similar procedural requirements for judicial review with strict time limits and notice requirements. These principles could be applied to the VRR to mitigate the effect on the defendant of

[59] Bail (Amendment) Act 1993, s 1(4) and (5)
[60] Criminal Justice Act 2003, s 58(4)
[61] Magistrates' Courts Act 1980, s 111(2) and Criminal Justice Act 1988 s 36(8) and Sch 3(1)
[62] Criminal Justice Act 2003, s 58(9) and Criminal Justice Act 1988, s 36(1)

having what was previously considered to be a final decision unpicked. Although there are time limits under the VRR there is a lack of clarity around when which time limit applies. Reducing the VRR time limit of three months to 21 or 28 days could shorten the period of uncertainty for defendants whilst still allowing sufficient time for victims to request a review.

There is also no requirement that the defendant be put on notice of the request. The effect of the VRR on the defendants' rights could be significantly improved by ensuring that all defendants are made aware that a case may be subject to a request for review if it is eligible regardless of the method of termination. This would perhaps be a relatively simple task when a notice of discontinuance is issued, but less straight-forward when the defendant is notified that no further action is being taken by the police or another third party or when the matter is brought to an end in the courtroom. Additionally, the CPS could notify the defendant when a request for a review has been received.

One exception to the requirements of notice and short time limits is the provisions which allow for re-trials for serious offences under Part 10 of the Criminal Justice Act 2003, also known as the exception to the double jeopardy rule.[63] Although the provisions only apply to a limited number of offences and must involve new and compelling evidence, there are no time restrictions and an application could be made many years after the original acquittal. Generally, rights of review can be distinguished from the exception to the double jeopardy rule on the basis that rights of review do not permit a defendant to be re-tried after he has been acquitted. They can facilitate a reversal of a decision not to prosecute or not to continue a prosecution, but this happens at an earlier stage when the public prosecutor decides not to pursue the matter. Although it could potentially happen during the trial, it is unlikely that the prosecutor would terminate the matter after the jury had retired to consider the verdict.[64] It clearly

[63] See: Ian Dennis, 'Rethinking Double Jeopardy: Justice and Finality in Criminal Process' [2000] Crim LR 933; Ian Dennis, 'Quashing Acquittals: Applying the "New and Compelling Evidence" Exception to Double Jeopardy' [2014] Crim LR 247; Paul Roberts, 'Justice for All - Two Bad Arguments (and Several Good Suggestions) for Resisting Double Jeopardy Reform' (2002) 6 E & P 197.
[64] For an example of a case where a trial date had been fixed see: *R (Hayes) v CPS* [2018] EWHC 327 (Admin), [2018] 2 Cr App R 7

would not be relevant after a jury had returned a not guilty verdict as this would be a jury acquittal, not a decision by the prosecutor not to continue. By comparison, therefore, the rights of review are a much less radical encroachment on the rights of defendants than the exception to the double jeopardy rule.

7.6.2 'Interests of justice' requirement

The provisions under Part 10 of the Criminal Justice Act 2003 also include an 'interests of justice' requirement which requires the court to specifically consider whether a fair trial would be unlikely when determining whether to grant leave for a re-trial.[65] This compels the court to take into account the effect of the decision on the rights of the defendant.

Although the VRR has the 'public confidence' requirement, the incorporation of a broader 'interests of justice' provision would compel the prosecutor to explicitly consider the impact of the decision on the defendant's fair trial rights as well as the interests of the victim and public confidence in the criminal justice system. The 'public confidence' test would not necessarily identify cases where the defendant might be disadvantaged by the reversal of a decision not to prosecute which would leave the defendant having to rely on the abuse doctrine. The application of an 'interests of justice' test would take place as part of the review process and would, therefore, be at a much earlier stage than an abuse argument which might only be heard by the court several months after the decision to prosecute.

7.6.3 Right to make representations

Defendants are entitled to be present and make representations in relation to applications to the Court of Appeal for permission for a re-trial post acquittal.[66] This enables defendants to argue against leave being granted including making representation as to why it would not be in the interests of justice to have a re-trial. In

[65] Criminal Justice Act 2003, s 79(2)
[66] ibid s 80(5)

a similar way, defendants would have a right to make representations as an interested party in judicial review proceedings. Therefore, this reinforces the arguments set out in the first section of this chapter that defendants should have a right to make representations in relation to requests for review under the VRR.

A variation of this right should be incorporated into the VRR to allow defendants to make representations why the decision not to prosecute should not be overturned.

7.7 Conclusions

The above analysis has shown that defendants have very limited rights in relation to rights of review. The concept of rights of review is not fundamentally in conflict with defendants' rights. None of the rights of review permit a prosecution when a defendant has previously been acquitted and therefore potentially have less impact than the reforms to the double jeopardy principle. Although rights of review clearly do have the potential to be contrary to the *interests* of defendants, there are limited opportunities for them to contest the decision to prosecute. To a large extent, defendants have to rely on the trial and appeal processes and if they wish to specifically contest the review decision to prosecute, they are likely to have to argue that the prosecution should be stayed on grounds of abuse of process. In order to successfully argue abuse of process, defendants will need to be able to show that they can no longer have a fair trial as a result of the representation that they would not be prosecuted on the basis that they relied upon that representation to their detriment.

There is more than a negligible risk of defendants being placed at a disadvantage at trial by their actions following the initial representation that they will not be prosecuted. Therefore, rather than rely entirely on the abuse doctrine to protect such defendants, it would be preferable to introduce a number of measures to reduce the likelihood of defendants suffering any such detriment. The VRR guidance should be amended to increase safeguards for the defendant by reducing the likelihood of reliance on decisions which may be reviewed. The defendant should routinely be made aware that a decision could be reviewed and notified when such a request is received. As a defendant would be an interested party in judicial review of a decision

not to prosecute, it would seem reasonable to permit them to make representations as part of the VRR; it would then be for the reviewing prosecutor to decide how much weight to place on those representations. If this were combined with an interests of justice requirement, the level of protection for the defendant would be enhanced. Tighter time limits and notice requirements should also be implemented to further mitigate the risk of defendants relying on a decision not to prosecute to their detriment.

The purpose of these proposals would not be to prevent the review of decisions, but to ensure that the defendant was no worse off as a result of the review process than defendants for whom the initial decision was to prosecute. The abuse of process doctrine remains a useful fallback procedure to protect those defendants who are disadvantaged by the retraction of the decision not to prosecute, but not as a way of routinely frustrating a legitimate review decision. Generally, there is nothing to suggest that defendants who are prosecuted following a review procedure would endure substantially more anxiety and distress than defendants who had been prosecuted from the outset.

Private prosecutions justify separate consideration as potentially they could lead to inappropriately brought prosecutions subjecting defendants to unnecessary stress and anxiety. However, defendants do have the option of referring these to the CPS to have the prosecution reviewed. The rights of defendants would be further protected by a provision that either required the CPS to be notified of all private prosecutions or alternatively, required the courts to specifically inform the defendant when the summons was issued of the power of the CPS to take over prosecutions so that they were aware of this particular route for contesting the decision to bring a private prosecution. In the event that the prosecution does not meet both stages of the Full Code Test, the prosecution should be taken over and discontinued.

Many of the issues discussed in this chapter will be developed further in the next chapter which focusses on the public interest.

Chapter 8 - An examination of the compatibility of the review mechanisms with the public interest dimension of prosecutions

8.1 Introduction

The previous chapter examined the impact of the rights of review on the rights of defendants and argued that the VRR and judicial review pose only a slim risk of undermining the defendant's right to a fair trial, which could be reduced further by the incorporation of additional safeguards. It was also argued that private prosecutions have greater potential to conflict with the rights of the defendant. This chapter will focus on the relationship between allowing victims to have rights of review and the public interest. This is critical to the examination of the overall impact of victims' rights of review on other interests in the criminal justice system and the assessment of whether the rights of review are coherent and principled.

As the basis of modern prosecutions is a two-party contest between the State and the defendant, an analysis of the public interest is central to this discussion. However, the conceptual and political basis of this contest is disputed and raises fundamental questions about the extent to which the State should be involved in conflicts which arise out of disputes between individuals. With the exception of private prosecutions, prosecutions are brought by the CPS or another prosecution agency purportedly acting for the State in the public interest. Therefore, the first section of this chapter will examine the concept of the public interest. As there are competing views on what the role of the State should be in the prosecution process and the extent to which it should intervene in disputes between private individuals, this section will discuss different notions of the role of the State and the nature of the public interest.

The second section will then review whether the rights of review are, individually and collectively, compatible with the public interest. It will be argued that, in principle, although rights of review do increase the victim's role in the decision to prosecute and

recognise another interest in the criminal prosecution, these are still consistent with the public interest rather than running counter to it. More specifically, both the VRR and judicial review can be accommodated within the criminal justice process without compromising public interest values. In contrast, private prosecutions it will be suggested, are not consistent with the wider public interest as a result of the increased control and party status that they permit a victim to have. The effect of this is that private prosecutions can be disproportionately based on the private interests of the individual without taking into account the wider interests of society. This could, for example, mean that an evidentially weak case is brought to court causing reputational damage to the criminal justice system.

8.2 The nature and basis of the public interest

Notwithstanding the historical nature of dispute resolution, the modern system of criminal prosecutions in England and Wales is a contest between the State and the defendant.[1] There is, however, no formal definition of the role of the State, or the related concept of the public interest, in this context. This section will show that the traditional criminal justice model is based on a conflict between the State and individual defendants leading to the requirement that public prosecutions are brought in the public interest. Prosecutions are brought by the State acting in the public interest as a sanction against the defendant for breaching the criminal law. As a result, the concept of the public interest is firmly rooted in both adversarial and inquisitorial criminal trial systems.[2] However, the nature and basis of the State's involvement in the prosecution process and the public interest is contested.

The orthodox view of criminal justice can be described by reference to the work of Andrew Ashworth. Ashworth has argued that the purpose of criminal liability is 'to declare public disapproval of the offender's conduct' and to 'punish the offender by

[1] John Spencer, 'The Victim and the Prosecutor' in Anthony E Bottoms and Julian V Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Routledge 2012) 141.
[2] John Spencer, 'Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?' (2016) 20 IJHR 601, 608.

imposing a penal sanction.'[3] This focus on the imposition of sanctions and punishment distinguishes criminal liability from civil liability which is primarily concerned with financial restitution for the harm caused to an individual. It is important to note, however, that crime and criminal liability are social constructs; conduct is not intrinsically criminal, the decision to criminalise particular types of behaviour is essentially a political one. Hulsman has argued that there is no 'ontological reality' of crime in that crime is 'not the object but the product of criminal policy.'[4] The criminalisation of particular types of conduct originate from political decisions made in the historical context of the time when the modern criminal law was developed.[5]

Ashworth describes this difference in terms of 'offences against society as a whole rather than mere matters between individual citizens.'[6] This distinction between public and private wrongs is not without controversy; conduct could be criminalised on the basis of the public value in doing so that goes beyond the harm or potential harm to individuals.[7] Ashworth argues that it should be 'a fundamental role of the State to maintain a system for the administration of justice' to ensure full procedural safeguards for defendants.[8] This conceptualisation of the State providing the machinery of justice is based on the notion of a social contract in which citizens 'agree to obey laws in return for protection of their vital interests.'[9] These principles arguably underpin the concept of the public interest; the State prosecutes on behalf of citizens collectively including the individual victim of the offence.

Prosecution by the State is, therefore, about more than achieving redress for the individual victim; it is an official response to offending behaviour, or censuring, which

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[3] Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 OJLS 86, 89.
[4] Louk Hulsman, 'Critical criminology and the concept of crime' in Eugene McLaughlin and John Muncie (eds), *Criminological Perspectives: Essential Readings* (3rd edition, SAGE 2013) 300–301.
[5] Alan Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law (Weidenfeld and Nicolson 1993) 9.
[6] Ashworth (n 3) 89–90.
[7] See John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence. Fourth Series* (Oxford University Press 2000).
[8] Andrew Ashworth, 'Rights, Responsibilities and Restorative Justice' [2002] Crim LR 578, 591.
[9] ibid 579; Although it is important to note that there is an argument that decisions as to criminalisation were to protect the interests of certain social classes and control others, see: Norrie (n 5) 26–29.

includes a punitive element based on the principle of retributive justice.[10] On this basis, Campbell et al have argued that, 'the primary interests in the application of the criminal sanction… are those of the State and the suspect/defendant/offender.'[11] This model prioritises culpability on the part of the offender and the application of a proportionate sanction based on the seriousness of the offending. For proponents of this view, there is little justification for permitting victims to have procedural rights in the criminal justice system which is a contest between the State and the defendant and to do so could introduce inconsistency depending on the particular victim's feelings towards the offender.[12] Ashworth argues that the 'victim's interest is surely not greater than yours or mine' but the 'victim's interest is as a citizen.'[13] Ashworth's concerns are that increasing victim participation could undermine the principle of proportionality in sentencing by introducing an element of inconsistency between offenders of similar offences as 'some victims will be forgiving, others will be vindictive.'[14] To increase victim involvement could result in too much weight being placed on the effect of the crime on the victim and less focus on the culpability of the offender; particularly, as some victims would be much more vengeful than others.

Fenwick has identified a 'discernible movement towards a "private" ordering' when the system was previously dominated by public interests.[15] Contemporary examples of this movement would include the VPS and compensation payments from the offender or the State. Fenwick concludes that it may be possible to accommodate some procedural rights for victims within the criminal justice system provided they were 'subject to supervision and scrutiny' and that levels of 'objectivity, consistency and impartiality' were maintained.[16] MacCormick and Garland have described the development of a more 'dialogic' relationship between public and private interests

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[10] Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005) 17–21.
[11] Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edition, Oxford University Press 2019) 50–51.
[12] ibid 51.
[13] Ashworth (n 8) 585.
[14] ibid 586.
[15] Helen Fenwick, 'Procedural "Rights" of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60 MLR 317, 318.
[16] ibid 333.

with this division being 're-drawn.'[17] Gradually individual victims are able to assert their rights in a range of contexts within the criminal justice system, but without fundamentally changing the nature of the adversarial contest between the State and the defendant. This suggests that it is possible to gently introduce individual procedural rights for victims without overriding the public interest foundation to the criminal justice system.

The traditional justice system based on culpability and proportionality principles as expounded by Ashworth is not universally accepted and has come under attack from a range of perspectives. Some of these are more radical than others.[18] The most prominent alternative models originate from the various incarnations of restorative justice. Nils Christie's seminal article exemplifies this distinction by challenging State control of criminal proceedings on the basis that victims are so 'thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena.'[19] Christie argues that they have 'lost participation' as their conflict has been stolen by professionals on behalf of the State. He proposes a 'victim-oriented court' which would incorporate additional stages to focus on the impact and needs of the victim and offer appropriate support to the offender separately from punishment.[20] Therefore, there are two dominant schools of thought: those that view crime as offending against society and those that support a restorative or community-based paradigm. The former group is more firmly associated with prosecutions in the public interest with the latter broadly focussing on crime being committed against individual victims. The institutional framework for the second group is not based on State criminal justice agencies bringing a prosecution against the individual, but often involves a community-based forum which only relies on the courts as a 'back up'

[17] Neil MacCormick and David Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Reprint, Clarendon Press 2004) 12.
[18] For an example of a radical perspective based on restitution, see: Randy Barnett, 'Restitution: A New Paradigm of Criminal Justice' (1977) 87 Ethics 279.
[19] Nils Christie, 'Conflicts as Property' (1977) 17 Brit J Criminol 1, 3.
[20] ibid 10–11.

system.[21] Dignan and Cavadino's typology identifies five models with different institutional frameworks: the retributive model, the welfare model, the civilian model, the victim/offender reparation model and the communitarian model.[22] The last three of these models represent different forms of restorative justice. The civilian model relies on the civil courts as a means of returning disputes to the parties using tortious principles and largely fails to take into account that the dispute could have had a wider societal impact beyond the individual victim.[23] The victim/offender reparation model 'seeks to balance and serve the interests of victims and offenders' and could be accommodated within the existing criminal justice framework.[24] The authors' favoured option is the Communitarian Model which is based on Braithwaite's reintegrative shaming theory.[25] This model results in the ultimate reintegration of the offender rather than stigmatization as part of conventional justice models. Dignan and Cavadino note that this model recognizes both the harm done to the individual victim and wider public interest.[26]

These types of communitarian models offer an alternative paradigm of justice to the conventional criminal justice system. A number of different restorative justice models have been proposed some of which envisage a complete alternative criminal justice system, such as Braithwaite and Pettit's republican theory.[27] Such a model would not be based around the notion of State prosecutions brought in the public interest, but would locate responses to criminal behaviour in the community with the victim as the injured party.[28] Braithwaite and Pettit argue that an alternative is required to the conventional criminal justice system that is 'comprehensive' rather than simply focusing on individual 'sub-systems.[29] Such a system would be based on four

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[21] James Dignan and Michael Cavadino, 'Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim's Perspective' (1996) 4 International Review of Victimology 153, 156.
[22] ibid
[23] ibid 165.
[24] ibid 166–167.
[25] ibid 169.
[26] ibid 172.
[27] John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon Press ; Oxford University Press 1990).
[28] John Braithwaite, *Crime, Shame, and Reintegration* (Cambridge University Press 1989).
[29] Braithwaite and Pettit (n 27) 7.

presumptions: parsimony (only using the minimum criminal justice interventions necessary); checking of power; reprobation (disapproval); reintegration (of both the victim and the offender back into the community).[30] This alternative is not intended to merely provide an alternative means of sentencing offenders, but should completely reconceptualise the theoretical basis for the entire criminal justice system. In fact, Braithwaite has argued that restorative justice should go further than reforming the legal system by providing 'holistic change' across many aspects of society including family life, work and politics.[31]

Zehr describes restorative justice systems as based on the notion of a conflict between the victim and the offender as an alternative to the State justice which is based on the concepts of guilt and punishment.[32] This alternative conception of justice is based on the notions of causing and repairing harm rather than blame and punishment.[33] Zehr's analysis proposes a new paradigm of justice based on restorative principles which highlights that the traditional retributive model, with its particular interpretation of what is in the public interest, is not the only model of criminal justice. Essentially, therefore, although the prevailing criminal justice system is based on a model of public prosecutions brought by the State acting in the public interest, other models have been proposed.

It is submitted, however, that despite the existence of alternative models of justice, the contemporary criminal justice system based on retributive principles remains more conceptually and politically defensible. Restorative justice would shift the focus of criminal justice towards a personal conflict between the victim, minimising the role of the State. This would mean that the victim and the community would become more dominant than the State, potentially resulting in arbitrary and inconsistent decisions as these would be severely influenced by the individuals involved. This could lead to

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[30] ibid 91.
[31] John Braithwaite, 'Principles of Restorative Justice' in Andrew Von Hirsch, Julian V Roberts and Anthony E Bottoms (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms.* (Bloomsbury Publishing 2003) 1.
[32] Howard Zehr, 'Retributive justice, restorative justice' in Gerry Johnstone, *A Restorative Justice Reader* (Routledge 2013) 32.
[33] Ross London, 'A new paradigm arises' in ibid 6.

unfairness to defendants in individual cases and less recognition that defendants have offended against society as a whole, not just the individual victim. This paring back the role of the State in the 'social contract' to this extent is not justified; however, it is possible to recognise the rights of victims without causing fundamental damage to the adversarial structure.

8.2.1 Managerialism

Another theme that has changed the concept of the State acting in the public interest is the development of managerialism and consumerism in criminal justice. Although different commentators have argued that managerialism emerged at different times, it is clear that by the end of New Labour's period of government in 2010 it had a grip on the public sector and was noticeable in criminal justice. Garland states that a 'managerialist, business-like ethos' had developed by the mid 1980s with an emphasis on 'economy, efficiency and effectiveness.'[34] Lacey described a 'managerial approach' in which the public sector was compared to the 'idealised image of the private sector' which resulted in a new focus on 'efficiency' and 'value for money.'[35] This managerialist criminal justice system is characterised by performance measures, efficiency targets, the publication of business plans and 'measurable and quantifiable outputs and cost-effective outcomes.'[36] This was accompanied by increased contracting out or privatisation of specific criminal justice functions, such as privately run prisons and transport services, and a new focus on 'consumers' in the criminal justice system.[37]

Allowing individual victims increased rights through initiatives such as the Victim's Charter situates them far more easily if not as consumers then at least as beneficiaries

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[34] David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (OUP Oxford 2001) 116.
[35] Nicola Lacey, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' [1994] MLR 534, 534.
[36] Eugene McLaughlin, John Muncie and Gordon Hughes, 'The Permanent Revolution: New Labour, New Public Management and the Modernization of Criminal Justice' (2001) 1 Criminal Justice 301, 313.
[37] Garland (n 34) 116–117.

of the criminal justice system. This aligns much more with those notions of public sector managerialism on the basis that they allot victims individual social rights that are often not enforceable, potentially distracting from the more significant structural problems in the criminal justice system.[38] Porter has described how managerialism has manifested in the CPS as being 'effectively encouraged to compete with itself for improved conviction rates, victim satisfaction, efficiency and meeting reduced budgetary targets' as, in reality, it has no competitors and has not been privatised.[39] This has resulted in increased emphasis on the volume of cases, conviction and guilty plea rates, and performance analysis in a way that can be measured statistically.[40] Garland observes that the criminal justice institutions have largely set their own performance measures against which they prefer to be judged.[41]

The VRR could be viewed as a managerialist tool for the CPS to monitor and justify its own performance. VRR annual data provides details of the number of eligible cases, the number of requests and the number of successful VRR requests. A breakdown by offence category is also provided together with a percentage figure for the number of successful reviews.[42] Although not formally presented as performance data, the recording and analysis of this data by the CPS could be used as such. The 2015-2016 Business Plan did suggest this stating, 'we will have published data on the performance of our Victims' Right to Review scheme' and this is specifically linked to levels of victim and witness satisfaction.[43] The CPS subsequently decided not to include VRR data in the annual business plans as 'this measure did not serve as a clear indicator of corporate performance' suggesting, therefore, that it had been considered as such and then discounted.[44] The annual report of 2014-15 declares that the VRR is

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[38] Brian Williams, 'The Victim's Charter: Citizens as Consumers of Criminal Justice Services' (1999) 38 The Howard Journal of Criminal Justice 384.
[39] Antonia Porter, 'Prosecuting Domestic Abuse in England and Wales: Crown Prosecution Service "Working Practice" and New Public Managerialism' (2018) 28 Social & Legal Studies 493, 496.
[40] See for example: Crown Prosecution Service, Crown Prosecution Service Annual Report and Accounts 2018-19 (CPS 2019)
[41] Garland (n 34) 119–120.
[42] CPS, 'Victims' Right to Review data' (June 2017) <www.cps.gov.uk/publication/victims-right-review-data> accessed 30 October 2019.
[43] CPS, 'Business Plan 2015-2016' (CPS 2016) 8
[44] CPS, 'Minutes of CPS Board meeting on 28 July 2015' <www.cps.gov.uk/publication/minutes-cps-board-meeting-28-july-2015> accessed 30 October 2019.

'fully embedded and continues to operate well, with steady uptake by victims and statistics indicating that the number of decisions being overturned remains low' suggesting that the VRR has been utilised as a performance measure.[45] It could be argued that it is in the public interest to have some form of monitoring device of prosecutorial decision-making and that the VRR fulfils this function.

8.2.2 Public interest under the Code for Crown Prosecutors

Despite the different models of criminal justice, the contemporary criminal justice system is clearly dominated by the traditional retributive model of which the concept of prosecution in the public interest is integral. Although historically prosecutions were brought by private citizens, the decision to prosecute has gradually been appropriated by the Crown purportedly acting in the public interest.[46] From the outset, it was clear that the CPS would act in the 'public interest' and not on behalf of individual victims with the legislation creating a national prosecuting authority to be headed by the DPP.[47] This is reasserted by the Code for Crown Prosecutors which clearly states the public function of the service as 'the principal public prosecution service for England and Wales' and emphasising its independence from investigatory bodies and other persons and agencies.[48] The distinction between the private interests of the victim and the assessment of the public interest is stressed by the requirement that prosecutors 'take into account the views expressed by the victim about the impact that the offence has had', but the Code also emphasises that 'the CPS does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest.'[49]

The concept of the public interest is embedded in the Code for Crown Prosecutors as the second stage of the Full Code Test and is defined in the Code by reference to a list of factors which the Crown Prosecutor is instructed to consider having satisfied

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[45] CPS, 'Annual Report and Accounts 2014-15' (CPS 2015) 8
[46] Christie (n 19).
[47] Prosecution of Offences Act 1985, s 1
[48] Crown Prosecution Service, 'The Code for Crown Prosecutors' (CPS October 2018) [1.2] and [2.1]
[49] ibid [4.14]

themselves that the evidential stage is met.[50] The prosecutor has to weigh up these factors to decide whether it is in the public interest to prosecute. These factors include the seriousness of the offence, the culpability of the offender, the circumstances of and the harm caused to the victim, the suspect's age and maturity, the impact on the community, whether prosecution is a proportionate response, and whether the sources of information needed protecting.[51] As a result of this structuring of the exercise of the prosecutor's discretion, two points are of note. Firstly, the interests of the victim are incorporated into the public interest stage of the test by the Code and as such the interests of the victim fall to be considered as part of the public interest assessment as one of the 'unprioritised' list of factors.[52] Secondly, the list of factors does not really define what the public interest is; the only factor that really focuses on the public at large is the need to consider the impact of the offence on the community.[53] There is a certain vagueness to what amounts to the public interest on a practical level. Arguably, the concept involves a degree of subjectivity on the part of the decision-maker as some cases may not be clear-cut as to whether it is in the public interest to prosecute. As a result, this could be a source of tension between the victim and the prosecutor which could lead to the victim challenging a decision not to prosecute.

The interests of the victim may correspond with the assessment of the public interest, but alternatively they may be incompatible. For example, a victim in a serious domestic abuse case may not support a prosecution, but the prosecutor has decided that a prosecution is in the public interest. Conversely, there may be occasions when a victim feels very strongly that a prosecution should be pursued, but the Crown decides that it is not in the public interest to prosecute perhaps because the suspect is suitable for a caution or a prosecution would not result in a meaningful sentence. In terms of the exercise of prosecutorial discretion, the interests of the victim are considered as part of the public interest assessment. However, it has been recognised

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[50] ibid [4.9]
[51] ibid [4.14]
[52] Andrew Sanders, 'The CPS - 30 Years On' [2016] Crim LR 82, 90.
[53] For an argument that the prosecutor should identify a purpose of punishment as part of the test, see: Jonathan Rogers, 'Restructuring the Exercise of Prosecutorial Discretion in England' (2006) 26 OJLS 775.

by the courts that these interests are distinct.[54] For the remainder of this chapter, the public interest will be treated as representing the wider, collective interest of the public at large as opposed to the specific interests of the victim as an individual.

It is clear that the public interest basis of prosecutions is firmly rooted in the State against the defendant model of justice. Although alternative models of justice have been proposed, the arguments in favour of replacing the existing model are not sufficiently compelling; to have a system based on restorative principles would unjustifiably marginalise the role of the State to the extent that the criminal justice system would resemble a variation of civil proceedings. The prosecution process is fundamentally a conflict between the State and the defendant although there is evidence of a gradual willingness to accommodate the interests of the victim in a number of ways. The next section of this chapter will examine whether the rights of review are compatible with the public interest requirement.

8.3 Are rights of review compatible with the public interest requirement?

In this section, it will be argued that judicial review and the VRR are consistent with the public interest. Victim participation through the VRR and judicial review can properly be accommodated within the adversarial system as a form of fault correction in relation to decisions not to prosecute in a way that allowing private prosecutions cannot. The VRR and judicial review permit the victims to challenge a decision, but do not allow victims to force a prosecution on the basis of their own private interests which may be contrary to the wider public interest. Private prosecutions, it is submitted, are potentially in conflict with the conceptual basis of the modern criminal justice system. Whereas neither judicial review nor the VRR undermine the adversarial criminal prosecution between the State and the defendant, the private prosecution does so by allowing the victim full party status without appropriate

[54] *R v B* [2003] EWCA Crim 319, [2003] 2 Cr App R 13, 27 (Lord Woolf)

safeguards to ensure that prosecutions are only brought that are in the public interest and not purely in pursuit of the victim's personal agenda.

To this end, two key areas will be explored: firstly, drawing on the previous chapters, the participatory role of the victim in the rights of review; secondly, an analysis of established appeal mechanisms to show that judicial review and the VRR do not override the public interest requirement and can properly be part of the adversarial system.

8.3.1 The role of victims in the rights of review

As the modern criminal justice system in England and Wales is based on a two-party adversarial contest between the State and the defendant, an important factor in determining whether victims should be permitted rights of review is the status and influence of the victim in these processes. Essentially, it will be argued that a process which allows the victim control of the decision-making or full party status is less defensible that one which allows the victim a voice, but control is retained by the State. The greater the level of participation on Edwards' model, the less compatible the review mechanism is with the adversarial system.[55] It will be suggested that on this basis, judicial review and the VRR are justifiable and thus consistent with the public interest, whereas private prosecutions are not.

As we saw in chapter six, the ultimate decision-making authority for judicial review claims and the VRR is the court and the CPS respectively. The victim may initiate a judicial review claim and indeed has full party status and conduct of the case in those proceedings. However, the judicial review proceedings are collateral to the criminal prosecution. In addition, the defendant in the judicial review proceedings is the CPS, not the individual accused of a criminal offence. Citizens have a right to bring judicial review proceedings in relation to decisions made by public bodies and the High Court has an inherent right to review them; this right is not limited to prosecutorial decisions,

[55] Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 Brit J Criminol 967.

but public decision-making generally. However, the victim has no real control over the outcome as an adjudication is made by the court which may include remitting the matter back to the public prosecutor for further review.

Similarly, the VRR exists outside the formal criminal prosecution. The VRR provides an administrative or private right to challenge decisions not to prosecute provided certain criteria are met. As has been seen in chapter three, the VRR does not attribute victims a particularly expansive participatory role; essentially, victims are limited to requesting that the decision not to prosecute is reviewed internally by the CPS to check that it is correct. Neither of these mechanisms entitle victims to control the decision-making process or to have much influence over the ultimate decision as to whether the previous decision should be set aside.

By contrast, the right of private prosecution does have the potential for the victim to make their own decision as to whether to prosecute and to have conduct and control of the prosecution throughout. The victim has full party status. Although this is subject to the right of the CPS to take the prosecution over, in principle at least, the victim becomes the prosecutor. This arguably may result in a decision which is contrary to the public interest. In *Jones v Whalley*, Lord Bingham questioned the continuing value of private prosecutions now that we have a public prosecution service and a system of law enforcement which is no longer dependent on prosecutions brought by private individuals: 'It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted.'[56]

The decision in *Gujra* also provides some insight into the view of the majority in the Supreme Court regarding the value of private prosecutions and whether prosecutorial decisions should properly be exercised by a public prosecutor rather than private individuals. Lord Neuberger indicated that he preferred the former over the latter stating, 'An objective, expert, and experienced assessment of the prospects [of obtaining a conviction] appears to me to be generally more reliable than the

[56] *Jones v Whalley* [2006] UKHL 41, [2007] 1 AC 63, 73

assessment of a person who will normally be (probably wholly) inexperienced in the criminal justice system.'[57] He also comments that as they are also the victim they can be 'far from dispassionate'[58] which is described by de Than and Elvin as 'an inbuilt conflict of interest' not taking into account the public interest when they bring a prosecution.[59] One of the key benefits of a public justice system is that they 'turn hot vengeance into cool, impartial justice' potentially avoiding the risk of 'escalating feud and vendetta' if victims were solely responsible for responding to criminal misconduct.[60]

De Than and Elvin further argue that the dual roles of being a victim and a prosecutor are problematic and argue that, in the absence of being abolished, private prosecutions should be reformed to have a pre-trial filtering mechanism, a statutory code and sanctions for inappropriate conduct of a private prosecution.[61] Arguably, these concerns regarding arbitrary decision-making would not exist in relation to judicial review or the VRR as although they allow victims to have a voice, the ultimate decision-making power sits with either the court or the public body allocated the function of making prosecutorial decisions. These concerns about the legitimacy of allowing victims a right of review to the cost of other interests will now be explored further by way of a comparison with other prosecution rights of appeal.

8.3.2 Comparison with other appeal mechanisms

The previous chapter highlighted that not all decisions in the prosecution process are irrevocable and that there are exceptions to the general principle that decisions are final. A central argument to this discussion relates to the concept of finality in criminal justice and whether it is justifiable to delay a final decision or re-open a decision which was previously believed to be final. The very nature of appeal mechanisms is that

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[57] *R (Gujra) v CPS* [2012] UKSC 52, [2013] 1 AC 484, 504-505
[58] ibid 505
[59] Claire de Than and Jesse Elvin, 'Private Prosecution: A Useful Constitutional Safeguard or Potentially Dangerous Historical Anomaly?' [2019] Crim LR 656, 667.
[60] Neil MacCormick and David Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish' in Ashworth and Wasik (n 17) 26–27.
[61] de Than and Elvin (n 59).

they can set aside existing decisions with the possibility that they are reversed. As a result, the principle of finality is not absolute and can be subordinate to other priorities. Prosecution rights of appeal may be justified on the basis that it is in the public interest to have procedures for remedying incorrect decisions. Sjolin has argued that appeal procedures are necessary on the basis that unremedied wrongful acquittals could lead to a loss of public confidence in the criminal justice system.[62]

An alternative perspective would be that procedures which undermine the principle of finality could be perceived as damaging the reputation of the criminal justice system. Roberts argues that departure from the 'culturally acceptable mode of forensic fact-finding' has the potential to 'threaten the capacity of procedural due process to deliver justice.'[63] Diluting the principle of finality too heavily could reduce public confidence in the criminal justice system. Roberts also argues that the principle provides an important limitation on executive power in that the State cannot routinely set aside jury verdicts and bring another prosecution.[64] However, it could also be argued that the need to remedy obviously incorrect outcomes is also relevant to the issue of public confidence in the prosecution process and that absolute finality without exception could be damaging reputationally in itself. The double jeopardy rule provides a useful comparison. As the Law Commission observed, the fact that the system was prevented from reacting to new evidence of guilt following an acquittal for a serious offence may 'undermine public confidence in the criminal justice system as much as manifestly wrongful convictions.'[65] These sentiments were echoed by the Court of Appeal in *Dunlop* which concerned an application to quash an acquittal after the defendant subsequently confessed to murder with the court stating that the public would be 'outraged' if the exception to the double jeopardy rule were not applied in that case.[66] There is, of course, a strong argument that wrongful convictions should be treated

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[62] Catarina Sjolin, 'Prosecution Appeals and References - Not Enough of a Good Thing?' [2019] Crim LR 934, 939.
[63] Paul Roberts, 'Double Jeopardy Law Reform: A Criminal Justice Commentary Report' (2002) 65 MLR 393, 410.
[64] ibid.
[65] Law Commission, *Double Jeopardy and Prosecution Appeals* (Law Com No 267, 2001) para 4.5
[66] *R v Dunlop* [2006] EWCA Crim 1354, [2007] 1 Cr App R 8, 129

differently to wrongful acquittals as someone has lost their liberty.[67] It is clear, however, that if exceptions to the double jeopardy rule are permitted, these have to be assessed on a case by case basis which is why the legislation has an 'interests of justice' requirement.

The requirement that it must be in the interests of justice for the Court of Appeal to permit a retrial means that the court must have regard to a number of factors including whether a fair trial would be likely and whether the authorities acted with due diligence and expedition since the original proceedings.[68] An interest of justice requirement could arguably take into account the different interests in the prosecution including the defendant and the wider public interest. Dennis has argued that to be legitimate an outcome must be 'factually correct and morally authoritative' and although there are strong arguments supporting the double jeopardy rule, 'the interests of finality of legal process ought to be subordinate to the interests of the legitimacy of the process.'[69] Essentially, Dennis argues that it is in the interest of justice to have a means of remedying mistakes.

Other forms of prosecution 'appeal' are also geared towards rectifying mistakes and errors that have been made. These mechanisms that have a specifically corrective function include the provisions to challenge judges' rulings which have the effect of terminating proceedings[70] and the power to challenge unduly lenient sentences.[71] Harris has suggested that the original principles of the 'unduly lenient' scheme were 'the rectification of gross sentencing errors and the restoration and maintenance of public confidence.'[72]

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[67] Roberts (n 63) 409; John D Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice?' (2003) 30 Journal of Law and Society 309, 317.
[68] Criminal Justice Act 2003, s 79
[69] Ian Dennis, 'Rethinking Double Jeopardy: Justice and Finality in Criminal Process' [2000] Crim LR 933, 944–945.
[70] Criminal Justice Act 2003, pt 9
[71] Criminal Justice Act 1988, ss 35-36
[72] Lyndon Harris, 'Evaluating 30 Years of the Unduly Lenient Sentence Scheme: Attorney General's References 1988-2017' [2019] Crim LR 370, 393.

Similar arguments to these could be put in favour of and against permitting reviews of decisions not to prosecute. Although the finality arguments are relevant in this context as well, they are clearly not as powerful as a request for review cannot overturn an acquittal and is likely to be an early stage of the criminal justice process, ordinarily before the matter has come to court. Additionally, there are clearly finality arguments against the prosecution being able to routinely change its decisions on whether to prosecute and it must be conceded that this could be damaging to the reputation of the prosecution process if it were to become the norm. However, as with the justifications for relaxing the double jeopardy rules, it would undermine the integrity of the criminal justice system and those working within it if there was no way of correcting an erroneous decision. Clearly, it would not be in the public interest to have a system which never had a power to review or regulate its own decisions. The potential corrective function of the VRR has been recognised by Manikis who views victims as 'agents of accountability' in relation to decisions not to prosecute.[73] Essentially, Manikis argues that the VRR allows victims a monitoring role where they can, 'scrutinise and question certain prosecutorial decisions to point out potential errors.'[74] Similarly, Rogers also highlighted that a potential benefit of the VRR is that it reduces the likelihood of errors in the application of the Code test resulting in an incorrect decision not to prosecute.[75] It would not be possible to completely prevent errors being made as generally decisions whether to prosecute are made by a single prosecutor and some decisions may be finely balanced. The rights of review can, therefore, provide a safety valve to reduce the risk of unremedied errors.

The VRR recognises the importance of public confidence in prosecutorial decisions and this is reflected in the application of the policy. Although there is a public interest stage to all prosecution decisions under the Code, there is an additional 'public confidence' filter which has to be applied when reconsidering prosecution following a successful request for review.[76] This could be seen as a variation of the 'interests of

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[73] Marie Manikis, 'Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process' [2017] PL 63.
[74] ibid 71.
[75] Jonathan Rogers, 'A Human Rights Perspective on the Evidential Test for Bringing Prosecutions' [2017] Crim LR 678, 687.
[76] Crown Prosecution Service, 'Victims' Right to Review Guidance' (CPS July 2016) [34]

justice' test although clearly it is narrower as it focuses on the public at large and does not take into account the interests of specific individuals involved in the case such as the victim and defendant. As set out in the previous chapter, the 'public confidence' test should be replaced with an 'interests of justice' test to strengthen the extent to which the VRR process takes into account the overall public interest in deciding whether to bring a prosecution following a successful review. Such a test would not solely be focused on whether public confidence would be increased or decreased by a prosecution, but could also consider factors such as the seriousness of the allegation, the nature of wrong decision and whether a fair trial is possible. A prosecution could still be brought in circumstances where to do so could damage public confidence in the criminal justice system, but the nature of the offender and the harm caused by it were so overwhelming that it would be in the interests of justice.

Judicial review clearly also has an important role to play in maintaining the integrity of the criminal justice system. With a focus on the lawfulness of the decision-making process, judicial review acts as an external control on the exercise of prosecutorial discretion. Although individual decisions may be contrary to the interests of a particular defendant, it must be in the public interest to ensure that such decisions are made lawfully and that any that are not are quashed.

A further justification for prosecution appeals is what Sjolin describes as 'legal development'.[77] Appeals mechanisms, including rights of review, have the potential to advance how the law is interpreted and applied; reviews may challenge the policy basis of how discretion is exercised as well as decision-making in individual cases. If victims were unable to contest decisions not to prosecute, the approach of prosecutors to particular types of case may ossify and become inflexible. Reviews, therefore, may provide the opportunity to stimulate new policies and change attitudes to particular types of cases. Examples of this in the context of prosecutorial discretion include

[77] Sjolin (n 62) 941.

Manning[78] in relation to the obligation to give reasons and *Purdy* in relation to the development of a policy on assisted suicide.[79]

This comparison of the different appeal mechanisms brings to the fore the unique attributes of the right of private prosecution which make it a poor fit within the contemporary criminal justice system. Although private prosecutions can be used as a means of countering a decision not to prosecute, they are not, in reality, a form of appeal or review; they are essentially a power to bring criminal proceedings personally. As a result, it arguably lacks any kind of corrective function in that there is no prerequisite that an original decision or stage in the process was in some way incorrect, wrong or unreasonable. There is no requirement that the public interest or interests of justice are considered per se. Although these considerations could be taken into account by the CPS in the event that they review the prosecution when considering whether to take it over, that does not in itself justify allowing victims to bring such proceedings.

The reference to other appeal mechanisms has shown that it can be difficult to determine precisely where the public interest lies and how these mechanisms can be harmful to the reputation of the criminal justice system and confidence in it as well as the possibility of augmenting it. A private prosecutor does not have to consider any such factors; the focus of the private prosecutor is likely to be on whether they can prove their case, not on whether the fact that they are bringing proceedings may be damaging to the wider system and the public's appreciation of it. Therefore, the lack of controls on private prosecutions means that they are more likely to be contrary to the public interest than either judicial review or the VRR.

[78] R v DPP ex parte Manning [2001] QB 330
[79] *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345

8.4 Conclusions

It is clear that the rights of review impact on all three elements to the criminal prosecution: the victim, the defendant and the public interest. It would not be satisfactory to evaluate rights of review solely from the perspective of the victim. This chapter and the previous one has shown that the rights of review do impact on the defendant and the public interest.

In principle, victims having rights of review through judicial review or the VRR is compatible with the public interest dimension of prosecutions. The right to challenge decisions not to prosecute by judicial review or the VRR does not compromise the adversarial contest between the State and the defendant. Although these two rights of review recognise the victim's interest in the case, they do not override the public interest basis of prosecutions. Furthermore, there is a public interest in obviously wrong decisions being corrected and therefore rather than defeating the public interest, these mechanisms actually serve it. The entitlement of a victim to challenge a decision not to prosecute can be seen as providing a checking mechanism against the possibility of mistakes being made in the exercise of prosecutorial discretion. These processes do not undermine the public nature of prosecutions; the victim can request a review but cannot mandate it and does not control the outcome. This is in the public interest in the same way that it is in the public interest to have other appeal and review mechanisms which relate to particular parts of the criminal justice process, such as the exception to double jeopardy, unduly lenient sentences and appeals on points of law. These mechanisms contribute towards ensuring that the inevitable mistakes that are made can be rectified. The fact that the system is sophisticated enough to have multi-layered appeal mechanisms relating to specific parts of the process is perhaps a virtue rather than a weakness. The VRR, in particular, provides a safety valve against incorrect decisions being final without any form of redress with minimal impact on defendants. Although it could be argued that the VRR provides a form of performance measure which could be used by the CPS for managerialist reasons, this does not detract from the fact that it has the potential to lead to a preferable outcome in individual cases.

The exception to these general conclusions in favour of rights of review is private prosecutions. These do have the potential to conflict with the public interest. The full party status in the prosecution as the result of bringing a prosecution cannot be justified in the modern criminal justice system as it shifts the focus of the adversarial system from a prosecution brought on behalf of the State to one that may be arbitrary or capricious brought by a private individual. Private prosecutions blur the distinction between prosecutions brought in the public interest and those brought in pursuance of a private agenda.

Private prosecutions do not have a sound conceptual basis compared to other methods of challenging decisions not to prosecute which essentially take place outside the prosecution process rather than allowing the victim to be fully integrated and to take control of the decision making. As a result, private prosecutions go beyond what is an acceptable level of participation in censuring criminal misconduct with the potential to introduce inconsistency, arbitrariness and even vengeance into the decision-making process. Additionally, whereas the need to have a procedure for remedying errors can justify the existence of judicial review and the VRR to contest decisions, this cannot be extended to the private prosecution; it cannot justify private prosecutions as there is no requirement that the original decision was flawed. In fact, it is also possible that a private prosecution could be brought by the victim following a decision which was legally correct, but which the victim disagreed with.

Although the rights of the defendant and the public interest have been discussed in individual chapters, clearly these interests overlap. In particular, it is also in the interest of defendants that the criminal justice system has mechanisms for correcting mistakes and that victims' rights are kept within reasonable limits which do not overwhelm the rights of defendants or the public interest by de-stabilising the system. It is also in the public interest, as well as the interest of defendants, that there are appropriate safeguards in place to prevent capricious decision-making, such as evidentially weak private prosecutions or those brought in pursuance of a personal vendetta for which there may be no public interest in prosecution. It is also the interest

of all three parts of the ‘triangulation of interests’ in criminal prosecutions that the integrity of the trial process is maintained.

Chapter 9 - Locating the review mechanisms within theoretical models of criminal justice

9.1 Introduction

This chapter will use established theoretical frameworks developed by legal scholars to re-evaluate whether there is a sound conceptual basis for allowing victims to have rights of review. Each of these models will be used as a lens to examine the victim's participatory role in the review mechanisms. This is directly relevant to the issue of whether the review mechanisms amount to a principled and coherent framework. This analysis will show that the three review mechanisms do not fit neatly within one particular model or theoretical framework and there may be competing arguments for locating them in different models. Similarly, the three mechanisms cannot easily be located within the same model and there are strong arguments for positioning them separately. In particular, it will be advanced that although judicial review and the VRR could justifiably be placed within a victim-focused model such as Roach's punitive model, the VRR is a better fit within Packer's crime control model which has the effect of drawing victims away from judicial review. Private prosecutions are by their nature so distinct that they do not fit easily within any of the established models which focus on systems of public, rather than private, prosecutions. This further highlights their lack of compatibility with the contemporary criminal justice system. A conclusion to be drawn from this is that the three review mechanisms do not amount to a coherent framework, but a collection of distinct mechanisms with different conceptual bases.

This chapter has two sections. The first section will provide an overview of each theoretical model and how they help us to understand the review mechanisms. The second section will focus on each of the review mechanisms in turn evaluating the extent to which the mechanisms fit coherently within the theoretical models.

9.2 The rights of review and the criminal justice models

In this section the theoretical criminal justice models developed by Packer, Beloof, Sebba, Roach, Ashworth, Edwards and Manikis will be used to evaluate the three review mechanisms.

9.2.1 Packer's Crime Control and Due Process models

Despite not examining the role of victims in criminal justice, Packer's original models provide a useful means of evaluating the review mechanisms which are more conceptually complex than they would initially appear. If the result of the successful use of a review mechanism is a prosecution and potentially a conviction, rights of review could be viewed as supportive of the crime control value of the suppression of crime. However, the crime control model emphasises the robust and efficient repression of criminal conduct.[1] There is also a 'premium on speed and finality' which depends on 'minimising the occasions for challenge.'[2] Therefore, it would initially appear that rights of review do not sit comfortably with the values underpinning the crime control model: they recognise the interests of victims and allow them to participate in the preliminary stages of the criminal process reducing system efficiency both in terms of speed and finality.

Private prosecutions fit awkwardly with the assembly line imagery of the crime control model as the private prosecutor is more likely to be dealing with a single case than a high volume.[3] As such, the private prosecutor's focus is more likely to consist of a dogged determination to obtain a conviction than efficiency concerns. The values of efficiency, speed and finality are not easily identifiable with private prosecutions. Crime control stresses the value of screening out weak cases, high guilty plea rates and effective plea bargaining.[4] Victims who bring a private prosecution are unlikely to be aware of, or be guided by, these values. This is, perhaps, because crime control

[1] Herbert Packer, *The Limits of the Criminal Sanction* (University Press 1989) 158.
[2] ibid 158–159.
[3] ibid
[4] ibid 160–161.

operates at a more macro level: the focus is on the broader objective of crime reduction rather than the minutiae of individual cases. The crime control model also identifies the public prosecutor as the official who should control the decision to charge which a private prosecution undermines.[5]

However, despite the emphasis on efficiency, the crime control model still recognises the need for ways of addressing errors and appeal procedures. Whereas the due process model treats appellate procedures as of central importance, the crime control model views them as more marginal and existing to 'correct those occasional slips' in the fact-finding process.[6] The VRR is essentially a simple appeal mechanism for correcting errors in the charging process. With strict time limits and qualifying criteria, the VRR mitigates the amount of delay and uncertainty caused by more formal procedures for appealing such decisions.

Packer distinguishes between appeals and 'collateral attacks' outside the trial and appeal processes which in the context of American criminal justice were challenges brought in the federal courts rather than within the state system that brought the prosecution.[7] The crime control model favours appeals brought within the state jurisdiction rather than a claim being re-litigated in the federal courts. The essence of this distinction could also be applied to judicial review and the VRR in England and Wales. The VRR provides an internal mechanism of review whereas judicial review is a form of collateral attack in the High Court outside the jurisdiction of the criminal courts. The crime control model favours administrative or extra-judicial decision-making procedures over judicial ones.[8] The alacrity of decision-making of the crime control model would be slowed down by this questioning of the prosecutor's decision through the courts. Certainly, in the context of judicial review proceedings, the victim is arguing their case that the prosecutor's decision be quashed and ultimately reversed. In this sense, the entitlement of the victim to apply for judicial review could be seen

[5] ibid 206–207.
[6] ibid 227–228.
[7] ibid 228.
[8] ibid 159.

as generating satellite litigation which has the effect of drawing out the pre-trial process.

Packer suggests that a feature of crime control is that it operates on an 'administrative, almost a managerial model' with uniformity of procedure through workers at fixed stations who each conduct certain elements of the procedure until the case reaches the end of this linear process.[9] Compared to judicial review, the VRR could be classified as an administrative procedure which is relatively informal with the flexible approach to requesting reviews and the initial local resolution stage. Again, it is also administrative in the sense that the decision is reviewed by the same executive department, namely the CPS, that made the initial decision. This potentially has the effect of reducing the risk of increased inefficiency caused by victims challenging decisions through the courts which would be more consistent with crime control. There are also clear financial and resourcing benefits for the public prosecutor of victims pursuing grievances through an internal route which would be consistent with the efficiency objectives of crime control.

Sanders et al comment that 'limited' safeguards are required in the crime control model to ensure reliability and, therefore, 'promote confidence in the system.'[10] The VRR could also be viewed as a way for the CPS to claim that decision-making by prosecutors is reliable and to demonstrate high levels of victim satisfaction. The VRR could be labelled as what Ashworth has described as a 'sweetener' to make victims feel valued to encourage their co-operation in the criminal justice system.[11] A more cynical interpretation of the VRR could be that it is a managerialist tool for measuring performance and victim satisfaction. VRR annual data provides details of the number of eligible cases, the number of requests and the number of successful VRR requests. A breakdown by offence category is also provided together with a percentage figure

[9] ibid 159.
[10] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th ed, Oxford University Press, USA 2010) 22.
[11] Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000) 197.

for the number of successful reviews.[12] Although not formally presented as performance data, the recording and analysis of this data by the CPS could be used as such. In this sense, the VRR is a valuable addition to crime control, it provides an informal, administrative method for quality assuring decisions made by prosecutors. As a result, it can also generate confidence in prosecutorial decision-making by demonstrating that such a safety net is in place and the published data can create the perception that the vast majority of decisions are correct because only a small number of decisions are referred for review and of those which are only a minority result in the original decision being declared incorrect.

The VRR also excludes victims from encroaching on areas which are valued by the crime control model. For example, the VRR cannot be used to challenge out-of-court disposals, selection of charges or acceptance of pleas.[13] These areas are protected from challenge and the existence of the VRR does not compromise these key tenets of crime control.

Additionally, although it can be viewed as an appeal or review, a different interpretation of the VRR would be classify it as simply an additional step in the routine procedure of making a decision whether to prosecute. As the VRR becomes more established in the criminal justice system, it may be viewed as simply part of the normal course of events that at the point that a decision not to prosecute is made, the victim has the opportunity to request that a specific 'quality assurance' stage is conducted to verify that this decision is correct.

Due process values are less easy to identify in the review mechanisms as the due process model is focused on the protection of the accused. However, there are values from the model that are relevant, such as the preference for formal fact-finding over informal procedures. The due process attribute of 'judicializing' decisions could be associated with judicial review as it involves transferring the decision whether to

[12] CPS, 'Victims' Right to Review data' (June 2017) <www.cps.gov.uk/publication/victims-right-review-data> accessed 30 October 2019.
[13] See Ch 2.3.2.

prosecute to the court. A procedure, such as the review mechanisms, which could introduce an element of inconsistency and arbitrariness into the decision-making process or allowed victims to influence it, could be seen as contrary to the values of the due process model.

9.2.2 Beloof's Victim Participation model

Beloof argues that Packer's two models do not recognize all the different sets of values applicable to the criminal justice system and proposes the victim participation model to complement Packer's models.[14] Beloof recognises the value of normative modelling as a way of identifying the 'value choices' of the criminal process and viewing it as a 'dynamic' rather than 'static' process.[15] The purpose of the victim participation model is to recognise the interest in protecting the victim from both the harm caused by the original offence and secondary harm caused by the criminal justice system. This is done by integrating the victim-oriented values in the criminal justice system such as fairness, respect and dignity.[16] These values are present in the increased service and procedural rights given to victim through both legislation and the Victim Code.[17]

Beloof represents the victim participation model with the image of the victim following his own case along the assembly line being consulted and making representations to public officials along the process.[18] Beloof accepts that the dominance of the victim participation model in a particular case will depend on the individual victim in that some will wish to participate more than others.[19] He then examines the extent of victim participation in a number of key stages of the criminal process alongside crime control and due process values. This allows him to conclude that his 'three-model concept' is more 'functional… because the law now reflects the

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[14] Douglas Evan Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' [1999] Utah Law Review 289, 290–292.
[15] ibid 291.
[16] ibid 293.
[17] Ministry of Justice, 'Code of Practice for Victims of Crime' (October 2015)
[18] ibid 296.
[19] ibid.

significance of genuine values of victim participation.'[20] Beloof's incorporation of a third model strengthens Packer's original dichotomy as it allows an assessment of the criminal justice system to consider the extent of victim rights and participation.

Beloof's victim participation model is based on the notion of the victim consulting with criminal justice professionals and making representations, not the victim prosecuting the case themselves.[21] The representation of the victim following their case along the assembly line consulting with the police and the prosecutor resonates with judicial review and the VRR as, at most, victims are able to make representations; they are unable to control the prosecution themselves.[22] However, this is perhaps suggestive of a form of consultation which exists throughout the course of the prosecution. The VRR and judicial review only really come into play when a decision is taken not to prosecute or to end existing proceedings. Furthermore, the model is based on the notion that victims would have more influence in the charging process than they actual do: the victim participation model would prefer victims to determine which charges should be brought rather than the state, which might have its own agenda on which cases to pursue.[23] However, Beloof concedes that if the decision to prosecute remains within the control of public prosecutors there should be a review process by which victims can challenge the decision.[24] This potentially resembles the VRR although this is a single right and is not necessarily representative of victims having a more dominant role in the prosecution process. Beloof's model cannot be used to justify private prosecutions as he is specific that 'the victim cannot control critical decisions' and these remain with professionals.[25] The victim participation model places a limit on the victim's role as its purpose is to recognise the victim's interest in the case, not to allow them to take it over. Although this model supports increased victim involvement, it does not replace the role of the State.

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[20] ibid 326.
[21] Beloof (n 14).
[22] ibid 296.
[23] ibid 313.
[24] ibid 313–314.
[25] ibid 296.

As with Packer's models, Beloof does not propose that the victim participation model should represent an ideal which excludes the other models; it should be seen as a spectrum which can be used to measure the extent of victim participation in the criminal justice system. It is, therefore, valuable in relation to the rights of review as it allows us to identify certain characteristics of the review mechanisms as compatible with the values of the victim participation model.

9.2.3 Roach's Punitive Model

Kent Roach has offered two models, the punitive and non-punitive model. He argues that actual and potential crime victims should be included in any new models of criminal justice.[26] Roach's punitive model is based on the conventional criminal justice system and relies upon the imposition of a criminal sanction.[27] It is, however, more critical of the criminal justice participants than Packer's crime control model. Victims, and others, can challenge the system if it does not meet their expectations.[28] Roach uses the analogy of a roller-coaster to represent his punitive model of victims' rights which is a combination of the assembly line of crime control and the obstacle course of due process.[29] He describes the model as in a 'state of constant crisis as it responds to the inadequacies of crime control to protect and serve victims' which is less deferential to police and prosecutors with victims, as well as the accused, scrutinising their decisions.[30] Roach accepts that under this model the assertion of victims' rights has the potential to disrupt the efficiency of the crime control model.

Rights of review have a stronger association with Roach's punitive model than the non-punitive 'circle' model as generally victims will be pursuing punitive aims when they use the mechanisms; ultimately, victims are pressing for a charge when initially one has been refused. This is compatible with the notion of victims being less

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[26] Kent Roach, Due Process and Victims' Rights: The New Law and Politics of Criminal Justice (University of Toronto Press 1999) 28.
[27] Roach's non-punitive model is a restorative justice model and is less relevant to rights of review. For a discussion of restorative justice, see ch 8.2.
[28] Roach (n 26) 30.
[29] ibid 29.
[30] ibid 29–30.

deferential to criminal justice professionals and challenging their decisions. Judicial review, for example, could be viewed as victims demanding the protection of the criminal law by enforcing their rights through the courts consistent with Roach's punitive model.[31]

Under Roach's punitive model victims scrutinize police and prosecution decisions to 'demand their rights to protection and solicitude from… criminal justice professionals in strong and sometimes emotional terms' and the model 'encourages the expression of grievance.'[32] This suggests a level of assertion of the victims' rights which are not provided under the VRR; the scheme is limited to providing victims who meet the qualifying criteria, with the right to request a review of a decision. The VRR does not anticipate or encourage the victim to express their view on why they believe the original decision to be incorrect or submit evidence or information in support of that view. In essence, the VRR does not encourage a dialogue with the victim and is quite narrow in focus.

Similarly, the VRR does not facilitate victims being as involved as Roach's model would appear to want. The VRR is not a generic right of review in that it is only those cases which meet the strict qualifying criteria that are eligible for review. The scheme does not allow victims to challenge decisions to prosecute some suspects and not others, some charges and not others nor decisions to accept particular charges or bases of plea. The VRR arguably does not prioritise or support the rights of victims to the extent that a victims-oriented model of criminal justice would envisage.

Private prosecutions do not fit comfortably within Roach's punitive model as although they are clearly in pursuit of a punitive outcome and the analogy of the roller-coaster swerving around the due process obstacle course is perhaps an apt one, this model is still based upon a system of public prosecutions.[33] Roach's model is a variation of

[31] ibid 30.
[32] ibid.
[33] ibid 29–30.

crime control and due process models with prosecutions being brought by the State rather than individuals.

Manikis has proposed a new model to complement Roach's models which focuses on victim participation through parsimony and moderation.[34] Manikis cites victim participation in prosecutorial decisions in support of her model on the basis that not all victim interventions in relation to prosecutorial decisions are to advance punitiveness. However, in order to argue this, Manikis groups judicial review and the VRR together and relies on the fact that a victim could potentially apply for judicial review of a decision to prosecute as well as one not to thereby concluding that it is 'not an inherently punitive process.'[35] The limitation of this approach, however, is that if the mechanisms for reviewing decisions not to prosecute are considered individually, the VRR is incapable of being used to review decisions to prosecute. As such, without a radical change of policy, the VRR inevitably advances punitive objectives in that victims could only use it to seek a prosecution when none was forthcoming following the original decision.

9.2.4 Sebba's Adversary-Retribution and Social Defence-Welfare models

Leslie Sebba argues that it is illogical not to include the victim in the prosecution process particularly as the roots of the adversarial tradition were as a contest between the victim and the defendant. However, he concedes that the modern conceptualization is a contest between society and the offender.[36] Sebba argues that Packer's models need updating to accommodate the role of the victim and outlines two alternative models: the adversary-retribution model and that social defence-welfare model.[37]

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[34] Marie Manikis, 'A New Model of the Criminal Justice Process: Victims' Rights as Advancing Penal Parsimony and Moderation' (2019) 30 Criminal Law Forum 201.
[35] ibid 211.
[36] Leslie Sebba, 'The Victim's Role in the Penal Process: A Theoretical Orientation' (1982) 30 American Journal of Comparative Law 217, 229.
[37] ibid 231.

The adversary-retribution model emphasises the role of the victim through the trial and sentencing phases by giving evidence against the defendant and the sentence being based on the impact of the offence on the victim. The State adopts a more 'subsidiary' role as 'overseer and enforcer' rather than dominating the proceedings.[38] The social defence-welfare model tackles the offender as a threat to society subsuming the welfare of the victim into this. This model is based on the notion of the State playing the dominant role in the proceedings by controlling both the threat of the offender and accommodating the needs of the victim.[39] These models are not presented as 'blueprints' by Sebba, but as a framework to evaluate the prosecution process.[40] It is not easy, however, to apply them to parts of the prosecution process that fall between the two extremes. Most stages of the contemporary criminal justice system have some degree of victim involvement, the difficulty is how this competes with other potentially conflicting rights such as those of the defendant and the wider public interest.

Sebba's adversary-retribution and the social defence-welfare models also provide an insight into the review mechanisms. The latter currently dominates the prosecution process with the State prosecuting the defendant on behalf of the victim. This model emphasises the relationship between the State and the victim and minimises the relationship between the victim and the defendant.[41] As such both judicial review and the VRR could be seen as in line with this model as neither facilitate the victim directly challenging the defendant; in each case, the victim contests the decision directly with the prosecutor or through the courts. Sebba cites the provisions in Israel for appealing decisions not to prosecute through an internal mechanism and by application to the High Court as an illustration of the social defence-welfare model.[42] These provisions appear similar to the rights of review in England and Wales.

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[38] ibid.
[39] ibid 231–232.
[40] ibid 238.
[41] ibid 231–232.
[42] ibid 232.

Private prosecutions, by contrast, could fit within Sebba's adversary-retribution model. Unlike most commentators, he specifically considers private prosecutions as a means of enhancing victims' involvement in criminal prosecutions.[43] However, the criminal justice system in England and Wales does not currently provide the conditions envisaged by Sebba for such a radical shift from a public prosecution system. To come within the adversary-retribution model the State would provide 'the machinery for the victim himself to achieve the desired objectives' which would essentially require a fundamental re-structuring of the contemporary criminal justice system which is geared towards State prosecutions.[44] Although Sebba identifies many of the main arguments against expanding private prosecutions, he does not adequately address the conflict between the victim's personal interest in the case and the public interest. His argument is that a system of magisterial leave could be implemented, but concedes that this may be seen as a breach of the separation of powers.[45] Although private prosecutions have 'obstinately survived', there is clearly not the political or judicial appetite for augmenting their role to the extent that they could replace the public prosecution system.[46]

9.2.5 Ashworth's Human Rights model

Andrew Ashworth has developed an alternative rights-based model which is firmly rooted in retributive justice and the notion of the State as the 'guarantor' of rights which is now adopted by Campbell et al.[47] They argue that international and domestic law provides a framework of rights which can be balanced and prioritized against one another. Their approach to victims is quite distinct to the more victim-focused models as they distinguish between 'service' rights and 'procedural' rights.[48] Although they support the improved treatment of victims by the criminal justice system, they argue

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[43] Leslie Sebba, 'Will the Victim Revolution Trigger a Reorientation of the Criminal Justice System?' (1997) 31 Israel Law Review 379.
[44] Sebba, 'The Victim's Role in the Penal Process' (n 36) 232.
[45] Leslie Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press 1996) 308.
[46] ibid 310.
[47] Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edition, Oxford University Press 2019) 50.
[48] ibid.

that the primary interests in the criminal justice system are those of the State and the defendant as a result of the State's law enforcement obligations.[49] On their interpretation, therefore, there are 'no convincing arguments' for victims having 'a right to influence any of the key decisions in the criminal process.'[50] Their argument is that the law should not take into account the personal views of victims which may be vengeful or forgiving depending on the individual victim, but should be taken in accordance with the rule of law. The authors also warn against claiming to take into account the views of victims when they do not influence the decision as this could leave victims frustrated having had their expectations raised. Although there is weight in the normative arguments underpinning this approach, the reality is that victims are gradually acquiring procedural rights and so perhaps the central issue is the extent to which they should be permitted rather than not permitting them at all.

The review mechanisms could be viewed as a way that victims can enforce their rights against the State. Judicial review could be seen as having a strong connection with the human rights-based approach as the criminal process is still controlled by the State; the victim does not have control of the decision to prosecute. Proceedings for judicial review of a decision not to prosecute allow victims to apply to the court for review of the lawfulness of the decision. In chapter four, case law was discussed which enforced the State's positive obligations towards victims under specific articles of the ECHR demonstrating that individual human rights are potentially protected by judicial review. Arguably, the traditional grounds of judicial review can also protect individual rights.

As VRR is a more informal mechanism, it is more difficult to explain this on the basis of enforcement of specific rights. Victims are not required to articulate their request in terms of their rights or how they have been breached, providing they meet the criteria they can simply request a review. The decision-maker has to determine whether the original decision was wrong, but that does not inevitably mean that individual rights were infringed as a result. The decision could be wrong on the basis

[49] ibid 50–51.
[50] ibid 51.

of an error of law, for example, which would not necessarily involve a human rights issue. The VRR is perhaps evidence that victims' interests in prosecutions have been recognised and that they have a right to request a review, but it difficult to explain in terms of human rights.

Private prosecutions clearly do not fit within the rights-based approach developed by Campbell et al as this values State enforcement and adjudication with procedures which ensure that decisions are 'more consistent, more predictable, and less arbitrary.'[51] This model advocates that decisions, including the decision to prosecute, are taken 'impartially and independently, and not influenced by the wishes of a particular individual.'[52] Private prosecutions are, therefore, incompatible with this approach as they allow victims to be a party to the prosecution and to conduct it throughout.

9.2.6 Ian Edwards/Marie Manikis' models of participation

Although the models discussed above identify different sets of values and interests in prosecutions, they do not measure different levels of victim participation. Edwards' typology provides a way of distinguishing between different degrees of participation.[53] This shows that the review mechanisms do increase victim participation to varying degrees.

Judicial review accords a high level of participation to the victim for the duration of the proceedings, akin to consultation on Edwards' model.[54] However, this does not continue beyond the judicial review proceedings with the victim returning to his non-party role as a witness. Chapter three concluded that participation under the VRR could be categorised on Edwards' model as 'expression' or 'information provision' at most as the process does not seek out the victim's preferences. These two mechanisms

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[51] ibid 24.
[52] ibid 51.
[53] Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 Brit J Criminol 967.
[54] See Ch 4.3.2

provide an *ex post facto* form of participation at most, with the victim who has been largely excluded from the process thus far, having a brief opportunity to participate by challenging the prosecutor in the event he decides not to prosecute. These are essentially rights to participate in 'non-prosecutions' as they only apply in circumstances where no prosecution is being brought.

Chapter five identified private prosecutions as allowing private prosecutors a high level of participation approaching 'control' on Edwards' model of participation. This is because the role of the victim in the criminal justice system is fundamentally changed by becoming a private prosecutor. The victim is no longer a marginalised provider of evidence, but becomes the controlling force of the prosecution, making the initial decision to prosecute including the selection of specific charges and defendants. This is very different to the limited, conventional role of the victim. This high level of participation and control would potentially continue throughout the prosecution to sentencing.

Manikis proposes an 'agents of accountability' category to Edwards' model to recognise the 'monitoring and oversight role' of victims scrutinising and challenging the decisions of criminal justice decision-makers.[55] Manikis categorises this role as 'non-dispositive' in that victims do not have overall control over the decision; their role is to request the review. Judicial review and the VRR are used as examples in this jurisdiction of relevant review mechanisms for this category. However, this amendment describes the victim has having an obligation to request a review if they identify a possible error with a requirement on the criminal justice decision-maker to seek out and consider the review.[56] These obligations arguably go beyond what is currently required of both participants, particularly the victim who is not obliged to request a review even if they do identify an error. A valuable aspect of this model is that it characterises judicial review and the VRR as checking mechanisms on public

[55] Marie Manikis, 'Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process' [2017] PL 63, 67.
[56] ibid

decision-making rather than simply identifying them as concerned with enforcing the interests of the victim.

9.3 Locating the individual mechanisms

This section will return to each of the review mechanisms in turn to consider how each of them is best located within the theoretical models based on the above analysis. This will also examine what each of these mechanisms means for the participatory role of victims. Essentially, this shows that the review mechanisms generally are expanding victim participation in the prosecution process with procedural rights to review decisions not to prosecute. As such, both judicial review and the VRR elevate victims' involvement predominantly during the pre-trial stage to allow them to contest the public prosecutor's decision. However, this is a moderate level of change as neither mechanism allow the victim to become the decision-maker. Judicial review potentially allows the victim to assert their challenge more forcefully than the VRR by presenting formal arguments as to why the decision should be overruled. An alternative, and perhaps more convincing, analysis of the VRR is that it is a further crime control measure which diverts victims from judicial review.

Private prosecutions were difficult to accommodate within the various models examined above which further highlights their poor fit within the contemporary criminal justice system.

9.3.1 Private prosecutions

In the context of the criminal justice models, private prosecutions appear an anomaly; they do not fit easily within the majority of the different criminal justice models which are based on public forms of justice system. Although Sebba's adversary-retribution model does consider private prosecutions, they would be as part of a criminal justice system where the role of the State was minimised and the adversarial structure was between the victim and the defendant in the majority of cases. In the contemporary

system, private prosecutions brought by victims are a rarity and are clearly at odds with publicly brought prosecutions.

Application of Edwards' model identified an increased level of participation throughout the prosecution which is quite different to the conventional role of the victim in prosecutions. The private prosecutor has full party status and is the primary decision-maker behind the prosecution both in relation to the decision to charge and the overall conduct of the case. This goes far beyond the conceptualisation of the victim envisaged by even the victim-focused models developed by Beloof and Roach which contemplate a role for victims, but not as a replacement for the State. This increased role also goes beyond the enforcement of rights or challenging the lawfulness of the original decision. Although there is increasing acknowledgement of the victim's interest in the case and the gradual accrual of procedural rights, the participatory role of the private prosecutor is in excess of the cautious development of rights that has taken place in relation to public prosecutions. It is, however, important not to overstate the extent to which victim have control over, and are the decision-makers in, the prosecution process as these are very much the exception rather than the norm and are heavily restricted by the statutory provisions which allow the CPS to take over the prosecution and the CPS change of policy in 2009 on private prosecutions.[57] The adoption of a policy which requires the Full Code Test to be applied for any private prosecutions which are referred to it severely curtails the victim benefiting from the full potential of bringing a private prosecution in response to a decision not to prosecute.

Overall, therefore, this lack of fit within the established models, further indicates that private prosecutions are out of place in the modern justice system and should be reformed.

[57] Prosecution of Offences Act 1985, s 6(2).

9.3.2 Judicial review

The application of these models identifies judicial review as consistent with the gradual expansion of victims' rights. Judicial review falls comfortably within Roach's punitive model and Beloof's victim participation model with the victim challenging the prosecution and enforcing their position through the courts. It also identifies with Ashworth's rights-based model on the basis that judicial review can provide a way for victims to challenge infringement of their rights. Judicial review clearly allows victims to challenge prosecutorial decisions in a robust and controlled way. Although this is in tension with some aspects of crime control which is the dominant value system in the prosecution process, it is an example of the interests of victims being provided for without de-stabilising or re-structuring the existing criminal justice framework. Victims are not permitted to become a party to the criminal prosecution or confront the defendant directly, but are able to challenge the decision of the public prosecutor by attempting to have the decision quashed by the courts. Judicial review proceedings are collateral to the criminal prosecution as a public law claim brought in the High Court by the victim as claimant against the CPS as defendant. This preserves the traditional role of the victim in the criminal matter, but still allows them to insist that their grievance is heard.

Although judicial review clearly does allow victims a significant level of participation, as well as being outside the prosecution itself, it predominately takes place during the early stages of the prosecution and does not extend beyond the judicial review proceedings; after these are complete, the victim returns to their non-party role as a witness. Despite this, the fact that judicial review applications of this kind have been entertained by the courts demonstrates the formal recognition that victims do have a stake in the decision to prosecute consistent with the victim-focused models as well as the rights-based models of criminal justice.

9.3.3 Victims' Right to Review

The position of the VRR is more complex. On one hand, it could be argued that the VRR can be accommodated within the victim-oriented models such as those posited

by Beloof or Roach; on the other hand, it could fit more neatly within the crime control model. The VRR does recognise the interests of the victim in a prosecution and provide them with a means of challenging public decision-makers. It provides victims with a procedural right to challenge decisions which they believe to be incorrect. The right to request a review is a change to the participatory role of the victim although it is most significant in the pre-trial stage of the process and is only relevant in the event of a decision not to prosecute as it is essentially a right to participate in non-prosecutions. As a result, realistically it only slightly changes the victim's role and only for the duration of the review process. The general position remains that the CPS makes the decision whether to charge a suspect on the basis of the Code for Crown Prosecutors.[58] However, rights of review mean that victims are not entirely excluded from that process.

The VRR could also, therefore, be located within Ashworth's human rights approach as a form of accountability and fault correction. This model recognises that there should be some limits to prosecutorial discretion and enforcement of rights. However, the victim does not have to prove, or even claim, that their rights have been breached to apply for review under the VRR. Therefore, depending on the circumstances of the case, it may not be possible to show that victims' rights have been infringed.

The analysis of these models has demonstrated how the VRR tentatively gives rights to victims, but these are modest and limited in their application and focus. An alternative, more compelling, approach would be to categorise the VRR within Packer's crime control model. Although Packer's work did not acknowledge the rights of victims, there are particular features of the VRR which make it consistent with the crime control model. Roach acknowledged that there are 'significant similarities' between the crime control model and his own punitive model in that both are concerned with factual rather than legal guilt and both assume that 'the enactment of a criminal law, prosecution, and punishment controls crime.'[59] As set out in relation

[58] Crown Prosecution Service, 'Code for Crown Prosecutors' (CPS 2018)
[59] Roach (n 26) 30.

to Packer's models in section one above, the VRR is supportive of certain features of crime control.

The VRR provides an administrative, informal mechanism for fault correction which diverts claimants from bringing 'collateral attacks' through the courts with minimal disruption to the crime control process. Although it is a form of appeal procedure, as an internal mechanism it is less inefficient and resource-intensive than 'collateral' challenges through the courts. The VRR allows the CPS to retain control of the process which involves little more than an additional quality assurance stage being incorporated into the 'assembly line' of the prosecution process. It also has a number of benefits for the public prosecutor in addition to diverting victims from the courts. It provides an opportunity for the prosecutor to check and correct erroneous decisions internally without the involvement of the courts. It also acts as a useful tool for the prosecution to demonstrate the efficiency of public prosecutions and generate confidence in the process by showing low levels of incorrect decisions and high rates of victim satisfaction.

Regardless of whether the VRR is considered better accommodated within crime control or a victim-oriented model, the VRR actually strengthens crime control values. Roach suggests that both due process values and victim rights can 'enable and legitimate crime control.'[60] In a similar way to victim personal statements being used to increase sentences, rights of review increase the likelihood of a suspect being charged with an offence. Rights of review could also be seen to legitimate crime control in this context as it would be difficult to justify public prosecutors having a second opportunity to review the same case without some external element. The fact that the request has originated from the victim who was not party to the original decision justifies permitting the prosecutor to re-consider the case again afresh.

[60] ibid 31.

9.4 Conclusions

Overall, the provision of rights of review to victims has expanded the participatory role of the victim in the criminal justice system by increasing their procedural rights. However, this is a moderate, rather than extensive or fundamental, expansion of the victim's role largely within the pre-trial stage of the process. The three rights of review are not the same and have different effects on the overall role of the victim.

An examination of the rights of review in relation to the established criminal justice models has shown the review mechanisms have increased victim involvement in the criminal justice system. An increase in the procedural rights of victims would normally be associated with a victim-oriented model such as those proposed by Roach and Beloof. However, these models contemplate levels of victim engagement which arguably are not present in all of the three review mechanisms. A closer analysis suggests that the VRR, in particular, is not as firmly rooted in victims' rights as it would first appear. The VRR has strong crime control characteristics drawing potential claimants away from the other mechanisms towards the internal mechanism which could be seen to support the crime control efficiency agenda.

The VRR is clearly the easiest mechanism to engage, but actually allows only minimal participation on the part of the victim and the procedural rights acquired by the implementation of the VRR policy are not extensive, only allowing victims to request a review in certain pre-defined circumstances and giving the victim limited rights of allocution in the matter. The VRR has been carefully constructed to increase victims' rights of participation in the prosecution process only slightly and in such a way that are more palatable to the prosecution. The VRR uses only limited resources and has minimal impact on the efficiency of the prosecution process compared to the alternative route of judicial review. Judicial review clearly does have the potential to remove the decision from the control of the prosecutor to the courts resulting in increased costs and delay; as such it is conflict with the values of crime control and is more appropriately associated with the victim-oriented models which specifically recognise the interests of victims in criminal justice.

Private prosecutions clearly have the potential to change the role of the victim most fundamentally by expanding the existing parameters of their conventional role both in terms of the level of involvement within the criminal justice process and the high level of control that bringing a private prosecution has the potential to achieve. However, although historically it was the role of citizens to bring prosecutions, this is now out of place in the contemporary criminal justice system. This lack of fit is emphasised by the difficulty in locating private prosecutions within the criminal justice models used in this chapter. The potential conflict between private prosecutions and crime control values can perhaps explain the restrictive approach that has been adopted by the CPS (and ultimately the court) towards prosecutions brought by private individuals. Although theoretically private prosecutions have the most scope of the three mechanisms to fundamentally reshape victims' involvement in the criminal justice system this is severely reined in by the more dominant crime control principles.

This re-evaluation of the review mechanisms using the theoretical models has demonstrated how each of the three mechanisms are conceptually quite different. Although judicial review can comfortably be identified as victim-focussed, the VRR has strong crime control characteristics. The use of these models has also further emphasised how difficult it is to justify the existence of private prosecutions in the contemporary criminal justice system as they do not fit easily within any of the established models. The conclusion to be drawn as a result is that the three mechanisms do not amount to a coherent framework, but are a collection of separate procedures which have different conceptual bases.

Chapter 10 - Conclusions

This thesis has evaluated the law and CPS policy in England and Wales that confers on victims a right to challenge decisions not to prosecute: the right of review under the VRR, the right to bring judicial review of such CPS decisions, and the right to institute a private prosecution. It has done so individually and collectively, considering the extent to which they provide a coherent framework for the protection of victims' rights. It found that while there is merit in each of the individual mechanisms, together they do not provide a systematic approach to allowing victims to have rights to review decisions not to prosecute.

This conclusion will be structured into two sections. The first section will provide an overview of the key arguments from each of the individual chapters. The second section will focus on the resolution to the primary research question posed in the first chapter:

To what extent does the law and CPS policy in England and Wales provide victims of crime with a coherent and principled framework for challenging decisions not to prosecute?

Its two sub-questions will also be answered:

1. **Do the mechanisms of the VRR, judicial review and private prosecutions provide victims with principled and coherent rights to challenge decisions not to prosecute?**
2. **To what extent do these rights of review encroach on the rights of the defendant and the wider public interest?**

This conclusion will also identify some tentative thoughts about the role of victims more widely in the criminal justice system, and to iterate some suggested lines of enquiry for further research.

10.1 Overview of key arguments from the individual chapters

Chapters 2 and 3 – the Victims' Right to Review

Chapters two and three, on the VRR, showed that the scheme partially fills the gap identified by the Court of Appeal in *Killick* in that it provides a way for victims to challenge certain decisions not to prosecute without resorting to judicial review.[1] The VRR is a free and simple procedure which on some occasions will successfully provide a catalyst for a prosecution following a decision not to prosecute. However, the VRR is intrinsically unprincipled in that it unjustifiably excludes certain decisions from the remit of the scheme, such as where some charges are terminated and others are continuing, or where only some suspects are prosecuted. Furthermore, it artificially recognises some victims and not others whilst not fully promoting victim participation and engagement as it does not encourage victims to make representations in support of their request for review.

Chapter 4 – Judicial review

In chapter four we observed that while decisions not to prosecute are amenable to judicial review, the courts have adopted a more restrictive approach following the implementation of the VRR. There is a clear expectation that the VRR is used rather than judicial review proceedings although they remain a valuable course of action for victims whose case is not eligible for the VRR or where the request under the scheme has been unsuccessful. However, judicial review is procedurally complex and requires victims to challenge the decision on established public law grounds. Although they potentially allow victims an increased participatory role, this takes place outside the criminal proceedings. Additionally, if the case is successful, the court is likely to quash the decision and remit it back to the CPS for further review. Therefore, although

[1] *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10

judicial review does publicly hold the CPS to account, it does not compel the prosecutor to bring a prosecution.

Chapter 5 – Private prosecutions

Although private prosecutions by individual victims are less common than they were historically, they are still worthy of consideration as they were specifically preserved by Parliament in the Prosecution of Offences Act 1986. Potentially, private prosecutions allow victims more control of the prosecution process than the other review mechanisms as, in theory at least, the victim controls the decision-making in terms of the decision to prosecute and the overall conduct of the case. However, this mechanism is substantially reduced in value by the power of the DPP to take the prosecution over and discontinue it. This power is even more significant as a result of the 2009 CPS policy to apply the same test to private prosecutions as public ones. Private prosecutions are not, therefore, principled or coherent as they have become contradictory. Despite being preserved by statute, in practice they have been rendered largely obsolete by the exercise of the CPS power to take the prosecution over; they have been reduced to a symbolic right as the true decision-maker behind the private prosecution is the public prosecutor. The original CPS lawyer will have determined the course of the case by that initial decision; provided the CPS gets notified of the private prosecution it is likely to be discontinued on the basis that it is essentially the same case as was initially determined.

This chapter also confirmed that private prosecutions are not an accountability mechanism as they wield no real power over the CPS; in fact, the CPS holds the power over the private prosecutor.

Chapter 6 – Thematic comparison of the review mechanisms

This chapter examined four themes that emerged from the analysis using the four criteria in the preceding three chapters on the individual mechanisms: procedural barriers; the public/private nature of the review mechanisms; the ultimate decision-making authority; and procedural justice.

The theme of procedural barriers highlighted the different standing requirements of the mechanisms, including the more rigid and restrictive standing requirements of the VRR. It was also clear that the victim's use of each of these mechanisms is heavily controlled by prosecution policy. The CPS controls access to the VRR by setting boundaries through the qualifying criteria as to when it can be used. Similarly, carefully drafted prosecution policies can become a barrier to judicial review as compliance with established policy will help protect the CPS from challenges. The CPS policy on private prosecutions also restricts the use of private prosecutions to those cases which the CPS would prosecute itself.

This chapter also recognised that the VRR is not entirely victim-focused and has clear benefits for the CPS. The VRR generates a perception that victims' procedural justice needs are being met by giving them a voice in the decision-making process, although the extent of this participation is much more limited than it appears.

Chapter 7 – Rights of the defendant

This chapter concluded that defendants have very limited rights in relation to rights of review. The review mechanisms are not in conflict with defendants' rights per se, although they could undermine their right to a fair trial in certain, limited circumstances. Defendants are largely dependent upon the doctrine of abuse of process to protect their right to a fair trial if this has been adversely affected by a review decision. This chapter proposed a number of reforms that could be incorporated into the VRR to reduce the likelihood of defendants being disadvantaged by the process, such as stricter time limits and defendants being notified when a request had been received. Defendants could be better protected against spurious private prosecutions by a stronger system for ensuring that such prosecutions were promptly referred to the CPS for review.

Chapter 8 – The public interest

It was argued in this chapter that the VRR and judicial review are compatible with the public interest. Although they both recognise the legitimacy of the victim's interest in the decision to prosecute, they do not allow the victim to control the decision-making and the public nature of prosecutions is not compromised. These two mechanisms provide means of fault correction which is clearly in the public interest. Private prosecutions, by contrast, can be distinguished on the basis that they do not necessarily arise out of a flawed decision not to prosecute and could be contrary to the public interest.

Chapter 9 – Locating the review mechanisms within theoretical models of criminal justice

This chapter re-evaluated the review mechanisms using established criminal justice models to show that the review mechanisms only amount to a moderate expansion of the victims' rights in the pre-trial stage of the prosecution process. There were competing arguments for how the individual review mechanisms could be located within the different models. One approach might be to locate all of the mechanisms within one of the victim-oriented models. Judicial review, in particular, fits comfortably within such a model as it can be clearly associated with increasing victims' rights.

However, there are also compelling arguments for associating the VRR, in particular, with Packer's original 'crime control' model. The VRR has a number of distinct 'crime control' characteristics which could interpret it as a 'quality assurance' process within the traditional prosecution process. It can also be seen as protecting some of the values that are closely protected by crime control, such as efficiency and a preference for administrative processes, by diverting victims away from the more resource-intensive route of judicial review.

Analysing the review mechanisms against theoretical models also identified that private prosecutions are difficult to locate within any of the established models. This confirmed their lack of fit within the contemporary criminal justice system which is based on a contest between the State and the defendant.

10.2 The Research Questions

This section will discuss the individual sub-questions before answering the primary research question.

Do the mechanisms of the VRR, judicial review and private prosecutions provide victims with principled and coherent rights to challenge decisions not to prosecute?

The first sub-question addresses the issue of whether the mechanisms of the VRR, judicial review and private prosecutions provide victims with principled and coherent rights to challenge decisions not to prosecute. Essentially, the answer to this question varies according to the individual mechanism.

Although the VRR has the clear potential to result in a satisfactory outcome for some victims, it is only internally coherent or principled to a limited degree. The VRR originated from the Court of Appeal's dicta in *Killick* inviting the DPP to review the arrangements for victims to contest decisions not to prosecute. However, the scheme which followed only applies to a relatively narrow range of possible decisions. This is partly as a result of the limited construction of who can use the scheme, which has a prerequisite of harm embedded within the definition of victimhood. The effect of this is to unjustifiably exclude certain factual victims from the reach of the scheme and to limit it to conventional primary victims. Although the VRR may give the impression that it is an entirely victim-focused initiative, this conclusion is undermined by a number of factors. Firstly, the scheme is restricted to limited categories of victim. The VRR could, therefore, be more inclusive by accepting a wider range of victims including those which have been indirectly affected by crime.

There are also a number of specific exclusions from the scheme which serve to significantly limit the cases that come within it. These limitations are not all justifiable and appear to be based on a policy decision on what type of decisions should be covered by the scheme. For example, the scheme excludes cases where some charges have been discontinued and others are continuing, or some suspects are being prosecuted and not others.

Furthermore, the VRR is not as responsive to victims' procedural justice needs as it should be. The VRR allows victims only a limited voice in the review process with victims being restricted to requesting a review. The level of victim participation and engagement is actually quite low; the VRR does not encourage victims to enter into a dialogue with the prosecutor regarding the case. Indeed, it does not even invite victims to make representations or submit additional material which may be relevant to the process. As an apparently victim-focused measure it should provide more meaningful opportunities for victims to express their voice and should expressly permit this rather than relying on victims to decide to submit unsolicited representations. Providing stronger rights to make representations would allow victims to engage with the scheme in a much more meaningful way; it would remain for the prosecution to determine how much weight should be attached to those representations. The Scottish model provides for this situation more effectively by still permitting reviews if no 'substantial and significant' charges are continuing. This would make the VRR much more victim-focused and give it a greater sense of legitimacy.

If the VRR is to be taken seriously as a means of holding the public prosecutor to account, a truly independent tier should be incorporated. To label the second stage of the review process as 'independent' is misleading as the review is conducted internally by the CPS. An independent layer, reserved for the most serious and sensitive of cases, could increase the credibility of the scheme and place it on a more principled basis. This could transform it from an internal form of accountability to one with an external element.

Judicial review is broadly coherent and principled as it operates on established legal principles which exist beyond the narrow issue of prosecutorial discretion. Compared to the VRR, it adopts a less rigid approach to standing and allows victims to have a voice in challenging the lawfulness of the decision not to prosecute. Although this is, of course, collateral to the prosecution process and only endures for the judicial review proceedings. The inherent jurisdiction of the High Court provides an independent and neutral forum for contesting the prosecutorial decision and can therefore be seen as a more robust method of holding the public prosecutor to account than the VRR.

Judicial review proceedings scrutinise the decision-making in accordance with established principles of administrative law that are not controlled by the CPS as the executive department who made the original decision. Judicial review brings the exercise of prosecutorial discretion within the supervisory jurisdiction of the High Court as with other forms of decision-making by public bodies.

The value of private prosecutions is heavily undermined by the unresolvable conflict between the power to bring a private prosecution and the public prosecutor's right to take it over. Law and policy are in conflict in this area. The law empowers victims to bring private prosecutions, but this is fundamentally undermined by the prevailing CPS policy to intervene in prosecutions which do not pass the two-stage test for public prosecutions. On one hand, therefore, private prosecution permit victims to have full party status to bring their own prosecution. On the other hand, this participation is substantially curtailed by the powers of the public prosecutor. This conflict will be examined further in relation to the second sub-question below.

To what extent do these rights of review encroach on the rights of the defendant and the wider public interest?

The second question focuses on the related issue of the extent the mechanisms encroach on the rights of defendants and the public interest.

Despite the hypothesis introduced in chapter one that rights of review could jeopardise the rights of defendants, this research has shown that they do not pose a great risk to

defendants' rights. Defendants are still able to rely on the safeguards within the trial and appeal processes in the same way as other defendants. Defendants have limited rights to contest the rights of review, particularly in relation to the VRR from which they are excluded.

The obvious focal points of the VRR are the victims and the state in the form of the public prosecutor. However, in view of its proximity to the adversarial process, it should also take appropriate account of the rights and interests of the defendants and how the scheme will impact on them. There remains, however, a slight risk that they may be unfairly disadvantaged by the reversal of a decision not to prosecute and defendants are largely dependent on the doctrine of abuse of process to address that. The comparison with other appeal procedures has identified a number of measures that should be introduced to mitigate the risk of injustice to individual defendants even further. These measures include more clarity around the VRR time limits, being put on notice of requests for review, a right to make representations and the incorporation of an 'interests of justice' requirement into the VRR.

Private prosecutions have the potential to result in defendants being prosecuted when the evidence against them is weak or a prosecution is contrary to the public interest. This is because a private prosecutor may be pursuing a private agenda and has not conducted an objective appraisal of the case in the same way as someone professionally detached from it would. Therefore, there is a risk of prosecution on the basis of arbitrary or capricious decision-making.

Allowing victims to have rights of review through the VRR and judicial review can be justified as a form of error identification and fault correction. Both these mechanisms permit victims to challenge decisions not to prosecute, but fall short of allowing victims to decide whether a prosecution should be brought. The VRR and judicial review are forms of quality assurance measures which provide a means of checking and correcting factually incorrect decisions. As the comparison with other appeal mechanisms has shown, it is in the interests of justice and the public interest to have such procedures in place. Obviously if such procedures were over-used and routinely identified incorrect decision-making on the part of the public prosecutor, this

could undermine public confidence in the prosecution process. However, providing that this is not the case, the existence of such procedures and the fact that, on occasions, decisions are corrected following review should increase public confidence rather than diminish it.

The VRR is a useful tool for the CPS to increase public confidence in the organisation. The very existence of such a scheme can create the impression of an organisation which values and respects victims of crime. The publication of data generated by the scheme which shows that only a small number of requests for review are made could be construed as meaning that the majority of victims are satisfied. Furthermore, the low numbers of decisions being reversed could suggest that the majority of prosecutorial decisions are correct. The fact that there is evidence of some decisions being successfully reviewed gives an element of credibility to the scheme. From the CPS perspective, there is perhaps an optimum level of successful requests; sufficient to demonstrate that the scheme provides an effective checking mechanism yet low enough to suggest that the majority of decisions are correct. However, the reasons for low levels of requests could be at least partly due to the strict qualifying criteria and because some situations which might result in a request are excluded from the scheme. The data could also be affected by how effectively the availability of the VRR is communicated to victims. The VRR is utilised by the CPS as an appealing way of responding to criticism of decisions not to prosecute, both to victims directly and through the media. The CPS can use the VRR to give weight to the original decision and to demonstrate that it must be correct because it has been verified.

The preceding chapters have shown that private prosecutions are now out of place in the contemporary criminal justice system. In addition, private prosecutions potentially conflict with the public interest aspect of prosecutions. In theory at least, they allow victims too much control over prosecutions which are now generally controlled by the CPS. This lack of fit is demonstrated by how private prosecutors are not compelled to take into account all of the interests in prosecutions, namely the defendant and the public interest, and that they can be used to pursue a private agenda potentially contrary to these interests. The fact that private prosecutions were also hard to locate within the established criminal justice models in the previous chapter also highlights

how unsuitable they now are. In reality, they are not a review mechanism in that they do not provide a way for victims to seek review of a decision not to prosecute. In fact, they potentially allow victims to circumvent the decision and bring their own proceedings despite the fact that the original decision not to prosecute may have been procedurally and substantively correct.

As a result, private prosecutions have a different conceptual basis to public prosecutions which are brought by the State as part of its obligations to citizens as a form of censure for transgressing the criminal law. Therefore, they are potentially in conflict with the public interest dimension of prosecutions and cannot be justified in their current form. Prosecutions brought by private citizens either need to be abolished or reformed to ensure that the State has greater oversight to ensure that prosecutions are not brought which are either contrary to the public interest or subject defendants to criminal proceedings when there is not an evidentially sound basis for doing so.

The primary research question: **To what extent does the law and policy in England and Wales provide victims of crime with a coherent and principled framework for challenging decisions not to prosecute?**

The final issue is whether the review mechanisms collectively provide a coherent and principled framework of rights for victims. Despite each having some value for victims, there are clear shortcomings to each of the mechanisms indicating that the VRR and private prosecutions are not intrinsically coherent or principled. Superficially, the three mechanisms provide a framework of rights with an internal mechanism, an external mechanism and a third procedure which allows the victim to bring a prosecution personally. On closer analysis, however, the three mechanisms do not fit together as a well-organised and principled system, but are a collection of disconnected measures which have developed separately and inconsistently.

In its current format the VRR is essentially a form of ADR which provides an internal route for victims to use, diverting potential judicial review claimants away from the courts. Compared to judicial review it represents a less transparent and less independent means of contesting a decision. There are clear benefits to the CPS of

promoting the VRR over judicial review as it is a less expensive and less resource-intensive mechanism which the CPS controls internally. Judicial review, by contrast, takes place externally in the independent, and potentially more unpredictable, forum of the High Court. Unlike judicial review, the CPS sets the parameters of the VRR and can determine which cases are eligible for review under the scheme. The CPS could potentially broaden or restrict the entry criteria if they wish; perhaps in response to a growing number of judicial review applications in a particular area. As the VRR acts as a barrier to judicial review, the CPS can effectively raise or lower the barrier as they see fit. The existence of the VRR also provides the CPS with an opportunity to either rapidly correct a wrong decision or to produce a more robust review reducing the likelihood of a successful application for judicial review.

The relationship between the VRR and judicial review is complicated and not representative of a coherent system or framework. On one level, the VRR appears to provide a form of ADR to be exhausted before resorting to judicial review. In this sense, it is understandable that the courts expect victims to use the VRR in the first instance. However, the VRR is effectively a barrier to judicial review and there is certainly not a natural progression from one mechanism to the other. The procedural requirements and focus of the two mechanisms are also quite different. Both require victims to have standing to use them, but the rules are different with the requirements of the VRR more rigid than the standing rules for judicial review. The VRR also has specific qualifying criteria for what types of decisions not to prosecute can be reviewed under the scheme; this is potentially more restrictive than under judicial review. As a result, there are some common situations which are specifically excluded from the VRR which could be subject to judicial review. For example, a decision to caution or to prosecute a particular offence or person would be excluded from the internal scheme, but could result in a claim for judicial review. As the VRR originated from the observation by the Court of Appeal that victims should have an alternative to judicial review, it is unjustified that the scheme is so restricted. Judicial review remains the residual route when the VRR cannot be used. Essentially, the two mechanisms are not a good fit with each another and not indicative of a coherent framework.

A recurring theme of this thesis has been the extent to which private prosecutions are an aberration in a system which is structured around prosecutorial contests between the State and the defendant. They originated from an era when prosecutions were brought on a different conceptual basis to what they are now; offending was against the victim rather than society generally. Although judicial review and the VRR do share certain common features, this commonality is not extended to private prosecutions. The VRR and judicial review both provide a means for victims to instigate a review of a decision not to prosecute, but neither allow victims full control of the decision-making process and both exist outside the prosecution itself. Whereas judicial review and the VRR provide a means of identifying and remedying errors in prosecutorial decision-making, private prosecutions allow victims to bring a prosecution without reference to factors such as the lawfulness or correctness of the original decision or the rights of the other interests in a prosecution, namely the defendant and the public interest.

The hypothesis set out in chapter one that the law and policy of England and Wales does not provide a coherent and principled framework for victims of crime to challenge decisions not to prosecute is therefore proven. Rights of review, however, is an area which would benefit from further research.

10.3 Further research

As there is only limited research on the rights to review decisions not to prosecute in England and Wales, this would benefit from further research. In particular, the following could be valuable to the further evaluation of the rights of review:

1. Empirical research with victims who have participated in the Victims' Right to Review to extent our knowledge of victims' understanding of review mechanisms and the extent to which they feel that their procedural justice needs have been met.
2. Qualitative interviews with CPS lawyers could be a useful method of identifying their understanding and perceptions of the processes. This may

reveal, for example, that the existence of the review mechanisms has changed their practices and attitudes, such as making them more risk adverse in their prosecution decision-making.

3. Research into private prosecutions brought by victims of crime would illuminate the extent to which victims use private prosecutions as a way of contesting decisions not to prosecute and whether prosecutions are brought by them in evidentially weak cases or contrary to the public interest.
4. Further comparative research on how the VRR has been implemented in EU jurisdictions could identify further ways of improving the scheme in England and Wales.
5. The thesis has alluded throughout to the implications more widely for the role of victims in the criminal justice system that have been, or might be, affected by allowing them the right to review a decision not to prosecute. While they were not central to the claims made, or debated, in this thesis, those implications remain ripe for some further exploration.
6. Comparison with other appeal mechanisms has been a useful way of evaluating the rights of review and this could be developed further to examine whether such mechanisms are consistent with one another; this could include, for example, the rights of victims to request reviews of decisions of the Parole Board.

Overall, therefore, this thesis concludes that although the law and policy in England and Wales does not provide victims with a coherent framework of rights, there is evidence that the VRR and judicial review of such decisions can be properly accommodated within the criminal justice system without compromising the rights of defendants or the public interest.

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