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# Victims and Criminal Justice

## Particular Groups of Victims
## Part 2

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with the assistance of

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# 14. Abuse of Power

# Some Theoretical and Pragmatic Observations on the Abuse of Power

*John P.J. Dussich*

## Contents

## 1. Introduction

In 1532 *Niccolo Machiavelli* wrote that to get power and remain in power a leader had to forget ideals. Further, he noted that powerful states approved the use of any possible means to get and keep power (including lying, cheating and murder). He observed that citizen rights were only those permitted for the benefit of the state. Although he personally did not approve of these methods, his analysis was accepted as characteristic of his times. Over four centuries later, the conflict-coercion perspective of *Steven Vago* describes societal power relations in a somewhat similar way:

> "Order is temporary and unstable because every individual and group strives to maximize its own interests in a world of limited resources and goods. Social conflict is considered as intrinsic to the interaction between individuals and groups. In this perspective, the maintenance of power requires inducement and coercion, and law is an instrument of repression perpetuating the interests of the powerful, at the cost of alternative interests, norms and values" (1981, p. 12).

One of the prime examples of the abuse of power in this century has been in the Republic of South Africa where the criminal law had been a major tool of repression. Through its Internal Security Act of 1982 Black Africans could be detained without trial or charge, for any length of time, without judicial recourse, incommunicado, and without access to a lawyer or family members (*Hovey* 1983, p. 4). The result was: a country with the highest rate of imprisonment in the world (400 per 100,000 people), extensive use of torture, and mass killings by police (*Harsch* 1980, p. 245).

The United States has also been frequently singled out as an abuser of power, externally in its foreign policy and internally with its political action committees. *Noam Chomsky,* a major critic of U.S. foreign policy, in referring to the United States' concern for the Third World, went so far as to state that it guarantees America's "freedom to rob and to exploit" (1987, p. 7). In a similarly critical vein, *Amitai Etzioni* a political and organizational sociologist, characterized Washington, D.C. as a legislative marketplace where corrupt politicians yield to private power and the principles of democracy fall victim to the special interests of political action committees (1988).

In many nations throughout the world legal sanctions exist to prevent, control and punish the abuse of power. In these countries most abuses are effectively kept in check by existing laws. However, some countries have no formal sanctions against abuses of power; consequently, multinational corporations, governments, military agencies, medical organizations, police forces, terrorists groups, criminals, economic institutions, religious groups, politicians and even parents have licence to use such methods as environmental pollution and price fixing, genocide and apartheid, civilian bombing and violent coups, medical experimentation and neglect, torture and brutality, hostage taking and massacres, extortion and white slavery, price fixing and usury, inquisitions and mass suicides, pogroms and disappearances, and child abuse and kidnapping, respectively (*Anonymous* 1985, p. 4). Having legal sanctions is not a guarantee against abuses; for many countries with laws still have significant abuses of power. The true measure of abuses of power is not only the presence of laws but also the extent of victimization.

From antiquity to the present, history is replete with dramatic and diverse examples of abuses of power. Some persons have earned infamous reputations for their degree of abuse (Caligula, Nero, Attila the Hun, Adolf Hitler, Stalin). Responses to abuses have also been dramatic and diverse. Some have been life long personal crusades, where individuals have become heroes in causes on behalf of mass suffering (Mahatma Gandhi, Harriet Tubman, Martin Luther King Jr., Mother Theresa, Nelson Mandela). Other responses have been highly organized efforts even resulting in wars between nations. International and national organizations have evolved to address major abuses (Amnesty International, International Committee of the Red Cross and the Red Crescent Society, the World Society of Victimology, the International Society for Social Defence, Mothers Against Drunk Drivers, the Weise Ring, National Organization for Victim Assistance). Countries have formed international alliances to champion the plight of mass victimization. Two noteworthy examples were the United Nations's 10 December 1948 Universal Declaration of Human Rights and the Council of Europe's 3 September 1953 European Convention on Human Rights. It is ironic that 1948 also was the year apartheid was adopted as the official policy of the South African Nationalist Party (*Harsch* 1980, p. 19). The most recent significant multinational effort to respond to abuses of power at the international level was by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held from 26 August to 6 September 1985 in Milan, Italy which endorsed the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution 40/34).

## 2. Definitions

### 2.1 Abuse

The term abuse means a violation of a standard, especially an agreed upon standard, where either individual or collective suffering has occurred which has led to physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights (*Declaration* 1986).

### 2.2 Power

The term power comes from the Latin "potere", to be able. In this context it suggests a recognized aggregation of forces of significant magnitude to exert a major influence over people. One of the often quoted writers on the topic of power is *Michel Foucault*, who in his book, "Discipline and punish", (1977) referred to power as those forms of domination and subordination that are the products of the asymmetrical balance of forces which influence all social relations (*Garland* 1990, p. 138).

### 2.3 Abuse of Power

Combining these two definitions, the phrase "abuse of power" then becomes, the violation of a standard in the use of forces such that persons are injured physically, mentally, emotionally, economically, or in their rights, as a direct and intentional result of the misapplication of these forces.

## 3. Assumptions

### 3.1 Legitimate Standards

Inherent in the above definitions is the assumption that standards of behavior are legitimate only within formal social collectivities (be they primitive tribes or sovereign states) which consent to participate in a union of mutual cooperation.

### 3.2 Moral Standards

Beyond legitimate standards it is assumed that there are also moral standards which exist from concerns manifest in cherished values (*Etzioni* 1988, p. 22). At the micro level these may be characterized as the new morality from which springs the laws of the future. At the macro level these may be characterized as the ethical framework within which our entire sanctioning structure functions. At either level, and in the abuse of power context, the consent to participate is assumed and therefore applicable even outside social collectivities.

## 4. Theory

### 4.1 Review

Theoretical explanations specifically aimed at the abuse of power are sparse. However, there are some theories that have indirect relevance. These are mostly macro sociological theories which generally address collective behavior. The list includes such contributors as: *Emile Durkheim* on power and anomie (1893, 1897); *Max Weber* on power and domination (*Rheinstein* 1954, pp. 322-337); *Gresham Sykes* on power and prisons (1958); *Irving Goffman* on power and asylums (1961); *R. May* on power and violence (1972); *Michel Foucault* on power and punishment (1977); *Noam Chomsky* on power and foreign policy (1987), *Stephen Pfohl* on power and social control (1988); and, *Amitai Etzioni* on power and political corruption (1988). None of these writers dealt directly with a theory of abuse of power. Although all of them contributed to the understanding of how power is used, their focal points were not on abuse of power per se. Needed then, is a theoretical model dedicated to the topic, abuse of power.

### 4.2 Social Behavior Model

One of the theoretical models which provides a logical framework for identifying conditions which gives rise to the abuse of power is the social behavioral model. This model posits that all behavior is goal directed and expects rewards. In this context, the "abuse of power behavior" also seeks rewards. Considerations of what or whom might be injured are subject mostly to the tests of efficiency and effectiveness. In this model victims are usually mere obstacles to be overcome toward the achievement of the self serving end. Legal or religious sanctions, and concerns for propriety, virtue,

or morality like all other obstacles, are predominantly screened to determine the impact of goal achievement. Like all behavior, abuse of power is also learned; and, it is an integral part of the larger social culture.

## 4.3 Causality

In any discussion of social problems the issue begs the question, what is the cause. Within the context of science, inferences of causality may not be taken lightly. Students of research are taught three criteria for inferring causality: causal order, association, and lack of spuriousness. Prior to satisfying these three criteria it is essential that a theory be identified so as to provide a structure, terms and postulates as the basis for understanding a phenomena.

## 4.4 Causal Statement

Using the precepts of the social behavioral model, a causal statement addressing the abuse of power would be:

> Abuse of power results when a powerful social entity (abuser) see king reward, takes purposive actions (methods) to obtain expected rewards with little or no regard for the injury it causes to persons, principles or property (victims). The expectations and methods used are shaped by learned, sociocultural notions that justify violations of standards with promises of reward with impunity.

## 4.5 Taxonomy

The three variables in the abuse of power are: an abuser who misused power, a method which directed that power, and a victim who suffered from that power.* Examples using this triad are:

* *Foucault* also used three major concepts to analyze domination in his treatise on prisons and punishment: power, knowledge and the body (1977, p. 28).

| Type | Abusers | Methods | Victims |
|---|---|---|---|
| Government | South Africa | Apartheid | Africans (*Harsch* 1980) |
| Corporation | Exon | Pollution | Alaskan waters (*Hodgson* 1990) |
| Crime organization | Mafia | Racketeering | Taxpayers (*Smith* 1975) |
| Religious organization | Catholic | Inquisition Church | Heretics (*Bainton* 1978) |
| Institutions | Prisons | Physical force | Inmates (*Foucault* 1977) |
| Secret society | Ku Klux Klan | Intimidation | Blacks (*Blaustein & Zangrando* 1968) |

## 5. Pragmatics

### 5.1 Prevention

To effectively achieve any success at social change either at the individual or societal level, one must go beyond repeated descriptions of abuses of power. Any plan to prevent abuses, must propose the adoption of principles of deterrence. This recommendation suggests that because we are genuinely concerned for changing the abuse of power behavior, we must move beyond anecdotal accounts (no matter how compelling), to objective plans that could directly thwart decisions which give rise to the abuse of power behavior.

### 5.2 Measurement

In recent writings it is generally accepted that the magnitude of the abuse of power problem far exceeds the problem of conventional crime (*Lamborn* 1984, p. 15). Yet to date no comprehensive surveys have been conducted measuring the nature and extent of abuse of power victimizations. Many infamous instances of abuse of power have been documented over the years; however, these have been isolated, subjectively reported accounts. Needed are comprehensive surveys with common terms, criteria and methods to provide empirical data upon which to base new policy (*Declaration* 1984,

p. 21). Ideally the setting of priorities by national and multinational organizations, rather than using these anecdotal accounts, should use accurate measurements of the problem prior to proposing remedial actions.

## 5.3 Laws

The task is then to identify the specific variables in a given society which are directly and clearly causal, and which are subject to change. This includes not only changing existing laws but also enacting new laws. The laws which emerge from this effort should be based on a coordinated scheme of deterrent actions designed to directly address the abolishment of the abuses of power. Ideally, the legislative process should be driven by research tested theories such that the causal inferences are as accurate as can be provided.

## 5.4 Social Conditions

Each society has different existing conditions which influences its behavior. In order to implement social change, those unique conditions as well as those common conditions found in all societies, must be addressed objectively. For example, if a society suffers from unemployment, poverty, crime and illiteracy, it would be difficult to establish community ethic's committees or to expect success from distributed pamphlets on victim rights when most of the populace cannot or write. Any approach must first take into account the social realities of the society under consideration. Plans for change can only succeed if they recognize the social context within which they exist.

## 5.5 Cultural Precepts

In all cultures information is transmitted from generation to generation through language. Each culture also transmits historical information unique to that culture, some accurate and some not. Many aspects of cultural heritage dictate expectations for how people should behave and how these behaviors should be sanctioned. In most societies cultural mandates are codified by laws and are reinforced by religious beliefs. Thus, attempts to change social behavior requires an understanding of those cultural precepts that come into play in the proposed changes.

## 6. Summary

Awareness of abuses of power achieves international proportions when the documentation of these major events becomes credible and achieves wide spread publicity. Examples range from the U.S. National Guard firing on students at Kent State University (*Scranton* 1970) to the Chinese military force used against students at Tiananmen Square. The universal outcry for action against abuses of power in the last decade finally culminated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power decreed at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985. The next steps are to more accurately identify both the nature and extent of the abuse of power. Thus the social behavioral model proposed herein and its accompanying taxonomy is offered to help begin the process of understanding this multi-faceted occurrence. In addition, the abuses of power phenomena also requires measurement in all its dimensions, qualitative and quantitative. It is understandable to be horrified by continuous examples of abuses of power. However, as social scientists and social planners, we contribute most significantly to the improvement of the human condition if we first recognize the theoretical properties of this phenomena, second ensure the phenomena is accurately measured, and third make the information generated known to decision makers. Thus, to achieve success in eradicating abuses of power, realistic planning should not only focus attention on changing laws, but also on changing social conditions and current attitudes designed to shape a covenant of human dignity and respect for human rights in accordance with the basic Universal Declaration of Human Rights signed into the United Nations Charter in 1945.

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# Victims of Crime and Abuse of Power in Africa:

# An Overview

*John Hatchard*

## Contents

## 1. Introduction

The study of victimology in Africa is in its infancy, a fact that is not surprising given the relative paucity of criminological studies of any kind on the continent. Little or no attempt has been made to examine the application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter the "Victims Charter") to Africa. The aim of this chapter therefore is to focus upon problems and perspectives of victimology within the framework of the Victims Charter. It forms a very preliminary part of a project by the author to undertake a detailed study of the operation of the Charter in Africa and seeks to give an overview of the topic rather than any detailed assessment of individual topics. In view of the continuing nature of the project, comments and additional information is very welcome. The chapter follows the Victims Charter by dividing the discussion into firstly, victims of crime and secondly, victims of abuse of power.

## 2. Victims of Crime

### 2.1 Victimization in Africa: Causes and Effects

In view of the shortage of space, it is not possible to meaningfully discuss the causes of crime and victimization in Africa. All that can be done is to emphasise some of the more obvious points. Causes of crime can be economic, social, political and sometimes mental. There is no doubt that in Africa economic and social problems are the major causes of crime. I will merely touch on two.[1] Firstly, rural-urban migration. The removal of restrictions on the movement of Africans at independence resulted in a rush from the rural areas to the urban centres. This placed a tremendous strain on the local authorities which just could not cope with the numbers. The result was the establishment of unauthorised squatter compounds in and around urban areas which became characterised by poor and overcrowded housing coupled with few, if any, amenities. These proved a breeding ground for

1 For a full discussion see, for example, *Hatchard & Ndulo* (1991, chap. 8).

crime. This situation still prevails today. Secondly, lack of education and employment prospects. Great emphasis is still placed on academic achievement. A good education can greatly enhance the prospect of employment and a place in the low-density housing areas. During the colonial period, education for blacks was rudimentary. Since independence, many countries have made rapid strides towards expanding educational services. However this is often frustrated by the rapid expansion of the population, coupled with acute shortages of trained teachers, books and equipment. As a result, many "drop out" at an early age and have no second chance. For example, in Zambia in 1987, out of 234,035 pupils who completed their primary education (Grade 7), a total of only 56,735 were able to move to move onto secondary schools, a progression rate of just 24%. The result is that the majority of pupils never progress beyond this point. Their plight is exacerbated by the inability of nations to provide sufficient jobs for its increasing workforce. Pitifully weak economies coupled to huge international debt repayments makes economic expansion impossible and leaves millions outside the formal employment sector. For example, at present, Zimbabwe annually produces up to 200,000 secondary school leavers, whilst only some 10000 new jobs become available each year in the formal employment sector. The future is bleak for such people and in the absence of any government financial assistance being available, many drift into crime.

There is much justification in feeling that poor housing, poor education, unemployment and poverty ought themselves to be viewed as crimes and those responsible for perpetrating and aggravating them viewed as criminals. The millions of persons living a shanty compounds are victims of inadequate and unfair socio-legal systems and clearly there is a need for a fundamental change in the structure of societies if crime and causes of crime are to be eradicated.

The result is that victims of crime and fear of crime abound. Despite the paucity and inaccuracy of crime statistics, there is no doubt that post-independence Africa has seen an enormous increase in crime. There are four offences which require particular attention partly because of their importance and topicality; partly because they are areas on which there is a certain amount of data; and partly because of their importance in the field of victimology.

### *2.1.1 Property Crime*

Spectacular rises in robbery and burglary have been widely reported. For example, in Zambia in 1964 there were 319 reported cases of robbery (8.7 cases per 100,000 of the population). In 1986 this figure had risen to 4426

(63.2). Indeed, in view of the massive upsurge in robberies since independence, Kenya, Malawi, Cameroon, Nigeria, Uganda and Zambia have all introduced capital punishment for armed robbery in an attempt to deter criminals-although there is no evidence to indicate that this has had any noticeable impact. The effect of such criminality is startling and leads to considerable victimization. Many people are gripped with continuous uncertainty, chronic anxiety and tension. In Africa, as in many other parts of the world, a whole generation has grown up under conditions in which they cannot easily relate to other people. When life styles are altered as a result of crime, the end result is the disfigurement of society and the downgrading of the quality of life. Many people avoid leaving their homes unattended for fear that a burglar will ransack the house in their absence. People lock themselves into their homes at dusk but remain fearful of the night despite the presence of a multitude of security devices. A significant proportion of income is dissipated through fear of victimisation. Businesses are discouraged because of low profits and high overheads due to theft and pilferage. Beleaguered businessmen often shorten their trading hours drastically and spend large sums on security. The result is often the stifling of the business which, at best, prevents expansion and at worst leads to the collapse of the enterprise. Thus property crimes affects every aspect of society and leads to widespread victimization. In the rural areas, there have been considerable increases in stock theft in recent years. Given the importance of cattle to villagers, such criminality itself has serious social repercussions on rural communities (*Cutshall* 1982, p. 1 et seq; *Hatchard* 1985, p. 488).

### *2.1.2 Homicide*

*Bohannan's* classic study on African homicide and suicide in the 1950's paved the way for several studies on homicide in Africa. However, they are all of a somewhat disparate nature with some concentrating solely on capital murder cases, others murder cases only whilst yet others include all unlawful killings. Most are over fifteen years old and therefore may not reflect current trends. All suffer from the perennial problem of lack of detailed information in police and court records. Indeed a recent study of homicide by the University of Zimbabwe was aborted because of the paucity and unreliability of official records.[2] Thus only a very general and tentative analysis of the topic is attempted here.

2 The studies also do not take into consideration the perennial problems of unreported and undetected cases.

Given the continued strength of extended family, it is not surprising that most studies report that a significant proportion of homicide victims are related. Most frequently the victim is the spouse and in particular the wife. The beating of wives is recognised as a social norm in many African societies. Often this conduct is the result of arguments revolving around the woman's "disobedience" or her failure to satisfy properly all the needs and demands of her husband. This frequently provides the context in which homicide occurs (*Fluehr-Lobban*, p. 30; *Hatchard* 1982, p. 6).[3] Several studies also report homicides connected with sexual jealousy. Often a wife caught in adultery or the adulterer himself is killed (*Tanner*, p. 49; *Hatchard* 1982, p. 5), whilst the slaying of a wife following her refusal to have sex or following her taunts suggesting impotence or lack of virility on the part of the husband, are all relatively common (*Fleuhr-Lobban*, p. 29). Other common motives for killing (not necessarily involving other family members) include disputes over land, water and cattle - this in view of the familial wealth stored in cattle in many societies.

One striking feature of the studies is the high level of homicides between non-relatives. One reason for this are killings for political motives which are common in many countries due to general instability coupled with widespread feelings of disharmony and antagonism. This is particularly the case in countries where there are ethnic and cultural differences within the population which result in inter-ethnic violence. More often than not it is the innocent who suffer therefrom (*Chihambakwe*, p. 29; *Bienen*, p. 75). The increasing number of deaths resulting from the commission of robberies and burglaries is probably symptomatic of the rise in property offences coupled with an increased use of weapons by criminals (*Hatchard* 1985, p. 486; *Tanner*, p. 72).

Allegations of witchcraft on the part of victims are surprisingly rare. *Bienen, Tanner, Hatchard, Chihambakwe* and *Fluehr-Lobban* all report that this was a motive for killing in only 5% or less of the cases studied. In such cases, judicial cognisance of belief in witchcraft often results in a finding of provocation and the imposition of a relatively short sentence (*Tanner*, p. 66). Slaying following a dispute over the payment of **lobolo** or bridewealth is also infrequent *Fluehr-Lobban*, p. 32). The use of "instant justice" resulting in the killing of thieves or suspected thieves, whether over

3 The seriousness of domestic violence and the resultant death and injuries led to a lengthy parliamentary debate in Zimbabwe in 1990. This led to calls for the intervention of the police and enforcement of the criminal law against those perpetrating violence. See Parliamentary Debates (Zimbabwe 4 December 1990.

money, property or cattle, is often a dominant motive precipitating homicide. This phenomenon is discussed below. The hiring of a killer is a rare occurrence (*Clifford* 1974, p. 121) although resort to **n'angas** i.e. traditional doctors, in order to determine who is the cause of one's current problems sometimes occurs and which sometimes results in the slaying of the victim "pointed out" by the **n'anga**.

The current literature undoubtedly raises more questions than answers. In view of the reported increase in homicide in virtually all African countries, there is clearly a need for a systematic study of the problem, although much is dependent upon the existence of adequate and reliable data.

### *2.1.3 Corruption*

Whilst much attention is focused upon victims of property and violent crime, the rapid increase in white collar crime, especially corruption by public servants is a more potent threat to the integrity of the State. In this context, "corruption" refers to the "misapplication of public goods to private ends" (*Nye* 1967, p. 417) or the "accepting or giving of any financial or other material benefit by way of a bribe or other inducement".[4]

Although a world-wide phenomenon, corruption is especially prevalent in Africa for two reasons in particular. Firstly, the depressed economic circumstances throughout the continent have had a negative impact on every society. The oppressiveness of external debts, chronic shortages of foreign exchange and consumer items and low levels of remuneration for public employees have created circumstances conducive to corruption. As *Leys* (1965, p. 215) points out, poverty strengthens all temptations for public officials and with forces which deter corruption generally weak in Africa, there is little threat of detection. A useful illustration of the type of conduct comes from Zimbabwe. Here, due to foreign exchange shortages, the main car assembly plant in the country was producing around 2000 cars per annum as opposed to an estimated demand of 25000 per annum. As a result, strict controls were placed on who could purchase a car whilst prices were controlled in an attempt to counter profiteering. On a number of occasions, senior government ministers obtained cars by improperly using political influence and pressure and then re-sold the vehicles at an enormous profit (*Sandura* 1988). Equally serious is the flight of capital resulting from illicit operations either by organized crime or of some transnational corporations in complicity with corrupt public officials. Thus, as the African Report notes

4 See sections 3 and 25 Corrupt Practices Act 1989 (Zambia).

whatever little resources are available in developing countries become the profits of developed countries and the bribes paid by those countries to corrupt public officials (p. 15). Secondly, financial pressures are sometimes exerted in furtherance of desired policies and projects. In Western societies, changes are normally implemented via organised interest/pressure groups and/or by a change of government through the ballot box. In African political systems often featuring a one-party state or military regime, such machinery is frequently ineffective or simply non-existent. Consequently, "alternative" means of influencing decisions occur in the form of payments to politicians and other public officials.

Everyone is the victim of corrupt practices. Scarce foreign exchange is utilised for personal gain of a few, thus hampering development and often leading to a shortage of goods and the creation of a black market economy with prices for basic commodities being greatly increased. Inevitably the poor are particularly victimized by this process. Citizens are also prejudiced by an inability to obtain access to even basic government services unless their request is accompanied by a bribe. In addition, organized crime can flourish by having large amounts of money available with which to bribe public officials. This is why arguably, corruption is the most serious criminal offence in Africa. The seriousness of the matter is well illustrated by Nigeria. Here one of the purported objectives of the 1983 coup which ousted the civilian administration and brought to power a military administration was to rid the country of corruption in all its facets and to introduce discipline into the body politic. The first of a series of military decrees in this direction was the Recovery of Public Property (Special Military Tribunals) Decree No 3 of 1984. This law was directed at those public officers who had engaged in corrupt practices or who had "contributed to the economic adversity of the Federal Republic of Nigeria". The decree had retrospective effect to October 1979, enabled a tribunal to impose a sentence of up to life imprisonment and excluded recourse to the ordinary law courts. *Karibi-Whyte* (1988, p. 90) notes the ovation given to this decree by the public.

Tackling corruption is extremely difficult and is exacerbated by the problems of detection because, by its very nature, it involves willing participants. Nevertheless, there is a real need to take meaningful steps to combat the problem. Several African countries have now established anti-corruption agencies and/or strengthened the existing criminal laws. Public servants, and in some cases Ministers and party officials, are required by law to explain the sources of their enrichment and to report on the state of their finances on a regular basis. Other countries have set up committees charged with investigating any sudden enrichment, particularly of public

officials. In recent years, in some countries the Office of the Ombudsman have been given the right to investigate corruption (see Part II for a full discussion). An examination of the approach of Zambia illustrates the scale of the measures taken aimed at curbing the menace. Here the original law relating to corrupt practices dated from 1934 and was generally outdated being narrow in scope and difficult to implement. Later amendments had little impact. As a result, in 1980 government made a fresh start with the enactment of the Corrupt Practices Act. The Act sought to deal with the problem in four ways: (i) by providing a comprehensive list of corrupt acts; (ii) by expanding the category of those affected to cover persons employed not only in the public service, but also in the ruling party, parastatals, and the private sectors; (iii) by imposing a mandatory minimum sentence of five years imprisonment upon conviction for acts involving corruption; and (iv) by the creation of the Anti-Corruption Commission with wide investigative powers.

The Anti-Corruption Commission, started work in December 1982. Its functions are investigative, preventive and educative. As regards the first, the Commission has sought to carry its operations nationwide. Originally based solely in Lusaka, it later opened three regional offices. In 1987 a liaison office was also opened at the Lusaka International Airport following persistent press reports of corruption on the part of immigration and customs officers there and the illegal exportation of precious stones. The Corruption Prevention Department was established in August 1986 with the task of instituting procedures designed to prevent corruption in public and private bodies. For example, in 1987 an exercise with the Department of Customs and Excise resulted in the introduction of new procedures designed to allow customs officials to monitor the import and export of expensive consumer items such as motor vehicles and electronic equipment. This emphasises the importance of crime control being proactive as well as reactive. The Community Relations Department is responsible for the educative functions of the Commission. These consist of disseminating information on the dangers of corruption through lectures, seminars, and the media. For example, the department produces a regular radio programme in English and the seven major vernacular languages. A further positive feature of the Commission is that it has attracted well-qualified personnel, many of whom are graduates.

Another innovative move has been legislation designed to prevent offenders enjoying the fruits of their crime. In November 1986 the Corrupt Practices (Disposal of Recovered Property) Regulations came into force. These provide that any property which was the subject of, and was recovered during the course of an investigation into, any offence alleged or suspected to have been committed under the Corrupt Practices Act can be confiscated

under certain conditions. These are **inter alia**, where the rightful owner has left Zambia for the purpose of evading the consequences of any investigation or prosecution; or the person in possession admits his involvement in the alleged corrupt act and agrees to surrender the property. Financial penalties of this nature have proved very effective in other countries and are an important weapon in the armoury of the Commission.

It is extremely difficult to assess the performance of the Commission. The number of complaints received from members of the public has risen from 681 in 1983 to 1398 in 1987. However there have been relatively few convictions, for example just 24 in 1986-87. This is perhaps an indication of the difficulty in obtaining sufficient evidence, especially because in many cases there is a "willing victim". Its deterrent value should not be underestimated and, together with its forfeiture powers, it is clearly making a useful contribution to combatting one of Zambia's major crime problems. However, the work of the Commission is inevitably hampered by two problems. Firstly, as *Lungu* (1981, p. 1) points out, although it has wide-ranging powers, it may not investigate members of the defence forces or the security services and is denied access to the secret or confidential deliberations of the Central Committee of the ruling party, UNIP, the Cabinet or any of their sub-committees. This means that critical areas of power are outside its jurisdiction. Secondly, and fundamentally, it cannot deal with the factors which are responsible for corruption in the first place. Even so, the introduction of a more constructive approach to tackling crime problems is welcome.

The detrimental effect of corruption on every society means that all States must take strong measures to combat it. Its eradication is largely dependent upon fundamental changes in economic and social conditions. Even so, concerted efforts are needed to develop more resistance to corrupt acts. In this regard, Zambia sets a useful example.

### *2.1.4 Environmental Offences*

This is a relatively new phenomenon upon which there is little data. However, reports of the dumping of toxic waste from Europe in parts of west Africa shows that this is a menace which potentially threatens to lead to millions of victims. The Bhopal tragedy in India is a startling reminder of the potential consequences of environmental disasters and of the immense legal problems arising from attempts to compensate victims and their families. Few African countries have made adequate legal provision to tackle such catastrophes. It is urged that in this respect governments urgently heed the call in the Victims Charter: "To review periodically...existing

legislation and practices in order to ensure responsiveness to changing circumstances, and to enact and enforce legislation proscribing acts that violate internationally recognized norms relating to human rights, corporate conduct and other abuses of power" (para 4(c)). As the African Report notes, such offences often have an international dimension and consequently only international co-operation can hope to bring such abuses to an end.[5]

## 2.2 Access to Justice

The neglect of victims rights in Africa is nowhere better illustrated than in the area of access to justice. Few countries have followed the Victims Charter and taken steps to inform victims of their rights and options, to set up any services designed to assist victims or to assist them during the judicial process. This is partly explicable by the lack of resources available for such action. For example, the provision of transportation by the police for victims to medical facilities, courts etc is virtually impossible given the acute shortage of transport such that there are not even sufficient vehicles for regular police patrols. Another factor is the lack of confidence by many victims, particularly the poor, in the police and the justice system itself--the reasons for which are examined in the following section. Likewise, economic constraints make the provision of legal assistance to victims virtually impossible.

The establishment of a justice system which reflects the needs and rights of victims as envisaged in the Victims Charter is a considerable challenge and the establishment of sophisticated organisations such as NOVA in the United States and Victim Support groups in the UK are certainly not feasible at present. However, as the Nigerian government has noted, "a criminal justice system that does not take into account the plight of the victim cannot be said to be comprehensive" (*Nigerian National Paper* 1990, p. 48). Indeed it is not in keeping with the traditional justice which always closely sought to actively assist victims. One positive contribution in this field is the establishment of the Legal Resources Foundation in Zimbabwe. This seeks to improve access to legal and information services to all sections of the population. As *Donovan* points out: "Ignorance ensures that ordinary people remain unaware of the basic rights to which they are entitled. Poverty means

5 See African Regional Meeting Report for the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders: A/CONF.144/RPM.5.

that even if the hurdle of ignorance is overcome, ordinary people cannot afford to pursue the remedies which are available".[6] The establishment of a publications unit has led to the publication of a series of booklets in English and the vernacular languages setting out basic legal rights and remedies. There is also a pilot project for the training of para-legal staff who will act as an advice and referral agency in the rural areas. The success of this project and a move to establish similar organisations thoughout the southern African region indicate that, given political and financial support, the development of realistic strategies aimed at improving access to justice for victims in Africa is attainable.

In this regard, States have a duty to take appropriate steps to assist victims of crime. Strategies will vary but a clear commitment to this duty is necessary.

## 2.3 Prevention of and Response to Victimisation

The police remain the traditional guardians of law and order. However, in the African context, the police are generally regarded as being unable to effectively protect victims and potential victims and as a result alternative methods of meting out justice have become commonplace.

### *2.3.1 The Police*

The coming of colonialism brought with it the legal system of the colonial power. New and aliens laws and institutions were introduced without any consultation with the local population. Essentially the justice systems were designed to maintain a Western system of law and order and to protect the colonisers against the "black peril", as Africans were euphemistically referred to in some official crime reports. This meant that the role of the police, who were basically a military force in most of Africa until at least the 1930's, was to protect whites and white interests. Several common characteristics accompanied the use of this policy. Firstly, officers were kept separate from the rest of the community by housing them in police camps. Secondly, black officers were frequently sent to areas other than their own based on the principle of divide and rule. Thirdly, all senior police ranks were reserved for whites.

6 *Donovan*: The lawyers role in the protection of Human Rights in Zimbabwe. Address to the Law Society of Zimbabwe, 1986.

The police were in the forefront of implementing the repressive colonial laws relating to, for example, strict controls on the movement of Africans and the exercise of political rights. Black police officers, in particular, were also perceived by the majority of people as being stooges of the colonial power - facts which led to the almost complete alienation of the police from the majority of the people (*Small*, p. 43; *Dube*, p. 7). In passing, it might be noted that in South Africa today, a similar situation still exists ensuring that black police officers continue to face intense hostility from township dwellers.

Independence generally had little effect on the structure and philosophy of police administration and police-public relations generally remain extremely poor. Behaviour which has tended to widen the gap between the citizen and the police includes (i) exaggeration by the police of evidence in court; (ii) use of unnecessary violence; (iii) fatuousness in dealing with public demonstrations; (iv) ineptitude in handling victims complaints (v) incivility to members of the public; (vi) unnecessary delay in attending to victims complaints.[7] This is coupled with a rise in violent and property crime which the police seem unable to control.

The problem is compounded by apparent government unwillingness or inability to provide adequate resources or acceptable conditions of service for the police. A good example of the point is the situation in Zambia. Poor conditions of service coupled with restrictions on recruitment has led to police strength being almost continually below strength since independence in 1964. This has coincided with the placing of onerous new responsibilities on the police, such as guarding government officials, foreign dignitaries etc. The resultant shortage of personnel has effectively prevented the undertaking of "normal" police activities and has seriously reduced the capacity of the police to protect citizens. This is particularly the case in high-density urban areas, many of which have now become virtual 'no go' areas. The poor performance of the police is exacerbated by the continued alienation of the force from the public. Police officers continue to live in the police camps in the urban areas, thus maintaining the colonial tradition of being separate from the communities in which officers are supposed to serve. There is also a serious accommodation problem in the rural areas. In some parts of the country, officers are accommodated in mud huts. In other cases

7 Quoted in *Okonkwo* (p. 31), as regards the police in Nigeria. There is no doubt that these sentiments apply to most African police forces.

officers are scattered in shanty compounds around towns. As the Inspector-General of Police has noted: "This does not raise the (morale) of the officers".[8] There is also a serious shortage of police stations in urban areas. For example, whilst the population of Lusaka increased by over 70% between 1963 and 1987, no new major police stations have been built. Consequently, this has placed an enormous strain on existing stations. Stations which were built to cater for small areas prior to independence, now cater for areas ten times larger than they were designed to cover. Officers in these stations are invariably over-worked due to lack of relief manpower. The result is that most of the new housing areas, both high and low density, have no permanent police presence. Transport also remains a real difficulty. Police stations and Paramilitary and Mobile Units are not even operating on the authorised allocation scale that was used in 1965. Not surprisingly the vehicles which are available are constantly breaking down from over-use. Thus in 1988 the Ministry of Home Affairs reported that out of a holding of 3000, the force had just 390 serviceable vehicles.[9] This acute lack of transport has resulted in the force virtually grinding to a halt (*Hatchard & Ndulo* 1991, chap. 8). Very similar problems are reported in other African countries (*Clinard & Abbott* p. 216 et seq; *Okonkwo*, p. 7; *Potholm*, p. 141). The problem is also often compounded by government policy towards the use of the police. For example, the politicisation of the police, which often leads to bias (actual or perceived) against certain sections of the population, and the use of the police as a para-military force to deal with internal dissent and the like.

Clearly police forces in Africa are failing to fulfil their prime duty of maintaining law and order and at present, victims of crime can expect little real protection or assistance. What has occurred is the alienation of the police from much of the population. As a result this has led to the frequent use of instant justice.

### *2.3.2 Instant Justice*

The failure of the police to protect citizens against violent and property crime has led to alternative measures being taken. For the more wealthy members of society, the response to potential victimisation has been to take their own defensive measures in the form of guards, dogs and the like at homes and businesses. For the poorer members of society, living in the high

8 Zambia Police Annual Report 1986 p. 2. The report actually refers to the raising the "morals" of the officers. This is probably true as well!

9 Times of Zambia 12 February 1988.

density areas in particular, such protection is far beyond their means, and with the failure of the police response to crime, many now take other measures to protect themselves and their families against criminal victimisation. This is characterised by the attacking and beating of alleged wrongdoers by members of the general public in so-called "instant justice" brigades, especially in the urban areas. Historically, "instant justice" was a traditional means of dealing with a thief in African villages and *Boeringer* (1971, p. 187) notes that there was a "customary practice" for the community or sub-groups within a community to use spontaneous self help sanctions against a variety of offenders. *Du Bois* (1968, p. 7) gives a vivid account of the phenomenon in Côte D'Ivoire:

> Toward a thief the public shows neither compassion nor mercy. He is immediately surrounded, seized, and then led off to the police station to the rhythmic chanting of "Thief!, Thief!" ("Voleur! Voleur!") His torment begins on the way, for every bystander, however unconnected with the actual incident, feels himself personally involved, and this general feeling of empathy with the victim gives the public license to vent its wrath on the alleged malefactor. People surge around the thief, shout insults, rush up to strike him, and hurl garbage at him.

In the urban areas of many African countries this has developed into a method of placing the law in the hands of the mob and of dispensing "justice" upon an alleged offender whether he/she is guilty or not, without any attempt to either examine the facts of the case or to inform the authorities. Offenders who fall into the hands of the mob are often seriously injured and many have been killed. For example, in Kampala, Uganda in 1968, seven alleged thieves were beaten to death (*Clinard & Abbott* 1973, p. 226) and there are several reports of alleged thieves being beaten to death in Tanzania and Zambia (*Boehringer*, p. 189; *Chilila*, p. 35). A striking example of the phenomenon occurred in Zambia in 1983 when a motorist who had knocked over and killed a young woman in an road traffic accident was attacked by an "instant justice" mob and beaten to death. As usual in such cases, punishment on the driver was inflicted immediately because the mob presumed he was guilty of committing an offence. This was a rare case in which the killer was apprehended, convicted of manslaughter and sentenced to four years imprisonment (*Yamba High Court of Zambia* 1983).

Instant justice is a distortion of the traditional means of dealing with offenders and is essentially a post-independence phenomenon. It is frequently resorted to by poorer members of society and springs from a desire to see severe punishment meted out to offenders. The structure of society plays a crucial role here. The criminal justice system is often seen

as being biased in favour of the wealthy and influential. Instant justice is therefore, a method for poorer people to protect themselves against a seemingly hostile environment. Not surprisingly, the most common offences which are dealt with in this manner are those which most directly affect the poor. Thefts and other property offences are particularly common, together with road traffic offences - these because most poor people travel by foot or by bicycle and are particularly vulnerable to injuries caused by motor vehicles. The law enforcement agencies are seemingly uninterested in protecting the poor or are unable to secure a conviction due to shoddy investigations and the like. The courts themselves are frequently viewed with deep suspicion. Wealthy or influential members of society are often perceived as being treated more leniently than the poor because of their social position or access to legal representation. As *Mainza Chona*, the then Vice-President of Zambia, recognised in a parliamentary debate in 1973:

> When the public hears about these lenient sentences, they tend to feel that the only way of administering real justice is to take the law into their own hands. Some people in this country have, for example, suggested that lenient sentences are partly responsible for the increasing incidents involving instant justice mobs, which we all condemn.[10]

All citizens require protection from criminal victimization and if the "official" channels are not capable of defending them, then alternative measures, however unacceptable, are resorted to. The greatest deterrence to criminal behaviour and instant justice is, without doubt, detection and conviction of offenders. If a real effort is made to develop a partnership between the police and citizen, instant justice mobs could be turned into bodies which would actively assist in the apprehension of criminals and crime prevention. In this respect, the introduction of neighbourhood watch schemes and the like might be investigated.

Perhaps the real lesson here is that the call to States in the Victims Charter to establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crimes is one which governments must both heed and act upon without delay. In addition, a commitment by States to implement the United Nations Code of Conduct for Law Enforcement Officials would be extremely valuable.

10 Parliamentary Debates (Zambia) 27 February 1973, col 1598.

## 2.4 Redress for Victims

A crucial element of the Victims Charter is the recognition that offenders should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimization, the provision of services and the restoration of rights (Article 8). This approach is very much in line with the emphasis on the resolution of disputes by means of compensation in African customary law which focused on the victim, rather than the offender. The sanctions that they imposed were aimed at not so much punishing the offender as wiping out the consequences of the offence. Accordingly they were, by and large, compensatory rather than punitive. They were intended to restore the victim to the same position he would have been in if the offender had not wronged him and to restore harmonious social relations which the offender's conduct upset (*Nsereko* 1989, p. 157). *Clifford* (1974) also notes that in the immemorial tradition it was the offender or his kin who were responsible for compensating the victim. Indeed all criminal cases were treated in the same way as civil cases with the chief aim being to get compensation for the individual or group against whom the crime was committed (*Kenyatta* 1939, p. 226). This practice was not favoured by the colonial authorities mainly because of the view that a crime was an act against the State. The emphasis was placed on punishment which led to the wide-scale use of imprisonment whilst financial penalties were generally in the form of a fine which was payable to the State. Victims were required to seek redress through the civil courts, a process which was both expensive, technical and time consuming. The inevitable result was that most victims never pursued their civil remedies. The need to move towards a system which genuinely benefits the victim is long overdue. This was emphasised in the *Harare Report* (1988, p. 2) which urged that "the more traditionally accepted measures of restitution, compensation and fines be adopted as the main penal measures in place of imprisonment, particularly because the African cannot appreciate a treatment like imprisonment which, if it benefits at all, is benefitting only the government, **in total disregard of the victim** and the African need to maintain social equilibrium." (my emphasis). The various mechanisms for placing the victim back in the forefront of the justice process in Africa are now examined.

### *2.4.1 Customary or Traditional Mechanisms*

Customary justice practices which are aimed at promoting reconciliation between the offender and the victim (and family and friends) are still

common in many African countries. Ethiopia, Central African Republic, Nigeria, Togo, Uganda, and The Gambia have all reported the existence of such practices. For example, in Ethiopia, the customary local justice systems have the discretion to mediate and arbitrate very minor crimes not given by law to the ordinary courts. This way of handling minor crime cases is encouraged as it leaves open the option of dropping a case altogether or of allowing a mitigation of criminal penalties. In Northern Nigeria a wide range of offences are compoundable by law including criminal trespass, causing hurt, assault and use of criminal force, hurt by act endangering life or safety or by a dangerous weapon, and burglary and housebreaking (*Adeyemi* 1990 p. 7). Writers on Zambia and Nigeria have reported that rape, defilement and even murder are sometimes compounded (see, for example, *Clifford*, p. 205; Adeyemi 1989). The question of whether customary mechanisms are utilised is also sometimes dependent upon the groups of people involved. It is reported that in Kenya, due to the differences in customary judicial systems, compounding procedures are only applicable where the offender and victim are from the same ethnic group and even lived within the same community, in order to guarantee a common understanding of the procedures.

This process is valuable as the victim is involved throughout the process and generally the compounding process requires the consent of the victim. For example, in Nigeria if the settlement does not meet the expectations of the victim, criminal and other court proceedings are resorted to.

Although it is difficult to evaluate the scale of the use of this process, there is no doubt that it is used extensively in some countries. According to a *United Nations study* (1985, p. 23), many developing countries worldwide share a positive evaluation of these alternative methods of dispute settlement. Indeed, some countries furnished research findings that revealed a great deal of success with such programmes as a means of reaching settlements, as well as a high degree of participant satisfaction with the procedures used. This is borne out in one of the are few national studies on this area. Here a study of both Nigeria and The Gambia revealed that of a total of 1000 cases examined, 20% of unintentional homicides; 60% of theft (these cases also involved restitution); 40% of rape and defilement and 67% of assaults were settled by a compounding procedure. In addition 72% of adultery cases in Nigeria were settled by the same process without invoking the criminal process (*Adeyemi* 1990, p. 8). There is also evidence that such procedures are being strengthened in some countries. For example, the Ethiopian government has already reinforced traditional mechanisms by

appointing a legal research body to investigate the improvement of customary justice practices and to undertake reforms of the various codes of the country.

### 2.4.2 *Compensation and Restitution Orders within the Formal Justice System*

The power of the criminal courts to order compensation or restitution was incorporated into the colonial Penal Codes of many anglophonic African countries. For the reasons discussed earlier, it is not surprising that such provisions were seldom used. What is surprising is that, given the traditional use of compensation, even after independence African nations have made relatively little effort to improve the situation and there are still many countries which do not provide for compensation in their formal criminal justice systems. These include francophonic countries such as Burundi, Rwanda and Cameroon, Portuguese-speaking countries such as Angola and Mozambique and Somalia, which operates an Italian-based system.

It is thus in Anglophonic Africa that most statutory provisions for compensation are found. A typical example of is Zambia. Section 175(1) of the Criminal Procedure Code states:

Any person who has been convicted of an offence, other than one punishable by death, may be ordered to pay compensation if it appears that:

(i) some person suffered material or personal injury in consequence of the offence committed; and

(ii) substantial compensation is, in the opinion of the court, recoverable by that person from the offender by a civil suit.

In most cases of theft and related offences, compensation may also be ordered to any bona fide purchaser of stolen property who has restored such property to the person entitled to it. An essentially similar provision appears in Kenya, Uganda and Tanzania.

In practice, the order of compensation is often of little practical value because the maximum amount of compensation which courts may order is frequently very low. For example in Zambia the maximum amount is fifty kwacha - a figure which has not altered since the provision was enacted in 1934 and which, in January 1991, was worth just £0.52. Victims in The Gambia are limited to £100 compensation (Section 145(1) Criminal Procedure Code) whilst in Zimbabwe the figure is $1000 (£200) (Criminal Procedure and Evidence Act, section 341). Any arbitrary restriction upon the amount of compensation which may be awarded is an unnecessary

restriction on the rights of the victim. The present position perhaps illustrates a continued unwillingness on the part of some governments to address the question of victims rights seriously. In this respect the position in Botswana represents an important model. Here a compensation order has the same effect as a civil judgment so that the rules governing the assessment of damages in civil cases applies to the determination of compensation. As *Nsereko* (1989, p. 164) notes, this means that the offender is liable to compensate the victim for all losses flowing directly and foreseeably from the crime. A similar system operates under the Northern Nigerian Penal Code. A further common limitation on the effectiveness of compensation in some countries such as Nigeria, Kenya, Tanzania and Uganda is that it can only be awarded when a fine is ordered and only when a "substantial" amount would be recoverable by civil suit. Thus in some cases victims are denied the possibility of compensation simply because the offence in question does not carry a fine as a penalty or because the sentencer does not consider a fine appropriate.

Even in countries where compensation orders are available, it is difficult to assess the extent of their use. Sentencing statistics are virtually meaningless in this regard. For example, in Zambia, Zimbabwe, Malawi, Nigeria and Kenya, official records do not indicate that compensation is ever ordered. However, it appears that compensation is sometimes awarded in addition a fine or imprisonment but this is not reflected in the statistics. Even so, what is clear is that, at best, there is a very limited use of compensation orders even today. This is extremely regrettable because there are several cogent reasons why many victims would benefit considerably by an increase in the use of the procedure. Firstly, it is a convenient and rapid means of assisting a victim and of avoiding the expense of civil litigation when the offender has the means which would enable the compensation to be paid (see *Inwood* (1974) 60 Cr App Rep 70). Secondly, civil and criminal cases are normally heard in the same court and by the same judges. Thus it is meaningless for a sentencer to send the victim to a civil court for redress because there is no such separate court. In any case, it is the self-same judges who would hear the action. Thirdly, it is greatly to the benefit of the victim to have the matter decided as quickly as possible as it facilitates the restoration of the harmonious relations between the parties concerned and avoids the expense and complexity of a civil action. Fourthly, the use of such an order (with no maximum limit or at least a realistic maximum limit), particularly in lieu of a prison sentence for petty or first time offenders, would make an important contribution to the development of a rational penal policy. A renewed interest in compensation orders is now required in order

to move towards, what Clifford calls "an indigenous policy for the treatment of offenders" and the establishment of a justice system which takes into account the needs of victims.

### *2.4.3 Restitution*

In many African jurisdictions, where, upon the apprehension of a person charged with an offence, any property is taken from him/her, the court may make a restitution order. This requires the property to be returned to the person who appears to the court to be entitled to it, or that it be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged. A court may also order the restitution of stolen property to its rightful owner.

There is little evidence to suggest that this order is utilised to any great extent. This is a pity because whether as a sanction in itself, or as an additional sentence or as a condition for probation, restitution not only provides a way of offsetting some of the harm done to the victim, but also provides a socially constructive way for the offender to make amends.

### *2.4.4 Future Developments*

Of course, the fact that the majority of offenders have no material assets makes the use of restitution and compensation orders inappropriate in many cases. In this respect they could be substituted by provisions ordering (subject to their consent) impecunious offenders to perform some appropriate work in order to repair, as far as possible, the damage inflicted upon the individual victim or in the form of community service. The Victims Charter also recognises the problem of indigent offenders and urges States to make funds available to provide compensation to victims and, where applicable, their families (Article 12). However the Charter rightly recognises that because some States are not in a financial position to establish such funds, other funds may also be set up for this purpose. Perhaps the possibility of establishing a partnership between government and the private sector or an international aid agency in this regard might be investigated. The crucial thing is that governments accept the principle that they have a responsibility to not only financially assist victims of crime but also to make such schemes a reality.

## 2.5 Developing New Strategies

Victimization in Africa show no signs of abating and is indeed exacerbated by the development of an international aspect to the crime problem. Lack of data in this field means that no clear picture is possible but the discussion shows that the plight of victims of crime in Africa is grim indeed. At present, little or no recognition is given to the needs and rights of victims and there are few initiatives being undertaken in this regard. The first goal must therefore be to make governments in Africa recognise that they have a duty to protect victims rights. In this respect the recommendation by the Economic and Social Council that Member States take the necessary steps to give effect to the provisions in the Victims Charter (ESC 1989/57) is most welcome. The challenging provisions in the Charter itself cannot be met overnight but strategies need to be formulated and priorities identified. These should include the following:

1) the undertaking of research in order both to determine the problems of and to seek solutions for victims of crime within national criminal justice systems. This could be coordinated through bodies such as Law Development Commissions which exist in several countries. Alternatively, as in Nigeria, a specially established body might undertake the task;[11]

2) the taking of urgent steps towards the compiling of adequate criminal and victimological data through statistical and other means. It is clear that in Africa the present situation concerning such information is appalling. The Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders unanimously resolved that a United Nations Crime and Criminal Justice Statistics and Information Network be established (Resolution 9). This was underscored by the General Assembly (GA/RES/42/59) and the Economic and Social Council (E/RES. 1986/11; E/RES. 1987/53). Most African countries do not even possess the necessary computer and telecommunications systems in order for them to participate in this recently established network. Clearly this is a priority area;

3) the need for States to pool information and data so as to acquire a more global view of the problems of victims. This will facilitate the development of relevant strategies particularly as regards the inter-

11 In Nigeria a government committee was established recently with the task of providing draft legislatin for remedies for victims of crime.

national dimensions of the problem. Such activities might well be assisted and co-ordinated by the recently established United Nations African Institute for the Prevention of Crime and Treatment of Offenders (UNAFRI);

4) the need to encourage the development of research projects between governments and international organisations and/or universities;

5) the need to generate interest and funding for victimological projects. For example, the Legal Resources Foundation in Zimbabwe is funded entirely by international donor organisations. The success of its work illustrates that the development of local projects on victims of crime is an area which is worthy of donor assistance.

Finally, whilst the above discussion is limited to victims of crime in the legal sense, the other victims of economic and social ills should not be forgotten. In particular the millions who are living in a "prison without bars" i.e. shanty compounds and who have no hope of escape therefrom, and those whose resorting to crime as a form of subsistence living. These are victims who also desperately need assistance.

## 3. Victims of Abuse of Power

Part B of the Victims Charter deals specifically with victims of abuse of power and states that:

- "Victims" means persons who individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights.
- States should consider incorporating into national law norms proscribing abuses of power and providing remedies to victims of abuses of power....
- States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, ...as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

Governments are now faced with the challenge of implementing these principles. In sub-Saharan Africa, governmental abuses of power are frequent and, as a result, citizens often become the victims of such abuse. The existence of corrupt practices amongst public officials was mentioned earlier. However, an even more prevalent problem is that of inefficiency and ineptitude on the part of government employees. Poorly qualified and trained staff coupled with low pay and poor working conditions all contribute to "non-administration" or at best "maladministration" and consequent economic loss, emotional suffering etc for the individual. On some occasions, abuses of power become of both national and international importance. This is especially so as regards human rights violations in the shape of detentions, torture, disappearances and the like. Such actions often bring a swift response from human rights organisations whilst international opinion condemns the outrage. Even then, there is often little **practical** assistance which can be offered to such victims. In addition, many victims of such abuses remain anonymous because there is no one able or willing to take up their case. They have no influential friends or relatives; no money to pay for legal representation; and no access to the media. But there are also thousands of victims of the abuse of power whose cases never make the headlines because of the "minor" nature of their problem. The widow whose state pension payments are unnecessarily delayed by an incompetent government clerk; the teacher who is fired for refusing requests for sexual favours from her superior; the businessman whose application for the renewal of his passport is met with a request for a "consideration" from a government official failing which the matter will be delayed. The list is endless. To each of these individuals, their case is of the greatest importance and the lack of any assistance results in victimization which causes considerable hardship through no fault of their own.

Whatever the case, it is crucial that mechanisms are established which seek to prevent and/or remedy such abuses. In this part it is intended to examine what protections are possible for victims of abuse of power in Africa and, in this regard, the discussion will focus on institutions designed to combat such abuses.

## 3.1 The Ombudsman

The object of the ombudsman is the pursuit of administrative justice for victims of abuse of power in a manner which is informal, flexible and inexpensive. If a citizen alleges that he/she has suffered injustice as a result of maladministration by a government official, he/she may complain to the ombudsman and ask him/her to investigate. Such investigation is confiden-

tial and the ombudsman has wide investigative powers and the power to recommend corrective action if a complaint is sustained. As a permanent national institution the office is potentially a most effective investigatory body operating within - although not being a part of - government. This is because the wide-ranging investigative powers give the ombudsman unique access to government documents and officials and allows the development of personal contacts with high-ranking government officials which can often swiftly resolve a complaint. In addition, government officials are sometimes extremely cooperative with the ombudsman once it is realised that the office is an important protection for them against unfounded, malicious or unfair attacks from citizens. Further, the office enables victims to identify with a known individual who (hopefully) retains their confidence, is impartial and able to fully investigate their complaints. Coupled with the informal, inexpensive, flexible and confidential nature of investigations, the ombudsman is a realistic guardian of the rights of all citizens.

The actual scope of "maladministration" is nowhere defined but the practical application of the term was discussed by the Zambian Ombudsman (known as the Investigator-General) as follows:

> the abuse of authority or maladministration about which my office is concerned may take various forms, e.g. corruption, bribes, favouritism, tribalism, harshness, misleading a member of the public as to his rights, failing to give reasons when under a duty to do so, using powers for the wrong purposes, failing to reply to correspondence or causing unreasonable delay in doing desired public acts.

The first such body was set up in Tanzania in 1966. The reason for its establishment was said by the Presidential Commission to be because:

> In a rapidly developing country it is inevitable that many officials, both of Government and of the ruling party, (are) authorised to exercise wide discretionary powers. Decisions taken by such officials can, however, have the most serious consequences for the individual, and the Commission is aware that there is already a good deal of public concern about the danger of abuse of power. We have, therefore, given careful thought to the possibility of providing some safeguards for the ordinary citizen...

Other African countries have followed the lead of Tanzania, namely, Mauritius (1970), Zambia (1973), The Sudan (1974), Nigeria (1975), Ghana (1980), Zimbabwe (1982), Swaziland (1982), Uganda (1986) and Namibia (1990).

As *de Smith* (1965, para 39) has rightly pointed out, "an ombudsman cannot be bought off the peg: he must be made to measure". This has meant that the ombudsman in Africa has developed somewhat different features to his/her counterpart elsewhere. Two characteristics in particular may be noted. Firstly, appointment by the Executive. The original concept of the institution was that the ombudsman would be linked to the legislature and indeed in Scandinavia (where the office originates) the office-holder is elected by Parliament itself. In Africa with the exception of the Sudan, the ombudsman is appointed by the executive. For example, in Tanzania, Zambia and Nigeria the appointment is the sole responsibility of the head of state. Elsewhere the head of state makes the appointment after consulting with others. For example, in Zimbabwe the President makes the appointment after consultation with the Judicial Service Commission whilst in Ghana the President must consult the Council of State before making the appointment. Secondly, without exception, the ombudsman in Africa has no enforcement powers but relies on making to recommendations the head of state to rectify an abuse of power - unlike the Scandinavian model where the matter is referred to the legislature. For example, in both Tanzania and Zambia the reports are sent directly to the President who may, particularly in difficult or sensitive cases, personally determine the matter. In view of the limited prestige of the legislature in many African countries it is somewhat unrealistic to expect such a body to implement recommendations. In theory the personal authority and prestige of the head of state can both ensure that recommendations are effectively implemented and serve as a spur to government officials to comply with the recommendations of the ombudsman. In practice, this means that victims are reliant upon the head of state for redress - which often never comes.

To date, the office has had a limited impact and numbers of cases remain very small. For example, in Mauritius barely 200 complaints a year are dealt with (*Sewgobind* 1980) whilst in Zambia the figure is around 550. In the Sudan, an average of only 200 complaints a year were received, this despite a population of over 18 million. In addition, the 6000 complaints received by the Public Complaints Commission in Nigeria is surprisingly low given a population in excess of 100 million.[12]

The paucity of complaints indicates that in practice the office of the ombudsman has brought little benefit to victims of abuse of power. The

12 Statistics of the Nigerian Public Complaints Commission. E.g. 8357 cases were handled in 1976 and 5225 in 1979. See generally the chapter by *Adamolekun* on Nigeria in *Caiden* (Ed), International Handbook of the Ombudsman, Alberta, 1983.

reasons for this position are plain. In many countries, the effectiveness of the office is severely hampered by, for example, limitations on both resources (inadequate budget, transport and staffing levels); doubts as to the impartiality of the office-holder; and limited jurisdiction (for example, in most African states the ombudsman is expressly excluded from investigating the operation of the security forces). In addition, in some countries the operation of the office is rendered largely ineffective due to the negative attitude of public officials. For example, in Nigeria *Akanle* notes: "Since its inception in 1975, one Commissioner after another has expressed indignation at the lascivious apathy of public officers when treating inquiries from, and investigations by the Commissioners" (1974, p. 70).

This brief overview shows that there is widespread government ambivalence to the ombudsman. Whilst prepared to retain the office as an illustration of an apparent willingness to assist victims of abuse of power, in reality there is no real commitment to the success of the office. This gloomy picture is reinforced by the fact that two offices have already ceased to function. In Swaziland the office of the ombudsman was created in November 1983 and operated between 1984 and 1987. However, following the coronation of King Mswati III in 1986, it was abolished by King's Decree and there is no present intention to re-establish it.[13] Similarly in The Sudan, the Peoples' Assembly Committee for Administrative Control was established under the 1973 Constitution and operated until 1985.[14] The first order of the General Command of the Sudanese Army following the April 1985 coup was the repeal of the 1973 Constitution and the dissolution of the Peoples' Assembly. As a result the Committee was dissolved and was not provided for in the 1985 Constitution. Again there is no intention at present to reestablish such a body.[15]

In view of the increasing importance and effectiveness of the ombudsman concept in other parts of the world, the record of the ombudsman in Africa is extremely disappointing. This is especially so given the failure of the "traditional" organs of governmental accountability in Africa i.e. the legislature and (to a lesser extent) the judiciary, to provide effective protection to victims of abuse of power. Given this background, the establishment of an

13 King's Decree No 1 of 1987.

14 Article 181 of the Constitution. An enabling Act was passed on May 9 1974 and amended in 1976 and 1979.

15 I am grateful to *Ahmed Shawky* of Cairo University at Khartoum for this information.

ombudsman in both Uganda and Namibia with increased powers is extremely welcome. In Uganda, the Office of the Inspector-General of Government (IGG) was established by statute in July 1986 and started functioning in September of that year.[16] The Namibian ombudsman was established by the Constitution, which became effective with the independence of Namibia on March 15 1990 and became operational in June 1990. The powers of these bodies are now examined in the context of the development of a new and more effective ombudsman model for protecting victims of abuse of power in Africa.

## 3.2 A New Model for Africa

Given the unique advantages of the ombudsman concept and the lacklustre performance of the first generation ombudsman model in Africa, the possibility of developing a more effective second generation model is extremely attractive. The recognition in Namibia that the office forms an integral part of any attempt to establish a constitutional framework for effective government accountability indicates that this is a realistic goal.[17] The proposed model is based largely on the Ugandan and Namibian offices although other features are included where appropriate. Its premise is that adopted in Uganda i.e.that the ombudsman concept can help "to ensure that the citizen receives just treatment from Government by guaranteeing democracy, the rule of law and (by) fostering human rights".[18] It is suggested that the new ombudsman model should develop along the following lines and incorporate four main characteristics.

### *3.2.1 An Enhanced Jurisdiction*

Whilst retaining the traditional investigative functions, the ombudsman can give the individual citizen effective assistance and protection on a wider range of issues. This is a key feature of both the IGG and Namibian Ombudsman.

16 See now the Inspector-General of Government Statute 1988.

17 For a full account see *Hatchard* and *Slinn*: "Namibia: The constitutional path to freedom. In: X(II) International Affairs 137-160.

18 See General Information on the Office of the Inspector-General of Government: Government Printer, Uganda, 1989, p. 4.

(a) Investigating alleged Human Rights violations

The investigation of such violations is notoriously difficult given the penchant for governments to keep such matters veiled in secrecy. This is neatly illustrated by the Zimbabwean case of *Tshuma.*[19] Here relatives sought information concerning the whereabouts of nine men who were allegedly abducted by members of the security forces in Matabeleland three years earlier and never seen again. The High Court was unable to assist when the police denied all knowledge of the incident. The relatives were thus unable to discover the fate of the men. This is the sort of case where an investigation by the ombudsman into the activities of the security forces on that occasion, including interviews with officers and access to relevant documentation, might have assisted the relatives by, at the very least, determining whether security personnel were involved in the incident.

The importance of such a jurisdiction is reflected in both Uganda and Namibia. In Uganda, the IGG may conduct and inquire or order an investigation into any allegation of a violation of human rights, and this includes the power to investigate cases of detention or torture. Similarly in Namibia the ombudsman has the duty to investigate complaints from any inhabitant of Namibia concerning violations of fundamental rights by government officials (both national and local). This jurisdiction is extremely wide-ranging as the only "officials" specifically excluded are judges and judicial officers. It is significant that both offices may investigate the very evils and abuses which have plagued the countries for so long. In Uganda, for example, complaints of human rights violations by members of the security forces of Amin, Obote and Okello were, for long, commonplace. In an effort to prevent such actions recurring, the IGG recently appointed a former high-ranking army officer to investigate complaints against members of the security forces on the basis that his personal contacts and knowledge would assist any inquiries. Assuming this is not a mere "window-dressing" exercise, the appointment may result in genuine accountability of the security forces. In Namibia the widespread human rights abuses perpetrated during the colonial era by the South African administration are well documented and need not be ex-

19 High Court of Zimbabwe, 1987 (unreported).

amined here.[20] The work of the ombudsman is intended to help ensure such abuses are never repeated.[21]

It is trite that the effectiveness of this jurisdiction depends upon the power to investigate the activities of all government officials and, in particular, the defence and police forces and the prison service. In practice these bodies are frequently responsible for some of the worst human rights violations and are often not within the jurisdiction of the ombudsman for "security reasons". The inclusion of this power in both Uganda and Namibia is thus extremely welcome and hopefully marks the beginning of a move for all African countries to follow suit. In doing so the aim of the Victims Charter to promote ethical standards by law enforcement, correctional and military personnel will be realised. Of course the expansion of the office into this field does not (and must not) exclude or diminish the operation of non-governmental human rights agencies See below). Both bodies can undertake meaningful investigations into alleged human rights abuses using their different modus operandi although there is no doubt that the access of the ombudsman to government documentation and personnel can play a decisive role in determining the truth of the matter. The perceived need for an "independent" body to investigate such matters is perhaps overstated.[22] Certainly the ombudsman must fulfil certain criteria if the office is to be credible (see below). If this is done, then impartial and effective investigations can result.

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20 See for example "To be born a nation: The liberation struggle for Namibia, Department of Information and Publicity, SWAPO, Zed Press, 1981, especially Section 1; Fact Papers on Southern Africa series from the International Defence and Aid Fund for Southern Africa.

21 In this connection, the Namibian ombudsman can also investigate violations of fundamental rights by "persons, enterprises and other private institutions." This will be a signisficant benefit for farm workers and many industrial workers, for example, who were subject to appalling treatment and conditions of service during the colonial perios. (see note 12 above). However, this is a jurisdiction unique to Namibia and the direct result of the oppression suffered by workers at the hands of their colonial masters. For the purpose of the model, it is not proposed that the jurisdiction be expanded in this direction.

22 Cf the argument put forward by *Richard Carver* in: Called to account: How African Governments Investigate Human Rights Violations" (1989) African Affairs 391.

(b) Investigating corruption

The National Resistance Movement Government in Uganda has rightly noted, that throughout Africa there is a "problem of corruption, particularly bribery and misuse of office to serve personal interests".[23] In practice the corrupt activities of government officials both hinder development and victimize persons both individually and collectively. The seriousness of the problem has led the United Nations Economic and Social Council to seek administrative and regulatory mechanisms to eliminate such practices.[24] One such mechanism is to make use of the ombudsman. In Uganda the IGG is charged with combatting corruption by, inter alia, examining the practice and procedures of public bodies (including parastatals) "in order to facilitate the discovery of corrupt practices and secure revision of procedures which may be conducive to (such) practices", investigating allegations of corrupt practices and fostering public support against corruption. In Namibia the ombudsman is required to "investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials".[25]

The advantage of using the office of the ombudsman here is that as a high profile "national institution" it is potentially better able to resist improper pressure from the executive than other bodies and is thus better equipped to undertake meaningful investigations. Operationally it can perform an auditing function thereby stimulating and making use of the flow of information that is essential to identifying and combatting dishonesty in government. In addition, as well as being a screening point for citizen complaints, its prestige and reputation for objectivity makes it an obvious point of contact for the reporting of wrongdoing by government officials. The confidentiality of its procedures gives the office an added advantage, particularly as this assists in countering possible intimidation of informants and victims. In terms of cost efficiency, it is also useful to have a unified office

23 National Resistance Movement 10-Point Plan: Point No. 7.

24 See Practical measures against corruption Document A/CONF. 144/8 prepared by the Secretariat for the Eight United Nations Congress on the Prevention of Crime and Treatment of Offenders held in Havana, Cuba in August/September 1990, p. 4.

25 Section 7 Inspector-General of Government Statute and Article 91(f) Namibian Constitution respectively.

rather than a separate anti-corruption body. In addition, some investigations are inevitably inter-related so that a unified investigatory procedure is arguably more convenient, efficient and time-saving.[26] Of course there are arguments against the operation of the ombudsman in this field. In particular it is said that the scope and complexity of investigations require the establishment of a specialist body which has the sole task of investigating and prosecuting corrupt practices. For example, in Zambia the Anti-Corruption Commission (ACC) operates independently of the office of the ombudsman (Commission for Investigations). The need to establish several ACC regional offices and the criminal nature of the investigations illustrate the practical problems of giving the ombudsman jurisdiction in this field. Even so, it is essential that the terrible scourge of corruption is tackled using every possible mechanism and in this respect the contribution of the ombudsman is potentially highly significant. That the ombudsman can successfully investigate corruption is illustrated by the fact that the IGG has regularly reported instances of corruption by government officials including members of the National Resistance Army. The President has acted on reports of corruption by disciplining members of the NRA and radically reshuffling the NRA leadership (*Africa Confidential* 1990).

Another possible argument against this new jurisdiction is that allegations of corrupt practices (and human rights abuses) are better investigated by **ad hoc** commissions of enquiry which are set up by the head of state. Certainly, on some occasions, such commissions have performed a useful function. For example, in 1988-89 in Zimbabwe, President Mugabe appointed the highly publicised Sandura Commission. Its investigations exposed instances of corrupt practices on the part of several senior government ministers and led to some Ministers resigning and others being fired by the President. However, in general such commissions achieve little, frequently suffering from delays, political interference and the like. Indeed it is asserted that

26 Of course the office is not involved in bringing criminal prosecutions, unlike for example, the Zambian Anti-Corruption Commission.

often "the importance of enquiries is lessened by the fact that recommendations can be and are easily ignored....Indeed such enquiries are launched only when the administration so desires and ordains."[27] Certainly the impact of the Sandura Commission in Zimbabwe was undermined when a senior minister imprisoned as a result of the enquiry was immediately granted a free pardon by the president. As a result, the Attorney-General decided not to pursue criminal prosecutions against other ministers implicated in the scandal.[28] A further handicap for such commissions is that the normal rules of evidence are often invoked, thus making a judicial determination of the matter more difficult. In the circumstances, such commissions of enquiry are not a realistic alternative to investigations by the ombudsman.

(c) Independent investigations and a legal advice function

The majority of the population in most African countries still suffer from ignorance of their legal rights and remain extremely susceptible to governmental abuses of power.[29] This means that the ombudsman must be in a position to take appropriate action to assist citizens. As is recognised in Uganda, this means that the ombudsman must be able to undertake investigations on his/her own initiative. As the IGG has noted "the Inspectorate does not just wait for complaints to be brought to it, but it also goes out to unearth corruption and maladministration whether the public complains or not".[30] Such a jurisdiction is especially important in cases where urgent action is required for it is clearly unacceptable to predicate action solely upon the receiving of a complaint from a citizen. This is particularly the case when transportation and communication problems often make it impossible for a victim to contact the office in order to lodge an urgent complaint.

27 *Rukwaro, G.K.* (1973). The case for an ombudsman in Kenya. East African Law Journal, 9, 43, 50.

28 See also the Miller Commission in Kenya which found that a senior government minister, Charles Njonjo, had misused his position as a public officer. However, a pardon was later granted and no prosecution ever took place. See the discussion in J.B. Ojwang Constitutional Development in Kenya ACTS Press, 1990, p. 187.

29 See, for example, the Report of the Secretary-General on the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Document E/AC.57/1990/3, 15 December 1989 paras 5-6.

30 General Information on the Office of the Inspector-General of Government op cit p7.

Equally pressing is the problem of lack of access to justice for the many indigent people in Africa. The complexity of the legal process, the absence of effective legal aid schemes and/or the non-availability of lawyers invariably prevents the majority of citizens enforcing their legal rights. This is particularly serious as regards constitutional rights and protections for it is trite that these are only of any real value if they are enforceable in practice. It is recognised in both Namibia and Uganda that the ombudsman also has a key role to play here. In the former, the ombudsman may provide legal assistance or advice to those seeking to enforce or protect a fundamental right through the courts.[31] In the latter, it is considered that because legal procedures are frequently lengthy, complex and expensive, the law courts are not always a suitable venue for many complainants to bring their cases. Accordingly the IGG may investigate complaints despite the availability of a judicial remedy. To give the ombudsman a responsibility in this field is both imaginative and appealing. A legal assistance and advice function is certainly not a substitute for a more formal legal aid scheme but it does represent a practical interim solution for dealing with the problems of access to justice for victims.

(d) Environmental issues

Africa continues to face severe environmental problems caused by the dumping of hazardous waste, over-exploitation of land, de-forestation and the like. As noted earlier, the growth of environmental crime is a serious concern of many countries. In Namibia, there was particular concern over the over-exploitation of natural resources during the colonial period. In an attempt to prevent this recurring, the ombudsman has the duty to investigate complaints concerning environmental issues, including "the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the destruction of ecosystems and the failure to protect the beauty and character of Namibia". Investigations are not apparently limited to government activities and this gives the ombudsman wide-ranging investigative powers into an area of growing importance. Coupled with the enhanced remedial procedures enjoyed by the ombudsman (see below), this represents an important extension of the work of the office and is one which is worthy of consideration in other jurisdictions.

31 Article 25(2) Namibian Constitution.

(e) Overview

The precise scope of the jurisdiction will inevitably vary from country to country. However, the real significance of the enhanced jurisdiction is that it emphasises that the African Ombudsman is not necessarily limited to the traditional functions of the Western model. It is a highly flexible institution with unique advantages over other organs of government accountability. Thus it offers a practical means of offering protection for victims at all levels. The office will continue to benefit those who are victims of incompetent and thoughtless officials. The new model will permit the ombudsman to investigate those undertaking deliberate abuses of power, including those at the highest echelons of government. This could well lead to government attempts to control the office by political means such as refusing to implement recommendations, pressurising the ombudsman into complying with presidential wishes, or simply appointing a pro-executive individual. Continued reports of harassment of lawyers indicate how real the threat is to those involved in investigating sensitive human rights issues.[32] This means that any enhanced jurisdiction requires the implementation of effective safeguards for the operation of the office. These are now examined.

### *3.2.2 Effective Remedial Procedures*

The ombudsman concept does not involve the exercise of any judicial or quasi-judicial function for the incumbent has no enforcement powers and can only make recommendations to rectify an injustice. In Uganda, as in most other African countries, if a complaint is not informally resolved after an investigation, any recommendation by the ombudsman for action is passed to the head of state who determines the appropriate action. This is frequently a time-consuming, cumbersome and unsatisfactory process. A true guardian of citizens' rights needs adequate powers in order to seek an appropriate and speedy remedy for breaches of those rights. In other words, the ability to take "effective" action is the key to the success of the new model. This is recognised in Namibia where the Ombudsman has the "duty and power to take appropriate action to call for the remedying, correction

32 See especially Bulletin No. 23 Centre for the Independence of Judges and Lawyers Bulletin. Protection for lawyers is now enshrined in the United Nations Basic Principles on the Role of Lawyers which was adopted at the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders in 1990.

and reversal of instances of ("maladministration", abuse of power etc.) through such means as are fair, proper and effective". This means that as well as the usual role of making recommendations for action to the head of state, the Namibian Ombudsman has other key powers. Thus he/she may take direct action by bringing proceedings for an interdict or other suitable remedy "to secure the termination of the offending action or conduct or the abandonment or alteration of the offending procedures". This means, for instance, that the ombudsman can afford victims direct, speedy and effective protection from abuses of power by intransigent government officials. This is especially significant in cases requiring urgent action and complements the independent investigatory power. In addition the ombudsman may challenge the validity of any statutory provision if the offending action or conduct "is sought to be justified by subordinate legislation or regulation which is grossly unreasonable or otherwise ultra vires". This power represents another major advance as it means that subordinate legislation becomes subject to critical review. In view of the limited scrutinising role played by most African legislatures and the proliferation of subordinate legislation, such a jurisdiction could transform the manner in which such regulations are used/abused.[33]

The wide-ranging investigations of the ombudsman may well uncover criminal conduct on the part of government officials. In such circumstances the Namibian Ombudsman may refer the matter to the Prosecutor-General with a view to prosecuting the offender(s). This is an unusual power in Africa and is significant because, in theory at least, officials, including senior government figures, could face criminal proceedings without the need to obtain presidential approval.[34] Such a power is welcome in that it gives the office an important new weapon when tackling of abuses of power. It remains unclear as to whether such a reference will be made public. Although confidentiality of proceedings and anonymity of the parties is traditionally one of the strengths of the office, the value of the reference procedure is certainly enhanced by an announcement of the fact accompanied by full details. This also has the benefit of making a presidential intervention in the matter politically more difficult.

33 The only comparable power is in Nigeria where the Public Complaints commissioneer may refer cases, where it is felt that the existing laws or administrative regulations are inadequate, to the Supreme Military Council for action. See Decree No. 32 of 1975 as amended by Decree No. 21 of 1979.

34 In Nigeria the Public Complaints Commissioner may recommend that a person be prosecuted if it is discovered that a crime has been committed or where the conduct of a person should be subject to disciplinary action. Decree No. 31 of 1975 as amended by Decree No. 21 of 1979.

These remedial procedures go well beyond those available to the "traditional" ombudsman. They are perhaps controversial in that they circumvent the role of the head of state who has, hitherto, always controlled the outcome of cases. However the new procedures are a necessary corollary to the enhanced jurisdiction of the ombudsman. The aim is not the replacement of the presidential role - for this will remain relevant and appropriate in many cases - but the provision of realistic alternative procedures aimed at the more effective and efficient protection of the rights of victims. In this respect, they deserve adoption. Even in those jurisdictions where only the "traditional" jurisdiction is retained, the development of new remedial procedures will also enhance the effectiveness of the ombudsman.

### *3.2.3 An Independent Appointment System*

The need for an impartial individual as ombudsman is paramount in order to reduce the danger that the work of the office is undermined by the presence of a pro-Executive appointee. The danger of such an appointee was recognised in Namibia. Here the ombudsman is appointed by the President on the recommendation of the Judicial Service Commission (JSC). This body consists of the Chief Justice, a judge appointed by the President, the Attorney-General (a presidential appointee) and two legal practitioners nominated by the local Bar Association. The presence of a formal appointment body whose membership includes "independent" persons represents the best hope of obtaining a demonstrably impartial appointee.[35] In most other African states, Judicial Service Commissions have either been abolished or turned into executive oriented bodies. Thus in an effort to devise a satisfactory appointment process, the establishment of an Ombudsman Appointments Committee (OAC) or the like might be more appropriate in practice. Although organised along similar lines to the Namibian JSC, it could usefully include representatives from other interested groups such as civil rights organisations and consumer bodies, the main opposition political party (if any) and a senior civil servant.[36]

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35 Although the appointment of the IGG is solely at the discretion of the President, an Appointments Board is established for other posts. However this consists of presidential appointees and senior civil servants. Section 4 Inspector-General of Government Statute 1988.

36 Such a committee opperates in Papua New Guinea and consists of the Prime Minister; Chief Justice; Leader of the Opposition; Chairman of the appropriate Permanent Parliamentary Committee and the Chairman of the Public Services Commission.

A related issue concerns qualifications for appointment to the office. Namibia follows the majority of other African states by requiring the incumbent to hold legal qualifications. In reality, this is surely unnecessary so long as there is legal expertise within the office itself. This view is reflected in Uganda where a person is qualified for appointment as IGG when he/she "has served in a field of discipline relevant to the work of (the IGG) for not less than seven years". So long as the necessary expertise is readily available, surely the crucial issue is not what the ombudsman is but who he/she is.

### *3.2.4 Acceptable Terms and Conditions of Service*

The Namibian Constitution recognises the vital need to guarantee independence of action for the ombudsman and provides that no member of the Cabinet, or the Legislature or any other person may interfere with the Ombudsman in the exercise of his/her functions. Even so, practical safeguards are needed for an able and impartial ombudsman may remain prone to executive pressure unless his/her appointment is accompanied by appropriate conditions of service. Ideally these should be similar to members of the judiciary with the incumbent enjoying security of tenure and the like. In practice most first generation African Ombudsmen are short term appointees. This constant change of office-holder potentially undermines the effectiveness of the office by ensuring that the incumbent never becomes too "effective" or popular. Perhaps there is also a fear that the ombudsman might pose a political threat to the government. His/her knowledge of the working of government through access to officials and sensitive official documents would be of considerable use to political rivals. There is thus a need to establish a more permanent position such that an able individual can pursue a career in this field and (hopefully) develop a meaningful institution. The mechanism may vary from country to country although the Namibian approach, where the conditions of service are virtually identical to those of judges, is probably the most satisfactory.

It follows that the removal from office of the ombudsman is not a matter for the exercise of independent presidential action. Again the Namibian approach is commendable in that the removal of the incumbent is dependant upon the recommendation of the JSC and then only on grounds of either mental incapacity or gross misconduct. For the reasons mentioned earlier, the OAC might usefully undertake this role in other countries.

### *3.2.5 Conclusions*

The second generation ombudsman model discussed here holds out the promise of an institution which will be in the forefront of efforts to effect meaningful government accountability in Africa. The lead set by Uganda and Namibia is extremely timely and may be seen as part of the international drive in the new Gorbachevian era towards the establishment of more open government and the development of a favourable environment for the protection of victims rights. The acid test for the new model is whether the victims, either individually or collectively, are afforded any real protection **in practice.** There is no doubt that many African countries view the ombudsman concept with considerable suspicion both because of the sensitive nature of the investigations and the potentially politically damaging repercussions of the findings. Often this has led to governments paying mere "lip-service" to the concept, whilst others have simply declined to introduce it. This is regrettable. Hopefully the fact that Uganda and Namibia - both with previously very poor human rights records - have moved towards the new model will encourage and persuade others to establish the ombudsman along these lines.

The resource implications of the model are formidable for it is essential that the office is provided with a well-trained and experienced staff backed up by adequate resources. This will take time to implement and in the short term it is perhaps unrealistic to expect spectacular results from the new model. However its advantages are so considerable that the operation of a limited "service" at the outset should not prevent the office making an immediate contribution to effective government accountability. For example, in Uganda the IGG has been effective in dealing with cases of unlawful detention in Kampala. However he has failed to investigate alleged political killings by the army upcountry. It is not clear as to whether this is due to lack of resources or lack of will (*Carver*, pp. 404-405).

The adoption of the second generation model coupled with the political will to make it work, satisfactory staffing and an adequate budget, means that the Ombudsman will be a key institution for the effective protection of victims of abuse of power in Africa. It is hoped that other African states will now give serious thought to developing an institution along the lines of the new model.

## 3.3 Independent Human Rights Commissions

A second approach is to establish independent human rights commissions. The ratification of the African Charter on Human Rights in 1986 was

followed by the establishment of the African Commission on Human and Peoples' Rights in November 1987. This represents an important milestone because for the first time a Pan-African organisation has been established within the Organisation of African Unity to "promote human and peoples' rights and ensure their protection in Africa". The recognition of the need to protect such rights throughout Africa was taken one stage further when in 1987 Togo established its own National Commission on Human Rights. This is an independent body recognised by the State and with the function of intervening in order to put an end to any cases of human rights violations in the country. It is independent in the sense that its 13 members are made up of magistrates, lawyers, medical doctors and individuals from womens organisations, workers bodies, the Red Cross, traditional rulers, parliamentarians and academics. This wide cross-section of society should be one of its particular strengths. Its funding comes largely from government although some 25% of its annual budget is donated by the United States Government and the Hanns-Seidel Stiftung from the Federal Republic of Germany.[37] It is empowered to receive complaints from any citizen of Togo, any foreign resident or any private group. This is interesting because it thus able to take up complaints from international human rights bodies. The Commission has extensive investigative powers and, in the event of any violation being uncovered, may negotiate for a solution with the appropriate authority or bring the matter to the courts or to the President. For example, in its first year of operation, 34% (N=64) of complaints investigated related to arbitrary detention. Around half of these were resolved by either the release or prosecution of the detainee. The commission is viewed as being part of the process of democratization of the country and promises fresh hope for victims of abuse of power. In March 1990 Benin also established a human rights commission along similar lines to Togo. These developments represent a challenge to other signatories to the African Charter to follow suit.[38]

As yet, it is not possible to assess the effectiveness of these bodies. Clearly it is not realistic to expect them to solve human rights abuses

37 The donation of part of its annual budget from western sources raises a question of whether this might affect the impartiality of the commission. For example, is there pressure to "find" abuses of individual freedoms?

38 In Zaire, the Department of Rights and Liberties of the Citizen was set up in 1986 and is in effect a Department of State. There remains some doubt as to whether this is intended to be a genuine inverstigatory body or merely an attempt to deflect international criticism of the human rights record of Zaire. According to the Lawyers'Committee for Human Rights, the Department "is not able to effectively redress human rights violations". (See their report on "Zaire" 3 October 1989).

overnight. But the very fact that they have been established, and in countries with a poor human rights record, represents an important step forward towards a continent-wide recognition of the need to protect citizens from the abuse of power.

### 3.4 Conclusion

In this brief survey I have only been able to touch on some of the issues relating to the practical responses to protecting victims of abuse of power. What I hope to have raised is an awareness that in developing countries (and not only those in Africa) it is possible to set up effective organisations aimed at protecting victims rights. The establishment of an ombudsman, independent human rights commissions and ngo's can all play a significant part in this process.

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# Victimising the Accused and the State Through Incarceration - The Experience of Botswana -

*Kwame **Frimpong***

## Contents

## 1. Introduction

The traditional notions of victims of crime tend to be focused primarily on those at the receiving end of the accused's conduct. There are, however, a variety of victims as a result of the perpetration of any single crime committed in a society. Our natural emotions lead us to forget about some of these victims. The paper examines two of such forgotten victims: the accused and the state, from the experience of Botswana.

The discussion is focused on the use of incarceration. It is argued that the misuse of incarceration has the effect of creating a double-edged knife: the effect of which is to make both the accused and the state victims of crimes committed in the country.

## 2. Method

The information presented here is based on a five year empirical research conducted in Botswana. It consists of visits to the prisons, interviews of both officers and some inmates, examination of prison records, organising seminars and workshops during which a cross spectrum of the state who are directly/indirectly connected with the administration of criminal justice were represented. The first of these Workshops was organised in 1985 and the proceedings were compiled in a Mimeograph (*Frimpong* 1987). The paper dwells substantially on the courts and the imposition of the custodial sentence. The pattern of imprisonment from 1980 through 1988 is the central focus of the study. It emerges that quite a sizeable number of persons are being sentenced to jail, thus raising the question as to whether the courts are seriously considering alternative sanctions to imprisonment.

## 3. The Country and its Legal System

The country which was formerly known as Bechuanaland has since independence from the British, September 30, 1966, been known as Botswana. It has an area of 582,000 square kilometers. The population according to the 1991 official estimates is 1,334, 386.

Botswana was originally declared a British protectorate on September 30, 1885 and thereafter was administered through the British High Commissioner resident in the Cape of Good Hope, South Africa. The result was that, unlike most former British colonies, Botswana has a legal system based on the Roman-Dutch common law and not on the English common law.

Botswana is bordered by Namibia, the Republic of South Africa, Zambia and Zimbabwe. The country recognises two official languages, English and Setswana which is the indigenous language. The dual court system which exists in the country operates along the lines of the two official languages. The received or the regular courts use the English language. They are made up of the Magistrate (Subordinate) Courts, the High Court and the Court of Appeal. Appeals from the Magistrate Courts go to the High Court and then to the Court of Appeal. The Customary Courts employ the Setswana language. There are three sets of customary courts: lower customary courts, higher customary courts and the Customary Court of Appeal. Cases from the lower customary courts go on appeal to the senior customary courts and then to the Customary Court of Appeal.

It is worth noting that the dual court system owes much of its existence to the colonial rule. The British did provide for the Chief's Courts for purposes of administering justice in the traditional way to the indigenous population. At the time of independence the two courts were operating in the country and the practice has transcended the independence era. This makes Botswana one of the few former British colonies which still permit the operation of the customary courts.

What is even more remarkable is the fact that the customary courts are permitted to try certain criminal cases. However, some limitations are placed on the criminal jurisdiction of the customary courts. For instance, they do not have the traditional right of creating offences, by declaring that a particular type of conduct is "contra bonus mores". The offences for which they can deal are created by the Penal Code (Cap. 08:01, *the Laws of Botswana*). And even then some of the offences created by the Penal Code are outside the jurisdiction of the customary courts (*the Customary Court Act*, Cap. 14:03, *Laws of Botswana*).

## 4. The Courts and Incarceration

There are 17 Magistrate Courts and 273 Customary Courts spread throughout the country. There is only one High Court and one Court of Appeal. For purposes of examining the imposition of prison sentences the

Court Appeal is excluded as it has no original jurisdiction. The High Court exercises its original criminal jurisdiction through indictment; however, this is on a limited basis. Most of the cases which come before the High Court are either on appeal or on review from the lower courts. Accordingly the prison sentences from the High Court are not many. The bulk of custodial sentences emanate from both the Subordinate and the Customary Courts. Between 1980 and 1988 43,493 persons were sentenced to imprisonment. This is equivalent to an average of 4,833 per year. A breakdown of the yearly committal and prison sentences is as follows.

**Table 1:**

| Year | Persons Committed | Persons Sentenced to Imprisonment | Daily Average |
|---|---|---|---|
| 1980 | 6,650 | 3,855 | 2,540 |
| 1981 | 7,128 | 3,696 | 2,238 |
| 1982 | 9,684 | 4,769 | 2,556 |
| 1983 | 10,968 | 5,433 | 2,936 |
| 1984 | 9,258 | 5,572 | 2,969 |
| 1985 | 10,529 | 5,712 | 2,966 |
| 1986 | 10,587 | 5,234 | 2,787 |
| 1987 | 11,937 | 4,940 | 2,532 |
| 1988 | 10,081 | 4,279 | 2,740 |
| Totals | 86,822 | 43,493 | 14,378 |

Source: Department of Prisons (Botswana) Annual Reports 1980-88.

If we set the number of persons sentenced to imprisonment in each of the years under review against 100,000 inhabitants, the figures are astonishing:

**Table 2:**

| Year | No. of Persons Sentenced to Imprisonment | Country Population | Pers. Impris. per 100,000 Inhabitants |
|---|---|---|---|
| 1980 | 3,855 | 903,000 | 427 |
| 1981 | 3,696 | 941,027 | 392 |
| 1982 | 4,769 | 975,628 | 408 |
| 1983 | 5,433 | 1,011,388 | 537 |
| 1984 | 5,572 | 1.048,245 | 532 |
| 1985 | 5,712 | 1,086,139 | 526 |
| 1986 | 5.234 | 1,125,008 | 465 |
| 1987 | 4,940 | 1,164,893 | 423 |
| 1988 | 4,279 | 1,205,834 | 355 |
| Year. Average | 4,833 | 1,051,240 | 542 |

The table shows that an average of 452 persons out of 100,000 inhabitants were sentenced to imprisonment each year. The highest recorded was 537 in 1983 and the lowest was 355 in 1986.

The picture is not different when we consider those actually in jail at a particular point in time per 100,000 inhabitants. This is shown in table 3 below:

**Table 3:**

| Year | Daily Prison Average | Country Population | Prison Popul. per 100,000 Inhabitants |
|---|---|---|---|
| 1980 | 2,540 | 903,000 | 281 |
| 1981 | 2,238 | 941,027 | 237 |
| 1982 | 2,556 | 975,628 | 261 |
| 1983 | 2,936 | 1,011,388 | 290 |
| 1984 | 2,969 | 1,048,245 | 283 |
| 1985 | 2,966 | 1,086,139 | 173 |
| 1986 | 2,787 | 1,125,008 | 247 |
| 1987 | 2,532 | 1,164,893 | 217 |
| 1988 | 2,740 | 1,205,834 | 227 |
| Year. Average | 2,696 | 1,051,240 | 257 |

On the whole, the average number of inmates per 100,000 inhabitants is 251. The highest recorded was 290 in 1983 and the lowest was 217 in 1987. These are very high figures and do not compare favourably with figures from some countries in other parts of the world. A random sampling is found in table 4.

**Table 4:**

| Year | Country | Prison Population per 100,000 Inhabitants |
|---|---|---|
| 1977 | Denmark | 62.0 |
| 1977 | France | 62.0 |
| 1977 | Belgium | 64.0 |
| 1977 | Great Britain | 81.0 |
| 1977 | Turkey | 100.0 |
| **1977** | **Botswana** | **278.0** |
| 1980 | Republic of South Africa | 440.0 |
| **1980** | **Botswana** | 281.0 |
| 1980 | United States | 189.0 |
| 1980 | Kenya | 165.0 |
| 1980 | Great Britain | 75.0 |
| 1980 | France | 52.0 |
| 1980 | The Netherlands | 21.0 |
| **1981** | **Botswana** | **237.0** |
| 1981 | Fiji | 202.0 |
| 1981 | Thailand | 138.0 |
| 1981 | Federal Republic of Germany | 91.0 |
| 1981 | Japan | 43.0 |
| **1982** | **Botswana** | **261.0** |
| 1982 | Ghana | 66.0 |
| **1983** | **Botswana** | **290.0** |
| 1983 | United States | 277.0 |
| 1983 | Austria | 114.0 |
| 1983 | Federal Republic of Germany | 103.0 |
| **1984** | **Botswana** | **283.0** |
| 1987 | Canada | 111.0 |

| Year | Country | Prison Population per 100,000 Inhabitants |
|---|---|---|
| 1988 | Austria | 96.0 |
| 1988 | Federal Republic of Germany | 86.7 |
| 1988 | France | 92.0 |
| **1988** | **Botswana** | **227.0** |

Sources: *Council of Europe* (1988; 1989); *Kaiser* (1983); *Department of Prisons* (1980-88); *Young* (1986); *Sodemann* (1986); *Frimpong* (1982).

This table shows that only a few countries have very high figures similar to those from Botswana. The only real exception is that of the Republic of South Africa. It might be argued that the figures are going down when one compares those of 1985 and 1988. Yes that is true; but even then the figure of 227 per 100,000 inhabitants is still very high. As shall be pointed out later the rather low figure of 227 has much to do with the utilisation of alternatives to imprisonment.

During any of the years under review the prisons have constantly exceeded their authorized capacity. In some cases the excess has been minimal, but in some other cases it has been quite substantial. Table 5 is clear on this.

**Table 5:**

| Year | Authorised Capacity | Daily Average | Excess |
|---|---|---|---|
| 1980 | 1,305 | 2,540 | 1,295 |
| 1981 | 1,305 | 2,238 | 933 |
| 1982 | 1,305 | 2,556 | 1,251 |
| 1983 | 1,308 | 2,936 | 1,628 |
| 1984 | 1,308 | 2,969 | 1,661 |
| 1985 | 1,408 | 2,966 | 1,558 |
| 1986 | 2,071 | 2,787 | 716 |
| 1987 | 2,142 | 2,532 | 390 |
| 1988 | 2,226 | 2,740 | 514 |
| Annual Average | 1,598 | 2,696 | 1,105 |

The years 1986 through 1988 showed a remarkable improvement with the increase in the prison accommodation. Similarly there was a decrease in the daily average. This was the result of a major amnesty granted to many inmates by His Excellency, the President during the country's 20th Independence Anniversary Celebrations. However, there should be no cause for rejoicing, because as the *Prisons Report* (1986, p. 4) concedes, "This means, therefore, that the number of persons who pass through the prisons is ever increasing". In 1986, alone if we combine the number of persons in jail as of January 1, (3,017), and those admitted into the prison during the year (10,587) we realise that a total of 13,604 persons were admitted into custody. In 1987 the figure went up to 13,955. In 1988 there was a slight drop in the figure (12,779), but this is still very high and should not be comforting.

## 5. Results

What do we deduce from all these tables and figures? For the period under study 110,818 persons were handled or passed through the prisons. However, not all of these actually remained in jail. Among them were those who were merely on remand or detained temporarily for their own safety. On the average 12,313 persons were handled by the prisons each year. The lowest figure was in 1980 (9,234) and the highest was in 1987 (13,955). This shows that one person out of 75 persons is likely to be handled by the prisons or to taste prison life.

Similar conclusions emerge if we look at the figures of those actually imprisoned. The total number of persons actually imprisoned during the study period was 67,265. This includes those who were in prison at the beginning of each year. On the average 7,473 persons were imprisoned each year. The lowest was recorded in 1981 (6,031) and the highest in 1985 (8,875). Further, it can be deduced that on the average one out of 142 persons is likely to be imprisoned each year.

We can also reach conclusions of similar nature by looking at the figures of those sentenced to jail, excluding those already in jail at the beginning of each year. It can be seen that 43,493 persons were sentenced to jail during the period. This is equivalent to an average of 4,810 per each year. The lowest was recorded in 1981 (3,696) and the highest in 1985 (5,715). It can be deduced that for each given year one out of 219 persons was likely to be sentenced to jail.

The deductions and conclusions made are quite disturbing when we consider the fact that Botswana is a fast developing country and also for the fact that the population is quite small (an average of 1,051,240). The population projections for 1990 and 1991 are 1,290,642 and 1,334,386 respectively.

One obvious disadvantage is the overcrowding experienced by the institutions. The 1986 *Prisons Report* (p. 4), laments over this, "The prisons, as a result, are experiencing more than ever before over population with its associated problems, the most prevalent being the health one".

## 6. Discussion

Two victims emerge from this pattern of the use of imprisonment. On the one hand is the inmate or the accused, and on the other hand is the state. The inmate suffers in the sense that he is the victim of the misuse of the prison sentence. It appears that the courts are more often quite ready and willing to send people to jail, no matter what the nature of the offence is. This is more so in the case of the customary courts which put 28,420 out of the 43,493 persons behind the bars. In principle the primary goal of incarceration is to protect society against dangerous criminals. All other considerations should be seen as by-products. *Judge Cohn* (1964) supports this view, "I submit that the only crime situation in which no alternative sanction is available or effective, and imprisonment therefore legitimate, is where the public must by all means be protected from probably recurring acts of violence ... It follows that the main purpose, and to my mind the only justification, of imprisonment is the protection of the public ...". If the advice given by *Judge Cohn* were to be followed most of the inmates in the jail would not have been there.

Imprisonment carries with it its own social and economic problems. Studies have shown that it may break-up marriages and families (*Morris* 1965), may result in physical incapacitation and/or mental impairment (*Tarling* 1979; *Frimpong* 1982). Ex-convicts find it difficult if not impossible to get any gainful employment and therefore become social outcasts who eventually drift into recidivism (*Farrington & Nuttal* 1980). We therefore find ourselves in a vicious cycle which might have been originated by the wrong sentencing.

The State is also a victim in two ways. First, the national resources, which would otherwise be used on something productive are employed on maintaining and feeding the inmates. There is no doubt that the Prisons Service

in Botswana is quite progressive in trying to reduce cost by doing a number of things for the Service. It is, however, equally true that the annual budget for maintaining the Service continues to grow. In 1980 the total expenditure on food for the inmates was P 407,653 (pula which was the same as in dollars since the pula was at par with the dollar). Now the official exchange rate is about 2 pula to a dollar. By 1984 the amount had gone up to P 841,785 and by 1988 the amount stood at P 1,392,155. The total expenditure for the whole Service for 1988 was P 12,083,880. But in 1980 it was a mere P 2,602,170.

The State is a victim also in another area. A sizeable part of the manpower is being sent to jail. The figures show that most of the inmates are males (they outnumber the females by 8:1) and fall between the ages of 21 and 45. It is significant to note that these fall within the active labour force group and therefore the country is deprived of a sizeable portion of its labour force. One may concede that a fairly large number of those sentenced to imprisonment were unemployed at the time of arrest and conviction. However, the fact that some of the convicts were potentially members of the active labour force cannot be denied.

One interesting feature of the policy of incarceration is the fact that the average Motswana (a citizen of Botswana) abhors imprisonment. Traditionally imprisonment was not practised by the indigenous population (*Frimpong* 1986). Colonisation came with imprisonment. Originally the convicts had to be sent to the Cape of Good Hope to serve their prison sentences. At the time of independence sufficient steps had been taken to establish some prisons (in the form of forts) in the country. This, however, did not change the people's dislike for incarceration. The strong resentment to imprisonment has emerged in two ways. At a Workshop at the University of Botswana (1986) the participants were unanimous in opting for corporal punishment as opposed to imprisonment. One would have thought that corporal punishment, because of its apparent dehumanising effect would not find supporters. The shock that I experienced from the revelation set me thinking of conducting further studies on the subject. This led to the second way of determining how the citizens do not favour imprisonment. I conducted some interviews among a cross section of the employees within the University of Botswana and the responses suggested a very strong rejection of imprisonment. Virtually everyone preferred corporal punishment to imprisonment. One woman explained, "If my husband is put in jail the family loses the breadwinner. Who will care for me and my children? But if he is caned, he simply feels the pain, but I have him in the house".

It is therefore surprising that the Customary or traditional courts are in the forefront in sending many people to jail. One would have thought that

as the custodians of the people's traditional rights and beliefs the customary courts would be in a better position to respond to the wishes of the people by being wary of using the custodial sentence indiscriminately. It is even more surprising to learn that the customary courts were the ones which resisted the introduction of "extra-mural labour" which was intended as an alternative to imprisonment.

The question which might be asked is whether there is a way out of this rather abusive way of using custodial sentence in Botswana. The answer is "yes" and the way can be found in the regular use of alternative sanctions. In this sense imprisonment should be used only as a last resort. Under the Penal Code (*Cap. 08:01, the Laws of Botswana*) the following alternative sanctions exist: fine, corporal punishment, forfeiture and the discharge of the offender without the imposition of any punishment. In addition the Prisons Act (*Cap. 21:03, the Laws of Botswana*) provides under sections 96 and 97 for the imposition of extra-mural labour (EML) as an alternative to imprisonment.

The use of extra-mural labour is limited in scope. There are two forms of it. First it can be imposed by the courts as an alternative to a sentence of not more than six months imprisonment or where a person has been committed for non-payment of a fine not exceeding P 400 (about US$ 200). The second type of extra-mural labour comes about when the Commissioner of Prisons or an Official Visitor (mainly members of the Bench) releases an inmate to perform EML. An extra-muralee would be required to do public work or service while staying at home. In a way it is similar to the Community Service Orders in England and Wales (*Powers of Criminal Courts Act* 1973).

The introduction of the extra-mural labour offers the best glimmer of hope of addressing the over-dumping of convicted persons in jail as the courts have a more effective and productive way of penalising the offenders. Even if the courts are not active in utilising it the Commissioner or an Official Visitor can still do the same. Figures from the *Prisons Department's Annual Reports* (1980-88) suggest that the courts are now responding favourably to the use of extra-mural labour. Initially the response was lukewarm, especially by the customary courts. All the courts combined started with 21 in 1980 and by 1988 the figure had reached 474. The customary courts in 1980 dealt with only 12 and in 1988 they sentenced 466 to EML. The Commissioner also released 121 inmates on EML. In 1980 he released 64 on EML. There is no doubt that a proper use of EML will provide a best alternative to imprisonment and thereby cut down the increasing number of people being sent into the prisons.

## 7. Conclusion

The foregoing has tried in a brief way to provide a synopsis of the apparent regularity of the use of custodial sentence by the courts in Botswana. The present rate at which courts are sending offenders into jail is quite alarming. If the trend continues, within the next 10 to 15 years we are likely to have a situation where one out of 50 persons would be prone to go to jail. The writer holds the view that this, to some extent, amounts to the misuse of the custodial sentence.

The courts are more than eager to send offenders to jail irrespective of the nature of the offence; thus disregarding all other alternatives to imprisonment which are less painful and disruptive. What is more disturbing is the fact that the majority of cases of incarceration are those of up to two years which may be seen as short-term imprisonment if we consider that many offences carry a maximum of 7 to 14 years. Prison in this sense is not being used as a last resort.

Under these circumstances it is not far-fetched to conclude that a process of victimisation is taking place. In the first place the convict is being victimised because in most cases he does not belong to the jail. His offence is not such that he must go to jail. With all the attendant problems associated with imprisonment it can be assumed that an inmate who goes to jail is likely to come back worse off. It has to be conceded that Botswana Prisons Service has an enviable record for a very progressive rehabilitation programme and a humane treatment of offenders. This, however, does not justify the large number of inmates being sent to jail, unless there is a conscious effort to use incarceration to achieve other goals which is not the case and cannot be justified under any rational grounds.

The State is also a victim in the sense that part of the national resources which could otherwise be used on some productive ventures are being pumped into the Prisons system to sustain the inmates and also to maintain the service.

It is the conviction of the writer that unless the courts seriously consider alternative sanctions to imprisonment the situation will get out of control. It is beyond doubt that imprisonment is not the answer to criminality (*Brody* 1976; *Greenberg* 1977). It is in this light that the introduction of the extra-mural labour is most welcome. Although the EML itself cannot solve

the problem of too many offenders entering the prison walls and creating over-crowding, it can in a limited way have an impact on the number of persons receiving custodial sentences.

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# Victimization and Abuse of Power in the Latin American Prisons

*Elías Neuman*

## Contents

## 1. The Delinquent as a Victim of the Penal System

Remand homes for adolescents and prisons for adults have particularly horrifying characteristics in Latin America. Harshness is so unreasonable that it transforms those who have violated the rules and transgressed the criminal law, into victims of the penal system. People are not imprisoned in order to comply with a punishment but to be punished continually every day.

It is common, with only a few exceptions, for the prison personnel, officials, custodians and inspectors, to have a retributive attitude and vindictive sense. This way of thinking stems from the fact that their activity consists of maintaining safety and custody of offenders.

The system applied in the classic prisons has been improved to consolidate severity of treatment and repression. In these ancient institutions, people live in a coercive and aberrant congestion where the disorder, leisure, illness, lack of food and medicines and the minimal attention and the scabrous sexual relations generate the worst form of environment. Prisons are so crowded that they cannot generally fulfill normal expectations in relation to lodging. In many places, inmates sleep on the floor due to the lack of beds. People under arrest and offenders usually live in the same sector of the institution, ratifying the pitiful image which the prison gives itself.

It has been said a thousand times that prisons are the first criminogenic element. Offenders must learn - in the case of primary offences - the new language and codes of these isolated places which have their own "folklore" and traditions, and have no connection with the social community itself. This training period becomes inauspicious and will survive during their lifetime.

The age of offenders ranges between 18 and 35 years of age. 90% of and in some prisons 100% of offenders come from humble origins. They provide resistance to the social and political systems in which they are bound to live, sent away from that Noath's Ark which the rousseaunean social contract constituted.

The problem of the transgressor minority which are imprisoned is even worse. In Latin America, there is no consideration for minors who remain in prisons called "remand homes", where a repressive policy is carried out

with the purpose of domesticating them. The adolescent becomes trapped amongst the strict disciplinary rules of military forces. Minors think only - something inherent to them - of how to escape and how to obtain revenge.

In other instances, minors are sent straight away to institutions or prisons for adults where they are not always segregated into separate sectors. In the police station, minors are mixed up with expert delinquents and generally used to satisfy their sexual appetite.

## 2. Brief Outline of the Prison Personnel

It was once said that the question "does the prison generate offenders?" should be changed to the following "do the prison personnel generate offenders?". Both questions are important, especially in Latin America where becoming deprived of freedom has become the most important penalty.

The prison personnel know that with the limited means and services at their disposal, and with crowded jails, it is impossible for them to do something which might dignify and improve their profession. This is the reason why they feel ashamed and socially diminished and therefore are ineffective and idle. I am talking about the hierarchical officials who believe that the big prison, or the prison with better comfort, is a solution to all their problems. Their minds are attached to the word "safety". That is why they think that a prisoner who remains 24 hours in a jail, is a person who does not cause any trouble, or that a good sedative during breakfast time, brings peace for the rest of the day to the whole prison population. For the officials, the prisoner must be more than safe, he must be "very safe".

In some countries of Latin America, the organization of these institutions has a military character. In Brazil, the prison known as Jundiai, located in Porto Alegre is administered by a military brigade. In Chile, institutions are governed by the gendarmerie; in Uruguay by the police and in Argentina, with the only exception in the province of Mendoza, institutions are governed by counter-military organizations which have an official status along with troops, acts, regulations, statutes and clothing belonging to military forces.

During the well known "Military Process" in Argentina, the penitentiary administration - which was appointed to provide security to the State - served in the clandestine prisons as well as in concentration camps. Prisoners who hate uniforms - because those in charge of their detention wore them - call these officials "policemen".

In this way we can see how the "Minimum Rules in relation to treatment of prisoners" held in Geneva, have clearly been contradicted. The "Recommendations in relation to the appointment and education of prison personnel" (Paragraph V), makes a reference to the "General conditions of services" and establishes that such personnel must have a civil character (Paragraph I) and in Paragraph 3, reads as follows: "The personnel must be specially appointed and must not belong to the armed forces, police power or other publice services".

In other instances, the personnel are appointed for political reasons. Friends are appointed, not those who are versed in prisons. In one place, those appointed as directors of the institution were ex-military officials, mariners and policemen. It is impossible with those kinds of people to try to reform or at least improve the problems in prisons. If it is true that the institutions reflect those in charge of them, the reflection in this case will be a very poor one.

People who have direct contact with prisoners are not precisely the officials or hierarchical personnel of the institutions but the guardians and custodians. Those guardians are prisoners as well, but on the other side of the bars.

After research and meditation, I understood that in Latin America the group of troops, personnel without any hierarchy in the military and counter-military corps, are elected purposely from those people who belong to different marginated sectors. It is true to this margination and to their desire to step up a level, that they do not realize that they are being used as an instrument by their hierarchical personnel. Guardians are conditioned and the superior officials abuse them due to their limited intellectual level.

On the one hand, the criminal population who are going to inhabit prisons, stem from humble and marginated people. On the other hand, those appointed as custodians come from the same place. All birds of the same feather.

A clear manipulation of the social system or imprisonment process exists, carried out by deprived people. The same sector of the population is used to control and punish. In this way, the officials who live in better class

conditions run no risk. This can be seen in particular in the revolts and riots in which "los negritos"[1] kill themselves...meanwhile the rest look on the panorama as if free from any danger.

If for one reason or another, one of the officials (or a policeman) dies, the mass media will report this situation widely because it is felt to be a menace to the whole system, to the public security and its control. In return, the death of a guardian is seen as a daily accident: A small ceremony with his relatives and a post mortem promotion in the best of cases.

Latin American countries are no stranger to the fact that the abuse of power exercised from above is executed by subordinate personnel.

It follows that the personnel without hierarchy, abuse power as victims and at the same time are responsible for the prisoners suffering. Generally, when mistakes and problems occur, including crimes, which publically implicate the institution, the hierarchical personnel come across to give the correct explanation of the case. They have a scapegoat who can be blamed amongst the subordinate personnel and in this way, they can restore the image of the institution. It is easy to say that the problem was due to the negligence, ignorance, alienation, discourtesy and excess or default of the troops. The institution remains unhurt and the system is not implicated. Custodians were not able to fulfill the efficient orders imposed upon them by officials, or they simply disobeyed them. The hierarchical personnel appear to be acting morally.

## 3. Default in Carrying out the so-called Treatment of Offenders and their Rehabilitation

It is difficult to talk about treatment of prisoners when we have merely obsolete means and services to do so, when we have remand homes which destroy the personality of adolescents, and when we have dirty jails and unsuitable personnel.

The process of victimization and de-personalization which most minors suffer during confinement as accused persons, makes them doubt their

1 "Negritos": A discriminative word used in Argentinian current language to make reference to that part of the society which is marginated and lives in a humble condition.

former values in life. Later, when they are imprisoned as offenders, they receive verification of this in the readjustment treatment which they are to receive, which adds to the nonsense of the cruelty imposed.

The treatment is based upon biological and psychosocial studies on prisoners. In many countries, there exist institutions which classify delinquents following the Di Tullio's doctrine. Biotypology is applied in an interdisciplinary way, and the judge in charge of the case receives a report in order to help him to decide whether or not to release the accused on bail. In Rio de Janeiro and San Pablo, the prosecuting judge receives the report which is used as a predication and in relation to treatment. These situations cause unavoidable difficulties. On the one hand, it becomes hard to carry out a treatment or therapy in prisons where the individual suffers daily repression or has no place to live or has nothing to eat. It becomes difficult to give a statement on his present and future attitude and capacity as well as providing a study of his personality.

On the other hand, it is a tradition in Latin America, for psychiatrists and psychologists not to be appreciated by offenders, because they form part of the prison personnel and as such are "policemen", namely members of the system.

This type of treatment is met with disapproval in countries such as Mexico, Venezuela, Colombia, Ecuador, Brazil and Argentina:

a) It is said that a crisis of treatment exists, on the basis that it becomes extremely onerous, taking into account the poor results obtained in connection with the recidivists. This recidivism would show the mistakes of the States in compliance with rules tending to readapt the delinquent more than the faults of the delinquents themselves.

b) It is believed that treatment carried out in dark prisons of "high security" tries to give effect to deprivation of freedom and the institution which ratifies it as a penalty.

c) States create delinquents generally by a neglect and terrible lack of caution - a sort of abuse of power by omission of power - trying to resocialize them by means of treatment. It has not been demonstrated that States have any serious and honest interests in such resocialization.

d) It is said that the readjustment treatment constitutes something which is absurd. Where will the presumably readapted person go after confinement? To the same society which made him a delinquent?

e) The critical criminologists object to the nasty smell of clinical criminology - as followers of positivism - namely implied in the ideology of treatment. They remark however that offenders should become aware of their own social margination and the influence of the authorities of social control over the offences which they have committed. Undoubtedly, this situation will allow the substitution of offenders as agents for social reform.

## 4. Certain "Traditions" and the Abuse of Power

The purpose of the penalty in National Constitutions or in penitentiary rules of most of the Latin American countries, appears to be the social rehabilitation of offenders. The Recommendations for the treatment of prisoners signed in Geneva in 1955 as well as The Interamerican Convention on Human Rights signed in Costa Rica in 1978 in connection with the arrest and treatment of prisoners, were adopted by many countries.

The National Constitution of Argentina, dated 1853, says in the final part of section 18: "Prisons in our country shall be sane and clean, for the security of the offenders residing in them and not for their punishment..." In 1958, the National Penitentiary Act, one of the first acts which included the Recommendations of the United Nations of 1955, embraces an advanced penitentiary regime as part of the treatment for successful rehabilitation of delinquents. These rules, like many others in Latin America, seem to be a petition of principles which are transgressed in an absolute sense. Furthermore, we cannot say whether or not the Penitentiary Act is good or bad because it has never been applied.

We are talking about legislation which has no relation to reality in the countries themselves. We cannot talk about a prison regime and much less of an advanced system, when neither adequate institutions nor means and services or qualified personnel are available to put such systems into practice. They are rules which seem to relate to the guilt complex of legislators, or rules which merely serve to swell their pride in international congresses dealing with imposition of penalties.

The same occurs in relation to release from jail and release on bail. Prisons are overcrowded with people who have been accused and arrested as a preventative measure. In Uruguay, the number people arrested under these circumstances, is as high as 90%. This figure is no less than 65 or 70% in other countries. Of course, they are innocent until a definite sentence has been pronounced to the contrary. Judges do not ignore that release from

jail must be the rule and any obstacle to this rule, the exception. However judges are surrounded by procedural rules which inhibit them from releasing those accused from jail under any kind of bond, when a particular type of offence has been committed. This is due either to the importance of the penalty or because of the fact that the minimum penalty is superior to the one requested for a suspended or pending sentence. The accused may be imprisoned for years and obtain an acquittal later at the same time in which the sentence is pronounced. Sentence may be pronounced requiring a shorter imprisonment sentence than already served.

Our National Constitution, our principle substantive rule speaks about "sane and clean prisons". Prisons in Argentina are neither sane nor clean. They are overcrowded and in disorder. Judges, knowing this situation, continuously send people who have been arrested to prison. Judges give priority to a procedural court which obstructs release from jail over our Magna Charta. This example may be generalized in all the countries of the region. Judges are fully aware that they are violating a constitutional rule. However, this situation does not seem to cause them sleepless nights. Can we say that they are improperly exercising the powers conferred on them or that the prison personnel improperly exercise their powers when they do not apply the precepts established by law which refer to treatment of the offender and their rehabilitation? Can failure to fulfill public duties or the mission entrusted to them, be considered an abuse of exercise of power?

Although we are clearly violating legal rules, these violations do not indicate that power has been abused in real life. Prisons with their rambling buildings and retributive criteria, crowded with offenders, have been obeying these rules before judges and prison personnel appeared in the world. The problem was born with the prisons themselves and became endemic. We do not think that judges sentencing offenders and accused persons are abusing power. States create these subhuman institutions which the judges have at hand to administer justice and fulfill their mission. The facts have surpassed them, rules are impossible to fulfill.

## 5. When the Human Being is broken

Remand homes, prisons and lunatic asylums are houses of violence. There exist men who lock up other men who have violated the law, in order to restore peace in society. Abuse of power occurs perhaps even if there are other alternative penalties and the judges arbitrarily insist on sending offenders to these ominous and dark institutions.

I believe that the abuse of power exercised in prisons, exists only when rules are provided intentionally in order to break the psychism, the morale and finally the identity of offenders. Offenders are transformed into a "number" which is taken into account at the time of surveys.

It is difficult to find an accumulation of violence such as is found in the lunatic asylums. With the exception of Cuba and Taubate (Brazil), the rest of the countries in the region show what men in control are capable of, in front of defenceless human beings. As the prisons are "schools which prepare men to commit crime", the lunatic asylums can be defined as "factories of insanes". All the material and human factors directly lead to the continuity of illness.

In these warehouses, the psychiatric margination including the defined psychopathic delinquent, are being sheltered. Mentally ill people are "buried". As in prisons, lunatics wander aimlessly from one place to the other, animalized by the lack of communication and idleness. Alternatively they rest in their beds without knowing what to do.

It seems that the organicist doctrine has been applied for the repression of the irrational. Clocks appear to have been stopped and human beings slip from one place into the other without consolation. The paths are long and dirty and the inmates are dressed in inadequate, long trousers without belts, dirty shirts and old shoes. All of these things give the place a lunatic appearance. There also exists an "asylum smell", a smell of perspiration, grease and urine owing to the non-existence of bathrooms.

The abuse of power which exists in the prison world, is manifested in omission to act, in aggression, violent and humiliating treatment and in the continuous torture of the inmates.

The doctors, with some exceptions, ratify this world of the warehouse of humans. Since the beginning, they have underestimated them and given them a label, finally finishing with the pastilleo.[2] All night they receive a sedative and in this way do not cause any trouble, or they receive anti-depressant pills in order to "diminish their paranoia". If a patient is depressed, he will receive "electroshocks" which is still being used in certain Latin-American prisons.

2 "Pastilleo": A word used in prisons by doctors meaning the action of giving "pills" to offenders in order to keep them quiet.

Patients who are part of the lunatic scenography are being prescribed - the term employed is "pastilleando" - automatically, sometimes by an officer who is also unwell.

Mentally ill people, like offenders, become "broken". This means that they no longer exist. They are mixed up amongst others and constitute merely one more of their numbers. There are no new diagnostic evaluations. There is no future. They are treated as if mental illness were of a chemical or organic nature. Insane people lose their rhythm, tenacity, capacity. The lunatics, like offenders, turn into people without a history.

They are furthermore denied the exterioration of their symptoms by usage of pharmacopeia.

This abuse of power, known and ratified by the Ministry of Social Action, rounds off its web of authoritarianism and oppression, giving privileges by their exclusive usage of "pastillaje" to the multi-national enterprises dealing with psychopharmaceuticals, thus establishing their personal business but not protection of the insane.

The institutional violence which victimizes people in remand homes and prisons, has created a special language and accompanying rules, where violence is a habitual part of life. The "cartel carcelario",[3] are known as "heavy persons" who make use of "fierros" (arms) in order to be clearly distinguished from offenders and "lapicero"[4] (swindlers, defaulters, forgers).

Relationships are established with the guardians and the only thing which separates them from the others are the bars. Offenders provide a profitable income for many of the personnel including the hierarchical officials. They receive payments for visits by relatives, for moving one friend from one sector to another one, for sexual contact, for allowing alcohol or other drugs to be provided. At the moment, the distribution of drugs is a very well organized network.

The criticism which the penitenciarists formulate, from Concepcion Arenal to Ruiz Funes, is the confusion of the warehouses and in relation to certain physical punishments and isolated jails or cells.

What is generally not mentioned - something which Kropotkin, Wilde, Pellico and Dostoiewsky actually mentioned - because they suffered in

3 "Cartel carcelario": important and dangerous groups formed in prisons, generally respected by everyone because of the use of violence and force.

4 "Lapicero": It comes from the Spanish word "lapicera" (pen) meaning those who commit crimes without the use of violence e.g. defaulters, forgers etc.

prison - is the deliberate de-personalization by means of the exercise of cruelty, which tends to lessen the spirits and privacy of offenders. They receive a particular treatment which damages their personal esteem until they loose it altogether. A continuous attack is directed at the dignity which they still have. This situation leaves a nasty bitterness and hatred in the offender, which contributes to more violence, secondary offences, namely situations which seem to arise from the "special treatment" which they receive.

## 6. Some Examples of De-personalization and Loss of Identity of Offenders

The ominous and kafkian circle of increasing degradation can be shown by the example which I learnt from an old prisoner. He said: "I acquire drugs to sleep or to fly...and I must buy them from a custodian who receives them from an official. I am a consumer. That's why they respect me. They know that they are humiliating me but nothwithstanding this fact, I have to pay them...every time I need those pills".

To the offenders, their relatives, wife, children, mother, girlfriend and friends, are extremely important. This may be the only aspect of life on their side. Offenders have more esteem for the personal fights of their relatives in courts than of the lawyers. They really appreciate the efforts made by their relatives and the delays in getting into prison, the food they bring, their economic and moral dearths, their communication with them.

More than the physical punishment which they receive or remaining locked in an isolated prison, offenders suffer when they are unable to receive visits. This denial causes them unbearable suffering.

In many places, for incomprehensible reasons, the offender is generally sent to another jail many kilometers away, separating him from his family. The offenders cannot see their family because they do not have the economic means with which to travel. I have said "see", because during imprisonment, the prisoners cannot touch their wives, mothers and sons. They are not allowed even to have the minimum of contact. In many prisons, not only in Latin-America, visits are carried out where visitor and offender are separated by a security glass. Beyond that glass, offenders will see their children grow up without even caressing them and they will see their mothers without even touching hands. It is as if they were no longer human beings and touching their nearest relatives would put the prison security in danger. In certain prisons, the number of visits allowed and its frequency is strictly regulated.

On the one hand, it is said that the family is the essential nucleus of society and on the other hand the offender is not allowed even minimum contact with his family. There is an exception to this situation. If visitors pay, they may have more visiting days or be able to visit outside in the garden where there are no bars between visitors and offenders. They may even be able to visit the offender in his cell or in a cell which is in good condition and which is rented for the occasion.

If you can pay, you can have sexual intercourse with a women, or in other prisons, with prostitutes.

Custodians, in complicity with officials, supply everything. Sexual intercourse may be carried out in the prisoner's own cell but for the poorest, in the exercise area or even in the reception area where there are other visitors and personnel. The visitors, in line with other offenders, form a kind of human folding screen. Behind that screen, the prisoner and his wife have (or intend to have) the intimate and intensive contact which is normal amongst human beings.

When the offender returns to his cell or shared cell, he will feel that he has forced his wife to do something which is both humiliating and unpleasant. A mechanical act. He has done this in front of the lasciviousness of custodians and other offenders. He realizes that, following his desires and sexual stimulus, he and his wife had have submitted to a display of love. He has become an animal and at the same time has had to pay for it. He has been used as an amusement for others. The last trace of their morality and privacy has been abandoned. They have lost their identity. He does not know who he is and where he comes from. He feels that his wife who did not commit any crime, has also been caught up in the penal or penitentiary rules.

In the authoritarian way which is implied in every abuse of power, certain cases exhibit a kind of sadism. Offenders are punished because they leave stains on the sheets during the night or because they have been discovered by custodians - who are looking through the peephole - masturbating. The prisons are therefore a punishment.

There is no useful and productive work for offenders in prisons. Some of them ask for work because it is their way of life or because they need to be dedicated to a task as the days pass. Others dedicate themselves to the well known "work of offenders" as a kind of hobby.

In some places, they work in workshops. Others spend their time as mechanics or car-cleaners for officials.

Remuneration does not exist, and if it exists, is poor. They feel that they have worked and have not received any payment. Indeed, they appreciate that they are no longer human beings and become offended not only themselves, but against the society which identifies them with the humiliation imposed upon them by the prison personnel.

What the prisoners are not aware of, is that their work is a human right and there is no rule which prescribes that prisoners must not only be condemned to prisons, but must also be punished with coercitive idleness. Some authors confuse the right of offenders to work with what is known as labour therapy and occupational therapy, because it is carried out in the institution.

## 7. The Serious Victimization: "Inspections"

In Latin-American prisons and jails, the personnel periodically carries out a tedious inspection of offenders, of their possessions and of the cell or sector in which they live. The purpose of this inspection is to find objects, the use and tenancy of which is forbidden or which may result in danger to them or the prison security. Mainly they are looking for arms and drugs, including alcohol.

These inspections are also applied to visitors, especially to their family; this fact leads to distasteful situations. For example, in the prisons in Buenos Aires, women, wives, mothers, daughters and friends or girl-friends of offenders are examined by female personnel in a humiliating way which hurts them and their feelings. In many cases, their vaginas are examined, even during their menstrual cycles. This is done in order to ensure that drugs have not been hidden there. It has been confirmed that baby clothes were inspected in some cases.

The arbitrary mind of an inspector may refuse to allow a woman to enter the prison, merely because she is wearing tight trousers or a short skirt. Visitors must leave certain products behind, because it may be forbidden in prison. The question is, what is the authority which forbids entry and what are the reasons? We can never know this as it is a secret of prison security.

When a woman meets the offender she feels morally and psychologically destroyed. The man sees her weeping and asks what happened during the inspection. She tells him the detailed story and he feels intense hatred mixed with impotence and pain rising in his veins. It is a crucial moment. He feels

that the abuse of power has reduced him to an object and that his wife has also been transformed in the same way. Their identity has diminished and they feel morally broken.

Inspections which are effected however, in overcrowded sectors, aim to mortify offenders and make them feel that they are "nothing". The personnel is obsessed with the idea of a revolt or jailbreak. If a bar of a window seems to be hollow and does not sound normal, it immediately creates suspicions. Inspectors also look for cannabis, cocaine and drugs such as amphetamines and barbiturates and alcoholic drinks, arms, etc. Inspectors try to arrive unobserved, with discretion. There are 30 or 40 inspectors belonging to groups which are the most hated and feared by offenders. They abruptly interrupt jails in command of an official. They enter shouting and waiving sticks about and garrottes, generally making a terrific noise. They are known as "paloteros"[5] and "barroteros"[6] who generally take over.

Inmates, no matter where they are, must stop their activities and run to the wall, one alongside the next, in absolute silence.

Thus, the inspection of the "ranchadas" takes places, namely the place where the offenders of the same group eat and meet, nearby their beds. Everything is destroyed. Possessions of offenders are purposely mixed up. Letters, photographs, clothes, food, fruit, heaters, plates etc. are mixed up and later appear in another "ranchada". Certain objects are thrown away and broken in order to give the sector an impression of total turmoil. One offender said: "It is a group of wild people rushing into a town of settlers". After this, inspectors who may arrive at any time during the day or night, begin their task of personal inspection. One inspector touches an offender's shoulder. At this moment, the offender must take flight. If he does not, he will receive kicks and beatings of any kind and nature. He must go to the centre of the sector and take a bedspread or blanket which is later put around him. He then has to strip himself without glancing at the inspectors. He has to show them his anus and testicles in order to demonstrate to the inspectors that he has no drugs or any other forbidden element. The stripped man, with his head bent, has to bear the inspectors' laughter and obscene remarks. They then give a military order "go on at full speed to the corner of the sector and put on the clothes which you will be given". Inspections may last up to two hours. There also exists extraordinary inspections with extra

5 "Paloteros": It comes from the Spanish word "palote" (stick) meaning the inspector who carries it.

6 "Barroteros": It comes from the Spanish word "barrote" (bar) meaning the inspector in charge of controlling bars.

personnel. When they finish, a loud whistle is heard and once again the order to "go on". At this time, the offenders run away, bumping into each other and ultimately reaching their "ranchadas" looking for their possessions. They then argue amongst themselves because all objects and food are mixed up. This can lead to violence. Slowly, they try to rebuild what has been lost or broken up.

This spectacle of reconstruction and the struggles and fights amongst offenders, are observed by the custodians and officials as being a source of entertainment. The offenders unanimously feel that violence has been exercised against them in order to make them feel insignificant. Almost all revolts occur after the inspections have been carried out.

Offenders feel that the inspections which their family receive and their own inspection are means employed by the authorities to ruin them. The aim is to point out where the authority lies and to enforce obedience to orders to the extent of complete submission. These victims are the "broken men" of whom Mariano Ruiz Funes speaks, buried amongst lawlessness against which they have no defence.

In many places, offenders make requests sometimes in writing, to the directors and security chiefs, asking that they alone be subjected to inspections, but not their family and friends. Furthermore, they ask for more respect to be given to their position when inspections are carried out and entry is made to their cells. They suffer the insulting attitude of the personnel during these inspections and this is something which is deliberate and is done in order to destroy them.

All the wounds which offenders receive, may be registered as a sort of "revenge" by custodians and inspectors who are managed and manipulated by the penitentiary authorities. They fulfill their tasks, showing at the same time their lack of scruples and aggressiveness. Violence exercised against these defenceless people is a daily occurrence, exhibiting clear abuse of power.

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# 15. Victim Policy and Victim's Rights

# Changing Victim Policy: International Dimensions

*Matti Joutsen*

## Contents



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1 Part I of this paper is based on *Joutsen & Shapland* 1 989.

The criminal justice system is not an easy system to change. Society contains a number of built-in obstacles to innovation. Practitioners in the criminal justice system may have a vested interest in the status quo, professors of criminal law and procedural law may argue with almost holy fervour in defence of the law in force, and criminologists may warn that "tinkering with the system" could have unanticipated (and unwanted) consequences. Politicians, reluctant to acquaint themselves with the technical nuts and bolts of law reform, may refuse to support large-scale shifts in the approach to criminal justice in fear that confused and frustrated voters will blame them for any resulting increase in crime, and vote them out of office.

In the light of the strong forces arrayed against change, it may seem surprising that change takes place at all. When the changes are extensive - as they have been in a number of European and North American countries over the past years - there is reason to wonder at the strength of the powers demanding these changes.

Some of the changes are due to the post-World War II escalation in the amount of crime, to changes in the structure of crime, and to new ways of looking at the functions of punishment in society. These changes, in turn, are largely the result of changes in society, for example demographic changes and shifts in values.

Almost throughout Europe and North America, a considerable number of changes have had a common denominator: a growing concern for the victim. The purpose of this paper is to review these changes (part I of the paper). The paper will also examine the international spread of these changes (part II of the paper).

# Part 1: General Trends in European and North American Victim Policy

## 1.1 Introduction

Europe and North America were the first areas to see the renaissance of interest in, and of support for, the victim.[2] Reviews of the development of victimology and the victim movement tend to focus on such milestones as the early pieces of research, and the impact of the feminist movement in the United States. (Recent and extensive bibliographies can be found in *Elias* 1990; *Fattah* 1989; *Joutsen* 1989; *Lurigio, Skogan & Davis* 1990 and *Miers* 1989. See also *Lamborn* 1985).

In the following, some of the changes brought about by victimology and the victim movement are reviewed under the general headings of changes in the position of the victim in the criminal justice system (including the role of the police and the prosecutor, and the procedural position of the victim) (sections 1.2-1.5), the adoption of more victim-oriented sentencing alternatives (1.6), the development of State compensation systems (1.7), the spread of victim support schemes (1.8), and the spread of mediation and conciliation schemes (1.9). The focus is on changes brought about since 1985, the year international standards on the subject were adopted by the Council of Europe and the United Nations (2.3).

## 1.2 The Role of the Police

Without the report of the victim or witness, most crimes would not come to the attention of the police. Without the cooperation of the victim or witness in identifying the offender, most crimes could not be solved, and the offender could not be brought to justice. Even so, the attitude of the

2 Hard-nosed skeptics, of course, can justifiably claim that the criminal justice systems in Europe and North America had gone farthest in abandoning the victim, and thus had the greatest need to recant. **Dayya** in Islamic law, personal reparation in traditional legal systems in Africa, and the role of mediation and conciliation in traditional legal systems in the Pacific, show that other criminal justice systems have succeeded in retaining victim-oriented elements.

police towards victims often leaves much to be desired. The police (understandably) regard the victim primarily as a source of information; once the necessary information is obtained, or if the police consider the victim to be a "poor" witness, the victim may well be ignored.

Victims, in turn, may expect that the criminal justice system, and the police in particular, will react promptly to the crime. This the police cannot always do. The police have limited resources, and must establish priorities of their own. There may thus be a conflict between expectations and reality. Overcoming these difficulties is in the interests of the police, of victims, and of the community in general. The methods that have been used in Europe and North America include statutory amendment, administrative guidelines, the establishment of state-funded or voluntary victim services connected with the police, and an emphasis on providing victims with more information.

The statutory approach is typified by the **United States**, where almost all states, and the federal government, have adopted statutory guidelines (widely known as "victim bills of rights") on how the police, and other officials in the criminal justice system, should deal with victims of crime (NOVA).

Statutory reform in **Sweden** and **Finland** has affected the investigation of offences. A 1988 reform of the Police Decree in Sweden stressed that the police were to provide help and support in particular to those affected by crime. Several Sedish police districts have already established "victim support units" to perform this police function (*Falkner* 1989). During the same year, a Finnish reform of the legislation on police investigations specifies what information and assistance the police are to provide a victim of crime.

In the **Netherlands**, special police guidelines were issued in 1986 on dealing with victims of sexual offences. These were followed one year later by more general guidelines to the police and the prosecutors on dealing with all victims. Among the recommendations are that both authorities provide the victim with the information requested, and that they ensure that the victim knows his or her rights in dealing with the case (*van Dijk* 1989).

In the **United States**, victim advocates' offices that have been established in connection with local police stations or prosecutors' offices appear to be changing attitudes and routines. These victim advocates help in counselling, personal advocacy (acting on behalf of victim or witnesses to ensure that they are dealt with appropriately by social services and the criminal justice system), referral to other sources of assistance, restitution, court orientation, transportation and escorting.

in **Canada**, several cities (in particular, Calgary, Edmonton, London (Ontario), Montreal, Toronto and Vancouver) have established police programmes for victims of crime (*Waller* 1990, pp. 149-150).

In 1990, the Home Office of **England and Wales** announced a "Victim's Charter", a statement of the rights of the victims of crime. The charter specifies how victims should be treated and what they are entitled to expect. The charter notes, for example, that the police should respond to complaints of crime as promptly as the circumstances require and allow, with courtesy and attention. The police should also provide the victims with various information, noted in the charter.

## 1.3 The Role of the Prosecutor

The relations between the victim and the prosecutor strongly parallel those between the victim and the police. The cooperation of the victim in prosecution is a major factor in putting together a "good case" and in securing a conviction. Here, as well, the victim is considered primarily as a source of information, and the interests of the victim may well be ignored. The methods that have been used in Europe and North America to improve relations include, once again, statutory amendment and administrative guidelines, but also training.

In the **United States** (where the statutory "victim bills of rights" referred to above apply also to prosecutors), one particular prosecutorial decision that affects the concerns and interests of the victim is the plea bargain. The large majority of all cases are plea bargained, and yet the victim's role in this had rarely been considered. Beginning with the Victim Witness Protection Act of 1982, which requires prosecutors to consult victims about the terms of a plea, this has changed considerably. The momentum was maintained by several authoritative statements from professional bodies and official sources, and by further legislative action (*Kelly* 1990, p. 176).

In the **Federal Republic of Germany**, concern has grown about the position of victims when charges are dropped against a suspect. In 90% of the cases where charges are dropped, the suspect is required to make a payment to, for example, a charitable organization such as the Red Cross. The victim is not consulted on such decisions. Very rarely are charges dropped on condition of payment to the victim. This is often defended on the grounds that it is difficult to control payment to the victim. However, new guidelines which came into effect on 1 October 1988 note, inter alia, that if compensation to the victim is a possibility, this should be the preferred outcome (*Schädler* 1989).

In **Poland**, the Public Prosecutor General issued guidelines in 1985 on the protection of the rights of victims in court proceedings. The underlying rationale has been the importance of having prosecutors understand their role and responsibility in relation to victims. Prosecutors are very influential in determining the progress of the case and the treatment of the victim in court, and in channelling information about the case back to victims. If they can be influenced, considerable progress can be made in meeting the needs of victims (*Bienkowska* 1989).

In the **Netherlands**, rulings by the Ombudsman have proven to be instrumental in changing prosecutorial practice. In several cases, the prosecutor had not informed the victim of his or her right as a "partie civile" to file a compensation claim in connection with criminal procedure. The victims in these cases complained to the Ombudsman, who has ruled that the State must compensate victims for their loss, to the extent that a court could have ordered such compensation. This channel (complaints to the Ombudsman) is regarded as singularly effective, as the procedure can be started by the individual concerned, acting on his or her own (*van Dijk* 1989).

Another method of changing prosecutorial practice in the Netherlands is through the arrangement of training courses. At first largely only those prosecutors who were already favourably disposed to assisting victims attended such courses. Today, these two-day courses have been made obligatory for all prosecutors. The courses use, for example, role play and videos (*van Dijk* 1989).

## 1.4 The Position of the Victim in the Trial

The European and North American criminal justice systems can be divided into three general groups. In the first group (roughly speaking, Northern and Eastern Europe), the victim has traditionally had the right to participate in the prosecution (at least in some respects) and to present civil claims in the criminal process. In the second group (again, roughly speaking, the countries that have a French-based criminal justice system), the victim can be a partie civile in the criminal process, and thus may generally present civil claims. In the third group (the common law countries), the role of the victim has traditionally been limited to that of a witness (*Joutsen* 1987, pp. 182; *Joutsen* 1988).

The victim could be assumed to have a stronger position in those countries where he or she can play a more active role in the criminal process. However, research from France, Germany, and the Netherlands, as well as

elsewhere, has noted a variety of problems. Even where the victim is assumed to have a very strong position, such as in Poland, recent research suggests that the victims themselves are very dissatisfied with how the system operates (*Bienkowska* 1990).

Victims have very different interests in turning to the criminal justice system, including different interests in going to court. There are those who wish to be heard, to "have their day in court", while others do not want on any account to be involved. They would prefer that the police, the prosecutors and the courts take care of the matter in full.

In part for this reason it is difficult to establish the "proper" position of the victim in procedural law. Laws foreseeing an active role for victims may fail because the majority of victims remain passive (largely, perhaps, due to ignorance of their rights), while laws foreseeing a passive role may lead to widespread discontent among those who wish to be heard.

Problems may also arise when the role of victim overlaps with that of witness. The rules of evidence may require the presence of the victim/witness at the court, but only for the brief time that the victim/witness is testifying. Considerations of fairness require that the defence has the right to rebut evidence submitted by the victim/witness; this right of rebuttal may lead to situations where the victim experiences so-called secondary victimization.

In the **Federal Republic of Germany**, reforms in December 1986 and January 1987 changed the procedural position of the victim in several respects. Among the main goals of the reforms were the development of the protection of the victim during court proceedings, the expansion of his or her formal rights to participate in the criminal process, and simplification of the procedure for claiming compensation from the offender. Restrictions were placed on the questioning of victims of sexual assault. The offender may also be required, under certain circumstances, to leave the courtroom while the victim is being questioned. The party claiming compensation should now have a procedural position almost equal to that of the public prosecutor (*Schädler* 1989).

**Czechoslovakia** is also considering strengthening the procedural position of the victim, although only for a narrow sector of offences. Although many other socialist countries (such as Hungary, Poland, the USSR and Yugoslavia) recognize certain cases as "private prosecution offences", Czechoslovakia applies a strict legality principle according to which all prosecution is carried out by the public prosecutor. Now, however, Cze-

choslovakia is planning to restore private prosecution for certain offences, in connection with plans for an extensive reform of criminal and procedural law (*Fico* 1989).

Work on general reform of criminal and procedural work is also being carried out in **Poland**. The Commission on Criminal Law Reform presently working on this issue has noted, inter alia, that the position of the victim in the criminal process should be simplified, and that he or she should have greater possibilities for participating in the process. For example, the victim should have the right of full participation as an auxiliary prosecutor. The victim should also have the right to prosecute, should the prosecutor fail to do so (*Bienkowska* 1989).

In general in the Eastern and Central European countries, the fundamental recent political changes have led to strong pressure to change the law. Major reform of criminal and procedural law is underway throughout this part of Europe. The reform provides a good opportunity to improve the position of the victim, but at the same time the strong pressures involved may, incongruously, weaken this position.

In the **United States**, where the victim has traditionally had the role solely of witness, the victims movement has brought about considerable changes during the 1980s. Since 1983, when Alabama as the first state allowed victims to attend the trial, bench conferences and motion hearings on par with the defendant, fourteen other states have passed laws allowing victims to remain in court, subject to the judge's discretion (*Kelly* 1990, p. 180).

Perhaps the most controversial proposal for many countries is that the victim be given a more active role in the criminal process. The formulation of the respective section of the 1985 United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power met with considerable difficulties (*Joutsen* 1987, pp. 179). In particular the delegation from the United Kingdom was reluctant to give victims an active right to be heard; it noted that "In the view of this delegation, the rights of victims should not extend in any way to sentencing, case disposal or course of trial" (*UN* 1985, p. 2, footnote 1).

There is little research available on the extent to which victims actually use available rights of allocution. Most of this research is related to the introduction in the **United States** of such a right (*Kelly* 1990, pp. 177-183).

Even if some victims do wish to have their day in court, there remains the danger that any attempt at large-scale reform may lead to unintended

results. In particular, the right of allocution may become limited to only certain persons, offences or rights. There is also the danger of a zero-sum game: the victim's gain may well be the defendant's loss (*Joutsen* 1988).

If complainants are given a clear decision-making role, there might well be strong pressures on them to work in a certain direction. However, contrary to received wisdom, existing research in European and North American countries suggests that victims in general are not especially punitive nor do they necessarily wish to be given (more) decision-making power over the punishment (*Hough & Moxon* 1985; *Erez* 1990).

The alternative to a right of allocution is to assure that information regarding the harm caused to the victim is presented to the court by, for example, the prosecutor. The use of "victim impact statements" or "victim statements of opinion" in the **United States** has by now extended to 48 states and the federal courts. These statements are usually prepared by the probation officer to guide the sentencing judge. However, in some cases the victim is permitted to fill out the form or even be heard in court on this issue, thus providing the victim with the possibility of expressing his or her feelings regarding the offence directly to the court. Such victim impact statements have generally been stipulated as part of the "victim's bill of rights" which have now been adopted in 44 of the 50 States in the United States (*Erez & Tontodonato* 1990).

## 1.5 Assisting and Protecting the Victim in Court

In **England**, research indicates that the small minority of victims who actually appear in court regard this as a duty and a natural part of being a victim (*Shapland et al.* 1985, p. 588; see also *Villmow* 1985, pp. 124-125; *Forst & Hernon* 1984, p. 5 and *Davis et al.* 1984). The actual experience in the witness box was not found to be distressing (with the major exception of victims of sexual assault), but apparent lack of prosecutor interest was. Victims feel that too little account is taken of their wishes when decisions are made on court appearance dates, cancellations, postponements and the giving of information to the press (*Mayhew* 1985, pp. 75-76).

In the **United States**, 35 states have adopted the policy that the state should provide "safe waiting rooms". However, problems have arisen in the implementation of this policy in the United States. Another approach being tested is an "on-call" system, where victim/witnesses remain at home or at work, prepared to come to court with half an hour's notice. A third approach

in 35 states is that the prosecutor is required (if necessary) to call the employer of a victim/witness, requesting that this employee be granted the day off to go to court.

Another problem faced in many countries concerns the right of the victim/witness to privacy. In most countries, the police report is a public document. Such reports ordinarily contain the name and address of the victim, information which the victim is often legally bound to give. This information may then be reported in the press, leading to difficulties for the victim - embarrassment, if not harassment. The media often defend their practice by referring to the human interest of the case, and to the right of the public to know where a crime has occurred.

In the **United States**, the National Organization of Victim Assistance (NOVA) has been promoting a code of press ethics. NOVA has argued, for example, that the name of rape victims should not be reported in the media. In the **Netherlands**, the national association of victim organizations has filed suit before the Press Council against ten newspapers which had published the names of victims (*van Dijk* 1989).

In **Denmark, Norway** and **Sweden**, victims of certain violent crimes such as sexual assault may receive the benefit of the services of a "support person" who will provide, for example, emotional support through the pre-trial and trial stages. The expenses for this are paid by the State.

Although the Danish and Norwegian systems permit the support person to provide legal assistance and, for example, represent the victim in court, this was not originally possible in Sweden. However, as of 1 July 1988 the support person has been granted rights during the pre-trial investigation and the trial, including, for example, the right to represent the victim (*Falkner* 1989).

This Swedish amendment came into force at the same time as a new Swedish law on injunctions providing protection against certain forms of harassment. According to the new law, a prosecutor or a court may forbid a specified person from visiting or otherwise contacting another person, if there is the risk that the former will commit an offence against the latter or otherwise harass this person (*Falkner* 1989).

## 1.6 Sentencing Alternatives

Along with the gradual exclusion of the victim from criminal proceedings, the punishment imposed by the State on convicted offenders has to a large extent been cleansed of victim-oriented elements. In European and North

American criminal justice systems, there are few victim-oriented sentencing options that can be compared with those (such as dayya and so-called personal reparation) that are still to be found in more traditional systems.

The most common **sanctions** in use throughout Europe and North America are imprisonment, probation, the suspended or conditional sentence, and the fine. These sanctions are designed for punishment and rehabilitation. Enforcement of such measures has little effect on the position of the victim. Even so, they can be imposed in ways that helps the victim.

Probation and other suspension of punishment, which is in use in one form or another throughout Europe and North America, is generally imposed on the condition that the offender does not commit a new offence during the probation period. (Other conditions may relate, for example, to residence, work, education, treatment and the use of alcohol or drugs.) Several countries permit the suspending of punishment on the condition that the offender compensate the victim for his or her loss. This is possible in **Austria, Belgium, Canada, Denmark, England and Wales, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Malta, the Netherlands, Norway, Poland, Portugal, Scotland, Sweden, Switzerland, Turkey** and the **United States** (*Joutsen* 1987, p. 233).

An experiment in **France** involves the use of the probation period for compensating the victims. Sentence is deferred in order to enable the offender to reimburse the victim and for the authorities to check that the reimbursement has taken place. The probation service monitors enforcement. For example in the court of St. Etienne, a 90 % level of overall reimbursement was reported in 1987 (*Robert* 1989, p. 4).

Compensation orders as an independent sanction are an option in **Cyprus, England and Wales, Greece, Ireland, Malta, Northern Ireland, Scotland,** and **Turkey.** In the **Netherlands,** adoption of the compensation order system was proposed in 1983. In 1987, it was proposed that the compensation order be integrated with the present partie civile system. One of the innovations would be that the prosecutor would be responsible for enforcement of the compensation order (*van Dijk* 1989).

Other forms of compensatory payments are used in **Bulgaria, Denmark, Greece, the Netherlands, Poland, Sweden,** and the **USSR** (*Bishop* 1988 and *Joutsen* 1987, pp. 236-237). **Barbados** and **Canada** are currently considering a system of restitution and reparation of victims of crime as independent criminal sanctions.

Although compensatory payments appear to be little used in practice in some of the countries noted, the compensation order is of growing impor-

tance in **England and Wales**. The Criminal Justice Act (1982) provided that if a court wishes to impose a fine and a compensation order, and the offender apparently lacks the means to pay both compensation and the fine, the court is to issue a compensation order only. Thus, the compensation order was elevated to the status of a full sentence (*Shapland* 1989). (Sec. 62 of the corresponding **Scottish** Act is similar.) In 1988, the law was changed so that the court must give reasons for not issuing a compensation order if an identifiable victim has suffered a loss. This means, among other things, that judicial review of the decision may be possible if nothing is said in the sentence decision about compensation (*Maguire & Shapland* 1990, pp. 216-218).

Furthermore, compensation orders in England are possible even in the case of concurrent sentences where, for reasons of procedural economy, the court passes sentence for only a few offences out of a series of similar offences (the other offences are "taken into consideration"). In such cases, the compensation order for victims of other offences can be attached. This development in England has been encouraged by research results that indicate consistently how important even partial compensation from the offender is to the victim, in comparison with no compensation or State compensation (*Shapland et al.* 1985 and *Newburn & De Peyrecave* 1988, pp. 18-21).

Also elsewhere, the renewed interest in the victim has sparked an attempt to integrate victimological considerations into sentencing. In the **Federal Republic of Germany**, for example, a proposal has been made that the offender is to be informed of what "reduction" he or she may receive in sentencing if compensation is paid to the victim. Furthermore, imprisonment can in some cases be suspended on condition that compensation is paid; such a condition is attached in roughly 10% of the cases where suspended imprisonment is used (*Schädler* 1989).

In the **Netherlands**, courts have the possibility of using a suspended fine that is set at a sum 15 % higher than the compensation for the offence. The fine is suspended on condition that this compensation is paid. Thus, the offender essentially has a choice between paying the compensation or paying a higher fine. Although this option is at present used by only some judges in the Netherlands, it is apparently highly effective in encouraging the payment of compensation (*van Dijk* 1989).

As of 1 February 1988, **Sweden** has made an exception from its general principle of using only certain general forms of punishment. A new sentencing option was adopted: when sentencing a person to probation or a suspended sentence, the court may, if appropriate, order the offender to

assist the victim in various ways, for example by repairing any damage caused by the offence. This option is foreseen to have particular applicability in the case of vandalism (*Falkner* 1989).

In the **United States**, all the states have adopted legislation reinforcing the common law authority of the courts to order compensation by the offender to the victim. Moreover, 23 states have enacted legislation requiring the court to do so, unless it explains in writing its reasons for not issuing such an order (*Hillenbrand* 1990).

## 1.7 State Compensation Schemes

Since the time the first general European crime victim compensation scheme was introduced in **England, Wales** and **Scotland** in 1964, similar schemes have been adopted by many other countries. At the moment, schemes exist in **Austria, Belgium, Canada, Denmark, England and Wales, the Federal Republic of Germany, Finland, France, Ireland, Luxembourg, the Netherlands, Northern Ireland, Norway, Poland, Scotland, Sweden** and the **United States** (*Joutsen* 1987, pp. 248-276). **Switzerland** has passed a constitutional amendment calling for such a scheme.

The Council of Europe Convention on State compensation to victims of crime was opened for signature on 24 November 1983 and entered into force on 1 February 1988. It has been ratified by **Denmark, Luxembourg**, the **Netherlands, Sweden** and the **United Kingdom**, and signed in addition by the **Federal Republic of Germany, France, Greece, Norway** and **Turkey**.

45 of the 50 states in the **United States**, and nine of the ten provinces of **Canada** (*Chappel* 1988, p. 380) have adopted a State compensation scheme. The Californian scheme, for example, paid out USD 40 million during 1987. Much of the impetus for the establishment or expansion of the schemes in the United States has come from the Victims of Crime Act 1984, which stipulated that the federal government is to pay a subsidy to the states equal to 35 % of what the state in question had paid out in awards during the previous year. The funding largely comes from a surcharge on fines, although other sources include forfeited bail money, and confiscation of all or part of the profits derived by an offender from the sale of the rights of the story concerning his or her offence ("notoriety-for-profit").

In the **United States**, State compensation is now to be paid to any person victimized by the offences covered by the relevant statutes, and not just to state residents. A further extension (in 37 states) was that compensation was to be paid to the victims of drunken driving and, even if the victim continues

to live with the offender, to victims of domestic violence (in 5 states). Finally, earlier criticism that State compensation was being paid only to a small minority of eligible victims is apparently no longer valid. For example, the absolute number of rejected awards is diminishing, and "participation in the offence" now results only in a decrease in the size of the award, and not full rejection. With the increasing liberalization of the schemes, it is possible that in a few years perhaps as many as one half of all eligible victims will receive State compensation (NOVA).

In the **Netherlands**, on the other hand, the State compensation system is not reaching very many victims. The procedure can commonly take up to two years, and only some 200 victims actually receive compensation each year (283 during 1987) (*van Dijk* 1989).

In **England**, the Criminal Justice Act 1988 transformed the Criminal Injuries Compensation Board from a body created and supported by administrative fiat to a statutory body. However, the CICB is still faced with a number of problems, including a backlog of cases, increasing cost, and criticism over decisions according to which an award is reduced or refused, for example because the victim was in part to blame for the offence (*Shapland* 1989).

In **France**, awards are paid on the basis of some one half of the applications received (1700 applications in 1987, with an outlay of 50 million francs). In addition, a special fund has been established for the victims of terrorism. The monies for the fund are collected through additional assessment of five francs on all home insurance policies. Total reserves of some 400 million francs have thus far been amassed. Suggestions have been made that these reserves could be made available for the benefit of all victims (*Piffaut* 1989).

The **Swedish** State compensation law was amended as of 1 July 1988 to make such compensation available also to a victim of an offence against personal freedom or other criminal molestation, and not solely to a victim of a violent offence (*Falkner*).

The coverage of the **Finnish** State compensation act was expanded in 1991 to include pain and suffering as well as (for such offences as sexual assault, unlawful threatening and deprivation of liberty) mental anguish. At the same time, an attempt was made to make the system for advance payments more effective.

In February 1986, **Poland**, as the first socialist country to do so, established a fund for assistance to victims, the "Foundation for Assisting Victims of Crime". The purpose the fund is to provide financial assistance to victims

of crime or (should the victim have died) their dependents. The award is discretionary, depending not only on the possibility that the victim has of obtaining compensation from other sources, but also, for example, on the seriousness of the loss, the financial and living conditions of the victim, and his or her possible contribution to the commission of the offence (*Bienkowska* 1989). At the present, **Czechoslovakia** is considering establishment of a similar fund (*Fico* 1989).

Although the general outlines of the State compensation schemes are similar, they differ greatly in matters of detail. For example, the definition of what crimes are covered ranges from deliberate acts of serious violence (**Austria**) to any criminal act that results in injury (the **Nordic countries**). Some (**France** and **Finland**) even cover some property offences. There are also considerable differences in the loss or harm covered, the obligation to cooperate with the authorities, and the extent to which the conduct of the victim is taken into consideration.

In respect of this last factor, all of the schemes pay attention to the behaviour of the victim in connection with the offence. The most restrictive schemes are to be found in the common law countries, where even the "perceived reprehensible behaviour" (e.g. drunkenness or illegal sexual activity) and the relationship between the victim and the offender, or the character and way of life of the victim may be taken into consideration.

## 1.8 Victim Support Schemes

When the victim movement took on a separate identity in the **United States** and **Canada**, it also became in many respects a conservative movement (*Fattah* 1989, pp. 57-63). One of the most vocal goals has been to increase the level of punishment for certain offences (such as sexual offences, domestic violence and drunken driving). However, the largest victim association in the United States, the National Organization for Victim Assistance, has sought to turn the orientation away from such "offender-bashing" towards helping victims and, in particular, promoting and ensuring victims rights.

The most active and well-organized victim support scheme is arguably to be found in **England and Wales and Northern Ireland**. Local support schemes began to appear during the 1970s. As opposed to the more independent and ad hoc development in the United States, the English model was based from the outset on close cooperation with statutory agencies and existing social provisions. In time, these were brought together under the network of the National Association of Victim Support Schemes (now

known as Victim Support) which has promoted training, issued guidelines on the activity, and also in other respects organized activities in support of victims (*Shapland* 1989). Today, the schemes remain based on the work of volunteers, although the association receives a considerable annual grant from the Home Office (*Victim's Charter* 1990, p. 4).

Victim Support works in close cooperation with the Scottish Association of Victim Support Schemes in **Scotland**, and the Irish Association of Victim Support in **Ireland**.

The largest victim association in the **Federal Republic of Germany** is the Weisser Ring (the "White Ring"), established in 1977 to provide direct assistance to victims. Among other services, it provides financial assistance and legal counselling for victims. Weisser Ring has also been established in **Austria** and **Switzerland**. In 1990 a Weisser Ring association was established in Hungary.

In **France**, the Ministry of Justice established a special office for victim affairs in 1982. This office has sought to implement laws affecting the position of victims, and improve their position in practice. One of its main functions has been to encourage the creation of local associations which would provide and coordinate direct assistance to victims (*Piffaut* 1989).

In the **Netherlands**, "Landelijk Buro Slachtofferhulp" was established in 1985 as a central pressure group that would produce initiatives in victim policy and monitor developments (*van Dijk* 1989). In **Belgium**, there are two national associations, the French-speaking "Aide de Reclassement" and the Flemish-speaking "Vlaamse Verenigung voor Forensizch Velyijnswek (*Reeves* 1989, pp. 87-88).

In the Nordic countries of **Denmark**, **Iceland**, and **Norway**, there is no central victim agency or voluntary association. In **Finland** and **Sweden**, small registered organizations exist ("Pahoinpitelyn uhrien tuki ry" in Finland, and "Hjälp brottsoffer" in Sweden), but these have been relatively inactive as of yet although local bodies are beginning to proliferate under the umbrella of the Swedish organization. The prevailing view of the authorities is that the legal system (as well as the social welfare and medical systems) already meet the needs of victims. The only exception from this complacent view has long been represented by the efforts of feminist and other organizations to assist the victims of sexual assault and domestic violence.

In the Eastern and Central European as well as the Mediterranean countries (with the exception of France and Germany), a central agency or association for victims is also lacking, and the authorities seem to take the

view that the legal system is satisfactory. Some indications of a change in attitude can be seen. For example, small-scale voluntary assistance groups have been formed in **Poland** and **Yugoslavia** (*Bienkowska* 1989; *Separovic & Josipovic* 1989).

In **Spain**, Valencia established the first local victim support office in April 1985. This scheme, which is staffed by civil servants, provides victims with legal assistance in penal, civil and administrative proceedings. Similar schemes are planned for other cities, including Barcelona, Bilbao and San Sebastian (*Vidosa* 1989).

To summarize, specialized services for victims of crime are spreading, but only in a few countries. General victim service schemes on the national level exist in **England and Wales, France, Germany, Ireland, the Netherlands, Northern Ireland, Scotland** and the **United States**. In addition, some private organizations and volunteer groups provide assistance to specific groups of victims (in particular, victims of sexual assault or domestic violence) in scattered locations throughout Europe and North America.

With these few exceptions, victims are generally left on their own to seek assistance from medical and mental health personnel, social services, insurance and other potential sources of help as best as they can.

## 1.9 Dispute Resolution and Restitution Schemes

The difficulties that victims may have with the criminal justice system have led to the attempts to improve the administration of justice described above. There is also another approach, that of finding an alternative to the criminal justice system. Such alternatives include dispute resolution (mediation and conciliation) schemes, as well as restitution programmes. The former seek, for example, to resolve the conflicts that may underlie the offence (for example, conflicts between neighbours) or to increase the understanding of the two parties of what has happened, thus restoring social peace. Restitution programmes are generally based on the finding that the criminal justice process in many countries is poorly designed to restore the losses of the victim (something the victim often regards as more important than punishment of the offender). A direct agreement between the victim and the offender may be more successful in this.

Until recently, private settlements of criminal matters have not generally been regarded with official favour by agents of the criminal justice systems in Europe and North America. Some jurisdictions have even criminalized "compounding a felony", where the offender and the victim reach a private settlement in order to avoid the criminal process.

The Eastern European countries have formed a significant exception to this rule. **Albania, Bulgaria, Hungary, Poland, Romania,** the **USSR** and **Yugoslavia** have experimented with various forms of social courts (*Joutsen* 1987, pp. 128-130).

For example in **Yugoslavia,** conciliation councils have long been an integral part of the local administration of justice. In 1985, the court's obligation to turn private complaints over to these councils to seek conciliation has been extended to all complaints, and not just certain categories (*Separovic & Josipovic* 1989).

In **Albania,** social courts were established in May 1990, replacing the earlier village, city and neighbourhood courts. The social courts are specifically designed to deal with minor criminal offences that do not pose a great threat to society. The social courts are solely conciliatory bodies, with no powers to enforce their decision.

In Western Europe, the impetus for the development of dispute resolution and restitution programmes has come from the **United States** and **Canada** (*Harland* 1983).

Many of the projects in **England** are being implemented at the police stage, and are generally designed for juvenile offenders. There is also at least one neighbourhood dispute resolution scheme.

One of the earliest experiments in mediation was in **France,** where a 1978 decree allowed the courts the possibility of appointing mediators for civil issues in criminal cases. Following criticism of the scheme and a reduction of use (linked to the 1981 change in Government), a new model for mediation was developed by the court in Nancy. This model, which has later been replicated in some fifteen other courts, provides the judge with the possibility of diverting some civil issues to a "suppliant d'juge" for mediation (*Joutsen* 1987, p. 131).

The courts have experimented with dispute resolution also in **Portugal** and in **Austria.** In Portugal, the judge is empowered to attempt conciliation as long as the harm done is deemed slight. In Austria, a project involving dispute resolution has been carried out in two juvenile courts. Furthermore, successful mediation may be taken into consideration in deciding to dismiss a case in **Denmark, England and Wales,** the **Federal Republic of Germany** and **Norway** (*Joutsen* 1987, p. 132 and footnote 3).

In **Finland,** dispute resolution schemes have spread quite rapidly, following modest beginnings in 1983 in Vantaa, a city next to Helsinki. Such schemes can now be found in all the major cities, and in some smaller cities.

The schemes tend to focus on the linkage between mediation and social welfare, and less on mediation as an alternative to criminal justice (*Rikollisuustilanne* 1989, pp. 98-99).

Experiments with dispute resolution schemes have also been carried out in the **Federal Republic of Germany** (for example in Cologne and Stuttgart; *Bussmann* 1987) and in many municipalities in **Norway** (*Hovden* 1987; *Stangeland* 1985).

In the **United States**, there are currently only about 20 or 30 formal projects, many of which are organized by the Mennonite Church. However, there are hundreds of programmes in which the prosecutor can turn cases over to a third party for mediation; many of these involve domestic violence.

## Part 2: International Dimensions

### 2.1 Introduction: The Process of Change

The process of change illustrated in part I of this paper has not been easy. Changing practice and policy is a two-stage process. It requires, first of all, the realization that something must be done, and second, a plan for what must be done.

The first stage, making people aware that there is a need for change, is often the more difficult of the two. In every country where improvements have been sought, practitioners and policy-makers have resisted change with the argument that their system already works the way it should. They rest in the complacent belief that their system serves the needs of victims, of the community and of the State. Nothing can be done until their attitudes have been changed through discussion within professions and in the media, aided by the publication of research results and exposure to the experiences of victims.

The second stage involves the dissemination of information on what changes are needed, the development of policies and programmes, the adoption of legislation and guidelines, a programme of training and research, and the provision of the necessary facilities and resources.

This process has not proceeded in the same way in the different European and North American countries. The development of victim policy in any one country is determined by the locus of the pressure for change. In countries where victims' associations have been established, reforms have often occurred along the lines such associations are interested in. When the

initiative is with the Government, reforms have generally been made in respect of the payment of State compensation to victims and in areas directly subject to statutes (such as court procedure), but fewer reforms have taken place in connection with the practice of the police and prosecutors.

The purpose of this part of the paper is to review some of the pressures - victimology, the victim movement, and international standards - working for the development of national victim policy, and how they have developed internationally.

## 2.2 The Flow of Ideas

The first stage in the process of change was initiated by the gradual dissemination of research results and anecdotal evidence of the difficulties victims face. The seminal victimological study is arguably Wolfgang's study (1958; 1967) of victim-offender interaction in homicide.

The concerns of victimologists have included such issues as the amount of hidden crime, the characteristics of victims, the interaction between victim and offender, possible precipitation on the part of the victim, and factors affecting the risk of victimization (*Miers* 1989; *Fattah* 1989, pp. 45-57). The initial research up to the beginning of the 1970s was almost solely to be found in the United States; countries that later became important research centres include Canada, England and Wales, the Federal Republic of Germany and the Netherlands (*Joutsen* 1989).

Researchers were not the only people interested in victims. Others, becoming aware (either through the research results or their own practical experience) of the problems victims faced, turned to direct action. Feminist organizations in the United States and in England established hot lines, shelters and other support services for the victims of sexual assault and domestic violence (*Tierney* 1982). Beginning in the early 1970s, consumer activists and individuals concerned about the victims of specific offences (in particular drunken driving) joined in advocating various types of reform and the development of specific services for victims. This initiated what is known as the victim movement - a movement that has taken a variety of forms (see *van Dijk* 1986, esp. pp. 9-11).

Why did these first strands of victimology and the victim movement develop primarily in the United States, and not in Europe? Possible reasons include the severity of the problem, the strength of research and an American activist tradition (see *Maguire & Shapland* 1990, pp. 206-207).

It is true that people are victimized - and have problems as victims - everywhere in the world. However, the problems faced by the victim in the criminal justice system in the United States may well be greater than elsewhere. When this is combined with the sheer volume of victimization in the United States, the problems may have become more visible.

Second, the United States has been the powerhouse of empirical (and, to a lesser extent, theoretical) criminology, and victimology-related sciences in general. Both academic and government funds are more widely available for research. The number of professional meetings and professional publications quickly spread the word of interesting phenomena and research results.

Third - and this is the most nebulous reason - Americans may tend less than Europeans to wait passively for the government to define and deal with a problem. The decentralized system of administration places the responsibility for providing many services (such as medical or social welfare services) on the individual citizen or on private agencies rather than on public authorities (*Chappel* 1988, p. 378). The common law tradition may make victims more prepared to assert their rights as citizens. There may also be a cultural factor: the tradition of self-help may make concerned citizens more prepared to organize ways of helping victims when the government seems unable (or unwilling) to do so.

The social sciences in Europe and Canada are heavily influenced by the trends in the United States. This can be attributed both to the wealth of research and to its accessibility. The language used, English, is widely understood. Furthermore, word of US research is spread through a number of channels: scientific and professional meetings and journals, other publications, and informal contacts. Word of developments in victimology first spread through general scientific publications and meetings (such as those devoted to the interests of criminologists or criminal lawyers). The first specialized international victimological meeting, the International Symposium on Victimology, was held in Jerusalem in 1973, followed by similar symposia at three-year intervals. Annual international post-graduate courses in victimology are organized in Dubrovnik (Yugoslavia). Also other victimological meetings have been held, primarily on an **ad hoc** basis. Victimology: An International Journal was established in 1976, the World Society of Victimology Newsletter in 1982, and the International Review of Victimology in 1989. The trickle of victimological literature through these and other channels has turned into a flood.

The discussion in the United States soon caused European and Canadian criminologists and others concerned with victims to redefine what they were

seeing, or to study it in new ways. (European and Canadian discussion may have had a corresponding effect on developments in the United States, but at least when measured by the questionable criterion of citations in the US literature, this effect would seem to have remained negligible.) The victim became a legitimate focus of inquiry, a new object to be measured, a new subject to be interviewed.

The victimization survey is a good example of the international flow of victimological research. The first victimization study was carried out in the United States in 1965 (*Ennis* 1967). The first national study in the world was carried out in Finland in 1970 (*Aromaa* 1971). This was followed by national studies in Denmark, Norway and Sweden (*Wolf* 1973). By today, national victimization surveys have been carried out also in Belgium, Canada, England and Wales, the Federal Republic of Germany, France, Ireland, the Netherlands, Northern Ireland, Scotland, Spain and Switzerland. Local surveys have been carried out at least in Greece, Hungary, Iceland and the USSR.

Truly international victimisation surveys for cross-cultural comparisons of victims (called for by *Shapland* 1987) have become a reality. In early 1990, an international study covering countries with a variety of legal systems appeared (*van Dijk et al.* 1990). This survey seeks to correlate differences in crime prevention behaviour with differences in victimisation levels, and to explore attitudes towards the police and differences in fear of crime. The United Nations Interregional Crime and Justice Research Institute is at present exploring the possibility of extending such victimisation surveys to developing countries.

The work on domestic violence and sexual assault provides an example of the international spread of innovations in the victim movement field. Beginning with the first shelter in Chiswick (near London) in 1971 and the first crisis hotline in St. Paul, Minnesota in 1972, shelters and hot lines gradually spread throughout North America, and to a more limited extent in Western European countries (*Tierney* 1982, p. 207). A 1976 listing noted 15 shelters (and 28 planned shelters) in the United States, seven in Canada, two each in England, Scotland and France, and one each in Ireland and the Netherlands (*Warrior* 1976, pp. 7-16). Those working in the shelters found much the same problems throughout North America and Europe: victims who were suffering mentally and physically, and yet who were at a loss over what to do, insensitive handling by the authorities, and the simple inability of the social welfare and criminal justice system to respond to the needs of victims.

The ad hoc attempts of volunteers brought help to many victims, but the activity was often short-lived; the organizers ran out of their initial fund of money or energy, and were unable to secure enough to keep the project going. It is not easy to work with victims. Certainly the job has its rewards, but the need for help far outweighs the capacity, and the constant litany of misery may easily lead to burn-out. The frustration can be compounded if the agents of the criminal justice system do not visibly change their attitude towards the victim or victim assistance.

The principal way of overcoming this danger is by institutionalizing the activity advocated by the victim movement, by gearing it for the long haul (*Maguire & Shapland*, 1990, p. 222). Two channels have been attempted in this. One is to enlist the support of the local or national Government. The second is to turn to volunteers. As noted in section 1.8, above, the organizational basis varies by country, from the volunteer efforts in England backed by State funding, to the State-centred organization in France, and to the crime victim commissions in the United States and Canada, which operate on the basis of state funds and (in parts of the United States) of special fines levied on offenders (*Waller* 1989, pp. 94, 96 and 100).

## 2.3 International Standards

The pressure for change has not come solely from within countries. Researchers, practitioners and victim advocates acting on the international level have produced recommendations on various aspects of victim policy. For example, in 1976 the International Association of Penal Law discussed the presentation of civil claims in the criminal process. The International Association of Judges produced a report on this same subject in 1983. Also in 1983, the International Association of Chiefs of Police adopted a "Crime Victims Bill of Rights", in which the Association urged police forces to establish procedures and train personnel to implement the "incontrovertible rights of all crime victims" (*Waller* 1990, pp. 139-140).

The most authoritative international standards have been produced by the United Nations and the Council of Europe.

In 1985, the United Nations General Assembly adopted by consensus the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration specifies basic standards for the treatment of victims of crime and abuse of power, for example in respect of access to judicial and administrative procedures, right to information and

fair treatment, consideration of their views, restitution and compensation, and victim services (*Bassiouni* 1988; *Joutsen* 1987; *Lamborn* 1988; *Waller* 1989).

Five years later, the United Nations Secretariat presented a "Guide for practitioners regarding the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" (*UN* 1990). An **ad hoc** expert working group convened under the auspices of the International Institute of Higher Studies in Criminal Sciences (Siracusa), the International Association of Penal Law, the International Society of Criminology, the International Society for Social Defence, the International Penal and Penitentiary Foundation, and the World Society for Victimology has also worked on measures for the implementation of the Declaration (*Bassiouni* 1988, p. 11 and passim).

The Council of Europe has been particularly active in this field (*Tsitsoura* 1989). In 1983, it produced a Convention on State compensation for victims of violent crime. It has adopted two recommendations of direct relevance to victims: the 1985 recommendation on the position of the victim within the framework of criminal law and procedure (R(85)11) , and the 1987 recommendation on assistance to victims and the prevention of victimisation (R(87)21). It has also dealt with various specific forms of victimisation, such as ill treatment of children in the family (1980) and violence in the family (recommendation R(85)4), and it has organized a criminological research conference specifically devoted to research on victimisation (1984).

With the exception of the Convention adopted by the Council of Europe, which is binding on its signatories, all of these international standards have primarily only an indirect influence on the policy of member states.

The extent to which resolutions adopted by the General Assembly of the United Nations and recommendations adopted by the Council of Ministers of the Council of Europe are binding has aroused some debate among experts in international law. Some have argued that Member States have approved the goals of intergovernmental organizations when they applied for membership, and are thus bound to observe the resolutions and recommendations adopted. Others have pointed out that although the goals of such intergovernmental organizations may meet with the general approval of the member states, there may well be disagreement over the proper method of achieving these goals.

The general understanding of what is implied by "recommendations" matches the everyday meaning of the term: such documents are only an

invitation to their addressees (member states) to apply the contents, and not an imperative exhortation to undertake a certain course of action. (*Castaneda* 1969, pp. 7-8).

It would, furthermore, be difficult to conceive of the willingness of political decision-makers of most (if not all) states to surrender their sovereignty in such internal matters as criminal justice to the extent that they would bind themselves in advance to following any and all resolutions that may even be passed by majority vote.

Even assuming the willingness of member states to be bound by resolutions and recommendations relating to victims and criminal policy, there would be considerable difficulties in drafting a recommendation that would take sufficient account of the different legal systems, ideologies in criminal policy, and criminal justice practice, so that it could be accepted as legally binding on a large number of member states. *Mathiesen* (1986) has noted that the pursuit of consensus leads to intensive discussions over the formulations used. Inevitably, the formulations become more and more general, and may in this way become excessively bland, leaving individual decision-makers leeway to interpret them in a variety of ways.

The significance of resolutions and recommendations does not lie in any legal binding effect. The significance lies elsewhere, in their potential to guide development. They embody what can be deemed an expression of a common ideal (*Castaneda* 1969, pp. 193-195). The draftsmanship that is involved in their preparation also requires a process of formulating ideas and concepts that may then be used, by the same draftsmen or their colleagues, in developing national legislation. Because of the greater precision to be found in the Council of Europe recommendations, this aspect of the documents will be more telling among its member states than is the case with United Nations resolutions among its member states.

The ideas embodied in resolutions and recommendations may also be on the way to becoming binding international law. This is, of course, the case with the Council of Europe Convention. It is also the case when the recognition and declaration of certain principles or even detailed rules brings them within the realm of customary international law (*Castaneda* 1969, pp. 19 and 168-169).

The resolutions and recommendations may not only guide development, they may also have an instrumental value. They may be used as clinching arguments by decision-makers in individual jurisdictions when these decision-makers seek to justify certain courses of action that they would have preferred even if the resolution or recommendation did not exist. When selecting from among various alternative approaches to achieving a certain

end, the decision-makers may thus defend their selection by referring to the United Nations Victim Declaration or one of the recommendations of the Council of Europe.

## 2.5 Conclusions

Merely incorporating certain provisions into a Declaration will not fulfill the intent of the world community as expressed in the unanimous decision of the United Nations General Assembly. The same is true of standards incorporated in a recommendation of the Council of Ministers of the Council of Europe. These documents are not binding law; they are only standards. A separate effort must be made to have them implemented.

This process of implementation will not lead to a uniformity of systems, a situation where the victim would have the same rights in all different criminal justice systems, and the same services available in all countries. The listing of changes in part I of the paper is instructive in showing what can be done, but it can also be misleading. A reader who seeks to compare the progressiveness (and victim-orientation) of countries by what changes are made might conclude that (for example) England and Wales is more supportive of victims than Finland. While this might be true in some respects, (certainly the effectiveness and scope of the English victim support scheme is an inspiration for all other countries) it is not true in others.

Quite simply, countries are on a different starting line when it comes to providing services to victims. Even though victimology and victim services have not received broad recognition as a specific area of action until recently, the need to develop victim policy and the network of social welfare and medical services varies considerably from one country to the next. The legal, economic, cultural and social circumstances differ to such an extent that not all countries need the same innovations. Furthermore, the same ideas will be applied differently. An example of this is the difference in the organization and funding of victim services in the United States, England and France. Another example is the difference in the status of victims in the Nordic countries, France and the United States.

For this reason, the standards of the United Nations and the Council of Europe should not be taken as a measuring stick for comparing one country with another. The standards could more beneficially be used to measure the progress that any one country makes towards providing greater assistance to victims.

*Waller* (1989, pp. 98-103) notes five target areas for practical improvement: the police, victim support centres, financial reparation, traumatic

stress focus for health, and participation of the crime victim in criminal justice. No country has a clean record in these five areas; there is always more that can be done. Each country could use the United Nations and Council of Europe standards to assess the extent to which it succeeds in meeting the needs of victims in these areas, and guide it in further improving the position of victims. The methods used could range from statutory amendment, legislative or administrative guidelines and training, to improved information.

In this work, however, one point should be emphasized. No reform should be carried out solely on the basis of a general but unspecified goal of improving the position of the victim. Every attempt at reform should have specific and realistic goals. Otherwise, the reform runs the risk of remaining a purely symbolic action. Furthermore, the reform should take into account possible side-effects on the operations of the various authorities, and on the rights of other parties.

Crime prevention and criminal justice is regarded as one of the more important functions of the community and the state. For too long, it has been the province of the authorities, and the victim has been sidelined. The just and equitable allocation of the social costs of crime and the control of crime requires that the victim be brought back to a more prominent position. This does not necessarily mean that the victim will benefit from all reforms in this direction. Also the victim has a responsibility for crime prevention and control. However, if the victim is seen to have such a responsibility, the victim should be acknowledged by the state as a key participant in the criminal process. Above all, the victim should be treated with courtesy, sensitivity and respect.

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# Policy Regarding the Victim-Council of Europe Norms[1]

*Aglaia Tsitsoura*[2]

## Contents



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1 The Council of Europe is an intergovernmental European organisation, having 25 member states (February 1991). Its aim is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. The Council of Europe has no organic links with the European Economic Communities (EEC).

2 The ideas expressed in this report are those of the author and not necessarily those of the Council of Europe.

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## 1. Introduction

Since 1956, the year of the creation of the European Committee on Crime Problems, the contribution of the Council of Europe towards the study of the most important problems of crime policy has been outstanding.

The phenomenon of victimisation and, in particular, the need to protect the rights of the victim could not escape the attention of the Council of Europe. In the early seventies, the Council of Europe started its activities regarding the victim. These activities include the preparation and adoption by the Committee of Ministers of:

- Resolution (77) 27 on the compensation of victims of criminal offences;
- Recommendation R (85) 11 on the position of the victim within the framework of criminal law and procedure;
- Recommendation R (87) 21 on assistance to victims and prevention of victimisation;
- the European Convention on the compensation of victims of violent crime (1988).

Provisions and recommendations regarding the position of victims in crime policy and the protection of their rights are to be found in many other Council of Europe texts.

The methodological aspects, the advantages and disadvantages as well as the results of "Studies on victimisation" have been examined by the Sixteenth Criminological Research Conference (1984)[3].

The purpose of the present paper is to analyse Council of Europe norms as formulated in the various texts and, in consequence, to define Council of Europe policy regarding victims.

3 See *Council of Europe*, Collected Studies in Criminological Research, Volume XXIII, Strasbourg 1985.

## 2. Basic Principles of the Victim Policy of the Council of Europe

### 2.1. Balanced Offender/Victim Oriented Policy

The victim-oriented policy of the Council of Europe is part of the overall crime policy of this organisation.

A fair balance between the rights of the victim and the rights of the offender is the basis of most of the above-mentioned instruments.

Protecting the victim is an objective which "must not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender" (Recommendation No. R (85) 11, Preamble 7th paragraph).

It is considered that measures in favour of the victims, in removing the victim's sense of injustice, may help application of a less punitive criminal policy, but one which is more effective.[4]

### 2.2. Differentiated Care for Victims of Criminal Offences and Victims of Abuse of Power

The above-mentioned Resolutions, Recommendations and Convention of the Council of Europe concern victims of criminal offences.

This does not mean that the Council of Europe disregards victimisation by abuse of power, as defined in many United Nations texts and in particular in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. In fact, the European Convention of Human Rights, which is the most basic text of the Council of Europe, contains numerous provisions aimed at avoiding abuse of power. Application of the

4 See explanatory report to the European Convention on the compensation of victims of violent crime p. 9.

Convention and, therefore, the protection of victims of such abuse are secured through the operation of the European Commission and the European Court of Human Rights.

### 2.3. A Policy Based on Social Solidarity

Assistance to and protection of victims is a responsibility which does not lie exclusively in the hands of the criminal justice system but requires cooperation of the public as a whole. Recommendation (83) 7 on the participation of the public in crime policy (cont. 25-32) as well as all the other texts concerning victims stress the importance of the public's solidarity for covering the victim's material, social and psychological needs.

Equity and solidarity is also the basis of the State's intervention in the compensation of the victim (Convention: Preamble, paragraph 2).

### 2.4. A Policy Based on the Results of Scientific Research

The need to ascertain, by victimisation studies and other types of research, the victim's needs and victimisation rates in order to develop assistance programmes is clearly mentioned in Recommendation R (87) 21 (Article 1).

Evaluative research of victim assistance or prevention programmes is asked for by the same recommendation (Article 18,19).

Research on provisions regarding victims or on the possibilities of mediation is considered desirable in terms of Recommendation R (85) 11.

Such recommendations are consistent with the policy adopted by the European Committee on Crime Problems since its creation: crime policy should always be based on data resulting from rigorous criminological research.[5]

## 3. Prevention of Victimization

Prevention of victimisation is - at the same time - prevention of crime, as described in Recommendation R (87) 19 (Organisation of crime preven-

5 See i.a Resolution (66) 18 on collaboration in criminological research.

tion). Specific measures, concerning action to be taken by potential victims or in favour of them, are mentioned in Recommendation R (87) 21 and other texts.[6]

In all these texts, prevention may be aimed at eliminating factors of crime (social prevention) or at eliminating opportunities to commit crime (situational prevention).[7]

The main lines of Council of Europe victim-oriented prevention are the following:

### 3.1 Information

Prevention of victimisation requires accurate information on both the risks existing and the means to face these risks and to prevent victimisation.

This information is to be given to:

- **The general public.** Recommendation R (83) 7 on participation of the public on crime policy urges governments to "encourage the public, through an appeal for solidarity and through the provision of information on the technical facilities available and the appropriate action to be taken, to prevent offences from being committed" (Article 25), Recommendation R (87) 21 (Article 3) contains similar provisions;
- **particularly vulnerable groups.** e.g. taxi drivers (Recommendation R (87) 21, Article 14);
- **effective victims,** in order to avoid further victimisation - (Recommendation R (87) 21, Article 13 and 14).

Dissemination of information should, however, be made in such a way as to avoid creating feelings of fear and insecurity among the population. Such feelings producing, among others, excessive avoidance behaviour, destroy the quality of life and may even produce an aggressive social atmosphere impeding any reasonable and well-balanced crime policy.[8] Exploitation of the public's fear of crime for political reasons is not an unusual phenomenon.

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6 E.g. Recommendation R (83) 8 on participation of the public in crime policy.

7 See Preamble (paragraph 3) of Recommendation R (87) 19 and Article 12 of Recommendation R (87) 21.

8 See i.e. Conclusions of the Sixteenth Criminological Research Conference. Collected Studies in Criminological Research, 1985 p. 16

### 3.2 Action Concerning Particularly Vulnerable Groups

Such groups should be identified by research. On this basis, special programmes of prevention should be drawn up in turn (Recommendation R (87) 21, Article 14).

### 3.3 Promotion and Supervision of Private Preventive Initiatives

Programmes of concerted action between neighbourhoods (e.g. neighbourhood watch programmes) should be encouraged. Equally, preventive action by groups with specific victimisation risks (e.g. jewellers) is advisable.

Such programmes, which exist in many countries, may be satisfactory when sufficient care is taken to avoid errors and violation of private lives. By no means should such action degenerate into vigilante activities and private justice.[9] For these reasons, Recommendation R (87) 21, Article 15 requires collaboration between people responsible for such programmes and local authorities and the police.

## 4. Assistance to the Victim

Such assistance becomes more and more necessary especially in large urban areas. The main Council of Europe guidelines in the field are as follows:

### 4.1 Organisation of Assistance

The victim may need assistance during the commission of the offence or after it. Such assistance may be given by the general public, public or private services.

9 See explanatory memorandum to Recommendation R (87) 21, p. 22.

### *4.1.1 The Public, the Victim's Family and Close Social Environment*

Recommendation R (83) 7, (Article 25) asks governments to encourage the public "to assist victims both during and after the perpetration of the offence". Such assistance may be direct or may imply calling the appropriate public or private services (police, Red Cross etc).

Recommendation R (87) 21, (Article 2) insists also on the need for solidarity "in the community and, in particular, in the victim's family and social environment". Comprehension of and assistance to the victim by his/her closest relations is not always given. For example, victims of sexual offences may be blamed by those within their immediate environment for lack of prudence or even improper behaviour.

The public should therefore be informed, not only of the victim's needs, but also of the existence and location of victim assistance services (Recommendation R (87) 21, Article 8).

### *4.1.2 Public and Private Assistance Services*

#### *4.1.2.1 Identification*

Recommendation R (87) 21 urges governments to identify private and public services offering assistance to victims and to assess their achievements and their deficiencies (Article 3).

According to replies to a Council of Europe questionnaire, governments are not informed of all existing assistance facilities. Some centres, private and usually concerned with a specific type of victim, prefer to operate outside any governmental supervision, even if this deprives them of public subsidies. However, according to Recommendation R (87) 21, knowledge of all possibilities of assistance available seems essential for the purpose of co-ordinating such assistance at national level.

#### *4.1.2.2 Structures*

Creation, development and support of public or private assistance services is considered essential (Recommendation R (87) 21, Article 5).

Distinction between public and private services is not always easy as private services are often subsidised by the state and public services often function along with voluntary work.

Services may be distinguished in:

- those designed to provide assistance to victims generally;
- those designed for specific categories of victims, such as children, victims of sexual offences etc. (Article 5);
- general medical and social services (Article 7).

Police should be added to these services: often they are the first ones to meet the victim. They should not only assist the victims but also inform them of assistance possibilities offered by other services (Recommendation (85) 11, Article 1 and 2).

### 4.2 Forms of Assistance

Assistance to the victim may include, as necessary (Recommendation (87) 21, Article 4):

- emergency help to meet immediate needs;
- continuing medical, psychological, social and material help;
- advice to prevent further victimisation;
- information on victim's rights;
- assistance during the criminal process;
- assistance in obtaining reparation by the offender or other agencies or compensation by the state.

Such assistance should never go beyond the limits permitted by respect for the victim's private life. Assistance services should approach victims only to the extent compatible with the protection of the victim's privacy (Article 8). The same should not disclose personal information regarding victims, without their consent, to third parties (Article 9).

### 4.3 Further Work of Assistance

Council of Europe Recommendation R (87) 21 provides a general framework for the assistance of victims. More detailed rules may be needed in the future, regarding organisation and functioning of assistance centres and ways and means of giving assistance.

## 5. The Victim within the Framework of Criminal Law and Procedure

### 5.1 General Principles

Recommendation R (85) 11 on the position of the victim within the framework of criminal law and procedure and other Council of Europe recommendations tend to improve the position of victims within the framework of the criminal process and to give them a more active role.

However, this role remains limited to the victim's claim of reparation for the damage by the offender. The victim is not involved in the sentencing process, which remains entirely in the hands of criminal justice. Nevertheless, reparation by the offender to the victim has various repercussions upon the penal process.

### 5.2 Main Lines of Policy

#### *5.2.1 Information for the Victim (Recommendation (85) 11, Article 2, 6, 9)*

Information should be provided to the victim at all stages of the process:

- at **police level**, regarding the possibility of material or legal assistance as well as regarding the outcome of police investigation;
- at **prosecution level** regarding decisions concerning prosecution or refraining from it;
- at **trial level** regarding the date and place of hearings concerning the offence which caused the victim's suffering, the opportunities of obtaining restitution and compensation within the criminal justice system and the outcome of the case.

#### *5.2.2 Protection of the Victim's Dignity and Private Life*

Victims should be received by police in "a sympathetic, constructive and reassuring manner" (Recommendation (85) 11, Article 1).

Questioning them should be made in a manner which gives due consideration to their personal situation, their rights and their dignity (Article 8). Victims should be protected during investigation and trial from any publicity which may unduly affect their private life or dignity (Article 15).

In very sensitive cases - for example children or victims of sexual offences - such protection may even make necessary holding the trial in camera or restricting disclosure of personal information to whatever extent is appropriate.

Although public hearings and liberty of expression are very important principles included in the European Convention of Human Rights (Article 6 and Article 10), protection of private life, which is also an important principle of the Convention, (Article 8) may be given priority.

### *5.2.3 Intervention of the Victim in the Criminal Process*

#### *5.2.3.1 At Prosecution Stage*

Recommendation R (85) 11 does not require consent of the victim in the prosecution's decision to file a case, although compensation of the victim by the offender or any serious effort to that end (e.g. partial reparation by offenders of modest means) should influence such decision (Article 5).

When informed of the decision not to prosecute, the victim should have the right to react:

- by asking for a review of the decision by a competent authority;
- by instituting private proceedings (Article 7).

These rights exist, up to now, in very few Member States of the Council of Europe. They constitute one of the important innovations suggested by the Recommendation.

#### *5.2.3.2 At the Stage of the Trial*

Although not mentioning the right of the victim to be "partie civile" the Recommendation (85) 11 requires that "it should be possible for a criminal court to order compensation by the offender to the victim". To this end existing limitations or restrictions should be abolished. Thus, the Recomendation recognises the merits of a criminal court decision imposing compensation: less onerous for the victim and, usually more rapid, such a decision may serve the needs of the victim better than a civil one.

### *5.2.4 The Decision on Compensation*

An important innovation introduced by Recommendation (85) 11 allows the court the possibility of ordering compensation of the victim as an autonomous and main penal sanction (Article 11), which "should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender" (Article 14).

By this possibility, existing until now in very few countries, compensation becomes the central point of the criminal process. The interest of the victim acquires priority over any other objective of this process. However, other objectives can equally be attained by such decision: for example, giving compensation to the victim may have a resocialising effect on the offender who becomes conscious of the damages produced by his offence.

Compensation may also be a substitute for a penal sanction or be awarded in addition to a penal sanction (Article 11).

Moreover, compensation or restitution made by the offender (or any genuine effort to that end) should be taken into account when deciding upon the form and the quantum of the sentence (Article 12).

When other financial conditions are attached to the award of deferred or suspended sentence or a probation order or of any other measure, great importance should be given - among these conditions - to the compensation by the offender of the victim (Article 13).

### *5.2.5 Extra Penal Measures*

Mediation and conciliation are more and more widespread in the Member States of the Council of Europe. Recommendation (85) 11 asks governments to examine their advantages, especially for the victims. A certain preoccupation with the possible negative effects of these measures (e.g. pressure exercised upon the victim to accept mediation against his/her wishes), explains this rather cautious attitude.

## 6. Compensation of the Victim by Public Funds

### 6.1 In General - Council of Europe Activities in the Field

Compensation of the victim by public funds, when the offender is not able to repair the damage, has been one of the main innovations in crime policy during the last decades, although this possibility began to be envisaged towards the end of the 19th century.[10]

This intervention may be understood as an **obligation** of the state to compensate the victim, because of the failure of the State's crime policy and of the prohibition of personal vengeance.

It may also be explained on grounds of **social solidarity** and **equity**: some citizens being more vulnerable and more unlucky than others, the state, representing the community, should compensate their losses.

It is also suggested that removing the victim's sense of injustice may facilitate a less positive and more effective criminal policy.[11]

Activities concerning compensation of the victim from public funds began in the Council of Europe in the early seventies and resulted in the adoption of Resolution (77) 27 and of a report (1978).

The Resolution, based on the principles of social solidarity and equity concerns mainly compensation of victims of bodily injury and of dependants of victims of murder.

The Resolution provides that foreign victims will be compensated on grounds of reciprocity. This clause precludes compensation for a great number of foreigners living in various European States and in particular for migrant workers.

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10 See *Congrès pénitentiaire international du Bruxelles*, Vol II, Berne, 1901, pp. 33 and seq., 41 and seq., 44 and seq., 81 and seq., 107 and seq., 142 and seq.

11 See explanatory report to the European Convention on the compensation of victims of violent crimes pp. 8-9.

To solve this problem and to give the provision on State compensation a more compulsory character, a Select Committee of the European Committee on Crime Problems was instructed to prepare a convention on this subject.

The European Convention on the compensation of violent crime was presented for signature on 24 November 1983. It entered into force on 1 February 1988.

The Convention offers a model in the creation of schemes of compensation for victims of violent offences from public funds. Member States who already have schemes for compensation should introduce the necessary amendments to bring their legislation and practice into line with the Convention.

## 6.2 Main Lines of the European Convention on the Compensation of Victims of Violent Offences

### *6.2.1 Theoretical Grounds*

As Resolution (77) 27, the Convention is based on the principles of equity and solidarity (Preamble, 2nd paragraph).

### *6.2.2 Subsidiary Role of the State*

According to the Convention, the state should intervene when compensation cannot be made available by the offender or other sources (e.g. insurance) (Article 2).

However, a decision on the offender's obligation to compensate can be considerably delayed. It is implicitly stated in Article 9 that the state may compensate the victim in the meanwhile and reserve the right to be reimbursed in case of any payment by the offender to the victim. Equally, the rights of the state (the competent authority) may be subrogated to the rights of the person compensated in relation to the amount of the compensation paid (Article 10).

### *6.2.3 Minimum Rules*

Provisions of the Convention are to be considered as minimum rules. States may extend the compensation required by the Convention to more categories of victims or to more items of compensation.

### *6.2.4 Victims Who May Benefit from State Compensation*

According to Article 2, such victims are:

- those who have sustained serious bodily injury or impairment of health directly attributable to a deliberate crime of violence;
- the dependants of persons who have died as a result of such crime.

In consequence, the Convention does not require compensation for:

- victims of non-intentional crime.

Such victims (e.g. victims of road traffic offences) have usually other possibilities of achieving compensation (e.g. insurance);

- victims of offences other than violent offences resulting in bodily injury or impairment of health. Thus, the Convention does not cover offences against property. Such offences are less serious than bodily injury and, in particular, so numerous that State funds could scarcely be sufficient for their compensation.

However, as above-mentioned, states may choose to be more generous than required by the Convention.

### *6.2.5 Conditions for Granting Compensation*

#### *6.2.5.1 Nationality*

Contrary to Recommendation (77) 27 which required reciprocity for state compensation of foreign victims, the Convention (Article 3) defines that "compensation should be paid by the State in whose territory the crime was committed:

- to nationals of the States Party to the Convention;
- to nationals of all Member States of the Council of Europe who are permanent residents in the state in whose territory the crime was committed."

Departure from the principle of reciprocity (an essential principle in international law) is an important innovation of the Convention. It permits - in particular - compensation of migrant workers coming from states which do not have schemes for state compensation and cannot offer reciprocity.

However, the Convention does not cover compensation of victims coming from non-Member States as well as of those who are not permanent residents in the state where the offence was committed (e.g. tourists).

Parties to the Convention may extend the field of compensation further, to include all categories of foreigners.

*6.2.5.2 The Applicant's Financial Situation*

Given the fact that compensation is not an automatic response to victimisation but an expression of social solidarity, the Convention allows reduction or refusal of such compensation on account of the applicant's (prosperous) economic situation. However, this provision, tending to exclude very rich victims, should not be interpreted as limiting compensation to cases arising from the lower social strata.

*6.2.5.3 The Applicant's Behaviour*

Interaction between the offender and the victim and, in particular, the victim's faulty behaviour or criminal way of life are to be taken into account when deciding on state compensation.

According to Article 8 of the Convention, compensation may be reduced or refused:

- on account of the victim's or the applicant's conduct before the crime (e.g. provocation) during the commission of the crime (e.g. simultaneous aggression of both parties) or after the crime or in relation to the injury or death (e.g., when the victim refrained from asking for medical help and caused or increased damages);
- on account of the victim's or the applicant's involvement in organised crime or his membership of an organisation which engages in crimes of violence.

It is considered that victimisation as a consequence of fights between criminal gangs or as a result of the activities of a terrorist organisation does not produce feelings of social solidarity among the community, justifying state compensation;

- when an award or a full award would be contrary to a sense of justice or to public policy (ordre public).

This provision - introduced after long controversies in the Committee - tends to give a discretionary power to the state authorities, allowing for example refusal to compensate a notorious criminal, even when his victimisation is not linked to his own criminality.

### *6.2.6 Items Covered by the Compensation*

Compensation should cover, at least, loss of earnings, medical and hospitalisation expenses, general expenses and, as regards dependants, loss of maintenance (Article 4). Other items, for example: pain and suffering (pretium doloris) may also be compensated, subject to the provisions of national legislation.[12]

Compensation schemes may impose:

- an **upper limit** to compensation. Public funds are not so large as to allow the payment of huge amounts of compensation;
- a **lower limit** to compensation. It is unreasonable to burden the schemes for compensation with demands concerning minimal sums of money.

National compensation schemes may specify a period within which any application for compensation should be made (Article 6).

### *6.2.7 Information*

It is often mentioned that victims do not apply to the compensation schemes because of lack of information about their existence.[13] To this end, the Convention attaches a great importance to such information and asks the parties to take the appropriate steps for information to be provided for the potential applicants (Article 11).

Leaflets giving information on compensation schemes should be available in all services receiving victims immediately after the commission of the offence (police, hospitals). Collaboration of the media for the information of the public in this respect is also desirable.[14]

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12 See explanatory report p.15.

13 See i.a. *Villmow, B.*, Implications of research on victimisation for criminal and social policy, in Council of Europe, Collected Studies in Criminological Research, Vol. XXIII pp. 122-123.

14 See explanatory report pp.18-19.

### *6.2.8 International Co-operation*

Parties to the Convention should grant mutual assistance for the implementation of the Convention (e.g. give information of the foreign victim's possibility of receiving compensation from an agency in his own country) (Article 12).

The European Committee on Crime Problems must be kept informed of the application of the Convention (Article 13). To this end the Parties should transmit to the Secretary General of the Council of Europe any relevant information about legislative or regulatory provisions concerning the matters covered by the Convention.

### *6.2.9 Ratifications*

The Convention has until now[15] been ratified by 7 Member States (Denmark, Finland, France, Luxembourg, the Netherlands, Sweden and United Kingdom) and signed by 6 Member States (Cyprus, Germany, Greece, Norway, Switzerland, Turkey). Non Member States may also adhere to the Convention.

It is obvious that ratification of the Convention advances in a very slow rhythmn. Member States who insistently asked for the Convention and actively collaborated to have it drawn up, have not, up to now, ratified it.

Delay in ratification of Conventions is not an infrequent phenomenon. However, special reasons (e.g. difficulties arising from the exclusion of the principle of reciprocity) may be amongst the reasons for the delay in ratification of this particular Convention. It is to be hoped that the acceleration of ratification, noteable in the most recent years, will continue in order to secure generalised implementation of the Convention.

## 7. Activities Concerning Specific Victims

The above-mentioned activities concern all victims or large categories of them (victims of intentional offences of violence causing serious bodily injury or impairment of health).

A number of other Council of Europe activities concern specific categories of victims or include victimological aspects.

15 February 1991.

## 7.1 Activities Concerning Special Categories of Victims

### *7.1.1 Victims of Domestic Violence - Ill-Treatment of Children in the Family*

Recommendation R (85) 4 on violence within the family (and its explanatory memorandum) deal with violence between spouses as well as with violence against children. It recommends measures for the prevention of such violence, reporting of such acts to the competent bodies, resolution of family conflicts, protection of the interests of the victims and, as a last resort, punishment of guilty family members.

The Fourth Criminological Colloquium (1979) has examined "Criminological aspects of the ill-treatment of children in the family".[16]

### *7.1.2 Victims of Sexual Exploitation of Children and Young Adults*

A Select Committee has drawn up a Recommendation and a report on this form of victimisation, sometimes linked to that mentioned in 7.1.1. Measures for providing information to the public in general and taken by concerned social groups, preventative measures, punishment of those guilty of exploitation as well as steps towards international co-operation are recommended to Governments. In addition, the Recommendation suggests research on various questions relating to this exploitation.

### *7.1.3 The Environment as Victim*

Resolution (77) 28 on the contribution of the criminal law in relation to the protection of the environment deals with prevention of victimisation of the environment and with the means (civil, administrative and penal) of reacting against acts violating the environment.

This topic has also been examined at the 17th Conference of European Ministers of Justice (Istanbul, 1990), who recommended further work on it and, in particular, examination of the opportunity of introducing "offences of endangering the environment" into national legislation.

16 See Council of Europe, Collected Studies in Criminological Research, Vol. XVIII, 1981.

### *7.1.4 Victims of Economic Crime and in Particular Victims of Consumer Fraud*

Recommendation R (81) 12 on economic crime and Recommendation R (82) 15 on the role of the criminal law in relation to consumer protection deals with the protection of victims of economic frauds and other economic offences.

## 7.2 Other Activities

Most of the Council of Europe activities contain victimological aspects e.g. those concerning juvenile offenders or young migrants, aimed at preventing primary or secondary victimisation.

Study on extra-penal measures and, in particular, mediation includes examination of the role of the victim in the solution of conflicts. The 19th Criminological Research Conference on "social strategies and the criminal justice system"[17] dealt with such questions.

# 8. Conclusions

Texts of the Council of Europe concerning the victim, now form an almost complete general guide for legislation and practice.

As already mentioned, they try to promote a balanced policy protecting the victim's rights without abolishing the offender's rights.

It is now important to follow the implementation of the above-mentioned norms in order to verify the gaps existing, the difficulties of implementation, the additional norms which may be needed.

The European Committee on Crime Problems invites governments periodically to report on new legislation introduced in the application of the Recommendations and of the Convention.

Protection of the victim remains a constant preoccupation within the framework of Council of Europe crime policy.

17 Council of Europe collected Studies in Criminological Research Volume XXIX (in preparation).

## 9. Summary

The author describes Council of Europe policy concerning the victim. She stresses that such policy tends to obtain a balance in the protection of the offender's and the victim's rights.

The main Council of Europe texts analysed are Resolution (77) 27 on the compensation of victims of criminal offences, Recommendation R (85) 11 on the position of the victims within the framework of criminal law and procedure, Recommendation R (87) 21 on assistance to victims and protection of victimisation as well as the European Convention on the compensation of victims of violent crimes.

Many other texts concern specific categories of victims (victims of domestic violence, of economic crime etc).

Protection of the victim remains a constant preoccupation witin the framework of Council of Europe crime policy.

# The Spirit of the Law of the 6th of July 1990

# Concerning Victims of Offences

*Anne d'Hauteville*[*]

## Contents



* Special thanks to *Valérie Ramos* for the translation.

The international society of social defense, by the adoption in 1954 of its basic program,[1] had not directly integrated the victim of a criminal offense in its reflections on the criminal phenomenon and in its choice of actions expressed through some fundamental principles of criminal policy.

Its president, *Marc Ancel*, however realised very early on the problems faced by the victims of criminal offence and knew how to integrate them into the construction of the criminal policy that he supported. "It is clear that looking at things from a criminal policy point of view i.e. essentially from a social defense point of view, the problem of the victim is considerably important.[2] "The basic program of social defense might therefore be reviewed.[3] *Marc Ancel* acknowledged the importance of the first works of victimology, accomplished in a criminological view. These works have brought "a new dimension" to the scientific and politico-criminal approach to delinquency.[4]

Initially interest in the victim was therefore focussed on the search for the causes of delinquency, on the role played by the victim in the mysterious mecanism of "passage to action". Victimology is, in this sense, an image of criminology.[5]

Research in "early victimology"[6] corresponded, in the history of ideas, to the apparition of modern social defense doctrines and to the rebirth of criminal policy studies but this was only "a temporal coincidence".[7] However, these victimological researches influenced the criminal policy put forward by the movement of new social defense.

The humanization of the criminal system considered first from offence and offender points of view has been recognized as "logically" necessary

1 *Ancel, M.* (1955). Un programme minimum de défense sociale. Revue de Science Criminelle et de Droit Pénal Comparé, 562ff.

2 *Ancel, M.* (1976) La défense sociale devant le problème de la victime. Revue de Science Criminelle et de Droit Pénal Comparé, 179ff.

3 *Ancel, M.* (1983). La révision du programme minimum de défense sociale. Revue de Science Criminelle et de Droit Pénal Comparé, 533ff.

4 *Ancel, M.*, op. cit. p.180, cf.179 list of the main international symposiums of victimology held between 1973 and 1978.

5 *Colin M.*, 25th congress of the French Association of Criminology (Grenoble, 13-14 Oct. 1989).

6 *Gassin R.*,Criminologie.Précis Dalloz, 2nd ed. n° 228 and n° 504 with the important bibliography quoted.

7 *Ancel, M.*, op.cit., p. 181.

"when the victim is taken into consideration."[8] However, in this direction of thought, the victim is not considered for himself but simply as "another role player in the criminal drama";[9] looking at things ante delictum, as a "citizen that must be protected from crime."[10]

Between 1975 and 1980, some researchers in victimology had changed direction. Research was oriented towards a person "victimized" as such i.e. a person injured by an offence, somebody trying to claim compensation, an individual feeling rejected, "whatever happened to be the origin of his misfortune and of his injury".[11]

The experts looked at the vicitm in physical and mental suffering whether he is an ill-treated child, a victim of sexual abuse, a victim of assault or of ill treatment, or somebody with an obsessive feeling of insecurity.[12]

The social consequences of the criminal act vis à vis the victim have been brought to light. A criminal act generally leads to social exclusion of the victim by affecting more or less seriously the links that tied him to different communities.[13]

Robert Badinter, at that time Minister of Justice, aware that the victim experiences complete and utter solitude, accompanied by a feeling of rejection, conducts a criminal policy definitely in favour of victims. This is

8 *Ancel, M.*, op.cit., p. 182.

9 *Ancel, M.*, op.cit., p. 180.

10 *Ancel, M.*, op.cit., p. 182.

11 *Gassin, R.*, op. cit. n$^{os}$251, that qualifies this "later victimology" as "victimology of the social reaction" or as "victimology of the action" cf. bibliography quoted.

12 Cf. the works of the 25th congress of the French Association of Criminology held in Grenoble on the 13th and 14th of October 1989 on "Victims and Society".

13 Cf. the report of the commission of studies and propositions in the field of help for victims chaired by Professor Milliez in June 1982.

expressed by the vote of the law of the 8th July 1983[14] and by the launching of a vast associative movement to help victims.[15]

An original policy to prevent delinquency was set up at the same time based on civil participation in the actions carried out locally by Councils for the Prevention of Delinquency ("Conseils Communaux de Prévention de la Délinquance", abbreviated as CCPD).[16] Activity was coordinated at a national level by the Interdepartmental Commission for Town and Urban Social Development ("Délégation Interministérielle à la Ville", abbreviated as DIV).

The policy for helping victims and the policy for the prevention of delinquency are not contradictory. In an overall vision of the criminal phenomenon, these two policies aim at fighting the rejection that is the cause or the consequence of delinquency.

14 Law n° 83-608 of the 8th of July 1983 to increase the protection of victims of infractions, Journal Officiel 9th of July 1983; JCP (Juris-Classeur-Périodique) 1983.III.54461; Dalloz 1983.L.351 and decree no 83-1156 of the 23rd of December, 1983; Journal Officiel 27th of December 1983, p. 3750.Cf. *Pradel, J.*, Un nouveau stade dans la protection des victimes d'infractions, Dalloz 1983.chron. 241; *Chartier, Y.*, L'indemnisation des victimes d'infraction pénales. Gazette du Palais 21st of June, 1985; *d'Hauteville, A.* (1984). Le nouveau droit des victimes. Revue Internationale de Criminologie et de Police Technique, 37, 437ff; *Couvrat, P.* (1983). La protection des victimes d'infractions: essai de bilan. Revue de Science Criminelle et de Droit Pénal Comparé, 577ff; *Lombard, Fr.* (1984). Les différent systèmes d'indemnisation des victimes d'actes de violence et leurs enjeux. Revue de Science Criminelle et de Droit Pénal Comparé, 277ff; *Bouloc, B.* (1984). Revue de Science Criminelle et de Droit Pénal Comparé, 117ff.; *Guth, J.M.*, Juris-Classeur-Procédure Pénale. Fascicule art.706-3 to 706-15 Code procédure pénale.

15 Movement coordinated by the Committee for Victim Protection and for Prevention created in 1982 by the Ministry of Justice and the National Institute for Helping Victims and for Mediation.

16 Cf. *Lazerges, Ch.* (1988). La mise en oeuvre par le conseil communal de prévention de la délinquance de l'idée de participation des citoyens à la politique criminelle. Revue de Science Criminelle et de Droit Pénal Comparé, 150ff.

The law of the 6th of July 1990[17] is a new and important step in French law to implement effectively the fundamental principles asserted by the European Convention for the Compensation of Victims of Violent Offences.[18]

- This progress concerns essentially the victims suffering from injuries resulting from personal attacks. The new law, concerned for consistency and social justice, puts on an equal footing victims of serious injury, whatever its origin. It asserts the right to complete compensation for all common law victims suffering from injuries resulting from personal attacks; it improves noticeably the implemented system of solidarity; it unifies the compensation systems by keeping integral the rights acquired by the victims of terrorist attacks.[19]

An effective system of social compensation, far from the criminal proceedings of searching and sentencing the author, could be implemented by removing the author's condition of defficiency and insolvency i.e. the subsidiary character of the system and by removing a ceiling of compensation through the CIVI.[20] The financial cost of complete compensation for serious injuries was transfered from the state to the Guarantee Fund for Terrorist Attacks created in 1986.

- For victims of less serious physical injuries and of material damages following a robbery, a breach of trust or fraud the previous system of

17 Law n° 90-589, Journal Officiel 11th of July. 1990, JCP (Juris-Classeur-Périodique) 1990.III.64.185 bis. Cf. the vote by the Minister of Justice on the 27th of August 1990 about the implementation of the new law, JCP (Juris-Classeur-Périodique) 1990.III.64.173 and the first comments.

18 Convention signed in Strasbourg on the 24th of November 1983, approved by the law n° 88-1251 of the 30th of December 1988 and published by the decree n° 90-447 of the 29th of May 1990.

19 Cf. Preambule of the bill, Doc. Sénat 21st of March, 1990 n° 197. We exclude from this survey the cases of victims of terrorism and the problem raised during the parliamentary debate on the law of the 6th of July 1990 by the judiciarisation of the compensation system from a specialized CIVI. The victims of terrorism have still the possibility to refer directly to the Guarantee Fund for Terrorism Attacks, created by the law of the 9th of September 1986, that remains for these victims the deciding and paying organism. About the law of 1986, cf. *d'Hauteville, A.* (1987). L'indemnisation des domages subis par des victimes d'attentats. RGAT 329 and *Renucci, J.F.* L'indemnisation des victimes d'actes de terrorisme. Dalloz 1987.chron.197.

20 The maximum compensation by the state was fixed by a decree. It increased from 190,000 F.F. in 1980 to 210,000 F.F. in 1981, 250,000 F.F. in 1983 and to 400,000 F.F. in 1986.

assistance for the most disadvantaged victims by the state, set up by the laws of the 3rd of January 1977 and of the 2nd of February, was extended in two ways.

Fistly, victims slightly injured can benefit from this system although they were previously excluded. Secondly, reevaluated financial assistance will benefit a larger number of victims by the fact that the maximum required resources were increased. However, this extended system, the financial cost of which has been transfered to the Guarantee Fund for Terrorist Attacks, is still subsidiary and maintains, through the offender's condition of insolvency, the first principle of compensation by the responsible party.

These two essential sections of the law of the 6th July 1990[21] convey two fundamental ideas of new social defense:[22]

- **The respect of human dignity**, i.e. the victim involved in criminal proceedings.
- The implementation of a **pedagogy of responsability**, through compensation supported by the author.

In hommage to Marc Ancel, we would like to show that the spirit of the law of the 6th of July 1990 corresponds, on those points, to the movement of the criminal policy he created.

21 The reform benefits every victim of French nationality, even if the infraction occurs abroad, and the victims of foreign nationality legally in France for events which occured on national territory. About the other elements of the reform: 1) the right of free delivery to the accused of the copies of minutes recording the infraction, of the testimonies and of the experts' reports in procedures in front of the criminal court can be extended in case of association with the public prosecutor (art. 16 of the law), 2) the legislative conservation of an automatic banker's order from the account of the charged person of that amount designated to the victim (art. 11 of the law), 3) the right of the associations helping victims to intervene in criminal proceedings in case of terrorist offences (art. 1 of the law). Cf. *Couvrat*, P. (1990). La loi du 6 juillet 1990 relative aux victimes d'infraction. ALD, 143ff.

22 Cf. *Ancel, M.* (1954; 1966; 1981). La défense sociale nouvelle: un movement de politique criminelle humaniste (1st;2nd;3rd ed.): Ed. Cujas.

## 1. Complete Compensation by a Solidarity Fund expresses the Respect due to the Victim of Injuries Resulting from Personal Attacks, by the Law and Society

*Marc Ancel* reminds us that percursors of the movement for social defense, such as *Adoplphe Prins*, had already rebelled against the neo-classical system. According to this system, material compensation of injuries suffered by the victim must be provided by civil law only, because "the duty of public law to compensate the victim is ignored. It was therefore untrue, and, from a criminal policy point of view inadmissible, to compare this obligation to a simple breach of contract. Public power and criminal justice might directly assume compensation of the injured party."[23]

In addition, the author underlines the "major step taken in Italy in criminal policy towards the publication of rights of the injured person".

The classical system "in which compensation of the victim depends on the discovery, the sentencing and the faculties of payment of the author of the act must be critized".

"What will happen if the offender has not been identified, is missing, if the judge acquits him through lack of satisfactory evidence, declares him non responsible or if he cannot materially support the compensation?" "One can even observe", says *Marc Ancel*, "that the more severely he is punished the longer his sentence will be and the less he will be able to assume his 'civil debt'... without taking into account the fact that a petty offence can lead to considerable civil damages".[24]

Two major ideas taken from these quotations allow us to explain the 1990 reform and to justify what may appear as an encouragement not to make people aware of their responsabilities.

- The first idea is that **complete compensation of injury is a fundamental right, of public character, of the injured person.**

23 *Ancel, M.* (1980). Le problème de la victime dans le droit pénal et la politique criminelle moderne. Revue Internationale de Criminologie et de Police Technique, 33, 133ff.

24 *Ancel, M.*, op.cit., p.136.

This principle is now asserted by article 2 of the law of the 6th July 1990 modifying article 706-3 of the code of criminal procedure. "Any person suffering from an injury, resulting from intentional or unintentional offences, can obtain complete compensation for injuries resulting from personal attacks..." when these offences have led to "the death, to permanent disability, to total industrial disabiliby equal or superior to one month, or when they are provided for in articles 331 to 331-3 of the criminal code", i.e. indecent exposure and rape.[25]

Of course financial compensation, despite its legal compensatory nature does not erase suffering and distress but it constitutes an official acknowledgement to the victim by the state, by justice and by society. In this sense compensation is a fundamental right.

"Social defense in 1950 was a movement for personal protection and promotion... In its new conception, the ideas of protection prevails so that the entire social body must be protected...". In this way it can be explained, and it is obvious, "why social defense, as a humanistic movemennt of criminal policy, expresses a necessary interest in the victim...".[26] *Marc Ancel* has certainly not disowned the Commission for "Criminal Justice and Human Rights",[27] which in its report on the investigation of criminal cases, wishes to include in its fundamental principles not only the "right to claim compensation but also the right to be compensated for the harm caused by an offence."

- The second idea is that **compensation must be ensured by the state or by society when it can not be provided by the author.**

Very large indemnities can be granted in the case of serious physical or mental injuries of those victims provided for in article 706-3 of the new code of criminal procedure.

It must be realised that total compensation of a young handicapped person can reach more than one million French francs and the compensation of more seriously injured persons i.e. paraplegics, tetraplegics, or those who have lost a limb can reach more than several million French francs.[28]

25 Infractions for which no disability is required since the law no 85-1407 of the 30th of December 1985.

26 *Ancel, M.,* La défense sociale devant le problème de la victime, op.cit., p.182.

27 The Commission chaired by Mireille Delmas-Marty gave its report to the Ministry of Justice.

28 Cf. *Lambert Faivre, Y.*(1990). Le droit du dommage corporel. Dalloz, no.5.

Faced with dramatic situations resulting in extremely large debts, the pursuit of a solvent responsible party, excluding insurance,[29] and maximum compensation by the state of 400,000 F.F., in case of defficiency, appeared inadequate and derisory. The financial cost of such compensation is indeed unbearable for every responsible person, whether he is a citizen integrated into society or a fortiori, a drop-out or social reject. It is illusory to reason that the financial capacities of the author should have an effect on the total compensation due to the victim. This is a source of unfairness and frustration discrediting justice.

This observation led the legislator, in 1990, to dissociate the mecanisms of compensation and research for a responsible party.

The new system[30] ist not subsidiary. The victim is no longer obliged to prove that the author has not been found or that he is insolvent. This meant that the victim was required to claim compensation in a civil court or, more often, in criminal proceedings by association with the public prosecutor. For more victims the legal process was a source of additional victimization and bitter disappointment.[31]

It must be realised that the legislator, in 1990, did not intend to affect the victim's right to association with the public prosecutor, rathermore, on the contrary, and this will be examined in the second part of the commentary. Victims of injuries resulting from personal attacks, however, must receive complete compensation as quickly as possible after the event. Later or at the same time as the event, these victims must also associate with the public prosecutor, whether to start state repressive action in case of the public prosecutor's inactivity; whether to intervene in a started trial as a witness, or to follow the process of elucidation of facts and to know whether or not the author has been decided criminally responsible.

29 That is why there are legal obligations for third party insurance. Cf. *Viney, D.* (1963). Le déclin de la responsabilité individuelle. Paris; *Viney, D.* (1982). La responsabilité: conditions. LGDJ. *Viney, D.* (1988). Effets. LGDJ; Cf. also *Lambert Faivre, Y.* L'évolution de l'assurance de responsabilité civile d'une dette de responsabilité à une créance d'indemnisation. RTD civ. 1987.1.

30 The law of the 6h of July 1990 came into force on the 1st of January 1991 for all the offences, even previous ones that did not lead to an irrevocable final decision of compensation (art. 18 of the law).

31 Cf. *d'Hauteville, A.* Les victimisations successives de la victime d'infraction pénale pendant son parcours judicaire. Report from the 25th Congress of the French Association of Criminology (Grenoble, 13-14 Oct. 1989).

Even when compensated, the victim keeps his right to be present at the trial in association with the public prosecutor. "The victim must be included in criminal proceedings not only as a requirement of some offences or as a plaintiff claiming compensation" asserted *Marc Ancel.* What is often described as a "vindicative" interest, consisting in wanting to render criminal justice must be sufficient to declare admissible association with the public prosecutor.[32]

The compensation of these victims[33] was supported by the state in the three previous laws of the 3rd of January 1977, the 2nd of February 1981 and the 8th of July 1983.

When the State Revenue Department was consulted by the local commission for compensation of victims,[34] it reiterated that is was an "aid" based on the idea of state solidarity and liability, for every case.

The new law by extending the abilities of the Guarantee Fund[35] for the Victims of Terrorist Attacks, created in 1986, to compensation for every type of victim, now transfers this cost to society.[36] Has this change a meaning other than a saving cleverly realised by the state and than reassertion of its irresponsibility with respect to delinquency? Is society now responsible?

*Marc Ancel* does not doubt that the state and society are responsible. "Compensation of an injured party is supported by the state"... means that the state, maintaining public order and personal security, is usually responsible for not having fulfilled its obligations" i.e. being to or ignoring how to prevent the offence". The link between this was of thinking and the "social contract" could be denied. It is now presented in a new form, calling to mind that society itself creates delinquency.[37] Examples of delinquency

32 Cf. also article L.466 of social security code, allowing association with the public prosecutor aiming to determine the culpability of managers.

33 N.B. the system established by these three laws was subsidiary and a ceiling was established.

34 The CIVI are civil courts. They include two judges and one lay assessor.

35 The Fund is called "Guarantee Fund for Victims of Terrorism and other Offences" (article 13 of the law). It is always financed by an annual banker's order on all goods insurance contracts concluded in France (approximately fifty five million French Francs). This tax had been fixed in 1986 to 15 F.F. and then descreased progressively to 1 F.F. It will be 4 F.F. in 1991. The Guarantee Fund becomes only an organism paying the compensation decided by the CIVI.

36 Composed here by those benefitting from goods insurance contracts.

37 *Ancel, M.* Le problème de la victime dans le droit pénal positif et la politique

generated by the excesses of society are unfortunately numerous. A lot of situations however do not fit in with this analysis and it is prefereable to see, in the extension of the abilities of the Guarantee Fund, the sign of solidarity shared between the great majority of people faced with this social risk.

The new law maintains the idea that the payments department, that was previously the State Revenue Department and that will be now the Guarantee Fund,[38] can claim in turn from the responsible party. Will we be able to continue to implement the criminal policy of responsabilisation of the offender in case of prior compensation by the Fund?

Is the pedagogy of responsibility dear to Marc Ancel still alive?

## 2. The Compensation by the Responsible Party as an Instrument of "the Pedagogy of Responsability"

The law of the 6th of July appears at first to lead to the author's deresponsabilitation because the collective compensation of vicitms is a spectacular progress. The government wants, however, to carry on with and develop the responsabilisation policy which is the condition of every lasting integration.

"Thanks to a variety of procedures and sanctions, the government's criminal policy aims to give a larger place to the offender's obligation to compensate and also to integrate the compensation due to the victim at every level of criminal proceedings".[39]

The compensation by the responsible party, or his serious efforts to compensate, can really play a crucial role on his path to integration under legal authority and with the aid of specialized services connected to legal institution.[40]

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criminelle moderne. op. cit., p.144.

38 Article 9 modifying article 706-11 of the code of criminal procedure.

39 Report of Y. Durant, Député n$^{os}$ 14 à 17, 5.

40 Associations of judical control. Probation and aid committees for the released persons and may be association to help the victims, in the context of a deferment of the pronouncement of the sentence with a test such as the compensation of the victim, cf. infra, note 49.

This is similar to the idea of implementing a pedagogy of responsibility imagined by the new social defense. That pedagogy has to be started from the beginning of the trial, during the proceedings and even to the end of the prison treatment. The presence of the victim at the trial allows, to some extent, the offender to become aware of the seriousness of the committed offence, not only with regard to the abstract notion of a breach of peace, but also with regard to the injury caused, in concrete terms, to the victim. This awareness is often an important element of the initiation of responsibility, of life in society and of the fight against a second offence.

It is possible to reconcile the right to the victim's effective compensation with the requirement of responsabilisation of the author? To try to answer it is necessary to distinguish between cases of injuries resulting from personal attacks (article 706-3 of the code of criminal procedure), and cases leading to material damages following a robbery, a breach of trust or fraud and cases of slight injuries.

- In case of injuries resulting from personal attacks, the victim will be able to claim complete compensation[41] from the CIVI the day after the events. The sums independently[42] allocated by the CIVI will quickly be paid by the Guarantee Fund that will be substituted with the rights of the compensated victim, and will be able to claim, in turn, from the responsible party.

Will the responsible party, in these circumstances, make efforts to pay back the Fund when he knows that the victim has already been compensated?

The ability of the Fund to claim in turn will indeed be administrative and inpersonal compared to the abilities of the other payments departments, e.g. Social Security Office, to claim in turn.

There are two answers to this worrying question:

- Firstly, the association of already compensated victims with the public prosecutor must be encouraged, it is necessary however to humanize

41 The new law replaced the expression "physical injuries" by "injuries resulting from personal attacks" including moral injuries. Cf. in this sense *Couvrat, P.*, op.cit., p. 145; about the previous system, cf. Civ.2$^{e}$, 14th of December, 1987; *d'Hauteville, A.* Dalloz 1989, p. 256.

42 The compensation system by the state and now by the Guarantee Fund is autonomous, whether or not a public action is pending, whether or not a criminal or civil decision has occured, fixing damages or not.

the legal process;[43] to make sure that the victim is treated as a person with rights and not as an "object" of examination; and to make sure that the victim is kept up to date with his case.

This is a requirement of the respect of human dignity firmly asserted by the new social defense. The victim must be heared. He has a right to speak and this right must be used in a dialogue with the responsible party and the judges. The responsible party will be aware of the real and human consequences of his act, provided that those conditions are fulfilled.

- Secondly, the Guarantee Fund must take advantage of the recoursory action that the law attributed to the state (article 706-11 of the code of criminal procedure modified by the law of the 6th of July 1990). The Fund can associate with the public prosecutor in criminal proceedings even for the first time at the appeal level. The law provides that the measure of this recoursory action is fixed according to the amount paid by the Fund to the victim, as compensation or as a retaining fee, up to the compensation sum due from the responsible party.

Because our legal system is based on subrogation and interdependence between responsability and compensation, once again the problem of the solvency of non insured responsible persons is brought to light. Might not the Fund's recoursory action be, realistically or legally, fixed according to the contributory abilities of the sentenced person to make him aware of his responsabilities and not to make him permanently insolvent which is a possible cause of dropping out from society and of delinquency?

A settlement between the Fund and the responsible party would bring desirable flexibility.

*Marc Ancel* underlinded that "a too heavy cost of compensation might impede the author's social reintegration; and that the requirements or the controls made to enable this repayment may lead him to drop out from society, to deviance, and even to permanent delinquency."[44]

- In case of material damages and of slight injuries: Article 706-14 of the code of criminal procedure - subordinates state assistance, and now Guarantee Fund assistance, to the strict conditions laid down by the law of the 3rd of Januray 1977. The victim must justify being unable

43 It is the idea expressed by article 16 of the law modifying article 279 allowing victims to freely obtain copies of some documents in criminal procedures.

44 *Ancel, M.,* Le problème de la victime dans le droit pénal positif et la politique criminelle moderne. op.cit., p.136.

"to obtain compensation in any way, or effective and satisfactory compensation, and to be, therefore, in critical materiel difficulties." This system is really subsidiary since the proof that the responsible party cannot pay is required.

The law of the 6th of July 1990, however, extended that system in two ways:

- Firstly, the Fund will be able to help financially those persons suffering from total industrial disability less than one month.
- Secondly, the level of maximum personal resources (above which help is not granted) was increased with respect to that required to be eligible for partial legal aid i.e. 5,270 F.F. and, consequently, the maximum amount granted will be 15,750 F.F.[45]

These legal conditions of total industrial disability of less than one month, in case of physical injuries, and of an annual familial income of less than 63,000 F.F. lead us to make two comments.

Firstly, those victims concerned are very vulnerable and the offence will therefore cause more often **ipso facto** serious personal problems. Society's solidarity is then justified in conditions of the impossibility to make the author pay i.e. non identification or insolvency.

Secondly, the compensation of injuries can often, in this hypothesis, correspond to indemnities financially bearable for a solvent author, or for an author having found, during or after the execution of the sentence, financial and regular ressources, thanks to a legal work.

One can consequently say that it is in this field, of small and medium delinquency, that the principle of compensation by the responsible party can hopefully be effectively asserted. The criminal policy encouraging the offender to compensate his victim can be developed at every level of proceedings:

45 About the debate during the development of the bill in the Ministry of Justice and during the vote of the law in Parliament, concerning the measure of this progress, cf. *Favard, J.* and *Guth J.-M.*, op. cit. n° 10. The retained maximum is of course low: resources slightly above 5,250 F.F. per month do not allow, more often, the conclusion of insurance contracts against theft. Criminal policy to prevent victimization should be elaborated. Cf. *Ancel, M.*, La défense sociale devant le problème de la victime. op.cit., p.184.

- The public prosecutor can act educationally by linking his decision to stop or start legal proceedings to the efforts made by the author of the crime;
- the public prosecutor can also give the case to conciliators. The mediation[46] experimented with in some towns might be extended to very numerous small cases on the borderline between criminal and civil law;
- the investigating magistrate can use the bail (article 138-11e of the code of criminal procedure) and the judicical control laid down in article 138-15e and 16e of the code of criminal procedure (i.e. obligations to take personal or material guaranties aimed at protecting the victim's rights or justifying that he contributes to family costs, etc.);[47]
- the judge can consider the efforts of compensation made by the accused as mitigating circumstances, or can encourage these efforts by defering the pronouncement of the sentence, after having declared his guilt (article 469-3 and 469-4 of the code of criminal procedure). This deferment, created by the law of the 11th of July 1975, puts into action the propositon of the trial's caesura stated by new social defense.[48] A law of the 6th of July 1989 has moreover provided for the possibility to put the accused to probation (article 469-4 of the code of criminal procedure), and this probation can be, for example, the victim's compensation;[49]

46 Cf. Bulletin du CLCJ, (Connection Committee of Socio-educational Associations of Judicial Control), déc. 1986, n° 8. La médiation; *Franco, M.J.* (1988). La variante de médiation. Mémoire de DEA, Université de Montpellier I; *Apap, G.* (1990). La conciliation pénale à Valence. Revue de Science Criminelle et de Droit Pénal Comparé, 633ff.

47 The socio-educational control of the associations of judicial control intensifies remarkably the chances of success of the investigating magistrate's decision.

48 Cf. *Ancel, M.* (1989). La défense sociale. Que sais-je? (2nd). p.71.

49 The control of the probation imposed by the court increases highly the chances of success. It must be made by the magistrate in charge of the carrying out of the sentence in the past-trial phase or by "any qualified person". After one year's positive experience carried out in the context of a draft treaty concluded with the local court of Montpellier, the regional association for informing and helping victims in this area has started conciliation steps with this court. In this way, it was entrusted, by the magistrate in charge of carrying out of the sentence in the past-trial phase, with the control of deferment of the sentence with an obligation to compensate the victim.

- The magistrate in charge of the carrying out of the sentence in the past-trial phase might finally take into consideration the efforts of compensation made by the sentenced person when personalizing the execution of the sentence.

For Marc Ancel the trial does not stop with the pronouncement of the sentence but must be considered in a broader context, including in addition the execution of the legal decision and the complete fulfilment of the sentence.

The principle of complete compensation of injury has always been considered as a fundamental principle of civil liability. To implement effectively this principle however requires the search for and the sentencing of the responsible party and, this is sometimes forgotten, his solvency.

Thus, more often, those conditions are not fulfilled when serious injury has been caused by an act of delinquency. Society does indeed generate mass criminality and favours an anonymity that sometimes renders difficult the identification of the author. It generates, too, delinquency through negligence that can lead to serious and irreparable injury on an individual level. Classic civil liability therefore cannot fulfill its compensatory function.

The solution can only be collective such as the recourse to compulsory insurance for the victims of road accidents, or the intervention of the Guarantee Fund for the victims of terrorist attacks, and now for the victims of common law delinquency.

Civil liability stemming from the traditions of ancient classical law aims at moralising individual conduct. It can be used in a trial as a pedagogical instrument allowing the offender to discover his duties as a citizen, if the charge is financially bearable. To require from the offender the complete or part compensation of the victim, or the complete or part repayment of the sums payed to the victim by the Guarantee Fund, becomes then an element of a personalized sentence, turned towards the future.

Thanks to this double objective i.e. the compensation of victims and the responsabilisation of offenders, the law of the 6th of July 1990 fits in with the developpment of our liability law and into the criminal policy movement by the new social defense.

# The Unholy Alliance between Victim Representation and Conservatism and the Task of Victimology

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## Contents



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## 1. Introduction

Often we read about the victim movement. Some address the growth of victim assistance groups, some address the international effort to give victims a stand in criminal proceedings, some address the career of the victim in social sciences. This paper looks at the victim movement and draws parallels from the scientific analyses of social movements. It adresses the appearing prevalence of conservative ideologies and explains the role of victimology in face of these facts.

## 2. Social Construction of Realities and the Formation of Social Movements

Sometimes our world around us is so confusing that the facts no longer fit together. Then we feel: we do not need facts, we need beliefs. Interpretations.

It is a well established fact that people want to make sense out of the world even without knowing facts, and they do so by activating ideologies (see *Lerner* 1967; *Geis* 1982).

Sociologists like *Berger* and *Luckmann* (1967) teach us that there is no such thing as a single objective definition of reality; there are various and competing realities each of which is defined by a different group, public or culture. We are dealing here with various definitions not only of social but of pysical reality.

> "The same data of facts may have different meanings to different groups or people at different times, and so will constitute different realities. These different realities are usually expressed in different words and symbols which come to have a reality of their own, and language objectivates the common experiences and perceptions. Language structures our thinking, so that we tend to forget the difference between the facts and the meanings we give them" (*Mauss* 1975 p. 4/5).

What is reality, is a **Social Construction of Reality**. The early American sociologist *W.I. Thomas* points out that whatever people believe to be real will be real in its consequences (*Thomas* 1923).

While the general public may have a reality by (uninformed) consensus, subgroups have special interests. Around these interests a public is formed. If organized this public becomes eventually a pressure group. This is an interest group that focusses mainly on the political process to pursue its interests. The group seeks and finds alliances which go along the way and support the "common cause". They then make efforts to mobilize public opinion, and activate various other processes typical of collective behavior and social movements. Social problem movements, as *Mauss* elaborated, can be analysed in a model using three concentric circles.

1. The outermost ring represents a kind of public, or part of public, which has general sympathy but is variantly committed. They are the "fair weather friends" often providing financial support and other resources that the movement needs. Their votes and their sheer numbers can be used to add political strength (or at least the semblance of it) to the movement.
2. The next ring includes the active membership, individuals and organizations who have a definite interest in the success of the movement, but who are not exclusively bound by this interest. They have equally strong interests in quite other causes and may be willing to compromise earlier with the existing world and to accept some reform or amelioration. They are often important people whose public support for the movement will help and give it legitimacy and acceptance, representation and assistance.
3. The inner circle is its heart or core containing the principle leaders and organizations having their goals almost exclusively in the success of the movement. *Mauss* characterizes them as rather like enthusiasts in a new religious sect. If the movement fulfills its goals, members and organizers in the inner circle will try to keep the movement going in new directions with new goals and causes rather than permit it to die out.

The success of any social movement will depend on the quality of the membership distribution among these three circles.

In the case of the victims, after mass victimizations by two World Wars and by mass cruelties against wide parts of the civil population in Nazi Germany and the occupied countries, a growing awareness of victims took place. Concerned scientists wrote about the criminal and his victim, the victims role in crime, the functional responsibilities of victims and discovered victim precipitation.

Crime no longer could be seen without paying attention to the victim. With more and more concentration on victimization we had a blooming of the victim in social science, with the whole array of busy activities which is usually made around a science (Science enterprise, see *Sessar* 1986), such as congresses, journals, seminars, training courses, etc. The victim assistance movement can be identified, the movement to change the serving role of victims in proceedings and the movement for an international criminal and social policy exemplified by an UN declaration.

## 3. Victims and the Social Construction of Reality

When victimologists left the armchairs, they found that they have not been alone standing around the victim. The victim was in the focus of quite a lot other people: While some used the victim solely for explaining crime, others focussed at the problem of suffering, while again others concentrated at the problems the process of social control might have with victims. In the light of the social reconstruction of reality, these groups reconstructed the reality of the victim quite differently:

- One group looked at the suffering and the support offered by the organized society, by the systems of social assistance. They found that these people did not get help. They got together to assist in what they perceived to be victims' needs (Victim Assistance).
- Another group looked at the possibility to get protection by the formal system of social control, especially from the criminal justice system. They turned to improve the criminal justice system to pay more attention to the victim (Victim Rights).
- Some of them looked at their own favorite interest which they had channeled already into action. Victims were said to be discontent with the society which treated them so badly, and they looked to join forces. The crime victim's problem was presented to be a one symptom of what was conceived as a larger bigger problem, and rising to one higher level of abstraction in thoughts, one might combine their initial cause with the victims cause (Women's liberation, ecology groups, civil rights). For example, the victims' problem was seen as part of the problem of a society in which man opress women. In particular, sexual crimes and domestic violence became expressions of the oppression of women as a whole. "Rape cannot be prevented substantially without a continuing struggle by independent women's groups,

> significant changes in the conditions that affect the most opressed segments of the ... population, and a determined opposition to war" (*Schwendinger & Schwendinger* 1983 p. 14).

Victim assistance groups provide social services. Social services need money. They inevitably tend to turn to the established means of social control, to the government, the community, the criminal justice system. At the 2nd Annual Convention on Victim Assistance in 1976 in Fresno/ California Knudten told the representatives of victim assistance groups gathered that he would be interested in who will survive the next year. Knudten claimed that only those would survive who demonstrated to the existing system of social control that they were valuable for that system, that the system could gain by using the services the victim assistance group would have to offer. (*Knudten & Fresno* 1976, summarized in *Kirchhoff* 1977 p. 313 et seq.) If you are helping the system to achieve what the system wants then you will survive, otherwise you will never get the means to assist victims in the next year. Fine humanitarian motives will help nothing.

It is not yet known whether this realistic and for many disappointing address gave the final momentum to the foundation of the National Organization for Victim Assistance or not. In the States this event is a milestone in the history of a social movement which is one aspect of the victim movement.

It is not intended here to analyse NOVA or some other victim assistance groups. It is merely suggested that victim assistance groups may form a social movement and that research on social movements may help us to understand more fully what the victim movement means and what victimology is. This paper shares the basic assumptions that not only victimization as a field of scientific research and analyses is man-made - social problems also are man made in the sense that they come into existence through the definition of people who define the situation as problematic and who act correspondingly to these definitions.

## 4. The Natural History of Social Movements

Before we look into the connections between the victim movement and conservatistic ideologies, it is helpful to look at some research on social movements which help understand how the connections work and what victimology has to loose and to gain from it.

Scientists found it useful to describe a common feature to all social movements, this is their emergence, their career, their decline and their end. In the history of research on social problems it is usually implied that social problems generate social movements - therefore as long as the problem is there, the movement will prevail.

Since *Blumer* (1971) it is possible to reverse the view and to view social movements as collective enterprises to establish a new order of life. They derive their motivational power from dissatisfaction and from hope for a new scheme. *Mauss* (1975) concludes that social movements generate social problems (Mauss 1975 p. xvii). For him, interest groups and their publics are the creators or the "discoverers" of social problems.(In this view it is only consequent that sociological theories about social problems are simply constructions of reality offered by social scientists as interest groups, see the chapter on sociological theories on social problems in *Mauss* 1975 (pp. 20 to 37).

Researchers look at what they call the "natural history of Social Movements" (e.g. *Blumer* 1951; *Reissman* 1972). *Mauss*, after reviewing the research done so far, puts some greater emphasis on the end of a social movement while most other research leaves the movement at the full blown up stage.

The Natural History of a Social Movement may be analysed in five stages:

1. Incipiency

   is a general stage (*Blumer* 1951, pp. 200-201), full of uncoordinated efforts,with neither established leadership nor recognized membership. Iit is the formation stage of the outer ring with people beginning to feel a mild threat to the realization of certain interests they believe to be vital. In this stage most of the institutions in society will react with either abhorrence (if the idea is too shocking) or with an attempt to restore the consensus through conciliation, compromise and absorption. This response in turn requires that the general feeling is to be expressed more clearly, looking for clear boundaries. In the victim movement there is such a stage with several battered shelters for women (e.g.) Ann Arbor (USA) or Chiswick. This stage is illustrated (by *Mawby & McGill* 1987 pp. 76, 77 for England) , especially the boundary seeking process is clear in the discussion between Pizzey and the feminists movement.

   The next step is

2. Coalescence

which is marked by the gradual formation of the two inner rings of the movement. Formal and informal organizations begin to develop out of the segments of the sympathetic public and, as a result of verbalized perceived failures of the government or society in general to take action after hopes and expectations that such would be forthcoming. It may be that society-wide coordination is necessary at this stage, that alliances are formed, ad hoc committees created and, some more formal and regional organizations developed.. Cooptation at this stage is only possible if society approaches capitulation. Courts can play a role in this development as seen with the anti obscenity movement where civil rights decision triggered off a reaction formation towards coalescence on the side of the movement.

It is tempting to see the development of the National Organizations for Victim Assistance in this framework or the struggle of NAVSS (1986/87) in England. Most victim assistance movements of national character are in this stage where a central headquarter is formed and alliances are sought. The established settled went through this stage.

If government and other traditional institutions take notice of a problem and if these set out a series of reactions to cope with it, then the movement has entered the stage of

3. Institutionalization.

This does not mean the adoption of many of the movement's goals or objectives which is frequently acompanied by a rapid decline of the movement itself. Institutionalization of the movement means

- society-wide organization and coordination,
- a large base of members and sometimes resources,
- an extended division of labor,
- regular thrusts into the political processes of society, like lobbying, campaigning in elections,
- growing respectability.

The mass media begins to see the movement favorably. The politicians begin to pay attention and are pleased if the movement backs their points. Legislation begins to pass to solve the problem. For the movement it is the period of greatest power, support, fashionability. For society it means taking account of the movement with a repertoire

of routines which have the effect of greatly increasing the cooptation - element in the mix. Repression is left only for the extremists who refuse to be bought off by the reactions.

*Mauss* believes that most of the social movements enjoy the hey-days of institutionalism, like the law and order movement, the anti drug movement, the movement against pornography, women's liberation, the ecology and environment movement.

4. Fragmentation

   The irony of the further development is that the success leads to fragmentation. This has several reasons:

   - the outer ring and much of the middle ring are stripped away through accomodations and cooptation - people believe that "things really have improved", they redefine the situation and this lets them turn to other (perhaps related) causes. This will lead them to look at the survivor's of the movement as extremists, fanatics, radicals.
   - the inner circle may fight among themselves over the true doctrine and about the possibility to compromise a sacred belief. Others will call for a modification of the program. Others will advocate to go into a different direction, by this weakening the strength of the survivor's even more.

5. Demise

   is the final stage in the movement - most critical element's of the movement's program have been appropriated, most leaders and the most effective members have been "bought off" and the outside support dried up. Small bands of "true believers" will be targets of ridicule, or outright repression. *Blumer* observed that movements "fade away", and Banfield states "Social problems sometimes disappear in the normal course of events" (quoted by *Mauss* p. 67)

Social problems leave a residual which make it possible to look at revivals, periods of quiescence, or reformulations.

*Mauss* (1975, p. 66) visualizes the natural history of social movements in a graph which is copied below. This natural history has several parallels to *Hauser's* theory of social change.

## 5. Observations in Victim Movements

Parts of the theory described above can be applied to the growth of the victim movement which came quite surprisingly even for victimologists. Stations of the history can be pointed out.

*Mauss* describes that at the institutionalized phase, social movements were to accept alliances from quite a different position. The women's movement e.g. was crucial for the momentum the victims'movement gained - one cannot explain the creation of shelters for battered women and rape crisis centers without going back to the women's movement. The diverse fractions of this movement found, as *Amir* and *Amir* (1979) put it, the smallest common denominator in actions promoting these institutions.

Sometimes the cooptation by the "establishment" can be followed very clearly by looking at some details of the rising new groups.

In the Federal Republic of Germany the cooptation process can be demonstrated by the fact that besides feministic shelters for battered women there opened shelters run by the churches. These shelters, regularly not as agressive on special societal issues when compared with the "free feminist" shelters, were the first to get communal finances for their institutions. The feminist shelters did not accept these welfare subsidies for specific philosophical reasons. Nowadays they receive in a number of states direct a financial assistance from the government separate from welfare contingencies for "people who cannot help themselves" and who are therefore on welfare subsidies. Of course money is needed and cannot be produced by the shelters, and the degree of cooptation is only gradually different. In Germany in 1977 seventeen persons founded the Weiße Ring, an organization which , according to their Basic Charter of Incorporation, assists victim in financial needs and supports administration involved in crime prevention. If this can be called the German branch of the victim movement, it started already in close cooperation with law enforcement and the police. The group has now in about 250 cities so local branches. They are headed by so called residents. These are volunteers assisting victims and asking the headquarters for financial assistance. Each case used to be checked by the innermost circle, the Acting Executive Committee. It was interesting to see that retired high ranking police officers of the Federal Office of Investigation took a leading role in the group, while the Chairman appeared to be a merchant in the security business. At times he was a tv journalist well known all over

Germany for his show where unsolved criminal cases were presented to the general tv - public . The public was asked to assist police in clearing the case. The Weiße Ring was able to collect money from its membership, by now more then 32,000 people. They received money from private donators so that anually more then 2 million dollars are provided for individual victims of crime. It is obvious that a mobilization of such a big group of citizen behind the slogan "Crime goes up - we assist victims" is close to a social movement. Besides assisting individual victims, the group is now very active in rallying for an improvement of the Victim Compensation Act. A sociological analysis of this movement is still at its beginning (*Kiefl & Lamnek* 1986, p. 317 et seq. and remarkably withdrawn and reserved).

It seems as if the giant dimension of the organization with its clearly demonstrable connections to social control institutions achieves effectively what otherwise must be achieved through cooptation - here the cooptation is already in the funding phase through an alliance with crime prevention measures. Given its enormous financial means this organization is able to raise funds from the private sector, it is difficult for other victim assistance activities to win ground. This in a way controls the development of victim activities.

In some phase of the natural history of a social movement the officials react towards it by setting up special government commissions to investigate the cause of the movement and to recommend solutions to the problem. In 1982 the President of the United States called together the Task Force on Victims of Crime. The report of the Task Force was published the same year (*President's Task Force* 1982).

Presidential Task Forces on Crime were called by President Johnson recognizing the urgency of the country's crime problem and the depth of ignorance about it (*deB Katzenbach* 1968, Foreword). The Harvard University Professor James Vorenberg acted as the Executive Director of the Commission, pulling together hundreds of expert consultants, among them the most renowned scientists in the field of crime and criminal justice. As a matter of fact, the work of the Commission on Law Enforcement can be seen as a milestone in the history of criminology. In the first concerted efforts scientists of the field gave evidence to the fact that their analyses and policy recommendations in reality added to the knowledge what no other scientistic profession was able to do. From this moment on the criminologist was established as the respected member in the academic field. Obviously it had contributed to knowledge in a field valuable for society and politics.

The *President's Task Force Report* (1968) and the different side reports had an immens influence on shaping the societal reaction in the Johnson - Nixon - Ford Area.

Therefore the influence of the President's Task Force on Victims could be expected to be great. An analysis of the Report on Victims shows that the Task Force stands very much in favor of what is to be seen as victim assistance programs in the States. This might be another step into the institutionalization phase of the victim movement.

The Report itself was evaluated elsewhere (*Kirchhoff* in *Separovic* 1988 p. 110 et seq.). The Commission stated that citizens from all over the country

> "told us again and again how heartened they were that this Administration has taken up the challenge, ignored by others in the past, of stopping the mistreatment and neglect of the innocents by those who take liberty for licence and by the justice system itself" (p. ii).

This is a quite different language than the Task Force Reports of the sixties! The Task Force reporting 1982 finds it necessary to restore balance to the criminal justice system, a balance of the offender's rights with the victim's rights.

The report has two parts, one part in which the reader is confronted with a shocking reality of criminal victimization.It gives a grim picture of severe violent crimes and the victims, the plight of the victim is depicted. The message is: the criminal justice system must again become fair, it has lost the balance that has been the cornerstone of his wisdom (p. 16). The Task Force on Victims recommends among other things:

- negate bail to people who are found by clear an convincing evidence that they present a danger to the community;
- give prosecution the right to expedited appeal of adverse bail determination;
- reverse, in case of serious crime, any standards that presumptively favors release of convicted persons awaiting sentence or appealing their convictions;
- provide penalities for failing to appear while released on bond that are more closely proportionate to penalties for the original offence
- tighten the strictness of due process in collecting evidence against the offender;

- open parole hearings to the public;
- abolish parole;
- limit judicial discretion in sentencing;
- make it mandatory for school officials to report violence against students or teachers - make employees' sexual assault, child molestation and pornography arrest records available to employers in cases where work will bring them into contact with children;
- provide for victim impact statement at sentencing;

and so on.

(Having noticed the recommendations we have to read the title of the Task Force again. It's name is really "Task Force on Victims").

To bring balance to the justice system, a constitutional amendment is proposed to the Sixth Amendment. According to this plan, the constitution should give the victim the right to be present and to be heard at all critical stages of judicial proceedings in every criminal prosecution (*President's Task Force* 1982 p. 114). In short, the Task Force Report reflects a law and order philosophy which assumes for certain that the victim has the same interests as the law and order proponents. This is an usurpation of the victim by conservative law and order ideologies. Miller in summarizing the ideological positions of right lists the crusading issues of this group:

- excessive leniency towards lawbreakers
- favoring the welfare and the rights of lawbreakers over the welfare and the rights of their victims, law enforcement officers and the law abiding citizen;
- erosion of discipline and of respect for authority;
- excessive permissiveness (*Miller* 1973).

The issues raised by the President's Task Force Report on Victims truly reflect *Miller's* observations.

In a time where a social movement seeks for greater societal recognition, it might find out that other societal groups discover that they can use the victim too: Karmen observes that "speakers of the conservative law and order movement have contended that liberals and radical leftists in the civil liberties movement show excessive concern for the rights of suspects and defendants at the expence of law abiding citizen and innocent victims"(*Karmen* 1986, p. 21).

In this climate, the victim assistance movement might be used or maybe coopted by a very repressive criminal policy which reflects the ideology of law and order and conservatism. The founder of the German child protection movement demanded in the beginning of the movement the death penalty for all who battered children (*Bärsch* 1988). In the same line was the idea to ask for an island in the Atlantic ocean where all the persons who severely assaulted children would be brought as internees. It took this movement thirty years to overcome the anti-offender ideology and to return to a pro-victim ideology (*Bärsch* 1988, p. 2).

In 1988 *Schreiber* demanded from the legislator several steps which he justified with the demands of the victims:

- Seing it from the victims' perspective, *Schreiber* demands that
- punishment, proscribed and meeted out, must again become a deterrent;
- an equilibrium between offence, offender and victim must be restored;
- it is unbearable that political demonstrations are misused by political chaots;
- probation and parole should be abolished for terrorists;
- it is unbearable that crime pays, that drug dealers can accumulate millions for which police does not even have the technical equipment to search;
- it is unbearable that corrections fully neglect the concept of severity of guilt while applying modern means like furloughs to mechanistically;

*Schreiber* pretends to stand in the shoes of victims. He is a former president of the police in Munich and now professor of the university of Munich. (*Schreiber* "Is our democracy still able to act?" paper presented to the Study Center Weikersheim on June 13 and 14, 1987, reported by *Schmidt* (PFA 1988, pp. 179-180). It is obvious that he preaches law and order while justifying his political favorites with "the victims' perspective". This abuse of the victim for political reasons must be rejected. Therefore it is impossible to overlook these unscientific statements of *Schreiber's* belief.

The Canadian Task Force Report on Justice for Victims contains 79 recommendations which are far more sober and not so fervent law and order oriented than the US Task Force Report. Among the recommendations we find that the services for victims should be paid not from general tax revenues but through a fine surtax to generate funds for victim services

within each province. In Manitoba e.g. the Victim Assistance Funds, used to pay for the development of services and programs for victims, is financed through the imposition of a 12% surcharge on existing fines. This is based on the belief that those who break the law should bear the responsibilities for supporting victims, in cases where no fine is meeted out the surcharge is $ 25 .If the offender does not pay, s/he will be obliged to serve additional days in prison or complete additional hours in the fine option program due to the surcharge. Here we see that a fine connection between victim assistance and increased offender oppression of the offender (*Manitoba Attorney General* 1988). Why, if the Manitoba Attorney General wants to know what works best for victims, does he not use general tax funds to pay for it?

## 6. Consequences

Scientific theory in any field of science is a kind of social reconstruction of reality. Sociological theories about social problems are presented by *Mauss* (1975) as constructions of reality offered by social scientists as interest groups. It might be helpful to realize that as soon as we talk about the victim movement we have to deal with a field that is not science in itself but is subject of scientific research. We must remind ourselves that victimology is different from victim assistance. Helping victims of course is practical social work and not science. This is not debatable.

Victimology is the social science of victims, victimizations and reactions to boths. The reactions may be formal or informal. It is based upon an normative orientation which is scientific.

That implies that not all ways of constructing reality can be used here but only certain whose goals constitute a description, measurement, analysis or interpretation of patterns, uniformities, associations and probabilities and eventually causal relationships (see *Wolfgang & Ferracuti* 1967 p. 24 and 25).

This activity is different from the conservative law and order demands in the name of the victims adressed in the section above. *Sessar* (1988) calls this phenomenon "Tertiary Victimization" - by he means the use of the victim as a means of social control -including the uses and abuses by the criminal justice system and by policy makers and legislators - into the scope of victimology. The fact that these misuses happen, does not disqualify victimology as a science. Victimologists however should be no longer willingly accept every statement which is made as a statement "in the name

of the victim". It is interesting to note how seldomly empirical research is published which adresses directly the needs of the victims as the victims see them (*Maguire* 1985). The little research which is supplied does not indicate that the assumptions of the spokesmen of victims are true. It seems that victims are not adequatly represented by voices heard in the institutional phase of the victims movement.

Victims seem to have a need for information on the progress of the case (*Maguire* 1982, 1985; *Shapland* 1984), practical needs in the first few days after victimization and emotional needs expressed through fear, anxiety, nervousness, self blame, anger, shame, difficulty in sleeping (*Friedman et al.* 1982). Certainly, some victims of serious crime report that they have been very much affected. These cases then were carried on to generalize the needs of all victims, understandable in the time of consolidation.

Clearly, victimology is not a social movement, even if this is often reclaimed.

Nevertheless, for victimologists it may be helpful to look even at one's own science in terms of a social movement.It may be assumed that quite surprising similarities can be discovered between the natural history of social movements and the "natural history" of victimology. Is the phase after *Mendelsohn's* statement a period of cooption by criminology which, given the demands of *von Hentig* and *Schafer*, have coopted almost to the capitulation of victimology? Is the start to new horizons with *Neuman, Elias* and *Separovic* a change in the goals like in the end of the institutional phase of some movements? Is a UN declaration of Victims of Crime and Abuse of Power a sign of cooptation by the criminal justice system, based on big swatches of speculation and ideological convictions which do not stand the test of rigorous scientific research? The World Society of Victimology and the growing number of National Organizations of Victimology in Greece, Brazil, Jugoslavia, Japan, Hungary and Poland can interpreted as a sign of consolidation and institutionalization. Certainly in the same vaine can the Forum be seen, the European roof organization of national victim assistance groups in European countries.

It is not yet clear whether the national societies of victimology constitute the beginning of fragmentation. We observe however that the discussion on victimology as a science of crime victims or a science of Human Rights Victimizations (see *Kirchhoff* 1990 and 1991) is not finished. Is it fragmentation if we now have not only the meritable journal "Victimology - An International Journal" edited by *Emilio Viano*, but the Neswletter of the World Society of Victimology WSVN, the Newsletter of the Australian

Society of Victimology, the Victimologist from Zagreb and the new International Review of Victimology edited by *John Freeman, Leslie Sebba* and *Joanna Shapland*?

It is a hope that *Mauss'* model remains a model, a metaphor: for the better of victimology. This hope is justified - for what reality is, that is constructed reality. Answers cannot be given now - a sign that quite a lot is still to be done by victimologists.

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# Victims' Rights under the Iranian Law

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## Contents



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Basically there are two aspects for the study of victims' rights: (1) to see whether the socio-legal system in a country provides the necessary level of relative security for everyone, does it prevent the potential victim from becoming an actual one, and (2) if this fails, then how does the system compensates the victim for the injury and damage he or she may have undeservedly suffered. In other words, the two main concerns in protecting the rights of the potential and actual victims in any society are **Prevention** of crimes and **Compensation** for damages. These objectives can be achieved only with cost and compromise to society as a whole.

In preventing crime, every society must by necessity restrict some of the rights which otherwise everybody likes to enjoy. No right or privilege is absolute if all members of society are to share more or less the same social values. Freedom of expression is guaranteed as long as it does not violate the right of other people to be immune from malicious attacks on their character and reputation. The right of the individual freely to enter into a private transaction with another individual is respected unless it becomes unconscionable in its outcome.

One can judge various criminal justice systems (and the social system behind it) on the basis of what priority they give to the protection of one set of specific human values as against another. In the United States, for example, the right of the accused - which potentially means everybody - to be immune from the pressures the police can exert to get involuntary confessions is considered more important than the right of the crime victim - which again may potentially include everybody - to have the offender brought to justice and punished in every individual case. The order of priorities recognized by the legal system requires general protection for the public in the use of their constitutional rights; rights of the individual victim is protected within the context of this basic concern for freedom of movement, expression and productive effort. In another society, the right to be protected against unprovoked attacks and other offenses may be considered more essential; certain limitations imposed on the rights of the public is considered a fair price to be paid in order to secure a minimum level of order and security for every person.

The question of compensation for victims of crime is even less settled than that of priorities of values in crime prevention policies. Here again, we can think of a scale according to which various societies compensate crime victims, from a criminal justice system which does not provide for the victim at one end, to asystem that provides total compensation with public funds to peoplewho have undeservedly suffered from a crime. At this end of the, spectrum one can think of total compensation by a national system of insurance coverage; all eligible members of a society that has failed either

to educate or provide properly for all its members collectively pay for the misfortunes that befall the victims of crime by paying their dues for protection against crime. Such an insurance plan is already used to a large extent in traffic accidents; victims of such accidents receive adequate compensation for their injury and damage irrespective of who was responsible in causing the accident. We are very far, however, from establishing a system that would provide compensation for all crime victims.

The Iranian criminal justice system, neither under the Shah or the present Islamic regime, did not, and does not provide compensation for the victims of crime. However, as we shall see, the pre-revolutionary system gave the victim an important measure of control over how the offender was to be punished. The post-revolutionary system also gives the victim an important role to play in the administration of the criminal justice system, and thus makes some measure of compensation possible in practice.

There were certain provisions in the Iranian penal system before the Islamic revolution that accorded certain important rights and privileges to victims of crimes. Although the system did not provide for payment of direct compensation to crime victims, it gave them certain rights that could be substantial in their outcome. For example, Article 45 of the Iranian Penal Code gave the criminal court power to reduce the punishment of a convicted criminal if there were certain extenuating conditions in the case. According to this Article:

> "In crimes and misdemeanors the court can, following the provision of Article 46, fix the punishment to less than what the law has provided, if is established that there is an extenuating circumstance in the case. "Extenuating circumstances" that can result in the reduction of punishment are such factors or considerations as the following:
>
> 1. Withdrawal of complaint [by the victim] or the Plaintiff. 2..."[2]

There were five more such "circumstances" enumerated in the Article, but the first and most important one was the consent of the "victim" to withdraw the complaint.

Article 46 of the Penal Code provided the limits within which the court could reduce the amount of punishment. According to this Article capital

2 All translations from the Penal Code of Iran, Criminal Procedure Act, Security Measures Act of 1960, and the *Hodoud and Qisas Act* are mine.

punishment could be changed to life imprisonment or "criminal imprisonment of First Degree" and life imprisonment could be changed into "criminal imprisonment of the First or Second Degrees".

It should be noted that the Iranian criminal justice system distinguished in Article 5 of the Criminal Procedure Act between two types of crimes; those that were more dangerous to the public, and those that were either less dangerous socially, or else were of such a nature that their prosecution could have caused great damage to the victim involved. In the first category of crimes, the Public Prosecutor would start criminal proceedings irrespective of whether the victim of the crime chose to press charges or not. In the second category, mostly out of concern for the privacy of the individual victim, the criminal proceedings would not begin unless the victim made a complaint. To find out whether a particular crime belonged to the first or the second category of crimes, one would have to look at Article 277 of the Penal Code, which referred to specific articles of the code as an exclusive listing of the second category crimes.

In crimes that could not have started without a complaint by the victim, Article 48 of the Penal Code provided that the complaint should be filed within six months from the time the crime was committed; otherwise the crime could not be prosecuted unless there was an acceptable justification for the delay. Thus, in such crimes as enumerated in Article 277 of the Penal Code, including, among others, various sexual crimes, the victim had an important leverage which could be used somehow to make up for the suffering and damages caused by the offender. For instance in the traditional Iranian society where the "shame" of rape would remain with the victim and ruin all her chances of ever getting married, the rapist could have been induced to marry the victim in return for the latter's consent not to press charges. Certainly the quality of such a marriage would be substantially less than ideal, but in the atmosphere existing at the time, and certainly much more so now, this measure of compensation could somehow ease the tremendous burden suffered by the victim. That is why the law had specifically provided in Article 209 of the Penal Code that if the offender agreed to marry the victim in certain specified cases, he would not be prosecuted for his sexual crimes.

As mentioned before, even in the first category of offenses (namely those where only the initiative of the public prosecutor would be needed to start prosecution), the withdrawal of complaint, or consent to drop personal charges by the private victim(s) of crime was the first consideration to reduce the nature or extent of the punishment. In such cases, too, the victim was given a substantial leverage, albeit indirectly, to influence the outcome

of a pending criminal case. He or she could use this power to receive at least partial compensation for the damage he or she had suffered in the crime.

The Penal Code provided that for the "consent" to be effective, it must be clear and unconditional. And once the victim gave his or her consent that the charges be dropped, or punishment reduced, he or she could not change his or her mind and request punishment again. If there were more than one victim in a criminal case, for their withdrawal or consent to be effective, it must have been given by all the victims. If the victim had a regular guardian, the right to consent to or drop charges would vest in the guardian; if the guardian was "accidental", meaning that he or she was appointed for a specific purpose, he or she could not consent to drop charges unless the prior approval of the Attorney General was also obtained. In case the victim died, the right to withdraw or consent to drop charges would vest in the heir(s); if there were more than one heir, to be effective all must have agreed to drop charges.[3]

There was another provision, which gave the victim priority over the public in satisfaction of damages. Article 4 of the Penal Code was rather self-explanatory:

> "An offender must return to its owner the property he has obtained through his crime, and if it does not exist any more, must return its price or equivalent. He must also compensate the victim for the damages suffered. If the offender must also compensate (the State) for having violated some public rights, the return of the property or payment of damages and other rights of the private claimant shall have precedence over that of the public."

The body of law that dealt with the subject of **prevention** in pre-revolutionary Iran was the Security Measures Act of 1960. The Act was modeled after European, especially French, Penal Codes, which in turn were inspired by ideas of the Italian School of Criminology and the more progressive concept of Social Defence. In several important respects it deviated from the traditional concepts of punishment which require the establishment of guilt or criminal responsibility, by proper court proceedings, before the individual rights and liberties of the offender could be suspended. The main objective of Security Measures is crime prevention, their basic premise being that if a dangerous state is observed in an individual and can be reasonably believed to be conducive to future criminal activity, society is

3 See Article 47 of the Penal Code.

justified in imposing certain restrictive measures on the individual before the potentially dangerous state is turned into an actual criminal act. Since the Security Measures, unlike punishment that is imposed for an infraction in the past, aim at prevention of crime in the future, there is no need to establish criminal guilt before they can be implemented. In other words, it is not **mens rea** which is the guiding principle in the application of Security Measures, but the existence of a dangerous condition in the individual.

The principle of legality of punishments is still the superseding principle in all civilized systems of law. Simply put it means that no act may be punished unless it has been previously defined as a crime, and a specific punishment is provided for it by law. This principle which is one of the cornerstones of almost all modern Penal systems, and a necessary guarantee against arbitrary punishments, restricts the domain of Security Measures to a large extent. Thus, it was provided in Article 1 of the Security Measures Act of 1960 that "...the court can adopt Security Measures only when a person has committed a crime." It should be noted, however, that the security measures enumerated in the 1960 Act could be imposed without regard to any particular Article of the Penal Code; such measures could be imposed independent of and separate from the punishments anticipated by the Penal Code. Thus, for example, Article 3 of the Security Measures Act of 1960 provided that insane criminals be kept in special institution, alcoholic offenders be cared for in special clinics and juvenile offenders spend time in the Center for the Rehabilitation and Reeducation of Children, all for the purpose, not of punishment but of treatment.

Depending on how these measures affect the rights and privileges of "potentially dangerous" individuals, they were classified in the Act as follows.

1. Those that eliminated the "dangerous" person's freedom for a specific period of time.
2. Those that limited some of the freedoms for a specific period of time, and finally,
3. Those that had a financial or economic impact. Here we briefly describe each of these measures.

## I. Measures eliminating freedom.

These measures were basically aimed at past offenders who had a "dangerous condition"; such persons would be totally deprived of their freedom unless and until their "dangerous condition" disappeared. The Act

had provided for several categories of persons with a "dangerous condition". Article 3 provided for the detention of the following as long as they were considered dangerous.

1. Insane criminals to be kept in special mental institutions that were to be built for the criminally insane.
2. Habitual offenders to be kept in exile.
3. Jobless offenders and loiterers to be kept in agricultural and industrial workshops.
4. Offenders addicted to alcohol and drugs to be kept for treatment in special centers.
5. Youthful offenders to be kept in the Center for Rehabilitation and Education of Children.

Since all these security measures were of an exceptional nature and open to possible misuse at the hands of enforcement officers, the law had provided for certain safeguards. For one thing, the security measures could be imposed only after a crime had been committed, and only as part of the over-all punishment. Besides, the Act had provided for certain specific conditions under which the measures could be imposed. For example, according to Article 5 of the Act:

> "If a person is convicted twice or more for having committed an intentional crime or misdemeanor, to more than two months of imprisonment, and then commits another offence that can be punished by imprisonment, and thus the court decides that he has a "dangerous condition" and is inclined to committing other offenses, or lives by pimping, prostitution or the like, he (or she) will be considered a habitual offender and the court can decide to have him kept in exile for an indefinite period of time. The period spent in exile is substitute for the punishment."

Despite such precautions, the language of the Act was still very broad and open to criticism. It would not have been very difficult to abuse the law and take away the freedom of such former offenders who made a nuisance of themselves for the law enforcement system.

### II. Security measures that restricted some of the freedoms

These measures were enumerated in Article 8 of the Act. They were:

1. Restriction to engage in particular business, profession or trade.

2. Restriction to live in a particular location.
3. Expulsion of foreigners.

**III.The financial or economic measures**

Article 12 of the Act provided for measures that had a financial or economic impact. They were:

1. Confiscation of dangerous products.
2. Precautionary guarantees.
3. Closing down of establishment.
4. Deprivation of parental rights, guardianship and the like.
5. Publishing the court's decision.

## 1. The Penal System of the Post-Revolutionary Iran

The Islamic Republic has a clear idea of what it wants to do with the offender; the government and various groups associated with it routinely impose severe punishments for all sorts of crimes, apparently believing that by such harsh methods they can solve the crime problem! The Prosecutor General of the regime, Mohammad Khoeniha, is reported to have defended the death penalty as the proper punishment for drug-trafficking, with the following words:

> "The implementation of this law has been very successful up to now...We hope that we shall solve this social problem through the decisiveness of the security forces and that the executions will continue until the last smuggler in the country is eliminated."[4]

The statement clearly reflects the policy of the regime in fighting all social problems, and that policy may even seem successful in the short run. The point is, however, the high price the society must pay as a whole in an atmosphere of agonizing fear, doubt and loss of freedom in order to make crime **prevention** a relative reality. As for the second objective, the victims' rights, i.e. **compensation**, the Islamic Republic may seem even more successful, albeit, as we shall see, in a curious way!

4 BBC Summary of World Broadcasts, 6 April 1989, quoted in AE op.cit. p. 8.

In 1982 the Islamic Republic passed a law called the law of *Hodoud and Qisas*. This new legislation replaced the Penal law of 1916 and became the basis of the executions and other physical punishments that were imposed on thousands of Iranians.

The new law, which is squarely based on Islamic principles provides for two kinds of punishment; *hodoud* which cover offenses that are considered violations of God's will as enunciated in the Koran and the Islamic traditions, and *qisas*, which is basically a comprehensive principle of punishment in Islam. Islamic penal law also provides for *tazirat*, and these are usually mild punishments covering less serious offenses, determined at the discretion of the individual judge.

*Hodoud* are of two kinds:

I. Those that cover specific offenses and their respective punishments as provided in the Koran itself. They include:

1. Theft, its punishment being cutting off the hand as provided in 38 Surah V, The Table Spread.
2. Adultery, with a punishment of one hundred lashes according to 2 Surah XXIV, Light.
3. Baseless accusation of adultery, with a punishment of eighty lashes, as provided in 4 of the same Surah, Light.
4. "Waging war upon Allah and His messenger and "striving after corruption in the land", punishable, according to 33 Surah V, The Table Spread, by "killing or crucifixion", or having the hands and feet on alternate sides cut off, or expulsion out of the land.

II. There are three other offenses for which there is no specific punishment in the Koran, but which are punished severely on the authority of Islamic traditions and the interpretation of those traditions. They include:

1. Sodomy.
2. Adultery with a married woman.
3. Drinking alcohol.

In the 1982 penal code of the Islamic Republic, the last three mentioned offenses carry the death sentence, the last one (drinking alcohol) only if it is repeated several times.

The Islamic Republic has used the 1982 law and the Islamic principles behind it, especially the Koranic provisions against those who fight Allah (*moharebs*) and those who "spread corruption on earth" (*mofsed f il arz*) to wipe out thousands of people, including those who dared to raise their objections against the excesses of the regime. The statements made by Ayatollah Yazdi, the head of the Judiciary in the Islamic Republic is quite revealing. He made it clear in his May 1990 interview on judicial issues that as far as the regime was concerned, members of opposition groups, including the Mujaheddin, were collectively guilty of "waging war against God" and "corruption on earth", and thus liable to the death penalty on the basis of their membership alone.[5]

Besides the seven enumerated crimes for which there is specific mandatory punishments, every other offense is punished according to the *qisas* principle. Qisas is the embodiment of the principle of retribution in its most exacting form.

The idea is that when a person commits an unprovoked crime against another, he should suffer the exact consequences as the victim. If he has killed someone, he should be killed for it; if he has broken another person's right arm, his right arm should be broken. The religious authority for the principle is derived from *ayahs* 178 and 179 of the Surah II, The Cow:

> "178. Believes, retaliation is decreed for you in bloodshed: a freeman for a freeman, a slave for a slave, and a female for a female..."
>
> "179. Men of understanding! In retaliation you have a safeguard for your lives; perchance you will guard yourselves against evil."[6]

Allah's intentions are made more precise in 45 Surah V, The Table, to wit:

> "In the Torah We decreed for them a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and a wound for a wound".[7]

What is noteworthy about the Islamic Republic's penal system, and its underlying Islamic concepts is its nearly total retrogression to the period of

5 The daily Ettela'at, 30 May 1990.

6 The Koran, translated with notes by N.J. Dawood (Penguin Books, 1981) p. 350.

7 Ibid p. 392.

private criminal justice and the important role the victim of crime plays in determining the social reaction to offender's criminal act. In other words, those offenses for which there is no fixed, mandatory punishment in the Koran or the traditions, are regarded basically as infringements upon the rights of the private individual who suffers from them. As such, the victims of these crimes are given the final word either to press charges or forgive the culprit, which would be sufficient to set him free.

It should be noted also that Koran commands the victims of crime, and the next of kin in case of murder, to show compassion and understanding and forgive the offender. Following the quoted passage of 178 Surah II, The Cow, above, Koran provides:

> "He who is pardoned by his aggrieved brother, shall be prosecuted according to usage and shall pay him a liberal fine. This is a merciful dispensation from your Lord. He that transgresses thereafter shall be sternly punished."[8]

And again, after stating the principle of retaliation in 45 Surah V, The Table, as quoted above, Koran provides the following language recommending forgiveness instead of revenge.

> "But if a man charitably forbears from retaliation, his remission shall atone for him. Transgressors are those that do not judge in accordance with Allah's revelations."[9]

The victim can certainly demand compensation for his or her injury and damage before giving consent or forgiving the culprit. If the parties agree on the amount to be paid by the offender, the payment becomes the offender's only obligation; he will not be punished.

There is language in the *Hodoud and Qisas Act* that make the consent of the owner of blood-money an important element in the administration of criminal justice in the Islamic Republic. For example Article 15 of the *Act* provides:

> "When a person is convicted to *qisas*, he must be killed with the permission of the owner of the blood-money [i.e. his or her heirs].

8 Id. p. 350.

9 Id. p. 392.

Besides, there are two other occasions where the offender is required to pay compensation, according to a detailed schedule of *diahs*, and not be punished for his offense. In these cases, too, the *diah*, that is the fine collected, goes to the victim.

1. Unintentional murder or personal injury. If a person kills or injures another person by mistake, he will not be convicted to the death penalty; he pays the special *diah* or blood-money provided for the particular crime committed.
2. When it is not possible to implement the *qisas* principle, as the exact retribution for the crime committed, again a *diah* will be collected from the offender and paid to the victim. For example, the offender breaks the middle finger on the right hand of the victim. That same finger on the right hand of the offender, however, has been already lost, so that the principle of exact retribution cannot be applied. Since it is impossible to apply the principle of *qisas*, a special *diah* is paid to the victim.

The *diahs* for all sorts of crimes are specified in Islamic law; the *kadi* (judge) just looks at the chart and fixes the right amount to be collected from the offender. To give one example, the *diah* prescribed for man-slaughter is 100 camels, or 200 cattle, or 1000 sheep or 1000 *methghals* of gold, or 10000 *derhams* of silver, if the victim was a man!

## 2. Offender as Victim

The Islamic Revolution brought with it a wave of devastating violations of human rights. The summary executions carried out in the first days after the supporters of the regime took control, could be perhaps explained as excesses of the crowd in its irrational zeal to "revenge" the various injustices which were allegedly committed by the former regime in Iran. But the illegal executions, baseless confiscation of private property, and the cruel methods of treating the opponents of the regime did not stop then; it is still going on in the name of Islamic justice. Various international organizations, including Amnesty International have done a great service to the spread of knowledge and consciousness, by documenting, under very difficult conditions, the cruelties committed by the regime against the people it defines as "criminals".

As of 1979 when the Khomeini supporters took control in Iran and established the Islamic Republic, the world has learned about the atrocities

and outrageous violations of human rights regularly committed by this regime. The following brief accounts are given just to provide a glimpse into the nature of a regime that routinely commits the most horrible crimes against the so-called "criminals".

## 2.1 The Use of broad and vague Language to kill the People

I quoted the language in the Koran which provides the death penalty for people who "fight Allah" and "spread corruption on earth". The Islamic Republic has used this broad and vague language to kill thousands of its political opponents. The regime has stated repeatedly that any opposition to the Islamic Republic is opposition to God, the implication - borne out by actual experience - being that any person who opposes the Islamic government will be executed without mercy.

In view of the fact that the present regime is covered with extreme secrecy and total lack of reliable information, it is not possible to get the exact figure of the people who have lost their lives as "offenders". Nevertheless the available estimates based on various sources of unofficial information, including extensive interviews with eye-witnesses and relatives of such "offenders" indicate the enormity of the repression exerted by the regime in the name of law enforcement. According to the latest report of Amnesty International:

> "Arbitrary arrest and unfair trial of political prisoners, including prisoners of conscience, continue in Iran. Torture and the application of punishments which constitute cruel, inhuman or degrading treatment remain widespread. Thousands of people were executed between 1987 and 1990 including more than 2,000 political prisoners between July 1988 and January 1989. This report records the activities of a group of government officials known to prisoners as the "Death Commission": the group reviewed the case of political prisoners in Tehran's Evin Prison and Gohardasht Prison in Karaj, sending hundreds of them to their deaths in the latter part of 1988. Many of those who died had been imprisoned for their non-violent political activity."[10]

10 Iran, Violations of Human Rights 1987-1990, Amnesty International 1990 AI Index: MDE 13/21/90, page 1.

## 2.2 Punishment of the Infidel and the Apostate

There is consensus among Moslem clergy that if a "natural" Moslem, meaning a person born of Moslem father and mother, renounces Islam and embraces another religion, his blood can be split. He is called *mortad* and is no longer the master of his life, property or social rights. He belongs to the group of people who are called *"mahdoor-ol dam"* (whose blood is wasted). In the words of an authority:

> "The male apostate from Islam...is killed...The woman who commits apostasy is imprisoned and beaten every three days (the female slave by her master) until she returns to Islam."[11]

The marriage of an apostate becomes automatically void,[12] and he or she loses all ownership rights.[13]

It is interesting to note that the *Hodoud and Qisas Act* of the Islamic Republic indirectly follows the rules about apostasy. The Act also discriminates against those that do not belong to an established religion (a religion that has a divine "book"). For instance, if a Moslem kills another Moslem, the law of *qisas* will be applied to his case. But if he kills a *"mahdoor-ol dam"* (including an infidel), he is not punished for it.

Even if he makes a mistake as to the religious convictions of the victim, and erroneously thinks that the prospective victim is *"mahdoor-ol dam"*, he will not be punished for his crime according to the law of *qisas*. He may have to pay blood-money only. A few examples will make the point clear.

In explaining the different situations when a Moslem kills another person, and the punishment provided by the Act, an authority states:

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11 *Schacht, J.* (1979). An introduction to Islamic law. Oxford University Press, p. 187.

12 Id. p. 165.

13 Id. p. 138. For traditions that sanction such drastic measures against born Moslems who renounce Islam see *Sahih Muslim* translated by Abdul Hamid Siddiqi (Lahore: SH Muhammad Ashraf (1976), Vol. III, p. 893 et seq.).

"Case 12. If a person, thinking that another person is *"mahdoor-ol dam"* gives him poisoned food and it turns out that he was not a *"mahdoor-ol dam"*, such a killing is not intentional murder and *qisas* will not be applied to it.[14]

"If a Moslem kills an "infidel" who is not *"mahdoor-ol dam"*, and he is not habituated to killing people, he will not be subjected to *qisas*, but pay blood-money fixed for an infidel."[15]

"If a Moslem injures an "infidel" with intention to kill him, and the victim converts to Islam in the meantime and then dies, the killer will not be subjected to *qisas*."[16]

"If a Moslem cuts the hand of another Moslem and the latter becomes an apostate and dies of the wound, there will be no *qisas* or blood-money, because a Moslem cannot be punished for killing an "infidel" and there is no blood-money for an apostate."[17]

"Killing another person is punishable by *qisas* only if the victim was not a *"mahdoor-ol-dam"* on religious grounds, and if he deserved to be killed, the killer must prove this fact in a court of law."

## 2.3 The Excessive Use of Death Penalty

Faced with the miseries of everyday life, and the intensely felt despair for a better future in the Islamic Republic, many Iranians have been driven to drugs to sedate and dull their senses. The regime, incapable of solving the underlying socio-economic problems that have given drug use a positive function in the Islamic Republic[18] has resorted to death penalty for drug traffickers and users presumably to cure the malaise.

"Thousands of prisoners have been executed in Iran since 1987, continuing a trend of extensive use of the death penalty that has characterized the Islamic Republic of Iran since shortly after its

14 Description of the *Hodoud and Qisas Act*, by Seyyed Mohammad Hassan Marashi, Tehran: Ministry of National Guidance, Vol. I, 1986, p. 12).

15 Id. p. 22.

16 Id. p. 24.

17 Id. p. 25.

18 See my article, "In Praise of Organized Crime", Rutgers Law Journal, Vol. 16 Nos. 3&4, 1985, pp. 853-867).

foundation in 1979. Dozens of executions of criminal offenses, many of them for drug trafficking, take place every month. In the first six months of 1990 about 300 executions for criminal offenses were announced in the official Iranian media. The majority of these were carried out by hanging, often in public. In a few cases execution victims were stoned to death, beheaded or subjected to a combination of punishments, including flogging and amputation, before being put to death. In 1989 Amnesty International recorded over 1,500 executions announced for criminal offenses, more than 1,000 of them for drug-trafficking offenses."[19]

"On some occasions, large numbers of convicted traffickers were executed on the same day in different towns. On one day in 1989, 81 people were executed. The policy is continuing. On 11 March 1990 the authorities hanged 38 convicted drug-traffickers in 12 cities."[20]

## 2.4 Inhuman and Degrading Punishments

As the above quoted passages indicate, the Islamic Republic has resorted to degrading and inhuman methods of punishment. Even if conviction of all alleged crimes were obtained with due process of law and proper judicial and extra-judicial methods-which, as we shall note, has not been the case-still there would be no rational reason why the convicted offenders in Iran should be subjected to such horrible punishments as hanging or flogging in public, stoning to death, cutting off the hand, beheading etc.

## 2.5 The Widespread Use of Torture

The use of torture as a means of extracting confessions and information about other people who may have been involved in anti-government activities is quite common in Iranian prisons. Many prisoners are routinely flogged, even after they are sentenced to serve time in prison, whenever the prison guards feel angered at their behavior. Besides,

"Suspension by the wrists is also common, often with one arm forced behind the back and the other over the shoulder so that the

19 Amnesty International, op.cit. p. 6.

20 Id. p. 8.

wrists meet behind the back, a position which causes intense pain. Psychological torture, including mock executions, is also reported."[21]

## 2.6 Lack of Fair Trial

People who are suspected of various crimes, especially those who are accused of anti-government activities, are routinely arrested without warrant and kept incommunicado for an indefinite period of time before they are brought before the court. The accused is not allowed the services of a lawyer; there is no opportunity to cross-examine the government accusers and witnesses, no real opportunity to challenge the presumption of guilt that permeates the whole system. Judges who preside over criminal proceedings are not trained in law; they are mullahs, chosen mainly for their loyalty and services for the regime. Even their religious qualifications, which supposedly would make them fit to sit on judgment, are open to question; to date many have been disqualified and discredited by the regime itself. In this respect it is interesting to note that the infamous ayatollah Khalkhali, better known as the "Hanging Judge" in the West, the man who is responsible for hundreds of summary and illegal executions has been recently disqualified by the Islamic Republic on religious grounds. This simply confirms the fact that the regime has killed thousands of people at the hands of the so-called "judges" it now feels compelled to disqualify.[22]

## 3. Need for a Redefinition of the Concept, Crime

The example of the Islamic Republic in the way it treats people accused of crime, shows once more that in various countries and in various times leaders who exercise unbridled power over the lives of the citizenry may take unfair advantage of their position in order to perpetuate their control. They may use various excuses, arguments and rationalizations to justify their abuse of power; the Khomeini regime wants to liquidate the enemies of the regime, and thus the enemies of God! Other dictators have resorted to other pretexts. The fact remains, however, that they all violate human rights in one way or another.

21 AI, Id. p. 44.

22 See Iran Times newspaper, November 2, 1990, p. 5.

Regardless of whether the people who have been wronged by the Khomeini regime were innocent or guilty, in reality they were all *victims* of aggression and violation of human rights at the hands of the agents of the Islamic Republic. The fact that these inhuman acts, which would be certainly punishable if committed by private citizens, were perpetrated by the machinery of state, does not make them any less heinous. In every country and culture people who commit crimes are brought to justice every day; they pay for the wrong they have done to others. But when even worse crimes are committed by the agents of an organized system of power, we only express regret without making the individuals who commit those acts in the name of the state accountable for their transgressions. We think about *victims* of crime only as those against whom one or more of the "offenses" defined by the penal code are committed. We know, however, that in special circumstances, like under the present Islamic Republic in Iran, people are illegally subjected to much more pain and suffering by the acts of the agents of the state, although the terrible acts committed against them are not defined as criminal.

There is no logical explanation, in term of the principles underlying the criminal justice system, for this flagrant contradiction and the injustice that is caused by it. If illegal acts that cause harm to individual victims are to be punished, as required by justice and as a preventive measure, then there is all the more reason why state officials who illegally violate the rights of the individual citizens should be punished even more severely. The fact that the Hanging Judge has killed thousands of people on orders, as he has claimed, from Khomeini, or in reliance on inherently illegal rules and regulations, should not absolve him from his tremendous criminal responsibility.

We have to redefine "crime" in order to include within the concept all the atrocities which are committed around the world in the name of maintaining state security and order, or in the process of imposing a special religious belief on the people. The argument that the traditional criminal law is incapable of dealing with such subjects, as being against the concept of sovereignty, may be relevant, but not at this stage. The idea is first to recognize the enormity of the problem as it affects the lives of millions of people, to call attention to the criminal nature of state-sponsored illegal acts, define them as criminal and provide for the punishment of the state agents who engage in such behavior. When the theoretical foundations of a system of criminal law that includes also state criminality is laid, the next step would be to utilize the available international forums and educate the public

in every country to perceive state-sponsored criminality as deserving severe punishment, and draw the necessary convention and code for a universal, organized reaction against such barbaric and widespread cruelties.

# 16. Special Victimological Issues

# Victims Coping with Crime -

# The Development of an Instrument

*Eva Tov*

## Contents

3. The Sample
4. Results
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## 1. Introduction

Coping with crime has become a central concept in victimological research during the last ten years. In German speaking countries this subject of research has been approached with the help of face-to-face interviews.

Although the concept of coping in psychology may already refer to a certain tradition and there a number of standardized, tested instruments, research into the processing of victimization experiences stands out because of the lack of such instruments.

The quality of research results however, stands and falls upon the quality of these instruments.

The construction and testing of the instrument portrayed in the following text, was undertaken by the author within the framework of her thesis.[1] The work constitutes the preliminary studies of a victim project which was carried out at the Max Planck Institute and which has been supported by the victim-help organization "Weißer Ring".[2]

## 2. Development of the Instrument

The aim of the development of the instrument was to construct a questionnaire which is able to record various forms and types of information and which is in the position to represent or reconstruct the emotional, social and comparative factors associated with a victimization experience.

The questionnaire should correspond with the usual test-theoretical quality criteria of objectivity, reliability and validity.

1 I wish to thank Dr. *Helmut Kury* (Priv. Doz.) at this point for his assistance with my work. I also wish to thank *Harald Richter* (Dipl. Psych.) for his support and cooperation. Finally, I wish to thank *Michael Würger* (Ped.) for his help in evaluation of the data.

2 Special thanks to the *"Weißer Ring"* for their help and support.

## 2.1 Stage One: Preparatory Works

The preliminary work in relation to the construction of the research instrument attempted to approach the subject-matter of the research in various ways. The varied approaches achieved by the inclusion of both theoretical and practically relevant material and of those parties directly and indirectly concerned with the theme, should uncover the greatest possible breadth and factual extent of the problem area.

### *2.2.1 Review of the Literature*

Intensive perusal of German and English literature was achieved on the one hand by means of well-known relevant psychology and criminology, namely, victimology works and on the other hand on the basis of computerized examination of literature for relevant keywords, which represented the period from 1978 to 1990.

The focus within the theoretical analysis of the theme, was aimed both at explanation of particular phenomenon which were noted time and again in connection with victimization and also the methodical analysis and assessment of supposed connections between the explanations.

It became clear that psychology provided a number of elaborate theories to explain the results of what includes individual and social ways of behaviour including the behaviour of the community in relation to such a serious occurrence as is illustrated by a victimization experience. The sphere of "coping with chronic illnesses" may in the meantime look back upon intensive and varied research traditions. It is therefore not surprising that one can then find a number of theoretically established and test-theoretically reliable instruments in relation to coping experiences involving chronically ill people.

Another picture is presented within the field of criminology. In English-speaking countries one admittedly makes strong reference to psychological theories; one also finds one or another theoretical approach which has developed on the basis of criminology discipline. However, it seemed to be sufficient until now, at least in German-speaking countries, to deal with what is predominantely a descriptive analysis of victimization experiences, with the use of instruments which have been developed on the basis of a "common-sense" logic.

### *2.1.2 Interviews with Experts*

The concrete development of the instrument was preceded by a period, in which experts who deal with victims of crime in one way or another, and also victims themselves were questioned as to their experiences and feelings regarding the needs and problems of the victim.

These interviews were carried out with the help of a semi-standardized interview which was developed, in order to assemble the greatest possible variation and breadth of experience. Particularly interesting aspects were explored.

Interviews of the following experts were carried out:

1. Representatives from criminal police in Freiburg,
2. an attorney who had instigated accessory proceedings in her function as a representative of victims of sexual offences,
3. an attorney also in his function as a representative of survivors of the victim,
4. a doctor at the University Clinic in Freiburg in her capacity as the police-contact in relation to the first stages of intervention into a crisis and medical examination of rape victims,
5. a social worker belonging to the women and children safehouse in Freiburg,
6. a representative of "equal rights for women" (Stelle zur Gleichberechtigung der Frau) in Freiburg,
7. three honorary members of the women emergency service in Freiburg,
8. a male victim of serious physical injuries where the offence occured around 8 years ago and a report had been effected,
9. a female victim of rape which had been committed 12 years ago and no report had been effected.

In addition, a lively exchange with university academics and experts outwith the universities in related areas, also took place.

### *2.1.3 Review of Existing Scales*

Examination of existing instruments in relation to the themes already mentioned was also effected alongside intensive literature studies and consultations with experts. The following instruments were adopted in the construction of the instruments:

- IPC-questionnaire in relation to locus of control (*Krampen* 1981)
- questionnaire in relation to handling stress (SVF) according to *Janke, Erdmann and Boucsein* (1984)
- ways of coping questionnaire according to *Folkman & Lazarus* (1988)
- Freiburg questionnaire in relation to coping with illnesses (FKV) according to *Muthny* (1989)

The instruments referred to below are, from the methodical-theoretical point of view, relevant to the development of the questionnaire set out.

## *1. Questionnaire in Relation to "Locus of Control" (Krampen 1981)*

The questionnaire in relation to locus of control developed by *Krampen* can be said to be a good standardized and frequently used research instrument, both by clinical and also non-clinical groups.

The theory behind the instrument implies that the locus of control of individuals portrays an important aspect of the individual's generalized expectations. A priori the following aspects of locus of control are distinguished:

- Internality, i.e. control over one's own life and events as perceived subjectively by the individual and amplification in the personal environment (I-scale).
- Externality defined by a subjective feeling of powerlessness, by a feeling of social dependence upon other, more powerful people (P-scale).
- Externality which is defined by fatality, by the generalized expectation that the world is unstructured and disordered, that life and events are dependent on fate, luck, bad luck and accident (C-scale).

The questionnaire consists of a total of 24 items (8 items per scale) which may be evaluated according to a six-grade Likert-scale.

## *2. Questionnaire in Relation to Processing of Stress*

This test developed by *Janke* et al. records methods of coping with stress. The following definition was set as the basis: "Under the term methods of coping with stress are to be understood those psychological events which are set in motion according to plan and/or not according to plan, consciously or unconsciously where stress emerges, in order to mitigate this position or end it" (*Janke* et al. 1984, p. 7).

In this way, methods of coping with stress can be said to be varied according to their form, the aims of such action and their function and effectiveness. They can be behavioral or intra-psychological according to their form. They can be directed at responses to stress or stressful situations and can be stress-negating or productive in their effect.

The following assumptions are the basis of the SVF:

- Strategies of coping with stress are not concerned with characteristics in the sense of traits, but rather about learned, habitual personal features.
- Changes which occur in the stress situation are not treated passively.
- The coping strategies are relatively independent of the form of response to stress.
- Many correlative coping strategies which are relatively independent of each other, can be distinguished (multidimensionality).
- The coping strategies are relatively independent of other personal features.
- The strategies can be examined by verbal techniques.

The SVF consists of 114 items, which can be divided into 19 steps, each comprising of 6 items. Every item must be assessed on the basis of a five-grade Likert-scale ranging from "not at all" to "very probable". In contrast to other methods, this presents the possibility of a more differentiated record than do, for example, scales which refer to one-dimensional trait concepts. In addition, it includes strategies such as "social retreat", "cognitive engagement" ect., which eventually increase stress. It is oriented both cognitively and also behaviorally speaking.

### 3. *Ways of Coping Questionnaire*

The questionnaire developed by *Folkman & Lazarus* (1988), is based on the assumption that stress itself does not affect the physical body and the spirit but rather the way one deals with it to a greater extent. The WCQ relates to thougths and dealings in connection with everyday stress. Coping processes should therefore be assessed and not dispositions or manners.

Little predicative value is attributed to dispositional assessment of coping in that the coping process according to the opinion of authors, is distinguished according to the particular stress experience by multidimensionality and variability.

The newest and revised edition of the instrument comprises 66 items which embrace a wide range of cognitive and operational strategies. The earlier differentiation between problem and emotion orientation was put aside because of the interaction of both components. The classifications follow a 4-stage Likert-scale. 8 factors in total were extracted by factor analysis. Certain connections between coping and particular personality correlations, for example locus of control are referred to. The role of attributions and social support in relation to coping and adaptation are also discussed.

#### *4. Freiburg Questionnaire in Relation to Coping with Illness*

The questionnaire developed by *Muthny* 1989 was constructed to record ways of coping in relation to the chronically ill. According to his view of coping, the ways of coping should be defined independently of success criteria of coping.

The following assumptions upon which the instrument is based, are important:

- coping with illness occurring on a cognitive, emotional and operational level.
- The processing character of coping is emphasized.
- Social contacts play a modifying role in the incident.
- Personality, situational and environmental influences affect the coping process.
- There is no linear interrelation between ways of coping and the success of coping.

### 2.2. Stage Two: Construction of the Instrument

#### *2.2.1 Theoretical Framework*

The development of the instrument took place amidst the background of corresponding theories especially from psychology and sociology. The central theories are outlined briefly in the following text.

### *2.2.1.1 The Stress and Coping Theory of Lazarus*

The central point of this theory lies in the perception of stress and not in its objective manifestations. Attempts at coping with stress are therefore directed at perceptions and associated thougts and emotions and these attempts are possibly directed equally towards these factors as towards the stressful experience itself (*Lazarus* 1984).

### *2.2.1.2 "Learned Helplessness": Seligman*

According to the theory of helplessness, being exposed to an uncontrollable stimulus changes the belief, that there is a relationship between one's own behavior and the resulting consequences (*Seligman* 1979). The results may be a lack of motivation and action (*Wortman* 1983).

Research in relation to these theories have also come to the conclusion that the perception of the experience of helplessness and also their causes, is more important than the clearly objective fact of helplessness itself such as in cases of victims of crime who are subjected to the violence and capriciousness of the offender. It therefore appears that there is a close relationship between the experience of helplessness for example, illustrated by victimization, and the attributions in relation to the causes of such experiences in particular and the individual's locus of control in general.

### *2.2.1.3 Attribution Theory/Locus of Control*

According to *Rotter's* theory (1966) there are various perspectives which interpret events in the world (internal, external and fatalistic). the receptivity of effects of the learned helplessness increases or rather decreases according to these perspectives . The accent once again, is placed upon the subjective perception and evaluation.

One can assume that there is a connection between locus of control as habituated learning experiences and causal attribution in relation to a concrete incident and dealing with this incident.

### *2.2.1.4 Social Support*

The central role in relation to the modifying effects of social support in stressful life events is referred to in many studies.

Social support perceived in theses studies appears to be more essential than the actual social bonds existing.

### 2.2.2 *Contents of the Instrument*

The questionnaire is roughly divided into four areas (social demography, questions in relation to the crime and the period afterwards, questions in relation to the trial and in relation to the present situation).

Apart from this there are three scales, two of which have been newly constructed and one which has already been tested. Finally, a section in relation to the assessment of the questionnaire has been applied.

#### *2.2.2.1 Sociodemography*

The individual sociodemographical variables are taken from categories of questions in relation to sociodemography which have been developed by recognized scientific institutions (i.e., the Center for Studies, Methods and Analysis (ZUMA) Mannheim) and working circles of market research enterprises.

The careful selection of questions in relation to sociodemography should allow precise statements, comparable to other study results regarding the composition of the sample.

#### *2.2.2.2 Questions Concerning Victimization and the Period After*

This complex of questions consists on the one hand of a series of information questions, for example, questions regarding the offence and the way in which it happened, questions regarding the damages and injuries suffered, questions regarding reporting behavior, questions regarding reporting, those regarding desires and needs at the time of the offence and questions about the offender.

On the other hand, appraisals should be effected, for example, formal and informal contacts should be appraised.

The fact that the people contacted ranged as a rule from professionals, to non-professional helpers to people in the community, meant that these formal and informal sources were made use of in the questionnaire.

The appraisal of treatment by the above-mentioned people should be assessed in accordance with 9 contrasting adjective pairs on a 7-graded Likert-Scale. These categories correspond to the semantic differential according to *Osgood* (*Kerlinger* 1979). The adjective pairs were constructed following upon the factorial dimensions of the semantic differential "evaluation", "power" and "activity". Three contrasting adjective pairs always belong to one dimension.

In addition, the extent of knowledge of the offender should be indicated and the feelings towards the offender at that time should be graded.

Furthermore, appraisals were made in relation to diverse punishment alternatives, in relation to anticipation of victimization (before the crime) and in relation to various responses after the crime and changes as a result of the crime. The question was therefore put as to how particular spheres of life had been influenced by the crime itself. 14 of the 15 spheres ranged from free-time and family to the working situation and affect physical, spiritual and mental faculties. The 15th area virtually subsumes the 14 sub-areas in the collective term "quality of life in general". Each area should be graded upon a 7-level Likert-Scale with the contrasting poles "positive"/"negative".

#### *2.2.2.3 Questions Concerning the Trial*

The questions in relation to the procedure consist to a great extent of information questions in relation to the date of the procedure, when it took place, participation in the procedure, preparation for the procedure, seeing the offender again, conviction of the offender etc.

The feelings of the respondent should also be classified and assessed, namely those feelings which are predominant when the respondent testifies before the court and those feelings prevailing in relation to the offender.

Finally, questions are asked as to the ultimate changes in relation to attitudes towards the offender, to the respondent his or herself and operation of justice on the part of the state.

#### *2.2.2.4 Questions Concerning the Present Situation*

Under this title can be found questions regarding damages and injuries occurring, anticipation of renewed victimization, assessment of the severity of the victimization experience and of the process of coping with such experiences.

#### *2.2.2.5 Special Scales: Attribution, Coping, Locus of Control*

##### *Attribution of the Offence*

This complex of questions contains 20 items which present possible causes for the crime experienced. The reasons stated and assessed in relation to personal relevance upon a five-level Likert-Scale, were categorised simply into three causal dimensions which were defined a priori: External

causes, internal causes and causes related to fate. The scale construction was effected according to rational plausibility criteria. The three-dimension-concept of this scale is related to the scales in the questionnaire by *Krampen* (1981) whose scale dimensions were a priori defined and confirmed factorwise at a later date as well.

*Coping after the Offence*

The items in relation to the sphere of coping with the offence, were constructed specifically for the sample of crime victims. The fact that there is quite clearly no tested scale in this area in German-speaking countries, meant that a lot of effort was put into developing these items. Precise perusal of related literature and instruments of the English- and German-speaking countries was therefore carried out. All current scales are related to stressful experiences in general (SFV, WCQ) or to coping with chronic illness (FKV).

116 items have emerged from this theoretical-methodical background and these items could be rationally classified according to 11 scales. Psychological knowledge was therefore taken account of in that behavior does not only relate to an operational level. Emotions and cognitions rather constitute an influential part of the "psychological apparatus" of people. Each area (emotion, cognition, behavior) was therefore covered by numerous items.

The sequence of items was defined by random distribution.

All 116 items should be evaluated according to the 5 categories of the Likert-scale in relation to the extent of personal utilization.

The aim of the "Itemblock" was to undertake further construction of scales through factor analysis and to compare the newly obtained factors with those already known to literature.

*Locus of Control (IPC)*

*Krampen's* questionnaire in relation to locus of control was added to the end of the actual questionnaire without modification. It should serve as a hypothesis test in relation to the connection between locus of control and particular coping variables assumed in literature (*Burgess & Holmstrom* 1979; *Lenox & Gannon* 1983).

*2.2.2.6 Respondent Feedback Concerning the Instrument*

The last page of the questionnaire attempts to record the quality of the instrument beyond direct evaluation of the instrument itself, by means of the respondents.

The questions relate to the assessment of the questionnaire as a whole, the form of questions and the replies to these items.

Finally, questions are asked as to the suitability of questions in relation to the individual personal case. The various answer possibilities are given in the form of a four category Likert-scale. There are then open spaces inviting comment, criticism or/and proposals for improvement.

## 3. The Sample

A sample of victims was collected for the preliminary test. These victims were looked after by the "Weißer Ring". The following conditions apply as selection criteria in relation to selection of the sample:

- the respondents had to be at least 18 years old at the time of the questionnaire.
- The offence should have occured at least 6 months earlier and at most 10 years earlier.
- The sample was to be collected from the totality of victims dealt with in Baden-Württemberg.
- Criminal proceedings should have taken place if at all possible.
- The victims should have assented to further use of their data when admitted to the "Weißer Ring".
- Personal victims and not survivors of victims should be dealt with.
- The preliminary test sought to cover replies to questionnaires totalling 40.
- The sample should be drawn using the selection criteria set as a basis for the sample.

A total of 90 respondents were collated, corresponding to the above mentioned selection criteria. The "neutral" drop-out rate amounted to 13. 44 questionnaires were returned corresponding to a return rate of 56%. The fact that the last questionnaires arrived so late that they could not form part of the evaluation meant that the sample which formed the basis of the evaluation amounted to 40. This return rate can be considered to be very satisfactory in comparison with similar postal surveys carried out.

## 4. Results

The following text describes the results of individual parts of the questionnaire and the newly constructed scales with reference to their quality. With the exclusion of the scales, the questionnaire was tested by means of item variances and item intercorrelations. Finally, the reliability was also defined according to Cronbach Alpha.

The next stage is to analyse the spheres of life affected by the victimization experience and criminal procedure.

Questions in relation to the procedure itself therefore follow hereon.

Finally, the results of the scales constructed by means of the factor analysis and reliability calculations carried out, are explained.

*Quality of the Questions in Relation to Spheres of Life affected by Victimization and the Criminal Procedure*

Reliability coefficients according to Cronbach Alpha were determined for the main parts of the questionnaire. Spheres of life affected by the crime and the criminal procedure are appropriate at this stage.

The Cronbach Alpha for the spheres of life affected by the crime amounts to Alpha= .84.

For the spheres of life influenced by the criminal procedure, Alpha amounts to .97.

After elimination of a number of items made redundant by the item intercorrelations carried out, the Alpha in relation to the spheres of life affected by the crime amounts to .79 and for the spheres of life affected by the criminal procedure .69.

*Quality of the Questions in Relation to the Criminal Procedure*

After a number of items were eliminated because of a lack of item variances, the remaining questions in relation to the procedure itself, point to a Cronbach Alpha of .92. In total 43 items belong to this scale.

*Quality of the Attribution Scale*

*Factor Analysis in Relation to the Area of Attribution*

The 20 items of the attribution variable "Please indicate to what extent the following matters according to your opinion have contributed to you being affected" were subject to a factor analysis. A scree-test was set up in the run up to the factor analysis. This test showed that the cut-off at 4 factors promised the best factor solution. The 4 factors explain a total of 59.2% of the variance.

Designation of the factors was produced by the totality of the facts represented by the individual items.

Factor 1 (social failure)

factor 2 (personal failure)

factor 3 (fate/uncontrollability)

factor 4 (external unhappy circumstances)

*Reliabilities of Attribution Scale*

The following table illustrates the reliability coefficients of individual scales:

**Table 1:**
**Reliabilities of Attribution Scales**

| Scale | Alpha |
|---|---|
| Scale 1 | .8152 |
| Scale 2 | .8186 |
| Scale 3 | .5803 |
| Scale 4 | .3864 |

The first three scales which can be simply arranged according to the dimensions of the IPC show the best reliabilities.

Factor 1 "Social failure" can therefore be attributed to the externality dimension, factor 2 "personal failure" to the internality dimension and factor 3 "uncontrollability/fate" to the fatality dimension. The 4th scale in contrast

constitutes a mixture of externality and fatality. Although attributed with external causes, they also have an unchangeable or fateful element.

Accordingly, the dimensionality of "locus of control" which had already been established a priori was also able to be confirmed at the attribution scale by means of a 4 factor solution. Whereas only 39.4% of the IPC - variance can be explained (see *Krampen* 1981), 59.2%, therefore around 20% more can be explained on the attribution scale.

*Quality of the Coping Scales*

*Factor Analysis in Relation to the Area of Coping*

The scree-test carried out for the factor analysis suggested setting the cut-off at factor 15 amounting to an explaination of variance of 84.3%.

The following should explain the designation of the factors.

Factor 1: (aggressive self-motivation)

Factor 2: (depressive coping)

Factor 3: (downward comparison)

Factor 4: (turning to positive ressources)

Factor 5: (self-enlivening/ "self cheering-up")

Factor 6: (attempt to make sense)

Factor 7: (attempt to maintain control)

Factor 8: (religiousness)

Factor 9: (assumption of social activities)

Factor 10: (observance and acceptance of help)

Factor 11: (circular thought processes)

Factor 12: (playing down the event)

Factor 13: (pragmatic acceptance)

Factor 14: (inner dialogue)

Factor 15: (attempt at coping by requesting help)

Reliabilities of Coping scales

The following presents an overall portrayal of the Cronbach-Alpha reliability coefficients of the 15 scales.

**Table 2:**
**Cronbach Alpha of the Coping Scales**

| Scale | Alpha |
|---|---|
| Scale 1 | .9148 |
| Scale 2 | .8996 |
| Scale 3 | .8296 |
| Scale 4 | .7165 |
| Scale 5 | .8583 |
| Scale 6 | .7369 |
| Scale 7 | .6342 |
| Scale 8 | .8933 |
| Scale 9 | .5959 |
| Scale 10 | .8704 |
| Scale 11 | .6163 |
| Scale 12 | .6866 |
| Scale 13 | .6037 |
| Scale 14 | .5849 |
| Scale 15 | .4621 |

## 5. Discussion

The new scales can establish that items were attributable to each factor and the designation, contents-wise, of the factors did not cause great difficulties as a rule. The factors often correspond to the coping factors known in literature. The fact that the dimensionality of the construct of coping can be said to be thus confirmed and the reliabilities of the scales are almost without exception, good to very good, means that one is dealing with a theoretically tested, workable scale.

The elimition of particular items or item units could be strictly test-theoretically derived and substantiated without loss of information.

The reliabilities in relation to individual areas of the questionnaire can be shown to be good without exception. The newly developed scales in the area of attribution can be confirmed by factor analysis in the sense of construct validity and point to good reliability in relation to their relevant subscales.

The coping scales can be confirmed by factor analysis including 15 factors. The reliabilities of the subscales can be shown, without exception, to be good.

Both newly developed scales therefore correspond to the quality criteria of the classical test theories and can be used as instruments for victim samples. This is all the more interesting as until now there have been no comparable instruments in German speaking countries.

The questionnaire presented can therefore be used as an objective, reliable and valid instrument which allows interesting results to be expected in samples of corresponding size.

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# Dealing with Criminal Situations

*Gerhard **Hanak** and Johannes **Stehr***

## Contents

## 1. The Reporting Behaviour of the Population in Criminological and Sociological Research: The Career of the Theme

The behaviour of those reporting a crime has only fairly lately been understood, in so far as its fundamental meaning relates to phenomena such as criminality, criminalization and social control. For a long time, this issue was regarded in criminology, essentially as a problem of criminal statistics, and was only too readily ignored. It was consequently only very selectively and briefly dealt with: Briefly dealt with in the sense that the subject was interpreted in a particularly one-sided way from the point of view of the police and prosecuting authorities, and the corresponding views of potential reporters to the police, where in contrast, never, or at most speculatively dealt with as a theme - and selectively dealt with in so far as only special aspects of the reporting behaviour, were regarded as worthy of research. We are concerned with estimations of the "actual" extent of crime within the framework of the so-called research on undetected crime - i.e. it should be at least approximately defined, how much "crime" does not come to the knowledge of the authorities and is therefore "withheld" in criminal statistics, because those injured/witnesses neglect to report. This is tied up at the same time with a second topic in research of undetected crime: The question of the determining factors behind readiness to report (*Heinz* 1972) in relation most of all to the reasons/motives for failing or neglecting to report. This "research into motive" was linked now and again to the crime policy-related intention to encourage the population's motivation to report; to improve "cooperation" between those injured by crime and the police, and in this way to achieve increasing effectiveness of the practice of criminal prosecution. Other empirical studies in the area of undetected crime, whose theory and design were essentially (social) psychologically coloured, where primarily concerned with the personality characteristics of those reporting/not reporting (e.g. *Stephan* 1976).

Common most of all to the earlier approaches in research and thematising of selective reporting behaviour of those injured and affected by crime, was the more or less explicit normative background assumption that reporting crime is the normal reaction to victimization and criminal injury and against which all other reactions (which from the police and criminal justice perspective merely constitute or are deemed to be a failure to report) were understood as requiring explanation, and even as a deviant social-pathological phenomenon. A number of relevant articles on the theme of the be-

haviour of those reporting crime, were only recently published in the USA, in which another view and a new/modified approach to the subject emerged: It was then realized, that is to say, presupposed that the behaviour of those reporting was to be based essentially in a cost-benefit-perspective, i.e. it follows defined and recogniseable patterns which can be prognosed. The intervention of the police in a case of victimization, can only be regarded as a plausible reaction if the potential reporter can hope (and actually hopes) for a reasonably concrete benefit from the act of contacting the police, namely, a benefit which exceeds or at least does not lie significantly behind the (social and physical) efforts/costs which are attached to the reporting of the crime. In the opposite case, the omission to report illustrates the expression of a realistic view of the thing. As we can see from this brief sketch, the direction of this research is orientated towards definitive social-psychological premises and a behaviour model in which the relevant rational aspects of the conduct itself are moved into focus and aginst which less calculable facets remain somewhat ignored.

A new paradigm in the research of crime reporting, was established in the past few years, mostly in the work of *Macnaughton-Smith* (1974) and *Rosellen* (1980), and has been looked into further since then in the research of *Hanak* (1984, 1986) and *Hanak, Stehr & Steinert* (1989) and contributed to empirically. The understanding stemmed first of all from *Magnaughton-Smith*, that if reports of crime are produced predominantly via the private initiative of the population, a sociological view of the reporting behaviour, needs first of all, basic research which looks into the question as to what situations and events are regarded by the population as particularly "in need of police intervention" (or eventually: as definitively criminal), and which others - even if they violate objective penal norms - are in no way regarded as being in need of police intervention/or perceived as criminal - and therefore hardly ever result in a "report/notification". This means, amongst other things, that sociological investigation of the behaviour of those reporting, must first of all, be extended and must deal with the entire spectrum of "police-mobilization" - and must also deal with the selection of cases from the pool of mobilization requests which are transformed by the police into a report.

*Rosellen's* contribution to this research (published under the somewhat misleading title "Private control of crime" in 1980) deals with the factual expectations of those who turn to the police and request police intervention - and in this way comes to conclusions which essentially agree with the assumptions of *Brauneck* (1974): namely that the interest in penalization of

offenders is of secondary importance (however, exists) whilst "remedy", "services", "clearing-up the crime" (in the case of the unknown offender) are expected.

The state of research relating to the theme of crime reporting at the beginning of the 1980s, could be summed up as follows:

"1. The phenomenon 'crime reporting' has been defined and interpreted in traditional criminal research, from a one-sided and arbitrary point of view. The criminal report was persistantly understood as a step towards the introduction of the criminal process or rather criminal prosecution, which is true from the perspective of the criminal justice system - and not as a strategy for dealing with conflicts and solving problems as it is viewed by those reporting in most cases. (...)

2. The report of a crime by an individual is one of many strategies for dealing with cases of conflict. The act of reporting does not merely pursue a particular defined goal, but rather many more potential goals. These goals can overlap with each other. The reporter of the crime is partly unaware of them. The most frequently assumed needs and interests which can motivate someone towards reporting a crime, may be said to be most of all 'investigation of unknown offenders', 'resolution of conflict', 'achievement of compensation for damage', 'sanctioning/disciplinary action', and 'police services'. A fine distinction between 'reporting' and 'mobilization of the police in a case which can be defined as criminally relevant by the police, must be insisted upon' (...)" (*Hanak* 1983, pp. 10 et seq.).

The approach to "reporting behaviour" formulated here, also implies a fresh understanding or at least another way of viewing the volumes and composition of what is presented as registered crime (known punishable acts) in the crime statistics: The reported/registered crime from the viewpoint suggested here virtually appears as the "negative" to the (criminal) conflicts/accidents/injuries/damages which can be dealt with and de facto are dealt with by informal (alternative) strategies - just as in reverse, the crime which remains undetected from the police/criminological viewpoint and although it is dissimilar in detail has a common characteristic: namely, that the police-criminal law-related procedures anticipated by those potential crime reporters (victims or witnesses) appear to allow no plausible settle-

ment of conflict or rather damage or have no relation to the actual incidents, and therefore police intervention is waived.[1]

In the following text, selected results will be reported from a study carried out in Frankfurt/M. (*Hanak, Stehr & Steinert* 1989; *Hanak* 1987; *Stehr* 1988). These results are tied up in many ways with the findings and questions arising from research on unreported crime/victimology, but nevertheless place different accents and choose a "more extensive" ethnographical approach to the subject for methodical reasons. This approach seeks to avoid speaking too quickly about criminality, offenders, victims and crime-reporting, and in this way, organizing/labelling events, situations and people by their respective "actors" in these significant categories, cannot be reflected alongside each other. In order to maintain such important definition processes for the further (private, police, or criminal justice-related) processing of the respective incidents, in focus, the public were asked in general about strategies, by means of which the problems, conflicts and cases of everyday injury/damage (of which there are quite a few with criminal or other legal implications) were processed (or regulation attempted). Material was collected in this way about the cases of injury and "stories of conflict" actually brought to the police, accordingly the expectations in relation to the police in connection with these "mobilizations" were addressed, and the extent to which those expectations were fulfilled or disappointed. Those other "stories" in which the intervention of the police was not called for (i.e. in the terminology of classical research on undetected crime: the report was "omitted") are also just as relevant to the views sketched here. Whilst research on undetected crime would presumably give preferential treatment, in the light of such materials, to the question of reasons for omission, it should be explained here above all, whether, and in what ways, and with the support of what resources, non-reported "crime" is normally coped with.

1 Compare *Blankenburg* (1980), where the non-utilization of the police/law is interpreted as an indicator of understanding of the limitations of the regulatory capacity of the scope of the law in the respective areas. The area of undetected crime, the preference of the police for informal settlement of conflict and "privatization" of conflicts, and the practice of the department of public prosecution of discontinuance of proceedings, are merely considered as various sides of the same coin to the extent that in the concrete case (or in respect of entire categories of cases) the private and professional "actors" concerned, have their doubts as to the efficiency of the medium of the police/(criminal) law.

Traditional victimology/research on undetected crime has more or less systematically faded out such questions and in this way suggested at the same time, that non-reported crime, or crime which is not processed by means of police resources or court procedures, in the end remains unresolved, so that the "victims" affected are left with the injury/damage caused to them. It is special to the victimology area of criminology, that it operates to a large extent with a tendency to characterize those injured by crime as victims, who are practically always reduced to their status as an object and who scarcely appear to be more than subjects capable of acting. These subjects appear to be scarcely capable of dealing strategically with the victimization which has happened to them, and which for their part is assumed to be traumatising. In this way, their position becomes an extreme distortion of reality.[2] A fleeting glance at the police statistics demonstrates clearly that in most cases other forms and qualities of what are mostly less traumatising crimes (often extremely annoying) are registered: the largest volume of recorded crime consists of forms of theft and property offences and the average extent of the loss set out, scarcely ever means a dramatic and decisive episode for the victim in the biography.[3] - In contrast, victimology is interested primarily in the victims of middle-ranging to serious

2 As one variant of the theme of victimology, "victims" by means of the "offence" itself have been made unable to act (*Schneider* 1982) and as another variant of this theme, the victimization is already a reflection of the lack of power and helplessness of people (*Kiefl & Lamnek* 1986). The "power-model" taken as a basis for these conceptions, is fairly simple: Power or rather powerlessness is ascribed - independent of situations - to people who are either suited to being powerful as offenders or to being powerless as victims. If the direction of victimology research is concerned to a great extent with victimization which has happened, then because of the constitution of this subject, the question remains in the background, as to if and as to what extent and under what conditions potential victimization can be prevented or at least their consequences limited. By the de facto performed delimitation of the subject, the ability of potential "victims" to fight back, is systematically underestimated, as is the drama of the average extent and consequences of victimization overestimated.

3 The results therefore of an investigation at the Vienna criminal district court (*Hanak* 1983, p. 17), the basis of which certainly dates back almost 10 years, are that the total sum of damages in relation to the property offences heard by the court there, lie predominantly (72% of cases) in the order of a maximum of 1,000 öS. New data from Austria appear to confirm that the average material losses occurring in the area of burglary crimes are not particularly high, or rather, they effect only a short-term disturbance to or interference with quality of life (compare *Pilgrim & Hanak* 1990, pp.

violent crimes and tends to generalize their empirical findings in relation to "damages by crime" both disproportionately and tendentiously.[4] It goes without saying that within the background of this "concept of the victim", the omission to report a crime, is to a large extent synonymous with a resigned acceptance of the criminal attack and its consequences, whereas the intervention of the police/criminal justice system tends to prove to be the only chance of mobilization of social support. It had therefore to be asked at the same time, as to the adequacy or reasonableness of this victimological conception.

## 2. Dealing with Criminal Injuries/Damages: The Relevance of Police and Criminal Justice

In the study, 234 people who reported over 1,100 "stories of conflict" of which 220 triggered off the intervention of the police, i.e. were brought to their attention, were questioned.[5] (Around 500 of the stories concerning conflict collected, were treated as relevant for criminal purposes). That means, first of all, that on average, each respondent was in a position to report a case of police-mobilization, but the actual distribution indicated that a reasonable minority of respondents actually had no relevant experiences, whereas a smaller number of informants were in a position to report more than one situation in which they had turned to the police. It can be established therefore, that most of the respondents viewed active reporting as an exception to the ordinary form of dealing with conflicts and cases of injury/damages. One consequence was that such experiences are remembered very well in general and therefore can be relatively detailed and completely reported in an interview situation.

A few observations first of all in profile, or rather in summary, of the 220 incidents brought to the attention of the police: It comes as no surprise, that in most cases, we are concerned with loss of or damage suffered to property (almost 2/3 of the cases in which the majority involve damage to property

4 For research focused upon "violent crime", compare the contributions of *Kirchhoff & Sessar* (1979) as well as *Schneider* (1982). We must reflect on the question of why and with what theoretical as well as practical (criminal-political) consequences, the situation of rape advances to the paradigm of victimization, and not e.g. theft which is more relevant in relation to crime statistics.

5 For the conception of the study and methods of data investigation see *Hanak, Stehr* and *Steinert* 1989, pp. 205-213.

by unknown offenders, in general in the form of theft, burglary or damage to property/vandalism). Reports of property offences/vandalism against known offenders to whom the injured party maintains an obvious relationship or rather, had maintained such a relationship, play an exceedingly small role.

The remaining can be allotted on the whole, to interference by means of physical violence, which the penal lawyer would subsume under categories such as bodily injury, dangerous threat or coercion. The police were also called in due to differing forms of disturbance (noise as a disturbance in the neighbourhood, nuisances such as disturbance by disorderly drunken persons in restaurants or bars or in the public street, therefore incidents to which normally no criminal relevance would be attached).

It can already be established - at this point - that those disturbances and injuries which have been brought to police attention, are concentrated quite definitely at both ends of the continuum of relationship. It is those incidents, predominantly in relation to which there is no or an extremely tenuous relationship between the party injured and the party reported (exactly 75%) that often lead to a report against an unknown offender. Further, quite often conflicts in the personal sphere can go wrong or are capable of going wrong and the police should intervene in such critical situations. The police are relatively rarely called in to intervene in a conflict, which is characterized by means of an average or middle distance between the adversaries. (It is most likely where a conflict between neighbours is concerned: extremely rare in contrast: conflicts at work, and in circles of friends or acquaintances).

*Expectations of those reporting:*

Due to the relatively heterogenous problem situations sketched here, it is still to be supposed that those reporting, have very differing concrete expectations in relation to police interventions - and this supposition can be confirmed from the material analyzed: There are at least four expectations cited repeatedly by those who reported:

- recording/protocol, administrative processing, establishment of the facts of the case (103 times);
- investigation/inquiry (84 times);
- disciplinary action/reprimand (46 times);
- introduction of criminal prosecution (49 times).

At the same time, "remedy/redress", i.e. putting a stop to the grievance, state of affairs or threat and other diverse "technical services" (for instance in connection with traffic accidents) play a certain role. It can therefore be foreseen, that the interest in recording and keeping records and establishment of the facts of the case, refers predominantly to the circle of property offences by unknown offenders, where the demand on insurance benefits presupposes the report, and that the interest in disciplinary action towards those reported, emerges as being given preferential treatment where there exists molestation and threats, and in other situations physical violence. The interim result is worth noting, namely that at any rate, very few thefts or burglary reports are carried out with the prospect in mind that it may result in the tracing or prosecution of the offender or offenders, and that the predominant number of those reporting such property crimes by unknown offenders, expect not more and not less than the proper protocol of the case of injury/damage and eventually a certain degree of sympathy or willingness to make certain routine checks, and at most and exceptionally, expect that the crime report will ensure that matters will be cleared up from a criminalistic point of view, or even that penal sanctioning of the offence or rather of the offender will follow. (About 10% of thefts and burglary reports against unknown offenders of crime, arise in such a way and concern most of all those untypical cases in which those injured/suffering damage can offer some concrete indication or clue, the pursuit of acknowledgement of which they wish to be taken up by the police. It remains to be observed that these special constellations remain within the number of theft and burglary reports, for the most part fringe phenomena, and reports against unknown offenders are usually such that scarcely even semi-useful indications and clues from those reporting, are provided.

It is clear from the relevant cases of typical theft and burglary reports against unknown offenders, that the police, virtually on the periphery of their "criminalistic" programs of dealing with crime, provide a number of services in relation to those reporting a crime - even if those cases where it neither comes to lengthy investigations, nor to an inquiry about the offender. Some of these services have a direct, practical benefit to those injured (for instance in connection with obtaining compensation for damages by means of insurance). Other services concern communication about the concrete case of injury/damage itself and the imparting of a more factual detached view of the incident.

These collected accounts about "crime as a damaging event" demonstrate in any case, that those reporting, to a large extent, harbour very modest and relatively realistic expectations. (The exceptions confirm the rule). The point is that demand on insurance benefits is at stake, in so far as such services

are not hoped for - either those injured fail to report, or they report in the vague hope that it cannot be of any harm if the police are informed, because they could succeed in the course of their routine investigations to recover stolen purses, handbags, bicycles and such things. (The material also includes individual cases which involve such realized calculations).

It remains to be established that bringing in the police is a plausible reaction to theft in particular where "anonymity" has played a role, whereas corresponding damage by known offenders or rather those which occur in more familiar settings to which only a limited number of people have access (e.g. place of work, classroom, circle of friends or acquaintances) are less likely to be a matter which is brought to the attention of the police - even although the theft offences in such familiar settings, are tied up on average with higher instances of injury or damage. (This means among other things, that theft offences are not registered with the police, precisely in those cases where the chances of detection are estimated to be reasonable, especially where the offender is known to the injured party or only a relatively small number of "suspects" are considered).

From this, it can be seen that the "criminalistic" contribution of the police towards coping with the problems already outlined, should not (and cannot) be estimated too highly, and that the factual processing of these cases of injury or damage can be managed in other ways: to a considerable extent by means of insurance benefits (which are however sometimes produced with difficulties and must be fought for first). Cases which in the form of investigation of and proving guilt of the unknown offender have proved to have a criminalistically successful outcome for the police which has not been derived from clues from those injured or other witnesses, cannot really be found in our material: A story of burglaries in holiday homes committed by young offenders resulted in the investigating police succeeding in establishing their identity, but did not lead to a criminal prosecution. The parents of the children were merely contacted and part compensation for the damage done, was brought about. - Only 4 of the 118 cases of property damage which were relevant for criminal purposes and which were reported to the police, brought about a court conviction of the offenders. In this way, we are concerned without exception, with cases which are atypical in so far as the offender is known to the reporter/injured party and is virtually handed over or in any case very concrete clues are presented as to his identity.

This interim account of results, which could be referred to in current discourse about crime, as evidence of the inefficiency of the fight against crime from a police and criminal court perspective, permits us indeed to come to quite another interpretation from the perspective of victims/reporters. We must look in advance to the fact that the damages arising from

theft/vandalism, burglary etc. reported by the respondents, in many ways point to a relatively minor extent of damage arising from the offence, so that offences appear as trivial and do not require to be followed up by an extensive series of procedures (penalties, compensation). The more serious cases of injury or damage can be partly compensated through insurance payments and at least the effect eased in some way. Some of the remaining cases are put down to experience of life, which are admittedly painful, but, by means of which naivety and extreme gullibility, are corrected which is also relevant in so far as particular ways of behaviour which may be of risk to oneself, are in the future avoided. (Examples are the many stories of theft within circles of friends or acquaintances, which result in allowing people access to a particular house and momentary access to the accommodation - and these guests prove to be unworthy of the position of trust in which they are placed and disappear with cash or valuable objects).

*Cases of "Violence"*

Just under a third of those police related stories (also) involved physical violence, violent acts against or between people. Those cases are concentrated once again at both ends of the relationship continuum: Experiences of violence occurring in anonymous situations are predominant (perhaps a Frankfurt speciality) such as for example, stories of unpleasant meetings with "violent types" who provoke passive passers-by and perhaps beat them up, with "rockers" who no one should come across at a late hour in a lonely and neglected underground station etc.

The cases of aggressive conflict struggles at a personal level, can be clearly distinguished from those attacks by strangers mentioned earlier. The former can scarcely be interpreted as "crimes" but nevertheless lead occasionally to the involvement of the police. (Most of all the so-called matrimonial disputes which on closer inspection sometimes arise from partnerships which have broken up in the interim period, but where a successful break in the relationship has not been made). In this area, protocolling and investigation is naturally only of marginal interest. Those reporting the crime, ask most of all for direct intervention into the critical situation, for a stop to be put to the threats, for the removal of a former companion/partner who is in a rage or who is being otherwise unpleasant, moral support, reprimand and eventually arrest of whoever has been reported etc. The expectations of those reporting the crime are in this instance therefore somewhat more demanding. However, even in these constellations, they have typically very little to do with criminal prosecution itself, or at least it can be said that before the question of a possible criminal

prosecution is to be settled, we are concerned first of all with preventing escalation (of the problem), to reduce the conflict and to contribute to a calming of the situation itself.

To sum up, it can be said, that the hoped for and required police services in this connection are in any case partly furnished already, but certain shortfalls in the police handling of these situations (measured against the expectations of those reporting to them) can be reconstructed: That applies to a particular extent to those "stories of threat" collected by us (i.e. someone feels threatened, turns to the police in the hope of getting protection. They are, however, given to understand that so long as nothing has actually happened, there is no ground for intervention). It can be noted that the police reservation proves in retrospect, in most cases to be realistic, i.e. no actual severe escalation or consequences of the offence can actually be noted. However, to those people who turn to the police in the face of such threats and who are scarcely able in such a situation to view the episode from a distance and with a clear view of matters, this attitude sometimes appears to be plain cynicism. It must be mentioned moreover in relation to incidents with provocative "violent types" in anonymous/semi-official settings, that the police often come just too late, because the attack has been exactly organized so that no one can run to the help of the victim. The very presence of passers-by is in fact as a general rule, not a special advantage to the victim of attack, because those passers-by hardly ever interfere.[6]

As for the rest, the stories of "violence" collected, allow us to conclude that there is a relatively distinct willingness expressed on the part of the intervening police, to trivialize in relation to minor and middle-ranging assault cases and other violence against the person, especially where young people are involved. This however also applies when lower-class or members of fringe groups are affected - naturally also in the family quarrel situations already mentioned. Not least, the reason may also be, (but surely not only) that according to the German Code of Criminal Procedure, non-aggravated assaults are not so-called "Offizialdelikte" (offences requir-

6 The lack of willingness of passers-by to intervene cannot be said in any way to be evidence for the hypothesis of "brutalization", which can be found in victimology discourse (see *Kiefl & Lamnek* 1986). It is also scarcely an expression of the "open refusal of victims of crime" (op.cit.), but rather our material leads to the conclusion that the willingness of passers-by to intervene increases if they interpret the situation in a common-sense way as "criminal". Such an interpretation assumes that the definition as "private affair" or as a "fair fight" (in the sense of a balance or equality of strengths) is excluded.

ing public prosecution), which more or less automatically have to be prosecuted, if they reach the attention of the authorities, but rather, only if a public/official interest in prosecution is asserted or there is a demand for prosecution by the injured party and the intervening police attempt in a number of cases, to persuade the injured party not to insist on a prosecution - or in any case are not particularly cooperative when the victim does not wish to make such a claim. This is particularly noticeable in so-called matrimonial disputes with to some extent significant injuries resulting (cf. *Feest & Blankenburg* 1972; *Kürzinger* 1978).

It otherwise remains to report, that police intervention in partnership conflicts (spouses, companions-in-live etc.) turns out in general to be very practical and pragmatic. The women reporting find this to be unsatisfactory when they had hoped not only for intervention into the crisis and aversion of the danger, but over and above, moral support or a definitive reprimand of the offender, and nothing of this kind is offered. Normally police intervention in such cases is however suitable to quieten acute conflict. (In most cases, the situation, namely the aggressor, has calmed down to such an extent before the arrival of the police, that they do not have to step in at all).

In the study, 5 out of 70 of the "stories of violence" reported to the police, ended in criminal conviction of the person reported/offender. The mobilization of the police is more frequently successful in so far as their intervention into the crisis contributes to a calming of the situation. More often, they trivialise for their part, the incidents reported and refer to them as private affairs or fail to support those reporting, who in any event have little respectability or authority in so far as making grievances are concerned.

*"Nuisance"*

The services offered by the police in connection with dealing with incidents of no criminal relevance, are evaluated positively (disturbance in the neighbourhood, removal of disorderly persons etc.): All of these contributed essentially to the satisfaction of the people making the complaint. However, once again, there are also those who make demands, who are little respected (young people, fringe groups) who in their attempts to use the police, are not listened to and report in retrospect that the police have done nothing for them.

## 3. Interim Account of Results

More than 1,100 stories of conflict were gathered together, of which 220 were brought to the police. That admittedly means that most conflicts are processed without police mobilization (and that also applies to the majority of criminally relevant incidents such as theft, fraud, assault) or remain on the whole unprocessed. However, that also means that a reasonable number of interpersonal problem situations and cases of injury/damage came to the attention of the police. Ten cases had criminal repercussions in the form of conviction of those reported. It is perhaps of interest to consider these 10 criminalized incidents within the entire background of material collected and to add one or two thoughts about the filtering-out process commonly practized by those injured/reporting, the police and criminal justice system (in criminal sociological terms: to reconstruct the selectivity of criminalization and to analyze the material according to the criteria decisive for this). First of all it must be established that the cases ending in de facto criminalization, do not with certainty follow the criterion of "severity" or "social harmfulness" of the offence: The most severe/dramatic/momentous cases which were reported by informants (and which sometimes led to almost "catastrophic" threats to life or in any case effected temporary losses to quality of life) were sometimes not reported at all, sometimes privately dealt with (often the end of the relationship with the offender constituted the entire "processing") or were not interpreted as "crime" by the police and/or criminal justice system and therefore not pursued further. It remains to say that the particularly serious cases of damage to property are mostly those which cannot be said to be without question "criminal" but rather result from civil law disputes. In contrast, the typical criminal damage (normally in the form of theft offences) was more likely to have minor to middle-ranging material loss, or in so far as they concerned enormous losses, could be (partly) compensated through insurance. As for the rest, the dramatic situations in which conflict arises are also concentrated in the "personal spheres" of the actors (headings: human disappointments, severe illnesses, collapse of life plans; dissolution of partnership inclusive of economic problems tied up within partnership itself). This also implies that the police and criminal justice system are scarcely adequate authorities for the processing of such problem situations, but rather at most can deal with particular "symptoms" in relation to these problems.

As already emphasized above: Criminal incidents/injuries are concentrated at both ends of the relationship continuum, referring either to no or an extremely selective victim-offender-relationship or to a strong/personal relationship. So viewed, it comes as a surprise, that the 10 criminal stories referred to previously, point to a "middle-distance" between offender and victim/reporter and to this extent, they are more likely to be atypical cases, if the are measured against the entire volume of reports. One plausible explanation for this circumstance is perhaps to be seen in the fact that the "no relationship"/"unknown offender"-cases are those where criminal prosecution, in the absence of a traced suspect is in most cases dropped, whereas the criminal incidents in the personal spheres are at the same time those which in so far as they have been reported at all, are interpreted by the police and judiciary very often as "relationship problems", matrimonial disputes, family affairs etc., and in this way, further prosecution becomes unlikely.

The police are therefore mobilized quite often if it is necessary for "criminal situations" to be dealt with, but it is only very rarely that the police response to the "report" corresponds to the common sense concept of criminal prosecution and the criminal imposition of penalties. This could in the first place be regarded quite simply as an indication of inadequacy and inefficiency on the part of the police and criminal justice system, the latter only being in a position to investigate unknown or rather fugitive offenders or to impose penalties upon the offender who is to hand, to an insufficient extent. Such ways of viewing things is in some respect, short of what is required, and overlooks a few aspects of the reporting behaviour on which, to a large extent, the police and criminal court processing of crime is based. And so, for instance, the reporter's expectations in relation to the theft and burglary offences are in many ways directed only very rarely and in view of special circumstances, directly towards the criminal prosecution and imposition of penalties upon the unknown offender. More often however, they are directed towards the protocolling of the event and eventually also towards introduction of police investigation for the purposes of seizure of lost objects (of value) and personal papers. The bringing-in of the police can in no way be directly interpreted in the context of "situations of violence", as an expression of interest in the criminal prosecution and criminalization of abnormal behaviour: the police should to some extent interfere, in so far as it is intervention in a crisis, and take remedial action. Sometimes the reporters also expect immediate disciplinary action and reprimand of the opponent or in general: moral support.

If victims/those injured turn to the police, then they do not do so in any case, out of a homogeneous (or even self-evident) interest in legal penalties. Instead of or rather along-side this expectation, the police are approached

with a number of other perspectives in mind, many of which have a lot to do with "instrumental" and pragmatical correction strategies. In a significant number of cases, the police are i.e. mobilised "in a desperate manner", i.e. without a concrete expectation or idea as to what has to be done in a critical situation. This all indicates that the reporting behaviour cannot simply be claimed to be an indicator of the "demand by the population for prosecution". One must rather proceed on the basis that according to the results of studies carried out in Austria, probably only around a quarter of criminal prosecutions instigated by private reporters, are in actual fact, brought to the police from the perspective of achieving a criminal justice type processing of the basic conflict (see *Hanak* 1982).

If the services desired by those reporting (crime), which have little, or rather nothing to do with the criminalistic program for actions, the latter being to a large extent felt by the police to be an obligation or duty and which has a prominent status in so far as their own self-portrayal is concerned, are provided to some extent both speedily and competently, then the omission of effective prosecution and sanctioning of offenders - in so far as this is above all expected - appears very often, although not always, to be a less dramatic disappointment. This can be formulated alternatively: The criminal prosecution activities, from the point of view of the reporters/injured parties, have relatively rarely contributed to the adequate processing of criminal incidents, although such cases also occur in which the penal conviction of the offender satisfies the feelings of a need for punishment felt by the victim. More often, other police services contribute to the fact that "loser stories" can be corrected or more realistically, limited in their consequences.

## 4. Informal Strategies for Processing Conflicts

As it has already been mentioned, the collected material is of more interest in so far as it relates decisively to one point of view: How is the processing of (criminally relevant) cases of conflict and injury/damage developed, in such cases where there is no police contact - to what extent and in relation to which case-constellations, do informal private sanctions play a role etc. These questions shall be answered exemplarily in so far as the class of theft-type injuries/damages is concerned and also the area referred to juristically as threat/coercion/bodily injury.

*Processing of unreported Cases of Theft*

It can be established in relation to around 60% of unreported cases of theft, that about 2/3 of the injuries/damages triggered off no "processing" or strategy of correction whatsoever. We can make two different observations from these unprocessed incidents of theft: One is the pronounced willingness to trivialise on the part of the injured parties. This is often also plausible because it concerns absolutely insignificant damages/injuries which can only be lightly compensated and such injuries/damages attract no perceptible or permanent "loss". The low regard articulated by some non-reporters in relation to material things in particular, appears to be especially noticeable and this is reflected now and again in such cases of "victimization" where the opportunity to use strategies for correction are entirely ignored where such efforts are reasonably cost-effective and the chances (privately or through the police) of investigating the "offender" or of recovery of the stolen property, appear quite reasonable. (This attitude, or rather the pattern of (non-)(re-)action related to it, can be seen more predominantly amongst the younger injured parties). From the research on undetected crime, well known standard motives for omitting to report a crime arise from a few theft cases: contact with the police is avoided because the futility of police investigation is anticipated and therefore the efforts of reporting itself appear disproportionate to the result. In many ways, the omission to report appears as a reflex arising from insight into the offence committed, namely as aiding and abetting the offence by one's own carelessness, lack of attention or naivety. Victimizations of such types are therefore noted regularly as "lessons" which are given to someone who should learn it the hard way - and processing extending beyond that (by means of police, imposition of penalties, scandalising) appears renounceable.

There are at most four reasons why thefts are accepted as waiving any "correction" strategies whereby these reasons often appear to be connected to each other:

- private investigations or strategies of mobilization (report) are (in most cases realistically) judged to be futile;
- the injury/damage is really insignificant or is judged in any case subjectively, to be "overcomeable";
- "correction" strategies appear to be possible but are experienced as involving disproportionate costs/effort, especially as their success is not definitely guaranteed;
- the injury/damage is tied up with one's own carelessness.

It remains to add, that the resigned or trivialising manner in which theft is dealt with is most likely if no insurance payments can be claimed.

*Sanctioning of known Offenders*

The question of formal and/or informal imposition of penalties upon those committing theft must first of all be answered very simply: In most cases, no penalties are imposed, merely for the reason that in the predominant number of cases, there is no known/seizable offender/suspect and the private or police investigation of unknown or fugitive offenders seldom succeeds in a comparative sense and sometimes is not or not particularly intensively pursued. A look at the category of theft-type damages which happen in a background where to some extent a distinct/continuing relationship (ca. 20%) exists, is all the more interesting. In order to anticipate: It can in no way be said that the legal or informal imposition of penalties in relation to the theft, flourishes in such a favourable framework of conditions. Effective confrontation with the offender/suspect only takes place in one third of these cases - and if the confrontation is looked for and taken up, then the injured parties/those complaining, confine themselves mostly to a relatively moral-free discourse aimed primarily at obtaining reimbursement. The practice of this moral-free discourse must not of course lead to the rash conclusion that there would be no moral indignation to be dealt with and that the thefts occurring would be regarded by those affected, in the end as a "civil law" dispute. The more serious injuries/damages often effect the break-up of a relationship and the demonstrative termination of friendship, which in view of the relatively serious extent of damage/injury, appears as a helpless sanction. This type of reaction also indicates that the corresponding injuries/damages are interpreted on the whole as "injury to honour" (breach of trust, "human disappointments") which cannot be processed by means of legal/police methods.

Consequently, it can be established that when we are concerned with known suspects/offenders and confrontation is taken up with them (both preconditions are met cumulatively in exactly 7% of the victimizations arising from theft), this does not mean that the imposition of penalties is by any means tried to some extent - and even less that a formal or informal sanction is actually imposed. The moral discourse i.e. the confrontation, is not only for "the offender" but rather also for the injured party, unpleasant and also embarrassing to a large extent. This applies particularly to thefts which arise from a background where pronounced relationships exist but occasionally also relates to such relatively anonymous situations. If the confrontation with known offenders/suspects does not take place, then that almost equally means that the offender/suspect is avoiding the confrontation.

The fugitive, but known offenders/suspects are at the same time mostly likely to be those who are reported to the police, whereas the report against known and seizable offenders is more likely to be a less used strategy.

Scarcely a quarter of theft stories/cases in a "relationship context" can be relatively happily processed and dealt with most likely in such a way that the injuries/damages are compensated by third parties who in a certain way feel (jointly) responsible (rarely by the offender him- or herself). At most, the recovery of stolen objects (direct by the injured parties or police) plays a role or the result is a report and criminal conviction of the offender. Such cases in which the aggrieved parties undertake more complex and costly (eventually risky) efforts to recover the stolen goods (in extreme cases with the involvement of allies) are more likely to be marginal and atypical.

It is not be overlooked, however, that the central resource for a relatively happy processing of the consequences of theft is insurance coverage the utilization of which, practically without exception, presupposes the report to the police.

*Burglary*

In this category of crime, the collected stories/cases scarcely permit statements on alternatives to police and criminal law type processing of cases and here especially (and this is different in relation to all the remaining forms of injury/damage) calling-in the police can be entirely regarded as a normal reaction (about 85% of relevant cases of victimization) and concurring patterns or rather motives for omission to report can scarcely be reconstructed from the relatively few cases not reported to the police: It therefore appears that the non-reported burglary offences are more likely to consist of offences which were not "completed" or for other reasons (e.g. because of the quality of objects seized) only insignificant property damage was caused, where now and again the damage arising could be repaired by the victim him- or herself (e.g. repair to damaged doors/locks etc.).

*"Stories" of Threat/Violence*

Of the stories/cases gathered together in which crimes against the person have been thematised (whose drama extends from slanderous assault without effective injury following to severe physical injury, e.g. knife stabs) at least half of them result in being "loser cases", i.e. they lead to flight or resignation. The quarrel with the aggressor cannot be kept up and accordingly the result of the confrontation is experienced as being unsatisfactory. It is at best positive, in so far as the "escape or flight" cases are concerned,

that the characteristic ignominious departure has perhaps spared the worst. Such "loser stories/cases" are concentrated, most of all, in the fields of conflict where the interaction/confrontation is more likely to proceed selectively and anonymously.

Around a quarter of physical injury stories/cases are met reasonably successfully with "resistance". Some of these resistance cases bear almost exclusively defensive features and are also aimed, in most cases, at hitting back at the attacker himself. In less frequent cases, the aggressor is clearly made aware that he has attacked "the wrong person". There is a wide spectrum of "retaliatory acts" in between these extremes, which are orientated to a great degree in their intensity and consequences towards the preceding attack.

Besides the standard variants sketched here (defeat/flight; demonstrations of ability to put up a fight) there are other fairly common variants occurring: the involvement or bringing in of the police (who then typically take informal and more cautious action, however, less often intervene "legalistically", e.g. via criminal report, arrest etc.); the processing by means of avoidance measures as sanctions (which is only a plausible reaction in conflicts where close social ties exist; break-up of a relationship, which has normally already been strained before the offence); sanctioning via local interdiction/"booting out" in such cases where the fight happens in bars/restaurants.

If contact with the police is waived (which applies in almost 3/4 of the "assault stories" collected), this is repeatedly explained with differing variants of "privatization" of the underlying conflict: It concerns a personal affair and that is why mobilization of third parties (and especially the police) is out of the question, so long as one copes to some extent with the critical situation or rather, it remains relatively harmless. The police are not then brought in if the escalation of a fight/argument in personal spheres is handled, or rather can be brought under control, with the support or help of third parties from within the same social sphere. It is especially in partnership conflicts which take a dramatic turn, that neighbours/friends/acquaintances prove to be useful allies to whom one can flee and with whom one can discuss the course of events.

It is rarely exlicitly stressed by reporters that they would like to save the respective attacker/offender from difficulties with the police/criminal justice system and therefore making a report/mobilization of the police is waived with either some or little consideration.

If the involvement of the police does not take place, the "omission" to report (which is then rarely ever understood as such, but sometimes appears

to a large extent to be self-evident) is often explained by the following characteristics in the respective situations: Someone has proved him-/herself to be adequately able to defend him-/herself in order to hit back at the attacker (reports to the police on the other hand as the typical strategy of those who have clearly lost/find themselves in the "losing lane"); the later "victim" who has him-/herself contributed to the emergence of the conflict and has quite intentionally provoked the offender or rather was him- or herself not adverse to a fight/brawl (e.g. this can happen quite often in bar/restaurant conflicts); the fight/argument is perceived as a "fair fight" and calling the police or other authorities would be interpreted as weakness or as a lack of solidarity (for instance within a clique/sub-culture); or someone him-/herself belongs to a sub-culture which itself stands opposed to the police. It must however be borne in mind that the reasons mentioned here failing to make use of strategies of mobilization in general and the involvement of the police in particular, lose relevance naturally in so far as action by the victim is concerned, where the acute threat of the situation or consequences of the offence are estimated to be considerable. The subjective judgement in relation to the situation, on the other hand, varies according to relevant experiences of conflict settlement by brute force, feelings of self-esteem and social competence.

## 5. Summary

The findings sketched here can first of all be transformed in the form of a "cartography of undetected crime" into a formulation of statements of its (likely) composition. It can be accepted with some certainty, that it is those cases which consist to a large degree of (not absolutely legal but social) trifling cases/bagatelles, i.e. of disturbance/nuisance which are regarded in the eyes of those affected/injured, as cases of injury/damage from which they can recover and which merely result in short-term irritation and scarcely require any processing sequence (or even legal steps/penalties). It also covers a considerable number of incidents relevant to criminal law, which are settled in the personal sphere of those involved, some of which have certainly resulted in a fair amount of what are relatively dramatic consequences arising from the offence, so that the "criminal quality" can hardly be doubted. The immediate social processing of these constellations is carried out partly by the break-up of the relationship (demonstrating avoidance), partly because some have stopped because the confrontation appeared to be embarrassing (and without much point) or rather, the conflict has happened where there is a relationship which is capable of being ended (or merely at high social or emotional cost). The area of undetected crime

is finally characterized by such constellations which stand out due to the fact that the victims/injured parties, at any one time, have to a large degree power, competence and the ability to fight back at their disposal. For this reason, it is possible for them to handle the criminal disturbance/interference comparatively well and to be able to waive mobilization of the police and criminal justice system.[7]

It can be established that moralising and sanctioning do not illustrate particularly relevant elements in the processing of criminal incidents/injury/damage cases. Everyday criminality is dealt with as a rule, both pragmatically and in a way which is interest-oriented, i.e. under the premises of conflict and injury/damage limitation. In the context of these calculations, the police are mobilised (and more rarely the private law); however the processing of a conflict and injury/damage via the police/insurance/law, is in fact only a variant which is made use of alongside avoidance procedures, or rather, self-help strategies. However, it remains to be observed, that there are many cases of criminal injury/damage in everyday life, which are so insignificant and part of nature, that the corresponding losses/disturbance or interference are scarcely interpreted as "victimizations" and corrective or processing sequences do not take place at all, because they appear to involve a disproportionate amount of cost and effort.

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7 These facets in the area of undetected crime remain omitted in criminological discourse, because the available empirical evidence stems from studies (e.g. victim surveys) which normally merely record forms of victimization of the natural person and not however that of organizations or business undertakings which for their part may very often use the civil justice system as an alternative to criminal law-related claims/conflict settlement (cf. *Hanak* 1990).

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