Victims of Crime in 22 European Criminal Justice Systems

The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure

PROEFSCHRIFT

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Chapter 7

England and Wales

Scenery

The United Kingdom of Great Britain and Northern Ireland, in short the United Kingdom (UK), includes Great Britain and Northern Ireland. Great Britain (GB) consists of the island of Great Britain and a series of smaller islands. The island of Great Britain is in turn divided into England, Wales and Scotland. The United Kingdom consists of the three separate jurisdictions of England and Wales, Scotland and Northern Ireland. Until the late 1990s legislation for all three jurisdictions was vested in the Westminster Parliament seated in London. This parliament consists of the Queen, the House of Commons and the House of Lords. In the House of Commons there are 523 seats for England, 38 for Wales, 72 for Scotland and 17 for Northern Ireland. In 1997, the newly elected Labour government set into motion a process of devolution. A Northern Ireland assembly was elected on 28 June 1998, and a Scottish Parliament and Welsh assembly on 6 May 1999.

In this chapter we focus on the jurisdiction of England and Wales. Of the 55 million people living in Britain, 48 million live in England on a total area of 129,720 square kilometres (50,085 square miles). Wales is less than one-fifth the size of England (8,017 square miles) and has a population of 2.9 million.
1 INTRODUCTION

From a continental perspective, the English criminal justice process is an enigmatic entity. In the absence of hallmarks of the civil law systems such as a written constitution and codes, it appears as a fascinating mix of curiosa and tradition that is in the throes of adapting to modern demands. After weathering the storm caused by the widely publicized releases of the Guildford Four, Bridgewater Four, Birmingham Six and Maguire Seven, the English criminal justice process has recently come under fire again following the inquiry into the investigation of the murder of black teenager Stephen Lawrence.

In contrast to continental systems, where the victim may actively participate as civil party in the criminal proceedings, the victim of crime as such has no locus standi in the English criminal justice process. He is not recognized as a party in his own right, although he may figure in the criminal proceedings in the role of witness or private prosecutor. Besides this lack of formal status, it is also a popular contention that this type of adversarial system is, by definition, tougher on victims of crime than the more inquisitorial civil law systems, primarily because of the adversarial principle of cross-examination by the individual parties. This is said to be compounded by the fact that serious offences heard in the Crown Court are decided by a jury of laymen.

Paradoxically — or perhaps as a logical antidote — other aspects of English victim policy compare favourably with developments in the civil law jurisdictions. For example, England was the first European jurisdiction to introduce state compensation, and its present scheme is much more extensive than those of all the other jurisdictions included in this research put together. Secondly, English Victim Support is the biggest and most well-developed victim support organization in Europe, and offers the widest and most sophisticated range of support to victims of crime.

In contrast to the predominantly civil law countries on the continent, England is a common law country. 'The common law' is 'the body of principles and doctrine that have emerged implicitly from the history of decision-making by courts rather than explicitly from politically motivated decisions of legislators.' Its roots go back to the first three centuries after the Norman Conquest (1066), when the royal courts developed rules applicable to the whole country, as opposed to local customs.

Historically, therefore, law in England is judge-made, and legislation has traditionally played only a supporting role. English law has developed in the courts in a piecemeal fashion, in contrast to the much more abstract, systematic civil law systems, with their impressive batteries of codes. Over the last few decades, however, legislation has begun to occupy a more prominent position in the English legal system. Statutes, i.e., Acts of Parliament asented to by the Queen, override the other national sources of law — an act may not be held to

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1 See, for a different perspective on the problems of the adversarial system, in particular for victims of rape, S. Lees, Carnal Knowledge, Rape on Trial, Penguin Books, 1996, chapter 7, pp. 181-209.
be unconstitutional by a British court. However, 'although the rules of common law are subject to legislative alteration and abrogation, there is an important sense in which the common law is superior to statute. As a body of evolving principle, the common law provides stability and continuity. Its settled doctrines and assumptions, though always open to reconsideration and challenge, constitute a framework into which legislation must be fitted.' The common law encompasses the basic principles of English law, and statute builds forth on these foundations.

2 GENERAL REMARKS AND BASIC PRINCIPLES

Characteristic of the common law is the adversarial nature of the criminal court proceedings. In principle the prosecution and the defence contest each other in court as equal parties before an impartial judge and jury. In reality the strength of the prosecution, which is backed by the state machinery, outweighs that of the defence. This imbalance is tempered in part by the right to trial by one's peers, embodied in the jury system, and the rules of disclosure obliging the prosecution to reveal their evidence to the defence during the pre-trial stages.

Typical adversarial principles featuring in the English criminal trial proceedings are those of immediateness and orality, the right of parties to cross-examine witnesses, the idea of the impartial judge who does not interfere with the questioning of the witnesses, and the involvement of the public (as lay judges in the magistrates' courts or as members of the jury in the Crown Court) in reaching the verdict. Furthermore, the prosecution and the defence may negotiate to avoid a full trial. The accused intending to plead not guilty to a charge may, for instance, agree to plead guilty to a lesser charge. Or, if there are several charges, he may agree to plead guilty to one of them if the others are dropped. These two situations are referred to as "charge bargaining." Another form of negotiation is "plea bargaining." Here, the accused agrees to plead guilty in exchange for a sentence discount. Already a wide-spread practice, the sentence discount has been given a statutory footing in section 48 of the Criminal Justice and Public Order Act (CJPOA) 1994.

If the defendant pleads guilty, for instance following negotiation between the prosecution and the defence, he is sentenced during a sentencing hearing – a full trial of guilt is not...

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3 The only situation in which a British court may override an act, is if it may be held contrary to the European Convention on Human Rights.
6 In practice, most criminal cases are not dealt with by a jury but by magistrates, see §3.3.
considered necessary. In England, most cases are heard in the magistrates' courts. In over 90% of the cases in the magistrates' courts and over 70% in the Crown Court, the defendant pleads guilty, meaning that there is no trial of guilt, only a sentencing hearing. This tendency towards trial avoidance is further consolidated by the strong discretionary powers of the police and the prosecution. A first discretionary filter is applied by the police when deciding whether or not to record a reported offence as a crime. It is estimated that more than 40% of the offences that are reported to the authorities are not recorded. Where the offence has been recorded, and the evidence shows that a case could be made, the police have several courses of action open to them. First of all, in cases that are trivial or where the accused is very young, they may decide to refrain from further action (referred to as 'NFA'—no further action). In the sphere of the non-formal reactions they may also decide to give an immediate informal caution or warning. The officer simply tells the defendant not to do it again, or words to that effect. Neither the NFA nor the informal caution are recorded. In 1994, 29.4% of all notifiable offences cleared up by the police ended in NFA. A more serious response is the formal police caution. This is a written warning, issued by a senior police officer, and recorded at the local Criminal Record Office. To issue a formal caution the accused must admit that he is guilty and must agree to his case being dealt with in this way, in the knowledge that the caution may be referred to in court for the next three years in sentencing procedures. In 1994, 185,000 offenders were cautioned in this way, which is almost 14% of all notifiable offences cleared up by the police. For young offenders, the Crime and Disorder Act 1998 will replace the current cautioning system with a new 'final warning scheme' which offers the police the choice of giving a reprimand for a first-time minor offence, or a final warning combined with a referral to a Youth Offending Team.

The final option open to the police is to forward the case to the Crown Prosecution Service (CPS). The CPS then 'takes the case into consideration', i.e., deliberates on its discretionary decision to prosecute. In 1994, 11.5% of all notifiable offences cleared up by the police were taken into consideration.

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8 In 1997, 242,000 offenders were sentenced for indictable offences at magistrates' courts and 76,600 were sentenced for indictable offences at the Crown Court, a ratio of 76% vs 24%. J. Mattinson and colleagues, Cautions, Court Proceedings and Sentencing England and Wales 1997, Home Office Issue 18/98, 17 September 1998.

9 See also S. Lees (1996), p. 95 and further for the process of attrition ("process by which cases are lost or dropped as they go through the various stages of the judicial system").

10 A. Ashworth (1998), p. 140. Of the 47 per cent (of offences) that are reported to the police, (non-recording) reduces the number of offences remaining in the system to 27 per cent. The most common reasons not to record an offence are that the offence was committed by a child below the age of criminal responsibility, the police do not accept the victim's version of events or the incident is resolved quickly and informally.

11 1,327,000 notifiable offences cleared up by the police of which 231,000 (interview of convicted prisoner) and 159,000 (other) led to no further action. Home Office Statistics 1994.


13 At the time of writing, the final warning scheme was being piloted in 6 areas. The pilots commenced on 30 September 1998 and are due to run for 18 months. If considered successful, the final warning scheme will be implemented nation-wide in the course of 2000/2001.

Flowchart of discretionary decisions:

<table>
<thead>
<tr>
<th>Offences</th>
<th>not reported</th>
<th>reported</th>
<th>recorded</th>
<th>not recorded</th>
<th>no further action (NFA)</th>
<th>caution (final-warning scheme young offenders)</th>
<th>forwarded to CPS</th>
<th>taken into consideration</th>
<th>not prosecuted</th>
<th>prosecuted</th>
</tr>
</thead>
</table>

The fact that the English criminal justice system tends to result in trial avoidance has important consequences for the position of the victim of crime. First of all, relatively few victims have to testify in court. This means that on the one hand most are spared the ordeal of a potentially traumatic court experience, but on the other hand are also denied the chance of having their say in court. Secondly, because the authorities have no need for the victim to prove the case once the defendant has pleaded guilty, there is no procedural incentive to inform the victim of the developments in the case. Thirdly, where a case ends with a caution, the victim is denied the chance of being awarded compensation by the criminal court. In Part II of this report we look at these and other problems in more depth, and discuss the initiatives that have been taken to solve them.

A further introductory observation on the English criminal justice process is that offences are divided into three categories:

1. summary offences, that are dealt with by the magistrates' courts;
2. indictable offences, which are serious offences that are tried in the Crown Court; and
3. offences triable either way, meaning 'in between' offences that may be tried either by magistrates or in the Crown Court. See §3.3.

Finally, compared to some of the continental courts the English courts are renowned for their 'pomp and circumstance', although there are enormous differences between the magistrates' courts and the higher courts. Whereas magistrates wear civilian clothing, the judge and barristers in the higher criminal courts dress extremely formally in robes and wigs. A higher English criminal court in session is an impressive sight. There is none of the informal atmosphere of the Scandinavian courts.\(^{15}\)

3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

3.1 Investigating Authorities

The police – the civil force responsible for maintaining public order – has the primary responsibility for the discovery and investigation of criminal offences. Throughout England and Wales there are 43 local police forces. There is no national force, although there is a

\(^{15}\) For a description of courtroom atmosphere in England see among others H. Kennedy, *Eve was Framed, Women and British Justice*, Chatto & Windus, London, 1992: ‘Many barristers love the wig and gown (...) The wig (...) is ridiculous and uncomfortable but especially liked by men who are going bald’ (p. 51). ‘There is far too much pomp and circumstance in British courts (...)’ (p. 52).
national Criminal Intelligence Service. Each force operates within a police area covering one or more counties,\textsuperscript{16} and is responsible to a local police authority (LPA).\textsuperscript{17} The only exception is the Metropolitan Police Service (MPS), which is directly responsible to the Home Secretary and Parliament. The Home Secretary is advised by the non-statutory Metropolitan Police Committee.

In England and Wales, the police operate more or less independently, for there is no direct judicial supervision of their activities, nor is the prosecution service involved in the investigations. Although all the forces must adhere to the police laws and guidelines, the Chief Constable of each district has a fair amount of discretion. In effect, he determines the culture within his own police force, and this leads to very real differences between the local forces.

In recent years the English policing establishment has suffered a series of embarrassments starting with the release of the Guildford Four and the Birmingham Six and culminating in the publication of the report of the Stephen Lawrence inquiry in February 1999. In this report it is concluded that the investigation into the death of black teenager Lawrence was marred by a combination of professional incompetence, institutional racism and a failure of leadership by senior officers of the Metropolitan Police Service.\textsuperscript{18}

### 3.2 Prosecuting Authorities

Until 1985, the police were not only responsible for the investigation of criminal offences, but also for their prosecution. By way of the Prosecution of Offences Act 1985, these two tasks were separated and the latter reallocated to the newly created \textit{Crown Prosecution Service} (CPS). This body, which is part of the civil service and is headed by the Director of Public Prosecutions (DPP), now prosecutes criminal offences for the Crown on behalf of the public. In its relatively short lifespan it has been subjected to several reorganizations. The CPS currently consists of 42 areas which correspond with the local police force areas. A CPS Inspectorate was established in 1996.

The segregation of the investigation and the prosecution of offences is sharp: unlike in many other countries, the CPS has not been given the power to supervise police investigations. Furthermore it should be noted that although in magistrates' courts employees of the CPS may conduct the prosecution of an offence themselves, the CPS must in principle employ barristers to do so in the Crown Courts. In England there is an important difference between CPS employees, solicitors and barristers. Those working for the CPS are civil servants, specialized in criminal prosecutions, and competent to represent the Crown in the magistrates' courts. The defence is often conducted by a solicitor, who is an independent lawyer with rights of audience in magistrates' courts. In cases going to higher courts, a solicitor does the preparatory work for the defence, and the CPS employee for the prosecution. In court, the cases of both parties are presented by barristers. Traditionally, solicitors had a monopoly

\textsuperscript{16} The exception is the metropolitan police district (MPD) and the City of London which are the only two non-county police areas.

\textsuperscript{17} This is an independent committee made up of three magistrates, five independent nominees and nine locally elected councillors (1994 Police and Magistrates' Courts Act).

over initial contacts with clients, and ‘the Bar’ (the barristers) over the rights of audience in the higher courts. Nowadays, changes are creeping in, with solicitors being granted rights of audience in some higher courts, and barristers taking up some of the tasks traditionally reserved for solicitors.

Although the CPS is the chief prosecuting body, there are others who have been granted (limited) rights to conduct prosecutions. In 1988, a special organization called the Serious Fraud Office (SFO) was created. This independent authority is responsible for the detection, investigation and prosecution of fraud involving more than £1 million. SFO investigation teams consist of lawyers, accountants and police officers. The SFO has been criticized for its alleged failure to secure convictions, for instance in the highly publicized trial of the Maxwell brothers, who were acquitted of large-scale fraud on 19 January 1996.19

### 3.3 Judiciary

Most criminal cases begin and end in the magistrates' court. This is the lower court of criminal jurisdiction. Most of the magistrates are lay judges, i.e., judges without legal qualifications. They sit in two's or three's and are advised by legally trained magistrates' clerks. In some larger urban courts the magistrates are professional lawyers with a seven-year 'general qualification' (several years' experience as a barrister or a solicitor). These stipendiary magistrates sit alone. The primary offences dealt with in the magistrates' courts are summary offences. These offences have maximum sentences of 6 months imprisonment or £5,000 fine.

More serious cases involving indictable offences go to the Crown Court. This court consists of six administrative ‘circuits’ and sits in 91 Crown Court centres around the country. The most famous of these is the Central Criminal Court, better known as the ‘Old Bailey’ in London. In the Crown Court, the question of guilt is decided by the jury, and the sentence is determined by the judge. Jury members are ordinary citizens selected from the local community. Judges in the Crown Court are either circuit judges, recorders or assistant recorders, although the most serious criminal offences may be presided over by a High Court judge.20 Circuit judges are full-time judges, whereas (assistant) recorders are part-time judges. To become eligible for appointment as a judge in the Crown Court one must have several years’ practical experience as a barrister or solicitor.

The decision on whether or not a case is sent to the Crown Court is taken during a committal hearing in the magistrates’ court. During such a hearing the magistrates decide if there is a case to be answered.21 Offences 'triable either way' may be heard either by the magistrates' court or the Crown Court. The decision on the mode of trial is taken by the

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19 *The Times*, 20 January 1996.
20 The High Court consists of the Queen's Bench Division, the Chancery Division and the Family Division. Together with the Court of Appeal and the Crown Court, the High Court of Justice forms the Supreme Court of Judicature.

magistrates. The Crown Court also hears appeals from the magistrates’ court. Prior to the Crown Court trial, there are Plea and Directions Hearings in the Crown Court which allow judges to exercise some degree of control over the management of cases in the pre-trial stages.

The Court of Appeal (criminal division) hears appeals of both fact and law from the Crown Court. Cases are usually decided by three or more Lords Justice of Appeal and/or puisne judges. A puisne judge is an ordinary judge of the High Court. To be appointed as such one must be a barrister of at least ten years’ standing. A Lord Justice of Appeal is appointed from among the puisne judges of the High Court but in principle a barrister of at least 15 years’ standing could also be appointed. The Court of Appeal sits in the Royal Courts of Justice in the Strand in London.

The final court of appeal in England and Wales is the House of Lords, which is also one of the chambers of parliament. Appeals from the Court of Appeal are heard by the Appellate Committee of the House of Lords. Peers allowed to serve on this committee are the Lord Chancellor, the Lords of Appeal in Ordinary (Law Lords) and others who have held high judicial office. The Lord Chancellor is, among other things, the head of the judiciary. The Law Lords, who become life peers upon appointment, must have held high judicial office or been practising barristers for at least 15 years. There may be up to 11 Law Lords at a time.


3.4 Home Office

The Home Office is the Government department responsible for internal affairs in England and Wales.! In the absence of a ministry of justice, which does not exist in England, the Home Office has a general responsibility for the criminal justice system, and the development of criminal justice policy and reform. It is headed by the Home Secretary.

Because of its considerable influence on the criminal justice process, the Home Office is, by definition, a key player in relation to the improvement of the position of the victim in the English criminal justice system. Direct responsibility for victims of crime resides with its Justice and Victims Unit (J&VU). In the last couple of decades, the Home Office has commissioned a substantial body of research concerning victims of crime (see bibliography).

22 Until recently, the defendant had the right to insist on a trial by jury, but this right was removed by Statute in 1999.
24 The House of Lords also hears appeals from Northern Ireland. For Scotland, the House of Lords is the final court of appeal for civil matters only.
and has published many circulars on the subject as well as two *Victim's Charters*, see § 4.3.

### 3.5 Lord Chancellor's Department

The Lord Chancellor is responsible for the day to day running of the courts, the appointment and training of judges and the administration of legal aid.

### 3.6 Probation Service

Before sentencing an offender, the court may ask for a pre-sentence report. This is a report on the offender's personal circumstances. The agency responsible for preparing these reports is the Probation Service. Until recently, there were 54 probation areas, but this is now being reduced to 42 to correspond with the police and CPS areas. Besides making pre-sentence reports, the service is also responsible for supervising probation orders and helping prisoners to settle into the community after their release from prison. The probation officers are unified in the National Association of Probation Officers. The service is the responsibility of the Home Office. The services are funded through local authorities, but with 80% of the money coming from the Home Office.

### 3.7 Prison Service

The Prison Service, which is divided into 15 regional areas, runs most of the prisons in England and Wales. It is an executive agency, which receives directions from the Home Office. It is responsible for matters related to the holding of persons remanded in custody or sentenced to imprisonment, such as their living conditions, release and rehabilitation.

### 3.8 Parole Board

On behalf of the Home Office, the Parole Board decides on the early release of prisoners. Its 70 members are appointed by the Home Secretary and must include members of the judiciary, psychiatrists, senior probation officers, criminologists and independent lay members. The Parole Board sits in panels of up to four members at its headquarters in Westminster.

### 3.9 Criminal Injuries Compensation Authority

The United Kingdom was the first country in Europe to set up a state compensation scheme. From 1964 until 1990, state compensation was assessed and paid out by the Criminal Injuries Compensation Board (CICB). This compensation was awarded on an ex gratia basis, along common law tort principles. In the late 80's it was decided to put the scheme on a statutory footing. After a series of false starts, including judicial review of a scheme introduced on

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28 This is a court order placing an offender under the supervision of a probation officer for a period of between six months and three years. It may be imposed instead of a prison sentence, on condition that the defendant is in agreement. Certain conditions may be attached, for instance that the offender must live in a particular place or must attend a course. See *A Dictionary of Law*, Oxford, 1994.

29 Davies, Croall and Tyrer (1998), pp. 5 and 9.
1 April 1994, a Criminal Injuries Compensation Act 1995 was finally passed by the Westminster Parliament on 12 November 1995, and came into force on 1 April 1996. This legislation introduced a tariff-based system for awarding compensation, thereby breaking with the former common law base given to awards. It is administered by a new Criminal Injuries Compensation Authority (CICA). Applications for awards received after 1 April 1996 are dealt with under the new scheme. All claims made before that date are settled under the old scheme. The new tariff scheme has come under a lot of criticism. On 25 March 1999 the Home Office Procedures and Victims Unit produced a consultation document suggesting further possible changes to the Criminal Injuries Compensation Scheme.

Under the new scheme, a victim of a violent crime can be compensated for (1) personal pain and suffering, (2) loss of earnings, and (3) costs of care. Injuries and losses resulting from domestic violence are covered, albeit under certain restrictions. The lower limit for an award is £1,000. Under the old scheme there was no upper limit on the awards, but the new tariff scheme sets a maximum of £500,000.

A first decision on each claim received by the CICA is taken by a claims officer. If the applicant does not agree with the decision he may apply for a review. This review is carried out by higher level claims officers. If the applicant is still not in agreement, he may ask for the decision to be appealed before the independent criminal injuries compensation appeals panel.

The Criminal Injuries Compensation Authority receives 80,000 claims a year and annually pays out in excess of £200 million.

### 3.10 Inter-agency Co-operation

Communication between the agencies involved in the criminal justice system is essential to ensure the system is operating as efficiently as possible. Formal ties between the agencies are limited – there is, for example, no judicial supervision of the police, nor is the prosecution formally involved in the investigations by the police. The Criminal Justice Consultative Council aims to improve communication, co-operation and co-ordination throughout the whole criminal justice system. This Council has 24 Area Committees. The Council nationally, and the Area Committees locally, provide a network of liaison and co-operation which aims to improve the smooth running of the criminal justice system. Furthermore, a new electronic mail system will greatly improve communication between criminal justice agencies, and therefore increase the effectiveness and speed of the criminal justice system.

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30 One important restriction is that the perpetrator and the victim may not be living in the same house when the claim is made. In many other jurisdictions, injuries resulting from domestic violence are not covered at all; see, for example, Chapter 12 on Ireland.

31 Hearings before the panel are oral. The panel sits throughout the UK and includes lawyers, doctors and lay members.

32 See Annual Summary of Activities.

33 In a pilot system which is being tested in Hampshire, more than 100 links have been made between the police, the courts, the Crown Prosecution Service, the Probation Service, prisons, and defence lawyers and barristers. In a press release the Home Office said: "In 1994 in magistrates courts alone in England and Wales there were over 2.5 million adjournments. Many of these can be avoided if the necessary information is provided on time." The Home Office Minister has said: "Importantly the victims of crime will also benefit from speedier communication. We want to ease the stress of going through the criminal justice process."
Previously known as the ‘Pre-Trial Issues Steering Group’, which was established in 1990, the Trials Issues Group (TIG) dates from January 1996 and consists of representatives of the CPS, the Home Office, the Justices' Clerks' Society, the Lord Chancellor’s Department, the Bar Council, the Law Society, the Magistrates’ Association, the Prison and Probations Service and the private sector. Its aim is to implement the recommendations made by the Pre-Trials Issues Working Group following an efficiency scrutiny of the administrative burdens in the criminal justice system. In 1996 the Trial Issues Group published a Statement of National Standards of Witness Care in the Criminal Justice System.

Representatives of all the criminal justice agencies and Victim Support are united in the Victims Steering Group. This body was set up in 1986, and is chaired by the Home Office. One of its tasks is to monitor the 27 standards of service set by the Victim’s Charter 1996.

3.11 Victim Support Organizations

Although victim support organizations are not agencies of the criminal justice system, they are very much involved in the workings of the system. Their contribution takes on many different forms, from offering emotional and practical support to victims in the pre-trial and trial stages, to advisory functions towards agencies and the government, and the initiation of programmes designed to improve the standards of court services. An example of such a programme is the innovative Witness Service run by Victim Support, which is the largest organization offering help and support to victims of crime.

The very first Victim Support scheme was set up in Bristol in 1974. Other schemes soon followed and in 1979 the National Association of Victim Support Schemes, now renamed Victim Support, was created. There are now at least 376 local schemes covering England, Wales and Northern Ireland. These schemes operate with a nucleus of paid staff members and many trained volunteers. The National Office is in London and strives to increase understanding of crime and to gain better recognition of victims’ rights. Victim Support offers help to an astounding 1 million people a year.

Other organizations involved in helping victims of crime are, among others, Support After Murder and Manslaughter (SAMM), Justice for Victims, Women’s Aid, the National Society for the Prevention of Cruelty to Children (NSPCC) and centres such as the London Rape Crisis Centre.

Although not a victim support organization as such, mention must also be made of Mediation UK. Originally called the Forum for Initiatives in Reparation and Mediation (FIRM), this group was founded in 1984. It acts as a national umbrella organization for a variety of mediation schemes between victims and offenders.

Office press release 062/96, 4 March 1996.

Where victims of crime are concerned, calls for greater co-operation between agencies are frequent. This is the case not only in relation to agencies working within the system, but also those outside the system such as accident and emergency departments of hospitals and social workers. See, for example, The Times of 16 July 1996 and the (Electronic) Telegraph of 24 August 1996.

Formerly known as the Witness to Court programme. See § 5.4.

4 SOURCES OF LAW

4.1 General

A striking feature of English law is that it has no written constitution, although a body of fundamental rights and duties of the public has evolved from such diverse sources as the Magna Carta (1215 AD), parliamentary legislation, common law, and European human rights law.37 Besides the common law, another typical source of English law that has evolved in time is equity. The old courts of common law did not recognize certain legal concepts, and were limited in their remedies, so some legal matters could not be satisfactorily resolved. Therefore a system evolved whereby litigants involved in such cases could petition the King, who then delegated the hearing of the petitions to the Lord Chancellor. The Lord Chancellor, who was originally a priest, decided what would be fair in a particular case. The law administered by the Lord Chancellor, and later by the Court of Chancery, became known as equity, which literally means fairness. Equity is now understood to be the 'principles of justice used to correct or supplement the law'.38 The Court of Chancery has since been abolished, and the administering of equity is done by the High Court of Justice, which also administers common law. A typical equity institution is the trust. Remedies such as orders to perform and injunctions also originate in equity.

Statutes are the primary written source of English law. The two main types of legislative preparatory works are Green papers — consultative documents — and White papers — draft proposals, expressing government policy. The green and white papers are command papers that are presented by the government to Parliament for consideration. Judges will not consult preparatory works unless there is a genuine ambiguity in a piece of legislation, which the parliamentary material may clarify.

The government frequently issues administrative guidelines by means of its Home Office Circulars, as well as drawing up directions, such as the Codes of Practice, and instructions, such as those to prison governors. Finally, charters set out general standards to be met by a particular agency or institution. A charter is a form of quasi-legislation embodying rules which are not directly enforceable in civil or criminal proceedings.39 The legal remedies offered are limited, although a charter may provide a grievance procedure which enables someone to make a justified complaint and on occasion receive some form of recompense.40

4.2 Sources of Criminal Law and Procedure

As yet, there is no code of English criminal law or procedure, although this is not for want of trying. In 1989 the Law Commission even published a Criminal Code for England and

40 A charter may set out a National Standard. This is a service standard which each operator within a particular service is expected to meet. Agencies delivering excellent public service may be rewarded with a Charter Mark Award.
Wales, but it never reached parliament in its totality because 'it now seems to be accepted that the enactment of a 220-section code would be too immense a task for Parliament to accomplish in a single Bill (...).'

Although nowadays criminal law and procedure is primarily regulated by acts of parliament, the common law is also still an important source, particularly of criminal law. Some offences such as murder, manslaughter and assault do not even have a statutory basis. Important doctrines such as those concerning intention and recklessness are also to be found in the common law.


Debates about whether particular legal problems should be solved using common law or legislation are still topical. This was demonstrated recently by the discussions on how to deal with the offence of 'stalking'. This is a series of acts which are intended to, or in fact do, cause harassment to another person. In the first such case to be brought, the accused pleaded guilty to inflicting 'psychological grievous bodily harm' and was sentenced to three years imprisonment. Using this decision as a precedent would give the previously undefined offence of stalking a common law footing. A legislative opening is found in the Criminal Justice Act 1995 which created the new offence of 'intentional harassment'. In practice the police found it difficult to prove the necessary intent. In its consultation document on stalking of July 1996, the government therefore proposed a new (civil) tort of molestation, and two new criminal offences for which no intent is required, namely (1) causing people to fear for their own safety, and (2) causing harassment, alarm and distress. The Protection from Harassment Act 1997, which was implemented on 16 June 1997, created two new criminal offences of harassment and putting people in fear of violence. No intent is required, although the perpetrator must know, or ought to know, that the effects of his conduct amount to harassment or putting someone in fear of violence.

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43 For a complete list up to 1998 see Davies, Croall and Tyrer (1998), pp. 30-33. See also the government website http://www.homeoffice.gov.uk
44 On 4 March 1996, Reading Crown Court sentenced Anthony Burstow to three years in prison for inflicting grievous bodily harm through psychiatric damage. (Electronic) Telegraph, 5 March 1996.
45 The leading article of The Times of 5 March 1996 discusses the situation under the heading 'Stop the Stalker, Common law may be better than new law'.
46 Home Office/Lord Chancellors Department, Stalking: The Solutions, Consultation document, July 1996.
47 A person who pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, is guilty of the offence of harassment (ss. 1 and 2). Conducting a course of conduct which causes another to fear, on at least two occasions, that violence will be used against him constitutes the offence of putting
4.3 Specific Victim-Oriented Legislation and Guidelines

Many regulations directly or indirectly influencing the position of the victim within the framework of criminal law and procedure are to be found piecemeal throughout the tangle of legislation that has appeared over the last decades. To give a few examples: sections on compensation orders can be found in the Criminal Justice Acts of 1948, 1972, 1982 and 1988, and the Powers of Criminal Courts Act 1973; compensation for victims out of forfeited property is regulated in the Powers of Criminal Courts Act 1973, the Criminal Justice Act 1988 and the Proceeds of Crime Act 1995; the Criminal Justice Act 1988 ensures anonymity of rape victims; section 51 (1) of the Criminal Justice and Public Order Act 1994 makes pre-trial intimidation of witnesses, or any person involved in the investigation, an offence; and the Criminal Injuries Compensation Act 1995 has placed state compensation to victims of violent crime on a statutory footing. Furthermore, mention should be made of the provisions in the Crime and Disorder Act 1998 dealing with the cautioning and charging of young offenders and reparation to victims. Finally, a Youth Justice and Criminal Evidence Bill presently before parliament is expected to receive Royal Assent by late Summer 1999. This Bill contains important new provisions for vulnerable witnesses who have to testify in court. The Bill follows the Speaking Up For Justice Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System which was published in June 1998.

As mentioned earlier, the Home Office has published two victim’s charters. The first charter which was announced in February 1990 is ‘a statement of the rights of victims of crime’, and is aimed at ‘setting out the rights and expectations of people who have become the victims of crime’.\(^{48}\) The second charter which was announced in July 1996 is ‘a statement of service standards for victims of crime’ and ‘aims to explain, as clearly as possible, what happens after the offence has been reported to the police and the standards of service you should expect’.\(^{49}\) The first charter does not provide the victim with any instruments to enforce the rights accorded him under the charter, nor does it place the criminal justice agencies under any direct legal obligation to meet the service standards.\(^{50}\) The second charter carries no legal obligations for the agencies either. However, the charter does explain how and where victims can make complaints if they feel standards are not being met. The standards of service set by the charter are to be monitored by the Victims Steering Group (see below), and each Annual Report of the Home Office must include a summary of progress made.


Regarding victims, the Crown Prosecution Service has a Code for Crown Prosecutors with

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\(^{49}\) The Victim’s Charter (1996), p. 1. For the record, the charter of 1990 is called ‘Victim’s Charter’ and the one of 1996 “the Victim’s Charter’. Also, the 1990 charter speaks of the victim in the third person whereas the 1996 charter addresses the victim directly as ‘you’.

\(^{50}\) For an evaluation of the status and significance of this charter see H. Fenwick (1995), and R.I. Mawby and S. Walklate (1994), pp. 170-177.
relevant sections, and a *Statement on the treatment of Victims and Witnesses* of November 1993. It has also published a *CPS policy document for prosecuting cases of domestic violence*. The CPS Inspectorate has reported on the thematic review of cases involving domestic violence (8 May 1998) and on the handling of cases involving child witnesses (29 January 1998).

In 1994 the Probation Service published a circular entitled *Contact with Victims and Victims’ Families* (PC77/1994). This was followed in July 1996 by a Joint Statement of the Association of Chief Officers of Probation and Victim Support on *The release of prisoners: informing, consulting and supporting victims*. The 1995 version of the *National Standards for Pre-Sentence Reports* determines that the impact of the crime on the victim may feature in a pre-sentence report.

## 5 ROLES OF THE VICTIM IN THE ENGLISH CRIMINAL JUSTICE SYSTEM

### 5.1 Reporting the Offence

The victim of crime can set the procedural ball rolling by reporting the offence to the police. Most offences known to the police are in fact brought to their attention by victims or other members of the public who witnessed the event. Offences may be reported by telephoning the local police station, by using the national telephone alarm system, in person at the local police station, or — more recently — via e-mail.\(^{51}\)

The 1998 British Crime Survey found that on average 44% of offences are reported to, or become known to, the authorities.\(^{52}\) The figures for reported sexual offences are significantly lower: only 19% of these offences become known to the police.\(^{53}\) Even so, the number of rape and sexual assault cases reported to the authorities has doubled in the last decade, although tragically the proportion of reported rapes that result in a conviction has, at the same time, more than halved.\(^{54}\) In general, reasons for not reporting an offence are, among others, that the victim feels the offence is too trivial to report, that the police wouldn’t be able to do anything about it or would not be interested, that it is a private matter and fear of reprisals.\(^{55}\) For victims of sexual offences there is the added fear of not being believed by the police, and of having to go through a traumatic courtroom experience.

Several initiatives have been launched to encourage more reporting of crime to the police. For instance, the ‘Crime stoppers’ scheme allows the public to report offences anonymously.

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\(^{52}\) The British Crime Survey (BCS) is a nation-wide household survey that measures crime against people living in private households in England and Wales. The 1998 survey is the seventh to be conducted since 1982, the year of the first survey. For the 1998 BCS, 14,947 interviews were conducted with members of private households. It should be noted that there are some differences between the offence categories used by the BCS, and those used by the police. As a result, only 62% of all BCS crimes overlap with police recorded crime, see 1998 BCS, issue 21/98, pp. 17-18. The ‘comparable’ offences are: vandalism, burglary, vehicle theft, bicycle theft, theft from the person, wounding and robbery.


\(^{55}\) 1998 BCS Issue 21/98 Table A4.2 p. 52. See also T. Newburn and S. Merry, (1990), pp. 5-7.
to the police. People can telephone Crime stoppers with information, or send them electronic mail.\textsuperscript{56} Children can report offences via ChildLine, a charity help line with 950 volunteer counsellors who answer approximately 3,300 calls a day.\textsuperscript{57} Many forces have introduced special domestic violence units, and rape examination suites. Furthermore, defendants accused of serious sexual offences can no longer personally cross-examine their victims in court, and further restrictions on questioning about the past sexual history of victims of sexual offences have been introduced (see § 8.2). In time, these measures may reduce the fear that victims of sexual offences currently have of court proceedings and lead to a further increase in the reporting rate.

In the English system complainant offences, where the victim must formally agree to the offender being prosecuted, are rare. Common assault is the only offence prosecuted by or on behalf of the victim.

5.2 Compensatee

Although a compensation order is made on the principle that the victim should be compensated for any damages, and may spare him the hassle of pursuing damages in a civil court if the award is high enough, the compensation order beneficiary is, technically speaking, not a civil claimant. In contrast to many other countries, where the decision on compensation is seen as a distinct civil law matter even though it may be settled in adhesion to the criminal trial, the English compensation order is a criminal sanction. Civil liability for the loss does not have to be established,\textsuperscript{58} although generally speaking this will be the case. The court may make compensation orders of its own accord — the victim does not have to submit an application. This is another important difference with most continental systems, where compensation is awarded on application by the victim, or the prosecution on behalf of the victim. To emphasize that the initiative is placed with the court, section 104 of the Criminal Justice Act 1988 requires the court to clarify why it has not made a compensation order where it had the power to do so.

Because the compensation order is a penal sentence, it can only be ordered if the offender is found guilty. Of course, the victim can always sue the offender for damages in a civil court, even if the criminal court has acquitted him. A compensation order has priority over a fine.

5.3 Private Prosecutor

The Prosecution of Offenders Act 1985 guarantees the right of members of the public to bring a private prosecution. As with a public prosecution, a private prosecution is instigated by making a formal complaint to the magistrates’ court. This procedure is called ‘laying

\textsuperscript{56} The online advertisement runs: ‘Ring Crimestoppers on 0800 555111 and you are GUARANTEED ANONYMITY - no one will ask for your name, call round asking you to sign a statement, or get you to come to court. In fact, we need never know who you are even if you want to claim a small cash reward.’ See website http://www.worldserver.pipex.com/crimestoppers/about.htm.

\textsuperscript{57} It is estimated that some 10,000 children try to contact ChildLine every day. In 1997-'98, ChildLine counselled more than 18,000 children who rang about physical or sexual abuse, or both. See the ChildLine website http://www.childline.org.uk/history.html

5.4 Witness

If a trial of guilt is held, the principle of orality dictates that the victim who is called as witness must tell his story in open court, in principle in the presence of the defendant. Although the defendant can choose whether or not he wants to 'take the stand' — i.e. testify under oath — the victim has no such choice. If he is called by the prosecution as a witness, he must testify.

Generally speaking, victims find testifying in an English court an unpleasant experience. First of all, the adversarial nature of the proceedings allows for cross-examination — the questioning of a witness by a party other than the one who called him to testify. During cross-examination, the examining party tries to undermine the testimony of the witness, either by contesting the facts (cross-examination 'to the issue') or by casting doubt on the credibility of the witness (cross-examination 'to credit'). In principle, the judge intervenes as little as possible during cross-examination. An aggravating factor may be the mandatory life sentence for murder. A mandatory sentence is a fixed sentence for a particular offence. The mandatory life sentence for murder implies that if the jury finds the offender guilty, the judge is obliged to sentence him to life imprisonment — he has no discretion in determining the sentence. In practice, this means that questioning during cross-examination in murder trials can be particularly harsh because the defence will do its utmost to prevent a guilty verdict. Plans of the previous government to introduce life sentences for (repeat) sex offenders unleashed a storm of protest that cross-examination of victims of sexual offences would become even tougher as a consequence. In §8.2, the questioning of the victim/witness is discussed in more depth.

There are also practical matters that can make testifying in court an ordeal. The date and time of the trial may be inconvenient for the victim/witness, and the waiting times annoying. In 1996 it was reported to the Parliamentary All Party Penal Affairs Group that 'although the Courts Charter stipulates that witnesses should not be kept waiting for longer than two hours, this was rarely the case in practice; and that when people left court vowing that they would not report crimes in future, this was often related to the length of time they had to wait more than to their treatment in the courtroom.' Listing practices are at present being reviewed as part of a joint performance management (JPM) strategy.

One explanation given for the general discomfort experienced by the victim/witness is that 'this is partly because the Anglo-Saxon adversarial judicial system defines victims as alleged victims, whose innocence is not established until the guilt of the defendant is

59 This entails 'giving a magistrate a concise statement (an information), verbally or in writing, of an alleged offence and the suspected offender, so that he can take steps to obtain the appearance of the suspect in court.' A Dictionary of Law (1994).

60 A Dictionary of Law (1994).

decreed'. In this sense, the defendant is not the only one put 'in the dock' during a criminal trial. It is common belief that the English adversarial system has some intrinsic characteristics that make testifying in court a potential ordeal for the victim/witness. If this is true, and the system itself is not altered, relief must be sought in the extra-systemic sphere. Particularly important here is Witness Service mentioned earlier, set up by Victim Support. Initially limited to the Crown Court, but now being extended to the magistrates’ courts, this programme aims to prepare the victim/witness for what he may expect in court, and to offer support before, during and after the trial. Information is provided on court procedures, the victim/witness may see the courtroom before the case starts if he so wishes, and other arrangements such as a separate waiting area away from the defendant and his family may be organized. For children who have to testify in court a special Young Witness pack has been published by ChildLine and the National Society for the Prevention of Cruelty to Children (NSPCC). The pack contains age-related illustrated booklets that explain to children what will happen in the courtroom and what is expected of them. Furthermore attention should be drawn to the recommendations made in the Home Office report on the treatment and protection of vulnerable and intimidated witnesses, and to the provisions in the recent Youth Justice and Criminal Evidence Bill. These developments are discussed in more detail in §8.3.

PART II: THE IMPLEMENTATION OF RECOMMENDATION (85) 11

6 THE VICTIM AND INFORMATION

6.1 Informing the victim

(A.2) The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation.

In 1988, the Home Office introduced a leaflet containing information about sources of help available to victims and opportunities for getting compensation, to be distributed by the

63 The dock is the enclosure in a criminal court where the accused is put. Being put ‘in the dock’ means to be put on trial.
64 The Witness Service was launched in 1989 in seven Crown Courts centres. Following a favourable evaluation in a research report published in 1991 the initiative received funding from the Home Office, and had been established nation-wide in all the Crown Court centres as of April 1996. Additional funding from the Home Office to extend the service to all magistrates’ courts was announced on 22 February 1999.
65 The pack was developed and funded by the Home Office, Lord Chancellor’s Department, Crown Prosecution Service, Department of Health, ChildLine and the NSPCC, with advice from the Law Society and Criminal Bar Associations as well as children’s organizations. See the ChildLine website (footnote 57).
police forces to victims reporting a crime. This leaflet, entitled ‘Victims of Crime’, was revised in 1994, and again in 1999, in consultation with the police service, the courts, the CPS, Victim Support and the Lord Chancellor’s Department. The leaflet – or a version used by the local police force – should be handed or sent to a victim within five working days of the report of the crime. The victim of violent crime should also be given a brochure about the Criminal Injuries Compensation Scheme. Following the Family Law Act 1996, which came into force in July 1998, a brochure on domestic violence was introduced which explains the protection available to victims of domestic violence.

For victims of serious crime, the police may offer extra help. In homicide cases, or cases where the victim is a child, there are special packs available containing information and advice on how to deal with the specific traumas and problems caused by these offences. Furthermore, many forces have Family Liaison officers who serve as a source of information and contact point for bereaved families in homicide cases. For victims of rape, some forces have introduced ‘rape chaperones’, whose responsibility it is to support the victim through the proceedings. This practice has been criticized because of the potential conflict of interests between the investigative duties of such an officer and his or her role as support person.

In practice, there are still many complaints from victims that they are not adequately informed of the opportunities for obtaining assistance, practical and legal advice, compensation from the offender and state compensation. One possible reason for the complaints is the significant cultural differences between the different police forces spread around England and Wales. Some forces are very dedicated to supplying victims with the government leaflets and any additional advice or support that may be needed. Other forces do not meet the required standards.

Victim Support forms an essential back-up to the police for the provision of all the necessary information to the victim. In cases of burglary, assault, robbery, theft (except where cars are involved), arson, harassment and damage to the home, a system of automatic referral has been introduced whereby the police pass on details of the victim to Victim Support, unless the victim asks them not to (implicit permission). Where sexual offences, domestic violence and homicide are concerned, details are only passed on if the victim gives his explicit permission. A national telephone helpline for victims was launched on 25 February 1998.

Furthermore, Victim Support can also provide the victim with information about the court proceedings, although it does not give legal advice. For such advice the victim must contact a solicitor. However, in the English criminal justice process a victim does not have the right to be legally represented during criminal proceedings.

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66 The Victim’s Charter (1996). The earlier Home Office Circular No. 50/1994 said that the leaflet should be passed on to the victim within three days of reporting the crime.

67 On one occasion, a force allowed itself to get carried away in its zeal to provide victims who had reported a crime with adequate information. Householders and businessmen who reported burglaries were rather shocked to receive a leaflet advertising high-velocity rifles, crossbows, survival knives and samurai swords as part of a crime prevention pack sent out by police in Bristol. The inclusion of the leaflet was ‘a mistake’. (Electronic) Telegraph, 13 May 1996.

68 As in many countries, this referral system, which relies on a sound relationship between the police and Victim Support, is at present under threat from new legislation concerning data protection.
(A.3) The victim should be able to obtain information on the outcome of the police investigation.

Regarding information on the outcome of the police investigation, the Victim's Charter 1996 envisages the following system. When a victim of crime reports an offence to the police, he will be given the name and telephone number of the Officer in the Case (OIC). Throughout the case, this officer is the main point of contact for the victim, who may get in touch with this officer at any time to make enquiries about the outcome of the investigation. Furthermore, the Victim's Charter commits the police to informing the victim if someone has been caught, cautioned or charged. The victim is then asked if he wishes to receive further information about the progress of the case. If the victim 'opts in' to this system, he should be told about any decision to drop or alter the charges substantially, the date of the trial and the final result, even if the victim is not required to attend court as a witness. According to the Victim's Charter, several police forces now use computerised systems to keep victims informed of major developments in their case. Satisfactory arrangements were due to be implemented nationwide in April 1997.

Where serious offences are concerned, special efforts are made to keep victims informed. Victims of rape, and families of murder victims, are informed of the outcome of the police investigation through their rape chaperone or family liaison officer respectively.

The 1994 British Crime Survey, which was conducted before the second Victim's Charter was published, shows that 28% of those reporting a crime were dissatisfied with the police. Of these, 60% said that (one of) the reason(s) for their dissatisfaction was that the police should have kept them more informed. A further 33% said the police made little effort and 26% thought the police were not sufficiently interested.

(B.6) The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.

As stated above, if someone has been caught, cautioned or charged, and the victim has subsequently opted in to the information system, he will be told about any decision to drop or alter the charges substantially. In England, this information is provided to the victim by the police, and not by the prosecution service. Families of someone who has been killed as a result of a crime may request a meeting with the CPS, to have the decision on prosecution explained to them.

In practice, there are still problems regarding the successful transmission of information on the final decision concerning prosecution. This may be due in part to the fact that although the CPS is the one taking the decision regarding prosecution, it is the police who should convey the decision to the victim. To reduce potential communication problems between these two agencies, the Royal Commission on Criminal Justice (RCCJ) has in fact recommended that 'the CPS should communicate directly with the victim when decisions have been taken, in advance of the date for trial, either to drop the case or to proceed on lesser or fewer charges.' This recommendation was also made by the All Party Penal Affairs Group: 'In our view the Crown Prosecution Service should inform victims directly of the
results of its decisions and the reasons for them. There should always be a written notification of decisions and reasons as well as any additional contact by telephone or in person. Finally, in a recent review of the CPS, it was also suggested that where the CPS drops or lowers charges, the CPS rather than the police should inform the victim. This proposal was included in the Labour Manifesto, and it has now been agreed on principle that the CPS should indeed be responsible for informing the victim of its own decision to drop or lower a charge. Unfortunately, implementation of this plan is slow.

On the other hand, a system in which the police are responsible for communicating all relevant information to the victim has the obvious advantage that the victim has just one point of contact. This is the underlying principle of the ‘One Stop Shop’ pilot projects that were announced in the Victim’s Charter 1996, and that have subsequently been carried out in 5 pilot areas. The results of the pilots are discussed below under guideline D.9.

Regarding requests of families of people killed as a result of a crime to meet a representative of the CPS, this standard has been fully met: from April 1997 to March 1998, all requests for such interviews were granted. However, in the opinion of the All Party Penal Affairs Group, too little is done to ensure that victims’ families are aware of the opportunity to meet the CPS in person. Furthermore the group feels the right to such a meeting should be extended to victims of other serious violent or sexual crimes.

(D.9) The victim should be informed of:
- the date and the place of a hearing concerning an offence which caused him suffering;
- his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice;
- how he can find out the outcome of the case.

Date and place of a hearing; outcome of the case
A victim who is required to testify in court is served a summons telling him when and where the trial will be. Victims who do not have to appear as a witness, but who have indicated that they wish to be kept informed, should also be told the date of the trial and the final result according to the standard set by the Victim’s Charter 1996. Also, if there is an appeal against the conviction or sentence in a case where someone has been killed, raped or sexually assaulted, the police will keep the family, or the victim, informed of developments. Information will be passed on about the date of the hearing and the result of the appeal.

In practice, it has proved difficult to systematically inform victims who are not required to testify of court hearings, and all victims of the final results. Again, the police are expected to relay this information to the victim, even though they are not the ones taking the decisions in question. The Home Office has therefore suggested that other agencies take over some of these tasks: ‘courts could post relevant documents and officers of the courts could carry out personal delivery of defendant and witness summons other than in relation to vulnerable

72 Parliamentary All Party Penal Affairs Group (1996), p. 11. For more about the reasons for dropping the case or proceeding on lesser or fewer charges, see the discussion in Ireland where the Director of Public Prosecutions is adamant that reasons for such decisions not be revealed.
victims.' Also, regarding notification of results to victims in non-sensitive cases, 'it is proposed that the courts or CPS should notify victims directly through the post.' In both instances, it is suggested that in sensitive cases the police should remain the responsible agency.\(^76\)

However, with the One Stop Shop pilot projects, a clear choice was made to channel all information through one police unit, hence the name 'One Stop Shop' (OSS). The five pilots commenced operation at the end of 1996,\(^77\) and were monitored by a group of researchers from the law department of the University of Bristol.\(^78\) The pilots were aimed at victims of domestic burglary, domestic violence, assault occasioning grievous bodily harm, sexual assault, robbery, criminal damage over £5,000, racially motivated offences, and attempting or conspiring to commit any of these offences. If in such a case an alleged offender had been identified, and proceedings were initiated, the victim was sent a letter inviting him to opt in to the OSS. Those who opted in were to be informed of the first hearing, the plea and directions hearing, the date of the trial and the outcome of the proceedings. Between the launching of the pilots and March 1998, a total of 1,292 eligible victims were offered the opportunity to opt in to the OSS by completing and returning a name and address form.

The report of the Bristol University researchers is based on statistics compiled by the five OSS units, interviews with 289 of the eligible victims and interviews with OSS personnel.

Forty-six percent of the eligible victims opted in to the OSS. Significantly, almost a quarter of the interviewees could not recall receiving the letter inviting them to do so.\(^79\) Just over a fifth of the interviewees who opted in claimed that they were not told about the date of trial, the verdict and the sentence. Of those who were informed of the date of the trial, half were told by people other than the OSS unit, for example by the officer in charge of the case. Almost one-third claimed they were not informed of the first hearing, and again almost half who were informed of this hearing received this information from someone other than the OSS unit.\(^80\)

Regarding the way in which information was passed to the victims, 73% who opted in received information about their cases by letter, and 83% of those who received letters thought they were easy to understand. Even so, a quarter of the victims who opted in said they would have preferred to have been informed face-to-face rather than by letter, and another 10% would have preferred to have been informed by telephone.\(^81\) Furthermore, a third of the victims complained that the information given to them was too late — for example, some had read about the verdict in their case in the papers before being informed by the OSS. OSS personnel in some of the pilots confirmed that there were problems with providing timely information. One of the reasons is that the OSS units themselves often


\(^{77}\) The pilot areas were: Sefton in Merseyside, Crawley in Sussex, Peckham and Southwark in the Metropolitan Police district, Aldershot and Farnborough in Hampshire and Chorley in Lancashire.


\(^{79}\) Hoyle et al. (1998), p. 13. Of the 289 interviewees, 226 had opted in the OSS and/or Victim Statement, 52 had opted out of both, and 11 had apparently not been invited to opt in at all, Hoyle et al. (1998), p. 10.

\(^{80}\) Hoyle et al. (1998), p. 17.

\(^{81}\) Hoyle et al. (1998), p. 18.
do not receive the relevant information from the Crown Court until several weeks after
the verdict and sentence have been pronounced.\textsuperscript{82} Communication between the CPS and
the police is also often problematic and the researchers found that ‘in some areas systems
for securing OSS information from the CPS appear to have broken down or seem to have
never been implemented’.\textsuperscript{83} There were also indications that the OSS system raises
expectations that it does not aim to meet. For example, most victims expected to be told
about remand and bail decisions, but this type of information is not part of the package
the OSS is committed to provide. Also, nearly half of the victims who opted in to OSS would
have liked to have discussed decisions taken in their case, but less than one-fifth were given
the opportunity to do so. Significantly, the victims who had opted \textit{out} of the OSS and who
wanted to discuss decisions in their case were given the opportunity to do so more than twice
as often as the victims who had opted in. The researchers suggested that the most likely
explanation for this is that the victims who have opted out contact the officer in charge of
the case when they want information, and that this officer is either more helpful or able
to provide more information than OSS personnel, who have no personal knowledge of the
case and only act as go-betweens.\textsuperscript{84}

The researchers conclude that the OSS services are not operating as well as they might.\textsuperscript{85}
They put forward that the basic premise of the OSS, that victims communicate with one
central point, ‘may create as many problems as it solves’, and that ‘thought could be given
to making each agency provide victims with information concerning the stage of the process
for which it is responsible’.\textsuperscript{86} If, on the other hand, the OSS project is continued then there
are three issues that need to be re-considered. First of all there is the question of whether
the opt in/opt out decision of the victim should remain the differentiating factor. Victims
who opt in have high expectations that are difficult to meet, and many of the victims who
‘opt out’ do not take a conscious decision to do so – there are numerous reasons why they
may fail to return the form other than the decision to opt out. As an alternative to the present
form of OSS, the Bristol University researchers suggest a universal service that gives victims
who really want to opt out the opportunity to do so at an early stage.\textsuperscript{87} Secondly, the scope
and timing of information provided by the OSS should be reconsidered – victims expressed
concerns about not being informed about bail, late information, and extended periods of
silence. Finally, the (lack of) involvement of the CPS, and the limited amount of substantial
information provided by them should be reviewed.\textsuperscript{88}

In particularly sensitive cases such as rape and homicide, or where a child has been the victim
of a serious offence, the (families of the) victims receive information on court hearings and
the outcome through their rape chaperone or family liaison officer. Although in the recent
past family liaison officers were often ill-prepared for the job – see § 8.1 on the (lack of)
training of police officers – these officers are generally very committed to keeping the victims
informed of developments and outcomes.

Finally, regarding information on a decision of the court to award compensation to the

\textsuperscript{82} Hoyle et al. (1998), p. 19.
\textsuperscript{83} Hoyle et al. (1998), p. 43.
\textsuperscript{84} Hoyle et al. (1998), p. 20.
\textsuperscript{85} Hoyle et al. (1998), pp. 17-18.
\textsuperscript{86} Hoyle et al. (1998), p. 45.
\textsuperscript{87} Hoyle et al. (1998), p. 45.
\textsuperscript{88} Hoyle et al. (1998), p. 46.
victim, most courts now use a computer-generated letter for notifying the compensatee of the amount awarded and the arrangements for payment of the order.\(^9\)

**Restitution, compensation, legal assistance and advice**

In England, it is the task of the police to inform the victim of the opportunities for obtaining restitution and compensation within the criminal justice process, legal assistance and advice. Unlike in many other jurisdictions, where the prosecution and the courts also have informatory duties towards the victim of crime, neither the English Crown Prosecution Service nor the courts have any such duties. For victims who are summoned to testify in court as a witness, additional information may be received through the Witness Service programme.

### 6.2 Information About the Victim

\( (A.4) \) In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim.

The English police were first given the duty to ensure that all relevant information about the injuries and losses suffered by the victim is included in the file in 1988, when the Home Office issued circular 20/1988 on Victims of Crime. A second edition of this circular was published in 1994. This commitment of the police is confirmed by the two Victim’s Charters.

To assist the police, the Trials Issues Group (TIG) has included a compensation form in its Manual of Guidance (MG). This ‘MG form 19’ – or a local police force version – is to be sent by the police to the victim. The accompanying letter informs the victim that court proceedings have been instituted, and that if the victim wants to make a claim for compensation, he should fill in the enclosed form and return it together with any supporting documents within 14 days of receiving this letter. The letter warns that failure to complete the form by the given date may lead to court proceedings without an application for compensation being made on the victim’s behalf.

There is evidence that the police do not manage to consistently adhere to the instruction to include all relevant information on the injuries and losses of the victim in the file. Many claims still fail for lack of adequate information about the victim’s injuries and losses,\(^9\) although that is not to say that the fault lies entirely with the police. Even if a compensation form has been sent to an eligible victim, he may fail to return the form for a variety of reasons. Perhaps he does not understand the form, his injuries and losses are not yet sufficiently clear, or he does not want to claim compensation. Whatever the reasons, a study conducted in 1996 which analysed 201 case files primarily concerning common assault and actual bodily harm found that only a small number of case files contained copies of the MG 19 compensation form completed by victims.\(^9\)

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\(^9\) A.W. Bush (1996), p. 56. The author also includes computer print-out documentation from eleven courts, the responses of 55 victims to questionnaires and information provided by eleven justices’ clerks about enforcement procedures, p. 42.
(D.12) All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account:
- the victim's need for compensation;
- any compensation or restitution made by the offender or any genuine effort to that end.

The victim's need for compensation

The decision of the court concerning a possible compensation order is made 'having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor' (section 35(1A) of the Powers of Criminal Courts Act 1973). It is up to the prosecutor to ensure that the court has access to all relevant information concerning the injuries and losses suffered by the victim because, contrary to proceedings in most other jurisdictions, the victim in England is not entitled to make his own representations. However, in theory the sentencing judge who is considering making a compensation order may call the victim to give evidence about the damages he has suffered, if the amount claimed by the prosecution is disputed by the defence. In practice, compensation orders are generally not made in disputed cases, and victims are therefore rarely called to give evidence about the losses they have suffered.

In principle, the case file should contain a completed MG 19 compensation form (see above) on which the prosecutor can base the claim for compensation. There has also been discussion about providing the court with information about the injuries and losses suffered by the victim as part of the pre-sentence report. Besides information on the offender's personal circumstances, the National Standards of 1995 now also require that the impact of the offence on the victim is recorded in the pre-sentence report. This impact is established on the basis of witness statements made by the victim, which are provided by the CPS to the probation service. There is no personal contact between the probation service and the victim. This implies that the pre-sentence report will not contain more information about the injuries and losses suffered by the victim than already found in the file. Furthermore, the Association of Chief Officers of Probation (ACOP) upholds that an evaluation of the injuries and losses suffered by the victim is not the responsibility of the pre-sentence report. A third method of providing the court with information on the injuries and losses suffered by the victim is through a Victim Statement (VS). A pilot project using these statements was run concurrently with the One Stop Shop pilots discussed earlier. Victims in five pilot areas were invited to opt in to the VS scheme. They were subsequently presented with a Victim Statement form, which was either filled out by the victim himself, or by a police officer on behalf of the victim depending on the pilot area. The first sections of this form invite the victim to provide information with a view to securing compensation for loss of property.

The Victim Statement as introduced in the pilot project in England should not to be confused with the Victim Impact Statement (VIS) currently used in the United States.
Besides the five areas that piloted the OSS scheme, Bedfordshire also ran a VS scheme, but this area was not included in the analysis made by the Bristol University researchers.
other losses, and personal injury. Furthermore the form asks for details of treatment and/or counselling and therapy, and finally details of the victim's doctor and place of treatment, if applicable. The value of the VS in its present design in relation to securing compensation for crime victims appears to be limited. Only 30% of eligible victims elected to opt in to the Victim Statement scheme, and although decision-makers are generally in favour of the statements, they have little impact on their decisions. One suggestion made by the researchers is that it should be possible for victims to update their Victim Statement at a later date to allow information about long-term effects and needs for compensation to be submitted to the court.

Compensation or restitution made by the offender
Information about compensation or restitution made by the offender or any genuine effort to that end is offered by the defence during their plea for mitigation, i.e. their plea for a reduction in the severity of the sentence, which is made by the defence before the sentence is passed. The court may even defer sentence so that it may take into account the fact that the offender has paid, or has agreed to pay, compensation to the victim following conviction (Powers of Criminal Courts Act 1973, section 1(1)). It is up to the offender to inform the court of his resources — it is not for the sentencing judge to initiate enquiries into the matter.

7 THE VICTIM AND COMPENSATION

7.1 The Expediency Principle and Compensation

(B.5) A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender.

A compensation order is a sanction that can be imposed by the criminal court only after conviction of the offender. This implies that in any case where the police decide not to record the reported offence, to take no further action, give an informal warning or a formal police caution, and in cases where the CPS decides to drop the prosecution, the victim is denied the opportunity of being awarded a compensation order by a criminal court. The number of victims who lose their chances for compensation in this way is considerable. For example, in 1997 the cautioning rate — i.e. the number of offenders cautioned as a percentage of all offenders found guilty or cautioned — for indictable offences was 37%. In the same year, the CPS discontinued around 12% of proceedings.

Guideline B.5 suggests that the question of compensation of the victim can influence discretionary decisions regarding prosecution in two ways. First of all, where an offender

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96 Other sections are on 'other effects of the crime', the nature and extent of emotional and psychological effect, threats, and other concerns for one's safety, Hoyle et al (1998), p. 25.
97 R. Morgan and A. Sanders, The Uses of Victim Statements, University of Bristol, Department of Law, 1999.
has not (yet) paid compensation to the victim, this could be a reason to go ahead with a prosecution. Conversely, where the offender has already paid compensation, or made a serious effort to do so, this could be a reason to discontinue the proceedings. These two interpretations are discussed below in relation to police cautioning and the discretionary decision of the CPS whether to prosecute.

**Cautioning**

In 1994 the Home Office issued Circular 18/1994 on the cautioning of offenders, with revised national standards on cautioning. These standards recommend that before a decision to caution is taken, the victim should be asked about ‘the nature and extent of any harm or loss they suffered as a consequence of the offence, and their significance relative to the victim’s circumstances’. Furthermore, he should be asked ‘whether the offender has made any form of reparation or paid compensation’. Explanatory note 4C adds that ‘if the offender has made some form of reparation or paid compensation, and the victim is satisfied, it may no longer be necessary to prosecute in cases where the possibility of the court’s awarding compensation would otherwise have been a major determining factor.’

In some police force areas compensation or reparation is sometimes made as part of a ‘caution plus’ scheme. In this case, the offender voluntarily agrees to perform a particular act, such as taking part in an activity set up by the probation service, in addition to being cautioned. However, the national standards on cautioning warn that ‘a caution is not a form of sentence. It may not be made conditional upon the satisfactory completion of a specific task such as reparation or the payment of compensation to the victim’. In other words, any arrangements for the reparation or compensation of the victim must be made on a voluntary basis. Furthermore, the national standards stress that ‘under no circumstances should police officers become involved in negotiating or awarding reparation or compensation’ (underlined in national standards). This is the opposite of what is expected of the police in relation to compensation in many other jurisdictions. In the Netherlands, for example, the police have a formal duty to attempt to reach a settlement between the offender and the victim.

**Discretionary decision to prosecute**

If the police decide to forward the case to the CPS, the CPS reviews the case against the Code of Crown Prosecutors. This code states that a case must pass two tests to qualify for prosecution. The first is the evidential test: on the basis of the evidence that has been collected, there should be a ‘realistic prospect of conviction’, i.e. it should be more likely than not that the offender will be convicted. The second is the public interest test: ‘in cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour’. The Code for Crown Prosecutors explicitly instructs the Crown to keep the interests of the victim in mind when establishing the public interest in a particular case. Furthermore it advises that a public interest factor in favour of prosecution is that ‘the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or

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1. This circular replaced the earlier HOC 59/1990 which established the first national standards for cautioning.
disturbance'. Conversely, if the defendant has put right the loss or harm that was caused, this is a public interest factor against prosecution. However, the Code is firm that defendants should not be able to simply buy themselves out of prosecution. In its 1993 Report, The Royal Commission on Criminal Justice cited research that found that 6% of discontinuances were attributable to the fact that the offender agreed to compensate the victim.

In conclusion, the question of compensation is taken into consideration in relation to cautioning and the discretionary decision to prosecute only in the sense that if compensation has been paid, or a serious effort made to that end, that could be a reason to discontinue the proceedings.

(B.7) The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings.

In England, a crime victim does not have the right to ask for a review by a competent authority of a decision not to prosecute. He does, however, have the right to institute private proceedings; see §5.3.

Bringing a private prosecution is a difficult and expensive business. There is no legal aid available for the private prosecutor, and if the magistrates' court refers the case to the Crown Court, the private prosecutor needs legal counsel. The impecunious victim has to rely on private sponsoring. Furthermore, the Director of Public Prosecutions may take over the case at any time, and decide to discontinue it. Despite these difficulties, occasions still arise where the victim refuses to resign himself to the fact that the CPS feels a prosecution will be unsuccessful, and takes matters into his own hands. One recent high profile private prosecution was conducted by the parents of Stephen Lawrence, the black teenager who was murdered by four white youths while waiting at a bus stop in London. Although this particular private prosecution did not result in conviction of the offenders, the public outcry at the way the investigation and public prosecution of the offence had been conducted did prompt the government to commission a public inquiry into the case. In the ensuing report it is recommended that the ability to initiate a private prosecution should remain unchanged. The Crown Prosecution Service, the Bar Association and the JUSTICE Committee are of the same opinion.

103 Code for Crown Prosecutors (revised) section 6.4 under h.
104 Code for Crown Prosecutors (revised) section 6.5 under g.
105 Moxon and Crisp, as reported in RCCJ (1993), section 4.36, as quoted by Ashworth (1998), p. 197 footnote 60.
106 The 1996 Victim's Charter does provide for a general grievance procedure, as does the Court's Charter in relation to mistakes in the conduct of court business. Such complaints may now ultimately reach the Parliamentary Commissioner for Administration, see H. Fenwick (1997), p. 323.
107 McPherson (1999), Recommendation nr. 40.
7.2 The Court and Compensation

(A.10) It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.

A criminal court may order the offender to pay compensation to the victim for any injury, loss or damage suffered as a consequence of the offence; see § 5.2. This general power to make compensation orders was first conferred on the criminal courts by sections 1-5 of the Criminal Justice Act 1972, later re-enacted as sections 35-38 of the Powers of Criminal Courts Act 1973 and subsequently amended by section 67 of the Criminal Justice Act 1982 and sections 104-105 of the Criminal Justice Act 1988. A compensation order made by a magistrates' court may not exceed £5,000 (s. 41(1) Magistrates' Courts Act 1980), but there is no limit to what the Crown Court may order by way of compensation.

In England, considerable effort has been put into overcoming the limitations, restrictions and technical impediments encountered in relation to the compensation order. Early research on the use of compensation orders in magistrates' courts found that compensation orders were rarely made in cases of personal injury. It was suggested that this was probably due to the difficulty of establishing the amount of damages to be awarded for the various injuries, and that suitable guidelines should be drawn up to help magistrates determine the level of compensation to be awarded. Although it took until 1988, the Home Office did eventually distribute guidelines drawn up by the (then) Criminal Injuries Compensation Board on appropriate amounts of compensation for different types of personal injury.

In the same year, two other measures were introduced to encourage criminal courts to make more use of the compensation order, in particular in cases involving personal injury. First of all, section 104(1) of the Criminal Justice Act 1988 obliges the court to motivate a decision not to make a compensation order where it could have done so. Where the court fails to meet this requirement, the victim may appeal to the Divisional court. Secondly, Home Office Circular 20/1988 gives the police the duty to ensure that all relevant information about the injuries and losses suffered by the victim is included in the file to be forwarded to the CPS, so that the CPS may in turn adequately inform the court, see § 6.2 above.

Following the introduction of these measures, the number of compensation orders made by the magistrates' courts in cases of violence against the person almost tripled from 8,100 in 1987, to 21,700 in 1989. Likewise, the amount of compensation orders made in the Crown Court in cases of violence against the person more than doubled, from 2,100 in 1987, to 4,700 in 1989. Since that first spectacular surge in the amount of compensation orders

111 Rudimentary provisions for compensation orders were first introduced by the Probation of Offenders Act 1907, but they were hardly ever made until the general power to do so was introduced in 1972. See Victim Support, Compensating the Victim of Crime, Report of an Independent Working Party Convened by Victim Support, 1993, nr. 1.09, p. 3.


awarded for personal injury, numbers have gone down again, although they are still higher than before the introduction of the 1988 measures: in 1993 the magistrates’ courts made 16,400 compensation orders against offenders convicted of violence against the person, for an average of £136, and the Crown Court made 2,300 orders for an average of £349. In absolute terms, for all types of offences, compensation is still awarded in only a minority of cases where an offender is convicted. In 1994, the magistrates’ courts made a compensation order in 22% of convictions for indictable offences, for an average of £183. The Crown Court ordered compensation in 9% of all convictions, for an average of £2,087. Significantly, research published in 1992 found that the most common reason given by the courts for not awarding compensation was that compensation was not sought by or on behalf of the victim. As we have seen, the victim does not have a personal right to make representations to the court regarding the question of compensation, but given the experiences on the continent there is no guarantee that more compensation orders would be made if that were the case. The key to success lies with the police and the CPS, who have an important responsibility to remind the court of its duty to take the matter of compensation into consideration, and to ensure that the court is properly informed of the victim’s need and wish for compensation.

(D. II) Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction.

Formally speaking, the compensation order is a penal sanction. Initially it could only be made in addition to another sentence. However, legislation now provides that the order may also be made instead of dealing with the offender in any other way (s. 35(1) Powers of Criminal Courts Act 1973, amended by section 67 CJA 1982).

In practice, the compensation order has both penal and compensatory characteristics giving it a hybrid nature and making it ‘yet another triumph for English pragmatism’. For example, even though the compensation order is cloaked as a penal sanction, it is used to ensure that the offender pays at least a part of the injuries, losses and damage that the victim has suffered as a consequence of the offence. On the other hand, although in general an order is only made where the offender is civilly liable in this way to the victim, the courts have nonetheless held that civil liability is not a prerequisite. Furthermore, it is not necessary that the exact amount of liability be established and awarded. Instead, the court awards the amount of compensation it considers ‘appropriate’, having also taken into account the offender’s means (Powers of Criminal Courts Act 1973, section 35(1A) and (4)). Consequently, although the amount awarded is more likely to be within the financial scope of the offender, compensation orders rarely cover the full amount of damages suffered by

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118 In the continental adhesion procedure, the victim presents his own civil claim for damages in conjunction with the criminal proceedings. In practice, this system has only moderate success. Among the main causes are the fact that victims are often poorly informed about the opportunity to claim compensation, and that they find the procedures for claiming compensation too complicated.
the victim.

Although a compensation order may be imposed as a sole sanction, it is usually awarded in conjunction with another sentence. In 1993 a compensation order was the sole or main penalty in less than 10% of cases where compensation was ordered in the Magistrates' courts, and in only 3% of cases in which compensation was ordered by the Crown Court.\(^{121}\) Likewise, in a recent analysis of 201 cases where compensation orders were made, compensation was ordered as the sole penalty in only 5.3% of the cases.\(^{122}\) If the compensation order is to be combined with a fine, and the offender does not have the means to meet both penalties, the ordering of compensation is to be given preference (Section 67 of the Criminal Justice Act 1982).\(^{123}\) In addition, 'it has been agreed with the Lord Chancellor's Department and the CPS that it would be right also to give compensation precedence over any order for costs in such circumstances.'\(^{124}\) In practice, unfortunately, 'courts frequently imposed a fine or costs even though the compensation order had been reduced due to the offender's lack of means.'\(^{125}\) In 1988-89, compensation was combined with a fine in 58% of assault cases.\(^{126}\) In his study Bush found that a compensation order was accompanied by a fine in 39.5% of the cases, and that costs were ordered in more than 50% of the cases.\(^{127}\) Finally, 'the possibility of making a compensation order was sometimes dismissed in favour of civil action, even though for many victims this might be impractical.'\(^{128}\)

(D. 13) **In cases where the possibilities open to a court include attaching financial conditions to the award of a deferred or suspended sentence, of a probation order or any other measure, great importance should be given — among these conditions — to compensation by the offender to the victim.**

Bush found that compensation was combined with a conditional discharge in 16.4% of the cases included in his analysis, with a probation order in 13%, a community service order in 11.5% and suspended custody in 1.4% of the cases.\(^{129}\)

### 7.3 Enforcement of Compensation

(E. 14) **If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.**

Compensation awarded by a criminal court in the form of a compensation order is a penal

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\(^{123}\) HOC No. 85/1988, p. 1.

\(^{124}\) HOC No. 85/1988, p. 4.

\(^{125}\) HOC No. 53/1993, p. 2.


\(^{127}\) A.W. Bush (1996), p. 56-57. The cases he analysed consisted of 149 common assaults, 35 cases of actual bodily harm, 17 assaults on a police officer, 14 offences under the Public Order Act 1986, 8 offences under the Criminal Damage Act, 2 indecent assaults and 1 offence under the Dangerous Dogs Act 1991, p. 44.

\(^{128}\) HOC No. 53/1993, p. 2.

sanction, and enforcement is therefore the responsibility of the state. In England, compensation orders are collected through the magistrates' courts, even if they are made by the Crown Court. The offender makes his payments to the court, and the court forwards the money to the victim. If both a fine and a compensation order are to be collected, the compensation order is to be given precedence. Willful neglect of a compensation order may be punished by a custodial sentence. Such a sentence in default extinguishes the duty to pay the order. Magistrates may impose a maximum term of 12 months for default, and the Crown Court up to 10 years. Besides imprisonment, the Crime (Sentences) Act 1997 also allows courts to impose community service orders, curfew orders and a disqualification from driving for up to 12 months in default.

In practice, enforcement procedures start with a notice of fine that is sent to the convicted person 2-3 days after conviction. This notice sets the payment deadline about 2 weeks after conviction, although many offenders are allowed to meet the compensation order made against them in instalments. If the offender has not paid the order within this period, he is sent a reminder. If the reminder also goes unheeded, a distress warrant or a bail warrant is issued.30

There are no national statistics for the total amount awarded in compensation orders, the amount collected and the amount written off.31 However, in his 1978 research on compensation orders in magistrates' courts, Softley reported that 34.7% of those ordered to pay compensation had paid within one month; 47.9% had paid within 3 months, and three-quarters had paid within 18 months. This left a quarter of those ordered to pay compensation who had not completed payment within 18 months. A tenth of those ordered to pay compensation had paid nothing.32 The rate and mode of payment of compensation has remained more or less the same over the years. Although a substantial amount of compensation is eventually paid, victims receive the money due to them in a piecemeal fashion, spread over a considerable period of time.33 Even so, it was estimated that in 1996 the annual shortfall between the amount of compensation awarded and the amount actually collected was £18 million.34 As regards imprisonment in default, Bush reports that where the offender was threatened with such a measure, this was usually suspended provided that small regular periodic payments are made.35

130 See Bush (1996), appendix O on enforcement procedures.
135 One significant exception in this respect was the Guppy case. In 1990, Darius Guppy was convicted of fraud and given a five-year prison sentence and a fine of £533,000. After Guppy had completed his prison sentence, the Appeal Court converted the fine into a compensation order on Guppy's request, to be paid on penalty of a three-year prison sentence. Guppy then declared himself bankrupt, claiming that the bankruptcy cancelled out the compensation order. The court judged that Bankruptcy should not be a secure sanctuary for someone attempting to escape a compensation order, and enforced the alternative three-year prison sentence (Electronic Telegraph 22 December 1995).
Several measures have been introduced, and suggestions made, to improve the collection rate of compensation orders. First of all, if the court considers the offender's assets to be the profit of criminal activities, a confiscation order may be made on the basis of the Proceeds of Crime Act 1995. In principle, the seized assets go to the Treasury, but the Act does allow compensation to be made to victims within the confiscation order. Secondly, in relation to young offenders the Crime and Disorder Act 1998 provides for the imposition of a reparation order (s. 67), through which the offender is ordered to 'undertake some form of practical reparative activity which will benefit the victim'. Although the reparation should be in kind, rather than financial, it does offer the offender the opportunity to 'make good' some of the damage. Furthermore, the court may choose to combine the reparation order with a compensation order. Thirdly, plans have been announced to make the wages that prisoners may earn during their detention go towards compensating the victims of crime. These plans were announced by the Prisons Minister at the annual conference of the Prison Service on 12 February 1996. If the wages scheme is successful, more judges may be encouraged to order compensation, even from those sentenced to imprisonment. At the time of writing the scheme had not yet been implemented. Furthermore, in an attempt to improve the enforcement of all financial penalties, including fines, compensation orders and confiscation orders, an inter-agency working group was set up by the Lord Chancellor's Department in May 1995. This group was given the task of assessing the true level and nature of financial penalties in arrears, and examining ways of improving enforcement. This has resulted in new 'good practice' guidance on the enforcement of financial penalties which was published on 10 July 1996. The working party will continue looking into enforcement matters, and is expected to report on, among other things, alternatives to prison sentence for default. One suggestion raised by the Magistrates' Association and others is that the Crown Court should enforce it own orders, rather that leaving this to the magistrates' courts. In the present system, an offender sentenced to a compensation order in the Crown Court, who is willing to immediately pay the order upon leaving the courtroom, cannot do so because only the magistrates' court may accept his payment. There has also been a steady increase in support for the idea of payment of compensation 'up front', that is to say that the court advances the amount of compensation that the victim is due, and then reclams this from the offender. This proposal has the support of, among others, Victim Support, the Magistrates' Association, the Justices' Clerks' Society, the All-Party Penal Affairs Group and the JUSTICE Committee. Such a system would greatly reduce the aggravation of victims over the irregular, small payments received over a longer period of time, but may have resource implications for the state.

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138 *Electronic Telegraph* 13 February 1996.
139 Members include representatives from the Magistrates' Association, the Stipendiary Magistracy, the Justices' Clerk's Society, the Association of Magisterial Officers, the Home Office and the Central Council of Magistrates' Courts Committees.
141 Press release Lord Chancellor's Department 10 July 1996.
by the Durham Police Authority to underwrite all compensation awards made by the courts to their police officers. Between 1 May 1997 and 30 April 1998, 31 police officers applied to the Police Authority for payment, for a total of £3,625. Approximately a third of this was eventually repaid by the offenders. Finally, it has also been suggested that a sentence in default should not automatically release the offender from the obligation to pay a compensation order. However, it should be noted that such a provision has been attached to the Dutch compensation measure (schatdevroedingsmaatregel, see the chapter on the Netherlands), and that this provision is at present discouraging the Dutch judiciary from ordering the compensation measure for fear of potentially punishing the offender twice for the same offence.

8 TREATMENT AND PROTECTION OF THE VICTIM

8.1 Victim-Awareness Training

(A.1) Police should be trained to deal with victims in a sympathetic, constructive and reassuring manner.

Each of the 43 police forces in England and Wales is responsible for the recruitment and training of its own police officers. Although most of the training that police recruits receive at their local police training centre is designed and delivered by their own force, about 20% of the programme consists of courses developed by the National Police Training group. All senior police officers with the rank of Chief Inspector and higher receive centralized training in leadership and managerial skills at Bramshill Police Staff College in the County of Hampshire.

Concerns about the quality of recruitment and training of police officers were voiced in the McPherson report on the inquiry into the death of Stephen Lawrence, and a Home Affairs Committee Inquiry into Police Training and Recruitment has been set up. One of the proposals voiced by the Police Federation is to establish a national Police University.

Specialized police courses

In 1988, Victim Support established The Families of Murder Victims Research Project. In the final report published in 1990, the researchers concluded that ‘(t)here does not appear to be any mechanism for supporting Police Officers in their dealings with families experiencing deep emotional distress. (...) The researchers understand that this area is not dealt with in Police training and think it could usefully be incorporated not only at basic training level, but also at Senior Police training level and on the Command course where management implications could be addressed.’ Astonishingly, not even family liaison officers — i.e., officers responsible for dealing directly with bereaved families — received any

144 J. Tildesley (1999), p. 44.
formal training on how to liaise with the families, deal with the trauma and combine their supportive role with their investigative duties. But recently awareness of the need for training of family liaison officers has grown, and a week-long training programme has now been designed by Avon and Somerset police. The course was first given in 1997 and also accepts officers from other forces.\footnote{149}

Many police forces have separate domestic violence and/or sexual assault units. The officers in these units have all received special training. Chief police officers were first advised to provide such specialised training in Home Office Circular 69/1986.

Training of the judiciary

There is no career judiciary in England: judges do not train specially to become judges, but are appointed directly from the ranks of practising solicitors and barristers. Nor is there a typical judicial career involving promotions to higher posts. Traditionally, the training of judges in England is minimal compared to other jurisdictions for fear of undermining judicial independence, but things are changing in this respect. Once appointed, the Crown Court judiciary, stipendiary and lay magistrates do receive training. For the lay magistrates, the Lord Chancellor may prescribe minimum training requirements. The Judicial Studies Board (JSB) takes care of all judicial courses. Regarding sensitization to victim's needs, the topic of the 1996 national summer conference of the Magistrates' Association was 'Victims and Witnesses' which resulted in the publication of a Victims and Witnesses Training Pack in April 1997.\footnote{150} The training pack can be used by the local magistrates' branches and benches as a manual for setting up a training programme on victims and witnesses. The pack includes a suggested programme for a complete one-day workshop, and alternative programmes. The one-day programme consists of an address by a guest speaker from Victim Support and group sessions.\footnote{151}

8.2 Questioning the Victim

(C.8) At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians qualified to assist them.

8.2.1 Questioning by the police

Awareness of the debilitating effect that unsympathetic questioning by the police can have on victims of crime first surfaced in the early eighties, when public attention was drawn to the tough questioning techniques that rape victims were regularly subjected to.\footnote{152} Since

\footnote{149}{ Police Magazine (Internet version) (1999), pp. 15-16.}
\footnote{150}{ Also useful is the checklist \textit{Practical Steps Towards Treating Victims and Witnesses Well} which was written by The Magistrates' Courts' Service Inspectorate for this conference.}
\footnote{151}{ The sessions are on identifying the victims, empathising with the victim, identifying problems and solutions, and action planning. During the session on identifying problems and solutions an audio tape of a victim recounting her experience of the criminal justice system should be played. The tape can be borrowed from the Magistrates' Association.}
\footnote{152}{ In 1982, a live investigation of a woman who had been raped was broadcast as part of the television series \textit{Police}. See S. Lees (1996), p. 23.}
then, much has been done to improve the treatment of victims by the police, in particular in relation to the questioning of victims of rape, other forms of sexual assault and domestic violence, child victims and other vulnerable victims. Home Office Circular 25/1983 was the first circular to offer advice to chief officers on the handling of investigations of rape, and the treatment of victims. This was followed by HOC 69/1986 on Violence Against Women. Since then, 'police handling of rape complainants, if not perfect, has certainly greatly improved'.\(^{153}\) If at all possible, questioning is carried out by a female member of a rape and domestic violence unit, or by a rape chaperone. Although many women who report rape now favourably assess how the police treated them, problems still occur during the medical examination. For a victim of rape, this is one of the most traumatic elements in the investigation. In theory, a victim can ask to be examined by a female doctor, but in practice examinations are still often carried out by a man because no female doctor was available at the time. Victims are often upset by the distant approach of the police surgeon.\(^{154}\)

Special attention has been paid to the questioning of vulnerable and intimidated witnesses in the *Speaking Up For Justice* Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System. This report was published in June 1998.\(^{155}\) In the report it is suggested that a witness may be vulnerable due to personal characteristics such as a disability or illness, or for circumstantial or situational reasons such as the nature of the offence or the relationship between the witness and the offender.\(^{156}\) Furthermore, it is argued that there should be a rebuttable presumption that a victim of rape or any other serious sexual offence is also a vulnerable witness. The Working Group recommends that during the police interview a vulnerable witness, particularly someone with learning disabilities, should be able to bring along a support person to a police interview, and that the police should be responsible for ensuring that a support person is present (recommendation 22).\(^{157}\) The Working Group also recommends that special attention be focussed on where interviews of vulnerable and intimidated witnesses are conducted (recommendation 23).

In the wake of the *Speaking up for Justice* report, a Youth Justice and Criminal Evidence Bill 1998 has come before parliament which includes special measures directions in the case of vulnerable and intimidated witnesses. The definitions of vulnerable and intimidated witnesses follow those suggested in the report, including the rebuttable presumption that a complainant in respect of a sexual offence is an intimidated witness (ss. 16 and 17). The special measures directions are aimed mostly at proceedings in the courtroom, see § 8.2.2.

### 8.2.2 Questioning in court

**Cross-examination**

One element that can still make the questioning techniques used by the police upsetting.

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\(^{155}\) See also the *Report of the Advisory Group on Video Evidence*, London: Home Office, 1989. The Advisory Group was chaired by Judge Pigot and is therefore generally referred to as the Pigot Report.


\(^{157}\) It is interesting that the Working Group is not in favour of extending the 'appropriate adult' scheme for defendants with a mental illness or handicap to the vulnerable witness, *Speaking up for Justice* (1998), nr. 6.6 p. 41. For a different approach see Chapter 20 on Scotland.
for victims is that the adversarial system forces the police to find out whether the victim will stand up to cross-examination in court. As we saw earlier in § 5.4, cross-examination can take on two forms. The first is cross-examination ‘to the issue’, that is, concerning evidence of facts and circumstances. The second is cross-examination ‘to credit’, that is, concerning the credibility of the witness. Although both forms of cross-examination can be aggravating for victims, the cross-examination to credit, where the defence will try to cast doubt on the character of the witness, may be a particularly bitter experience, especially for victims of sexual offences. The judge should try to prevent harassment during cross-examination but he cannot (seem to) favour the witness in a contested case. Cross-examination in its most extreme form was demonstrated in 1996 in a case where a woman who had been gang raped by six men was cross-examined by each of the six defendants’ counsel for a total of 31 hours over 12 days.\footnote{Letter from H. Reeves, director of Victim Support, to The Times, 01 August 1996.}

*Measures for victims in general*

Several measures have been taken to alleviate the plight of the victim/witness undergoing questioning in court. The ‘Witness to Court’ programme contributes significantly by offering the victim/witness the opportunity to familiarize himself with the court surroundings and be informed of the procedures. Another important change is that barristers conducting the prosecution may now introduce themselves to the victim/witness before the trial commences. Initially, pre-trial communication between the victim/witness and representatives of the prosecution was limited to the CPS employee or solicitor preparing the case. Any form of contact with the barrister could lead to suspicions of influencing the witness. It is reassuring for the victim who has to testify if he knows who will be conducting the questioning, and has met him before the trial actually commences. This particular problem is also lessening with the increasing rights of CPS employees to conduct their own prosecutions in court, rather than having to rely on the services of a barrister. The number of times the victim/witness is required to appear in court to testify has also been significantly reduced by the abolishment through the Criminal Procedure and Investigations Act 1996 of oral committal hearings. Finally, as mentioned earlier, the Penal Affairs Group has recommended that listing practices (i.e., the court timetable) be reviewed with a view to reducing time spent waiting at court by witnesses.

*Measures for special groups of victims*

As early as 1975, the need was felt for a special provision to protect victims of rape against unacceptably intrusive questioning about their sexual history. The Heilbron Report of the Advisory Group on the Law of Rape recommended that restrictions be made on the admission of this type of evidence. Subsequently, section 2 of the Sexual Offences (Amendment) Act 1976 provided that in any rape trial ‘except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant’. Unfortunately, in practice judges have proven loath to withhold their leave to question the complainant about her past sexual history, and the *Speaking up for Justice* report therefore recommends tightening up the law on this type of questioning (recommendation 63). The relevant provisions are now found in sections 40-42 of the Youth Justice and Criminal Evidence Bill 1998.
This Bill also provides that the court may make a 'special measures direction' for a witness who is vulnerable or intimidated in the sense of the Youth Justice and Criminal Evidence Bill. The special measures include allowing the witness to testify from behind a screen to prevent him or her seeing the accused (s. 22); allowing the witness to give evidence by means of a live link (s. 23); the removal of gowns and wigs during the giving of the witness’s evidence (s. 25); admitting a video recording of an interview of the witness as evidence in chief of the witness (s. 26); admitting a video recording of any cross-examination or re-examination of the witness as evidence of the witness under cross-examination or re-examination respectively (s. 27); and questioning through an intermediary (s. 28).

Regarding listing practices, in the Newcastle Crown Court and at Kingston, innovative practices have been developed in cases where child witnesses are involved. In Newcastle, the child witness is allowed to wait at home until the trial is about to start, and he is then telephoned. In Kingston, the court timetable is arranged so that cases involving child witnesses start in the afternoon. All the legal rigmarole such as the swearing in of the jury and the legal arguments and opening speeches are then dealt with, and the child witness is called to give evidence the following morning.\textsuperscript{159}

\textit{On an Englishman’s inalienable right...}

One last issue to be addressed in relation to the questioning of the victim in court concerns the principle that a defendant in a British court has always had the right to conduct his own defence, without professional legal representation. The Criminal Procedure Act 1865 allows him to call witnesses and address the jury,\textsuperscript{160} and he may personally cross-examine witnesses called by the prosecution. If a defendant elects to conduct his own defence, and subjects his victim to cross-examination, the judge must be extremely prudent about interrupting the proceedings. Too many interventions in cross-examination may form the basis of an appeal on the ground that the defendant has been prevented from putting his case. In 1988, legislation determined that victims of violent offences under the age of 14 and victims of sexual offences under the age of 17 (CJA 1988, amended 1991) could not be personally cross-examined by the accused. Then, in another case to hit the headlines in 1996 (the Ralston Edwards rape case), a man accused of rape personally subjected his victim to six days of cross-examination in court about the intimate details of the rape. The reactions in the press were diverse. Although everyone was dismayed at the ordeal the victim was put through in court, and many called for changes in the law to prevent this happening again, others stoically defended the right of the defendant to conduct his own defence. ‘Although some European legal systems insist that a defendant in court must be represented by a professional lawyer, it has always been an Englishman’s inalienable right to defend himself.’\textsuperscript{161} The Working Group on the treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System was asked to look into the matter. In its report it recommends that there should be a mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and serious sexual assault (recommendation 58) and that in the case of other witnesses and other offences the court should have discretion to impose

\textsuperscript{159} Letter from H. Reeves, director of Victim Support, to \textit{The Times}, 01 August 1996.

\textsuperscript{160} In civil cases, the defendant conducting his own defence may call in the help of a ‘Mackenzie Friend’. This is someone who helps present the case, but is not necessarily a qualified lawyer. In criminal cases the services of a Mackenzie Friend cannot be called upon (information provided by Lord Justice Rose, 3 March 1997).

\textsuperscript{161} A. Hamilton, \textit{The Times} 23 August 1996.
a prohibition on defendant cross-examination (recommendation 59). In keeping with the recommendations of the Working Group, the Youth Justice and Criminal Evidence Bill prohibits cross-examination by the accused of complainants in proceedings for sexual offences, of child complainants and other child witnesses (ss. 33-34). It also provides that the court has the discretion to prohibit cross-examination by the accused of other witnesses (s. 35). In cases where an accused is prevented from conducting the cross-examination himself, suitable measures for representation must be made, see further section 37 Youth Justice and Criminal Evidence Bill. Although in practice cases where the accused personally cross-examines his victim are few and far between, the proposed legislation is a significant step towards reducing the potential threat of unnecessary secondary victimization by the criminal justice system of (vulnerable) victims of crime.

8.3 Protection of the Victim

(F.15) Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or particular status or personal situation and safety of the victim make such special attention necessary, either the trial before the judgement should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate.

In general, the release of personal information about victims of crime to the press during police investigations is at the discretion of the local forces. There is no national code or guideline on this. Rather, police forces have their own codes and practices. Some have stringent rules, and only release information with the permission of the victim in question, whereas others are extremely free with passing on information. The Police Research Group has suggested that minimal personal information about victims and witnesses should be given over police radios, and that screened facilities should be used in identification parades. A study of victim and witness protection found that on high crime housing estates 13% of incidents reported by victims and 9% reported by witnesses led to their suffering intimidation.

The English media, with its harsh tabloid culture and sensational reporting, can pose serious problems for victims of crime. Often, victims are harassed by the press for details, and even offered huge sums of money for their story. At present, the only victims to enjoy any form of standard national protection are victims of rape or sexual assault, and juveniles. The Sexual Offences Amendment Acts 1976/1993 determine that, once rape or sexual assault has been reported to the police, no-one may publish the name, address or photograph of the victims. To do so is a criminal offence. This protection prevails for the rest of the victim’s life, even if the case does not go to court. Section 49 of the Children and Young Persons Act 1933 prohibits the publication of details likely to identify any child or young person involved in proceedings in the youth court, but this prohibition only comes into force after proceedings have been started, and not during the investigation! The Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System recommends that the courts should also have the power to prohibit the press from reporting.

details that could lead to the identification of a witness who is likely to suffer intimidation as a result (recommendation 39). The relevant provisions are now contained in the Youth Justice and Criminal Evidence Bill as sections 43-49.

The identity of victims of rape or sexual assault may not be revealed in open court. Regarding other victims, the judge or magistrates may, upon request, agree not to read out their name and address, and it is now established practice to remove the address of a witness from his statements before these are disclosed to the prosecution. As mentioned earlier, the judge or magistrates may now also allow a vulnerable or intimidated victim/witnesses to testify from behind a screen or via a TV link. Furthermore, the court will be allowed to order everyone to leave the court while a vulnerable or intimidated witness is giving evidence, except for the accused, legal representatives acting in the case and any interpreter or other person appointed to assist the witness (s. 24 Youth Justice and Criminal Evidence Bill 1998). It should be noted that in several other jurisdictions the accused may also be removed from the courtroom while certain witnesses testify, as long as he can watch the proceedings via a live link, or can listen to a tape recording of the evidence, see for example the chapter on Sweden.

Finally, it has been reported that victims’ statements and photographs are being used and traded as pornography in prisons. To combat this, the Home Secretary has proposed that people accused or convicted of sexual offences have limited access to these materials.

(G. 16) Whenever it appears necessary, and especially when organised crime is involved, the victim and his family should be given protection against intimidation and the risk of retaliation by the offender.

Several different forms of protection can be provided to the victim and his family. First of all, in extreme cases of victim (witness) intimidation, the police may provide physical protection through increased police patrols, police transport, 24 hour surveillance, protective custody or short- or long-term relocation. Some police forces provide personal alarms to protect vulnerable witnesses, in particular repeat victims.

Secondly, a victim may apply for an injunction or protection order under the civil law. For example, in situations of domestic violence the victim may be granted a non-molestation order or an occupation order under Part 4 of the Family Law Act 1996. A non-molestation

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163 It also recommends that the provisions are extended to cover reporting not only in England and Wales, but also in other parts of Great Britain, (recommendation 40).


165 This does not imply that the identity of the victim is also withheld from the defendant. The defendant has the right to know who is accusing him.

166 Speaking up for Justice (1998), nr. 8.27 p. 52.

167 Consultation paper Sentencing and Supervision of Sex Offenders, see The Times, 18 June 1996. Subsequently, Parliament passed the Sexual Offences Protected Material Act, but due to technical flaws in the act it has not been implemented.


169 R. Elliott (1998), p. 120.
order is a court order that prohibits the person against whom the order is made from using, or threatening to use, violence against the applicant, or from intimidating or otherwise harassing that person. An occupation order establishes who may live in the family home. Both the non-molestation order and the occupation order can be granted for a period of six months, or for an indefinite period. Where the court has attached a 'power of arrest' to the order, the person against whom the order was made can be immediately arrested if he breaks the order. 170

Under criminal law, the Protection from Harassment Act 1997 provides for a restraining order which prohibits further harassment or conduct which causes fear of violence. Furthermore, it is a criminal offence to intimidate a witness in the course of an investigation, or to harm or threaten to harm a witness after the trial has ended (1994 Criminal Justice and Public Order Act). The maximum penalty is five years' imprisonment. Alternatively, prosecutions for witness intimidation may also be brought under the common law offence of perverting the course of justice. In 1996 almost 370 offenders were convicted in England and Wales for one of the two statutory offences. 171 Furthermore, an unknown proportion of the 2,000 offenders convicted or cautioned for perverting the course of justice – which also covers offences such as bribery and giving false information – involved witness intimidation. 172

Where a defendant is released on bail, the court must immediately inform the police, who must in turn notify any witnesses who are known to be worried about the defendant being released on bail. 173 Furthermore, any victim of rape or sexual assault, and the family of a murder victim, should be informed if the accused is granted bail pending an appeal. 174 The Criminal Justice Act 1994 determines that, if the CPS has opposed the granting of bail from the start, it can now also appeal once the opposed bail has been granted. Grounds for an appeal are the risk of serious harm being done by the offender, and the public interest, which includes the interest of the victim. The Act also states that the CPS can appeal to court against a conditional release on bail. These provisions came into force on 10 April 1995.

The Statement of National Standards of Witness Care in the Criminal Justice System, which was issued by the Trials Issues Group in July 1996, addresses the question of providing protection during court proceedings to intimidated (victim)witnesses. It ensures that priority is given to cases in which witnesses are at risk of being intimidated and that confidential information relating to the intimidation of a witness should be communicated to the prosecution service using a special form (MG6) (3.1). 175 Furthermore, as we have seen earlier, the addresses of witnesses should be removed from copy statements and other documents submitted to the prosecution, except where necessary to prove the case (4.4), and if possible witnesses should not be required to reveal their addresses in open court (17.1). In particularly sensitive cases an application can be made to the court that a witness who is at risk of being intimidated need not disclose his name in open court (17.1). A nominated court official should be briefed

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170 See Women's Aid website.
175 National guidance on the implementation of these standards is to be provided (3.1).
in advance of any special arrangements the police intends to make at court to protect
witnesses who are at risk of being intimidated, and the prosecution (and defence) should
also be informed of these arrangements (12.1). In addition, the courts should develop
contingency plans with the police for dealing with intimidation in court (12.2). In principle,
courts should have separate waiting areas for defence and prosecution witnesses. Where
no such separate facilities are available, the prosecution may apply to the court for special
arrangements to be made in cases where witnesses are at risk of being intimidated (16.1).

Post-trial arrangements aimed at protection include informing the victim if someone
who has been given a life sentence or who has committed a serious sexual or violent crime
is to be released from prison. The probation service must ask the victim within two months
after the sentence has been passed whether he wants to be told of an eventual release, and
if so, is responsible for informing him when release is pending. In addition, a victim help
line has been set up through which victims can phone in and relate any fears they have
concerning, for instance, the (temporary) release of offenders. This victim help line receives
about three calls a day. The major concerns voiced by the callers are about the temporary
release of offenders, offenders being released earlier than expected and traumatizing letters
and telephone calls received by the victim from the offender. With a view to reducing the
amount of threatening telephone calls, a pilot project using a computer system through which
calls made by prisoners can be monitored was set up in 1997. In the pilot, each prisoner
has been given a Personal Identification Number (PIN) and a list of authorised numbers.
A call to an unauthorised number — for example to the victim — is immediately blocked.

Many of the provisions listed above are fairly new, and as yet little is known about their
implementation and practical effect.

9 CONCLUSIONS

We will first draw conclusions regarding the three themes embodied by the recommendation,
namely information, compensation, and treatment and protection. We will then address
the question of whether an adversarial system is tougher on victims of crime than a more
inquisitorial system.

Regarding the provision of information to the victim, a first conclusion is that a clear
choice has been made in England to channel all information through the police. This has
the advantage that the victim has just one point of contact with the authorities, but the
disadvantage that information has to be processed through several channels before it reaches
the victim, as demonstrated by the One Stop Shop pilots. The victim does not receive
information first-hand and cannot communicate directly with the decision-taker. In the
light of experiences in other countries, it would be preferable to adopt a system where each
authority is responsible for communicating its own decisions to the victim. The agreement

176 Victim's Charter 1996, National Standards Probation Service 1995. See also (1) an Instruction
to Governors, September 1994, on the protection of the child or young person as victim; (2) an
Instruction to Governors, November 1994, on the risk involved in, and the assessment of,
temporary release; and (3) the Joint Statement of the Association of Chief Officers of Probation
and Victim Support on the release of prisoners: informing, consulting and supporting victims,
of July 1996.

177 (Electronic) Telegraph Issue 737 Sunday 1 June 1997.
on principle that was recently reached, that the CPS is to be made responsible for informing the victim of a decision to lower or drop the charges, should be implemented as soon as possible. A second conclusion is that, because the victim of crime has no locus standi in the criminal proceedings, there is very little procedural incentive to inform him of the developments in his case, unless he is required to testify as a witness. Significantly, in the McPherson report, published in March 1999 following the Stephen Lawrence Inquiry, it is recommended 'that consideration should be given to the proposition that victims or victims’ families should be allowed to become “civil parties” to criminal proceedings, to facilitate and to ensure the provision of all relevant information to victims or their families.' It should be noted that in the civil law systems the primary aim of the ‘partie civile’ is to give the victim the opportunity to secure compensation in adhesion to the criminal proceedings. In as far as his compensation claim is concerned, the civil party may exercise several procedural rights such as questioning of witnesses and addressing the court. It is as yet unclear whether the recommendation now made in England envisages such far-reaching consequences.

As regards compensation, many efforts have been made to increase the effectivity of the compensation order. From an international perspective it is at present more successful than the adhesion model adopted on the continent, with more victims receiving at least some compensation than in any other country. Definite advantages of the compensation order model are that the state is responsible for enforcement, that the amount of compensation need not be established on a strict civil law basis and that the offender’s means are taken into account so that the order is within his financial capacity. Unfortunately, in practice judges often combine a compensation order with a fine and/or costs which partly defeats the purpose of the exercise. Ideally, a compensation order should never be combined with another financial commitment, unless the convicted person clearly has sufficient financial means. In relation to state compensation it should be noted that, despite all the criticism being voiced in England about the present system, more state compensation is paid out there than in all the other countries surveyed in this study put together.

In the sphere of treatment and protection of the victim, encouraging steps have been taken to reduce the negative impact of cross-examination on vulnerable (victim) witnesses. Although the nature of cross-examination remains unchanged, some of the rough edges are being taken off by tightening up legislation on questioning about the past sexual history of rape victims, prohibiting personal cross-examination by the accused person of (among others) rape victims, and the introduction of special measures directions such as testifying from behind a screen.

One remarkable difference between the English common law system and the continental civil law systems is that in England the victim has absolutely no locus standi. To add insult to injury, the victim is only the alleged victim. This assertion is highly contentious because it equates the principle of the presumption of innocence of the offender with a presumption of falsehood of the victim. The *presumptio innocentia* is a procedural, not a material, principle – it offers certain ground rules for the procedures to be adopted in establishing the truth. To ensure the defendant has a fair trial, the presumption of innocence guarantees, first of all, that the onus of proof lies with the prosecution, and secondly that this proof must establish the guilt of the offender beyond reasonable doubt. Adopting a further principle of the

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presumption of falsehood of the victim adds nothing to these procedural guarantees. The issue is not whether the Crown Prosecution Service or its key witness, the victim, is lying, but whether their case can meet the procedural standards necessary to ensure conviction. In this respect the English adversarial system is tougher on victims of crime than a more inquisitorial system where the victim is regarded as the victim until proven otherwise, and is treated in accordance with this assumption. It would be a great step forward if the authorities in the English criminal justice system would let go of the idea of the presumption of falsehood of the victim in exchange for a presumption of truthfulness of the victim. Strange as this may seem, such an assumption does not in any way compromise the presumption of innocence of the defendant.

Of course, there is one situation in which the victim does have a recognized procedural position: if he acts as private prosecutor. It is striking that despite the failure in almost all respects of the institution of private prosecution – with the exception, perhaps, of a certain symbolic value – it continues to enjoy the staunch support of the authorities; see, for example, the recent recommendation of McPherson to preserve the private prosecution. Given the minimal practical value that the private prosecution has, we would strongly recommend the introduction of a right to ask for a judicial review of a decision to drop a prosecution instead of, or alongside, the right to private prosecution.

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# Supplements

## ABBREVIATIONS

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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACOP</td>
<td>Association of Chief Officers of Probation</td>
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<td>British Crime Survey</td>
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<td>Cr App R</td>
<td>Criminal Appeal Report</td>
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<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<td>FIRM</td>
<td>Forum for Initiative in Reparation and Mediation</td>
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<td>GB</td>
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<td>GBH</td>
<td>Grievous Bodily Harm</td>
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<td>Justice and Victims Unit</td>
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<td>Local Police Authority</td>
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<td>Manual of Guidance</td>
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<td>Metropolitan Police Service</td>
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<td>National Society for the Prevention of Cruelty to Children</td>
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<td>Officer in the Case</td>
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<td>One Stop Shop</td>
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<td>Probation Circular, also Police Officer</td>
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<td>PVU</td>
<td>Procedures and Victims Unit</td>
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<td>Royal Commission on Criminal Justice</td>
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<td>Victim Impact Statement</td>
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Chapter 8

France

Scenery

France is one of the largest countries in Western Europe. It stretches from the northern plains to the Pyrenees in the south, and from the rugged coastline of Brittany to the Alps. Another geographical feature, which is particularly treasured by the French, is that France finds itself at the core of Europe. It is situated between economical and politically powerful countries like Germany, Spain, England and Italy. And this is of course how the French think and have always thought of their country: at the very centre of things.

To people all over the world, France is a symbol of the good life, excellent wine and food. Countless grapevines grow on the limestone plains of Bordeaux and the Alsace, where villages produce wines which are famous all over the world. Wine is one of most renowned export products of France. For the French, a good glass of wine is indispensable during their meals. French culinary traditions have been perfected over the centuries and have made cooking a highly refined art. French haute cuisine originated in the spectacular feasts of the French kings, and is typified by rich, elaborately prepared and beautifully presented multi course meals. Today, chefs in countless places inside and outside France have been taught the art of preparing dinners in this grand style for their guests. One could say that France has changed European gastronomy, and maybe even gastronomy worldwide. Besides gastronomy, French culture, art, and (legal) thought has greatly influenced Europe.

With respect to fundamental principles of justice, France has shaped European legal thinking especially in the field of human rights. For many people struggling against autocratic regimes and striving for a more humane society, the events which took place after the French Revolution are still a source of inspiration. In 1789, the urban masses took to the streets to demand freedom and equality for the people. On 14 July of the same year, Parisians attacked the Invalides, seized weapons, and stormed the Bastille prison, which was the ultimate symbol of the regime’s despotism. After the French Revolution, various enlightened changes were made. One of the more remarkable events was the promulgation of the Declaration of the Rights of Man (Déclaration des Droits de l’Homme et du Citoyen). A document which seized people’s attention throughout the world and has had a great influence on Western ideas of justice.

Napoleon Bonaparte, who seized power in the chaos that reigned after the Revolution, was, apart from a great military leader and conqueror, also the instigator of a number of important legal reforms. He reorganized the judicial system, and promulgated civil and criminal codes, which not only shaped the French legal system but also those of many other European countries. Throughout Europe, the organization and functioning of the prosecution
services are determined by Napoleon’s ideas, for instance the indivisible nature of the service and its hierarchical structure. The civil party (partie civile) or adhesion procedure which allows victims to claim compensation from the offender within criminal proceedings also originates from the Napoleonic code of criminal procedure.

Nonetheless, for a long time victims have felt left out by the criminal justice system. Despite their right to claim compensation within criminal proceedings, and their right to instigate private prosecution, victims were traditionally excluded from the criminal justice system. It was only during the 1980's, that the legislature started to pay attention to the position of victims. The Minister of Justice defended his initiatives on behalf of victims as follows: ‘The interventions of the criminal justice system are too exclusively focussed on the offender, the victim occupies only a marginal position, and that despite the psychological, moral or material difficulties he is frequently confronted with.’ (tr. MB).

The first action undertaken by the Minister of Justice was to install the Committee Milliez (see § I) and to create The National Office for Victims and Crime Prevention (see § 3.7.) whose aim was to study and develop reforms and measures to improve the position of victims. The Committee Milliez recommended the promulgation of new victim-oriented legislation. The legislature opted for a twofold strategy to improve the position of the victim of crime. On the one hand, it introduced legislative reforms regarding the right of the victim to receive compensation, i.e. by creating State Funds (see § 4.5). On the other hand, it created different mechanisms to facilitate criminal proceedings for victims both by enhancing knowledge about their legal rights – by means of leaflets and a Victim’s Guide -, as well as by supporting victim services (see § 3.6).

A remarkable feature of France’s criminal justice policy is the ‘politique de la vile’: criminal justice programmes for urban areas. In 1985, the government entered into Crime Prevention Agreements with local communities. The assistance to victims and the prevention of recidivism form a systematical part of the Prevention Agreements (see also the chapter on Belgium, who copied this initiative). The improvement of assistance available to victims is often used as an argument by the justice authorities to stress the importance of the crime prevention programmes, labelled as ‘justice de proximité’ (justice in the community). Victim services are encouraged to participate in the houses of justice which are mainly situated in difficult neighbourhoods (maisons de justice et du droit, see § 6).

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2 “L’intervention de la justice pénale est trop exclusivement centrée sur le délinquant, la victime n’apparaissant que de manière marginale, et cela malgré les difficultés d’ordre psychologique, moral ou matériel auxquelles elle est fréquemment confrontée.” R. Badinter, Minister of Justice, Circular regarding the protection of victims and the reinforcement of their rights, Circular relative à la protection des victimes et au renforcement de leurs droits, 25 July 1983.
4 See J.L. Domenech (1995), pp. 82-84.
PART I:
THE FRENCH CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

In France, victims have always had a special position within the criminal justice system. In particular, the victim who acts as a civil claimant (partie civile) has been given numerous procedural rights. Since the promulgation of the 19th century codes of criminal law and procedure, French law has progressively given victims greater opportunities to claim compensation by adhering to the criminal process. In 1906, the Supreme Court recognised that the complaint of the victim who at the same time states he wants to act as a civil claimant before the examining magistrate was sufficient to initiate public prosecution of the offender. Hence, in theory this power to start criminal proceedings against the offender makes the victim the equal of the public prosecutor. The legislature also took steps to make the victim’s civil action more effective, and to facilitate payment of compensation by the offender to the victim, both before and after the trial. However, there are quite a few practical impediments which may prevent victims from fully enjoying their rights. In practice, the working of the partie civile or adhesion model are often unsatisfactory, on account of its complexities, the delays it causes and the expenses it brings about. The enforcement of compensation awarded by the court to the victim remains particularly problematic.

For that reason, Lombard proclaims that for a long time the French legislature as well as the criminal justice authorities were satisfied by the formal recognition of the rights of the civil claimant, while ignoring the victim in practice.5

Until 1982, no real victim policy existed. In that year, Robert Badinter – the Minister of Justice at the time – entrusted an official committee under the chairmanship of professor Milliez6 with the task to undertake a study on the position of victims in criminal law and procedure. In June 1982, the Committee Milliez presented a report containing propositions regarding the treatment of victims within the criminal justice system. The report clearly showed the discrepancy between the legal and the actual position of victims within criminal proceedings. The report aroused the interest of the Minister of Justice and he promoted the creation of victim support services (see § 3.6). The Minister of Justice stated the following objectives of victim policy: the creation of reception services and the provision of information and support for victims of crime, the facilitation of access to the criminal justice system, and finally, the improvement of the victim’s chances of obtaining compensation.7

Subsequently, new legislation was introduced to improve financial compensation for damages and to facilitate the participation of victims in criminal proceedings in 1983.8 Since then,

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6 The Committee Milliez was installed on the 5th February 1982 by the Minister of Justice; La commission d’aide aux victimes a été installée sous l’appellation de "Commission d’étude et de propositions dans le domaine de l’assistance aux victimes", le 5 février 1982, par M. Robert Badinter, Garde des Sceaux, Ministre de la Justice, et placé sous la présidence de M. le Professeur Paul Milliez.
8 Law 83/608 of 8 July 1983, incorporated in the Code of Criminal Procedure.
the attention given to the position of victims of crime has risen considerably. Usually, however, the attention and reforms concentrate on the question of compensation. A good example is the State Compensation Schemes (see § 4.4).

2 General Remarks and Basic Principles

The present criminal justice system gained its distinctive features from the Declaration of the Rights of Man (Déclaration des Droits de l'Homme et du Citoyen) and the Napoleonic Codes (see scenery). The concepts and values laid down in the Declaration greatly influenced the Napoleonic codes of criminal law and procedure issued soon after the Revolution. The influence of the codes on the present criminal justice system can still be felt. The basis of contemporary criminal law is found in the 1810 Penal Code (Code Pénal) and the 1808 Code of criminal procedure (see § 4.2).

Traditionally, the French criminal justice system comprises one simplified procedure: direct action (citation directe). Recently, two other simplified and accelerated trial proceedings have been added: the direct comparition and the convocation. The direct action procedure may be used by both the public prosecutor and the victim. Regarding misdemeanours, it is the normal procedure to follow, as well as for certain serious misdemeanours (délits, the middle category of offences, see § 3.3). It cannot be used to try felonies, or against unknown offenders. Direct action is started by a summons issued either by the public prosecutor or the victim, containing the reasons for the procedure and the facts held against the accused. The latter usually receives the summons at least 10 days before the trial, although this period may be extended to five months depending on the accused’s place of residence. During the trial, the court may demand additional evidence or information. The investigation is conducted by the police court or district court during the hearing. The procedure of direct action is quite frequently used (see the table below). The immediate comparition (la comparution immédiate) is characterised by some as the French version of Anglo-Saxon plea bargaining. It is a process without judicial investigation and a lengthy trial hearing but it remains a judicial procedure involving a judge. This speedy process is applied for: 1) adult offenders who have been caught in the act for offences punishable with a prison term between one and seven years; and 2) for adult offenders if the crime is punishable with a prison term between two and seven years. The convocation (convocation par procès verbal) is applied for all offences, regardless of the punishment that is prescribed by law. The comparition is the most simplified and speedy procedure. The court will see the accused, who will be kept detained until the trial, on the same day. If the court cannot hear the case immediately, the public prosecutor may opt for the normal trial procedure, the convocation procedure, or may ask the permission of the court to keep the accused in preventive custody until the court can hear the case, which must be no later than on the second day. The accused does not have to accept the comparition and may ask the court to suspend the hearing for 15 days to win time to prepare his defence. But he thereby risks being detained until the trial. If the court does not keep the accused on remand, the public prosecutor may opt for the convocation procedure. He will summon the accused to present himself before the court within a period which can vary from 10 days to two months. The convocation procedure

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does not require the accused to remain in pre-trial detention, however, he may be put under judicial control by the probation service. As is indicated in the table below, the convocation is frequently employed by the prosecution service. Also, the frequency of use is steadily increasing, in five years from 17.4% of all cases to 42.6%. The comparition, to which many more conditions are attached, is less frequently used.

<table>
<thead>
<tr>
<th>Evolution in public action in the period 1990 – 1995</th>
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<td>referrals by exam. mag.</td>
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<td>duration of instruction</td>
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2.1 Basic Principles

During the pre-trial stage, the proceedings are governed by the secrecy principle. This means that the investigations performed by the police and the examining magistrates are shielded from any publicity. As a rule, the details of the outcome of the investigation also have to remain secret until the trial. Another prominent feature of the French criminal justice system is the expediency principle. According to this principle, the public prosecutor may charge a person with an offence if there is sufficient evidence, and if prosecution is in the public interest. If not, he may dismiss the case. In practice, the vast majority of criminal cases will not go to court but will be (conditionally) dismissed (classé sans suite, see § 7.2) or will proceed

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12 Exam. mag. is the abbreviation of examining magistrate (juge d'instruction).
13 Instruction is the French term for the judicial investigation in which the examining magistrate is involved.
through the mediation process (see § 7.1). In 1995, 5,191,255 crimes were reported, of which 4,161,926 cases were dismissed (see also the table below). In an average legal district, approximately 70% of cases are dismissed but in the bigger legal districts this number rises to almost 90%. According to Casorla, the dismissal of cases has become a criminal policy, which enables the system to make the best use of the relatively limited means and personnel.14

The trial proceedings are governed by the principles of orality, publicity and contradiction. The principle of orality determines that the judge may only reach a decision based on evidence which has been directly laid before the court during the course of the trial. This means that the accused, the witnesses and experts must all be heard during the trial. Yet the rule is not absolute. By exception, in the district courts and the police courts (see § 3.3), the president of the court may authorize the use of documents by a witness (ss. 452 and 536 CCP), and experts may consult their notes (s. 108 CCP). The principle of publicity is an important safeguard for the accused. It stipulates that the public and the press are allowed to attend court hearings. Again, the principle of publicity is not absolute. The court may decide to proceed without any public present and hold the trial in camera, if there is reason to fear that publicity would endanger public order or morals (see § 8.3).

The principle of contradiction, like the principle of orality, concerns the obligation to hear all parties to the case. The most important aspect of this principle is that the defence counsel has the right to contradict the opinion of the prosecution service. Nevertheless, the presence of the defence counsel is only mandatory in the Court of Assizes.15

3 JUDICIAL AUTHORITIES AND CRIMINAL JUSTICE PARTNERS

3.1 Investigating Authorities

On a national basis, the police are organised into two separate bodies: the national police force (police nationale), which is subject to the authority of the Minister of the Interior, and the state police force or ‘gendarme’ (gendarmerie nationale). The gendarmes operate under the supervision of the Ministry of Defence.

The national police are active in the larger towns. They are subdivided into two forces: a police force for the Paris area (Préfecture de police) and a regional police force (sûreté nationale) for the rest of urban France. Within the national police, one branch deals with keeping the peace and preventing crime (police administrative), the other with judicial police activities (police judiciaire) such as the collection of evidence and the search for offenders (ss. 13-14 CCP). The first duty of the judicial police is to provide the prosecution service and the examining magistrate with possible evidence to allow these authorities to decide whether the suspect should be brought before the criminal courts. The judicial police have to carry out orders from both the public prosecutor and the examining magistrate, and operate under the direct authority of the Procurator General (procureur général). He should make sure that the members of the judicial police carry out orders and do not abuse their powers. This force is also

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14 F. Casorla (1997), p. 91. According to Casorla 'le Parquet, en vertu de l'opportunité des poursuites, décide de classer les affaires éclairées pour éviter de surencombrer les juridictions déjà surchargées, cette faculté de classement [...] étant largement utilisée dans un souci de gestion'.

controlled by the indictment chamber (Chambre d'accusation), a sort of pre-trial court, which has the authority to impose disciplinary sanctions on judicial police officers. The gendarmes, on the other hand, are responsible for policing small towns and the rural areas. This police force also consists of two branches: a regional force and a standby police force for special tasks.

Both the gendarmes and the national police are competent to accept complaints and reports of all offences. There is one exception to this rule. The national police are exclusively competent concerning road accidents. In practice, victims in small towns tend to be more satisfied with the gendarme than with the police because the former is said to be more inclined to write down reports regarding certain offences. Victim support workers are told by their clients that the gendarmes take complaints regarding family matters, quarrels among neighbours, and other complicated situations more seriously. According to the victims concerned, the police often refuse to act in these situations. In rural areas, however, the gendarmes seem to work in a completely different manner; here victims are less satisfied with their performance. (For police training, see § 8.1).

3.2 Prosecuting Authorities

The prosecution service (Ministère public) is the collective name for the organization of public prosecutors (procureurs et substituts). Individual public prosecutors are appointed after positive advice by the Minister of Justice (Garde des Sceaux) and the Superior Counsel of the Judiciary (Conseil supérieur de la Magistrature). Public prosecutors are members of the judiciary, together with judges. Therefore, they are sometimes referred to as magistrates of the prosecutor's office, or standing magistrates because they stand up in court to present the charge (requisitions), in order to distinguish them from the trial judges or sitting magistrates. Every member of the judiciary is trained at the National Academy for judges and prosecutors (Ecole Nationale de la Magistrature). The curriculum of the academy does not contain subjects relating to the particular position of victims in criminal law and procedure. As a result, not all members of the judiciary are aware of the rights and interests of victims of crime, or of the risk of secondary victimization during criminal proceedings. Inavem (see § 3.7) occasionally intervenes to provide training for magistrates. Nevertheless, public prosecutors are very conscious of the interests of victims regarding pre-trial claim settlements or mediation. These processes are always initiated by the prosecution service and carried out by victim support services (see § 3.6).

The prosecution service functions as an indivisible unity; the individual members can therefore take over each other's duties, and it is organised in a hierarchical manner. The Minister of Justice at the top of the hierarchy may order public prosecutors to take public action in specific cases (s. 36 CCP). He determines the official policies regarding prosecution.

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16 In the small villages, less than 10,000 inhabitants, a community police force (la police municipale) can be created. The competence of the municipal police is limited to the enforcement of by-law (les arrêtés municipaux) and crime prevention. A municipal police force may also be created in larger communities for reasons of public order and security. See G. Stefani, G. Levasseur, B. Bouloc, Procédure pénale, 15ème édition, Dalloz, Paris, 1993, p. 282.

17 Information supplied by Mr. O. Bonnac, Director of victim support (L'Association d'Aide aux Victimes d'Infractions Pénales des Hauts-de-Seine) in Nanterre, May 21st 1996.
by issuing directives. Public prosecutors have to follow these official lines of policy. Besides, the Minister of Justice has the right to intervene in individual cases. His instructions have to be printed on the back of the legal file in order to safeguard the rights of the accused. However, it seems that the law is not always respected, and instructions are frequently given by telephone. Furthermore, the hierarchical structure implies that the members of the prosecution service have to follow orders from their superiors, although there are some exceptions to this rule. Firstly, the chief public prosecutor of the district court may oppose the instructions of the Procurator General of the court of appeal, and even act contrary to the instructions. But the public prosecutors may not oppose the orders of the chief public prosecutor of their own district. Secondly, in accordance with the dictum *si la plume est servie, la parole est libre*, a subordinate has to follow his superiors in written documents but he is free to express his opinion in court. In recent years, however, opposition against the consequences of the hierarchical structure has been growing. It was felt that the right of the Minister of Justice to intervene endangered the independence of public prosecutors. The public developed a profound suspicion of the criminal justice authorities and criminal proceedings. According to the legislature, 'his situation affects the social pact. How can a citizen who has committed an offence accept to be subjected to a penal sanction if he has the inner conviction that another citizen who has committed the same offence, or even a more serious one, is not punished due to his circumstances, or some sort of protection?' (tr. MB). As a result, a Bill was introduced in Parliament to enhance the public's confidence in the criminal justice authorities and to create transparency in criminal policy in 1998. It was accepted by the National Assembly on the 29th of June 1999, in particular regarding the dismissals of cases by the prosecution service. The 1999 Act on the Exercise of Public Action and the Modification of the Code of Criminal Procedure reforms the relation between the Minister of Justice and the hierarchical organization of the prosecution service (part I), and reinforces the authority of the prosecution service over the judicial police (part III). The Procurator General retains authority over all the members of the prosecution service (s. 36 CCP), as well as the power to give instructions to public prosecutors in order to start prosecution, or to seize an examining magistrate (s. 37 CCP). He may, however, no longer issue any instruction which impedes the prosecution of a certain crime (s. 37

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22 According to the 1999 Act, the competences of the Minister of Justice have undergone considerable change (s. 30 CCP). The Minister is no longer be able to give instructions regarding individual legal files (s. 30-1 CCP). The main role of the Minister of Justice is to develop general orientations of criminal policy and enhance coherence and transparency (s. 30 CCP). In exceptional cases only, may he seize jurisdiction to put public action in motion. If the Minister of Justice puts the prosecution machinery in motion, by a written document sent via the Procurator General to a public prosecutor, it remains the competence of the individual public prosecutor to decide whether he will continue prosecution or not. In urgent cases, the document may be sent by all means, e.g. by fax (s. 30-2 CCP).
23 Part two of the 1999 Act regards the dismissal of cases, see § 7.1.
The role of the public prosecutor is modified as well (ss. 39-1 to 39-4 CCP). The main duty of public prosecutors is to apply the law, and to start public action in accordance with the national criminal policy as determined by the Minister of Justice. If necessary, he may adapt official policies to local circumstances (s. 35-1 CCP). Moreover, public prosecutors should inform judges in their legal district about the implementation conditions of the national criminal policy during a general meeting which should take place at least once a month (s. 39-3 CCP). Finally, the statute addresses the control of the public prosecutor over the judicial police (s. 41 CCP). To ensure a proper functioning of the pre-trial investigation, he should determine what means are required to successfully conclude the investigations together with the police chiefs. If necessary, a formal agreement should be made on the allocation of means. In respect of the many long-lasting pre-trial investigations in the past (in 1995: an average judicial inquiry lasted for 14.6 months), it is essential that section 8 obliges the public prosecutor to fix a date when the investigation has to be concluded (s. 75-1 CCP). All these measures are intended to increase public confidence in the criminal justice system, and reinstate the principles of transparency in criminal policy, efficiency and a respect for the criminal justice authorities.

As stated in the 1999 Act, the primary function of a public prosecutor is the instigation of criminal proceedings against suspects (ss. 1, 31 CCP). In addition to this main assignment, the public prosecutor has certain derived functions, such as the capacity to directly receive reports of crime from the public as well as indirectly from the police (see § 5.1), furthermore the public prosecutor has the power to direct the police during the criminal investigation (l'enquête préliminaire, ss. 75-78 CCP) and has great powers during the judicial investigation. After the investigation, the police file will be sent to the public prosecutor, who may subsequently file an indictment against the suspect, dismiss the case, or try to mediate between the offender and the victim (see § 7.1) The exercise of public action is governed by the expediency principle (la règle de l'opportunité des poursuites, s. 40 CCP) and the official lines of prosecution policy as established by the Ministry of Justice (see § 2 for data regarding the number of cases dismissed, and § 6.1, under B.6.).

During the trial, the public prosecutor presents and substantiates the charges against the accused. Following the court's verdict, he may appeal any decision of the court concerning the culpability of the accused or the sentence imposed on him (ss. 497, 546 CCP). The public prosecutor also has the task to ensure the enforcement of the verdict (s. 32 CCP), although

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24 A novelty is the responsibility of the Procurator General to coordinate and evaluate the general orientations of criminal policy as issued by the Minister of Justice (s. 35 CCP). He will inform his subordinates about the elements of the policy, and he may inform the general public in order to safeguard transparency (s. 37-1 CCP). He must report back to the Minister of Justice in the form of an annual report, and inform him of important developments. The Minister of Justice may also request to be informed on any case which is referred to the prosecution service (s. 37-2 CCP).

25 In addition, they should inform the Procurator General or the Minister of Justice about cases which should be brought to their attention. Moreover, he should provide the Procurator General with an annual report about the implementation of the criminal policy (s. 39-4 CCP). F. Casorla (1997), p. 92.

26 He may for instance ask the examining judge (le juge d'instruction) to perform further investigations. He has access to the file of the examining judge at any time and may request the performance of certain inquiries, which he considers necessary to get the facts. The public prosecutor is also entitled to attend all hearings of the civil claimant (partie civile) performed by the examining judge (s. 119 CCP).
in this context the role of the sentencing judge (juge de l'application des peines) must be considered as well (see § 3.3 and § 3.4). However, he is not involved in the enforcement of the victim's claim for damages (see § 7.3).

### 3.3 Judiciary

Apart from the members of the prosecution service, the judiciary consists of three main types of judges. The classification is closely linked to the procedural stages. They are active in the pre-trial stage, the trial and the post-trial stage respectively. Likewise, the organization of the courts is characterized by a division along the lines of the pre-trial and the trial stage.

During the preliminary stage, the examining magistrate (juge d'instruction) plays an important role. The examining magistrate is a judge of the district court, who is appointed as such by Presidential Decree. In general, there is one examining magistrate per criminal court, but there may be more than one. In the latter case, the president of the court will decide which examining magistrate investigates a case. He will usually use a sort of schedule (tableaux de roulement), but he may refer a case to an examining magistrate who is specialized in such cases. The objective of this procedure is mainly to ensure the independence of examining magistrates. Neither the public prosecutor, nor the victim may choose a particular examining magistrate. The examining magistrate may become involved in the judicial investigation after a request by the public prosecutor, or because the victim of crime requests his intervention by constituting himself as a civil claimant before him (see § 5.2). The examining magistrate may intervene in a case against a known or unknown offender (case against X). Usually, the examining magistrates investigate the more complex and serious crimes.

Over the last few years, an average of 8% of the cases were referred to an examining magistrate (see § 2). The duration of the investigation by the examining magistrate (instruction) amounted to 14.6 months on average in 1995, which is very long. The scope of the investigations is determined by the request to the examining magistrate to investigate a certain case. If new facts are found, the examining magistrate should notify the public prosecutor in order that the latter may decide to include these facts in the investigation or the charge. The main duty of the examining magistrate is to discover evidence in a case, and if necessary to find the identity of the suspect. He should also prepare a legal file on the suspect, his personality, curriculum vitae, and his criminal antecedents (dossier de personnalité). This file enables the court to impose a penal sanction appropriate to the case, and with respect to the personality of the offender. In order to fulfill his tasks, the examining magistrate has several investigative and coercive powers. He may examine witnesses and allow house searches, attachments or wire tabs. After the investigation, he evaluates the evidence and

30 A. West c.s. (1992), p. 211.
31 Between 1968 and 1977, the duration increased from 5.9 to 8.5 months. Between 1990-1994, it has risen further from 11.6 to 13.5 months. Casorla mentions the following as reasons for the current considerable duration of the activities of the examining magistrate: the increase of delinquency, the new forms of delinquency, the regulations imposed by the legislature, and the high number of mutations among examining magistrates, as a result of which the newcomers are usually faced with 100 to 150 legal files of which they have no knowledge, when they enter the office; and finally, the perfectionist attitude of the examining magistrates. F. Casorla (1997), pp. 88-92.
decides to dismiss the case if there is insufficient evidence (ordonnance de non-lieu), to bring the case directly to court (ordonnance de renvoi), or to refer the case to the chamber of indictment (ordonnance de transmission de pièces). The latter is mandatory in the case of felonies.32

The chamber of indictment is an investigative court which functions in the pre-trial stage, in fact it is a chamber of the court of appeal, presided over by the President of the chamber who is appointed by Decree. The chamber of indictment has three main functions: 1) a second degree jurisdiction of the judicial investigative stage; 2) an instance of appeal regarding the decisions of the examining magistrate; and 3) a jurisdiction of control which can take disciplinary measures against members of the judicial police. In its first function, the chamber of indictment acts as a body of investigation which performs a double check of the evidence. Its intervention is requested by the Procurator General, and is mandatory regarding felonies. It reviews the evidence and the charge, and takes decisions similar to those of the examining magistrate. But the decisions of the chamber of indictment are called prescribed judgements (arrêts de réglements: de non-lieu, de renvoi, de mise en accusation). If the chamber of indictment finds the crime constitutes a misdemeanour or a serious misdemeanour, it will send the case to the police court, respectively to the district court. If the crime constitutes a felony, the case is sent to the Assize Court. In its second function, the chamber of indictment acts as a court of appeal against decisions of the examining magistrate. The public prosecutor, the accused, and the victim who assumes the role of a civil claimant (see §5.1) have the right to lodge such an appeal. The chamber of indictment may either confirm or squash the decision of the examining magistrate. In the latter case, it may decide to refer the case to another examining magistrate. Finally, the chamber of indictment acts as a body of control. As such, the parties – including the civil claimant – may file requests with the court to nullify investigative acts.34

During the following stage, the trial judges are the principal actors. They play an active role in the courtroom because it is their duty to establish the facts, to weigh the evidence and to find the truth. To that end, the legislature has given judges significant powers. They may order the appearance of additional witnesses in court and request the collection of new evidence. Judges trying criminal cases may work in five types of courts: the police courts, the district courts, the Assizes Court, the court of appeal or the Supreme Court. The classification of offences, and thus the seriousness of the crime, determines the competence of the courts. Criminal offences are divided into three categories: felonies (crimes); serious misdemeanours (délit); and misdemeanours or police violations (contraventions). Felonies are the most serious offences, punishable by a minimum prison sentence of 10 years. The middle category, the serious misdemeanours, are offences punishable with two months to 10 years’ imprisonments and/or a fine not exceeding 25.000 FF (EUR 3811). The least serious misdemeanours are punishable by a maximum prison term of 2 months and/or a fine not exceeding 20.000 FF (EUR 3,049).

Last in the hierarchy of the courts are the police courts competent to try misdemeanours. These are the only courts which consist of a single judge. Next in line are the district courts that hear criminal cases. This type of court is always composed of a three-judge panel. Felonies are tried by one of the Courts of Assizes, which is divided into two chambers: one

35 The exchange rate for 1 French Franc is EUR 0.152.
for adult suspects, the other for juvenile delinquents. The Assizes Court is a jury court, and consists of three judges and nine lay jurors. Appeals against verdicts of the police courts and the district courts can be lodged with one of the courts of appeal (cour d'appel). The Supreme Court (Cour de Cassation) has two main functions: it is a court of appeal and a court of partial legal review. As a court of appeal, it is the only court which can function as the instance of appeal in felony cases. But there are plans to reform the Court of Assizes and to create an instance of appeal for cases tried by it. This appeal court would consist of three judges and four lay jurors. As a court of partial review, the Supreme Court ensures a uniform interpretation of the law throughout the Republic. Here, legal recourse to the Supreme Court is restricted to rulings of the courts of appeal which involve a point of law. The Supreme Court can agree with either the lower court's interpretation of the law or it can overrule its opinion and have the case retried. All courts are independent and their budget comes from the Ministry of Justice.

<table>
<thead>
<tr>
<th>Classification of offences</th>
<th>Courts of first instance</th>
</tr>
</thead>
<tbody>
<tr>
<td>misdemeanours (contraventions)</td>
<td>police court (tribunal de police)</td>
</tr>
<tr>
<td>serious misdemeanours (délits)</td>
<td>district court (tribunal correctionnel)</td>
</tr>
<tr>
<td>felonies (crimes)</td>
<td>Court of Assizes (Cour d'Assises)</td>
</tr>
</tbody>
</table>

The third type of judge is actively involved in the post-trial stage. These judges are referred to as sentencing judges (juge de l'application des peines). They determine the actual punishment in a specific case, and/or determine the conditions of a suspended sentence and the appropriate probationary regime (see further § 3.5). The sentencing judge also decides in which prison the offender will have to serve time.

3.3.1 Criminal Proceedings

The first stage in criminal proceedings is the inquisitorial preliminary stage. Relatively simple cases do not enter the preliminary stage and will be sent directly to the lower courts to be tried. The court itself will collect the evidence. More complex or serious cases will be investigated by the examining magistrate. He will also see offenders who are caught red handed. Once the evidence has been collected, the examining magistrate commits the case to the pre-trial court of investigation to decide on the charge. The trial stage, on the other hand, takes place in an accusatorial manner. As a rule, the court proceedings are oral and open to the public (see § 2.1 and § 6.3.). The trial begins with a description of the essential facts of the case by one of the judges and the confirmation of the accused’s identity (ss. 294, 406 CCP). The hearing starts with the examination of the accused (ss. 328, 442 CCP) by the president of the court after which he will call the witnesses for questioning (s. 329 CCP). Traditionally, the court directs the questioning and is the only authority which may put questions to the witnesses and experts (see § 8.2). The parties to the proceedings, including the defence and the public prosecutor, may only suggest questions to the court. However,

since 1993 a tendency to neutralize the active and predominant role of the judge has been set in motion. And although the Supreme Court has prevented the introduction of the Anglo-Saxon system of cross examination, the parties have gained the right to directly question the accused, witnesses and experts. Hereafter, the oral presentations of arguments (débat contradictoire) are made: firstly, by the victim who acts as a civil claimant (civil party, partie civile) or his advocate, then the public prosecutor and finally by the defence counsel. The civil claimant and the public prosecutor may respond to the arguments presented by the defence. The accused or his counsel are entitled to have the last word. The trial ends when the court has reached a verdict. If the victim has claimed compensation, the court should also make a decision concerning the civil claim for damages (see § 7.2.). Judgments must be reasoned and have to be read out loud in court (ss. 366, 485 CCP). All decisions may be appealed by the defendant, the civil claimant and the public prosecutor within ten days of the sentence (s. 497, 498 CCP). The appeal of the civil claimant only concerns the civil claim. The appeal stays the enforcement of the sentence of the lower court (s. 506 CCP). After a guilty verdict by the criminal court, the sentencing stage commences. Here, the actual punishment will be decided upon by the sentencing judge (see § 3.4).

3.4 Enforcement Authorities

Following the finding of guilt, the public prosecution service must ensure the enforcement of the verdict (s. 32 CCP) in cooperation with the sentencing judge (juge de l’application des peines). This judge works at the district courts (s. 709-1 CCP) and in close cooperation with the probation services. The sentencing judge decides which treatment the convict has to be submitted to, and what his regime will be within the prison facility (le régime des centres de détention – D 116 CCP).

The role of the sentencing judge is of particular interest to victims. After all, he is the one who imposes conditions on the offender, for instance, he may order the payment of damages in combination with a deferred sentence (see § 7.2, D.13). To illustrate the importance of the work of the sentencing judge, for clients of the probation services, the way compensation is paid to the victim is determined by the sentencing judge in 81% of

39 But the Act of 24 August 1993 has prevented that the point of gravity would be transferred from the pre-trial stage to the trial stage. According to Casorla, the legislature has prevented the introduction of a justice bavarde, entirely centred on the trial hearing. In the French criminal justice system, the centre of gravity has remained with the pre-trial stage, and the trial is based on the evidence collected in the preliminary judicial investigation in order that the court may reach a conclusion, after the oral presentation of arguments. F. Casorla (1997), p. 99.
the cases. He usually requires the offender to reserve 10 to 20% of his income to compensate the damages sustained by the victim (see also § 7.3). In practice, the sentencing judge fills in a form to indicate which conditions will be attached to a conditional dismissal or suspension. He may choose from the 14 conditions that are mentioned on the form. Especially relevant are the following conditions: the payment of full or partial compensation by the offender (nr. 5), and the order to refrain from contacting the victim (nr. 13). Regarding the former condition, the sentencing judge may order the offender to pay compensation even in those instances in which the criminal court did not award compensation to the victim. The rules of conduct are an important asset with respect to the protection of victims from their offenders (see § 8.3). The sentencing judge also monitors whether the offender fulfills his obligations. According to s. 739 CCP, the convicted person is placed under his control. To this end, the sentencing judge is assisted by probation officers who perform the actual monitoring of the offenders (s. R50-31 CCP). The probation officers report back to the sentencing judge, who can take action if the offender does not comply with the obligations, as mentioned in the sentence (see § 7.2 and § 7.3).

3.5 Penitentiary and Probation Services

The prison and probation services are confronted with many convicts who have been sentenced to pay compensation to their victims. It is their duty — under the guidance of the sentencing judge — to make sure that sentences are carried out, and legal compensation mechanisms are respected. Prison and probation services have to check whether the conditions attached to the sentence are fulfilled. Furthermore, they may deduct certain sums off the prisoner’s wages as part of the compensation which has to be paid to the victim or the Guarantee Fund. Finally, the services maintain contacts with victims of crime and may inform them on several issues, for instance back payments. For the actual functioning of the services' tasks regarding the payments by offenders to victims, see § 7.3.

3.6 Victim Services

Most of the victim support organizations (associations d’aide aux victimes) were established by private citizens, following the publication of the report of the Commission Milliez in 1982 (see § 4.3). In October of the same year three victim support centres were opened in Rouen, Colmar and Lyon. Since 1983, the Ministry of Justice financially supports private initiatives to establish victim support organizations. The National Council of Crime Prevention has also been very supportive of victim services. The main drawback of the fact that victim services are created on private initiative is that local victim support centres are not distributed evenly throughout the country. Some regions are well-covered but others have only one victim support centre. In the latter areas, victims may have to travel far to get assistance. Or worse, they may even ignore the very existence of victim support. Locally, public prosecutors are often the driving force behind victim services. About 85% of all victims support schemes have been created on the initiative of public prosecutors. This is the reason

43 CPAL, les Comités de Probation et d’Assistance aux Libérés.
why the vast majority of victim services are located in court buildings. The advantage of such a location is that victim support workers have easy access to public prosecutors and the court's office. This enables them to get quick and up-to-date answers to questions. Moreover, they can call the public prosecutor's attention to certain aspects of a case. One disadvantage is that most victims never visit the court buildings, due to the relatively small number of victims whose case is actually prosecuted (see § 2). This could be remedied by introducing an automatic referral system. The police, however, do not refer victims to victim support in a systematic manner.

Nowadays, more than 150 different victim support organizations exist in France, with more than 500 local centres. The local schemes are run by professionals, such as lawyers and psychologists. The volunteers who work at the victim support centres usually have a university degree in law or psychology, and are often also professionally active in these fields. According to Inavem, the umbrella organization of victim services (see § 3.7), this policy is chosen to provide quality service to victims. Most services are run by one or two paid (part time) staff-members. Because of the fact that one organization usually runs more than one centre, many local centres are only open for a few hours a day, or a few days a week. The 150 victim support organizations do not only have different statutes, but may also provide different kinds of assistance, and in a different manner. Three basic types of victim support organizations can be distinguished: the ad-hoc organizations, the multiple services organizations and the municipal victim services. The only activity of the ad-hoc victim services is to provide victim support. They are often created on the initiative of magistrates, lawyers or academics. Multiple services organizations have added victim support to their other activities in the field of criminal justice, for instance involving suspects put under judicial control, released prisoners and juvenile delinquents. Finally, the municipal victim services are very few in number. They are situated in town halls and services are provided by a public servant. These schemes are basically political organizations and the services they provide are highly dependent on the outcome of local elections and the financial position of the community.

In general, victim services provide information about judicial proceedings, psychological assistance and organize meetings to mediate between victims and offenders. All services are provided free of charge. It has to be emphasized that, contrary to victim services in other jurisdictions, mediation is an important part of the daily service provided to victims. In fact, 75% of victim services are also mediation services. The mediation process is initiated by

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45 The remaining victim support centres are situated in town halls, hospitals, 'maisons de justice' and police stations.
46 Information provided by Mme D. Moyal, Secrétaire Générale du Parquet de Paris et Ancien Présidente d’Aide aux Victimes in Rouen, May 21st 1996.
47 In some legal districts, the copy of the police report that is handed over to victims contains the address of the local support scheme, in other districts police officers inform victims personally. However, most policemen do not feel compelled to inform victims. Medical doctors refer victims to victim support schemes in a much more systematic manner than the police. The legal-medical centres (Services Médico Légaux) in particular, situated in ordinary hospitals, inform victims of violent crime of services of victim support schemes in an efficient manner.
48 The victim support organizations are run by approximately 800 persons. The volunteers represent about 60% of this group and provide 25% of the assistance to victims. See J.L. Domenech, Les associations au service des victimes, Victimologie, nr. 1, 1994, p. 7.
50 Victim support mediates between victims and offenders in more than 5000 cases per year.
the public prosecutor who decides which cases are suitable for mediation. Usually, mediation is perceived by the prosecution service as an appropriate answer to petty crime. The prosecution service then requests victim services to establish an agreement between the offender and the victim. But victim services may also try to mediate between the offender and the victim on the initiative of the victim. Victim services appreciate the importance of mediation because it safeguards both the pecuniary interests of the victim, and enhances the offender's sense of responsibility for his actions.

In 1989/1990, only 1.2% of the victims contacted a local victim support centre. More recent data are not available. Today, the victim support organizations assist about 75,000 victims annually. The Ministry of Justice guarantees more than 15 million FF (EUR 2,286,735) of their budgets (1998). This seems quite generous but according to the Director of Inavem it is a negligible sum of money, if one considers that France has 60 million inhabitants. Also, this contribution lags behind compared with the sums allocated to Victim Support in England and Wales, and the Netherlands. Moreover, in the same year more than 800 million FF (EUR 121,959,214) was donated to the State Compensation Funds (see § 4.4). This difference in the allocation of financial means indicates that the legislature gives priority to the compensation of victims of crime. In fact, it means that the legislature emphasizes one of the two pillars of the new criminal justice policy (see Scenery). The compensation of victims is selected as the most important instrument to demonstrate that victims are no longer the forgotten party of the criminal justice system. However, the willingness to invest in victim services is much less, despite the fact that they are the most important sources of information for victims about criminal proceedings as well as the State Funds. This duty is explicitly attributed to the victim instead of the criminal justice authorities, such as the police. Finally, the Act regarding the Protection of the Innocence Presumption of Defendants and the Rights of Victims (BRV, see § 4.3) formally recognizes victim services and their support for victims in section 41 CCP. The legislature hereby acknowledges the important role of victim support services and their contribution to procedural justice. At the same time, it formalizes current practice of public prosecutors to contact the victim services to make sure that victims receive practical or legal assistance and support.

53 Information provided by J.L. Domenech, Director of Inavem, 26 March 1999.
54 Information provided by J.L. Domenech, Director of Inavem, 26 March 1999.
56 In recent years, France has been condemned by the European Court for Human Rights on several occasions for its practice regarding pre-trial detention, and the lengths of the pre-trial stage. French examining magistrates almost as a matter of rule placed suspects in preventive custody. An enactment that stresses both the importance of the presumption of innocence and establishes restrictions on the application of pre-trial detention was needed. Finally, the presumption of innocence also needed to be safeguarded in the media. A penal sanction was created to prevent the publication of photographs or other images of suspects, as well as the publication of articles or opinions which may affect the presumption of innocence.
57 Projet de loi renforçant la protection de la présomption d'innocence et les droits des victimes, nr. 1079 of 4 October 1998. It was adopted by the Senate on 25 June 1999.
3.7 The National Institute for Victim Support and Mediation

In 1986, the National Institute for Victim Support and Mediation Inavem (Institut National d'aide aux Victimes et de Médiation) was founded to try to structure victim support. Inavem is an umbrella organization providing assistance to the local victim services. The French system of victim support departs from a national policy, imposed by Inavem, and leaves a margin of appreciation to its members. According to the 1993 Victim Support Charter, the main objective of the different victim support organizations is to provide information to the general public and the justice authorities about victim support. From this point of view, victim services are the interfaces between a victim-oriented policy and society. They maintain contacts with local politicians, local social services, and the local justice authorities. The victim services organize work-meetings to coordinate activities of local authorities, as well as training-sessions. Inavem maintains external communications on a supra-local level, for instance with the Ministry of Justice, and is responsible for the training of victim support-workers.

Inavem's main objectives are on the one hand to define and evaluate victim services, and on the other hand to coordinate and support the services provided by its members. These objectives are sometimes frustrated by the fact that victim support organizations already existed prior to the establishment of Inavem, and are financially independent. They receive funds from the Ministry of Justice (1/3), the local authorities and from other local budgets (2/3). Consequently, the services provided are foremost inspired by local needs and shaped by local (political) ideas. This causes a fragmentation which is hard to overcome. Another task of the umbrella organization is to promote the activities of local schemes. Inavem tries to promote victim support by organizing national campaigns and manifestations and prints posters. National publicity campaigns are not easily set up because local victim services all have different names, provide different services, and use very diverse locations, from court-buildings to hospitals. One name for the whole of France would enhance the public’s familiarity with victim support. Furthermore, Inavem occasionally provides training for police officers and members of the judiciary to try to sensitize them to the needs and interests of victims (see § 8.1). In general, Inavem trains foremost its own victim support workers but sometimes training is also provided for the authorities with whom they have to cooperate on a daily basis, and in particular judges, public prosecutors and policemen.

Finally, since 1992, Inavem has intervened after national catastrophes, e.g. a bomb explosion or an accident involving many victims, and has coordinated the emergency services.

58 All but three victim support services are members. These three services have chosen to remain independent and follow their own course of action.
59 Inavem, Charte des services d'aide aux victimes et de médiation, 1993.
62 For instance: Association Montjoye (Nice), P.A.V (Paris Aide aux victimes), Antenne Prevention, Mediation, Droit et Citoyennete (Clichy-la Garenne), Accord 68 (Mulhouse).
63 Locally, the victim services use classic communication strategies, like advertisements in local papers and the distribution of flyers and posters.
64 See the brochure of Inavem: 'Formations'. The training programme consists of two or three day courses on the subjects of victim support and mediation, e.g. the first contact with victims, compensation for victims, the enforcement procedures, victims and the Cour d'Assises and analysing a conflict in the framework of mediation.
This type of intervention has become one of its specialities; it ensures both professional relief for victims and gives publicity to the activities of victim support services.

### 3.8 The National Office for Victims and Crime Prevention

In September 1982, the Minister of Justice established the National Office for Victims and Crime Prevention (Bureau des Victimes et de la Prévention) as a part of the Directorate of criminal affairs (Direction des Affaires Criminelles et des Grâces). This office studies, coordinates, and proposes legal reforms as well as action programmes to enhance and improve the position of victims within criminal procedure. Two aspects are considered especially relevant, and were emphasized by the Minister of Justice at the time. These aspects are on the one hand, the improvement of compensation schemes (see § 4.4), and on the other hand, the founding of new victim support centres.

### 4 SOURCES OF LAW

#### 4.1 General Sources of Law

The principal sources of law are the Constitution of 4 October 1958 and the Parliamentary Acts (lois). The Constitution makes brief reference to the preamble of the 1946 Constitution and the Declaration of the Rights of Man and of the Citizen of 1789. Both texts are part of French constitutional law. Moreover, the 1789 Declaration contains several principles relating to criminal procedure that are binding to the legislature. Any departure from them may be invalidated by the Constitutional Counsel (Conseil Constitutionnel).

Enactments always pass through the National Assembly and the Senate, and are promulgated by the President of the Republic. Since the 1958 Constitution, however, Parliament has in effect shared its legislative function with the government. The latter now has its own autonomous power to issue regulations (règlements autonomes, s. 37 Constitution) as well as regulations concerning the application of laws. These regulations constitute the second part of the Code of criminal procedure.

Customary law retains a place as a minor source of law. Case law (jurisprudence) and doctrinal writings are formally not recognised as a source of law, but have great persuasive value. The general principles of law have also helped shape the criminal justice system.

#### 4.2 Sources of Criminal Law and Procedure

The 1957 Code of Criminal Procedure and the 1994 Penal Code are the most important sources of criminal law and procedure. These Codes are still very much shaped by the Napoleonic Codes, which have played a primary role up to and including this century. It

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66 Règlement d'administration publique et décrets en Conseil d'État, 2e partie du Code de procédure pénale. The regulations are indicated by a capital R followed by a number, whereas the decrees are indicated by a capital D and number.
67 A.West c.s. (1992), pp. 43-64. Internal circulars (arrêtés ministériels) may give an official interpretation of a rule of law. However, these circulars only have hierarchical authority within the administration.
was only in 1974, that the first commission was installed to revise the 1810 Penal Code (Code Pénal). France had to wait until 22 July 1992 before the President of the French Republic could present a revised and modernised Penal Code. It came into force on the first of March 1994. The Code of Criminal Procedure (Code de Procédure Pénale) of 1808 had been revised a few decades earlier, and came into force in 1959. Since then, many modifications and reforms have been implemented. Important procedural reforms were enacted in 1983, 1992 and 1993 respectively. The purpose of the 1993 reforms (Acts of January and August 1993) was to streamline criminal law and criminal procedure in view of the new 1994 Penal Code. In 1998, a great number of Bills were introduced in Parliament (such as the EPA of June 1999, see § 3.2) and the Act regarding the Protection of Innocence Presumption of Defendants and the Rights of Victims (BRV, see § 3.6).

The Code of criminal procedure is divided into four parts, the first of which comprises legislation. The remaining three parts contain various statutes: decrees of the State Counsel or regulations (décrets en Conseil d'État), ordinary decrees (décrets simples) and bylaws or orders (arrêtés). The first legislative part is organized into five books in a chronological manner. The preliminary title (ss. 1-10 CCP) specifically mentions the civil claim for damages (action civile) and bears special relevance to the position of the victim as a civil claimant within the framework of criminal proceedings (ss. 2-5, 10 CCP, see § 5.3).

4.3 Specific Victim-Oriented Sources of Law and Guidelines

The Code of Criminal Procedure has always contained provisions that recognize the rights of victims who suffered losses and injuries as a result of an offence. Traditionally, the victim can become a civil claimant and act as a party to the criminal proceedings (partie civile). Notwithstanding his legal rights, he has nevertheless been the forgotten man in the criminal justice system for a long time. The rights of the civil claimant were poorly applied in daily practice. The authorities were generally satisfied with a theoretical knowledge of the plaintiff's rights and ignored the victim as a person. The concept of 'victim' was not mentioned in criminal law and procedure until 1975. Two years later, the first victim-oriented law was issued concerning State Compensation Funds for victims, and this was followed by a number of other important but isolated laws and decrees. One of those was for instance the 1983 enactment to facilitate the participation of victims within the criminal process, which has been incorporated in the Code of Criminal Procedure. The following two innovations of

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70 Sections of these parts are preceded by the letters R, D and A respectively. The sections of the legislative part are quoted without a preceding letter.
71 (I) the preliminary stage of criminal proceedings, ss. 11-230; (II) the trial stage, ss. 231-566; (III) specific appeals; (IV) special procedures, and (Victim) the enforcement of judgments (ss. 707-802).
74 For instance the 1978 Decree 113 which allows victims to claim a percentage of the prisoner's wages to cover their damages. See M. Mériage (1991), p. 240.
the 1983 Act are of particular interest. Firstly, the criminal courts may award damages to the victim even if the offender has been acquitted (ss. 470-(1), 541 CCP). Secondly, the civil courts remain competent to take action in summary proceedings, even if the criminal court is already dealing with the principal claim of the civil claimant (s. 5-1 CCP, see further § 7.3).

The legislature has since tried to improve the possibilities of victims to obtain compensation. The Act of 6 July 1990 has enlarged the scope of the State Compensation Funds (see below), and added a new chapter to the Code of Criminal Procedure concerning the pecuniary assets of prisoners, of which the victim may claim 20% (see § 7.3). In July 1991, two Acts were promulgated that are relevant to the position of victims in criminal proceedings. The Act of 9 July 1991 reformed the ways compensation awarded by the court can be executed (see § 4.5 and § 7.3). In 1993, the legislature allowed the public prosecutor to try mediation before taking a decision about prosecution (s. 41 CCP). Nowadays, mediation is a very important instrument to ensure compensation for the victim in the pre-trial stage (see § 7.1). The 1998 reform Act on the Accessibility of the Courts and Conflict Resolution refers to the houses of justice (maisons de justice et du droit, see § 6), and states that, under the authority of the presidents of the district courts, houses of justice may be established. Houses of justice should facilitate the access of citizens to legal authorities and proceedings, the prevention of crime, and the provision of support and legal aid to victims (s. 21). In addition, two other law reform proposals were made which are relevant for victims of crime in 1998. Firstly, the BRV (see § 3.6) which prohibits publications which affect the victim's dignity (see § 6.3), recognizes victim services and their work (see § 3.6) and facilitates the procedure of constituting oneself as a civil claimant (see § 5.3). Equally important to a large majority of victims of crime is the Act on the Exercise of Public Action (EPA, see § 3.2). This statute reforms the functioning of the prosecution service as a whole, as well as the expediency principle. Moreover, the victim is given greater powers to oppose the final decision not to prosecute (see § 7.1).

Legal Aid

The Act of 10 July 1991 concerns legal aid (aide juridique), which is available for both defendants and victims. Recently, in December 1998, this Act was modified. The 1998 Act on Legal Aid (ALA) enlarges the scope of the legal aid regulations, and facilitates access to the judicial system: legal aid may cover general information about victims' legal rights as an orientation for undertaking legal steps; legal aid to go through the proceedings, or to execute a judicial order; legal consultations; and finally aid to write legal documents (s. 75). The summary proceedings before the civil court have a very broad scope, they may concern expert opinions, advance payments and the distrain of goods.

75 The summary proceedings before the civil court have a very broad scope, they may concern expert opinions, advance payments and the distrain of goods.
77 Loi du 9 juillet 1991 portant reforme sur des procedures civiles d'execution, nr. 91-850. The Act has been incorporated in the Code of Criminal Procedure.
79 Loi 98-1163 du 18 decembre 1998 relative a l'accès au droit et a la resolution amiable des conflits.
80 This section will be incorporated into the ss. L 7-12-1-1/2/3 of the Judicial Organization Act.
81 Loi 91-647 of 10 juillet 1991 relative a l'aide juridique.
82 Loi 98-1163 du 18 decembre 1998 relative a l'accès au droit et a la resolution amiable des conflits. This Act modifies the 1991 Act on legal aid, as well as provisions in inter alia the Act on the Judicial Organization, and the Act on Military Pensions for Invalidity and Victims of War.
9 ALA, modifying s. 53 CCP). The conditions for legal aid are determined by a departmental
counsel for access to legal proceedings (conseil départementale de l'accès au droit, ss. 9 and 10 ALA).
Victims may apply for legal aid both during and before the proceedings to the legal aid office
(bureau d'aide judiciaire). Legal aid may be granted partially or fully (s. 22 ALA). Also,
the reform Act enables victims to bring their state-paid lawyer into mediation proceedings
(l'aide à l'intervention de l'avocat [...] en matière de médiation pénale, s. 13 ALA).

State Compensation Schemes

State compensation schemes are particularly well developed in France. Nowadays, State
Funds for victims of crime (1977), natural catastrophes (1982), road accidents (1985), terrorist
acts (1986), serious crime and sexual offences (1990), and victims of AIDS (1991) have been
set up. The 1990 state compensation scheme also allows parents of deceased victims to claim
compensation from the state.

In 1977, a State Fund (Fonds de Garantie) had already been introduced for certain victims
of criminal offences, and in particular for victims of unknown offenders. In 1981, this scheme
was expanded to incorporate certain victims of theft, embezzlement or breach of trust. In
1983, the conditions for claiming compensation were relaxed. Following the increase of
terrorism during the 1980's, a special fund was created in September 1986 for the
compensation of victims of terrorist acts. Today, the State Funds of 1977 and 1990 form
one single scheme to compensate victims of serious crime. The Reform Act of 6 July 199063
considerably enlarged the scope of the 1977 State Fund (ss. 706(3), 706(14) CCP). It extended,
for instance, the time limit in which damages could be claimed (s. 706-(5) CCP) and relaxed
certain requirements to claim damages, e.g. concerning the nationality of the claimant (s.
706-(3) CCP).64 This State Fund for Victims of Crime is commonly referred to as CIVI,
after the committee which grants state compensation (Commission d'Indemnisation des Victimes
d'Infractions).

The CIVI may award full compensation to victims of crimes which have caused death,
or the incapacity to work for at least one month. Victims of sexual crimes, such as rape or
sexual assaults, can be fully compensated by the State Fund even if the crime did not cause
an incapacity to work.65 The claim should be presented to the secretary of the CIVI, within
three years of the date of the offence. Proceedings are not free but the claimant may obtain
legal aid. Committee hearings are informal and not open to the public. The committee's
decision is final, and if positive, the victim will receive payments within one month of the
date of notification. If the State Fund for Victims of Crime compensates the victim, it is
subrogated into the victim's right to claim damages from the offender (s. 706-(11) CCP).

In practice, the State Fund for Victims of Crime and the other state compensation
schemes are much more effective and persevere in claiming damages from the offender than
the individual victim. Furthermore, contrary to the difficulties victims have to face when
they try to trace the offender, the Funds gets all the necessary cooperation from the police
and the prosecution service to find the offender and to retrieve from him the sums the state

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63 Loi de 6 juillet 1990, nr. 90-589 (Recueil Dalloz Sirey, 1990, 27-ième cahier, pp. 315 et seq.).
65 Circular of 27 December 1990, C. 706(3), under 2., as incorporated in the Code of Criminal
Procedure.
paid to the victim.\textsuperscript{96} Most researchers consider CIVI as the only genuine advance that has been made since the 1980's to improve the position of victims.\textsuperscript{87} Despite this great achievement, critics of the collective compensation schemes have stated that the 1990 Reform Act risks undermining the responsibility of the defendant. This criticism is not entirely justified because the Reform Act also underscores the offender's obligation to pay damages by trying to recuperate sums from him\textsuperscript{88} but given the incapacity to pay of many offenders the legislature tries at the same time to limit the financial consequences of crime for victims.\textsuperscript{89}

In 1986, 180 new applications were made to the CIVI. In 1991, this number had risen to 235, and in 1995 to 513. In 1995, victims demanded more than 74 million Francs from the CIVI and received about 30 million Francs as compensation from the state.\textsuperscript{90} The latest available statistics show that 9818 victims presented a claim for state compensation to the CIVI in 1996. The next year, the number of applicants had increased by 10.7\% (10,865 applications). In 1996 and 1997, victims were awarded 587.9 and 654.5 million Francs respectively (EUR 89,624,777 and 99,777,882). This represents an increase of 11.3\% in awarded state compensation. In 1997, an average sum of more than 60,000 FF (EUR 9,147) was awarded per victim.\textsuperscript{91}

Victim-Oriented Guidelines
There are two important Guidelines for victims: the 1996 Guideline on the houses of justice (see § 6) and the Circular of 13 July 1998 on victim policy regarding the provision of information by the judicial authorities to victims and the protection of the victim's right to compensation. The 1998 Circular states, amongst other things, that victims should be able to learn important developments in their case (see § 6.1), such as the final decision on prosecution and the date and place of the trial. It also establishes the duty to make sure that as complete and accurate a statement on the victim's losses is provided to the court (see § 6.2), the duty for the judicial authorities to give attention to the question of compensation (see § 7.2) and to its enforcement (see § 7.3).

5 ROLES OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM

According to the law, the victim may play a prominent role within criminal proceedings, in his capacity of a reporter of crime (referred to as complainant), a civil claimant, or private prosecutor. In practice, however, the victim will not always feel as if he has been given such


\textsuperscript{87} Information supplied by Mrs. R. Zaubermann of CESDIP-CNRS, Guyancourt, 23 May 1996.


\textsuperscript{91} See http://www.justice.gouv.fr/chiffres/indemn.htm
a prominent position. The victim who reports the crime is commonly subjected to repetitive questioning (see § 8.2). During the pre-trial and the trial stage, the victim-witness may be confronted with the offender, as a means of establishing the truth (see § 8.2). During the trial stage, a public debate on the victim’s private life and his personality frequently occurs because of the accusatorial nature of the criminal proceedings. Finally, during the enforcement stage, the civil claimant is not assisted in any way by the authorities in collecting compensation from the offender. Consequently, he has to send in the bailiffs, who will in return charge the victim for his services (see § 7.3). 92

5.1 Reporting the Offence

The legislature only uses the term ‘reporting an offence’ if a third party makes the crime known to the authorities. If the actual victim reports the crime, it is called a ‘complaint’ (a specific form of the complaint is described in § 5.2). Little difference exists between the filing of a report or a complaint since it has the same effect. The only difference is that the complaint is filed by the victim of the crime. 93 The victim may lodge a complaint if he feels the offender should be identified, prosecuted and punished, or if he wants to receive compensation for the damages caused by the offence. Victims may report offences to the police, the prosecution service (see § 3.2) or examining magistrates. Victims may contact them in person, by telephone or by letter. The complaint has to contain the facts regarding the offence and the claim for damages. Victims can file a complaint against both a known or unknown person. If the victim reports a crime to the police, they are obliged to record it in writing and hand it over to the public prosecutor (s. 86 CCP). If the facts are complex, the identity of the offender is unknown, or if the investigation by the examining magistrate is mandatory, victims will be referred to the examining magistrate to report the crime. 94

A complaint filed by a victim does not only serve to inform the criminal justice authorities of the occurrence of an offence. It may also be used by the victim to set in motion criminal proceedings, if this has not already been done by the public prosecutor. The complainant may file a complaint with the examining judge and constitute himself as a civil claimant (la plainte avec constitution de partie civile adressée au juge d'instruction, s. 85 CCP), or he may act as a private prosecutor (citation directe - see § 5.5). According to the law, the victim will then have to pay such sums as the court thinks fit to cover the potential costs of the action by way of a deposit (consignation, s. 88 CCP), unless he is entitled to legal aid (see § 5.5.). 95

In practice, victims usually report crimes to the police instead of using their right to go directly to the public prosecutor. The main reason for this is that the police stations are normally situated nearby, and they are more accessible to victims than the prosecutor’s office. In addition, this tendency is probably reinforced by the fact that public prosecutors refer victims back to the police, unless a particularly complicated or serious offence is involved which requires the intervention of the examining magistrate. If the victim reports the crime


For instance concerning felonies, and in case of an offence of the 5th category committed by a minor. See G. Stefani c.s. (1993), p. 219.


to the police, he will always be given a copy of the complaint (*procès verbal*). This will facilitate further contacts with the authorities to obtain information about the developments in the case (see § 6). Concerning victims who have difficulty coming to the police station to file a complaint (the elderly or disabled), the police may take down the report at the victim's home (*prise de plainte en domicile*). However, this is not standard practice. 97

Regarding the reporting by non-victims, French law contains explicit obligations for citizens to report a crime. This can be divided into a general obligation and specific obligations for certain professionals to denounce a criminal act to the authorities. All citizens have a duty to report a) acts against one's physical integrity; b) assaults or the neglect of children and other vulnerable persons; c) crimes against the State and d) theft of nuclear material. 98 Those who have an obligation to report crime by virtue of their profession are sometimes hindered by professional confidentiality. According to s. 226-14 PC, their professional vow of secrecy ceases to exist if there is a legal obligation to report the crime which has become known to them in their line of duty. According to Gayraud, the problem is that the law is not very clear in this respect. It probably does not concern medical doctors or clergymen. He is of the opinion that it only regards accountants, who come across irregularities in the books, bank-employees who suspect a transaction of money laundering, and finally all officials (*tout officier public ou fonctionnaire*) who have heard about a punishable act in the line of duty. However, strictly speaking, reports by these persons are not reports against persons. They only inform the legal authorities of facts that may lead to the disclosure of crimes. 99 This interpretation of the law is an analogy of the rules regarding the right of certain persons not to testify or to remain silent (see § 5.5).

5.2 Complainant

Regarding certain crimes referred to as complainant offences, filing a complaint is an essential condition for starting public action. 100 Complainant offences include, for instance, defamation (*diffamation*, s. 48 PC), insults (*outrage*, s. 48 PC), calumnious statements (*dénonciations calomnieuses*) published in the press, or the publication of private conversations or images without the consent of the persons concerned (ss. 368-373 PC). 101 Procedures and practice are the same as described in § 5.1.

5.3 Civil Claimant

Within French criminal proceedings, the closest judicial equivalent of the victim is foremost that of the civil claimant (*partie civile*). As such, the victim is entitled to demand compensation from the offender in criminal, as well as in civil court (s. 4 CCP). However, there are some restrictions. If criminal proceedings have been started in respect of the same facts as in civil proceedings, then not only must the civil case be adjourned until the criminal court has

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97 Information supplied by researchers of IHESI, 20 May 1996.
100 The law contains the following expression: *l'action publique ne pourra être engagée que sur plainte de la victime, de son représentant ou de ses ayants droits* (see s. 372 PC).
reached a decision, but the civil judge is not entitled to reach a decision contrary to that of the criminal court. Furthermore, if the victim has exercised his right to claim compensation before the civil court, he may not start criminal proceedings afterwards (s. 5 CCP).

The prerequisites to admit a victim’s claim for damages in criminal court are mentioned in s. 2 CCP. Civil claimants should have suffered personal harm which has been caused directly by the offence (dommage actuel, personnel et direct). Losses and injuries may be of either a material or moral nature, or both. In addition, the right of the victim may be transferred to his heirs, assignees (cessionnaires) and creditors. Likewise, the victim’s rights may also be transferred to third parties (les tiers subrogés), such as the insurance companies or social security agencies which have compensated the victim. Furthermore, certain associations, for example, associations fighting against discrimination or sexual abuse may join the criminal proceedings as a civil claimant, if provided for by law (s. 2(1)-2(12) CCP).

The formal conditions which apply to victims who wish to constitute themselves as a civil claimant depend on the manner and the moment the claim for civil damages is presented. The victim may join the criminal proceedings (par voie d’intervention) or he may choose to act as a private prosecutor (par voie d’action see § 5.4). If the victim joins the criminal proceedings (s. 3 CCP), his constitution as a civil claimant is not subject to special formalities. A simple declaration stating the facts and the damages suffered will be sufficient. The victim may intervene before or during the court proceedings (audience). Before the trial, the victim can make a statement to the clerk of the court’s office (greffe du tribunal), or he may send a registered letter to arrive at the court at least 24 hours before the hearing. The clerk of the court will transmit it to the public prosecutor, who has to inform the civil claimant of the date of the hearing. The victim may also constitute himself as a civil claimant before the examining judge (intervention devant la juridiction d’instruction, s. 87 CCP). Again, a simple statement of the facts and the losses and injuries suffered are sufficient. During the criminal proceedings, the victim may join the proceedings at any stage leading up to the close of argument, either through a statement recorded at the clerk’s office, by filing a submission with the court, or even verbally (ss. 419, 420 CCP). Finally, it is also possible to constitute oneself as a civil claimant if the offender is sentenced by default (ss. 419, 420 CCP).

The purpose of the constitution as a civil claimant is to remedy the harm caused by the offence by awarding compensation (réparation des dommages-intérêts, s. 2 CCP), by restitution and by ordering the offender to pay legal costs, such as the fees of the victim’s lawyer and

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102 According to the principle of le criminel tient le civil en état.
103 This derives from the principle of l’autorité sur le civil de la chose jugée au criminel, which expresses the preceedency of criminal proceedings over civil litigation (la primauté du procès pénal sur le procès civil).
104 ‘L’action civile en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l’infraction.’ (s. 2 paragraph 1 CCP).
106 G. Stefani c.s. (1993), pp. 156; 185-188.
109 Restitution (restituto in integrum) may also be applied by the court by virtue of its capacity. See ss. 99, 478 and 479 CCP. Even the military and maritime courts may order restitution although no civil action may be brought to their attention. See M.S. Groenhuijsen, Schadevergoeding voor slachtoffers van delicten in het strafgeding, Ars Aequi Libri, Nijmegen, 1985, p. 212.
The civil claimant has the right to claim payment for damages caused by the offence. It is important to note here that the public prosecutor cannot claim damages on behalf of the victim, if the latter does not explicitly ask the court to award him compensation (see § 7). If the victim chooses to join the criminal procedure, his claim is accessory to the criminal case brought before the court. This implies that whenever the court cannot convict the accused and cannot establish that the damages were caused by a punishable act, the victim is left empty handed (s. 470 and 541 CCP). The ancillary nature of the claim for damages has two exceptions. If the claim is presented before the Court of Assizes (Cour d'Assises – ss. 371-375 CCP) the decision regarding the claim for damages is taken after the decision of the laymen on the question of the guilt of the accused. The court may, even after an acquittal, honour the claim of the civil claimant, according to s. 372 CCP. The second exception refers to the situation in which the offender cannot be convicted by the court because he can invoke a justification (absolution). This has no consequence for the victim since the court may grant the claim for damages (ss. 468 and 532 CCP).

Joining the criminal proceedings has many advantages, such as lower costs and the speediness of the procedure, however, the main advantage is that the burden of proof lies with the examining judge and the public prosecutor. In theory, a disadvantage of being a civil claimant is that he cannot be heard as a witness during the pre-trial or the trial stage (see § 5.5). As a civil claimant, the victim has many rights to pursue his (financial) interests. He has the right not only to ask compensation from the offender and his accomplices but also from certain third parties. Civil action may be enforced against the offender, his heirs, civilly responsible persons (tiers civilement responsables), and even the state (administration) if the offence has been committed by a public servant while performing his duties. Moreover, the civil claimant can benefit from the inquisitorial character of the proceedings. He does not need to prove the guilt of the accused. The public prosecutor, in cooperation with the judicial police, and in some cases the examining magistrate, will build a case against the accused. Meanwhile, the civil claimant has the right to contribute to the legal qualification of the facts, to demonstrate the damages and injuries suffered as a result of the crime, and to ask the court to award him compensation (dommages et intérêts). Furthermore, the civil claimant has specific rights during the pre-trial and trial stage. During the preliminary investigation, he can be questioned by the examining judge or be confronted with the accused only in the presence of his lawyer (s. 114 CCP). He may ask the examining judge to perform certain acts, for instance to take his statement or to hear witnesses. He can demand an expert’s assessment, in particular a medical or psychological report (s. 82 CCP). If the judge does not wish to comply with the request, he must motivate his decision. Another right of

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10 G. Stefani c.s. (1993), pp. 146-149.
12 Section 372: La partie civile, dans le cas d’acquittement comme dans celui d’absolution, peut demander réparation du dommage résultant de la faute de l’accusé, telle qu’elle résulte des faits qui sont l’objet de l’accusation.
14 The victim benefits also from the principle of solidarity regarding complicity in an offence (s. 55 PC). See G. Stefani c.s. (1993), p. 215. In civil proceedings, he must establish and prove the facts.
15 G. Stefani c.s. (1993), pp. 188-197.
the civil claimant is the right to be notified of all important procedural actions and decisions (ss. 89, 183, 186 CCP). He also has the right to be informed about the time and place of the trial (s. 391 CCP). The public prosecutor is legally bound to summon all those who constitute themselves as civil claimants during the pre-trial stage to appear in court (s. 420 CCP). Finally, as a party to the proceedings, he may appeal any decision of the examining judge on the condition that it interferes with his civil interests (ss. 81, 82, 87 and 186 CCP). During the trial, the civil claimant has the right to present his claim for compensation, the right to question witnesses and experts, and he may speak each time before the public prosecutor is given the floor (s. 460 CCP). He may bring his own lawyer (s. 424 CCP). He may ask the court to visit the place of crime (s. 456 CCP), and to deposit records (conclusions, s. 459 CCP). Finally, he has the right to appeal decisions of the court affecting his civil interests (ss. 497, 546 CCP), even before the Supreme Court (cassation, s. 567, 573 CCP).

The BRV (Bill regarding inter alia the Rights of Victims, see § 4.3) will be very important to the position of the civil claimant once it is promulgated, because it will facilitate the ways victims can constitute themselves as a civil claimants. This will be through four different measures:

a) abolishing the rule that the victim can become a civil claimant by a simple letter addressed to the court only when a certain small sum of money is concerned. Also, the victim will be authorized to constitute himself as a civil claimant by fax (télécopie, s. 29, modifying s. 420-1 CCP);
b) introducing the possibility for the victim to constitute himself as a civil claimant before the trial proceedings, by making a statement before a (judicial) police officer (s. 29, modifying s. 420-1 CCP);
c) increasing the opportunities for the courts to postpone the hearing- at the request of the public prosecutor or the civil claimant- to a later stage to deal with the civil claim for damages of the victim, in order to allow the victim to bring the necessary documents of proof (s. 30, modifying s. 464 CCP);
d) enlarging the scope of the civil claim for damages by allowing the victim to claim not only compensation for damages and injuries but also for legal costs, such as the costs of his attorney. A claim for legal costs will also be allowed before the Supreme Court (s. 31, modifying s. 618-1 CCP).

5.4 Private Prosecutor

According to section 2 CCP, criminal prosecution can not only be initiated by the public prosecutor but also by the individual victim or certain recognized organizations representing specific groups of victims (see § 3.3).116 The victim may proceed by taking action himself as a private prosecutor and summon the accused to appear in court (citation directe par exploit d’huissier). Nevertheless, after the victim has started criminal proceedings, the public prosecutor has to take over, because public prosecution is the prerogative of the public prosecutor.117 Moreover, the victim cannot bring private action concerning all punishable acts. He may only do so, if the crime does not require a judicial investigation by the examining magistrate (s. 551 CCP). This means that the victim is not allowed to prosecute felonies (ss. 388, 392

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117 Judgment in the Laurent-Aithalin-case of 8th December 1906; Cass. 8 décembre 1906, D.P. 1907, 1, 207.
and 531 CCP). A more practical prerequisite is that he can only summon the defendant to court if the offender's identity is known to him, if the facts are simple, and if there is enough evidence to prove the offence. 118 Finally, the legislature has introduced some measures to prevent abuse of the right to private prosecution. If the victim summons the defendant to court, he will have to pay such sums as the court thinks fit to cover the potential costs of the action by way of a deposit (consignation, s. 392(1) CCP), unless he is entitled to legal aid. 119 And he runs the risk to be held liable for legal costs including legal fees, if the accused is found not guilty. Furthermore, the accused, once acquitted, has the right to claim damages in criminal or civil court from the victim who acted as a private prosecutor, if the latter acted imprudently by doing so. (s. 472 CCP).

Statistics do not indicate how often the victim acts as a private prosecutor. This is a result of the fact that under the heading of direct action, the actions of the prosecution service are also included. The only finding is that there seems to be a steady decline in the number of direct actions. In 1990, 66.2% of prosecutions were initiated through direct action; in 1992, 54.1%; in 1994, 45.3%; and in 1995, 40.8%. 126 Despite the lack of hard evidence, it seems improbable that victims frequently use the possibility to act as private prosecutors.

5.5 Witness

In general, a witness — who may be the victim or any other person with knowledge of the facts in the case — can give testimony both during the preliminary investigations and in court. During the pre-trial stage (enquête préliminaire), persons who might be able to give information will be heard by the police. This may be the reporter of the crime, the victim, or a third person. Witnesses can be heard by the police without consideration of factors such as age or family relations (s. 62 CCP). During the questioning by the police, witnesses are not obliged to take an oath. In addition, they are legally not obliged to give a statement, although there are some exceptions to this rule. 121 Apart from being heard by the police, witnesses may also be heard by the examining magistrate who can only take not only judicial decisions but also has a fact-finding function (actes d'information). The examining magistrate is competent to hear and question witnesses and to confront witnesses with each other, or with the suspect (s. 114, 119, 121 CCP, see § 8.2). 122

As a rule, witnesses are obliged to give evidence. In the pre-trial stage, witnesses who are summoned to give evidence and refuse to comply, may be brought in to the magistrate's office by the police. Also, they can be given a fine (s. 109 CCP). During the trial stage, witnesses also can be summoned to testify in court (s. 435, 437 CCP). Again, if they refuse to comply, they can be brought to court by force and can be ordered to pay a fine and costs (amende et frais pour non-comparition, s. 438 CCP). However, the law allows certain witnesses

120 F. Casorla (1997), p. 92. Maybe the reason for this decline in private prosecutions (poursuites en citation directe) is the steady increase of the number of public prosecutions following a report (en convocation par procès verbal). In 1990, of the total amount of 447,461 prosecuted cases, only 17.4% were prosecuted after a report. In 1991, the figures were respectively: 427,017 and 21.6%. In 1992: 397,421 and 28.1%. In 1993: 383,438 and 32.5%. In 1994: 392,838 and 36.9%. In 1995: 373,660 and 42.6%.
to remain silent or to be heard without having to be sworn in. Family members (up to the fourth degree) of the suspect or accused, including the person they live with, as well as the defendant's accomplices, cannot be forced to testify. Persons who are bound by their professional vow of secrecy (e.g., medical doctors, s. 378 PC) do not have to testify, unless the law indicates otherwise. Furthermore, journalists do not have to reveal their sources (s. 109 CCP). Members of the government can only be heard as witnesses when authorization by decree is granted by the Counsel of Ministers (s. 652 CCP).

In general, witnesses have to take an oath to tell the truth both before the examining magistrates (ss. 103, 452 CCP) and in court. However, family members and spouses of persons involved in the criminal proceedings who are willing to speak, as well as children under the age of 16 years old are not heard under oath (ss. 108, 447, 448 CCP). Another category is formed by victims who have constituted themselves as a civil claimant. They cannot be heard as a witness because acting in the capacity of a witness as well as a claiming party is considered to be incompatible (ss. 335-(6), 422 CCP). In court, they can only inform the court on an informal basis (à titre de renseignement) without being questioned under oath (s. 335-(6) CCP). However, since the victim is usually the main witness for the prosecution this potential loss of testimony is solved in practice by first hearing the victim as a witness, after which he is accepted as a civil claimant within the criminal process. On the one hand, this leaves the victim the free choice to testify or not. If he does not want to be a witness, he constitutes himself as a civil claimant and avoids examination by the defence. Naturally, this is not possible if his testimony is crucial to proving the case. If the victim wants to give evidence, he can wait and constitute himself as a civil claimant after he has been heard as a witness. On the other hand, victims who have constituted themselves as civil claimants prior to the trial and who are heard by the examining magistrate enjoy certain rights as a party to the proceedings (ss. 104, 114, 115 and 120 CCP). One of these right is that they cannot be questioned or confronted with other witnesses or the suspect without the presence of their lawyer, unless they renounce this right explicitly. Furthermore, the victim's advocate has the right to obtain copies of the legal file (s. 114 CCP). With respect to the questioning of witnesses see § 8.2, and concerning their protection see § 8.3.

PART II: THE IMPLEMENTATION OF RECOMMENDATION (85) 11

6 THE VICTIM AND INFORMATION

An interesting development with respect to the victim and information is the creation of the Maisons de Justice et du Droit. These 'houses of justice' are situated in ordinary but usually difficult neighbourhoods (quartiers défavorisés), and provide housing for judicial and non-judicial services. The houses of justice are part of the Prevention Agreements and the general justice programme which seek to bring the legal system and the people closer together (justice de

proximité—see Scenery). The houses of justice seek to find alternative solutions to petty and ordinary crime and the feeling of impunity. The houses of justice have a threefold objective: judicial action, including mediation (action purement judiciaire); victim support and facilitating access to the judicial system (aide aux victimes et accès au droit); and information and communication (information et vie du quartier). The houses of justice establish a framework for action programmes regarding victim support and assistance, as well as for local mediation and conciliation programmes. In addition, the houses of justice wish to facilitate the victim's access to the legal system in cooperation with the Legal Aid Service (Conseil départementale de l'aide juridique).

A house of justice is established on the basis of a covenant between the chief of police, the president of the district court, the public prosecutor of the district court, the mayor, the Bar Association, and local representative of the legal aid service. The probation services may also profit from the houses of justice and create decentralized local centres which allow closer contact with their clients. The houses of justice represent a new way to decentralize the different legal services, including victim support, and to bring them into neighbourhoods. The setting up of houses of justice in difficult neighbourhoods has been the subject of much criticism, because it appeared to be a new form of 'social control', giving the law access to places that had escaped thus far from the traditional forms of justice. Although nobody contests that the rule of law is necessary in these neighbourhoods, a lot of people question whether justice must be involved in all areas of the social world, to regulate all disputes in life through mediation for instance.

In practice, the houses of justice mean to make information and assistance available to the victim in an easy and accessible manner. The victim will be able to find everything he needs under one and the same roof. He can get information about his rights and criminal proceedings from police officers or public prosecutors, as well as support from victim support workers and legal assistance by legal aid-lawyers. If the victim wants to try mediation this can be arranged more easily because the communication lines between public prosecutors — who authorize mediation — mediators, and the victim are very short. Moreover, public prosecutors can respond rapidly to practical or legal problems faced by victims when they come into contact with the criminal justice system.

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According to the Ministry of Justice, the provision of information is of fundamental importance. The Ministry regrets that this essential activity has received the least attention by the participants of the houses of justice. It is emphasized that more attention should be given to the provision of information about the functioning of the legal system (p. 5).

127 Translation of section 2 of the Convention relative à la création et au fonctionnement de la maison de justice et du droit.

128 Ministère de la Justice (1996). According to the Ministry of Justice, the provision of information is of fundamental importance. The Ministry regrets that this essential activity has received the least attention by the participants of the houses of justice. It is emphasized that more attention should be given to the provision of information about the functioning of the legal system (p. 5).


131 Ministère de la Justice, Note d'Orientation: Réaffirmer le droit dans la ville. La justice de proximité, AR1501/, p. 11
permit the assessment of the effectivity of houses of justice. The Ministry of Justice, however, seems to regard the houses of justice very favourably. Also, the growing number of houses of justice seems an indication of their success. By the first semester of 1999, fifty houses of justice in operation and 32 projects had been set up. All houses of justice are situated in urban areas (zones urbaines).\footnote{Ministère de la Justice, \textit{Etat des maisons de justice et du droit}, 3 Mars 1999 (3 March 1999).}

6.1 Informing the Victim

\textit{(A. 2) The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation.}

The police are not formally obliged to inform victims of crime. In fact, this characterises the entire information system. All informative duties are placed with the prosecution service. It is therefore hardly surprising that the police do not systematically inform victims about their possibilities to obtain assistance and legal advice, nor about their right to obtain compensation from the offender or the State.

In practice, the victim who reports a crime to the police is provided with a copy of the report. Some police forces print or stamp the address of the local victim support centre on the copy. Concerning the other items of information (obtaining assistance, advice and compensation) actual provision depends on the individual police officer who handles the case.\footnote{The same applies to the examining magistrate. Once the case is transferred to the judicial investigation stage (l'instruction), the examining magistrate may be an important source of information to the victim. As a rule, he will hear the victim. Examining magistrates have developed information strategies regarding certain types of victims only (see § 6.1 under B.6 and D.9.). Unfortunately, to other victims, the examining judge will only explain his own activities, such as the confrontation with the offender. Confrontations between the offender and the victim in his office are frequent and considered a useful tool to find out the truth (see § 8.2). The problem is that only victims of serious crimes are informed of this procedure one day before the confrontation. Information supplied by Mr. S. Portelli, examining magistrate, Creteil, 22 May 1996.} However, the victim is frequently informed about state compensation schemes, but this only concerns victims who fall within the scope of one of the specific State Funds (see § 4.5). In 1998, the Ministry of Justice and the Ministry of the Interior developed an information brochure about victim support schemes and the services they provide to victims of crime.\footnote{Ministry of Justice, Circular of 13 July 1998, \textit{La politique pénale d'aide aux victimes}, p. a2.}

Instead of creating a formal obligation for the police to inform victims on all items of information mentioned in guideline A.2, the legislature and the justice department have opted for another, threefold strategy. Firstly, many information and notification duties are placed with the public prosecutor (see § 6.1 under B.6 and D.9). The second strategy is to inform victims through leaflets and the victims' guide. The leaflets are aimed at informing victims of the various aspects of criminal proceedings and are published by the Ministry of Justice. The leaflets are very practical and concise. They are classified by subject, for instance how to file a complaint, which court the victims should go to, or how to obtain
compensation. In general, however, the leaflets are not available from police stations. The most likely places to find them are the courts and prosecutor’s offices, town halls and victim support centres. This in fact conforms to the formal information policy in which the police hardly play a role. The main disadvantage of this policy and application is that not all victims who report a crime are reached in this way.

In addition to the leaflets, the Ministry of Justice published the first issue of the guide to victims’ rights in 1982. This pocketbook explains the rights and procedures in a clear, simple, but detailed manner. Therefore, it is an important means to provide victims with information about criminal proceedings. Thirdly, the victim services (see § 3.6), and the houses of justice (see § 6), are considered a vital instrument in the information flow to victims. The task to inform and assist victims is handed over to victim support services because, according to the authorities, the victim needs more information and support than the police are able to provide. The number of authorities who maintain contacts with victim support services varies considerably. In some legal districts, contact between the police and victim services is very good, while in others, the examining magistrates or public prosecutors refer victims to victim support. The former situation mainly arises if local victim support schemes have opened a centre at the police station. The fact remains, however, that no automatic referral systems exist between the authorities and local victim services, unless they find themselves in the same building, as is the case if a victim centre is situated at a police station or in the houses of justice (see § 6).

In spite of these different strategies, or maybe because of the lack of one specific obligation for the police, victims are usually poorly informed about their rights. Furthermore, victims are still frequently ignored by the authorities unless they have joined the proceedings as a civil claimant or if their testimony is useful for the proceedings (see § 6.1, B.6 and D.9).

(A. 3) The victim should be able to obtain information on the outcome of the police investigation.

The preliminary investigations are ruled by the principle of secrecy (see § 2.1). Therefore, the first person notified by the outcome of the police investigation is the public prosecutor (ss. 19 and 40 CCP). The police are not obliged to inform victims about the outcome of the investigation. In practice, the copy of the police report given to victims contains the standard sentence that victims will not be notified unless the police investigation has been successful. Victims who express a wish to be informed, will be referred to the public prosecutor. He has the final responsibility concerning information by the legislature. First

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Under the title Justice leaflets (Les fiches de la justice) are published: Vous portez plainte; L’aide juridictionnelle; L’indemnisation des victimes; La médiation pénale; L’aide aux victimes; A quel tribunal s’adresser?

Information supplied by Mrs. R. Zaubermann of the research centre CESDIP – CNRS, Guyancourt, 23 May 1996.

Ministry of Justice (1982b).


Information supplied by Mrs. Ch. Cazalens, lawyer working at SAVIR, the victim support service at the district court in Créteil, 22 May 1996.

The same applies to the notification of the final decision regarding prosecution (s. 40 CCP, see § 6.1 under B.6.).
of all, the public prosecutor has the general duty to inform victims who assume the role of a civil claimant of relevant developments in their case (see § 6.1, under D.9.). Since 1998, the circular of the Minister of Justice stipulates that every victim should be able to learn about the important developments of the pre-trial investigation as soon as possible. This includes the outcome of the police investigation.

(B. 6) The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.

The public prosecutor has a formal obligation to inform victims about the final decision regarding prosecution. The final decision encompasses both the conclusion to dismiss or prosecute the case, and the decision to try mediation between victim and offender (ss. 40 and 41 CCP). Firstly, the victim has to be informed of the public prosecutor’s decision to dismiss the case in order to enable the victim to instigate private prosecution (s. 40 CCP, see § 7.1, B.7). In practice, however, many victims are not informed about a dismissal. This is a fact which is recognized by the Minister of Justice and constitutes a matter of great concern and attention in the 1998 Circular. Also, the timing of notification may frustrate the victim’s chances of successfully instigating private prosecution. In future, the Circular and the EPA (see § 4.3) may improve this practice. It introduces a new s. 40-1 CCP which states that if a case is dismissed for other reasons than that the identity of the offender is unknown, the notification mentioned in s. 40 CCP must be reasoned and must contain an explanation as to the law and the facts. This is repeated in the 1998 Circular (p. a2). The notification must also explain how the victim may oppose this decision: either by direct action, constitution as civil claimant before the examining magistrate, or by asking a review from the Procurator General, and/or the review committee (see § 7.1). Secondly, the victim has to be informed of the decision to prosecute because he may decide to join the criminal proceedings as a civil claimant and claim compensation. Finally, the victim must be informed if the public prosecutor wants to try mediation since the victim must agree to such an alternative (s. 41 CCP). The public prosecutor may opt for mediation if he feels that the case is more suitable for pre-trial settlement. Usually this regards cases which would have otherwise been dismissed, and family or neighbourly disputes in which prosecution will only

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[141] In several legal districts internal guidelines are issued by the Procurator-General to the public prosecutors working in his district. In Paris, for instance, such a guideline has been issued in 1996 (circulaire nr. 2-96) which stresses the public prosecutor’s duty to notify the civil claimant of relevant decisions in his case. Still, this policy does not broaden the general legal obligation to all victims mentioned in the police file. As a result, a large number of victims is still not notified.


[144] Information supplied by victim support workers in Hauts de Seine, Nanterre, 21 May 1996. Researchers of IHESI confirm this practice. According to former police officers working at IHESI, it is quite common that the notification of the dismissal is given only after a considerably long period of time (six months).

[145] If the mediation is successful, the case will be dismissed (classement sans suite) and if it fails, the offender will usually be prosecuted.
aggravate the conflict. The way mediation is used can thus be characterised as net-widening. Instead of referring cases which would otherwise be dealt with by the courts, mediation is primarily used for cases which would have been dismissed by the prosecution service.

(D. 9) The victim should be informed of:
   a. the date and the place of a hearing concerning;
   b. his opportunities of obtaining restitution and compensation within the criminal justice process; legal assistance and advice;
   c. how he can find out the outcome of the case.

Ad (a) Information about the date and location of a hearing should be provided to the victim who reported the crime (s. 391 CCP). In addition, the civil claimant is summoned to court (s. 420 CCP). The summons always contains the date and place of the trial. In practice, however, unless victims act as civil claimants, they are not informed in a systematic manner. Many victims do not realize that if they do not act as civil claimants they will have virtually no rights, including the right to be informed. It is not exceptional that victims call the prosecution service or victim support to get information about their case, only to find out that the trial has already taken place. This state of affairs is recognized in the 1998 Circular, in which the Minister of Justice says that it still happens too often that victims are not notified of the date and place of the trial. A particularly problematic area concerns the accelerated trial procedure, and in particular the immediate comparition (comparition immédiate). Here, many victims are not informed of the date and place of the trial. By means of the immediate comparition, the offender can be tried on the same day or within a few days (s. 394 CCP). In a situation where swiftness is called for, the victims are informed hastily or not at all. To remedy this problem, in certain legal districts like Paris an internal circular has been circulated to the public prosecutors to remind them of their duty to inform the victim. However, in practice, it is not uncommon for the victim to be notified long after the trial, which often means that they will have missed out on the opportunity to claim damages through criminal proceedings (see A.3 and B.6). This is particularly true if more

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147 Information supplied by Mr. S. Portelli, examining magistrate at the district court of Créteil, 22 May 1996.


149 Information supplied by Mrs. N. Baranger, National Office for the Protection of Victims, Chef du Bureau de la Protection des Victimes et de la Prévention. Direction des Affaires Criminelles et de Grace, Paris, May 20th 1996. The Paris district court issued a paper on the 7th of April 1993, in which it states that it is unacceptable that victims are not informed of the date of their trial. As a countermeasure, the district court introduced a policy to notify victims by telephone in March 1993 (p. 3).

150 During my visit to the prosecution service, offenders were brought before the public prosecutor in the morning and were tried in the afternoon.

than one victim is involved in a speedily tried case. The Minister of Justice addresses these problems in his 1998 Circular, and stresses that the prosecution service and the police should pay particular attention to the provision of information to the victim in such speedy trial proceedings. He should be informed – without delay – about the date and the place of the trial, as well as the ways in which he may effectuate his legal rights.

Ad (b) The information duties of the public prosecutor mostly concern civil claimants (see § 6.1, A.3 and B.6.) and victims of serious crimes. Regarding compensation, the 1998 Circular obliges the public prosecutor to inform the victim about his legal opportunities. It is also recommended that the practice observed in certain legal districts to inform victims of state compensation schemes is applied nationwide. It is important to note that for juvenile victims, the vast majority of examining magistrates have adopted a policy of sending an informative letter to the parents in which they explain the right of the parent to constitute themselves as a civil claimant and to claim compensation. The examining magistrates have also adopted an information policy concerning victims of violent crime. They send them a letter in which they include relevant information and an invitation to come to their office. In cases which are tried speedily, many victims are deprived of the right to obtain restitution and/or compensation within the criminal process due to the ill-functioning of notification strategies. According to the public prosecutors, victims rarely complain about this lack of information because they know that the offender cannot pay compensation. Notwithstanding the common sense of victims, the authorities deprive victims of his share (10%) of the inmate’s food and pocket money. This monthly sum can be transferred to the victim’s account by the prison service (see § 7.3).

In practice, the task to inform the victim about proceedings, and about possible assistance is usually passed on to the victim’s lawyer. However, the 1998 Circular stipulates that every victim should be given information on the general procedural rules as well as on the proceedings in court. It states that numerous prosecutor’s offices have already created letters which explain the workings of the criminal justice system, and the role the victim can play, as well as the assistance he may get from victim support services. Furthermore, this information should also be given to the victim in the letter that informs him of a dismissal or of the date and place of the trial. According to the 1998 Circular, the prosecution service has specific and special responsibilities towards victims of serious crimes, concerning e.g. rape, homicide, manslaughter, sexual abuse of children, and collective disasters (bombings in...)

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155 Information supplied by Mr. S. Portelli, examining magistrate at the district court in Créteil, 22 May 1996.
157 In general, the victim’s lawyer becomes an important source of information to the victim. A practice which is quite reasonable and understandable. But at the same time, it may cause problems for victims who do not have a lawyer because they are simply overlooked. Paradoxically, this practice may also affect the rights to information of victims who do have a lawyer. The knowledge of lawyers of the rights of victims, and for instance of the existence of State Funds, is mediocre. According to Mrs. Baranger, the average lawyer is more aware of the rights of offenders. She qualifies the average lawyer’s knowledge of victims’ rights as poor: six out of ten lawyers have never heard of the State Funds or the CIVI.
etc.). A new obligation for public prosecutors is that they should send a personalised letter to these victims or their families in which they are informed of the possibilities for victim support. In addition, every victim may contact the prosecutor's office to ask for information. It should also be noted that victims of serious crime can ask to have an interview with the public prosecutor. In practice, the public prosecutor may invite a victim of serious crime to his office and will give him information regarding the criminal proceedings and how to safeguard his interests. However, according to the National Office for Victim Support and Mediation (see § 3.7.) this information is usually limited to an absolute minimum! It is also unclear who should inform the victim that he is entitled to see the public prosecutor in person. It follows that victims who have been affected by ordinary crimes — such as misdemeanours, theft and burglary — are significantly less frequently informed about their rights than victims of serious crime. These victims are often condemned as passive bystanders of the criminal proceedings, simply because they are not aware of their rights. One of the reasons for this is that many victims of ordinary crime hesitate to constitute as civil claimants. Acting as a civil claimant usually implies that they will need a lawyer, and it is assumed that the offender will not have the money to repay the costs of a lawyer. Public prosecutors and victim support workers estimate that for ordinary crimes only half the victims receive adequate information. With respect to victims of serious crime, and especially rape, assault and murder, more victims (or their relatives) will be reached. Many of these victims also benefit from the fact that their legal costs are paid from State Funds (see § 4.3). Besides, chances are higher that they will be made aware of the existence of victim support services.

Ad (c) With respect to the outcome of the case after the trial, it is only victims who have constituted themselves as civil claimants who are automatically informed because they are a party to the proceedings. Others have to contact the courts on their own initiative.

6.2 Information About the Victim

(A. 4) In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim.

As a rule, statements in police reports contain information about the injuries of and damages incurred by victims. However, this information may be included primarily to substantiate the charge instead of substantiating the victim's claim for compensation. The 1998 Circular, however, stipulates that the police and gendarmes should gather precise and detailed information about the victim's losses and injuries, with the help of the victim. And it establishes a formal responsibility for public prosecutors regarding the accuracy of the police statement. Moreover, it obliges the judicial authorities to create a file on the victim and include it in the legal file. All information and data concerning the victim should be gathered

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162 The lack of information also causes their ignorance regarding free legal aid.
163 Information provided by inter alia Mrs. M. Bernard, Inavem, and victims support workers of l'association départementale d'aide aux victimes d'infractions pénales des Hauts de Seine in Nanterre.
in the victim file (côté victime dans les dossier pénaux) so that the situation of the victim, the losses and injuries suffered by him, as well as the procedures followed regarding compensation are clearly recorded. The data in the victim’s file should be provided by the victim and/or his lawyer, the police, the examining magistrate, the public prosecutor and the victim services. It is emphasized that victim services should be able to provide information about the victim’s needs, as well as the difficulties faced by him in the aftermath of the crime. The main purpose of the victim’s file is to provide the court with all the necessary information about the victim (see D. 12).

In case of bodily harm, a medical report is enclosed and, if necessary, a report on psychological trauma is included. If the police report does not contain these types of information, the public prosecutor or the examining magistrate will contact the police to obtain this information or will retrieve it himself. Sometimes, the public prosecutor or the examining magistrate will need additional information which is obtained in the same manner. With respect to victims of sexual crimes, the 1998 Circular recommends the creation of multi-disciplinary teams (équippes pluri-disciplinaires) composed of specially trained police officers, psychologists and medical doctors. If a victim reports a sexual crime, he should be received and assisted by this team. In this way, the expertise to question and physically and psychologically examine the victim are readily available. The risk of losing evidence is therefore minimized. Also, the creation of cooperative agreements between the prosecution service, the police, hospitals, victim support services and women’s organizations is recommended to improve the treatment of victims of sexual crimes.

(D.12) All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account:

- the victim’s need for compensation;
- any compensation or restitution made by the offender or any genuine effort to that end.

The police statements on losses and injuries, as well as the victim’s file are always made available to the court, as they are included in the legal file. The introduction of the victim’s file (see above, A.4) is a very important development. In addition, victims who play the role of civil claimants have participatory rights which enable them to clarify their claim for compensation to the court.

Information concerning any compensation or restitution made by the offender will be made available to the court by the public prosecutor, the defence counsel, or both. This information is relevant to the court because the court may adjourn the trial or suspend the sentence if the offender has paid, or is willing to pay compensation (see § 7.2, D.11). In practice, however, cases in which the offender has already paid compensation to the victim will not go to court, unless a serious offence is involved (see § 7.1).

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166 Information supplied by Mrs. Gouineau, who is responsible for a mediation service within a section of the Palais de Justice in Paris, 20 May 1996.
7 THE VICTIM AND COMPENSATION

7.1 The Expediency Principle and Compensation

(B. 5) A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender.

The public prosecutor has the authority to take the decision whether or not to prosecute. His decision not to bring charges (classement sans suite) is an administrative decision (see B.7). The expediency principle allows the public prosecutor to drop charges if the offender is not identified, if there is not enough evidence to build a case (technical reasons), or if a dismissal serves a particular interest (policy reasons). As stated in § 2, the vast majority of cases are dismissed. When taking such a decision, the public prosecutor can take the question of compensation into consideration in several ways. Firstly, he may select the case for mediation between the offender and the victim. Since the January 1993 Act, the public prosecutor has the power to try to mediate between victim and offender in order to ensure payment of civil damages to the victim, to end the conflict caused by a misdemeanour, or to contribute to the rehabilitation of the offender (s. 41 CCP). In France, mediation is used more and more. Since the introduction of the 1993 Act until 1996, the number of cases which is dismissed under the condition to pay compensation, or after a mediation agreement, has risen with 20%, nowadays the number represents 7% of the total number of dismissed cases. Although only few studies are available, the success rate for mediation is probably between 50% and 80%. The combination of mediation specialists who have enough time to pursue a claim-settlement, and the promise of the public prosecutor to drop

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168 The public prosecutor’s freedom to make such a decision is limited. It is firstly limited by the fact that he can receive instructions by his superiors (ss. 33, 36, 37 CCP). Secondly, for certain crimes, the decision should be taken by other authorities (e.g. crimes against the state which fall under the competence of the military courts). In the latter case, the public prosecutor has an advisory function. See G. Stefani c.s. (1993), pp. 442-443.

169 The mediation procedure is as follows. The public prosecutor selects a file and contacts mediation services or mediators at the courts, who in turn contact the parties. If all goes well, the case is dismissed and the victim is compensated for his damages within an average of three months. See F. Casorla (1997), p. 92. If the mediation attempt is not successful, the public prosecutor will, as a rule, decide to prosecute the offender. On the other hand, if the victim and offender have reached an agreement, the public prosecutor will drop the charges. Mediation is therefore an important instrument in an overloaded criminal justice system, especially if external mediators are responsible for the actual mediation between the offender and the victim.

170 According to mediators, the primary goal is payment of compensation to the victim.

171 Introduced by the Act of 4 January 1993 (Loi nr. 93-2 du 4 janvier 1993). Concerning mediation the sections R 92, R 121 and R 121-1 are also relevant.


the charges may well be the essential ingredients for success. Mediation thus seems to be a viable alternative to conditional dismissal (see § 7.2, D. 13).\(^{174}\) Conditional dismissal constitutes the second possibility for the public prosecutor with regard to compensation and the decision whether to prosecute. Finally, the 1999 Act that reinforces criminal procedures introduces section 41-1 CCP, which allows the public prosecutor to demand the offender to compensate the losses he has caused prior to his decision to prosecute (s. 41-1-5° CCP). For certain crimes, the new section 41-2 CCP allows the public prosecutor to require the offender to pay compensation to the victim instead of imposing a fine, withdrawing his driving or hunting licence, or ordering an alternative sanction consisting of 60 hours of community service. If the offender accepts the offer, the victim is informed by the public prosecutor (s. 41-2 CCP).\(^{175}\)

(B. 7) The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to instigate private proceedings.

Until the 1999 Act (EPA, see § 4.3), the victim had no right to ask for a review of the public prosecutor's decision not to prosecute, or to appeal a decision.\(^{176}\) However, the victim did have – and still has – the right to instigate private proceedings (see § 5.4). He may either summon the offender directly to appear in court (citation directe) or constitute himself as a civil claimant before the examining magistrate (saisie du juge d'instruction). In practice, however, this right was not fully used by victims for the simple reason that they were not informed about it (see § 5.3 and § 5.4).\(^{177}\) The EPA has introduced two instances of review: the Procurator General and, in second instance, the review committee (commission de recours). It states that anyone who has reported a crime, and who cannot constitute himself as civil claimant may ask for a review of the dismissal. The request for a review should be addressed to the Procurator General within one month after notification of the dismissal (see § 6.1, B.6), or, if no notification has been given within 8 months after the crime has been reported to the authorities. The written request has to be motivated and should include the notification of the dismissal, or a copy of the initial report about the crime. The Procurator General may either order the public prosecutor to prosecute, or if he agrees with the dismissal, may notify the reporter of the crime of this decision. Regarding the latter situation, the reporter of the crime may, within one month of the notification, or if the Procurator General fails to respond within two months after the request, contact the review committee (s. 5, introducing s. 48-1 CCP). The review committee is composed of public prosecutors from different courts of appeal, and are appointed by Decree. The public prosecutor involved in the case under review will not have a seat in the committee (news. 48-2 CCP). The request to the review committee has to be motivated and should include the notification of the Procurator General approving the dismissal (new s. 48-3 CCP). The review committee may inspect the legal file and other documents relating to the investigation. It may also request

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\(^{175}\) Loi de 9 juin 1999 renforçant l'efficacité de la procédure pénale.

\(^{176}\) A. West c.s. (1992), p. 227.

\(^{177}\) Information supplied by Mr. S. Portelli, examining magistrate at the district court in Créteil, 22 May 1996.
additional information from the Procurator General. The review committee will then give a final decision regarding the dismissal, which is sent to the Procurator General, the public prosecutor, and the reporter of the crime. The committee may order the public prosecutor to start a public action against the accused (new s. 48-4 CCP). Finally, the Act includes a provision regarding the abuse of the review proceedings. The committee may request the prosecution service to summon the reporter to court, if it feels he abused the procedure. The court may then impose a fine, not exceeding 100,000 FF (EUR 15,245, s. 48-5 CCP).

7.2 The Court and Compensation

(D.10) It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished. Criminal courts have the power to award civil damages to a victim who has constituted himself before or during the trial as a civil claimant (s. 464 CCP). Likewise, the court may order the restitution of goods seized by the authorities (s. 373 CCP). Regarding the trials by jury, it is the jury who decides on the question of guilt, but the professional judges decide on the civil claim for damages (s. 371 CCP). Even if the accused is acquitted, the courts may award damages to the victim. This is a rather unusual phenomenon among jurisdictions adhering to the adhesion or partie civile model. But it has recently been underlined in s. 25 of the 1999 Act which is a revision of s. 626 CCP. Even in the Assizes Court, compensation can be awarded to the victim if the offender has been acquitted. The only condition is that it must be proven that damage was caused by the facts that were the object of the trial (ss. 373, 470-(1), 541 CCP). This power of the court to award compensation to the civil claimant goes much further than in most jurisdictions. Furthermore, the court may order provisional payment of compensation to the victim. It may also, if it cannot decide on a civil claim for compensation, order a certain sum to be paid to the victim provisionally. The court may decide that this provisional sum should be paid immediately (s. 464 CCP). It is interesting to note that the court should award full compensation to the victim concerning all material and/or moral damages which can be established and proven. The court cannot lower the sum the offender has to pay to the victim, not even in those cases where it is quite obvious that the offender will never be able to pay such a sum given his financial situation, and even though he might be able to pay a smaller sum (see §7.3). Only with regard to the victim’s legal costs, has the court been given the power to take the financial capacity of the offender into account, and lower the amount of compensation accordingly (s. 475-1 CCP, introduced in 1993). Finally, the court may also impose a suspended sentence on condition that the victim is compensated for his losses and injuries (ajournement avec mise à l’épreuve, s. 132-(62) PC).

178 The law explicitly mentions the right of the accused who has been acquitted by the jury to claim compensation from the victim acting as civil claimant (s. 371 CCP).

179 The legislature has made several special provisions regarding the situation of an acquittal on the facts (l’acquittement) or an acquittal on points of law, or on the ground of an exemption (le relâche, l’absolution).


181 This obligation of the courts is not mentioned explicitly in the Code of Criminal Procedure. It is a rule of civil law.
FRANCE

(D.11) *Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction.*

Within the French criminal justice system, compensation is by nature a matter of civil law, even if it is the criminal court that awards damages to the victim. Therefore, compensation is not a penal sanction. However, it can be awarded in addition to a penal sanction, or as a substitute. In the majority of cases, compensation is awarded in addition to a penal sanction, e.g. a prison sentence, or a suspended sentence (see D. 13). Likewise, a sentence may be made subject to the payment of compensation by the offender. As a result, compensation can be a substitute for a penal sanction in the sense that the payment of damages in the pre-trial stage may lead to a dismissal of the claim, and after the trial it can be imposed as a condition on a suspended sentence (see D.13).

(D.13) *In cases where the possibilities open to a court include attaching financial conditions to the award of a deferred or suspended sentence, of a probation order or any other measure, great importance should be given—among these conditions—to compensation by the offender to the victim.*

Compensation may play a role regarding the suspended sentence, the deferred or postponed sentence (*l'ajournement avec mise à l'épreuve*) and the conditional release.

Sentences may be suspended conditionally (*le sursis avec mise à l'épreuve*, s. 739 CCP) or unconditionally (*le sursis simple*, s. 735, 736 CCP). The suspension of a sentence does not affect the payment of compensation by the offender to the victim, as ordered by the court (s. 736 CCP). The court may use this possibility when it appears that the offender has paid, or is willing to pay, compensation to the victim. The sentencing judge plays an important role with regard to the conditionally suspended sentence. The sentencing judge (*juge de l'application des peines*) will determine the conditions to the suspended or conditional sentence and will supervise their fulfilment (s. 739-1 CCP, s. C.997 CCP). According to the law, he should try to obtain compensation for the damages and injuries suffered by the victim, even in the absence of a decision of the court about the civil claim for compensation (s. 132-45 PC, R.58-6°, R. 536-5°). In practice, the sentencing judge may choose from 14 conditions, of which one is the payment of full or partial compensation by the offender. Most sentencing judges consider securing the payment of compensation to be an important aspect of their work. Nevertheless, they face quite a number of problems. It will take at least three months before the court's verdict reaches the sentencing judge. However, if the court has decided that the offender should be subjected to a conditional sentence, the sentencing judge will be notified earlier to enable him to undertake action. It frequently occurs that the offender has been ordered to pay compensation to the victim as well as pay for his legal costs, whereas it may take a long time before the sentencing judge receives the verdict and the address of the civil claimant. As a result, any payments of compensation have to be postponed for at least three months. Obviously, this does not encourage offenders to pay. In fact, this practice is contrary to the law which stipulates that the sentencing judge should have the verdict within fourteen days (s. C.997-1 CCP). If that is impossible, he should at least be

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182 Information supplied by Mr. G. Quillien, sentencing and trial judge, Paris, 24 May 1996.
183 The conditions are listed in the record of notification: *procès verbal de notification* (p. 2).
sent a copy of the verdict. Furthermore, the sentencing judge is often confronted with the financial incapacity of the offender. Many offenders are not capable of paying compensation because they are unemployed or have many creditors, etc., often this implies that only part of the claim can be enforced. Usually, sentencing judges will allow the offender to pay in monthly installments. Besides, their job is complicated by the fact that the police do not look into the financial position of the suspect during the judicial investigation, and are very unwilling to do so afterwards. If the sentencing judge makes a formal request to conduct a financial investigation, the police will only take down a statement by the offender regarding income and bank accounts. The powers of the sentencing judge to investigate the financial means of the offender are limited. This leaves the sentencing judge no other option than to threaten the offender with imprisonment, which usually leads to a legal tug of war. As a result, the obligation to ensure compensation for victims is very time-consuming.

Compensation may be awarded in combination with a deferred sentence (l'ajournement). The criminal court holds the latter possibility if it finds the accused guilty of the charge but wants to suspend the sentence by placing the offender under the control of the probation service in order to give him the opportunity to compensate the victim (s. 132-62 PC). He may even order the payment of compensation if the victim has not presented a civil claim for damages. The legislature recommends that the probation service immediately fix a scheme for payments to the victim, because this approach has been very successful in the past in legal districts that apply this strategy.

The question of compensation may play a role with respect to conditional release of the offender (liberté conditionnelle, s. 731 CCP). again the sentencing judge plays an important role here, because he may determine the conditions attached to a conditional release (s. D. 535 and D. 536 CCP). The sentencing judge may order the offender to pay all the sums which are due to the victim (s. D 536- (5) CCP). Such conditions may affect the decision to release an offender, and also the continuation of the release (l'octroi et le maintien). Consequently, if the offender has been released on the condition that he pays compensation to the victim and if this condition is not fulfilled, the judge may revoke the conditional release and put the offender in prison again to serve the remainder of the sentence.

7.3 Enforcement of Compensation

(E.14) If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.

Compensation is a matter of private law. Therefore, it has no priority over fines, or other monetary sanctions. The civil claimant is primarily responsible for collecting the money.

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185 Information supplied by sentencing judge, Mr. G. Quillien, CPAL, 24 May 1996. See also Tribunal de Grande Instance de Paris, Le jugé de l'application des peines et l'indemnisation des victimes, 7 April 1993. This report elaborates on the many practical problems faced by sentencing judges. The problem with financial investigations is dealt with on page 16. An almost identical report was issued in 1996.
The legislature has, however, introduced several measures to facilitate payment of compensation to the victim. Unfortunately, these measures are still not very successful in practice. Firstly, the examining magistrate may order the offender to pay (le cautionnement en cours d'instruction, ss. 142, 142-1 CCP) to prevent concealment of capital or assets. Secondly, the 1983 Act states that fraudulent insolvency is a punishable offence (s. 314 PC). This makes it easier for the authorities to take legal action against a defendant who tries to prevent having to compensate the victim. Furthermore, offenders who are sentenced to a term in prison are obliged to open an account to which their pecuniary possessions, and salaries must be transferred (s. 728-1 CCP). Ten per cent of these sums should be used to compensate victims and should be automatically paid to their accounts. This sum will at least cover 120 FF (EUR 18.3) on a monthly basis. This option was included in the law of 6 July 1990 which added a new title to the Code of criminal procedure entitled 'The pecuniary assets of prisoners'. To ensure enforcement, the legislature obliges the public prosecutor to inform the penitentiary service of the amount of compensation the civil claimant is entitled to (D.325 CCP). Next a sum equal to 10% of the prisoner's earnings should be set aside for the victim. Prison authorities who select inmates for work inside the prison facilities should give priority to those prisoners who have to pay damages or who have a family to sustain (D 101 CCP). Nevertheless, this provision has limited significance in practice. Less than 40% of prisoners generate earnings and those who do are normally paid at a level which falls below half the legal minimum wage. In addition, these arrangements only apply to victims who have brought a civil claim for damages. Because of the failure to attain success, the Ministry of Justice gives a lot of attention in its 1998 Circular to improving the actual implementation. The Ministry obliges the judicial authorities and the penitentiary services to keep a file on the state of affairs regarding the victim's claim for compensation. It reminds the prosecution service that it should provide the prison services with the verdict of the court (s. 325 CCP). The public prosecutor should send the prison services a copy of the court's decision (s. 132-4 CCP), who should then keep track of any payments in the file on compensation (ss. 155 and D.310 CCP). Moreover, upon his release, the prison services should provide the offender with certificates of his payments to the victim (s. 334 CCP).

Concerning early release, the application of 1993 Circular 93-6 E3 requires the decision on release to include the court's decision on compensation to the victim and

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188 The Act of 8 July 1983, renforçant la protection des victimes d'infractions. This Act was integrated into the Penal Code and the Code of Criminal Procedure. It also establishes the State Fund set up to compensate victims of crime if the offender is unknown or insolvent.

189 See ss. D. 113 CCP 10% of the salary for prison work (rémunérations du travail du détenu), D.328 CCP 10% of his monthly allowance of 1200 FF (avoirs du détenu, déduction faite de la provision alimentaire mensuelle de 1200 F, EUR 183) and D. 329 CCP 10% of all sums payable to him (toute somme versée au détenu).

190 Ministère de la Justice (1982), pp. 263-265. See also Ministère de la Justice (1998), p. b13 and b16. On page b16, a model is included of an information letter which the penitentiary services should send to the victim of crime. In the letter mention is made of the 10% of the offender's earnings (salaire, mandat, etc.) that is reserved for payments to the victim.

191 This is 10% of his monthly allowance of 1200 FF for food (120 FF or EUR 18.3).

192 The legislature has made several special provisions regarding acquittals on the facts (l'acquittement), on a point of law, or on the ground of an exemption (le relaxe, l'absolution).


the sums paid to the victim by the offender. If direct transfer does not cover all damages, the victim may proceed to seize (saisie-arrêt) the bank-account or the prisoner's income. In this way, the victim can seize up to 50% of the offender's capital to cover his damages. If direct transfer or seizure of financial assets amounts to the sum needed to compensate all damages, the victim has the right to confiscate the offender's property. Finally, the 1991 Act has given victims the possibility to contact the public prosecutor to find out the address of the convict in order to facilitate enforcement of the court's decision on compensation. Unfortunately, this law is not very effective. In practice, public prosecutors are not very eager to start any investigation concerning the whereabouts of the offender. They will usually tell the victim that if he has not heard from them within three months, the address cannot be traced. In reality, they will not easily be persuaded by an individual victim to look into the matter.

In a national survey, the Ministry of Justice evaluated the work of the prison and penitentiary services relating to the compensation of victims (1993). It showed that approximately 40% of the prison population has one or more victims to whom compensation has to be paid. However, in reality this number could be much higher because the penitentiary services do not know about 30% of the prison population whether they have been ordered by the courts to pay compensation to victims. A total of 64% of all those victims entitled to compensation by detainees receive no compensation at all. More than 30% of offenders whose victims have been identified pay no compensation. According to the probation services, 25% of their clients have to pay compensation to victims. In practice, however, only a minority of victims known to the probation and prison services (approximately ⅓) are compensated (partly) by their offenders. This number is actually rather disappointing if one remembers that these services only know with respect of 40% and 25% of the inmates whether they owe compensation to their victims. With respect to prisoners, one of the causes is that 36% of the prison population (belonging to the 40% group) absolutely refuse to pay damages. According to the survey, very few convicts actually pay compensation of their own free will (317 prisoners in the whole of France), furthermore the survey shows that detainees are more inclined to pay compensation if the sentence contains an order to deduct a modest sum from the offender's (prison)wages. Usually this sum amounts to less than 200 FF (EUR 30,5) per month (see § 7.3).

In 1998, the Ministry of Justice stresses that five years later nothing has changed. It emphasizes that the judicial

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196 Ministère de la Justice (1982), pp. 265-266.
198 Information supplied by Mr. O. Bonnac, victim support service of Hauts de Seine, Nanterre, 21 May 1996. Mrs. D. Moyal, secrétaire générale du parquet de Paris, has a more positive view on the matter. Although she also feels that insurance companies are more successful in getting a positive response from the prosecution service. Mrs. D. Moyal supplied this information on 21 May 1996.
200 The reasons given by the prisoners for not paying compensation were: 1) lack of money; 2) difficulties in tracking down the personal particulars of the victim; or 3) unwillingness to comply with the court order.
authorities and partners should establish an active policy towards compensation. In addition, the judicial authorities, prison services and victim services should set up cooperation agreements to facilitate the payments of compensation to the victim.

Daily practice and research thus show (see § 7.2, D.13) that in spite of the obligation to award compensation for all proven damages and losses, only a small percentage of the awarded damages will actually be recovered. Today, the enforcement of compensation remains one of the major problems victims have to face. This may *inter alia* be due to the fact that collecting compensation is mainly the responsibility of the victim, and remains difficult in spite of almost all special measures described above, which were intended to facilitate compensation. Usually, the only assistance available to the victim is the bailiff. In addition, few victims seem to be aware of the fact that they have to take action in order to enforce the verdict of the court. Sometimes, they do not know that they may use the services of a bailiff. Research indicates that victims are often unable to collect the damages awarded by the court. According to Piffaut, 23% of victims who were granted compensation by the court actually received some sort of payment within one year. Only 11% were fully compensated, for the rest received only a part of the awarded compensation. According to d’Hauteville (1989), these figures are even lower: 12% of civil claimants receive compensation from the offender within twelve months, whereas only 6% of civil claimants are fully compensated for their losses and injuries. d’Hauteville mentions that no data is available as to the amount received after the first year, although she feels it improbable that many offenders will start paying then. According to sentencing judges, this great discrepancy between the amount of compensation awarded by the courts and the amount that is actually received by victims still exists up to date. Apart from the fact that some offenders cannot afford to pay compensation, the discrepancy is also caused by two other factors: the lack of assistance available to victims when they try to collect damages, and the limited use of existing possibilities by the authorities to ensure payment.

The lack of actual success may be linked to the fact that the criminal court is obliged by law to award full compensation to the victim and has no ways to limit the amount of compensation, even if it is obvious that the offender never is going to able to pay such a sum (see § 7.2). Whether this has negative consequences for the actual payment of compensation by offenders has not been the subject of research. However, logic dictates that offenders who are faced with a court order to pay more compensation than their financial capacity allows will not be willing to compensate the victim fully, or even partially because

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203 Information supplied by Mr. S. Portelli, examining magistrate at the district court of Créteil, 22 May 1996. According to Mrs. Ch. Cazalens of SAJIR, another problem is victims expect that the offender pays the sum awarded by the courts. They are never told that there is a chance that the offender will not be able to pay. This causes many disappointments. According to Cazalens, the victim should have the right to be informed about the financial position of the offender.
204 G. Piffaut (1989), p. 126. Piffaut also includes some data concerning specific types of crime, such as property offences 3,570,000 FF (EUR 5,444,243) was awarded by the court to victims of theft, but only 43,450 FF (EUR 6,624) was actually paid by the offenders. Concerning bodily injuries, 450,000 FF (EUR 68,602) were granted to victims and less than half this amount was actually received (p. 119).
it may seem irrelevant to them to pay part of the due sum. This assumption seems to be
backed up by an evaluation study that has been carried out by the Ministry of Justice of
1993, which reflects the extreme unwillingness of prisoners to pay compensation despite
the many measures that have been introduced to help the victim to enforce the court's
sentence regarding compensation. In the future, the implementation of the reform measures
as introduced by the legislature to facilitate compensation could improve dramatically if
the judicial authorities comply with the 1998 Circular.

8 TREATMENT AND PROTECTION

8.1 Victim-Awareness Training

(A.1) Police should be trained to deal with victims in a sympathetic, constructive and reassuring
manner.

Except a summary training of police officers in the juvenile brigade, there is no official
training programme in police schools or academies concerning the treatment of victims
in France. As a result, guideline A.1 is not met formally. Only occasionally does the umbrella
organization for victim support Inavem (see § 3.6.) offer training sessions and seminars on
the subject of needs and rights of victims to the police and other organizations. It is
therefore highly recommended that the police schools and academies start to train recruits
and incumbent personnel to deal with victims in a constructive manner.

Despite the lack of attention in official training programmes for victims, instructions
have been issued by the Minister of the Interior which focus on the importance of proper
treatment of victims. In the 1987 circular on the subject of how victims are received at the
police stations, the Minister of the Interior stressed the importance of improving the first
contact between citizens and the police because far too often victims have good reason to
complain how they were received because the availability of police officers and the
information given to victims is insufficient, or simply because victims are treated without
respect and consideration. In the same circular, the Minister underlines the importance
of special treatment of female victims of violence or other crimes who have asked the police
for help. Although he admits that police buildings are sometimes unsuitable for receiving
victims, as they are too dilapidated and too small, the police should not dodge their
responsibilities regarding proper treatment of victims and the quality of their facilities at
the police station. The 1992 circular issued by the Ministry of the Interior shows that
the situation still did not improve sufficiently at all police stations in the period 1987-1992.
In this circular, the Inspector of Police expresses his discontent about the deplorable way
a victim of violent crime was received, a fact which came to his knowledge through the press.

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207 Inavem, Formations 1996, Paris. This is confirmed by Mrs. Moyal of the prosecution service in
Paris, 21 May 1996. Before 1990, no attention whatsoever was paid to the position of victims.
Nowadays, only the victim services are active in giving training to police officers and organizing
seminars.
208 Ministère de l'Intérieur, Direction générale de la police nationale, Note de service, 20 October 1987,
He objected strongly to the fact that his attention was once again called to this fact. Furthermore, he qualified the refusal of the police to take down a complaint as unacceptable.210 (See § 8.2 regarding police reorganization and the way victims are received at police stations).

In fact, most problems regarding the treatment of victims originate in the perception the police forces have of this task. Activities concerning victims are not considered as part of basic police duty. According to Zaubermann of CESDIP-CNRS,211 the way the victim is treated by the police during their first contact is still inadequate. The police frequently make quite cynical and defeatist remarks.212 However, researchers of IHESI213 deny that this is a general problem. They feel that only police officers in very bad and crime-stricken neighbourhoods display such a cynical attitude towards victims. Zaubermann, however, holds the opinion that this is a widespread problem because the police do not have a customer-oriented attitude or policy (absence d'une politique de service aux clients). She thinks that the only solution to the current problems would be the introduction of a customer-oriented policy, with an emphasis on a more constructive, sympathetic and respectful method of dealing with victims of crime, which should be put into action by the chiefs of police. Until now, police activities concerning victims have not been looked upon as real police work. Dealing with victims is perceived as work that is only of marginal interest. This perception has changed little over the past decade.214

In addition, many police stations are not very well equipped. Researchers of IHESI have found that in many police stations victims cannot be given any privacy. Often, victims have to file a complaint and relate their story in the presence of third persons. Another problem is that reporting a crime outside office hours is very difficult (see § 8.1).215 Nevertheless, there have been some improvements in the treatment of victims. Until the 1980's, there were a number of problems regarding victims who wanted to report domestic violence. The police did not take such reports seriously, and even refused to take down the complaint. Furthermore, the reports which were taken down were more often than not dismissed by the public prosecutor. Fortunately, this is no longer common practice, even though it does still occur.216 This is hardly surprising given the fact that the police are not trained to deal with victims, and many chiefs of police pay hardly any attention to victims.

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210 Ministère de l'Intérieur, Direction Départementale des Polices urbaines du Rhône, Cabinet, Note nr. 221/AD du 7 janvier 1992. See also Note nr. 16.368/AD of 2 décembre 1991, on the subject of the reception of complainants.

211 Centre de recherches sociologiques sur le droit et les institutions pénales (CESDIP), Centre national de la recherche scientifique (CNRS).

212 During Mrs. Zaubermann’s visits to various police station (in the course of a research into functioning of the police), she witnessed frequent remarks like: ‘You are number 25 who has come in to report this today,’ ‘It is quite useless to file a complaint, we will never find the offender,’ or ‘Your complaint will only end up in the wastebasket.’

213 Institut des hautes études de la securité intérieure (IHESI), visit on 20 May 1996.

214 Information supplied by Mrs. R. Zaubermann, CESDIP-CNRS, Guyancourt, 23 May 1996. She recognizes that the position of victims has improved in theory, but that there has been hardly any progress in practice.

215 Information supplied by Mr. R. Filleul and fellow researchers of IHESI, 20 May 1996.

216 According to the crime statistics, domestic violence is a considerable problem in France. Also, about 12% of the clients of victim services are victims of domestic violence. Information supplied by Mr. O. Bonnac, victim service in Hauts de Seine, Nanterre, 21 May 1996.
8.2 Questioning of the Victim

(C. 8) At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians qualified to assist them.

In training programmes for police officers, examining magistrates and judges, no attention is paid to questioning procedures concerning victims (see § 8.1). Therefore, the way the victim is questioned depends largely on the personality and sensitivity of the examiner. The victim can be questioned at different stages of the proceedings. It is not uncommon for a victim to be questioned during the pre-trial stage by the police and the examining magistrate.

Questioning by the police is often an unpleasant experience for victims. The manner in which the victim is examined generally reflects little consideration for his personal situation and emotions. It is not unusual for victims to have to repeat their account of the facts (or part of it) two or three times, simply because different police officers join in the questioning.217 However, recently the police have been making an effort to improve their performance, not in the least because of pressures from the Ministry of the Interior to treat victims and witnesses in a more considerate manner (see § 8.1). The Ministry of the Interior has, for instance, recently published a practical police guide, based on the 1986 Deontological Police Code, which stresses the importance of correct treatment and examination of witnesses. According to this official police guide, the police are required to be polite to witnesses, to take due consideration of their emotional state of mind, to be interested in the witnesses’ statements and finally to show witnesses that they are available for them. Furthermore, it is stressed that the workload and the urgency to act rapidly can never be an excuse for individual police officers to forget their duties with regard to witnesses.218 Also, the fact that more female officers are now being employed by the police seems to have had a positive effect.219 On the other hand, the reorganization of the police in 1992 meant that victims now have to tell their story on an even greater number of times. In 1992, the police decided to leave the first contact and reception of victims at police stations to administrative personnel. As a result, victims who come to report a crime or need the assistance of a police officer need to first tell their story to persons who are not trained as police officers. These people then decide whether the case requires the attention of a police officer and, if so, which one. This practice does not only downgrade the relevance of reception (which is already often inadequate220) and appropriate treatment of victims, but also increased the number of times...

217 Information supplied by researchers of IHESI, 20 and 23 May 1996.
219 Most participants whom I interviewed confirm this. In particular, those working at victim support are highly critical of the questioning techniques of the police.
220 The reception of victims by both the national and the state police is inadequate, according to victim services. The reception of victims at police stations has always been a problematic issue. The Ministry of the Interior has repeatedly issued internal circulars to all police stations in which the problem was underlined. In 1987, the Ministry wrote: ‘Or trop souvent, des victimes ont à se plaindre de l’accueil qui leur est disponible dans les locaux de police, en raison notamment du manque de disponibilité, de l’insuffisance de renseignements qui leur sont communiqués ou parfois tout simplement de l’absence d’égards.’ (20 October 1987, DCPU/EM/nr. 009928. In 1991 and 1992, the Minister again...
the victim has to tell his side of the story and answer questions. Moreover, it has practical drawbacks. The time difference between the first contact at the reception desk and the second contact with a police officer has caused additional waiting times at the police station. The average time a victim has to wait before he can speak to a police officer who is competent to take down the complaint varies generally between 20 and 60 minutes. However, quite frequently victims have to wait up to an hour and a half before they can speak to a police officer. An additional problem is that the administrative personnel work only during office hours. Consequently, the reception desk is often unstaffed in the evening, at night, and during the weekend. This is why the large majority of victims who want to report a crime at those hours are asked to come back the next day, unless the crime is considered to be a very serious one.²²¹

Children (between 4 and 18 years old) are questioned by police officers in the juvenile brigade (brigade des mineurs). They receive no special training on how to question children.²²²

The questioning of abused children by the police is a matter of particular concern. Currently, these children are subjected to repetitive questioning. In 1996, initiatives were undertaken to start up a project to introduce video-registered questioning.²²³ However, to date, no actual implementation has been achieved.

During the judicial investigations by the examining magistrate, the victim may be heard and questioned again.²²⁴ A striking aspect of questioning carried out by the examining magistrate is that the victim may be confronted with the accused (ss. 114, 119 CCP).²²⁵ In general, examining magistrates highly value the instrument of confrontation. Furthermore, they consider it beneficial to the victim, in the sense that it can be seen that the offender is called to account. Regarding serious crime, the examining magistrate will inform the victim about the proceedings and usually prepare him for a confrontation with the offender during the preliminary investigation. Although it is not uncommon for examining magistrates to prefer an unexpected confrontation for the sake of establishing the truth and to assess the credibility of the victim-witness.²²⁶

During the trial stage, the victim is usually summoned again to give evidence. As a rule, the victim is heard and questioned in the presence of the accused. However, in court, questioning techniques are generally considerate, in part this is due to the fact that the president of the court directs the questioning. He is the one who puts all the questions to the victim, including those of the public prosecutor and the defence lawyer (s. 454 CCP).

²²¹ Information supplied by researchers of IHESI, Institut des Hautes Études de la Sécurité Intérieure, on May 23rd 1996.
²²² Information supplied by Mrs. M. Baranger, 20 May 1996.
²²³ Information supplied by researchers of IHESI, 20 May 1996.
²²⁴ The public prosecutor has the right to be present during the questioning of the witnesses and the civil claimants (s. 119 CCP).
²²⁵ This is generally considered to be a task for the examining magistrate. Although everyone is conscious of the fact that this may be a very traumatic experience, it is considered necessary in order to assess the credibility of the victim-witness.
²²⁶ Information supplied by Mr. S. Portelli, examining magistrate at the district court of Créteil, 22 May 1996.
Direct questioning of the victim by the defence counsel is thus not allowed. The presiding judge may also refrain from asking certain questions if he considers them irrelevant to the case, or uncalled for. After his testimony, the witness is usually free to leave the courtroom. He may be subjected to further questioning during the trial if the public prosecutor or other parties request that the court call the witness to the stand again at a later stage to be confronted with e.g. the testimonies of other witnesses, or the statement of the accused (s. 454 CCP).

8.3 Protection of the Victim

(F. 15) Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or particular status or personal situation and safety of the victim make such special attention necessary, either the trial before the judgement should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate.

As a rule, trials are open to the public. The media, however, are not allowed to record the proceedings by using a photo camera or a tape-recorder. Television cameras are barred from the court room as well. Violations of this rule can lead to a fine of 120,000 FF/ EUR 18,294 (s. 308 CCP). The court is allowed to hold the trial in camera if publicity is expected to affect public order or moral (ss. 306, 400 CCP). The court also has the authority to hold the trial behind closed doors (huis clos) to protect the victim from unwanted publicity. The court may take this decision of its own accord, or at the request of the public prosecutor and/or the victim in his capacity of a civil claimant (ss. 306, 400 CCP). Furthermore, the presiding judge may expel members of the public and the defendant if they disturb the peace (ss. 402, 404, 405 CCP).

With respect to the disclosure of personal information and publicity in general before or after the trial, quite a number of restrictions apply both before and during the trial. Members of the police force are bound to secrecy during the pre-trial stage (s. 11 CCP), whereas their freedom of speech is limited by their code of conduct (code d'éthique) during and after the trial. Furthermore, all persons involved in the criminal proceedings are bound by the principle of secrecy. This rule includes members of the judicial police, experts and clerks of the court. Publication of documents or pieces of evidence is a punishable offence. The law stresses that it is prohibited to publish any information concerning victims who act as civil parties during the criminal proceedings before the court has given its verdict (Act of 2 July 1931, s. 2). A breach of this injunction can lead to a fine of 120,000 FF (EUR 18,294, Press Act of 29 July 1881, s. 39). Finally, the publication without consent of images of someone in private surroundings constitutes a criminal offence (s. 368 PC). Thus, pictures of victims or their family taken by the boulevard press in or around their home cannot be published.

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227 The same procedure applies to the proceedings in the Court of Assizes (ss. 324 – 346 CCP).
228 The only exception to this rule has been created for the civil claimant who has constituted himself as such before the examining magistrate and the defendant (Instruction générale, C. 22).
Finally, the BRV\textsuperscript{229} (see § 4.3) may enhance the protection of all victims — and not only that of civil claimants — against publications which affect the victim's dignity. The legislature proposes reinstatement of s. 39 PC. As a result, publication of images or photographs which show the crime scene or the circumstances under which a crime was committed could lead to a fine of 100,000 FF (EUR 15,245), if such a publication negatively affects the dignity of the victim.

\textbf{(G. 16)} Whenever it appears necessary, and especially when organised crime is involved, the victim and his family should be given protection against intimidation and the risk of retaliation by the offender.

According to Pradel, the French legal system lags behind other legal systems with respect to the protection of witnesses, despite the fact that the protection of witnesses against threats of grievous bodily harm or related reprisals is extremely common in domestic violence cases and drug-related crimes.\textsuperscript{230} Contrary to other jurisdictions, no special enactment exists concerning the protection of witnesses. Nevertheless, the Penal Code and the Code of Criminal Procedure contain several provisions that may offer protection to victims. The Penal Code protects victims from intimidation or retaliation by the offender by stipulating that threatening or intimidating a witness, a victim or a civil claimant is an aggravating circumstance, and will lead to a more severe punishment for the offender (ss. 222 and 322 PC). In addition, any threat or intimidation that is uttered to pressure the victim not to file a complaint, to retract a statement or to lie to the courts is a punishable act (s. 434-(15) PC). It can be punished by three years of imprisonment and a fine, even if the threat did not have the intended effect. The Code of Criminal Procedure does not contain provisions that directly aim to protect victims or victim-witnesses. Protection is offered through more general measures. During the pre-trial stage, the protection of witnesses is mainly ensured through preventive detention of the accused (s. 144 CCP). Furthermore, the examining magistrate can take certain security measures (s. 138 CCP). He can \textit{inter alia} order the accused not to leave a certain fixed area or to frequent certain places. The examining magistrate often uses these legal provisions.\textsuperscript{231} Since 1995,\textsuperscript{232} witnesses who are being threatened or who fear retaliation may ask the permission from the public prosecutor to give the address of the police station in the report instead of their own address (ss. 62-1 CCP). During the preliminary judicial investigation, the examining magistrate may authorize the victim to use the address of the police station (s. 153 CCP). In this way, the accused cannot easily find out about the whereabouts of the victim from the legal file. According to Pradel, however, more and more victims want to report and testify anonymously for fear of reprisals by the offender. Reports can sometimes be made anonymously. However, regarding the preliminary judicial investigation and the trial, the Supreme Court has a much more rigid approach toward anonymity. It has decided that anonymous statements before the examining magistrate and the trial judge are void.\textsuperscript{233}


\textsuperscript{231} According to Inavem and volunteers of local victim schemes.

\textsuperscript{232} Act of 21 January 1995 has introduced the sections 62-1 and 153 CCP.

This means that unless personal details of the victim are removed from the legal file and victims are allowed to testify in a manner that prevents them from being recognized, for instance via a closed television link, the protection of victims against intimidation or retaliation will remain problematic. During the trial, the court has few powers to protect the victim-witness. The Supreme Court has stated that if the accused has requested to hear a witness, the court is only allowed to refuse the request when there is a risk of reprisals or intimidation, and under strict conditions. The court should give an elaborate motivation for a decision not to hear a witness. In general, however, the court can only order the police to stand between the victim-witness and the accused. In the post-trial stage, the sentencing judge can, to some extent, and in some cases, protect the victim from retaliation by the offender. The fourteen conditions the sentencing judge can impose in combination with a conditional suspension include the order to refrain from contacting the victim (the 13th condition, see §§ 3.3, 3.5, 7.2.). This order is not the same as the order not to frequent the area where the victim lives or works. The former is much stricter, and does not offer the same protection. In addition, a victim who does not want the offender to find out about his address but who wants to receive compensation may ask for the intervention of the local victim support centre. Because the prison services cannot act as intermediary, victim services offer this service instead. Of course, this requires the consent of the offender and the victim. The offender then makes payments to the local victim support scheme, which will transfer the money to the victim.

9 CONCLUSIONS

The most prominent role of the victim in the French criminal justice system is that of the civil claimant (partie civile). The main prerogative of the civil claimant is the right to claim compensation from the offender. This traditional feature may explain why for a long time the only time real attention was paid to victims was when compensation was involved, as is demonstrated, for instance, by the establishment of State Compensation Funds. In fact, these Funds have greatly improved the situation of many victims in the aftermath of crime. However, although the provision of information to victims, as well as their treatment and protection are equally important, these matters have been underexposed. The inadequate provision of information is mainly due to the choice to hold the prosecution services and the judiciary responsible, in cooperation with victim support services. There is a danger that numerous victims who report to the authorities will not find their way to the other authorities, or to victim services. This is caused because there is no systematic referral system at the level of the police. Concerning the provision of information about the final decision on prosecution, the 1999 Act on the Exercise of Public Action may prove to be an important step forward because it requires notification. Moreover, it introduces the possibility of a (judicial) review of this decision in addition to the right to private prosecution. The treatment

235 Information supplied by Mr. S. Portelli, examining magistrate at the district court in Créteil, 22 May 1996.
of victims is still greatly dependent on individual members of the criminal justice authorities who barely receive training on how to deal with victims. Setting up adequate training programmes for policemen and public prosecutors would certainly enhance the treatment of victims by the criminal justice authorities, as well as the manner in which they are questioned. It is particularly worrisome that even police members who question children do not receive adequate training. In addition, it is recommended that child interviewing studios are set up, and reforms are introduced that allow the use of pre-recorded evidence or a live television link in court. Concerning the protection of victims, the French judicial system still does not offer adequate protection against intimidation and the risk of retaliation, however, the recent Bill on the Rights of Victims has increased the victim’s right to protection against undue publicity.

In conclusion, the most significant achievements of the French legislature aimed at improving the position of victim have been the state compensation schemes. However, it is high time to implement the other objectives of victim policy as formulated by Badinter in 1982, namely the treatment of victims as well as the provision of information to victims of crime.
Supplements

ABBREVIATIONS

ALA - Act on Legal Aid (Loi relative à l'Aide Juridique).
BRV - Bill on the presumption of innocence and the Rights of Victims (Loi renforçant la protection de l'innocence et les droits des victimes).
CIVI - Committee granting state compensation (Commission d'Indemnisation des Victimes d'Infractions).
CCP - Code of Criminal Procedure (Code de Procédure Pénale).
D - Decree – included in the CCP (Décret).
EPA - Act on the Exercise of Public Action and the Modification of the CCP (Loi relatifs à l'action publique en matière pénale et modifiant le code de procédure pénale).
IHESI - Police Institute of Higher Education (Institut des Hautes Études de la Sécurité Intérieure).
INAVEM - National Institute for Victim Support (Institut National d'Aide aux Victimes et de Médiation).
PC - Penal Code (Code Pénal).
R - Regulation – included in the CCP (Régulation d'Adminstration Publique).

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Chapter 9

Germany

SCENERY

On 31 August 1990, the Federal Republic of Germany (Bundesrepublik Deutschland) and the German Democratic Republic (Deutsche Demokratische Republik) signed a Treaty of Unification, joining the two Germanies. The Treaty of Unification, which established the constitutional and political framework for German unification, was ratified by the West German parliament (Bundestag) and the East German parliament (Volkskammer) on 20 and 21 September, respectively, of that same year. Subsequently, on 2 October, the East German parliament voted to dissolve itself, and 3 October was proclaimed 'the day of German unity'. General elections for a new Bundestag of unified Germany were held on 2 December 1990.

Technically speaking, the two Germanies were united by accession of the German Democratic Republic to the Federal Republic of Germany. The Basic Law (Grundgesetz) of former West Germany provided two possible means of unification.¹ The first was accession of the former East Germany to the Federal Republic of Germany. The second was unification of the two Germanies whereby a completely new German constitution would be adopted.² Because of all the difficulties involved in consolidating a union in a totally new constitution, the two German governments agreed on the first option. Before accession to the Federal Republic, the East German parliament abolished the political districts into which the former Democratic Republic of Germany had been divided in 1952, and re-established the five pre-communist States (Länder). The reunified Federal Republic of Germany is a federation of sixteen States, with Berlin as its capital. It covers 356,010 square kilometres and has a population of over 82 million.

¹ This particular Grundgesetz – i.e., the Grundgesetz that was approved by the allies and ten of the eleven West German states and subsequently promulgated on 23 May 1949 – should be translated as 'Basic Law' and not as 'Constitution' because 'the authors of this instrument for the political reorganization of one part of Germany deliberately avoided calling it a constitution, rather a Basic Law, in order to keep people aware of the fact that Germany was a divided country'. K. Stern, 'Germany's Path to Unity', in: Tilburg Foreign Law Review, Vol. 2 (1992/1993) No. 2, 136.

² Sections 23 and 146, respectively.
With the accession, federal law and the law of the European Community replaced (most of) East German law, and the legal structures and institutions of the Federal Republic of Germany were introduced throughout the former East German territory.
PART I:
THE GERMAN CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

There have been two key developments in the history of the German criminal justice system. First of all, by the seventeenth century, local Germanic law had been almost entirely displaced through extensive reception of Roman law. Secondly, as the German States moved towards unification in the course of the nineteenth century, the need for clarity of law grew. This resulted in sweeping codification and led to the introduction of important federal legislation such as the Penal Code of 1871, the Code of Criminal Procedure and the Code of Civil Procedure of 1877, and the Organization of the Courts Act of 1879. A new Civil Code was adopted in 1896. These codes still lie at the heart of the present-day German legal system.

In view of the above, the German legal system may be described as a civil law system flavoured with indigenous customary law. It has served as a substratum for many other legal systems, those of Austria, Liechtenstein, Greece, many of the Swiss cantons, and Turkey among them.

2 GENERAL REMARKS AND BASIC PRINCIPLES

German law distinguishes between felonies (Verbrechen), misdemeanours (Vergehen) and non-criminal infractions (Ordnungswidrigkeiten). A felony is an unlawful act punishable by one year’s imprisonment or more (§ 12-1 of the Penal Code, Strafgesetzbuch, StGB). A misdemeanour is an unlawful act with a punishment of less than one year’s imprisonment, or a fine (§ 12-2 StGB). The non-criminal infractions such as minor traffic offences are punished with an administrative fine only, and are dealt with by administrative agencies, although the offender may insist on his case being heard in a criminal court.

Section 152-2 of the Code of Criminal Procedure (Strafprozessordnung, StPO) provides that the public prosecutor is obliged to take action against all criminal offences, unless determined otherwise by law, in as far as there is a sufficient actual basis. This strict adherence to the principle of legality (Legalitätsprinzip) has been diluted in respect of misdemeanours in more than way. First of all, with the permission of the court responsible for the main trial, the public prosecutor may refrain from prosecuting a misdemeanour if the guilt of the offender may be considered minimal and prosecution is not in the public interest (§ 153 StPO). Alternatively, with the permission of the court and the accused, the public prosecutor may provisionally refrain from initiating criminal proceedings on condition that the accused meets one of a number of optional stipulations, among them the payment of compensation to the victim (§ 153a StPO, see § 7.1 under B.5). In practice, discretionary policies have grown in most states. To even out the growing differences in prosecuting practices between the districts, general discretionary guidelines have been established. Thirdly, it should be noted that there is a widespread practice of sentence-bargaining, i.e. the defendant agrees to plead guilty in exchange for a reduced sentence. In order to speed up proceedings, courts and prosecutors usually agree in advance on a reduced penalty, if the suspect or his defence promise to ease proceedings by a (partial) confession. The Federal Constitutional Court
has permitted this practice, despite severe scholarly criticisms.\(^3\)

The principle of instruction (*Instruktionsmaxime*) encompasses the duty to search for the material truth. Technically speaking, the growing discretionary practices are in conflict with this principle, because a settlement reached by negotiation may not necessarily be the most truthful solution to the case. The principle of instruction also implies that the court is not bound to the evidence laid before them by the parties. This is confirmed by section 261 StPO which allows the court to decide on the outcome of the evidence according to its own free conviction, formed out of the totality of the trial. The judge is not bound by a guilty plea. The principle of instruction also allows the judge to personally question the witness, defendant and other participants in the trial.

The principle of immediacy (*Unmittelbarkeitsprinzip*) determines that all evidence must be presented in court during the trial proceedings. The principle of publicity (*Öffentlichkeit*) means that all trials are open to the public (s. 169 of the Court Organization Act, *Gerichtsverfassungsgesetz*, GVG), although some types of cases may be held in camera to protect a party to the proceedings, a witness or injured person (s. 171b GVG, see § 8.3.1 under F.15). However, it is forbidden to make any form of recording of the trial, whether on tape, radio, television, photography, or film (s. 169 GVG). According to the principle of orality (*Mündlichkeit*), all court proceedings must be oral.

### 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

#### 3.1 Investigating Authorities

The state prosecution service (*Staatsanwaltschaft*) is formally responsible for the investigation and the prosecution of criminal offences, with specially appointed police departments acting as the public prosecutor's auxiliaries (*Hilfsbeamte der Staatsanwaltschaft*) (s. 152-2 GVG in conjunction with the laws of the individual states appointing the police as such). The task of the police as auxiliary of the prosecutor is to investigate offences and prevent the suppression of important materials relating to a case (s. 163-1 StPO). In practice, the investigation of criminal offences is left to the police, and the prosecutor acts as legal supervisor. Communication with the prosecutor is usually limited to written reports. The examining magistrate (*Ermittlungsrichter*) operates somewhere in the middle ground between the prosecutor and the judge. This magistrate has several coercive powers that he may exercise during the preliminary investigation such as ordering searches of premises and detention of suspects, and deciding on pre-trial custody. He cannot exercise these powers on his own, but only at the request of the prosecutor.

The police are part of the Ministry of the Interior (*Innenministerium*) although their position as auxiliary of the prosecutor means that some of their duties fall within the remit of the Ministry of Justice (*Justizministerium*).

The investigation of federal offences is the responsibility of the federal police agency (*Bundeskriminalamt*). For non-federal matters, each state has its own police department. A

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police department consists of three police sub-divisions:

(1) the police headquarters (Polizeipräsidium);
(2) the police secretariat (Polizeidirektion); and
(3) the police inspectorate (Polizeiinspektion).

Police headquarters are situated in the bigger towns, whereas the other two units operate in villages and rural areas. Within the forces there is a further division between the ordinary uniformed police forces (Schutzpolizei) and the criminal investigation unit (Kriminalpolizei).

The German police has no discretionary powers and all files must be passed on to the prosecutor. *

3.2 Prosecuting Authorities

The highest public prosecutor is the Attorney General (Generalbundesanwalt), who is attached to the federal prosecutor’s office and is responsible for, among other things, cases brought before the federal Federal Court of Appeals (s. 142-1-1 GVG). He is supported in this by one or more federal prosecutors (Bundesanwälte) (s. 142-1-1 GVG). In the sixteen states, a state prosecution service (Staatsanwaltschaft) is attached to every District Court (s. 141 GVG). In the lower courts, prosecution is conducted by state prosecutors (Staatsanwälte) or district attorneys (Amtsanwälte) (s. 142-1-2 and 142-1-3 GVG respectively). The state prosecution service resides under the Ministry of Justice. It is a bureaucratic organization, and a German prosecutor is a career civil servant, rather than an elected official. The prosecutor conducts his affairs independently of the courts (s. 150 GVG).

3.3 Judiciary

There are several courts acting as courts of first instance. The Local Court (Amtsgericht) constituted as a judge sitting alone hears misdemeanour cases where a penalty not exceeding two years is to be expected (s. 25-2 GVG). It also hears misdemeanour cases that are privately prosecuted (s. 25-1 GVG). Crimes that are not reserved for other courts and where a penalty not exceeding four years is to be expected are heard by the Sheriff’s Court (Schöffengericht, s. 28 GVG). This court consists of a presiding professional judge and two lay judges. Lay judges have the same legal position as professional judges except that they do not have the right to inspect the files. They must form their opinion on the basis of the oral hearings in court. The most serious offences are heard in first instance by the District Court (Landgericht, s. 74 GVG). Finally, the Higher State Court (Oberlandesgericht) is a court of first instance for cases of terrorism and political crimes such as high treason and assault against the highest representative of the state (s. 120 GVG).

There are two types of appeal, viz., the first instance appeal on points of law and fact (Berufung) and the second instance appeal on points of law only (Revision). First instance appeals against decisions of the Local Court are heard by the District court. The Higher State Court hears both first and second instance appeals against decisions of the District Court. The Federal Court of Appeals (Bundesgerichtshof) hears second instance appeals against decisions

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of the Higher State Court (s. 135 GVG). Constitutional appeals are heard by the Federal Constitutional Court (Bundesverfassungsgericht).

3.4 Ministry of Justice

Besides the Federal Ministry of Justice (Bundesministerium der Justiz), each of the sixteen individual states has a state ministry of justice (Landesjustizministerium). The Federal Ministry of Justice is responsible for general legal policy. It drafts bills concerning constitutional and procedural matters, the courts, and the legal profession. Furthermore, it reviews draft bills of other federal ministries as well as international agreements, to ensure they are in accordance with the Basic Law, and makes federal judicial appointments. The state ministries of justice are responsible for training the legal profession and for appointing their own state judges.5

3.5 Victim Support

Throughout Germany, there are many organizations offering support of various kinds to victims of crime. The largest of these agencies is the charity Weisser Ring ('White Circle'), which was founded in 1976.6 More than 400 branch offices (Anlaufstelle) reside under the eighteen regional offices of Weisser Ring, which has its national office in Mainz. The organization operates with 78 professionals and approximately 2,300 volunteers, and has a total budget exceeding DEM 22 million. Funding for the Weisser Ring is provided by the fees paid by 70,000 individual members, the proceeds from court fines and private donations and legacies. The organization not only offers practical support and advice to victims of crime, but if necessary also financial support, which is hardly surprising in view of the marginal state compensation scheme. Practical support includes assisting the victim in his dealings with officials, accompanying him to court and referring him to other agencies offering services. In practice, financial support mostly consists of emergency payments of up to DEM 500, but in serious cases much more may be paid, depending on the needs of the individual victim. If necessary Weisser Ring also pays for legal assistance for the victim during court proceedings.7 In 1995, the organization spent a total of DEM 9.3 million on direct support for victims.8

Fifteen individual victim support organizations are united in the Arbeitskreis der Opferhilfen (ADO) ('Working group for victim support'). This umbrella organization, which was founded in 1968, and restructured in 1992, works mainly with professional employees. The fifteen

individual organizations are financed with state funding, donations and proceeds from court fines. ADO itself relies on the membership fees it receives from its fifteen member organizations, as well as sporadic funding from other sources.\(^9\)

3.6 Compensation Authority

In 1976, state compensation was introduced in Germany by the Compensation for Victims of Violent Crimes Act, (Gesetz über die Entschädigung für Opfer von Gewalttaten), generally known as the Victim Compensation Act (Opferentschädigungsgesetz, OEG).\(^10\) Claims are made against the German federation but are administered by the individual states under the umbrella of social security. The application form is lodged with the local compensation authority, who decides on the claim in first instance (s. 6-1 OEG).\(^11\) The authority makes its own inquiries and may request perusal of police and court files as well as hospital and other medical records. Disputed claims are heard by the Social Courts (s. 7-1 OEG).

Compensation can only be awarded for the financial consequences of injury to one’s health – the OEG does not provide compensation for matters such as damage to property, or pain and suffering. Furthermore, the provisions of the OEG are interpreted very restrictively by the Social Courts. For example, regarding the requirement that the violent criminal act was committed intentionally (s. 1-1 OEG), the victim is expected to provide full proof of this intent. In practice, this requirement of proof is generally interpreted as meaning that the offender must have been identified and convicted by a criminal court, despite the fact that the OEG itself contains no such stipulation.\(^12\)

24,461 applications were made for state compensation in 1993, which amounts to approximately 10-15% of all those who would have been eligible.\(^13\) The total amount paid out in state compensation in the same year was DEM 70 million (approx. EUR 35.8 million).\(^14\)

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9 Main source: M.S. Groenhuijsen and M.I. Veldt, Overzicht van Organisaties voor Slachtofferhulp in Europa, Katholieke Universiteit Brabant, Tilburg, november 1993, pp. 8-9.


11 I.e., the authority already responsible for administering the Federal Assistance Act on Pensions to War Victims (Bundesversorgungsgesetz, BVG).


4 SOURCES OF LAW

4.1 General

The German legal system formally recognizes only two sources of law. The first of these is statutory law (Gesetze). In principle, legislative power resides with the states, except in those matters where the Constitution accords this power to the bicameral Federal legislator (s. 70-1 GG). In some cases, there is concurrent competence, meaning that if the Federation does not legislate on a certain issue, the states may do so. Matters such as police powers and civil and criminal law are areas where there is concurrent competence to legislate. In case of conflict, Federal law always prevails over state law (s. 31 GG.).

Federal legislation is published in the Federal Law Gazette (Bundesgesetzblatt, BGBl.), which also contains the documents relating to the legislative history of a statute (Erlauterungen zu einem Gesetzentwurf). These documents are important. They reflect the ideas and intentions of the legislator, and a law's progress through parliament. The documents published in the BGBl. are relatively short, because only the most important memoranda are included.

The other source of law that enjoys formal recognition is customary law (Gewohnheitsrecht), but nowadays it is of minor significance.

That case law, or judicial law-making (Richterrecht), is not recognized as a formal source of law is the legacy of the reception of Roman law followed by the codification movement of the nineteenth century. In that tradition, the task of the judge is limited to applying the written law, but this formal view does serious injustice to the influential role that the courts now play in relation to the interpretation and development of the law. The Federal Constitutional Court may even overrule a federal statute if it finds that it is in conflict with the constitution. There is no official rule of precedent. The higher federal and state courts publish official reports of their decisions in decision collections (Entscheidungsammlungen).

European Community law is another 'informal' source of law. Furthermore, great store has always been set by doctrine and legal theory. The commentaries to legislation (Kommentare), textbooks (Lehrbücher), monographs (Monographien), and articles (Aufsätze) are regularly consulted in the course of court decision-making. The amount of material that is produced by way of legal literature is phenomenal.

4.2 Sources of Criminal Procedure

Although technically speaking there is concurrent competence regarding criminal procedure, the primary source of criminal procedure is Federal law. Most of the criminal procedure regulations are to be found in the Code of Criminal Procedure (Strafprozessordnung, StPO) and the Court Organization Act (Gerichtsverfassungsgesetz, GVG). There are also some sections which have direct bearing on criminal procedure in the Code of Civil Procedure (Zivilprozessordnung, ZPO) and the Penal Code (Strafgesetzbuch, StGB).

15 The bicameral Federal chamber consists of the Bundestag (Federal Assembly elected by direct popular vote) and the Bundesrat (Federal Council in which the State governments are directly represented by votes).

16 In the ZPO: Zustellung, i.e., the notification of decisions, (see s. 34 StPO); Kostenfestsetzung, i.e., estimation of costs, (see s. 464b StPO). In the StGB, for instance, the Antragsdelikte, offences to be prosecuted only on the complaint of the victim (77-77b StGB).
Regarding criminal procedure, the Constitution is extremely important. It has ‘both a guiding and a correcting function with respect to criminal procedure. (…) Criminal procedure must, both in theory and in practice, comply with the Constitution and its valuesystem.’ In Germany, as in the U.S. and in Ireland, constitutional review takes place. The German Constitution not only contains general fundamental rights (ss. 1-19 GG) but also so-called *justizielle Grundrechte* (judicial fundamental rights) (ss. 101.1, 103, 104 GG).

The decisions of the Federal Court of Appeals in criminal cases are published in the *Entscheidungen des Bundesgerichtshofes in Strafsachen* (BGHSt.).

### 4.3 Specific Victim-Oriented Sources of Law and Guidelines

The most important procedural rights of the victim are found in a separate chapter five of the Code of Criminal Procedure on participation of the injured person in the proceedings (*Beteiligung des Verletzten am Verfahren*). Part 1 deals with private prosecution, part 2 with auxiliary prosecution, part 3 with compensation, and part 4 with the remaining rights of the injured person. There are also other scattered sections of the Code of Criminal Procedure that deal directly or indirectly with the victim.\(^{18}\)

The most significant piece of legislation to be introduced after the Victim Compensation Act of 1976 was the First Act for the Improvement of the Position of the Injured Person in Criminal Proceedings (*Erste Gesetz zur Verbesserung der Stellung des Verletzten im Strafverfahren*) of 18 December 1986. This act is generally known as the Victim Protection Act (*Opferschutzgesetz, OSG*).\(^{19}\) It is aimed at strengthening the (procedural) position of the victim by, among other things, according him more rights to participate actively in the proceedings and extending his right to information and protection.\(^{20}\)

In 1996, the Act for the Protection of Child Witnesses (*Gesetz zum Schutz kindlicher Zeugen*) was adopted, followed in 1998 by the Act for the Protection of Witnesses during Questioning in Criminal Proceedings and for the Improvement of Victim Protection (*Gesetz zum Schutz von Zeugen bei Vemehmungen im Strafverfahren und zur Verbesserung des Opferschutzes*), in short the *Witness Protection Act* (*Zeugenschutzgesetz, ZSchG*).\(^{21}\) This latter act, which entered into force on 1 December 1998, provides for the audio-visual recording or transmission of testimonies of witnesses, as well as for extended rights to a lawyer for victims exercising their procedural rights, for example, as an auxiliary prosecutor. Furthermore, a month earlier, parliament had passed the Act for the Surety of the Civil Claims of the Victim of Crime (*Gesetz zur Sicherung der zivilrechtlichen Ansprüche der Opfer von Straftaten*), known as the Victim's Surety Act (*Opferanspruchssicherungsgesetz, OASG*). This act provides victims who have a civil claim against

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\(^{18}\) See, for example, section 61-2 StPO on the oath in relation to the injured person.

\(^{19}\) BGBI. 1986 I, 2496-2500.


\(^{21}\) BGBI. 1998 I, 820-822. Simultaneously, an Act for Combatting Sexual Offences and other Dangerous Offences (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*), known as the Sexual Offences Act (*Sexualdeliktegesetz*) was passed (BGBI I 1998, 160 ff). This act aims to protect the public, and in particular children, from sex offenders.
the offender with a right of distraint on money received by the offender from the media for selling them his story of the criminal offence which he committed against the victim.\textsuperscript{22}

5 ROLES OF THE VICTIM

\textit{Opfer} translates as ‘victim’ in the broadest sense of the word. In the Code of Criminal Procedure, reference is usually made to the \textit{Verletzte} — the injured person or party. The StPO does not offer a definition of injured person, and its precise meaning seems to depend on the context of the individual section in which it is to be found.\textsuperscript{23} This lack of a definition is not necessarily a bad thing, because most definitions of ‘injured person’ cause more problems than they solve.\textsuperscript{24} In this chapter we will translate \textit{Opfer} as victim. Where the law speaks explicitly of \textit{Verletzte}, we will use the translation injured person, unless we want to emphasize the fact that the \textit{Verletzte} has taken on a participatory active role in the proceedings, in which case we will speak of injured party.

5.1 Reporter and/or Complainant

The first decision to be taken by the victim is whether or not to report the offence to the authorities. An offence may be reported orally or in writing to the prosecutor’s office, the police, or the Local Court (s. 158-1 StPO). If an untrue report turns out to have been made purposely or frivolously, the person who made that report runs the risk of being ordered to pay the procedural costs made so far (s. 469 StPO).

Complainant offences (\textit{Antragsdelikte}) are offences that can only be prosecuted following a formal request for punishment of the offender. In general, this complaint may be made by the injured person (s. 77 StGB), but there are certain situations in which the complaint may be made by someone other than the injured person. For instance, if the accused is in military service, the commanding officer may make the complaint (s. 77a StGB). A complaint may be made to the court or the prosecutor’s office in writing or \textit{zu Protokoll} (on record), or in writing to other authorities (s. 158-2 StPO). The complaint may be withdrawn up to the moment that a verdict is to be reached, but once withdrawn, a complaint cannot be made a second time (s. 77d-1 StGB). Examples of complainant offences are: defamation, various forms of violation of privacy and common assault.

A survey conducted in the mid-1990s found that 58.9\% of the interviewees victimized by a criminal offence had reported the offence to the authorities, although there were significant differences depending on the type of offence. For example, 76.9\% of the victims


\textsuperscript{23} See S.N. Patsourakou, \textit{Die Stellung des Verletzten im Strafrechtssystem, Eine rechtswissenschafterische, rechtspolitische und rechtsphilosophische Analyse}, Forum Verlag Godesberg, Bonn, 1994, pp. 29-42, for an analysis of the different interpretations of \textit{Verletzte}.

\textsuperscript{24} See, for instance, the definition of the Swedish term \textit{mälsåganda} (injured person or party) in § 5 of Chapter 22.
of burglary had reported the incident, against only 31.8% of the victims of assault. The most popular reason for reporting was to secure insurance. This reason was underscored by 59.4% of the victims. Other (cumulative) reasons were to ensure that there was an investigation (53.3%), punishment of the offender (46.7%), the amount of damage suffered (38.4%), prevention of future incidents (31.5%), and getting help (17.4%).

Those who did not report the offence to the police (more than 40%), the main reason was that they felt there was not enough proof (58.8%). Other reasons were that the offence was not serious enough (31.6%), that the police would not have done anything about it (21.4%), the assumption that the police was not needed (11.2%), and that the victim was not insured (10.5%).

5.2 Civil Claimant

Via an adhesion procedure (Adhäsionsverfahren) (ss. 403-406c StPO), the injured person may present a civil claim for compensation of damages resulting from the crime during the criminal proceedings. Such a claim may be made in written form or orally to be noted down by the clerk of the court (Urkundsbeamten), and orally during the main proceedings right up to the moment that the closing statements are to be presented (s. 404-1 StPO). A compensation claim may be withdrawn up to the moment that the judgement is to be announced (s. 404-4 StPO). The claimant, his legal representative, and the wife or husband of the person entitled to making a claim may participate in the main proceedings (s. 404-3 StPO). If the injured person is represented by a lawyer, he has a right to legal aid according to the rules for legal aid in civil law cases (s. 404-5 StPO). The court may reject the application for a joint procedure without giving any reasons. It suffices for the court to say that the application is not admissible. An adhesion procedure cannot be raised against a juvenile or against a young offender dealt with according to juvenile law. In all other cases, compensation may only be awarded if the accused is found guilty of the criminal offence, or is sentenced to a special measure (see § 7.2 under guideline D.10 and D.11). No appeal can be made against the decision of the court (s. 404-5 StPO).

5.3 Auxiliary Prosecutor

A victim of, among other things, a sexual offence, criminal defamation, assault, kidnapping or attempted murder, or manslaughter may support the public statement of claim as an auxiliary prosecutor (Nebenkläger). So may the person who has brought a public statement of claim through the judicial review procedure (Klageerzwingungsverfahren, see § 7.1 under B.7)

25 M. Kilchling, Opferinteressen und Straferfolgung, Max-Planck-Institut für Ausländisches und Internationales Strafrecht, edition iuscrim, Freiburg im Breisgau, 1995, pp. 211-212. Questionnaires were returned by 781 people who had been victimized at least once since 1985, and by 1,399 people who had not been victimized since 1985 (pp. 95-96). The offences committed against those falling within the first group included theft, vandalism, car theft, bicycle theft, house breaking, robbery, (sexual) assault and other offences (pp. 101-104).

26 M. Kilchling (1995), pp. 220-221. Further reasons were: Ersatzbedingung (10.8%); the seriousness of the offence (9.9%); no special reason (5.2%); and, finally, that it was a decision taken on the spur of the moment (1.4%).

27 M. Kilchling (1995), pp. 252-259. Further reasons were: fear for the offender (5.0%); that they could deal with the matter themselves (3.2%); and, finally, fear of the police (2.5%).
(s. 395-1-3 StPO) and the person entitled to initiating a private prosecution (s. 395-2-3 StPO). Furthermore, it is striking that the parents, children, siblings and spouse of a murder victim may also act as auxiliary prosecutor (s. 395-2-1 StPO).28

The burden of preparing and presenting the prosecution and proving the case remains with the prosecutor, but on the basis of his declaration of solidarity with the prosecution, the injured person may exercise a number of active procedural rights. The injured person must make his wish to be recognized as auxiliary prosecutor known to the court in writing (s. 396-1 StPO, Anschlussklärung). The court decides on the matter after having heard the prosecutor (s. 396-2 StPO).

The auxiliary prosecutor has the right to: be present during the main hearing, even if he is to be heard as a witness; refuse a judge or expert witness (Ablehnung); put questions to the witnesses; object against decisions of the presiding judge and contest the permissibility of questions; offer evidence; and make statements (s. 397-1 StPO). A person who is entitled to an auxiliary prosecution may be assisted or represented by a lawyer, even before the public prosecution has been raised, and even if he does not join the prosecution as an auxiliary prosecutor after all (s. 406g StPO). The (potential) auxiliary prosecutor is entitled to legal aid (s. 397a StPO). The initial lack of scope of the provisions for legal aid for the auxiliary prosecutor has long been a point of severe criticism in Germany, but significantly the relevant provisions were extended on 1 December 1998. Finally, the auxiliary prosecutor has the right to appeal against the judgement (s. 401-1 StPO) and to also act as auxiliary prosecutor during remand procedures.29

In practice, victims of serious offences quite regularly constitute themselves as auxiliary prosecutor.

5.4 Private Prosecutor

Private prosecution is limited to trespassing, defamation, violation of confidentiality of mail, common assault, intimidation, vandalism, and comparable offences listed in section 374-1 StPO. In these cases, the public prosecutor only initiates a public prosecution if this is in the public interest (s. 376 StPO). In all other cases, it is up to the injured person (or his legal representative) to initiate a private prosecution. In relation to the six offences explicitly mentioned above, a private prosecution may only be raised if an attempt to reach a settlement (Sühneversuch), i.e., to arrange compensation from the offender to the victim under guidance of a mediator appointed by the administration of the District Court, has failed (s. 380-1 StPO). In the event of a private prosecution, the public prosecutor is not obliged to cooperate, but the court may submit the files to the public prosecutor if it is of the opinion that he should take over the prosecution (s. 377-1 StPO). The public prosecutor may at any time, until the decision of the court acquires force of law, take over the prosecution (s. 377-2 StPO). The private prosecutor may be supported or represented by a lawyer (s. 378 StPO), and has the same rights to appeal that the public prosecutor normally has (s. 390 StPO).

Only in relation to these minor offences does the injured person have a right to private prosecution. There is no subsidiary right to private prosecution for serious offences, although the injured person may ask for judicial review, see §7.1 under guideline B.7.

28 See section 395-2 StPO for others who may also constitute themselves as auxiliary prosecutor.
5.5 Witness

The injured person may be called as a witness (Zeuge) for the prosecution. The accused and the witness who is also the victim are regarded as parties to the case with opposing interests and aims.\(^{30}\) It is to the discretion of the court whether the injured person acting in this capacity is placed under oath or not (s. 61-2 StP0).\(^{31}\) The reason for not placing a witness under oath must be recorded in the protocol (s. 64 StP0).

The injured person may be assisted and represented by a lawyer, who has the right to be present if the injured person is heard by the court or the prosecutor, to criticize questions put to him and ask for the hearing to be held in camera (ss. 406f-1 and 406f-2 StP0). The injured person who is heard as a witness has the additional right to ask for the presence of a confidant (s. 406f-3 StP0). For the questioning of the injured person called as witness, see § 8.2.

PART II: THE IMPLEMENTATION OF RECOMMENDATION (85) 11

6 THE VICTIM AND INFORMATION

6.1 Informing the Victim

In general, whether or not a victim of crime receives information depends on his role in the proceedings. Federal legislation is based on the conviction that only victims with an active participatory role in the proceedings have real need of information: 'Victims [who] are not involved in the proceedings do not have special rights nor special obligations – that is a basic conviction which the legislator has.'\(^{32}\)

(A. 2) The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation.

S. 406h of the Code of Criminal Procedure provides that the injured person must be made aware of the rights accorded him by sections 406d-g StPO, as well as his right to join the prosecution as an auxiliary prosecutor, and, in that capacity, to request the appointment of or consultation with a lawyer as adviser. The rights embodied in sections 406d-g include:

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\(^{30}\) Party in the sense of §356 StGB. See H. Dabs, ‘Angeklagter und "verdächtiger Zeuge" – Parteien im Strafprozeß (§ 356 StGB)', in: NStZ 1995, Heft 1, p. 16, with reference to RGSt 49, 342, 344; BGHSt 5, 301,305.

\(^{31}\) Compare Sweden (Chapter 22), where the injured person is never placed under oath, and England (Chapter 7), where the victim called as witness is always placed under oath.

being informed on application of the outcome of the case in as far as it concerns him; having a lawyer inspect the court files on his behalf; being advised or represented by a lawyer, and requesting the presence of a support person during questioning as a witness. An earlier section (s. 403-2 StPO) provides that the injured person or his heir should be informed of the criminal proceedings as soon as possible, and that, at the same time, he should be made aware of his right to present a civil claim for damages during the criminal trial. There is no statutory obligation to inform the (eligible) injured person of the opportunity to claim state compensation.

Both section 403-2 StPO and section 406h StPO leave open who should pass on the information to the injured person. Instead, the German legislator has elected to place a general responsibility with all the justice authorities. Although, for practical reasons, the police would appear to be the obvious authority to provide the initial information to the injured person, German practice seems to indicate that it is primarily the public prosecutor and the court, rather than the police, who are responsible for the distribution of the appropriate information (see under the second element of guideline D.9). The driving thought behind federal legislation on the victim of crime is that only victims with an active participatory role in the proceedings have real need of information. In the German system, injured persons participating actively in the proceedings have contact with the prosecutor and the court, and therefore these agencies can fulfil the task of providing the necessary information to these injured persons. One wonders how a victim can decide whether or not he wants to participate actively if he is not told of his rights beforehand. It seems that the police form a personal opinion on the desirability and necessity of active participation of a particular injured person on the basis of the gravity of the offence, on whether a suspect has been apprehended, and so on. ‘Eligible’ injured persons are then referred to a lawyer, the public prosecutor, or the court for further information. Another reason for the emphasis being on the prosecutor and the courts, rather than the police is that the police do not receive sufficient legal training to be able to explain to the injured person what his procedural rights and opportunities are.

Victims of rape or sexual assault are advised by the police to see a doctor as soon as possible. There are no special medical units for rape victims. They can just go to their own private doctor, a medical centre, or an official state doctor. However, most of the state police forces do have a special rape or sexual assault unit where a victim of rape can make her report to a female officer. In practice, some victims are unfortunately not referred to the special units until after the report has been made.

However, according to M. Joutsen, the (then) Federal Republic of Germany is one of the European States requiring the police to inform complainants (read: victims who have reported an offence) of their rights and role. This obligation is to be found in brief instructions published by the Ministers of Justice of the individual states together with the Federal Ministry of Justice. Section 17 (and cf. ss. 93 and 96) of the Code of Criminal Procedure of the former German Democratic Republic determined that the court, the prosecutor, and the investigating organs are obliged to inform the complainant of his rights (M. Joutsen, The Role of the Victim of Crime in European Criminal Justice Systems, HEUNI, Helsinki, 1987, pp. 173-174).


The victim should be able to obtain information on the outcome of the police investigation.

Contrary to the police in many other jurisdictions, the German police have no discretion in deciding how to deal with cases under their investigation. They cannot themselves drop a case but must, upon completion of the investigation, forward the file to the public prosecutor who then decides whether to proceed with the case.

There is no obligation for the police to keep the victim informed of the progress in his case, although the victim may contact the police himself to make enquiries. Another channel through which the injured person can access information is by making use of his right to have a lawyer inspect the files on his behalf (406e-1 StPO). This is only possible if the injured person contends that he has a legitimate interest in doing so (for example, that he has suffered damage and is therefore entitled to claim compensation from the offender). Such an interest is automatically presumed to be present if the injured person is eligible to join the proceedings as an auxiliary prosecutor. Permission to inspect the files may be refused to protect the interests of the accused or other persons, to safeguard the aims of the investigation, or to prevent delays in the proceedings (s. 406e-2 StPO).

A study conducted in the early 1990s found that 20% of the victims who were included in the survey were represented by a lawyer, and that 71.4% of these lawyers inspected the files at some point in the proceedings. Therefore, in absolute terms, only 14.3% of the victims made use of their right to have a lawyer inspect the files.

The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.

If the public prosecutor decides to drop prosecution, or to close a case following the preliminary investigations, he must inform the complainant of this decision and furnish him with the reasons for doing so (s. 171 StPO). If the complainant is also the injured person, he must furthermore be informed of his right to appeal this decision and the term within which he can do so (see § 7.1 under guideline B.7).

There are no provisions for informing the victim of a decision to go ahead with a prosecution. The standard set by guideline B.6 is only partly met.

The victim should be informed of:
- the date and the place of a hearing concerning an offence which has caused him suffering;
- his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice;
- how he can find out the outcome of the case.

Date and place of the hearing

The victim only receives this information if he has an active role to play in the proceedings. For example, the victim who is summoned to appear as a witness is informed through the summons. If he is acting as private prosecutor or auxiliary prosecutor, he has the right to be informed of the date and place of the main hearing at least a week before the hearing will take place (s. 385-2 and 397-1 StPO). Finally, the injured person who has made a claim

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for damages before the main hearing must also be provided with this information (s. 404-3 StPO). Victims who do not have one of these roles are not informed of the date and place of a hearing.

Restitution, compensation, legal assistance and advice

With reference to the remarks made above under guideline A.2, in practice it is largely up to the prosecutor and the court to inform the injured person of these particular rights, but here, too, there are problems. One of the hypotheses of a German study conducted in the early 1990s was that 'since the law does not specify that judges or prosecutors must take responsibility for informing victims of their rights, there will be no incentive for these practitioners to become aware of the provisions in the law, much less commitment to implementation. Furthermore, we expect to find that even when these provisions are known by practitioners, they are to a considerable extent rejected or ignored.'

26.3% of the judges and prosecutors interviewed said that they never inform the victim of his or her rights, 44% that they informed only those victims who make an inquiry about their rights, and a mere 8.8% that they always inform victims. Judges inform victims more regularly than prosecutors, and thereby prefer to impart the information orally. Prosecutors inform victims of their rights either orally or in writing.

The victims themselves were also interviewed. 25.7% of the interviewees said that they had been sufficiently informed about their rights. To assess what 'sufficiently informed' implied in practice, they were asked about their individual knowledge of their rights. It turned out that 40% (35.5% if police officers as victims are excluded) were aware of their right to inspect the court files, 25.7% (22.6% excluding police officers) knew they could apply for information regarding the outcome of the proceedings and only 20.6% (16.7% excluding police officers) had heard about their right to claim compensation during the criminal proceedings. 57.1% of the respondents said they would have liked to have received more information about their rights.

Perhaps most interesting of all are the reasons offered by judges and prosecutors for the low scores. 81.6% of them thought that the main reason for failing to inform victims is that it is 'quite simply forgotten' during the daily routine activities. 52% of the judges and 60.3% of the prosecutors stated that there was no suitable opportunity to give such advice. 63.2% of the judges and 62.8% of the prosecutors believed that the informatory provisions are not accepted by judges or prosecutors. 28% of the judges and 32% of the


41 M. Kaiser (1992), pp. 147-149.
prosecutors even thought that the duty to inform is unnecessary.\(^{42}\)

There is no clear policy on which authority should impart what type of information at what point in time to the victim. Preferably, each agency should be given individual specific responsibilities. The judges, prosecutors, and also lawyers questioned in the above study expressed the general opinion that the courts and the prosecution service should inform the victim, rather than the police. When asked 'who should undertake the task of helping the victim in some way, in so far as such an effort can be made', these three groups all gave the following order of preference: (1) lawyers;\(^{43}\) (2) the court; (3) the public prosecution service; (4) police; (5) victim help organizations; (6) public support; and (7) the victims themselves.\(^{44}\)

There again, of the 20% of victims who replied that they were actually informed of their rights, this information was given either by a court practitioner or, in a few cases, by the police, but never by a prosecutor or court.\(^ {45}\)

A pilot project has recently been launched by the prosecution service in Naumburg (Sachsen-Anhalt). The public prosecutor responsible for the investigation now sends a standard letter containing information on how to claim compensation through the adhesion procedure to the injured person in all potentially eligible cases. Not eligible is, for example, a case involving a juvenile or young offender, because the adhesion procedure can only be initiated against adults. That the injured person's compensation claim could significantly delay the speedy winding up of the case is not a valid reason for the prosecutor to consider the case non-eligible.\(^ {46}\)

**Outcome of the case**

The injured person has the right to be informed on application of the results of the judicial proceedings, in as far as they are relevant to him (s. 406d-1 StPO). A result is 'relevant' if the injured person has the right to appeal against it on the basis of an active participatory role as auxiliary prosecutor, private prosecutor, or civil claimant. The results in question include the decision to hold the main hearing in camera (s. 204 StPO), to initiate some form of judicial hearing (for example, ss. 153-2, 206a and 206b StPO), and the final verdict (s. 260 StPO). If it proves impossible to send the information to an address given by the injured person, the information need not be given (406d-2 StPO). The court that has taken the decision must pass on the information to the injured party as soon as the decision has taken effect, and in such a way that it is easily understood by the injured party.\(^ {47}\) As we saw above, only 25.7% of the respondents to the victim surveys conducted in the context of the German study discussed above knew they could apply for information regarding the outcome of the proceedings.

There are additional, more specific provisions regarding the passing on of information concerning the outcome of the case to the injured person, depending on the role he plays in the proceedings. For instance, the injured person acting as private prosecutor is to be

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43 Information on restitution and compensation, legal assistance, and advice is provided free of charge by the information services of the lawyers' local associations in court houses (Rechtsberatungsstellen der Anwaltskammern), G. F. Kirchhoff (1992), p. 144.
informed of all decisions that the public prosecutor would otherwise be informed of (s. 385-1 StP0). One could argue that this includes the results of the trial, regardless of whether the private prosecutor has made an explicit application to be thus informed. The injured person who has made a civil claim is to receive a copy of the decision regarding his claim with the reasons supporting the decision, or an extract thereof (s. 406-4 StP0). Regarding the injured person acting as auxiliary prosecutor, the auxiliary prosecutor does not have to be informed of decisions that were taken before he joined the proceedings, and that have been made known to the public prosecutor (399-1 StP0). However, there is one exception. If the auxiliary prosecutor joins the proceedings after an appeal has been made, he should immediately be provided with the decision against which the appeal is being made (s. 399 StP0 in conjunction with section 401 StP0).

6.2 Information About the Victim

(A.4) In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim.

Following the investigation, the police forward the file to the prosecutor, or, if special measures must be taken which require the permission of a judge, to the Local Court (s. 163-2 StP0). The file includes information on the injuries and losses sustained by the victim, but only in as far as this is necessary to prove that the offense was committed. A distinction is made between loss in a legal sense and the loss suffered by the victim in an absolute sense. For example, if a five-year-old car is stolen, its net worth (loss in a legal sense) could be substantially less than what it will cost the victim to replace the car (absolute loss suffered by the victim). The latter category also includes matters such as the costs made by the victim to consult a lawyer. If information about the legal loss that the prosecutor needs to build his case is lacking from the file, he will contact the lawyer of the injured person requesting the information, or alternatively ask the police to question the injured person about the loss. The police and public prosecutor do not enquire into the absolute loss suffered by the victim.

(D.12) All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account:
- the victim's need for compensation;
- any compensation or restitution made by the offender or any genuine effort to that end.

In principle, the injured person who claims damages from the offender through the adhesion procedure is responsible for compiling his own evidence in support of his claim. Naturally, the prosecutor will provide the court with any information on injuries and losses needed to build the criminal case against the accused, but the civil claimant (or his lawyer) must produce any additional evidence that is needed to substantiate the civil claim. The Code

See BGH, Beschl. v. 23.8.1994 – 1 StR 343/94 (LG Karlsruhe) reported in NStZ 1995, Heft 1, pp. 47-48, for a decision on the obligation to send a copy of the judgement to the legal representative of the auxiliary prosecutor.
of Criminal Procedure does not explicitly furnish the civil claimant with the right to address the court on the matter of his civil claim, although he does have the right to make his claim orally during the main proceedings up to the moment that the closing statements are presented (s. 404-1 StPO, see § 5.2). 49 Earlier we mentioned the pilot project in Naumburg (Sachsen-Anhalt) where the public prosecutor now sends any eligible injured person a letter containing information on the adhesion procedure. In addition, the public prosecutor offers further support by providing the injured person with a standard form on which he can make his claim and indicate what items of evidence he can produce. 50

One of the elements that the court must take into consideration when determining the punishment to be meted out to the offender is whether he has made an effort to compensate the damage, or to reach a settlement with the injured person (s. 46-2 StGB). In 1994, an additional section 46a StGB was introduced. This section provides that if the offender, in an attempt to reach a settlement with the victim (referred to as Täter-Opfer-Ausgleich, TOA, i.e., victim-offender mediation), has fully or largely compensated the injured person, or has made a genuine effort to do so, this may result in mitigation or even waiving of his sentence (s. 46a StGB). A sentence may only be waived in this way if the offence in question carries a maximum penalty of one year’s imprisonment or a fine of 360 day units. 51 Throughout the German federation, there are numerous organizations and projects involved in bringing about TOA. Since 1993, statistics have been kept on the amount of cases in which TOA is attempted by a number of these groups, the results achieved and the effect of successful TOA on further court proceedings. 52 The statistics provided by 42 organization in 1995 showed that, in that year, mediation had been attempted in a total of 1813 cases, 53 which incidentally amounts to an almost negligible proportion of the approximately 4,3 million cases that are investigated annually. 71\% of all cases selected for TOA are selected by the public prosecutor or district attorney. 54 In that case, the mediator reports back on the results of the mediation to the prosecutor or district attorney. 6% of the cases in which TOA is attempted are selected by the judge himself, in which case the mediator reports directly to the court. Finally, because paying compensation, or making an effort to do so, can have

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49 Conversely, the injured person acting as auxiliary prosecutor has a general right to produce evidence (in support of the criminal case) and to make statements during the trial (s. 397 StPO). In this way, the auxiliary prosecutor is free to provide any information he feels is relevant to the court.

50 In their discussion of the pilot project, Rössner and Klaus criticize the standard form for being too concise because it does not allow for an 'unspecified' claim to be made, whereby the court is invited to establish the extent of the damage which was not visible before the main court hearing (see their alternative design for a compensation claim form). Furthermore, Rössner and Klaus argue that the police and the prosecution service should evaluate the material and immaterial damage suffered by the victim, not only with a view to building the case against the offender but also with a view to the adhesion procedure. As remarked earlier, this is not currently done in Germany. D. Rössner and T. Klaus (1998), pp. 91-95.

51 For an explanation of the (rather academic) difference between these two sections, see D. Rössner and T. Klaus (1998), p. 62.


a favourable effect on the sentence, the counsel for the defence will always provide the court with the relevant information in his plea for mitigation.

7 THE VICTIM AND COMPENSATION

7.1 The Expediency Principle and Compensation

(B.5) A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender.

This guideline implies that, on the one hand, the fact that the injured person can present a compensation claim during the criminal proceedings is a reason to continue a prosecution which the public prosecutor would otherwise have dropped, but that, on the other hand, a serious pre-trial effort by the offender to compensate the injured person may be a reason not to prosecute.

The first interpretation is not recognized in German legislation. Regarding the second interpretation, it should be noted that there is no discretion in relation to the prosecution of serious offences, only in relation to misdemeanours. In these cases, section 153a-1 StPO allows the prosecutor to provisionally refrain from prosecution on condition that the accused performs a certain task to compensate for the damage he has caused, donates money to charity or the state, fulfils some other useful task, meets a maintenance order or participates in a traffic seminar. In practice, dismissals on the basis of section 153a-1 StPO are only occasionally made on condition that the accused pays compensation: in 1996, public prosecutors imposed compensation as a condition in a total of 4,161 cases, which amounts to a mere 1.7% of all cases dismissed under this section. By comparison, in more than 224,000 cases, the offender was ordered to make a payment to the state or to other public institutions. However, the rate has more than doubled since 1991, when compensation was imposed as a condition for dismissal in 0.7% of all prosecutorial dismissals.

With the permission of the court, the public prosecutor may also refrain from prosecuting an offence if the conditions under which the court may waive sentence have been met (s. 153b StPO). As described above in § 6.2 under guideline D.12, one of the conditions for waiving sentence in cases where the offence carries a maximum penalty of one year's imprisonment or a fine of 360 day units, is that the offender, in an attempt to reach a settlement with the victim, has fully or largely compensated the injured person, or has made a genuine effort to do so (s. 46a StGB). In absolute terms, however, TOA is attempted in so few cases that a case is hardly ever dismissed in this way.

Finally, section 153a-2 StPO provides that, if the summons have already been served, the court may, at any time during the proceedings, with the permission of the public prosecutor and the accused, provisionally drop the proceedings under imposition of one of the conditions listed in section 153a-1 StPO, which include paying compensation to the victim. Proportionally speaking, the courts are significantly more inclined to impose compensation as a condition for dismissal than the public prosecutors: in 1996, compensation was imposed in around

57 Then again, the score was 1.5% in 1977. See M. Kilchling (1995), footnote 58, pp. 7-8.
5,300 cases, i.e. 7.8% of the 68,000 cases dismissed by the courts. However, this is down from a total of about 6,300, i.e., 8.5% in 1989.\textsuperscript{58}

(B.7) The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings.

In Germany, the victim has the right to ask for a review by a competent authority of a decision of the public prosecutor not to prosecute. The right to institute private proceedings only exists in relation to a very limited number of minor offences, see § 5.6. There is no subsidiary right to private prosecution for serious offences.

Within two weeks of being informed by the public prosecutor that no further proceedings will be pursued against the offender (see § 6.1 under B.6), the complainant who is also the injured person may appeal against this decision (Klageerzwingungswesfahren). This appeal is made to the highest-ranking prosecutor of the prosecutor's office in question (s. 172-1 StPO). If the superior prosecutor upholds the decision to end the proceedings, the injured person may appeal in second instance to the Higher State Court (172-2 in conjunction with 172-4 StPO). The time limit of a month commences at the moment that the injured person is informed of the decision of the superior prosecutor, and is instructed that he has the right to challenge it. There are a number of cases in which there is no right to this second appeal. For example: if the offence concerned is subject to private prosecution; if the public prosecutor has dropped prosecution of a misdemeanour with permission of the court under section 153-1 StPO; if the public prosecutor has dropped prosecution with permission of the court under imposition of a condition under section 153a-1 StPO; or if the public prosecutor has dropped prosecution with permission of the court because conditions allowing the court to refrain from punishment have been met under section 153b-1 StPO (s. 172-2 StPO). These latter two restrictions encompass those cases where the proceedings are ended on condition that the offender compensates the injured person, or has already done so.

One prosecutor interviewed in Freiburg (February 1999) could recall only three or four appeals in the last four years against a decision not to prosecute. None of them resulted in prosecution.

7.2 The Court and Compensation

(D.10) It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.

The injured person who has suffered damage as a result of a criminal offence may claim compensation from the offender through the adhesion procedure, as described above in § 5.4. However, the German adhesion procedure is singularly unsuccessful, and in practice currently amounts to little more than a token institution.

In the analysis of this failure, a distinction should be made between, firstly, the frequency with which an injured person makes a claim for compensation through the adhesion procedure, and, secondly, the way the criminal courts subsequently deal with such a claim.

\textsuperscript{58} M. Kilchling (1995), p. 11.
Making a claim through the adhesion procedure

In 1989 in the state of Baden-Württemberg a total of 122 adhesion procedures were brought in the Local Court and 10 in the District Court.\(^5\) Not one adhesion procedure was initiated by the injured persons interviewed by Kaiser, even though 67.6% would have been eligible,\(^6\) and all more recent publications uphold that, at the time of writing, victims still rarely initiate an adhesion procedure.\(^6\)

One obvious problem is the lack of information provided to victims about the opportunity to claim compensation through the adhesion procedure, see § 6.1 under A.2 and in particular under D.9, second part.

Secondly, victims are offered very little support by the authorities in preparing their claim. It is generally held that the claim must be made in accordance with the strict standards set by section 253-2 Code of Civil Procedure (Zivilprozeßordnung, ZPO), despite the fact that, on the face of it, section 404-2 StPO allows for a more lenient approach.\(^5\) Because of the lack of practical support from the authorities — with the exception of the pilot project in Naumburg, see § 6.2 under D.12 — most injured persons who wish to make a claim in adhesion to the criminal proceedings feel compelled to consult a lawyer. However, lawyers often advise their clients to take their claim to a civil court rather than to the criminal court. In practice, legal aid for a civil claim presented through the adhesion procedure amounts to half of the legal aid for a procedure in the civil court (s. 404-5 StPO in conjunction with section 89-1 BRAGO), and Kaiser found that 76.2% of the lawyers indicated that they would more often initiate an adhesion procedure if the financial rewards were the same.\(^6\) Furthermore, more than half of the lawyers consider the adhesion procedure to be a foreign body in the criminal proceedings.\(^6\)

A third significant factor is that there are several other competing provisions that may result in compensation for the victim in the context of criminal proceedings which can make the adhesion procedure superfluous. An essential factor is whether or not the offender is willing to pay compensation at the outset. For example, where victim-offender-mediation (TOA) has already taken place, the prosecutor may decide to drop the prosecution (s. 153b StPO in conjunction with 46a StGB). Alternatively, the prosecutor and the court may drop the case on condition that the offender pays compensation (s. 153a-1 StPO and 153a-2 StPO, respectively). Sections 46-2 and 46a StGB also stimulate the offender to pay compensation to the victim voluntarily, or to participate in TOA, because this may lead to mitigation or even waiving of his criminal sentence, in which case the adhesion procedure is also superfluous. Where the offender is encouraged to pay compensation under one of the above provisions, the injured person is saved both the effort and the financial risk involved in initiating an adhesion procedure. With the introduction of these alternatives, the main function of the adhesion procedure has become to give the victim an instrument with which

\(^6\) The claim should include a description of the object of the claim (amount of damage), the grounds for the claim and items of proof (s. 404-2, second sentence StPO). See the discussion and references to case law and commentaries in D. Rössner and T. Klaus in: D. Dölling et al. (1998), p. 87.
\(^6\) M. Kaiser (1992), pp. 269-270.
to challenge an offender who is not prepared to pay compensation beforehand.  

Reception by the courts of the adhesion procedure  
In practice, the attitudes of judges and prosecutors towards the adhesion procedure are very negative. Kaiser found that 62.1% of the judges, and 70.2% of the public prosecutors consider the adhesion procedure to be a foreign body in the criminal proceedings. Furthermore, a majority of the judges and prosecutors are of the opinion that the adhesion procedure overburdens the court. These attitudes have a negative effect on the readiness of the authorities to stimulate the victim to make use of the adhesion procedure, as well as on the reception they give the adhesion procedure when presented to them in court.  

There are no great pressures on the court to decide on the claim for compensation. If the accused is not found guilty of a criminal offence, and is furthermore not sentenced to a special measure, no decision is taken on the civil claim. Neither does the court have to decide on the claim if the claim is ‘not suitable’ for settlement within the criminal proceedings, in particular if it will cause delay to the proceedings (s. 405 StPO). Here one should keep in mind that the adhesion procedure is most likely to be invoked where the offender does not wish to pay compensation, or contests the claim, because otherwise chances are that he has already made good the damage through one of the alternative provisions mentioned above. A contested claim is more likely to cause delay than an uncontested one. The court does not have to furnish specific reasons for its refusal to decide on the claim.  

Finally, the court may give preference to awarding compensation as a condition to a suspended sentence (see under D.13), rather than through the adhesion procedure. As with the alternative provisions available in the pre-sentencing stages, this option is often to the advantage of the victim because of the greater pressure it puts on the offender to comply. If it is so that the adhesion procedure is a failure for the simple reason that it is being outshone by a host of more effective alternatives through which compensation can be awarded, so much the better. However, as we have seen, the pre-sentence stage options are only sporadically used, and compensation as a condition to a suspended sentence fares little better. In absolute terms, the criminal courts do not often award compensation by the offender to the victim, whether through the adhesion procedure or in any other form.  

(D.11) Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction.  

Compensation awarded in the form of a decision on a civil claim made through the adhesion procedure is equal to a judgement reached in a civil suit (s. 406-3 StPO), and may be awarded in addition to a penal sanction. Although it is awarded following a separate procedure, in its own right, and has a distinctly different status to the decisions rendered on the penal aspects of the case, it is to a certain extent dependent on these decisions. First of all, compensation may not be awarded if the accused is neither found guilty of a criminal offence, nor subjected to a measure to improve him or protect the public (s. 405 StPO). Secondly,

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65 For the conflict between the adhesion procedure and other provisions, see D. Rössner and T. Klaus in: D. Dolling et al. (1998), pp. 84-85.  
66 Kaiser (1992), pp. 270-271. On a scale of 1 (not a foreign body) to 6 (a foreign body) 42.1% of the judges gave a 6, 20% gave a 5 and 19% gave a 4. The scores for public prosecutors were: 40.4% awarded a 6, 29.8% gave a 5 and 15.8% gave a 4.  
if the verdict in the criminal trial is overturned on appeal, a decision to award compensation also becomes void, even if the appeal was not directed against this decision (s. 406a StPO).

Compensation paid voluntarily by the offender in the early stages of the proceedings, which has resulted in the dismissal of the case by either the public prosecutor or the court, is in effect, albeit not in name, a substitute for a penal sanction. The same goes for compensation imposed as a condition to a suspended sentence. Kilchling found that 56.4% of the victims questioned in his survey considered compensation imposed as a condition to be of a punitive nature, against 43.6% who felt it was not. 68 This is in contrast to the general attitudes of judges, prosecutors, and lawyers as perceived in the course of our study, who are much more loath to consider compensation to be a true punishment, and therefore prefer to impose other sanctions or conditions in addition to, or instead of, compensation. Kilchling’s findings invite the careful observation that the generally negative attitude of the judiciary towards compensation as a punishment is not reflected by the attitude of victims. That judges continue to combine compensation with ‘real’ punishments such as a fine satisfies their own tendency towards dogmatic differentiation between matters of civil law and matters of criminal law, but does not necessarily correspond with the victims’ wishes.

(D.13) In cases where the possibilities open to a court include attaching financial conditions to the award of a deferred or suspended sentence, of a probation order or any other measure, great importance should be given – among these conditions – to compensation by the offender to the victim.

Suspended prison sentence combined with probation order

If a sentence of not more than a year’s imprisonment has been imposed, the court may suspend the prison sentence and put the offender on probation if it seems likely that being sentenced is already in itself sufficient warning for the offender, and that he is not likely to commit further offences even if the sentence is not enforced (s. 56-1 StGB). Under special circumstances, a longer prison sentence up to a maximum of two years may also be suspended and the offender put on probation (s. 56-2 StGB). Incidentally, in this latter case, any attempt of the convicted person to compensate for the damage caused by his act should be taken into consideration (s. 56-2 second sentence StGB). The probation order may be for a maximum of five years and a minimum of two years (s. 56a-1 StGB). One of the conditions that the court may attach to the probation order is that the offender compensates to his financial capacity for the damage caused by his act should be taken into consideration (s. 56a-1 StGB). The probation order may be for a maximum of five years and a minimum of two years (s. 56a-1 StGB). One of the conditions that may be imposed are that he pays a sum of money to a charity, does something else for the benefit of the community, or pays a sum of money to the treasury, but these three may only be ordered if they do not stand in the way of compensation being paid to the injured person (s. 56b-2-1 StGB). More than 85% of all offenders are sentenced to a fine and not to imprisonment so, in absolute terms, probation is imposed in relatively few cases. 69 Of all the cases in which probation is awarded in this way, about 10% is on condition that the offender compensates the injured person. 70

Compensation as condition for parole

Compensation may also be imposed as a condition to an early release from prison on parole (s. 57 StGB in conjunction with s. 56b-2-1 StGB), but this option is rarely used. 71

Caution in relation to a fine

Finally, if someone has run up a fine of up to 180 day units, the court may caution the offender after establishing his guilt, then determine what sanction would be appropriate but subsequently suspend the actual sentencing of the offender to this sanction (s. 59-1 StGB). The court may attach a condition to the caution that the offender tries to reach a settlement with the injured person or compensates for the damage caused by the offence (s. 59a-2-2 StGB). It appears that the courts have so far never used this option. 72

In conclusion, although there are plenty of relevant provisions, the courts do not give great importance to attaching compensation as a condition to a suspended sentence, parole or other comparable measures.

7.3 Enforcement of Compensation

(E. 14) If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.

Compensation awarded through the adhesion procedure is not a penal sanction, but a decision which is equal to a judgement reached in a civil suit. The court may declare the decision provisionally enforceable, and may attach the condition that surety is given by the offender (s. 406-2 StPO). Enforcement takes place according to the rules applicable to decisions taken in civil law suits (s. 406b StPO). This implies that the responsibility for enforcement lies first and foremost with the injured person himself. However, the injured person’s claim for compensation should be given priority over the State’s claim to a pecuniary penalty (fine) and court costs. 73 Since the coming into force of the Victim’s Surety Act (see § 4.3), a victim with a civil claim against the offender has a right of attachment on money received by the offender for selling the story of his offence to the media.

Where compensation has been ordered as a condition for a dismissal by the prosecutor or the court, or for a suspended sentence, there is an increased incentive for the offender to meet the condition because otherwise he runs the risk of being prosecuted or having to undergo the full sentence after all.

If compensation is to be paid following Victim-Offender Mediation, the mediator is responsible for checking that the compensation has actually been paid, and for reporting back to the public prosecutor or court, depending on who referred the case. 74

Finally, one interesting provision that was lost with the unification of the two Germanies was a law passed in the former East Germany on 14 December 1988 concerning the payment

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in advance of compensation to victims of crime (Schadenersatzvorauszahlungsgesetz). This progressive provision is something that many victim support organizations throughout Europe are now campaigning for.

8 TREATMENT AND PROTECTION OF THE VICTIM

8.1 Victim-awareness Training

(A.1) Police should be trained to deal with victims in a sympathetic, constructive and reassuring manner.

The police department of each individual State determines its own entrance criteria, hires its own personnel, and trains them at a ‘Readiness Police Division’ (Bereitschaftspolizeiabteilung, BPA). Because of the supervisory tasks of the Federal Ministry of the Interior over the police of each State, the curriculum at each BPA is the same throughout Germany. The basic training curriculum consists of two years formal instruction and testing followed by two years apprenticeship in a BPA operational unit. The overall emphasis is on classroom academics, paper/pencil tests, and physical agility.

Training on how to deal with victims in a sympathetic, constructive, and reassuring manner is not part of the standard curriculum for the uniformed police forces. In relation to dealing with rape victims, only members of specialist police rape units receive appropriate training, which is generally provided by representatives of local women’s groups or rape crisis centres. However, in practice victims of sexual abuse still often have to report to non-specialist police officers, and problems caused by unsympathetic treatment have been signalled by members of the Feminist Lawyers’ Association.

Training of other authorities

Law students in Germany face a tough six and a half year programme. This programme is divided into two parts. The first part consists of four years – eight terms – of university studies which is rounded off by the final state examination (Staatsexamen). For this exam the student is required to know everything he has ever learnt at university. Because the quantities of material to be known are so huge, but also because, in the state exam, candidates are required to solve practical cases whereas the university lectures are of an academic nature, most German students prepare for the exam with the help of a coach or crammer (Repetitor).


76 A.J. Balzer (1995), 'Police Training in Germany and California', CJ Europe On-Line, http://www.acsp.uic.edu/oicj/pubs/cje/050501.html, p. 1. This article is based on interviews and observations made during a two-week visit to Germany in May 1995. The author, who is Director of the San Francisco Police Department academy and Adjunct Professor at Golden Gate University, San Francisco, primarily visited the Readiness Police Division in Enkenbach-Alsenborn.

Also, many students are not ready to take the exam after the designated four years but actually need five and a half to six years to prepare.

After passing the exam, the candidate becomes a trainee (Referendar) in the federal State where he/she took the examination. A trainee receives two and a half years of practical on-the-job training. Traineeships must be completed at civil law court, at a penal law court, in public administration, and at a law firm. This second part of the programme is rounded off by a second state examination after which the trainee is a qualified lawyer (Volljurist). 40-50 percent of qualified lawyers work for the state either as judges, public prosecutors, or in public administration. However, for some jobs, notably with the criminal police, passing the first State examination is a sufficient qualification. Competition for judicial and prosecution posts is fierce and only those with excellent exam grades are appointed.

Prosecutors and judges do not generally receive training on how to deal with victims of crime. The only exception is the specialist prosecutors for rape cases that are found in some areas.78

8.2 Questioning the Victim

(C.8) At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians qualified to assist them.

The Code of Criminal Procedure contains one section that has been interpreted as embodying a general right of the witness (victim) to be treated with due respect. Section 69-1 StPO provides that the witness must be given the opportunity to recount what he knows about the case coherently. This is understood to imply that the witness should be treated as an interlocutor and not as a mere medium to get at the truth.79

There are several factors determining the overall nature of the questioning of the victim. Not only the type of questions that are asked is relevant, but also by whom and the tone in which it is done, as well as the frequency of the questionings.

Frequency of questioning
To start with the last point, the arrangement of the criminal proceedings in Germany is such that victims are often subjected to six or more questioning sessions. First of all the victim is questioned one or more times by the police. Secondly, the public prosecutor may also wish to question him, followed, thirdly, by the investigating magistrate. Then, in serious cases such as sexual assault, he may be asked to submit to an examination by a psychologist to prepare a statement on his credibility. Finally, he can be summoned to testify in court, and again in a higher court in the case of an appeal. Victims often complain about the strain of repeated questioning, in particular, victims of sexual offences.80

Who does the questioning, and how
The previous section contains a list of authorities that have the right to question the witness

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As far as questioning by the police is concerned, some States now have special rape units which aim to provide a specially trained female officer for the questioning of (female) victims of rape. Once the case gets to court, the injured person is the first to be called to give a statement. It is to the discretion of the court whether or not to put the injured person under oath (s. 61-2 StPO). In Germany, the judge has an investigative function and may therefore put questions to the witnesses. The public prosecutor and the counsel for the defence may even ask the judge for permission to leave all the questioning to him (s. 239 StPO). On request, the presiding judge must also grant the other judges permission to put questions to the defendant, witnesses, and expert witnesses (s. 240 StPO). It is up to the individual judge how active or passive he is. For example, in one court case attended in the context of this study, each witness was first questioned extensively by the presiding judge before the public prosecutor and the counsel for the defence were allowed to question. In this particular case, there were three defendants, each with their own lawyer. Every witness, including the injured person, was questioned by the judge, the prosecutor, and all three counsels for the defence respectively. Some witnesses were then questioned again by one or more of these agents. One counsel for the defence in particular employed an aggressive questioning technique which clearly caused the witnesses a great deal of discomfort. The judge did not intervene, and at one stage even told a witness to try not to get upset because everyone has their own particular style of questioning. To safeguard the interests of the injured person, he may be assisted and represented by a lawyer, who has the right to be present if the injured person is heard by the court or the prosecutor, to challenge questions put to him and to ask for the hearing to be held in camera (ss. 406f-1 and 406f-2 StPO, see §§5.3 and 5.5). The injured person who is heard as a witness may also ask for the presence of a confidant (s. 406f-3 StPO).

Long waiting times at court cause much aggravation to victims and others called to testify. This problem is recognized by section 214-2 StPO, which allows the court to send staggered summonses to witnesses, so that they do not all have to be present at the start of the main proceedings. Other provisions aimed at lessening the burden of having to testify are found in the new Witness Protection Act, which came into force on 1 December 1998 (see § 4.3). Among other things, it introduced a new section 58a StPO which provides that the (pre-trial) questioning of (among other witnesses) victims under the age of 16 may be audio-visually recorded. This material can then be shown during the main trial. A further new section is section 168e: if being questioned (in the pre-trial stages) in the presence of all those entitled to be present (i.e. the defendant and his lawyer, and the public prosecutor) poses a serious threat to the well-being of the witness, and if this threat cannot be dealt with in any other way, the judge may question the witness in a different room, under transmission of the testimony to the others by audio-visual means. A comparable section 247a StPO has been introduced in relation to questioning during the main proceedings. This method, which is known as the Mainzer Modell after its use in a case in Mainz involving numerous child victim/witnesses of sexual abuse, has been severely criticized because the presiding judge leaves the courtroom to conduct the questioning and cannot therefore see the occurrences and reactions to the testimony in the courtroom. It has therefore been suggested that the judge remains in the courtroom and questions the witness via an audio-visual link. Before

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82 Freiburg Local Court, 7 February 1996.
the judge resorts to questioning a witness outside the courtroom, he should first see whether the problem cannot be solved by removing the accused from the courtroom for the duration of the testimony under section 247 StPO, or by closing the court to the public under sections 171b or 172 GVG. In the former situation, the presiding judge must inform the accused of the contents of the testimony when he is allowed to return to the courtroom. The accused may be removed if it is feared that the witness will not speak the truth in his presence; if the witness is under 16 years of age and it is feared that questioning in the presence of the defendant may damage his well-being; or if the presence of the accused poses a serious threat to the health of any other witness.

If a person under the age of 16 does personally appear in court to testify, he may only be questioned by the presiding judge (s. 241a-1 StPO). Other persons entitled to question the witness (other judges, the public prosecutor, the accused and his lawyer) have the right to put questions to the child witness through the presiding judge, who may also grant them leave to put questions directly to the witness, if damage to the well-being of the witness need not be feared (s. 241a-2 StPO). The practice of putting questions to the witness through the presiding judge has been criticized because the questions that the parties want to ask are transmitted orally to the presiding judge, who then puts them to the witness, if necessary after rephrasing the question, but the witness has already heard the original formulation of the question, which may be upsetting. It is therefore advisable to put potentially upsetting questions on paper before handing them to the judge.84

Type of questions

S. 68a-1 StPO provides that questions which pertain to facts that may cast dishonour on the witness or his relatives, or which concern his or his relatives' personal life may only be posed 'if unavoidable'. However, case law says that the defendant may question the credibility of a witness without having to fear a heavier punishment if it turns out he was wrong.85 There are no special rules regarding questioning about the previous sexual history of victims of sexual offences. If the defendant contends that the victim consented to the sexual act, then the court decides whether questions about the previous sexual history are relevant to establishing whether the defendant's belief in consent was justified.86 Questions about previous convictions of the witness may only be asked when they are necessary to decide on whether or not the witness should be placed under oath, or to decide on his credibility (ss. 68a-2 in conjunction with 60-2 and 61-4 StPO).

85 BGH, Urt. v. 3.8.1994 — 2 StR 161/94 (LG Darmstadt) reported in NStZ 1995, Heft 2, pp. 78.
8.3 Protecting the Victim

(F. 15) Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or particular status or personal situation and safety of the victim make such special attention necessary, either the trial before the judgement should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate.

In principle, the proceedings before a court of law are public (s. 169 GVG, see § 2). However, publicity may be excluded when personal circumstances of a party to the proceedings, a witness or an injured person are discussed, to protect the privacy of these persons (s. 171b-1 GVG). The court may also exclude publicity during the trial, or a part of the trial, if it is feared that the life, personal integrity, or freedom of a witness or another person is threatened (s. 172-1a GVG). Regarding the judgement of the court, which is normally made public (s. 173-1 GVG), the court may decide not to publish the reasons for the judgement, or a part thereof, if this is necessary to protect the privacy or safety of the persons mentioned above (ss. 173-2 in conjunction with 171b and 172 GVG). It is generally prohibited to make audio-visual recordings of trials (s. 169-2 GVG).

(G. 16) Whenever it appears necessary, and especially when organised crime is involved, the victim and his family should be given protection against intimidation and the risk of retaliation by the offender.

Organized crime is becoming increasingly violent according to the Federal Police Agency. This has led to a diminished willingness of witnesses who have been threatened to speak out, and even lawyers representing witnesses who are at risk are fearful of retaliation. Witness protection, which is offered by the police (Sicherheitsbehörden) of the federation and the states, has therefore become increasingly important. In 1992, witness protection was offered in 370 cases. This had increased to 650 cases in 1994.87

9 Conclusions

The German legal system, which belongs to the civil law family, has served as a substratum for the legal systems of several other jurisdictions included in this study, among them Austria, Liechtenstein, Greece, many of the Swiss cantons and Turkey. More often than not, the position of the victim of crime in these jurisdictions is based on the German model.

On paper, the position of the victim of crime in German criminal law and procedure is strong. Legislation provides that he may exercise a variety of active participatory rights, either by joining the proceedings as an auxiliary prosecutor or by presenting a civil claim for damages in adhesion to the criminal proceedings. Unfortunately, practice is disappointing in several respects.

Whether the victim of crime receives information depends on his role in the proceedings.

87 Die Welt, 20 February 1996.
Federal legislation is based on the conviction that only victims with an active participatory role in the proceedings have real need of information. The legislature has opted to place a general responsibility with all the criminal justice authorities to inform the injured person of the rights awarded him by the Code of Criminal Procedure, rather than appointing a single responsible agency. In practice, it seems that the public prosecutor and the court, rather than the police, are considered responsible for the provision of the appropriate information. This is unusual, given the fact that in most jurisdictions the police are given this task because they are the first, and often the last, agency that the victim comes into contact with. The present distribution of informatory responsibilities in Germany is maintained by the fact that the police receive no particular training on the legal rights of the victim. Consideration should be given to the establishment of a basic duty for the police to inform victims of their rights and opportunities, as well as the introduction of victim-oriented training for police officers. Furthermore, it should be possible for victims who expressly choose not to exercise their participatory rights, but who nonetheless want to be kept informed, to opt in to a system whereby they are notified of the most significant developments in their case and the outcome.

The injured person may claim compensation from the offender in adhesion to the criminal proceedings. In practice, the German adhesion procedure is not a success. There are a variety of causes for this, among them the lack of information and support offered victims in preparing the claim, and the negative attitudes of judges and prosecutors towards dealing with a civil claim during criminal proceedings. The fact that a lawyer representing a victim stands to earn twice as much if the claim is brought in civil court as he does if it is heard by a criminal court does not improve matters either. However, the adhesion procedure is not the only road leading to compensation for the victim in the course of the criminal proceedings. Other options include victim-offender mediation (TOA), which was introduced in Germany in 1994, and the provisional dropping of the proceedings by the court on condition that the offender compensates the victim. Although use is now made of both options, the absolute number of victims compensated in this way is still only very small. No great importance is given by the courts to attaching compensation by the offender to the victim as a condition to a suspended sentence, parole or other comparable measures. Where compensation has been awarded through the adhesion procedure, the enforcement is left entirely to the victim. The advantage of compensation ordered as a condition for a dismissal by the prosecutor or the court, or for a suspended sentence, is that it is enforced by the prosecutor's office.

Regarding questioning by the authorities, significant efforts have been made to reduce the strain placed on the victim/witness. Some of the German States now have rape units where (female) victims of rape may be questioned by a specially trained female officer. 1996 saw the introduction of the Act for the Protection of the Child Witnesses, which was followed in 1998 by the Act for the Protection of Witnesses during Questioning in Criminal Proceedings and for the Improvement of Victim Protection. Among other things, the new legislation provides that audio-visual recordings of pre-trial questioning of victims under the age of 16 may now be used as evidence in court, and that vulnerable witnesses may be questioned through a video-link.
Supplements

ABBREVIATIONS

AnwBI - Anwaltsblatt Deutscher Anwalt Verein
ADO - Arbeitskreis der Opferhilfen, Working group for victim support
Beschl. - Beschluß, decision
BGBl. - Bundesgesetzblatt, Federal Law Gazette
BGH - Bundesgerichtshof, Federal Court
BGHSt. - Entscheidungen des Bundesgerichtshofes in Strafsachen, decisions of the Federal Court of Appeals in criminal cases
BPA - Bereitschaftspolizeiabteilung, Readiness Police Division
BKA - Bundeskriminalamt, Federal Police Agency
BVerfG - Bundesverfassungsgericht, Federal Constitutional Court
cf. - conform
DEM - Deutsche Marke, German Marks
DNP - Die Neue Polizei, Aktuelle Fachzeitschrift für die Aus- und Fortbildung et al. - and others
EURO - currency of the European Monetary Union
GG - Grundgesetz, Constitution
GVG - Gerichtsverfassungsgesetz, Constitution of the Courts Act
HMSO - Her Majesty's Stationery Office
i.e. - id est, that is
jr - junior
LG - Landesgericht, District Court
MschrKrim - Monatsschrift für Kriminologie und Strafrechtsreform
no. - number
NSzT - Neue Strafrechtliche Zeitung
OASG - Opferanspruchssicherungsgesetz, Victim's Surety Act
OEG - Opferentschädigungsgesetz, Victim Compensation Act
OLG - Oberlandesgericht
OSG - Opferschutzgesetz, Victim Protection Act
p. - page
pp. - pages
s. - section
ss. - sections
StGB - Strafgesetzbuch, Penal Code
StPO - Strafprozessordnung, Code of Criminal Procedure
SZEG - Witness and Expert Compensation Law
TOA - Täter-Opfer-Ausgleich, Victim-Offender mediation
Urt. - Urteil, judgement
U.S. - United States of America
v. - von, of
ZPO - Zivilprozessordnung, Code of Civil Procedure
ZSchG - Zeugenschutzgesetz, Witness Protection Act
ZSEG - Zeugen- und Sachverständigenentschädigungsgesetz
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Chapter 10

Greece

Scenery

Greece is one of Europe’s earliest civilisations. The legacy of ancient Greece still pervades the consciousness of virtually all western nations. Even after more than 2000 years, philosophers are still enchanted and captivated by their Greek predecessors Socrates, Plato and Aristotle. Greek myths were a primary source of inspiration for our earliest literature. And in our times, many people still admire the works of the ancient Greek author Homer, and enjoy reading the Iliad and Odyssey. Many of our most revelatory words come from ancient Greek: drama, tragedy, chaos and democracy, to name but a few. The latter, democracy, is perhaps the greatest legacy of Greece to modern European society.

Reminders of the glorious past are everywhere, whether in the form of famous sites such as the Acropolis or the oracle of Delphi, countless crumbling fragments of ancient buildings, or in the traditions, customs and beliefs of its people. For instance, Tuesday is regarded as an unlucky day because that is the day the Byzantine Empire fell to the Ottomans.1 Traditionally, few Greeks will sign an important transaction, get married or start an important journey on a Tuesday, though, this is not so true anymore. And in Greece, hospitality is still considered a virtue and is far from being reduced to a myth.

The Greeks have clung to their traditions with more tenacity than most other peoples. This can easily be explained by looking to their past. Through centuries of occupation by, amongst others, the Franks, Venetians and Turks, tradition and religion were the key factors in keeping the Greek identity alive. In Greece, tradition and religion are closely linked. In general, Orthodox religion is an integral part of the Greek identity and life style. About 98% of Greeks belong to the Orthodox Church, which was founded by Constantine the Great in the 4th century after he was converted to Christianity by a vision of the Cross. By the 8th century, there were growing differences and an increasing rivalry between the Pope in Rome and the Patriarch of Constantinople. In the 11th century these differences had become irreconcilable and in 1054 the Pope and the Patriarch excommunicated each other. Ever since, the two have gone their separate ways as the Roman Catholic Church and the (Greek/Russian) Orthodox Church. During Ottoman times, membership in the latter church was one of the most important criteria in defining a Greek, regardless of where he or she lived. The Orthodox Church was and is a principal upholder of Greek culture and traditions.

1 See Chapter 24, § 1.
The Greek year is centred around the festivals of the church calendar. Most Greeks, young and old, will go into one of the many churches when they have a problem and light a candle to the saint they feel is most likely to help them. Even hip, young urban Greeks have respect for traditions, plus a great willingness to participate in them and keep them alive.²

Greece, or the Hellenic Republic as it is officially called, has been a democracy and a parliamentary republic since 1975. In June of the same year a new Constitution was adopted after seven years of military rule and dictatorship. On April 21, 1967, army colonels seized power. The army felt threatened by increasing liberalization and political disarray and staged a coup that brought a junta of colonels to power. The junta’s rule included torture, censorship and arbitrary arrest. The regime, however, also encouraged foreign investment and continued to enjoy U. S. support. Student demonstrations in Athens were suppressed by martial law in 1973 and, a year later, General Ioannidis’s attempt to overthrow Cyprus’s president provoked a Turkish invasion of Cyprus that ultimately led to the junta’s downfall. A referendum was organized to determine the fate of the monarchy. After the monarchy was defeated by a two-thirds vote, the Constitution was drawn up, which established the Hellenic Republic, free general elections and a 300-member parliament charged with appointing a ceremonial president. The Republic is divided into regions and island groups.³ For administrative purposes these regions and groups are divided into 52 prefectures (nomoi).

Traditionally, Greece was an agricultural country but the importance of agriculture to the economy has declined rapidly since WW II. About half of the workforce is now employed in services; only about 20% in agriculture and the remainder in industry and construction. Tourism is by far the most important industry in modern Greece. About ten million tourists visit Greece each year.⁴ This is a truly astonishing number because the last census taken recorded approximately the same population (1991).⁵ Nowadays, Greece is largely an urban society with 70% of the population living in cities. By far the largest city is Athens, where more than 3 million persons live in the greater Athens area. The second largest city is Thessaloniki with almost 1 million. These two cities provide housing for 40% of the population, while less than 15% live on the islands. The most populous of these are Crete (540,000) and Evia (208,000).⁶ A socioeconomic portrait of Greece would not be complete without reference to the level of education of the population. Education in Greece is free at all levels of the state system, from kindergarten to university. Even the compulsory books are free of charge for all students. At the age of 12, children enter the ‘gymnasio’ and at 15 they may leave school or enter the ‘lykeio’ which prepares them for the competitive

² One of the traditions inspired by religion is the fasting before Easter, which means (by and large) that meat and other animal products, such milk or the famous feta cheese, cannot be eaten. This tradition is so much respected, that Mac Donalds introduced special products, such as vegetarian spring rolls. It even started a campaign to advertise their vegetarian products and reassure clients that only vegetable oil is used (March 1998).

³ The regions of the mainland are the Peloponnese, Central Greece or Sterea Ellada, Epiros, Thessaly, Macedonia and Thrace. The island groups are the Cyclades, Dodecanese, North-Eastern Aegean, Sporades, islands in the Saronic Gulf and the Ionian island group. The large islands of Evia and Crete do not belong to any group.


university entrance examinations. There are 3 law faculties in Athens, Thessaloniki and Komotini. According to the latest available data (1991), approximately 20% of the population have a secondary school diploma, and 6% have finished a degree in higher education. About 40% have only primary education, 10.6% have not finish primary school and 6.8% of the population is illiterate. One of the reasons many pupils leave school early and do not continue their studies, despite the fact that education is available to all, at no cost, is the education system. The system is frequently under fire for its inflexible and anachronistic teaching methods. According to a survey, 89% of the students and 72% of the teachers are dissatisfied with the education system.

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CHAPTER 10

PART I: THE GREEK CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

Under ancient Greek law, reconciliation in the sense of an informal or formal settlement of private conflicts was the rule. This was the way to handle disputes and conflicts in almost all ancient societies. Unsurprisingly, the ancient Greek goddess of Justice was presented as a smiling young girl with a friendly look. Only much later in history was the blindfolded goddess of Justice with a sword in her right hand invented, the goddess who prevails in the current criminal justice system. Mediation is no longer practised. Therefore victims have to rely on the formal legal systems in order to seek justice and compensation. Traces of the friendly and smiling goddess, however, are still visible. In the Greek courts, the atmosphere is very informal — no robes are worn — and agreeable. The atmosphere is reminiscent of ancient times when justice was rendered under an olive tree at the market place with people all around: when parties could still speak to the judges and argue their case. The Greek courtrooms are just as crowded and noisy as an old market place: the doors remain open at all times, giving access to the central hallway where all the witnesses, family members and friends are gathered and waiting for ‘their’ case (see further § 8.2). During the trial, the parties, including the victim-witness, speak with the judges in an informal manner, often gesturing for emphasis. Even raising one’s voice to explain a point of view to the court seems absolutely acceptable, as it would be anywhere else in Greece. In the midst of all the noise and crowds, the judges remain calm and very much in charge of the proceedings. Moreover, they seem to be able to concentrate on the evidence presented to them despite the never ending cacophony. In spite of this relaxed and informal atmosphere, the victim has little to gain from going to the criminal courts, unless he wants to see the offender punished and give evidence.

2 GENERAL REMARKS AND BASIC PRINCIPLES

Apart from its typical Greek appearance, the legal system follows the European continental tradition. Whereas criminal law is influenced mainly by German and Swiss criminal law and doctrine, criminal procedural law is influenced by German, French, and (former) Italian legislation. The Greek criminal justice system is based primarily on two Codes, the Penal Code and the Code of Criminal Procedure, and a number of criminal statutes. The two Codes were enacted at the same time and entered into force on January 1, 1951. They have undergone numerous amendments since their promulgation, some of them inspired by foreign legal science and case law.

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10 Robes are only worn in the Supreme Court.
11 In 1993, for instance, the death penalty was abolished.
12 Countries such as Germany, Switzerland, or more recently, France and England inspired the Greek legislature to propose legal reforms in the field of criminal justice.
The 1951 Codes are the expression of the historical evolution of contemporary Greek legal doctrine, which began with the Greek national liberation struggle (1821-1829) to shake off the effects of the Turkish rule. Following the Turkish conquest of Constantinople in 1453, Turkish criminal law was in force in Greece and consisted mainly of rules derived from the Koran. These rules were applied by Turkish judges according to Turkish legal thinking. At that time, criminal law was completely alien to Greek legal thought and culture. In this sense, Turkish rule constituted a break in the evolution of Greek criminal law and procedure, which lasted from 1453 until 1821. Following the liberation of the Turks, a new Greek criminal justice system had to be created. In 1822, the first Constitution was promulgated, followed by a Greek Code of criminal law in 1834. This Code was drafted by the German jurist Ludwig von Maurer and clearly reflected the principles of liberalism and humanism (see § 4.2). In 1911, along with a general reform of Greek public institutions, the legislature began with a new draft of the codes of criminal law and procedure. The fruits of this long and painful effort are the Penal Code and the Code of Criminal Procedure of 1 January 1951. In addition to these Codes, there are a number of criminal Statutes dealing with specific crimes, involving, for instance, drugs, firearms and antiquities, but also traffic violations. Statutes are quite important to the daily practice of the criminal justice system because 70 to 75% of all offences are violations of criminal statutes.

In the last decades, Greek society has undergone rapid socioeconomic and political change. First of all, it has changed from a rural to an urbanized society. As a result, traditional Greek society — which used to be characterised by strong social control of the family, the neighbourhood and the church — is gradually disappearing. This has been associated with rises in crime rates and delinquency. Crime statistics of the Athens police show, for instance, an increasing involvement of young persons in crime. Besides urbanization, Greek society has also become less homogeneous, due to the great influx of tourists, foreign workers and illegal immigrants from the former Eastern block countries. The millions of tourists and the great number of illegal immigrants also have an other effect on society and on criminality, for instance, the property crime rates. The recent political changes are also related to new trends in criminality. Looking back over the recent history of Greece, the period between 1967 and 1974 is most illustrative. The military junta which seized power after a coup d'état, not only dissolved parliament but also created martial courts. These courts tried military crimes as well as ordinary criminal cases. This judicial change, along with the reduction of freedom and the severe penalties which were imposed, resulted in less criminal acts. A clear decrease in criminality could be seen especially in the first years of the dictatorship. However, the restrictions of individual liberties and violations of human rights only had

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15 For youngsters in the 7-12 age group the change is +91.5%, in the 13-17 age group: +78%, and for those in the 18-20 age group: +22.4%. Figures taken from C.D. Spinellis, Key-findings of a preliminary self-report delinquency study in Athens, Greece, in: J. Junger-Tas e.o.(ed.), Delinquent behavior among young people in the Western world, p. 291.
16 According to police officers, public prosecutors and judges, illegal immigrants from the former socialist countries (in particular Albanians) are accountable for about 1/3 of the petty crime, such as pickpocketing, and other property crimes.
17 The number of convicted persons dropped from 92,644 in 1967 to 66,685 in 1968. And a sharp increase was seen in 1972, when the number rose from 74,789 to 102,278. See statistics from the year 1960-1990 in: C.D. Spinellis (1997), p. 31.
a temporary effect. When the rule of law was restored, crime rates went back to ‘normal’. However, one has to keep in mind that criminality is still rather low, compared to other European countries.

2.1 Basic Principles

The pre-trial proceeding is governed by the legality principle, whereas the trial proceedings are governed by principles, such as the principle of publicity (s. 93-2 Const. and s. 329-1 CCP) and of orality (s. 331 CCP). These state that criminal trials must be held in public, unless otherwise provided for by law, the sentence given in public, and that the court may only rely on evidence which is produced during the trial. Other principles include the principle of continuity (s. 339 CCP) and of unity of the proceedings (s. 340 CCP).

3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

In 1990, the Greek criminal justice system had the following personnel: 39,335 police officers, of which 2,269 were females; 415 public prosecutors and 1,444 judges, both trying criminal and civil cases. The criminal justice system as a whole seems overloaded and overworked, due to the mandatory prosecution, cumbersome and time-absorbing pre-trial proceedings. Furthermore, little use is made of the summary proceedings to protect the rights of the accused, and the absence of mediation and claim settlement before the trial. Currently, a new Code of Criminal Procedure is being drafted to address some of these issues and to try to remedy the bottlenecks of the criminal proceedings and its delays. Also, the criminal justice authorities generally feel they have too much work and too few means to make their work easier. Computers are still largely absent in the criminal justice system. Police officers keep hand written records and the legal files are either manuscripts or typed in the old-

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18 C.D. Spinellis (1997), pp. 36-37


21 Every year about 1200 freshmen are accepted at Athens and Thessaloniki University, which have the biggest law faculties. Currently, there are plans to introduce a numerus clausus to limit the number of students because of the surplus of lawyers, especially in Athens (15,000 lawyers in Athens and 6,000 in other parts of Greece). But people are sceptical about this proposal because many will circumvent the restrictions and study abroad, as is done already by those who fail the entrance exams. In order to become a lawyer after 4 years of law school, one has to do an unpaid traineeship of 1.5 years followed by an exam. The traineeship is not taken seriously by all future lawyers. It is quite common to spend this period in other ways, e.g. fulfilling the military service or studying abroad. After the exam, they have to appear before a committee of the Bar Association consisting of 3 lawyers, 1 judge and 1 public prosecutor. The Bar Association, however, accepts everyone who passed the exam as a lawyer, even those who have clearly not done any practical training. Since they outnumber the magistrates, the committee is a formality. The reason behind this practice is that the Bar Association is afraid of being seen as a syndicate and feels confident that practice will filter out any ‘bad’ lawyers. Information supplied by Mr. G. Rigos, judge of the Supreme Court in Athens and Mr. G. Karampelas of the Court of Appeal in Piraeus, 2 March 1998. Also G. Natsinas, lawyer, Athens, 9 March 1998.
fashioned way. There are in the courts also no computers and therefore all files are typed by the judges' secretaries.

3.1 Investigating Authorities

The image and mentality of the police were a problem until 1975. The police have been associated with oppressive regimes throughout long periods of Greek history, for instance, during the 400 year occupation by the Turks and their security forces, long periods of autocratic regimes, and, more recently, the military junta. The latter has been particularly devastating for Greek humanistic principles. Police methods were deeply influenced by the totalitarian ideas of the junta. This did not enhance the popularity of the police among the people. Nowadays, however, citizens are no longer afraid of them. Everyone seems convinced that this is a new era and the current force cannot be compared with the 1967-1974 force. According to the police, the integration of Greece into the European Community has been a great incentive to bring about reforms. Through European Conventions, particularly in the field of human rights, and European cooperation between police forces, police mentality and methods have changed for the better.\textsuperscript{22}

When the Greek Republic was founded in 1975, a dual police system existed, consisting of a gendarmerie at a general level and a kind of municipal police (city police) in Athens, Piraeus, Patras and Corfu. This dual system was in effect until 1984 when the two forces were united under the name of 'Hellenic police' ('\textit{Elleniki asynomia}). The police fall under the authority of the Ministry of Public Order. It is an armed force functioning under its own organic laws, and has a military-type structure. Its personnel display and submit to military discipline. The police cover the entire country, except for areas where the coastguard and the customs services have jurisdiction. They are structured into central and regional services following the administrative division of the state into districts, prefectures, municipalities and communities. Training falls under the central branch for administrative support. Police personnel are distinguished into police and civil personnel, and made up of men and women.\textsuperscript{23}

The Greek police are responsible for public order, state security, civil defence and assisting the armed forces in defending the country against external threats.\textsuperscript{24} Furthermore, they have to fight all types of crime and protect civil liberties and the individual rights of citizens and foreigners residing in Greece.\textsuperscript{25} In the context of these missions, police officers and sub-officers

\textsuperscript{22} Information supplied by police officer Papachristos, Filothei police station, on the 14th of March 1998.

\textsuperscript{23} There are approximately 42,000 policemen and 2,400 civil police officers. Among the 42,000 policemen, there are currently 2,754 women employed by the police (March 1998). Female police officers work mainly with minors, in security divisions and as instructors at the Police Academy. It is always possible for a victim to ask for a female police officer to conduct the investigation or examination. Information supplied by Mr. Constantinopoulos, Ministry of Public Order, 6 March 1998.

\textsuperscript{24} Greek National Central Bureau, \textit{Training of police officers in Greece}, International criminal police review, nr. 446, Jan-Feb. 1994, p. 32.

\textsuperscript{25} Some members of the police and security forces nevertheless violate legal safeguards and commit human rights abuses. The police occasionally interrogate suspects as 'witnesses' allegedly because witnesses do not have the right to legal representation during police questioning. In some cases this has resulted in torture or mistreatment and the subsequent signing of statements. The police also mistreated students after violent demonstrations in late
CHAPTER 10

...conduct preliminary investigations and carry out other duties ordered by the public prosecutor. In general, criminal investigations are performed by the police under the direction of the public prosecutor (s. 35 CCP, see § 3.3). The relationship between the police and the prosecution service is good these days, according to both services. The police do not have problems following orders from the public prosecutor. In fact, they appreciate the guidance, especially in complicated or sensitive matters. Contact between the police and public prosecutors are usually conducted by telephone. But police officers also visit the prosecutor's office if a very important case is being investigated. However, there is some criticism of the training procedures. According to the prosecution service, the training in specific police tasks is sufficient and even good. The police, however, lack knowledge of the law which sometimes causes problems during the investigation. These problems may be linked to the fact that there is no judicial police. All investigative activities are performed by members of the police with the rank of officer. Finally, there are no special branches to deal with victims of sexual offences. There is only one specialized force which deals with minors. In practice, it deals mainly with juvenile delinquents.

3.2 Prosecuting Authorities

The prosecution service has a pyramid structure and is characterised by the principles of hierarchical subordination and indivisibility (s. 24 Act on the Judiciary). The Minister of Justice is at the top of the pyramid, and is responsible for the administration of criminal justice, the judiciary, the prosecution service and the penitentiary. Due to the principle of hierarchy, public prosecutors must follow orders from their superiors and can represent each other by acting in the name of the top of the pyramid structure. In practice, this means that the public prosecutor is an independently operating member of the judiciary, although there are some exceptions. The court of appeal in plenary session and the Minister of Justice can order the public prosecutor to bring a charge in a particular case (ss. 29-30 COP). Then he is obliged to prosecute even though he, personally, has a different opinion. However, he is free to ask the court to acquit the accused. Since public prosecutors are judicial officers, they are not considered a party to the criminal proceedings. They must be objective and...
Members of the prosecution service have a core function in the criminal proceedings. They have to be heard before any judicial decision can be taken, both during the pre-trial and the trial stage. The examining magistrates, the judicial council and the court alike all have to consult the public prosecutor in the case. Failing to do this would nullify the judicial decision. He has the right to appeal both the decisions of the judicial council and the court. They also have a monopoly over the prosecution of crimes, in that private prosecution does not exist. It is their duty to prosecute offences and, more generally, enforce the law. Public prosecutors are obliged to prosecute as soon as they have knowledge of its occurrence, either through the police or because the victim or a citizen reported the crime directly to the prosecution service (ss. 43 and 46 CCP). In principle, public prosecutors are obliged to prosecute each and every offence that has been reported to them according to the legality principle (mandatory prosecution), on the condition that the report is not manifestly ill-founded. There is only one exception to the rule of mandatory prosecution: the expediency principle is unofficially operative regarding a limited number of petty offences. The public prosecutor does have the right to suspend prosecution of a misdemeanour if the sentence is insignificant compared to a court sentence in another case with the same offender (s. 44 CCP). He may also refrain from prosecuting, when it concerns an alleged extortion case in which the victim was threatened with public revelation of a crime and prosecution would risk revealing that crime. Finally, prosecution may be dropped in the case of rape when the victim states that publicity of a trial would cause serious mental suffering (s. 344 CCP). The main reason for this rule is that rape is not a complainant offence; it can be prosecuted ex officio, even if the victim does not want the case to be brought to trial. In the case of rape, the legislature wanted to prevent any legal actions which would further harm the victim, especially because there are so few measures to protect the victim of rape during the criminal proceedings (see § 8.3). Decisions not to prosecute have to be communicated to the public prosecutor at the court of appeal.

Normally, however, criminal action will be started because the public prosecutor is bound by the principle of mandatory prosecution. Once, public action is started, the public prosecutor can no longer abstain from it or waive prosecution. Therefore, plea bargaining is not possible. The public prosecutor may follow three lines of action if he has been informed of the occurrence of a crime. He may either order an investigation carried out by the police or a judge of the police court; a judicial investigation performed by an examining magistrate; or summon the accused directly to court. The choice depends on the severity of the crime. Firstly, the police investigation (also referred to as the ‘summary investigation’) is ordered by the public prosecutor after a minor misdemeanour and is usually carried out by the police. But the preliminary inquiries can also be conducted by a judge of the police court (s. 243 CCP). The purpose of the pre-trial investigation is to collect the evidence needed in order to decide whether there is a case against the accused (s. 239 CCP). Secondly, a preliminary judicial investigation by an examining magistrate (referred to as the ‘ordinary investigation’)

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is required whenever the crime can be classified as a felony or a misdemeanor for which a detention on remand can be ordered pursuant to the law. The judicial inquiry can normally only be terminated if the examining judge has heard the accused (s. 270 CCP) and the judicial council has reached a decision (see § 3.3). Both the so-called summary and ordinary investigation are governed by the principle of secrecy and are an essentially written procedure. Thirdly, the case can be sent directly to court if the perpetrator is caught in the act or the case concerns a petty or minor offence.

After the summary investigation, the legal file is sent to the public prosecutor. He may either send the case to trial, or if he feels more investigative activities are called for, refer the file to the examining magistrate to perform the judicial inquiry. On the other hand, if the public prosecutor feels the case should be dismissed because not enough evidence was found during the investigation, he may request the judicial council (see § 3.3) to pronounce the accused's acquittal (s. 245 CCP).

If at the end of the pre-trial stage the decision is taken to start the criminal process, the public prosecutor will summon the accused and all important witnesses (s. 321, 327 CCP).

### 3.3 Judiciary

Judges and public prosecutors are appointed for life by a presidential decree in order to safeguard their independence and impartiality; they can only be dismissed in those cases explicitly mentioned in the Constitution (s. 88 Const.). With respect to impartiality of judges, public prosecutors, investigative judges and law clerks have to be excluded from their duties if they have close relationships with each other (s. 14 CCP). Moreover, close relationships between magistrates and lawyers are not really appreciated and usually perceived to contravene the rules of conduct or ethics. In the smaller towns, they may even be excluded from a case. Magistrates may also be challenged for the above reasons if there are serious doubts about their impartiality (s. 15 CCP).

The judiciary consists of two different type of courts; the first functions in the pre-trial stage; the second are the trial courts. During the pre-trial stage, the judicial council takes decisions in legal matters, in addition to the examining magistrate. The latter carries out the preliminary judicial inquiry at the formal request of the public prosecutor. The involvement of the examining magistrate is obligatory in all felony cases, and in complicated misdemeanor cases, such as certain types of fraud (s. 246-3 CCP). He examines the offender and witnesses, and tries to collect evidence by investigating the scene of the crime, hearing experts, etc. However, he is bound by the mandate of the public prosecutor as described in the formal request: he may only investigate the offence as mentioned there. Coercive measures can be ordered by both the examining magistrate and the judicial council (s. 272 et seq. CCP). However, the judicial council is more or less a real court whereas the examining judge conducts the judicial investigation at the request of the public prosecutor. The judicial council is a chamber of the misdemeanor court if it acts in first instance, or of the court of appeal at the appellate level. In both cases it is composed of three judges. The hearings are not public, but are held in camera. The judicial council will decide about public

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33 According to the Constitution, their appointment will be terminated after a criminal conviction, a grave breach of discipline or if magistrates have become ill and mentally or professionally incapable of functioning properly.

prosecutors' requests, and give its decision after hearing his opinion on the case (s. 306 CCP).

The decisions of the judicial council must always be justified. The judicial council in its role as appeal court hears appeals against decisions of the judicial council of first instance. It is even possible to go all the way up to the Supreme Court, if the public prosecutor does not agree with the council.

A judge involved in the pre-trial inquiry, either as the investigative magistrate or a member of the judicial council, may also be a member of the court trying the case in the main trial proceedings. It would be impossible, especially, in the provincial courts where only three or four judges work, to have the judicial council and the trial court composed of different judges. In principle, preliminary judicial investigations can only end by a decision of the judicial council in first instance. If, however, the case involving a felony for which enough evidence exists to prove it in court, the file may be referred directly to the second instance judicial council which will then decide irrevocably (s. 308 CCP).

Furthermore, the public prosecutor may send the a misdemeanour case directly to court, in particular if the offender was caught red handed (see § 3.2).

The trial courts can be sub-divided into three categories, based on the three types of crimes: petty offences, misdemeanours and felonies (s. 18 PC). Firstly, the police court is competent to try petty violations. It is composed of one single judge. Secondly, the misdemeanour court can be a panel court, composed of three judges, or it can function as a single-judge court. As a panel court it is competent to try the more serious misdemeanours (s. 112 CCP). As a single-judge court, it is competent to hear the less serious misdemeanours carrying custodial sentences of less than one year or a financial penalty only. The latter court is also competent to hear appeals against judgments of the petty offence court (s. 114 CCP). The three-judge misdemeanour court also hears appeals of the decisions of the single-judge court. Thirdly, the mixed criminal court is competent to try felonies. It is called a mixed court because it consists of three professional judges and four lay judges. The mixed court can be a court of first instance and an appellate court. Although the mixed court was originally competent to try all felony cases, many of them – especially financial crimes, such as money laundering, fraud, aggravated embezzlement – are now tried in the court of appeal (functioning as a first instance court) because of their complexity. Still, the mixed court is competent to handle serious and violent felonies such as intentional homicide (s. 299 PC), severe and deadly bodily harm (ss. 310, 311 PC), rape (s. 336 PC), sexual abuse of a mentally disabled person and child abuse (ss. 338, 339 PC). The mixed court decides on both guilt, the aggravating or extenuating circumstances and the sentence (s. 404 CCP). However, the explicitly judicial problems are decided by the professional judges of the mixed court only. These legal problems may vary from the preliminary questions to the admissibility of the claim for compensation of the victim. The professional judges also decide about the admissibility of prosecution and may order to drop the charges (s. 405 CCP). Thus, despite its name, the court of appeal often functions as a first instance court. As such, it is composed of three members. As a three-member court of appeal, it hears appeals against decisions of the three-member mixed court of misdemeanours. The court of appeal with a panel of five judges is competent to deal with legal remedies against sentences of the three-member


36 A petty offence is a crime punishable by jail or a fine; a misdemeanour is a crime punishable by imprisonment, a pecuniary sanction or confinement in a reformative institution; and a felony is a crime punishable by confinement in a penitentiary.
court of appeal (s. 499 CCP). Finally, the Supreme Court (Areos Pagos) is composed of five members when deciding on demands for annulment from court orders or decisions (s. 10, 513 CCP). All offences committed by children and adolescents are tried before the juvenile courts. Most crimes can be tried twice, once at each level. Most criminal courts function both as a court of first instance and appeal. The appeal for error of law from all criminal courts have to be lodged with the Supreme Court (s. 484, 510 CCP).

**Competence of the courts:**

<table>
<thead>
<tr>
<th>Crimes</th>
<th>First instance courts</th>
<th>Courts of appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>petty violations</td>
<td>police courts</td>
<td>misdemeanour court</td>
</tr>
<tr>
<td>less serious</td>
<td>single-judge misdemeanour court</td>
<td>three-member court of misdemeanours</td>
</tr>
<tr>
<td>misdemeanours</td>
<td>three-member misdemeanour court</td>
<td>court of appeal (three members)</td>
</tr>
<tr>
<td>felonies</td>
<td>mixed criminal court or, court of appeal (three members)</td>
<td>mixed criminal court of appeal or, court of appeal (five members)</td>
</tr>
</tbody>
</table>

Judges who try criminal cases also always try civil cases. In fact, their competence in civil court is much more appreciated. Judges can only be promotion on the basis of their performance in civil cases. There is a committee which evaluates a magistrate's competence and assesses mainly his civil cases, not his performance in criminal court. One of the possible reasons is that civil proceedings are all done in writing and thus very easy to assess, whereas criminal proceedings are essentially oral. More generally speaking, civil law has more status and draws more attention than criminal law. An indication of this is that of the 12 civil reviews there are only three criminal law reviews.

3.3.1 Criminal Proceedings

The trial stage can be divided into two parts: the preparatory stage and the public proceedings. During the former, the accused, the witnesses and the experts are summoned to appear in court, at a specific date and time. The actual trial proceedings begin with the case being called. The presiding judge ascertains whether the accused, his defence counsel and the summoned witnesses are present by calling their names. Pursuant to the law, the accused must undergo questioning about his personal circumstances (s. 342 CCP) and the presiding judge must inform him about his rights. Then the public prosecutor briefly states

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37 In court decisions, dissenting opinions are included. The dissenting judge is not obliged to write out his opinion but his name has to be mentioned in the verdict according to the law: Act 2172/93, s. 40.

38 Information supplied by Mr. G. Rigos, judge of the Supreme Court in Athens, and Mr. G. Karampelas of the Court of Appeal in Piraeus, 2 March 1998.
the charges, after which the evidence is taken. The witnesses are ordered to leave the courtroom until they are summoned back individually (s. 350 CCP). The presiding judge directs the examining and authorizes his fellow-judges, the public prosecutor, the counsel of the civil claimant and the defence counsel to ask questions to the witnesses (s. 357 CCP). It is the duty of the presiding judge to protect the witnesses and he may forbid certain questions or interrupt the public prosecutor and the parties when they go too far (s. 333-335 CCP). In return, they may object to the rulings of the presiding judge on the conduct of the trial, in which case the president and the other judges will decide upon the matter. After examination of the witnesses, the reports of the experts are read out and the experts may be summoned to clarify their report. All written evidence included in the legal file must, in principle, be read aloud (s. 364 CCP), in pursuance to the principle of orality. In practice, only inexperienced judges will act literally according to this obligation. Normally, judges will say that reading the entire document is not necessary since they have been read by the court; only the relevant parts can be stressed and read aloud to the court. If followed to the letter of the law, even the simplest trials could last for days. After taking the evidence, the public prosecutor and the other parties have the right to speak. The accused is always entitled to have the last word.

The trial ends with a deliberation in camera on the issue of guilt and the public pronouncement of the sentence. If the accused is found guilty, the public prosecutor and the accused intervene concerning the penalties or other measures the court may impose, including the civil claim of compensation (s. 371 CCP). Since 1993, verdicts of the court include dissenting opinions and also state by whom it was given (Law 2172/93, s. 40). It is up to the dissenting judge whether his opinion is included (in full) in the verdict. In any case, the name of the dissenting magistrate should be stated. In practice, it is very rare for the trial court to read out the grounds of the sentence. Usually only the verdict is announced publicly.

3.4 Enforcement Authorities

The victim is not assisted in any way by the authorities responsible for executing penal sanctions in the collection of compensation.

3.5 Probation and Penitentiary Services

These services deal exclusively with offenders and have no contacts with the victim of crime, nor do they assist or facilitate the payment of compensation to the victim.

3.6 Victim Services

There is no national victim support service in Greece. However, after pressure from women's groups, the Government established a centre for battered women in Athens in 1988. A residential facility for battered women and their children opened in 1993. These centres provide legal advice, psychological counselling, information on social services, and temporary services.

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residence. Battered women can also go to state hospitals and regional health centres, although these facilities are often not adequately staffed to handle such cases properly (see § 3.1, A. 1). Furthermore, there is a Society for victims of terrorism, Thanos Axarlian, and a medical centre for the rehabilitation of torture victims. There are two centres in Athens which offer free psychological help. The public, however, is unaware of it. Since psychology is a rather new subject in Greece, the university has only recently started to teach psychology as a separate subject.

For the position of victims of crime, the Greek Society of Victimology is of particular interest. The Society of Victimology was legally recognized on 1 October, 1987. It has, among its activities, a series of publications on victimology (Thymatologica, 1990) highlighting the needs and interests of victims of crime.

4 SOURCES OF LAW

4.1 General Sources of Law

Formally, the sources of law are legislation and custom (s. 1 Civil Code). Among the formal sources of law, legislation is by far the most important source of law. The Constitution of 1975 is the top of the hierarchy, followed by ordinary enactments and statutes. Custom does not play a primary role, but is used as a means by which the ideas of the legislature can be clarified. The written law does not leave much room for custom. The formal description seems, however, an oversimplification of reality. Other sources of law can be nonetheless quite influential even though they have no formal value. Such sources are judicial decisions and doctrine. The creative role of case law is usually hidden behind the veil of the notion ‘interpretation of the law’ since officially judges cannot create law and courts are not bound by judicial precedent. The non-binding character of legal precedents does not imply that the courts often deviate from prior court decisions. Lower courts, although technically not bound by the decisions of the higher courts, usually conform to them. In this respect case law and particularly that of the Supreme Court plays an important role and may also create customary law. Doctrine also is of great importance in the creation and application of laws. Moreover, court decisions often cite the names of legal scholars, whose opinions are taken into consideration. Doctrine appears in the form of commentaries, manuals, articles and comments on court decisions as published in legal periodicals.

4.2 Sources of Criminal Law and Procedure

The Constitution of June 1975 contains several provisions concerning criminal law and procedure. The present Constitution was adopted by a specially empowered Parliament,

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43 Information supplied by Mrs. E. Andreou, psychologist, Athens, 10 March 1998.
with a year after the fall of a seven-year military dictatorship (1967-1974). It contains a mixture of traditional and modern provisions, the latter base somewhat on the experiences of the military rule. It emphasises the judicial protection of the individual and is closer to the daily realities of the different authorities. Finally, it regulates the jurisdiction of the courts (s. 96-97 Const.).

The first Greek Penal Code (1834) was the work of a German scholar, Von Maurer, who was member of a council for King Otto, also of German origin. The 1834 Penal Code was written in two official languages, German and Greek. It introduced the trichotomy of criminal offences that still exists today: infractions (or petty offences), misdemeanours and felonies. In 1911 a committee was set up to draft a new Code. The draft text was revised several times; the last revision took place in 1948. The current Penal Code came into force on the 1st of January 1951. It still has a close connection with the German Penal Code and with German criminal law doctrine, despite the fact that it is a brand new document and not an updated version of the former. There are, however, also influences from Italian and French legal doctrine. The 1951 Penal Code follows a bifurcated sanction system, which consists of main and supplementary penalties and security measures. The overwhelming majority of sentences impose a short custodial sentence up to three months (73.7%).

The main source of criminal procedural law is the Code of Criminal Procedure. The first Greek Code of Criminal Procedure (1834) was heavily influenced by the French Code (Code d'instruction criminelle) of 1808. The current Code from 1951 was influenced by the French and Italian legal traditions, and by the German Code of Criminal Procedure. Another important source of procedural criminal law is the Act on the Judiciary.

4.3 Specific Victim-Oriented Sources of Law and Guidelines

Most provisions relevant to victims can be found in the Penal Code and the Code of Criminal Procedure. Both Codes safeguard the fundamental rights of the offender and the victim, as stated in the Constitution. According to Psarouda-Benaki, Greek criminal law functions as a set of rules for the person harmed by a punishable act.

There is no Act on free legal aid, either for the accused or the victim. Nevertheless, it is possible to get free legal assistance which is is open to the very poor in Greece, who are unable to afford a lawyer either in a civil or a criminal case. It consists of a procedure in civil court, where one may ask the court to appoint a lawyer. The civil court bases its decision on documents which prove one's poverty (by means of a declaration by the mayor and a receipt from the mayor of the municipality).
and the fiscal office). If the court allows the request, it will send its decision to the Bar Association. The President of the Bar Association is then obliged to appoint a lawyer to represent the applicant in court (ss. 194-204 Code of civil procedure).\textsuperscript{52} Unfortunately, this is, in reality, a mere theoretical option, since, without a lawyer, most people do not know this option exists. The uneducated and poor, and particularly immigrants, do not know how to apply for it nor what the requirement are. Secondly, the procedure is very difficult and bureaucratic. Moreover it usually requires some degree of perseverance.\textsuperscript{53}

Finally, a State Fund for victims of terrorism exists as well as a victim support service for this specific group of victims (see § 3.6).

5 Roles of the Victim in the Criminal Justice System

Pursuant to Greek law, victims of crime have an important position in the criminal justice system. Victims' rights are legally recognized including the right to participate actively in the criminal procedure. The victim has the right to claim material and immaterial compensation for damages caused by a crime. In practice, however, these rights are rather theoretical.

5.1 Reporting the Offence

Crimes can be reported to the authorities by the victim and any interested individual. Victims can report both to the police and the prosecution service. The report (\textit{minisstis}) can be submitted orally or in writing. Victims usually go to the police to report a crime if it has been committed recently, or if it involves a crime in which police expertise is needed. For instance, after a theft or breaking and entering, the police can take fingerprints or secure other evidence. In these cases, a public prosecutor would also refer the case back to the police. However if the crime has happened some time ago and/or is very complicated, e.g., fraud or embezzlement, victims will go directly to the public prosecutor.\textsuperscript{54} Lawyers also often advise their clients to go directly to the public prosecutor if a serious crime has been committed.\textsuperscript{55} It is estimated that between 50 and 70\% of all cases are reported directly to the public prosecutor.

5.2 Complainant

A person who is directly prejudiced by an offence may submit a complaint to the public prosecutor and request that public prosecution of the crime will take place (s. 46 CCP). This request has to be made by means of a document, called the criminal complaint (\textit{eglissis}). The formal complaint of the victim is required in certain specific cases as a prerequisite to public action. The cases which can only be prosecuted after a formal complaint by the victim are

\textsuperscript{52} Information supplied by Mr. B. Dervenjas, public prosecutor at the court of appeal in Athens, 6 March 1998.

\textsuperscript{53} Information supplied by Mrs. E. Panagotaki, judge at the court of appeal in Athens, and Mr. G. Rigos, judge at the Supreme Court, Athens, 2 and 6 March 1998.

\textsuperscript{54} Information supplied by Mr. P. Nikoloudis, public prosecutor at the court of appeal in Athens, 3 March 1998.

\textsuperscript{55} Information supplied by Mr. Natsinas, lawyer, Athens, 9 March 1998.
stipulated by law. They fall into two categories. The first are minor crimes which are not considered important enough to justify public action. These include: theft between close relatives, light wounds, slander and minor fraud. The second category includes crimes in which publicity may do more harm to the victim than the accused, e.g. defamation or sexual offences. In these cases, the legislature wishes to make sure that the victim wants to start criminal proceedings. This prerequisite is so strong that even after a complaint has been filed and the trial has started, the victim retains the right to waive his complaint and to discontinue the proceedings. If the public prosecutor decides not to prosecute, the complainant can only present his claim in civil court. He is not allowed to start a private prosecution against the suspect. He can, however, oppose the decision of the public prosecutor by filing a formal complaint with the public prosecutor of the court of appeal (see § 7.1, B.7)

5.3 Civil Claimant

Pursuant to the law, the victim has the right to bring a civil action into criminal proceedings as a civil claimant (referred to as civil claimant – politikos enagon). The victim is entitled to do this if he has a claim according to civil law. According to s. 914 Civil Code (CC), he who has caused damage to another by his illegal and imputable behaviour is obliged to indemnify the latter. The civil claimant may claim both material and immaterial damages in criminal proceedings, to the same extent as in civil court (s. 932 CC). In order to become a civil claimant, the victim has to make a formal statement saying that he wants to act as a civil claimant within the criminal process. This statement can be made before or during the hearing in first instance (s. 82 CCP), and up to the point of taking evidence from the witnesses (s. 63 CCP). The victim will need to justify wanting to act as a civil claimant during the criminal proceedings, otherwise other parties may ask that his request will be dismissed (s. 85 CCP). Every natural or legal person can become a civil claimant, if he has suffered direct damages as a result of the offence. Therefore, surviving relatives of a victim who died as a result of crime may claim damages for pain and suffering (s. 63 CCP).

As a civil claimant, the victim generally has the same rights as the accused (s. 108 CCP). This is usually considered a great advantage for the victim. In the pre-trial stage, the victim has the right to look at the file, to be present with his own counsel, to be heard, and to appeal the decisions of the judicial council. At the trial stage, the civil claimant may, inter alia, summon witnesses, question all the witnesses and comment on their testimony, ask the defendant questions through the presiding judge, argue before the court on the guilt of the accused, and, with respect to his claim for compensation, he has a limited right to appeal the court’s decision. In practice, the right of the civil claimant to explain his opinion on the evidence collected is very valuable. He may, for instance, tell the court that he feels a particular statements is false or inaccurate (s. 104-2 CCP).

Besides the obvious advantages of acting as a civil claimant there is, however, one big drawback: he is legally obliged to have a lawyer. The accused, on the other hand, is under no legal obligation to appoint a defence counsel. His interests will be safeguarded by the

presiding judge.\textsuperscript{57} If the civil claimant joins the criminal proceedings before the trial, he has to appoint a lawyer and give the latter’s name to the court. If it is done during the trial, he will have to bring his own lawyer. In practice, most victims need a lawyer which is their only source of information and the only one who will represent their interests. There are only two instances in which the civil claim of the victim may be brought by the public prosecutor: if the victim is mentally disabled or if the State is the victim of a crime (s. 70 CCP). In all other cases, the claim for civil damages does not concern the public prosecutor. There are quite a few victims to whom the legal obligation of bringing a lawyer to court is an actual hindrance to justice. They cannot ask for damages in criminal or civil proceedings because they do not have the means to advance the legal fees of their advocate. There is virtually no free legal aid.\textsuperscript{58}

In practice, the participation of the victims in criminal proceedings as civil claimants is very common (see § 7, introduction). However, Greek criminal courts very often make use of their right, according to civil law, to refer the claim for material damages to civil court (s. 65-2 CCP). The claim for moral damages, will usually be granted to the victim if it does not require special evidence and examination by the court but is made by a rough estimate and following certain routine practices.\textsuperscript{59} Therefore victims only claim a symbolic sum which is not difficult to award. They have to ask for some money, even if it is only symbolic because of the legal requirement that the victim must have a justification for becoming a civil claimant. In criminal court, victims hardly ever claim more than the minimum amount of 15,000 Drachms (EUR 45.7) for moral damages. Judges admit that if they claimed material damages they would most probably dismiss it because they feel they have no time to examine the civil claim. This is collaborated by criminal lawyers, who in return claim that it would be stupid to urge their victims to claim all damages in criminal court, and thus pay the legal fee which is determined by the amount of compensation claimed, when the court will certainly dismiss the claim for material damages (see § 7.2, D.10).

5.4 Private Prosecutor

There is no private prosecution in current Greek criminal law. The 1834 Code of Criminal Procedure provided for the initiation of criminal proceedings by the victim as a private prosecutor. This, however, was abolished in 1920.\textsuperscript{60} Now the victim can no longer bring accusations against the offender without the assistance of a public prosecutor willing to start public action. The 1951 Code of Criminal Procedure introduced a monopoly of prosecution by the State. Hence, the prosecution service is competent to prosecute all punishable acts, except for petty crime which can be handled directly by a police officer (s. 27-1 CCP, see § 3.2).

\textsuperscript{57} This rule was established because there is no virtually no free legal aid in Greece and not all suspects can afford to pay for a defence counsel. Only in felony cases, the accused have a free defence counsel. If the accused has no lawyer, the court protects his interests.

\textsuperscript{58} The accused is not obliged to bring a lawyer. His interests are then safeguarded by the court. Only in felony cases, will the court appoint a lawyer who has to represent him without being paid (pro bono).

\textsuperscript{59} D. Spinellis (1993), p. 1147.

\textsuperscript{60} Law 2236 of 1920. See D. Spinellis (1997), p. 361.
5.5 Witness

If the victim does not want to participate as a civil claimant, he will usually will be obliged to come to court as a witness. The witness is the object of examination, viewing or expertise, during the trial, particularly if the crime has caused bodily injury or in rape cases. According to the law, the public prosecutor must summon all important witnesses to the trial (s. 327 CCP).

Anyone can assume the role of a witness, with the exception of clergymen, advocates, medical doctors and civil servants regarding facts they have learned in their religious, professional or official capacity. All witnesses take an oath in the courtroom, before being invited to give testimony (s. 210-219 CCP). However, the complaining or victim-witness and minors are not obliged to take an oath (s. 221 CCP). The husband or wife of the accused, as well as other close relatives are entitled to refuse to testify (s. 222 CCP). The witness can testify freely, without being interrupted by the parties. This means that he will be asked by the president of the court to give an account of what he knows about the case. It has to be noted that witnesses only give testimony about the facts. They are not asked to express their personal opinion, unless if is closely related to the facts. At the end of their testimony, the witnesses are invited to answer questions from the court, the public prosecutor or the counsel for the defence (s. 223 CCP).

The victim-witness and the accused may appoint their own technical advisors (s. 204). Technical advisors function as technical advocates and are entitled to submit written remarks to the public prosecutor and the court, prior to the inquiry.

In practice, victims always have to give evidence in court, mainly because of the principle of direct testimony in criminal proceedings, which is closely linked to the principle of orality. The principle of direct testimony does not apply to the entire trial proceedings but only to that part in which the witnesses and experts are heard. The second factor is that the victim is the primary witness and often the only direct one. According to judges, this is always required by the court even if the victim has been questioned and heard during the pre-trial stage because it is the ultimate test of the credibility of the witness. Only a small category of victims do not have to give evidence in court. According to the law, only victims who are unable to act as witnesses because of death, old age, serious illness, or any other serious impediment, and those victims who reside abroad, are exempt from giving evidence in court (s. 365-1 CCP).

The main problem is that most witnesses who come to court without a lawyer are unaware of their rights. The witness is not obliged to have a lawyer, however, without one he remains uninformed and ignorant of his rights during the proceedings. According to estimates of legal practitioners, about 70% of victim-witnesses bring a lawyer with them to court. Lawyers are usually the only source of information for the victim since there is no national victim support service (see § 6.1, A.2 and § 3.6). Consequently, the victim-witnesses who come without a lawyer do not know that they can ask the court to have the case tried behind closed doors. Nor do they know they can appoint their own technical advisors, which may be relevant in complicated cases.

62 Information supplied by Mr. Karampelas, judge at the court in Piraeus, 7 March 1998.
6 THE VICTIM AND INFORMATION

There are no laws or regulations which specify that the victim is to be informed by the criminal justice authorities. As a rule, he is therefore completely dependent on the willingness of the authorities to give him certain types of information.

6.1 Informing the Victim

(A. 2) The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation.

The police do not inform victims about any of the above-mentioned subjects. At best, the victim is advised to get a lawyer. In general, the police do not refer to services because they are few and far between and situated only in Athens (see § 3.6). In Athens, however, the police are unaware of their existence. The exception to this rule is the group of victims with bodily injuries or otherwise in need of medical care. They are sent or taken to a medical doctor, the hospital or to the legal-medical service to secure evidence.

(A. 3) The victim should be able to obtain information on the outcome of the police investigation

During the pre-trial stage, the proceedings are governed by the secrecy principle. The police, therefore, cannot make any statements on the outcome of their investigation. The victim who wants to obtain information will be referred to the public prosecutor handling the case. In practice, the victim is hindered by the fact that no copies of the report or complaint are given to him. Reports are assigned a number and written down by hand in a book; there is no computerised system, and it is time consuming to get a copy. Victims who request a copy, which is quite rare, have to wait two or three days before they can come to the station and pick it up. If, after some time, the victim would like to have a copy of the report, he has to be able to give the date of the report in order to find it in the book. The number of the report is necessary if the victim wants to find out what happened in their case. Consequently, victims are hardly ever able to get information on the outcome of the police investigation.

(B. 6) The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.

After the pre-trial investigation, the public prosecutor will inform the civil claimant of the

63 Information supplied by police officers in the districts of Omonia and Filothei (Athens), and with the Thessalonika police, central police station.
final decision. Moreover, most examining magistrates\(^{64}\) will also inform the victim about what is (likely) to happen in his case. They cannot always tell exactly whether the case will go to trial or not since in many cases this will be decided by the judicial council.\(^{65}\) If the case does go to court, the victim will usually be summoned to appear as a witness.\(^{66}\)

With respect of the right to be informed of the final decision, it makes a big difference whether a victim assumes the role of complainant, witness or a civil claimant. The complainant has a limited right to be informed of the final decision, despite the fact that his complaint is necessary to set the criminal justice system in motion. Only if the public prosecutor rejects his formal complaint, does the complainant have to be informed of this decision (s. 47-1 CCP). As a rule, the public prosecutor will do this because the complainant has the legal right to oppose the decision (see § 7.1, B.7). For all other types of crime, the public prosecutor has no part in the final decision to prosecute. This is the task of the judicial council. Its decision to prosecute will be communicated to the victim by the public prosecutor, usually in the form of a summons to appear in court. The final decision to dismiss the case is not communicated to the witness, only to the civil claimant. As a witness, the victim will not be directly informed of the decision to drop the case. If the case is to be tried in court, he will receive a summons to testify. The summons is a very sure way of informing victim-witnesses about the final decision to prosecute and the date of the trial since they are always called to appear in court. The civil claimant, on the other hand, has, besides the formal right to receive first-hand information about the final decision, the right to other types of information (see below, D.9).

\[\text{(D. 9) The victim should be informed of:} \]
\[\text{- the date and the place of a hearing concerning;} \]
\[\text{- his opportunities of obtaining restitution and compensation within the criminal} \]
\[\text{justice process, legal assistance and advice;} \]
\[\text{- how he can find out the outcome of the case.} \]

The public prosecutor informs the civil claimant of the date, place and time of the hearing. The civil claimant is a party to the proceedings and has the right to be informed. Since the victim as a rule has to testify in court, he will be summoned to appear. In the summons, the date and the place of the hearing are indicated.

With respect to obtaining compensation, legal assistance or advice, there is no obligation to inform the victim nor is this done in practice. The police will occasionally tell a victim it is better to have a lawyer. The lawyer is quite important to victims since he is the only source of information the victim on these subjects.

The outcome of the case will only be communicated to the civil claimant, who has been present during the trial. If the civil claimant was absent, the public prosecutor does not have the legal obligation to inform him. But of course, the civil claimant can ask his lawyer or go to the prosecution service and ask for the results. The witness is never informed of the

\(^{64}\) For instance, in the Athens first instance court there are 38 examining magistrates and only one is known never to inform the victim. Information supplied by Mrs. Malakassi and Mr. Moratoglou, examining magistrates at the first instance court in Athens, 11 and 13 March 1998.

\(^{65}\) Information supplied by Mr. Moratoglou, examining magistrate at the first instance court in Athens, 13 March 1998.

\(^{66}\) Information supplied by Mrs. Malakassi, 15th examining magistrate at the first instance court in Athens, 11 March 1998.
outcome of the case. Unless the victim asks someone where and how he can find out what happened, chances are that he will never know or will read about the case in the press.⁶⁷

6.2 Information About the Victim

(A. 4) In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim.

The police give a description of the injuries and losses of the victim in their case report, simply because it is part of the evidence. If the victim has suffered bodily injury, a medical report is required and will be included in the file. However, the information on the injuries and damages of the victim are not included with the objective of safeguarding the victim's right to be compensated for his moral and material damages within the criminal process (see § 7).

(D. 12) All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account:

- the victim's need for compensation;
- any compensation or restitution made by the offender or any genuine effort to that end.

The criminal court never grants compensation to the extent that the victim is actually financially compensated for his losses. It will only adjudicate the moral claim for damages, which means that the victim is granted 15,000 Drachms (EUR 45,7), a symbolic sum. If the victim wants to claim material damages and/or a higher sum for moral damages, he must go to civil court (see § 7, D.10).

With respect to any compensation or restitution made by the offender before the trial, the Penal Code includes a provision which allows the court to mitigate the sentence (s. 84 PC). This provision states that the court may take into account whether the offender demonstrated any genuine regret and sought to nullify or mitigate the effects of his act. In practice, it makes little difference whether an offender displays regret or has paid compensation. If the offender tells the court he regrets his actions and the court finds it credible, it will give a lighter sentence. If he can prove he already restituted stolen goods or paid a certain amount of compensation, this will be appreciated by the court. However, even if he has paid full compensation, he will usually not be acquitted by the court.⁶⁸

7 THE VICTIM AND COMPENSATION

The principle of compensation, not only by the offender but also from the State, has been recognised in Greek society and enactments from an early date. The prevention of a blood

⁶⁷ Information supplied by Mr. G. Karampelas, judge at the court of appeal in Piraeus, 7 March 1998.

⁶⁸ Information supplied by Mr. G. Karampelas, judge at the court of appeal in Piraeus, 7 March 1998.
feud or vendetta by paying a certain amount of money to the victim’s family was a common way of preventing further bloodshed. This institution is clearly mentioned in Homer’s *Iliad* (books 3 and 9). In addition, in ancient Greek the word ‘punishment’ (*poini*) means to pay a sum of money to the victim’s family, to compensate them for their loss.\(^6^9\) In modern times, compensation by the offender is awarded only in a limited number of cases by the criminal courts. Nonetheless, victims of crime often present claims for damages in criminal court, not only because they seek compensation but also because the idea that the court awarding them damages – even if only a symbolic sum – may give them some moral satisfaction.\(^7^0\) According to Spinellis, it is generally accepted that the civil claimant in the criminal proceedings pursues not only compensation, but also conviction of the offender. In this way, the participation of the victim as a civil claimant contributes to the restoration of social peace. The civil action of the victim has a mixed character, it is not of a purely civil nature because it serves also a penal function.\(^7^1\)

Although there are no national statistics on the subject, the participation of the victim as a civil claimant in the criminal proceedings is very common.\(^7^2\) Legal practitioners estimate that in more than 50% of the cases a civil claim for damages is presented in criminal court. Some even suggest that the victim acts as civil claimant about 70% of the time.

Compensation involves generally the payment of money to the civil claimant (see § 7.1, D.10). Non-pecuniary compensation sometimes takes place in cases of libel, slander, and defamation. The defendant may give an official declaration before the court, in which he admits his crime and publicly apologises to the victim. By contrast, other forms of reparation are unusual.

Although mediation does not exist officially, there are, of course, cases in which a settlement is agreed upon before the trial or even before the pre-trial investigation has started. Such settlements between victim and offender concern mostly petty crime, committed by negligence. Often the insurance companies take the initiative to settle the case outside court, and pay compensation to the victim.\(^7^3\) However, prior to the trial no one can take the decision to dismiss the case after a payment of damages. Therefore, the case will still have to go to court. But in cases of petty crime, the court will normally be willing to acquit the offender if all parties involved indicate that they are satisfied with the arrangement. In all other cases, payments of compensation will have only a mitigating effect (see § 7.2, D. 13).

It is important to stress that more and more people have property insurance. There is, however, still a portion of the population which is still entirely dependant on compensation received from the offender to cover the damages.\(^7^4\) State compensation for victims of violent

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\(^6^9\) The idea of State compensation was even recognized in ancient times and can be found in the Code of Hammurabi (2000 BC), which states that in case of a homicide ‘the town and the Leader will pay an amount of money to the victim’s relatives’. In modern times, however, the State has not undertaken action to ensure compensation for victims of violent crime.


\(^7^1\) See D. Spinellis (1997), p. 363.

\(^7^2\) D. Spinellis (1993), p. 1147.

\(^7^3\) D. Spinellis (1993), p. 1147.

\(^7^4\) There are no statistics on this subject, however, the insurance industry is currently a flourishing and booming business.
crime is not yet available. The Convention has been signed but not ratified because the State lacks the money to set up a Fund.  

7.1 The Expediency Principle and Compensation

(B. 5) A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender.

In general, the public prosecutor has no power to take a discretionary decision. Pursuant to the legality principle, he is obliged to prosecute every punishable act that has been brought to his attention (ss. 36, 43 CCP) and has to bring charges against the suspect and even to the still unknown offender. This sets the criminal proceedings in motion, and the only way to stop them is by a public decision by the criminal court or a decision by the judicial council that either acquits or decides to send the accused to court (s. 313 CCP). The judicial council is a pre-trial court (see § 3.3) which examines the evidence in a case in order to decide whether the case should go to trial or be dropped. The decision of the judicial council is only based on the feasibility of a trial based on the evidence collected. The question of compensation of the victim as such is not taken into consideration.

The legislature created, however, exceptions to the rule of mandatory prosecution. First, the public prosecutor may file the case if the initiative to start public action is with the police or any other authority and he feels there is not enough evidence. He then files the case and reports his decision to the court of appeal. Second, the public prosecutor may dismiss the case if the report or complaint by the victim is not based on the law, if it is too vague, or if he reached the conviction that the accusation is false. In such cases, the public prosecutor must send his reasoned decision to the victim who reported the case (see § 7.1, B5). Third, he may dismiss a case in which public action can no longer be taken, for instance because the offender has died. In practice, with respect to complainant offences, the public prosecutor who feels there is no case against the suspect, will contact the victim. If the victim agrees to dismiss the case, it ends then and there. If the victim does not agree, he has the right to oppose the decision (see B.7).

A special circumstance arises in rape cases. Under Greek criminal law, rape is not a complainant offence and the public prosecutor can and must act even if the victim does not agree. However, in order to avoid secondary victimization of the victim, he has the right to tell the court that the trial and the publicity will cause suffering and that he wants the case to stop. Here, the victim has been give the unique right to oppose public prosecution. The legislature created this rule to protect the rape victim. However, in my opinion, it would be better to protect the interests of the victim in other ways, for instance, by creating rules to protect the victim-witness, or to have the trial behind closed doors unless the victim wants

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75 Information supplied by Mr. Spiropoulos, Counsellor for the Minister of Justice, Athens, 12 March 1998.


77 The judicial council is a panel of judges who reach a decision in camera. Their decision must be reasoned, and legal remedies are possible, both to the judicial council in appeal or the Supreme Court.

78 Information supplied by Mr. P. Nikoloudis, public prosecutor at the court of appeal in Athens, 3 March 1998.
it public. Now, the victim who is afraid of the questioning or the publicity (see § 6.3) has only one option, which has the unwanted effect of letting the offender go free.

(B. 7) The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to instigate private proceedings.

The public prosecutor is obliged to initiate criminal proceedings, according to the principle of mandatory prosecution. The decision not to prosecute a case is not taken by the public prosecutor but by the judicial council (see § 3.3). However, the law stipulates certain exceptions to the rule of mandatory prosecution (see B.5). In these cases the public prosecutor may take the discretionary decision to dismiss the victim’s report formally by a written order. Pursuant to the law, this order is served upon the victim (s. 47-1 CCP). If the complaint is discarded by the public prosecutor, the victim has the right ask for a review of the decision. He may lodge an appeal against the dismissal with the public prosecutor of the court of appeal within 15 days. If the latter agrees with the victim and accepts the grounds of the appeal, he will order the public prosecutor (of the first instance court) to prosecute the case (s. 48 CCP). After the decision of the judicial council not to prosecute the case, the victim cannot ask for a review. The reason is that the procedure before the judicial council is, in itself, already a sort of review. All the evidence is examined by these pre-trial judges after which they give their binding advise regarding prosecution.

7.2 The Court and Compensation

Early in the history of the modern Greek legal system, the legislature recognised the interests of victims and allowed the victim to present his civil claim for compensation within criminal proceedings. In the Explanatory Memorandum of the 1932 Draft of the Code of Criminal Procedure, for instance, it was stated that the State must protect, at least to the same extent as the defendant, the citizen who has suffered from the offender, in this way restoring the legal order. And according to the 1949 Memorandum of the final draft, the legislature wished to facilitate satisfaction of the legal claims of the person suffering damages as a result of the offence, considering that the procedure before the civil courts is so lengthy and costly. The legislature wished to combine both actions, and reduce legal costs, because they are based on the same facts. It was self-evident that if the civil claim for compensation was too complicated, the criminal court should have the power to refrain from its adjudication and refer the claim to the competent civil court. It is, however, common practice to refer civil claims for material damages to civil court.

(D. 10) It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.

The Code of Criminal Procedure allows the possibility of the victim to present civil damages, both of material and immaterial nature, during the criminal trial and obtain compensation from the offender (see ss. 63-70 CCP). There are, however, some practical impediments to the legislature’s starting point. It is an established rule in everyday court practice to award

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the victim, in his role as civil claimant, only moral damages and to abstain from adjudicating the material damages and refer this part of the damages to civil court. The standard reasoning of the criminal court is that the claim is not 'clear'. According to Alexiadis, no exceptions of these tactics are known. As far as material damages are concerned, the civil claim for damages is always passed on to the civil court. This practice is possible because the law states that the claim can be referred to civil court whenever it needs additional evidence ("the claim is not clarified") and/or if the claim amounts to more than 15,000 Drachms (EUR 45,7, s. 65-2.2 CCP). Concerning moral damages, the victim can claim compensation in criminal court only if he limits the claim to a very low amount, provided for in the law. This usually means that the victim claims 15,000 Drachms as compensation for his moral damages. Often, however, the offender is the main or only source of compensation for the victim, unless it concerns a traffic accident or the theft of a car or motorbike where the damages are generally covered by mandatory insurance. But even if the court grants damages to the victim, implementation of the rule that damages caused by a punishable act should be compensated may be overruled by the public objective of criminal proceedings or by court practice. Regarding the former, the law states that the rehabilitation and re-socialisation of the offender and his reintegration into society may overrule the obligation to pay civil damages to the victim (s. 1 Correctional Code). Apart from this legal exception, court practice establishes a far more important reason for not granting damages in the criminal process. In theory the court can award both material and moral damages which are proven. In fact, they hardly ever do, not even with for material damages.

There are apparently four reasons why compensation only plays a marginal role in the criminal process. First, the victim does not ask for material damages. In general, lawyers will advise their clients to ask for compensation of material damages in civil court where supposedly higher sums are awarded for both material and moral damages. This is considered a clever strategy because criminal proceedings are essentially oral and papers are rarely used. In order to prove material damages, on the other hand, the victim needs a lot of paperwork which must be examined by the court. This is supposedly difficult with oral proceedings. Secondly, as a rule, the victim only claims a the symbolic sum (15,000 Drachms, EUR 45,7) to justify his presence as a civil claimant, and because lawyers advise them to because of the legal fees. Pursuant to the law, the court can only adjudicate those damages that the victim explicitly asks for during the criminal proceedings (s. 106 Code of civil procedure). Consequently, if the victim only claims a small sum for moral damages, the court cannot grant more. Third, it is believed that it would be too time consuming in a criminal trial to establish and prove material damages. Everyone feels that there is simply no time to consider the civil damages of the victim because of the workload. In felony court, judges have to deal with about 20 cases a day. With respect to misdemeanours, there are usually about 30 or 40 cases to be tried. In the police courts, where petty offences are tried,

81 Pursuant to Greek law, a third person who is responsible under civil law may also be sentenced to pay damages to the victim.
82 S. 914 of the Greek Civil Code.
83 The court fee is only 0.6% of the amount of money claimed as compensation. In addition the legal fee of the lawyer has to be paid, which allows a lawyer to appear in court. The latter sum amounts to 50,000 Drachmas (EUR 152,33). The lawyers' reasoning is that since they will go to civil court anyway to claim material damages, why make the client pay more than the minimum in court fees.
at least 100 cases a day have to be heard. Fourthly, the established court practice seems to be a profitable solution to both lawyers and magistrates. Counsellors earn more money if they represent their clients in both criminal and civil procedures, whereas judges do not have to be bothered with claims for material damages or for high amounts of moral damages.  

Finally, the established practice may be upheld by the fact that legal practitioners learn their trade in practice. University teachings are very theoretical and not much attention is given to the opportunity of to claim civil damages in criminal court. Training lawyers and magistrates is not well established (see § 3 introduction and § 3.3). As a result, the trade is learned from colleagues. If young lawyers only see that their patrons claim civil damages in civil court, chances are that they will imitate this procedure. The same applies to young judges: if they notice that judges are not willing to look into the matter of compensation when they are trying criminal cases, this is likely to become customary behaviour. Judges all have the expertise to deal with civil law and the assessment of civil damages: they all try cases in both criminal and civil court (see § 3.3).

From the above, it is clear that the criminal court rarely deals with the question of compensating the victim for material damages and only awards symbolic sums as moral compensation. The only other way in which the victim can pursue his claim for compensation is to present it in civil court. Nonetheless, most legal practitioners also feel that the civil route is not open to every victim and can, in many cases, be considered a mere theoretical option since the victim will have invested time and money without a guarantee of compensation by the offender. In general, it takes a long time to get an irreversible decision on the damages. The victim will have to pay a lawyer to represent him in civil court, which is obligatory and expensive, although, lawyers are sometimes willing to work for a percentage of the amount of civil damages the victim will obtain. The common percentage is about 20%. Only in cases of property crime when an insurance company is involved, do victims usually go to civil court to get compensation and often with success. Yet, very few people actually have property insurance. This makes compensation from the offender all the more necessary. In reality, therefore, the civil courts are not accessible to many victims because the outcome is uncertain since the civil courts are, strictly legally speaking, not bound by decisions of the criminal court, and the victim has to confront the offender for a second time. It is hardly surprising that in many cases, the victim does not use his right to claim compensation in civil court. Civil proceedings also tend to take a long time and represent quite a financial burden.

It is fair to conclude that the recognition of the right of the victim to claim compensation in criminal court is rather theoretical and symbolic, despite the good intentions of the

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85 As far as theft of cars and motorbikes are concerned, or if the damages were inflicted by a traffic accident, the situation is quite different because of the obligatory insurances. The report rate is almost a 100% because of the requirement of all insurance companies to report a crime to the authorities.

86 It usually takes one year before the case can be presented in court. As a rule, the first hearing is followed by a postponement. After two years the case may be decided upon, but it will normally take another three or four months before the motives of the sentence are published. When an appeal is lodged by one of the parties, the case may take five or six years. Information supplied by Professor Courakis, University of Athens, 10 March 1998.
The legislature allows one of the three options mentioned in D.11: compensation can only be awarded in addition to a penal sanction. Compensation is not a sanction because it is purely based on civil law, nor can it substitute for a penal sanction. The civil claim for compensation is accessory to the criminal proceedings. The criminal court only has jurisdiction in civil matters if the civil claim is joined to the criminal proceedings. The court cannot grant civil damages to the civil claimant if, for whatever reason, the accused is acquitted (s. 65-1 CCP). On the other hand, if the accused has been found guilty, the criminal court is obliged to examine the civil claim and decide upon it (s. 65-2 CCP). In practice, nevertheless, the court will usually refrain from adjudicating the claim for material damages and refer it to the civil courts. As a rule, it will only grant a very low and symbolic sum for moral damages (see supra § 7.2, D.10).

(D. 13) In cases where the possibilities open to a court include attaching financial conditions to the award of a deferred or suspended sentence, of a probation order or any other measure, great importance should be given — among these conditions — to compensation by the offender to the victim.

The Penal Code offers the court the opportunity to attach financial conditions to a suspended sentence. The decision to grant a suspension of sentence is based on the circumstance of the crime, the conduct of the offender, particularly any demonstration of regret and willingness to nullify the effects of the crime (s. 100-1 PC). The court may order a suspension of the sentence on the condition that the offender has paid 'judicial fees and any restitution and monetary satisfaction' to the victim (s. 100-3 PC). The court may determine a time in which these conditions have to be fulfilled. According to judges, however, a decision to suspend the sentence will be almost exclusively based on the circumstances under which the crime was committed, the motives for the crime, and the character and the conduct of the offender. Only in rare cases, does compensation actually play a role.88

87 Due to an amendment, the court can no longer attach financial conditions to parole. Under the former s.106 PC, parole could only be granted if, during the period of punishment, the offender behaved well and fulfilled his judicially determined duties to the victim as well as he was able [...]. I have been unable to find out why the law was changed and this provision abolished.

88 Information supplied by Mr. G. Karampelas, judge of the court of appeal in Piraeus, 7 March 1998.
7.3 Enforcement of Compensation

(E. 14) If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.

The legislature has not provided for compensation in the form of a penal sanction. Nevertheless, the Penal Code includes a provision which gives priority to compensation over fines and other pecuniary penalties if the offender's income or property is insufficient to satisfy both obligations (s. 77 PC). According to Courakis, this provision is not often applied in practice. If an offender has been sentenced to pay a fine and (moral) compensation, he is immediately taken by the police officer to the public cashier at the court. If there is not enough money left to pay the victim, this is not taken into consideration. Without payment of the fine, he will be taken into custody. Offenders would therefore rather pay the fine than the damages of the victim. Furthermore, the legislature created a special rule with respect to those cases in which bail has been paid. The amount of money set for bail has to be returned after a conviction of an offender. However, this will not be done before the sum awarded to the victim is deducted from it. Even if bail has been granted by a third party, compensation is deducted before it is returned (s. 303-2 CCP). Finally, for the enforcement of damages awarded by the criminal court, arrest of the offender may be ordered and executed by the public prosecutor (s. 570 CCP).

In practice, compensation granted by the criminal court is purely symbolic (see § 7.2). Therefore the fact that victims do not receive any help in collecting the money, usually 15,000 Drachmas (EUR 45,7), awarded to him by the court is not that important. If the amount of compensation is more substantial, which is normally the case after a civil suit, the lawyer will help the victim get the damages. In most cases, the lawyer's fee will have to be paid out of the amount, or he will get a percentage.

8 TREATMENT AND PROTECTION

8.1 Victim-Awareness Training

Judiciary

In the early 1990s, the school for judges and public prosecutors was opened in Thessaloniki. Here trainees, who passed an entrance exam, follow a 1,5 to 3-years program. The length varies according to the need for judges and prosecutors. The plan was to give them three years training, but now the demand for judges is so high that they limited the course to one and a half years.

Police

Greek police officers are given both initial and advanced training, and opportunities for more academic studies at the Police Academy, which consists of the College for police

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89 Information supplied by Professor Courakis of the University of Athens, 10 March 1998.
91 Information supplied by Mr. G. Rigos, judge of the Supreme Court, Athens, 2 March 1998.
constables, the College for officers and the advanced studies College. Male and female students are accepted if they are between the ages of 18 and 26 and have completed their secondary education. The duration of the training of police constables is two years and includes basic police studies, law and sociology, as well as training in weapon techniques, shooting, physical education and self-defence. At the officers college, training takes 4 years and is equivalent to a university training. Also, the entrance requirement are the same as for the university. Graduates of the college for constables under 35 and university graduates under 28 can take the competitive entrance exam. Law, criminology and psychology are taught on a university level, as well as police operations, public relations, languages and other more practical subjects. The teachers are usually ordinary university professors, teachers from the higher education institutions, experienced police officers, and sometimes magistrates. Furthermore, specialists give lectures on topics of general interest and visits and study trips are organized. The college for advanced studies offers training for police officers of all ranks, which are necessary for promotion to a higher rank. The duration of these courses are six hours a day for six to eight months. The college also provides for short courses on specific topics (such as drug-related crimes, public relations or public safety) and language courses at various levels. Finally, there is an instructors school attached to the advanced studies college.

(A. 1) Police should be trained to deal with victims in a sympathetic, constructive and reassuring manner.

In the police curriculum, no specific courses are given on the best ways to deal with victims of crime. The training of lower rank officers does not cover the issue. At the officers college, some attention is given to victims within the framework of criminology, and occasionally, seminars are organized to address issues regarding certain types of victimization, such as sexual exploitation. However, they receive no training on how to treat victims in a sympathetic, reassuring and constructive manner. This is especially worrying in cases involving sexual offences and violence against women, in which a high degree of sensitivity is needed. The incidence of (sexual) violence against women and domestic violence which is actually reported to the police is low. For instance, only 25% of the victims of domestic violence report the abuse. Athens' Equality Secretariat, however, which operates the only shelter for battered women, believes that despite the low report rate the actual incidence is high. According to a recent study, 23% of married women are beaten by their husbands.

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92 The College for sergeants has been abolished in 1996.
94 According to Mr. Constantinopoulos of the Ministry of Public Order some attention is given to the position of victims, especially in seminars. However, in my interviews with policemen and police officers no one remembered that the subject had been addressed during police training. Only relatively few women (25%) report the abuse committed against them to the police, while even fewer women (21%) ask for medical treatment, and 23% of the women are victims of domestic violence practised by their husbands. Data from a thesis under preparation by I. Fereti, included in a press release by the General Secretariat for Equality as represented in: C.D. Spinellis, (1997), p. 235. According to the police statistics of the Ministry of Public Order, 234 cases of rape were reported in 1995. No other statistics are available.
The General Secretariat for Equality of the Sexes, an independent government agency, asserts that the police tend to discourage women from pursuing domestic violence charges and instead undertake reconciliation efforts, even though the police are neither qualified for this task nor charged with it. The police confirm that they usually try to reconcile the members of the family in cases of domestic violence. Another reason for the low report rates may be the high degree of social control in some communities, or the way in which the police handle a complaint by the victim.

At the police station, cases of domestic violence follow a routine procedure. The officer on duty hears the case. The woman, in most cases, complains of battering; she is told that the appropriate channels for those cases are the civil courts. If the woman insists, the husband or partner is asked to appear together with his wife or girlfriend at the station to give the facts. Attempts at informal mediation follow and the officer might caution the man. The cases often end there. Sometimes, the woman persists and files a complaint. Nonetheless, often the woman returns a few days later to withdraw it. In general, policemen are unprepared to handle victims of family violence. Moreover, the police tend to regard incidents of domestic violence as a private or social problem. It is not perceived as real police work, offering the rationale that their powers are, in any event, insufficient to deal adequately with the situation. Spinellis recommends that efforts should be made to train police officers of both sexes to respond with courtesy and promptness to such cases and inform victims of their rights.

With respect to victims of serious crime and sexual violence, the police take victims seriously and try to support them. According to the police, they first try to calm the victim and make him feel comfortable. They realize that, especially with respect to sexual crimes, it is very difficult for most victims to go to the police. Usually, the police will try to involve the family or friends of the victim in order to create a social network of support for the victim.

96 The General Secretariat also claims that the courts are lenient when dealing with domestic violence cases. U.S. Department of State (1997), p. 11. See http://www.usis.usemb.se/greece.html

97 Information supplied by police captain Papachristos, Filothei police station, 14 March 1998.

98 A survey of police stations located in the greater Athens area suggested that in each station 2 to 4 incidences of family conflict, wife battering and female victimization were brought to the attention of the police on a weekly basis. A similar survey in small cities revealed that women almost never seek assistance from the local police. See C.D. Spinellis (1997), pp. 235-236.

99 In Greece, the building of the police station is a reflection of the neighbourhood in which it is situated. The very busy Omonia police station, situated in the poor and socially degraded centre of Athens, is too small and very old. There are no waiting facilities and people line up in the small hallways. The police are aware of their difficult working conditions and try to make the best of it. They have for instance no room where victims can identify offenders without being seen themselves, so the police will take the victim into an office, with the door slightly opened and walk the offender (unknowing of the presence of the victim) passed the door. The Filothei station, situated in a very rich neighbourhood, is a modern building with lots of space and adequate facilities. The irony is that crime is highest in the poor neighbourhoods, where the facilities are the poorest. During my visit to both stations, the Filothei police station was virtually empty of suspects and victims and police officers seemed to have little to do. Whereas, people were lining up in the old Omonia station and the police officers were clearly overcharged. It is quite obvious that the service which can be given to victim is influenced by these working and housing conditions.

This is considered very important because official support services are few (see § 3.6). The police, however, have contact with social welfare services situated inside hospitals. These services are contacted in cases of serious of violent crime, at the request of the victim. If the victim is under the age of 18, it is standard procedure for a social worker is to be called in. In cases of rape, the police will try to convince the victim that medical evidence is required, but if he does not want to see a doctor at the legal medicine service, the police respect this decision. Furthermore, they also try to protect the victim by keeping the case away from the media.\footnote{Information supplied by Commander Tasigiorgos and police officer Petrou of the Omonia police station in Athens, 11 March 1998. These dates were corroborated by police officers in Filothei (Athens) and Thessaloniki.}

8.2 Questioning the Victim

The Greek court room is very informal, crowded and noisy (see § 2). Another feature is that all evidence has to be presented during the trial. Every criminal case has numerous witnesses who all have to testify. Usually, witnesses only have to answer some short questions from the judge and may leave the stand after a few minutes. In general, it can be upheld giving evidence in a Greek courtroom is not as daunting an experience as in most other jurisdictions. The courtroom is not an intimidating place, the judges wear ordinary clothes and sit under an icon of a compassionate Christ figure.\footnote{In fact it is a copy of the gospel, the Greek equivalent of the Bible.} The stand where the accused and the witnesses are heard is decorated as well by an icon on which everyone swears to tell the truth. The witness stand is only about half a metre from the bench, so the hearing by the judge almost resembles an ordinary private conversation. Also, the lawyers and public prosecutor stand and sit respectively very near to the witness stand. This feeling is reinforced by the fact that it is hard for the public to hear exactly what is said, especially if the witness speaks softly, because of the noise inside the court building. And there is no need to speak up since the judge is sitting close by.

\footnote{Information supplied by Mrs. Malakassi, 15th examining magistrate at the first instance court in Athens, 11 March 1998. However, Mr. Moratoglou of the same court, says he only confronts victims and suspects if they were acquainted with each other.} (C. 8) At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians qualified to assist them.

During the pre-trial stage, the police takes the victim’s statement and may also question him (see § 8.1, A.1). Occasionally, the victim is called back to the police station to give additional evidence or another statement. All the police reports are examined by the public prosecutor. When he feels the police file is complete, and only concerns a petty offence, it is sent straight to the police court or the single judge misdemeanour court. In serious misdemeanour and felony cases, the police file is sent to the examining magistrate who re-examines the case and questions the victim and witnesses. The examining magistrate can carry out all investigative actions necessary to find out the truth. He may examine the victim more than once, and it is not unusual to confront the victim with the suspect.\footnote{The public}
prosecutor never sees the victim before the trial, unless the victim reports the case to him instead of to the police.\textsuperscript{104}

During the trial stage, the court always requires the victim to come to court. This is a rule virtually without exception, because judges feel this is the ultimate reliability test. In court, the victim is questioned by the president of the court, the public prosecutor, the other members of the court and the defense counsel of the accused. The court will also allow the victim-witness to put questions to the accused and vice versa, albeit not directly but through the president of the court. The manner of questioning depends very much on the persons involved. Some magistrates and lawyers feel it can be more effective to act angry with a witness, in order to find the truth.\textsuperscript{105} However, in general the questioning is not aggressive but can be very critical. Pursuant to s. 358 CCP, the court will have to ascertain the credibility of the witness. In the opinion of the judges, the victim is an alleged victim until the trial is over. Consequently, the court is usually rather critical with regard to the testimony of the witnesses, including the victim-witness.

The president of the court has powers to protect the victim and other witnesses against unsympathetic or harsh questions.\textsuperscript{106}

Only small children can be excused from coming to court, in which case their parents will tell their story. There are not child interviewing studios nor is there video-link questioning of children.\textsuperscript{107} The only protective measure regarding child-witnesses is directed at child-suspects who are always heard behind closed doors.\textsuperscript{108} With respect to the mentally handicapped, there are no special rules to protect them during the questioning. Pursuant to the law, the police, examining magistrate and the court, can refrain from questioning a mentally handicapped person if they cannot understand the facts (s. 220 CCP). In all other cases, they are obliged to appear in court and give evidence.\textsuperscript{109}

\textsuperscript{104} Information supplied by Mr. Nikoloudis, public prosecutor at the court of appeal in Athens, 3 March 1998.

\textsuperscript{105} Information supplied by Mr. P. Nikoloudis, public prosecutor at the court of appeal in Athens, 3 March 1998.

\textsuperscript{106} If lawyers challenge, for instance, a rape victim on his behaviour prior to the crime, the court will not interrupt the questioning. It will more likely decide not to take these facts into consideration.

\textsuperscript{107} Information supplied by Mrs. H. Panagiotaki, judge at the court of appeal in Athens, and Mr. G. Rigos, judge at the Supreme Court, Athens, 2 March 1998.

\textsuperscript{108} Surprisingly, there is a provision to protect minors sitting in the audience. The president of the court can tell minors under the age of 17 to leave the courtroom (s. 329-1 CCP). In practice, this rule is hardly ever used.

\textsuperscript{109} Information supplied by Mr. G. Karampelas, judge of the court of appeal in Piraeus, 7 March 1998.
8.3 Protecting the Victim

(F. 15) Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or particular status or personal situation and safety of the victim make such special attention necessary, either the trial before the judgement should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate.

The protection of the victim’s private life leaves a lot to be desired. There are hardly any legal provisions which the victim can refer to. It is even suggested that the right of the victim to dignity and an unaffected private life is a principle which is not respected in criminal proceedings. The biggest problem here is the press, but the courts are also to blame. Trials which are held in camera are very rare. The courts attach (too) much importance to the concept of a public trial. Only in juvenile court, do the trial proceedings always take place behind closed doors. This means that only if the accused is a minor, does the criminal process not involve the public. If the victim is a child, and the offender is an adult, this is not considered a reason to close the doors of the courtroom. Also, in other cases in which there is a real risk of (unduly) affecting the victim’s private life or dignity, will the trial be held in public. The biggest problem here is the press, but the courts are also to blame. Trials which are held in camera are very rare. The courts attach (too) much importance to the concept of a public trial. Only in juvenile court, do the trial proceedings always take place behind closed doors. This means that only if the accused is a minor, does the criminal process not involve the public. If the victim is a child, and the offender is an adult, this is not considered a reason to close the doors of the courtroom. Also, in other cases in which there is a real risk of (unduly) affecting the victim’s private life or dignity, will the trial be held in public.

As far as the media are concerned, Greece generally has a tradition of outspoken public discourse and a vigorous free press. The mass media are known to publicize descriptions and photographs of victims of extreme violence, usually without their permission. They also try to interview these victims. Sometimes this goes hand in hand with intrusion into family life or the victim’s past. It has been said that the Greek media are ‘crime maniacs’ and cover most stories in a very sensational and disrespectful manner. Undoubtedly, such reports infringe upon the constitutional guarantees of respect to human dignity and personal life. The only way open to the victim to fight this, is to go to civil court and ask for a fine on the grounds of violation of private life. Usually, this will not be enough to stop the press, or to stop them in other cases. The revenues from the story and pictures outweigh the hindrance of a civil process and the payment of a fine. Only juveniles are given protection from press coverage. There is a general prohibition on publishing names and photographs of juveniles (both offenders and victims) in the press; only the initials can be given. According to criminologists another aspect of mass media reports is that – as far as violence against women is concerned – they tend to minimize inhibitions of potential perpetrators. The only way nowadays, to order the press out of the court room is at the request of the accused. Only after such a request, can the president of the court deny the press access to the

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110 Information supplied by Mr. Karampelas, judge at the court in Piraeus, 7 March 1998.
111 According to Judge of the Supreme Court G. Rigos, in his 32 years career as a judge, he never heard or experienced a judge holding the trial behind closed doors.
112 Information supplied by Mrs. E. Panagotaki, judge at the court of appeal in Athens, and Mr. G. Rigos, judge at the Supreme Court, Athens, 2 March 1998.
113 Information supplied by Mr. Karampelas, judge at the court in Piraeus, 7 March 1998.
courtroom. The president, however, may refuse to issue such an order if he feels this contradicts with the general interest.  

\((G.\ 16)\) Whenever it appears necessary, and especially when organised crime is involved, the victim and his family should be given protection against intimidation and the risk of retaliation by the offender.

During the pre-trial stage, provisional detention of the accused may be justified in felony cases. However, in pursuance to the law, the interests of the victim do not play a direct role as they are not included in the grounds for provisional detention. Pre-trial detention is only justified to prevent new crimes, to avoid the very probable absconding of the defendant, or if he is considered especially dangerous to society (s. 282-1 CCP). Likewise, the court can impose security measures upon the suspect before the trial, such as the prohibiting them going certain places. However, these measures are seldom applied. Another possibility is to oblige the accused to present himself every week or month at the police station (s. 282-2 CCP).

In practice, if a victim is actually threatened or intimidated, the offender can be detained to prevent repeat crimes (e.g. threatening the victim) or because he is considered dangerous. Before the trial, the public prosecutor and examining magistrate have the authority to protect the victim against intimidation by ordering police protection. This is done if the life or the physical integrity of the victim or his family is in danger, or if he is pressured to change his statement (Law 207/94). In the opinion of magistrates such events are very rare, and the requests of victims for protection even more infrequent. However, according to the police, there is room for improvement in protecting victims before the trial.

During the trial, the court may order the defendant to be taken away from the courtroom if it is convinced that the presence of the accused would prevent the witness from speaking freely. The counsel of the defence will then remain in the courtroom to protect the rights of the accused. When the defendant returns, the president of the court will tell him in detail what has been said during his absence (s. 360-1 CCP). In practice, however, this rule is not widely known and presumably not often applied.

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115 Information supplied by Mr. G. Karampelas, judge at the court of appeal in Piraeus, 7 March 1998.
117 Information supplied by Mr. Moratoglou, examining magistrate at the first instance court of Athens, on the 13th of March 1998. According to the examining magistrate, the protective measures which do not allow the offender to frequent the victim's street or workplace are never applied.
118 Information supplied by Mrs. Malakassi, 15th examining magistrate at the first instance court in Athens, on the 11th of March 1998, and with Mr. Dervenjas, public prosecutor at the court of appeal in Athens, on the 6th of March 1998. Only Mr. Rigos of the Supreme court claims to have applied the provision many times as a trial judge. He seems, however, to be the exception to the rule.
119 It has occurred that victims have told the police they were sorry they reported the crime because they felt unprotected. The police themselves, however, have limited powers. Court orders are required to take a suspect into custody.
120 Not one of the judges, public prosecutors, lawyers or police officers whom I interviewed seemed to be aware of this legal provision. This legal possibility to protect the victim was never mentioned to me, not even after I suggested to them that this was possible in other jurisdictions.
After the trial, there is no special protection for victims other than the right of all citizens to ask for police protection. However, the court may decide to apply security measures as a condition of the suspended sentence (ss. 100 and 100a PC). In particular, the new section 100a PC is aimed at avoiding vendettas. The court may condemn the offender to stay or to live in a certain area, or even oblige him to go and live somewhere else. In practice, controlling security measures is a big problem. The probation service is only active in the field of juvenile offenders. A new law was introduced in 1991, but due to lack of funding it has not been applied.\textsuperscript{121}

\section*{9 Conclusions}

The victim's need for information is only met if he assumes the role of civil claimant. However, the provision of information should not be so dependant on a formal role; the police should be obligated to provide any victim who reports a crime with information. Concerning compensation, the law as applied by the courts is more or less effective as far as satisfying the victim's need for compensation for moral damages. The criminal justice system is not effective, however, in compensating victims for the material losses they have suffered. Victims are awarded only a symbolic sum and need to present their claim in civil court. The treatment of victims by the criminal justice authorities is not regulated in any enactment or regulation. Therefore, it remains entirely dependant on the victim's first contacts, either in the police station or at the court, in the person of the examining magistrate or trial judge. As far as the protection of victims is concerned, quite a few legal impediments and practical restrictions have to be overcome. Legal practitioners should, whenever possible be more understanding of the victim's need for protection. The courts should make more use of the legal options to hold a trial behind closed doors, to avoid the public as well as the media. In general, more attention should be given to the protection of the victim against publicity that may unduly affect his private life or dignity as well as against intimidation by the offender.

The rights of the victim, as presented in criminal law and procedure, cannot be effective without fundamental change. The legislature, the courts, the police and other institutions should evaluate and upgrade their organizations from the perspective of the victim. There is a need for support services both at police stations and at the courts. In particular, a court service for victim-witnesses should receive priority to provide victims with information about the proceedings as well as their rights and opportunities. Criminal justice authorities and lawyers should change their approach to the question of compensation. They should support more effective ways to integrate the victim's right to obtain compensation in the criminal proceedings in order to combat the discrepancy between the law in the books and in action. Moreover, it would be a great step forward for victims of violent crime if the Greek state would ratify and implement the 1983 Convention on Compensation for Victims of Violent Crime.

\textsuperscript{121} They reacted to my suggestion by saying that this never happens in a Greek court room, or they did not think such power of the court was provided for by law.

Information supplied by Professor Courakis of the University of Athens, 10 March 1998.
Supplements

ABBREVIATIONS

CC        - Civil Code
CCP       - Code of Criminal Procedure
PC        - Penal Code

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Mr. Spiropoulos, Councillor for the Minister of Justice, Athens;
A. Tasigioroi, chief of police at Omonia police station;
Mrs. Tzumerka, head of the division of minors at the court of first instance, Athens.
Chapter 11

Iceland

Scenery

Iceland is a land of many extremes. Situated in the far north-west of Europe, just below the Arctic Circle, this island of 103,000 square kilometres lies on the Mid-Atlantic Ridge. Here, the African and American tectonic plates are being pulled apart at a rate of 2 cm per year and lava is constantly bubbling up through the break, making Iceland one of the volcanic hot-spots of the world. The last major upheaval dates occurred on 1 October 1996, when a huge volcanic eruption began beneath the Vatnajökull glacier in the south of Iceland. The volcanic workings of the earth have bestowed upon Iceland a seemingly interminable supply of natural hot water and all energy is either geothermal or hydro-electrically produced.

Twenty per cent of Iceland is covered by rough lava fields and a further 11 per cent by ice – the Vatnajökull glacier is the largest ice cap in Europe – making large parts of Iceland uninhabitable. With a population of just 275,264,1 of which 120,000 live in the capital Reykjavik,² the population density is a mere 2.5 per square kilometre. The incessant dark of winter, which is in stark contrast to the perpetual light of summer, may be the reason Icelanders are such avid readers – the Icelanders are almost 100% literate and produce more books per capita than any other country in the world.

The first settlers in Iceland were probably 5th century Irish monks who were looking for a quiet place to live and meditate. In the 9th century, the country was settled by the Vikings, and it is to them that the first ‘official’ settlement of Iceland in 874 is accredited. In 930, the Icelandic settlers established what is now the oldest parliament in the world, the Althingi. Although the Althingi was presided over by a Law-speaker, its powers were in practice limited and could not prevent the warring Icelandic chieftains from fighting each other. The escalating anarchy eventually prompted the King of Norway to step in, and the Althingi submitted to Norway in 1262. This was the beginning of a long period of foreign rule, first by Norway and, from 1397 onwards, by Denmark.³ Full independence was not

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1 Per 1 December 1998.
2 Reykjavik means ‘Smoky Bay’, and was so named by the official ‘First Settler’ of Iceland and founder of Reykjavik, the Viking Ingólfr Arnason. The ‘smoke’ Ingólfr saw was in fact steam rising from geothermal springs.
3 The sovereignty of Iceland was transferred from Norway to Denmark with the Scandinavian union of Norway, Denmark, and Sweden in 1397. T. Perrottet (ed.) (1995), Iceland, Houghton Mifflin Company, p. 52.
achieved until 1944, when Iceland finally became a republic with a constitutional democracy.4

The tiny community of present-day Iceland is a wonderful mixture of the old and the new. Speaking the oldest living language in the world, the Icelanders still use patronyms and are listed by their first names in the telephone book. Yet this homogenous and affluent society is now among the most modern in Europe. It was also one of the first countries to recognize women’s suffrage, and the Icelanders are proud of the fact that in 1980 Vigdis Finnbogadóttir became the first woman in history to be democratically chosen as president of a state.5 Formally, women enjoy an emancipated position, although in practice there are still very few women in powerful positions.

Icelanders have the longest working hours in Europe, averaging between 46-49 hours a week. Unemployment is around 1%, and life-expectancy is an amazing 80-something years for women and 75 years for men. This is attributed in part to a healthy diet of fish, which is the pillar of the Icelandic economy. The ferocious protection of its fishing industry brought Iceland international fame in the ’70s when its tiny coastal guard stood up to the British navy during the so-called Cod wars.

1 March 1989 has been dubbed Beer Day, for it was on this day that the prohibition on beer was lifted — the ban on wine had already been lifted in 1921. Alcohol in Iceland is extremely expensive, which is probably why both incoming and outgoing passengers can buy duty-free at Keflavik International Airport. Despite the high prices, there is a surprising amount of alcohol abuse in Iceland and, in keeping with other European jurisdictions included in this study, many traffic offences involve driving under the influence.

Iceland was a founding member of the North Atlantic Treaty Organization (NATO) and joined the Council of Europe on 9 March 1950. It is a member of the European Free Trade Association (EFTA). Iceland has no armed forces.

Home rule was established on 1 February 1901, and on 1 December 1918, Iceland became a sovereign state with its own flag, linked to Denmark by virtue of having a common king. The union with Denmark was formally terminated on 17 June 1944. T. Perrottet (ed.) (1995), pp. 68-69.

Vigdis Finnbogadóttir served as President of Iceland from 1980 until 1996.
PART I: 
THE ICELANDIC CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

Official statistics in Iceland are mostly concerned with fishing quotas, and therefore it is difficult to support statements on crime rates with data. However, it is generally accepted that, compared to other Western European countries, Icelandic crime rates are low (when the fieldwork for this report was conducted in December 1996 there had not been a murder for more than two years). The little data available certainly point in this direction.6

Although crime rates are low in Iceland, there is considerable concern among the public that crime is increasing dramatically. In reality, the rise in crime appears to be far less spectacular than feared, although an increase has been signalled in the cases dealt with in court involving drug-related offences such as theft and random violence. However, this could be due to fact that the general public is becoming more sensitive to violence and therefore reports crime more readily to the police.7 The concern among the public, which has been referred to as a ‘moral panic’,8 may in part be due to the exaggerated crime reports in the media. The Minister of Justice also fanned anxiety by calling for tougher sentencing for violent crimes in a speech at the opening of the new Supreme Court building on 5 September 1996.9

2 GENERAL REMARKS AND BASIC PRINCIPLES

At the beginning of this century, the Icelanders transformed their practically medieval society into a fully-fledged modern nation.10 The same capacity for speedy change was demonstrated towards the end of the century when the Icelandic criminal justice system made the decisive move from inquisitorial to accusatorial in the space of just a few years. The final transition of the Icelandic criminal justice system from inquisitorial to accusatorial was triggered by a case concerning a minor traffic offence that was taken to the European Commission in Strasbourg, and eventually came before the European Court of Human Rights.11 In 1984, Jón Kristinsson, an Icelandic citizen, was charged for exceeding a speed limit and ignoring a stop sign. At the time, the established procedure for offences committed outside Reykjavik

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6 See, for example, the 1993 figures of the Reykjavik Police as presented by Helgi Gunnlaugsson at the International Conference of Law and Society, Glasgow, Scotland, July 10-13, 1996.
7 Information supplied by three judges of the district court in Reykjavik.
9 Daily News from Iceland, 6 September 1996.
10 Under the foreign rule of Norway and Denmark, Iceland had become one of the poorest nations of Europe – in the 19th century there were still no roads and very few stone-built houses. Having gained self-rule in 1918, the economic situation improved drastically following, among other things, the impact of World War II and the stimulus of Marshall Aid. As a result, Iceland became a modern and affluent country in the space of just one generation. T. Perrottet (1995), pp. 87-88.
was that the local magistrate not only conducted the investigation, but also heard the case and passed judgment (s. 4 Lög um meðferð opinberra mála, Code of Criminal Procedure, CCP, 1974). In Jón Kristinsson’s case, it was the deputy chief of police of Akureyri who fulfilled all these tasks, first deciding on whether a preliminary criminal investigation should be set in motion, then offering Jón a settlement in accordance with the law, and, when Jón refused the offer, subsequently hearing the case and judging upon it as district court judge. Jón appealed to the Supreme Court (there are only two judicial instances in Iceland, see § 3.3), and one of his grounds for appeal was that the case had not been heard by an impartial judge because one and the same person had acted as both deputy chief of police and deputy district judge. On 25 November 1985, the Supreme Court acquitted Jón of ignoring the stop sign, but upheld the District Court’s judgement on the speeding charge, saying: ‘In the Icelandic court system, judicial powers in district courts outside Reykjavík are vested in town and county magistrates who serve collaterally as chiefs of police. The District Criminal Court’s decision cannot be set aside on the ground that the deputy town magistrate of Akureyri tried the case in question. Furthermore, no specific facts have been established which would disqualify the town magistrate or his deputy.’

On 10 April 1986, Jón Kristinsson lodged an application against the Republic of Iceland with the European Commission of Human Rights, claiming that he had not been tried by an impartial tribunal within the meaning of section 6-1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Commission declared the application admissible on 13 October 1987 and in its report of 8 March 1989, came to the conclusion that there had indeed been a violation of section 6-1. Meanwhile, the Icelandic legislature had already taken action. On 19 May 1989, Act no. 92/1989 on the Separation of District Judicial and Administrative Powers was passed by the Icelandic Parliament. This act, which was to enter into force on 1 July 1992, ensured the separation of the investigative and judicial functions. District executive agents would then be responsible for the administration of the police, and district court judges independent of the executive would hear the criminal cases.

In the light of these developments and the fact that the Icelandic government had reached a friendly settlement with Jón Kristinsson on 28 December 1989, the European Court of Human Rights struck the case off the list on 1 March 1990.

The Jón Kristinsson case acted as a catalyst in speeding up a process that had already tentatively been set in motion in 1951, when the first Icelandic Code of Criminal Procedure was passed (see § 4.2). Until that year, the Icelandic criminal justice system was truly inquisitorial — one and the same court would initiate the investigation of a criminal offence, present the prosecution, and then deliver judgement. In fact, considering the diminutive size and remoteness of many of Iceland’s communities, it was totally understandable that those Icelandic outposts did not have a separate police force, prosecution service, and court to deal with the one or two incidents that occurred there each year. As the Icelandic

13 On 9 January 1990, before this act could come into force, the Supreme Court of Iceland quashed a judgment of a District Criminal Court on the ground that the judge concerned was both deputy county magistrate and head of the district police which had conducted the investigation. To bridge the gap until 1 July 1992, the President of Iceland, acting on the advice of the Minister for Justice, issued a Provisional Act on 13 January 1990 creating new posts of district court judges.
government maintained to the European Commission in the Jón Kristinsson case, 'The Icelandic system where investigative and judicial powers are combined has a historical and geographical origin and they emphasise that the conditions prevailing in Iceland are significantly different from those of other member States of the Council of Europe. These particular Icelandic conditions form the background for the legal system (...).' For understandable geographical reasons, many of the earliest changes in the direction of a more accusatorial system were limited to the main Reykjavik area, where almost half of the population lives, with the authentic inquisitorial system surviving in all other parts of Iceland until that, too, was brought to a definite end by the Jón Kristinsson case.15

Evidence is evaluated freely (1991 CCP) and there are no rules on the admissibility of evidence. The high conviction rate in Iceland is remarkable. According to the judges interviewed, this is due in part to the ample use that the prosecutors make of the expediency principle — cases appearing in court are mostly 'certain' cases. That all evidence is admissible, regardless of how it was acquired, may also be of influence. It is interesting, for instance, that until fairly recently, it was common practice to keep suspects who refuse to confess in solitary confinement.

3 JUDICIAL AUTHORITIES AND CRIMINAL JUSTICE PARTNERS

The Icelandic community is small, and people tend to know each other. The professional legal world is even smaller and police chiefs, prosecutors and judges are usually no strangers to each other.

3.1 Investigating Authorities

The Code of Criminal Procedure of 1991 provides that the public prosecutor supervises police investigations. However, in practice, prosecutors do not lead or supervise the investigation of offences, but leave this entirely to the police. The judiciary is in no way involved in the investigation of offences — there is no such thing as an investigative judge.

When the fieldwork for this study was conducted in December 1996, the policing tasks were divided between the State Criminal Investigation Police (SCIP) and the local police.16 The SCIP was established in 1976 by act no. 108/1976, on the State Criminal Investigation Police (Lög um rannsóknarlögreglu ríkisins). Until 1976, there was just one Icelandic police force, with local divisions headed by regional directors. The police in Reykjavik were attached to the criminal court, under the direction of the president of the court. Because Reykjavik is by far the largest police district, the director of the Reykjavik police was also Chief of the Icelandic police, meaning that the president of the criminal court in Reykjavik was in

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15 Jón Kristinsson's complaint was against the way the Criminal District Court of Akureyri, which is situated in the North of Iceland, dealt with his case. Akureyri has a population of 15,000 and is the largest town outside of Greater Reykjavik.
16 The Vice Chief of the State Criminal Investigation Police prefers to call this organization the National Bureau of Investigation.
command of the Icelandic police force. In the early ‘70s, this situation was thought to be untenable and the SCIP was established to take over the investigation of criminal offences from the criminal courts.

The SCIP was made up of 42 police officers who worked for one of the following four divisions:

1. violent crime;
2. tax and bookkeeping;
3. theft;
4. other property offences.

The SCIP operated mainly in the Reykjavik area, leaving the local Reykjavik police force to deal with traffic offences, matters of public order, and petty crime. The SCIP also rendered assistance to the local chiefs of police outside Reykjavik and had the authority to take over any cases involving serious offences that occurred there.

On 1 July 1997, the SCIP was abolished. It was replaced by a much smaller office called the Chief of State Police. This office only has investigative powers where tax matters and economic crimes are concerned. Its other tasks are to direct the Icelandic police force, assist regional directors of police around the coast, decide matters of policy and maintain contact with Interpol. The fieldwork for this study was conducted prior to 1 July 1997, and, of necessity, this report therefore describes the situation as it was before the SCIP was abolished.

### 3.2 Prosecuting Authorities

The Office of the Director of Public Prosecutions commenced work on 1 July 1961. When the fieldwork for this study was being conducted, there were nine prosecutors working at this office, which is located in Reykjavik. There are no formal requirements to become a public prosecutor other than having a law degree from the University of Iceland, nor is there a formal training programme.

The office of the DPP has a nationwide responsibility for the prosecution of more serious offences such as murder, rape, and assault. Other cases, in particular traffic offences, minor drug offences, vandalism, the illegal brewing of alcohol, and theft of vehicles are prosecuted by or on behalf of the respective chiefs of police. Like the public prosecutors, the police prosecutors have law degrees.

On 1 July 1997, the prosecuting powers of the office of the DPP were drastically reduced. Many of the cases formerly prosecuted by this agency were transferred to either the chiefs of police or the newly established office of the Chief of State Police (see § 3.1). The philosophy behind this decentralization of the powers of prosecution is that a reduction in the number of agencies dealing with one and the same case increases efficiency. The agency conducting an investigation obviously has the most intimate knowledge of a case, and communication about the cases within one agency is easier than communicating between two different agencies.

This most recent decentralization of the powers of prosecution is part of a process that was set in motion in 1992. In that year, it became possible for the DPP to appoint a local chief of police to prosecute a particular offence. Another option is for the DPP to indict the accused himself and then delegate the further proceedings to the police prosecutor. If

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17 Information provided by Thorir Oddsson, Vice-Chief of the SCIP, 17 December 1996.
the DPP decides to keep a case for himself, he may appoint an attorney to do the case for him.\textsuperscript{18}

3.3 Judiciary

The eight district courts of Iceland hear both criminal and civil cases, although the individual judges do tend to focus on one area of law. After earning a law degree, there is no further formal training necessary to become a judge. Before being appointed, most judges start their careers by gaining experience either as a court clerk, in the Ministry of Justice, or in private practice. Iceland has no jury system. Although Danish criminal procedure, which operates with juries, was applied in Iceland during the Danish domination, running a jury system in a country with only 265,000 inhabitants, where everyone knows everyone, would be almost impossible.

Appeals against judgments of the district courts, whether concerning the facts or points of law, are heard by the Supreme Court (Haestiréttur) — there are only two judicial instances in Iceland. The Supreme Court of Iceland consists of nine judges and has been in operation since 1920, when the Danish Supreme Court relinquished its position as the highest court of Iceland. Supreme Court hearings are oral.

Because of the inquisitorial background of the courts, Icelandic judges have a long tradition of active participation in the court proceedings, and some are finding it hard to adapt to the much more reserved role they are supposed to play in the new accusatorial system. At present, the way a case is heard in court may vary greatly from judge to judge. Regarding the questioning of witnesses, for instance, some of the older judges still insist on questioning the witnesses themselves, whereas the younger ones will now leave that to the parties. Owing to all the recent changes in procedure, situations also arise in which the judge has no choice but to participate actively in the proceedings. It is only since 1992 that prosecutors must always appear in court to present the case, and some of those used to the old system are insufficiently acquainted with the new accusatorial rules. Both the judges and the prosecutors need time to adapt to the new proceedings.

3.4 Damages Committee

Since 1 July 1996, when the Act Respecting the Treasury’s Payment of Damages to Those Suffering Loss on Account of Violations (Lög um greiðslu ráðhjáls á bóturn til þolenda afbrotta) of 10 March 1995, 69/1995 (see further § 4.3) came into force, victims of violent crime can claim state compensation. The claims are decided by the Damages Committee. This committee consists of three persons appointed by the Minister of Justice who must be eligible for an appointment as district judge (s. 13 sub 2).

State compensation is awarded for damages suffered as a consequence of violence directed against the person. Compensation for loss of clothing and other personal effects, including low amounts of cash, which the party sustaining loss was carrying on his person at the time the bodily harm was inflicted, can be claimed. (s. 2). Furthermore, compensation can be awarded for non-pecuniary loss, with the exception of cases involving offences against personal integrity (i.e., libel and defamation) (s. 3). Damage to property is compensated if

\textsuperscript{18} Information provided by Hallvardur Einvarsson, Director of Public Prosecutions, 16 December 1996.
it was inflicted by a person under care of the state, i.e., someone serving a prison sentence, in remand detention or someone being held in another state institution against his will (s. 4). To qualify for state compensation, the loss must have been reported to the police without undue delay, and a claim for compensation must have been filed against the offender (s. 6). Even if the offender remains unknown, or cannot be traced, or if he cannot be held responsible due to incompetence, the victim can still claim state compensation (s. 9). Claims must be filed within two years after the offence was committed (s. 6) and should be for a minimum of ISK 100,000 (1,284 euro). The maximum awards are: ISK 250,000 (3,211 euro) for loss of articles; ISK 2,500,000 (32,115 euro) for bodily harm; ISK 600,000 (7,708 euro) for non-pecuniary loss; and ISK 2,500,000 (32,115 euro) for loss of a provider (s. 8).

3.5 Victim Support

Unlike the victim support organizations in, for example, England, Germany, the Netherlands, or Sweden, there is as yet no organization in Iceland that offers basic support to all victims of crime, regardless of the offence they have suffered. Only victims of sexual offences can find organized help, although the Red Cross will try to accommodate anyone asking them for help. Of the three places victims of sexual offences can turn to, the first to be established was the Women's Shelter, which offers a safe haven to battered women and their children. The Women's Shelter was set up in the early eighties by volunteers involved in the growing feminist movement. Through their work in the Shelter, these volunteers realized that a second organization was needed to offer more structural help to the growing number of women turning to them for help after suffering some form of sexual violence. This eventually resulted in the launching on 8 March 1989 of Síðamót, the Reykjavík Counselling and Information Centre for Survivors of Sexual Violence. This voluntary organization offers counselling to anyone who has suffered some form of sexual violence. Most of the clients are women and children, although men are also welcome.

Unlike the Women's Shelter and Síðamót, the Rape Trauma Centre (RTC) is run by professionals. This centre was established in 1993 on the recommendation of the Parliamentary Rape Committee and is located in the Citizen's Hospital in Reykjavík. The RTC team consists of doctors, nurses, social workers, psychologists, and lawyers. Anyone who has suffered sexual violence is encouraged to go directly to the centre. Depending on the victim's wishes, he or she can then undergo a full medical examination, receive counselling from a social worker, and/or receive legal advice. Forensic evidence is secured using kits and a camera provided by the police, and all findings are noted on special forms designed in cooperation with the police. If the victim wishes, a lawyer will accompany him to the police station to report the offence if this has not already been done. Finally, the victim is offered follow-up support, such as medical check-ups, further counselling and legal support

19 The word Síðamót was invented by the founders of this organization and means 'meeting point of different paths'. The thought behind the name is that the people coming to Síðamót for help have walked down different life-roads, but now meet on the basis of the shared experience of sexual violence.

20 The centre is a national one and victims of sexual offences from anywhere in Iceland may be referred. However, for those people living on the other side of Iceland, getting to Reykjavík by the one road that runs around Iceland is no easy matter. The Reykjavík RTC is therefore considering opening one or more small units in other parts of Iceland.
3.6 Ministry of Justice and Ecclesiastical Affairs

The Ministry of Justice and Ecclesiastical Affairs is responsible for upholding law and order, and ensuring that civil rights are respected throughout Iceland. It consists of the Minister’s Office, a Legal Division, a division for Administration and Services, and an Operations Division. The Legal Division is responsible for, among other things, the preparation of draft legislation and the coordination and supervision of committees working on legislative issues. It also publishes all Icelandic legislation. Relations with the criminal justice authorities are maintained by the office of Police and Judicial Affairs, which is part of the Administration and Services division.

4 SOURCES OF LAW

4.1 General

The primary source of Icelandic law is statutory law enacted by the Althingi and assented to by the President of the Republic. Some legislative power has been delegated to the President, the Ministers, and other authorities. Where they have been accorded such a power by statute, these authorities may issue binding regulations or other administrative rules. Iceland does not recognize a formal rule of precedent, but in practice, decisions of the Supreme Court are followed by the district courts which makes for an unofficial rule of precedent. Many important rules of criminal law have in fact been created by the courts or established in doctrine. A final, remarkable, source of Icelandic law, in particular where criminal liability is concerned, is the so-called total analogy (s. 69 Constitution and s. 1 Penal Code). The analogy must be based on a statutory provision and must be ‘total’. That is to say, the situation not covered by a source of law must be more or less identical to one covered by a statute. In practice, analogy is almost never used as a source of criminal law, although there have been one or two cases where criminal liability on the basis of analogy was declared punishable herein or totally analogous to conduct here declared punishable' (italics for emphasis, EH). This was first determined in the General Penal Code of 1869.
recognized. In practice, a court of another nationality would probably reach the same conclusion via interpretation as an Icelandic court via analogy. The Danes also still recognize analogy as a source of criminal liability.

4.2 Sources of Criminal Law and Procedure

Criminal law
In the time that Iceland was under the domination of first Norway and later Denmark, there was a massive reception of Norwegian and Danish law. Subsequently, the first integrated piece of Icelandic criminal legislation to be enacted — the General Penal Code (Almenn hegningarlög) of 25 June 1869 — was more or less a translation of the Danish Penal Code of 1866. The Code of 1869 was amended and modified over the years and eventually replaced by a new General Penal Code (PC) of 1 August 1940 (act no. 19/1940). Although this latter code is not a translation of a Danish code, Danish law did still serve as a source of inspiration.

Apart from in the Penal Code, penal provisions are also to be found in special criminal statutes such as the Traffic Act, the Customs Act, and the Law regarding Alcoholic Beverages.

Procedure
For a long time, the Icelandic rules on criminal procedure, which were also initially derived from Norwegian and then Danish law, were to be found scattered through various statutes and decrees. It was not until 20 February 1951 that the first integrated Code of Criminal Procedure (Lög um meðferd opinberra málak) was passed by the Althingi, following several earlier failed attempts. Significantly, the new Act put an end to the absolute power of judges to prosecute offences, and by 1 July 1961 the newly established Office of the Director of Public

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28 For example, Norwegian procedural law — both civil and criminal — was declared applicable in Iceland by a Royal Ordinance of 2 May, 1732 (H. Einvarðsson (1989), p. 66.

29 Royal Ordinance of 2 May 1732 determining that legal proceedings in Iceland should be conducted in accordance with King Christian V's Law of Norway of 15 April 1687, which also extended to criminal cases; Decree of 3 June 1796, Ch. IX, that the role of the prosecution was to collect evidence to prove guilt. With this, a distinction between criminal and civil litigation was formally recognized; Decree 24 January 1838 to amend and augment the provisions already in effect governing criminal procedure; Decree 6 September 1841 with provisions relating to proof in criminal cases. H. Einvarðsson (1989), pp. 66-67.

30 In earlier versions of what eventually became the 1951 Act, the draughtsmen had attempted to include several changes in the direction of a more accusatorial system. Their suggestions included commissioning a Public Prosecutor, increasing the number of Criminal Court Judges in Reykjavík, and establishing an Office of a Director of Investigations. Unfortunately, the Althingi deemed these changes too expensive and submissions of the bill in 1936, 1948, and 1949 met with failure. The contested provisions were therefore removed, and the bill was duly passed. H. Einvarðsson (1989), p. 68-69.
Prosecutions had taken over the formal responsibility for the prosecution of criminal offences. The 1951 Act was replaced in 1974 by a new Code of Criminal Procedure, Act no. 74/1974. This act confirmed that the Public Prosecutor has the power to prosecute (s. 20) and also that he supervises the investigation (s. 21). Another power that the act bestowed upon the prosecutor was to determine whether the case was sufficiently serious to warrant an adversarial procedure as set out in sections 131-136 (s. 130). If the adversarial procedure was not to be followed, the defendant presented his case before the judge in the absence of the prosecution, unless the Public Prosecutor decided otherwise. In the absence of the public prosecutor, the judge investigated ex officio and independently all the facts of, and issues in, the case, even if the prosecution had already investigated them and prepared reports on the matter (s. 75 CCP). In effect, the judge took over the role of the prosecutor.

This practice was eventually contested before the European Court in the Thorgeir Thorgeirson case, and even though it was condoned by the Court, the Icelandic legislature had already drawn its own conclusions. In act no. 92/1989 on the Separation of District Judicial and Administrative Powers, section 123 determined that if the prosecutor does not appear at a court sitting, the case must be adjourned. This act came into effect on 1 July 1992, six days after the judgment of the European Court in the Thorgeir Thorgeirson case, and mention is made of the act in the decision made by the European Court.

The 1974 Code of Criminal Procedure survived until 1991, when it was replaced by a new Code of Criminal Procedure of 26 May 1991, Act no. 19/1991. This last act, which came into force on 1 July 1992, is the result of a thorough revision of Icelandic procedure by the Committee on Judicial Procedure.

### 4.3 Specific Victim-Oriented Sources of Law, Guidelines and Initiatives

In the last two decades, there has been significant activity on the research, policy and legislative front regarding the evaluation and improvement of the position of the victim. The first Icelandic survey on violence in the family was carried out in the early eighties. Then, in 1984, a parliamentary rape committee was established to examine the legal and social situation regarding sexual offences and to make recommendations to improve the position of victims of such crimes. In its report published in 1989, the committee recommended:

1. amending the Penal Code on certain points; most importantly, extending the definition of rape to include other than female victims;

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31 According to the act, such a procedure is to be followed if:
(a) the offence is punishable by a term of imprisonment of more than eight years;
(b) the offence is punishable by a term of imprisonment of more than five years and the issues of law or of fact involved require such a procedure; or
(c) the case concerns matters of special significance or the outcome of the case is otherwise of great public importance.


33 This act was passed by the Althingi on 19 May 1989 and approved by the President on 1 June 1989.

34 Sub C.42.

(2) amending the Code of Criminal Procedure
   (a) to give victims of sexual offences an absolute right to free legal assistance;
   (b) to include an exhaustive enumeration of circumstances allowing a case to be dismissed;
   (c) to modify the principle of re-evaluation of evidence in the light of the previous sexual history of a victim of sexual violence;
(3) introducing state compensation;
(4) organizing regular seminars for the police and health service personnel;
(5) enacting rules prohibiting the publication of information about the victim;
(6) establishing a Rape Trauma Centre.

Most of these recommendations have now been implemented. In 1992, the Penal Code was amended and, among other things, the definition of rape extended to include other than female victims. State compensation was introduced by act no. 69/1995 of 10 March 1995, Respecting the Treasury's Payment of Damages to Those Suffering Loss on Account of Violations (see § 3.4), and the Rape Trauma Centre commenced operation in 1999 (see § 3.5).

In May 1994, the Althingi decided that research should be done on domestic and other violence against women and children. Subsequently, in 1995, the Ministry of Justice appointed a domestic violence committee to examine the causes, consequences and extent of violence in the home, as well as other kinds of violence against women and children. The committee conducted a nationwide telephone survey among a stratified random sample of male and female Icelanders, aged 18-65. In the 12 months prior to the survey, 2.8% of women had been victims of violence in or outside the home, and 1.3% had been victims of domestic violence. Domestic violence was not limited to a particular sociodemographic group, and a woman's level of education and economic status appeared of little influence. The results were presented to parliament in February 1997. Another report that was published in 1997 dealt with violence at work.

In December 1996, the Icelandic Ombudsman for children published a report on how the position of child victims of sexual abuse in Iceland compared with other Nordic countries. In his opinion, the position of the Icelandic child victim did not compare favourably. Subsequently, at the beginning of 1997, the Ministry of Social Affairs published a report on the occurrence of sexual offences against children, which led to strong debate in Iceland. According to the report, the child welfare committee had received 465 cases in the last five years in which it was suspected that sexual offences had been committed against children. In total, 560 children (under 16) were involved. Approximately 30% progressed to the state prosecutor and 10% made it to court. At least 7% of the cases resulted in a conviction. It was estimated that at least 50 children per year required psychiatric help due to sexual violence committed against them. At the time, it was clear that the help that was publicly

36 The only recommendation that has not been implemented to date is: (2c) to modify the principle of re-evaluation of evidence in the light of the previous sexual history of a victim of sexual violence.

37 Ministry of Justice (February 1997), Report on the Causes, Magnitude and Consequences of Domestic Violence and Other Violence Against Women and Children. See also Thórdís J. Sigurðardóttir and Hildigunnur Ólafsdóttir (1998), 'Vold i nærmiljø', in: Nordisk tidsskrift for kriminalvidenskab, 85. årgang, nr. 1, pp. 1-37. Incidentally, the committee simultaneously studied violence against men and drew several interesting comparisons, see the report and article just mentioned.

available did not suffice. The Ministry of Social Affairs and the National Centre for the Protection of Children looked into the matter and entered into discussion with specialists from the child- and juvenile psychiatry departments of the National Hospital, together with specialists from Stýgamót.\textsuperscript{39} The most significant outcome of this focus on children was the establishment in 1999 of a special centre referred to as the Children’s House. This centre has all the facilities required for carrying out medical examinations of child victims of sexual and other violent offences, as well as for questioning them at each stage of the criminal proceedings, see § 8.2.

In 1998, a second domestic violence committee presented its report with recommendations on legal measures to be taken in regard to domestic violence. Among other things, the recommendations include the introduction of protection orders, a right for victims to be represented, and guidelines for the police on how to deal with cases of domestic violence. The report has not been published.\textsuperscript{40}

Finally, the Code of Criminal Procedure was amended by act no. 36/1999 of 10 March 1999, which came into force on 1 May 1999. Among other things, the act introduced a new chapter VII (ss. 44a-i) on victim lawyers. Victims of sexual offences as well as child victims now have an absolute (and enforceable) right to free legal assistance (s. 44a CCP). Victims of other violent offences may also be appointed a lawyer if they have made a request for legal assistance, have suffered damages, and the police considers such assistance necessary (s. 44b CCP). The amendment also introduced a provision that victims of sexual offences should not be referred to by name in court rulings.

5 ROLES OF THE VICTIM

The roles of the victim of crime are limited to reporting the offence to the authorities, claiming damages in adhesion to the criminal proceedings and acting as witness. Iceland does not recognize the institution of private or auxiliary prosecutor.\textsuperscript{41}

5.1 Reporting the Offence

In Reykjavik, the type of offence determines whether a report of a criminal offence has to be made to the State Criminal Investigation Police or the local police. The latter deals mainly with traffic offences and matters of public order,\textsuperscript{42} while the SCIP is responsible for all other types of crime. Often, if the local police receive a call that an offence has been committed, a patrol car from the Reykjavik police station will pull out, but the SCIP usually arrives fairly soon afterwards to take over. In all other parts of Iceland, the local police initially deal with all criminal offences, although in serious cases the help of the SCIP will be called in.

When a crime is reported to the police by an individual, for instance, a burglary, the police take down a report. If it is the victim himself who reports the crime, he is given a copy of this report. He can send this copy to his insurance company, where it serves as

\textsuperscript{39} Nordisk Kriminologi 23(1) 1997, p. 32.
\textsuperscript{40} Nordisk Kriminologi 24(2) 1998, p. 29.
\textsuperscript{41} See otherwise, for instance, France, Germany, and Sweden.
\textsuperscript{42} Patrolling the streets, general safety, etc.
sufficient proof that the offence has been committed. If the offence took place in Reykjavík and/or it is being dealt with by the SCIP, the case will be sent down to the department responsible for that particular type of offence – a burglary case, for example, will be sent to the department that handles enrichment crimes. The department registers the case and conducts any further investigations.

The SCIP manual contains specific guidelines for handling reports of sexual offences. These cases have priority and a victim reporting such an offence should not be kept waiting in the lobby of the SCIP office. If the victim is a female, and she wants the report to be taken down by a female officer, the manual states that this wish should be respected. The victim is informed that at this stage only preliminary questions will be asked and is encouraged to go to the Rape Trauma Centre. A more detailed report will then be taken down later. Alternatively, if the victim has gone directly to the Rape Trauma Centre before contacting the police, the police will be informed by the RTC team, who can then alert the proper officer. If a case is ‘urgent’ – i.e., the reporting of the crime is within a week of the commission of the offence – the victim can come to the police station immediately, even if it is in the middle of the night. In non-urgent cases, the victim will be asked to come back in the morning. If the victim does not feel up to going to the police station after the medical examination at the RTC, the SCIP will send an officer to take down the victim’s report at the centre.

If the victim approaches the police by telephone, the office must take the call seriously and direct it to the head of the division responsible for sexual offences. All such calls must be registered.43

A committee made up of a representative of the police, a doctor, a social worker and a psychologist reviews suspected cases of child abuse or domestic violence to decide how they should be dealt with. If the committee decides that charges should be brought, the social services office will do so itself rather than encourage the wife or child to press charges. The reason for this is that if the case fails, which often happens, and the accused claims damages, he must direct his claims against the social services rather than the woman or the child.

5.2 Civil Claimant

Section 3 of the 1991 CCP provides that a victim may present a claim for compensation in adhesion to the criminal proceedings. Decisions on compensation claims presented during criminal proceedings are based on the Damages Act (Skaðabótatalóg) no. 50/1993, of 19 May 1992. Normally, the prosecutor will present the claim in court unless the victim has a lawyer in which case this person will present the claim. The civil claim for damages must not be too complicated. It may be awarded even if the accused is not convicted, for instance, if he is found not guilty on the grounds of insanity.

5.3 Witness

Section 125 of the Code of Criminal Procedure of 1991 stipulates that if the accused is being tried for an offence which by law cannot warrant a sentence longer than eight years, if his plea of guilt is unconditional, and if the judge has no reason to doubt that the confession

43 Information provided by Thorir Oddsson, Vice-Chief of the SCIP, 17 December 1996.
is truthful, the case may be brought to trial immediately and no further evidence is needed.\textsuperscript{44} This means that in practice most criminal cases where the accused makes a full confession do not lead to a full trial, and victims are usually not called to testify in court. The exceptions here are cases involving violent crime or sexual offences because these offences may be punished by more than eight years’ imprisonment.

While the law stipulates that the accused cannot be put under oath, all witnesses testifying in court may be placed under oath, but in practice the oath is no longer used.\textsuperscript{45} It seems to have simply gone out of fashion.

\section*{5.4 The Victim’s Right to a Lawyer}

The right to free legal assistance, as conferred on victims of sexual and violent offences as well as child victims by the 1999 amendment to the Code Criminal Procedure, has in effect been in existence for rape victims since 1993 when the Rape Trauma Centre first commenced operation. From the outset, the RTC in Reykjavik has had a team of lawyers, and one of these lawyers is always on 24-hour call.\textsuperscript{46} Whenever a victim of sexual violence reports to the RTC, the centre confers with the lawyer to determine whether, in this particular case, the legal proceedings have a chance of succeeding and whether the victim should be encouraged to press charges. If the victim is definite about not pressing charges, the involvement of the lawyer ends there. Otherwise, the lawyer comes to the hospital and meets the victim after the medical examination, if the victim so wishes. The lawyer explains the whole legal procedure the victim will have to go through. If the victim makes up his (in practice read ‘her’)\textsuperscript{37} mind to press charges, the lawyer accompanies him to the police station to make a report. Following the 1999 amendment, the police (or the court, if the victim is under the age of 18) then appoints the lawyer as réttargestumadur (‘legal rights protector’) to the victim.\textsuperscript{46} Throughout the legal proceedings, the victim’s lawyer protects his interests. He will keep tabs on the progress of the case, attend all sessions where the victim is questioned, and prepare the victim’s compensation claim. Initially, all of the activities of the lawyers representing victims were based on practice rather than on rights. They had no formal right, for instance, to be present at police questioning of the victim, but were seldom be refused access (see § 8.2). At first, some judges were wary of the lawyers representing victims, querying them about their presence in court. Some prosecutors would invite them to draw up a chair and sit next to them. Otherwise, the lawyer sat in the public seating area, waiting for the moment when he could present the compensation claim. Not all judges were in favour of victims having a general right to a lawyer. It was their fear that

\begin{itemize}
\item See \textit{Daily news from Iceland} 20 October 1995. On 19 October 1995 the Reykjavik District Court sentenced a man to six months in prison for robbery 24 hours after the crime was committed.
\item When one of the prosecutors working for the office of the director of the public prosecutions once asked for a witness in a certain case to be placed under oath, the judges deciding the case had to confer how this was supposed to be done. Information supplied by the office of the DPP.
\item The legal team consists of five female and one male lawyer. Initially, the idea was to have an all-female legal unit, but the lawyers felt that because the legal system is most definitely not all female, males should be included in the team. Sometimes victims are concerned when faced with the male team member, but in practice being a good victim’s counsel is not about gender. Almost all the clients of the RTC team are female, but for the sake of consistency we will refer to the victim as ‘him’ throughout the chapter.
\item Prior to the amendment, the lawyer was not officially appointed in this manner.
\end{itemize}
this would have an adverse effect on the proceedings.\(^{49}\) With the 1999 amendment, the presence of lawyers representing victims in court was given legal footing.

PART II:
THE IMPLEMENTATION OF RECOMMENDATION (85) 11

6 THE VICTIM AND INFORMATION

6.1 Informing the Victim

\(^{(A.2)}\) The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation.

Legislation requires the police to give victims information about compensation. Section 170-1 of the CCP of 1991 provides that: 'In case it be revealed upon the investigation into a case that a person has sustained loss through the conduct attributed to the accused, the party undertaking the investigation shall afford that person an opportunity of filing a claim for compensation which may be adjudged in an eventual Lawsuit. The party sustaining the loss shall be granted guidance upon the preparation of the claim.' This is repeated in section 18 of the 1995 Act Respecting the Treasury’s Payment of Damages to Those Suffering Loss on Account of Violations which provides that: ‘The police is duty bound to grant a party sustaining loss guidance concerning the party’s entitlement to the payment of damages in accordance with the present act.’

Regarding information about the possibilities of obtaining assistance and practical and legal advice, it is standard practice with the police to refer a victim of a sexual offence to the Rape Trauma Centre before taking down his statement. The victim should also be informed of other relevant services and centres such as Stígamót. This information will be passed on orally – there is no standard leaflet containing an overview of the services available to victims. Stígamót and the RTC have their own leaflets and are both listed in the telephone directory. The RTC also runs a daily advertisement in the newspaper and organizes its own publicity campaign.

Victims who are referred to the RTC are given all the information and advice they need by the RTC team, see above §§ 3.5 and 5.4. The provision of information to victims of other offences depends more on the commitment of the individual police officer. It appears that in Reykjavik, the State Criminal Investigation Police, which deals with more serious crime, is a little more consistent in this respect than the local police.\(^{50}\)

\(^{(A.3)}\) The victim should be able to obtain information on the outcome of the police investigation.

A police investigation may have a variety of results. It may draw a blank, in which case the

\(^{49}\) Information supplied by judges of the district court in Reykjavík.

\(^{50}\) Information provided Björn Bergsson, lawyer and team-member RTC, 13 December 1996.
case is closed. Alternatively, a suspect may be located, and if the evidence seems sufficient, the case sent to the prosecutor who decides on further proceedings. Regarding the first outcome of the police investigation, the State Criminal Investigation Police has a standard letter that is sent to the victim whose case is closed. It expresses the regret of the SCIP that they have insufficient leads to solve the case and invites the victim to contact the police if he has any additional information that could throw new light on the matter. The letter then says that if the police hear nothing from the victim, they will presume that he has nothing to add. The case will then be filed and, if necessary, reopened if anything new turns up. The letter concludes by thanking the victim for his consideration. In practice, many cases are merely put aside rather than officially closed and filed, meaning that the police put the case on indefinite hold in the hope that additional leads will surface. The victim is not informed of these developments. Neither is the victim informed if the file is sent on to the prosecutor after a successful police investigation. In other words, no news may be good or bad news. The only victims who are informed of a decision to send the case on to the prosecutor are victims of sexual violence who have a Rape Trauma Centre lawyer, because the RTC lawyers have explicitly requested the SCIP to keep them posted. These lawyers also regularly call the police of their own accord to enquire about the progress of their client’s case. In general, the police are reluctant to pass on information over the telephone, and any victim making his own enquiries will usually be requested to either come to the police station in person, write a letter asking for information, or direct his enquiries through an attorney. However, the RTC lawyers have established an informal relationship with the police and, on the basis of these contacts, usually receive the information they ask for. In the experience of the RTC lawyers, it is a lot easier to get information from the SCIP than from the local police.\textsuperscript{51}

Both a representative of Stígamót and of the Ministry of Justice expressed their concern that there is no legislation or guideline confirming the right of the victim to information about the progress of his case. All the information that the police pass on in this respect is based on goodwill and personal commitment. Victims of sexual violence with an RTC lawyer are kept informed because of the vigilance of their legal representatives. Other victims must rely on police benevolence. The local Reykjavik police, unlike the SCIP, have no standard letter for when a case is closed, but even with the SCIP, there is no guarantee that the information is actually passed on. There is certainly no supervision or control over what happens in this respect in the rest of the country.

(B.6) The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.

Section 114 of the 1991 CCP provides that the accused and the injured party must be informed of a decision to dismiss a case or drop the prosecution. In practice, if the prosecutor decides not to prosecute, he will inform the police, the accused, and the victim of his decision by mail. The letter that the victim receives is very short and formal, saying little more than that, in view of section such and such of the law, it has been decided to drop the case. If the victim has a lawyer, the letter will be sent to the lawyer rather than to the victim. If necessary, the lawyer will ask the prosecutor for an explanation and translate the legal jargon for the victim. The prosecutor will never of his own accord contact a victim to offer an

\textsuperscript{51} Information provided Björn Bergsson, lawyer and team-member RTC, 13 December 1996.
explanation.

Formerly, the prosecutor informed only the police of his decision, assuming that they would pass on the news to the victim. However, the SCIP protested that the one taking the decision should also pass on the information to the parties involved because the decision-maker can best explain why the case is being dropped, which led to the establishment of the practice now current.

As was the case with information on the outcome of the police investigation, the victim is only informed of a negative decision, i.e., the decision not to prosecute. Only if the victim has a persistent RTC lawyer will he receive information on a positive decision, i.e., to indict and prosecute the accused.

(D.9) The victim should be informed of:
- the date and the place of a hearing concerning an offence which has caused him suffering;
- his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice;
- how he can find out the outcome of the case.

Date and place of a hearing
The authorities have no formal obligation to inform the victim of the date and the place of a hearing concerning an offence which has caused him suffering. Neither has an established practice in this respect evolved. The only reason to inform a victim of the date and place of a hearing is if he is needed as a witness. However, as recounted in § 5.3, most cases where the accused has made a full confession do not require a full trial. Relatively few victims are summoned to appear in court to testify. A victim who does have to testify will receive a court order from the prosecutor to appear as a witness a few days before the hearing.

Until the 1999 amendment of the CCP, the victim had no enforceable right to being kept informed by the authorities of the date and place of a hearing. Only persistent lawyers succeeded in eliciting information on hearings. Cases concerning sexual offences are heard in two stages. At the first hearing, a date is set for the further trial, and it is determined which witnesses will be called. Prior to 1999, neither the victim/witness nor his lawyer were informed of this first hearing and therefore finding out the date and place were a matter of perseverance. The lawyer would regularly contact the court to enquire whether the case had arrived, who the judge was, and if any hearing was planned. If a victim had to appear at a later hearing, both he and his lawyer were informed when and where this was to take place. Because the court order was not received until a couple of days before the trial, the lawyer would once again try to get timely inside information. If, for some reason, the victim did not want to receive the court order at home, for instance if he did not want his family to know, it could be agreed with the prosecutor that the order be sent only to the lawyer. The necessity for acquiring inside information has declined significantly due to the introduction by means of the 1999 amendment of a general right for the victim to be informed of the date and place of a hearing (s. 44a CCP). A civil claimant now also has the right to be informed of the date and place of a hearing (s. 172 CCP) even though the physical presence of the claimant is not required in court because officially it is the task of the prosecutor to present the claim for damages.

Restitution and compensation, legal Assistance, and advice
This guideline acts as a backup for the earlier guideline saying that the police should inform
the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender, and state compensation. As we saw earlier, the police have a formal duty to offer the victim guidance on making a compensation claim, but there are no set forms for recording the victim's compensation claim. The victim may put the claim down in writing himself, get a lawyer do it for him, or ask the police to help him. The police include the document in the file and it will therefore reach the prosecutor if the case is sent on. Alternatively, the file may contain an explicit statement that the victim does not want compensation, although this rarely happens. If there is nothing in the file concerning a compensation claim, the prosecutor will contact the police, asking them to inform the victim of his right to make a compensation claim. The police are then responsible for the completion of the file. If the file reaches the court and there is no compensation claim included, even though the case lends itself to such a claim, and the file also does not contain an explicit statement of the victim that he does not want compensation, the court is under no obligation to enquire after such a claim or inform the victim of his rights in this respect.  

Regarding legal assistance and advice, if the police refuses to appoint a lawyer at the request of a victim, the victim may address his request to the district court (s. 44 c CCP).

**Outcome of the case**

In general, the way for a victim to find out the outcome of a case is to contact the court or read the papers as there is no established practice regarding how a victim gets this information. A victim who has made a compensation claim will be informed by mail if compensation has been awarded to him. The letter will state how much compensation has been awarded and also that he can get a copy of the sentence from the court. If a victim's lawyer is involved in a case, he will try to be present when the sentence is read out in court and inform the victim as soon as possible. The RTC team tries to avoid situations in which a victim first learns about a sentence from the papers.

### 6.2 Information About the Victim

(A.4) *In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim.*

The injuries and losses suffered by the victim form an important part of the evidence to be collected during the police investigation. However, the statement provided by the police on the injuries and losses is aimed at proving that a criminal offence was committed and not at substantiating a claim for compensation. Information essential to the victim's claim, but of no further relevance to the criminal case, may therefore be missing. Furthermore, the seriousness of some injuries does not become apparent until a significant amount of time has lapsed.

In contrast, the documentation on the injuries suffered by victims passing through the Rape Trauma Centre is generally excellent. The doctors fill out detailed medical forms and the victims are asked to come back after two weeks and again after three months for further check ups. Reports of the victim's physical and mental well-being at these follow-up meetings are also made. With the permission of the victim, copies of all the medical forms are sent to the police who will add them to the file or send them to the prosecutor if the

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52 Information supplied by the Office of the DPP, December 1996.
file has already left the police station. Victims not passing through the Rape Trauma Centre will often have to provide any additional information on injuries and losses that do not surface until later on their own initiative, for instance, when making their compensation claim.

The successful transmission of additional information on injuries and losses may also depend on whether the case is being prosecuted by the office of the Director of Public Prosecutions or by a police prosecutor (see § 3.2). The police prosecutor is part of the police force and will therefore often have much more direct contact with the case, making it potentially easier to keep him informed of developments. The DPP is a totally different organization located in a different building and therefore a more explicit effort may be required to get the information from the police to the DPP. On the other hand, cases prosecuted by the DPP are generally of a more serious nature than those handled by police prosecutors, and therefore more time and care may be spent on the collection and presentation of evidence.

(D. 12) All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account:

- the victim's need for compensation;
- any compensation or restitution made by the offender or any genuine effort to that end.

In the normal course of proceedings, information concerning the injuries and losses suffered by the victim that is needed to prove that the alleged criminal offence was committed will be included in the file made available to the court. The provision of this evidence is the responsibility of the investigating and prosecuting authorities. If the victim passed through the Rape Trauma Centre, all the relevant information will be recorded on the special forms filled out by the examining doctor. Often the examining doctor will be asked to testify in court about the injuries suffered by the victim. He is regarded as an expert witness, and, despite the adversarial principles governing the court proceedings, no counter-expertise is allowed.

If the victim is making a compensation claim, he too must provide information concerning the injuries and losses he has suffered in support of his claim. If the victim has passed through the RTC, he may refer to the forms presented as evidence in the criminal case. Other pieces of evidence are hospital bills, dry-cleaning bills, and receipts of purchase of goods damaged or stolen by the accused. Furthermore, section 172-5 CCP provides that the judge may afford a party sustaining loss or his representative an opportunity of expressing himself about the compensation claim and explaining it if this does not cause considerable delay or inconvenience in a case. In that case, the victim or his representative can inform the court in his own words of the injuries and losses suffered by the victim.

Regarding any compensation or restitution made by the offender or any genuine effort to that end, pre-trial mediation is not practised in Iceland. If the offender has reimbursed the victim, his counsel will inform the court of such, for it is a mitigating factor that can affect the sentence.
7 THE VICTIM AND COMPENSATION

7.1 The Expediency Principle and Compensation

(B.5) A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender.

The decision whether or not to prosecute is a discretionary one. Initially, the discretionary powers given the Icelandic prosecutor by law were extremely wide — the prosecutor could dismiss a case on more or less any grounds he wanted. In 1989, the parliamentary rape committee (see § 4.3) recommended that an exhaustive list be made of grounds on which a case may be dismissed. Such a list was subsequently introduced as section 113-2 of the CCP of 1991. Grounds for dismissal include the following: if the offence is minor; if it appears that the accused cannot be held criminally responsible (for example, on grounds of insanity) and it is not necessary to ask for security arrangements pursuant to the Criminal Code; if the violation has caused the accused unusual suffering and prosecution is not deemed necessary for general preventive purposes; and in unusual circumstances where it is thought that prosecution is not necessary in the general interest. The accused may also avoid being prosecuted by accepting a fine (s. 113 in conjunction with 115 CCP). Finally, if the prosecutor finds it justified to dismiss the prosecution, but is in doubt about the grounds for doing so, he may ask the Minister of Justice to propose to the President of the Republic that dismissal of the prosecution is permitted pursuant to section 29 of the Constitution (s. 113-3 CCP 1991). The office of the DPP may dismiss cases on its own initiative. Police prosecutors may dismiss minor cases on their own authority, but if the dismissal is to be based on other grounds (s. 113-2, b-f CCP 1991), they must send the case together with the proposal of dismissal to the office of the DPP (s. 113-4 CCP 1991).

The question of compensation of the victim plays no role whatsoever in the discretionary decision of the Icelandic prosecutor. Any compensation paid pre-trial by the offender to the victim, or any efforts made to that end, is at the initiative of the offender or his legal representative; prosecutors do not try to secure pre-trial compensation. If compensation has been paid before the trial, this will serve as a mitigating factor where sentencing is concerned, but will not prompt the prosecutor to dismiss the prosecution. On the contrary, the fact that the offender has already paid compensation only goes to prove his guilt. Neither will the fact that no pre-trial compensation has been paid prompt the prosecutor to pursue prosecution where otherwise he may have dropped the case.

(B.7) The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings.

Under the law of the Icelandic Commonwealth (A.D. 930-1262), no distinction was made between civil and criminal litigation. Whatever the cause of action, individuals were always engaged in their private capacity, and had to prosecute their cases by themselves. In time, the power to prosecute was transferred from the individual to first the courts, then to the

53 Information provided by Björn Bergsson, lawyer and RTC member, 13 December 1996.
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office of the DPP and police prosecutors (see § 3.2). Nowadays, an individual only has the right to institute private proceedings in libel cases. In all other cases, the power to prosecute is reserved for the prosecuting authorities. However, if the prosecutor decides not to prosecute, the victim may appeal to the Ministry of Justice. In practice, such appeals are rarely made.

7.2 The Court and Compensation

(D. 10) It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.

The criminal court can order compensation by the offender to the victim if the victim has made a claim for compensation. The court cannot order compensation on its own initiative. In principle, the compensation claim must be specified unequivocally in the indictment (s. 171 CCP 1991) and should not be 'too complicated'. The judge does not have to take into consideration a claim he believes will cause considerable delay or inconvenience in the case (s. 172-1 CCP 1991). A judge may permit a claim not mentioned in the indictment to be filed in court if the accused agrees to this and the judge feels this will not lead to undue delay or inconvenience (s. 171 CCP). In principle, it is the prosecutor who presents the claim in court, unless the victim is represented by a lawyer, in which case the lawyer prepares and presents the claim.

Compensation is awarded for direct loss and harm which has resulted from the criminal offence. In addition, if the victim has filed a claim to that intent, the court may order the accused to pay the costs incurred by the victim in the preparation and presentation of his case 'such as on account of the acquisition of documentation concerning the claim and counsel's assistance' (s. 172-4 CCP 1991). If a criminal case is appealed to the Supreme Court, the Supreme Court will also take any compensation claim made by the injured party in conjunction with the criminal case into consideration (s. 173-1 CCP 1991). The accused and the injured party may also appeal specifically against the compensation awarded by the district court. In that case, the Supreme Court will treat the appeal as a civil case (s. 173-2 CCP).

55 Information provided by the Office of the DPP, December 1996.
56 Translation by the Office of the DPP.
57 'In the Supreme Court of Iceland, a claim for compensation which has been adjudged in substance at the District level shall be taken for consideration in the ordinary manner if a case is also appealed for that purpose' (s. 173.1, translation by the office of the DPP).
58 'An accused and a party claiming compensation in accordance with the provisions of the present Section are individually authorized to appeal specifically to the Supreme Court (of Iceland) a District Court's provision where a claim for compensation has been awarded in substance if the Judgment is not appealed in another respect, but that petition will be subject to the same procedure as the appeal of Civil Cases' (s. 173-2 CCP 1991, translation by the office of the DPP).
Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction.

The claim for compensation is adjudged in conjunction with the criminal case, but under the auspices of civil law — the decision to award compensation is not a penal sanction nor a substitute for a penal sanction, but may be awarded in addition to a penal sanction. It is decided on the basis of the Damages Act (Skadabótalög) nr. 50/1993 of 19 May 1993. When this act first came into force on 1 July 1993, the judges dismissed more compensation claims than usual because the claims did not meet the requirements set out by the new act. In general, Icelandic judges are perfectly happy to deal with a civil claim together with the criminal case. In some 60 to 70% of cases where injuries or losses have been suffered by the victim, claims are indeed made. In rape cases, the score is even said to be 100%. Ordering compensation from the offender to the victim as a financial condition to a deferred or suspended sentence, of a probation order or any other measure, is not done in Iceland. Formally speaking, it appears to be possible to make the payment of damages a condition for a suspended sentence, but so far all attempts in this direction have failed to materialize because there is no supervisory apparatus. At present, there is some discussion among judges that this sentencing option should perhaps be taken into consideration again.

7.3 Enforcement of Compensation

If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.

Compensation is not a penal sanction, and the criminal court judge sees the sentence he imposes on the accused for committing the offence, and the compensation he awards on the basis of a compensation claim, as two totally unrelated issues. He will therefore not attune the two to each other, which may well result in the imposition of a fine in combination with compensation, even if it is perfectly clear to the court that the offender does not have the

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59 The penal sanctions in Iceland are imprisonment or a fine. Community service as an alternative to a fine, or imprisonment up to three months, does exist, but it is not something that is championed by judges. Their main objection is that the decision to let the accused do community service instead of paying a fine or sitting out a prison sentence is not taken by the sentencing judge but after the sentencing by the enforcement authority. Therefore the judge has no control over who does community service.

60 Information provided by Friðgeir Björnsson, president district court Reykjavík, Ingibjörg Benediktsdóttir and Pétur Guðgeirsson, judges district court Reykjavík, 23 December 1996.

61 In rape cases, the police will not send a file on to the prosecutor until the victim has put forward his compensation claim.

62 Information provided by judges of the district court of Reykjavík, 23 December 1996.
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means to meet both financial obligations. The amount to be paid in the form of a fine is decided on the basis of the offender’s means, but compensation is awarded according to the amount of damages, injuries, or losses suffered. In principle, the injured party who has been awarded compensation is responsible for collecting the money himself. In practice, this means that many victims never receive the money due to them, or at best, only part of it. Victims of sexual offences, in particular, do not dare approach the offender to ask for their compensation. However, since the act providing for state compensation came into force on 1 July 1996, victims of violence whose damages amount to more than ISK 100,000 can send the court judgement directly to the Damages Committee, without first demanding payment from the offender. The Committee then pays out the amount awarded by the criminal court (s. 11) deducting any sums that the victim has received, or stands to receive, from the offender (s. 10). No payment is made to the extent to which the party causing loss is considered to have acknowledged the claim or its amount in the course of the proceedings of the case (s. 11-3).

8 Treatment and Protection of the Victim

8.1 Victim-Awareness Training

(A.1) Police should be trained to deal with victims in a sympathetic, constructive and reassuring manner.

To become a police officer in Iceland, a two-year training course must be completed. The first 6 months of training are spent at the national police academy. This is followed by a year of on-the-job training with a police force, before returning to the academy for a further six months. Every three or four years, there is a follow-up course.

In 1989, a parliamentary rape committee (see § 4.3) recommended that regular seminars be organized for the police and health service personnel to instruct them on how to deal with victims of sexual offences, not only regarding the formal procedures and the securing of proof, but also in how to approach such victims in a compassionate and understanding manner. Instruction regarding this matter during the basic police training should also be increased.

Prior to 1 July 1997, most cases that were not traffic offences were dealt with by the SCIP. This means that the local police force had very limited contact with victims of crime. Even though they were often the first to arrive at the scene of a crime or to respond to a call from the public, the SCIP usually arrived shortly afterwards to take over. Nevertheless, the local police force in Reykjavik organized courses for its employees in how to deal with victims of crime which had to be attended by all patrol officers, but the tiny forces spread around the coast of Iceland could hardly be expected to do the same. The SCIP, which had much more contact with victims of crime, also started to organize regular seminars for its officers on how to deal with victims (of sexual offences).

On 1 July 1997, when the SCIP was disbanded, almost half of the officers previously working for this organization were transferred to a local police force, along with a large part of the investigative powers of the SCIP. Almost all of the police dealings with victims of crime now fall to the local police, and training will have to be adapted to prepare officers for these new tasks.
8.2 Questioning the Victim

(C.8) At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians qualified to assist them.

8.2.1 Questioning by the Police

Victims of sexual offences
The manual of the State Criminal Investigation Police stated that a (female) victim of a sexual offence should be able to ask for a female officer to conduct the questioning. Of the 6 or 7 officers working in the division which handled sexual offences, two were female and they were made available if the victim wanted them. In practice, victims of sexual offences were more often than not simply questioned by the officer on duty.

If a victim of a sexual offence has passed through the Rape Trauma Centre, one of the RTC lawyers will accompany him to the police station to offer support during the questioning. During the questioning of the victim by the police, the RTC lawyer is there to offer moral support, but also to check that the questioning is being done properly — he may for instance prompt questions in the interest of the victim. He has already heard his story and will try to ensure that it really comes through.

Children
Prior to the launching of the Children’s House (§ 4.3), the SCIP had a special room where children could be taken for questioning. Whether a child psychologist or other specialist was called up to work with the child was left to the discretion of the individual police officer dealing with the case (police manual). Concern about this practice had been expressed by Stigamót, who felt that a child should always be questioned by someone specially trained to do this. In principle, the questioning of children by the police was video-taped, although there were no rules on this other than what the SCIP manual said.

Nowadays, child-victims of sexual and other violent offences are questioned in a special studio in the Children’s House. The questioning is mostly done by a child specialist and audio-visual recordings are made. From behind a one-way mirror, the session is observed by a judge, the defence lawyer, the child’s lawyer and the policemen responsible for the investigation.

8.2.2 Questioning in Court

At present, the way the victim/witness is questioned in court depends very much on the presiding judge. The older judges are often reluctant to relinquish the powers they had under the old inquisitorial system and still prefer to conduct the questioning themselves. The younger judges are more apt to let the accusatorial procedures run their course, leaving

Vice versa, there has been criticism and controversy about child victims of sexual abuse who came to the police via Stigamót. In some cases, police officers felt that these victims had been unduly influenced by Stigamót and that words had been put in their mouths. It was feared that these tainted testimonies would lead to the dismissal of cases, and therefore Stigamót now encourages child victims to go directly to the police before receiving any counselling.
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the questioning to the parties themselves, with only an occasional intervention. Not only
the judges but also the prosecutors and defence lawyers need time to adapt to the new
accusatorial system. Before the changes in the law came about on 1 July 1992, the presence
of a prosecutor in court was usually not required (see § 4.2).

Children who have been questioned in the studio in the Children's House in the presence
of the judge, defence and police are no longer required to testify in court.

Regarding the questioning of a victim/witness in the presence of the accused, section
59-6 of the CCP of 1991 provides that a judge may decide to have the accused removed
from the courtroom during the testimony of a witness if the judge deems it possible that
the presence of the accused may cause the witness particular aggravation or may influence
his testimony. The defence lawyer remains in the court, and an audio-tape of the testimony
is played to the accused upon his return to the courtroom. At the time the fieldwork for
this report was being conducted, it was standard practice to remove the accused during the
testimony of the victim in rape cases. However, since then the Supreme Court has indicated
in several rulings that stricter conditions should be met before the removal of the accused
is allowed. As a result, requests by the prosecutor for the removal of the accused are made
less often, and the district courts are not as apt as before to honour them.

Although some defence lawyers employ fairly tough questioning techniques, the RTC
lawyers find that, generally speaking, the mainly male defence lawyers are embarrassed
at having to ask a woman about sexual details. Concerning questions about the previous
sexual history of the victim, the parliamentary rape committee suggested in its 1989 report
that the principle of re-evaluation of evidence in the light of the victim's previous sexual
history should be modified. This recommendation has not been translated into legislation.
In practice, however, victims are seldom questioned about their previous sexual history.

8.3 Protecting the Victim

(F. 15) Information and public relations policies in connection with the investigation and trial
of offences should give due consideration to the need to protect the victim from any publicity
which will unduly affect his private life or dignity. If the type of offence or particular status
or personal situation and safety of the victim make such special attention necessary, either
the trial before the judgement should be held in camera or disclosure or publication of
personal information should be restricted to whatever extent is appropriate.

Rules governing the media

In Iceland, the media have an internal code of ethics which stipulates that victims of crime
shall not be unnecessarily embarrassed — any pictures of, or interviews with, victims of crime
are only printed with their permission. A victim may make a complaint to the press office

64 In the interview with three judges of the district court of Reykjavík on 23 December 1996, one
recounted that he always starts the proceedings by asking the accused in a general way about
important points of the case, before allowing the prosecutor to take over. Another judge totally
disagreed, saying that the prosecutor should start the questioning, then the defence lawyer, and
that right at the end the judge may ask any questions that he feels have been omitted.

65 Information supplied by RTC lawyer. A representative of Stigamót disagrees, contending that
defence lawyers are often of the macho type and humiliate women in court.

66 According to Stigamót, there would probably be an outrage if they were. Information supplied
by Stigamót.
or the organization of journalists if the code of ethics is broken. A disciplinary measure may be taken. There is only one tabloid newspaper in Iceland which focuses on sensational news, although it must be said that television is paying an increasing amount of attention to crime. Regarding the defendant, state television and radio apply the guideline that he shall only be referred to with terms such as 'the accused' and 'the defendant' until he is actually convicted of, and sentenced for, the offence. This is important not only for the privacy of the accused but also for the victim. In a country as small as Iceland, it is often easy to guess the identity of the victim if one knows who the accused is.

**Policies of the authorities**

If the police are approached by a journalist asking for details about a particular case, the standard response is 'no comment'.

The courts are allowed to hold trials concerning sexual offences in camera if it is deemed necessary. Surprisingly, even though the basic principle is that a trial should be public, all cases concerning sexual offences are held behind closed doors, no matter what.

The parliamentary rape committee included in its report a recommendation that rules be enacted prohibiting the publication of information about the victim, and since the 1999 amendment of the CCP victims of sexual offences may no longer be referred to by name in court rulings. Before the amendment, it was already standard practice of the Supreme Court to use only the initials of victims of sexual offences in publications of such cases. This good practice was followed by the district courts, which also refer to the accused by his initials if a positive identification of the accused leads to automatic identification of the victim. However, within the four walls of the courtroom, victims are not allowed to remain anonymous.

(G.16) Whenever it appears necessary, and especially when organised crime is involved, the victim and his family should be given protection against intimidation and the risk of retaliation by the offender.

As yet, Iceland does not have organized crime, although there are suspicions that such a thing may be surfacing in relation to drugs. Perhaps for this reason the protection that the Icelandic system can offer the victim and his family against intimidation and the risk of retaliation by the offender is minimal. There is no such thing as a civil protection order, i.e., a court order prohibiting the offender from contacting the victim or going within a certain area. However, the police may caution an accused person that he or she may not approach the victim. To go against this caution is a criminal offence that may result in prosecution. In extreme cases, the police may also provide surveillance to protect the victim. In practice, it is often difficult for an offender to avoid meeting his victim because the Icelandic community is so small. Likewise, banning him from certain areas in a small town may have serious consequences for the offender. The victim is not informed of the date when the

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67 Information provided by Björn Bergsson, lawyer and RTC team member, 13 December 1996.
68 See otherwise England and Wales, where a ferocious tabloid culture has led to it being made a criminal offence to publish personal details of victims of sexual offences.
69 The Supreme Court publishes its decisions itself.
70 In one case, a woman had been harassed for 7 years by a taxi-driver (the English would classify this culmination of harassment as 'stalking'). The girl worked in the main street of Reykjavik and the man would drive slowly up and down this street, stopping regularly before the shop
person convicted of committing an offence against him is released from prison. In practice, this causes problems because in the small Icelandic community victims and offenders of a particular age often move in the same social circles, leading to surprise encounters between the two. A civil protection order such as those found in many other countries was being considered by the second domestic violence committee at the time the fieldwork for this study was done.

9 CONCLUSIONS

Over the last two decades, Icelandic criminal law and procedure has found itself in a state of flux. Substantial changes from an inquisitorial to a more accusatorial system have been effected, and the police, in particular, have been fundamentally reorganized.

Until recently, the focus was mostly on victims of sexual offences, indicating that Iceland was still in the early stages of development regarding the improvement of the position of the victim of crime. However, the recent initiatives taken in relation to victims of violence and child victims show that Iceland has lifted off from the launching pad of a successful victim policy. However, much still needs to be done. For example, as yet there is no victim support organization offering support to any victim regardless of the type of offence, although there are several groups catering for the needs of victims of sexual assaults.

Although his opportunities for active participation in the proceedings are still limited to reporting the offence to the authorities, testifying in court as a witness in a contested case and presenting a claim for compensation in adhesion to the criminal proceedings, recent legislation has increased the victim’s right to information and to legal assistance. Victims of sexual offences and child victims now have an absolute right to representation by a lawyer, and victims of other violent offences may be appointed a lawyer if necessary.

At present, the victim has no real possibility for contesting a decision of the public prosecutor to drop a prosecution. Private prosecution is only open to the victim in libel cases, and an appeal to the Ministry of Justice is hardly ever made. Consideration should be given to how the standard set by guideline B.7 of the Recommendation of the Council of Europe can best be met.

In court, a civil claim for damages in adhesion to the criminal proceedings is presented by the public prosecutor, unless the victim has a lawyer. It is the responsibility of the individual victim to collect from the offender any compensation awarded by the court. However, victims of violent crime may send the court judgement directly to the Damages Committee. Consideration should be given to offering more support to victims in their efforts to enforce compensation awarded against the offender. One option would be to have compensation enforced free of charge on behalf of the victim by the debt collection agency, a system that has recently been introduced in Sweden.

The police have started organizing seminars on how to deal with victims of sexual offences. If necessary, a victim of a sexual offence can be questioned by a female officer but the questioning is generally done by the officer on duty. Most victims do not have to testify where she worked to stare in. The girl was provided with police surveillance for three months, during which time the offender lay low. The police felt they could not prohibit him from driving up and down the main street because this would have had a huge impact on his job as a taxi-driver. (Information provided by Thorir Oddsson, Vice-Chief of the SCIP, 17 December 1996).
in court. If a victim of a sexual offence is called as a witness, the case is heard behind closed doors. An extremely positive development has been the establishment of the Children’s House for the examination and questioning of child victims at all stages of the legal proceedings.
Supplements

ABBREVIATIONS

A.D. - Anno Domini
CCP - Code of Criminal Procedure
diss. - dissertation
DPP - (Office of the) Director of Public Prosecutions
ed. - editor
EFTA - European Free Trade Association
EH - Ernestine Hoegen
etc. - et cetera
Eur. Court H.R. - European Court of Human Rights
ISK - Icelandic Kronor
NATO - North Atlantic Treaty Organization
NBI - national Bureau of Investigation
no. - number
nr. - number
p. - page
PC - Penal Code
pp. - pages
RTC - Rape Trauma Centre
s. - section
SCIP - State Criminal Investigation Police
sic - spelling mistake by author of quotation
ss. - sections
sub - below/under
Vol. - volume

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Ireland

The history of the beautiful island of Eire (Ireland) is one of constant struggle against foreign domination, famine and internal strife. Having been converted to Christianity between the 3rd and 5th centuries AD, the Irish were first beleaguered by the Vikings who arrived at the end of the 8th century, and then by the Normans, who had conquered England in 1066 and invaded Ireland in 1169. In the centuries that followed, the predominantly Catholic Irish struggled against the Anglo-Normans but could not prevent Protestant settlers from England and Scotland from confiscating large tracts of land. Subsequent Irish rebellion in which a considerable number of settlers were murdered was bloodily beaten down by the Protestant Oliver Cromwell in 1649, who in turn confiscated huge amounts of land to share out among his supporters. Strife between the Catholics and the Protestants continued, and came to a head in the Battle of the Boyne of 12 July 1690, when the Irish Catholics led by James II of Scotland were beaten by the English Protestants led by William of Orange. The Irish surrendered in 1691 with the signing of the Treaty of Limerick.

Harsh times lay ahead for the Catholics, who were severely restricted in their private and public life by the penal laws of 1695. At the same time, the Protestant parliament in Dublin was striving for more independence from the English and was eventually granted freedom of legislation in 1782. Meanwhile, the different creeds were entrenching themselves in organizations such as the Presbyterian United Irishmen and the Protestant Orange Society, better known as the Orange Order. The unrest eventually backfired on those striving for complete independence of Ireland, when Ireland became part of the United Kingdom of Great Britain and Ireland through the Act of Union of 1800. The Dublin parliament was disbanded and Irish representatives were given seats in the British House of Commons.

Massive failure of the potato crop resulted in the Great Famine of 1845-51, which led to the deaths of about 1 million people, and the emigration of another 1 million. Further entrenchment of the different factions took place following the founding of organizations

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2 These laws not only outlawed Irish culture, music and education but also prohibited the Catholics from buying land, raising their children as Catholics and joining the army or navy or entering the legal profession.
such as the Ulster Unionists (1885) and the Ulster Volunteer Force (UVF) on the one hand, and the Irish Volunteers (later succeeded by the Irish Republican Army, IRA), the Irish Republican Brotherhood (IRB), the Irish Citizens' Army for self-defence and Sinn Féin on the other. Part of the Irish Volunteers and the Irish Citizens' Army set up the Easter Rising on Easter Monday 1916, and when the British executed 15 of the leaders of the failed rebellion, growing support for the republicans was ensured. The republicans won the general elections of 1918 and declared Ireland independent, to the outrage of the English. The ensuing Anglo-Irish war, fought from 1919 to 1921, ended with the Anglo-Irish Treaty of 1921, which ratified the partition of Ireland into 2 separate states: (1) the Irish Free State, which was renamed the Republic of Ireland in 1948, and (2) Northern Ireland, which remained part of the United Kingdom.

The conflict did not end with partition. The civil war that broke out in the South eventually petered out in 1923. But in the North, the fairly substantial Catholic minority was systematically discriminated against by the Protestants. They were kept out of power, jobs and housing, and the 'troubles' definitively erupted when the Royal Ulster Constabulary used excessive violence to break up a civil rights demonstration in Derry in October 1968. In August 1969, British troops were sent in, and what followed was years and years of guerilla warfare conducted by the IRA and other para-military groups against the British, both in Northern Ireland and abroad. Eventually a joint declaration called 'The Framework Document' was issued by the British and Irish governments, and a cease-fire was announced on 31 August 1994. On 7 February 1995, the Irish government formally ended the national emergency. Although hostilities were resumed a year later, following the bombing of Canary Wharf in London on 9 February 1996, the most substantial step to date towards peace was made on 10 April 1998 with the signing of the Northern Ireland Peace Agreement. In a referendum held on 18 May 1998, the Agreement received the overwhelming support of the people of both the Republic and of Northern Ireland, and a northern assembly with 108 seats was elected on 28 June 1998.

Despite the troubles, and contrary to popular belief, the criminal justice statistics show Ireland to be the most non-violent country of Western Europe, and homicide, in particular, remains at a low level compared to other European countries. Violent crime in the Republic of Ireland is at a level of 60% compared to that in Northern Ireland. Both 'Irelands' have been a member of the (now) European Union (EU) since 1 January 1973. Although all of Ireland

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3 A Home Rule Act had been passed in 1912 by a new Liberal British government, but was suspended with the outbreak of WWI in 1914.
4 In the Republic, 94% of voters supported the Agreement. In Northern Ireland, 71% voted in favour, and 29% against.
5 A Northern Ireland parliament was first created on 22 June 1921, but disbanded in the thick of the troubles in 1972.
6 See, for example, the Department of Justice, Tackling Crime, Discussion Paper, May 1997, diagram p. 40, and De Volkskrant (Dutch daily newspaper) 3 July 1996.
was still considered 'deprived' in EU terms in 1989, the economy has since improved dramatically, and stands to receive a further boost if lasting peace is achieved. In this chapter, we will focus on the Republic of Ireland.

Most of the Republic of Ireland is Roman Catholic, and the Church and religion still have a significant, although steadily diminishing impact, particularly where issues such as divorce or abortion are concerned. Legislative power is vested in parliament (the Oireachtas) which consists of the President (An tUachtaran), the Lower House (Dáil) and the Upper House (Seanad). The 166 members of the lower house are elected by the public. The lower house then nominates the Prime Minister (Taoiseach) who is appointed by the President. The president is elected by popular vote for a seven-year period.

The Irish language is the first official language, with English recognized as a second official language (Article 8 Constitution).

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9 A national referendum on divorce was one of the hot items of Irish politics in 1996. The referendum resulted in a narrow victory for those lobbying for the right to divorce. The Constitution has since been changed allowing for divorce. Women are now allowed to travel abroad for an abortion. This was decided in a referendum in 1992 following a highly-publicized case of a young rape victim who was threatened with prosecution if she went to England for an abortion.
10 Of the 60 members of the upper house, 11 are nominated directly by the Prime Minister, 43 are elected from five panels representing vocational interests and 6 by the graduates of the National University of Ireland and the University of Dublin.
11 In 1991, Mary Robinson was elected the first female president of Ireland. Hugely popular, she was appointed the United Nations High Commissioner for Human Rights in 1997. She was succeeded as President of Ireland by Mary McAleese.
12 Regarding the annotation of elements of the Irish Constitution, the Irish have divided their Constitution into articles that are in turn divided into sections.


PART 1

THE IRISH CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

Ireland is a country with a common law system, and an adversarial criminal justice process. In the early days, when Ireland was still free of foreign invaders, the Irish had a system of native customary law which was administered by travelling judiciaries called Brehons. This system is therefore known as Brehon law. The Normans had invaded England in 1066, and initiated the development of what is now referred to as English common law. It is this body of law which the Anglo-Normans brought to Ireland and which at the end of the 17th century had largely replaced Brehon law. Following the Act of Union of 1800, through which Ireland became part of the United Kingdom, English common law and statutes were applicable in Ireland, and these were in principle left in place when the Republic of Ireland was established in 1921. Since then, the Irish legislator and courts have developed this law in their own fashion, often looking to countries other than England for inspiration, although "as the pace of legislative change is slower in Ireland than in England, the (English) common law is today more intact in Ireland than in England."

Ireland has a written constitution, the Bunreacht Na hÉireann (Constitution of Ireland). This Constitution, which was enacted on 1 July 1937, and came into force on 29 December of that year, replaced the earlier Constitution of the Irish Free State which came into effect in 1922. The Constitution overrides all other sources of law. In this respect, Ireland resembles the United States of America with its written Bill of Rights, rather than England where there is no written constitution.

2 GENERAL REMARKS AND BASIC PRINCIPLES

The Irish criminal justice system is a typical adversarial process whereby the parties determine the scope of the proceedings. As is the case in England, the Irish criminal justice system tends to result in trial avoidance. A defendant who pleads guilty, and whose plea is subsequently accepted by the judge, is sentenced and convicted without a full trial taking place. There is an informal system of plea-bargaining, whereby the prosecution and defence may negotiate about the charges and the plea. The accused may, for instance, agree to plead guilty to a lesser charge, or guilty to one of several charges if the others are dropped.

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13 The common law is "the body of principles and doctrine that have emerged implicitly from the history of decision-making by courts rather than explicitly from politically motivated decision of legislators" (J. Waldron, The Law, Routledge, London and New York, 1992, p. 15). See also §§1 and 2 of Chapter 7.

14 See D.A. Binchy, Corpus Iuris Hibernici, Institute for Advanced Studies, 1979, for an annotation in six volumes of the ancient law tracts.

15 S.E. Quinn, Criminal Law in Ireland, Magh Itha Teoranta, Co. Wicklow, 1988, p. 2.

16 There are other similarities between the Irish and the American criminal justice process, such as the system of indictments or written accusations for more serious offences to be heard in the Circuit Court or Central Criminal Court, and the acceptance of Victim Impact Statements. However, at arraignment the accused is afforded the opportunity to withdraw a plea of guilty and is equally informed of his/her right to a trial by jury.
Defendants are generally given a sentence discount for a guilty plea (see § 5).

Offences are either summary or indictable. Summary offences may be tried by courts of summary jurisdiction (Art. 38.2 C), that is to say by the District Courts, which sit with one judge and no jury. Indictable offences, which are more serious offences, are usually tried by judge and jury in the Circuit Court or the Central Criminal Court, although some are heard by the District Court (see §3.3). Under common law, offences were categorized as either felonies or misdemeanours, but this distinction did not run parallel to the one between indictable and summary offences – there are both felonies and misdemeanours that are indictable. The Criminal Law Act of 1997 abolished the distinction between felonies and misdemeanours and provided for the concept of the ‘arrestable offence’ – an offence carrying a potential five-year prison sentence or a more severe penalty in which case an arrest may be made without a warrant.\(^{18}\)

The decision whether or not to prosecute in a particular case is a discretionary one. Most criminal prosecutions are initiated by a state agency, such as the Director of Public Prosecutions or the Garda Síochána, depending upon the nature of the offence (see §3.2 and §7.1 under B.5).

In principle, the trial should be public and evidence presented orally, although whenever a witness cannot appear in court, his written statement is admissible (s. 21 Criminal Justice Act (CJA) 1984). Parties may cross-examine each other’s witnesses.

3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

3.1 Investigating Authorities

Policing in the Republic of Ireland is done by the Garda Síochána na h-Éireann, which translates literally as Guardians of the Peace of Ireland. Irish police officers are referred to as Gardai (pronounced *gardee*), or Guards. The Garda was established in 1922, when the Irish Free State was proclaimed, to replace the Royal Irish Constabulary, which was associated with British rule. In 1925 the Dublin Metropolitan Police, which had been founded in 1836, merged with the Garda, to form one national force. Since 1996, the Garda has been organized into six regions which are in turn divided into divisions. The divisions are further divided into districts and sub-districts. During the last two decades, increasing emphasis has been put on community policing. A Community Relations Section was established in 1979, and Urban and Rural Community Policing Schemes have been piloted and introduced around Ireland.\(^{19}\) Traditionally, Ireland is one of the most heavily policed areas of Europe.\(^{20}\)

\(^{18}\) See Byrne and McCutcheon (1996), nrs. 6.59-6.61, pp. 207-208. The comments there concern the (then) Criminal Justice Bill of 1996, which was enacted as the Criminal Law Act of 1997, and came into operation on 22 July 1997.

\(^{19}\) See the discussion paper *Tackling Crime* of the Department of Justice, May 1997, pp. 80-83. Other elements of community policing are the establishment of a Crime Prevention Unit, a National Juvenile Office, Youth Diversion Projects and several special schemes such as Neighbourhood Watch, Community Alert and Business Watch.

For a population of around 3.6 million, the Garda has 10,817 members of all ranks stationed at 702 stations around the country. Only 8% of the force is female. Uniformed members of the force do not carry firearms.

The Garda Siochána operates in complete independence – there is no supervision by the prosecuting authorities or members of the judiciary. Where a summary offence is concerned, the Gardaí do not only conduct the investigation but also bring the prosecution to the District Court. Technically speaking, the Garda who acts as prosecutor in such cases is a private prosecutor (see §5.3). Indictable offences are investigated by the Gardaí and then referred to the prosecuting authorities to be dealt with further.

In relation to victims of crime, the Garda Siochána has set up a domestic Violence and Sexual Assault Investigation Unit in Dublin in 1993, which has a nation-wide role. The unit resides under the responsibility of the National Bureau of Criminal Investigation (NBCI) and received 6,000 calls in 1996. The Gardaí have a written policy on Domestic Violence Intervention, and a pro-arrest policy.

### 3.2 Prosecuting Authorities

The Attorney General and the Director of Public Prosecutions are 'Law Officers in the State', i.e., lawyers who act on behalf of the Government in legal matters. The position of Attorney General (AG) is a political appointment. The AG is appointed by the President on the nomination of the Taoiseach (Art. 30.2 C.) and must retire from office upon the resignation of the Taoiseach (Art. 30.5.4 C.). The AG acts as adviser to the Government in matters of law and legal opinion and fulfills any other functions assigned to him by law (Art. 30.1 C.). The Constitution determines that indictable offences are prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose (Art. 30.3 C.). Since the establishment of the office of the Director of Public Prosecutions (DPP) by the Prosecution of Offences Act, 1974, the task of prosecuting such offences has been transferred almost entirely from the AG to

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22 Although unarmed the Gardaí have been embarrassed by a report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which found that people ran ‘a not inconsiderable risk of being ill-treated’ in certain Garda stations. The report was handed to the Irish government in 1994 and was responded to and published by the government on 13 December 1995, see The Irish Times 14 December 1995. The report also found that some staff in Mountjoy and Limerick Prisons ‘have a propensity to ill-treat prisoners’. More recently, the Mountjoy prison has been criticised for chronic overcrowding and a chronic lack of resources leading to the minimum chance of rehabilitation in prison and serious breaches of human rights standards (Penal Reform Trust, The Irish Times 28 May 1996).


24 See Byrne and McCutcheon (1996), nr. 3.53 pp. 67-68.
IRELAND

The DPP.\textsuperscript{25}

The DPP is a civil servant appointed by the Government but acting with complete autonomy. The 14 lawyers working in the DPP’s office examine files submitted to them by the Gardai and decide on the charging and prosecution of the accused persons. The DPP is not involved in the investigation of offences, although he may request the Garda to collect additional information or conduct further investigations. Communication with the Garda is mostly limited to the transmission of files.

The DPP does not implement his own decisions, but leaves this to the Chief State Solicitor’s Office. One of the tasks of this agency is to brief the barristers acting on behalf of the State in court. The Chief State Solicitor is also solicitor to the Attorney General, Government departments and State bodies.\textsuperscript{26}

A prosecution in a summary offence, or an indictable offence up and until committal for trial, may be brought by a member of the public. For the private prosecution see §5.3.

3.3 Judiciary

Organization
The District Court (AN CHÚIRT DUiCHE) is the court of lowest jurisdiction. Here, a judge sitting alone hears summary offences, and conducts a preliminary examination of the evidence in relation to indictable offences. An accused may be dismissed by the District Judge if he considers the evidence insufficient to support the allegations contained in the charges. The District Court consists of the President of the District Court and a maximum of 50 ordinary judges.\textsuperscript{27} The court covers the Dublin Metropolitan District and 23 other districts.\textsuperscript{28} The Circuit Court (AN CHÚIRT CHUARDHA) hears appeals in summary cases dealt with by the District Court, and is the court of first instance for indictable offences. It sits on 8 circuits and consists of the President of the Court and a maximum of 27 ordinary judges. Serious criminal cases before the Circuit Court are heard by the Judge and a 12-man jury. The Central Criminal Court (AN PHRíOMH-CHÚIRT CHOIRíUÍL), which is the name given to the High court exercising its criminal jurisdiction, is situated in Dublin and this court, too, sits with judge and jury. It is the court of first instance for very serious indictable offences. The maximum number of ordinary judges to be appointed to the High Court is 24.\textsuperscript{29} The Special Criminal Court (AN CHÚIRT CHOIRíUíL SPEISIALTA) historically dealt with terrorist offences against the State, however, the jurisdiction of this court is not confined

\textsuperscript{25} The first director, who was still director at the time of writing, started work in 1976.
\textsuperscript{26} A possible unification of the DPP’s Office with the Chief State Solicitor’s Office is at present under consideration, although no political action has yet been taken. The division of the tasks related to bringing a prosecution between two different agencies has occasionally given rise to practical problems in relation to efficiency and communication. In 1995, the Director of Public Prosecutions called for the establishment of a single prosecution agency, see The Irish Times 3 October 1995, reporting on an article published by the DPP in the Garda management journal Communiqué.
\textsuperscript{27} The Courts and Court Officers Act, 1995. On 1 May 1998 the District Court consisted of the President and 47 Judges.
\textsuperscript{28} The President of the District Court is assigned to the Dublin Metropolitan District. The court regulations allow for 38 of the other judges to be permanently assigned to a district, and for 12 to be deployed on a temporary basis, depending on where they are needed. See Department of Justice, Equality and Law Reform, Irish Judicial System, May 1998.
\textsuperscript{29} The Courts (No. 2) Act, 1997.
to these offences. It sits with three judges but no jury. At the time of writing, appeals from the Circuit Criminal Court, the Central Criminal Court and the Special Criminal Court were heard by the Court of Criminal Appeal (AN CHÚIRT ACHOMHAIRC CHOIRIÚIL) which consists of one Supreme Court and two High Court judges, one of which may be the President of the High Court. The Court of Criminal Appeal may be abolished in the near future. The Supreme Court (AN CHÚIRT UACHTARACH) hears appeals which involve a point of law of exceptional public importance. It consists of the Chief Justice and 7 ordinary judges, and may sit in two or more divisions simultaneously.

The Irish Courts

<table>
<thead>
<tr>
<th>Supreme Court</th>
<th>Court of Final Appeal on points of law in criminal and civil cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Special Criminal Court</td>
<td>Terrorist offences against the state, and other offences at the discretion of the DPP</td>
</tr>
<tr>
<td>Court of Criminal Appeal</td>
<td>Appeals from the Criminal Courts</td>
</tr>
<tr>
<td>Central Criminal Court (Judge and Jury)</td>
<td>Serious indictable offences</td>
</tr>
<tr>
<td>Circuit Court (8) (Judge and Jury)</td>
<td>Indictable offences, appeals from the District Court</td>
</tr>
<tr>
<td>District Court (24) (Judge)</td>
<td>Summary trials, preliminary examination of indictable offences</td>
</tr>
</tbody>
</table>

In October 1995, the Working Group on a Courts Commission was established by the Minister for Justice to review the operation of the court system. Recommendations made by the working group to date are contained in a series of 5 reports which include the establishment of a Courts Service to manage the court system and the creation of an Information Office.

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30 Courts and Court Officers Act 1995, section 4. The functions of the Court of Criminal Appeal will be taken over by the Supreme Court, but before this section is implemented by a Commencement Order, the backlog of civil appeals in the Supreme Court must be dealt with. Byrne and McCutcheon (1997), nr. 7.35, p. 242.

31 The maximum number of ordinary judges was increased from 4 to 7 by the Courts and Court Officers Act, 1995. The arrangement that the court may sit in two or more divisions simultaneously was also introduced by this Act.

32 The working group is chaired by the Hon. Mrs. Justice Susan Denham, Judge of the Supreme Court. Other members include five judges, a former Attorney General and the chairwoman of Women’s Aid.
for the courts. The Court Service was due to commence operation around the beginning of 1999.

**Appointment**

A barrister or solicitor who has been in practice for at least ten years is eligible for appointment to the District Court (s. 29(2) Courts (Supplemental Provisions) Act 1961). Until 1996 only barristers were eligible for appointment to one of the other courts, but the Courts and Court Officers Act 1995 has now been amended so that section 30 allows both barristers and solicitors who have been in practice for at least ten years to be directly appointed as a Circuit Court Judge. However, only barristers of 12 years' standing may be directly appointed to the High Court or the Supreme Court (s. 5(2) Courts (Supplemental Provisions) Act 1961). A new provision that a Judge of the Circuit Court of four years' standing may also be appointed to the High or Supreme Court does allow solicitors to be appointed to these courts via a detour (s. 28 Courts and Court Officers Act 1995). Juries are drawn primarily from the electoral roll.

**Court Atmosphere**

A typical Dublin District Court scene looks like something taken directly from a Dickens novel. As solicitors rush around between courtrooms and people jostle each other in the doorways, Gardaí officers line the courtroom walls with their charges chained to them. It is impossible to know which case will be called next so the court is packed with waiting lawyers, accused persons and their families, Gardaí and witnesses. Meanwhile, elsewhere in the same 'Four Courts' building, barristers stride importantly through the imposing domed hall in a flurry of robes and wigs. The Circuit and Central Criminal Court are located around this hall, and the atmosphere in these imposing courts is much more formal. The judge sits towering above the court, with the jury to one side and the witness box and the dock to the other. Counsel sits below and in front of the judge, senior counsel in the first rows with the solicitors opposite. Junior counsel sit behind, while the public is seated at the back of the court.

**Training**

Mandatory training for judges is relatively new, and was first introduced by the Court and Courts Officers Act, 1995. Section 16 of this Act determines that those wishing to be considered for judicial appointments must agree to attend any courses stipulated by the Chief Justice or the President of the Court to which the person is appointed. Judicial training is now the responsibility of the newly established Judicial Studies Institute. Although Judges

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33 The reports are:
(1) Management and Financing of the Courts, April 1996;
(2) Case Management and Court Management, July 1996 (this was followed by a conference on Case Management on 16 November 1996);
(3) Toward the Courts Service, November 1996;
(4) The Chief Executive of the Courts Service, March 1997;

34 See §3.4 for an explanation of the difference between barristers and solicitors.


36 Byrne and McCutcheon (1997), nr. 6.102, p. 223.
appointed before 1996 are not compelled to follow any courses, the Judicial Studies Institute aims to provide training for all judges.\textsuperscript{37}

### 3.4 Legal Profession

The Irish legal profession distinguishes between solicitors and barristers. Broadly speaking, the solicitor takes a case from a member of the public and does the preparatory work, and the barrister presents the case in court.

Apprentice solicitors receive a 4½-month vocational training course at Blackhall Place in Dublin. This is followed by an 18-month internship with their employers, before returning to Blackhall Place for a further 2-month advanced course. Following a High Court ruling in October 1995, all candidates, including law graduates, must sit entrance exams. Non-law graduates are also eligible if they pass the annual entrance exam called the Final Examination First Part. Solicitors are represented by the Law Society.

A prospective barrister must pass a two-year Barrister-at-Law (BL) degree course set by the Honourable Society of King’s Inns in Dublin.\textsuperscript{38} Those who have successfully completed the course are ‘called to the Bar’ by the Chief Justice which is followed by at least one year of ‘devilling’ – working with an established barrister to learn the ropes.\textsuperscript{39} The ruling body of the barristers is called the Bar Council. Regarding the dress of barristers in court, section 49 of the Courts and Court Officers Act 1995 makes the wearing of wigs optional for barristers and senior counsel. In practice, wigs remains popular.

Victims of crime do not have a right to legal representation in Irish criminal proceedings. The issue of legal representation for victims of rape is, at present, the subject of debate.\textsuperscript{40} The main argument offered against such an institution is that it would jeopardize the right of the accused to a fair trial because he would be faced by two opposing parties rather than one.\textsuperscript{41} It is also argued that it would complicate the criminal trial and alienate the jury to such a degree that it could lead to unjustified acquittals.\textsuperscript{42} Other arguments are that additional costs would be incurred by the State, that it involves the risk of coaching the victim/witness and that it would lead to an increase in the number of appeals challenging the fairness of

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\textsuperscript{38} An additional requirement is that one ‘keeps commons’ by dining in the Hall of the Honourable Society ten times in each of these two years. Byrne and McCutcheon (1997), nr. 3.31, pp. 59-60.

\textsuperscript{39} http://indigo.ie/~gregk/qualify.html

\textsuperscript{40} Antagonists include the Law Reform Commission in its Report on Rape (1988), and the Second Commission on the Status of Women. The Dublin Rape Crisis Centre is a fierce protagonist. Also in favour is The Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence Against Women and Children (1996, pp. 86-87). The Task Force on Violence Against Women leaves the matter open and recommends that the Department of Justice addresses the issue (April 1997, pp. 87-88), which it subsequently did in its Discussion Paper The Law on Sexual Offences of May 1998 (pp. 42-43).

\textsuperscript{41} See, for example, the Law Reform Commission Report on Rape (1988) as quoted by the Department of Justice, Equality and Law Reform in its Discussion Paper The Law on Sexual Offences of May 1998, p. 42.

\textsuperscript{42} Idem.
the trial. Protagonists argue that legal representation for victims of rape would make the trial much less traumatic for them and would lead to an increase in the reporting of such crimes. The Department of Justice is doubtful about the constitutionality of legal representation of victims of sexual offences, although it does suggest that representation might be allowed where an application is made to the court to present evidence on, or cross-examine, the complainant's past sexual history. An application is heard by the judge only, so there is no question of the victim's representative influencing the jury.

Criminal offences may also give rise to civil actions, for instance if the victim of a sexual offence applies for a barring or protection order (see § 8.3 under guideline G.16). Section 26(3) of the Civil Legal Aid Act, 1995 determines that complainants in a case of rape, aggravated sexual assault, unlawful carnal knowledge and incest qualify for free legal advice on the basis of the Civil Legal Aid Scheme. The legal aid solicitor may also accompany the victim into the criminal court, but may not participate in the proceedings in any way.

3.5 Probation and Welfare Service

The Probation and Welfare Service is part of the Department of Justice, Equality and Law Reform. Although it is not recognized in law as a separate agency, in practice this service functions independently under the direction of the Principal Probation and Welfare Officer, and reports to the Prisons Division (Probation) of the Department of Justice. The headquarters are in Dublin, with regional offices around the country. The role of the Probation and Welfare Service is two-fold. First of all, it serves the courts by preparing pre-sanction reports on offenders who have been found guilty, and by supervising probation orders, community service orders and offenders on temporary release from custody. Secondly, it provides a welfare service for offenders. This includes counselling for incarcerated persons.

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45 In principle, no evidence may be adduced, and no question asked in cross-examination, about the past sexual history of a victim of rape or sexual assault (s. 3 Criminal Law (Rape) Act, 1981, as amended by section 13 of the Criminal Law (Rape Amendment) Act, 1990). However, an application may be made to the court that such evidence is relevant to the case and could make a difference to the outcome, in which case the judge may give leave for the production of evidence and/or cross-examination about the victim's past sexual history. A comparable measure was introduced in England by the Sexual Offences (Amendment) Act (1976), but in practice the English judges have proved very unwilling to disallow such evidence, more or less turning the measure into a dead letter. O'Malley reports that although the Irish formula seems more restrictive, 'the dearth of reported appellate judgments on this section would suggest that defence counsel are not experiencing any great difficulty in getting leave when they ask for it' (Th. O'Malley, Sexual Offences: Law Policy and Punishment, Round Hall Sweet & Maxwell, Dublin, 1996, p. 242.).
and their families to help them cope with prison, treatment and social development programmes, the preparation of offenders for eventual release, and a variety of programmes to encourage the reintegration of offenders into their local communities.\textsuperscript{48} The Probation and Welfare Service is currently under Review.

### 3.6 Department of Justice, Equality and Law Reform

The present Department of Justice, Equality and Law Reform (\textit{An Roinn Du agus Cirt, Comhionannais agus Athchóirithe Dl}) was established in July 1997 when the previous Department of Justice was merged with the Department of Equality and Law Reform. Its main task is to ensure community security, and its responsibilities range from the Garda Síochána, the courts, the prisons and law reform, to immigration, the promotion of equality, land registry and registry of deeds, and matters related to Northern Ireland. The Department is in the process of reviewing its goals and strategies and has published a series of policy statements.\textsuperscript{49} One change to be effected in the near future is the transferral of the administration of the Courts, which is at present handled by the Courts Division of the Department, to an independent Courts Service.

On 28 February 1997, the Department of Justice published a Charter for Victims of Crime which sets out the standards to be met by agencies of the criminal justice system. The Project Development Division of the present Department is in the process of revising this charter. Furthermore, the Department is responsible for the Criminal Injuries Compensation Tribunal, and provides funding for Victim Support.\textsuperscript{50}

### 3.7 Criminal Injuries Compensation Tribunal

Victims of violent offences, or in the case of death, his dependants, may claim state compensation on the basis of the Scheme of Compensation for Personal Injuries Criminally Inflicted. This non-statutory scheme, which was introduced in February 1974 and amended in 1986, is administered by the Criminal Injuries Compensation Tribunal. The Chairman and six ordinary members of this tribunal must all be practising barristers or solicitors. The Tribunal also administers the payment of compensation to members of the Gárdh Síochána on the basis of the Gárdh Síochána (Compensation) Act 1941, as amended in 1945, and the payment of compensation to prison officers on the basis of the Scheme of Compensation for Personal Injuries Criminally Inflicted on Prison Officers of June 1990. In the following we will deal only with the Scheme of Compensation for Personal Injuries Criminally Inflicted.


\textsuperscript{49} The first to be published as part of the Strategic Management Initiative (SMI) was \textit{Community Security – Challenge and Change} of December 1996. Other publications containing mission and policy statements are the SMI Discussion Paper \textit{Tackling Crime} of May, 1997, and the \textit{Customer Service Action Plan}, 1997.

\textsuperscript{50} This amounted to IR£18,000 in 1993, £110,000 in 1994, £180,000 in 1996 and £280,000 in 1997.
Inflicted.\(^51\)

An application for compensation should be made on the Tribunal's application form (s. 22), in principle no more than three months after the event giving rise to the injury (s. 21). Compared to other countries, this period of limitation is extremely short—in Switzerland a claim may be made up to two years after the offence was committed, and in the Netherlands three years. The Tribunal may consider a claim made after the three month period of limitation if there are circumstances determined by the Tribunal to justify exceptional treatment (s. 21). Payments on the basis of the scheme are 'ex gratia', i.e., the applicant does not have a legal right to receive state compensation, but awards are made 'out of charity'. In practice, it is unlikely that an award will be refused if all the requirements of the Scheme are met.\(^52\) The injury for which an application is made must merit compensation for a minimum of 50 Irish pounds (s. 9). This is a notably low threshold compared to many other countries. In England, for example, an application to the Criminal Injuries Compensation Authority may not be for less than 1,000 pounds sterling, i.e., approx. 1150 Irish pounds.\(^53\)

Section 10 of the scheme excludes victims of domestic violence from state compensation, and since the amendment of 1986 no compensation is paid for pain and suffering. The Republic of Ireland has not signed or ratified the European Convention on the Compensation of Victims of Violent Crimes.

### 3.8 Victim Support

_Victim Support_ (formerly: The Irish Association for Victim Support) is a community based, voluntary organization which was founded in 1985. At the time of writing it consisted of 25 local branches with a National Office in Dublin. Victim Support aims to provide victims of crime with practical help and emotional support in the aftermath of the crime. Its volunteers visit victims at home. An automatic referral system of victims of burglary from the Gardaí to Victim Support was set up in June 1992, and has since been extended to victims of other offences (see Part II under A.2). Specialist services set up by Victim Support include a Court Victim Witness Programme, a support group for families of murder victims, the Dublin Tourist Victim Service and a Hospital Project.\(^54\) Finally, there is a 24-hour help line.

Other organizations providing (emotional) support to victims of crime are, among others, Women's Aid, the Dublin Rape Crisis Centre and the National Children's Alliance. Legal advice can be obtained from bodies such as the Free Legal Advice Centres (FLAC) and the Coolock Community Law Centre.

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\(^{52}\) D. Greer (1996), section 4.4 p. 338. Only Denmark recognizes a legal right to state compensation, all other countries involved in our research award compensation 'ex gratia'.

\(^{53}\) Exchange rate as of 21 July 1998. 50 Irish pounds is about 43 pounds sterling. The English minimum threshold for claiming compensation is 23 times higher than the Irish one.

\(^{54}\) The Court Victim Witness Programme provides emotional support to victims who have to appear in court as a witness. A volunteer accompanies the victim for the duration of the court hearings. The hospital project is intended to offer emotional support to victims attending Accident and Emergency departments.
4 SOURCES OF LAW

4.1 General

Important sources of Irish law are the Constitution, legislation and common law. These sources co-exist but where conflict arises common law is overridden by legislation, and both are overridden by the Constitution. Primary legislation consists of Acts, i.e., statutes passed by the Oireachtas. Secondary legislation is enacted by persons/bodies to whom the Oireachtas has delegated this power. The High Court, and on appeal the Supreme Court, have a right to constitutional review of any law (Art. 34 C). Legal doctrine is articulated by the courts rather than by academic commentators. Although academic texts are now more frequently referred to, they do not enjoy the status that the commentaries and scholarly writing of medieval and later jurists had. As a member of the European Union, European Union law is also applicable in Ireland, and can take precedence over the Constitution (Art. 29.4.5 C.).

Regarding international law, Ireland has a dualistic legal system, i.e. international rules must be explicitly incorporated by an Act of the Oireachtas into Irish law to acquire validity. The European Convention on Human Rights has not been incorporated into domestic Irish law in this way, and therefore has no direct effect.

Administrative guidelines, circulars, codes of practice and charters promulgated by Government agencies are all forms of quasi-legislation that seek to regulate a particular area of Government business or set a general standard to be met by a particular agency or institution, but lack force of law.

4.2 Sources of Criminal Law and Procedure

In the Irish Constitution, important principles of criminal procedure can be found such as, for instance, that no person shall be tried on any criminal charge save in due course of law (s. 38.1 C.) and that minor offenses may be tried by courts of summary jurisdiction (s. 38.2 C.). Attempts to codify Irish criminal law and procedure have never been made. Common law is an important source for, among other things, the rules on evidence. Nowadays, there are also countless statutes containing rules of criminal law and procedure. Examples of statutes from before 1921 that have been amended but are still applicable today are the Offences Against the Person Act 1861, and the Punishment of Incest Act 1908. More recent legislation includes the Criminal Procedure Acts of 1967 and 1993, numerous Criminal Justice Acts, the Criminal Law Act, 1997 and the Bail Act, 1997.

4.3 Specific Victim-Oriented Sources of Law and Guidelines

First of all, it should be noted that although Ireland has a written Constitution, this Constitution does not award the victim of crime any specific rights. In other words, the

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56 According to Byrne and McCutcheon (1996), the works of writers such as Coke, Hale and Blackstone were accorded a status which approached that of judicial decisions, Nr. 1.18 p. 9.


example of some of the American states which have incorporated a victim's bill of rights into their Constitutions has not been followed. The Irish (and English) alternative to a bill of rights is a Charter for Victims of Crime, which sets out the standards by which the Government expects victims of crime to be treated. The Irish Victim's Charter was published in 1997. The charter does not have force of law, unlike the numerous pieces of legislation which contain provisions relating to the procedural position of the victim of crime. To give a few examples of such legislation, the compensation order is shaped by sections 6-9 of the Criminal Justice Act, 1993. Written or oral Victim Impact Statements may be presented to the court in relation to sexual or violent offences on the basis of section 5 of the same act. Regarding sexual offences, the Criminal Evidence Act, 1992 contains provisions on providing evidence through television link or intermediary, and videorecording as evidence at trial. Anonymity of complainants is dealt with in section 7 of the Criminal Law (Rape) Act 1981 as amended by section 17(2) of the Criminal Law (Rape) (Amendment) Act 1990. Similar regulations concerning victims of incest are found in the Criminal Law (Incest Proceedings) Act 1995. The Domestic Violence Act, 1996 broadened the scope of the legal remedies available to victims of domestic violence.

Being a country with a common law system, case law is also an important source of provisions effecting the position of the victim of crime, both in criminal law and in procedure. In The People (Director of Public Prosecutions) v. J. T., the Court of Appeal recognized a right of vindication by the victim of a criminal offence.

The Gardaí have issued a Headquarters circular nr. 21/98 of 3 February 1998 entitled Victim Support and Charter for Victims of Crime. This circular outlines Garda Síochánaí policy in relation to victims of crime, and contains directions for Gardaí on their duties towards victims such as referral to Victim Support and the provision of information (see §6.1). The superintendent of each Garda station is responsible for the implementation of the circular, and every sergeant is responsible for ensuring that the Gardaí he works with comply with the instructions. The implementation of the circular is to be evaluated six months after it was issued – i.e., August 1998.

4.4 Noteworthy Research, Developments and Initiatives

'Like other aspects of Irish social policy, the criminal justice system suffers from a lamentable
absence of empirical research. Until recently this was certainly true where empirical (and other) research on victims of crime in Ireland is concerned. But things are starting to move in this respect, and several surveys and an increasing number of reports have been published in the last decade or so.

Breen and Rottman were the first to design a national Irish victimization survey. It was carried out by the Economic and Social Research Institute (ESRI) in 1982/83, and the results were published in 1985. In 1994 O'Connell and Whelan carried out a postal survey in Dublin in which 623 respondents were asked about their experience of crime victimization in the preceding three years and their beliefs about crime prevalence, as well as their views on the seriousness of ten different types of offences and what penalties were appropriate for these offences. The results were published in two articles, one on crime victimisation in Dublin and the other on the public perception of crime prevalence. The ESRI then administered a national random survey for a study on violence against women. This study was commissioned by Women's Aid and the results were published in 1995 as Making the Links. In 1996, on the initiative of the Garda Síochána, the ESRI interviewed 959 persons who had reported an indictable crime to the Gardaí in the year ending October 1995. Offences excluded from the research were those resulting in death, sexual offences and offences committed against Gardaí on duty. Among other things, this particular survey focussed on the impact of crimes on victims, their satisfaction with Garda service and victims' other crime experiences. In 1998, The Garda Research Unit published an analysis of rape statistics between 1994-1997. The Central Statistics Office was due to carry out a survey on crime victimization and reporting rates as part of their Quarterly Household Survey in the Autumn of 1998.


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66 R. Breen and David B. Rottman, Crime Victimization in the Republic of Ireland, Economic and Social Research Institute, Paper No. 1 121, April 1985.
which was set up by the National Women's Council and funded by the Department of Justice, published its report. In the same month the Government set up a *Task Force on Violence Against Women* and this group published its findings in April 1997. In May 1998 the Department of Justice, Equality and Law Reform published a discussion paper on *The Law on Sexual Offences*. Other prominent works are *Crime and Punishment in Ireland* published by P. O'Mahony in 1993, and Thomas O'Malley's *Sexual Offences: Law Policy and Punishment* of 1996. Finally, D. Greer has published extensively on compensation from both the state and the offender for victims of crime.

A more recent publication is a study by the presented by the Dublin Rape Crisis Centre and the School of Law Trinity College in Dublin of how victims of rape are treated by the legal process in other European jurisdictions. One of the key recommendations made by the authors is that the victim of rape should be entitled to legal representation. Still due at the time of writing was the report of a working group that had been established to review the Child Abuse guidelines.

Many of the above reports and projects focus on victims of sexual offences. This indicates that Irish research on victims of crime is still in the initial phases. An international comparison shows that victims of sexual offences are always the first to draw the attention of activists and researchers. Only later is attention shifted to victims of other offences.

## 5 Roles of the Victim

**Terminology**

In both the Victim's Charter and the Scheme of Compensation for Personal Injuries Criminally Inflicted, the victim of crime is simply referred to as *victim*. The Charter gives no further explanation of who is recognized as such, but in the terminology of the Scheme for Compensation the victim is ‘the person who sustained the injury’ (s. 3 under a). Once the offence has been reported to the police and recorded as a crime, until the moment the offender is convicted, the victim is properly described as the *complainant*. This term is mostly used with regard to victims of sexual offences whose alleged attackers are under prosecution.

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70 The SMI Discussion paper *Tackling Crime* published by the Department of Justice in May 1997 touches on the position of the victim within the broader framework of problems facing the Irish criminal justice system.


73 Victim Support defines the victim of crime as ‘any person or persons who have suffered harm of any kind, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their capacity to function within the community, through acts or omissions which are in breach of the criminal laws of the country. It includes, where appropriate, the immediate family or dependants of such persons, and any person who suffers harm in assisting such persons’, see the Victim’s Charter of Victim Support p. 2.

In relation to compensation orders (i.e. compensation to be paid by the offender to the victim), the Criminal Justice Act, 1993 speaks of the *injured party*, which is defined as 'any person who has suffered (...) personal injury or loss resulting from an offence' (s. 6-1). In a case where death has resulted from the offence, a dependant of the deceased person concerned is also an injured party (s. 6-12 under a). The person in whose favour a compensation order is made is the *compensatee*. The injured party who takes his compensation claim against the offender to a civil court is referred to as the *plaintiff* in the civil proceedings.

**The victim and trial avoidance**

As we saw in §2, the Irish criminal justice system tends to result in trial avoidance — in the case of a guilty plea that has been accepted by the judge, a full trial is not necessary, and prosecution and defence may negotiate on an informal basis to avoid one. Trial avoidance is further encouraged by the fact that a guilty plea is sometimes rewarded with a sentence discount.\(^{75}\) In our report on England and Wales, we remarked that such trial avoidance

\(^{75}\) The sentence discount is not without its problems. In rape cases, the reason given by the Supreme Court to justify the discount is that ‘an admission of guilt made at an early stage in the investigation of the crime which is followed by a subsequent plea of guilty, insofar as it spares the victim the additional trauma and distress of giving evidence in court, is a significant mitigating factor to be taken into account in determining sentence' (The Director of Public Prosecutions v. G. (S.C. No.353 of 1991), I. R. [1994] 587). On the other hand, it may be difficult for the victim to come to terms with a, in his eyes, disproportionately lenient sentence for the offender. Until 1993, it was not possible in practice for the Director of Public Prosecutions to appeal against an acquittal or an unduly lenient sentence. Although the DPP had a formal legal right to appeal to the Supreme Court against a sentence imposed by the Central Criminal Court, that right had never been exercised because of a long-standing tradition that a sentence imposed by a criminal court could not be disturbed except through an appeal by the convicted person. See *Introduction and General Note* accompanying Criminal Justice Act, 1993 (1993 No. 6). Following two absurdly lenient sentences in a rape case and an incest case, against which it was impossible to appeal, there was a major public outcry and subsequently section 2(1) of the CJA 1993 was introduced, determining that: ‘If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the ‘sentencing court’) on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.’ The issue which at present is being debated in Ireland is whether the sentence discount for a guilty plea is *obligatory*, in which case a sentence reduced for this reason cannot be termed unduly lenient. A trial judge who imposed a life sentence on a rapist in two separate cases, saw both his sentences overturned by the Supreme Court on the grounds that a sentence discount should have been given because the defendant had pleaded guilty (The People (Director of Public Prosecutions) v. Tiernan [1988] I.R. 250; and The Director of Public Prosecutions v. G. (S.C. No.353 of 1991), I.R. [1994] 587). In a subsequent case which came before the same trial judge in 1995, a man who pleaded guilty to 10 rapes and 17 other sex offences against children aged 4 to 14, was sentenced to 15 years imprisonment. The trial judge wanted to consider a life sentence but said that the two earlier decisions of the Supreme Court prevented him from doing so. In his opinion, one of the decisions 'precludes the imposition of the maximum sentence by reason of the accused's plea of guilty and confession.' Politicians and victim support groups such as the Rape Crisis Centre and the National Children's Alliance have vented their concern about these developments. The Minister of Justice has stated that a judge should be free to impose a sentence arising from the evidence he or she has heard, and that if she found that the limitations imposed on the judge could be removed by law, she would do so (The Irish Times 7 December 1995).
means that, on the one hand most victims are spared the ordeal of a potentially traumatic court experience, but on the other hand those who would like to are denied the chance of having their say in court. In Ireland, this potential disadvantage is, in part, countered by the introduction of the Victim Impact Statement which allows the victim of sexual offences or offences involving violence to at least put across to the court how the offence has affected him (s. 5 CJA 1993, see §5.5). 77

A consequence of the disposition towards trial avoidance is that relatively few victims are required to testify in court, so that the active participation of the victim is often limited to reporting the offence, unless evidence under section 5(3) is tendered by the victim detailing the effects of the crime on him or her. Those who do have to testify in court do so as a witness for the prosecution. If the court decides to make a compensation order the victim as injured party is the compensatee. Finally, the victim may take a summary offence to court as a private prosecutor. All these roles are discussed below.

5.1 Reporting the offence

The victim of a crime can report an offence committed against him to the Garda Síochána by contacting his local Garda station in person or by phone, or by dialling the Garda Free Phone confidential service. The Victim’s Charter obliges the Gardaí to respond to complaints of crime as promptly as the circumstances allow, with courtesy and attention. Also, for female victims of sexual offences, a female Garda should be made available, and the Gardaí should always try to arrange for the victim to be seen by a female doctor. Regarding the implementation of these standards, it should be noted that at the time of writing only about 8% of the Garda Síochána were female. On the other hand, a special Domestic Violence and Sexual Assault Investigation Unit has been established by the Gardaí in Dublin, and a new Garda station to be built in Dublin will have a special suite for victims of serious crimes. This suite will have medical facilities, including those needed for the collecting of forensic evidence, and a secluded rest area with kitchen and bathroom facilities.

In 1997, the Irish crime rate dropped by 10%, and the balance of the first half of 1998 indicated that it was expected to have dropped a further 10% by the end of that year to just under 83,000 crimes. This was the lowest Irish crime rate since 1980. But these figures are based on police statistics of the number of offences reported to them, and it is unclear what the ‘dark figure’ of unreported crime is. A first analysis of the figures acquired through the Dublin Victim Survey conducted by O’Connell and Whelan in 1994 seems to indicate that an amazing 81% of all offences committed are reported to the Gardaí. This figure seems too good to be true, and O’Connell and Whelan themselves question this figure. In

76 Chapter 7 § 2.
77 See § 6.1 of Chapter 7 for current pilot projects with victim statements.
79 At the time of writing, there were no women above the rank of superintendent, and of the 160 or so superintendents only 2 were women. About 22% of the applicants in the last Garda recruitment drive were women.
80 For the aims of this unit see the Victim’s Charter (1997), p. 15.
81 Victim’s Charter (1997), p. 11. I had the opportunity to look round a suite in Belfast, Northern Ireland, and was very impressed by the facilities.
particular, it is inconsistent with informed estimations of the number of sexual offences that are reported to the police. One-third (or less) of the victims who approach a rape crisis centre report the offence to the Garda. Furthermore, a book published in 1995 about sexual harassment at work says that Irish women are less likely to report such offences than women in Britain or the United States. One of the reasons appears to be that Irish women are ill-informed about what constitutes sexual harassment. Finally, it is not mandatory for social workers, counsellors, teachers and others to report child sexual abuse cases, inviting further speculation on the dark figure in relation to these offences.

Whatever the Irish reporting rates may be, the reasons victims gave in the Dublin Victim Survey for not reporting an offence are fairly mundane: firstly, many victims felt that the crime was too trivial to report, and secondly, it was often thought that the gardaí would be unable to do anything about it. Similarly, O'Dwyer found that the main reasons that people who had already been victimized by one offence did not report a second offence committed against them was, first of all, that it was not important enough (11%), secondly that the Gardaí could do nothing about it (7%) and thirdly that the Gardaí would not be interested (5%).

5.2 Compensatee

In Ireland, compensation orders could initially only be made in cases of criminal damage to property. The fact that compensation paid in other cases could be considered in mitigation of sentence did sometimes lead to the indemnification of victims of other offences, but the need to extend the scope of the ‘official’ compensation order was still felt, and the criminal courts were duly given a general power to make compensation orders for victims of any offence by the Criminal Justice Act 1993. Section 6(1) of this Act now determines that the court may order any person — adult or juvenile — who has been convicted of committing an offence, to pay compensation to any person who has suffered injury or loss as a result of that offence, unless the court sees reason to the contrary. The maximum amount of compensation that the District Court may order is £5,000, which equals its jurisdiction in tort.

The Irish compensation order is, in many ways, similar to its English counterpart, at least in theory. First of all, the order is made ‘on application or otherwise’. In other words, the judge has the power to make a compensation order even if no claim for compensation is made by the injured party (or the prosecutor on his behalf), but by the same token, the absence of a claim is not a valid reason for the court to refrain from making such an order. Secondly, in making an appropriate order the court should have consideration for the

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84 The Irish Times June 17 1997. The Irish Times of July 23 1998 does report that there has been a 2% rise in the number of reported rapes, despite the general drop in the crime rate.
87 K. O'Dwyer (1998a), p. 27. Seventy-one percent of the victims who reported an offence to the Gardaí had previously or subsequently also reported another offence committed against them. The rate of reporting by repeat victims ranged from 20% for fraud, 49% for theft in the home and 50% for vandalism to 93% for vehicle theft and 95% for burglary.
88 Compare to the present situation in Cyprus, see chapter 5.
offender’s means (or in case of a juvenile offender the means of the parent or guardian) (s. 6(5)). Other similarities are that the court may allow for the order to be paid in instalments (s. 6(6)), the order may be made instead of or in addition to dealing with the offender in any other way (s. 6(1)), and payment of the order is made through the courts (s. 7).

But there are also significant differences between the Irish and the English compensation order – besides the age difference. First of all, the Irish criminal court does not have the duty of its English counterpart to give reasons for not awarding a compensation order. This implies that the Irish court has been given more discretion in deciding whether a compensation order should be made even though ‘the apparent intention of the Act is that the making of a compensation order will be normal rather than exceptional.’ A second difference is that even though the Irish criminal court must consider any evidence and any representations that are made by or on behalf of the convicted person, the injured party or the prosecutor (s. 6(2) CJA 1993), the Irish Garda does not have the responsibility of ensuring that all information about the injuries and losses of the victim is made available to the court, a duty that the English police do have. The chance that the Irish court will not have access to sufficient evidence to decide the compensation order, is therefore potentially greater than for the English criminal court. Thirdly, if the offender has insufficient means to pay both compensation and a fine, the English court must give priority to compensation, whereas the Irish criminal court has been given much more discretion in determining the hierarchy between a compensation order and a fine.

In practice, the Irish compensation order is much less successful than the English one. This could be due to (a combination of) the differences just described, but there are also other reasons which are described in Part II of this chapter.

### 5.3 Private Prosecutor

The private prosecution – criminal prosecution by a member of the public – is a common law institution with what some call a ‘long and noble history’. In Ireland, the person fulfilling the role of private prosecutor is called a ‘common informer’, described as ‘a member of the public capable of giving information in respect of the commission of an offence’.

Common informers may prosecute summary offences. They may also initiate the prosecution of indictable offences, but once an indictable offence is actually returned for trial by the judge of the District Court, the case must be handed over to the Director of Public

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90 The English compensation order was introduced in 1972.
92 S. 6(7) reads as follows: ‘Where the court considers- (a) that it would be appropriate both to impose a fine and to make a compensation order, but (b) that the convicted person has insufficient means to pay both an appropriate fine and appropriate compensation, the court may, if it is satisfied that the means are sufficient to justify its doing so, make a compensation order and, if it is satisfied that it is appropriate to do so having regard to the means that would remain after compliance with the order, impose a fine.’
94 State (Cronin) v Circuit Judge of the Western Circuit [1937] IR 34,49. See P. Osborne (1993), note 7 page 120.
Prosecutions. The DPP treats the case as he would any other case and may therefore decide to drop the prosecution, even if that is against the explicit wish of the common informer. The courts are unlikely to interfere with the DPP's decision or order a prosecution to proceed.

Most private prosecutions in relation to summary offences are conducted by the Garda, or 'official' common informers. Members of the public are 'unofficial' common informers. On average there are two private prosecutions by 'unofficial' common informers a week in the District Courts of the Dublin Metropolitan Area, out of a total case load of approximately 240,000 criminal actions per annum. This is a percentage of only 0.05. In other words, even though the Irish private prosecution is said to function as a constitutional safeguard against arbitrary prosecution policies of the DPP, 'in truth it amounts to little more than constitutional tokenism' for the normal citizen. For the unofficial common informer, there is no legal aid. Also, with no backing from the Garda, the investigation and preparation of the case may be extremely difficult.

5.4 Witness

In the event of a trial proceeding, the victim will be called to testify as a witness for the prosecution. The principle of orality dictates that evidence must be presented orally, but, as already pointed out in §2, section 21 CJA 1984 allows for written statements if a witness cannot appear in court. Parties have the right to cross-examine each other's witnesses. During cross-examination the examining party may contest the facts and/or cast doubt on the credibility of the witness — in the Anglo Saxon adversarial system victims are said to be 'alleged victims, whose innocence is not established until the guilt of the defendant is decreed.'

Before an indictable offence can proceed to trial in the Circuit Criminal or the Central Criminal Court, it is first subjected to a preliminary examination by a judge of the District Court. All the evidence that the prosecution intends to use against the accused is collected in a 'Book of Evidence' which must be served on the defence. The judge then decides whether a sufficient case has been presented to return the case for trial (Criminal Procedure Act 1967).

In H v Director of Public Prosecutions [1994] 2 ILM 285 the Supreme Court refused to order the DPP to proceed with a prosecution for sexual offences which the applicant alleged her husband had committed against their children and which the DPP had already decided not to prosecute. See Byrne and McCutcheon (1996), nr. 6.69 footnote 53 p. 211.

The distinction between 'official' and 'unofficial' common informers is based on the wording of section 9(2) of the Criminal Justice (Administration) Act of 1924. P. Osborne (1993), p. 139.

P. Osborne compares the Irish rate of private prosecution by private individuals to the English rate. In 1981, the Royal Commission on Criminal Procedure in England and Wales found that 2.4% of all prosecutions in a sample of courts were prosecuted by private individuals, and that 82% of these private prosecutions were for common assault (s. 42 of the Offences Against the Person Act 1861). It should be noted that in England, common assault is a complainant offence that may only be prosecuted by or on behalf of the victim. Most of the private prosecutions brought in Ireland are also for common assault. See P. Osborne (1993), p. 140 footnote 95.

P. Osborne (1993), note 8 p. 121.

This assertion is highly contentious because it equates the principle of the presumption of innocence of the offender with a presumption of falsehood of the victim. The *presumptio innocentia* is a procedural, not a material, principle—it offers certain ground rules for the procedures to be adopted in establishing the truth. To ensure the defendant has a fair trial, the presumption of innocence guarantees first of all that the onus of proof lies with the prosecution, and secondly that this proof must establish the guilt of the offender beyond reasonable doubt. Adopting a further principle of the presumption of falsehood of the victim adds nothing to these procedural guarantees. The issue is not whether the Prosecution or its key witness, the victim, is lying, but whether their case can meet the procedural standards necessary to ensure conviction. For questioning see § 8.2.

5.5 The Victim Impact Statement

The Victim Impact Statement was introduced into Irish legal practice in 1992, and placed on a statutory footing by the Criminal Justice Act of 1993. In determining the sentence to be imposed on an accused convicted for a sexual offence or an offence involving violence, section 5(1) CJA 1993 requires the court to take into account any effect (whether long-term or otherwise) of the offence on the victim. Where necessary, the court may receive evidence or submissions concerning these effects. Section 5(3) CJA gives the victim the right to give this evidence in person to the court if he so wishes. In all other cases where information about the impact of the offence on the victim is required, this is provided to the court by means of a Victim Impact Statement or Report. In practice these reports are compiled by the Gardaí at the behest of the DPP, or by a psychiatrist or psychologist. The forms used by the Gardaí for writing down the victim impact statement were composed by Victim Support.

The introduction of the Victim Impact Statement and accompanying right for the victim to participate actively in the sentencing procedure if he so wishes has caused some perturbation. Opponents feel that only the seriousness of the offence should determine the sentence, because to allow the impact of the offence on the individual victim to feature in the sentencing decision is to allow a certain degree of arbitrariness into the system. Every victim is different, and the same offence may effect individual victims in different ways. There is also debate about the evidentiary status of the VIS—should the defence be allowed to challenge the evidence of victim impact, and if so, may the defence then obtain independent reports on the impact on the victim or cross-examine the victim? The practical Irish reaction to this problem is that "this scenario seems rather theoretical and unlikely to arise in practice." Furthermore, it is contended that the VIS raises the expectations of the victim that he really has something important to say in relation to the sentence, although in practice his statement may have very little or no influence at all.

Whatever the case may be, Victim Impact Statements are now provided fairly regularly

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103 A VIS does not necessarily have to be to the disadvantage of the offender. The information pack for the judiciary on the VIS includes some examples of reports of excellent recoveries made by victims after horrific offences were committed against them.
to the court in cases involving sexual or violent offences, and victims do occasionally use their right to address the court during a sentencing hearing.

PART II:
THE IMPLEMENTATION OF RECOMMENDATION R (85) 11

6 THE VICTIM AND INFORMATION

6.1 Informing the Victim

(A.2) The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation.

Assistance, practical and legal advice
The Gardaí first started formalizing their procedures for dealing with victims of crime in 1988, when a Garda document was issued laying down minimum standards for service delivery to victims of crime. In May 1992 a pilot scheme for the automatic referral of victims of burglary to Victim Support was initiated in three Garda areas. By the time the project was formally evaluated in 1996/1997, the scheme had already been extended on an informal basis to several other areas, but unfortunately only for victims of burglary, to the exclusion of victims of all other offences. Although the pilot project had chosen burglary cases as its testing ground, it was never the intention that automatic referral would be limited to victims of this type of offence only. This has been made very clear by HQ circular 21/98 Victim Support and Charter for Victims of Crime of 3 February 1998. The infrastructure envisioned by this circular for all offences is as follows. Communication between the local branch of Victim Support and An Garda Síochánaí is conducted through a Liaison Garda, to be appointed in each area by the Chief Superintendent. Any Garda investigating a criminal offence must give the victim a Victim Support Introduction Card. This Card explains what Victim Support is and what it does, and informs the victim that someone from the organization will be in touch with them. Secondly, every victim is sent a letter by the Superintendent of the District in which the offence took place. This letter confirms that the offence has been reported, and gives the name, telephone number and station of the investigating Garda as well as the crime reference number under which the offence has been registered. It also reminds the victim of the availability of Victim Support. Finally, an Automatic Referral Sheet must be completed by the investigating Garda as soon as is practicable and forwarded to the Liaison Garda, who is, in turn, responsible for transmitting

\[\text{Special arrangements are being made for the referral of relatives of murder victims. The Superintendent will supply the names and addresses of those relatives whom it is deemed would benefit from the service, as soon as the investigation allows. In these cases a member of the investigating team will maintain a continuous liaison between the Gardaí, Victim Support and the victims. See HQ circular 21/98.}\]
the referral sheets to Victim Support.  

In practice, problems have arisen in relation to what constitutes ‘automatic referral’. To the chagrin of Victim Support, a section has been included in the automatic referral sheet to be filled out by the Gardai asking whether the victim wants to be referred. Only a victim who has given his permission is referred, even though the HQ circular makes no mention of the fact that the victim must be asked for permission.

The nationwide Gardai-to-Victim Support referral system is still very young and needs time to be implemented. Together with the difficulties with automatic referral, this explains why the referral rates are still very low. In his national survey of victims who had reported an indictable offence to the Gardaí, O’Dwyer found that, on average, 50% of the respondents felt no need for support, although a lot depended on the type of offence. Forty-six percent of burglary victims indicated they had no need for support, but only 16% of assault victims, 26% of aggravated theft victims, 28% of aggravated burglary victims and 29% of victims of theft from the person said they had no need for support. Eventual contact of victims with Victim Support was very low: 7% of victims of aggravated burglary, 3% of aggravated theft victims and only 2% of burglary victims had contact with the organization. According to O’Dwyer, these figures reflect the Victim Support network and Garda referral policy of three years ago.

Finally it should be noted that specific informatory duties have been established towards victims of domestic violence by the Garda Síochána Policy on Domestic Violence Intervention which was introduced in April, 1994 and updated in March 1997. This document instructs the Garda dealing with a case of domestic violence to make sure the victim is fully informed of all legal measures that they can take and of the relevant services in the area, and to provide the victim with a copy of the Domestic Violence Information leaflet (DMA). According to the Task Force on Violence Against Women, the statistics suggest that the Garda policy may not be implemented in a consistent manner in all Garda districts.

Compensation from the offender, state compensation

Despite the fact that the Government Victim’s Charter of 1997 states that the Gardaí have been instructed to ensure that the victim is informed of the fact that the criminal court may make a compensation order, victims of crime are not informed by the Gardaí about their opportunities for obtaining compensation from the offender or the state. Not a word about compensation is said in HQ circular 2/98, nor does the letter sent by the superintendent to each victim of crime contain any information about compensation. The Gardaí do not stock the forms that are necessary to claim compensation from the Compensation Tribunal and the victim must ask for one himself directly from the Tribunal, or Victim Support. Any information about compensation that a victim may receive from a Garda is entirely due

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107 How and when the sheets are forwarded depends on the agreement made between the local branch of Victim Support and the Liaison Garda. In some areas the sheets are faxed to Victim Support immediately, which means that someone could visit the victim within a few hours. In other areas the Victim Support Branch Coordinator might drop by the Garda station once a week to pick up any referral sheets.


110 Victim’s Charter (1997), p. 5. In addition, the Charter says that when a decision has been taken to caution rather than prosecute, the victim should be reminded of how he can seek compensation through a civil court action, p. 7.
to that Garda's personal initiative, or in answer to direct questions from the victim.

In conclusion, although structured efforts are now being made to set up a system for providing the victim of crime with the information mentioned in guideline A.2, there are still serious gaps and problems. Those victims who do not wish to be referred to Victim Support, or who do not have a local branch of Victim Support in the area, are unlikely to be informed of their opportunities for obtaining assistance, practical and legal advice, compensation from the offender and state compensation. The provision of information about compensation from the offender and the state still needs to be incorporated in Garda victim policy. More information could be included in the letter sent to each victim by the Superintendent. Alternatively, a brochure containing basic information could be printed and handed to each victim reporting an offence.¹¹¹

(A.3) The victim should be able to obtain information on the outcome of the police investigation.

The Victim's Charter cites that at the outset the victim should be given the investigating Garda's name and Garda station, the telephone number where he/she may be contacted for information relating to the investigation, prosecution or court case, an outline of the investigation process and assurance that he will be kept informed of developments in the case. As the case progresses, the victim should be specifically informed, as far as is possible, of significant developments in the case. This includes being told when a suspect has been charged with the crime following the investigation and whether the charged suspect is in custody or out on bail.¹²

These commitments are confirmed by the Garda HQ circular 21/98. To ensure victims are informed of the name, telephone number and station of the investigating Garda, calling cards are being issued for use by the Gardai. The letter sent by the Superintendent to each victim also contains this information. The way in which the victim is informed of the progress of the case has been left to the discretion of the local Garda divisions. Subsequent contact between the Gardaí and victims, the type of contact and the way in which the contact is effected will all be evaluated when the implementation of HQ circular 21/98 is assessed in August 1998.

In practice, it can be very difficult for a victim to get hold of the Garda who is investigating his case to make enquiries about the progress of the case. The hours that the Garda is on duty depends on the unit he is in, and how the flexible duty system that is used to cover peak hours works out. Other officers in the station are unlikely to know anything about the case.¹¹³


¹¹³ Victim Support training course given by Sergeant D. Beakey, 27 April 1998.
O'Dwyer found that although victims are in general satisfied with the initial service rendered by the Gardaí, the satisfaction rates dropped dramatically where information about the progress of the case was concerned (see table below). These results are in keeping with satisfaction rates in other countries (see, for instance, Chapters 7 and 17). Although O'Dwyer's results indicate that there is a problem in relation to keeping victims informed of the outcome of the police investigation and the progress of the case, it should be noted that his survey was carried out in 1996, before the Victim's Charter was introduced, and long before the HQ circular 2/98 came into circulation. Still, it is unlikely that satisfaction rates with information about the progress of the case will have increased dramatically since O'Dwyer conducted his survey. Keeping victims informed over a longer period of time is one of the most difficult things to achieve (see Chapter 25). The Irish chances of success in this area would be boosted if a uniform system for informing the victim were devised and implemented nationwide, rather than leaving it to the discretion of the local Gardaí.

**Satisfaction ratings by victims of crime:**

<table>
<thead>
<tr>
<th>Satisfaction with:</th>
<th>Satisfied/very satisfied (%)</th>
<th>Dissatisfied/very dissatisfied (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>speed initial call taken</td>
<td>80.8</td>
<td>11.2</td>
</tr>
<tr>
<td>speed to scene</td>
<td>77.1</td>
<td>14.5</td>
</tr>
<tr>
<td>thoroughness</td>
<td>71.2</td>
<td>16.7</td>
</tr>
<tr>
<td>politeness</td>
<td>93.7</td>
<td>2.7</td>
</tr>
<tr>
<td>understanding of problem</td>
<td>82.6</td>
<td>10.2</td>
</tr>
<tr>
<td>answers to question</td>
<td>80.2</td>
<td>10.9</td>
</tr>
<tr>
<td>performance of first Garda(i)</td>
<td>74.1</td>
<td>13.7</td>
</tr>
<tr>
<td>information on case progress</td>
<td>35.8</td>
<td>40.2</td>
</tr>
<tr>
<td>information on outcome</td>
<td>27.8</td>
<td>47.1</td>
</tr>
</tbody>
</table>

Note: totals do not add up to 100% because of omissions of those who were neither satisfied nor dissatisfied.

(B. 6) *The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.*

Both the Victim's Charter and Garda HQ circular 21/98 state that the victim should be told when a decision has been taken not to prosecute but rather to caution the offender. There is no commitment to informing the victim when a decision has been taken to go ahead with the prosecution.

Where the offence is a summary one, and the prosecution in the District Court is in the hands of the Gardaí as common informers, the decision whether to prosecute is taken

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by the same body that is responsible for informing the victim. But where the offence is an
indictable one, matters become more complicated. After the Gardai have completed their
investigations in relation to such an offence, the file is sent on to the Director of Public
Prosecutions. This body decides on prosecution on the basis of two general principles: (1)
is there enough evidence to make a conviction likely, and (2) is prosecution in the public
interest.\textsuperscript{116} If the DPP decides to go ahead with the prosecution, the file is forwarded to the
Chief State Solicitor who is responsible for the implementation of the DPP's decision. Where
the DPP decides \textit{not} to prosecute, this information is relayed back to the Gardai, who are
in turn responsible for passing this information on to the victim. The office of the DPP itself
has no direct contact with the victim.

Under the Prosecution of Offences Act, 1974, the DPP is not allowed to explain his
reasons for deciding \textit{not} to prosecute in a particular case. Even the Gardai are not informed
of the reasons unless they specifically ask. Victims often find it frustrating that nobody can
tell them why the prosecution in their particular case has been dropped. Although to the
outsider the refusal to explain the decision may seem an admission of weakness and a self-
protective mechanism, the DPP's office feels there are very good reasons for keeping the
grounds for non-prosecution private. If, for example, it concludes that the victim in a certain
case has no chance of surviving the cross-examination by the defence, it may be more hurtful
to try to explain to that victim that he is considered to be a hopeless witness than to refuse
to give any reason at all for the decision. The Working Party on the Legal and Judicial Process
for Victims of Sexual and Other Crimes of Violence Against Women and Children recognizes
a potential conflict of interests and therefore recommends 'that the powers of the DPP under
the Prosecution of Offences Act, 1974 be reviewed in the interests of accountability so as
to allow the DPP to give reasons as to why prosecutions do not proceed, except where it
may not be in the public interest that such reasons be set out.'\textsuperscript{117} Victim Support feels that
'victims should have the right to be advised of the reasons why the prosecuting authorities
decided:

(a) not to proceed with a charge in the first instance;

(b) to enter a 'nolle-prosequi' at the commencement of the trial;\textsuperscript{118}

(c) to withdraw a charge during the course of a hearing.\textsuperscript{119}

Perhaps the recent introduction of the Freedom of Information Act, 1997, which establishes
a new statutory right to obtain reasons for decisions affecting oneself,\textsuperscript{120} heralds change in
this respect.

\textsuperscript{116} Byrne and McCutcheon (1996), nr. 6.69 p. 211.

\textsuperscript{117} Report of the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of
Violence Against Women and Children (October 1996), Recommendation nr. 38 p. 82.

\textsuperscript{118} A nole-prosequi automatically terminates the criminal proceedings. It is most commonly
entered when the accused has a physical or mental incapacity making it impossible for him to
plead or stand trial, but also if the DPP considers the prosecution not to be in the public
interest. Unlike an acquittal, the nole-prosequi does not bar a further prosecution.

\textsuperscript{119} Victim Support Victim's Charter p. 8.

\textsuperscript{120} This Act also establishes a legal right for each person to access information held by public
bodies, and a legal right for each person to have official information relating to him/herself
amended where it is incomplete, incorrect or misleading. See Office of the Probation and
(D.9) The victim should be informed of:
- the date and the place of a hearing concerning an offence which has caused him suffering;
- his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice;
- how he can find out the outcome of the case.

Date and place of a hearing
According to the Victim’s Charter, the victim should be told of the date on which any court proceedings are expected to commence, and whether or not it is likely that he will be required to give evidence. In the words of Garda HQ circular 21/98, the time, date and location of a hearing of any charge laid against an accused will also be made known to the injured party. If there is any likelihood of an injured party being called as witness then the prosecution process will be outlined to him.

Although the court determines the date and place of a hearing, it is the Gardai who must inform the victim and the witnesses that a hearing will take place. If the offence is a serious one, to be heard in the Circuit Court, the court informs the Chief State Solicitor’s Office of the date of the hearing, the Chief State Solicitor’s Office informs the Gardai, and the Gardai should inform the victim and the witnesses. In some cases the victim and witnesses are informed directly by the Chief State Solicitor’s Office, for instance if a formal summons is served on the victim and witnesses to appear in court. If a case is to be heard in the District Court, it is always the Gardai who contact the victim and witnesses, either by telephone, in person or by letter. Summons to appear in the District Court are served only occasionally if it is feared that somebody is not going to appear.

Most problems in relation to information about the date and place of a hearing have to do with guilty pleas for cases dealt with in the District Court. No full trial hearing is necessary in such a case, and the victim is not involved in any way in the proceedings. There is absolutely no reason, other than on the basis of the commitments of the Victim’s Charter and the Garda HQ circular, to inform the victim of such a hearing. It should also be noted that even if the date and place of a hearing in the district court are passed on to the victim, there are still some hurdles to overcome. First of all, if the hearing is in one of the courtrooms of the Dublin District Court, one almost needs to come equipped with a map and compass to locate the particular courtroom where the case is to be called. The ‘user unfriendliness’ of the Four Courts building has been recognized by the Working Group on a Courts Commission who proposed the establishment of an Information Desk where people could obtain whatever information they might need on the courts. In February 1997, a Courts Assistance Officer was appointed to man the newly established Information Desk; this officer directs people to the correct courtroom, and deals with a host of other queries. Secondly, it is often almost impossible to know at what time the case will be called. Cases are not dealt with systematically according to a pre-determined roll, but are called out more or less arbitrarily. It is hard enough for a legally trained visitor to understand what is going on,
let alone a victim who hasn't a clue about legal procedure, and it is all too easy for a layperson to sit in utter confusion in the Dublin district court and not even realize the case he is interested in has been called. For those victims and witnesses who have been referred to the Court Victim Witness Programme of Victim Support, the volunteers working in this programme offer invaluable support by sitting with the victim in the District Court and ensuring they understand what is going on.

**Restitution and compensation, legal assistance and advice**
There is no duty or commitment of any of the agents involved in the criminal justice process to inform the victim of his opportunities for obtaining restitution and compensation. Victims are simply not informed in this respect in Ireland, and this amounts to a clear breach of Recommendation R (85) 11.

Regarding legal assistance and advice, we have already seen in §3.4 that a victim is not entitled to legal representation in the criminal court, but that a complainant in a case of rape, aggravated sexual assault, unlawful carnal knowledge and incest may qualify for free legal advice on the basis of the Civil Legal Aid Scheme. In practice, however, applicants are usually advised to apply without legal aid for a protection order and to issue summons for a barring order. 124

**Outcome of the case**
The Victim's Charter says that the victim should be informed by the Gardaí of the outcome of the case and any conditions attached, if he is not present in court to hear it. It adds that on a practical level it is sometimes difficult for the Gardaí to ensure that the result is passed on to the victim in every circumstance but that the Gardaí aspire to provide the very best service possible in this regard. 125 HQ circular 21/98 promises that the outcome of the trial will be brought to the attention of each injured party.

O'Dwyer found that only 27.8% of the victims involved in his survey were satisfied about being informed of the outcome of the case, as opposed to 47.1% who were dissatisfied (see table earlier in this report). 126 These figures demonstrate that informing victims at the end of the proceedings, when the case has been wound up, is the most difficult of all the informatory tasks to achieve. It remains to be seen what improvements the commitments made in the Victim's Charter and Garda HQ circular 21/98 will bring about.

6.2 **Information About the Victim**

(A.4) *In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim.*

This guideline has not been translated into the Victim's Charter, nor into Garda HQ circular 21/98. Unlike their English counterparts, the Irish investigating authorities do not have a special obligation to ensure that such information is included in the file. Any details about the injuries and losses suffered by the victim that are put in the file are included solely as

126 These figures take account of cases not concluded at the time of interview, see O'Dwyer (1998a), p. 25.
part of the evidence to prove the accused has committed the offence, and not with a view
to securing a compensation order for the benefit of the victim.

(D.12)  All relevant information concerning the injuries and losses suffered by the victim should
be made available to the court in order that it may, when deciding upon the form and
the quantum of the sentence, take into account:

- the victim's need for compensation;
- any compensation or restitution made by the offender or any genuine effort to that
  end.

In theory, information concerning the injuries and losses suffered by the victim may be
provided to the court by the prosecuting authorities or the injured party himself—representations
may be made by or on behalf of the injured party and the prosecutor, as well as the convicted person (s. 6(2) CJA 1993) — or through a Victim Impact Statement.
To start with the prosecutor, this type of information is, in general, made available to the
court by the prosecuting authorities only in so far as it is necessary to prove the guilt of the
accused. No special effort is made to provide the information with a view to helping the
court make a compensation order. Injured parties are poorly informed of their opportunities
to apply for compensation, and so they are rarely the source of this information either. Only
where a VIS is provided to the court in the case of a sexual or violent offence is there a good
chance that the court is properly informed of the injuries and losses suffered by the victim.
The VIS form used by the Garda Síochána explicitly instructs them to specify any economic
loss (property loss, property damage, medical and hospital costs, other economic losses such
as lost wages and/or income) and physical injuries suffered by the victim: 'Physical injuries
should include type and extent of the injuries, whether treatment, or hospitalisation was
required and whether absence from work occurred. Dental and medical reports should be
attached (if any). Where property has been stolen or damaged a full description including
value of such property should be included. Financial Costs listed should include costs of
all medical treatment and replacement or repair costs of property and loss of wages/income
and all incidental losses.' To assist the Garda in itemizing all the losses and injuries, the
form is divided into separate sections on (1) economic loss, (2) physical injuries, (3)
psychological/psychiatric effects and treatment, (4) life changes and (5) additional
information.

Greer remarks that it remains to be seen whether the provisions made in the Criminal
Justice Act 1993 to ensure that the criminal court is adequately informed of the injuries
and losses of the victim are sufficient to ensure that this happens in practice in all relevant
cases. For the time being the conclusion must be that criminal courts are only provided
with the necessary information in those cases where a correctly completed VIS is provided
to the court.

7 THE VICTIM AND COMPENSATION

7.1 The Expediency Principle and Compensation

(B.5) A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender.

The decision whether to prosecute is a discretionary one, regardless of whether it is the Garda Síochána in relation to summary offences or the Director of Public Prosecutions in relation to indictable offences who takes the decision. As we have seen earlier, the availability of evidence and the public interest (seriousness of the offence) are the main factors influencing the prosecutorial decisions, but matters such as the resources available to the Gardaí may also be considered. In Ireland, the question of compensation of the victim does not feature in any way in the decision whether to prosecute: that the offender has indemnified the victim is no reason to drop a charge, nor is the victim’s wish to be awarded compensation by the criminal court reason enough to proceed with the prosecution of a case that would otherwise be dropped.

(B.7) The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings.

There is no institutionalized right for the victim to ask for a review by a competent authority of a decision not to prosecute, but in practice the DPP does receive letters from victims asking for reconsideration of the decision. In that case there will be a review within the office but almost invariably the decision remains the same. The victim is then generally sent a letter explaining that the matter has been reviewed, that careful consideration has been given to the evidence, but that the decision stands. No further reasons are supplied.

Of course, the victim may initiate a private prosecution as a common informer, as described in § 5.3. But in relation to indictable offences this right is only of a limited nature because any case progressing beyond the District Court must be handed over to the DPP, who may then decide not to prosecute after all. This begs the question whether the victim can undertake any action to compel the DPP to proceed with the prosecution. In theory, judicial review of the discretionary decision of the DPP regarding prosecution could be exercised if it can be shown that the DPP has ‘acted mala fide or was influenced by an improper motive or policy.’ In that case the remedy sought would be that of mandamus – ‘a prerogative order from the High Court instructing an inferior tribunal, public official, corporation, etc., to perform a specified public duty relating to its responsibilities; for example, an instruction to a statutory tribunal to hear a particular dispute.’ In other words, where there appears to be no valid reason for not charging, the court could order the DPP

129 Information provided by R. Sheehan, Office of the DPP, 29 April 1998.
131 See P. Charleton (1990), footnote 8 p. 143.
to pursue the prosecution at the request of the victim. In practice, unless the DPP takes a totally unjust or clearly corrupt decision, it is extremely unlikely that a victim could enforce a prosecution of an indictable offence in this way.

7.2 The Court and Compensation

(D.10) It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.

Looking at the principles of the Irish compensation order, as explained in § 5.2, one must conclude that there are no formal limitations, restrictions or technical impediments preventing a criminal court from ordering compensation by the offender to the victim.

Unfortunately, in practice the Irish compensation order is at present a bit of a non-runner. Some of the reasons for the lack of success have already been mentioned – the fact that the court is not compelled to consider making an order, the poor provision of information about the injuries and losses on which the court must base an order, and the fact that when they would like to impose both a fine and a compensation order there is no definite obligation for the court to give priority to the latter. Additional practical problems arise from the fact that the compensation order is made by the criminal court 'on application or otherwise'. At first sight this stipulation appears advantageous to the victim because even if an application for compensation has not been made, the court may still award a compensation order. But the English experience shows that the courts themselves rarely take the initiative to make an order unless they are compelled to do so, and that the chance of compensation being awarded is much greater if an application is made. The Irish criminal court establishes the amount of compensation 'having regard to any evidence and to any representations that are made by or on behalf of the convicted person, the injured party or the prosecutor (...)’ (s. 6(2) CJA 1993). Because the Gardaí do not inform the victim that the court may order a compensation order, and because there do not appear to be any provisions regulating how an application should be made, victims rarely make an application themselves. In most cases, it is therefore up to the prosecutor to make the application on behalf of the victim. But Irish prosecutors are not accustomed to asking the court to impose a certain penalty – which is what a compensation order is – because sentencing is the sole prerogative of the

To combat this problem, and to encourage judges to consider making a compensation order on a structural basis, English legislation of 1988 introduced the provision that the judge must justify why he has not made a compensation order, in a case where that would have been appropriate. Typically, one of the two most common reasons now given by the English courts for not making a compensation order is that compensation was not sought by or on behalf of the victim. (The other most common reason is the offender's lack of means.) See D. Greer, 'United Kingdom: Great Britain', in: D. Greer (ed.), Compensating Crime Victims, A European Survey, Max-Planck Institut für Ausländisches und Internationales Recht, edition iuscrim, Freiburg im Breisgau, 1996, pp. 573-638, p. 589, with reference to D. Moxon, J.M. Corkery, C. Hedderman, Developments in the Use of Compensation Orders in Magistrates' Courts since October 1988, Home Office Research Study No. 126, London 1992, p. 14.
And because the victim simply does not know how the system works, it is unlikely that he will prompt the prosecutor to make an application on his behalf. At present the compensation order has very low priority with any of the criminal justice agencies. The Gardai do not inform the victim in this respect, the prosecutors (Gardai in summary offences, the DPP in indictable offences) do not apply for compensation on behalf of the victim, and the judges are not in the habit of awarding compensation. As a result, the compensation order in its present form is very unsuccessful in Ireland.

(D.11) Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction.

Legislation provides that the Irish compensation order is a penal sanction that may be ordered instead of or in addition to dealing with the offender in any other way (s. 6(1) Criminal Justice Act 1993). But despite the fact that the compensation order is therefore a financial penalty by force of law, in reality it is not really felt to be a true sanction on a par with imprisonment or even a fine, because compensation is something the offender is compelled to pay anyway on the basis of his liability in tort. This attitude may explain why in practice compensation is never imposed as the sole penalty.

(D.13) In cases where the possibilities open to a court include attaching financial conditions to the award of a deferred or suspended sentence, of a probation order or any other measure, great importance should be given—among these conditions—to compensation by the offender to the victim.

At the time of writing there was no legal basis for attaching the payment of compensation as a financial condition to the award of a deferred or suspended sentence. However, such provisions will be incorporated in the upcoming Children's Bill. For young offenders under age 18, a diversion programme exists. Within this programme, young offenders could, for instance, be ordered to work in order to compensate for damages they have caused. Compensation is occasionally ordered as a condition for probation, albeit only in a limited number of cases. A probation order may consist of either a conditional discharge or an absolute discharge. The conditional discharge implies that the offender has agreed to meet...
certain conditions, and that if he fails to do so he must appear in court to be sentenced. The absolute discharge applies only in the District Court, and has the distinct attraction for the offender that the conviction is not recorded. Examples of cases where an absolute discharge is given are if the offender has offered to pay a certain sum of money to a charity, or if he agrees to put a given amount into the 'poor box'. The poor box money is donated by the court to worthy causes. Victim Support has, on occasion, received money in this way.

7.3 Enforcement of Compensation

(E.14) If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.

The provisions governing the enforcement of compensation are found in section 7 CJA 1993. Although compensation is a penal sanction, it is not collected in quite the same way as fines. Instead, compensation orders are enforced in the same way as maintenance orders, under application of the relevant provisions of the Family Law (Maintenance of Spouses and Children) Act, 1967 (s. 7(2) CJA 1993). Because it was considered undesirable that the victim should be forced to have further contact with the offender, it was decided that payments under the compensation order should be handled by the District Court clerk. At the written request of the injured party, the clerk is responsible for enforcing payment. One of the measures open to him is to apply for an 'attachment of earnings' award. This is a court order most commonly used to secure maintenance, in which case the employer of the person who has to pay the maintenance transfers a certain part of the salary directly to the spouse and children to whom the maintenance is due. Where a compensation order is concerned, the district clerk applies for such an order in his own name, so that the employer pays a reserved part of the salary of the convicted person to the clerk, who then transfers the money to the victim.

To allow for the fact that most offenders are of limited means, the court may provide for payment of compensation in instalments (s. 6(6) CJA 1993). Also, if the offender suffers a substantial reduction in means after the compensation order has become enforceable, the court may reduce the amount to be paid, vary any instalment or direct that no further payments need to be made (s. 6(8a) CJA 1993). On the other hand, if there is a substantial increase in the means of the convicted person the court may increase the amount to be paid, the amount of any instalment or the number of instalments payable (s. 6(8b) CJA 1993). In that case, the increased amount may not exceed what the offender would be ordered to pay by a civil court in civil proceedings for damages, nor the limit of the Court's jurisdiction in tort (s. 6(8b)ii CJA 1993). If, in any ensuing civil proceedings, the civil court establishes that the injuries and losses amount to less than the convicted person has already paid under the compensation order, an order for repayment may be made (s. 9 CJA 1993).

Whether or not the compensation order has priority over any other financial sanction

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138 Byrne and McCutcheon (1996), nrs. 10.24 and 10.25, pp. 308-309.
139 It was feared that, particularly in cases of physical or sexual abuse, contact between the victim and the offender could add to the trauma of the victim, and also that many victims might be hesitant about taking action against an offender who refuses to pay. D. Greer (1996), nr. 6.11 p. 363.
140 Byrne and McCutcheon (1996), nr. 10.20 p. 307.
imposed on the offender depends on the criminal court which made the order – if the convicted person appears to have insufficient means to pay both a compensation order and a fine, the court may give priority to the compensation order (s. 6(7) CJA 1993 and Victim’s Charter p. 5). However, if the court is satisfied that after compliance with the order the offender will still have sufficient means to pay a fine, the court may make the compensation order and impose a fine. In that case it is unclear which of the two has priority when it comes to enforcement.

Very little is known about how the enforcement of compensation works in practice. There are no statistics available.

8 TREATMENT AND PROTECTION

(A.1) Police should be trained to deal with victims in a sympathetic, constructive and reassuring manner.

Training of the police

Student Gardaí are recruited through entry competitions, and subjected to a two-year basic training programme consisting of theoretical courses taught at the Garda Síochána College in Templemore, Co. Tipperary, and on-the-job training in placement stations. The total training period is split into 5 phases. The first phase consists of 22 weeks spent at the college where the students receive instruction in subjects such as Law, Social Science, Communications, Theory of Policing, Irish Language and Physical Training. The second phase of 24 weeks is spent gaining practical work experience at a garda station. After successfully completing phase three back at the college, the students are attested, i.e. they become members of the Garda Síochána with full powers of arrest, although they remain under probation for a further two years. For the fourth stage they are again attached to a station for further work experience before returning briefly to the college to graduate.

The college also offers Sergeants’ courses and Inspectors’ courses. Most refresher courses are offered locally.

Instruction on how to deal with victims of crime has been included in the basic training programme since Garda training was revamped in the late nineteen-eighties. Representatives of Victim Support and Women’s Aid are invited to the college to address the students, and a separate compulsory module on victims of sexual offences is taught. However, in terms of hours of overall course time, the instruction on victims is modest. Garda officers nominated by their section to specialize for the domestic violence unit receive further training in a follow-

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141 350 new Gardaí were recruited in each of the years 1995, 1996 and 1997. In addition, an extra 400 new Gardaí were recruited between July 1996 and December 1997. The competition for the years 1998-2000 involved 1,000 places.

up course.  

8.2 Questioning the Victim

(C.8) At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians qualified to assist them.

How often the victim of crime is questioned in the course of the criminal proceedings, and by whom, depends very much on the type of offence and the strategy adopted by the defence. All offences are investigated by the Garda Síochána and therefore every victim will be questioned initially by a Garda. In the case of a summary offence, the case is then brought before the District Court for trial. If the accused pleads 'guilty' to the charge, a full trial is not necessary and the victim will not be required to testify. If the plea is 'not guilty', the victim will, in principle, be required to testify orally and under oath in court. The prosecution — in a summary offence, the Garda — must call its witnesses first. After the examination in chief of the witness by the prosecutor, the defence may cross-examine. The judge's involvement in the questioning of the witness is minimal. His main task is to ensure that the parties observe the proper procedures when questioning the witness. The judge also has a limited right to direct questions at the witness, but in doing so he may not (seem to) promote the case of one or the other of the parties.

An indictable offence to be tried in the Circuit or Central Criminal Court is first subjected to a preliminary examination in the District Court. In theory, the victim/witness may be questioned by the defence during this stage of the proceedings, as well as during the main trial, but in practice most of the questioning is left for the main trial. In the case of a 'not guilty' plea, the examination of the witnesses during the main trial of an indictable offence follows the same order as during the trial of a summary offence heard in the District Court. Similarly, if the plea is 'guilty', a full trial is not required.

As regards questioning of the victim by the Garda, we have already seen that a female Garda should be made available for a victim of a sexual offence (although only about 8% of the Garda Síochána were female at the time of writing), that a Domestic Violence and Sexual Assault Investigation Unit with a nation-wide role has been established by the Gardaí in Dublin, and that a special suite for victims of serious crimes will be included in a new Garda station in Dublin (see §3.1). But certainly one of the most significant steps to date in relation to Garda procedures has been the recent abolition of the rule that the victim must actually go up to, and physically touch, the offender in an identification parade.

To be questioned and cross-examined in an Irish criminal court can be a very harrowing experience. To lessen the trauma of testifying in court, different measures have been introduced, some of a legislative and others of a more informal nature. A legislative provision in cases of rape and sexual assault is that no evidence may be adduced and no questions asked in cross-examination about the past sexual history of the complainant, except with

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Information provided by K. O'Dwyer, Garda research unit, Templemore College, 1 May 1998. See also The Department of Justice, Equality and Law Reform (May 1998), nr. 6.5.4. p. 50.

See Byrne and McCutcheon (1996), nr. 5.75 p. 175 and nr. 6.71 p. 212.

leave of the judge (s. 3 Criminal Law Rape Act, 1981). In England this rule has hardly provided victims with the intended protection because judges invariably grant permission to broach the subject of the victim's past sexual history. Little is known about Irish legal practice in this respect, but O'Malley remarks that 'the debar of reported appellate judgments on this section would suggest that defence counsel are not experiencing any great difficulty in getting leave when they ask for it.' Another legislative measure is that section 13 of Part III of the Criminal Evidence Act, 1992 determines that in cases involving sexual or violent offences, a witness under the age of 17 is permitted to give evidence through a live television link, unless the court sees good reason not to. The court may also allow other witnesses in such cases to testify via the video link. The court may direct that questions for a person under the age of 17 testifying through the video link be put through an intermediary (s. 14). Appropriate equipment was installed in the Four Courts in Dublin in January 1994, but no other courthouses in Ireland have yet followed suit. The Criminal Evidence Act, 1992 also allows for the admission in evidence of video recordings of statements given to the Gardaí or any other competent person by alleged victims under the age of 14 (ss. 15 and 16), but apparently these provisions have not yet come into force.

Regarding non-legislative measures, Victim Support has taken the invaluable initiative of establishing the aforementioned Court Victim Witness Programme, which offers the victim/witness moral support throughout the court proceedings. The Department of Justice has recognized the need for providing appropriate facilities for victims of crime attending court, and a special room for victims has been furnished in a newly built courthouse at Westpark, Tallaght in Dublin. Rooms for victims are to be provided in all renovated and newly built courthouses. In March 1998 the Department of Justice also published an information pack for child witnesses and their parents/guardians which explains the court procedures and what will be expected of them.

Finally, it should be noted that it is a principle of common law that an accused may conduct his own defence, without legal representation. However, following some exceptionally dramatic cases where the offender personally subjected his victim to traumatic questioning in court, the English Youth Justice and Criminal Evidence Bill will prohibit cross-examination by the accused of complainants in proceedings for sexual offences, of child complainants and other child witnesses (see Chapter 7). The Irish stance on this point should also be

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146 As amended by section 13 of the Criminal Law (Rape) (Amendment) Act 1990. Originally, this protection was only offered to complainants in rape cases, but the 1990 Rape Act extended the measure to include complainants of sexual assault offences.


149 See sheet on video link in the Courts provided by the Department of Justice, Equality and Law Reform.


151 Information sheet Victim Support on the Court Victim Witness Programme.

152 The information pack consists of three booklets on Going to Court: (I) For Parents/Guardians of Child Witnesses; (II) For Young Witnesses under 17 years of age; (III) For Child Witnesses under 10 years of age. The booklets explain what happens using illustrations and simple wording.
reviewed.\textsuperscript{153}

\textbf{8.3 Protection of the Victim}

(F.15) Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or particular status or personal situation and safety of the victim make such special attention necessary, either the trial before the judgement should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate.

In camera hearings

Article 34.1 of the Constitution embraces the principle of publicity: justice is to be administered in public, except in special and limited cases as may be prescribed by law.\textsuperscript{154}

The law establishes one general exception and several specific exceptions to this principle that can be applied to the benefit of the victim of crime. The general exception is found in section 20(3) of the Criminal Justice Act 1951 which allows the court to exclude the public from hearings in relation to any criminal proceedings 'of an indecent or obscene nature'. More specifically, hearings in relation to rape and (attempted) aggravated sexual assault (s. 6(1) Criminal Law Rape Act (CLRA), 1981)\textsuperscript{155} and incest (s. 2(1) Criminal Law (Incest Proceedings) (CLIPA) Act, 1995) are held 'in camera'. All persons except officers of the court, those directly concerned in the proceedings, \textit{bona fide} representatives of the Press and any other persons (if any) that the court allows to be present are excluded from a hearing in camera. In these cases the verdict or decision and the sentence must be announced in public (s. 6(4) CLRA, 1981 and section 2(2) CLIPA, 1995 respectively).

In its Discussion Paper on the Law on Sexual Offences, the Department of Justice, Equality and Law Reform recently raised the question whether similar statutory rules should not be introduced for other sexual offences, particularly where the victims are children or mentally impaired. Although the court may apply the general exception of section 20(3) CJA 1951, specific statutory measures would recognize the fact that sexual offences other than rape, aggravated sexual assault and incest can be devastating to those involved, and would set one standard in relation to the principle of publicity for all sexual offences.\textsuperscript{156}

\textsuperscript{153} In one illustrative Irish case, the offender, who was standing trial for six counts of alleged sexual offences against his mentally handicapped daughter, had refused legal representation and therefore he himself conducted the cross-examination of the daughter, the girl's mother and another daughter. The People (D.P.P.) v J.T. before Walsh Costello and Barron JJ, 27 July 1988. See, for an evaluation of this case, P. Charleton (1990).

\textsuperscript{154} One of the questions currently under debate in Ireland in relation to the principle of publicity is whether television cameras should be allowed into the courtroom (see Byrne and McCutcheon (1996), nr. 4.23 p. 89 and P. Lambert (1996)). A different aspect of publicity that we found surprising was the amount of exposure \textit{offenders} are subjected to. It is common for newspapers to print the full name as well as photographs (usually taken on the way in or out of the Four Courts in Dublin) of offenders. Only a person accused of rape is granted anonymity, but once found guilty the anonymity is no longer protected, see Department of Justice, Equality and Law Reform, \textit{The Law on Sexual Offences, A Discussion Paper}, May 1998, nrs. 4.7.3 and 4.7.4, pp. 32-33.

\textsuperscript{155} As substituted by section 11 of the Criminal Law (Rape) (Amendment) Act 1990.

\textsuperscript{156} Department of Justice, Equality and Law Reform (May 1998), nr. 4.5 p. 30.
Anonymity
Statutory provisions on anonymity offer further protection against intrusive publicity for victims of sexual assault offences: section 7 of the CLRA, 1981, as amended by section 17 of the CLRA 1990, prohibits the publication of matters likely to lead members of the public to identify the complainant in such cases, unless the court directs otherwise. To violate this rule is to commit a criminal offence. Of particular interest is the rule that publishing information provided by the complainant of her own free will is also prohibited, unless permission to do so is granted by the court. The reasoning behind this rule is that the legislator felt it should be crystal clear that anonymity is, in principle, guaranteed for victims of sexual offences, so that future complainants are not deterred from reporting such an offence. Secondly, such a strict rule may prevent complainants from being pressurized or induced to go public.¹⁵⁷

At the time of writing it was not (yet) a criminal offence to reveal the identity of a child complainant. Even though in practice this information is not published, the upcoming Children’s Bill, 1996 will make it an offence to publish reports or pictures of any child involved in court proceedings, whether as complainant, witness or accused, or any information that could lead to identification of that child (s. 209).¹⁵⁸

In relation to anonymity, the Department of Justice again raises the question whether these provisions should not be extended to cases other than sexual assault. Although protection will be offered in many additional cases once the Children’s Bill, 1996 becomes law, sexual intercourse or buggery with a mentally impaired person are noticeably absent.¹⁵⁹

Media reports
Finally, even in cases where both the above protective measures are applied – i.e., the trial has been held in camera and the victim is protected by anonymity – the victim may still suffer unduly from insensitive and/or incorrect media reports. In terms of sexual violence against women, the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence Against Women and Children is particularly concerned about the unthinking use of language in many press reports, the narrow and generally sexualised stereotyping of women, the almost exclusive focus on ‘actual’ reporting, and a tendency to dwell on explicit and often salacious detail. The Working Party therefore recommends that a Code of Practice for the Reporting of Sexual and Other Crimes of Violence Against Women and Children be drawn up by the National Union of Journalists.¹⁶⁰

¹⁵⁷ Department of Justice, Equality and Law Reform (May 1998), nr. 4.6 pp. 30-32.
¹⁵⁸ Department of Justice, Equality and Law Reform, The Law on Sexual Offences, May 1998, nr. 4.6.6 p. 32.
The Domestic Violence Act, 1996 provides victims of domestic violence with a range of civil remedies they may invoke for their own protection. Although these remedies are imposed by civil proceedings, it is a criminal offence to breach them. The Gardai may arrest and charge any person breaking an order, and the court may impose a maximum punishment of a £1,500 fine and/or twelve months imprisonment. The safety order is a court order against the perpetrator that he shall not commit further acts of violence, or threaten to do so. The order may be made for a maximum of 5 years and does not require the perpetrator to leave the family home, unlike the barring order, which may be made for a maximum of 3 years.

The protection order and the interim barring order are interim measures aimed at providing the victim with temporary protection until the court decides on the application for a safety order or barring order respectively. The measures provided by the Domestic Violence Act are aimed at married couples, co-habiting couples, parents and, in some instances, others living together. It is also possible for the health board to apply for an order on behalf of a victim who is too fearful or traumatized to do so themselves, without the permission of the victim. The state is considering the use of electronic tagging to alert the police should someone breach their barring order.

In terms of how these measures are actually applied, The Task Force on Violence against Women reports that between August 1994 and July 1995 4,500 applications were received for a barring order, of which 2,000 were granted. The relevant provisions of the Domestic Violence Act, 1996 came into effect on 27 March 1996. Between April and July 1996, 1898 applications for barring orders were received, and 567 granted. Assuming that applications are submitted evenly throughout the year, this indicates that the actual number of applications has increased from 4,500 in 1994/95 to approximately 5,700 (1898 x 3) in 1996/97, whereas the actual granting of a barring order has dropped from 2,000 to around 1700 (567 x 3).

Protection may also be offered for offences other than domestic violence. For the relatively new problem of 'stalking', which was recognized as a criminal offence by the Non-Fatal Offences Against the Person Act, 1997, the court may, for instance, order the 'stalker' not to communicate with the victim, or to approach his or her home or work place. This order may be made in addition to a maximum sentence of 5 years imprisonment.

Finally, it should be noted that the safety of the victim also features in bail decisions. In Ireland, the constitutional right to liberty in combination with the presumption of

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161 See the Report of the Task Force on Violence against Women (April 1997), pp. 49-50, where the above information is derived from.
162 The Irish Times 11 January 1996.
164 Of the applications, 1048 were received in the provincial courts and 850 in the Dublin Metropolitan District. Of the barring orders granted, 454 were granted in the provincial courts and 113 in the Dublin Metropolitan District. In Dublin, judges are clearly more reserved about granting barring orders. See further the Report of the Task Force on Violence against Women (April 1997), p. 51 for figures, also on applications received and granted for protections, barring and interim barring orders.
innocence means that, in principle, the accused has a right to be released on bail. This right may be denied if there is the probability of the accused evading justice. In *The People (A.G) v. O'Callaghan [1966]*, I.R. 501, the Supreme Court determined that the possibility of interference with witnesses or jurors is one of the elements to be taken into consideration when deciding on this probability.

9 CONCLUSIONS

The common law jurisdiction of Ireland is a curious mix of the old and the new as far as the position of the victim of crime is concerned. In principle, the position of the victim is comparable to the one in England: he has no locus standi and no active participatory rights, except for in his capacity as private prosecutor, and compensation can be awarded in the course of the criminal proceedings in the form of a compensation order. Yet there are also some interesting differences. Regarding the compensation order, there is no obligation on the Irish criminal courts to explain why they have not imposed a compensation order where they could have done so, an obligation that does exist in England. Nor is the Irish system of enforcement of compensation as successful as the English one. On the other hand, the Irish do have a provision allowing the victim to address the court in person about his compensation order, something which is at present still unthinkable in the English criminal justice system. Furthermore, the Irish are ahead in the development of a Victim (Impact) Statement.

Placed in a broader European context, Ireland scores about average as far as the implementation of the Recommendation is concerned. Provision of information to victims is generally poor and much needs to be done in this respect. Regarding compensation, the Irish compensation order is not as effective as the English or the Scottish one, but definitely more successful than the continental adhesion procedure, with the exception of Sweden. Substantial progress has been made regarding the treatment and protection of the victim.

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Supplements

ABBREVIATIONS

AG - Attorney General
art. - article
BL - Barrister-at-Law
C. - Constitution
CICT - Criminal Injuries Compensation Tribunal
CLRA, 1981 - Criminal Law (Rape) Act, 1981
CJA - Criminal Justice Act
Co. - County
CPT - European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DPP - Director of Public Prosecutions
ESRI - Economic and Social Research Institute
EU - European Union
FLAC - Free Legal Advice Centre
HQ - Garda Head Quarters
I.R. - Irish Reports
IRA - Irish Republican Army
IRB - Irish Republican Brotherhood
NBCI - National Bureau of Criminal Investigation
nr. - number
p. - page
pp. - pages
s. - section
ss. - sections
S.C. - Supreme Court
UVF - Ulster Volunteer Force
VIS - Victim Impact Statement
WWI - World War I

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