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

Ter verkrijging van de graad van Doctor aan de Katholieke Universiteit Brabant, op gezag van de rector magnificus, prof. dr. F.A. van der Duyn Schouten, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de aula van de Universiteit op

Vrijdag 9 juni 2000 om 14.15 uur

Door

Marion Eleonora Ingeborg Brienen, geboren op 28 april 1965 te Castricum

en om 15.15 uur door

Ernestine Henriëtte Hoegen, geboren op 31 december 1968 te Kitzbühel, Oostenrijk

Ministerie van Justitie
Wetenschappelijk Onderzoek- en Documentatiecentrum 's-Gravenhage 21/1999
Chapter 18
Norway

Scenery

Lying on the western side of the Scandinavian peninsula, and with a population of only 4,419,955, the Kingdom of Norway is a country of mountains and fjords. Harald Fairhair (Harald Hardråde), the Viking leader who united Norway around 900, is generally considered to have been the first Norwegian King. Local chieftains continued to rule the country and in the mid-14th century, Queen Margaretha united Denmark, Norway and Sweden in the great Nordic Union. Sweden broke out of the Union after a short while and then the plague swept through Scandinavia, killing all but one of the Norwegian chieftains. The country was left in disarray, and Denmark became the leading nation, eventually reducing Norway to a Danish province. The Union lasted until 1814. Ceded to Sweden in that year, and hungry for independence, Norway defiantly adopted its own Constitution on 17 May 1814. However, the Swedes pressurized their western neighbours and forced them to accept the authority of their King, although allowing Norway to retain its Constitution. Eventually the Norwegians seceded peacefully from Sweden in 1905, and thereupon became the Kingdom of Norway, with Prince Carl of Denmark accepting the invitation to become King of Norway.

Norway is divided into 19 counties. As in the time of the local chieftains, and in contrast to the more centralized style of the Danes, the Norwegians still favour a decentralized administration of government. Unusual is that the national assembly (Storting) of Norway cannot be disbanded prematurely by the government. Elections are held every fourth year, to be concluded by the end of September (s. 54 Constitution). Because it is not possible to hold early elections, a crisis between the government and parliament can only be solved by reaching some form of consensus. The national assembly, which is made up of two departments, the Lagting and the Odelsting, may obtain the opinion of the Supreme Court on points of law (s. 83 C.).

Norway has six ombudsmen. The ombudsman is of origin a typically Nordic institution.

1 July 1998.
2 See, for instance, the Dutch daily newspaper NRC of 18 July 1997.
3 An ombudsman for defence (established through a parliamentary resolution of 21 April 1952), for conscientious objectors (November 1956), for public administration (June 1962), for consumer affairs (under the terms of the Marketing Control Act of June 1972), for equal opportunities (by legislation of June 1978) and the ombudsman for children (by legislation of
The ombudsman makes recommendations, assessments, and criticisms which the relevant public bodies voluntarily comply with.
PART I:  
THE NORWEGIAN CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

During the Union with Denmark, the Norwegian criminal justice system was gradually transformed by the introduction of Danish law and methods. In the process several traditional Norwegian principles of criminal procedure, such as the participation of laymen and the principles of immediacy and orality, were gradually lost. Danish legal officials, initially appointed to assist the Norwegian lay judges with the preparation of legal documents, took over the role of both prosecutor and judge in 1604, the year in which a new criminal code written in Danish was introduced in Norway. The long distances to be travelled in a country with often severe weather conditions and inadequate means of transportation meant that witnesses were reluctant to appear in court. Therefore the professional judges, eager to deal promptly with criminal cases, began accepting written testimonies, and the principles of immediacy and orality lost much of their meaning in practice. After the Union with Denmark was dissolved in 1814, the Norwegians were keen to replace remnants of Danish domination, although it took until 1887 to introduce a new code of criminal procedure. Through this code, the traditional Norwegian principles of lay participation, orality, and immediacy resurfaced.

Formally, the new code of 1887 anchored the Norwegian criminal justice system in accusatorial principles such as the three just mentioned. In practice, however, Norwegian criminal procedure now also contains many more inquisitorial elements such as the search for substantive truth and the active role of the judge therein. The judge is not bound by a confession of the defendant, and plea bargaining, in the sense of agreeing to confess in exchange for a lesser sentence, is clearly in conflict with the spirit of Norwegian criminal proceedings. Also, even if the prosecutor limits the scope of the indictment, the judge is not bound by the qualification of the prosecutor.

Faced with the same criticism as Denmark, that its criminal justice system was not in concurrence with the European Convention on Human Rights because defendants sentenced by a jury had no right of appeal, the Norwegian Ministry of Justice paved the way to extending the rights of appeal with its 1992 ‘two-instance’ preparatory work (NOU 1992:28, *To-instansbehandling, anke og juryordning i straffesaker*) and subsequent legislation. Before the reforms, the High Courts (*lagmansrett*), sitting with three professional judges and a jury of ten, acted as courts of first instance for offences with a maximum prison sentence of 6 years or more. There was no appeal to the Supreme Court against the verdict, only against the sentence, although the judges could unanimously overrule the decision of the jury and order a re-trial. Since the reforms, all cases, regardless of their gravity, are first heard in the

---


5 For an extensive analysis of the nature of the Norwegian criminal justice system viewed in the light of the position of the injured person therein, see A. Robberstad, *Mellom Tvekamp og Inquisition, Straffeprosessens grunnstruktur belyst ved formørmedes stilling*, Universitetsforlaget, Oslo 1999, in particular part II: Fra tvekamp til inquisisjon — og tilbake igjen? (From a duel to inquisition — and back again?), pp. 51-180.
district court (byrett). The high court now acts as a court of appeal for all offences. Offences with a maximum prison sentence of more than six years are heard by a jury, other cases by three professional judges and four lay judges (see § 3.3).

2 GENERAL REMARKS AND BASIC PRINCIPLES

In the above, several important principles of Norwegian law have already been mentioned. The principle of the participation of laymen in the criminal justice process is realized by involving lay judges and, depending on the gravity of the case, juries in the criminal proceedings (see § 3.3). The principles of immediacy and orality can be found in section 296-1 Code of Criminal Procedure, CCP (Straffeprosessloven, strpl), which provides that witnesses should testify in person and orally, unless this is impossible for a special reason. Section 294 CCP gives voice to the principle of the search for material truth. It explicitly gives the court the task of ensuring the case is completely solved, and, to achieve this, allows the court to call for new evidence and adjourn the proceedings. However, a judge may not take up a case on his own initiative (s. 63 CCP).

Another important principle is the principle of expediency which can be found in section 69 CCP. Prosecution may be (conditionally) waived for a variety of reasons, one of them being that the defendant is prepared to pay compensation (see § 7.1 under B.5).

Offences are formally divided into ‘crimes’ and ‘misdemeanours’. An offence is a crime if it is punishable by more than 3 months imprisonment, otherwise it is a misdemeanour. A defendant who has confessed to an offence that has a maximum punishment of not more than ten years can be sentenced during a special simplified procedure, see section 248 CCP.

3 JUDICIAL AUTHORITIES AND CRIMINAL JUSTICE PARTNERS

3.1 Investigating Authorities

Investigations are initiated and carried out by the police (s. 225-1 CCP). The Director of Public Prosecutions and the public prosecutor can order an investigation to be initiated or stopped, and give instructions on how it shall be carried out (s. 225-2 CCP). There is no such thing as an examining magistrate in Norway.

The Norwegian police force, which falls under the responsibility of the Minister of Justice, is divided into 54 police districts, each one headed by a Chief of Police operating from the district headquarters. Geographically speaking, the police districts are similar in size but, depending on the population density, the amount of police personnel employed in each district varies from as little as twenty to more than 1,850 (Oslo). All police stations in a particular district are subordinate to the local Chief of Police. The country police stations (lensmannkontor) are staffed by somewhere between two and twenty rural police officers.

---

6 For an analysis of this procedure, and the comparable Danish one, see C.F. Mulder and P.J.P. Tak (1993).
8 The police reside under the Director of Public Prosecutions when acting in their investigative capacity.
3.2 Prosecuting Authorities

The Norwegian Prosecuting Authority (Påtalemyndigheten) is a three-tiered organization (s. 55 CCP). At the top stands the Director General of Public Prosecutions (riksadvokaten), who is a senior state official with overall responsibility for the prosecuting authority. Only the King in Council may issue general rules and give binding orders to the Director General (s. 56 subsection 2 CCP). Most of the directions to the Director General have been laid down in the 'Instructions on Prosecution' (Påtaleinstruksen), of 28 June 1985 (see § 4.2). In addition to his organizational and administrative responsibilities, the Director General also conducts the prosecution of the most serious offences himself.

The public prosecutors (statsadvokater) form the second level of the prosecuting authority. The public prosecutors are organized into ten districts, and are responsible for the prosecution of offences with a prison sentence of more than six years.

The 54 Chiefs of Police and the police prosecutors form the third level of the prosecuting authority. In their prosecuting capacity, the Chiefs of Police reside under the Director General and the local public prosecutor. They are responsible for the prosecution of offences with a maximum prison sentence of 6 years. The police prosecutors are fully integrated into the police force and have their office at the district police headquarters. The construction of incorporating part of the public prosecution authority into the police force has greatly enhanced communication between the two bodies, although it must be said that, for the improved communication between the police and the lowest level of the prosecution authority, a sacrifice may have been made regarding the communication within the prosecuting authority itself. The police prosecutors are very much part of the police force,
whereas the public prosecutors have their own office. Many of the public prosecutors start out as police prosecutors. Relations between the police (prosecutors) and the public prosecutors vary around the country.

### 3.3 Judiciary

In Norway, there are 98 District or City Courts (byrett in the towns and Herredsrett in the countryside), 5 High Courts (Lagmannsrett) and one Supreme Court (Høyesterett).

In the District Court, cases are decided by one professional judge and two lay judges (domsmenn). In special cases, the court may sit with three professional judges and five lay judges. Since the 'two instances' legislation came into force in 1995, all cases now start in the district court, regardless of their gravity. The verdict must be motivated and may be appealed to the High Court. Offences carrying a maximum prison sentence of ten years where the accused has made a full confession may, with the offender's consent, be dealt with in a summary procedure before a court of examination and summary jurisdiction (forhørsrett) (s. 248 CCP). This is a court sitting with a single professional judge who also deals with such issues as remand proceedings. After reading the files and hearing the confession of the accused, the judge determines the sentence. There is no prosecutor present in the courtroom. The accused may appeal against the sentence to the High Court.

Since the 'two-instance' legislation came into force in 1995, the High Court no longer acts as a court of first instance, only as a court of second instance regarding appeals against judgements of the District Courts. All cases decided on in the District Court may be appealed on questions of guilt, sentence, application of the law, or error in procedure, regardless of the maximum prison sentence for each particular offence. However, there are differences in the procedure for dealing with appeals, depending on the type of appeal and the gravity of the offence.

#### Appeal on the question of guilt

An applicant appealing on the question of guilt in the case of offences with a maximum prison sentence of six years must be granted leave to appeal by a panel of three professional judges of the High Court. If the appeal is granted, the case is heard by three professional judges and four lay judges. If the offence carries a maximum sentence of more than six years and the District Court has imposed a prison sentence, no leave to appeal the question of guilt is required. Such a case is tried again before three professional judges and a jury of ten. The jury decides the question of guilt, but their decision - whether guilty or not-guilty - may be unanimously overruled by the three professional judges and a re-trial ordered (forenyt behandling) (s. 376a CCP). The sentence is decided by the professional judges together with four of the jury members - the foreman and jury members who voted not

---

9 For a detailed description and evaluation of these summary proceedings, see C.F. Mulder and P.J.P. Tak (1993).

10 The presiding judge selects the jury by drawing lots. Fifteen potential jury members are present at the opening session of a trial, and their names put in a large jar. The presiding judge draws five names from the jar, and these are allowed to go home. The remaining ten are sworn in as the jury.

11 Note that, in Denmark, only a decision of guilty may be overruled, see Chapter 6 § 3.3.
The accused has no further appeal against the verdict of the jury, although he can appeal to the Supreme Court against the sentence. Leave to appeal is required in all cases where the district court only imposed a fine or seizure.

**Appeals against the sentence and other partial appeals**

Appeals to the High Court against the sentence of a District Court, the application of the law or error of procedure are usually dealt with via a written procedure by three professional judges. However, if the offence carries a maximum prison sentence of more than six years, the appeal is heard by the High Court sitting with three professional judges and four lay judges.

The Supreme Court acts as court of cassation as well as court of appeal for appeals against sentences, error in procedure, and application of the law by the High Court. As a court of cassation, the main task of the Supreme Court is to guard the uniformity of law, and this is done mainly by giving very explicit and detailed guidelines for sentencing in their judgements. Leave to appeal to the Supreme Court is granted by a committee of five, sometimes eighteen, Supreme Court judges.

Judges and public prosecutors are appointed by the government on the basis of a recommendation of the Ministry of Justice. Assistant judges are appointed by the Ministry of Justice or the courts themselves. Candidates for the judiciary must have Norwegian nationality, be reliable and trustworthy persons and have no criminal record. The judges of the Supreme Court must be at least 30 years old and have obtained the highest grades in the final university examination. Judges of the first and second instances must be at least 25 years old and have obtained the second highest grades in the final university examination. Once appointed, judges and public prosecutors need not undergo any particular training. Moreover, Norwegian legislation does not provide for any possibility of further training. No reform of the current system of recruitment of judges and public prosecutors is on the agenda in Norway.  

### 3.4 Government

The Norwegian government has an important role to play as regards the position of the victim of crime. For lack of a firmly rooted, national victims' movement (see § 3.5), the State provided measures for victims of crime. After publishing several memoranda concerning victims of crime (see § 4.3), the government published its ‘Plan of Action for a Safer Society 1993/96’ in 1993. As part of this package, it announced that it would: (1) establish a Norwegian Resource Centre for Studies and Information on Violence (*Kompetansesenter for voldsofferarbeid*); (2) publish a handbook for victims and their relatives; (3) publish a pamphlet on the legal rights of the victim; and finally, (4) establish victim support schemes in a number of police districts. The Ministry of Social and Health Service, the Ministry of Family and Children, and the Ministry of Justice were given joint responsibility for realizing these schemes.

---

12 Note that, in the old system, before independence from Denmark and the subsequent introduction of a new CCP in 1887, the sentence was decided by the professional judges alone, which is the procedure still adhered to in Denmark today.

measures.

Regarding the first measure, the Norwegian Resource Centre for Studies and Information on Violence was opened in 1996, in the building of the College of Oslo (Høgskolen i Oslo). Working with four counsellors, a secretary, a librarian and a director, the Resource Centre aims to set up training programmes to increase victim awareness among social workers, doctors, hospital personnel, and the like. Furthermore, the Resource Centre aims to become the central point of knowledge and communication as regards victims of crime, establishing contact between all the agencies and researchers currently involved in some way with victims of crime. There is a notorious lack of research in the field of victims in Norway, and the Centre intends to make recommendations as to what research projects should be funded with the money from the victim fund to be established by the government (see § 3.10). The Centre has also started its own library.

Regarding the second and third measures, a handbook for victims and their relatives, and a brochure explaining the legal rights and duties of the victim, were published in 1995. For developments in relation to establishing victim support schemes, see the next section.

3.5 Victim Support

Although there is as yet no well-established, national victim support movement in Norway, there have been several individual enterprises aiming to help victims cope with their situation. Most of these cater for victims of sexual offences and/or violence. There are 19 Support Centres against Incest (Støttecenter mot incest). These centres are self-help groups offering support to women who are victims of incest or who are mother to a child who is a victim of incest, with the exception of one centre which deals exclusively with male victims. In addition to the Support Centres against Incest, there are approximately 50 Crises Centres (Krise Senter) around the country offering support to battered and raped women. The Crises Centres offer victims and their children temporary housing, counselling and help in contacting the police, legal aid, social welfare, medical services, and so on. In Oslo, there is also a Rape Trauma Centre which is located at the city's public emergency centre. Women who have been raped are advised to go to the centre as soon as possible after the offence has been committed, to be medically examined (see § 5.1 and § 6.1 under guideline A.2). The examination is to secure the necessary forensic evidence and to provide the women with appropriate medical care. Also located at the Oslo public emergency centre is a special unit for victims of violence. In total there are about 25 medical emergency centres in Norway giving specialised attention to rape victims or victims of violence.

There are two victim support organizations in Norway that offer general support to victims of violence. These are the National Association for victims of violence (Landsforeningen for voldsofi) and Norwegian Victim Support (Norsk Forbund for Voldsofre, NFV). Both organizations are centred in Oslo and work exclusively with volunteers. The National Association for victims of violence was launched on 14 April 1989. A small group who did not agree with their policies split themselves off and founded Norwegian Victim Support on 22 February 1992. This strife is still characteristic of victim support in Norway. Although the names of both organizations suggest that they operate on a national basis, the work is

---

14 See the brochure of the Oslo Krise Senter for Misshandlede og Voldatte Kvinne.
15 The Rape Trauma Centre in Oslo served as an example for the one set up in Reykjavik, Iceland.
concentrated mainly in the Oslo area. Whereas the National Association appears to work from the homes of the volunteers, the Norwegian Victim Support opened an office close to the centre of Oslo on 18 April 1997. Victims could call in at the office where they were counselled according to their needs. Unfortunately, in 1999 the office had to be closed again due to lack of funding.

By July 1997, the government had also launched five local victim support schemes as part of its plan of action for a safer society. At present the aim of the Ministry of Justice is to establish 20 local victim support offices, with their own independent umbrella organization. Directed by ex-police officers, the individual schemes are independent of both the police and other public services, although cooperation with the police is close. They are apolitical and non-religious, and the help they offer is free. The local offices work with a paid director and voluntary staff. The trial period of the project runs until 2000, when it is due to be evaluated by the research department of the police academy in Oslo.

### 3.6 Conflict Resolution Boards

In 1981, an experiment was set up in Norway with conflict resolution or mediation boards (konfliktråd). Aiming to settle relatively minor cases involving damage, loss or other violations, the Act on Mediation in Conflict Resolution Boards (Lov om megling i konfliktråd) of 15 March 1991 No. 3 now compels all municipalities to establish such a board, either independently or in cooperation with another municipality. In 1996, there were 42 Conflict Resolution Boards, working with 710 mediators.\(^{17}\)

The Conflict Resolution Boards may mediate in both criminal and civil cases. The Board may refuse to mediate in a criminal case referred to them by the parties themselves, but must always attempt to settle a case referred by the prosecuting authority (police or public prosecutors). For the prosecutor to refer a case, both the victim and the offender must agree to dealing with the case in this way. The mediator tries to settle cases by bringing together the offender and the victim. A successful resolution results in the drawing up of a contract between the offender and the victim in which it is agreed that the offender will either pay the victim compensation, repair the damage, or do some other useful work, in exchange for which the case will be considered closed. The Board deals only with straightforward cases involving relatively minor offences and young offenders, where there are no problems of evidence and the (identifiable) victims and offenders preferably live in the same town.\(^{18}\) Initially intended as a way to divert cases from the criminal justice system, the system of Conflict Resolution Boards has actually led to net-widening. Youths who are formally too young to be held criminally liable in the criminal justice system\(^{19}\) are increasingly being

---


18. The Ministry of Justice is also planning a project to bring more serious offences before the Conflict Resolution Boards. Information supplied by Ole K. Hjemdal, August 1999.

19. ‘No-one may be punished for an act committed before the age of 15’, section 46 PC.
brought before the Conflict Resolution Boards in the hope that punishment in the form of some sort of labour will prevent them from committing offences in the future. The threat of reporting the incident to the police, meaning that the victim's name will go on file, is often enough to convince young offenders to appear before the Board.

The Boards are not without their problems. There are substantial differences in the settlements reached for comparable offences. Also, some victims such as shopping malls or other commercial centres can be very hard-lined, insisting on a minimum amount of compensation to be achieved, which is often beyond the means of the offender. Another problem encountered by the Boards is that insurance companies have started coming to the mediation meetings, where they proceed to reprove the offenders, turning the meetings into lessons in morals rather than an attempt at mediation.

The Conflict Resolution Board should not be confused with the Conciliation Board (Forbetskår), also known as the Court of Conciliation. This institution has been in operation for more than 200 years, and aims to reach a settlement in civil cases to prevent litigation. The settlement can be enforced in the same way as a judgement.

3.7 Enforcement Authorities

The State Recovery Agency (Statens Innkrevingssentral), which has its office in Mo i Rana in the county of Nordland, is responsible for collecting any compensation that the injured person has been awarded during a criminal trial (s. 30-11 Instructions on Prosecution).

3.8 Probation Services

In Norway, probation is supervised by the Kriminalomsorg i frihet. There are special probation officers for the supervision of community service.

3.9 Lawyers

In Norway, there is no distinction between barristers and solicitors, notaries or other practising lawyers. They are all referred to as advokat. Victims of rape and sexual abuse, and, under certain circumstances, victims of other violent offences are entitled to a state-paid lawyer, see § 5.7. Some victims' lawyers are specialized as such, but others usually do defence work.

3.10 Compensation Tribunal for Victims of Violence, County Chairman

Before the Norwegian state compensation scheme came into operation on 1 April 1976,23

---

23 Following a parliamentary decision of 5 March 1976, by Royal Decree of 11 March 1976 om erstattning fra staten for personskade ved straffbar handling. A Royal Decree of 23 January 1981 introduced new provisions which came into force on 1 July 1981. These were amended by Royal Decree of 6 December 1985. Note that the compensation scheme does not (yet) have a statutory basis: 'The Department of Justice justified this situation on the basis that a Royal resolution would be easier to change than statute law. They argued further that the need for
claims were dealt with by the Compensation Tribunal for Victims of Violence (Erstatningsnemnd for Voldsofare). Under the new provisions of 1981, the responsibility for dealing with compensation claims in first instance was transferred to the nineteen local County Chairmen (fylkesmenn), with the Compensation Tribunal hearing appeals. This decentralized administration of state compensation is very different from the heavily centralized Swedish and Danish approaches. In those countries, all state compensation claims are dealt with by one and the same authority working with a professional staff. In Norway, the task of assessing state compensation claims circulates among the staff of the County Chairmen, who have many other things to do beside dealing with these claims. Although there are guidelines for determining the level of compensation to be awarded, there are differences in the way the individual counties assess the claims.

State compensation may be awarded to victims of crime who have suffered personal injury as a result of violent crime. In principle, the criminal act must have been reported to the police and a request for prosecution made. Furthermore, the injured person must have made a compensation claim against the offender to be dealt with in concurrence with the criminal proceedings. Compensation claims must be for a minimum of NOK 1,000 (EUR 121). The maximum award is NOK 200,000 (EUR 24,258).

In § 3.4, we briefly mentioned that the Norwegian government intends to set up a victim's fund, following the Swedish example. This fund is to be financed in part by fines paid by offenders, including traffic offenders. It will be administered by the Compensation Tribunal.

4 SOURCES OF LAW

4.1 General

Statutes (lov) — legislation passed by parliament and approved by the King (ss. 76-81C.) — form the main source of law in Norway and ‘(a) key principle of the Norwegian legal system is that most areas of law are regulated by legislation passed by the Storting’. Norwegian legislation goes back to the Middle Ages, and regional codes existed long before King Harald Fairhair first united the country around 900. The first national code, based on four of these regional codes, was compiled by King Magnus the Lawmender (Magnus Lagabote) in 1274. This code remained in force until 1687 when Christian IV decreed his Norwegian amendments would probably be quite extensive, at least at the outset’ (G. Brottveit, ‘Norway’, in: Compensating Crime Victims, A European Survey, edited by D. Greer, Freiburg im Breisgau 1996, pp. 437-493, p. 447). The reference is to Innstillinger fra justiskomiteen (Recommendation from Justice Committee). St. prp. No. 39, 1975-76, p. 1. By 1999, the Department of Justice was considering replacing the resolution with statutory law and at the same time revising the whole scheme (information provided by O.K. Hjemdal, August 1999).

24 In special cases, compensation can be awarded even if these criteria are not met (s. 5 Royal Decree of 23 January 1981).

25 By the end of August 1999, the proposed law was still being considered by of the Department of Justice and no corresponding bill had (yet) been put before parliament.

Important with regard to the modern statutes are the preparatory works known as the Norwegian public reports (Norges offentlige utredninger, NOU). The abbreviation NOU is followed by the year of publication and the number accorded the report in the state series.

Further sources of law are formed by case law and circulars (rundskriv). The Ministry of Justice and the Director General of Public Prosecutions both regularly issue circulars.

4.2 Sources of Criminal Law and Procedure

The main source of criminal law is the Penal Code (Almindelig Borgerlig Straffelov (Straffeloven), strl) of 22 May 1902. 'No one may be convicted except according to law, or be punished except after a court judgement' (s. 96 C). Contrary to the situations in Denmark and Iceland, analogy is not a source of Norwegian criminal law.

Regarding criminal procedure, Norway did initially share the Nordic tradition of having one code of procedure dealing with both civil and criminal cases. Whereas this tradition still lives on in Denmark and Sweden, Norway now has a separate Code of Criminal Procedure (Lov om rettergangsmåten i straffesaker (Straffeprosessloven), strpl) of 22 May 1981. This code, which came into force on 1 January 1986, replaced the earlier code of 1887. Another important source of criminal procedure is the Instructions on Prosecution (Regler om ordningen av rådmyndigheten – Rådalinstruksen), decreed on 28 June 1985. In this directive, the government has laid down rules for the internal organization of the prosecution service as well as for the enforcement of its tasks.

4.3 Specific Victim-Oriented Sources of Law and Guidelines

The Code of Criminal Procedure contains many provisions that directly concern the victim of crime. Examples are: the rules on the injured party's right to a lawyer (chapter 9a, s. 107a-107d); the prohibition order (chapter 17a, s. 222a); private prosecution (chapter 28); and civil claims (chapter 29). For the victim who has to testify in court, chapter 10, dealing with witnesses is also relevant. Other procedural rules concerning the way the authorities must treat the victim are found in the Instructions on Prosecution.

The injured party also features in the Penal Code, for instance in sections 78 and 79, which specify who must make the complaint if the victim is a minor or an artificial person such as a business.

Regarding the victim's right to a lawyer, sources of law to be consulted in addition to chapter 9a of the Code of Criminal Procedure are the Legal Aid Act (Rettshjelploven) of 13 June 1980 no. 35 and Circulars G-101/83, G-0032 of March 1986 and G-38/39 of 23 February 1989 of the Department of Justice (see above § 4.9).

Moving to the Conflict Resolution Boards, there is the Act on Mediation by Conflict Resolution Boards (Lov om megling i konfliktråd) of 15 March 1991 No. 3, and a Directive of the Director of Public Prosecutions R. 2581/93 of 6 December.

---

27 L. Winsvold (1996). There is some confusion here. Further on in this article, Winsvold speaks of Christian V rather than Christian IV. Also, according to Mulder and Tak (1993), who speak of Christian IV, the Norwegian Law was decreed in 1604 rather than 1687 (p. 66).


29 Introduced by Act of Parliament of 1 July 1994 no. 50, which came into force on 1 January 1995.
State Compensation was first introduced by Royal Decree (Kongelig resolusjon) of 11 March 1976 which came into force on 1 April of the same year. New provisions were added by Royal Decree of 23 January 1981 (in force 1 July 1981) and these were subsequently amended by Royal Decree of 6 December 1985.30


5 ROLES OF THE VICTIM

The Norwegian words kriminalitetsofie (victim of crime) and voldsoffer (victim of violence) are not used in Norwegian legislation. The term used there is fornærmede, translated by Age Lind as 'the aggrieved (person/party), the innocent (person/party); the offended (person/party); complainant; victim.'31 Norwegian legislation does not offer a definition of fornærmede, in contrast to, for instance, Swedish legislation, which gives a definition of the comparable term målsågande in its Code of Judicial Procedure.32 The closest the Norwegian Code of Criminal Procedure gets is in section 3 CCP: 'In this act the expression fornærmede refers also to those others who have suffered damage as mentioned in the first section'. The first section (of s. 3) speaks of those who have suffered damage and have a legal claim against the accused. According to Andenæs, the conception of the fornærmede as he who has an interest that the penal provision in question aims to protect is the most dominant in theory and practice.33

Generally speaking, the fornærmede is not a party to the criminal proceedings,34 even though the chapter on the victim’s right to a lawyer is placed in ‘Part 2. The Parties’ in the Code of Criminal Procedure. In the chapter on Sweden, we stated that some have argued that the comparable concept of målsågande is per definition considered to be a party to the criminal proceedings, on the basis of the fact that, like the defendant, he cannot be placed under oath when testifying. Others argue that the målsågande is only a party to the criminal proceedings if he is presenting a compensation claim, supporting the prosecution or conducting a private prosecution. This led us to translate målsågande with injured party if he is presenting a compensation claim, supporting the prosecution or presenting a private prosecution, and injured person if his involvement reaches no further than giving a statement in court. The Norwegian fornærmede who testifies in court must always do so under oath,

32 The målsågande is ‘the one against whom the offence was committed, or who was affronted or harmed by it’ (s. 8 ch. 20 CJP). This definition adds to, rather than detracts from, the general confusion about who qualifies as a målsågande, see the introduction to § 5 of Chapter 22.
33 J. Andenæs, Norsk straffeprosess, bind 1, 2. Utg., Universitetsforlaget, Oslo, 1994, pp. 89-90. See also A. Robberstad, Bistandsadvokaten, Offenes stilling i straffesaker, Universitetsforlaget, Oslo, 1994, pp. 35-37. Robberstad refers to Andenæs and also Hov (1983), pp. 17-57, and mentions that the Penal Code Committee has suggested that section 93 of the new Penal Code should read as follows: ‘The person whose interest that the penal provision aims to protect is damaged, or who in another way is directly hurt by the criminal act, has the right to demand prosecution as fornærmede’ (p. 35 footnote 1). See NOU 1992:23 pp. 288 and 246. The old Penal Code of 1902 was still in force at the time of writing (July 1997).
thereby annulling any speculation about whether he is per definition a party to the criminal proceedings. Furthermore, there is no real equivalent in Norwegian legal practice to the Swedish opportunity of supporting the prosecution (however, see § 5.5 for a qualification). This means that the fornørmede can only become a party to the proceedings by presenting a compensation claim or a private prosecution. Regarding a compensation claim, the fornørmede becomes a party only in as far as his claim is concerned, i.e. in the civil proceedings attached to the criminal trial.\footnote{See A. Robberstad (1999) for an extensive discussion of whether or not the victim is a party to the proceedings, pp. 320-349.}

In line with the way we translated målsägande in the chapter on Sweden, we will translate fornørmede as injured party only if the victim is presenting a private prosecution or as far as his role in the civil proceedings regarding the compensation claim is concerned. In all other cases, fornørmede will be translated as injured person.

5.1 Reporting the Offence

An offence may be reported to the police, the police prosecutors, the public prosecutors or the Director of Public Prosecutions (s. 223 in conjunction with 55 CCP). An oral report must be taken down in writing and dated by the recipient, and if possible signed by the person reporting the offence (s. 223 CCP, see also s. 7-1-1 IOP). Any report made to the public prosecutors or Director of Public Prosecutions may be immediately forwarded to the relevant police authorities (s. 7-1-2 IOP).

A victim wanting to report a crime at the main police station in Oslo must first state his business to a police officer seated behind a glass shield in the reception area. He will then be let through into the main waiting room where he must stay until an officer is free to take down his statement. This will normally be done in one of the offices behind the waiting room. For victims of sexual offences and serious violence, a special room has recently (early 1997) been furnished where they can wait in privacy. The room has been pleasantly wallpapered, has comfortable chairs and a table, several plants and pictures on the wall. Coffee and tea are at hand. Before this room was available, victims of such offences would be left to wait on a sofa in the corridor behind the waiting room, in the midst of the hustle and bustle of busy police officers.

In Oslo, a victim of rape reporting the offence just after it has been committed will be encouraged to first go to the local Rape Trauma Centre for a medical examination. With the permission of the victim, the official forms on which the doctor notes down his findings may later be used as forensic evidence. After the medical examination, the police will bring the victim back to the police station to take down (the rest of) her statement. Many victims of a sexual offence do not report the offence until much later. Some first contact a lawyer for advice. A victim's lawyer (see § 5.7) may accompany the victim to the police station and be present during the police questioning (s. 107c-2 CCP). Some victim's lawyers are known to have advised their clients against reporting a sexual offence to the police, which is ironic considering that the Victim Committee of the Ministry of Justice presumes that the victim's lawyers will lessen the strain that the legal proceedings place on the victim, therefore encouraging more rather than less reporting.\footnote{NOU 1992:16, p. 27.}
5.2 Complainant

Here, the word ‘complainant’ refers to the injured person who requests the offence to be prosecuted by the prosecution authority. In Norway, there are several offences that can only be publicly prosecuted upon complaint by the injured person. These include, among many other things, offences against his or a deceased’s honour, embezzlement, larceny and pilfering, extortion, fraud and breach of confidence, vandalism, disturbance of the peace, violation of privacy, and several offences against property rights. The first time the injured person is questioned in relation to a complainant offence, he must be asked whether he wishes the offence to be prosecuted (s. 236 CCP, s. 8-7-1 IOP).

If the injured person is under the age of 18, the complaint is in principle made by the person who has parental responsibility, or otherwise the injured person’s guardian (s. 78 CCP). The same section determines that if the injured person is over 16 years of age, a complaint cannot be made against his wish in cases concerning bodily harm and insult to honour. Furthermore, if the injured person has reached the age of 16, he can also make the complaint himself. Section 79 CCP determines who is to make the complaint if the injured person is a business, an association, the state, or a municipality.

A complaint may be made up to six months after the person qualified to do so has learnt of the offence and of the person who has committed it. If there is a right to annulment, the time within which a complaint may be made is three years (s. 80 CCP). The injured person must be asked whether he wants to make a formal complaint the first time he is questioned (s. 236 CCP).

A complaint cannot be withdrawn once the indictment has been sent (s. 82-1 PC). However, if the perpetrator has committed the complainant offence against one of his ‘nearest’, as defined in section 5 PC, or one of the offences of sections 409 – 412 PC is concerned (house servants), the complaint may still be withdrawn after the indictment has been sent (s. 82-2 PC). Once the complaint has been retracted, it cannot be made again (s. 82-3 PC).

Initially, domestic violence was also a complainant offence. Women who had been beaten by their husbands would report to the police and file a complaint, and then return later to withdraw the complaint, much to the frustration of the police officers and prosecutors involved. In 1988, domestic violence was changed into an offence where the decision to prosecute is left entirely to the discretion of the prosecuting authority.

5.3 Civil Claimant

A civil claim that the injured person, or any other person who has suffered damage, has against the accused may be presented in conjunction with the criminal proceedings, provided that the claim arises from the same act that the trial is dealing with (s. 3-1 and 3-3 in conjunction with ch. 29 CCP). Such a ‘civil claim’ may be based on either private law or public law. Examples of claims based on public law that can be presented in conjunction with the criminal trial are: a claim based on the Building Act for the demolition of an illegal

---

37 Prosecution of the offence must also be in the public interest, see section 251-1 CCP.
38 Section 78 CCP also determines who acts as complainant if the injured person is mentally ill or deceased (s. 78-2, 78-3). Furthermore, the body who has compensated the damage, or who has the legal duty to do so, is also considered to be an injured person (78-4). Also the state if it has fully or partly compensated the damage or committed itself to do so (78-5).
building, or a claim for an additional fee as a result of incorrect tax returns. In the context of this chapter, the most common claim based on private law is a compensation claim.

The first time the injured person is questioned (by the police), he must be asked whether he has a claim that he wants the prosecuting authority to take along with the case pursuant to section 3 CCP (s. 236 CCP). If he wants compensation or reparation, the amount must be specified and substantiated (s. 236 CCP). The injured person may either request the prosecuting authority to present the claim in court (s. 427 CCP) or do so himself (s. 428 CCP), in which case he may claim costs on the basis of ch. 13 of the Act on Civil Litigation (s. 439-1 CCP). The first time the injured person appears in court, the court must ask him whether he wishes to make a claim, if this has not been ascertained beforehand (s. 426 CCP). If the injured person has a lawyer in accordance with s 107a-d CCP (see § 5.7), this lawyer must be offered the opportunity to make a statement about the civil claim of the injured person even if the prosecuting authority is presenting the claim (s. 107-c-4 CCP). In practice, the prosecuting authority is all too happy to leave the presentation of the compensation claim in its totality to the injured person's lawyer.

The court may decide that the civil claim will be dealt with after the criminal case has been decided upon (s. 431 CCP). In practice, in a case before the district court, the civil claim will be dealt with simultaneously with the criminal case. In other words, when the prosecutor presents the criminal case in court and sums up the charges, he will also make the civil claim. Before the High Court sitting with a jury (i.e., cases with a maximum prison sentence of more than 6 years), no mention will be made of the civil claim until after the jury has pronounced its verdict. Then, in a combined sentencing annex claims hearing which follows the pronouncement of the verdict, the civil claim will be presented and decided upon. A civil claim may be presented even if the verdict on the criminal charges is not guilty.

### 5.4 Private Prosecutor

An injured person may institute a private prosecution in case of: (1) a punishable act which is not subject to public prosecution; (2) a punishable act which is subject to public prosecution only if it is considered necessary in the public interest; (3) other punishable acts in so far as the prosecuting authority has refused to comply with a request for public prosecution or has dropped an initiated prosecution other than on the basis of sections 69 or 70 (s. 402 CCP).

The regulation that a private prosecution may be instituted if a punishable act is not subject to public prosecution no longer has any practical value. Whereas in the past the Penal Code and other special penal acts used to contain offences which the public authorities were not eligible to prosecute, there are no longer sections withholding the right to prosecute criminal offences from the public authorities. The second category of offences where a private prosecution may be instituted consists mainly of libel cases (andreklankelser). These are complainant offences, and therefore a public prosecution requires both a complaint and a public interest (s. 251-1 PC). For lack of such a public interest most libel cases are privately prosecuted. Finally, section 402 CCP recognizes a subsidiary right to private prosecution for the injured person where the prosecuting authority has decided to

refrain from prosecution.\(^{41}\) This category is not limited to complainant offences, but also includes offences where either a complaint or a public interest is required for a public prosecution. Intended as a corrective for the policies of the prosecuting authority, the subsidiary private prosecution is hardly ever used in practice.

If the prosecuting authorities have initiated a public prosecution in the case of an offence of the second or third category, and subsequently decide to drop this prosecution, the injured person may take over the prosecution where the case stands. If the main hearing has already commenced, this is only possible in libel cases (s. 406 CCP).

The private prosecutor may act personally or through a legal representative pursuant to the provisions of chapter 4 of the Code of Civil Procedure (twistemålsloven). However, in cases before the High Court, the private prosecutor must engage counsel to conduct the case. Only through the latter may the private prosecutor exercise the rights he has during the preparatory proceedings and the main hearing (s. 410 CCP). A private prosecution is subject to legal aid in keeping with ch. 13 of the Code of Civil Procedure (s. 440-1 CCP).

### 5.5 Auxiliary Prosecutor

In the rare occurrence that a public prosecution has been decided on in a case falling within the second category of offences mentioned in 402 CCP – punishable acts subject to public prosecution only if it is considered necessary in the public interest – the injured person may join the prosecution (s. 404 CCP). In that case, the injured person has the same rights of participation as a private prosecutor, but his position as a witness (see § 5.6) remains unaltered (s. 404 CCP).

### 5.6 Witness

The victim’s main role in the criminal proceedings is as witness for the prosecution. Unlike in, for example, Sweden, where the victim does not actually testify as a witness, but rather gives his account of the events without taking an oath in the same way that the defendant does, the Norwegian victim testifying in court has the same status as any other witness. The presiding judge will admonish him to speak the full truth without withholding anything, and will warn him of the consequences of giving a false statement (s. 128 CCP). The witness must then promise (rather than take an oath) to speak the plain and full truth and not withhold anything (s. 131 CCP).

In the introduction we recounted how, during the union with Denmark, the principle of orality during criminal proceedings was gradually lost. Because of the long distances and difficult weather conditions in Norway, witnesses often had arduous journeys to make to get to court, and Danish officials eager to speed up proceedings started accepting written testimonies. With the new Norwegian Code of Criminal Procedure of 1887, a return to the principle of orality was made, but even in the most recent Code of Criminal Procedure of 1981, consideration is still given to the difficulties witnesses may experience in getting to

---

\(^{41}\) See Anderes Part 1 (1994), pp. 84-85 for the distinction between an ‘absolute’ (ubetinget) right to private prosecution and a ‘subsidiary’ (subsidiert) right to private prosecution. An absolute right to private prosecution means that the injured person has an independent right to initiate a private prosecution, regardless of the decision of the prosecuting authority. A subsidiary right to private prosecution may only be employed if the prosecuting authority has decided not to prosecute, or to drop the case.
a Norwegian court. Section 109 CCP determines that a person who has to travel more than 300 km with a motorised vehicle or 50 km by different means, or a corresponding distance partly by the first, and partly by the second means, is relieved of the duty to testify in a district or city court. Double maximum distances count for testifying in a High Court. However, the court can extend the duty to testify if it considers it necessary.

Before the two-instance legislation was introduced, serious cases with a maximum penalty of more than six years imprisonment went straight to the High Court, which acted as a court of first instance. This meant that a victim in such a case had to testify in court only once, because only the sentence could be appealed to the Supreme Court. All cases now start in the district court, where the conviction rate is much higher than in the High Court sitting as a jury court. Because almost all serious cases are appealed, the victim now generally has to testify twice, first in the district court and then in the High Court. For this reason, victim advocates have propounded that the two-instance legislation is detrimental to the position of the victim.

5.7 The Victim's Right to a Lawyer

Legislation

In cases concerning rape and sexual abuse, the injured person has the right to assistance by a state-paid fornavnetes advokat — injured person’s lawyer — if he so wishes (s. 107a CCP and relevant sections PC). The same section determines that, in other cases, the court may appoint a lawyer for the injured party upon request if there is reason to believe that the injured party has suffered considerable damage to body or health as a consequence of the offence and that therefore there is need for a lawyer. The injured person’s lawyer is paid by the state in the same way as defence lawyers (s. 107a in conjunction with 107d and 107 CCP). That the state pays for the bistandsadvokat is a very important factor. In some countries, although the victim is allowed to have a lawyer, he must pay for this himself, and the lawyer will stick to the bare essentials to limit the costs.

According to section 107c-1 CCP, it is the task of the injured person’s lawyer to guard his client’s interests in connection with the investigation and the main proceedings in the case. The lawyer should also offer the injured person the help and support that is ‘natural and reasonable in connection with the case’. The section goes on to determine that the lawyer shall be notified of, and has the right to be present during, examination of the injured person by the police or the court during the preliminary investigation. He also has the right to be present during the main proceedings in the case. After the presentation of the evidence has been rounded off, the court may decide that the lawyer will be removed (107c-2 CCP). During the questioning of the injured person, the lawyer has the right to pose additional questions. He may also protest against a question that is not relevant to the case or that is posed in an improper way. During the examination in court, the injured person may not...

---

42 Initially, only victims of rape had a right to a state-paid lawyer. The relevant section was first introduced into the old Code of Criminal Procedure by an amendment Act of 12 June 1981 no. 66, and was incorporated in the new CCP of 1981 which came into force in 1985. The right to a lawyer was later extended to other sexual offences including sexual abuse of children. See also A. Robberstad (1999), pp. 306-308.

43 On the recommendation of the Victim Committee of the Ministry of Justice (NOU 1992:16, pp. 27-28), this part was included by Act of 1 July 1994 no. 50, which came into force on 15 August 1995.
NORWAY 739

confer with his lawyer about the answers to questions without the court’s consent (107c-3 CCP). The injured person’s lawyer must be granted the opportunity to offer his opinion on procedural questions concerning the injured person. The lawyer must also be given the opportunity to express himself about any civil claim that the injured party has, even if the claim is presented by the prosecuting authority (107c-4 CCP).

Victims who do not qualify for a bistandsadvokat, may still be entitled to free legal advice on the basis of sections 18-1-2 and 13-2 of the Legal Aid Act (Rettshjelpsloven), which determines that an injured party claiming compensation for personal injury in a civil lawsuit qualifies for both free legal advice and/or free legal aid for the conduct of the case. Circular G 38/89 called ‘Extended Legal Aid to Victims of Violence’ adds that legal aid for victims of violence in relation to compensation claims against offenders is determined regardless of the victim’s financial situation. Free legal aid may be awarded both if the claim is being brought in a civil case, and if presented pursuant to chapter 29 CCP in conjunction with criminal proceedings.44 There are special legal aid arrangements for battered women.45 It should be noted that a lawyer appointed to assist a battered woman on the basis of the Legal Aid Act and the two directives mentioned in the last footnote do not have the same procedural rights as a bistandsadvokat appointed on the basis of ch. 9a CCP.46

Task

Although the Code of Criminal Procedure speaks of a fornærmedes advokat (ch. 9a), in the Instructions on Prosecution (s. 8-8 IOP) and in the day-to-day practice of the courtroom the word used for the lawyer of the injured person is bistandsadvokat – supporting lawyer, freely translated as victim’s lawyer. Legislation determines that the victim’s lawyer is there to guard the victim’s interests and offer him the necessary help and support, but it is not at all clear what this entails. According to the Victim’s Committee of the Ministry of Justice, the tasks of the victim’s lawyer during the preliminary investigations may include establishing contact with the local care agencies, keeping the victim informed of the developments in his case, appealing against a decision to drop prosecution, helping victims of violence with their state compensation claims, ensuring there is proper documentation to substantiate a claim of compensation to be presented in conjunction with the criminal proceedings and preparing the victim for what he is to experience in the courtroom, not only by giving examples of the questions he may expect to be asked, but also by showing him round the courtroom before the trial starts, and if necessary organizing a meeting with all the actors in the case.47

In the view of the Committee, the tasks of the victim’s lawyer during the main proceedings are limited. He should be present during the questioning of the injured person, but there is no need for him to remain in court throughout the trial. Furthermore, his task regarding the compensation claim is a subsidiary one. It should be left to the prosecuting authority to present the claim, with the victim’s lawyer ensuring the timely presentation of

---

46 NOU 1992:16, p. 27.
all documentation, including a statement of the effects of the offence on the victim.\textsuperscript{48}

Robberstad has expressed her concern at the Victim Committee's limited view of the tasks of the victim's lawyer in court. The Victim Committee had decided that the victim's lawyer should not be present in court once the victim has been questioned, and therefore does not know how the proceedings have developed, goes directly against the committee's terms of reference to give the injured person better information and stronger participatory rights. Equally objectionable to Robberstad is the idea that the victim's lawyer should have only subsidiary rights regarding the compensation claim. Since the regulations on the victim's lawyer were first introduced in 1981, the victim's lawyers have fought a long and hard campaign to be allowed to present their clients' compensation claims in court. Initially, judges refused to let them do so, saying it was not part of their job, and that if they did insist on presenting the claim, the state would not pay them for doing so. Eventually one particular victim's lawyer won an appeal against a ruling that he was not allowed to present a compensation claim in court, and after this appeal, it was generally accepted that the compensation claim was part of the victim's lawyer's job. It is important to realize the difference in significance the compensation claim has for the Norwegian victim's lawyer compared to, for instance, the Swedish or Danish victim's lawyer. In Norway, presentation of his client's claim was a right that the victim's lawyer had to fight for tooth and nail, whereas in Sweden and Denmark, the compensation claim has turned into an excuse for not fulfilling the other tasks the victim's lawyer has been given (see Chapters 6 and 22).

In 1991, the Norwegian Law Society (Den Norske Advokatforening) published a handbook for its members on the rights and duties of the victim's lawyer.\textsuperscript{50}

Practice

In practice, the main task of the victim's lawyer at present seems to lie in the pre-trial stages, although his role in court is not as limited as the Victim's Committee envisioned. Keeping the victim informed of all developments during the preliminary investigation, being present during police questioning, reassuring him and explaining the proceedings, and preparing him for what will happen in court form the basis of his duties towards the victim. Once in court, the lawyer acts as a moral support and guards against abusive or unnecessary questioning. He will normally remain present during the presentation of the other testimonies, and, in practice, the prosecuting authority will gladly leave the presentation of the compensation claim to the victim's lawyer.

Although there are several very capable and experienced lawyers acting as victim's lawyer, the role of victim's lawyer is often fulfilled by young, inexperienced female lawyers. Because the job is poorly paid, and the active participatory rights on behalf of the victim are limited, the role of victim's lawyer is rather unglamorous and therefore often falls to the younger members of the establishment still trying to make a name for themselves. Not adept at courtroom practice, they may be intimidated by the other actors involved in the case, and miss opportunities to participate or intervene.

\textsuperscript{48} NOU 1992:16, p. 29.
\textsuperscript{49} A. Robberstad (1994), pp. 255-256. This book was written on the basis of fifteen years' experience as a victim's lawyer. See also her dissertation (1999).
\textsuperscript{50} T. Vangen, Bistandsadvokatordningen, En fremstilling av gjeeldende rett med hovedvekten lagt på advokatens oppgaver, Den Morske Advokatforening Nr. 56, Oslo, 1991.
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 and practical advice
Police officers in all districts should now distribute the government information brochure 'From the Report to Court', explaining the legal proceedings and the victim's rights and duties.\(^{51}\) In practice, it seems that the police in just over half the districts use the brochure, and that there is still a serious lack of information from the police to the victims in many districts. Some of the police districts are now addressing this problem. Oslo has produced an information package that should be given to all persons that report a crime, and Tunsberg has developed a set of instructions for its police officers, reminding them of the victim's rights to information throughout the legal process.\(^{52}\)

In the five police districts where government victim support schemes have been established, the victims are advised by the police to contact the local scheme for further help and support. Many of the other organizations offering help and support to victims of crime have their own leaflets which can be found at the police stations, in public libraries and in the courthouse. Any victim of a sexual offence reporting to the police will be encouraged to go to the local Rape Trauma Centre, if there is one. At the centre, the victim will receive proper medical care, and the necessary forensic evidence can be secured. Another type of practical assistance that the victim of crime can apply for is counselling by a publicly appointed psychologist. He must apply in the same way as any other citizen, which may take a long time, and although the state pays part of the costs, the victim himself must also make a financial contribution.\(^{53}\)

Legal advice
When reporting an offence, eligible victims must be informed of their right to have a lawyer (107a-3 CCP). This is further specified in the chapter on police questioning of the Instructions on Prosecution (IOP). Section 8-8-1 IOP provides that, in cases concerning infractions of sections 192-199, 207, 209 or 212-1 or 212-3 PC, the injured person must, before he gives his statement be made aware of his right to receive legal assistance by a state-paid lawyer,

\(^{51}\) Fra anmeldelse til dom, En orientering til voldsofre om rettigheter og plikter. The brochure is rather tedious reading.

\(^{52}\) Information provided by O.K. Hjemdal, Project Manager of the Norwegian Resource Centre for Studies and Information on Violence, August 1999. The Resource Centre conducted a small, informal study, calling a small sample of police districts to ask if they used the government brochure. Furthermore, a considerable proportion of all victims calling the Resource Centre do so to complain about the lack of information provided by the police.

\(^{53}\) Of course, victims are free to seek help from a psychologist in private practice, in which case they must pay all the costs themselves.
in concurrence with ch. 9a CCP. Likewise, injured persons who may qualify for legal assistance because of the potentially negative effects of the act on their physical or mental health (see § 5.7) must be informed that the court may appoint a victim's lawyer upon request. Furthermore, the injured person must be asked whether he has a preference for a particular person to be appointed as lawyer to the case (s. 8-8-2 IOP). Where it is suspected that the injured person will fall within the regulations on legal aid for cases involving wife battering, she must be told of this (s. 8-8-3 IOP). Finally, the police must tell the injured person that he has the right to defer giving his statement until his victim's lawyer has arrived (s. 8-8-1 IOP).

That all the necessary information has been passed on to the victim must be evident from the report made by the police (s. 8-8-4 IOP). At present, the way this is noted down in the report differs per police station. At the stations still working with typewriters, a statement that the victim has been informed is typed in by hand by the officer taking down the report. Where reports are taken down using computers, it is a matter of selecting the appropriate blocks in a standard text. At the time of writing, a nation-wide computer system was on the point of being introduced. All reports must be read out loud to the victim. Victims must read the report themselves and then sign their name.

Compensation from the offender

The first time the injured person is questioned (by the police), he must be asked whether he has a claim he would like the prosecuting authority to take along in the case in concurrence with section 3 CCP (s. 236 CCP, 8-7-2 IOP). The procedures for presenting a claim in conjunction with the criminal proceedings must be explained to him (s. 8-7-2 IOP). Every victim who has reported a crime should be sent a standardized letter by the police confirming that the report has been received and that, if the victim wishes to make a compensation claim, he must inform the police and provide them with the necessary documentation in support of the claim.\(^\text{54}\) In practice, the police do not always send such a letter and not all victims are informed of their right to make a compensation claim against the offender.\(^\text{55}\)

Compensation from the state

If the injured person has suffered loss as a consequence of a violent offence, he must be informed of the opportunity to claim compensation from the state (s. 8-7-3 IOP). A claim for state compensation is made on a standard form that the police will provide to the victim. Helping the victim to fill in the form is not really considered part of the task of the police, and for lack of time, they will encourage the victim to seek help elsewhere.

A large proportion of the victims who contact the Norwegian Resource Centre for Information and Studies on Violence ask for information about the state compensation schemes, because they have not (perceived that they have) received this information from the police.\(^\text{56}\)

\(^\text{54}\) Information provided by N. Bjønnes and I. Wirum, public prosecutors attached to the Oslo Police Force, 19 June 1997.

\(^\text{55}\) Information provided by O.K. Hjemdal, Project Manager of the Norwegian Resource Centre for Information and Studies on Violence, August 1999, based in part on communication with the Norsk Forbund for Voldsofte.

\(^\text{56}\) Information provided by O.K. Hjemdal, Project Manager of the Norwegian Resource Centre for Information and Studies on Violence, August 1999. The payment of state compensation to the victim leads to subrogation of the claim of the victim against the offender, i.e., the state, as subrogee, may subsequently sue the offender for compensation.
The new local victim support schemes set up by the government, the already existing organizations offering help and support to victims of crime, and the victim's lawyers have an important back-up role to play regarding the informative duties of the police.

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

If there is no reason to continue an investigation, the police can decide to discontinue the criminal proceedings (s. 17-1-1 IOP). Among those to be informed by letter of this decision are the injured person who has reported the crime (s. 17-2-2b IOP) and the victim's lawyer, if one has been appointed (s. 17-2-2e IOP). The letter must include the instruction that an appeal against the decision may be directed to the prosecuting authority superior to the one who has taken the decision, and that the period within which an appeal may be made is three weeks from the day the letter about the decision reached the person appealing. Generally speaking, the letter should also include information about the possibility of a private prosecution (s. 17-2-2 IOP).

The decision to drop the criminal proceedings – not to be confused with the decision to waive prosecution, see under guideline B.6 – must be put in writing, dated, and signed by the court in question. In the same way, it shall be noted when, by whom, by what means, and to whom information about the decision has been sent. A copy of the letter containing information about the decision must be put in the case file (s. 17-3 IOP).

Of course, a victim can make his own enquiries about the developments in his case. In all serious cases, the victim is given the name and telephone number of the officer leading the investigation. In the standard letter sent to such victims, the name of the prosecutor formally in charge is also listed. In practice, people often do not understand the difference between a prosecutor and the police, and therefore regularly direct their enquiries to the prosecutor. In this respect, the fact that the first tier of prosecutors is integrated into the police force only adds to the confusion. In particularly serious cases, a liaison officer may be appointed.

In Oslo, the police were working on a computerized system whereby victims will be automatically informed not only of negative decisions but also of other developments such as the arrest of a suspect. According to new regulations, this type of information must now also be passed on.

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

**Legislation**

The prosecutor may take one of a variety of decisions regarding the prosecution of a particular offence. First of all, suitable offences may be forwarded to the Conflict Resolution Board to be settled by a mediator (s. 71a CCP). If a settlement is reached, the case is not prosecuted. Because both the offender and the injured person must agree to the case being

---

57 When someone has been appointed as the responsible person in a case where the question of prosecution resides under a superior prosecuting authority, the decision to drop the charges or continue the matter under a lesser penal provision must, as a rule, be put before them (s. 17-1-2 IOP).

58 See the relevant section in Chapter 22 for similar experiences of the Swedish prosecutor in Umeå.
sent to the Conflict Resolution Board (s. 71a CCP), and are actively involved in the actual settling of the case, they will be kept well informed of any such developments in their case. If no settlement is reached, the case goes back to the prosecuting authority to be dealt with further.

Secondly, if the prosecuting authority is of the opinion that the case should result in a fine and/or forfeiture, he may offer the accused the opportunity of paying a pre-trial fine and/or accepting forfeiture instead of prosecuting the offence (s. 20-1 IOP). The pre-trial arrangement may include paying compensation to a person who has a legal claim against the accused as a result of the offence (s. 20-2-2 IOP in conjunction with s. 3 CCP). The IOP does not indicate that the injured person or a victim’s lawyer should be informed of such a decision.

The prosecutor may decide to drop the prosecution (s. 69 CC). An injured person who has reported the offence and any victim’s lawyer involved in the case are among those who must be informed in writing of such a decision (s. 18-5-1-a and 18-5-1-d IOP)). The letter must contain information about how and where an appeal against the decision may be lodged (s. 18-5-1-2 IOP).

Finally, the prosecuting authority may decide to prosecute the accused, in which case an indictment is issued. The injured person must be informed that an indictment has been sent by the prosecuting authority, and told that he may request to inform himself of the content of the case-file (s. 264a-1 CCP). A victim’s lawyer appointed on the basis of section 107a CCP must be sent a copy of the indictment, together with a list of evidence and documents of the case (s. 264a-3 CCP), if any.

Practice
A nation-wide data system has been installed so that all letters informing injured persons and others of the decisions taken in their case are now automatically sent out.

Haugesund is one of the police districts in Norway that has established a routine of informing victims of serious offences in person that their case will not be prosecuted. Rather than sending them the standard letter that is sent to victims of less serious offences, victims of sexual and other serious offences are invited to come to the police station where the situation is explained to them. At present, such routines are left to the initiative of the individual police districts, although a directive of some sort was expected in the Autumn of 1997. Oslo has also adopted this routine.

(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 victim is not informed directly of the date and place of a hearing unless he is summoned to court to testify. Although all injured persons must be informed of the fact that an indictment has been issued in their case, the law does not actually oblige the authorities to send them a copy (see above). However, things are rather different if a victim’s lawyer is involved in the case. The victim’s lawyer must be sent a copy of the indictment, a specification (or list) of evidence, and, if possible, documents of the case. Furthermore, he must also
be informed of when the case is to be heard (s. 264a-3 CCP). The same section determines that the lawyer must be offered the opportunity to express himself before the court about the date on which the main proceedings in the case are to take place.

Confessing defendants may be sentenced in a shortened procedure before a court of examination and summary jurisdiction, if the defendant agrees to such a trial and the court has no objections (s. 248 CCP, see § 3.3). No witnesses are required. The prosecutor will inform the victim that the case is to be dealt with in a shortened procedure. However, the trial date is not set until later by the court, and the court only informs those parties who are to appear. This means that even the prosecutor is generally unaware of when such a hearing takes place, because his presence is not required in court. However, even if the victim knows of the time and place of the hearing, he will not be allowed to be present because these sessions are closed to the public. The idea behind the shortened procedure is that the judge more or less sits down with the accused, who fully admits that he committed the offence, to discuss the matter and decide on a suitable sentence. The informal atmosphere would be jeopardized if the public were allowed to walk in and out. A victim’s lawyer is rarely involved in a case that is dealt with in a shortened procedure, but if there is one, and he insists on making an appearance in court, then the prosecutor will also appear.

Restitution and compensation, legal assistance and advice
If the police have met their legal obligations towards the injured person regarding compensation (see § 6.1 under guideline A.2), the injured person will have been asked the first time he was questioned whether he has a compensation claim he would like to bring, and the procedures for presenting such a claim will have been explained to him. The person who has suffered direct damage through a criminal act must be informed immediately of a decision not to present his civil claim during the criminal proceedings (s. 17-6 IOP). If the prosecution is to be dropped on condition that the offender pays compensation, the letter informing, among others, the injured person and a victim’s lawyer of the decision to drop the prosecution must state that this is on condition of compensation being paid (s. 18-5-2 IOP).

Outcome of the case
If compensation or restitution has been awarded during the criminal proceedings, the police must duly inform the claimant as soon as the claim can be enforced. The claimant must be informed of the amount awarded, against whom it has been awarded and that the State Recovery Agency will give further instructions about collecting the money. A copy of the decision of the court regarding the compensation claim must be included (s. 30-10 IOP). The same section determines that if profits are to be confiscated, the injured person and other claimants must be acquainted with the procedure for claiming part of the profits to cover their right to compensation, cf. section 37d CCP, first part.

Other ‘outcomes of the case’ are the decisions of the court regarding guilt and sentence. At the time of writing, victims were not informed of these decisions, but a system was expected to be in place by 1998, ensuring that victims do receive this information.
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.

If a victim of a sexual offence has been examined in a Rape Trauma Centre, the results of this examination will have been noted down on official forms by the examining doctor, and with the permission of the victim, these forms are included in the file.

There are standard police forms for recording the injuries and losses suffered by other victims, but often these are not filled in. Furthermore, despite the fact that victims are sent a letter encouraging them to provide the police with the necessary documentation to substantiate the claim (see § 6.1 under guideline A.2) the response is generally poor. Where adequate documentation is lacking, the prosecutor is quick to drop the compensation claim. Only if the offence is serious and the damage substantial and if he has reason to believe that the offender has the means to pay will he ask the police investigator to contact the victim to ask if there is any documentation.

(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 public prosecutor will only present a compensation claim on behalf of the victim if there is sufficient (written) evidence to substantiate the claim. All documentation is made available to the court. If a victim’s lawyer is involved in the case, he is allowed to make a statement on the issue of compensation and will ensure that all relevant information is submitted to the court. In the High Court, the civil law claim is dealt with after the actual trial itself (see § 5.3) but some judges do allow a victim’s lawyer to put questions to the witnesses during the main hearing, as long as the questions are aimed at clarifying points concerning the compensation claim. The largest problem regarding the assembling of the appropriate documentation to substantiate the claim is not that the police do not inform the victim of his right to make a claim, or remind him to provide the necessary written evidence, but that it is not sufficiently clear to victims how they should respond.

That the offender may have already reimbursed the victim, or made any genuine effort to that end, may be put forward as a mitigating factor in determining his sentence, but trying to make pre-trial amends is not something that a defence lawyer will encourage his client to do.
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 of the Norwegian prosecuting authority whether or not to prosecute is a discretionary one (s. 69-1 CCP): 'Even if guilt is considered proven, prosecution may be omitted provided that such special conditions exist that the prosecuting authority after an evaluation of the totality feels that overriding reasons speak in favour of not prosecuting the act.' Among the conditions that may be attached to a waiver of prosecution is the payment of compensation and restitution to the injured person, if the accused is considered capable of paying (s. 69-3 CCP in conjunction with 53-4 PC, s. 20-2-2 IOP).

Guideline B.5 implies two things: (1) that if the offender has not made any serious attempt to compensate the victim, this could be a reason to go ahead with a prosecution where a waiver was also under consideration; and (2) vice versa, that where the offender has made a serious attempt to compensate the victim, this could be a reason to waive prosecution.

In Norway, the question of compensation of the victim by the offender has no effect on the discretionary decision of whether to prosecute. In fact, I got the distinct impression that the general attitude there towards compensation is that it is totally irrelevant for the victim whether the money comes from the offender or the state. The starting point is that, considering that most offenders do not have the means to pay compensation anyway, there is hardly any point in bothering to claim compensation from them in the first place. Furthermore, the notion that some victims might actually prefer a small amount of compensation from the offender rather than a larger amount from the state was totally alien to all the interviewees. Despite the fact that, in Norway, the compensation claim is a civil law matter, there is hardly any interest in ensuring that it is indeed the offender, rather than the state, who is made to face up to the (financial) consequences of his act. N. Christie does not appear to have many followers in his home country.

This attitude has strongly coloured the way the compensation claim is dealt with in court. For the police and the prosecutor, the compensation claim is mostly an inconvenience that they could well do without. The court assumes that the claim in a case of violent crime will be immediately forwarded to the local County Chairman in the form of a state compensation claim, without any serious attempt being made to first acquire the money from the offender, and that the County Chairman will reassess the claim according to the state compensation guidelines. One victim's lawyer even suggested that the opportunity of presenting a compensation claim in a criminal court should be dropped completely, and claims sent directly to the County Chairman.

59 Or others who have suffered loss and are entitled to, and have made a claim for, compensation. See, for instance, J. Shapland, J. Willmore, P. Duff, Victims in the Criminal Justice System, Gower, Aldershot, 1985; J. Wemmers, Victims in the Criminal Justice System: A Study into the Treatment of Victims and its Effects on their Attitudes and Behaviour, Kugler, Amsterdam, 1995.

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 Norway, the injured person has the right to ask for a review of both a decision to close the criminal proceedings (see § 6.1 under guideline A.3) and a decision not to prosecute (see § 6.1 under guideline B.6). Furthermore, he has the right to institute private proceedings as discussed in § 5.4.

An appeal against a decision to close the criminal proceedings should be made to the authority superior to the one who took the decision. In other words, if the police prosecutor has decided to close the criminal proceedings, then the appeal must be directed to the public prosecutor (statsadvokat). The injured person may appeal up to three weeks after he has received the letter informing him of the decision (see sections: 59a CCP and 17-2-2 IOP).

A decision not to prosecute is appealed in the same way as a decision to close the criminal proceedings, in other words, the appeal must be directed to the superior prosecuting authority, within three weeks of having been informed of the decision (s. 59a CCP and s. 18-5-2 IOP).\(^2\) It is not possible to ask for a review of a decision of the Director of Public Prosecutions (s. 59a CCP).

As we saw in § 5.4, the injured person has a subsidiary right to private prosecution where the prosecuting authority has decided to refrain from prosecution (s. 492 CCP). Although the prosecuting authorities receive many complaints against decisions taken by lower authorities regarding prosecution, subsidiary private prosecutions are extremely rare. A private prosecution is not a realistic option because, contrary to what the Code of Criminal Procedure implies, the Ministry of Justice has a policy of not giving legal aid for private prosecutions. An average private prosecution costs between NOK 100,000 and 200,000 (approximately EUR 12,000 and 24,00 respectively), which is beyond the means of most victims.

7.2 The Court and Compensation

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 compensation by the offender to the victim if a claim for compensation has been made, either by the prosecuting authority on behalf of the injured person, or by the injured person himself (or his lawyer). The criminal court may not make such an order on its own initiative. The first time the victim appears before the court, he will be asked whether he has such a claim to make (s. 426 CCP). The claim must have been filed before the main proceedings to allow the defendant to prepare his case. There is no limit to the amount of compensation that may be claimed or ordered.

There are no existing limitations, restrictions or technical impediments as such, but the previously described attitudes towards compensation for the victim of crime make that the criminal court awards compensation to victims on an incidental rather than a structural basis.

---

\(^2\) See also Circular R. 368/95, Del 11 — no.2/1996 Oslo, 31 October 1996 on complaining about decisions of the prosecutor (Klage over påtaleavgjørelser).
Compensation is not a penal sanction but a decision made under civil law. There is no relation between the decision taken on guilt and the sentence on the one hand, and the compensation claim on the other. This implies that compensation will never be ordered as a substitute for a penal sanction. It also means that, even if the accused is found not guilty, he may still be ordered to pay compensation to the injured person.

A court may order the offender to pay compensation to the victim as a condition for a suspended sentence (s. 53-4 PC). However, no great importance is given to compensation as a condition for such a sentence. The situation is comparable to the role that compensation plays in relation to the discretionary decision of the prosecutor whether or not to prosecute (see § 7.1 under B.5): although agreements on compensation may be reached through a conflict resolution board, this is done outside the sphere of the criminal proceedings. Prosecutors and judges do not go out of their way to bring about the awarding of compensation for the benefit of the victim of crime. In relation to compensation as a condition for a suspended sentence, Van Kalmthout and Tak also signal that effective control is impossible, and therefore courts seldom impose special conditions.

7.3 Enforcement of Compensation

A court may order the offender to pay compensation to the victim as a condition for a suspended sentence (s. 53-4 PC). However, no great importance is given to compensation as a condition for such a sentence. The situation is comparable to the role that compensation plays in relation to the discretionary decision of the prosecutor whether or not to prosecute (see § 7.1 under B.5): although agreements on compensation may be reached through a conflict resolution board, this is done outside the sphere of the criminal proceedings. Prosecutors and judges do not go out of their way to bring about the awarding of compensation for the benefit of the victim of crime. In relation to compensation as a condition for a suspended sentence, Van Kalmthout and Tak also signal that effective control is impossible, and therefore courts seldom impose special conditions.

Although compensation is not a penal sanction, it may be collected by the State Recovery Agency in the same way as fines if the claimant so wishes (s. 30-1 IOP). Any money collected from the debtor must first be used to cover compensation claims awarded to an injured party or other claimants (s. 30-7 IOP), meaning that, even though compensation is not a penal sanction, it does have priority over fines and other financial sanctions. The claimant is to be asked whether he wants to pursue his claim himself, or whether he prefers to leave it to the State Recovery Agency (s. 30-11 IOP).

In its intention, this system of collecting compensation on behalf of the victim is progressive and desirable. The only other jurisdiction to have such an enforcement system for...
compensation awarded through the adhesion procedure is Sweden. However, the Swedish experience shows that several preconditions must be met to achieve an optimal *modus operandi*. It is important that the State Recovery Agency approaches the victim as soon as possible after the decision, either by telephone or with a clear and concise letter, asking for permission to enforce the compensation order on behalf of the victim. The service offered by the Agency should be free of charge, and if so, the letter must explain that this is the case. Even better than a system whereby explicit permission is asked is a system of implicit permission. This implies that the Agency informs the victim that it will proceed with the enforcement unless the victim indicates that he does not want the compensation to be enforced. This situation will rarely arise because a victim who has pursued his civil claim in conjunction with the criminal proceedings is unlikely to protest against enforcement. See § 7.3 of Chapter 22.

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.

In 1992, the training programme of police recruits was revamped and upgraded, and a degree from the National Police Academy (formerly called the Police Training College) in Oslo is now recognized as a full college degree. It stands equal to the degrees offered by colleges of higher education with two years of theoretical work, and can make up half of a university bachelor's *cand.mag.* degree.

Recruits receive a three-year basic training programme. The first year is spent at the Police Academy in Oslo (or at a second academy to be opened in August 1997 in Bøde), on theoretical work. During the second year, students gain practical experience working at a police headquarters or a country police station, before returning to the Police Academy for the third and final year. Basic training includes instruction on how to deal with victims of violence and sexual offences, the legal rights of the victim (for instance, to a lawyer in case of sexual offences), and the procedures to be followed when taking down a report. When police training was changed from a two-year to a three-year programme in 1992, several new subjects, such as political science, psychology, sociology, criminology and foreign languages, were introduced. Among the main themes of the psychology course are stress and crises, aggression and violence, domestic violence, and sexual assault.

Besides the three-year basic training programme, the Police Academy also offers further advanced training courses. Since May 1992, qualified police officers may apply for a special one-week course on the investigation of sexual offences (part I). The course deals with, among other things, relevant legislation, the questioning of victims of sexual offences (both child and adult) and offenders, routines to be followed in relation to the examination of the

---

To be distinguished from compensation awarded in the form of a compensation *order* in the common law countries. A compensation order is by design a purely penal sanction, and not a decision made under civil law. As with all sanctions imposed on the offender, such an order is enforced by the state. The money is then transferred to the victim. See further Chapters on 5, 7, 12, 16, and 20 on Cyprus, England and Wales, Ireland, Malta, and Scotland, respectively.
victim by a doctor, the collecting of evidence, the mentally handicapped as victim and/or
offender, and the role of the victim's lawyer. 25 police officers applied for the 8th edition
of the course, which was given from 12-16 May 1997 in Kjevik.66

Officers who have successfully completed this course, and who are in practice regularly
involved in the actual investigation of such offences can take a further course on the
investigation of sexual offences (part II). The course deals with proceedings in court,
technical aspects of the investigation and the person of the sexual offender. The course
seems to be geared towards what the officer needs to know to solve the crime, rather than
how he should meet the needs of victims. The victim does not feature explicitly other than
as the object of examination. This second course is taught at the National Police Academy
in Oslo. It ran for the first time in January 1997, with 23 police officers taking part.67

8.2 Questioning the Victim

Questioning by the Police

Victims of sexual offences may ask to be questioned by a female police officer. There are
both male and female officers in the police force specially trained to question, among others,
victims of sexual offences, and children and handicapped victims (see § 8.1). If a victim's
lawyer has been appointed, he is always allowed to be present during the (police) questioning
of his client.

For the questioning of children, the Oslo police station has a special room with one-way
mirrors where the children can sit and play during the questioning. The session is observed
from another room through the mirrors by, among others, the defendant's lawyer, the
prosecutor, and the victim's lawyer. The whole session is videotaped. After an unsuccessful
experiment in which child victims of sexual abuse were questioned by (non-police) child
specialists, the questioning is now done by one of the specially trained police officers.

Questioning in Court

Pursuant to section 239 CCP, children under the age of 14 and the mentally handicapped
may be questioned outside the courtroom, in the way described above. By Act of 23 May
1997 no. 30, section 239 CCP was extended, determining that the court may decide that
the child is to be observed rather than questioned. A (video)tape of the questioning or
observing of the child or mentally handicapped person is shown as evidence in court.

The opinions of the interviewees varied as to how tough the questioning of victims is
in court. The law allows the presiding judge to ask the witness to give an account of the
events in his own words. How actively the judge is involved in the further questioning of
the witness depends on the individual judges. As in the other Nordic jurisdictions, there does
not seem to be a tradition of harsh cross-examination. A victim may not be asked about her
past sexual history.

The court may decide to let a witness testify in the absence of the accused (s. 284 CCP),

---

or to hear the case behind closed doors (see § 8.3 under guideline F.15). Witnesses are never called in a shortened trial for confessing offenders.

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 discussion or publication of personal information should be restricted to whatever extent is appropriate.

The press are not allowed to take photographs during the main hearing in court, neither are they allowed to photograph those involved in the case on their way to or from the courthouse. The press code of ethics forbids using names of victims in print, unless of course they themselves approach the press. Generally speaking, relations with the press are good and, barring a few exceptions, there are no problems regarding the privacy of victims.

If necessary, a trial may be held in camera. From 1987-1991, all cases involving sexual offences were automatically heard behind closed doors. At that time, there were a lot of incest cases in court, and the victims' lawyers were drawing attention to the position of the victim. Later, a reaction to this developed and the result is that one now needs a very good reason to convince the judge to close the doors.

Anonymous witnesses are not allowed following a 1997 judgement of the Supreme Court in the Munch case. The name of the witness is always asked for and answered out loud in court, although a judge of the Oslo City Court thought it would probably be possible to ask for the address not to be read out.

(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.

In 1994, a new section 222a was introduced into the Code of Criminal Procedure, making it possible for the prosecuting authority to issue a protection order. The new section came into force on 1 January 1995. A protection order can be made, regardless of whether an investigation or charge has been brought against the person on whom the order is served. It is meant for the initial phases, i.e., before the other coercive measures permitted by the

---

68 One such exception is recounted by A.C. Frøstrup, 'Fremm末medes 'rettsvern' overfor massmedia', in: Lov og Rett 1995, pp. 501-502. As a result of the incident described there the author sent a legislative proposal to the Ministry of Justice, to forbid the taking of photographs or making of pictures of injured parties on their way to or from the court, or in the vicinity of the court.

69 The famous painting 'The Scream' by Norwegian painter Edvard Munch was stolen from an Oslo museum. When the painting had been recovered, English undercover police officers tried to testify anonymously in the ensuing Norwegian court case, but the Supreme Court did not allow it.

70 By Act of 1 July 1994 no. 50. The preparatory works can be found in NOU 1992:26, in Ot.ppr.no.33 for 1993-94 (Pp.) and in Innst.O.vr.39 for 1993-94 (Innst.). See also circular G 103/94 of the Ministry of Justice and Nytt i strafferetten no. 1/1996 pp. 24-25 and 48-54.
9 CONCLUSIONS

The Norwegian criminal justice system belongs to the Nordic family of law. Typical for these systems is the right of victims of sexual and serious violent offences to a state-paid victim's lawyer. This right was first introduced in Norway in 1981 and was initially only for victims of rape. Since then, it has been extended to include victims of all sexual and serious violent offences.

In Norway, most of the grass-roots organizations providing support for victims of crime are focused on victims of sexual and/or violent offences. Support for other types of victims is much less well-established, although by the year 2000 the government intends to have set up 20 local victim support offices, with their own umbrella organization. In contrast to most other jurisdictions, where state compensation is administered centrally, Norwegian state compensation is administered locally by the County Chairmen. A significant development was the opening of the Norwegian Resource Centre for Studies and Information on Violence in 1996. The Resource Centre aims to become the central point of knowledge and communication regarding victims of crime.

On the whole, Recommendation (85) 11 on the position of the victim of crime in the framework of criminal law and procedure has been quite well-implemented in Norway. Regarding the provision of information, the police in just over half the police districts now provide the victim with a government information brochure explaining the legal proceedings and the victim's rights and duties. The Code of Criminal Procedure provides that victims of sexual and serious violent offences who qualify for the appointment of a state-paid victim's lawyer must be informed of this opportunity, and that the fact that they have been informed must be noted down in the report of the offence. Information on state compensation should also be provided by the police but there is evidence that victims do not always (perceive to) receive this information. The injured person who has reported an offence, and his lawyer, must be informed in writing of a decision by the police to discontinue the investigation or of a decision by the prosecutor to drop the prosecution. In some of the police districts, it is now established routine to invite victims of serious offences down to the police station to inform them in person of a decision not to prosecute. Unusual from a comparative perspective is the obligation to inform the injured person that an indictment has been issued against the offender by the prosecuting authority: in most jurisdictions

---

71 Information supplied by police prosecutors of the Oslo police.
72 Information provided by O.K. Hjemdal, Project Manager of the Norwegian Resource Centre for Information and Studies on Violence, August 1999.
victims are only informed of negative decisions to drop the case, not of positive decisions. On the other hand, it is disappointing that victims are not informed directly of the date and place of a hearing unless they are summoned to court to testify. This shortcoming is compounded by the system of the shortened court proceedings for confessing defendants, where no witnesses are required. Only if a victim's lawyer is involved in the case, will information about when the case is to be heard always be provided.

Regarding compensation, Norway adheres to the adhesion procedure. Unusual is the fact that compensation may be awarded in the course of the criminal proceedings on civil law grounds even if the offender is found not guilty of the criminal offence. The claim is presented by the public prosecutor or by the victim's lawyer. If the injured person so wishes, enforcement of compensation awarded by the court is carried out by the State Recovery Agency, and has priority over fines and other financial conditions. Advanced as this package of measures may seem, practice shows that compensation is awarded only incidentally rather than on a structural basis. One explanation for this may be the prevalent attitude that one may as well apply directly to the County chairman for state compensation rather than first trying to claim compensation from an offender who is likely to be insolvent. Significantly, the notion that some victims might actually prefer a small amount of compensation from the offender rather than a larger amount from the state was totally alien to all the Norwegian interviewees. The potentially progressive system for enforcement of compensation could be further refined by working with implicit rather than explicit permission of the victim to go ahead with the enforcement.

Regarding treatment and protection, police recruits receive training on how to deal with victims of violence and of sexual offences, the legal rights of victims and the procedures to be followed when taking down a report. For qualified police officers there are further advanced courses on the investigation of sexual offences. A victim of a sexual offence may ask to be questioned by a female police officer. In the Oslo police station, there is a special child studio for questioning children. Videotapes of questioning sessions in the child studio may be used as evidence in court. The press is generally well-behaved regarding the privacy of victims of crime. The instruments available for physical protection of the victim are limited: since 1994, the prosecuting authority may issue a protection order and a pilot has been conducted with personal alarms for victims.
Supplements

ABBREVIATIONS:

C. - Constitution
PC - Penal Code, Straffeloven
CCP - Code of Criminal Procedure, Straffeprosessloven, std
CJP - Code of Judicial Procedure (Sweden)
IOP - Instructions on Prosecution, Påtalainstruksen
EURO - currency of the European Monetary Union
KRIPOS - The National Bureau of Crime Investigation
No. - number
NOU - Norges offentlige utredninger, Norwegian State Publisher
NOK - Norwegian Crowns
ØKOKRIM - National Authority for Investigation and Prosecution of Economic and Environmental Crime
PC - Penal Code
p. - page
pp. - pages
R. - Rundskriv, circular

BIBLIOGRAPHY:

Andenæs, J. (1994), Norsk straffeprosess, bind 1, 2. utg., Universitetsforlaget, Oslo;
Andorsen, K.V. (1992), 'Pådømmelse av fornærmedes erstatningskrav i lagmannsretten', in: Lov og Rett, pp. 494-495;
Council of Europe, Questionnaire on the role of the public prosecutor, as filled in and returned by the Norwegian Director of Public Prosecutions;
Ericsson, K. (1996), Forsømte eller forbryterse?, (manuscript);
Ericsson, K. (1990), *Alternativ Konfliktløsning*, KS-serien no. 2-90, Institutt for kriminologi og straffrettsforskning;
Hov, J. (1981), *Fornærmedes Stilling i Straffeprosessen*;
Kompetansesenter for voldsofferaarbeid, *Handlingsplan for 1997*, Sammendrag;
Norinform (July 1992), *The Courts and the Administration of Justice in Norway*, produced for the Ministry of Foreign Affairs;
NOU 1992:16, *Sierkere vern og økt støtte for kriminalitetsofre*;
NOU 1992:28, *To-instantebehandling, anke og juryordning i straffesaker*;
Robberstad, A. (1994), *Bistandsdoktoraten, Oftenes stilling i straffesaker*, Universitetsforlaget, Oslo;
Vangen, T. (1991), Bistandsadvokatordningen. En fremstilling av gjeldende rett med hovedvekten lagt på advokatens oppgaver, Den Norske Advokatforening No. 56, Oslo;

Circulars:

Rundskriv fra Riksadvokaten R. 2581/93, Del II-no. 2/1993 Oslo, 6 December 1993, Konfliktråd, Regler og retningslinjer om megling i konfliktråd;

Brochures:

Justisdepartementet (1995), Fra anmeldelse til dom, en orientering til voldsofre om rettigheter og plikter;
Kompetan sesenter for voldsofferarbeid (1997), Når noen du kjenner har vært utsatt for vold, mishandling eller overgrep;
Norsk Forbund for Voldsofre, VOLD, Reaksjoner, rettigheter og plikter, En håndbok og idékatalog – for voldsofre, deres familier, arbeidskolleger og venner – for støttepersoner og mundigheter, lovgivere og politikere;
Oslo Krise Senter for Mishandlede og Voldtatte Kvinner.

Manuals:


WITH MANY THANKS TO:

Arvid Bakke, Victim Support Haugesund;
Nicolai Bjonness, Assistant Chief of Police, Public Prosecution Authority, Oslo Police;
Jane Dullum, Department of Criminology, University of Oslo;
Gro Haaland, lecturer at The National Police Academy;
Ragnhild Hennum, Department of Criminology, University of Oslo;
Ole Kristian Hjemdal, Project manager Resource Centre;
Ruth Anker Hoyer, Assistant Chief Justice, Oslo City Court;
Knut H. Kallerud, Senior Public Prosecutor, Riksadvokatembetet;
Stein Myhrvold, Chief Inspector, The National Police Academy;
Erik Martinsen, Norsk Forbund for Voldsofre;
Lars Meling, Head of Division, Police Department, Ministry of Justice;
Elisiv Bakketeig Nyhagen, Department of Criminology, University of Oslo;
Anne Robberstad, Department of Public and International Law, University of Oslo;
Karl-Hendrik Sjursen, Chief of Police, Haugesund Police District, and his main prosecutor;
Laila Stub, Ministry of Justice;
Ingrid Wirum, Assistant Chief of Police, Public Prosecution Authority, Oslo Police;
Heidi Ysen, Advokatfirmaet Hestenes og Dramer & Co.
Chapter 19

Portugal

Scenery

‘On 25 April 1974 the armed forces movement, setting the seal on the Portuguese people’s long resistance and interpreting its deep-seated feelings, overthrew the fascist regime. The liberation of Portugal from dictatorship, oppression and colonialism represented a revolutionary change and an historic new beginning in Portuguese society. The Revolution restored fundamental rights and freedoms to the people of Portugal.’

Preamble of the Constitution of the Portuguese Republic, 2 April 1976.1

A well-known part of the Portuguese personality is ‘saudade’, a very Portuguese and almost undescrivable feeling of nostalgia. It is foremost expressed in the fado, the typical Portuguese folk music.2 In the cafes and bars in Lisbon, the fado is usually sung by people from the neighbourhood. During the singing of the fado, a reverent silence reigns.3 The fado expresses a great scale of sentiments; it is a mixture of happiness, irony, relief and sadness caused by daily or past suffering or love affaires that once were, or will never be. The existence of sad fados (fado triste) about past day-to-day sufferings is not surprising if one looks at recent Portuguese history which is characterised by a succession of dictatorial rulings and a continuous state of poverty. The first dictatorial regime was established in 1917 but ended quickly in 1918 with the murder of dictator Sidónio Pais. At the end of the First World War, the country was demoralized and impoverished. Strikes were a part of daily life, and political parties no longer enjoyed the confidence of the public. From 1924 on, the public demanded more and more openly to be ruled by strong leaders. In 1926, the military staged a coup, and the military regime remained in power until 1933. Life in the 1930s was difficult in most parts of the world, and Portugal was no exception. The persistent economic decline combined with excessive military budgets had impoverished the country. The desperate situation in Portugal forced the military regime to give a young professor, António de Oliveira Salazar (1889-1970), carte blanche as Finance Minister. Salazar succeeded in

1 The Constitution is revised by Law 1/89 of 8 July 1989 and by Law 1/92 of 25 November 1992 (Here the official English translation is used).
2 The fado gained national fame in the nineteenth century with the singer Maria Severa, the mistress of nobleman Marquis the Vimioso. Women who sing the fado often wear a black shawl over their shoulders to honour Maria Severa, and to express a state of mourning over her death.
3 J. Rentes de Carvalho, Portugal, (original title: Um guia para amigos (1989), translated into Dutch by H. Lemmers), Amsterdam, Uitgeverij De Arbeiderspers, 1989, p. 49.
stabilizing the exchange rates and cutting public expenditures.

In 1932, when Salazar was appointed Prime Minister, he founded the New State (Estado Novo), a dictatorial, civilian, one-party regime. Under the fascist regime, the paramilitary organization, the Portuguese Legion (Legião Portuguesa), the youth organization (Mocidade Portuguesa), and a large police force joined in oppressing opponents. The military and the police enjoyed privileged positions in society. During the Spanish Civil War, Salazar supported the fascist regime of Franco. However, during the Second World War, he retained a neutral position, despite his sympathy for the German fascist regime, and allowed the allied forces to use military bases on the Azores. Shortly after the war, Portugal was therefore allowed membership in NATO. Although Salazar gave the country a certain economic and financial stability, it was only obtained by suppression and enormous social stagnation and by making use of the wealth of the Portuguese colonies, in particular Angola and Mozambique. The political repression and poverty forced many thousands of Portuguese to emigrate in the 1960s. In 1968, Salazar was replaced by Marcelo Caetano. But by then it was clear that fundamental changes could no longer be avoided. The effects of the colonial wars and the high rate of emigration on Portuguese society no longer allowed the repression to continue.

In April 1974, a nonviolent, peaceful revolution took place, the Carnation Revolution. To commemorate this event, people take to the streets wearing red carnations annually on the 25th of April. The years that followed the restoration of democracy and the independence of the colonies bear a great resemblance to the period of the Republic in 1910; political and administrative instability and financial chaos. From the early 1980s on, however, Portugal set out on a path that positively led to the country's economic and social development. Portugal's entry into the Common Market has proven to be a factor that has contributed greatly to the improvement of the economic situation and living standards.

History shows that Portugal has little democracy for the first three quarters of the century. For more than 40 years, from 1932 until April 1974, Portugal was isolated under the totalitarian regime of Salazar and Caetano. The impact of this period on modern democratic Portuguese society cannot be underestimated. Numerous persons were deprived the opportunity of an adequate education. According to the 1994 victim survey, based on national statistics, 13% of the population is illiterate and 62% has only a primary education. Another legacy of dictatorship is the mentality of public servants, including criminal justice authorities, and the attitude of the Portuguese towards persons in positions of authority. Although the 1974 Revolution did change this attitude considerably, certain officials still treat the public with disdain. In general, government officials are not customer-friendly. The Portuguese usually respond to such treatment with resignation and do not challenge officials. There is always the possibility that public officials cross a thin line and abuse power. The danger is especially great with the police, which was allowed to rule over people's lives in the not so distant past. Today, despite a clear change, there are still

---

4 The problems were even bigger as a result of the nationalization of a great number of companies, the attempts at agricultural reform on the Alentejo, the repatriation of 800,000 refugees from the former colonies and the general recession of the world economy.


7 Information supplied by Mr. L. de Miranda Perreira, president of the Portuguese probation service and president of the board of A.P.A.V., and Mrs. R. Busse, staff member of A.P.A.V. and co-ordinator of A.P.A.V., Lisbon, 12 April 1996.
allegations of police brutality. The U.S. Human Rights Report of 1996 speaks of ‘persistent, credible reports’ of brutality in prisons. This mentality permeates daily life. Women, who are among the most vulnerable members of society, frequently suffer from domestic violence. The U.S. Human Rights Report refers to cases of violence against women as ‘common’. This can also be concluded from the national survey on violence against women. The survey claims that 52.2% of Portuguese women are victims of some kind of violence, such as sexual aggression (25.4%) and physical violence (13.7%). It is important to note that surveys indicate that the situation of women is not much different in other countries.

---

9 In Portugal, the U.S. reports were not well received nor was the content widely accepted and acknowledged. Foremost because the Portuguese feel that the Americans do not have the moral authority to criticize their criminal justice system since the U.S.A. frequently violates human rights.
11 Commission for Equality and Women’s Rights, Portugal, Status of women, Lisbon, 1994

14 In the Netherlands, for instance, the outcome of the 1997 national survey on domestic violence shocked the nation. Almost half of the population (45%) has been a victim of domestic violence, at least once. For 27% of the population domestic violence is part of daily life, and of those 11% suffer from (sometimes serious) physical injuries as a result of violence within the family.
1 INTRODUCTION

Following the April Revolution, Portugal became a parliamentary democracy with a president and a legislative assembly. In 1986, Mario Soares was Portugal’s first elected civilian president in 60 years. A new and different society also needs legal reform: a new Constitution and Codes of Criminal Law and Procedure. The new democratic Constitution, which was promulgated in 1976, puts great emphasis on the obligation of the (judicial) authorities to safeguard the people’s civil and human rights. Drafting of a new Penal Code (Código Penal) took considerably longer. It was promulgated in 1983, and revised in 1995. The new Code of Criminal Procedure (Código de Processo Penal) was issued in 1988. An National Ombudsman was also chosen by the Assembly of the Republic to serve the same purpose (s. 23 Constitution). Each citizen may apply to the Ombudsman for relief resulting in about 3000 complaints annually, a substantial number of which due to delays in the judicial process.

Current Portuguese criminal law is based on modern principles which ensure the protection of the rights of the individual and the community at large, including the principle of a balance between the rights of the suspect, the prevention of crime, and the interests of the victim. A revision of criminal procedure was necessary as a result of section 32-5 of the Constitution declaring that criminal proceedings should be accusatorial. This is realized by a functional distinction between the court and prosecution on one hand, and the examining magistrate and trial judges on the other. Contrary to witnesses, experts and civil claimants, whose rights are limited to their own sphere of competence (see § 5.3 and § 5.6), the court, public prosecutor, accused, defence counsel, and the victim acting as an auxiliary prosecutor (assistente, see § 5.5) have the formal status of active participants in criminal proceedings. They have autonomous rights that may influence the actual course of the proceedings. The 1982 reform of the Penal Code has strengthened the position of victims in several ways, particularly by allowing him to act as an auxiliary prosecutor, which allows him to have a voice in the proceedings and increases the possibility of being compensated for damages suffered. The legislature broadened the number of offences which may be prosecuted after an formal complaint of the victim (the complainant offences, see § 5.2). Furthermore, a number of sentences, such as probation orders, reprimands and suspended sentences, were made dependent on the offender’s willingness to pay compensation and/or the consent of the auxiliary prosecutor (see § 7.2).

---

16 The second revision of the Constitution took place in 1989, 1/89 of 8 July 1989, Diário da República, 1st series, nr. 155. Published in English by the Directorate-General for Mass Communication.
15 Penal Code, Código Penal, Decreto-Lei, nr. 48/95.
17 M.Q. Roma, Criminal justice and police systems: management and improvement of police and other law enforcement agencies, prosecution, courts and corrections, and the role of lawyers, Bureau of Comparative Law, 1995, A/Conf.169/G/Portugal/3, p. 3.
19 See § 7 for some critical remarks.
Unfortunately, few victims actually profit from the increased rights and opportunities of assuming the role of auxiliary prosecutor. In 1997, for instance, 373,209 cases were tried in criminal court involving 64,393 victims. Of these victims, only about 10% (6,889) acted as auxiliary prosecutors and about 18% (12,168) as civil claimants.\(^{20}\) The fact that only 10% of the victims assume the role of auxiliary prosecutor is an indication of the shortcomings of the Portuguese criminal justice system vis à vis victims, especially since the rights of victims are assured only if they act as auxiliary prosecutors (see § 5.4 and Part II). The reason for this phenomenon is probably that victims are inadequately informed about the benefits of assuming the role of auxiliary prosecutor. In fact, according to Portuguese Victim Support (A.P.A.V., see § 3.6), the vast majority of victims are effectively denied access to the courts and further are denied rights during criminal proceedings because they are not aware of the full range of possibilities.

2 GENERAL REMARKS AND BASIC PRINCIPLES

The criminal justice system is shaped foremost by the accusatorial nature of the proceedings.\(^{21}\) Both pre-trial and trial stages are governed by the principle that both parties shall be heard (s. 32-5 Const.). Further, criminal proceedings are based on the material distinction between the prosecution service and the court on one hand, and the active participation of the accused, the defence counsel, and the victim as auxiliary prosecutor on the other. It is the duty of the public prosecutor to remain impartial so as to discover the truth. Therefore, Portuguese criminal procedure cannot be classified as a party procedure as this would make the public prosecutor only responsible for prosecuting the accused.\(^{22}\) The role of the court is a surprisingly active one. Trial judges have many powers of discovering truth, including the calling of additional witnesses and ordering the review of pre-trial documents which might otherwise not be admissible in court (s. 323 CCP). While the accused is presumed innocent, if he freely admits guilt,\(^{23}\) and the maximum penalty is less than three years of imprisonment, the court can immediately render a verdict (s. 344 CCP). It is furthermore remarkable that the defence counsel does not only work for his client but must also assist the court in the course of justice. Counsels can even be compelled to cooperate against the will of the accused (ss. 334-3, 332-5 CCP).\(^{24}\)

The distinction between three sorts of crimes — private, semi-public and public crimes — is particularly relevant for the victim. This has great impact on the functioning of the criminal justice system and on the manner of prosecution. Private crimes (crimes particulares) can only be prosecuted upon the victim's formal complaint and private indictment of the victim (see § 5.2). The victim must then assume the role of auxiliary prosecutor (assistente, § 5.4). With respect to semi-public crimes (crimes semi-públicos), the public prosecutor has the power to bring charges but the indictment must be supported by charges brought by the

---


\(^{23}\) Within Portuguese law the defendant cannot plea dguilty in order to get a less severe penalty and there is no plea bargaining.

\(^{24}\) J. de Figueiredo Dias (1992), pp. 461-466.
victim or others (ss. 49, 111 CCP). Again, the victim must file a formal complaint and assume the role of auxiliary prosecutor. The existence of private and semi-public crimes is justified by the idea that criminal prosecution against the wishes of the victim or without his approval and authorisation may be detrimental to his position. Only public crimes (crimes públicos) are can be prosecuted by the public prosecutor without the consent of the victim (ss. 49-52, 111 CCP).

Despite the fact that, in theory, persons charged with offences must be tried in the shortest amount of time possible in keeping with the requirements of the defence (s. 32-2 Const.), it is remarkable that the waiting list for outstanding court cases in Portugal is ‘three or four times’ longer than the European average. This is due to an excessive work-burden on judges, who must handle extensive administrative responsibilities and paperwork. According to Marques dos Santos, the vice-president of the European Union of Justice Officials, the Portuguese justice system is ‘the worst in Europe’. However, the 1997 Justice Statistics on the average length of criminal trials do not support this opinion. The passing of false checks result in the taking of about 22 months in court each. It takes 17 months for the court to reach a verdict in cases of sexual violence and 14 months in cases of homicide. A case may remain on the desk of the public prosecutor for more than a year for no apparent reason. The delays before a case goes to trial appear to be the most frustrating for all participants, including the victim, particularly if the victim and the accused are acquainted. To remedy this problem, the legislature introduced summary and extra summary proceedings in 1988. In these proceedings, neither the intervention of the victim as auxiliary prosecutor nor as civil claimant is allowed. This does not affect, however, the duty of the public prosecutor to hear, before formulating the closing speech (alegações finais), victims who have normally the right to act as such (s. 393 CCP). In the day-to-day workings of the court, summary proceedings are seldom used, except for in a very limited number of simple cases.

The demands on the criminal justice system are further compounded by the lack of a system of mediation between victims and offenders. Mediation and pre-trial claim settlements can lighten the burden on the criminal justice system. According to the Ministry of Justice, when victims were asked about the use of such programmes, 57% responded that

26 Marques dos Santos, as quoted in The News (Portugal’s national newspaper in English), edition 373, 1 March 1996.
27 Information supplied by a lawyer and volunteers of A.P.A.V., Lisbon, 11 April 1996.
28 The summary procedure (processo sumário, ss. 381 ff CCP) can be chosen if the penalty for a crime does not exceed three years’ imprisonment. The proceedings are summary because the law cut out the preliminary investigation (preliminary investigations and instruction) which can only be done if the accused is caught in flagrante delicto. The extra-summary proceedings (processo sumártisimo, ss. 392 ff CCP) apply to those cases where the penalty is less than six months’ imprisonment. The proceedings are extra short because the law permits the waiving of a formal trial if the defendant confesses. In this case, the public prosecutor asks the judge to concede a particular penalty. If the judge is in agreement, he may render his decision immediately. See J. de Figueiredo Dias (1992), pp. 454-455.
29 The second revision of the Constitution took place in 1989, 1/89 of 8 July 1989, Diário da República, 1st series, nr. 155. Published in English by the Directorate-General for Mass Communication.
30 Information supplied by volunteers and employees of A.P.A.V., Lisbon, 11 April 1996.
they would be willing to participate in mediation. Hence, there is a considerable potential for informal dispute resolution. Such as system need not deprive the offender of his rights nor need it infringe on the rights of victims. Although the Constitution allows for the possibility of providing for non-judicial ways of settling conflicts (s. 205-4 Const.), the legislature has not yet set up any mediation schemes.

2.1 Basic Principles

The ex-officio principle is based on the idea that prosecution is a matter of public interest and is the responsibility of the state. This is subject to certain limitations because of the existence of semi-public and private crimes. In the case of semi-public crimes, the public prosecutor may only start criminal proceedings against a defendant if charges brought by the victim or by others (s. 49 CCP and s. 111 PC). In the case of private crimes, only the victim has the right to begin criminal proceedings against a defendant. The criminal process is also governed by the legality principle, which obliges the authorities to investigate all offences which come to their attention (s. 262 CCP). The prosecution services is, furthermore, obliged to indict a defendant whenever there is sufficient evidence to establish the commission of a crime and to identify the perpetrator (s. 283 CCP). The principle of legality is, however, not absolute as the public prosecutor may decide to dismiss or suspend a petty crime case (ss. 280, 281 CCP). The principle of immutability stipulates that the indictment cannot be withdrawn once a court of law has been asked to make a ruling on a case. This principle does not apply to semi-public and private crimes, as the individuals who have pressed charges may choose to stop the proceedings at any point up to the moment of sentencing (ss. 51, 114 CCP) with the consent of the accused (s. 51-3 CCP).

3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

3.1 Investigating Authorities

The police are responsible for defending the rights of the citizens and for preventing crimes while safeguarding those rights and freedoms (s. 272 Const.). The police forces include the Public Security Police (PSP, Polícia de Segurança Pública), the National Republican Guard (GNR, Guarda Nacional Republicana) and the Judicial Police (PJ, Polícia Judiciária). The PSP is responsible for the crime prevention maintaining public order. The GNR is also charged with maintaining public order and also assists the judicial authorities, in the latter capacity it is part of the judicial police. The PJ is a national judicial police force which operates under the supervision of the prosecution service and the Ministry of Justice. In general,

---

33 Regulation on the organization of the PSP, approved by Decree-Law 321/94 of 29 December 1994.
34 Decree-Law 231/93 of 26 June 1993, section 2.
35 Organizational regulation, as approved by Decree-Law 295-A/90 of 21 September 1990, ss. 1-4
the judicial police assist the prosecuting authorities and work under their direction (ss. 55, 56 CCP). The relationship between the police and the prosecution service has changed considerably since the 1980s law reforms. The police are now placed under the direction of the prosecution service. The public prosecutor heads up investigations and supervises the police who follow his instructions. This change was not embraced by the police who argued that the organization of the prosecution service is too rigid. The police claimed that the need for authorization from the public prosecutor caused delays in investigative activities, especially at nights and on weekends as it is almost impossible to contact public prosecutors at those times. Despite a 1994 law, there was still no adequate access to public prosecutors; no night or weekend shifts were set up by 1996. Today, the situation has changed. In Lisbon and Oporto public prosecutors and examining judges work shifts on Saturdays and on bank holidays from 9:00 to 4:00. In other legal districts, the shifts are from 9:00 until 12:30. Still, the fact that contacts between the police and the prosecution service are entirely in writing and that there is almost no face-to-face contact cause difficulties.

3.2 Prosecuting Authorities

The prosecuting authorities are officially part of the judiciary (s. 221-3 Const.). The prosecution service (Ministério Público) is an independent and autonomous body within the administration of justice (s. 221-2 Const.). Public prosecutors (procuradores da República) must remain objective and assist the court in discovering the truth (ss. 53 and further CCP). Their autonomy is safeguarded by their exclusive submission of magistrates to directives, orders and instructions provided by their own organic statutes. (see further § 7.1, B.7). According to the legality principle, the prosecution service has the powers to represent the state in starting criminal proceedings, and defending public interests as reflected in the law (s. 221-1 Const.).

It is the responsibility of the public prosecutor to investigate the commission of a crime, to find its perpetrators, and to gather the evidence to prepare an indictment (s. 262 CCP). The prosecution service must act on offences brought, directly or indirectly (through the police), to its attention. Public prosecutors receive reports of crime and complaints, perform preliminary investigations with the help of the police (ss. 262-285 CCP), bring charges and sustain those charges in court, lodge appeals and finally, enforce penal sanctions and

---

37 For a detailed discussion: J. de Faria Costa, 'As relações entre o Ministério Público e a polícia: a experiência Portuguesa', BFD 70, 1994, pp. 221-246.
38 Decreto-Lei nr. 167/94 de 15 de Junho, which establishes the duty of public prosecutors and judges to work in rotation at Saturdays, Sundays and during bank holidays at the courts.
39 Information supplied by Mr. Amiral, Assistant Director of the Judicial Police in Lisbon, 12 April 1996 and by judges at the criminal court in Lisbon.
40 Information supplied by P. de Matta (lawyer) and J. Lázaro (lawyer and staff of A.P.A.V.) when correcting this Chapter, 13 September 1999.
41 Information supplied by Mrs. Faria, judge of the criminal court in Lisbon, 16 April 1996, and J. Figueiros, chief of the Benfica police squadron, Lisbon, 15 April 1996.
measures. If the public prosecutor has formulated a charge for which additional proof is needed, further investigation can be conducted under the guidance of the examining magistrate during the judicial investigation (instrução, ss. 286-310 CCP). If there is enough evidence to prosecute, the trial stage (julgamento, s. 311 ff CCP) commences (see § 3.3.1).

Notwithstanding the above, within Portuguese criminal law prosecution is not the exclusive right of the prosecution service. The law allows for prosecution by the victim as auxiliary prosecutor. The auxiliary prosecutor can also indict based, in whole or in part, on the facts set out in the public prosecutor's charge or on other facts which do not substantially alter the charge (ss. 68 and further CCP). If prosecution is instigated by the victim, the prosecution service must perform its tasks within the limits set by the auxiliary prosecutor (ss. 50-2, 285-3 CCP).

The relationship between public prosecutors and judges is very different from that between prosecutors and the police (see § 3.1). Public prosecutors and judges are both members of the judiciary and the prosecution service is, as a rule, inside the court-building. As a result, there is more personal contact and interaction. In addition, public prosecutor frequently send their case to a judge for comments. A judge may, for instance, find that a case does not have enough supportive facts to go to court and recommend to undertake further investigations. The public prosecutor often follows the advice, although since 1987, judges no longer have the authority to order additional investigations, the (re-)examination of witnesses, or hearing of experts prior to the trial. However, if a public prosecutor does not follow their advice, they may personally undertake investigations in court.

3.3 Judiciary

The judiciary is independent and autonomous (s. 206 Const.) and impartially administers justice. Judges only have to accept instructions when executing sentences of a higher court in appeal, and the Higher Council of the Bench, presided by the president of the Supreme Court, is the only authority that has the power to appoint, assign, transfer, and promote members of the judiciary, or take disciplinary action against them (s. 219, 220 Const.). Judges play roles both during the pre-trial and the trial stages. While the preliminary investigation is conducted by public prosecutors, there are other functions which are the exclusive competence of the examining magistrate (juiz de instrução). Under Portuguese criminal law, the criminal investigation and the passing of a sentence can never be carried out by the same magistrate. Therefore, criminal investigative courts were established to perform judicial investigations in order to gather more information or to evaluate the final decision on prosecution (s. 286 CCP). The examining magistrate may delegate investigative acts, that are not directly connected with fundamental rights, to the police or prosecution service (s. 32-4 Const.). He is, however, bound by the indictment as prepared by the prosecution service, but he may choose to emphasize the findings of the victim acting as auxiliary prosecutor (s. 288 CCP).

---

45 Information supplied by Mrs. Faria, judge of the criminal court, Lisbon, 16 April 1996.
47 In Italy the examining magistrate is much more part of an autonomous body of investigation.
48 J. de Figueiredo Dias (1992), pp. 449-453. In France is the examining magistrate situated in a procedural position which is dependant on the prosecution service.
After the preliminary investigative stage, a case may go to court in one of the four judicial districts with seats in Lisbon, Evora, Coimbra and Oporto. There are also six courts of appeal (tribunal da relação), four of which are located in the those named cities as well as one each in Guimarães and Faro. Each judicial district is in turn divided into judicial circuits made up of one ore more counties (comarcas) coinciding more or less with municipality boundaries.

At first instance, criminal cases are tried by the county criminal courts which comprise a single-judge court (tribunal singular), a collective court composed of three judges (tribunal colectivo), and a Court of Assizes or jury court (tribunal do júri). The latter consists of a jury composed of the judges from the collective court and eight jurors and hears cases punishable with more than eight years’ imprisonment. It may be formed at the specific request of the public prosecutor, the victim in his role as auxiliary prosecutor or the defendant (s. 13 CCP, s. 2 Act on the Court of Assizes).49 In appeal, the four courts of appeal (tribunais de relação) and, thereafter, the Supreme Court (Supremo Tribunal de justiça) are competent to hear cases.50

The jurisdiction of the trial courts is determined by the type and seriousness of the offence. Generally speaking, a court presided over by a single judge handles cases for which the prosecution service thinks the punishment should not exceed three years or for which the maximum penalty is five years’ imprisonment (s. 16-3 CCP).51 If the public prosecutor recommends to five years or less, the court cannot impose a more severe penalty.52 The case is tried by a collective court if the charge or maximum penalty exceeds five years (s. 14 CCP). The Assize Court may be convened at the request of one of the participants in case of more serious crime punishable by heavier sentences. The Supreme Court has both original and appellate jurisdiction. Two possibilities for appeal exist under the new Code of Criminal Procedure: decisions made by a single-judge court may be appealed before the court of appeal and decisions of the collective court or the Court of Assizes before the Supreme Court. The system of legal remedies does not provide for two instances of appeal in criminal cases.53

The enforcement court (tribunal de execução das penas) oversees enforcements of penal sanctions and is also responsible for rehabilitation. The enforcement court is assisted by prison system social workers (s. 1-6 Act 783/76)54 as they visit detainees monthly, supervise compliance with, inter alia, conditions of early release. Moreover, judges of the enforcement court coordinate social services during rehabilitation. The enforcement court has, however, no competence concerning the enforcement of compensation awarded to the victim by the court (see § 7.3).

3.3.1 Criminal Proceedings

In cases that depend on the complaint of the victim, the presiding judge may ask whether the victim wishes to forgive the accused before the actual trial starts. If the victim indicates to the court that they are willing to forgive the defendant, no trial takes place. Unfortu-
nately, many victims, and especially victims of domestic violence, are intimidated by the court and feel that they must make a show of good-will to the court by agreeing to forgive the accused, and yet they do not realize the consequences of their answer in court. Victims are infrequently informed about this formality by either the presiding judge or by even their own lawyer. The victim will be responsible for legal fees and court taxes but never get an opportunity to present the case and so lose any chance of claiming compensation within criminal proceedings.\textsuperscript{55}

If the individual does not waive his rights as outlined above, the criminal trial begins when the president of the court identifies the defendant and reads the charges to him. The president then asks the defendant if he wishes to speak about the case while at the same time informing him of his right to remain silent. The court then allows the public prosecutor to speak, who gives the floor to the lawyers of the auxiliary prosecutor, the person injured by the offence, the persons responsible under civil law, and, finally, the accused. All participants have the opportunity to present facts and substantiate the evidence (s. 339-2 CCP). At the end of the court session, each is allowed to make a concluding statement based on the facts and the law (s. 360-1 CCP).\textsuperscript{56}

Judges play an active role during the trial. They have the power to question participants, request further investigations or require the presence of particular witnesses and experts. In practice, judges seldom use the right to order further investigation because this entails additional administrative paperwork which judges must do themselves. The active role played by judges during the trial has little effect on the protection of victims since judges can take only few protective measures (see § 7.2 and § 8.3).

3.4 Enforcement Authorities

The prosecution service and the enforcement courts are responsible for the enforcement of decisions by the court. However, they do not assist victims in obtaining compensation from the offender (see § 7.3).

3.5 Probation Services

The probation service (\textit{Instituto de Reinserção Social})\textsuperscript{57} is responsible for offender rehabilitation. Probation officers and the judicial authorities work closely together, however, the enforcement courts only occasionally inform probation officers about overdue payments of awards or asks for assistance in their collection. Probation officers feel that their relationship with offenders would be jeopardized by such interventions. Recently, however, the courts have started to ask the probation services to propose an amount of compensation which the offender would realistically be able to pay to the victim.\textsuperscript{58} Whether the assessment of the

\textsuperscript{55} Information supplied by Mrs. Brito Lopes, lawyer and member of the Commission for Equality and Women’s Rights, Lisbon, 15 April 1996. Contrary to her opinion, others, and in particular lawyers, feel that victims are as a rule informed by the presiding judge and their counsel.


\textsuperscript{57} Decreto-Lei nr. 58/95, de 31 de Março 1995.

\textsuperscript{58} Information supplied by the coordinator of the probation service in Lisbon, Mr. Carlos, and members of his staff, Lisbon, 19 April 1996.
financial capacity of the offender to pay compensation contributes to the actual payment of damages to the victim has not yet been the subject of research.

3.6 Victim Services

Portuguese Victim Support, A.P.A.V. (Associação Portuguesa de Apoio à Vitima), was founded in June 1990. It was founded by a group of 27 associates, consisting of members of the investigating and prosecuting authorities, lawyers, journalists, the probation service, health and social services, and other relevant bodies of society. Before 1998, funding was provided mainly through the probation service, which subsidized five staff members. Today, however, A.P.A.V. receives funding from the Ministries of Justice, the Interior, and of Work and Solidarity as a result of a Protocol concluded between those Ministries and A.P.A.V. on 10 March 1998. The significant funds provided for in the agreement attest to the value and importance of Victim Support to Portuguese society. There is increased cooperation between A.P.A.V. and the police forces (PSP and GNR) as Victim Support assists the police in dealing with victims, particularly with victims of sexual crimes and domestic violence. Also, the police refer more victims to Victim Support.

Unfortunately, Portugal has a low report rate for these and other crimes (see § 5.1) and so the police are unable to reach those in need of services. A.P.A.V. has used local and nationwide publicity campaigns, television appearances, and articles in regional and national newspapers to reach victims. A.P.A.V. has, for instance, a weekly radio programme in Coimbra and Caiscais in which various legal topics are discussed in practical, understandable terms. This is an especially effective approach in a country where the percentage of persons who are illiterate or poorly educated is still high by European standards (see Scenery). The new funding allows A.P.A.V. to participate in programmes and projects in the fields of information, training, and research. The ALCIPE project (part of the 1998 European Union DAPHNE project), for example, attempts to combat domestic violence through the provision of information to victims but also by providing training for the criminal justice authorities.

The primary goals of A.P.A.V. are to promote victims' rights, and to protect and support victims of crime. Victims receive information, individual attention and guidance, moral, social, legal and psychological support, and financial aid and assistance. A.P.A.V. is a source of emergency financial assistance as victims may find themselves in precarious financial situations since they often do not qualify for welfare or income support. Women who are victims of domestic violence or sexual crimes can receive funds for housing as well as for daily necessities. Securing housing is a primary concern. A.P.A.V attempts to locate housing for victims in danger in shelter or low-budget (hotel) rooms. If housing is unavailable, as a last resort, victims must be placed with trusted family or friends.

A.P.A.V. is a nonprofit, voluntary organization with eleven local centres in the ten major cities: Braga, Coimbra, Cascais, Faro, Loures, Setúbal, and two in Lisbon, one of which is in the judicial police station. Free and confidential victim support services are provided by paid staff members and trained volunteers (180 in 1999). Many volunteers are at the final

60 Information supplied by a group of volunteers of A.P.A.V., Lisbon, 11 April 1996.
61 According to the Commission for Equality and Women's Rights there are no official shelters for victims of domestic violence. The only shelters available are a few privately owned houses, mostly by the catholic church, and these are overcrowded.
year of their university studies or have a university degree in psychology, law or social work. According to the coordinator of A.P.A.V., this allows Victim Support to provide professional, legal, and psychological assistance to victims; services which are difficult for ordinary citizens to obtain. Volunteers receive training to provide information through a Lisbon-based help-line, by mail and in face-to-face contacts, as well as long-term counselling. In emergency, volunteers may accompany victims to the hospital, the police station or to court. As a part of the multi-agency approach, victims are referred to other community agencies which also provide aid, legal advice or counselling. A final task, that is much valued by volunteers, is to provide training for police officers, and teach victim-awareness in schools and health centres.

According to the National Office of A.P.A.V., there has been a steady increase in the number of victims seeking the help of Portuguese Victim Support: 1,240 in 1995, 2,200 in 1996, 3,300 in 1997, and 4,100 in 1998. A.P.A.V is meeting a growing demand for support services. The vast majority of clients served by A.P.A.V. are women who are victims of domestic violence and sexual crimes.

According to the police, most crimes are reported in the morning or at lunch time. But most victim support centres are opened between 2:30 pm until 7:00 pm. which means that victims must return to their home, sometimes waiting another day before they can be helped or counselled. As a result, even in Lisbon, where A.P.A.V. and the police work together closely, many victims who are told about Victim Support, either must go to the other Lisbon centre which is the only centre open from 10:00 am to 5:30 pm, or come back the next day. Waiting usually means that victims do not come back altogether. The limited hours of opening may explain why many the number of victims seeking help is not still greater, despite the fact that their number is growing annually.

4 SOURCES OF LAW

4.1 General Sources of Law

The 1976 Constitution of the Democratic Republic of Portugal has significantly influenced and shaped modern criminal law and procedure. It states the principles of fundamental rights and freedoms in guaranteeing them through criminal law and proceedings. For instance, each citizen, including those who lack financial resources, is promised equal access to the courts (s. 20 Const.). The Constitution also includes a section on the functioning of the judiciary and safeguards, among other things, its independence and impartiality. Modern criminal law and procedure is, furthermore, shaped by international conventions, as well as by the other sources of law, such as legal doctrine and case law.

4.2 Sources of Criminal Law and Procedure

The most important sources of criminal law and procedure are the Penal Code of 1982 and the Code of Criminal Procedure of 1988 (see further § 4.3). There are also secondary sources of criminal law and procedure such as Acts and Decrees (Decreto-Lei) which regulate

---

certain aspects of criminal procedure. For example, the 1987 Act (387-A/87) on the Court of Assizes, and the 1991 Act (43/91) regulating international cooperation in criminal procedure.

4.3 Specific Victim-Oriented Sources of Law and Guidelines

Despite the fact that the rights and interests of victims are not specifically safeguarded in the Portuguese Constitution, these are recognized to some extent by the laws and in governmental policy documents, such as the National Working Plan, 'Grandes Opções do Plano.' The latter recognizes the necessity of psychological as well as material assistance for victims of crime.65 The Penal Code and the Code of Criminal Procedure contain several victim-oriented features. The notion of the crime victim (vítima), however, is used only occasionally by the legislature.66 The victim is variously referred to as the injured person (ofendido),66 the civil claimant (lesado), and the auxiliary prosecutor (assistente, see § 5). Nonetheless, the General Part of the Penal Code states that the victim is important in criminal proceedings and has the same status as the defendant and the state in the punitive triangle. The legislature explicitly acknowledges the victim’s right to receive compensation69 and to be protected from secondary victimization (point 17 General Part PC). New provisions make suspended sentences, probation and parole contingent on restitution or compensation.70 To better protect victims, particularly victims of sexual crimes, from secondary victimization, the legislature increased the number of complainant offences which can be prosecuted with the explicit consent of the victim through the filed complaint (see § 5.2).

Within criminal procedure, the attention for victims is most clearly expressed by the role of auxiliary prosecutor (see § 5.5). A victim who acts as auxiliary prosecutor has the same rights as the accused. The public prosecutor may, for instance, only suspend proceedings if the auxiliary prosecutor and the accused both give their consent (concordância do arguido e do auxiliary prosecutor, s. 281-la CCP).71

In addition to the Penal Code and the Code of Criminal Procedure, other important sources of law benefiting victims are the Act on Access to the Courts (AAC, 1987), the Free

---

65 For instance, in the 1990 and 1991 policy plans much emphasis is put on the importance of compensation and financial assistance for victims.
67 See ss. 1-1 g and 88-2c CCP. In the proposed amendment of the Penal Code, the concept of 'victim' is the same as the injured person.
68 The injured person (ofendido) is a participant in the proceedings and may act as a witness. He is not actually a party to the proceedings, contrary to the auxiliary prosecutor (assistente).
69 The injured person (ofendido) is a participant in the proceedings and may act as a witness. He is not actually a party to the proceedings, contrary to the auxiliary prosecutor (assistente).
72 Decreto-Lei nr. 387-B/87, de 29 de Dezembro.

Access to the courts and Free legal aid
The AAC requires the state to inform citizens about the functioning of the law, through publications or other means of communication (s. 4 AAC.). The government must also create information services (serviços de acolhimento: reception desks) for victims at the courts and the forensic services (s. 5 AAC). By 1999, such services have only been created within the forensic services, but not at the courts. Citizens should have access to legal advice and legal aid services (modalidades de consulta jurídica e de apoio judiciário, s. 6 AAC). The legal advice services should be set up in cooperation with the Bar Association (s. 11 AAC). In practice, however, it cannot be said that the effective access of victims to the courts is satisfactorily guaranteed, for the promised services have either not been created or they function inadequately (see § 6). Free legal aid should furthermore be available to persons of insufficient financial means (s. 19 AAC). The Act on Free Legal Aid specifies that financial incapacity can be proven by all means and must be established by the court (s. 6 FLA). If so, the legal costs and fees will be paid by the State, including the costs made before the trial to prepare the case (s. 7 FLA). However, it is important to note that the sums for legal aid are limited by a minimum and maximum amount, which vary according to the type of criminal proceedings. The amounts for summary proceedings are approximately half of those for ordinary criminal proceedings.

Protection of women and State compensation
In 1991 a law was passed which protects female victims of violent crimes within criminal proceedings. The APW provides for (a) a prevention programme and assistance schemes; (b) a telephone help-line; (c) specialized police units to assist female victims of crime (see § 8.1); (d) governmental support for associations assisting female victims of sexual and violent crimes; and (e) a State Compensation Fund; (f) publication of a guide for victims of domestic violence (s. 3 APW).

In 1999, eight years later, only some of the items mentioned in the 1991 Act are realized. The associations for women have been given the right to constitute themselves as auxiliary prosecutor to represent the victim during the criminal proceedings. They may even claim compensation from the offender or the state on behalf of the victim (s. 12 APW). Public awareness campaigns focussing on sexual, physical and domestic violence against women have been organized (s. 1-2, and s. 2 APW). The Women’s Guide (Guia do Nova

74 Law 423/91, Decreto-Lei nr. 423/91, Protecção as Vítimas de Crimes Violentos. It came into effect by the Regulating Decree of 22 February 1993, Decreto Regulamentar 4/93.
75 Free legal aid can be claimed by persons of financial incapacity, i.e., persons who receive social benefits, alimony, or who earn 1.5 times the minimum wage (s. 20 FIA).
76 The table annexed to the 1988 law mentions the following amounts: for an ordinary criminal process, the minimum and maximum payable sums are respectively 24,000 and 42,000 Escudos (EUR 120 and 209); concerning summary proceedings the sums are 12,000 and 24,000 Escudos (EUR 60 and 120).
77 Lei nr. 61/91, de 13 de Agosto, Garante protecção adequada às mulheres vítimas de violência.
78 Recommendation 15/84 of the Council of Europe and UN Resolution 31/77.
Rumo) was published by the Ministry of the Interior and the police forces in 1998. It is a practical guide including the addresses of social and victim services, a security plan for women living in a situation of violence with a checklist of documents and items needed to flee the home. The Guide also stresses the fact that violence against women is a criminal offence, and encourages women to report such crimes to the police. (see §§ 8.1 and 8.3). The telephone help-line is set up but it only offers legal orientation. The other aspects of the law have not been implemented yet. Up to date, no prevention programmes have been set up. Nor have special police units been established to assist female victims of crime. The police forces do not yet have special crises centres or units. Moreover, only certain policemen and women have been trained on how to deal with these victims, not by the police schools but by the private organization A.P.A.V. (see § 3.6). Finally, the matter of the creation of a State Compensation Fund was finally settled two years later (April 1993).

The 1982 Penal Code and the 1988 Code of Criminal Procedure (s. 130 CCP) both already called for a State Compensation Fund for victims of violent crime who are unable to force offenders to pay compensation. The State Fund was finally created almost ten years later by the 1991 Act and the 1993 supplementary Regulations for the Protection of Victims of Violent Crime (referred to as the SCA). The State Compensation Fund was finally founded in April 1993.

State compensation is based on a concept of social solidarity. As a result, the following principles govern the payment of State Compensation: a) no consideration is given to moral, non-pecuniary loss; b) there are set limits on compensation as set out in the Civil Code on personal injury; c) the payment of compensation is the responsibility of the Minister of Justice; and d) injuries caused by negligence are not compensated. No moral damages can be claimed from the State Fund, which greatly reduces the level of compensation that can be awarded by the Committee on State Compensation.

In order to qualify for claim state compensation, victims must be able to prove to the Committee on State Compensation that they sustained serious injury as a result of a violent crime and that they cannot obtain effective and sufficient compensation from another source (ss. 1-1(a) and (c), and s. 7 SCA). A claim may be submitted to the Minister of Justice a victim or their surviving dependants or by the public prosecutor. In the claim any compensation already received must be reported and the amount of compensation sought must be

---

79 The Women’s Guide is part of the INOVAR project, see § 8.1.
80 Decreto Regulamentar nr. 4/93 de 22 Fevereiro 1993.
81 Decreto-Lei nr. 42391, Proteccão as Vítimas de Crimes Violentos.
82 The sums are limited to maximum amounts as provided for by s. 508 of the Civil Code concerning personal injury. This means that where compensation is paid on a lump sum basis, the maximum payable amount to a single person for injury or death is six million Escudos (EUR 29,928). If compensation is paid on a periodic basis, the maximum amount is 500,000 Esc. (EUR 2,482) for each injured person, not to exceed 1.5 million Esc. (EUR 7,482) in total when several persons have been injured by the same act of intentional violence. See M.J. Antunes, Portugal, in: D. Greer, Compensating Crime Victims, Max Planck Institute, Freiburg i.Br., 1996, p. 503, and the Annex on pp. 507-508.
84 The following persons have the right to be compensated if they depended on the deceased victim for maintenance: the husband or wife of the deceased victim, the (step)children, parents, brothers and sisters, and finally the victim's nephews and nieces while under age (s. 1-1(b) SCA). See M.J. Antunes (1996), p. 502.
spelled out. A copy of the claimant’s income tax returns must be attached (s. 5 and 6 SCA). Claims for compensation from the state must be made within one year from the date of the offence, or if criminal proceedings are begun, one year from the date a sentence is given by the court (ss. 4-1 and 4-2 SCA). These times may be waived by the Minister of Justice if certain justifiable circumstances have prevented the presentation of the claim within the normal time span (s. 4-3 SCA). The identity of the offender need not to be known for compensation to be awarded, not is the successful prosecution of the offender required (s. 1-2 SCA). Compensation may be reduced or refused if the victim’s conduct during or after the crime contributed to the loss, if he has a relationship with the offender, or if payment of compensation would be contrary to public order (s. 3 SCA).

Compensation includes loss of earning or profits, medical expenses, and in the event of death, funeral expenses and loss of maintenance. Adjustments will be made for assistance received from social security services and for any compensation paid by the offender (s. 2-2 SCA). The actual amount of compensation is sole the prerogative of the State Compensation Committee. The Committee, which is headquartered in Lisbon, consists of a presiding judge appointed by the Supreme Council of the Judiciary (Conselho Superior da Magistratura), a lawyer appointed by the Bar Association, and an administrator appointed by the Ministry of Justice (s. 6-2 SCA). The Committee reports directly to the Ministry of Justice (s. 2 of the 1993 Regulations). After the state has compensated the victim, it subrogates in the rights of the victim (s. 9 SCA).

In 1994, the State Fund paid 110 million Esc. (EUR 548,678) to 110 victims of whom the majority were relatives of murder victims. In 1997, there were still 69 cases and 118 new cases. Seven cases were awarded an average provisional sum of 578,571 Esc. (EUR 2,286). In 1997, state compensation was awarded in 98 cases for the average total of 2,382,358 Esc. (EUR 37,410) per person. In 1998, the Committee decided 103 cases awarding the average amount of 2,846,524 Esc. (EUR 14,198) per case. It also received 74 new claims and awarded provisional sums in two cases of 750,000 Esc (EUR 3,741) and 250,000 Esc (EUR 1,247). Only 10% of the victims of the approximately 150 violent crimes per year apply for state compensation. The public, and victims of violent crime in particular, are unaware of the Fund. However, it is promising that the sums awarded have doubled between 1994 and 1998.

Finally, the 1991 APW has been given teeth by Act 129/99, under which victims of domestic violence can seek state compensation. A victim of domestic violence who faces serious financial hardship can today file a request for state compensation (s. 2b Act 129/99).

5 ROLES OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM

Under Portuguese criminal law, the victim (offendido: injured person) may decide what role he wants to play. The victim may either act as a civil claimant (lesado, sujeito da acção civil,
s. 72-1 CCP) or as an auxiliary prosecutor (assistente, ss. 68-70 CCP). A family member or a dependent who suffered damages as a result of crime may also become a civil claimant. If the crime is a private or semi-public crime, it may only be prosecuted with the consent of the victim (see § 2).

5.1 Reporting the Offence

The victim who wants to report a crime (denunciante) may go to the police or directly to the public prosecutor (s. 241 and 244 CCP). It is the prosecution service which keeps a record of all crimes which are reported. If it is requested, a certificate attesting to the filing of a report must be given (s. 247 CCP). However, persons filing the report a crime are not given a copy of the actual report by the police. Written proof of the reporting of a crime may be obtained from the public prosecutor’s office, a fact which may be withheld by the police.

Reports may be made in person or in writing. However, it is not obligatory to report a crime (s. 242 CCP). Currently, the fact that only about 25% of the victims report crimes to the authorities is a major problem. Of those who do not report crimes to the authorities, 32°/s did not report the crime because they do not expect the police to take an interest in the case. Obviously, low reporting rates influence the ability of the criminal justice authorities to fight crime. In addition, it has consequences for the way victims are informed about their rights (see § 6). Given the low report rate, other ways must be found to reach victims.

5.2 Complainant

Under Portuguese law there are a great number of offences which can only be prosecuted based on a complaint of the victim (private and semi-public crimes, see § 2). For offences such as simple assault, sexual crimes, and theft within the family, the law demands that victims lodge a complaint (queixa), which is different from criminal prosecution by the state. In the case of private or semi-public crimes, the complainant instigates a criminal investigation and may withdraw the complaint (desistência) at any time up to sentencing stage, if the accused does not object to the withdrawal. Such examples of victims rights are perceived as evidence for the legislature’s concern for victims. Victims may chose to have an active role, which is particularly important in cases where personal honour and family peace are

---

90 Information supplied by police officers, Lisbon, 12, 15 and 16 April 1996.
91 In 1992, 74% of the victims of crime did not report to the authorities. In 1994, this percentage was slightly lower at 72%. See Victim survey 1992 and 1994, Inquérito de vitimização, Gabinete de Estudos e Planeamento do Ministério da Justiça, Lisboa, 1993 and 1995, respectively p. 32 and p. 89. Even in case of violent crimes, only 38% of the victims reported this to the police in 1994 (p. 119).
93 Speech of M.R. Crucho de Almeida on behalf of the Ministry of Justice given at the Annual Meeting of the European Forum for Victim Services, Lisbon, 8 June 1995.
94 The accused may, for instance, be willing to see the proceedings through to conclusion in order to clear his name (s. 114-2 PC). Relatório ponto 6b CCP).
at stake. The victim's point of view should remain paramount, and the action of the authorities be dependent on the wishes of the victim.  

Because of a relatively large number of complainant offences, i.e., crimes that can be prosecuted only after a civilian complaint, one would expect to find more victims involved in the system. In fact, this is not the case. Only 5% of victims of domestic violence or sexual offences file a complaint because of social pressures. In 1992 and 1994 surveys of victims few of the female respondents admitted to having been the victim of a sexual offence (rape: 0.3%, other sexual crimes: 0.2%). It is possible that for cultural reasons, women would not reveal being a victim of such crimes, even in anonymous interviews. Another reason why cases may never reach the sentencing stage is that complaints may be withdrawn at any point during the pre-trial and trial stages. In 1990, 41% of the cases ended during the pre-trial stages, because charges were dropped by the victim. In cases of sexual assault and domestic violence, victims tend to withdraw their complaint within days. This may be because the parties were able to find a resolution outside of court. It is more probable that victims give in to social pressure to drop charges. Such pressure may be from within the family but the criminal justice system itself may be a source of pressure as well. As stated earlier, an affirmative answer on the point of the victim when asked by the court if they are willing to forgive the accused may lead to discontinuance of the proceedings (see § 3.3.1). Therefore, while there are advantages of a system designed to give ultimate control to the victims themselves, the most vulnerable of those victims may be excluded altogether.

5.3 Civil Claimant

Under the Portuguese criminal justice system, the victim who wants to be compensated by the offender is a civil claimant (lesado). His role is strictly limited to the pursuit of his claim for damages (perdas e danos, s. 74 CCP). He is not considered to be a party to the proceedings. He has participatory rights but cannot influence the course of the proceedings.

The civil claimant must file a claim for compensation within 20 days of being notified that the case will be prosecuted or an indictment issued (s. 77-2 CCP). The civil claimant must compile a list of the losses and injuries, alone or with the help of a lawyer (s. 79 CCP) and he must calculate the damages. The civil claimant may choose to be represented by counsel during the proceedings but it is not mandatory (s. 76 CCP, see further § 5.5), unless the amount of the damages exceed 750.000 Esc. (EUR 3,741). If the civil claimant does not have a lawyer, the public prosecutor must help him present the claim in court (s. 77 CCP). In general, the victim's interests are better served if he hires a lawyer, as most public

97 Victim survey (1992), p. 86. Also, victim survey (1994), pp. 137-138: here the percentages were 0.1% and 0.2%. However, when these figures were compared with police statistics, it turned out that 498 judicial investigations were performed concerning sexual crimes.
99 This may be partly caused by the delays faced by the victim during the criminal proceedings (see § 2).
101 The civil claimant is not entitled to free legal aid, contrary to the auxiliary prosecutor, because the civil claimant does not need to be legally represented in court. His interests will be represented by the public prosecutor (see § 7.2).
prosecutors are reluctant to argue the civil claimants' right for compensation.\(^{102}\) The victim with insufficient money may apply for free legal aid (see § 4.3).

As a civil claimant, the victim joins his claim for civil damages to the criminal proceedings (s. 71 CCP). Before 1982, the question of compensation was an integral part of criminal proceedings. The court could award compensation \textit{ex officio}. Today, this is only possible in a limited number of cases (s. 128 PC, see § 7.2).\(^{103}\) Presenting a civil claim for compensation in criminal court is, in principle, required by law (see § 7). Any sentence of a criminal court must also contain its decision on compensation, if a victim claimed damages (s. 377 CCP).\(^{104}\)

The civil claimant has several procedural rights. The claimant should be informed by the police of his right to claim compensation (s. 75 CCP) and by the public prosecutor of his right to prosecute (s. 77 CCP) or dismiss the case (see § 6.1, B.6). He has the right to ask for a review of decisions made by the public prosecutor (see § 7.1, B.7. The civil claimant is entitled to access to the legal file and has the right to obtain copies of it (s. 89 CCP). But if he initiated criminal proceedings, he has access to only those parts of the legal file that are relevant to the exercise of his rights (s. 89-2 CCP). The civil claimant may request that proceedings are expedited when the time frame set by law has been exceeded (s. 108-1 CCP).

5.4 Private Prosecutor

Portuguese criminal law to initiate private action against the offender in case of private and semi-public crimes (see § 5.2).\(^{105}\) Private crime cannot be prosecuted on the initiative of the public prosecutor even though he may have sufficient evidence to prove an offence. The private prosecutor must bring criminal charges before an offence can be investigated and prosecuted. Like the complainant, the private prosecutor has the right to discontinue proceedings in the case of private crimes at any time before the sentencing stage, subject to the agreement of the accused. The private prosecutor must assume the role of auxiliary prosecutor (see below), in case of private crimes.

5.5 Auxiliary prosecutor

The right of victims to participate in the criminal process as an auxiliary prosecutor (\textit{assisteント}, s. 69-1 CCP), is an important victim-oriented feature of the Portuguese legal system. In the case of crimes which require private indictment and complainant offences, they must become an auxiliary prosecutor. There are many positive aspects to this role but there is also one main disadvantage. The primary advantage for the victim who acts as an auxiliary prosecutor is that he can serve simultaneously as civil claimant and private prosecutor, and can benefit from the rights attached to each of these roles. In addition, he enjoys numerous autonomous procedural rights and, as such, he is considered as a party to the proceedings. The main disadvantage is that he must be represented by a lawyer. While legal aid is available, many citizens earn too much to qualify for a state paid lawyer. Whether or not the requirement for a lawyer keeps victims from assuming the role of auxiliary prosecutor is unknown. Victim support workers seem convinced that few victims choose to act as an

\(^{102}\) Information supplied by judge Faria of the criminal court in Lisbon on the 16th of April 1996.

\(^{103}\) J. de Figueiredo Dias (1992), pp. 466-467.


auxiliary prosecutor simply because they are not aware of their right to assume this role, or indeed what this would entail.

Section 68 CCP outlines which persons may act as auxiliary prosecutors. First, victims of crime, their surviving relatives or their representatives, if they are unable to appear before the court themselves. Second, in the case of crimes of corruption or with some types of fraud, every citizen may become an auxiliary prosecutor. Third, certain associations may assume the role of auxiliary prosecutor, e.g. associations fighting against violence directed at women, associations of immigrants, or anti-racism groups (Act 20/96).106

Victims must become an auxiliary prosecutor at least five days prior to the opening of the judicial investigation, or five days prior to the trial (s. 68 CCP, and s. 287-1b). This rule is intended, inter alia, to protect the rights of the defendant for the principle of equality of arms requires that he knows, in advance, of the fact that there is an auxiliary and a public prosecutor.107

As said earlier, the auxiliary prosecutor his autonomous procedural rights in both the preliminary and the trial stages. He may make accusations against a suspect, independent from the prosecution service (s. 69-2a CCP). This is not to say however that he can make accusations which cannot be sustained. The law requires the existence of a public interest to the prosecution and punishment of the accused. He may oppose a provisional suspension of the proceedings (s. 281-1a CCP), and/or demand the opening of the judicial investigation within five days after being informed of the indictment, or the final decision not to prosecute (s. 287-1b CCP).108 He may to oppose the continuation of the trial based on new facts109 (s. 359-2 CCP). He has the right to lodge appeals with the examining magistrate or the trial judge against decisions which may affect his position (ss. 69-2, 284, 287-1, 401 CCP).110 Furthermore, he enjoys all the rights of the civil claimant, e.g. the right to consult the legal file and to obtain copies of them (s. 89 CCP), or to require speedier proceedings when the terms stated in the law are exceeded (s. 108-1 CCP). Finally, the auxiliary prosecutor has the right to speak at various moments during the proceedings. He may produce evidence, ask the authorities to take certain measures, and add facts to the indictment. According to Crucho de Almeida, the auxiliary prosecutor’s right to speak can be compared to the Victim Impact Statement.112 But the rights of the auxiliary prosecutor go even further than that

106 Act 20/96 allowing associations to become auxiliary prosecutors, Decreto-Lei nr. 20/96, de 6 Julho 1996, permite a constituição como assistente em processo penal no caso de crime do índole racista ou xenofobia por parte das comunidades de imigrantes e demais associações de defesa dos interesses em causa.

107 O.M. de Oliveira (1994), p. 249-250. De Oliveira feels that victims, who did not become auxiliary prosecutors, should also have the right to have a voice in order to protect their rights and interests. After a substantial change of the facts, they should be given the opportunity to become an auxiliary prosecutor to enable him to oppose to a trial based on the new, altered facts.


109 When the public prosecutor, the accused and the auxiliary prosecutor agree the trial may off course be based on new facts.


112 See Chapters 7 and 11: Victim (Impact) Statement. Other jurisdictions allowing a victim impact statement are the United States of America, Australia and New Zealand.
because he also enjoys procedural rights.\textsuperscript{113}

In addition, the auxiliary prosecutor has the right to be notified of certain decisions or relevant developments in his case (see § 6). During the pre-trial stages, he should not only be informed about the final decisions of the judicial authorities, e.g. on prosecution, the competence of the court (resolução do conflito de competência, s. 36-5 CCP), or the use of expert-witnesses (prova pericial, s. 154-2 CCP). He must be informed about the time and place of preliminary hearings\textsuperscript{114} (debate instrutório, s. 297-4 CCP) and the trial (audiência, s. 313-2 CCP).

Notwithstanding the advantages of acting as an auxiliary prosecutor, victims should be aware that assuming this position also brings certain obligations. First, the auxiliary prosecutor must be represented by a lawyer during proceedings (s. 70 COP). Second, he has to pay court fees. These fees vary according to the amount of compensation claimed and on the number of judicial acts, e.g. the lodging of appeals. If the auxiliary prosecutor has very limited financial resources, the state will meet his financial obligation.\textsuperscript{115} Third, the auxiliary prosecutor or his lawyer has to appear in court. An unjustified absence or a second absence of the auxiliary prosecutor (or his lawyer) is interpreted as the wish not to pursue the role of auxiliary prosecutor or to stop the proceedings altogether, unless the accused requests to continue the proceedings.\textsuperscript{116}

Although there can be many advantages to playing the role of auxiliary prosecutor,\textsuperscript{117} only a small percentage of victims of crime act as such. Criminal justice statistics show that in 1989 less than 6% of the victims has a lawyer, which means that the percentage of victims acting as auxiliary prosecutors is equal or less than 6%. According to the 1992 and 1994 statistics, the number of auxiliary prosecutors has slightly risen to 8% in 1992, and to 11% in 1994.\textsuperscript{118} These figures are the more surprising as victims can only have an active status as an auxiliary prosecutor.\textsuperscript{119} This practice is probably due to the fact that victims are not informed about the advantages of acting as an auxiliary prosecutor.\textsuperscript{120}

\section*{5.6 Witness}

Any person with knowledge of the commission of a crime may give evidence, unless he has mentally disabilities and cannot understand the questions put to him by the parties (ss. 128, 131 CCP). If the case of sexual offence, if the witness is a child under the age of 16, an expert opinion may be asked to assess his capacity to testify (s. 131 COP). In addition to these two exceptions, there may be limits on the testimony of the auxiliary prosecutor and the civil

\textsuperscript{113} M.R. Crucho de Almeida (1993), p. 115.

\textsuperscript{114} He is for instance entitled to be notified of hearings of auxiliary prosecutors, civil claimants and witnesses outside the court’s jurisdiction (fora comarca, s. 318-2 CCP), or at their homes. The latter option is used if they have valid reasons not to come to the court (s. 319-2 CCP). O.M. de Oliveira (1994), pp. 73-74.

\textsuperscript{115} Conversation with a lawyer working as a volunteer at A.P.A.V., Lisbon, 11 April 1996.

\textsuperscript{116} O.M. de Oliveira (1994), pp. 159-160.

\textsuperscript{117} According to Crucho de Almeida one can compare this to the victim impact statements on the consequences of crime. But auxiliary prosecutors have much more capacities than the making of a statement in court. Since academics, such as J.J.M. van Dijk, consider the active participation of victims to be beneficiary, the role of auxiliary prosecutor is extremely interesting. See M.R. Crucho de Almeida (1993), pp. 114-116.


\textsuperscript{120} Information supplied by lawyers working as volunteers at A.P.A.V., Lisbon, 11 April 1996.
claimant (s. 133 CCP), family members of the accused (s. 134 CCP) and persons who can be exempted on grounds of their professional right to remain silent (s. 135 CCP), e.g. priests, preachers, lawyers, medical doctors, and journalists (s. 135-1 CCP). the court of appeal, or if necessary the Supreme Court, may be called upon to rule on the question of the privileges of non-disclosure (s. 135-3 CCP).

Due to the orality principle (see § 2.1), victims always have to testify in court. The president of the court will first question a witness (s. 348-3 CCP), after which the witness is be questioned by the public prosecutor and the defence counsel (contra-interrogatário). All these parties may reexamine him, if needed (s. 348-4 CCP). The court and/or the members of the jury may at any times intervene and ask the witness questions (s. 348-5 CCP). Other parties and participants may, furthermore, suggest additional questions to the court for the witness (ss. 346 - 349 CCP). Concerning the questioning and protection of victims, see §8.

PART II
THE IMPLEMENTATION OF RECOMMENDATION (85) 11

6 THE VICTIM AND INFORMATION

In Portugal, there is a general lack of information concerning civil rights in general. A considerable percentage of the populations is illiterate, especially in the rural areas, or has only enjoyed primary school education (see scenery). It is therefore difficult to effectively communicate by newspapers, or other written means of communication. Therefore other means of informing citizens and victims should be developed. Victim Support (see § 3.6), an organization that has some success in getting information to potential victims by means with the government might use.

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 are not required by law to inform victims of their rights or to refer them to social or victim services. However, the police forces issue internal police circulars to instruct officers to inform victims about their legal rights, such as the right to become an auxiliary prosecutor (s. 68 CCP), to have a lawyer (s. 70 CCP), to ask for compensation from the offender (s. 71 CCP) or from the state in the case of violent crime (Act of 1991, see § 4.3). The police are also instructed by internal circulars to refer victims to victim support (A.P.A.V., see § 3.5).121 The legislature, however, has mandated that the judicial authorities (s. 75 CCP), i.e., judges, examining magistrates and public prosecutors (s. 1b CCP), provide the victim with information on compensation. They are not obliged to inform the victim of the possibilities of obtaining assistance, practical and legal advice.

In practice, the judicial authorities informally delegates this duty to legal trainees and

121 See for instance the P.S.P. circular nr. 635/94 of 28 February 1994.
to the police. At the prosecution service, for instance, young trainees with as little as one and a half years of legal experience inform victims. The main backlash is that these trainees are still not experienced.\textsuperscript{122} Also, at the police level, the provision of information to victims is not really taken at heart, in spite of the internal instructions and the delegation of duties by the judicial authorities. If a victim goes to the police to report a crime, the police take down the report and give the victim a form (termo de notificação) which explicitly refers to section 75 CCP (obliging the authorities to inform the victim about their right to claim damages (indemnização). The notification form is itself written in such formal legal language that most victims simply do not understand. This problem might be solved by having the police explain its content orally, but this is not done.\textsuperscript{123} Nonetheless, according to law, the form must be signed both by the police officer and the victim attesting to the fact that the information has been communicated. The police seem more concerned with obtaining a signature of the victim than in actually making sure that he understands his rights. The Chief of Police in Lisbon and officials of the Ministry of Justice argue that explaining the rights of victims is the responsibility of the judicial authority and not of the police.\textsuperscript{124} This is a no-win situation for victims: the judicial authorities delegate their duties to the police who do not feel compelled to execute the informal assignment. This may be explained by the fact that the police are not legally required to inform victims, and by the fact that the prosecution service does not attach much importance to this assignment. It is hardly surprising that the information contained in the notification form is not understood by the average victim: 13\% of the population is illiterate\textsuperscript{125} and many others attended only primary school.

Yet, remarkably only 14\% of the victims complain about not receiving (adequate) information\textsuperscript{126} and eight out of ten of these victims said they would report a crime again in similar circumstances,\textsuperscript{127} even though only about 25\% of victims in Portugal report crimes to the authorities. The low percentage of victims who complain about receiving inadequate information or no information at all can be explained by cultural and social norms in Portuguese society (see Scenery).\textsuperscript{128}

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

Criminal procedural law does not contain a provision which requires the police or the public

\textsuperscript{122} Information supplied by lawyers who work as volunteers at A.P.A.V. and colleagues from their law firms, 12 April 1996.
\textsuperscript{123} The notification form states the following: 'The civil claimant X, is informed in accordance with the section 75 CCP and following, on the basis of which he may, if he does not have the economic means, ask the intervention of the prosecution service in order to bring about a claim for civil damages.' (Translation MB) The notification form states — in legal jargon — how the victim should act in order to claim compensation.
\textsuperscript{124} Information supplied by Chief of Police Figueiro, PSP squadron of Benfica, Lisbon, 16 April 1996.
\textsuperscript{125} There is some dispute about the number of Portuguese that are illiterate, according to the 1991 Census it is 11\%.
\textsuperscript{127} M. R. Crucho de Almeida (1995).
\textsuperscript{128} See also M.E.I. Brienen, E.H. Hoegen, 'Victims of crime in different jurisdictions and the influence of local realities', in: J.J.M. van Dijk et. al., Caring for Victims, Criminal Justice Press, Monsey, N.Y., USA, pp. 157-164.
prosecutors to notify victims of the outcome of a police investigation. Therefore, victims must contact the criminal justice authorities on their own to learn the outcome of a police investigation. However, contacting the authorities is not as simple as it might seem. First, the police generally refuse to give information to victims due to the secrecy principle that governs the pre-trial stage and refer them to the prosecution service. Victims must then attempt to determine which public prosecutor is handling the case. Even if they succeed in locating the responsible public prosecutor, there is a chance that he refuses to provide the victim with information. As with the police, the prosecution service is also generally reluctant to provide information prior to the trial. Some public prosecutors will simply not take the time to inform victims about the outcome of a 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.

According to the law, a decision not to prosecute should be communicated to the accused, the victim who reported the crime, the auxiliary prosecutor, and finally the civil claimant (s. 277-3 CCP). The victim who reported a crime is notified if he has assumed certain formal roles. First, as an auxiliary prosecutor he has an autonomous right to be provided with information during the preliminary and trial stages. The auxiliary prosecutor can ask the examining magistrate to review the decision of the prosecution service not to prosecute (s. 287-1b CCP, see § 7.2, B.7). The civil claimant is informed because he has the right to claim compensation from the offender. Notification may be done in person, the papers (s. 113-1 CCP), but usually, it is done by an official letter through the mail (notificação). The law is very specific regarding timely notification as the auxiliary prosecutor has only five days to request the opening of the preliminary investigation by an examining magistrate (s. 287-1b CCP).

There is controversy about practical implementation of s. 277 CCP. The criminal justice authorities claim that this duty being carried out, victims are usually notified of the final decision regarding prosecution. On the other hand, victim support workers say this is not the case. Unfortunately, no research has been done to determine the percentage of victims who are informed by the prosecution service.

(D. 9) The victim should be informed of:
-the date and the place of a hearing concerning;
-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.

The victim who acts as auxiliary prosecutor has the right to be informed of all the facts set out in the guideline. He is also entitled to be informed of his opportunities for compensation (s. 75 CCP). In practice, this information is given by means of a notification form (see § 6.1, A.2.). The law further stipulates that the auxiliary prosecutor and the civil claimant have

---

129 Information supplied by Mr. Amiral, sub-director of the Judicial Police in Lisbon, 12 April 1996.
130 Information supplied by victim support workers of A.P.A.V.
the right to a state-paid advocate if he is unable to pay for such services (§ 70 CCP, and ALA, see § 4.3). As a party to the proceedings, he is also informed of the date of the trial and the outcome of the case.

The civil claimant is also informed of the opportunity to obtain restitution and compensation (§ 75 CCP). He is, however, not informed of the date and place of a hearing, nor of the outcome of the case (see § 5.3).

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 general rule, police reports contain information on losses and injuries suffered by the victim. The statement on the victim's injuries must be given by the forensic legal institute (Instituto do Medicina Legal) and added to the legal file, for it to be considered complete. However, the primary concern of the authorities is to establish that a crime has occurred not to facilitate an eventual payment of compensation by the offender.

(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 statement is included in the legal file and thus available to the court. But it is not always accurate or complete. In fact, according to judges, it rarely contains all the information they need to decide on the question of compensation. Therefore, the victim himself is usually responsible for informing the court of his need to be compensated for his damage.

Offenders infrequently have paid any compensation or restituted stolen goods. However, the defence counsel will notify the court if his client has either paid compensation, or if he is willing to compensate the victim in the future in an effort to improve the court's opinion of the accused. In some cases the public prosecutor may inform the court.

7 The Victim and Compensation

The right of victims to receive compensation within criminal proceedings is a deep-rooted
principle in Portuguese society and criminal law and procedure. Both the Penal Code and the Code of Criminal Procedure contain the right of the victim to be compensated. Even the right of victims of violent crime to receive State Compensation is laid down in the Penal Code (s. 129-1 PC — see § 4.3).

The victim’s claim for compensation (pedido de indemnização civil) may be separated from the criminal proceedings (s. 72-1 CCP), for instance if the victim was not informed about the opportunity to claim compensation in criminal court in accordance with s. 75-1 and s. 77-2 CCP.\textsuperscript{136} However, as a general rule losses and injuries caused by a criminal offence must be presented in criminal court (s. 71 CCP). This rule differs greatly from rules in most other jurisdictions. Before the new Code of Criminal Procedure, another difference was that the criminal court had the right to award compensation on its own initiative, but now the victim should, as a rule, file a formal claim for damages (ss. 71 up to 85 CCP).

7.1 The Expediency Principle and Compensation

\textsuperscript{(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.}

Criminal proceedings are governed by the legality principle (see § 2.1). The public prosecutor is required to investigate all crimes which are brought to his attention (s. 262 CCP), and to bring an indictment when he has gathered sufficient evidence to establish that a crime has been committed by a suspect (s. 283 CCP). However, the legality principle is not absolute.\textsuperscript{137} Limitations in the strict adherence to the legality principle are a result of private and semi-public crimes. Here, the public prosecutor cannot bring charges if the victim does not agree.\textsuperscript{138} Second, the public prosecutor has limited powers to dismiss a case (arquivamento

\begin{itemize}
  \item In addition, civil claim for damages may be presented in civil court, according to s. 72-1 Ccp if:
    \begin{itemize}
      \item (a) 8 months have passed since reporting the crime and the prosecution service still did not bring charges;
      \item (b) there is a decision not to prosecute or to suspend the prosecution; or if the proceedings have been stopped before the sentence can be enforced (sentença transitar em julgado);
      \item (c) the proceedings depend upon complaint or private prosecution;
      \item (d) at the time of the criminal proceedings there were still no damages, or if they were not or only partly decided upon by the court;
      \item (e) the criminal sentence did not mention the claim for damages;
      \item (f) the claim for damages was presented against the accused and the civil responsible person or only against the latter, while the accused was the only person summoned to appear in court;
      \item (g) the value of the claim would lead to civil proceedings in full court and the criminal trial is presided by a single judge;
      \item (h) the criminal proceedings are pending before a military court or are held in a summary form;
      \item (i) the victim was not informed about the opportunity to claim compensation in criminal court.
    \end{itemize}
\end{itemize}

\textsuperscript{136} J. de Figueiredo Dias, M.J. Antunes (1993), pp. 322-323.
The public prosecutor may dismiss a case by closing the judicial investigation under the following conditions: a) if he cannot substantiate the charge; b) if he is unable to identify or accuse the perpetrator; and c) if public action is prohibited (s. 277 CCP). Even though, these are not real discretionary powers, the public prosecutor must inform, inter alia, the auxiliary prosecutor and the reporter of crime who may oppose a decision not to bring charges (s. 277-3 CCP). In practice, proceedings are infrequently dismissed.

Second, the public prosecutor may also dismiss the case, provided that he gets the explicit permission of the examining magistrate. Likewise, the examining magistrate may dismiss a case with the consents of the public prosecutor and the accused (s. 280 CCP). This section is only applied in cases of petty crime and where the Penal Code explicitly permits a dismissal. For instance s. 148 PC states that the examining magistrate may dismiss cases of bodily injury if the injury was not inflicted intentionally and are not causing more than three days of sick leave. It seems surprising that a dismissal under s. 280 CCP does not require the notification or the consultation of the victim, contrary to the previous two instances. However, the difference is justified by the legislature in that these are cases of minor offences without serious effects.

Third, the public prosecutor may suspend the proceedings conditionally if the sentence of an offence is less than five years of imprisonment (s. 281 CCP). But he must have the explicit consent of the examining magistrate, the auxiliary prosecutor and the accused. The fact that the consent of the auxiliary prosecutor is required before a decision to suspend proceedings can be made is a clear indication that the legislature is attempting to preserve the rights and interests of victims. The victim’s consent is closely linked to a long tradition of the public prosecutor taking into consideration the auxiliary prosecutor’s point of view.

As shown in the § 6.1 and § 6.2, the legislature is concerned with how suspensions might
affect victim compensation for material losses and moral damage (s. 281-2a, 2b CCP). If the conditions, such as the payment of compensation, are fulfilled, and the period of time is set for the duration of the suspension (maximum of two years), the case is dismissed and cannot be reopened (s. 282-3 CCP).

(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.

As mentioned in B.5, decisions not to prosecute are based on different criteria. Under s. 277 CCP, the victim has more than one option to have the decision not to prosecute the offender reviewed. A victim may ask a review of this decision by a high-rank public prosecutor within thirty days (s. 278 CCP). The prosecutor may then decide to either bring charges, continue the investigation, or agree with the decision not to prosecute. If a victim acts as an auxiliary prosecutor, he may ask the examining magistrate, within five days of notification of the decision, to examine the validity of the decision not to prosecute (s. 287-2b CCP). Unfortunately, because the victim must have assumed the role of an auxiliary prosecutor, others who have not are denied a judicial review. It is not possible to quickly become an auxiliary prosecutor after being notified of the decision not to prosecute. This must be done at least five days before the opening of the judicial investigation (s. 287-1b and s. 68 CCP).

Decisions in minor cases, under s. 280 CCP, cannot be opposed through a review (s. 280-3). Against the decision to suspend the proceedings, no appeal can be lodged (s. 281-5 CCP) nor can it be reviewed. The consent of the parties to the proceedings, i.e., the public prosecutor, the examining magistrate, the accused and the auxiliary prosecutor, is already a safeguard of the validity of the decision. It is unfortunate, nonetheless, that the consent of the victim who did not (yet) play the role of auxiliary prosecutor is not also required.

7.2 The Court and Compensation

Though, the 1988 Code of Criminal Procedure reinforced the position of the auxiliary prosecutor to the benefit of victims, the former Code of Criminal Procedure (1929) offered in many instances better protection of victim’s interests, e.g. regarding compensation. Traditionally, the court had the power to award compensation on its own initiative in the absence of a formal request by the victim. The 1988 Code of Criminal Procedure requires that victims present a formal claim for compensation to the court, up to five days before the trial. The claim must be substantiated with the necessary proof of the losses and injuries suffered. This new requirement was introduced, amongst other things, to adhere to the continental adhesion procedure and to make it more likely that big sums of compensation

---

147 The other conditions are aimed primarily at the protection of the victim, see § 8.
150 Until recently, the Code of Criminal Procedure stipulated that if the accused did not appear in court, the trial would be delayed until the defendant did appear. In 1998 (by Act 59/98, s. 10), this was changed. If the defendant does not appear in court for the second time without a valid reason, the trial will take place in their absence (s. 333-2 and 334 CCP). Under the former Code, persons who were accused simply disappeared, until they were arrested for another offence. This was very distressing for victims as there many delays. The rules of the 1929 Code have been reinstated.
are awarded by the courts. Before 1988, the courts usually awarded smaller sums, related to the financial capacity of the offender. This new perception of the question of compensation (see also s. 128 PC) stipulates that compensation is a matter of private law and, therefore, needs to be the result of a formal request by the victim.

In practice, this modification tended to be very disadvantageous to victims. Because the vast majority of victims were not informed about the change in the law, they arrived in court with false expectations regarding compensation. This situation was frustrating both for victims and judges. Furthermore, many problems arose because victims do not know how to make a substantiated claim, particularly if they are not assisted by a lawyer. In 1996, Victim Support presented a proposal to the Minister of Justice by which the court would again be allowed to award damages on its own initiative. Fortunately, in 1998, the government agreed to the A.P.A.V. request, and returned to the court the power to award compensation without a formal request by the victim. However, the legislature did not totally reinstate this power of the court. The courts can only award compensation without a formal claim under special circumstances, when the rights and interests of victims need ‘special’ protection (s. 82A CCP).

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

Claims for compensation must be presented in criminal court (s. 71 CCP), unless the law stipulates otherwise (s. 72 CCP). Since 1998, the court can award compensation both with and without a formal request. As stated earlier, victims can file a formal claim for compensation up to five days before the trial. According to members of the judiciary and volunteers of A.P.A.V. (see § 3.6), judges frequently encounter cases in which victims would be entitled to civil damages but where no formal claim has been made. In 1998, the court was again allowed to award compensation without a formal claim in those cases where the special needs of the victim or the need to protect the rights of the victim would call for such reparative action of the court (particulares exigências de proteção da vítima). This means in practice that in a limited number of cases compensation can be awarded ex officio. Given the fact that courts always have awarded compensation without a formal request, it is expected that they will act in accordance with section 82A CCP. On the other hand, because compensation is now explicitly governed by private law (s. 82 CCP, s. 128 PC), problems common to all adhesion procedure-models occur. In 1994 and 1995, less than fifty percent of the claims for compensation were actually awarded by the court. Whether this is caused by the inadequacy of the presented claim, the absence of sufficient evidence, or the attitude of the judiciary is unclear. However, what is needed to evaluate the changes in law is to know how many times victims were compensated under the previous 1929 Code. What is common knowledge is that victims who have file a claim for damages generally are

---

151 See the introduction to the new Code of Criminal Procedure, under point 6.
152 A.P.A.V., Proposta de revisão das normas do actual Código de processo penal, April 1996(b).
154 In 1994, of the 12,168 claims for compensation presented in court only 4,904 were awarded (indemnizações arbitradas). In 1995, 15,925 requests were made of which 6,649 were granted. See the justice statistics for the years 1994 and 1995, Estatísticas da Justiça, respectively pp. 158, 164.
granted less compensation by the court than asked. This is said to be caused by the fear or suspicion of judges that victims attempt to profit from the situation and ask for more than to which they are strictly entitled.\textsuperscript{155}

\textit{(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 is governed by private law, albeit that it may be imposed without a formal request (see D.10). Also, compensation may be imposed in addition to a penal sanction or in combination with a suspension of the proceedings. Normally compensation is awarded in addition to a prison term. In addition, the court may give a warning (\textit{admoestação}) to the defendant in stead of a fine, on the condition that the defendant has fully compensated the victim. The court must be convinced that payment of compensation is sufficient punishment for the crime committed (s. 60-2 PC). The court may also choose not to impose a penal sanction (\textit{dispensa da pena}, s. 74 PC) for crimes for which the penalty is less than six months' imprisonment on condition that the offender has compensated the victim.

Portuguese criminal procedural law provides for the suspension of the proceedings (\textit{suspensão provisória do processo}) if the penalty for the crime committed is less than five years’ imprisonment and compensation is paid (s. 281-2(a), (b) CCP). It is interesting to note that when proceedings are suspended, conflicts are usually solved through meetings between the offender and the victim which take place in the public prosecutor's office.\textsuperscript{156} Supervision of the conditions imposed on the offender is left to the probation services (\textit{serviços de reinserção social}, s. 281-4 CCP – see § 3.5). In practice, the option to suspend proceedings is not frequently used. In 1988, only 1% of cases where a defendant was indicted ended in a suspension.\textsuperscript{157} Although this percentage probably has risen during the past ten years, there is no indication that there has been a spectacular rise. According to probation officers, the option is not often used. Probation officers would especially like to see the suspension of proceedings, combined with the payment of compensation to victims, for juvenile offenders.\textsuperscript{158}

Finally, the court may reduce the sentence of offenders by 50% if they have compensated the victim for all his losses or otherwise provided restitution. In case of partial compensation or restitution, the sentence may be reduced proportionally (s. 301 PC). In practice, this option is quite frequently applied. Though it depends to a great extent on the defence strategy as the lawyer will not encourage for his client to pay compensation or restitute goods if they will be denying his guilt.\textsuperscript{159}

\textsuperscript{155} Information supplied by Judge Faria, criminal court in Lisbon, 16 April 1996. Also confirmed by various lawyers and victim support workers of of A.P.A.V.


\textsuperscript{157} M.R. Crucho de Almeida (1993), p. 111.

\textsuperscript{158} Information supplied by the coordinator of the probation service in Lisbon, Mr. Carlos, and members of his staff, Lisbon, 19 April 1996.

\textsuperscript{159} Information supplied by P. da Matta, J. Lázaro, 13 September 1999.
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 to compensation by the offender to the victim.

In light of an agreement on the part of the accused to pay compensation to the victim or to make restitution, the court may order the suspension of proceedings (ss. 48, 49 PC and s. 281 CCP, see D.12), a suspended sentence (suspensão da execução da sentença, ss. 50, 51 PC), probation (ss. 53, 54 PC) or a conditional release (s. 61 jo. 72-2e PC).\(^\text{160}\) No research has been done on how frequently these measures are used in practice. However, a study conducted in 1999 showed for the possibility of compensation is infrequently used as a condition for early release.\(^\text{161}\)

The court may consider awarding compensation by several other means. It is empowered to choose freely between imprisonment and another sanction which would facilitate the offender’s rehabilitation and enhance his capacity to compensate the victim (escolha da pena, s. 71 PC jo. s. 72-2e PC). The court may also limit the sentence (atenuação especial da pena) inter alia on the condition that the defendant compensated the victims for his losses (s. 72 PC). It may order the payment of compensation must be guaranteed (caução econômica, s. 227-2 CCP) or that a part of the wages earned for work done in prison be used to make payments to the victim.\(^\text{162}\) The court may also offer official rehabilitation to offenders who can prove having compensated the victim.\(^\text{163}\)

Unfortunately, there are no studies on whether these measures are frequently used. But that there exist possibilities clearly demonstrates that judges, who feel that compensation is important, can facilitate the payment of compensation to victims.

### 7.3 Enforcement of Compensation

In order to appreciate how important it is for the average Portuguese victim to receive compensation, one must realize that the insurance rate and the coverage provided by insurance differs considerably from other countries, especially from those in northern Europe. Although medical insurance is available to all citizens, all medical expenses are not covered. As a result, victims must attempt to recover expenses from offenders or the state (see § 4.3). Except for compulsory fire and automobile insurances, most Portuguese are uninsured because they cannot afford premiums. Relatively few Portuguese have property coverage so, unlike in countries where property damages is generally covered by insurance companies, the only hope for compensation is that awarded by the court.\(^\text{164}\) Consequently, many Portuguese victims consider compensation to be a more adequate and satisfying punishment (32%) than imprisonment (21%).\(^\text{165}\)

---


\(^\text{162}\) S. 72 do Lei no. 265/79, de 1 de Agosto, 'Execução das medidas privativas de liberdade'.

\(^\text{163}\) Section 101-1 do Dec.-Lei no. 738/76, de 29 de Outubro relating to the tribunals charged with the enforcement of sentences (tribunais de execução das penas).

\(^\text{164}\) Information supplied by the lawyers Ribeiro Cardosa and Basilio Luis, Lisbon, 18 April 1996.

\(^\text{165}\) Victim Survey of 1994, p. 100.
(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.

As mentioned earlier (§ 7.1, D.11), the court has several means of facilitating payment of compensation from the offender to the victim. It should be stressed that Portuguese law contains several provisions which are aimed at the rehabilitation of offenders and which allow them to remain employed while serving their sentence. This improves the financial ability of offenders to pay compensation to victims. Indeed, experience shows that once a perpetrator is convicted and sent to prison, it is much more difficult for victims to collect the money. Despite the fact that 50% of the prison wages can be set aside for compensation of victims, only 25% of his paycheck is available to the victim if detainees have to support their families as well (s. 72 Act 265/79). In practice, it rarely happens that probation or prison services assist the victim in collecting the prison wages to which they are entitled to. Victims are generally unaware of the possibility to claim part of the wages, and prison and probation workers do not particularly want to assist victims in the collection of wages. Despite all the efforts by the legislature to facilitate the payment and enforcement of compensation, it is still often quite difficult for victims to collect the money. One of the reasons for this is that victims get little to no assistance from the authorities, such as the prison or probation services. Furthermore the court responsible for the enforcement of sentences (tribunal de execução de penas) cannot enforce the private claim for civil damages not can it supervise compliance with the part of the sentence concerning compensation. It only supervises the enforcement of penal sanctions, such as imprisonment or the conditions attached to a suspension or probation order.

As a result, the victim must, as a rule, try himself to collect damages from the offender. This is generally rather difficult. A victim who has legal representation will usually be more successful as his lawyer will assist him with the collection of money. Many lawyers directly benefit if compensation is collected as they may depend on that to recover their fees.

8 TREATMENT AND PROTECTION

8.1 Victim-Awareness Training

Judges and public prosecutors
Until 1980, no training especially designed for members of the judiciary existed in Portugal. Since then a School for the Judiciary (Centro de Estudos Judiciarios) has been established. To date, however, victimological issues are not discussed during the training of judges and public prosecutors.

166 See ss. 43-46, 48, 49, 53, 54, 59-61, 71 and 75 PC; ss. 280, 281 and 392 CCP.
169 Information supplied by P. de Matta and J. Lázaro, 13 September 1999.
170 There is more than one court involved. The court awarding the damages is not the same as the one that has power for enforcement of sentences.
171 Information supplied by lawyers working as volunteers at A.P.A.V., Lisbon, 11 April 1996.
172 See Act nr. 16/98, Lei que regula a estrutura e funcionamento do Centro de Estudos Judiciarios.
public prosecutors. A.P.A.V., however, sometimes provides a few hours training on the needs and rights of victims.

**Police**

The PSP-Academy (*Escola Superior de Polícia*),\(^{173}\) established in 1982, offers a four-year curriculum which comprises subjects such as psychology, criminology, public relations and communication techniques which, among other things, covers sometimes the position of the victim.\(^{174}\) The programme of the academy is only for higher-ranked officers and equals a university degree. Ordinary policemen of the PSP are only trained for six months.

The judiciary police are trained for nine months at the PJ-school (*Escola de Polícia Judiciária*/*Instituto Nacional de Polícia e Ciências Criminais*), which began training of the judiciary police in 1978. The curriculum does not contain explicit victim-oriented subjects but police ethics and communication techniques are taught. The PJ-school has good relations with Victim Support (A.P.A.V.) and at the end of each year a seminar is given to teach the students about the particular needs of victims.\(^{175}\)

Police schools and academies provide basic, permanent and advanced training courses for incumbent personnel, who need to follow these if they want to be promoted to higher ranks, and other law enforcement agents. However, these courses do not cover victim-oriented topics.

Training of members of the GNR is different because it falls under the Ministry of Defence and the Home Office. Ordinary personnel may enter GNR with only nine years of compulsory education, which means that they may be 16 years old.\(^{176}\)

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

To date, no official programmes exist to train the police how to deal with victims. The police are also not trained how to deal with, for example, children or victims of sexual crimes. The only training available to all police forces with respect to the treatment of victims and their rights and interests is provided on a modest scale by private and public services, involving A.P.A.V. and the Commission for Equality and Women's Rights (*Comissão para a Igualdade e para os Direitos das Mulheres*). These organizations try to make police officers more sensitive to the way in which victims may react to crime. They organize lectures and seminars to make police officers aware of the risk of secondary victimization, for instance, during the questioning of victims.\(^{177}\) This situation may change in the very near future with a Resolution to implement the INOVAR project.\(^{178}\) INOVAR is a project of the Ministry of the Interior to improve the relationship between the police forces and the population by promoting victim support and a proper treatment of victims by the police

\(^{173}\) *A Escola Superior de Polícia, Decreto-Lei nr. 432/82 of 15 October and 402/93 of 7 December 1993.*

\(^{174}\) *Plano de estudos do curso de formação de oficiais de polícia, Ministério da Administração interna e da Educação, Portaria nr. 298/94 (anexos) de 18 de Maio 1994.*

\(^{175}\) Information supplied by Mr. Loio, teacher and psychologist at the PJ-school (*Instituto Nacional de Polícia e Ciências Criminais*), 17 April 1996.

\(^{176}\) Information supplied by Mrs. Pedrosa, teacher in criminal law at the the PJ-school (*Instituto Nacional de polícia e ciencias criminais*), 17April 1996.

\(^{177}\) Information supplied by Mrs. Brito Lopes, Commission for Equality and Women’s Rights, Lisbon, 15 April 1996.

\(^{178}\) *Resolução do Conselho de Ministros, nr. 6/99 of 8 February 1999.*
forces (s. 1 Resolution). The INOVAR Committee (grupe de missão INOVAR) has established the following two rules: 1) every victim should be treated as an individual who deserves sympathy and respect and who should not be blamed for what has happened, and 2) the victim should be informed and guided through the criminal process. The first objective of the INOVAR Committee is to train police officers on how to deal with victims of crime and, in particular, how to treat the most vulnerable victims such as children and tourists, and those at the highest risk, such as the elderly and women. The Committee must have established special training programmes and behavioural coaching sessions for all police officers teaching them how to deal with victims by 2001.179

Changes in the training of the police forces are gradually beginning to show some results and are supported by the INOVAR project. Already, the attitude of young police officers is very different from that of their older colleagues. They are more aware of the need to improve the public image of the police and are conscious of the fact that the police should treat the public, and victims in particular, in a polite and friendly manner.180

Even before the INOVAR project, the government made an effort to improve the police facilities and working conditions. In 1990, the government already stated in the working plan ‘Grandes Opções do Plano’ that the treatment of victims at police stations has to be improved,181 which was repeated in the working plan of 1996.182 New police stations were built to provide for a better reception of victims and offer the possibility to question them in privacy. Many of the old police stations are situated in former convents which have a rather depressing atmosphere and where it is difficult to assure the privacy of victims as they report a crime. In general, the need for privacy for victims is more understood and respected. However, there are still no interviewing studios to interrogated children, persons with mental disabilities and victims of sexual crimes, nor any specially trained officers to question them (see § 8.2). However, this may change within the coming years if the INOVAR project succeeds in its mission. Already in 1991, the Act on the Protection of Women (see § 4.3) called for the creation of special units to assist female victims of sexual or violent crime, including domestic violence (secção para atendimento às mulheres vítimas do crime, s. 1-1 and s. 7 APW). These units would, inter alia, have the duty of informing victims about their rights, assisting them with the preparation of their cases in court, and referring them to

---

179 Other objectives are inter alia:
   a) better reception facilities at the police stations and separate rooms to speak in private with victims;
   c) setting up data systems on victim support activities undertaken by the police, such as handing out support leaflets, as well as a registration system of complaints filed by victims etc.;
   d) collecting statistical data in a national data base on services provided to victims;
   c) setting up an INOVAR guide for citizens which contains relevant legislation, such as the State Compensation Act, and services;
   f) designing protocols or ‘victim-contracts’ between the social services and public authorities to improve the quality of services;
   g) enhancing the awareness among hospital personnel of the needs of certain victims who need emergency treatment but claim it was caused by an accident;
   h) developing a plan for public action regarding victims of domestic violence, (etc.).

180 Information supplied by Figueiro, chief of police (PSP) in Benfica, Lisbon, 16 April 1996.
professionals, e.g. psychologists, or social and victim services for further assistance (s. 8 APW). In 1999, however, no such special units have been established, nor have police officers been trained to give direct assistance to women. Only a limited number of officers have been given a few hours training by services such as A.P.A.V. It would be advisable to set up such specialized units as soon as possible.

In practice, despite improved in the amount of attention given to the treatment of victims, the 1994 Victim Survey shows that approximately 50% of victims are dissatisfied with their treatment by the authorities. Victims indicated several reasons why there were dissatisfied (more than one reason could be indicated): 74% claimed that the authorities did not show any interest in their case; 28% mentioned that they had not received any information from the authorities, and 23% complained about unpleasant and impolite treatment.\(^{183}\) Other studies also reveal the relatively high level of dissatisfaction with the police. According to Crucho de Almeida, a much greater percentage of victims are dissatisfied with the police (62%), because the police are not interested (49%), do not provide information (14%) or are simply rude (8%).\(^{184}\) These figures, combined with the very low level of reporting in Portugal of approximately 25%, are cause for great concern.\(^{185}\) For that reason, the implementation of the 1991 APW and the success of the INOVAR project are essential for the restoration of public confidence in the police forces and the criminal justice system.

\section*{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.

In general, victims are not questioned with due consideration of their need for privacy. According to volunteers of A.P.A.V., this is even the case for victims of very serious crimes despite the 1991 Act for the Protection of Women (see § 4.3 and § 8.1). Routinely, victims reporting crimes are questioned in very crowded rooms at a desk where victims are seated near them (chair next to chair), separated only by a small partition. They must tell their

\(^{183}\) Victim Survey of 1994, p. 96.

\(^{184}\) Other complaints mentioned in the survey are that the police did not apprehend the offenders (34%), they did not take action after the crime was reported to them (33%), they did not find the stolen objects (27%) and finally that the police are too slow (17%) in: M.R. Crucho de Almeida (1993), p. 105.

\(^{185}\) According to reports of Amnesty International and the U.S. Department of State on Portuguese human rights practices, the negative perception of the police is not surprising. The police forces show much of the culture of the pre-democratic era, which leads to police brutality. The Portugal human rights report of the U.S. department of state, 1994, section 1.c, for instance, mentions the following to illustrate the frequency of police brutality: After the allegations of police brutalities, the Portuguese authorities started a formal investigation in 1992, which continued in 1993 with no announced results. The PSP itself responded through a press release and stressed that its selection and training processes were improved and that internal disciplinary actions had been taken against officers accused of the maltreatment of citizens, as a result of which 64 PSP members were dismissed between 1991 and 1993. In fact, these figures are not really surprising given the fact that many policemen entered the force with only primary school education and did not receive adequate training.
story which is clearly audible to others seated next to them as well as to the numerous persons waiting elsewhere in the room or in the hallway. Even when volunteers of A.P.A.V. accompany victims of serious crime, the police question them in the same manner, showing clearly that this is in fact standard procedure. Despite the fact that victims of sexual offences should get special treatment according to police procedures and under the 1991 Act, they are questioned in the same manner. According to victim support workers, the police are often unaware of their own procedures which call for questioning by female officers, in separate, private rooms.\textsuperscript{186} Victim support workers who have accompanied victims of sexual crime report that they must often remind police officers of the existing special procedures for victims of sexual crimes. On several such occasions the police had to study the police manual, at the request of victims support workers, before continuing questioning in the manner prescribed therein.\textsuperscript{187}

There were no special procedures for the questioning of victims in court, including victims of serious crime or particularly vulnerable victims (see § 5.6), until 1999, with the exception being witnesses under the age of 16. In this case, the president of the court conducts the questioning of minors and no direct questioning by other parties is allowed.\textsuperscript{188} The 1999 Witness Protection Act introduced protective measures for vulnerable victims, e.g. due to their young or old age, or (mental) health as well as those who have to testify against family members of persons on whom they are dependant in cases of domestic violence (s. 26 WPA). It is peculiar that victims of sexual offences or the mentally disabled are not mentioned in this law. Victims, however, who fall within the scope of section 26 WPA are accompanied during questioning by a social worker or another person they trust and may be provided with psychological assistance and support (s. 27 WPA). The examiner must not subject vulnerable witness to repetitive questioning (s. 28 WPA). During the trial, the presiding judge must make sure that these victims are not directly confronted with the accused, if it is feared that they might not be able to give free, spontaneous or true statements. To do this, the judge may decide to allow the vulnerable witness to testify through a live television or video link. The presiding judge directs the questioning but allows the other parties to suggest additional questions (s. 29 WPA). If necessary, the judge may be assisted by a social worker (s. 31 WPA).

The public prosecutor and the defence lawyer question all other victims directly and usually without much consideration. Judges may intervene but only if they consider the line of questioning to be irrelevant or impertinent (s. 323 (g) CCP. Whether they intervene in practice depends on the attitude of the presiding judge towards the protection of victims against hostile questioning. Since according to members of the judiciary themselves there is little awareness of the concept of secondary victimization, judges do not readily intervene. They are much more aware of the rights and interests of the accused than of the rights of victims.\textsuperscript{189}

\textsuperscript{186} Victims of sexual crimes have to be examined by a medical doctor of the institute of legal medicine (\textit{Instituto de medicina legal}). The police accompany the victim to the institute.

\textsuperscript{187} Information supplied by several professional victims support workers and volunteers of A.P.A.V in Lisbon and Coimbra.

\textsuperscript{188} Information supplied by Mr. Amiral, Assistant Director of the Judicial Police in Lisbon, 12 April 1996.

\textsuperscript{189} Information supplied by judges, lawyers and members of A.P.A.V at various times during my stay in Portugal.
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 judgment should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate.

The protection of witnesses against any publicity which might unduly affect their private life or dignity represents a genuine problem in the trial stage. There are far fewer problems in the pre-trial stages with the handling of information and public relation policies than later on in the criminal proceedings. The police are bound by the secrecy principle and are not allowed to make statements to the press which would reveal specific information about a case. Furthermore, the media (órãos de comunicação social) are only allowed to publish the few legal documents which are not subject to the rule of confidentiality (s. 88 CCP). It is also forbidden to reveal the identity of minors under the age of 16 who are victims of sexual crimes or of crimes against the honour. These control mechanisms mean that no detailed information can be made public until the court has reached a decision on whether a case will be tried in open court or behind closed doors. And so there is no real publicity until the case goes to trial.

During the trial stage, the situation is very different. If the court decides to hold the trial in public and the media are interested in the proceedings, there will be full scale publicity. The press will likely publish the names of the accused and victims involved. Although pictures cannot be taken in the courtroom, photographs taken outside the court building are published. These pictures are easily taken because most courts are former convents and have only one door for entry and exit which all parties must use. Images of trial hearings cannot be published unless permission has been granted by the court but they do allow filming in the court room with two major restrictions: the faces of the persons present cannot be filmed nor may their voices be recorded. In addition, the media are not allowed to publish legal documents or acts before the verdict of the court. The sanction for such publications is contempt of court. Unfortunately, this does not always prevent publication, particularly in cases which attract a large number of readers or viewers.

During the trial, problems may arise because victims must always give testimony in court as no pre-trial statements cannot be used, with the exception of certain declarations (declarações para memória futura) of very ill witnesses and witnesses living or staying abroad (s. 271-1 CCP). The only protection available to the non-threatened victim-witness (see § 8.3) is to hold the trial in camera. The presiding judge may decide to hold all or part of the trial behind closed doors if this is necessary to safeguard the personal dignity of persons involved in the case, to uphold public morals, or to ensure the proper working of the court itself (s. 209 Const., s. 321 CCP). The legislature has also given auxiliary prosecutors, who are victim of a sexual crime, the right to ask the court to restrict publicity if they fear it will unduly affect their private life or dignity and they may request that certain judicial acts and decisions will not be made public (s. 87 CCP). However, judges are not always willing to

190 Information supplied by Mrs. Brito Lopes, lawyer and employed by the Commission for equality and women’s rights, Lisbon, 15 April 1996.
respond positively to such requests.\footnote{Information supplied by lawyers working at A.P.A.V., 11 April 1996.}

\textit{(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, the examining judge above all has the power to protect the victim-witness against intimidation or retaliation by a perpetrator. He may, for example, impose coercive measures if the accused risks to interfere with the investigation or the collection of evidence (s. 204 CCP). The examining magistrate may order the payment of bail (\textit{prestar caução}, s. 197 CCP) or order the accused to report periodically to the police (s. 198 CCP). The examining magistrate may also protect the victim-witness by suspending certain rights of the defendant, such as his parental rights if he is accused of a crime punishable by more than five years imprisonment\footnote{O.M. de Oliveira, \textit{Problemática da Vítima de Crimes, Reflexos no Sistema Jurídico Português}, Rei dos Livros, Lisbon, 1994, pp. 74-75.} (s. 199 CCP). Or, the examining magistrate may order the defendant not to contact certain persons, not to visit certain areas, not to leave a designated area without permission or from contacting certain persons (s. 200 CCP), or not to leave his house without authorization (s. 201 CCP). If the suspect violates these orders, other measures of coercion may be imposed (s. 203 CCP). As a last resort, the accused may be taken into preventive custody (s. 202 CCP).

The civil claimant has the right to ask the court to impose certain conditions, e.g. an order not to frequent a certain area (s. 200 CCP). Conditions may be imposed if the offence is punishable with more than three years imprisonment\footnote{Mr. Ribeiro Cardoso and Mr. Luis mentioned the following case as an example of how the criminal and civil justice system with relation to the protection of the victim. A woman was physically abused by her husband and her daughter was sexually abused as well. In 1993, the woman reported the crime and eventually prosecution was started against the husband. The woman got a divorce but the husband was granted visiting rights and the sexual abuse of the daughter continued. In 1995, the woman went to civil court to ask the court to forbid the visits of her ex-husband to her daughter. The civil court refused because the criminal court had not decided yet upon the case of abuse. She then wrote to the public prosecutor to ask him to contact the examining magistrate and ask for the application of section 200 CCP to forbid the contacts between the father and the daughter pending the criminal proceedings. According to the lawyers, the fact that the measure was not imposed – although the public prosecutor and the examining magistrate knew very well that the sexual abuse of the daughter continued – is an example of the attitude of the many members of the criminal justice authorities towards victims, and of their insensitivity to their problems. Others lawyers and volunteers of A.P.A.V. corroborated this example and told similar stories.} (s. 200 CCP). In practice, however, examining judges are not inclined to use their powers to restrain the freedoms of the accused.

The possibilities for protecting the victim in court from intimidation by the offender are limited. The court can only sanction intimidating behaviour by removing the accused from the court room, if the court feels that his presence will prevent the witness from telling the truth or if his presence seriously compromises the physical or moral integrity of the witness. The legislature explicitly stresses the possibility of removing the accused during the testimony of a witness under the age of 16 (s. 252 CCP).
The 1999 Witnesses Protection Act (WPA)\textsuperscript{194} will be a great leap forward for the protection of witnesses, if the protective measures will be put into action. Though the protective measures are of an exceptional nature and can only be applied if they are needed to ensure the proper functioning of the criminal process (s. 1-4 WPA). The main objective of the Act is to ensure protection for witnesses whose life, physical or psychological integrity, or property is threatened (s. 1-1 WPA). Family members and other persons close to the threatened witness may also benefit from the special measures it introduces (s. 1-2 WPA). Moreover, particularly vulnerable witnesses, such as children, may also be protected by special measures, even if they do not fulfill the criteria of subsection 1 (s. 1-3 WPA). For the protection of threatened witnesses, the Act contains special measures, including the distortion of the voice of witnesses and the disguise of their image (s. 4 WPA) and the use of a closed-circuit television or video link (teleconferência, s. 5 WPA), or both. If the technical means allow the use of such a link, the court has the right to see the images of the witness without the distortions (s. 14 WPA). The use of a live television or video-link may be requested by the public prosecutor, the defendant or the witness (s. 6 WPA). The testimony by television or video link is given in a public building, such as a court, police station or prison facility, which has the necessary equipment (s. 7 WPA)\textsuperscript{195} and a separate room used to take the witness' statement. Also, a magistrate should be present to identify the witness on behalf of the presiding judge in the court room and to ensure that the statements are given spontaneously and out of free will. Furthermore, he should attest the authenticity of the video registration and insure that it is not compromised. The examining magistrate may also act as an intermediary person between the presiding judge and the witness (s. 10 WPA).

The Act allows a witness to testify anonymously regarding crimes punishable by more than eight years' imprisonment and in the case of organized crime (s. 16 WPA). Whether or not to allow this is determined by the examining magistrate following a request by the public prosecutor (s. 17 WPA). The examining magistrate first consults the Bar Association to ensure adequate legal counsel for the defendants (s. 18-3 WPA). Then the examining magistrate, the public prosecutor and the defence counsel meet to discuss the request (s. 18-4 WPA). The court's verdict cannot be uniquely based on the anonymous testimony (s. 19 WPA).

The Witness Protection Act contains a protection programme for all threatened witnesses. Witnesses and their families can be relocated to another place of residence during the criminal process, be transported by an armoured vehicle to and from the court building or the interviewing room, be assigned a private waiting room in court, be put under police protection, and be kept in prison under a special regime which allows him to be isolated of other prisoners and to be transported (s. 20 WPA).

A special security programme is available in cases involving organized crime, or when the life, liberty, physical or psychological integrity of a witness is seriously threatened, or if his testimony is considered essential to the discovery of the truth (s. 21 WPA). Under the special security programme, a witness may change his appearance or his identity, and he may be relocated elsewhere in Portugal or abroad, as well as given the (financial) means to build a life in his new place of residence (s. 22 WPA).

Victims who are not covered by the Act can be protected by the imposing of rules of

\textsuperscript{194} Act nr. 93/99 of 14 July 1999, regula a aplicação de medidas para protecção de testemunhas em processo penal.

\textsuperscript{195} Member of the technical staff who perform the registration of the testimony shall be punished if they compromise the protection of the threatened witness s. 9 WPA).
conduct on the offender in the post trial stage. The court may order the offender to refrain from carrying out certain occupations or professions, from staying in certain specified places, from residing within a defined area, from making contact with certain persons, from joining certain associations or attending certain meetings; and from possessing objects with the purpose of committing another criminal offence (s. 54 PC). Other conditions covered in the Penal Code are arranging bail, reporting periodically to a the police of a probation officer, accepting compulsory treatment in a psychiatric hospital, a drug rehabilitation clinic or any other therapeutic institution. The court may attach such conditions to a suspended sentence (suspensão de execução de pena, s. 50 – 52 PC), a probation order (regime de prova, s. 53 -56 PC), or conditional release from prison (ss. 61-64 PC).

9 CONCLUSIONS

The Portuguese criminal justice system has been considerably revised and modernised since the 1974 Revolution. The primary aims of the extensive legal reforms were to ensure respect for human rights as laid down in the European Convention and to safeguard the rights of defendants. There has been a gradually growing willingness has been gradually growing to protect the rights and interests of victims of crime according to international standards. Also, the initiatives to repair the negative effects of the legal reforms regarding compensation are noteworthy. This is most clearly shown by recent legal reforms such as the State Compensation Act, the Act on the Protection of Women and the Witness Protection Act. However, progress still must be made in the actual implementation of these legal reforms.

The position of victims within criminal proceedings could be further enhanced by allowing more victims to assume the role of auxiliary prosecutor (assistente) during the pre-trial and trial stages. This role is a traditional and a remarkable victim-oriented feature of Portuguese law that not only allows victims to participate in the criminal process and to claim compensation but also gives victims official standing. As an auxiliary prosecutor, the victim’s role is not limited to a claim for compensation. He may play a more extensive role as a genuine party to the proceedings. The Primary reason for the relatively small number of victims assuming this role is the lack of information.

This lack of information is a more general deficit of the criminal justice system. It is advisable that victims are provided with more information about their rights and opportunities in criminal proceedings. The police should be required to inform every victim who reports a crime of his resources for obtaining assistance, how to obtain practical and legal advice, and the possibilities for compensation from the offender and from the state. Information on relevant developments in a case, such as the outcome of the police investigation or a final decision on prosecution, should not be limited by whether a victim takes on a formal role nor should only negative outcomes or decisions be communicated. The exchange of information about the victim’s losses and injuries between the criminal justice authorities should also be improved.

Recent legal reforms which again allow the court to award compensation without a formal claim reflect a victim-oriented attitude. However, the enforcement of the court’s decision on compensation and the collection of the money by the victim could be improved by allowing the national debt collection agency, which collects fines, also to collect compensation on behalf of victims.

Finally, the treatment of victims would be improved by integrating victim-awareness training into the official curriculum of police schools and academies and the curriculum of
the Judicial Studies Centre for the judiciary to enhance awareness of the rights and interests of victims. This may also for both police officers and the judiciary improve the manner in which victims are questioned. At the same time, awareness must be raised regarding the special needs of certain victims, in particular children, persons with mental disabilities, victims of sexual or violent crimes. These victims must be protected from publicity, intimidation and retaliation. As a first step toward a better protection of numerous victims the law in the books must be implemented in day-to-day legal practice.
Supplements

ABBREVIATIONS:

AAC - Act on the Access to the Courts
AFL - Act on Free Legal Aid
A.P.A.V. - Portuguese Victim Support Organization (Associação Portuguesa de Apoio a Vítima)
APW - Act on the Protection of Women
CCP - Code of Criminal Procedure
Esc. - Escudos
GNR - National Republican Guard (Guarda Nacional Republicana)
PC - Penal Code
PJ - Judicial Police
PSP - Public Security Police
SCA - State Compensation Act
WPA - Witness Protection Act

BIBLIOGRAPHY:

A.P.A.V. (1996a), Dossier Informativo, Informative dossier


Figueiredo Dias, J. de (1974), Direito processual penal, Editor, Coimbra.


Ministry of Justice, Working plan (1990), Grande Opções do Plano o Relatório em anexo à Lei nr. 64/90, de 28 de Dezembro, Diário da Rep., 1 Serie, 3nd Supplemento.


Reutes de Carvalho, J. (1989), Portugal, De Arbeiderspers, Amsterdam.


Roma, M.Q. (1995), Criminal justice and police systems: management and improvement of police and other law enforcement agencies, prosecution, courts and corrections, and the role of lawyers, Bureau of Comparative Law, A/Conf.169/G/Portugal/3.
Secretaria de Estado da Justiça (1995), Os direitos humanos e a violência contra as mulheres, Lisboa.

WITH MANY THANKS TO:

M.R. Almeida, Ministry of Justice, research department (Gabinete de Estudos e Planeamento)
Mr. Amiral, sub-director of the judicial police, Lisbon.
C. de Brito Lopes, Committee for Equality and Women’s Rights, Lisbon.
R. Busse, A.P.A.V., Lisbon
Mr. Carlos, probation officer, Lisbon.
M. Carvalho, A.P.A.V., Lisbon.
A.C. Ribeiro Cardoso, lawyer, Lisbon.
Mrs. Faria, judge at the district court, Lisbon.
E. Ferreira, National Institute of Police Sciences and Criminology, Lisbon.
M.A. Ferreira Antunes, public prosecutor (Procurador-Geral Adjunto) and Director of A.P.A.V., Lisbon
J. Figueiros, PSP, Benfica, Lisbon.
J. de Figueiredo Dias, professor of the Coimbra University, Coimbra.
J. Lázaro, lawyer and staff member of A.P.A.V., Lisbon.
Mr. Loio, psychologist and teacher at the PJ-school, Lisbon.
B. Luis, lawyer, Lisbon
L. de Miranda Pereira, A.P.A.V., Lisbon.
I. Patricio, judicial police, Lisbon
Mrs. Pedrosa, teacher at the PJ-school.
D. Pinto da Costa, Institute of Legal Medicine, Porto.
M.C. Portugal, lawyer, Lisbon.
M.Q. Roma, Bureau of comparative law, Lisbon.
C. Romano, National Institute of Police Sciences and Criminology, Lisbon.
P. Saragoça de Matta, lawyer, Lisbon.
R. Tasares da Silva, Committee for Equality and Women’s Rights, Lisbon.
Chapter 20

Scotland

Scenery

The United Kingdom (UK) comprises Great Britain and Northern Ireland. Great Britain (GB) consists of the island of Great Britain (England, Wales, and Scotland) and a series of smaller islands. The United Kingdom consists of the three separate jurisdictions of England and Wales, Scotland, and Northern Ireland. Until the late 1990s, legislature 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 Scotland, which is in the North of the island of Great Britain. It covers an area of 30,414 square miles and has a population of just over 5 million, which is about 9% of the total population of the United Kingdom. The Scotti first arrived from what is now Northern Ireland in the fourth century, and established a kingdom that remained independent for many centuries. Scotland's rugged Highlands and harsh climate served as natural defences, and made it one of the more impenetrable parts of the UK. The Romans never made it into the Highlands, instead preferring to seal off Scotland by building Hadrian's wall. The English were more persistent. Their campaign to conquer Scotland was launched at the end of the 13th century by Edward I of England, whose most ignoble deed in Scottish eyes was undoubtedly the stealing of the Stone of Destiny on which generations of Scottish Kings had been crowned. The stone was not returned to Scotland until 1996. In time, the many wars of independence against the English took their toll on Scotland and its economy, and it eventually agreed to the Act of Union of 1707. The act disbanded the Scottish parliament and effectively placed Scotland under English rule. However, although legislation for Scotland was now made by the UK parliament, the Scots did retain their own legal system and court structure, which has remained separate from the English legal system throughout. Now, with the reinstatement of the Scottish parliament, the Scottish legal system is on the eve of a new era.
PART I: THE SCOTS CRIMINAL JUSTICE PROCESS

1 INTRODUCTION

The Scottish legal system is a 'mixed' legal system made up of elements of both the common law and the civil law traditions. It is a popular belief that such a mixed system is potentially superior to a non-mixed (common or civil law) legal system, because it combines the best of both. In Scotland, there is a 'classical perception of Scots law as a remarkable system of quality' and even of 'genius'. However, in relation to the position of the victim of crime, the Scots criminal justice system does not compare at all favourably with many non-mixed systems. It even seems to combine some of the worst elements of the common law and civil law systems in this respect, and fails to meet several of the requirements of Recommendation R (85) 11. In relation to the position of the victim in the framework of criminal law and procedure, 'the genius of Scots law is a myth that is dangerous (...)'.

The history of Scots law is a complicated one that has aroused debate and controversy. Although there is widespread agreement that medieval Scots law was derived from the common law of England, opinions differ as to the extent of the influence that Roman law had on Scots law in later centuries. One reading holds that, following the wars of independence in the fourteenth century, the Scottish legal system lay in disarray until it was revived by the newly founded Court of Session (1532) along the lines of a system of law modelled on natural and Roman law that was expounded by Stair in 1681 in his book *Institutions of the Law of Scotland*. Others contend that there was no such radical break with medieval customary law, and that where sixteenth century lawyers drew on Roman law, this was only to supplement lacunas in their own system. One thing that is clear is that from the fifteenth to the seventeenth or eighteenth century, Scottish law students studied first at French and later at Dutch universities, and that during this period the writings of continental jurists were regularly quoted in Scottish courts. Today there are still remnants of French terminology in contemporary Scottish legal jargon. Compare, for example, the Scottish 'advocate' to the French 'avocat'.

The Act of Union of 1707 transferred the right to legislate for Scotland to the English
Scotlands Parliament in Westminster. In addition, the House of Lords was recognized as the final court of appeal for Scotland in civil matters, a position it still holds today. However, the House of Lords was never a court of appeal for criminal matters. This means that, even though the Scottish criminal courts are bound by legislation produced in Westminster, they are free to interpret their own criminal law as they like. The Scottish courts have on occasion even interpreted legislation applicable in both England and Scotland in a different way to the English courts. Criminal law and procedure is therefore the area of Scots law that has been least anglicized. With the reinstatement of their own parliament, the Scots will be able to gain further control over their legal system.

2 General Remarks and Basic Principles

The principle of expediency determines that the decision whether or not to prosecute is a discretionary one to be taken by the public prosecutor. Traditionally, this power has been exercised restrictively in Scotland. Research published in 1982 concluded that 'for all fiscals the emphasis is on prosecution. While this may be in part a reflection of the lack of alternatives available to prosecutors it is largely a product of the particular orientation of the criminal justice process in Scotland towards court proceedings'. In the ten years prior to 1982, the exercise of discretion led to a decision not to prosecute in an average of only 8% of all cases. However, the fiscals' attitude towards prosecution, and their options for disposal, are gradually changing. In cases in which there is sufficient evidence that the alleged offender has committed a crime, and the crime is 'not so trivial as to merit no action', the fiscal may now dispose of a case by issuing a written or oral warning to the alleged offender. Furthermore, since the introduction of section 56 of the Criminal Justice (Scotland) Act 1987, the procurator fiscal may offer an alleged perpetrator within the competence of the district court a fixed penalty (a 'fiscal fine'). Upon payment of the fiscal fine, no further proceedings are taken, and the offender avoids the recording of a conviction. Finally, a case may be diverted for treatment by psychiatric or social work services or for reparation to take place. As a result of these changes, the amount of disposals by alternative means is now greater than the amount of prosecutions. Having said that, the introduc-

7 As held in Mackintosh v Lord Advocate (1876) 3 R (HL) 34.
tion of the fiscal fine has led to substantial net-widening, i.e., offences that would otherwise not have been prosecuted are now dealt with by means of the fiscal fine.\textsuperscript{14}

Plea negotiation aimed at trial avoidance is characteristic of the adversarial criminal justice systems of the common law jurisdictions. This is also the case in Scotland, where \textit{charge bargaining} between the prosecution and the defence is established practice. Negotiations about the charge may, for example, result in the procurator fiscal accepting a guilty plea in exchange for a reduction of the charge, an alternative charge or a deletion of charges.\textsuperscript{15} In Scotland, the Crown is ‘master’ of the prosecution and the judge must accept whatever plea negotiation the prosecution has agreed to.\textsuperscript{16} This is different to the situation in England, where the judge may refuse to accept such a ‘deal’. Charge bargaining should not be confused with \textit{sentence bargaining} where the accused person agrees to plead guilty in exchange for a sentence discount. This form of bargaining requires the participation of the judge. The English criminal justice system allows for sentence bargaining, whereas the Scots system does not. Plea negotiation affects the position of the victim of crime in the criminal proceedings, as we will see in the course of this report (see also Chapter 7).

The trial stage of the criminal proceedings is also governed by accusatorial principles. The parties to the case call their own witnesses, and the role of the judge is to oversee, rather than participate in, the trial. The judge is allowed to ask witnesses questions but should do so with discretion. The trial is held in public and the proceedings are oral – only under exceptional circumstances are pre-trial statements admissible as evidence.

A distinction is made between ‘solemn’ proceedings where the trial is conducted before judge and jury, and ‘summary’ proceedings held before a judge or judges without a jury. Solemn proceedings may be brought in the High Court of Justiciary or in a sheriff court, whereas summary proceedings are conducted in a sheriff or district court.

\section{3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS}

\subsection{3.1 Investigating Authorities}

In theory, the responsibility for the investigation of a crime lies with the Lord Advocate, who is the chief Law Officer of the Crown in Scotland and head of the prosecution service. The Lord Advocate is represented locally by the procurators fiscal. In practice, the investigation of a crime is carried out by the Scottish police service. Although the procurator fiscal has the power to instruct the police on the investigation, he will only exercise this power where particularly serious offences are concerned, leaving the investigation of all other offences entirely to the police.

Since 16 May 1975, when the local government in Scotland was reorganised, the Scottish police service comprises eight police forces. There are considerable differences between the forces in the type of area they cover and their size. For example, the Northern Constabulary covers the local authority region of Highland and the island authorities of Orkney, Shetland, and Western Isles. It consists of a regular force of 642 with a support staff of 253. By contrast, Lothian and Borders Police covers an area which includes Edinburgh, the capital of Scotland. This force consists of 2,500 police officers and 1,100 civilian

\textsuperscript{14} P. Duff (1993), pp. 487-489.


members. Due to the differing local circumstances, it is hardly surprising that each force has developed its own practices and procedures.

3.2 Prosecuting Authorities

Responsibility for the prosecution of crime lies with the Lord Advocate, who is assisted in this by the Solicitor General, procurators fiscal, and Crown Office staff.

The position of Lord Advocate is a political appointment, made after each change of the UK government by the Prime Minister of the day. The Lord Advocate is a Minister of the Government and has a seat in one of the Houses of Parliament. The Solicitor General is the second Law Officer of Scotland and he, too, is a Minister of the Government. Unlike the first and second Law Officers, the procurators fiscal are civil servants whose appointments are permanent.17 The procurators fiscal are assisted by procurator fiscal deputes.

The pivot of the Procurator Fiscal Service is the Crown Office which is situated in Edinburgh. The Lord Advocate and the Solicitor General have their offices here, as do Crown Counsel (Advocate Deputes) that represent the Crown in the High Court and the Appeal Court (see § 3.3.1). The Crown Office instructs procurators fiscal on how to proceed in cases inviting solemn proceedings and performs its many other duties through departments such as the High Court Unit, the Appeals Unit, the Fraud Unit, and the Policy Group.

3.3 Judiciary

At the bottom of the criminal court hierarchy stand the district courts. In 1996, Scotland was reorganized into 32 local authority areas,18 and the district courts now correspond with these. Judges of the district court are mostly lay Justices of the Peace who are appointed by the Secretary of State, although stipendiary magistrates may be appointed by the local authority.19 At the time of writing, Glasgow was the only district court to have stipendiary magistrates. A Justice of the Peace may impose a maximum sentence of 60 days imprisonment or a fine of £2,500.20 A stipendiary magistrate has the same jurisdiction and sentencing powers as a sheriff court sitting summarily (see below). Proceedings in the District Court are always of a summary nature.

---

17 In the sixteenth century, the procurator fiscal was an agent (procurator) of the local sheriff (judge, see § 3.3) responsible for collecting fines on behalf of the sheriff. At that time, the sheriff was an examining magistrate who also investigated crimes falling within his jurisdiction and brought offenders to trial. In time, these investigative duties of the sheriff were delegated to the procurator fiscal, whose position as public prosecutor was confirmed by the Criminal Procedure (Scotland) Act 1700. Eventually, the appointment of procurators fiscal was transferred from the sheriff to the Lord Advocate, who had been acting as principle prosecutor of the King since the sixteenth century. The dormant investigative responsibilities of the sheriff were definitively removed by the Sheriff Courts (Scotland) Act 1876. See Crown Office Scotland (no date), pp. 1-2. For a historical development of the office of the procurator fiscal, see also S.R. Moody and J. Tombs (1982), pp. 18-22.

18 Local Government etc. (Scotland) Act 1994.

19 District Courts (Scotland) Act 1975, section 5(1). A stipendiary magistrate must be an advocate or solicitor of at least five years' standing, District Courts (Scotland) Act 1975, section 5(2).

20 Criminal Procedure (Scotland) Act 1995, section 7(6), known as the 1995 Act.
Scotland is organized into six Sheriffdoms which are in turn divided into Sheriff Court Districts. In criminal cases, the Sheriff Court may sit with or without a jury. Solemn proceedings on indictment are heard by sheriff and jury. The sheriff may impose a maximum prison sentence of 3 years, or an unlimited fine unless prescribed otherwise by statute. Summary proceedings are heard by a sheriff sitting alone. In that case, the maximum prison sentence for a common law crime is 3 months which may be extended to 6 months if the offender has a relevant previous criminal record. There are also statutory offences for which the sheriff may sentence for up to 12 months’ imprisonment. It is up to the procurator fiscal to decide which court will hear the case, and whether by solemn or summary procedure. The accused has no say in this.\(^{21}\)

The High Court of Justiciary is the supreme criminal court in Scotland. This court consists of the Lords Commissioners of Justiciary headed by the Lord Justice General, and these judges also make up the Court of Session, which is the highest domestic civil court. The High Court of Justiciary acts both as a court of first instance and a court of appeal. Offences reserved for its exclusive jurisdiction are those of treason, murder, and rape, but it may also hear in first instance any other offence triable under solemn proceedings unless determined otherwise by statute. It has unlimited sentencing powers, again unless determined otherwise by statute.

There is no career judiciary in Scotland and judges do not specialize in civil or criminal cases but have a mixed practice. Sheriffs must have practised as an advocate or solicitor for at least ten years before being appointed to the bench. High Court judges are usually appointed from the Faculty of Advocates (the Scottish bar), although a sheriff of at least five years’ standing or a solicitor who has held the right of audience in the High Court and the Court of Session for at least five years can also be appointed.

### 3.3.1 Procedures

**Solemn Procedure\(^{22}\)**

The procurator fiscal opens the solemn proceedings with a *petition* which contains the charge against the accused. The accused subsequently appears before the sheriff for the *first examination*. During this brief hearing, which is held in private, the fiscal requests the court to commit the accused to prison for further examination. Bail may be granted. During the first examination, and any further appearances on petition before the sheriff, referred to as *further examination*, the fiscal may subject the accused to *judicial examination*, i.e. question him about the offence.\(^{23}\) Once the accused has been committed for trial (*full committal*), or committed for further examination and released on bail, the fiscal starts with the *precognition* of the case. In this stage of the proceedings, the witnesses are questioned by the (depute) fiscal or one of the precognition clerks of the fiscal's office. All the precognition statements and documentary evidence are then sent to the Crown Office in Edinburgh for a decision on how to proceed. The Crown may decide on *indictment*, either in the High Court or in the sheriff court, or on *no further proceedings*. Alternatively, it may decide that summary rather

\(^{21}\) Compare with England where the accused may decide which court hears his case if the offence is 'triable either way', i.e., can be heard on indictment in the Crown Court or summarily in the magistrates' court.


\(^{23}\) This is where Scottish pre-trial proceedings still harbour an inquisitorial element.
than solemn proceedings should be taken. An indictment in the High Court is prepared by
the Crown Office itself, but an indictment in the sheriff court, or a summary complaint, is
prepared by the fiscal responsible for precognition of the case. An indictment must be served
on the accused within 80 days of full committal (80 day rule). The trial must commence
within 110 days of full committal (110-day rule) and within twelve months of the first
examination (twelve-month rule).

To prepare for the trial, the defence also has the right to precognosc the witnesses cited
by the prosecution. Although the solicitor may take precognitions himself, he will usually
employ a precognition agent.

At the first diet of solemn proceedings in the sheriff court, the court establishes whether
the case is ready to proceed to trial on the date set for the trial diet. There is no first diet in
solemn proceedings in the High Court, although a preliminary diet may be held at the request
of the Crown or the defence. If prior to the trial diet the accused has informed the prosecu-
tion in writing of his intention to plead guilty, a full trial does not take place (s. 76 of the
1995 Act). In that case, the accused is sentenced during a shortened section 76 diet. If the
accused pleads not guilty to (a part of) the indictment, the case proceeds to trial.

At the trial diet, a jury of 15 is empanelled. There are no opening speeches in Scots
criminal procedure. The Crown is the first to lead evidence. Each witness is put under oath
or affirmation before being questioned by the Crown during the examination-in-chief. The
defence may then cross-examine, before the Crown is allowed to re-examine. With witnesses
for the defence, the roles are reversed: the defence conducts the examination in chief, the
Crown cross-examines and the defence re-examines. The accused does not have to give
evidence, but if he does, he is put under oath or affirmation just like any other witness.

As said earlier, the judge may also ask any witness questions.

After all the evidence has been heard, the prosecution and then the defence offer their
closing speeches. The judge directs the jury on the law which they must apply to the case. After
deliberation, the jury returns a verdict of guilty, not guilty, or charge not proven. If the jury
finds the accused guilty, the prosecutor moves for sentence, i.e., invites the court to pass
sentence. It should be noted that it is not for the prosecutor to suggest what that sentence
should be. After the prosecutor has moved for sentence, the defence may offer a plea in
mitigation. The judge may adjourn the case prior to sentencing for a variety of reasons, for
example, to allow for a social enquiry report to be made. The accused must be present when
the sentence is passed in open court.

Summary Procedure
Under summary procedure, the police report the findings of their investigation to the fiscal
who then decides whether to prosecute or take no further proceedings. Alternatively, he
may offer the offender a fiscal fine or give him a warning. If the fiscal does decide to prosecute,
he prepares the complaint. The accused is cited to appear at the first diet although he does not
have to attend in person. Instead, he may respond to the citation in writing, or arrange to
be represented by a lawyer or another authorised person. If, in his response to the com-
plaint, the accused pleads guilty — whether in person, through representation or by letter
— the case is dealt with in a shortened procedure similar to the section 76 procedure
described for solemn proceedings. Where the plea is not guilty, the trial diet is fixed. The

24 Compare to the Nordic countries where neither the accused nor the injured person presenting
a civil claim is put under oath.
prosecution and defence may prepare their case in a similar fashion to the preparation of a case under solemn procedure, although the Crown only occasionally obtains precognitions for summary cases. Before the trial diet itself is held, an intermediate diet is arranged. This enables the court to find out if the case is ready to proceed to trial. The court will also enquire whether the accused intends to uphold his plea of not guilty, and establish if the parties have managed to agree on uncontroversial evidence.

At the trial diet itself, witnesses are heard in the same fashion as in solemn proceedings. Prosecution and defence conclude with their speeches, after which the court will normally return its verdict there and then. The verdict may be guilty, not guilty, or charge not proven. Sentence may also be passed immediately, but the court may also decided to adjourn to allow for a social enquiry or similar report to be made.

3.4 Solicitors and Advocates

The legal profession consists of solicitors and advocates. The members of the Faculty of Advocates are lawyers specialized in courtroom procedure and their role in a criminal trial is to plead their client's case in court. In general, the advocates' work is concentrated around the higher courts. Advocates are entitled to do both defence and prosecution work. The Lord Advocate gives commissions of three to four years to advocates to represent the Crown. These are then referred to as Advocate Deputes or Crown Counsel. In the lower courts, the procurator fiscal (or one of his deputes) presents the Crown's case.

Until 1990, solicitors only had right of audience in the district and sheriff courts. This was changed by the Law Reform Miscellaneous Provisions (Scotland) Act 1990, and solicitors may now also take rights of audience for the higher courts.26 Where the advocate's role is limited to pleading the case before the court, the solicitor is involved in the criminal proceedings at a much earlier stage. It is his responsibility to prepare the case and ensure that it is ready to proceed to trial. Every solicitor is a member of the Law Society.

It should be noted that there is no obligation for an accused person to be legally represented. If he wishes, he may conduct his own defence.

3.5 Scottish Office Home Department

The Scottish Office is the Department of the UK Government that handles Scottish affairs. It has been based in Edinburgh since 1939. It is headed by the Secretary of State for Scotland, who is a member of the UK government and is accountable to the parliament at Westminster. The Scottish Office Home Department (SOHD) is responsible, among other things, for criminal justice policy and procedure, for the administration of the police service, for legal aid, and for liaison with the legal profession.27

In 1996, at the behest of Victim Support Scotland, the then Minister of State set up a Scottish Office Victims' Steering Group, its remit being to promote good practice and co-ordinate victim policy development. Senior representatives from the key criminal justice agencies and government departments sit on the group, as does Victim Support Scotland.

26 A solicitor with right of audience in the High Court of Justiciary or the Court of Session is referred to as a solicitor advocate.
27 Http://www.scotland.gov.uk/structure/s-home.htm
3.6 Scottish Court Service

The Scottish Court Service is responsible for administering the sheriff courts and the High Court of Justiciary. It provides court accommodation and supporting staff. The clerk of each court, who is a member of the Court Service, is responsible for scheduling cases, and for citing the jurors where a trial is to proceed under solemn proceedings. Witnesses are not cited by the Court Service but by the respective parties calling them.

3.7 Social Work Services

There is no centralized probation service in Scotland. Tasks such as making social enquiry reports (SER) on offenders prior to sentencing, and the supervision of probation orders, supervised attendance orders and community service orders are carried out by the Social Work Services. These come under the Scottish Office, which provides 100% funding, but are administered and directly managed at the local authority level.

3.8 Criminal Injuries Compensation Authority

State compensation for victims of violent crime is arranged on a UK level. 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 1980s, 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 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.

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. All claims must be for a minimum of £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 on review to be appealed before the independent criminal injuries compensa-

---

28 It also administers the Court of Session, which is the high court for civil matters. The district courts are administered by the local authority.

29 Compare with Liechtenstein where there is no centralized probation service either (Chapter 14).

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, Ireland (Chapter 12).
tion appeals panel.\textsuperscript{31}

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

### 3.9 Victim Support Organizations

There are several organizations that provide emotional and practical support to victims of crime. \textit{Victim Support Scotland} is a national organization that works with 120 staff and 1,500 volunteers. Its 32 local services, which correspond with the 32 local authority areas, provide support to victims, regardless of the type of offence committed against them. In 1984, its first year of operation, Victim Support Scotland had 84 referrals to its local services.\textsuperscript{32} In 1997/98, the total amount of new referrals had risen to 34,413.\textsuperscript{33} Victim Support Scotland is the initiator of several significant developments aimed at improving the position of the victim, which include an inter-agency victim steering group and pilot Witness Support projects in three sheriff courts (see § 5.4). On 27 November 1998, it launched its Victims' Manifesto for the Scottish Parliament.

Examples of other organizations that provide support to victims of crime are \textit{Women's Aid}, \textit{Rape Crisis}, and \textit{Families of Murdered Children}.

### 4 SOURCES OF LAW

Although the influence of Roman law may have created ties between Scots criminal law and the civil law systems of continental Europe, Scotland never went so far as to codify its law, and the \textit{common law}—"the body of principles and doctrines that have emerged implicitly from the history of decision-making by courts rather than explicitly from politically motivated decisions of legislators"\textsuperscript{34}—remains an important source of criminal law. For example, the offences of murder, rape, minor assault, and breach of the peace are all common law offences. It should be noted that there are sometimes significant differences between Scots common law and English common law.

Despite the persistence of the common law, \textit{legislation} has become increasingly important since the 19\textsuperscript{th} century. There are now many statutory offences, i.e., offences that are defined in Acts of Parliament, and there is ample legislation in relation to criminal procedure. One distinct remnant of civil law connections is a wide-spread respect for authoritative legal writings which are regularly quoted before the courts. The most eminent of these \textit{institutional writings} was published by David Hume in the 19\textsuperscript{th} century.\textsuperscript{35}

\textsuperscript{31} Hearings before the panel are oral. The panel sits all around the UK and consists of experienced barristers.
\textsuperscript{32} At that time, it was called the Scottish Association of Victim Support Schemes.
\textsuperscript{33} Victim Support Scotland Monthly Statistics Database.
5 ROLES OF THE VICTIM

5.1 Reporting the Offence

The 1996 Scottish Crime Survey (SCS) found that 49% of all crimes and offences were reported to the police. Of the offences known to the police, 64% were reported by the victim himself. The Scottish term for the person who accuses another person of having committed an offence against him is 'complainer' – the equivalent of the English term 'complainant'.

Reporting rates vary considerably depending on the type of offence, the perceived seriousness of the offence, and insurance cover. There is also a relation between the age of the victim and the rate of reporting. Reasons given by victims for not reporting are that they thought the offence was too trivial (40%), that the police would not have been able to do anything (31%) or that the police would not have been bothered or interested. 11% of assault victims said they were afraid of reprisal by the offender, and 14% of these victims felt that the incident was a private, personal, or family matter.

5.2 Compensation Order Beneficiary/Compensatee

A Scottish criminal court may make a compensation order to the benefit of the victim. This is 'an order requiring (a person convicted of an offence) to pay compensation for any personal injury, loss or damage caused, whether directly or indirectly, by the acts which constituted the offence.' The compensation order in its present form was introduced into the Scots criminal justice process by the Criminal Justice (Scotland) Act 1980. The relevant provisions are now found in the Criminal Procedure (Scotland) Act 1995.

When making the order, the court must take into account the offender's means. Also, the amount ordered is limited by the court's own sentencing powers (see § 3.3). The victim

36 SCS 1996, p. 67. Reporting rates are based on Victim Forms relating to crimes committed in 1995. It should be noted that the crime survey does not cover rape or sexual assault.

37 In 18% of the incidents, another member of the household told the police, in 14% another person, in 2% the police were there, and in 3% the police found out in another way. SCS (1996), p. 70.

38 For example, theft of a motor vehicle is reported in 100% of all incidents, and housebreaking in 71%. Assault is reported in only 39% of all incidents and other household theft (35%) and personal theft (other than theft from the person) (26%) score even lower. SCS 1996, p. 68.

39 67% of offences that victims considered 'most serious' are reported to the police against 41% of 'least serious' offences. 91% of those who make an insurance claim for damaged or stolen property report the offence to the police, against 42% of those who do not make a claim. SCS 1996, p. 69.

40 Where the victim is aged 65 or over, 63% of the incidents are reported, against 48% involving victims under the age of 65. The reasons offered by the crime survey are that older people generally have more time to report offences, and are more anxious to have stolen property recovered because they are less affluent, have collected their possession over a long period of time, and are more respectful of the police. SCS 1996, p. 69.

41 1995 Act, section 249(1).

42 For an account of the historical development of compensation in Scotland, see Lord Cameron of Lochbroom (1991), pp. 316-322.

43 1995 Act, section 249(5).
cannot himself ask the court to impose a compensation order — he is not recognised as a party to the criminal proceedings. It is therefore up to the procurator fiscal to alert the court to the possibility of making such an order in a relevant case. An order cannot be made in respect of loss suffered in consequence of the death of any person.\textsuperscript{44}

More information about the compensation order and the way it works in practice is given in § 7.2 under D.10-D.13 and § 7.3 under E.14.

5.3 Private Prosecutor

A person who has suffered a personal wrong as a consequence of an alleged crime may bring a private prosecution under solemn or summary proceedings.\textsuperscript{45} Private prosecution under solemn procedure can only be brought in the High Court, and the private prosecutor must first apply for the concurrence of the Lord Advocate. If the Lord Advocate refuses his concurrence, he must give reasons for doing so. The applicant may then apply to the High Court for permission to proceed without the Lord Advocate’s permission. A successful private prosecution under solemn procedure is extremely rare. The Lord Advocate hardly ever concurs with such a private prosecution, and the High Court is loath to subject this decision of the Lord Advocate to judicial review. This century only two private prosecutions under solemn procedure have been allowed to proceed. The first was \textit{J. and P. Coats Ltd. v. Brown, 1909 S.C. (J.) 29} which concerned a case of fraud, and the second \textit{H. v. Sweeney and Others, 1983 S.L.T. 48} (the ‘Glasgow Rape Case’) where the defendants were accused of severely assaulting and repeatedly raping the complainer.\textsuperscript{46} Both these private prosecutions resulted in convictions.

Private prosecutions under summary procedure occur more frequently, ‘at least where the title to prosecute is conferred by statute’.\textsuperscript{47} Under summary procedure, the private prosecutor requires the concurrence of the public prosecutor of the court in which the complaint is brought. An appeal against a refusal to concur is brought before the High Court.

\textsuperscript{44} 1995 Act, section 249(4)(a).

\textsuperscript{45} Besides the public prosecutor and the private prosecutor, there is a third category of prosecutor, viz., the ‘prosecutor in the public interest’. This type of prosecutor does not require the concurrence of the public prosecutor of the court in which the complaint is brought, section 311(4) 1975 Act. See \textit{Templeton v. King, 1933 J.C. 58} as discussed in C. Gane and C. Stoddart (1994), pp. 77-79.

\textsuperscript{46} See C. Gane and C. Stoddart (1994), pp. 57-62 and 71-77, respectively. See also J. Buchholz, \textit{Der Staatsanwalt im schottischen Recht. Seine gerichtsverfassungsrechtliche Stellung, seine Kompetenzen und deren Kontrolle; zugleich eine rechtsvergleichende Betrachtung der gerichtsverfassungsrechtlichen Stellung der Staatsanwaltschaft im deutschen Recht}, (Europäische Hochschulschriften: Reihe 2, Rechtswissenschaft; Bd. 979, Zugl.: Saarbrücken, Univ., Diss., 1989), Peter Lang, Frankfurt am Main-Bern-New York-Paris, 1990, pp. 106-141. Incidentally, the opening sentence of the opinion of Lord Justice-General (Emslie) in \textit{H. v. Sweeney and Others} is a classic example of the traditional common law stance that the victim is an \textit{alleged} victim until the offender has been proven guilty: ‘This is a bill for criminal letters by the alleged victim of the crime of rape and of what appears to have been a gruesome and hideous assault in which she was grievously injured and disfigured by repeated slashing cuts of a razor.’\textsuperscript{46} C. Gane and C. Stoddart (1994), p. 56.
The financial risks involved in bringing a private prosecution are substantial. If the private prosecution fails, the private prosecutor may be ordered to pay all costs. See § 7.1 under guideline B.7.

5.4 Witness

Where the accused pleads ‘not guilty’ and the trial is to proceed, the victim may be called as witness for the prosecution. This implies that in the pre-trial stages, he may be precognosced by both the prosecution and the defence, and that, in the trial stage, he can be called to court to testify. Matters relating specifically to the questioning of the victim witness by the police, prosecution, and defence in all trial stages are dealt with in § 8.2 under C.8.

In the last decade, it has been recognised in Scotland that the way trials are time-tabled and processed, the lack of adequate facilities in courthouses, and a systematic lack of information for those attending court cause much distress to witnesses, and initiatives have been taken to address these issues. In 1990, the Scottish Law Commission published a report on “The Evidence of Children and Other Potentially Vulnerable Witnesses”. This led the government to introduce measures enabling child witnesses (1993) and vulnerable adults (1997) to give evidence by alternative means such as closed circuit television. In 1995, the Lord Advocate established a Working Group on Child Witness Support. Its report was still due at the time of writing.

In § 3.9, we mentioned the three pilot Witness Support projects that were set up in the sheriff courts of Ayr, Hamilton, and Kirkcaldy. The services in Ayr and Kirkcaldy commenced operation in October 1996 and are aimed at providing information and practical help to all witnesses attending court. The Hamilton service came into operation in May 1997 and is aimed specifically at victim witnesses. The type of support provided by all three services ranges from enabling a witness to see the courtroom before the trial commences and explaining the procedures to him, to helping him find his way around the courthouse and keeping him informed of the progress of the trial. The three projects were evaluated by two independent researchers. They found witnesses were overwhelmingly positive about the service provided to them and that the projects were also generally well received by criminal justice personnel.

Other initiatives in relation to witnesses include a pilot Witness Protection Project set up by Strathclyde Police in August 1996 (see § 8.3 under G.16); the “Joint Statement on Crown Witnesses” of the Crown Office, Procurator Fiscal Service and Scottish Court Service of January 1998; the distribution of leaflets explaining court procedures to witnesses and victims, including specially designed excellent brochures for children and for adults with learning disabilities; the provision in June 1998 of guidance by the Scottish Office on interviewing people with a mental disorder with the help of an ‘appropriate adult’; and the publication in December 1998 of a Scottish Office consultation document “Towards a Just Conclusion” on vulnerable and intimidated witnesses in Scottish Criminal and Civil Cases.


50 An appropriate adult is a person who has expertise in dealing with mentally disordered people.
Some local courts have developed their own Codes of Practice for the provision of services to witnesses. For example, in Airdrie sheriff court, such a code has been drawn up by the regional sheriff clerk and the procurator fiscal.

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.

Policy

Official policy regarding the provision of this type of information to victims of crime is meagre. The Justice Charter for Scotland 1991 states that victims of crime are entitled to be treated helpfully and sensitively by the police, and that if the victim wishes it, the police will put him or her in touch with Victim Support.\(^{51}\) In 1998, the Scottish Office published a leaflet 'Reporting a Crime', which offers basic information to the victim and should be handed to him by the police when a crime is reported. It has been agreed between the police and Victim Support that victims of housebreaking, assault, harassment, theft, and robbery should be routinely referred. For offences such as sexual assault or murder, the consent of the victim must be sought.

Practice: assistance, practical and legal advice

The Police College does not explicitly instruct the probationary constables to provide the type of information described in the above guideline, although they are made aware of the existence of Victim Support. Provision of any type of information to the victim seems to vary from force to force, and from one individual police officer to the other.\(^ {52}\) The information leaflet is not yet routinely distributed, but it was introduced relatively recently and it needs time for its distribution to become established practice.

The obvious organization for the police to refer victims to for assistance and practical advice is the local Victim Support service. Victim Support does not provide legal advice as such, although it will explain legal procedures to the victim. Procedures for referring victims differ from force to force.\(^ {53}\) Research commissioned in 1995 by the Crown Office to the MVA Consultancy found that 7% of victims had been contacted by Victim Support. A majority of these (63%) were victims of housebreaking. Of those victims who did not contact Victim Support, 38% said that they had not been told about Victim Support when they reported the offence.\(^ {54}\) The 1996 Scottish Crime Survey found that 3% of victims who had reported a crime to the police had been contacted by Victim Support. Again, a majority

---

53 MVA Consultancy (1995), no. 3.3.2, p. 11.
54 MVA Consultancy (1995), no. 5.5, pp. 29-31.
of these were victims of housebreaking.\textsuperscript{55}

As in many other jurisdictions, new trends in data protection have led to problems in relation to the referral of victims to Victim Support. There is disagreement in Scotland about the consequences of UK data protection legislation for the referral system and although all police forces are committed to accessing victims of crime to Victim Support, they are understandably unwilling to act in contravention of the law. The obvious solution of asking victims for their permission to be referred is not without its problems either. There is no guarantee that where a crime report form states that a victim refused permission, he was actually asked whether he wanted to be referred. Secondly, victims of crime tend to refuse help at the time of the police interview, even though later they might have found support useful.\textsuperscript{56} Problems with referrals to Victim Support have also had consequences for the Witness Support projects.\textsuperscript{57}

\textit{Practice: compensation from the offender, state compensation}

Information on compensation, whether from the offender or the state, is given much less often than other forms of information. The MVA Consultancy report established that 13\% of victims had received information about compensation, and that, in 40\% of these cases, this information had been provided by the police.\textsuperscript{58} The Criminal Injuries Compensation Authority does not advertise its services, nor does it produce public information leaflets. However, if the victim is given the general information leaflet by the police when reporting the crime, he will find the address of the CICA where he can apply for the necessary forms. Citizens’ Advice Bureaux, Victim Support, and solicitors are other sources of information about compensation.

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

\textit{Initiative of the victim}

One way for the victim to find out about the outcome of the police investigation is for him to make his own enquiries. The Justice Charter for Scotland (1991) states that the victim has a right to know the name, number, and station of the officer dealing with the case. The 1996 Scottish Crime Survey reports that in 36\% of the incidents where the police were involved, this information had indeed been given to someone in the household. It was said not to have been given in 52\% of the incidents, whereas 12\% of those interviewed could not remember.\textsuperscript{59} Since then, some forces have introduced Crime Management Systems whereby each victim is sent a letter with the crime reference number given to the case and

\begin{itemize}
  \item \textsuperscript{55} SCS 1996, p. 73. It seems likely that these differences in percentages are related to the different research methods employed.
  \item \textsuperscript{56} Information provided by Victim Support Scotland, November 1998. In the 1996 SCS, 85\% of the victims who reported an incident to the police said they thought it would not have been helpful to be contacted by Victim Support. The MVA Consultancy found that 58\% of the victims who did not contact VS thought they could handle the situation themselves. Compare the chapter on Switzerland for a similar experience of the Zürich police force. Here, too, victims tend to refuse help when asked whether they want to be referred.
  \item \textsuperscript{57} D. Lobley and D. Smith (1998), p. 49.
  \item \textsuperscript{58} MVA Consultancy (1995), no. 6.4, pp. 34-35.
  \item \textsuperscript{59} SCS 1996, p. 71.
\end{itemize}
the name and telephone number of the investigating police officer. 28% of victims surveyed by the MVA Consultancy in 1995 had themselves contacted the police to ask for information about their case. Victim Support also regularly makes enquiries on behalf of victims.

**Pro-active policy: formal**

Police forces may also adopt a pro-active policy towards keeping victims informed of the progress and outcome of the police investigation. Seven of the eight police forces have a formal policy that after reporting a crime, the victim should be contacted if someone is charged. Likewise, if the crime remains unsolved, the police should contact the victim after 14-21 days to give him an update on the progress in his case. The Strathclyde police force leaves it to the discretion of the individual officers whether to keep the victim informed. In urban areas, crimes considered trivial by the police may be screened out.

**Pro-active policy: in practice**

In the MVA Consultancy research, 47% of the victims reported that the police had contacted them at some point to give them information on their case, whereas 52% contended that this had not happened. The MVA Consultancy researchers were clearly disappointed by these figures, and ascribe them to the fact that force policy on providing information to victims of crime was fairly new at the time the research was conducted. They also feel that it is possible that victims who were dissatisfied with the police response were perhaps more incited to respond to the survey mailout part of the research than those who had been adequately informed. But the MVA Consultancy figures correspond quite closely with the 1996 SCS figures which found that 44% of victims felt they had been 'very' or 'fairly' well informed, which is a substantial increase from the 36% of victims who felt they had been similarly informed in the 1993 SCS. One obvious point of interest to victims is whether anyone has been charged. The MVA Consultancy reports that 35% of the victims said they had not been told whether anyone had been charged.

Further interesting conclusions of the MVA Consultancy research are that victims in rural areas are more likely to be informed than victims in urban areas; older, female victims are almost three times more likely to be informed by the police than young male victims; victims of housebreaking are twice as likely to receive information as victims of assault, which is probably directly related to the age and sex of the victim; and that good news information is much more likely to be passed on to the victim than bad news. The contact was usually by phone (53%) and/or a personal visit (50%). Occasionally the victim was sent a letter (8%).

---

60 MVA Consultancy no. 3.3.5, pp. 11-12, and information provided by the Police College, November 1998.
61 MVA Consultancy no. 5.2.19, p. 26.
62 MVA Consultancy (1995), nos. 3.3.2-3.3.4, p. 11.
63 MVA Consultancy (1995), nos. 5.2.1-5.2.3, pp. 22-23.
64 SCS 1996, p. 71.
65 MVA Consultancy (1995), no. 6.2.1, p. 32.
66 MVA Consultancy (1995), nos. 5.2.4-5.2.19, pp. 23-26.
At the time of writing, the Crown Office pursued a primarily re-active policy regarding the provision of information to victims of crime. A victim who contacts the Crown Office to ask about the progress of his case will be duly informed whether a final decision has been taken concerning prosecution, and if so, what that decision is, but the Crown Office will not normally volunteer information of its own accord.\(^{67}\)

It should be noted that the Crown Office is in the process of reviewing its position regarding the provision of information to victims. First of all, the oft-quoted MVA-Consultancy research on the information needs of victims of crime was in fact commissioned by the Crown Office. Secondly, it is looking into the possibilities for introducing a pro-active system whereby victims are automatically informed by computer-generated letter of key decisions. On the basis of a relational database that would integrate the information systems of all the criminal justice agencies, the victim could then be informed of matters such as the arrest of a suspect, the decision in relation to prosecution, whether he is expected in court as a witness, and the outcome of the case. It is unclear when such a system could be up and running in Scotland.\(^{68}\)

In the MVA Consultancy research, 42% of the victims who knew that someone had been charged in relation to the offence committed against them had not been informed of the decision regarding prosecution. Where the victim had been informed, this information had been received from the police in 37% of the cases, despite the fact that police interest and involvement in the case formally ends the moment they hand over their report to the procurator fiscal. The MVA Consultancy researchers remark that this might be due in part to the fact that witness citations to appear in court, which may often be the source of the information, are delivered by the police, even though the citation originates with the procurator fiscal. In 22% of the cases where the victim had been informed of the decision in relation to prosecution, this information had been relayed to him by the procurator fiscal.\(^{69}\)

\(\text{(D.9)}\) 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**

Information on the date and place of a hearing is usually a by-product of a citation to appear in court as a witness.\(^{70}\) Citations are issued by the procurator fiscal and delivered by the police, but as a result of a successful pilot exercise in postal citations in 1998, this practice is likely to change. There is as yet no system in place for informing victims who are

---

\(^{67}\) MVA Consultancy (1995), no. 3.4, pp. 12-14, and information provided by the Crown Office, November 1998.

\(^{68}\) Information provided by M. McLaughlin, Policy Unit of the Crown Office, 25 November 1998.

\(^{69}\) MVA Consultancy (1995), no. 6.3, pp. 33-34.

not required as a witness of the date and place of a hearing. Moreover, the only type of hearing the victim is likely to receive any information on is a trial diet. The chances of him being informed of the date and place of a first examination, further examination, first/preliminary diet, section 76 diet or a sentencing hearing are negligible.

In its research on the information needs of victims, the MVA Consultancy found that 58% of victims who knew that someone had been charged said they had been told their case had gone to court, 13% were told the case had not gone to court and 29% were not told anything. Victims of vehicle and other theft were the least likely to be informed.\(^{71}\) Information that a case had gone to a full trial was given to the victim in 32% of the cases that went to court. A further 40% said they had not yet been told whether there would or would not be a trial. 61% of the victims who had been told there was to be a full trial attended court, all but one of them as a witness.\(^{72}\) 79% of the victims who did not get information on the trial said they would have wanted this information.\(^{73}\)

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

In § 6 under A.2 we mentioned that, according to the MVA Consultancy 13% of victims received details on compensation, and that the police had provided this information in 40% of these cases. A further 14% had received this information from the procurator fiscal and another 14% from the courts. In other words, the contribution of the procurators fiscal and the courts towards informing victims about restitution and compensation is relatively modest. Information from the procurator fiscal is most likely to come in the shape of a compensation form, see § 7.2 under D.12.

Because the victim is not a party to the criminal proceedings, and cannot therefore be legally represented in these proceedings, there is little reason for the courts to inform the victim about legal assistance.

**Outcome of the case**

It should be noted that the third element of D.9 does not say that the victim should be informed of the outcome of the case, only that he should be informed of how he can find out the outcome of the case. One way for the victim to find out the outcome is to attend the sentencing hearing which is open to the public. However, few victims are aware of this opportunity, even if they have attended the trial diet as a witness. This is because after having testified, witnesses are thanked for coming to court and told that they may go, which most of them do. Few realize that they may stay to listen to the rest of the proceedings.\(^{74}\) Another way for the victim to find out the outcome is to contact the clerk of the court. The number can be found in the telephone directory. Sometimes Victim Support makes enquiries on behalf of the victim. Finding out the outcome was one of the services rendered on occasion by the three pilot Victim Witness Support projects.\(^{75}\) Incidentally, it should be noted that notifying victims of outcomes when the offender is a juvenile is seen as counter to the system of juvenile justice in Scotland.\(^{76}\)

---

\(^{71}\) MVA Consultancy (1995), no. 6.5.1, p. 35.

\(^{72}\) MVA Consultancy (1995), no. 6.5.4, p. 36.

\(^{73}\) MVA Consultancy (1995), table 8.1, p. 46.

\(^{74}\) Information provided by Victim Support, November 1998.

\(^{75}\) D. Lobley and D. Smith (1998), p. 4.

The MVA Consultancy asked the 533 victims who knew someone had been charged what the outcome of the case was. 58% said that they had not yet been told the outcome, despite having reported the crime over a year ago. Of the 224 victims who knew the outcome, 24% had been informed by the courts, 21% by the police, 17% through the newspapers, 14% by the procurator fiscal, 7% by a friend or relative, 4% by their own solicitor, 3% by a defence agent, 1% by a relative of the offender and 8% by other than the above.

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.

When the police have completed their investigations into an offence, they send a police report to the procurator fiscal. This report is aimed at providing the fiscal with all the information he needs to arrive at a decision of whether to take proceedings. In as far as information about the injuries and losses suffered by the victim is relevant to this decision, it will be included in the police report. The Scottish police do not compile this type of information with a view to helping the victim secure compensation from the offender or the state. From the victim's point of view, the statement on his injuries and losses may therefore be far from clear and complete. Likewise, the criminal court is likely to find that the police statement on the injuries and losses of the victim provides insufficient information on which to found a compensation order. To remedy this, a compensation form was designed for procurators fiscal to give to the victim, but this form has had only relative success, see under D.12 below.

(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.

It is the responsibility of the Crown to provide the court with all the necessary information on which to base a compensation order. Although some relevant information may have reached the procurator fiscal through the police report (see earlier under A.4) more often than not additional information is required. Prior to the trial, the procurator fiscal may send the victim a compensation form, to be filled in and returned to him. During the trial, he may lead the victim in evidence of the injuries and losses – the victim may not address the court on the issue of compensation of his own accord. Where there is a plea of guilty, and no trial takes place, it is particularly important that the compensation form is properly filled in.

Compensation forms are not sent as a matter of course in every case where there is injury or loss. Rather, it is left to the discretion of the individual procurator fiscal, whose decision will depend on his assessment of the nature of the case and whether or not the court will be inclined to make a compensation order. An alternative way of making the required

information available to the court would be to include it in the Social Enquiry Report, as has been suggested by Victim Support and was proposed in the Scottish Office research report into the use of Social Enquiry Reports 'Helping the Court Decide'.\(^78\) So far, the Victim Impact Statement has not made its entrance into the Scots criminal justice system.\(^79\)

Any restitution or compensation made by the offender, or any genuine effort to that end, can be put forward by the defence in mitigation of sentence.

## 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.

Earlier we saw that fiscals are gradually exercising their discretion as regards prosecution more readily, and that the amount of cases dealt with by alternative means has increased substantially in the last two decades. More and more offenders are given a warning or are offered a fixed penalty, which means that an increasing percentage of victims lose their chance of being awarded a compensation order by a criminal court. However, the procurator fiscal may also divert a case for reparation to take place.\(^80\)

Guideline B.5 suggests two things: first of all, where the prosecutor is in doubt about whether to go ahead with proceedings, the fact that the victim loses his chance of having a compensation order made in his favour by a criminal court if proceedings are abandoned, could be a reason to go ahead; and secondly, that where the offender has made a serious effort to compensate the victim in the pre-trial stages, that could be a reason not to prosecute.

In Scotland, the first interpretation of the relation between compensation and the discretionary decision whether to prosecute is not recognized. The decision is taken on the basis of the available evidence, in the light of the overall criteria of serving the public interest. The victim's need for compensation is not recognized as an individual element of this public interest.\(^81\) The procurator fiscal will never be swayed by the victim's need for compensation to go ahead with a prosecution that he may otherwise have abandoned.

But where the payment of compensation could be a reason to refrain from prosecution, the situation is slightly different. An accused person may avoid prosecution through successful participation in a Reparation and Mediation Project, or by proposing through

---

\(^78\) 

\(^79\) In *H.M. Advocate v. McKenzie*, 1990 S.L.T. 28, the High Court ruled against the request of the trial judge to be provided with information on 'the feelings of the victim in relation to the disposal of the case'. See S.R. Moody, 'Victims and Scottish Criminal Justice', in: *The Juridical Review* 1997 Part I, pp. 9-10 for an analysis.


\(^81\) Information provided by M. McLaughlin, Policy Unit of the Crown Office, 25 November 1998, and Chief Inspector A. Smailes and colleagues of the Scottish Police College, 19 November 1998. See otherwise Chapter 7 on England and Wales, § 7.1 under B.5, where the victim's interest is considered a separate element of the public interest.
his solicitor to the procurator fiscal that he compensates all damages, in exchange for a decision not to prosecute. In practice, the number of cases settled in this way is minimal.

(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 Scotland, the victim of crime does not have the right to ask for a review by a competent authority of a decision not to prosecute. Once the decision not to prosecute ‘is communicated to the accused, his agent or to one who could be reasonably expected to communicate it to the accused’, the right of the public prosecutor to prosecute is relinquished. This right is also lost when a warning is issued or a fiscal fine accepted and paid. However, in all these instances, the right of the victim to initiate a private prosecution is left unimpeded. However, we have already seen that successful private prosecution is only for the happy few. As the situation stands in practice at the moment, Scotland does not meet the requirements of guideline B.7. One solution would be to retract the rule of renunciation so that a system of review can be introduced. In practice, prosecutors already skirt around the rule by simply not informing the accused that there will be no further proceedings. Another matter of interest is that, where evidence for a serious charge is contestable, plea-bargaining may result in the accused agreeing to plead guilty to a lesser charge in exchange for the dropping of the serious charge. The problem for the victim in such a case is not that there are no proceedings, but rather that the charges are for a lesser offence than the one he feels was committed against him. The question arises whether the victim should also have the right to ask for a review of such an arrangement.

If Scotland decides to stand by its option of private prosecution, it should at least strive to make this remedy a viable option for the victim of crime.

It is interesting to note that, in Scotland, the lack of a right to ask for a review, and the difficulties involved in bringing private prosecution, are not generally regarded as urgent problems that need addressing. However, since 1994, Victim Support Scotland has called for recognition of the right of victims ‘to be consulted and informed on relevant aspects of their case.’ The ‘relevant aspects’ include the right to consultation about key decisions in the management of the case, including changes to charges, pleas and no prosecutions. With the increased use of Crown’s right to discretion as regards prosecution, which results in more and more cases where no proceedings are taken, it is certainly a matter that deserves priority.

83 Although there is evidence that fiscal fines are well accepted in Scotland, there are no plans to introduce fiscal compensation (or to consult victims on fiscal fines). JUSTICE (1998), p. 49.
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.

As indicated in § 5.2, every criminal court has the power to order compensation by the offender to the victim. Despite the fact that the Scottish courts have had this power since the coming into force of the Criminal Justice (Scotland) Act 1980, however, the compensation order is not a popular sanction, and its use has decreased rather than increased over the years. In 1986, a compensation order was made in 9,565 cases (crimes and offences), and by 1996 this had dropped to 7,085 cases. The 1996 figure amounts to 4.6% of all charges proved in that year.86

In Scotland, the authorities generally put the failure of the compensation order down to the lack of resources of most offenders. The court must take the offender's means into consideration when deciding whether to make a compensation order, and for what amount. Furthermore, where the compensation order is combined with a prison sentence, the authorities argue that offenders rarely have an adequate source of income during their imprisonment from which to pay a compensation order, and that it may even be considered unreasonable that someone who has just completed a prison sentence should start paying compensation.87 The average value of compensation orders made in 1996 for all crimes and offences was £220. The highest average award for a particular type of offence was £684 for serious assault.

In our view, the capacity argument is a smokescreen behind which the real reasons for the failure of the compensation order are hidden. The long and the short of it is that the pursuit of a compensation order simply does not enjoy any priority with the authorities. In its present construct, it is up to the procurator fiscal to draw the court's attention to the fact that the victim would like a compensation order to be made, but making any such suggestion for sentencing is at odds with the traditionally minimal involvement of the procurator fiscal in the sentencing process. Although he moves for sentence, he is not accustomed to suggesting to the court what the sentence should be (see § 3.3.1).88 Furthermore, procurators fiscal tend to only put forward the matter of compensation if they know that the sheriff hearing the case is inclined to award compensation. Where plea-bargaining has taken place, a partial plea could even deprive a victim of the opportunity to apply for a compensation order.89

(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.

The compensation order is a penal sanction which may, in principle, be made instead of, or in addition to, imposing any other sentence. Because it is a penal sanction, it can only be made if the accused is convicted of the offence that caused the injury, loss, or damage. However, if the court subsequently grants the offender an absolute discharge, makes a

---

88 See otherwise, for example, the Dutch prosecutor (Chapter 17).
probation order or defers sentence, a compensation order cannot be made. 90 Where the court finds it would be appropriate to impose both a fine and make a compensation order, but the offender has insufficient means to pay both, preference should be given to the compensation order. 91

Because the compensation order can be made `instead of or in addition to' imposing any other sentence, there is, at least in theory, nothing preventing the judge from combining a compensation order with a prison sentence. However, this is seldom done in practice for the reasons of capacity and `unreasonableness' mentioned earlier.

The status of penal sanction leads us to another key component of the lack of priority enjoyed by the compensation order. Even though the compensation order may have the formal status of penal sanction, it is not really considered to be a proper punishment, and criminal courts still prefer to impose fines rather than compensation orders as a non-custodial sentence. 92

In England, in an attempt to increase the use of the compensation order, the criminal court must now consider making a compensation order of its own accord, regardless of whether the prosecutor has made mention of the victim's desire for compensation. Moreover, the court is obliged to give reasons for not making such an order where it could have done so. Comparable measures should be introduced in Scotland.

(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.

Although the court may not make an independent compensation order where it has deferred sentence or made a probation order (see above under D.11), it may make payment of compensation a condition of a probation order. 93 In that case, the offender must pay the compensation within eighteen months of the order having been made, or two months before the end of the probation period, depending on which of the two is earlier. 94

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 penal sanction and is collected in the same way as fines. 95 It is the responsibility of the court to enforce the order, and payments are made by the offender to

90 1995 Act, section 249(2)(a)(b) and (c). In a summary case, the court gives an absolute discharge `without proceedings to conviction' (1995 Act, s. 246(3). See A.L. Stewart (1997), pp. 255-256.
91 1995 Act, 2. 250(1).
93 1995 Act, section 229(6).
95 1995 Act, section 252. However, the court may not impose a period of imprisonment or detention in default of payment at the same time as actually making the compensation order, 1995 Act, section 252(2). Such an alternative may only be imposed by a fines enquiry court, see A.L. Stewart (1997), p. 245.
the clerk of court, who transmits it to the victim. Arrangements can be made for payment by instalments or after a certain period of time. If both a compensation order and a fine have been imposed, payments made by the offender should first be put towards settling the compensation order, and only after that has been paid off, may the rest of the money be appropriated to the fine. What usually happens in practice is that the payments are proportionally divided over the fine and the compensation order. For example: if a fine of £100 has been imposed, together with a compensation order of £50, payable at £3 a week, the clerk will put £2 a week to the fine, and £1 to the compensation order. Hamilton and Wisniewski found that 87% of compensation orders imposed were eventually paid in full, but that less than half of the orders paid by instalment were paid on time. In some 6% of cases, no payment was made at all.

If the convicted person fails to meet the payments of his compensation order, he may be sentenced by a fines enquiry court to imprisonment or detention in default. It should be noted that a Supervised Attendance Order, as introduced by section 62 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, and available to fine defaulters as an alternative to custody, is not available in relation to compensation orders.

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.

The Scottish Police College at Tulliallan Castle, Kincardine, provides centralized training for police recruits of all eight Scottish police forces. Students must complete a twelve week basic course (first stage training) at the college, then spend approximately eight months on probation at their own forces, gaining practical experience, before returning to the college for a further six week advanced course (second stage training) prior to graduating. The national training provided by the Police College is supplemented by in-force training offered by the individual forces.

The Scottish criminal justice agencies are gradually recognizing that victim awareness training is a necessity. This recognition is reflected, among other things, in the report of the Hamilton court working party, the Scottish Home and Health Department Police (Chief Constables) Circular No. 3/1990 on domestic violence, and the Justice Charter. The 1997 Scottish Office report 'Hitting Home' on the police response to domestic violence recom-
mends 'that forces review the content and extent of in-force training on domestic violence, bearing in mind: the need for probationer and other constables to receive awareness as well as procedural training; the value of involving Women’s Aid workers delivery; and new provision to first line managers by the Scottish Police College.'

Regarding the training of the police in relation to victims in general, Victim Support has a forty-five minute input into the first stage training course offered at the Police College. Furthermore, the college offers direct and indirect training in relation to specific groups of victims/witnesses. For example, during both first and second stage training attention is paid to interviewing the child witness and the rape victim as part of the instruction on the investigative interview technique. The ‘Hitting Home’ report provides an inventory of in-force training on domestic violence. Awareness training for probationers is provided by Women’s Aid in four of the forces, by a domestic violence officer in a fifth force and by police trainers in the other three forces. Four forces also provide some form of training on domestic violence to more senior constables.

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.

In the Scottish criminal process, a victim can be questioned, or asked to give a statement, numerous times. First of all, he is interviewed by the police. Then he may be precognosced by the prosecution, and later by the defence. If cited as a witness for the prosecution for the trial diet, he will be examined in court by the procurator fiscal, and cross-examined by the defence. In the following, we will focus on the measures that have been taken by the different agencies to lessen the burden of being questioned, in particular where vulnerable victims such as children, the mentally handicapped and victims of sexual offences are concerned.

Police

All eight police forces have taken steps to improve the investigation of violent offences committed against women and/or children. Five forces now have special Female and Child Units, two others have Child Protection Units and one has numerous specialist officers who can assist in the investigation of sexual assault. Also, six forces now have special suites for interviewing children and victims of sexual assault. Many of the specialist officers are female. In most forces, interviews of a suspected victim of child abuse are increasingly conducted


103 Police officers are taught to interview along the lines of the PRICE model. According to this model, there should be five stages in any police interview: (1) Planning stage; (2) Reporting stage; (3) Information stage; (4) Closure; (5) End. When the person being interviewed is the suspected victim of an offence, his specific interests and needs should be addressed during the different stages of the interview.

104 The report does add that there is great variance in the quantity of this latter training, and that, at the time of inspection, some forces had temporarily suspended post-probationer training for constables in order to keep within budgeted spending. Scottish Office (1997), nos. 6.21-6.23.
by a police officer together with a social worker. Special efforts are being made to ensure that child victims are only interviewed once by the police.\(^{105}\) If a victim of sexual abuse wants to be interviewed by someone of the same sex, every effort will be made to comply. If the victim suffers from a mental disorder, he should be accompanied to the police interview by an ‘appropriate adult’ on the basis of the appropriate adult scheme.

**Precognition prosecution**

The procurator fiscal, one of his deputes, or a precognition clerk may invite the victim to come to the fiscal’s office for a precognition statement. Victims are often confused about who or what the procurator fiscal is,\(^{106}\) and what is going to happen during precognition. The Crown has published a special leaflet ‘An Interview with the procurator fiscal’ explaining how such an interview is conducted, to people with learning disabilities.

**Precognition defence**

A second precognition may be conducted on behalf of the defence, often by precognition agents who tend to be ex-police officers. There is an increasing awareness that precognition by the defence can cause an undue amount of distress, especially when the precognition agent turns up unannounced, or at an inconvenient time. The Law Society has issued guidance for precognition agents.\(^{107}\)

**In Court**

Being cited as a witness and having to appear in court is stressful to all victims, whether vulnerable or not. However, in cases where the accused has pled guilty, victims do not have to testify in court. There is also a statutory obligation for parties to try to reach an agreement with other parties on uncontroversial evidence.\(^{108}\) Such an agreement could mean that the victim does not have to testify in court, either. In practice, this duty of parties does not yet seem to have had the desired effect.

The way trials are time-tabled and processed causes a lot of distress to victims who are called to testify as a witness in court. It is difficult to predict the course of affairs on any given day in court. Cases may take longer than expected, or be cancelled at the very last moment, for instance, due to a late guilty plea of the accused. To ensure that valuable court time is not wasted and to cater for all eventualities, the clerk of court will schedule more cases than can actually be heard on a particular day. Witnesses who have waited in the courthouse for several hours may find themselves being asked to come back another day

---


\(^{106}\) As established several times by the MVA Consultancy (1995).

\(^{107}\) Article 13 of the Code of Conduct for Criminal Work, with effect from 1\(^{st}\) March 1999: ‘When carrying out precognition of witnesses, whether personally, through directly employed staff, or through external precognition agents, the nominated solicitor is responsible for the manner in which the contact is made with the witnesses and the manner in which the witnesses are actually precognosed. In particular, it is the duty of the solicitor to ensure that any matters associated with the witness of which he is aware which would affect the taking of the precognition or the mode of contact, such as age, disability or other vulnerable status, are taken into account by him and communicated to any precognition agent.’

\(^{108}\) 1995 Act, section 257(1).
or, if there is a late guilty plea, told that their testimony is no longer required.\textsuperscript{109}

Once in court, the victim/witness must stand during his testimony. If the case concerns a sexual offence, the defence may not question the victim about her past sexual history, or sexual inclinations, without special permission of the court on application.\textsuperscript{110} Not all practitioners are aware of this provision, and there is evidence of inconsistency in its use.

There are now special provisions in place allowing for children and vulnerable witnesses to be questioned on application via live television link, on commission or behind a screen. There have been some problems with the television link system, mainly due to unfamiliarity with the equipment. When a child in an abuse case is questioned in open court, the judge will either come down from his bench and sit with the child at the clerk’s table, or have the child sit next to him on the bench. Wigs and gowns are removed by all. In Glasgow sheriff court, there is a special centre for children attending court with a specially adapted courtroom for cases involving children. Similar facilities are being included in the new sheriff court being built in Edinburgh.\textsuperscript{111}

One final potential problem in relation to questioning in court is the fact that if the accused is conducting his own defence – he does not have to be legally represented – he may in principle cross-examine the victim himself. In England, two notorious cases in which victims were subjected to harrowing questioning by their assailants have led to legislation prohibiting such questioning in sexual cases (see Chapter 7). In Scotland, the general attitude of the criminal justice agencies is that such a prohibition is not necessary. Firstly, such cases are rare, and, secondly, the Scottish judge has wider discretion to intervene than the English judge. However, in its manifesto for the Scottish parliament, Victim Support Scotland has called on the parliament to introduce legislation similar to that introduced in England.\textsuperscript{112}

\section{8.3 Protection}

\textit{(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 the consultation document on vulnerable and intimidated witnesses, the Scottish Office reports that it is now established good practice for the police to ‘avoid turning the spotlight on a witness and his identity at the scene of the crime’.\textsuperscript{113} The police are now also much more conscious of the need to avoid embarrassment to victims/witnesses, for instance, by using an unmarked police car to pick someone up at their home or work.\textsuperscript{114} However, it is

\textsuperscript{109} ‘Waiting seems one of the permanent and ineradicable features of the criminal justice process’, D. Lobley and D. Smith (1998), p. 52.

\textsuperscript{110} 1995 Act, section 274(1).

\textsuperscript{111} Justice Charter 1991, p. 9.

\textsuperscript{112} Victims’ Manifesto no. 24, p. 7.


\textsuperscript{114} Information provided by Chief Inspector A. Smailes and colleagues, Scottish Police College, 19 November 1998.
not unusual for a victim of crime to find his name and address mentioned in a newspaper report on the case, or even to hear them broadcast on the radio. Only in the case of a sexual offence is it a statutory offence for the press to reveal the name of the victim. It is not permitted for the press to take photographs in court, although they may take pictures of people arriving at, and leaving, the court. Also, TV cameras have been admitted into Scottish courts, albeit under stringent conditions.\footnote{115} It is permitted to make drawings in court.

In cases involving sexual offences, the public may be removed from the court during the testimony of a child,\footnote{116} or of the complainer.\footnote{117} Although the whole case may be held \textit{in camera}, the court will normally only be closed to the public during the testimony 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.}

In Scotland, protection of the victim can be provided in several ways. In relation to bail, the possible intimidation of witnesses may be a reason to refuse bail,\footnote{118} and if bail is granted, it is a standard condition that the accused does not interfere with witnesses.\footnote{119} Other conditions that may be imposed include the condition that the accused stays away from the victim or the victim's home. Breach of such a condition is an offence for which the accused can be punished with imprisonment of up to 3 months and/or a fine of up to £1000.\footnote{119}

In relation to the precognition of the victim by the defence, it is now common practice to give the address of the victim as 'care of' the local police force. This means that the defence is not given the home address of the victim, but can instead contact him through the local police.\footnote{121}

Physical protection of the victim and his family is generally provided by the police. Strathclyde police force have introduced a Witness Protection Programme whereby a specially trained team consisting of a Detective Inspector, two Detective Sergeants and a Detective Constable is responsible for organizing whatever protective measures are necessary for victim and non-victim prosecution witnesses of serious crimes who are under life-threatening intimidation. Between September 1996 and the end of July 1998, 117 cases of intimidation involving 142 witnesses came to the attention of the Strathclyde police. 37 of these, involving 55 witnesses, were classified as 'level 1' cases, i.e. cases where the threat to the witness was high or very high. 14 of these level 1 cases, involving 24 witnesses and their families, were dealt with through the Witness Protection Programme, with protection in the other 23 cases being provided by the investigating division. Those in the Witness Protection Programme were relocated to new homes.\footnote{122}

\footnote{115}{See I. Willock, 'Television in the Courts', in: \textit{SCOLAG Journal}, March 1994, p. 41.}
\footnote{116}{1995 Act, section 50(3).}
\footnote{117}{1995 Act, section 92(3).}
\footnote{119}{1995 Act, section 24(5).}
\footnote{120}{1995 Act, section 27(2).}
\footnote{121}{A.L. Stewart (1997), p. 116.}
Even though it is a serious offence under Scottish common law to interfere with a witness, and it is generally thought that between a quarter and half of all witnesses do suffer some level of intimidation, prosecution for intimidation is rare.\(^{123}\)

9 CONCLUSIONS

The Scots criminal justice system is a 'mixed' system, with both common law and civil law traits. Regarding the victim of crime, one of the most distinct Scottish features is the precognition process, whereby both defence and prosecution may interview the victim-witness in the course of their respective preparations for the trial. This procedure often causes distress to victims of crime.

Notification of victims is generally poor, and Scotland is one of the few jurisdictions that actually fails to meet the standard set by guideline B.7, on providing the victim with some form of effective recourse against a discretionary decision not to prosecute the offender. On a better note, the Scots (or rather the UK) state compensation scheme is among the best in the world, and the compensation order as found in Scotland is potentially much more successful than the continental adhesion procedure. However, to increase its striking rate, it should be made obligatory for the court to consider making a compensation order of its own accord, regardless of whether the procurator fiscal has mentioned the victim's desire for compensation. Furthermore, the court should be obliged to give reasons for not making such an order where it could have done so.

There is a definite awareness that things need to be done to improve the position of the victim, in particular regarding treatment and protection. The police have made substantial progress in relation to the treatment of child victims and victims of sexual assault and the Crown has developed a very good leaflet explaining how an interview is conducted by the procurator fiscal to people with learning disabilities.

\(^{123}\) Information provided by Victim Support in November 1998 based on 15 years experience of supporting victims and witnesses.
Supplements

ABBREVIATIONS:

CICA - Criminal Injuries Compensation Authority
CICB - Criminal Injuries Compensation Board
cds. - editors
GB - Great Britain
JC - Justiciary Cases 1917-
no. - number
p. - page
pp. - pages
PRICE - Planning Reporting Information Closure End. Model for police interview
R (85) II - Recommendation number II of 1985 of the Council of Europe
s. - section
SCCR - Scottish Criminal Case Reports 1981-
SCS - Scottish Crime Survey
SER - Social Enquiry Report
SLT - Scots Law Times 1893-
SOHD - Scottish Office Home Department
UK - United Kingdom
v. - versus
VSS - Victim Support Scotland

BIBLIOGRAPHY:


Buchholz, J. (1990), *Der Staatsanwalt im schottischen Recht. Seine gerichtsverfassungsrechtliche Stellung, seine Kompetenzen und deren Kontrolle; zugleich eine rechtsvergleichende Betrachtung der gerichtsverfassungsrechtlichen Stellung der Staatsanwaltschaft im deutschen Recht*, (Europäische Hochschulschriften: Reihe 2, Rechtswissenschaft; Bd. 979, Zugl.: Saarbrücken, Univ., Diss., 1989), Peter Lang, Frankfurt am Main-Bern-New York-Paris;


Gane, C., Stoddart, C. (1994), Criminal Procedure in Scotland; Cases and Materials, W. Green/Sweet and Maxwell, Edinburgh;
Greens Criminal Court Statutes (1994), W Green/Sweet and Maxwell, Edinburgh;
Henderson, S. (1997), Service Provision to Women Experiencing Domestic Violence in Scotland, The Scottish Office Central Research Unit;
Hume, D. (1844), Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes (first published between 1797 and 1800, and again in 1844);
JUSTICE (1998), Report of the JUSTICE Committee on the role of the victim in criminal justice, JUSTICE;
Justice Charter (November 1991);
Miers, D. (1997), State Compensation for Criminal Injuries, Blackstone Press Limited;
Morrison, B. (1992), 'Supervised Attendance Orders – a fast track or a road to nowhere?', in:
Murray, K. (1997), Preparing Child Witnesses for Court, Scottish Office Central Research Unit;
MVA Consultancy (1995), Information Needs of Victims, The Scottish Office Central Research Unit;
Statistics on Use of Compensation Orders as a main or secondary punishment by main crime or offence, 1986-1996;
Scottish Crime Survey 1996;
Scottish Office (1998c), Towards a Just Conclusion, Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases, November 1998;

Miscellaneous:
Airdrie Sheriff Court Code of Practice for Joint Provision of Services to Witnesses by Sheriff Clerk’s Office/Procurator Fiscal’s Office Airdrie, June 1997;
Criminal Injuries Compensation Authority, Application Form — Personal Injury;
Criminal Injuries Compensation Authority Business Plan 1998-1999;
Criminal Injuries Compensation Authority, Victims of Crimes of Violence, A Guide to the Criminal Injuries Compensation Scheme, Issue Number One (4/96);
Criminal Injuries Compensation Authority, Criminal Injuries Compensation Scheme, Guide to Applicants for Compensation in fatal Cases (Issue Number One 4/96);
Criminal Injuries Compensation Authority, Criminal Injuries Compensation Scheme, Guide to Applicants for Loss of Earnings and Special Expenses, (Issue Number One 4/96);
Crown Office Circular No. 1685: Warnings to Accused Persons;
Crown Office and Procurator Fiscal Service, An Interview with the Procurator Fiscal (information leaflet for readers aged 5-12 years);
Crown Office and Procurator Fiscal Service, Going to Court as a Witness? (information leaflet for readers aged 12-16 years);
Crown Office and Procurator Fiscal Service, A Visit to Court (information leaflet for disabled persons);
Witnesses;

Crown Office Scotland, The Prosecution of Crime in Scotland (no date);
Home Office, Criminal Injuries Compensation Scheme, 12 December 1995;
Legal Services Agency, Victims of Violent Crime: How to claim compensation (written by Simon Collins and Paul Brown), Spring 1996 (leaflet);
Reporting a Crime, A Guide for Victims and Witnesses (leaflet);
Scottish Court Service, An Introduction to the Scottish Court Service (information brochure);
Scottish Court Service, Complaints: How to complain about or comment on services provided by court administration staff (information brochure);
Scottish Court Service, Statement of Charter Standards;
Scottish Office, Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme, December 1993;
Victim Support Scotland, Strategic Plan 1997-2000;

WITH MANY THANKS TO:

Colin Baxter, The Scottish Office Home Department;
Jim Brody, Chair Victim Support Scotland;
The Rt. Honourable the Lord Cameron of Lochbroom, High Court of Justiciary;
Michael P. Clancy, Deputy Secretary of the Law Society of Scotland;
Eric Cumming, Scottish Courts Service;
Alistair J.M. Duff, Solicitor;
Fiona Hird, Social Work Services Group;
David Lobley, Lancaster University;
David McKenna, assistant director Victim Support Scotland;
Morag McLaughlin, Policy Unit, Crown Office;
Susan R. Moody, Senior Lecturer, University of Dundee;
Alison Paterson, director Victim Support Scotland;
David Shand, Keeper of the Rolls;
Alan Smailes, Chief Inspector, Scottish Police College, and colleagues;
David Smith, Lancaster University;
Peter Spurgeon, Chief Executive of the Criminal Injuries Compensation Authority.
Chapter 21
Spain

Scenery

Advertisements of the tourist industry say: "Spain. Everything under the sun." Indeed Spain is a wonderful and fascinating country. It has all kinds of natural treasures: beautiful coasts and beaches, rough mountains, the peace and quiet of desolate areas in central Spain and even sand deserts reminiscent of Arab countries. In fact, the Arab world is very near and it is hardly surprising that Spain was invaded during the Middle Ages. In Grenada, the Alhambra — a palace of the Moors — in all its magnificence still stands. Likewise, the origin and culture of the Spanish people come in many variations. For instance, in Andalusia in the south of Spain, the men play their famous passionate guitar music to women dancing the flamenco’s. In the north the Catalan and Basque people reside, both with their own language, history and culture.

Despite the magnificence of the country and its rich culture, life has not always been easy for the Spanish people. One does not have to look too far back to find a dark period in Spain’s history. In this century alone, Spain has been subjected to from a gruesome civil war followed by the adversities of the dictatorship of general Francisco Franco. On 18 July 1936, the civil war started with a military coup commanded by general Franco. By the end of that year the Nationalist troops, as the fascist conspirators of France were referred to, controlled the greater part of Spain. Only Castilla la Nueva, Catalunya, Valencia, Murcia, Almeria, Gijon and Bilbao remained in Republican hands. The Republican government formed a coalition cabinet in Valencia while the Nationalists (Junta de Defensa Nacional) named Franco head of the government and commander of the armed forces. The Spanish civil war stirred up strong emotions around the globe. People from other continents, e.g. the United States of America, came to fight Franco and fascism. Despite the many fierce battles, such as the bombing of Guernica (April 1937) which has so strikingly been depicted by Picasso, the nationalists prevailed and made a victorious entry into Madrid on the 28th of March, 1939. This date marks the beginning of the Republican exile and the Francoist dictatorship. General Franco ruled Spain from 1939 until the day of his death on 20 November 1975.

After Franco’s death, the monarchy was restored on his explicit wish as expressed in the Law of Succession (1947). Juan Carlos took the oath of King of Spain at a joint session of Parliament (Cortes) and the Council of the Realm. This event closed a dark period in
Spanish history, and opened the doors to the outside world for the Spaniards who fiercely hoped for a rapid democratic transition. In December 1978, the Spanish people approved the new Constitution by referendum with an 87.8% majority. From then on Spain is defined as a parliamentary monarchy (s. 1.3 Const.). The transition, however, did not go without further struggle because supporters of the former authoritarian regime tried to regain power. In 1981, a group of civil guards, supported by one of the military generals-in-chief, burst into the Spanish House of Parliament and held its members hostage. It was only the decisive intervention of the King which aborted the attempted coup d'état. The next year new elections were held in which the socialists obtained an absolute majority. Felipe Gonzalez became the first socialist Prime Minister of the new Spain. The elections represented the consolidation of the democratic process and marked the end of the transition period to democracy.¹

One aspect of the organization of the modern Spanish state directly affects victims. Spain consists of one central State government and 17 autonomous communities. According to the Constitution, the central government has the exclusive competence inter alia in the regulation of basic conditions which guarantee the equality of all Spaniards in the exercise of their rights and fulfilment of their constitutional duties and the administration of justice. Therefore all improvements regarding the legal position of victims of crime within the criminal process must be initiated by the central government (see § 4 and Part II). On the other hand, the autonomous communities are each competent 'to promote the conditions necessary to ensure that its citizens, and groups into which they are integrated, enjoy true and effective freedom and equality and to eliminate all obstacles which impede or obstruct the fulfilment of these aims.'² Obviously the communities cannot modify any type of legislation, but they have the exclusive competence to create services for victims of crime (see § 3.6). The advantage of this system is that services will usually fit local necessities. On the other hand, it discourages or even prevents the creation of a national victim support organization. Another disadvantage is that the formation of services depends on local political will and the financial situation of the region. If the autonomous government does not financially support victim services or other social services (by e.g. providing housing and paying the salaries of employees), no services are provided (see § 3.6). The central government does not fund these services directly.³ For instance, in Valencia victim support and mediation programmes are carried out by employees of the local victim support scheme but the funding remains problematic. As a result, it is uncertain how long they will be able to assist victims. A further disadvantage is that a great disparity exists between the various regions. The richer communities can offer more services to victims than the poorer regions. This situation creates a certain degree of inequality. Victims in rich communities have a better chance than those in poor regions of: obtaining information, practical and legal advice; effectively starting or joining legal proceedings; and safeguarding their (financial) rights and interests.

---

¹ See http://www.DocuWeb.ca/SiSpain/English/history/civil.html; .../dictator.html; .../monarchy.html
PART I:
THE SPANISH CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

There are two very distinct elements that influence the position and rights of victims in criminal proceedings. First of all, an essential feature of Spanish criminal law and procedure is that the civil and criminal liability of the offender are not seen as separate effects of a breach of the law, but are perceived as truly interconnected. The victim's claim for civil damages is perceived as a claim ex delicto. As a result, the Penal Code contains rules regarding civil liability as a result of crime, and the Code of Criminal Procedure compels the public prosecutor to join the civil suit for damages to the criminal proceedings (s. 108 CCP). Furthermore, it is also remarkable that the legislature presupposes the victim's civil claim for damages, unless the victim explicitly expresses his wish not to claim damages from the offender (s. 112 CCP). The legislature in most other jurisdictions have the opposite approach: unless the victim explicitly asks for compensation he will not obtain it.

Secondly, the very organization of the state into autonomous communities affects the position of victims. The communities have the exclusive authority to create services, such as victim support schemes (see Scenery).

2 GENERAL REMARKS AND BASIC PRINCIPLES

Since the establishment of the new democratic society, the legislature has tried to adapt the legal order to the new political reality. The Constitution led to the enactment of new legislation and inspired many reforms in the field of criminal law. As a result, Spanish criminal law and procedure is characterised by an ongoing process of reform. The Penal Code (Código Penal) was revised for the first time in 1973 and very recently a new Penal Code was promulgated (1995). The Code of Criminal Procedure (Ley de Enjuiciamiento Criminal) however still dates from 1882 but has been subjected to important reforms, some by virtue of the new Constitution, others because of decisions of the Constitutional Court and the European Court of Human Rights. Today, the will to reform is great and there are many proposals to change criminal law and procedure. In this respect it is important to note that Spain is very much influenced by the German legal tradition and legal doctrine. Just like in Germany, the legislature and academics have a rather dogmatic view of legal reforms. Laws have to be dogmatically sound, and often the way in which a certain law is or should be implemented in practice is of secondary importance.

2.1 Basic Principles

The legality principle (s. 25-1 Const.) dictates that public crimes have to be prosecuted ex

---

6 Information supplied by Professor P. Stangeland, University of Malaga, 15 May 1997.
officio by the public prosecutor. Consequently the public prosecutor has practically no margin of appreciation regarding the final decision of prosecution (s. 105 CCP, see § 7.1). The principles of concentration (s. 744 CCP), orality and publicity (s. 681 CCP) govern the trial proceedings. The principle of immediacy regulates the reproduction of evidence in court (see §§ 3.1, 4.1, 5.5 and § 8.2).

Finally, the criminal justice system is governed by the principle of accumulation (see § 5.3). This means that the victim's civil claim for compensation is by law joined to the criminal process. Only in exceptional cases, is the victim allowed to present his claim in civil court.

3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

Spanish citizens often consider the criminal justice system to be distant, bureaucratic and legalistic. This image is enhanced by the working methods of the criminal justice authorities. First, the criminal justice authorities have little to no personal contact with each other. As a rule, they communicate only in writing.

The examining magistrate leads the judicial investigation and does not relay data to the police. Much to the dismay of the police, they are not kept informed about the state of affairs during the investigation. Nevertheless, if the police or victims services need information from the examining magistrate their questions will usually be answered appropriately. But the magistrate will not inform them on his own initiative. In the smaller towns, however, the situation may be different. Here, the police may have personal contact with examining magistrates. For instance, in Manresa the chief of police talks three or four times a week with examining magistrates to discuss ongoing investigations.

The police and public prosecutors do not maintain relations, not even in the smaller towns. This is due to the fact that public prosecutors do not direct the (judicial) investigation, which is the exclusive duty of the examining magistrate.

The main task of the public prosecutor is to prosecute the accused. Moreover, public prosecutors usually work at home when they are not required to be in court and are therefore difficult to contact.

Second, hardly any coordination of responsibilities between the different authorities exists. Occasionally, a meeting between police officers and magistrates is organized by the senior examining magistrate (Juez Decano). He may call for a meeting with the national police, civil guards, and local police (see § 3.1) in order to coordinate investigative duties or priorities in police action. However, to illustrate the exceptional character of such a meeting: it has only taken place once in the community of Valencia, in the past twelve years. According to the Valencia police, the main reason for this lack of communication is the excessive workload of magistrates.

Third, the degree of coordination tends to be low even within the same body. For example, medical doctors are obliged by law to report their suspicion of a punishable act to the examining magistrates. Sometimes, the victim himself will also report the crime for which he needed medical attention. These two reports may be distributed to two different examining magistrates, and are thus dealt with separately as if it concerned two different cases. Since magistrates are independent, the Ministry of Justice cannot give instructions

---

Information supplied by Mr. M. D. Hidalfo González, police chief, Jefe brigada operativa de la Policía Nacional, Manresa, 26 May 1997.
3.1 Investigating Authorities

The police is divided into two national forces: the national police (Policía Nacional) and the civil guards (Guardia Civil), which is the more militarily organized police. The civil guards work in the smaller towns and rural areas. The main authority of the civil guards is in the field of traffic and border control. The national police force operates in the larger urban areas and has a more general authority. The head of the State security (Director de la Seguridad del Estado) is responsible for both police forces. Furthermore, there is a local police force (Policía Local) and the two autonomous parts of Spain have their own police force: the Basque police force (Ertzaintza) and the Catalan police force (Mossos d’Esquadra). Because there are so many forces, confusion concerning their competences may arise. Furthermore, one is not always aware of the actions of the other forces.8

Every police officer, may act as a member of the judicial police (Policía Judicial) and is competent to investigate crimes and to arrest suspects (ss. 282 et seq. CCP). However, in practice, the police have separate brigades which perform judicial tasks. Members of the judicial police have an auxiliary function. They have to follow instructions issued by the examining magistrates (Juezes de Instrucción) and public prosecutors. As soon as the police become aware of a public crime, or are required to act by the victim regarding a private or semi-public crime, they must notify the examining magistrate or the public prosecutor (s. 284 CCP).

Victims of crime can report offences to any of the police forces, the examining magistrates (Juez de Guardia) and public prosecutors on duty (Fiscal de Guardia, see § 5.1). With respect to the treatment of women who want to report a crime, it is relevant to note that the national police force has established a special service (Servicio de Atención a la Mujer – SAM) whose purpose is to protect women who are victims of violence. The aim of this service is to give ill-treated women expert assistance, which takes the type of crime and the personality of the woman, as well as her social circumstances into account.9

3.2 Prosecuting Authorities

The prosecuting authorities are considered to be part of the judiciary (see § 3.3). In pursuance to section 124 of the Constitution, the prosecution service (Ministerio Fiscal) should defend the rule of law, the rights of citizens and protect public interests. In the exercise of these functions the public prosecutor may act ex officio, or at the request of the victim (see § 5.2 and § 5.4). The activities of the prosecution service and the individual public prosecu-

---

9 A striking example is a shooting between the civil guards and the national police in the Basque country (1997). Both police forces were operating in civilian clothes during an anti-terrorist campaign. Due to ignorance of each other’s activities and inadequate coordination, a police officer got shot by the other force.
tors are regulated in the 1870 Act on the Judiciary (Ley Orgánica del Poder Judicial)\(^{11}\) and the Statute of the prosecution service (Estuto Orgánica del Ministerio Fiscal).\(^{12}\)

Contrary to most jurisdictions, the prosecution service has neither the authority to investigate offences, nor to direct the police investigations. This power lies exclusively with the examining magistrate (see § 2 and § 3.3). The main competence of the public prosecutor is to accuse and process the case. However, the public prosecutor does not have the monopoly on prosecution (see § 5.4). He can only prosecute a certain category of offences ex officio, the so-called public crimes (delitos publicos). This is the largest category of offences. The other categories of crimes, private crimes (delitos privatos) and semi-public crimes\(^{13}\) (delitos semi-publicos) can only be prosecuted if the victim has filed a formal complaint or reported the offence to the criminal justice authorities (see § 5.2). Examples of private crimes are defamation, insult, and slander (s. 215 PC) which all require a formal complaint by the victim. Semi-public crimes like domestic violence (concerning spouses and/or children), maltreatment of schoolchildren by their teachers, and abandonment of the family can only be prosecuted after the victim or his legal representative reports the crime to the criminal justice authorities (ss. 104 CCP and 228 PC).\(^{14}\) Finally, the public prosecutor has no real discretionary powers (s. 105 CCP, see § 7.1, B.5).

3.3 Judiciary

The judiciary\(^{15}\) consists of public prosecutors (see § 3.2), examining magistrates, trial judges and sentencing judges.

The examining magistrate (juez de instrucción) plays a crucial role within the criminal justice system. He controls and directs all criminal investigations. The report of each crime is sent to his office, and he may decide to proceed with the judicial investigations, or request the dismissal of the case (see § 7.1, B.5). In practice, the examining magistrate only investigates felonies. The judicial investigation of misdemeanours is confined to the oral court hearings and will be conducted by the trial judges.\(^{16}\) The examining magistrate is a very important authority for many victims of crime. Victims may report crimes directly to his

---

\(^{11}\) The Act on the Judiciary has been reformed by Act 6/1985 of July, and Act 5/1997 of 4 December.


\(^{13}\) Semi public crimes comprise both felonies (delitos) and misdemeanours (faltas). The former category comprises inter alia sexual crimes (s. 178 PC); slander and insult (s. 215-1 PC); abandonment of family and not paying alimony (s. 228 PC); injuries caused by serious imprudence (s. 267 PC); and the felonies of ss. 162-2, 201, 287, 296 PC. The latter category consists of: threats, the use of force, bullying of a less serious nature; damages and injuries, or even death caused by imprudence (s. 621 PC), and the misdemeanour of s. 624 PC. See J. Solé Riera, La tutela de la víctima en el proceso penal, Bosch, Barcelona, 1997, p. 53 (footnote 112).

\(^{14}\) Violent offences (delitos de agresiones), sexual harassment and abuse, can be prosecuted either after a report by the victim, or a complaint by the public prosecutor. However, if the victim is a minor, mentally ill or incompetent to act, the prosecution service may start public action ex officio (s. 191-(1) PC). Prosecution concerning violent and sexual crimes can no longer be stopped by the pardon of the victim or his legal representative (s. 191-(2) PC).

\(^{15}\) The functioning of the judiciary is governed by the Act on the Judiciary of 1985, Ley Orgánica 6/85 del Poder Judicial.

office, and they may be heard and questioned by the examining magistrate (see § 5.1 and § 8.2).

Trial court judges work either as a justice of the peace, or in the criminal, provincial or national courts. The classification of offences has direct bearing on the competence of the criminal courts. The Penal Code distinguishes two categories of offences: felonies (delitos) and misdemeanours (faltas). The first category is divided into the more and less serious felonies. The former carry a prison sentence between six and twenty years, the latter can receive a maximum penalty of six years imprisonment. Certain trivial misdemeanours are dealt with by the justices of the peace (juez de paz de lugar, s. 14-(1) CCP), who are not professional judges but elected citizens. The other misdemeanours and the less serious felonies punishable with a prison sentence up to six years are tried by the criminal court (Juzgados de lo Penal). Most criminal matters are decided in first instance by the criminal court, where a single judge presides. Serious felonies, punishable by more than 6 years' imprisonment are judged by the provincial court of justice (Audiencia Provincial). This court was created in May 1988, and is composed of three judges. A limited number of crimes are dealt with by the national court of justice (Audiencia Nacional). The jurisdiction of this special court extends to organised crime, white collar crime, drug related offences and felonies which transgress the territory of one province, and finally, it has jurisdiction over terrorist acts. Furthermore, a jury court was formed in May 1995. Pursuant to section

---

17 See also ss. 99 – 103 of the Act on the Judiciary (Ley Orgánica del Poder Judicial, 1 July 1985)
18 Until 1988, the crimes tried by the criminal court were judged directly by the examining magistrate (juez de Instrucción). However, the decisions of the European Court of Human Rights in the cases of Decouver and Piersal, in which the Court condemned the fact that the judge who directs the judicial investigation also pronounces a sentence in the same case, ended this practice and led to the promulgation of the 1988 Act of the Judiciary (Ley Orgánica 7/1988, de 28 de diciembre). The legislature created a new type of courts, presided by a single judge for all criminal offences punishable with a maximum of six years imprisonment: the criminal court. Act 36/1998 of 10 November 1998 is very relevant here because it has changed the competence of the criminal court and the provincial court. Before this Act, the criminal court was competent regarding crimes punishable with a maximum of three years’ imprisonment. However, this turned out to be rather disastrous for the functioning of the provincial courts which almost collapsed under its highly augmented workload. According to a study of the Ministry of Justice which compared the workload of this court in the second trimester (1569 cases), and third trimester (2297 cases) of 1995, with that of 1996 (respectively 2297 and 5147 cases), the case load had increased with 67.3% in the second trimester and 124.07% in the third trimester, while the workload of the criminal court rose only 4.61% in the second trimester (from 22.485 to 23.523 cases) and declined 0.9% in the third trimester. The research, furthermore, compared the first two months of 1996 with those of 1997, and found that the workload of the provincial court had risen 154% (from 937 to 2380 cases), and that the workload of the criminal court had diminished 18.91%. Clearly something had to be done. Therefore, the legislature decided to widen the competence of the criminal court to crimes threatened with a prison term of up to six years. See V. Magro Servet, ‘La reforma del sistema competencial de los juzgados de lo penal y las audiencias provinciales’, La Ley, 1997, D-301, p. 1919.
20 The national court of justice was created by legislative decree nr. 1/77 of 4 January 1977
21 According to Vadillo, the reason for conferring this competence on a national court is to ensure consistency in sentencing. The special procedure has been criticized since its creation. Experts doubted whether the national court was compatible with the Constitution. These critical voices are silent today and the Spanish appear to agree that it is compatible with the Constitution. See
125 of the Constitution which stipulates that it is every citizen's right to participate in judicial proceedings as a juror, a Court of Assizes has been established. This court consists of nine jurors and one professional judge, and is competent regarding certain specific felonies enumerated in section 1 of the 1995 Act on the Jury Court (AJC), for instance felonies directed against human life – i.e. homicide and infanticide –, and against a person's liberty and honour. The jury decides whether the charge has been proven, and whether the accused is guilty or innocent (s. 3 AJC). The judge decides on the sentence and the punishment of the offender (s. 4 AJC). Nonetheless the administration of justice by the institution of a jury has not yet taken root in Spanish criminal proceedings. The Constitutional Court (Corte Constitucional) is an essential element of the Spanish legal order (s. 159 Constitution). It is not part of the judiciary as such and is only subject to the Constitution itself and to the organic law whereby it is regulated (Ley 2/1979, of 3 October 1979). It has the power to interpret the Constitution (s. 161 and 162 Const.) and it protects the fundamental rights of citizens (recurso de amparo, s. 162 Const.). Moreover it has the function of a court of last resort. Ordinary appeals can only be lodged concerning judgments of peace and the criminal courts. Spanish criminal proceedings do not allow ordinary appeals against decisions of the provincial and national courts of justice, nor of decisions of the jury court. Legal remedies against these verdicts can be entered only with the Supreme Court (Tribunal Suprema). But appeal to the Supreme Court is limited to grounds of violation of the law and/or breach of procedural rules (ss. 849 et seq. CCP). This system of legal review is heavily criticised because court decisions concerning the most serious crimes are not subject to ordinary appeal, as opposed to the less serious offences.

The final category of judges consists of sentencing judges (jueces de vigilancia penitenciaria). The main duty of the sentencing judge is to execute the verdicts of the trial judges, in particular the prison sentences. He may also decide which convict qualifies for a conditional release, whether certain rules of conduct should be imposed, and if so, which (s. 90 CCP). He may furthermore decide to impose security measures (medidas cautelares, ss. 97, 98, 105 CCP, s. 94 AOf) inter alia for the benefit of the victim (see § 9). Finally, the 1997 Bill introduced the possibility for sentencing judges to hear the victim on matters regarding his personal safety or his right to receive compensation from the offender, before taking any of the above-mentioned decisions (s. 13, audiencia del perjudicado).


See, for further information on the jury court, J.M. Pugnaire Hernández, Ley del jurado, Formularios y escritos para profesionales y ciudadanos, Bosch, Barcelona, 1995.


According to the latest information supplied by F. Gonzalez Vidosa, trials by jury still had not taken root by January 1999.

The appointment of its twelve members is for a nine-year term and every three years one-third of the judges are replaced by new members.

Decisions of the justices of peace can be remedied before the criminal courts and judgements of the latter can be appealed before the provincial court ( Audiencia Provincial).


Proyecto de Ley Orgánica reguladora del procedimiento ante los juzgados de vigilancia penitenciaria (May 1997).
3.3.1 Criminal Proceedings

Spanish criminal proceedings are composed of three stages: the preliminary investigations, the intermediate proceedings and the trial.

The purpose of the judicial investigation (sumario) is to collect evidence and to formulate the indictment (s. 229 CCP). However, the evidence collected in the legal dossier cannot be used directly by the court, as a result of the principle of immediacy. Evidence must be presented and reproduced by the parties during the trial. There is one exception: if parties cannot reproduce certain pieces of evidence, the evidence collected in the pre-trial stage may be used as documentary evidence (s. 730 CCP). 30

The intermediate proceedings are held to decide whether or not to prosecute. They are held in camera with all parties present. The public prosecutor and the private prosecutor have the right to present their written claims to the court (escrito de calificación, s. 650 CCP). These submissions include the nature of the offence, the charge and the facts regarding the civil claim for damages. The accused may respond in writing to these allegations and may present his point of view in writing to the court. Finally, the parties must indicate the evidence they intend to introduce during the hearing, by presenting the list of witnesses and experts they wish to summon to court (s. 656 CCP). The court may subsequently decide to send the case back to the examining magistrate for further investigation (s. 631 CCP), or to close the judicial investigation. The latter decision may lead to the opening of the trial (juicio oral) or the court may dismiss the case (sobreseimiento – s. 632 CCP, see § 7.1, B.5).

The trial proceedings begin with the court asking the accused whether he confesses to the charge (s. 688 CCP). If he confesses the crime, the court will ask him whether he wants to proceed with the trial. If not, the court may give its verdict immediately (ss. 655 and 694 CCP). The trial will continue if the accused pleads not guilty, and if he confesses but contests the civil damages. In the latter case, the proceedings will be directed only at the determination of the losses and injuries of the victim (s. 695 CCP). If the trial continues, the witnesses may be questioned by all parties involved in the proceedings (ss. 701 et seq. CCP). Confrontations are possible, although not very frequent in practice. Once the evidence has been presented, the parties are entitled to modify their submissions presented during the intermediary stage (ss. 732, 653 CCP). If the court considers the qualification of the criminal act to be inadequate, it can read a certain prescribed formula (tesis) to the parties and invite them to reflect and modify their positions (s. 733 CCP). The public prosecutor, the civil claimant and the defence counsel may make final statements (ss. 734-737 CCP). Finally, the judges deliberate upon the evidence produced and pronounce a sentence (ss. 740-742 CCP). 31

3.4 Enforcement Authorities

The authorities involved in the enforcement of sentences do not assist the victim in the collection of money from the offender (see § 7.3).

3.5 Probation and Penitentiary Services

Nowadays, these services deal exclusively with offenders and their punishments. Before

---

1979, however, these services played a role with respect to the payment of compensation by offenders to their victims. In 1979, penitentiary law was substantially modified to promote the social rehabilitation and social reintegration of the offender. However, the repeal of penitentiary work as a fundamental element of treatment also led to the loss of the old system in which part of the earnings of the inmate could cover the damages of the victim. Moreover, early (conditional) release from prison became an automatic right. In general, however, the proceedings regarding conditional release do not take the interests of the victim into account (see § 3.3 and § 8.3). 32

3.6 Victim Services

In Spain, no national victim support service exists. This is due to the fact that the establishment and funding of services are the responsibility of the autonomous communities (see Scenery and § 1). The first victim support centre was established in Valencia, in 1985. After four years, the example of the Oficina de Ayuda a la Víctima del Delito (O.A.V.D.), 33 was followed in Barcelona and Palma de Mallorca (1989). During the 90's, many communities followed: Alicante, Bilbao, Castellón, Gerona, Guipúzcoa, Lanzarote, Las Palmas de Gran Canaria, Lleida, Logroño, Madrid, Málaga, Murcia, San Bartolomé de Tirajana, San Sebastián, Sante Cruz de Tenerife, Sevilla, Tarragona, Vitoria, and Vizcaya. The Valencian victim support centre has given moral and practical support to the other offices. 34

During the first ten years of the O.A.V.D., 30,765 victims were given assistance in Valencia. 35 The Valencian victim support scheme maintains good relationships with the police and other legal authorities, especially with the examining magistrates. The examining magistrates—which often come in contact with victims (see § 3.3)—have been very supportive of the work of the O.A.V.D. Together they have started the first mediation programme in Spain. 36 The O.A.V.D. also took the initiative to give lectures to the police on the subject of the treatment, rights and interests of victims. 37 Finally, the O.A.V.D. works closely with the social services.

However, in other parts of Spain, the relations between victim support and other authorities and services are not always as good as in Valencia. During its first years, the support schemes ran into many problems, as was the case in Valencia. Many factors have played a role. For instance in the Basque community the national police force refuses to talk to the local victim support schemes because of the political problems the police have with

33 O.A.V.D. is the official abbreviation, as used by the victim support scheme in their annual reports.
34 Mrs. F. Gonzalez Vidosa, a lawyer, is the driving force behind the victim support scheme in their annual report.
36 See F. Gonzalez Vidosa, L. F. De Jorge Mesas, Mediación, 1ª experiencia de adultos en España, report of January-June 1994. The mediation programme was front page news because there is no legislation authorizing mediation. Nevertheless, it is practised in Valencia on an experimental basis.
37 For instance the O.A.V.D. has given lectures of about 2.5 hours to all stations of the national police in Valencia (21 in total), the 7 stations of the civil guards, and in all 70 stations of the provincial police. See 1997 Annual Report.
the local Basque government, which funds victim support.

In spite of the many problems still facing victim support, the work of the various schemes is very important to the victims. Not only is the assistance of victim support often crucial with regard to the provision of information, it is also of major importance to victims in need of practical or psychological assistance. In practice, the majority of victims who come to victim support, have suffered physical, psychological, or sexual abuse. Many of these victims not only need support and practical help, they need psychological help as well. In Spain, no free psychological assistance is available outside the victim support schemes.

In addition to the victim support services, there are some services which provide assistance to specific categories of victims. Some, such as the information centres for women's rights (Centros de información de los derechos de la mujer), and the association for assistance to raped women (Asociación de asistencia a mujeres violadas) can be found in the major cities. Other services are locally based. In Madrid, however, some services are relevant to victims in the whole of Spain. These include the Ministerial Bureau for Victims of Terrorism (Oficina de Atención al Ciudadano y Asistencia al las Víctimas de Terrorismo), the Ministerial Bureau for Economic Assistance for Victims of Violent and Sexual Crimes (Oficina de Información, Dirección General de Costes de Personal y Pensiones Públicas), and the investigation committee concerning maltreated women (Comisión para la investigación de malos tratos a las mujeres).

3.7 Social Services

There are many social services which may work with victims of crime; some may even provide financial and practical support. This is particularly relevant to the vulnerable group of victims of domestic violence (see also § 3.6 and § 8.3). However, victims — like all citizens — are only entitled to economic assistance or welfare for six to twelve months. Emergency economic assistance amounts to 25,000 Ptas (EUR 125), which is too little to get by. In addition to financial help, the social services have established shelters for victims of domestic violence. The problem of domestic violence is very severe in Spain (see § 8.3). There are shelters (casas de acogida, centros de recuperación) in all autonomous communities. Barcelona, for instance, has five community shelters and Madrid has three, two funded by the community and one financed by a private organization (see Scenery and § 1). Most shelters can offer protection for 30 to 50 women, free of charge. However, the stay in those shelters is usually limited to three months. Therefore, it is hardly surprising that victims of domestic violence are forced to return to their violent partners if they cannot find a job. With respect to psychological help, social services cannot offer any assistance. No post-trauma counselling is available within the social services. In practice, this is a problem for many victims who are unable to pay for the expertise of a psychologist (see § 3.6).

3.8 The National Ombudsman

First of all, it is important to mention that the Ombudsman (defensor del pueblo) has played an important role in the promulgation the 1995 State Compensation Act (Act for the Provision of Aid and Assistance to Victims of Violent Crimes and Sexual Offences: referred to as SCA, see § 4.3). He advised the Minister of Justice to reform the law in order to compensate victims of violent crime from public funds. He was also a catalyst in ratifying the European Convention of the Council of Europe regarding State compensation schemes for victims of violent crime. In 1990, the Minister introduced a draft Bill on state compensa-
tion which led to the promulgation of the 1995 Act. Second, victims may write to the Ombudsman if they are badly treated by the authorities, or if they were deprived of effective access to the criminal justice system. And although the Ombudsman cannot remedy the treatment directly, a complaint may affect the legislature which includes all the complaints in its annual report (Memoria del Defensor del Pueblo).

4 SOURCES OF LAW

4.1 General Sources of Law

The 1987 Constitution plays a fundamental role in the Spanish legal system (see § 2). Its importance can be illustrated by the fact that violations of the incorporated fundamental rights give rise to a special form of remedy (el recurso de amparo) before the Constitutional Court (see § 3.3). The Constitution of 1978 contains several provisions which have shaped Spanish criminal law and procedure. It embodies fundamental values and has a direct and binding effect on the legal order. The basic principles in this respect include the right of every citizen to judicial protection (tutela efectiva de los jueces y tribunales) and to effectively exercise legal rights (ejercicio de sus derechos e intereses legítimos — s. 24-1 Const., see § 6.1, A.2), and the right to a fair trial (s. 24-2 Const.). Chapter VI of the Constitution concerns the judiciary (el poder judicial) and guarantees the independence of magistrates (s. 117 Const.), free legal aid for those in need (s. 119 Const., see § 4.3.), as well as the right of every citizen to prosecute crimes (acción popular, s. 125 Const., see § 5.4.). The Constitution also proclaims the exclusive competence of the state in matters of the administration of justice (s. 149-5 Const.). In addition to the codified sources of law, such as Acts and Codes, there are a number of general principles which govern criminal proceedings (see § 2.1).

4.2 Sources of Criminal Law and Procedure

The codification process of criminal law started with the promulgation of the Penal Code (Código Penal) in 1848. Major reforms of criminal law took place in 1870, 1944, 1973, and 1995. On 8 November 1995 the current Penal Code was adopted by the Spanish parliament (Congresso de los Diputados) following fifteen years of debate. It took effect on 25 May 1996. The 1996 Penal Code reflects the values and fundamental rights laid down in the 1987 Constitution. Modern insights have led to alterations regarding financial penalties and the purposes of sentencing. Since 1996, the court must take the convict's ability to pay into account when imposing a fine. This may also play a role in compensation, if the payment

---

39 Information supplied by F. González Vidosa.
40 Remarkable is the provision that sanctions which deprive the offender of his liberty must be directed towards his rehabilitation (reeducación y reinserción social — s. 25-2 Const.). See R. Vadillo (1993), p. 383.
41 Imprisonment up to a hundred years or more is no longer possible, the sentencing range is now from a minimum of six month to a maximum of twenty years. In exceptional cases a sentence of thirty years may be imposed. Release from custody as well as the possibility of a reduced sentence is integrated into the new Code.
is considered as a mitigation factor (see § 7.2, D.13). The central philosophy of the new Penal Code is to enhance the rehabilitation of the offender, for instance by imposing an alternative sentence. Finally, the 1996 Penal Code introduced a number of new offences to update criminal law, such as money laundering and sexual harassment. The Code of Criminal Procedure of 1882 (Ley de Enjuiciamiento criminal) has also been subjected to numerous reforms. The most important reforms since the promulgation of the Constitution are the revisions of 1983, 1988 and 1992. The first two reforms were necessary to adapt the Code of Criminal Procedure to the values incorporated in the Constitution. In addition to these enactments, other statutes have shaped the functioning of criminal law and procedure such as the 1985 Act on the Judiciary (Ley Orgánica 6/85 del Poder Judicial, see § 3.3) and the general Statute relating to the prosecution service (Estatuto Orgánico del Ministerio Fiscal, see § 3.2).

4.3 Specific Victim-Oriented Sources of Law and Guidelines

The Penal Code and the Code of Criminal Procedure both contain many provisions relating to victims (see also § 2). The 1992 reform of the Code of Criminal Procedure introduced the summary proceedings (juicios rápidos), in addition to the abbreviated proceedings. Here, the legislature recognised the right of the victim to oppose the public prosecutor’s decision to try the accused in summary proceedings. The victim may act accordingly, if he feels that the crime is more serious than the public prosecutor had stated in the indictment, or if he thinks that the investigation of the facts, circumstances or persons was inadequate.

The 1996 Penal Code seems to ameliorate the position of victims of crime. Victims who are party to the proceedings have the right to be heard when a prison sentence will either be suspended, or substituted by another punishment (ss. 80-87 PC and ss. 88-89 PC respectively). At the same time, it introduces measures which may facilitate the victim’s right to be compensated, i.e. the court may lower the sentence if the defendant has paid compensation for the damages caused by the crime, or has minimized its effects (s. 21-5 PC, see § 7.2, D.13). It improves the protection of the victim by allowing the court to impose rules of conduct (s. 83 PC, see § 8.3). Finally, it has significantly expanded the number of crimes which can be prosecuted on the initiative of the victim.

In addition to the Penal Code and the Code of Criminal Procedure, other enactments are relevant to the position of victims of crime. The Act of 21 June 1989 involves new complainant offences in certain cases of personal injury, and even death, resulting from simple negligence (imprudencia, s. 621-(6) PC, see also § 5.2). The objective of the reform was to encourage conciliation between the victim and the offender and to facilitate financial agreements concerning civil damages. The legislature felt that the offender would be motivated to compensate the victim for his losses and avoid criminal proceedings. However, this strategy is not without its critics. According to Torio-López, the 1989 Act has the advantage of facilitating pre-trial claim settlement. However, the disadvantage of a lesser

---


44 Crimes for which reporting the offence (denuncia) is required include ss. 162, 191 PC (sexual crimes), ss. 201, 228, 267, 287, 296, 620 PC (not very serious threats or insults), ss. 621 (injuries or death caused by imprudence), s. 624 PC. Crimes for which a complaint (querella) must be filed include slander and insults s. 215 PC; and sexual crimes s. 191-1 PC (which states that the public prosecutor has to file an official complaint in order to prosecute sexual crimes).
degree of protection of human life clearly outweighs this advantage.\textsuperscript{45} Furthermore, Chapter II of the 1995 State Compensation Act (SCA, see § 4.4) deals with assistance to victims of violent and sexual crime. Section 15 SCA obliges police officers and magistrates to give victims of violent and sexual crime the appropriate information and to question victims of serious crime with respect (see § 6). Section 16 SCA concerns victim support services. The Minister of Justices has taken it upon himself to create more victim support centres. These centres will be established throughout Spain, in court buildings, or at the prosecution service. The choice between these two options depends on the local needs and opportunities. To date, this provision has not yet been implemented.

\textit{Legal Aid}

The Free Legal Aid Act (FLA)\textsuperscript{46} is important to victims with limited financial means. This Act ensures observance of the constitutional right of effective access to the courts for all persons residing in Spain (ss. 119, 124 and 125 Const.). Not only private persons, but also social services and associations recognized by law have the right to apply (s. 2 FLA). Victims who earn less than twice the minimum wage (s. 3 FLA), or in special circumstances less than four times the minimum wage (s. 5 FLA) and wish to defend their rights in court can apply for free legal aid. The provisions suggest that many victims can apply for legal aid. This is not true, however. The income requirements are, in fact, very restrictive and only the really poor are eligible.\textsuperscript{47} Applications have to be submitted to the Free Legal Aid Committee (Comisión de Asistencia Jurídica Gratuita, s. 9). The Bar Association (Colegio de Abogados) has to assess the financial incapacity of the applicant, as well as his personal situation, and must send its findings to the Free Legal Aid Committee.\textsuperscript{48} According to section 6, the right to free legal aid covers the costs of pre-trial consults and deposits, the costs of legal representation, and copies of judicial decisions.

\textit{State Compensation}

The government expressly undertakes to compensate victims of terrorism and victims of violent and sexual crimes. However, no real Funds have been established. State compensation is an administrative procedure, and applications have to be submitted to the Ministry of Economy (Ministerio de Economía y Hacienda).

State compensation for victims of terrorism was introduced by s. 24 of the 1984 Act.\textsuperscript{49}

\textsuperscript{45} A. Torío-López (1996), p. 519. According to Torío-López, the protection of citizens should be the legislature's primary concern. Serious crimes should not be the subject of private negotiations. Only with respect to less serious crime or property crime, should such provisions be allowed.

\textsuperscript{46} Act on Free Legal Aid of January 1996; Ley 1/1996, de 10 de enero 1996 de Asistencia Jurídica Gratuita, authorized by Royal Decree 2103/1996 of 20 September, and regulated by Orden de 23 de septiembre de 1997 sobre tramitación de las solicitudes de asistencia jurídica gratuita en el ámbito de la jurisdicción penal.

\textsuperscript{47} In practice this means that if the household of the victim earns more than 114,000 Ptas per month, the victim cannot apply for free legal aid (1997). This is a very small sum, and few citizens have such a low income.

\textsuperscript{48} The Regulation of 23 September 1997 has been promulgated because many problems arose from this obligation. The study into the financial capacity of the applicant may be very time consuming. As a result, some applicants were deprived of their Constitutional right to have access to the legal proceedings.

It contains a number of general measures for dealing with activities of armed gangs and terrorist organizations in response to the increase in the number of violent incidents resulting from the Basque separatism movement. The victims' right to compensation was later acknowledged in the 1987 Act and was implemented by the Royal Decree of 28 October 1988, which has since been revised several times. The general scope of the State Compensation scheme for Victims of Terrorism (SCVT) is payment of compensation for any loss arising from physical or psychological injuries, medical expenses and material damages to the victim’s house or car as a consequence of a crime committed by an armed gang or a terrorist organization (ss. 1.1; 1.2 (b), (d); 2.1 SCVT). Compensation for property loss is based on the cost of repairing the house and other basic elements of the building to make it habitable again (ss. 13, 14 and 15 SCVT). Royal Decree 1734/1998, declared for the first time that the objective of compensation of damages to the home is to restore it as much as possible to its original state (s. 25 SCVT). In addition, it introduced the option to pay for provisional housing while the victim’s home is being repaired (s. 26 SCVT). State compensation for victims of terrorism is awarded in addition to whatever other compensation the victim may claim in court or from insurance companies (s. 4 SCVT). But medical expenses are only met in full if they are not covered by some other scheme. Section 6 SCVT states the criteria for determining the amount of compensation for pecuniary loss caused by the incapacity to work.

State compensation for victims of violent crime was introduced by the 1995 Act for the Provision of Aid and Assistance to Victims of Violent Crimes and Sexual Offences (hereafter referred to as the State Compensation Act: SCA) which extends the scope of the 1979 compensation scheme for victims of terrorism to all victims of violent or sexual crimes. However, the 1995 SCA did not become law until one-and-a-half years later by means of the Royal Decree of May 1997. This Royal Decree contains practical regulations (88 section) concerning the State Fund for victims of violent and sexual crime.

The SCA provides for the payment of State compensation to direct and indirect victims of intentional violent crime resulting in death, serious physical, and psychological or mental health injuries. Victims of sexual offences also benefit from the scheme, even if the crimes are of a non-violent nature. The compensation payable to the victim is proportional to the severity of the injuries. It is assessed with reference to the financial situation of the victim, the number of persons financially dependent on him, and the severity of the injuries. The actual sums are determined in s. 6 SCA. The application for compensation should be filed within one year after the crime was committed (s. 7 SCA) with the Ministry of Economics (s. 9 SCA). An appeal against the decision taken by the Ministry may be lodged with the National Commission for Assistance to Victims (Comisión Nacional de Ayuda y Asistencia a las Victimas de Delitos Violentos y contra la Libertad Sexual, s. 11 SCA). As a result of the payment...
of compensation to the victim, the State may subrogate in the rights of the victim against the offender up to the total amount of the paid sum (s. 13). According to Torio López, it is interesting to note that the SCA only establishes a scheme of public assistance. Thus, the victims mentioned in the law are not given a right to State compensation for the financial losses suffered as a result of crime. To date, there are still no published data available on the number of applications to the Commission, nor on the actual sums awarded to the applicants.

5 ROLES OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM

5.1 Reporting the Offence

According to the law, everyone who has knowledge of the perpetration of an offence has the legal obligation to report it to the proper authorities (denuncia). Non-compliance is punishable by fine (s. 259 CCP). Also, anyone who learned of an offence while performing his profession is obliged to report it (s. 262 CCP). Medical doctors, for instance, fall into this category. If they do not report a crime, they can be given a fine (s. 262-(1) CCP). Only lawyers and attorneys at law can appeal to professional secrecy (s. 263 CCP). Other persons who are not obliged to report are juveniles, the mentally ill, spouses and other family members of the offender (ss. 260, 261 CCP).

Crimes can be reported in writing or orally, in person or by another person with a mandate to act (ss. 265, 266 and 267 CCP). The report can be taken down by the police, or by functionaries at the courts working for examining magistrates and public prosecutors (s. 264 CCP). Furthermore, crimes can be reported to the justice of the peace (juez de paz, s. 259 CCP). The majority of victims report crimes to the police, though quite a few believe it is better to report directly to the courts. However, police stations are much better equipped to handle reports. At police stations victims can report a crime in relative privacy whereas at the courts they have to report the crime in a public area, such as the main entrance hall where people are often waiting. Moreover, police stations are open 24 hours

56 Most medical doctors are so afraid to overlook a possible offence that they report everything to the authorities, even if it is quite obvious that someone broke his arm during a football match. Obviously, most cases reported by medical doctors will not even be investigated, unless it seems to concern a serious incident. Information supplied by examining magistrate, De Jorge Mesas, Valencia, 12 May 1997.
57 Ante el juez o funcionario del Juzgado de Guardia, ante el Fiscal del Juzgado de Guardia, en la Policía Nacional, Guardia Civil y Policía Local.
58 Information supplied by magistrates, victim support services and police officers, Valencia 12 to 17 May 1997.
59 While visiting police stations and courts in Valencia (12 – 16 of May 1997), I noticed the different treatment of victims who were reporting a crime. Victims entering the police station are welcomed by a policeman at the entrance and asked whether they want to report a crime or whether they want information about, for instance, documents. Those who want to report a crime are asked to wait in a separate room where they are collected by an officer. At the courts, however, victims have to report the crime at the main entrance. I witnessed that, although there was a private room available to take down the report, every victim had to tell their story in the busy entrance hall. Even when a woman with her children came in to report a case of serious domestic violence and was clearly embarrassed to talk about it in the presence
a day.

Victims who have reported a crime are entitled to ask for a copy of the report (s. 268 CCP). In practice, however, the police hardly ever give them a copy. Instead, they may be given a paper confirming they reported a crime.60 Usually, victims are only given a copy after a telephone call from the local victim support centre. Victim support centres also advise their clients to give the police advance warning, so that the a carbon copy of the typed report can be made.61 A copy of the report is valuable to the victim because it contains the name of the officer who took the report, which generally facilitates further contacts with the police.

It is relatively easy to report crimes to the authorities, but it is also very time consuming. Waiting times can be quite long at both police stations and the magistrates' office. Victims may have to wait from 15 minutes up to several hours.62 Moreover, police officers and the functionaries at the courts who take down the report have a very limited knowledge of the law. As a result, the report only contains the declaration of the victim and no legal information relevant to the case. What is more, the examining magistrate often shelves these, unless he calls the victim to his office because essential information is missing.63 That may be the reason some victims prefer to take their lawyers with them to report a crime although this is not required by law.64

Perhaps the lack of privacy and the long waiting times contribute to the relatively low reporting rates compared to other countries.65 It has been estimated that more than 50% of thefts are not reported. In addition to the above-mentioned factors, there are several other reasons why victims are unwilling to report crimes, such as a widespread distrust of the criminal justice system.66 Furthermore, victims are deterred by the length of criminal
proceedings, the legal costs and the costs of a lawyer. Another interesting factor is that victims who know the offender often do not report the offence because of intimidation, or out of fear of reprisal (see § 8.3).  

5.2 Complainant

All citizens may file a complaint and act as a private prosecutor with respect to public crimes (s. 270 CCP, see § 5.4). In addition, the victim has been given this right regarding private or semi-public crimes (see § 3.2). Semi-public crimes can be prosecuted on the initiative of both the public prosecutor and the victim. Private crimes, such as insult and libel can only be prosecuted after a complaint by the victim (querella de la persona ofendida, s. 104 CCP), and can be referred to as the classic complainant offences. Other private crimes can only be prosecuted after a report (denuncia) by the victim or his representative. These crimes can also be considered to be complainant offences. In 1989, the range of complainant offences was broadened (see § 4.2) to include most cases of physical and mental injuries which were caused by simple negligence (imprudencia, s. 261 PC).

The advantage of complainant offences is that the victim is free to decide whether he wants to instigate criminal proceedings or not, and cannot be forced to be involved against his will. A disadvantage may be that the perpetrator cannot be prosecuted if the victim, for whatever reason, decides not to press charges.  

The legislature realized that this freedom may constitute a risk for victims of sexual offences, who can be pressured by the offender, their family or friends not to file a complaint, or who may be too afraid to initiate criminal proceedings. In 1983, sexual assault ceased to be a complainant offence. This policy was extended to all other sexual offences in 1989. Another development concerns private crimes, such as insult and slander. Here a process of decriminalization is set in motion. The legislature has created instruments within civil law to defend one's honour. Nowadays, victims of these crimes can choose between criminal or civil proceedings.

5.3 Civil Claimant

The Spanish criminal justice system has adopted the principle of accumulation. This means that the civil claim for compensation is, as a rule, part of the criminal proceedings (s. 108 CCP). The public prosecutor should demand compensation on behalf of the victim, unless the victim has explicitly renounced his right (s. 108 CCP), or wants to claim damages in civil court (s. 112 CCP). The victim should inform the public prosecutor of his intentions at the deposition stage of the proceedings (s. 109 CCP). Because the public prosecutor acts on behalf of the victim, the civil claimant does not need to have a lawyer to claim compensation from the offender.

The legislature has, furthermore, taken additional measures to safeguard the right to compensation and to facilitate the participation of the civil claimant in the proceedings. For instance, just because the victim has not informed the public prosecutor of his wish to

68 Another interesting manner to avoid proceedings, and even to terminate ongoing proceedings is the pardon. (perdón, indulto, s.130 PC) If the victim officially forgives the perpetrator, criminal proceedings will end. This may be done up to the enforcement of the sentence.
69 Act of 5 May 1982, Ley 1/1982 de 5 de mayo.
receive compensation, and did not constitute himself as a civil claimant does not mean that he has given up his right to receive compensation within the criminal process (s. 110 CCP). In summary proceedings, the constitution as a civil claimant is facilitated by the fact that the victim does not have to file a complaint (formular querella, s. 783 CCP). Also, the civil claimant and his heirs or legal representatives are exempt from the normal requirement of putting up a bond to cover the costs of the trial (s. 281 CCP).

Magistrates may as well safeguard the victim’s right to claim compensation in criminal proceedings. During the pre-trial stage, the examining magistrate may take certain precautionary measures (medidas cautelares) in order to ensure the effectiveness of a possible civil claim. For instance, he may order the accused to set up a bond (fianza) or an attachment bond (embargo de bienes suficientes, s. 615 CCP) to ensure the actual payment of the compensation. During the sentencing stage, the court not only passes a sentence on the offender, but also orders him to pay compensation to the victim. The sentence resolves all questions relating to civil liability which have risen during the trial (s. 142 CCP).

5.4 Private Prosecutor

Criminal procedural law empowers every Spanish citizen, who has concrete evidence against the suspect to be involved in the criminal proceedings (ss. 101 and 270 CCP). They may join the proceedings as an active party alongside the public prosecutor, if the latter has decided to prosecute the case. If, on the other hand, the public prosecutor does not prosecute the case, every citizen has the right to prosecute independently (accion popular). This right exists even if he has not been affected by a punishable act. Thus, in Spanish criminal proceedings, everyone has the right to constitute himself as a private prosecutor. The role of the private prosecutor is traditionally perceived as a way of involving ordinary citizens in the criminal justice system, as well as a way of bringing the system close to the people. This right is referred to as people’s action (accion popular, s. 19 CCP and s. 125 Const.). The only condition is that the crime must be a public one, i.e. one which does not need the formal complaint or report of the victim (see § 3.2). Private prosecution starts with a complaint lodged with the examining magistrate (s. 272 CCP); and the complainant must be accompanied by a lawyer (s. 277 CCP). The legislature furthermore obliges complainants to deposit a certain sum in order to prevent abuse of this right (s. 280 CCP). The victim, or the relatives of the deceased are exempt from this (s. 281 CCP).

Like every citizen, victims (perjudicados) who have been prejudiced by an offence have the right to initiate criminal proceedings and to prosecute the accused, independent of, or alongside the public prosecutor (accion particular). With respect to the category of crimes referred to as private crimes (see § 3.2), the victim has the exclusive right to prosecute (querella, ss. 270 – 281 CCP). The public prosecutor does not intervene in such offences. In cases of semi-public crimes (see § 3.2), both the victim and the public prosecutor are entitled to start criminal proceedings against the suspect (see § 5.2). The victim may act as a private prosecutor if the public prosecutor does not initiate public action, if he wants to press different charges against the accused than those brought by the public prosecutor, or

72 Foreigners have the same rights as nationals to the extent that the former have to be prejudiced directly by the crime (s. 101 CCP).
to obtain more compensation than is actually claimed by the public prosecutor. However, before the victim can assume this role, he is required by law to hand over proof that he has tried to reconcile with the perpetrator. The only exception to this rule concerns victims of rape (violación) and kidnapping (rapto, s. 278 CCP). In the case of private crimes like insult and defamation, victims need the permission of a judge to proceed with a private prosecution (s. 279 CCP). Victims who want to act as private prosecutor may apply for free legal aid (ss. 20, 121 CCP). The conditions, however, are rather strict (see § 4.3). In practice, this is a major hindrance to exercising their rights because having a lawyer is obligatory by law. This obligation is a result of the fact that private prosecutors have to fulfill the same requirements as public prosecutors in order to instigate criminal proceedings (ss. 649—651 CCP). Victims who can afford a lawyer or who are entitled to legal aid are much less hesitant to act as private prosecutors than other victims, for whom the costs of legal representation in fact obstruct their constitutional right to start private prosecutions. As a result, few citizens act as private prosecutors. Martín Delgado therefore feels that the legislature should facilitate the use of this fundamental right. The situation is somewhat different for sexual crimes because women’s associations often act as private prosecutors on their behalf.

5.5 Witness

According to the Penal Code, anyone with knowledge of a crime may qualify to be a witness (testigo) in criminal proceedings, and can be compelled to give evidence (s. 410 CCP). Witnesses who are unwilling to give evidence can be fined (s. 420 CCP), although some people, like relatives of the suspect, cannot be obliged to testify (ss. 416, 417 CCP).

Witnesses can be heard both during the pre-trial and the trial stage. They always have to testify under oath even during the pre-trial stage (s. 434 CCP). Before the trial, they can be summoned by the examining magistrate to give evidence (s. 421 CCP). As a rule, the magistrate summon the victim and others mentioned in the report or complaint to testify. He hears them in his office, in private, and without other witnesses or the accused (s. 435 CCP). Witnesses who have given evidence before the examining magistrate do not necessarily have to testify again in court, however, they can be made to (s. 446 CCP). In practice, witnesses are usually required to appear again in court to repeat their previous statements and to undergo further questioning (see § 8.2).

The law provides for confrontations between the victim-witness and the accused, but only if there is no other way to find out who — the victim or the accused — is telling the truth (s. 455 CCP). Furthermore, the law explicitly states that the judge should not allow the intimidation of the victim-witness (s. 454 CCP). For more on the protection of witnesses, see § 8.3.

28 Associations may act as private prosecutors, either through private or popular action. This has been decided by the Constitutional Court. Information supplied by Martínez Arrieta, magistrate, Madrid, 19 May 1997.
6 THE VICTIM AND INFORMATION

Access to the judicial system is a fundamental right of all citizens. However, in practice this right cannot always be exercised due to a general lack of information. It has been suggested that more time should be spent on the judicial system at school to enhance general knowledge of the legal system. Unfortunately, the lack of information given to victims reflects the norm: citizens are usually poorly informed about their rights and obligations. Spain has no tradition of informing citizens by way of brochures or leaflets. However, the Ministry of the Interior has printed a brochure on state compensation (see § 4.4) and an information letter to be used by the criminal justice authorities (see § 6.1). This should be seen as a remarkable initiative.

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 legislature has introduced two legal obligations to inform victims of crime: a general information duty regarding all victims and a special information duty for victims of violent and sexual crimes, and victims of terrorism. First, in pursuance to s. 789-4 CCP along with ss. 109 and 110 CCP, the authorities have a general duty to inform victims of their right to be involved in the criminal proceedings, as a private prosecutor or as a civil claimant. They should inform victims of their right to claim compensation from the offender, as well as the right to apply for free legal aid if they have insufficient financial means. In addition, they should explain how and when the victim can exercise these rights. The victim should be given this information when he reports the crime. Usually, the judicial police and/or the examining magistrate will be responsible for the provision of information. The practice is referred to as the formal offer of assistance to victims (ofrecimiento de acciones al perjudicado). The legislature has introduced this obligation as part of the summary proceedings (s. 783 CCP). However, in practice this responsibility has a more general scope. The importance of the formal offer of assistance for all victims as soon as they have contacted the criminal justice authorities has also been confirmed by the Constitutional Court. Likewise, the relatively new Act on the Jury Court (see § 3.3) explicitly mentions the obligation to inform victims of their rights regarding compensation and free legal aid (s. 25-2). The authorities

81 The examining magistrate is involved in almost all criminal cases, except misdemeanours when the investigation is done during the trial.
inform victims by means of an information letter, in which their rights within the criminal proceedings are stated, as well as how they can claim damages. The letter is written in a very formal and legalistic manner, which is not easily understandable for non-jurists. The information letter explicitly mentions the fact that the public prosecutor may ask damages on behalf of the victim, and that they have the right to a lawyer. This letter is standardized and issued by the Minister of the Interior. It is used in all Spanish regions. The authorities must explain the content of the letter, after which the victim signs it. In addition, the authorities should ask the victim whether he would like to claim his damages independently of the public prosecutor, or if he would like the public prosecutor to claim damages from the offender on his behalf. His answer is indicated on another paper, which the victim has to sign as well. The papers are added to the legal file. As a rule, victims are told about their rights and then sign the papers, in accordance with the law and regulations. The authorities will not easily forget this, because the Constitutional Court has decided that if victims are not informed of their rights, the summary proceedings can be declared null and void (declaración de nulidad de actuaciones). The Court based this decision on the consideration that lack of information prejudices the victim's fundamental right to claim compensation (see § 4.1). According to magistrates, the police inform all victims because they do not know whether or not a case will be tried summarily, and thus, whether they would cause the summary proceedings to be void.

However, the main problem with respect to the information duty is that the police and examining magistrates tend to be more interested in having the victim’s signature, so they can prove they have informed the victim, than in really informing the victim and explaining his rights to him. This reflects a bureaucratic, and non-committal attitude towards the spirit of the law. Another problem is that victims are not given a copy to read at home, unless they ask for it. Therefore it is hardly surprising that the information does not come across. The large majority of victims do not understand the content of the papers they have to sign. According to a 1997 study done on the Canary Islands, 95% of the victims do not

---

83 Acta de instrucción de derechos al perjudicado u ofendido, issued by the Ministry of the Interior, general directorate of the police.
84 The paper is entitled Constancia de ofrecimiento de acciones al perjudicado. (para unir a las diligencias).
87 According to De Jorge Mesas, examining magistrates should explain the content of the paper to victims who come to their office, especially, if it is obvious that they are insufficiently informed by the police. However, in practice, magistrates do not have the time to inform every victim, because of the heavy workload and the sheer number of cases. The police should therefore spend more time explaining the content of the paper to victims. Information supplied by Fr. L. de Jorge Mesas, examining magistrate, Valencia, 12 May 1997.
88 Usually, victims do not know exactly what the questions mean because the police have not explained the legal options. The police just fills in the form, and add the paper to the legal file. Therefore, the Valencian victim support service has printed a letter in which everything is explained step by step. The letter also advise what kind of action the victim should take, according to the circumstances of the case (known or unknown offender, etc.). This letter should be given to the victim by the police or the examining magistrate.
89 Information supplied by the Institute of Police Studies (Instituto de Estudios de Policía), Madrid, 20 May 1997.
recall being given information, but they do recall signing a paper.\textsuperscript{90}

Contrary to the directive of the Ministries of Justice and the Interior\textsuperscript{91} which stresses
the obligation of the police to inform victims, some officers tend to leave the information
duty to examining magistrates, particularly if the police know that the victim will be
summoned by the examining magistrate. In some parts of Spain, such as Madrid, magis-
trates therefore have the impression that they fill out the form is more often than the
police.\textsuperscript{92} In spite of all these critical remarks, in most regions the police take their
information-providing duty seriously. For instance, in Valencia, in 1992, the police have
evaluated the police performance in cooperation with victim support, they kept records of
which victims (indicated according to the offence), and how many were informed, their
special wishes regarding information or assistance, and whether they were referred to, and
contacted by victim support. These data also clearly demonstrate that victims of various
types of crime are informed, not just victims of crimes which may be tried summarily.\textsuperscript{93}

Secondly, the police are obliged to inform victims of violent and sexual crimes in
accordance with the Act for the provision of aid and assistance to victims of violent crimes
and sexual offences (SCA, see § 4.3). The police must inform these victims about their right
to apply for state compensation (s. 15-1 SCA). There are still no data on how this law
operates in practice. However, again the police use an information letter to explain the law;
at the bottom of the letter, the victim’s signature is required. Interestingly, the victim can
take the letter home. This is important because it contains the name and telephone number
of the police officer in charge, and the number of the file,\textsuperscript{94} which greatly facilitates future
contact between victims and criminal justice authorities. It should be possible to extend this
policy to other victims of crime. Finally, the legislature has stipulated that the police should
inform victims of terrorism of armed gangs of their right to receive state compensation. The
Ministry of the Interior has published a leaflet which the police are meant to give to victims
of terrorism to inform them of their right to compensation by the State. Furthermore, the
Ministry has opened a free telephone helpline for victims of terrorism.\textsuperscript{95} The number of the
helpline is mentioned at the back of the leaflet, and is frequently shown on television and
in the press.

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

Usually, victims are not informed of the outcome of the police investigation unless their case
is sent to the examining magistrate. He will summon the victim to his office for
questioning.\textsuperscript{96} The examining magistrate may then tell him the outcome of the police
investigation. However, if the suspect is not found or if the examining magistrate does not
conduct a judicial investigation, chances are very slim that victims will be told. It is further-
more difficult for a victim to inquire of his own accord about the outcome of the investiga-
tion. The victim is not given a registration number which would enable him to have access

\textsuperscript{90} P. González Gil c.s. (1997), p. 104.
\textsuperscript{91} Ofrecimiento de acciones al ofendido o perjudicado, Dirección general de Justicia e Interior.
\textsuperscript{92} Information supplied by Martínez Arrieta, magistrate, Madrid, 19 May 1997.
\textsuperscript{93} F. Gonzalez Vidosa, Ofrecimiento formal de acciones. Estudio y evaluación de su puesto en practica, (1
\textsuperscript{94} The information letter was given to me by the Leida police.
\textsuperscript{95} The helpline is operated by the Oficina de Atención al Ciudadano y Asistencia al las Víctimas de
Terrorismo del Ministerio del Interior. (telephone number: 900-150.000).
\textsuperscript{96} Visits to the Valencian police stations and courts, during the week of 12-16 May 1997.
to his file. The police are unable to give him this information because the registration number is provided by the court and is for internal use only.

The 1995 State Compensation Act contains the duty to inform victims of violent and sexual offences about the developments which occur during the police investigations (curso de sus investigaciones, s. 15-2 SCA). The right of this specific category of victims to be notified of the outcome of the police investigation is implicitly included in this provision. It is still uncertain whether victims of violent and sexual are actually notified. In May 1997, victims were not yet receiving information about the outcome of the proceedings. This may be explained by the fact that the Royal Decree to implement the Act was only issued on May 23, 1997. However, the Decree was only really necessary for the functioning of the State Fund, and not to the provision of information.

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

The final decision regarding prosecution may be to bring an indictment against the offender or to dismiss the case (sobreseimiento). In the former, the victim will only be notified when his presence is needed during the trial (by means of a summons). In the latter case, the dismissal is not really a discretionary decision. The law stipulates when a case can be dismissed. The public prosecutor may only request the dismissal of the case, and if there is a private prosecutor the latter should not oppose his request (s.642 CCP). The final decision lies with the court of the pre-trial stage. This court may ask the public prosecutor and the victim's lawyer (procurador del querellante) if they feel the case should be prosecuted or dismissed (s. 627 CCP). However, the law does not contain a legal obligation to notify the victim of the decision to prosecute. In practice, the victim is hardly ever informed about this decision.

(D. 9.) The victim should be informed of:
- the date and the place of a hearing concerning;
- 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.

The requirement to notify victims of the date and place of the hearing is not completely met. Only victims who are summoned to appear in court are informed of the date and location of the hearing (s. 175-4° CCP). The role of the victim in the criminal proceedings is therefore crucial. With respect to victims of violent or sexual crimes, a special legal provision exists. They should always be informed of the date and the place of the trial (celebración del juicio) irrespective of their role in the criminal process (s. 15 SCA).

In accordance with s. 109 CCP, the victim has to be informed about his rights to constitute himself as a party to the proceedings and his right to claim restitution, reparation and compensation. In this respect, the law requires that the criminal justice authorities to

---

98 An unconditional dismissal is only possible if there is not enough evidence, if the facts do not constitute a punishable act or if there is no criminal responsibility (s. 637 CCP). A conditional dismissal can be granted if the offence does not justify a trial, or if it is difficult to indicate specific persons as the perpetrators or accomplices of the crime (s. 641 CCP).
6.2 Information About the Victim

Furthermore, the victim of a violent or sexual crime has the right to be informed of his opportunities for obtaining restitution and compensation (reparación del daño sufrido) and of the opportunity to get free legal aid. (s. 15-4 SCA, see also § 4.3). In cases of violent or sexual offences, the legislature has furthermore declared that information should be provided in a comprehensible manner by the police when the victim reports the crime, or in any case during the victim's first contact with the authorities. However, such a legal obligation does not exist for other victims of crime. This omission may prevent the victim effectively using his rights. Finally, it is interesting to note that if criminal proceedings in absentia are dismissed (archivar los autos), the record has to inform the victim of his right to claim compensation in civil court (ss. 841, 843 CCP).

There is no legal obligation to tell victims how they can get information on the outcome of the trial. Victims who act as a civil claimant or a private prosecutor will be informed of the outcome of the trial. Other victims have to contact the prosecution service or the clerk at the court in order to hear the court's decision. The victim of a violent or sexual crime again has a special position. He will be notified of the court's decision, even if he is not a party to the proceedings (s. 15-4 SCA).

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 report normally contains information about the injuries and losses suffered by the victim. After the police investigation, it is sent to the public prosecutor. He must mention the amount of damages and the injuries suffered by the victim in the indictment, as well as the civilly responsible persons liable to pay compensation (s. 650 CCP). Therefore, the accuracy is of the police report is very important. A safety net in this respect is formed by the examining magistrates, who, as a rule, check whether the report gives an accurate description of the injuries and losses of the victim. From a formal perspective, the legal obligation of the police to make an accurate statement of the victim's injuries and losses is mentioned only in the State Compensation Act (s. 15-2 SCA). Formally, the duty concerns victims of serious and sexual crimes only.

(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 accordance with the principle of accumulation (s. 100 CCP), the public prosecutor presents the claim of compensation to the court (s.108 CCP). To be able to do this, the police and the victim inform the public prosecutor of the victim's injuries and losses, as well as his need for compensation (see § 5.3). In practice, however, the court is not well

informed about the damages suffered by the victim. Moreover, the public prosecutor will only claim compensation if the victim is present. If the victim is not present, the public prosecutor will assume that the victim is not interested in compensation, despite the latter's legal obligation to claim damages on behalf of the victim, and thus to inform the court of the victim's need for compensation. It is also the duty of the public prosecutor to inform the court of any payments of damages or restitution made by the offender before the trial. In practice, the defence lawyer always informs the court of any compensation or restitution made by his client, because this is usually a mitigating factor (see § 7.1).

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 final decision regarding prosecution is governed by the legality principle. The public prosecutor has the obligation to prosecute all cases in which an indictment can be issued (s. 105 CCP). In addition, the decision to dismiss a case is not taken by the public prosecutor but by the court (see § 3.3.1, under intermediate proceedings). Also, the court has no real discretionary powers (s. 105 CCP, ss. 622-645 CCP). It may decide to dismiss (part of) the case, either conditionally or unconditionally (s. 634 CCP). The unconditional dismissal (sobreseimiento libre) is equivalent to an acquittal, which will be issued only if there is not enough evidence to convict the accused, if the facts do not represent a criminal act or if the accused is not criminally responsible (s. 637 CCP). A conditional dismissal (sobreseimiento provisional) can be granted if the offence does not justify a trial, or if it is difficult to indicate specific persons as the perpetrators or accomplices in crime (s. 641 CCP). The freedom to dismiss a case is so limited that there is hardly any room to take the question of compensation into consideration. As a result, it is hardly surprising that the question of compensation does not play a role here. If there is enough evidence to prosecute the accused, the case will go to court and the victim can claim compensation (see § 7.2).

(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 victim has the right to initiate private proceedings, as does every citizen (see § 5.4). As said before under B.5, the decision not to prosecute is not taken lightly. Therefore, it is even

---


104 According to the law, this court is competent to try the case (s. 622 CCP). In fact, the court acts in a sort of pre-trial capacity. The examining magistrate sends the legal file to the court, after which the court decides whether the case should be prosecuted. The public prosecutor may also request the court to dismiss the case (s. 642 CCP).

more remarkable that the legislature has stipulated that the court should take the opinion of both the public and the private prosecutor into account, before taking the decision to dismiss the case. The court is, however, not bound by their opinion (ss. 644, 645 CCP).

7.2 The Court and Compensation

The Spanish Penal Code considers the payment of compensation (reparación de los daños y perjuicios) by the offender as a legal obligation. Compensation is considered to be both a consequence of and a reaction to the offence (ss. 125, 126 PC), and at the same time a way to protect the rights of the victim. According to Gimeno Sendra, the criminal process has, in theory, an important restorative function. In practice, however, the victim plays only a secondary role and his right to be compensated is not duly respected.106 Obviously, not all offenders have the financial means to pay compensation, but the public prosecutors should at least try to secure some types of payments on the victim's behalf. This is corroborated by Tori6-Lopez. He is also of the opinion that the law in action is far less advantageous than the law in the books would suggest. According to Tori6-L6pez, compensation is rarely awarded in criminal proceedings. Consequently, far too many victims have to go to civil court if they wish to be compensated by the offender.107 Moreover, the court's order to pay for damages normally lacks any practical consequence.108 Because the diligence of the criminal courts with regard to compensation of the victim is so weak, victims often try to settle their claim with the offender outside the courts or else they claim compensation from insurance companies.109

(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.

Under section 100 CCP every punishable act gives rise to both public action (acción penal) and may also result in civil action (acción civil). Civil action is aimed at compensating the victim by means of restitution of goods, reparation of losses and compensation of the damages caused by the crime. Both actions can be undertaken at the same time or separately (s. 111 CCP). If only public action is initiated, civil action is automatically supposed to be started as well, unless the victim explicitly expresses his wish not to exercise his rights to claim compensation (s. 112 CCP). This presumption is referred to as the principle of

106 V. Gimeno Sendra, 'La reforma del proceso penal en el actual sistema democrático español', in: Centro de Estudios Judiciales, La prueba en el proceso penal, nr. 12, Madrid, 1993, p. 146
109 The Attorney General of the Supreme Court has stressed that more attention should be given to the position of the civil claimant. Moreover, the authorities should make more use of cautionary measures to protect the victim's financial interests. A more in-depth investigation of the offender's property should be sought with assistance from the police, in close cooperation with inter alia the treasury department. See Serrano Gómez (1991), pp. 258-259.
accumulation. In legal doctrine, much emphasis is put on the real and substantial link between the criminal and civil aspects of a case. Both aspects are dealt with during the same actual investigation and the same judicial proceedings, even though different legal consequences may be attached to them. As a result, the court may always award compensation to the victim and order the offender to pay civil damages.

In practice, however, the situation is very different. The courts rarely award compensation to the victim, who is therefore obliged to present his claim in civil court if he wishes to obtain compensation for the injury or losses caused by the offence. According to criminal justice statistics for the year 1995 (published 1998), in 36,824 cases, the offender was ordered to pay compensation to the victim. The number of tried cases in that year was 243,329. The total amount of compensation that offenders were ordered to pay them was 43,081,061,415 Ptas (EUR 259 million). However, if one disregards the crimes against the state, only 31,486 offenders were ordered to pay compensation. Furthermore, the declaration of the offender's civil liability normally lacks any practical consequence because the victim is not assisted in collecting the money (see §7.3) and most offenders lack the financial means to pay. Serrano Gomez estimates that about 95% of those convicted for theft lack the resources to pay compensation to their victims.

(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 is not an independent penal sanction, nor can it substitute for a penal sanction. As described above (D.10), compensation can be awarded in addition to another penal sanction.

(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.

Financial conditions can be attached to a suspended sentence (ss. 80, 81 PC). The payment of compensation to the victim can also be a mitigating factor at the sentencing stage (s. 21 PC). Furthermore, the court may suspend the enforcement of a prison sentence on the condition that the victim is compensated. Finally, compensation may be imposed as a condition for rehabilitation of the offender.

The regime of the conditionally suspended sentence (remisión condicional) has been modified substantially by the 1996 Penal Code. Under the old Penal Code the victim played

---

110 Spanish criminal proceedings resemble the German adhesion process (Adhäsionsverfahren) by which the victim is allowed to join the criminal proceedings with his civil action. They differ, however, in several respects, such as in practical realization. The German model does not reflect the actual practice of the court because compensation is rarely awarded and the victim is de facto forced to sue the offender for liable in civil court. In Spain the victim often does not get compensation because it is difficult to execute the awarded damages (see §7.3)
no role in the procedure of the conditionally suspended sentence, except for two situations in which the victim had initiated the prosecution of a private or semi-public crime. Then it was only granted at the request of the victim, or after hearing the opinion of the victim. The suspended sentence could only be applied to those crimes punishable by less than one year imprisonment under the former Penal Code. The new Penal Code, however, has extended this period to a maximum of two years' imprisonment. More importantly, it contains a list of conditions which are necessary for the application of a suspended sentence (s. 81 PC). One of these conditions is the payment of compensation to the victim (s. 81 (3a) PC). Only if the court has established the partial or total incapacity (imposibilidad)\textsuperscript{114} of the offender to pay compensation, can the condition be modified. For complainant offences (see § 5.2), if the court wants to impose a suspended sentence it must hear the opinion of the victim (s. 86 PC). Second, the payment of compensation is recognized as a mitigating circumstance (circunstancia atenuante, s. 21-(5) PC). Until the introduction of the 1996 Penal Code, the offender had to pay compensation out of 'spontaneous remorse' (arrepentimiento espontáneo) in order to profit from sentence mitigation. This has been abolished because of its moral resonance. Academics were of the opinion that it was incompatible with a democratic criminal justice system.\textsuperscript{115} It is important to note that the partial payment of compensation is a mitigating factor as well. Nevertheless, the Supreme Court has stated in very clear terms that partial compensation of the victim's losses when the offender is capable of fully compensating the victim is insufficient to profit from sentence mitigation.\textsuperscript{116} This decision has led to the acceptance of the jurisprudential principle of 'compensation to the extent of one's capacity' (reparación en la medida de la propia capacidad).\textsuperscript{117} The third change, under the 1996 Penal Code, is the authority of the court to suspend the enforcement of a prison sentence (suspensión de la ejecución de las penas privativas de libertad) on the condition that the victim has been compensated (s. 83 PC).\textsuperscript{118} The court may suspend a prison sentence if it concerns a first offender, the prison sentence does not exceed two years, and if the offender has fulfilled his civil responsibility towards the victim, unless the court declares the offender insolvent (s. 83 PC). According to Tamaritt Sumalla, this provision rule demands a very active attitude of the court because a mere declaration of his incapacity to pay compensation at the time of the trial is insufficient; the court should also consider his future ability to pay damages.\textsuperscript{119} In practice, however, the courts have usually no means to make such in-depth investigations into the (future) financial capacity of the offender. Therefore, the practical implications of this provision are relevant for offenders who can afford to pay damages at the time of the decision to suspend the prison sentence.

Finally, compensating the victim is one of the conditions for rehabilitation\textsuperscript{120} of the

\textsuperscript{114} According to Tamaritt Sumalla, the term 'incapacity' is surprising. Why did the legislature not choose the term 'insolvency' as was done for conditioning rehabilitation? J.M. Tamaritt Sumalla (1994), p. 70.


\textsuperscript{117} According to Tamaritt Sumalla, this principle corresponds to victimological ideas with regard to conciliation and reparation of losses. M. Tamaritt Sumalla (1994), pp. 61-66.

\textsuperscript{118} The suspension of the prison sentence does not affect the obligation to pay damages to the victim (s. 80 (3) CCP).


\textsuperscript{120} Rehabilitation means the annulment of criminal antecedents.
offender. If the offender wants to be rehabilitated one of the conditions is the payment of compensation to the victim, unless the criminal court has declared him insolvent (s. 136 PC). This provision constitutes an opportunity to serve both the interests of the victim and the convict, especially since his economic situation will be taken into account.

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.

According to Spanish criminal law, when the suspect is found guilty, the court must, in its final decision, not only pass a sentence upon the offender but also order him to pay compensation for any loss caused by the crime. According to section 142 CCP, the verdict of the court shall resolve all questions regarding civil liability which have been mentioned during the trial proceedings. Although the responsibility of the offender to pay for compensation is considered a civil responsibility ex delicto, and compensation is awarded by the criminal court, it is not collected in the same way as a fine. However, the civil claim for damages and the victim's legal costs have priority over other financial claims (s. 126 PC). The Penal Code awards compensation a preferential (prioritario) position in relation to fines (la pena de multa). If the offender is unable to pay all his debts, he should first of all pay compensation to the victim, second compensate the State for the costs of the proceedings, third compensate the costs of the private prosecutor (particular o privado), followed by payment of the adjudication costs of the victim, including those of the victim's defence counsel and finally, at the bottom of the list, the fine (s. 126 PC).

It is very advantageous for victims that the law gives priority to compensation of the victim. Nevertheless, academics have made some critical remarks about the order of the list. Tamaritt Sumalla, for instance, criticizes the fact that the costs incurred by the private prosecutor to have the case tried in court are only in third place, after reimbursing the state, because legal doctrine justifies the existence of private crimes as a means to protect the interests of the victim. He is of the opinion that the legislature should revise the priorities and give the private prosecutor's legal costs priority over payments to the state, especially since many victims make a cost-benefit analysis before starting criminal proceedings.

Victims are not assisted by the authorities in the collection of compensation from the offender. The judges who execute the sentences of the criminal courts (Juzgados de Vigilanzia) are only responsible for the enforcement of prison sentences and do not assist victims with

123 The preferential position of compensation over fines (la pena de multa) has been questioned as to its conformity with the Constitution, however the Constitutional Court decided on 10 December 1991 (STC-Ple, nr. 230/91 ) that the legal provision is in accordance with the Constitution. It stated that one could not ignore the fact that enforcement of verdicts which constitute a declaration of the civil responsibilities of the offender is aimed at the protection of the victim, which in itself constitutes a valid objective of criminal policy and a constitutional value. This legal provision is especially relevant if the offender cannot cover his debts (s. 246 CCP). See J.M. Tamaritt Sumalla (1994), pp. 57-61.
enforcing their claim for damages. Nonetheless, the authorities can facilitate the collection of compensation. During the pre-trial stage the examining magistrate may take precautionary measures (medidas cautelares) to ensure the effectiveness of the enforcement of the claim for damages. In order to facilitate this procedure, he may set a judicial bond (fianza) and where appropriate, an attachment bond (embargo de bienes suficientes - s. 615 CCP) to ensure that any compensation awarded by the court will be received by the victim. Likewise, the court may also order the offender to sell goods up to the amount of compensation set by the court. It may even seize goods to cover the remaining sum of the damages if the victim already has been partially compensated by the offender. In theory, the seizure of goods has developed into a legal mechanism which safeguards the compensation of the victim’s damages (s. 127, 128 PC). In practice, however, examining magistrates rarely take any measures to secure the victim’s right to be compensated by the offender. Also, not many victims are aware of their right to request the court to seize goods. According to Solé Riera, the criminal courts should notify the victim of his right to seize goods, for instance, along with the notification of their decision on the civil claim for compensation. This is the only way to safeguard the effective use of the victim’s right to intervene in the seizure and selling of the defendant’s goods, e.g. by other creditors, and to secure his right to be compensated for his losses.

In general, however, victims have execute the sentence themselves without any assistance from the authorities. This means that the victim has to either hire the services of a bailiff, or consider additional civil proceedings in order to try to recover the claim. An additional problem is that the legal provisions mentioned above will not be applied unless the victim has explicitly requested their application. In daily practice, few victims – and in fact very few lawyers – know these legal options. The examining magistrate will usually not take action of his own accord, nor will the public prosecutor ask for the seizure of goods on behalf of the victim. An additional problem is that the courts regularly declare the offender to be insolvent, particularly regarding property crimes. It is therefore hardly surprising that the court’s order to pay compensation to the victim normally lacks practical consequences (see also § 7.2, D.10).

8 TREATMENT AND PROTECTION

8.1 Victim-Awareness Training

Judiciary

Judges, examining magistrates and public prosecutors are not given victim-awareness training during their academic education or judicial apprenticeship.

125 Information supplied by Examining magistrate F. de Jorge Mesas, 12 May 1997.
129 Information provided by Professor dr. J. de la Cuesta, Instituto Vasco de Criminología, San Sebastian, 22 May 1997.
130 Research shows that offenders are usually unable to pay compensation to victims. For instance, regarding crimes against property, the courts have declared 95% of the offenders insolvent. See Serrano Gomez (1991)p. 257. See also A. Torío-López (1996), pp. 524-525.
Police

The police are not trained to deal with victims, and receive no training on any other subject relating to victims of crime. The only training course that might have some relevance is the basic course 'attention to citizens' (atención al ciudadano).

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

The only exception to the above general rule is the occasional training offered by victim support workers, as is the case in Valencia (see § 3.6). Because of the apparent lack of training, the attitude of the chief of police is often crucial to the treatment of victims. Without his clear directions, police officers are not likely to give much thought to the issue. Nevertheless, most citizens are satisfied with the way the police treat them. A study performed by the Institute of Police Studies (1996), which includes an evaluation of the police based on interviews with the public, demonstrates this. Considering their lack of training, the data are surprisingly positive. The majority of citizens (65.4%) feel that they were treated with respect. The performance of the civil guards was somewhat better than average (65.9%) and the local police scored somewhat lower (62.2%).

Victims may report not only to the police, but also to inter alia public prosecutors and examining magistrates (see § 5.1). Unfortunately, the lack of training is also reflected in the education and training of magistrates. Consequently, the way in which victims are treated by the criminal justice authorities usually depends on the sensitivity of the individual police officer, public prosecutor or magistrate. This is especially true where protective measures are concerned (see § 8.3). More attention should be given to enhance awareness of the rights and interests of victims. In practice, lack of awareness may lead to unsympathetic and repeated questioning of victims (see § 8.2), lack of information (see § 6), and the inadequate use of space within the police stations and offices of magistrates when filing a report (see § 5.1).


132 In Valencia, the pioneer city in Spain with respect to victim assistance, attention to victims of crime by the police turned out to be entirely dependent on the direct support of the chief of police in that area. While in charge, he was able to motivate his subordinates to treat victims properly, to inform them about their rights and to refer them to the local victim support centre. However, the new chief of police did not consolidate this practice, and as soon as the officers noticed that correct treatment of victims was no longer a priority, their attitude changed as well and referral rates dropped significantly (O.A.V.D. 1996). The developments in Valencia are the same in other parts in Spain (see § 4.3).

133 Instituto de Estudios de Policía, Demandas de seguridad y victimación, Estudio nr. 7 del I.E.P., Madrid, 1996, p. 91. In general, the public has more confidence in the civil guards and considers them more respectful, more efficient, and more inclined to listen to questions.

134 As a result, the level of knowledge of the interests and rights of victims is generally low, even with lawyers who are supposed to defend their rights in court.

135 In certain communities, such as Valencia (1989, 1994) and Las Palmas (1997), training has been given to the police on the treatment and rights of victims. However, these are local initiatives.

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.

During the pre-trial stages, the victim can be questioned by the police and the examining magistrate (see § 5.5). The manner in which the victims are questioned depends largely on the sensitivity of the personnel. According to the police, it is common practice for victims to come to the police station and/or to the examining magistrate’s office several times to give additional information about the case. For victims under the age of 18, and victims of sexual offences, a special form of assistance has been developed. The police have special brigades who deal with these victims, which enhances the awareness of their special needs. Minors are currently questioned by the police, a psychologist and the examining magistrate. In Valencia (1997) they are trying to coordinate these sessions, and to reduce the questioning to one combined session. Victims of sexual crimes, as other victims, have to endure repeated questioning although the special force of the police are aware of the risk of secondary victimization. Usually, someone from this special brigade will accompany the victim to the forensic medical doctor to secure the evidence, and this officer will be present during the questioning by the examining magistrate. The victim of sexual crime therefore has one officer in the case who is his liaison with the other criminal justice authorities.

As a result of the principle of immediacy, witnesses who have already given evidence during the pre-trial stage are usually heard again in court. There is only one exception to this rule: witnesses who are unable to attend the trial can be excused from giving evidence during the trial. According to the law the statement can be read in court if the witness cannot come to court ‘for reasons outside his will’ (s. 730 CCP). During the trial, the president of the court directs the debates and should take care to avoid impertinent questioning, without obstructing the right to a proper defence (s. 683 CCP). The victim-witness is questioned by the court, after which the public prosecutor may question him, followed by the defence counsel (s. 708 CCP). The president of the court may also question the witness again on certain aspects of his statement which need further clarification. The court can overrule impertinent or unnecessary questions (s. 713 CCP). But the defence counsel or the public prosecutor may seek remedy if the court does not allow them to ask certain questions. Juvenile victim-witnesses, under the age of 18, can testify in court without the presence of the offender. They can be accompanied by their parents or guardians. No such provisions exist for other vulnerable victims. This is largely due to the fact that the Supreme Court has decided that the offender has the fundamental right to hear the testimony of the victim (see § 9).

In practice, the witness is not informed of what will happen in the court room. Only the victim support services inform and prepare the victim-witness for the trial. Information is essential, especially since the victim-witness will, as a rule, be confronted with the accused during the trial (see § 8.3). In court, the victim-witness has to stand next to the accused.

---

During the questioning, furthermore, contrary to the law, few judges will disallow certain (disrespectful) questions put by the defence counsel. Even attacks on the character of the witness are sometimes allowed. In general, the questioning in court does not give much consideration to the feelings of the victim. And it is often not very respectful. The only exception to this rule involves the questioning of minors or victims of violent or sexual crimes. In these cases, the defence counsel and the public prosecutor are normally very cautious about the manner in which they handle these victims. Nonetheless, for crimes in which the testimony of the victim is of critical, such as rape, the questioning may be severe. Recently, however, the manner of questioning may have improved due to the introduction of formal rules on the issue. The 1995 State Compensation Act (SCA) obliges the criminal justice authorities to question victims of violent crime or sexual offences with due respect and consideration to their personal situation, their rights, and their dignity (con respeto a su situación, a sus derechos y a su dignidad) at all stages of the procedure (s. 15-3 SCA).

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.

Trials are usually held in public, however, the court may decide to hold the trial behind closed doors for reasons of public order or morals. It is important to note that the legislature explicitly mentions the fact that the court should hold the trial in camera out of respect for the victim or his family (s. 680 CCP). The decision to hold the trial in camera may be taken before or during the trial (ss. 681, 682 CCP) (see § 8.2).

In pursuance to section 15-5 SCA, the public prosecutor should protect victims of violent crime or sexual offences from all forms of unwanted publicity, in particular publicity which would lead to the disclosure of facts about the victim's private life or which would unduly affect his dignity. The way in which the public prosecutor should perform this task is also described by law (see G. 16). Section 15 SCA, furthermore, affirms the victim's right to ask the court to hold the trial in camera (puerta cerrada).

With respect to publicity by the media, it must be said that the presence of television cameras is quite normal in Spanish courts. It is up to the president of the court to decide whether the media are allowed to enter the courtroom. This decision should give due consideration to the need to protect the victim and the accused from publicity which may unduly affect their private life or dignity. In practice, however, it is doubtful whether the

---

139 Visits to the court in Valencia and Manresa.
142 This section, uses the exact same words as the first sentence of Recommendation C.B., only the scope is not as wide. It does not concern all victims, only victims of violent and sexual crime.
143 Information supplied by F. Gonzalez Vidosa, victim support, 15 May 1997.
private life of the parties is duly protected. Only vulnerable witnesses, protected by the 1994 Act on the Protection of Witnesses (APW, see G.16) are covered by special provisions with respect to protection against publicity. The police forces and the prosecution service should prevent pictures being taken and should be sensitive to any other form of public exposure (s. 3 APW). The provision that the police should prevent picture taking is very relevant, because the press is often waiting outside the court building if they are barred from the courtroom.

\[(G.16)\] 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.

In 1994, the Act on the Protection of Witnesses and Experts in Criminal Proceedings (APW) was promulgated. According to the legislature, daily practice showed that many victims and witnesses were unwilling to cooperate with the criminal justice authorities out of fear of retaliation and reprisals. Consequently, crucial information was often not available during criminal proceedings. With the enactment of the APW, the examining magistrate was made responsible for the evaluation of the risks and dangers to the witness. After assessment of the situation, he must take appropriate measures to protect the witness, if necessary. In order to benefit from the protection given by the 1994 enactment, the witness must be in a situation which poses serious threats to the person of the victim, his freedom or his possessions (s. 1 APW). If the examining magistrate feels the witness deserves to be protected, he can take several measures. First, he may order removal of the name, address, workplace and profession of the threatened witness from the legal files (diligencias). Second, the examining magistrate may take measures to conceal the visual identification of the witness. Also, the police should make sure that no pictures of the witness are taken, and they can seize all material containing images of the witness. In addition, the magistrate may decide not to send the summons to the address of the witness, but to a judicial body (órgano judicial interveniente, s. 2 APW). Third, the witness may be placed under police protection and can be driven to and from the court in special cars (s. 3 APW). Fourth, upon the official request of one of the parties to read the testimony instead of giving an oral statement, the pre-trial testimony of the protected witness can be used in court (ss. 4-(5) APW, 730 CCP). Finally, the witness may even enter a witness protection programme. In exceptional cases, the identity of the witness may be changed, and he may be provided with the financial means to change residency and work. With respect to the protection from publicity, see § 6.3.

In practice, however, certain victims — who would seem to qualify for the protection offered by the APW — are, in reality, not protected from the offender. Victims of domestic violence and those repeatedly threatened by their former spouses are not sufficiently protected, during either the pre-trial stage or the trial stage because they do not qualify for

\[144\] In the Alcazar case, an extremely high-profile case in which the evidence against the accused was not quite convincing, the media was nevertheless allowed in the court room. In the newspapers, and on television, pictures of the parties and scenes of the trial (including the questioning of witnesses and the accused) were shown. In my opinion, this unduly affected the private life of the accused, as well as that of the witnesses, including his family members.


\[146\] Explanatory Memorandum, Exposición de motivos, pp. 1-2.
The topic of domestic violence has dominated the Spanish press in recent years. In 1997 alone, 70 women were killed as a result of domestic violence and 20,000 cases were reported to the police. In 1996, 53 women were killed, and more than 16,000 women filed a complaint with the police. It is estimated that the latter figures are only 10% of the actual cases of domestic violence. The killing of wives and former spouses has caused outrage, and numerous groups of women have taken to the streets to demonstrate and demand protection. The call for protection was strengthened by media reports illustrating the lack of response by the authorities to this particular group of women and their children. According to women interviewed, they were told that the new law did not apply to their situation, even if there had been serious threats against their lives. An additional problem with respect to the protection of abused women is that judges are generally reluctant to send their husbands to prison. Judges prefer to order a weekend arrest (s. 35 PC), which in practice only makes the situation worse. According to Tirado Estrada, a public prosecutor, the protection of victims of domestic violence is difficult, if not impossible in practice, because both judges and prosecutors lack the legal means to protect them. They only have the options of detention on remand (prisión provisional) and provisional liberty (libertad provisional) before and during the trial proceedings, neither are very suited to protect victims. Pre-trial detention can only be applied in a very restricted number of cases because the Constitutional Court has ruled that it is an exceptional measure and should be applied as ultima ratio. Provisional liberty is to prevent an accused from fleeing the country by imposing the obligation to present himself regularly to the court. Obviously, this measure does not prevent further abuse or threats. Tirado Estrada states that the legislature should provide additional and better legal instruments to enable the criminal justice authorities to offer efficient and adequate protection to victims of domestic violence.

There are other (legal) measures, beside the APW, which offer some degree of protection during the pre-trial and trial stage. The most general is provided by s. 464 PC which stipulates that persons who try to persuade victims not to report a crime, not to testify, or to change their account of the facts by means of intimidation or violence, can be punished with between one and four years of imprisonment. In practice, however, very few police officers and judges are inclined to act in accordance with the law. The courts rarely exercise the right to punish the offender who threatens the victim, out of fear that they will be seen

---

147 According to Valiente Fernández, there are public policies intended to counter violence against women, such as legal reforms, information campaigns, and the establishment of services for these women, including shelters. The implementation of these policies, however, has been weak and the number of services are clearly insufficient. See C. Valiente Fernández, 'Políticas contra la violencia sobre la mujer en España (1975-1995)', Ciencia Policial, Special edition on violence against women, March-April 1996, pp. 29-46.


149 Weekend arrest is an arrest of 36 hours (two days) during the weekend. The court may order weekend arrest up to a maximum of 24 weekends, unless it is imposed as a condition to a suspension of a prison sentence (ss. 37, 86 PC).


as subjective and taking the side of the victim. Furthermore, the law allows examining magistrates and judges the authority to take security measures. They may have the accused or offender placed in an internment facility. This may be a medical or any other facility necessary to handle the abnormal or dangerous behaviour of the accused or convict (s. 101 PC). Unfortunately, this provision is only rarely applied. Examining magistrates and judges may also impose rules of conduct on the offender, i.e. that he live in a certain place, not visit certain areas, or they can take away the custody of the family (s. 105 PC). The same rules of conduct may be imposed if the offender is granted conditional release (s. 90 PC). In practice, rules of conduct are not imposed as often as is necessary. In cases of conditional release, the sentencing judge does not maintain contact with the victim. As a result, it is questionable whether he takes the victim's need for protection into account. However, this practice may change by the enactment of the 1997 Bill on procedures before the sentencing judge (see § 3.3). Another form of protection concerns the protection of victim-witnesses inside the court buildings. According to the law, witnesses should be placed in a separate waiting room (s. 704 CCP). In practice, however, most courts lack sufficient waiting spaces to enforce this rule. Therefore, most victim-witnesses have to wait in the hallway until they are asked to give testimony. However, in extremely serious cases it may occasionally happen that the president of the court allows the victim-witness to wait in the room where the judges reside (behind the bench) and to enter the court this way. In practice, the rule that victims have the right to wait in a different room than the offender is interpreted as follows: it is not applied unless the victim-witness or his lawyer explicitly asks the court not to let him wait in the hallway. During the trial, the president of the court can protect the victim from the offender by expelling the latter from the court room for a certain period of time or for the entire trial, if he behaves himself in an improper manner, (s. 687 CCP). However, in all other cases, the court cannot prevent the adult witness seeing the accused. Only juveniles do not have to testify in the presence of the accused (see § 8.2). In practice, victims often display a need for the application of protective measures, and even for additional forms of protection. In court, victim-witnesses frequently try to conceal their identity, by wearing a scarf and sunglasses, out of fear of the accused, his friends and family. These victims have no other option than to take their own precautions. According to Martínez Arrieta, the court should not only make better use of the existing legal provisions, they should also try to protect the victim in other, more creative ways. The decision of the Constitutional Court that it is a fundamental right of the accused to hear the victim, does not in any way prevent the court from allowing the victim to testify from behind a screen. This would safeguard both the right of the accused to hear the testimony, and protect the victim at the same time. Moreover, the Constitutional Court has even decided that an intimidated victim may testify in court, without being seen by the defendant because this does not make the witness anonymous. The defendant could learn the identity of the victim-witness, as well as contradict his statements. Finally, certain Spanish regions, such as Valencia, have started experiments with an alarm bracelet. Certain victims of domestic

153 According to Martínez Arrieta, most judges are not very inclined to protect victims or witnesses.
155 During my visits to the courts, the victim-witnesses were always waiting in the hallway amidst the accused, their friends and family. The atmosphere was sometimes quite tense.
156 Information supplied by Martínez Arrieta, magistrate, Madrid, 19 May 1997 and by various victim support workers, amongst whom F. Gonzalez Vidosa.
violence or physical abuse may wear an electronic bracelet. If they press the button on the bracelet, the nearest police station is alerted and will respond immediately to protect the woman. Victims who may wear such a bracelet are protected by the court order against harassment, intimidation or retaliation from the offender.\footnote{Volkskrant (Dutch newspaper), \textit{Armband tegen mishandeling Spaanse vrouwen}, 2 August 1999.}

9 CONCLUSIONS

In the last years, the Spanish criminal justice system has undertaken several initiatives to improve the position of victims. The State Compensation Act, in particular, deserves mention since it has not only introduced a state compensation scheme for victims of violent crime, but also emphasizes the rights of victims of violent and sexual crimes, and how the criminal justice authorities should treat them. The Witness Protection Act is also praiseworthy. The legal framework is also in place to safeguard the victim’s right to compensation through criminal proceedings. In the Spanish criminal justice system, the public prosecutor has the legal obligation to demand compensation on behalf of the victim (see \textsection 7) and safeguard his (financial) interests. The same rule applies to the simplified trial proceedings. For instance, during the abbreviated proceedings (procedimiento abreviado) the public prosecutor has the obligation to protect ‘the rights of the victim and those of the persons who suffered damages as a result of the crime’(s. 781 CCP).\footnote{Translation by the author.} The law even gives the payment of compensation priority over any payments to the state, such as fines. For a judicial system that adheres to the civil claimant model, this is very remarkable. However, implementation of the law still lags behind. It is therefore high time that the courts bring the law to life.

Information on victim rights are less well safeguarded. However, it is important to realize that the inadequate information strategies are really the derivatives of inadequacies in the provision of information to citizens in general. The printing of leaflets for victims is therefore very noteworthy. Nevertheless, the system needs to be improved. Information should not only be available to certain victims, such as civil claimants, or victims of violent or sexual crimes. Moreover, the police should not consider the provision of information as a symbolic gesture. If police officers strive only to obtain the victim’s signature as proof that information was provided, the legislature’s purpose is actually sabotaged. This practice needs to be sanctioned by police management, which should stress the relevance of victim-oriented activities. The supportive attitude of high-ranked police officers and examining magistrates, combined with better training of the criminal justice authorities on victim rights and interests, is the only way to effectively combat the instrumental view many criminal justice authorities still have of victims.
Supplements

ABBREVIATIONS:

AJC - Act on the Jury Court
AOJ - Act on the Organization of the Judiciary
APW - Act on the Protection of Witnesses
CCP - Code of Criminal Procedure
Const. - Constitution
FLA - Act on Free Legal Aid
PC - Penal Code
Ptas - Pesetas
SAM - Servicio de Atención a la Mujer (police service for women)
SCA - State Compensation Act
SCVT - State Compensation Act for Victims of Terrorism

BIBLIOGRAPHY:


German Mancero, I. (1995), 'La victima en el proceso penal: proteccion del interes colectivo y difuso a traves de la personacion de las asociaciones y grupos de victimas en el proceso, Cuadernos de politica criminal, no. 55, pp. 239-265.


Govern Balear, Oficina de Ayuda alas Victimas del Delito (1990), Guia de derechos de las victimas, Palma de Mallorca.


Instituto de Estudios de Policía (1996), Demandas de seguridad y victimizacion, Estudio nr. 7 del I.E.P., Madrid, November.


Magro Servet, V. (1997), 'La reforma del sistema compentencial de los juzgados de lo penal y las audiencias provinciales', la Ley, D-301


Martinez-Arrieta, A. (1990), 'La victima en el proceso penal (II)', Actualidad Penal, no. 5, pp. 49-56.


Romero Coloma, A.M. (1989), 'Problematica de le prueba testimonial en el proceso penal español (I)', Actualidad Penal, nr. 29, pp. 1615-1625.

Romero Coloma, A.M. (1990), 'Problematica de le prueba testimonial en el proceso penal español (II)', Actualidad Penal, nr. 22, pp. 229-240.


Ruiz Vadillo, E. (1987), 'Algunas consideraciones sobre la responsabilidad civil procedente de


Tamarit Sumalla, J.M. (1993), *La reparación a la víctima en el derecho penal, estudios y crítica de las nuevas tendencias político-criminales*, Generalitat de Catalunya, Centre d’estudis jurídics i formació especialitzada.


---

**WITH MANY THANKS TO:**

C. Aguarod Ayneto, Police Commissioner C.N.P., Lleida.

Prof. J.L. de la Cuesta, Institute of Criminology, San Sebastian

M.C. Eguibar Morales, Police Commissioner P.C.P., Valencia.

M. Correa Gamero, Directorate General of the Police, Madrid.

Prof. Fr. De Jorge, examining magistrate at the Valencia courts, and associate professor at the University of Valencia, Valencia.

Prof. P. González Gil, University of Las Palmas, Escuela Superior de Ciencias Criminologicas (ESCCRI), Las Palmas.

F. González Vidosa, Director of Victim Support Valencia, Valencia.

M.D. Hidalgo González, Chief of Police, Manresa.

J.A. Lloret Pascual, Police Commissioner C.N.P., Valencia.

Mr. Martínez Arrieta, judge at the district courts, Madrid.

Mr. Don Manuel del Alvarez, Institute of Police Studies, Madrid.

J. Sarmiento de Mann y de Leon, Director of ESCCRI, University of Las Palmas, Las Palmas.

Prof. P. Stangeland, University of Malaga.

Prof. J.M. Tamarit Sumalla, University of Lleida, Lleida.

G. Varona, Institute of Criminology, San Sebastian.

M.I. Vevia Romero, Ministry of Justice, Madrid.
Chapter 22

Sweden

Scenery

The Kingdom of Sweden (Konungariket Sverige) is a constitutional monarchy which has had a written Constitution (Grundlag) since the middle of the 14th century. With its 450,000 square kilometres it is the fourth largest country in Europe, but is relatively sparsely populated with 8.8 million people. Originally largely agrarian, Sweden is now one of the most industrialized nations in the world. With the possible exception of the United States of America, Sweden is the only industrialized country in the world that has the capacity to be relatively self-sufficient. The capital of Sweden is Stockholm and the country is split into 24 provinces (Län).

A typical feature of the Scandinavian countries is that they are more or less homogeneous, with limited regional, linguistic, religious, racial or ethnic heterogeneous qualities. This may be one of the reasons why there is still a strong sense of community in Sweden.

Sweden was one of the ten founding countries of the Council of Europe, and became a member of the European Union in 1995, thereby breaking with a long tradition of a strictly neutral foreign policy, both in times of peace and war.

The Swedish form of government is a parliamentary democratic monarchy. The King

---


3 However, with an influx of 1 million immigrants, Swedish society is in the process of becoming more diverse.

4 Despite this strictly neutral foreign policy, some contend that Sweden was formally at war with San Marino until as late as 4 May 1996. Apparently the San Marino signature was missing from the 1648 Peace of Westphalia documents, which ended the Thirty Years War. It was therefore decided to end 'hostilities' on 4 May 1996 with an official declaration on television that the two countries are not at war (Electronic Telegraph, 3 May 1996).
is Head of State but has no authority in the actual governing of the state. His function is mainly symbolic. The governing of the state is done by the government (Regering) headed by the prime minister (Statsminister). In Sweden, the government bureaucracy is not highly centralized. Although the national government is located in Stockholm, it is largely administered at the provincial and local levels. In fact, it is characteristic of the Swedish constitutional scheme that the government and administration are considered separate functions.

Legislation is vested in the Swedish parliament (Riksdag), which has been a unicameral parliament since 1970. Sweden has never been forcibly subjected to the rule of a foreign power and therefore, 'although deriving stimulation and ideas from other nations, has succeeded in carrying forward from her own distant past the main lines and basic traditions of her legal order'.

Sweden is not only renowned for Pippi Longstoccing, IKEA and Volvo cars, but also for the invention of the now widespread institute of the ombudsman, and for her extensive welfare system. However, even though the government has pledged to defend the traditional values of this welfare system, it is now under serious threat because Sweden can no longer afford the huge costs involved.

---


6 An ombudsman is an official appointed to investigate complaints against public authorities.

PART I:  
THE SWEDISH CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

The Swedish criminal justice system belongs to the group of Nordic legal systems. With the introduction of the new Code of Judicial Procedure (Rättegångsbalken) in 1948, a transition was made from an inquisitorial to a much more accusatorial system. The Code regulates both criminal and civil procedure. A substantial part of the code deals simultaneously with both types, but there are also many chapters and sections concerning either criminal or civil cases. However, even then the rules are remarkably similar. A Swedish judge deals with both criminal and civil cases, although a certain degree of specialization does occur.

In reality, the criminal justice system is not purely adversarial but is in fact made up of a mix of adversarial and inquisitorial elements. The adversarial elements are, for instance, the principles of immediateness and orality, the right of parties to cross-examine witnesses, the general rejection of the notion of an examining magistrate and the involvement of the public (in the form of lay judges) in the reaching of a verdict. However, this is tempered by a surprising devotion to the inquisitorial idea of unearthing the material truth, as opposed to the adversarial notion of procedural truth. Significant in this respect are that the prosecutor has the duty to consider both incriminating and exempting evidence in his search for the objective truth; that the otherwise non-examining judge is allowed to ask the witnesses questions, and to bring new evidence or expert witnesses into the trial if required; and finally that even in the case of a full confession the whole trial must take place.

This mix of inquisitorial and accusatorial elements in the Swedish criminal justice system makes it a particularly interesting country to study as far as the position of the victim in the framework of criminal law and procedure is concerned. Some adversarial principles considered to be detrimental to victims of crime — in particular the principle of cross-examination — do exist, yet the position of the Swedish victim often compares favourably with that of victims in other jurisdictions. It appears that there are certain elements capable of neutralizing the negative effects of such a principle.

The fieldwork for this report was conducted in April 1996, and the first draft completed several months later. In the course of 1999, further written material that was available at the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg-im-Breisgau, Germany, in February 1999 was incorporated into the report.

2 GENERAL REMARKS AND BASIC PRINCIPLES

In contrast to the other Nordic countries, where the principle of legality is unwritten, this principle is laid down in section 3 chapter 8 of the Swedish Instrument of Government. As a matter of principle all offenders must be prosecuted, i.e., the prosecutor has no discretion in this: ‘Unless otherwise prescribed, prosecutors must institute actions for

---

offences falling within the domain of public prosecution' (s. 6 ch. 20 Code of Judicial Procedure, RB). However, in due time modest opportunities for the police, prosecution and courts to refrain from or divert prosecution and sentencing have been introduced through legislation. See § 7.1 guideline B.5.

There is no formal division of offences into crimes or infractions. Evidence is evaluated freely and there are no rules whatsoever on inadmissible evidence. In court, dress is informal — no one wears a robe, and although one does see lawyers in suits there are also plenty of cardigans and jumpers. Significantly, everyone is addressed in the same way, i.e., using the more informal du (second person singular) instead of ni (second person plural). Titles are not used in court.

3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

3.1 Investigating Authorities

The primary agent responsible for the investigation of crime is the police, but the Swedish prosecutor is also involved in investigatory work. It is his task to direct the police in the preliminary investigation (s. 3 ch. 23 RB, see §3.2). The prosecutor is usually first informed by the police of a case when a suspect has been apprehended. If it is a serious crime he is alerted earlier. There is no examining magistrate.

The Ministry of Justice is responsible for the police. The main police authority is the National Police Board. There are 24 county police administrations, each led by a County Chief of Police. Within the counties there are community police districts. In Sweden a great deal of effort is being put into the introduction of community policing — policing in close contact and co-operation with the public. Police officers are to be made personally responsible for a section of a police district so that they can get to know the residents and can respond to the particular policing needs of their area.

In 1993 a special Crime Investigation Secretariat was set up with the Police Division of the National Police Board. For the investigation of serious crime counties have either a County Crime Investigation Department or special Serious Crime Investigators attached to police authorities or districts in the county.

3.2 Prosecuting Authorities

To make the prosecution service 'more effective, more flexible and less vulnerable' it was completely reorganized on 1 July 1996. The original number of thirteen prosecuting authorities (dklärgmyndigheter) has been reduced to seven, located in Stockholm, Västerås, Linköping, Malmö, Göteborg, Sundsvall and Umeå respectively. Each prosecuting authority is led by a first prosecutor (överdklägare). The administrative and fiscal work is done by the prosecution chambers (dklärgarkammare), led by a chief prosecutor (chefsklägare). The Attorney General (riksklägare) is the highest public prosecutor in Sweden. It is up to him to determine the amount and location of the prosecution chambers.

13 Press release, Department of Justice, 28 March 1996.
Although the main task of the prosecution service is to prepare cases for trial and present them in court, they are also involved in the investigations of crime: where necessary they will lead the preliminary investigations (see § 3.1). Of course, prosecutors simultaneously head many cases so they are seldom physically present during investigatory work. However, the police do regularly confer with the prosecutor.

### 3.3 Judiciary

Sweden has ninety-seven district courts (tingsrätt), six courts of appeal (hovrätt) and a Supreme Court (Högsta Domstol).

The district courts are general lower courts and, unless otherwise prescribed, courts of first instance (s. 1 ch. 1 RB). Each district court, which may be divided into divisions, has a chief judge (lägman) and one or more associated judges (rådman) who are ‘learned in law’ (s. 2 ch. 1 RB). Criminal cases are generally heard by one professional judge and a panel of three lay judges. (s. 3b ch. 1 RB).

The courts of appeal have jurisdiction of appeals from the general lower courts. Each court of appeal has supervisory authority over the lower courts within its circuit (s. 1 ch. 2 RB). In certain cases a court of appeal also functions as a court of first instance (s. 2 ch. 2 RB). A court of appeal is split into two or more divisions and has a president, one or more division heads (hovrättslagman) and associate judges (hovrättsråd) who are all ‘learned in law’ (s. 3 ch. 2 RB). Criminal cases are usually heard by a bench consisting of three professional judges and two lay judges (s. 4 ch. 2 RB).

The Supreme Court, located in Stockholm, is composed of twenty-five justices (justitie-råd). The justices are appointed by the government. Some of them serve on the Law Council (lagrådet), which examines proposals for new legislation which the Government intends to submit in an Act to Parliament (see § 4.1). The others serve in the three chambers of the Supreme Court. Each chamber is normally composed of seven justices (ch. 3 RB).

A Swedish professional judge deals with both criminal and civil cases — as we have seen, there is one comprehensive Code of Judicial Procedure. The Swedish layman system has a very long, never-interrupted history, but is today considered a matter of democracy. Sweden was the first Scandinavian country to establish a distinct legal profession, alongside an extensive layman system.

### 3.4 Enforcement Authorities

The debt collection agencies (Kronofogdenyheter), are responsible for the enforcement of judgements and orders from the general courts, as well as the enforcement of arbitration awards and many of the decisions of the administrative authorities. The Swedish debt collection agencies function independently of the courts. The victim of crime may come into contact with the local debt collection agency when seeking to enforce a compensation order (see § 7.3).

---

14 An appeal may take the form of a vad (regular appeal against a lower court judgement) or a besvär (limited appeal against a lower court final order), see chapter 49 Appeals From Judgements and Orders of Lower Courts RB.

15 See also The Supreme Court — an Introduction, pamphlet Lbs offset, Jönköping 1989. Also of interest is the brochure (in English) Facts about The Swedish Judiciary 1995/96, The National Courts Administration, Jönköping.
3.5 Probation Services

The National Prisons and Probation Administration (Kriminalvårdsverket) is the highest central authority responsible for the handling of persons convicted of a crime. The National Parole Board (Kriminalvårdsnämnden) decides on the early release of prisoners. In Sweden there is no such thing as bail.

3.6 Crime Victim Compensation and Support Authority

The Crime Victim Compensation and Support Authority (Brottsoffermynndigheten) is a governmental agency that was established in 1994 in Umeå. Upon its establishment, the responsibility for dealing with state compensation claims was transferred from the Swedish Compensation Board to this new authority. In 1997 the Authority received 5,002 claims for state compensation and paid out a total of 62 million kronor (7,075,934 euro). One of its other tasks is the management of the Victim Fund (brottsofferfond). Since 1994, offenders convicted of offences for which they can be imprisoned are ordered to pay 300 Swedish Crowns into the Victim Fund, and the proceeds are used to support activities aimed at improving the position of victims of crime, for instance the work of victim support and research projects. Furthermore, the Authority is in the process of setting up a Centre for knowledge and information on victims of crime (Kunskapscentrum). The aim is to become the most specialized Swedish or even Scandinavian body on victim-related issues, and to act as an intermediary in providing information to other institutions.  

3.7 National Swedish Council for Crime Prevention

The National Swedish Council for Crime Prevention (Brottsförebyggande rådet (BRÅ)) is a governmental organization that was established in 1974 and is part of the Ministry of Justice. In the latter half of the 1980's, BRÅ produced, among other things, two important reports on the position of the victim, but since the creation of the Crime Victim Compensation and Support Authority, BRÅ concentrates primarily on crime prevention, although it is still responsible for producing a leaflet called ‘For you, as a victim of crime’ (Till dig som utsatts för brott). This leaflet informs victims of crime of the judicial proceedings following the reporting of an offence, and of their rights (see § 6.1 under guideline A.2).

3.8 Victim Support Organizations

The Swedish National Victim Support Organization (Brottsoffersjournas Riksförbund (BOJ)) was founded in 1988. It is the umbrella organization of 101 local branches of victim support throughout the country. As in most countries, victim support relies on a large contingent of volunteers and a few professionals. The cooperation with the police is generally excellent. This is due in part to the fact that the creation of the local victim support branches was largely a police initiative. There is a police officer on every victim support board. Victim

---


17 Support and help for victims - an inventory of problems (Söd och hjälp åt Brottsoffer - En problemmunteling (Kansli PM 1986:1)); and Victims (Brottsoffer (BRÅ UTREDNING 1988:1)). These reports were produced at the request of the government.
Support is regularly involved in court proceedings when one of its volunteers acts as a support person for the victim (see § 5.4).

There are also other groups concerned with offering support to victims of crime, for instance the women’s organization Riksorganisationen för kvinnojuror i Sverige (ROKS) in Stockholm, and the child protection groups Rädda Barnens pojkdomstagnings- och Barnens Rätt i Samhället (BRIS), both also in Stockholm. The crisis centre (Kriscentrum) of the Skandia insurance company in Stockholm offers professional help to victims of crime and other traumatized persons who have taken out a Skandia insurance policy.

4 SOURCES OF LAW

4.1 General Sources of Law

Acts (Lag) passed by Parliament are the primary source of law. All bills presented to parliament are first reviewed by the Law Council, which is composed of judges from the Supreme Court and the Supreme Administrative Court. The council reviews all bills to assure that they do not violate constitutional law.

The legislative preparatory works which are used as an aid to interpreting the acts are extremely important in Sweden. The initial report, the reports of the Legislative Council and Parliamentary Committee, and the ministerial explanation in the parliamentary bill are all elements of the legislative preparatory works. The ministerial explanation is considered the most important. The initial reports are prepared by committees appointed by the government and are published as part of the series of either the Department of Justice (Ds) or the state publisher (SOU). Other preparatory works are collectively published in the Parliamentary Documents (Riksdagstrycket), with a shortened version appearing in New Juridical Records Part I (Nytt Juridiskt Arkiv, NJA).

The government also issues regulations through ordinances and directives. Finally, even though there is no rule of precedent in Sweden, in practice, case law of the Supreme Court does function as a source of law. Judgements of the Supreme Court are also published in the New Juridical Records.

4.2 Sources of Criminal Law and Procedure

The primary source of criminal law is the Penal Code (Brottsbalk, BrB) (1962:700). In Sweden, no formal distinction is made between crimes and other contraventions. The Penal

---

18 There is also a tourist victim service – Sveriges Riksforbund för Brottssdrabbede Resenärer – located in Malmö, although it is unclear whether this service was still in operation at the time of writing. For more information on victim support organizations in Sweden, see SOU 1998:40, pp. 233-255.
19 This Swedish practice is contrary to the Procota ruling of the European Court of Human Rights, see Procota v. Luxembourg, European Court of Human Rights, 28 September 1995 Series A, vol. 326, AB 1995/588.
20 Swedish laws are published in the Collected Statutes (Svensk Författningssamling, SFS). Each act is numbered according to the year in which it is published, followed by a serial number, for instance 1962:700. Even if an act is amended, it is always referred to by its original number. Like acts of parliament, they are given a number based on the year of publication and a serial number, for instance Ds 1993:29 or SOU 1995:33.
Code is divided into three parts: Chapters 1-2, General Provisions; Chapters 3-24, Crimes; and Chapters 25-38, Sanctions. Many criminal offences, for instance traffic offences, are not listed in the penal code but can be found in other Acts and ordinances containing provisions for crimes and punishment.

The primary source of procedural law is the Code of Judicial Procedure (Rättsgångsbalk, RB) (1942:740). As recounted in § 1, it is a combined code for criminal and civil procedure. Two other important procedural acts are the Preliminary Investigations Ordinance (Förundersökningsskungörelse, FuiK) (1947:948), and the Enforcement Code (Utsökningsbalk) (1981:775). Regarding procedure, there are also some matters that feature only summarily or not at all in acts, for instance the question of the burden of proof. Here the Supreme Court has, in effect, set precedents formulating rules of evidence.

4.3 Specific Victim-Oriented Sources of Law, Guidelines and Initiatives.

In the Code of Judicial Procedure there are many sections dealing directly or indirectly with the victim of crime, or rather the injured person (see § 5). These sections mostly concern his active legal rights and obligations in court such as his duty to give a statement and his right to support the prosecution or initiate a private prosecution. Other rights of the victim, such as the right to information, are found in the Preliminary Investigations Ordinance.

The victim may claim compensation from the offender on the basis of the Tort Liability or Damages Act (Skadeståndslag) (1972:207). State compensation is claimed on the basis of the Criminal Injuries Compensation Act (Brottsoffad) (1978:413).


Guidelines for the police concerning their duties to provide victims of crime with information and protection are found in the letter and directives of the National Police Board of 21 June 1994 (Rikspolisstyrelsen, brev till samtliga polismyndigheter, diarienummer POB-480-5651/93). For the prosecutors there is the circular of the Attorney General of 5 April 1989 (Riksåldagens cirkulär RÅC 1:114), and the circular of the Attorney General of 27 June 1994 (Riksåldagens cirkulär RÅC 1:122). Both contain the Attorney General's advice on how prosecutors should deal with injured persons.

The department of justice has issued several important reports on (aspects of) the position of the victim. For example 'The Witness and Injured Person in Court' (Vittnen och Mdlsagande i Domstol) (Dss 1995:1); and the earlier 'The Victim of Crime in Focus – measures to strengthen the position of the victim of crime' (Brottsoffens i Blickpunktten – ätgörer att stärka brottsoffens ställning) (Dss 1993:29). These two reports are examples of legislative preparatory works. Two important reports on the subject of compensation are 'Compensation for Violation caused by Crime' (Ersättning för Kränkning genom brott) (SOU 1992:84), which deals with compensation for violation of personal integrity in conjunction with crime, and 'Compensation for Immaterial Damages in case of Personal Injury' (Ersättning för ideell skada vid personskada) (SOU 1995:33), which deals with compensation for non-financial losses suffered in conjunction with personal injury.

By directive of 15 June 1995, the government appointed a special committee to evaluate all the measures taken in Sweden in the last ten years to improve the position of the victim of crime. The committee was instructed to examine how the measures work in practice,
what flaws there are from the point of view of the victim, and to make recommendations for further improvements and legislative changes. The final report was published under the title ‘Victims of Crime: What has been done? What should be done?’ (Brottsoffer: Vad har gjorts? Vad bör göras?) (SOU 1998: 40).

Finally, the Crime Victim Compensation and Support Authority has published a comprehensive overview of all the research projects and work being done for victims of crime in Sweden.

5 ROLES OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM

Terminology and the victim as witness
The Swedish word *brottsoffer* means victim of crime (*brott* translates as crime, and an *offer* is a victim). However, this term does not feature anywhere in Swedish legislation. The term most commonly used is *målsägande* which translates as injured person.

It is essential to realize that *målsägande* embraces a much smaller group than *brottsoffer*, for a victim of a crime is not automatically also an injured person. The legal definition of injured person found in the Code of Judicial Procedure is: ‘the one against whom the offence was committed, or who was affronted or harmed by it’ (s. 8 ch. 20 RB). This definition is vague, to say the least, and no author has as yet come up with a simple but effective rule of thumb for who qualifies as an injured person. Here it will suffice that in general an injured person is the person against whom the act was directed and who has suffered damages in accordance with the damages act as a direct result of this act.

The victim of crime who qualifies as injured person is accorded several rights and opportunities within the criminal justice process. The most important ones are the right to claim damages, the right to support the prosecution and the right to private prosecution if the public prosecutor refrains from prosecuting. If the injured person makes use of one or more of these rights, he has the status of party in the proceedings. He may then be called injured *party* rather than injured *person*.

Some also argue that the injured person has the status of party regardless of whether he employs one of these rights. One of the interesting aspects of Swedish judicial procedure is that, even though the statement of the injured person is considered essential to the

---

23 For the terms of reference see Kommittédirektiv, Utvärdering av åtgärder på brottsofferområdet, Dir. 1995:94.
proceedings, he may not be heard under oath, just as the accused may not be heard under oath. Patsourakou explains this as follows: 'In the context of the proceedings the injured person is seen as a natural opponent of the accused, so that in so far he can not be a witness.'

A similar explanation is that it is a question of balance between the injured person and the accused – if the defendant cannot be coerced to speak the truth, then neither should the injured person: for both the accused and the injured person the situation is so personal that they can hardly be expected to be objective. This concern for the balance between the accused and the injured person implies that in one sense at least, they are seen as equals. However, this recognition of a certain emotional equality, expressed in equal treatment regarding giving statements, does not necessarily imply a formal legal equality in the sense of both automatically being considered a party to all the legal proceedings. Furthermore, the wording of the provision in the Code of Judicial Procedure on the hearing of the injured person also suggests that the injured person is not by definition a party to the case: ‘Anyone who is not a party in the case may be heard as a witness; in a criminal case, however, the injured person may not be heard as a witness even if he presents no claim in the case’ (s. 1 ch. 36 RB). The use of the word ‘however’ implies that the injured person not presenting a claim is not considered to be a party. The reasoning behind this stipulation is that, because both the accused and the injured person have an interest in the outcome of the case, their testimony may not be considered to be impartial. A final argument against the idea that the injured person is a party, regardless of whether he presents a compensation claim or supports the prosecution, is that being a party seems to suggest that one may participate in the proceedings in one way or another. Only the injured person presenting a compensation claim or supporting the prosecution has such active participatory rights, although even injured persons not presenting a claim or supporting the prosecution must come to court to give a statement. These rights include being allowed to enter into the question of guilt in court, making one’s own interrogation, being sent a record of the judgement and having a right to appeal.

To summarize, there are three ‘grades’ of victims: (1) Brottsoffer – victim of crime in the broadest sense of the word; (2) Målsagande – not presenting a compensation claim, nor supporting the prosecution. Although not party in a legal sense, he is considered a party in an emotional sense; (3) Målsagande – presenting a compensation claim and/or supporting the prosecution. He is a party in an emotional and a legal sense.

In the rest of this chapter we will use the following terminology: victim of crime for victim in the broadest sense; injured person for someone who qualifies as målsagande, whether or not he is presenting a compensation claim or supporting the prosecution; and injured party for the målsagande actively participating in the (court) proceedings by either presenting a compensation claim and/or supporting the prosecution or initiating a private prosecution.

5.1 Civil Claimant

A private claim against the suspect or a third person in consequence of an offence may be consolidated with the prosecution of the offence (s. 1 ch. 22 RB). According to the Swedish Act on Legal Aid, the injured person is entitled to have a lawyer take care of his claim for damages in the criminal proceedings. If he does not avail himself of a lawyer, the public prosecutor will present the claim for him. Compensation claims are regularly presented during the criminal proceedings, and compensation is often awarded, although the amounts

---

are never high. See §6.1 guideline D.9, and §7.2.

5.2 Private Prosecutor

If the public prosecutor decides not to prosecute a case, for instance because he feels there is not enough evidence, the injured person has a subsidiary right to institute a private prosecution (s. 8 ch. 20 RB). Likewise, if the prosecutor decides to drop a prosecution the injured person may take over where he left off (s. 9 ch. 20 RB). Before embarking on a private prosecution the injured person may ask for a review of the decision of the prosecutor not to prosecute, although this is not a formal pre-requisite. He can do this by writing a letter to the prosecuting authorities. A higher-ranking prosecutor will then re-examine the case.

A private prosecution is not without risks for the injured party. If the case is lost he must bear all the costs of the trial, and if the judge decides there was no probable reason to prosecute, the injured party may even be sentenced for initiating an unfounded prosecution. Although private prosecutions are rare, they do still occur occasionally (see § 7.1 guideline B.7).

5.3 Auxiliary Prosecutor

When a prosecutor has instituted a prosecution, the injured person may support the prosecution (s. 8 ch. 20 RB). By simply saying in court that he wants to do so, the injured person may support the prosecution. Nothing further is required of him, but he is now allowed to take part in the preliminary examination protocol and to pose questions during the main proceedings (s. 8 ch. 20 RB).

5.4 The Injured Person’s Right to Legal Counsel and Support

Victims of sexual or other serious offences have a right to a legal adviser (målsägandebiträde). Initially only victims of sexual offences had a right to such a state-paid adviser but section 1 of the Act on Legal Advisers (ALA) (Lag om målsägandebiträde) (1988:609), has been amended so that victims of crimes against life and health (murder, assault, gross negligence causing grievous bodily harm, etc.), of offences against life and liberty (kidnapping, threatening with a weapon, molestation) and victims of (aggravated) robbery also qualify. A legal adviser may not be appointed if the prosecution has decided that a general prosecution shall not be brought or that such a prosecution shall be discontinued (s. 2 ALA).

The legal adviser must guard the interests of the injured person throughout the preliminary examination and the trial (s. 3 ALA). This may involve attending police questioning of the injured person, helping him prepare his compensation claim and presenting it for him in court, and assisting him with a possible appeal.

The legal adviser is appointed by the court at the request of the injured person. Advocates, assistant lawyers in law firms or anyone else suitable for the job may be appointed (s. 21 rättshjälpslagen (1972:429), Act on Legal Aid). In practice, a court will appoint a legal

This translates literally as an injured person assistant, but the preferred translation of the Swedish government committee in the SOU report 1998:40 is legal adviser. See the English summary, SOU 1998:40, p. 27. Other translations are: injured person/party advocate and complainant’s counsel. From now on we will refer to the målsägandebiträde as the victim’s legal adviser or victim’s lawyer.
adviser from a list of lawyers they consider suitable. Most courts are aware of the fact that victims of sexual offences have a right to such assistance, but may be more difficult to convince of the need for a legal adviser in other cases. Some judges are also reticent because of the costs involved for the state.  

Apart from guarding the interests of the injured person, the legal adviser must also offer 'help and support' (s. 3 ALA). This implies a form of non-legal, humanitarian aid that legal advisers are not trained to give. This void may be filled by appointing a stödperson, a support person (s. 15 ch. 20 RB). It is his task to provide personal support for the injured person throughout the proceedings, in the form of a sympathetic ear or reassuring presence during dealings with the authorities. Often support persons also help with practical things such as filling out insurance claim forms. Support persons are usually volunteers from the local victim support branch, without any legal training. The National Victim Support Organization has produced a handbook explaining what is expected of them. Unlike the victim's legal adviser, they are not compensated for their efforts. An injured person may have both a legal adviser and a support person, the former to take care of his legal interests and the latter for moral support. In court the prosecutor, the legal adviser and the injured person all sit together during the proceedings. If there is also, or only, a support person, he, too, may sit next to the injured person.

The support person may be of particular importance to the injured person after the trial. With the closing of the case all legal actors understandably lose interest in the injured person, however sympathetic they may have been during the proceedings – the case is over from their point of view. For the injured person it may be vital to compare notes with someone who was also present in court.

PART II:
THE IMPLEMENTATION OF RECOMMENDATION (85) 11

6 THE VICTIM AND INFORMATION

6.1 Informing the Victim

It is clear that the Swedish authorities realize how important information is for the injured person. In a circular from the Attorney General, for instance, it is recognized that 'a substantial part of the support for the injured person consists of the information that the

Information provided by M. Frederiksson and U. Malm, Victim Lawyers in Malmö, 17 April 1996.

Information provided by Umeå Victim Support, 25 April 1996, in concurrence with information provided by M. Frederiksson and U. Malm, Victim Lawyers in Malmö, 17 April 1996.

Initially, the National Victim Support Office received telephone calls from support persons complaining that courts did not allow them to sit next to the injured person. There are no regulations on this. The support persons were advised to inform the courts that sitting next to the injured person is common practice. The courts now comply with this. Information provided by P. Svensson, director of Swedish National Victim Support, 23 April 1996.

Information provided by Umeå Victim Support, 25 April 1996.
police and prosecutors must supply. The influential Victim of Crime in Focus report of 1993 (see § 4.3) suggested, among other things, several legislative changes to improve the provision of information to the injured person. These changes were made in 1994.

(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. 13a of the Ordinance on Preliminary Investigations (FuK) provides that the injured person should, if possible, be informed whether the prosecutor can present a personal claim of the injured person as a consequence of the offence, and of the possibilities to claim compensation under the Criminal Damages Act (1978:413). In this context information should also be given in a suitable manner about the rules that apply to such a claim. Furthermore, section 13a FuK provides that if the conditions for the appointment of a legal adviser or the granting of a protection order are met, the injured person should be informed of the rules that apply to the appointing of a legal adviser or the granting of a protection order as soon as possible. Finally, the injured person should, to a suitable extent, be given information about the rules concerning a support person, the possibility of getting general legal aid and advice, and also about authorities, organizations and others who can offer support and help.

The Ordinance does not determine who should pass on this information. However, because both the police and the prosecutor are involved in the preliminary investigation, and the information mentioned above is to be given during this preliminary investigation, these agents are, in fact, responsible for the fulfilment of this task. The police, being the first point of contact for the victim, have the primary responsibility of informing him, especially regarding notification that should take place 'as soon as possible', i.e., where the appointment of a legal adviser or the granting of a protection order is concerned.

It is clear from a letter and accompanying guidelines sent by the Swedish National Police Board to all local police authorities that the police have indeed assumed primary responsibility for the provision of the aforementioned information. Furthermore, a section of the Police Statute provides that 'the police should strive to provide the public with advice and support. In particular, the police should supply crime victims with the information they need as a result of the crime they have been subjected to.' This statement elevates the informative tasks of the police from an 'extra' one, to be fulfilled in addition to all the normal tasks, to a fundamental one which is considered part of the police's general task to provide the public with advice and support.

The joint involvement of the police and the prosecutor in the preliminary examination implies that the prosecutor must act as an informative safety net: it is up to him to inform the injured person, if for some reason the police fail to do so.

Concerning ways in which the information is to be passed on to victims, the National Police Board writes in its guidelines to all local police authorities: 'Information to crime victims may be supplied both orally and in writing. A combination of oral and written information is probably to be preferred in most cases. It is very important that any written

---

35 Letter and guidelines of 21 June 1994 of the National Police Board to all local police authorities, POB-480_5651/93).
36 S. 3 Ch.1 *Polislag*. 
information material should be kept up to date.' The National Council for Crime Prevention produces a leaflet for victims (see § 3.7) which explains what he can expect from the authorities, what his rights are and what type of reactions he may have to the crime. On the back is a list of addresses and telephone numbers of national victim organizations. Once the police officer who has taken down the victim's report has told him of all his rights, he should give him a copy of this leaflet to take home. The National Police Board advises that this leaflet should be supplemented with local information.

In practice

In their research on the relation between police and victims in Stockholm, Lindgren and Christianson found that many victims would have liked to have received more information from the police, especially concerning the progress and outcome of their case, and the opportunities for compensation. According to the researchers most of the information that the victims said was lacking can be found in the leaflet of the National Council for Crime Prevention, but the large majority of victims indicated that they had not received the brochure. The majority of policemen interviewed said that they seldom or never handed it out. Some of the policemen had never even heard of the brochure.

Since Lindgren and Christianson conducted their research in 1993-94, efforts have been made to solve the problem of the unissued leaflets. Apparently the stock of leaflets sent to the police stations was swiftly exhausted and never replenished. In 1994, pending a revision of the leaflet of the National Council for Crime Prevention, the National Police Board put together material called 'Information to Crime Victims' to be distributed by the police to victims of crime. In 1995 the revised leaflet of the National Council for Crime Prevention was printed.

The problems with the leaflets are not the only reasons for an inadequate flow of information from the authorities to the police. Also problematic is the fact that the stipulations of the Ordinance on Preliminary Investigations leave the police a fair amount of discretion in deciding whether it is actually necessary to inform the victim—section 13a Fuk speaks of 'if possible', 'if the conditions are met' and 'to a suitable extent' (see above). There is no absolute informatory obligation on the part of the police. The remark of the Swedish National Police Board regarding the provision of information concerning rights to damages under the Criminal Injuries Act and how an application for such damages is processed by the authorities illustrates this point: 'In principle, this information should always be supplied but there is no legal obligation to this effect. For example, exceptions could be made in cases where there are a large number of injured persons.'

Regarding information concerning the appointment of a legal adviser or the granting of a protection order, the police officer taking down the report must decide whether one or both of these measures is called for. Two lawyers working as specialized victim lawyers (Brottsofferjuristerna) in Malmö reported that they were often only appointed when the criminal proceedings were already well under way, even though the legal adviser is supposed to guard the interests of the injured person from the word go. In practice the police and the prosecutors are often not familiar with the rules concerning the legal adviser, and either say

37 M. Lindgren and S.-Å. Christianson, Relationen Mellan Polis och Brottsoffer i Stockholms Polismyndighet, PHS Rapport 1994:2 Polishögskolan Forskningsenheter, p. 44. It should be noted that Lindgren and Christianson use the word brottsöffer rather than mälsögonde throughout their report.

38 Letter and guidelines of 21 June 1994 of the National Police Board to all local police authorities, POB-480_5631/93.
nothing to the victim reporting the crime, or tell him or her that they are not eligible for such assistance, even though in actual fact they do often qualify. Nowadays police officers graduating from the police college will have received special training on the rights of victims (see § 8.1). For the older generation local training should be organized. In Umeå, for instance, all the police officers had to attend a half-day training course when the FuK was changed in 1994.

Apart from a shortage of leaflets, a lack of awareness of the rules and wrong decisions on who qualifies for certain measures, another reason that information is sometimes not passed on to the injured person is the disinterested attitude of some police officers. This can be prevented by training, good examples set by high-ranking officers and the development of set routines to be followed by police officers when taking down a crime report. The introduction of a special form containing a list of points that must be presented to the injured person is part of an attempt to establish such routines. The police officer must tick a box for each item of information that he passes on. A completed form is no guarantee that the information has actually been given, but at least it will help jog the memory of a willing police officer, and may stimulate a more disinterested officer to at least make an attempt to inform the injured person. It will be interesting to see whether the move towards community policing (see § 3.1), with its increased personal involvement of police officers with citizens, will stimulate a more engaged attitude towards the informatory needs of victims of crime.

It is extremely important that victims reporting a crime are informed of the authorities, organizations and others who can offer help and support (final element s. 13a FuK). Despite all the measures and good intentions regarding the duty of the police to inform the injured person, many still remain ignorant of their rights and opportunities. This is not necessarily the fault of the police. Often injured persons are simply too shocked to take in what is being explained to them, and they may find the leaflet difficult to understand. Also, in practice many problems are encountered by injured persons when trying to figure out the amount of compensation they may ask. If there is no legal adviser taking care of this, it is often up to the various victim support organizations to help out (see § 3.8). These extra-systemic organizations function as a back-up to the criminal justice system. However, according to Lindgren and Christianson only a limited number of people actually come into contact with the victim support organizations.\(^{39}\) In Sweden, there is a police officer on the board of every local branch of Victim Support (Brottsofferdjur). At first, this police officer passed on all details of potential clients to his organization and then Victim Support contacted the injured person. On the information form that the officer taking down the crime report has to fill out, a box was included that the injured person must be informed of the existence of his local Victim Support branch. However, other victim support organizations protested, and now general information on all the different organizations should be provided, rather than just about brottsofferdjur. Also, the Swedish Justitiecouncil — the Swedish Parliamentary Commissioner for the Judiciary and Civil Administration — decided that it violates the privacy of individuals to pass on personal details of injured persons to the local branch of Victim Support. Following this decision the liaising officer now passes on just the name, address and telephone number of a potential client. No further details may be given.

The Ordinance on Preliminary Investigations contains a final safeguard that all the information that the injured person should receive during the preliminary investigation has indeed been passed on to him. A protocol or report of the proceedings (protokoll) is made

of all preliminary investigations of crime (s. 21 ch. 23 RB), and section 20 of the FuK provides that it should be noted in this protocol whether the injured person has received the information due to him. If the case is to be prosecuted, the prosecutor has the duty to provide the court with a copy of this protocol or with notes on the preliminary investigation. The court can then check whether all the requirements of, among others, section 13a FuK have been met.

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

Once the preliminary examination has been closed, the injured party — i.e., an injured person who has a compensation claim, intends to support the prosecution or initiate a private prosecution — has a right, upon request, to receive a copy of the protocol of the preliminary investigation. He must make this request on his own initiative, for the police will not ask him whether he wants to receive a copy.40 If a legal adviser has been appointed, this person will get a copy on behalf of the injured person.

The legal adviser guarding the interests of his client should ensure that all his rights are exercised, but injured persons without this assistance must rely on other sources to inform them of their right to receive a protocol. As stated, the police will not do so, nor is it likely that the prosecutor will volunteer this information. Also, nothing is said in the information leaflet of the National Council for Crime Prevention on the matter. Therefore, it is up to the local branch of Victim Support to inform the injured person of this right.

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

An injured person who reported the crime in question or who has submitted a claim for damages or made a request to be kept informed about the investigation, should be notified of a decision by the public prosecution authorities not to initiate an investigation, to close an investigation or to waive prosecution (s. 14 FuK). The police have an obligation to ask all injured persons whether they want to be informed of such decisions (s. 13b FuK). The injured person’s wishes must be recorded on the special information form mentioned above. Subsequently, whenever part of the requested information is passed on, the date on which this was done and the person who did this must also be registered on the form.

Normally, if the prosecutor decides not to prosecute, the injured person will be informed by mail: ‘Notification about decisions of the prosecutor is usually done according to routine with standard forms used by the respective authorities.’41 These standard forms state that the prosecution has been waived, with a standard decision term such as ‘the charge cannot be proven’, ‘the suspect cannot be identified’, or ‘the act is not considered a crime’. The absence of any further explanation can be upsetting for the victim involved in the case, for he may feel his situation has not been taken seriously. This problem is recognized in the Prosecutor’s circular, which recommends that in certain cases the prosecutor should consider changing the customary routine by adding a brief explanation to the standard form.

---

40 Information provided by J. Wikdahl of the Umeå police authority, 24 April 1996. The protocol is not listed on the police information form, to be filled out when taking down the initial report of the crime. See also M. Fredriksson and U. Malm (1995), p. 102, and Brotsoffren i Blickpunkten (Ds 1993:29) pp. 45-46.

41 Riksdagshagens cirkular RÅC 1:122, 27 June 1994 (circular issued by the Attorney General), part 2.4, p. 7.
In extremely severe cases, for instance sexual offences, a personal relaying of the information may be called for, either by telephone or during a face to face meeting of the prosecutor and the injured person. In practice, in a particularly severe case, the prosecutor will telephone the injured person in question to explain.

So far we have discussed only 'negative' decisions, i.e., decisions not to initiate an investigation, to close an investigation or to waive prosecution. Nothing has been said about informing the injured person of a decision to go ahead with the prosecution. Some will argue that this is remedied by the injured person's right to receive information about the date and place of a hearing (see evaluation guideline D.9), but because quite some time may pass between the decision to prosecute and the actual trial, the injured person will then have to endure an unnecessarily long time of uncertainty. It would be better if the injured person were also informed of the decision to go ahead with the prosecution. This could be done using the same standard forms that are used for informing the injured person of a decision not to initiate or to close an investigation, or to waive prosecution. The government committee that published its findings on the evaluation of the provisions for victims of crime in SOU report 1998:40, concludes that the victim should not only be informed as soon as possible of the decision to go ahead with the prosecution, but also of the contents of the charges raised against the accused. The committee suggests that either the prosecutor should send the injured person a copy of the writ of summons served on the accused, or the court should be made responsible for informing the injured person that proceedings have been initiated.

(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.

The injured person must be asked whether he wants to be kept informed of the date of the main hearing in the case as well as the court's final decision (s.13b FuK). Once again, the injured person's wishes and the actual passing on of the information must be recorded on the special information form. It should be noted that in Sweden almost every injured person is required to give a statement in court, even if he is not presenting a personal claim. Therefore he will receive this information automatically, whether he wants it or not: 'The injured person shall (...) be given notice to appear (at the main hearing) if he supports or joins in the prosecution, or if he is to be examined as part of the prosecutor's case' (s.15 ch. 45 RB).

Information on obtaining restitution and compensation in the criminal justice process, legal assistance and advice, the basic duty of the police and prosecutor to inform the injured person has already been dealt with above (see § 6.1 guideline A.2). In addition, section 2 chapter 22 RB provides that during the investigation of an offence, if the investigating authority or the prosecutor finds that a private claim may be based on the offence, he shall,
if possible, give sufficient notice to the injured person prior to institution of the prosecution. This section designates the police as the first checkpoint and the public prosecutor acts as the safety net. In principle, the injured person should fill out a compensation form, to be included in the protocol. Usually this form will be provided by the police, and will be returned to them by the injured person. If for some reason or other the compensation form is missing from the files sent on to the prosecutor, and the prosecutor feels a private claim can be made, he will send the form to the injured person of his own accord.45

Earlier we mentioned that a meeting between the injured person and the prosecutor could be called for, for instance when the prosecutor must tell the injured person of a decision not to prosecute in the case of a serious offence. In cases where a prosecution will take place there may also be good reason why an injured person would appreciate a meeting with the prosecutor. The prosecutor, being 'learned in law' and well aware of the facts of the case, is in an ideal position to explain to the injured person how he can claim compensation and what he should expect in court. A general rule that the prosecutor should personally meet the injured person before the main proceedings has been rejected because it could jeopardise the prosecutor's position as the seeker of the objective truth.46 This does not mean that meetings between the prosecutor and the injured person may not take place. On the contrary, the Attorney General's circular propounds that in certain situations such meetings are essential, especially where it concerns sexual offences: by explaining to the injured person what he can expect in court, he can be spared unnecessary suffering.47 Diesen argues that the contact between the prosecutor and the injured person is central to the confidence in the justice system, the rehabilitation of the victim and to prevent the victim from taking the law into his own hands.48 For the prosecutor, also, such a meeting can be beneficial because he can make a personal evaluation of the injured person's character. In fact, in practice this is the main reason why meetings between the prosecutor and the injured person take place.49

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.

If the injured person has filled in a compensation form and returned it to the police, this will be included in the file that is forwarded to the prosecuting authorities. But all other information that is compiled by the police on the injuries and losses suffered by the victim is provided with a view to proving that a criminal offence was committed, and not to substantiating the injured person's claim for compensation. Information essential to the victim's claim, but of no further relevance to the criminal case, may therefore be missing. If a legal adviser has been appointed he should check that the prosecuting authorities have

---

47 Riksåklagaren's cirkulär RÅ 1:122, 27 June 1994 (circular issued by the Attorney General), part 4.2.1, p. 10.
48 Diesen in Billström c.s. (1995), p. 65. Obviously, if a legal adviser has been appointed he can explain the legal ins and outs, and what will happen in court, to his client. However, even then establishing trust between the injured person and the prosecutor is important.
49 Information provided by L. Appelgren of the Office of the Attorney General, 15 April 1996.
indeed received all the necessary information. In practice, because the police assume that the legal adviser will take care of the paperwork surrounding the compensation claim, they may be a little casual in giving the prosecuting authorities the required statement on the injuries and losses 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.

The protocol of the preliminary examination is forwarded to the court, so the court will have automatic access to the compensation form filled out by the injured person, if it has been included in the file. In Sweden, one of the main principles governing the trial proceedings is that the hearing shall be oral (s. 5 ch. 46 RB). If the injured person has a compensation claim it is presented by his legal counsel, or if no such person is present, by the prosecutor. The injured person is explicitly questioned in court about the extent of his injuries and damages. Supplementary written evidence such as hospital bills will be required.

The offender may have made a genuine pre-trial effort to compensate the victim, for example through one of the eleven mediation projects that have recently been set up in Sweden. This information will be provided to the court by the offender's lawyer.

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 involves two strategies. First of all, if the offender has not made any serious effort to compensate the victim, this could be a reason to go ahead with a prosecution where otherwise a waiver would have been appropriate. Secondly, where the offender has made a serious attempt to compensate the victim, this could be a reason to drop the prosecution.

As recounted earlier in § 2, Swedish practice operates on the basis of the principle of legality: if there is enough evidence, all cases barring the most trivial ones are prosecuted. Consequently, there is at present little room for allowing the question of compensation to influence the decision whether or not to prosecute.

However, some legislative openings for discretionary decisions regarding the prosecution of offences have been created. For example, section 7-1 ch. 20 RB provides that prosecution may be waived if nothing more serious by way of punishment is expected than a fine, and

---

50 Information provided by J. Wikdahl of the Umeå police authority, 24 April 1996.
the public interest does not require prosecution of the suspect. Furthermore, trivial offences can be dealt with by order of summary punishment by fine or summary imposition of a breach-of-regulations fine (ch. 48 RB). An order of summary punishment by fine may not be issued if the injured person has declared that he intends to institute a civil claim in consequence of the offence or has requested institution of prosecution (s. 5 ch. 48 RB). Here, the first interpretation of guideline B.5 is explicitly adhered to.

Although a decision not to prosecute means that the injured person is denied the opportunity for compensation from the offender in a criminal court, he may still claim damages from his insurance company or, if he has suffered a violent offence, from the Crime Victim Compensation and Support Authority. To claim damages from the insurance company the prosecutor must proclaim that the injured person does have a case, even though there is not enough evidence to prosecute. The injured person may also still initiate civil proceedings for damages against the alleged perpetrator.

(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.

The Swedish injured person has both the right to ask for a review of a decision not to prosecute, and the right to institute private proceedings (see § 5.4).

In Sweden, most crimes fall within the domain of the public prosecution, although sometimes only upon complaint by an injured person. If the prosecutor decides not to prosecute, the injured person may ask for a review by simply writing to the prosecuting authorities with the request to reconsider the case. The ‘competent authority’ who reviews the case is a higher-ranking prosecutor of the same authority as the prosecutor who took the initial decision not to prosecute. The right to a review is not regulated in any legislation.

The right to institute private proceedings for an offence falling within the domain of public prosecution comes into play only if the injured person has reported the offence to a competent authority, and the prosecutor has decided that no prosecution shall take place (s. 8 ch. 20 RB). Here a ‘competent authority’ is the office of any prosecutor or the police (s. 5 ch. 20 RB). It is not formally necessary that the injured person first ask for a review, although this is the normal procedure. Private prosecutions are relatively rare, because most injured persons accept that there is no point in going to court if there is not sufficient evidence. However, occasionally private prosecutions do take place though they are rarely successful.

---

53 Generally speaking, a trivial offence is one which is punishable only by fine, or by day-fine or imprisonment for up to six months (s. 4 ch. 48 RB).
54 Information provided by L. Appelgren of the Office of the Attorney General, 15 April 1996. In 1996, in a landmark case, the parents, brothers and grandparents of a murdered boy were awarded damages by a civil court. This was the first case in which such a wide group of relatives were all recognized as injured parties. Helsingborg civil court, 18 April 1996.
55 Information provided by D. Engström, Judge of the Umeå District Court, 24 April 1996.
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.

In § 5.2, we reported that the injured person may consolidate a private claim against the accused or a third person in consequence of an offence with the prosecution of the offence (s. 1 ch. 22 RB). Such a private claim enables the criminal court to order compensation by the offender to the injured person. Although there are no existing absolute limitations, restrictions or technical impediments preventing such a possibility from being realized, there are stipulations entailing relative limitations. If the private claim is consolidated with the general prosecution of the offence, the prosecutor has the duty to prepare and present, together with the prosecution, the injured person’s claim provided that it can be done without inconvenience and that the civil claim is not found devoid of merit (s. 2 ch. 22 RB). Also, when a private claim has been consolidated with the prosecution, the court may direct that the claim be disposed of separately in the manner prescribed for civil actions. In effect, these two regulations allow the prosecutor and the court to divert the private claim of the injured person to a civil court if, for instance, they feel the claim will be too time consuming. Also, the claim may be too complicated for the prosecutor who is, after all, a criminal law specialist. Of course this argument is not to be expected from a Swedish judge who is presumed to be competent in both criminal and civil law (see § 3.3).

If a private claim based upon an offence is consolidated with the prosecution and it is found that the act charged is not criminal, the private claim may nonetheless be decided on (s. 7 ch. 22 RB). An injured person may appeal the decision on compensation, as well as the sentence imposed on the offender.

(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.

In Sweden the penal sanctions (Brottspåföljder) include the ‘general punishments’ of imprisonment and fines, and the ‘other sanctions’ of conditional sentence, probation and surrender to special care (part three ‘Of Sanctions’ of the Swedish Penal Code). In addition to a ‘general punishment’ or ‘other sanction’ the court may impose a special legal effect (särskild rättsverkan). The awarding of damages under the Tort Liability Act – a compensation order – is such a special legal effect, as is, for example, the forfeiture of property which has been used to commit the offence (ch. 36 BrB).

In Sweden, compensation may be combined with any other penal sanction. However, when it comes to enforcement it does not have priority over other penal sanctions (see § 7.3). This means that if a fine is combined with compensation, any money that the offender has is first put towards the fine, and only later towards the compensation. This seriously jeopardizes the chances of the victim ever receiving any compensation. Therefore judges should, at the sentencing stage, avoid combining compensation with a fine.\(^{57}\)

---

\(^{57}\) Information provided by D. Engström, Judge of the Umeå District Court, 24 April 1996.
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.

Since 1988, a court may attach to probation or a conditional sentence the condition that the offender renders the injured person some type of service, for instance repairing the damage he has caused. Furthermore, since 1994 an offender who is sentenced for one or more crimes may be ordered in court to pay a fine of 300 kronor, if imprisonment falls within the scale of punishment for one of the crimes. This money is then passed on to the Fund for Victims of Crime (s. 1 and s. 3 Act on the Victim Fund, see § 4.3) This fine is a penal sanction and is collected in the same way as other fines — if the offender does not pay voluntarily, the debt collection agency pursues the matter. However, because ‘regular’ fines have precedence over the fine designated for the fund, the collection rates are low.

Also, since 1994 Sweden is experimenting with the electronic supervision of convicted persons. To take part in such a programme the convicted person must meet certain conditions, and one of these may be that the offender pays 50 kronor a day to the Fund for Victims of Crime.

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.

As we have seen, compensation is a special legal effect and not a penal sanction as such. Neither does it have priority over any other financial sanctions imposed on the offender. In principle, the enforcement of the compensation is the responsibility of the person to whom it was awarded. However, Sweden is one of the few jurisdictions included in this research that have taken seriously the recommendation to assist the injured person in the collection of the money as much as possible.

In 1994, the Swedish legislature introduced an innovative solution for the problematic enforcement of damages by the victim of crime. Instead of leaving the enforcement of damages awarded by a court entirely to the initiative of the individual victim, the court now forwards such a decision directly to the local debt collection agency. The agency then sends the victim a letter providing him with all the necessary information and inviting him to make a written or oral application to the agency for enforcement of the damages. Unfortunately, no routine statistics have been kept on the amount of decisions dealt with in this way. On the basis of a questionnaire sent to all the debt collection agencies, the Swedish Governmental Committee on Victims of Crime estimates that somewhere between 40-60 percent of the victims answer the letter sent by a debt collection agency. The amount of effort put into enforcement following an application by the victim varies from one debt collection agency to the next. Those agencies who tried to provide the Committee with percentages in answer to the questionnaire indicated that between 16-40 percent of the victims who apply for enforcement of damages eventually receive full payment through enforcement.

59 SOU 1998:40, p. 258
or voluntary payment. To monitor the performance of this system, the Swedish Governmental Committee recommends that routine statistics should be kept on the enforcement of damages by the debt collection agencies. Furthermore, it concludes that the letter sent by the debt collection agencies to inform the victim, and the forms on which the application for enforcement are made, should be improved and simplified. In addition, Victim Support has signalled that the letter to the victim neglects to mention that the services of the agency are free of charge. The system could also be made more effective by basing enforcement on implicit instead of explicit enforcement. In that case the debt collection agency would automatically enforce the court decision on damages, unless the victim indicates that he does not want enforcement by the agency to take place. Because compensation through the adhesion procedure is only awarded on application by the victim, it is safe to assume that provisional permission has been given until the victim indicates otherwise.

In the long run, many injured persons actually do receive some form of compensation. If for some reason or other the offender does not pay (he has not been found, or has no financial means) then the injured person may address his insurance company. Since the 1960's, Swedish insurance companies have offered insurance against assault as part of their household insurance coverage. If the insurance company does not cover the damages, or only covers part of them, then victims of violent crime may apply for state compensation (see § 3.6).

8 TREATMENT AND PROTECTION OF THE VICTIM

8.1 Victim-awareness Training

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

Police
At the time the fieldwork for this study was being conducted, all police cadets received a 33-month Basic Training Programme. This consisted of 10 months of theoretical training at the National Police College, an 18-month Field Training Period and a further 5 months of theoretical training, again at the National Police College. This institute also offers, among other things, Chief of Police training programmes, advanced or function-oriented training, and commissioned courses. Furthermore, it is responsible for the supervision of local and regional training courses. With the introduction of community policing these county level training sessions have become particularly important. They are led by Regional Training Officers who in turn receive training and support from the National Police Board.

The National Police College has introduced centralized training on victims of crime, but for the most part this concerns the legal rights of victims rather than techniques for dealing with them in a sympathetic, constructive and reassuring manner. The structural training on the legal rights of victims of crime was started following the introduction in 1994

---

60 SOU 1998:40, p. 259
61 SOU, 1998:40, p. 262
62 For an overview of insurance in Sweden, see supplement 10 to SOU 1998:40, pp. 601-611.
of legislation stipulating that the police must inform victims of crime of their rights and must work closely with victim support (see §§ 3.8 and 6.1). Young police officers fresh from the Police College are therefore aware of the legal position of the victim, but additional training must be provided for older officers. This discrepancy between the younger and the older generation has been recognized by the Swedish police authorities. In Umeå, for instance, with the introduction of new legislation regarding the position of the victim in 1994, all officers had to attend a half-day training course.

Police training is presently undergoing a major overhaul. As far as the general treatment of victims of crime is concerned, this was one of the areas dealt with by the working group set up to inspect the recruitment and training of policemen.64

Training of other authorities
To become a public prosecutor one must complete a university law degree and then work in court for two years. This is followed by a further training course.

The road to becoming a professional judge is a long one. After obtaining a university law degree a candidate will work as an assistant to a judge, where he will spend a few years in a district court, followed by a few more years in a court of appeal. Many candidates then work outside the courts for some time, for instance in the Ministry of Justice, in the hope that eventually they will be appointed as an ordinary judge.

At present, prosecutors and judges receive no training on the treatment of victims of crime, although such courses are under consideration.65

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.

Generally, the police is the first authority to question a crime victim. If a victim goes to the police station to report the crime one of the officers on duty will take down the report. There are specially trained officers for sexual offences and offences involving abuse of children. Once a report has been taken down by the officer on duty, the file is passed on to one of these specialists. He will then question the victim a second time. Questioning usually takes place in the police officer’s private office. There are often special rooms for the questioning and videotaping of children.66

The main hearing in court begins with the prosecutor stating the charge. The defendant then enters his plea, the prosecutor introduces his case in more detail and then the injured person is examined (s. 6 ch. 46 RB). The prosecutor is the first to direct questions at the injured person. This is followed by questions from the victim's legal adviser, if he has one. The prosecutor's questions are aimed at proving the criminal case whereas the legal adviser is out to secure the injured person's compensation claim. The defence may then question the injured person. In a case of serious assault heard in the Stockholm district court on 16

64 Press release Department of Justice 27 July 1995. For more information on training of the police see SOU 1994:40, pp. 157-158.
66 Information provided by J. Wikdahl of the Umeå police authority, 24 April 1996.
April 1996, the order of questioning of the injured person was as follows: (1) prosecutor, (2) victim's legal adviser, (3) defence, (4) prosecutor, (5) defence, with intermittent questions from the president of the court. The adversarial principle of cross-examination clearly dictated the proceedings, yet the search for the material truth allowed the judge to take part in the questioning. At all times, the tone of questioning was pleasant and respectful. That harsh cross-examination is not the Swedish way of doing things was also confirmed by all the interviewees. It is felt that the facts should speak for themselves, and because it is the duty of the court to establish the material truth, there is no need for the parties to fight each other to the death. In this respect the Swedish adversarial system clearly differs from, for example, the English adversarial system, where the parties really oppose each other.

Throughout the proceedings, starting with the preliminary examination by the police and the prosecutor and ending with the trial, the legal adviser acts as a general safeguard against, among other things, unsympathetic questioning of the injured person. The legal adviser may, in principle, be present during all questioning of the injured person, although often he is not appointed until just before the trial. Also, the presence of a support person may put the injured person at ease in court. Finally, in severe cases the prosecutor is likely to have interviewed the injured person some time before the trial starts. The number of unfamiliar faces will therefore be limited to the defence. If the injured person feels uncomfortable in the presence of the accused, he may ask for the latter to be removed when he makes his statement (s. 7 ch. 46 RB). It is also possible for the injured person to follow the rest of the proceedings via an intercom in another room.

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 Sweden, there is no real right to anonymity. One of the basic principles of the Constitution is that parties should have total access to any information which may serve as a basis for a decision by a court or an authority. This also applies to restricted information to a large extent; it is considered essential that a party should be aware of, and given the opportunity to refute, any information of importance to the case.67 To offer some sort of protection, certain barriers have been created making it more difficult, but never impossible, for the accused to get hold of personal information concerning the injured person. Although the injured person's name must always be recorded in the protocol (s. 21 FuK), his civic registration number, profession or occupation, address, telephone number and place of work, and where applicable the fact that he or she is registered in the Seaman's Register, should be recorded only if this information is of importance to the investigation. In other cases this information should be recorded on a separate personal data sheet. Furthermore, information about the age, occupation and address of the injured person will not be included in the summons served on the defendant, unless this information is of importance to the case in question (s.16 ch. 45 RB). This also applies to all documents relating to appeals to a

---

higher court. Furthermore, the court must not ask an injured person about his/her age, occupation and address unless this information is required for the assessment of the case (s.10 ch. 36 RB). Section 5 h. 14 Sekretnellslagen (1980:100), the Secrecy Act, determines that secrecy must not prevent a party from having access to information on which decisions in a case may be based. In effect this gives the accused an absolute right to personal information concerning the injured person. Also, all the personal information mentioned above is recorded in the court files, even if it has been kept private during the preliminary investigation and the court trial. In the knowledge that the accused always knows his name, the injured person must draw comfort from the fact that access to other personal information is not automatic: the accused will have to make an effort to get hold of it.

There are several more long-term possibilities for safeguarding personal information of injured persons who have reason to feel threatened. First of all it is possible to ask for national registration secrecy (folkbokföringssekretess). A special mark is introduced alongside one's personal details in the tax authorities national registration register, indicating that information about the personal registration number, name, address, marital status and details of any children or relatives of the threatened person may only be handed over to a third party after thorough consideration (s. 15 ch. 7 Secrecy Act).

Another option is non-updated registration (kvarskrinning): if a threatened person has moved house he can remain registered at his old address for up to three years (s. 16 Act on National Registration, folkbokföringslagen (1991:481)).

The most drastic measure is to take on a new identity. Permission may be granted by the Stockholm district court at the request of the National Police Board. A fake I.D. is valid for a maximum of five years (Act on Fictitious Personal Details, lagen om fingerade personuppgifter (1991:483)).

The above are all measures aimed at protecting information about the injured person from the accused, whereas guideline F.15 is aimed much more at keeping information from the public. In Sweden, there are no particular rules regarding information that may or may not be passed on to the media. Names of both the accused and the injured person regularly appear in print.

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

It is a criminal offence to threaten an injured person or a witness, and the penalty for this is six years in prison (s. 10 ch. 17 BrB). However, the government committee that made its report in SOU 1998:40 found that victims and witnesses are only occasionally subjected to threats and intimidation in Sweden.

To protect the victim and his family, the public prosecutor may issue a protection order (Besökförbud). This order, which is issued by the prosecutor, prohibits the alleged offender from contacting the injured person. When an injured person reports an offence, and the police feel a protection order may be called for, they must inform the injured person of this opportunity (see §6.1). If the injured person so wishes, the police must contact the prosecutor. Protection orders are often issued to protect harassed women.

The police may also offer various forms of protection. For particularly threatening situations an injured person may be given bodyguard protection, if necessary with help from a security company. Other options are to give the injured person a supply of teargas or install certain safety measures in his home such as new locks, shatter-proof windows, safety
doors and an alarm system. Furthermore, all police authorities may distribute so-called safety packs. These consist of a mobile phone linked directly to the nearest police station, a tape recorder attached to the threatened person’s telephone and an acoustic alarm. Finally, the police may provide women with a watchdog.\(^{68}\)

In Sweden, an injured person should be informed if someone who is detained pending further investigation or trial escapes, if this is deemed necessary (s.13c FuK). Also it is suggested in the Attorney General’s circular that in cases of violence against women, or other protracted or serious offences involving violence or breaches of the peace, notification of the injured person of the release of a suspect could be called for. This kind of notification is not a procedural obligation but rather a social service that the prosecutor or the investigating officers can lend the victim. The aim is to reduce the risk of a new confrontation and to make things easier for the victim.\(^{69}\)

\section{Conclusions}

In keeping with the Nordic tradition, victims of sexual or other serious offences in Sweden have a right to a state-paid lawyer for the course of the criminal proceedings. This right was first introduced in Sweden in 1988 and was initially only for victims of sexual offences, but later amendments increased its scope to also cover victims of violence and related offences against life and liberty. In addition to a legal adviser, an injured person may also benefit from the appointment of a support person, usually a volunteer from the National Victim Support Organization. In contrast to the other Nordic jurisdictions of Denmark, Iceland and Norway, where the development of basic victim support for victims of other than sexual and/or violent offences is still in the early stages, Sweden already has a well-established network of 101 local victim support branches. State Compensation is administered centrally by the Crime Victim Compensation and Support Authority. This organization also administers the Victim Fund. Convicted offenders are ordered to pay 300 Swedish Crowns into this fund and the proceeds are used to support activities aimed at improving the position of the victim. Other jurisdictions should give serious consideration to establishing a comparable fund. The Crime Victim Compensation and Support Authority is in the process of setting up a Centre for Knowledge and Information on Victims of Crime. A similar centre has already been established in Norway.

A distinction is made between the victim of crime, the injured person and the injured party. The former refers to the victim in the broadest sense of the word. The injured person is the person against whom the offence was directed and who has as a consequence of this offence suffered damages in accordance with the damages act. The injured party is an injured person who actively joins the criminal proceedings by entering a claim for compensation against the offender, becoming an auxiliary prosecutor or acting as a private prosecutor. Particularly interesting about the Swedish judicial procedure is that the injured person is seen as the natural opponent of the accused. As a matter of balance, neither the accused nor the injured person can be heard under oath. One unusual arrangement is that


\(^{69}\) Riksdagens cirkulär RÅC 1:122, 27 June 1994 (circular issued by the Attorney General), part 2.3.2, pp. 4-5.
the injured person may not only appeal the decision on compensation, but also the sentence imposed on the offender.

Sweden is among the more successful jurisdictions in as far as the implementation of Recommendation (85) II on the position of the victim in the framework of criminal law and procedure is concerned, although there are still improvements to be made regarding the provision of information. The Ordinance on Preliminary Investigations provides that the injured person should be extensively informed of his rights and opportunities, but it fails to specify a responsible agency. In practice, the police have assumed primary responsibility. Problems have been signaled, among other things, regarding the distribution of informative leaflets, the awareness among the police and prosecutors of the rights of the injured person, and privacy regulations in relation to referral to victim support organizations. At his own initiative, the injured person may obtain information on the outcome of the police investigation. He may opt in to being informed by standard letter of a decision of the public prosecutor not to initiate an investigation, to close an investigation or to waive prosecution. The letter could be further improved by furnishing reasons for such a decision. The injured person is not informed of a positive decision to proceed with a prosecution. This should be remedied so that he is not left in uncertainty for an unnecessarily long period of time. Finally, he may also opt in to being informed of the date of the main hearing and the court’s final decision. It should be noted that the injured person is regularly required to give a statement in court.

Regarding compensation awarded during criminal proceedings, more use could be made of the opportunity to attach compensation as a condition to a suspended sentence. Particular mention should be made of the fact that the local debt collection agency now enforces the compensation on behalf of the injured person. Such an arrangement neutralizes one of the main failings of the adhesion model, namely that the enforcement of compensation awarded by the criminal court is left entirely up to the victim. All other jurisdictions that have the adhesion model should introduce an enforcement system similar to the Swedish one.

The training of the authorities regarding the way they should treat victims needs further attention, in particular where the prosecuting authorities and the judiciary are concerned. Consideration should also be given to remedying the fact that names of both the accused and the injured person regularly appear in the newspapers. Finally, it is a sign of sophistication that where serious offences are concerned efforts are being made to inform the injured person if the accused escapes pending further investigation or trial, or if he is released from prison.
Supplements

ABBREVIATIONS:

a.o. - among others
ALA - Act on Legal Advisers
AVF - Act on the Victim Fund
BOJ - Swedish National Victim Support Organization
BrB - Penal Code
BRÅ - National Swedish Council for Crime Prevention
ch. - chapter
c.s. - cum suis
Dir - directive
Ds - Series of the Department of Justice
FuK - Ordinance on Preliminary Investigations
cds. - editors
idem - idem dito
i.e. - id est (Latin), that is
p. - page
pp. - pages
RB - Code of Judicial Procedure
RAC - Circular of the Attorney General
s. - section
SOU - state publisher

BIBLIOGRAPHY:

Ekelöf, P.O. (1990), *Rättgång*, Första/andra häftet, Sjunde upplagan, Lund;
Heumann, L. (1973), *Mälsågande*, Sverige o.O.;

**Circulars:**

Swedish National Police Board, Letter and guidelines POB-480-5651/93, 21 June 1994;  
Riksåklagarens cirkulär: Riksåklagarens allmänna råd om åtgärder med avseende på målsägande i brottmål, RÅC 1:114, 5 April 1989;  

**Brochures and Reports:**

Brottsoffermyndigheten, *Brottsskeblagen*, Umeå (no date);  
Domstolsverket, *Vig*gen Till Domstol, Jönköping, September 1994;  
Domstolsverket, *Legal Aid*, Jönköping 1995;  
Domstolsverket, *Att vittna vid domstol*, Jönköping, April 1995;  
Domstolsverket, *Facts about The Swedish Judiciary 1995/96*, Jönköping (no date);  
Lagerbäck, B. (1991), *Victims of crime and their reaction* (2nd revised version), Skandia Group,
WITH MANY THANKS TO:

Leif Appelgren, Office of the Attorney General, Stockholm;
Helen Brydhsten, Volunteer Umeå Victim Support;
Christian Diesen, Professor in Procedural Law, Stockholm University, Stockholm;
Dag Engström, Judge Umeå District Court, Umeå;
Max Fredriksson and Ulf Malm, Victim Counsels, Malmö;
Björn Lagerbäck, Skandia Crisis Centre and Sophiahemmet, Psychologist;
Magnus Lindgren, Psychologist Stockholm University;
Bo Svensson, Judge Supreme Court, Stockholm;
Per Svensson, director Swedish National Victim Support, Södertälje;
Jan Wikdahl, Umeå Police Authority, Umeå;
Anna Wergens, National Victim Authority, Umeå;
Annika Öster, Umeå Prosecution Authority.
Chapter 23

Switzerland

Scenery

The Swiss Confederation\(^1\) is a comparative lawyer's dream — or perhaps a nightmare. It consists of 26 autonomous cantons and half-cantons,\(^2\) each with its own constitution and unique legal system. Landlocked, and bordering on Austria, France, Germany, Italy and Liechtenstein, Switzerland has four national languages, namely German, French, Italian and Romansch.\(^3\) Most cantons have one official language, with French predominating in the western cantons, German in the east and Italian in the canton of Ticino in the south. The cantons of Berne, Fribourg and Valais are officially recognized as bilingual (French and German) and Graubünden in the southeast is even trilingual (German, Romansch and Italian). The federal administration has three official languages, and federal legislation and the verdicts of the federal court are printed in French, German and Italian simultaneously. All three versions are considered equally authoritative.\(^4\) Forty-eight per cent of the Swiss population is Roman Catholic and 44 per cent is Protestant, and the religious denomination is spread somewhat indiscriminately across the cantons: some cantons are mainly Protestant, others mainly Catholic and the remainder are mixed. Furthermore, although on average Switzerland is a rich and prosperous country, with a national income per capita that is second in the world only to Luxembourg, there are also substantial differences between the individual cantons regarding socioeconomic circumstances.\(^5\) Cities such as Zürich, Berne

---

1 In Latin: Confederatio Helvetica, hence the international CH abbreviation for Switzerland.
2 There are 23 cantons, and three of these are further divided into half-cantons, making 26 autonomous entities. See section 1 Federal Constitution (FC) and section 1 of the draft for a new Constitution (see further below § 3 on 'Sources of Law' for information on the draft for a new Constitution).
3 S. 116-1 Federal Constitution, section 5 draft Constitution. 63.7% of the Swiss have German as their mother tongue, 19.2% speak French, 7.6% Italian, 0.6% Romansch and 8.9% another language (Statistical Data on Switzerland 1994, Swiss Federal Statistical Office, Berne, 1994).
5 The canton of Zürich, which has a German-speaking, predominantly Protestant population of 1,178,000, tops the list with a national income per capita in 1995 of US$ 38,677, a cantonal expenditure of US$ 5,349,140 and a cantonal revenue of US$ 5,181,061 (CHF 57,114, CHF
and Geneva are modern and ‘in touch’ whereas some of the more rural cantons could be described as backward: in Appenzell, which consists of the two half-cantons of Innerrhoden and Ausserrhoden, women did not get the vote in cantonal affairs until 1991. All in all, Switzerland is like a miniature model of Europe, with an astounding array of languages, history, traditions, religions and socioeconomic circumstances captured within its borders.\(^6\)

The foundations of the present-day Swiss Confederation were laid on 1 August 1291, when the three forest cantons of Uri, Schwyz and Unterwalden formed a defence alliance against the Habsburg domination. In 1315, a strong Austrian army marched to the Swiss territories to reassert Habsburg rule, but was soundly beaten by the young alliance. This success enticed other cantons to join the Swiss union, first Lucerne in 1332, then Zürich in 1351, Glarus and Zug in 1352 and Bern in 1353. Fribourg and Solothurn joined in the 15th century. After the Swiss had definitively defeated the Holy Roman Emperor Maximilian I at Dornach in 1499, the independence of the Swiss Union was established by the Treaty of Basel of 22 September of that year, and not long afterwards the cantons of Appenzell, Schaffhausen and Basel joined the confederation. Fighting as mercenaries of several European princes at the beginning of the 16th century in the wars which plagued Northern Italy in particular, the Swiss seized the opportunity to capture the Italian territory that now forms the canton of Ticino. Perhaps all these military successes made the Swiss a little reckless, for it was a decidedly under-strength Swiss army that was finally defeated by a combined effort of the French and Venetians at Marignano in 1515. This defeat prompted the Swiss confederation to introduce its policy of neutrality to avoid any further embarrassment, a policy that Switzerland has stuck to ever since.\(^7\)

The Reformation of the 16th century alighted in Switzerland in the form of Ulrich Zwingli in eastern Switzerland, and Calvin and Farel in the west. Although there was bitter internal strife, Switzerland did not involve itself in the thirty years' war which racked the rest of Europe – except to sell food and raw materials to the fighting nations. In the Peace of Westphalia of 1648, which ended this war, Switzerland was formally recognized as a completely independent state. Although remaining outwardly neutral, internal unrest continued. Swiss revolutionaries found themselves supported materially as well as morally by French revolutionaries, and by 1798 they had occupied all of Switzerland. Napoleon Bonaparte then united Switzerland in the Helvetic Republic, but Swiss resentment against this measure eventually led him to reestablish the Confederation of cantons in 1803 with

---


\(^7\) Despite this withdrawal from the international battle field, the Swiss army is still a force to be reckoned with, with compulsory military service for all able-bodied males, and three-week refresher courses every two years up to the age of 42. After national service, the men are transferred to the civil protection service until the age of 60. Furthermore, Switzerland has a highly sophisticated infrastructure in case of war, including underground emergency hospitals as well as shelters for all its civilians and food and raw material stock piles. M. Honan, *Switzerland, a Lonely Planet travel survival kit*, Lonely Planet, 1997, p. 19. Interestingly, Swiss guards are responsible for the protection of the pope.
the Act of Mediation. Aargau, St. Gallen, Graubünden, Ticino, Thurgau and Vaud subsequently joined the confederation which now sported a new written constitution. After the final defeat of Napoleon, the Congress of Vienna laid down the permanent neutrality of Switzerland. Valais, Geneva and Neuchâtel were added to the confederation. However, the internal religious differences had still not been settled, and a civil war broke out in 1847. A protest league formed by the Catholic cantons was crushed by the Protestant federal government, and federal powers were strengthened by the new federal constitutions of 1848 and 1874, respectively. On 1 January 1979, the canton of Jura became the last canton to join the Swiss Confederation.

Switzerland remained neutral during both World Wars, and this policy of neutrality has enticed many international organizations such as the International Red Cross, the World Health Organization and the World Council of Churches to establish headquarters in Switzerland. Although a member of the League of Nations after World War I, Switzerland did not join the United Nations for fear of compromising its neutral status. However, it is a member of many organizations affiliated with the UN, such as UNESCO. It was a founding member of the EFTA in 1959 and joined the Council of Europe in 1963. An attempt to join the EEA, which was intended as a first step towards EU membership, was voted down in a national referendum in 1992. All the French-speaking cantons, but only one German-speaking one, were in favour of joining, which made the remaining German-speaking parts of Switzerland very unpopular with their French-speaking compatriots.

Nowadays, Switzerland is renowned for its magnificent Alps, its discreet banking opportunities, watch-making industry, chocolate, cheese and muesli. It is also the country where Albert Einstein developed both the General and the Special Theory of Relativity while working in the Bern patent office at the beginning of this century. Finally, Swiss crime rates are among the lowest in Europe.
1 JUSTIFICATION

To speak of 'the Swiss criminal justice system' is misleading because there is no such thing. The Confederation has the competence to pass legislation regarding substantive criminal law (s. 64bis-1 Federal Constitution, FC) but the organization of the courts, criminal procedure and the administration of criminal justice (Rechtsprechung) is left to the individual cantons (s. 64bis-2 FC). This means that there are 26 different criminal justice systems in Switzerland, each with its own institutions and procedures. Some of these cantonal criminal justice systems have distinct German or Austrian characteristics whereas others are more French-oriented. Of course, the case-law of the federal court does guarantee a certain minimum level of cantonal uniformity, as does the European Convention on Human Rights which is directly applicable by the Swiss courts. Despite these — and other — unifying influences (see § 4), there are still substantial differences in principles and procedures between the cantons. For example, the French-speaking cantons of Vaud, Neuchâtel, Geneva and Jura have explicitly recognized the principle of opportunity, whereas the other cantons follow the principle of legality. A second example concerns the responsibility for instruction and prosecution. In keeping with the French tradition, the cantons of Neuchâtel and Lucerne have an investigating magistrate in charge of instruction and a prosecutor to deal with the prosecution. The cantons of Basel-Town and Ticino represent the German and Italian tradition, in which both these tasks are assigned to one and the same magistrate.

An overview of principles and characteristics of Swiss criminal justice that accommodates all the cantons would necessarily be of such a general nature that it would hardly be of any value — rather like trying to capture all the criminal justice systems of Europe in one single description. Neither is it possible to describe all 26 cantonal criminal justice systems individually. Therefore, we have decided to take the canton of Zurich as a pivot. The reasons for this are as follows. First of all, regarding victim policy, Zürich is considered the most successful of the Swiss cantons. Secondly, it proved to be easier to establish the necessary contacts to conduct our research with the authorities in Zürich than in other cantons. However, other cantons besides Zürich also feature in this chapter, although in less detail. In particular, mention is made of arrangements for victims in the cantons of Geneva, Vaud, Saint-Gall, Basel-Town, Ticino, Lucerne and Neuchâtel. All these cantons featured in either the first or the second evaluation study of the position of the victim of

---

11 It is debatable how much practical effect this particular difference in principles has. In practice, the principle of opportunity may be restricted by policy agreements, whereas the principle of legality is often stretched by the formal recognition of exceptions (see Chapter 3 on Austria, for example).
13 The capital of the canton of Zürich is the city of Zürich. In the following 'Zürich' refers to the canton of Zürich. The city of Zürich is referred to explicitly as such.
crime in Swiss law which was carried out by the CETEL centre of the University of Geneva in 1995 and 1997, respectively (see § 4.7). Occasionally, reference is also made to cantons other than these.

In principle, each section starts off with a description of the relevant federal framework. This is followed by an analysis of the Zürich regulations and practices. Finally, any interesting regulations and practices found in other cantons are mentioned. Where Swiss terminology is used, this is mostly limited to the German version, in particular in reference to the canton of Zürich where German is the primary language. Where one of the French-speaking cantons is concerned, Swiss terminology may be in French.

2 BASIC PRINCIPLES OF THE ZÜRICH CRIMINAL JUSTICE SYSTEM

The principle of officiality (Offizialprinzip) determines that the right and the duty to prosecute offences are reserved for the state. This means that most prosecutions are initiated and carried out by the public prosecutor, with the exception of complainant offences (Antragsdelikte), offences reserved for private prosecution (Privatstrafklage) and offences where the special permission of a political authority is required for prosecution (Ermächtigungsdelikte). Closely linked to the principle of officiality is the principle of legality, which obliges the authorities to prosecute all those offences where there is sufficient evidence to substantiate the case (s. 41 Constitution of Zurich, Kantonsverfassung, KV). In Zürich, the principle of legality has been somewhat tempered by the introduction in 1995 of section 39a Zürcher Strafprozessordnung (ZStP), which recognizes a certain amount of discretion for the authorities in particular cases. Section 39a ZStP states explicitly that a discretionary decision not to prosecute may only be taken if it is not detrimental to the interests of the injured person (see § 7.1 under guideline B.5).

In Zürich, the principle of immediacy (Unmittelbarkeitsprinzip) is rarely adhered to during the main proceedings, and decisions of the court of first instance are usually taken on the basis of the file. Nowadays, full oral proceedings are held only in the jury courts, which deal with about 20-30 cases per year. In all other cases, the principle of immediacy features only in the investigative stages (Untersuchungsverfahren).

3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

3.1 Investigating Authorities

Varieties

Policing is a cantonal responsibility. The organization of the police, their recruitment and training, uniform, weaponry and definition of powers in relation to the other authorities are left entirely to the individual cantons. This has resulted in 26 distinct police organiza-

---

14 A circular of 14 April 1992 of the public prosecutor of Zürich to the regional prosecutors first allowed prosecutors to use their discretion regarding prosecution in certain cases. This was later codified as section 39a ZStP as part of the revision of 24 September 1995 of the Zürich Code of Criminal Procedure. N. Schmid (1997), nos. 102 and 103, pp. 29-30.

tions, each with their own uniform, police academy and training programmes, traditions and tasks. In general, the cantonal police forces (Kantonspolizei) of the German-speaking cantons consist of a Criminal Division (Kriminalpolizei), a Security Division (Sicherheitspolizei) and a Traffic Division (Verkehrspolizei). In the French-speaking cantons, the national police (Gendarmerie) are responsible for security and traffic, and the security police (Säte) act as criminal police. The canton of Ticino, which is Italian-speaking, has a strictly regional organization with four divisions. Besides the cantonal police forces, the larger cantons also have municipal police forces (Gemeindepolizei).

The Federal Department for Justice and Police (Eidgenössische Departement für Justiz und Polizei, EDP) is responsible for federal policing affairs. The policing duties of this department are in fact carried out by the Federal Prosecution Service (Bundesanwaltschaft) which has a legal service (Rechtsdienst), a police service (Polizeidienst) and a central police office (Zentralpolizeibüro, SZPB). Although there is no federal police force as such, the police service of the Federal Prosecution Service is responsible for the investigation of federal offences. Cooperation between the cantonal police forces is coordinated by the central police office.

Zürich

In the canton of Zürich, criminal investigations are generally led by the district prosecutor (Bezirksanwalt) (s. 25 ZStPO) and carried out by the Criminal Division of the cantonal police force. However, the city police (Stadtpolizei) of the city of Zürich also have a fully authorised Criminal Division. Which of the two forces investigates a particular case depends on whom the offence is reported to.

3.2 Prosecuting Authorities

Zürich

In Zürich, the prosecuting authorities consist of the offices of the district attorney (Bezirksanwaltschaften) and the prosecution service (Staatsanwaltschaft) (s. 72 ZGVG). These authorities are responsible for the investigation and prosecution of crimes and misdemeanours (ss. 72-73 ZGVG).

Zürich is divided into 12 regions (Bezirke). Eleven of these regions have a district court (Bezirksgericht), and the prosecution of offences dealt with by this court is in the hands of the office of the district attorney (s. 72.1 ZGVG). Originally, this post was held by the viceroy or stadholder (Statthalter), as is still suggested by section 80-1 ZGVG, but nowadays the district attorneys are elected every four years by the people. In principle, anyone can be elected district attorney, even without a law degree.

The district attorneys are supervised by the prosecution service (s. 86 ZGVG), which

---

17 The 26 Swiss cantons are further divided into about 3000 autonomous municipalities (Gemeinde). There are about 100 municipal police forces, G.A. Schmoll (1990), p. 102.
18 G.A. Schmoll (1990), pp. 96-97.
19 In a report of February 1998, the government of Zürich (Regierungsrat) proposed a merger of the two criminal divisions, see the Neue Zürcher Zeitung of Wednesday 18 February 1998 and the Tagblatt der Stadt Zürich of the same day.
20 A special examining magistrate is appointed in cases of private prosecution (s. 73.3 ZGVG).
21 The district of Dietikon, which was created by act of 10 March 1985, does not (yet) have its own district court or district attorney. N. Schmid (1997), pp. 92 and 96.
22 Information provided by U. Weder, prosecutor in the canton of Zürich, 18 February 1998.
in its turn is supervised by the judicial directorate (Justizdirektion) and, above that, the governmental council (s. 91 ZGVG). The members of the prosecution service – 11 at the time of writing – are elected by the governmental council. The prosecution service is responsible for the prosecution of offences falling within the competence of the jury court, i.e., the most serious offences – and for all appeals of the prosecuting authorities against decisions of the courts (s. 395-1 ZStP0). There is a special youth prosecution service (Jugendstaatsanwaltschaft) for dealing with offences committed by children and juveniles (s. 93 ZGVG).

3.3 Judiciary

Federal
The Swiss cantons are competent to organize their judiciary systems independently, and the cantonal courts are competent to rule in cantonal as well as in federal law matters. The Confederation has never established a federal judiciary system at the local level throughout the country. The Swiss Federal Supreme Court (Bundesgericht) serves as a national court of appeal in federal law matters and decides constitutional law issues. However, federal statutes passed by parliament are not subject to judicial review (s. 113 Federal Constitution). Judges and clerks do not wear robes. This aims to reflect Switzerland's democratic tradition where the judiciary is expected not to differ from ordinary people.

The structure of the judiciary varies from canton to canton. Some have juries for first-instance hearings of serious offences (Zürich, Berne, Fribourg). Throughout Switzerland, judges are elected for a number of years rather than appointed for life. The elector differs per canton: either the people, parliament, government, court of appeal or a special electoral body. In some cantons it is possible to be a judge and a member of parliament at the same time. There are also cantons where the examining magistrate may also be trial judge (Berne, Valais).

Zürich
Each municipality chooses one or more Justices of the Peace (Friedensrichter) (s. 4 ZGVG). The Justices of the Peace decide minor civil disputes, but also hear libel cases (s. 7 ZGVG). Judges sitting alone (Einzelrichter) (s. 19-1 ZGVG) hear cases concerning infractions threatened only by a fine. They also act as court of first instance for other infractions, as well as for crimes and misdemeanours where a punishment of not more than six months' imprisonment or a fine is demanded (by the district attorney) and where the judge sitting alone does not consider a heavier punishment called for (s. 24-1-1/2 ZGVG). Finally, the judge sitting alone operates as custodial judge (Haftrichter, s. 24a ZGVG), i.e., he decides on pre-trial detention and other custodial measures.

The 11 district courts (Bezirksgerichte) act as criminal courts of first instance for all crimes

http://www.admin.ch/TF/E/INTRO/HISTORIQ.HTM
http://www.admin.ch/TF/E/INTRO/DECISION.HTM

This construction was condoned by federal case law until the Piersack and De Cubber judgements of the European Court of Human Rights (ECHR Piersack v. Belgium, October 1, 1982, Series A, vol. 53 and ECHR De Cubber v. Belgium, October 26, 1984, Series A, vol. 86, respectively), F. Dessemontet and T. Ansay (eds.) (1995), p. 247. Compare the more recent developments in Iceland, as described in the chapter on Iceland.

24 http://www.admin.ch/TF/E/INTRO/HISTORIQ.HTM
27 This construction was condoned by federal case law until the Piersack and De Cubber judgements of the European Court of Human Rights (ECHR Piersack v. Belgium, October 1, 1982, Series A, vol. 53 and ECHR De Cubber v. Belgium, October 26, 1984, Series A, vol. 86, respectively), F. Dessemontet and T. Ansay (eds.) (1995), p. 247. Compare the more recent developments in Iceland, as described in the chapter on Iceland.
and misdemeanours not already falling within the competence of other courts of first instance (s. 32 ZGVG). A district court consists of a president and at least four judges (s. 26 ZGVG). The district court of the city of Zürich is the biggest with up to 62 members. 29 The president of a district court is a legally trained full-time professional judge, but in most districts some of the other judges are lay judges. 29 In principle, the district court sits as a bench of three (s. 30-1 ZGVG). The district court also acts as juvenile court of first instance (Jugendricht, s. 34 ZGVG).

The most serious offences and misdemeanours such as (deliberate) manslaughter, murder, serious assault and robbery are heard in first instance by a jury court (Geschworenengericht, s. 56 ZGVG). A jury court consists of a bench of three judges (Gerichtshof), one of whom presides, and a jury of nine (Geschworenenbank, ss. 50-52 ZGVG). The jury members are chosen by the municipalities, at a ratio of one jury member per one thousand members of the population. 30

The High Court (Obergericht) acts as court of appeals. The High Court judges are elected by the cantonal parliament (s. 38 ZGVG) for a period of six years. There are three criminal chambers (Strafkammer), a prosecution chamber (Anklagekammer) and a revision chamber (Revisionskammer). The cantonal parliament may also add a juvenile chamber (Jugendkammer) to the High Court (s. 45-1 GVG) but has not yet done so. 31

Finally, the Court of Cassation (Kassationsgericht) deals with appeals against the interpretation or application of the law (Nichtigkeitsbeschwerde, s. 69a AGVG).

3.4 Victim Support

Federal

The federal Victim Support Act (OHG, see § 4.1) compels the individual cantons to provide public or private counselling services (Beratungsstellen, s. 3-1 OHG) for victims of the most serious offences – offences against life and liberty, and sexual offences – and their relatives (see § 6.1 under guideline A.2). These counselling services must offer, or help the victim find, medical, psychological, social, material and legal help (s. 3-2.a OHG) and inform the victim of all the opportunities for getting such help (s. 3-2.b OHG). The support offered by the counselling services must include both emergency and long-term support (s. 3-3 OHG) and is free of charge (s. 3-4 OHG). Additional costs such as medical, legal or procedural costs should also be shouldered by the counselling services if the victim is incapable of doing so himself (s. 3-4 OHG). Vocational training of the staff of the counselling services, and those entrusted with victim support, is to be stimulated by the federation, which must provide suitable funding (s. 18-1 OHG).

Most of the cantons have met their obligation to provide counselling services by entrusting the tasks described in the Victim Support Act to one or more public or private organizations that already provided support for victims of crime: only in five cantons was it necessary to set up new organizations, 32 although additional new services have also been

29 This is not the case in the city of Zürich and in Winterthur, N. Schmid (1997), no. 332 p. 96.
created in some of the other cantons. The organizations that are now recognized as OHG counselling services include social services, other public services attached to the central administration, the local legal aid service and a variety of private organizations. Occasionally, a counselling service covers more than one canton. Some of the counselling services are capable of providing both emergency and long-term support themselves. Others primarily provide emergency support and refer to other organizations for long-term aid, and the remainder provides referrals for both types of support. By the end of 1996, a total of 74 organizations had been recognized as OHG counselling services. The number of direct and indirect (see § 5.1 opening section on terminology) victims requesting support has steadily increased from 2,163 in 1993 to 9,036 in 1996.33

Zurich
In the canton of Zurich, where the responsibility for the implementation of the OHG has been placed with the Judicial Directorate, only private organizations that were already working with victims of crime have been recognized as OHG advice centres. In 1993 – the year the Victim Support Act came into force – six private organizations were recognized. By 1 January 1996, this number had grown to ten. With the exception of the victim support group ‘The Outstretched Hand’ (Opferhilfe-Beratungsstelle der Dargebotenen Hand), all of the recognized organizations deal with a particular group of victims, either children, female victims of sexual offences, male victims of sexual offences or family members of victims of traffic offences. The decision to recognize mostly specialized victim support organizations was a conscious one. The canton feels that, because the different types of victims are faced with different problems, specialized support is called for. The ten recognized advice centres are supervised by the Cantonal Victim Support (Kantonale Opferhilfestelle). This centre is attached to the general secretariat of the Judicial Directorate. It also acts as the cantonal compensation board and liaises with the confederation and the other cantons. Since the OHG came into force, the number of victims that have turned to one of the advice centres

34 The figures for 1994 and 1995 were 4,218 and 6,454, respectively.
35 Beratungsstelle des Mädchenhauses Zürich; Notle-"foni und Beratungsstelle für Frauen – Gegen sexuelle Gewalt, Züri; Frauen-Notle-"foni, Beratungsstelle gegen sexuelle Gewalt, Winterthur. The victim support group Castagna offers support to sexually abused girls and boys, their mothers, female youths and women victimized in their childhood.
36 Beratungsstelle für männliche Opfer sexueller Gewalt. It is worth noting that attempts to set up a victim support organization dealing exclusively with male victims of sexual offences have failed in several other countries. See, for example, Chapter 11 on Iceland.
37 Vereinigung für Familien des Strassenopfers.
39 The welfare department of the city of Zürich (Sozialdepartement der Stadt Zürich) also has a Contact Point for Victim Support (Kontaktstelle Opferhilfe) which offers financial support in the light of the OHG to victims of violence. Its secondary aim, to prevent violence against women and children, seems to have taken over as ‘Leitmotiv’ because on 1 January 1998 the group was renamed the Specialist Group Violence against Women and Children (Fachstelle Gewalt Gegen Frauen und Kinder). The Specialist Group works together closely with the advice centres, see OH! Zeitschrift für Opferhilfe in der Praxis, 1/97, p. 8.
of the canton of Zürich for support has grown from 1,611 in 1993 to 3,645 in 1996.\textsuperscript{40} Besides the ten victim support organizations that have been recognized by the canton as advice centres in the sense of the OHG, there are also other victim support groups in operation. An example is the Weisser Ring, which is focusing more and more on victims not catered for by one of the OHG advice centres.

4 SOURCES OF LAW

4.1 Federal Sources of Law

The Federal Constitution (Bundesverfassung des Schweizerischen Eidgenossenschaft, FC) of 1874 is the foundation of Swiss legislation. This written Constitution replaced the earlier Constitution of 1848, which was the first of the present Swiss Confederation. In 1987, the federal assembly decided that a complete revision of the Constitution was called for.

Federal legislation is passed by the bicameral federal assembly (Bundesversammlung). It takes precedence over cantonal legislation but the Confederation is only competent to legislate in matters expressly reserved for the Confederation by the Federal Constitution (s. 3 FC). Besides the Federal Constitution, important pieces of federal legislation are, for example, the Civil Code (Zivilgesetzbuch, ZGB), the Penal Code (Schweizerisches Strafgesetzbuch, StGB) and the Federal law on the Organization of the Federal Courts (Bundesgesetz über die Organisation der Bundesrechtspflege).

The most important case-law of the Federal Court (Bundesgericht) is published in the 'Official collection of the Decisions of the Federal Supreme Court' (Amtliche Sammlung der Entscheidungen des schweizerischen Bundesgerichts, BGE), which goes back to 1874. Formally, decisions of the Federal Court are binding only upon the court whose decision has been appealed.\textsuperscript{41} In practice, federal case-law carries considerable authority.

Customary law and legal doctrine are also recognized as federal sources of law. Section 1 of the Swiss Civil Code explicitly instructs the judge to turn to customary law if no legislative provision is available, and in section 3 of the same section he is further instructed to seek inspiration in the solutions put forward by legal scholars. The Commentaries (Kommentare) to the codes are considered the most important doctrinal works, followed by manuals, monographs and articles published in professional journals.\textsuperscript{42}

4.2 Cantonal Sources of Law

Besides the sources of law emanating from the Swiss Confederation – i.e., the Federal Constitution and federal legislation, case-law, custom and doctrine – the cantons also generate their own sources of law. Each canton is organized as a constitutional republic, with its own legislative, executive and judicial branches. Cantonal legislation is passed by the unicameral cantonal parliaments.\textsuperscript{43} Regarding the relations between federal and cantonal sources of law the main rules are as follows: (1) federal law takes precedence over

\textsuperscript{40} OH! Zeitschrift für Opferhilfe in der Praxis, 1/97, p. 8.
\textsuperscript{43} Some cantons still have People's Assemblies (Landsgemeinden) where matters are settled by a show of hands of voters in the marketplace.
cantonal law and (2) constitutional law takes precedence over ordinary statutes. Ordinary federal statutes prevail over cantonal constitutions. The constitution of the canton of Zürich dates from 18 April 1869.

4.3 Federal Sources of Criminal Law and Procedure

Substantive Criminal Law

S. 64bis of the Federal Constitution, which determines that the Confederation may legislate on substantive criminal law whereas criminal procedure is left to the cantons, first made its appearance in the Federal Constitution in 1898. A Federal Criminal Act (Bundesstrafgesetz) of 1853 had already recognized as offences certain acts against federal institutions, but it took until 1 January 1942 for the first Swiss Penal Code (Schweizerisches Strafgesetzbuch, StGB) to come into force. Nowadays, there are about 300 federal laws and ordinances containing substantive criminal law regulations.

In principle, the Swiss Penal Code is applied by the cantonal courts of first and second instance, with the Federal Court acting as Court of Cassation. Part IV of the ‘Official collection of the Decisions of the Federal Court’ contains the most important decisions of the Federal Court regarding criminal law. The Swiss Association for Criminal Law (Schweizerische Kriminalistischen Gesellschaft) publishes an overview of the main Swiss case-law concerning criminal law and criminal procedure in a series called ‘Administration of Justice in Criminal Cases’ (Rechtsprechung in Strafsachen, RS).

Criminal Procedure

Not all crimes are left to the cantons to deal with. Section 340 StGB determines that offences against the Confederation and its institutions, and other offences which are of national interest, fall within federal competence. Criminal procedure for the prosecution of these offences is found in the Federal Code of Criminal Procedure (Bundesgesetz über die Bundesstrafrechtspflege, BStP) of 15 June 1934. The organization of the Federal Court and some general rules of procedure are found in the Federal Code on the Judiciary System (Bundesgesetz über die Organisation der Bundesrechtspflege, OG) of 16 December 1943. Offences dealt with by the judicial authorities of the cantons are prosecuted on the basis of cantonal criminal procedure. It is a dormant ambition of the Swiss Confederation to replace the 26 individual cantonal codes of criminal procedure with one single federal code of criminal procedure. However, such a project would first require an amendment to the Constitution, and it seems unlikely that this will be achieved in the very near future. However, the confederation may impose rules of criminal procedure where this is necessary to ensure the uniform application of federal substantive criminal law. This has resulted in the imposition on the cantons of, among other things, the principle of free appreciation of evidence (s. 249 BStP). Other federal statutes containing rules of criminal procedure are, for example, the Military Code of Criminal Procedure (Militärstrafprozess, MStP) of 23 March 1979, the aforementioned Administrative Penal Code of 22 March 1974 and the Federal Act on Petty Traffic Fines (Bundesgesetz über Ordnungsbussen im Strassenverkehr, OBG) of 24 June 1970.

---

45 This code was adopted in a referendum on 21 December 1936.
48 This is complemented by the Regulation on Petty Traffic Fines (Verordnung über die Ordnungsbussen im Strassenverkehr, OBV) of 4 March 1996.
Regarding victims of crime, rules on criminal procedure that all cantons must adhere to are found in the Federal Act on Support for Victims of Crime (Bundesgesetz über die Hilfe an Opfer von Straftaten) of 4 October 1991, also known as the Victim Support Act (Opferhilfegesetz, OHG), see § 4.5.

4.4 Cantonal Sources of Criminal Law and Procedure

The cantonal codes of criminal procedure are very diverse. Some are extremely basic, setting out little more than the bare essentials, whereas others are very detailed.49 Many of the codes have generated their own entourage of commentaries and handbooks, and the fact that there is no collected edition of the cantonal codes of criminal procedure does not make it any easier to get an overview of criminal procedure in the different cantons.

The Zürich Code of Criminal Procedure (Gesetz betreffend den Strafprozess (Strafprozessordnung), ZStPO) of 4 May 1919 is the oldest of all the cantonal codes of criminal procedure. Rules on Zürich criminal procedure are also found in the Cantonal Constitution (Kantonsverfassung, KV) of 18 April 1869, the Constitution of the Courts Act (Gerichtsverfassungsgesetz, GVG) of 13 June 1976 and the Act on Cantonal Criminal Law and the Execution of Punishments and Measures (Gesetz über das kantonale Strafrecht und den Vollzug von Strafen und Massnahmen, StVG) of 30 June 1974. In the course of the last few years, the Code of Criminal Procedure and the Constitution of the Courts Act have been overhauled in stages. Further renewal of parts of these codes is pending, and will, for instance, include the abolishment of the jury court.50

Instructions for the judicial authorities of Zürich are also found in a variety of regulations and other measures. Examples are the Regulation on the Competence in Juvenile Criminal Proceedings (Verordnung über die Zuständigkeit im Jugendstrafverfahren, VZu) of 29 December 1976, the Regulation on the Public Prosecutor (Verordnung über die Staatsanwaltsschaft, VStA) of 12 December 1990 and the Instructions of the Public Prosecutor on the Investigation Procedures (Weisungen der Staatsanwaltschaft für die Untersuchungsführung, WBA) of 1994.51 Zürich case-law is published in the Journal for Zürich Case-law (Blätter für Zürcherische Rechtsprechung, ZR).

4.5 Federal Legislation Concerning the Victim of Crime

Switzerland is noted for its system of direct democracy, where the people can themselves initiate legislation by submitting an initiative signed by at least 100,000 citizens, or force a referendum on a proposed law with the support of 50,000 signatures. It was such a people's initiative that triggered the first substantial step towards explicit legislative arrangements in Swiss law for victims of crime. The initiative submitted on 18 September 1980 by the fortnightly magazine 'Der Schweizerische Beobachter' carried 164,237 signatures and triggered the process that eventually led to the introduction into the Federal Constitution on 2 December 1984 of section 64ter. This section states that 'the confederation and the cantons must ensure that victims of violent offences receive support. This includes reasonable compensation, if as a consequence of the offence the victims run into economic difficul-

---

51 This abbreviation is derived from Weisungen an die Bezirksanwaltschaften, the name first given to this instruction.
ties.\textsuperscript{53}

On 14 May 1985, the Federal Ministry of Justice and Police appointed a special committee to prepare a report and draft legislation on support for victims of violent offences. The committee completed its work on 23 December 1986, but it took until 4 October 1991 for the new Victim Support Act (\textit{Bundesgesetz über die Hilfe an Opfer von strafiaten, Opferhilfegesetz, OHG}) to be adopted. The OHG aims to provide victims of violent and/or sexual offences with support and to improve their legal position (s. 1-1 OHG). Support in the sense of the OHG is a broad concept, including both (a) counselling (b) protection of the victim and preservation of his rights in criminal proceedings, and (c) state compensation and reparation\textsuperscript{54} (s. 1-2 OHG). Regarding (a) counselling, the OHG determines that the cantons must provide counselling services (s. 3-1) which offer various forms of immediate and long-term support free of charge (ss. 3-2 to 3-5), and that those working in a counselling service must respect a requirement of confidentiality (s. 4). In other words, the Victim Support Act gives victims of violent and/or sexual offences a \textit{legal right} to support. Regarding (b) the protection of the victim and his rights in criminal proceedings, the OHG contains regulations on the protection of privacy (s. 5), the duties of the investigating authorities (s. 6), the right of the victim to be accompanied by a person of his confidence and to refuse to answer certain questions (s. 7), his rights in the criminal proceedings (s. 8), his right to claim compensation from the offender within those proceedings (s. 9) and the composition of the court hearing the case (s. 10). Finally, sections 11-17 deal with (c) state – or more precisely cantonal – compensation and restitution. Guidance on determining the level of such compensation is provided by the Victim Support Regulation of 18 November 1992 (\textit{Opferhilfeverordnung des Bundesrates, OHV}).\textsuperscript{55} The Regulation also deals with the financial support which is to be provided to the cantons by the confederation, and the way the implementation of the OHG is to be evaluated. Both the Act and the Regulation came into force on 1 January 1993. This was also the date on which the European Convention on the Compensation of Victims of Violent Crimes came into force in Switzerland.\textsuperscript{56}

\subsection*{4.6 Implementation of the Victim Support Act in the Cantons}

The implementation of the measures introduced by the OHG is left to the 26 individual cantons, with financial support from the Confederation for a period of six years (s. 18-2 OHG and ss. 7-10 OHV).\textsuperscript{57} Although the cantons had been warned by letters of 26 July

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{53} 'Der Bund und die Kantone sorgen dafür, daß die Opfer von Straftaten gegen Leib und Leben Hilfe erhalten. Dazu gehört eine angemessene Entschädigung, wenn die Opfer infolge der Straftat in wirtschaftliche Schwierigkeiten geraten.' The initiative of \textit{Der Schweizerischer Beobachter}, which pleaded for federal legislation on compensation for victims of violent offences, led to a counter-initiative of the Federal Parliament, which proposed a constitutional section encompassing more than just compensation. The magazine then withdrew its initiative in favour of the parliamentary initiative, which was eventually adopted by popular vote. See A. Kuhn, \textit{L'aide aux victimes en Suisse}, Lausanne, 1993, pp. 3-4.
  \item \textsuperscript{54} \textit{Entschädigung und Genugtuung}.
  \item \textsuperscript{55} The regulation also deals with the financial support to be provided by the confederation, the training of the counselling service personnel and evaluation of the use of the money of the confederation is put to.
  \item \textsuperscript{56} Switzerland signed the Convention on 15 May 1990 and ratified it on 7 September 1992.
  \item \textsuperscript{57} By the end of 1996, the federation had spent a total of 18.5 million Swiss francs on support for the implementation of the OHG, see Second Federal Report (1998), p. 3. Per annum: 1993 = 5 million francs; 1994 = 4 million francs; 1995 = 4.5 million francs; 1996 = 5 million francs.
\end{itemize}
\end{footnotesize}
and 19 November 1991 about the intention of the Confederation to have the OHG come into force on 1 January 1993, the actual decision on the OHG coming into force was not taken until 18 November 1992. This left the cantons very little time to incorporate the regulations dealing with criminal proceedings into their own legal systems, and many responded by introducing emergency legislation. Since then, 22 cantons have adapted either their code of criminal procedure or their act on court organization, or have introduced organizational regulations or directives. In Zürich, the OHG measures were provisionally implemented by decree of 2 December 1992 (Einführungsverordnung zum Opferhilfegesetz, EV OHG) and later consolidated in the Act on Implementation of the Victim Support Act (Einführungsgesetz zum Opferhilfegesetz, EG OHG) of 25 June 1995. This act came into force on 1 January 1996.

The implementation of the OHG by the individual cantons has resulted in slight differences between the cantons in the position of the victim in criminal procedure. Occasionally, some cantons have been more generous than others in implementing a particular measure found in the OHG. For example, the cantons of Schwyz, Schaffhausen and Appenzell Innerrhoden have explicitly extended the regulations on the right of the victim to present civil claims within the criminal proceedings to all injured parties, rather than just to victims of violent offences as suggested by the OHG. Similarly, in the canton of Zürich, all injured parties, and not just victims of violent offences, now have the right to appeal against a decision not to open, or to terminate, the investigation (s. 395-1.2 ZStPO). There is also disagreement between the cantons on the interpretation of certain terms or measures. Depending on the interpretation of the definition of the victim given by the OHG, victims of a particular type of offence may not qualify for cantonal compensation in one canton, although they would be eligible in another. The cantons will be looking to the federal court to help clarify certain points, and an important coordinating role has been awarded to the Swiss Liaison Conference on Victim Support (Schweizerische Verbindungsstellen-Konferenz — Opferhilfegesetz, SVK-OHG). Each canton has a liaison officer (Verbindungsstelle) for victim support. The 26 cantonal liaison officers meet in four regional conferences (Regional-konferenzen) and each regional conference sends two delegates to the Swiss Conference. The Swiss Liaison Conference has developed guidelines to help the cantons with the application

---

60 T. Maurer (1993), p. 383. Likewise, federal criminal procedure also extends this right to all injured parties, see section 210 BStP. Maurer argues against extending the rights of the Victim Support Act to include victims other than of violent or sexual offences. Regarding the rights to notification and information, he remarks that it would hardly be worthwhile if all victims of traffic offences, who have only suffered material damages, were also to be referred to the advice centres and notified of the outcome of the case (Maurer, 1993, p. 383). Incidentally, the Victim Support Act does cover victims of serious traffic offences.
61 This includes the spouse, children, parents and other relations of the victim, in as far as they have made a claim for compensation against the offender, sections 395-1.2 ZStPO in conjunction with 2-2 OHG.
62 One example of discord concerns the inclusion by the OHG of victims of traffic offences. Initially several cantons refused to include such victims in their cantonal arrangements.
63 Other participants in this federal conference are representatives of both the Conference and the Secretariat of Directors of the Cantonal Social Services (FDK), a representative of the Conference of Directors of the Cantonal Departments of Justice and Police, and a representative of the Federal Ministry of Justice.
of the OHG, and to iron out the most flagrant differences in approach.  

4.7 Evaluation of the Victim Support Act

Every two years, the cantons must report to the Confederation on the utilization of the financial support provided by the Confederation (ss. 11-1 and 11-2 OHV), and the Federal Ministry of Justice then evaluates the effectivity of victim support on the basis of the cantonal reports (s. 11-4 OHV). At the time of writing (October 1998), the Victim Support Act had been in force for just under six years, and two such reporting rounds had been completed. The 'First Report of the Federal Ministry of Justice to the Federal Council on the Implementation and Effectivity of Victim Support in the years 1993 and 1994' was presented in February 1996, and the Second Report on the years 1993-1996 appeared in January 1998. Part of both evaluations was contracted out to the Centre of Legislative Study, Technique and Evaluation (Centre d'étude, de technique et d'évaluation législatives, CETEL) of the University of Geneva. The first CETEL report, 'The victims' point of view on the application of the Victim Support Act' (August 1995), is based on interviews with 25 representatives of agencies involved with victims of crime and 45 victims. The second report on 'The protection of the victim in the criminal proceedings' (November 1997) examines the position of the victim in four cantons (Basel Town, Lucerne, Neuchâtel and Ticino). Data for this report were drawn from literature research as well as from interviews with 24 lawyers and 23 judges, who also replied to three successive questionnaires.

A nation-wide victim survey was conducted between April and June 1998, as a follow-up for a similar survey conducted in the late eighties.  

5 ROLES OF THE VICTIM

Terminology

Victim (Opfer) in the sense of the OHG is a person whose physical, sexual or psychological integrity has been directly damaged by a criminal offence (s. 2-1 OHG). As was said earlier, although it is clear that it covers victims of sexual and/or violent offences, the exact scope of this definition has not yet been established.  

To help the cantons on their way, the guidelines issued by the SVK-OHG offer a non-exhaustive list of the relevant violent and/or sexual offences. The OHG extends the right to counselling to the victim's spouse, to his or her children and parents as well as to others who are similarly close to the victim (indirect victims, section 2-2-a OHG). If these persons have a civil claim against the offender, they are also put on a par with the victim as far as the exercising of procedural rights and civil

---

64 Immediate access to decisions of the Federal Court, the administration and the cantons, as well as details on administrative practice will be provided by an information system to be launched in the near future. Information provided by E. Zürcher, director FDK, February 1998.


66 See, for instance, the commentary of P. Gomm, P. Stein and D. Zehntner on the OHG (Kommentar zum Opferhilfegesetz, Verlag Stämpfli und Cie AG Bern, 1995).
claims (s. 2-2-b), and the claiming of cantonal compensation and reparation (s. 2-2-c) is concerned.

The Zürich Code of Criminal Procedure alternates between the terms ‘victim’ (Opfer) and ‘injured person’ (Geschädigter), and sometimes both terms are used within one and the same section. Where ‘victim’ is used, this is in the limited sense of the OHG. ‘Injured person’ in the sense of the ZStP0 is a broader concept, and covers any person who has directly suffered damage, or whose damage threatened to be increased, by the offence (s. 395 1-2 ZStP0).

5.1 Reporting the Offence

The Swiss victim survey published in 1989 concludes that there are no major differences in reporting patterns between Switzerland’s several linguistic regions, and that in comparison with other countries, reporting rates in Switzerland are relatively high. Reporting is strongly influenced by the seriousness of the physical and/or material consequences of the crime, the potential rewards of reporting such as insurance, and any potentially undesirable outcomes, for instance if the offender is an acquaintance. Reporting is only weakly associated with the victim’s attitude towards the police.

In Zürich, offences may be reported by any person to the prosecution service, the district attorney, the mayor, and all officials and employees of the cantonal and municipal police (s. 20 ZStP0). The report (Strafanzeige) may be made orally or in writing (1001 BStP). The principles of officiality and of legality compel the authorities to investigate all offences reported to them. Victims of sexual offences may ask to be questioned by someone of the same sex (s. 6-3 OHG).

5.2 Complainant

Federal Legislation

Any person injured by a complainant offence may request the punishment of the offender (s. 28 StGB). The period of limitation is three months from the day the identity of the offender becomes known to the person eligible to make a complaint (s. 29 StGB) — for marital rape, the period of limitation is 6 months (s. 190-2 StGB). If the complaint is made against one of several perpetrators, all the other perpetrators must also be prosecuted (s. 30 StGB). The complaint may be withdrawn as long as the verdict in first instance has not yet been made known (s. 31-1 StGB), but once withdrawn, the complaint cannot be made a second time (s. 31-2 StGB). If a complaint against one of several accused persons is withdrawn, the complaints against all the other accused persons are also automatically dropped (s. 31-3 StGB), unless one of the accused persons protests against this, in which case the complaint against him is not dropped (s. 31-4 StGB). Once the complaint has been made, the principle of officiality comes into force. This implies that from then on the case is in the hands of the authorities.

In Switzerland, complainant offences are either minor offences where prosecution is not deemed necessary in the public interest, or offences where prosecution may be detrimen-

---

67 For example section 10 ZStPO.
70 Persons who are legally incompetent may also report an offence, see N. Schmid (1997), p. 244.
tal to the interests of the victim. Examples of the first category are minor assault (ss. 123, 125-1 and 126-1 StGB) and certain instances of theft (ss. 137-2, 141-142 StGB). The second category includes property offences where the victim is a family member of the offender, or lives in the same house (for example ss. 138-2, 139-4, 146 III, 147 III StGB), libel cases (s. 173 ff StGB) and marital rape (s. 190-2 StGB). Regarding marital rape and assault within marriage, a parliamentary initiative to make these offences into non-complainant offences was approved by the National Council in December 1997. There are similar developments in Norway, where domestic violence was altered into a non-complainant offence in 1988, and inverse developments in Austria, where 'less serious' forms of rape and sexual abuse within the marriage were turned into complainant offences in 1989.

Zürich
Where complainant offences are concerned, the authorities may only intervene from the moment the complaint has been made. However, in urgent cases protective measures may be taken before the complaint has been made (s. 24 ZstPO).

5.3 Civil Claimant

Federal Legislation
As long as the offender has not been acquitted or the proceedings terminated, the criminal court must decide on the civil claims of the victim (s. 9-1 OHG). The court may decide on the criminal aspects of the case first and deal with the civil claims later (s. 9-2 OHG). If deciding on the civil claims in their entirety makes disproportional demands on the criminal court, the court may decide on those claims in principle only and refer the victim to the civil court. However, small claims should be decided fully if possible (s. 9-3 OHG). A small claim is a claim of up to a few thousand Swiss Francs.

Zürich
The injured party may pursue his civil claims against the offender through the civil courts, or present them to the criminal court in adhesion to the criminal proceedings (s. 192-1 ZStPO). The claim must be directed orally or in writing to the criminal court (s. 192-1 ZStPO). Alternatively, it may be handed in to the investigating authorities up to five days before the main hearing (s. 192-3 ZStPO).

5.4 Private Prosecutor

It is up to the individual cantons to decide whether the prosecution of certain offences should be left entirely to the injured person. In the canton of Zürich, the complainant offences of libel found in sections 173-177 StGB have been further categorized as private prosecution offences (principales Privatstrafklageverfahren). The main procedural regulations are

71 N. Schmid (1997), nos. 86-87, p. 25.
72 See article M. Killias 11 February 1998 in the Neue Zürcher Zeitung. At the time of writing, the Penal Code had not yet been changed, and marital rape was therefore still a complainant offence.
found in sections 286-293 ZStPO. As usual, the financial risks make private prosecution an unattractive option. The parties must bear their own expenses for the evidential proceedings during the investigation and the main trial (s. 291 ZStPO). The losing party is ordered to pay both the expenses of the trial and the expenses of the other party (s. 293 ZStPO).

5.5 Subsidiary Prosecutor

The institution of subsidiary prosecution (Subsidiäres Privatstrafklageverfahren), which allows the injured party to take over the prosecution if the public prosecutor has decided to drop the proceedings, is more or less non-existent in Switzerland. In the canton of Zürich, the right to subsidiary prosecution was initially recognized for all offences, (s. 46 ff old ZStPO), but it was abolished with the reform of the Code of Criminal Procedure of 15 June 1995.75

5.6 Witness

Victim Support Act

The Victim Support Act has introduced several protective measures in relation to the victim in his capacity as witness. The stipulation that victims of sexual offences may ask to be questioned by someone of the same sex (s. 6-3) extends beyond the preliminary stages of the investigation to the main investigative proceedings (Untersuchungsverfahren). This implies that in those cantons where an examining magistrate conducts the questioning of the victim as witness, the victim of a sexual offence may also require this judge to be of the same sex. Finally, section 10 OHG determines that victims of sexual offences may require that the court deciding the case has at least one person of his or her sex on the bench. This is a unique arrangement, not found in any of the other jurisdictions involved in this study.

The victim who is to be questioned as witness or informant (Ausläufersperson) may be accompanied by a person of his confidence (s. 7-1 OHG) and may refuse to answer intimate questions (s. 7-2 OHG). If the victim so wishes, a confrontation with the defendant is to be avoided by the authorities, and the defendant’s right to a fair trial must be respected in a different way. However, a confrontation may be ordered if the defendant’s right to a fair trial, or an overriding interest of the criminal prosecution, so requires (s. 5-4 OHG). Regarding victims of sexual offences, a confrontation between the victim and the defendant may only be ordered if this is necessary to guarantee the right of the defendant to a fair trial (s. 5-5 OHG).

Zürich

S. 128 ZStPO explicitly states that ‘any person, including the injured person, can be called to testify before the investigating authorities with the exception of those exempted by law’. Exempted are the blood, adoptive and step relatives of the accused and those related to him (or her) in ascending and descending lineage, his brothers and sisters and brothers-in-law and sisters-in-law (s. 129-1 ZStPO), his spouse, and divorced spouse in as far as the testi-

75 N. Schmid (1997), no. 873 p. 274.
76 An Ausläufersperson is someone who is helping the authorities with their enquiries, without being categorized as either a defendant or a witness. This in-between category is used to approach individuals of whom the police does not yet know whether they should be regarded as a suspect or as a witness. It is also used to accommodate persons whom the authorities do not want to subject to the full implications of being a witness, for example children or injured persons. See N. Schmid (1997), nos. 464,465.
mony concerns the period before the divorce (s. 129-2 ZStPO).

S. 7-2 OHG, which gives victims of violent and/or sexual offences the right to refuse to answer intimate questions, is repeated in section 131-2 ZStPO. A district court in Zürich dealing with crimes and misdemeanours against morality must consist of members of both sexes (s. 30-2 ZGVG), and if a case is to be decided by a judge sitting alone, a victim of a sexual offence may demand that this judge be of the same sex as the victim (s. 24-4 ZGVG). Again, this is a unique arrangement.

S. 10 ZStPO warns that the injured party may only be questioned in as far as this is necessary to solve the case. It is essential to realize that court proceedings in the canton of Zürich are rarely oral. This means that victims are only occasionally required to testify in open court.

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.

Federal legislation: Victim Support Act

The Victim Support Act provides that, when the victim of a violent and/or sexual offence first comes into contact with the police, they must inform him of the victim support counselling services (s. 6-1 OHG). It is up to the police to help the victim overcome any initial inhibitions he may have against approaching one of the counselling services. Besides handing over a form with addresses and a description of the type of help offered by each service, the police should explain that the victim can turn to a service of his choice and that he can expect to receive medical, psychological, social and material support free of charge. Secondly, the police must pass on the name and address of the victim to a counselling service, but not before it has been pointed out to the victim that he may refuse to have his name transmitted (s. 6-2 OHG). In principle, referral is based on a system of explicit permission, although if the victim does not respond to the announcement of the police that he can refuse to have his name transmitted, this may be interpreted as implicit permission. To avoid problems, it is advised to write down on a form that the victim has given his permission. The police may pass on only the name and address of the victim, at most with a short note stating he is a victim in the sense of the Victim Support Act. No further details of the case may be given, unless the victim gives his explicit permission for further information to be passed on.

77 For information and data on how the requirements listed above are met in practice, see the relevant sections in Part II, in particular § 8.2 under C.8 on questioning the victim.


Thirdly, in all phases of the proceedings the authorities must inform the victim of a violent and/or sexual offence of his rights (s. 8-2 OHG), which includes the victim's right to claim compensation from the offender in adhesion to the criminal proceedings.\textsuperscript{80} If the investigating authorities have failed to fulfil this duty, it is up to the court to ensure that the victim is adequately informed.\textsuperscript{81}

The Victim Support Act only deals with victims of violent and/or sexual offences, and its arrangements are therefore not applicable to victims of other offences. There is no federal legislation compelling the police in the different cantons to inform victims of non-violent and non-sexual offences of their rights and opportunities. Any such regulations are at the initiative of the individual cantons.

\textit{Cantonal legislation: Zürich}

The duty of the Zürich police to inform victims of violent and/or sexual offences of the counselling services when they first come into contact with the police, and to refer their names and addresses to a counselling service unless permission is refused, is reproduced in section 22 I ZStPO.

S. 1911 ZStPO determines, among other things, that the authorities must inform injured persons of their rights. This section covers more than just victims of violent and/or sexual offences, because a victim of any offence can be an injured person, i.e., have a civil claim against the offender as a consequence of the offence.\textsuperscript{82} On the other hand, it does not cover victims who do not have a civil claim against the offender. In Zürich the injured person has fairly extensive participatory rights. First of all, he must be given the opportunity to be present during the questioning of witnesses and expert witnesses, and to put questions to them which may help to solve the case (s. 10 I ZStPO). Failure to grant the injured person this opportunity means that the information derived from such a session is invalid in as far as it is detrimental to the position of the injured person.\textsuperscript{83} The injured person may provide the investigating authorities with evidence to prove the extent of the damages he has suffered (s. 10 II ZStPO). He may present a claim for compensation in adhesion to the criminal proceedings (s. 192 I ZStPO) and inspect the files (s. 10 III ZStPO), and he has a right to free legal assistance if this is called for in view of the interests and personal circumstances of the injured person (s. 10 IV ZStPO). Furthermore, the injured person has a right to receive copies of decisions and verdicts (for example s. 320 ZStPO) and to appeal against these decisions (s. 395-2 ZStPO). The appeal may also be directed against issues of guilt and punishment, not just against the decision on his civil claim for damages.\textsuperscript{84}

\textsuperscript{80} Gomm, Stein and Zehntner (1995), p. 147. This could also include the victim's right to claim state compensation, although the commentary to section 8 II makes no mention of this.

\textsuperscript{81} Gomm, Stein and Zehntner (1995), p. 147.

\textsuperscript{82} N.B. the injured person does not actually have to have made a claim for compensation to benefit from these – and other – rights to be informed. It is enough that he is entitled to make a claim for compensation. Compare to Austria and Liechtenstein, where the exercise of certain rights of the injured person depends on whether or not he has actually made a claim for compensation.

\textsuperscript{83} N. Schmid (1997), no. 516 p. 146.

\textsuperscript{84} N. Schmid (1997), no. 523 p. 148. This goes further than the minimum standard set by the Victim Support Act, in which a victim of a violent and/or sexual offence should be able to appeal against the verdict of the court with the same legal instruments as the accused, providing he was already a participant in the proceedings and in as far as the verdict concerns his civil
Obviously, the injured person can only exercise these rights if he is duly informed of them. The corresponding informative tasks of the authorities are encompassed not only by the explicit stipulation of section 19 II ZStPO, but also by the ‘judicial duty of care’ (richterliche Fürsorge). This principle is derived from the principle of fair trial and implies that the authorities have a special duty to ensure that people who have no knowledge of criminal proceedings and who have no legal representation are informed of their rights.85

**Practice: general**

There are no Swiss statistics on how often the police informs the victim of crime of the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation. Therefore, no quantitative remarks of a general nature can be made. The following contains qualitative observations about the way victims of violent and/or sexual offences are informed.

The 45 victims interviewed for the first CETEL report (1995), had all been selected via one of the counselling services – i.e., they had all been referred to a counselling service. A third had been referred by the police, although the average number of victims referred in this way varied from canton to canton. The Zürich police scored significantly higher than the police in other cantons, which is probably due to the fact that their system of referral has been in place longer than in the other cantons.86 More than half of the victims interviewed for the first CETEL report had been referred to a victim support counselling service by another support organization, by the social services, or by a legal authority such as a judge or a lawyer. Not one victim had been referred by the medical services, which is remarkable considering that 60% of the interviewees had come into contact with a medical service.87

The majority of the victims who were interviewed for the first CETEL report felt they had been sufficiently informed of their rights and the course of the criminal proceedings.88 However, a number of victims did point out the drawbacks of being informed by the police shortly after the offence. Some said they could not remember any of the information they had been given because of the state of shock they were in, whereas others felt they had been buried under piles of information irrelevant to their case.89 The second CETEL report is enthusiastic about the practice developed in the cantons of Basel-Town and Lucerne, where the victim's rights are first explained to him in detail, and he is then given a leaflet repeating all the information to take home.90

**Practice: Zürich**

In the canton of Zürich, the police work with a list of instructions on Victim Support

---

85 N. Schmid (1997), no. 245 p. 69 and no. 521 p. 147.
87 CETEL (1995), p. 35. N.B. This report is based on interviews with only 45 victims. Great care should therefore be taken with the results. Regarding the poor referral by medical services, see also Chapter 6 on Denmark.
(Merkblatt zur Opferhilfe) and a form on notification of the victim and referral to a counselling service (Orientierung des Opfers/Meldung an Beratungsstelle) which has to be filled in by the officer taking down the report. The rights that the victim should be informed of are listed in the instructions. They include most of the procedural rights of the victim found in the Victim Support Act — to be accompanied by a person of confidence, be questioned by someone of the same sex, refuse to answer intimate questions, not be unnecessarily confronted with the offender — and his right to be informed of, and referred, to a counselling service, but his right to claim cantonal compensation is not included in this list. In other words, the Zürich police do not inform the victim of the possibilities of obtaining state compensation, and guideline A.2 of Recommendation R (85) 11 is not fully complied with.\footnote{Compare to Ireland (Chapter 12), which is also poor regarding the provision of information about state compensation.}

The form to be filled in and signed by the police states that the victim ‘has been informed of his rights in accordance with the Victim Support Act’. Regarding ‘passing on of the address to a counselling service’, one of the boxes ‘yes’, ‘no’, or ‘time to consider’ must be ticked. If the victim gives his permission, the relevant counselling service must be marked, as well as the mode of communication the victim prefers, i.e., by telephone or by letter. If the victim wants to be referred, the original is sent to the counselling service immediately. A copy of the form is given to the victim, and 2 further copies are kept in the police archives, and the Youth and Sexual Offences Department of the cantonal police force, respectively. In the experience of the Zürich cantonal police, most victims of violent and/or sexual offences do not want to be referred to a counselling service. Having to decide there and then at the police station may be asking too much, and most victims just want to go home. Those who indicate that they want time to consider do occasionally phone up later to say they would like a referral, but this rarely happens. Of course, the victim can also approach a counselling service later at his own initiative, without a referral by the police.\footnote{Information provided by J. Streuli of the Youth and Sexual Offences Department of the Zürich cantonal police force, 18 February 1998.}

In Zürich, a claim for state or rather cantonal compensation can be made at the Cantonal Victim Support Point of the Judicial Directorate (Kantonale Opferhilfestelle der Justizdirektion). This is an administrative body incorporated in the General Secretariat (Generalsekretariat) of the Judicial Directorate which decides on all claims for cantonal compensation exceeding 500 Swiss francs.\footnote{Although the Victim Support Point has no counselling duties of its own, it is responsible for the supervision of the 10 counselling services in the canton of Zürich, and liaises with the confederation and the other Swiss cantons. It has also produced a leaflet containing information for victims of violence (INFOHG, Informationen für Opfer von Gewalttaten).} The application must be made on a special cantonal compensation form within two years of the committing of the offence. The form can be obtained from the Judicial Directorate and the counselling services, but not from the police or the district attorney.\footnote{Information provided by S. Stähelin, Judicial Directorate, Zürich, 17 February 1998.} The district attorney does send victims of violent and/or sexual offences a letter containing information about their rights (see under A.3), which informs the victim that he can get a form for state compensation from the judicial directorate.

Thirty-seven per cent of all the Swiss claims for state compensation made in 1995 and 1996 originated with the canton of Zürich. With a total of 415 claims, Zürich had almost
3½ times as many claims as the next best canton of Bern, which received 122 such claims. According to the first CETEL report of 1995, the relatively high score of Zürich is due to the fact that the counselling services in this canton inform most of their clients of the opportunity to claim state compensation, whereas the counselling services in other cantons only inform those victims whom they consider to have a good chance of actually being awarded state compensation. These scores could be much higher if the police were also to inform victims of violent offences of their opportunity to claim state compensation, for it is only a small percentage victims that is referred to a counselling service.

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

Legislation
Neither the Victim Support Act, nor the Code of Criminal Procedure of the canton of Zürich, state in so many words that the victim should be able to obtain information on the outcome of the police investigation. The OHG does mention that, if the victim of a violent and/or sexual offence so wishes, he should be informed of decisions and verdicts free of charge (s. 8-2 OHG), but the commentary on this section does not imply that this encompasses the outcome of the police investigation. The Zürich Code of Criminal Procedure is more promising in this respect when it determines that victims of violent and/or sexual offences should be informed of important procedural decisions, in particular regarding the taking into custody or release of the accused (...) (s. 10 IV Z StPO).

There are no formal arrangements for keeping victims of offences other than violent and/or sexual ones informed of the developments in their case. It is up to them to make their own enquiries. However, in the canton of Zürich, an injured person (i.e., someone who has a civil claim against the offender) has the right to view the files and to be present during the questioning of the accused (s. 10 II Z StPO), and should in this way be kept informed of at least some of the developments in his case.

Practice: general
A certain number of victims interviewed for the first CETEL report did not press charges against the offender for personal reasons, because they feared reprisals or because they thought the criminal proceedings would cost too much time and money. Of those who did press charges, the offender remained unidentified or on the run in five cases. There were also a number of criminal proceedings which were still in progress at the time of the interview. Therefore, the report is justifiably reserved about the weight of its conclusions in regard to the way victims experienced the criminal proceedings. However, it does conclude that one of the sources of discontent of victims was the difficulties they encountered.

---

95 Second Federal Report (1988), p. 19. Related to the size of the population, Zürich scores an average of 2 claims per 10,000 citizens. This is second only to Schaffhausen, with 2.4 claims per 10,000 citizens. Schaffhausen has a population of 34,300 against the 1,168,000 of Zürich.
98 The section adds that the victim of a violent and/or sexual offence should also be informed of the approval of the summons (Anklagezulassung), see also under B.6.
99 The injured person may attend the questioning of the accused, as long as his presence does not jeopardize the aims of the investigation. The investigating authority may, in the interests of the investigation or at the request of the accused, question the accused without the presence of the injured person, section 10 III Z StPO.
in obtaining clear and non-contradictory information about the progress of the case.\textsuperscript{100}

\textit{Practice: Zürich}

Keeping the victim informed of the progress of the case is a grey area. Mostly, victims receive information if the police need them, for instance for further questioning or for a lineup.\textsuperscript{101}

In the canton of Zürich, the prosecuting authorities have an important part to play in the investigative stages of the proceedings, and the task of communicating decisions such as the taking into custody of the offender is left to them. A victim in the sense of the Victim Support Act is sent a form by the district attorney stating his rights, and asking him to indicate his wishes regarding the exercise of his rights by ticking a series of boxes. One of the options reads: ‘I would like to be informed of important procedural decisions such as the taking into custody or release of the accused and the approval of the summons.’\textsuperscript{102} The victim must fill in the form and return it to the district attorney. It is unknown how often these forms are returned.

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

\textit{Legislation}

The victim who has joined the proceedings as a party, for instance as a civil claimant, is automatically informed of verdicts and decisions.\textsuperscript{103} This will include a decision not to prosecute. Victims of violent and/or sexual offences who have not joined the proceedings have the right to be informed of decisions and verdicts if they have indicated that they want to be kept informed (see above).

In the canton of Zürich, the victim of a violent and/or sexual offence must be informed of the ‘approval of the summons’ if he has indicated that he wants to receive this information (s. 10 IV Z StPO). In preparation of the main proceedings, the summons must first be submitted to the president of the district court (district court cases) or the summons chamber (Anklagekammer) (jury court and Court of Appeal cases) (s. 165 Z StPO). If the summons is found to meet all the formal requirements and the charge has sufficient substance, it is accepted, and the prosecutor may go ahead with his case. Regarding victims other than those of violent and/or sexual offences, in Zürich any injured person must be informed by letter of a decision to drop the prosecution (\textit{Einstellungsverfügung}) (s. 40 Z StPO).

\textsuperscript{100} CETEL (1995), p. 41.
\textsuperscript{101} Information provided by J. Streuli of the Youth and Sexual Offences Department of the Zürich cantonal police force, 18 February 1998.
\textsuperscript{102} Form of the district attorney I for the canton of Zürich dated 14 July 1997. For an explanation of ‘approval of summons’ see the next section.
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
In Zürich, the injured person must be given the opportunity to attend the questioning of (expert) witnesses, and to ask them any questions relevant to solving the case (s. 10 I Z StP0). In principle, he should also be given the opportunity to attend the questioning of the accused (s. 10 III Z StP0). Mostly, these questioning sessions are conducted prior to the main hearing, and the injured person should therefore be invited to these pre-trial hearings.

The main hearing itself is usually based on the files only: adherence to the principle of immediacy has been moved forward to the pre-trial phases. The injured person is optionally invited to the main hearing, if he wishes to receive such an invitation (s. 192 IV Z StP0). The investigating authorities must inquire after his wishes (s. 10 II Z StP0). The injured persons in a case are to be listed in the summons or a register, and in particular it should be noted whether they have made a claim for compensation or have refused to be invited to the main hearing (s. 162 III Z StP0). Once the summons have been accepted, the president of the court sets the date for the main hearing, and sends an invitation to the injured person, among others (s. 171 I Z StP0).

According to the public prosecution service in Zürich, every injured person receives a form asking him to indicate whether he wishes to be invited to the main hearing. However, the form sent by the district attorney includes no such explicit enquiry, although it does ask whether the victim wants to be informed of decisions such as the taking into custody or release of the accused and the acceptance of the summons (see earlier).

Restitution and compensation, legal assistance and advice
The general obligation of the authorities to inform victims of violent and/or sexual offences of their rights in all phases of the proceedings, as established by section 8-2 OHG, encompasses a subsidiary duty for the court to make sure the victim has been properly informed.

In Zürich, the investigating authorities are obliged to inquire if, and to what extent, the injured person wants to make a compensation claim against the offender (s. 10 II Z StP0). The letter that the Zürich district attorney sends to injured persons reminds the injured person that he may make a claim for compensation against the offender and includes a special form which can be used to make the claim. The injured person has the right to ask the president of the court to award him legal aid, if this is necessary in view of the interests and personal circumstances of the injured person (s. 10 V Z StP0). The letter sent by the district attorney asks whether the injured person wishes to make such a request, and if so, whether he already has a lawyer.

Presumably only to the injured person who has indicated that he wants such an invitation. This particular section of the Zürich Code of Criminal Procedure is not clear in this respect.

Information provided by U. Weder, prosecutor in the canton of Zürich, 18 February 1998.

Outcome of the case

It has already been mentioned several times that the victim of violent and/or sexual offences may request to be informed of decisions and verdicts free of charge (s. 8-2 OHG). In Zürich, the convicted person, the prosecution service and the injured person should all be informed in writing of the final verdict (s. 320 Z StPO). The Constitution of the Courts Act expands on this as follows: the accused, the private prosecutor and the prosecuting authorities are to be informed of the decisive parts of the verdict in writing immediately after the announcement of the verdict. Furthermore, they must be sent a complete copy of all verdicts and final decisions (s. 186 I Z GVG). The injured person should receive written notification of the decisive parts of the decision regarding his civil claims free of charge, a full copy is sent only upon request (s. 186 II Z GVG).

6.2 Information About the Victim

(A.9) 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.

In the canton of Zürich, the police have little involvement in the making of a compensation claim by the victim. Although the police does have the duty to tell the victim he can make such a claim, the necessary forms and additional information are sent to the injured person by the district attorney. In other words, any statement on the injuries and losses suffered by the victim that the police may send to the prosecuting authorities is made with the aim of providing criminal evidence to support the charges, and not with any intention of supporting the victim's possible claims for compensation. However, the injured person may hand over evidence to prove the extent of the damages he has suffered to the investigating authorities, i.e., to the police or the district attorney or prosecution service (s. 10 II ZStPO). In this case, any documents or other material provided by the injured person should be forwarded with the file.

(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.

Relevant information concerning injuries and losses provided by the victim to the investigating authorities on the basis of section 10 II ZStPO reaches the court as part of the file. Besides this, the injured party may require that witnesses and expert witnesses are summoned to appear during the main hearing with regard to the compensation claim (s. 205 III ZStPO). The injured party may furthermore personally address the court on the matter of his compensation claim (s. 248 I ZStPO). Alternatively, he may ask the prosecutor to take care of his interests for him (s. 248 II ZStPO).

Regarding the transmission of information between authorities, a specific problem has arisen in relation to the awarding of cantonal compensation. In 18 out of the 26 cantons, claims

---

107 See section 280 II ZStPO regarding maximum costs.
for cantonal compensation are decided by an administrative body, including Zürich (see earlier) and Geneva. In the other eight cantons, the claims are decided by either the Council of State (3 cantons), a criminal court judge (1 canton), a penal committee (2 cantons) or the civil court (2 cantons). In Geneva, the judicial authorities refuse to pass the penal files to an administrative body as long as the criminal proceedings are still in progress. As a consequence, the administrative body deciding on cantonal compensation is obliged to conduct its own investigations and to question the victim all over again about the facts of the case. Ironically, this is a form of secondary victimization which the Victim Support Act aims to avoid. Although this problem in communication was observed in Geneva, it is believed that it may also figure elsewhere.

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 Victim Support Act does not touch on the relation between a discretionary decision of the prosecuting authorities and compensation of the victim.

In Zürich, section 39a ZStPO determines that in the cases where the principle of opportunity may be exercised, the public prosecutor and the district attorney may only refrain from further prosecution if no fundamental interests of the criminal prosecution or the injured person obstruct the way. The primary example of such an interest of the injured person given by Schmid in his manual on Zürich criminal procedure, is if the injured person has made, or has expressed the desire to make, a claim for compensation.

\(B.7\) 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.

Right to ask for a review

The right to ask for a review is embodied in section 8-1.b of the Victim Support Act: the victim (of a sexual or violent offence) may demand the decision of a court, if proceedings are not initiated or they are terminated. This is regardless of whether he has made a civil claim for compensation against the offender.

In the canton of Zürich, any injured person, not just the victim of a sexual or violent offence, has the right to ask for a review by a competent authority of a decision not to prosecute (s. 395 ZStPO). The spouse, children, parents or other relatives of a victim of a sexual or violent offence also have this right, in as far as they have made a claim for compensation against the offender (s. 395 ZStPO in conjunction with 2-2 OHG). If the decision to not open or to terminate an investigation is taken by the district attorney, the request for a review should be directed to the judge sitting alone of the district court (s. 402-
If the decision is taken by the juvenile prosecutor, the president of the juvenile court is the competent authority (s. 402-3 ZStPO), and a decision of the public prosecutor is reviewed by the High Court (s. 402-4 ZStPO). Finally, if a decision to not open or to terminate a criminal investigation is taken by a governing body (Verwaltungsbehörde), the request for a review should be directed to the judge sitting alone of the district court (s. 402-10 ZStPO).

Right to institute private proceedings
The type of private proceedings referred to in guideline B.7, where the injured party may proceed with a prosecution if the public prosecutor has dropped the case, is referred to as subsidiary private prosecution proceedings in Zürich (see §§ 5.4 and 5.5). This right was abolished in 1995.

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.

Legislation: federal
In principle, the Victim Support Act compels the criminal court to decide the civil claims put before the court by the victim (s. 9-1 OHG). With this provision it is now no longer possible for the Swiss criminal courts to refer the victim's claims for compensation and reparation (Schadenersatz- und Genugtuungsforderungen) to the civil courts more or less at will. In most cantons, it was common practice to automatically refer any claim that was partially or totally contested by the offender, but much more compelling reasons are now required to do so. The Federal Supreme Court has confirmed that the list of circumstances in which the claim may be referred to a civil court is exhaustive and should be interpreted restrictively.

The criminal court may deal with the victim's civil claim for compensation in one of the following ways. First of all, the claim may be awarded - or dismissed if unfounded - in its totality. Alternatively, the criminal court may award part of the claim, in which case the victim must pursue the remainder of his claim in the civil court. Section 9-3 OHG encourages the courts to at least decide small claims in their totality. The criminal court may also establish that the offender is liable towards the victim in principle, and then leave it to the parties to reach an agreement regarding the amount of compensation to be paid. Only if it is impossible for the criminal court to decide on the compensation claim on the basis of what the parties have put forward, may the claim be referred to the civil court. However, if only a little additional information is needed to reach a decision, or if it is necessary to wait until the total (medical) damages suffered by the victim can be established, the court could make use of the option offered by section 9-2 OHG, to decide on all the criminal


aspects of the case first, and postpone the consideration of the civil claim to a later date.\textsuperscript{114} The federal legislator hopes that this staggered way of dealing with the criminal and the civil issues will make it much easier for the criminal court to decide on the civil claims than before.\textsuperscript{115} Compare this segregated way of dealing with the criminal and the civil aspects of the case with established practice in Norway and the suggestions put forward in Austria by Fuchs (see the relevant chapters).

\textit{Legislation: Zürich}

In general, the Zürich legislation on civil claims in adhesion to the criminal proceedings concurs with the Victim Support Act. One exception concerns the consequences for the civil claim of an acquittal of the accused. In the eyes of the Victim Support Act, the criminal court is no longer compelled to decide on the victim's claim for compensation if the accused is acquitted or the proceedings are terminated (s. 9-1 OHG). In Zürich, if the offender is acquitted because he is considered to be of unsound mind (\textit{non compos mentis, ontoerekeningsvatbaar, not responsible}) under the imposition of one of the measures listed in sections 43 or 44 StGB, the criminal court must still decide a civil claim made in adhesion to the criminal proceedings by victims covered by the Victim Support Act (ss. 285e StPO in conjunction with 2 OHG).\textsuperscript{116} The measures referred to include enforced admittance to a psychiatric institute, or a drug or alcohol rehabilitation centre.

S. 9-4 OHG allows the cantons to establish alternative rules for civil claims in cases settled by order in chambers (\textit{Strafmandatsverfahren}) and in proceedings against children and juveniles. In Zürich, minor offences may result in a prosecutor's transaction (\textit{Strafbefehl}, ss. 317-326 ZStPO). In these cases, 'civil claims of the injured party against the accused may be referred to the civil court regardless of the nature of the offence in question, if it is impossible to take an immediate decision on the claim on the basis of the file and material provided by the parties' (s. 317-3 ZStPO). Not applicable in proceedings leading to a prosecutor's transaction are section 193-2 ZStPO (the court may first decide on the criminal aspects of the case and deal with the civil claims later) and 193-3 ZStPO (if deciding on the civil claims in their entirety makes disproportional demands on the criminal court, the court may decide on those claims in principle only and refer the victim to the civil court. However, small claims should be decided on fully). In other words, where a prosecutor's transaction is concerned, the victim does not have the same right to have his civil claims decided on that he has in full criminal proceedings. In this area, the situation that existed before the introduction of the Victim Support Act persists.\textsuperscript{117} The same goes for criminal proceedings against children and juveniles (s. 386a ZStPO in conjunction with s. 317-3 ZStPO).

\textit{Practice}

The CETEL report of 1997 makes the following observations regarding civil claims in practice in the cantons of Neuchâtel, Basel, Ticino and Lucerne. In general, the criminal court judges who are confronted with civil claims of the victim do not establish the exact


\textsuperscript{117} See N. Schmid (1997), nos. 913-914, pp. 280-281.
amount of damages suffered, with the exception of Lucerne where the examining magistrates try to establish the amount of damages. Most of the problems encountered are attributed to the poor quality of the file provided by the victim's lawyer, the complexity of the case and the difficulty of evaluating or calculating the damage. Ironically, civil claims containing calculations that are put before the criminal court by lawyers are rather badly received. Certain judges consider such civil claims to be unrelated to the criminal proceedings and send the victim to the civil court. In general, the lawyers who were questioned for the CETEL report advise their clients to put their civil claims for compensation before the criminal court (see otherwise lawyers in Germany, Austria, Turkey and Greece). The problems reported by the lawyers are due, on the one hand, to the inexperience of the penal judges in dealing with civil claims, and, on the other hand, to the embarrassment of victims who do not want people to think they are taking action in the penal sphere to be able to receive compensation.

Throughout Switzerland, the cantonal counselling services are obliged to bear the costs of a lawyer for victims of sexual or violent offences, in as far as this is called for on the basis of the personal circumstances of the victim (s. 3-4 OHG). Victims of other types of offences must pay for a lawyer themselves. Regarding legal practice in the canton of Zürich, no help is provided by any of the legal authorities with filing and substantiating the claim for compensation. The police have no involvement whatsoever in compensation, nor does the prosecutor feel in any way responsible for assisting the victim in this respect.

To give an impression of the amount of compensation and reparation awarded by the courts in Zürich: in a case reported in the papers in January 1997 involving sexual offences and attempted murder, the victim was awarded US$ 103,600 (CHF 140,000) in damages (Schadenersatzforderung) and US$ 51,800 (CHF 70,000) in reparation (Gentegtuung) by the jury court. By comparison, a claim for state compensation must be for a minimum of US$ 370 (CHF 500) and may not exceed US$ 74,000 (CHF 100,000) (s. 4 OHV).

Barring these general remarks, very little information is available about the awarding of compensation in adhesion to the criminal proceedings in practice. It is as yet unknown, for example, whether the option of dealing separately with the criminal and the civil aspects

---

120 The 'personal circumstances' of the victim include not only his financial situation but also his physical and mental health, command of languages and level of education, complexity of the facts of the case, size of the victim's claim, behaviour of the offender or his insurance, lack of other cost centres such as insurance against legal costs, the chances that the claim will be awarded, and the social circumstances of the offender and whether or not the latter has a lawyer. See Gomm, Stein and Zehntner's commentary on the Victim Support Act (1995), p. 83. Other costs to be refunded by the cantonal counselling service include medical expenses and further legal expenses (s. 3-4 OHG). See, for Zürich, R. Banti Keller, U. Weder and K. Meier, 'Anwendungsprobleme des Opferhilfegesetzes', in: Plädoyer, 5/95, pp. 30-44, pp. 32-33.
121 Information provided by Jakob Streuli, Kantonspolizei Zürich, 18 February 1998.
122 Information provided by Ulrich Weder, public prosecutor in, 18 February 1998.
123 Rate of exchange of 6 October 1998 of 0.74 US$ against one Swiss Franc. This particular case was reported in the New Zürcher Zeitung No. 15 of 20 January 1997, see R. Hauser (1997), p. 338.
of the case has the desired effect in practice.\textsuperscript{124}

\textbf{(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.

The compensation awarded by the criminal court is a decision on a matter of civil law. It is not a penal sanction, but may be awarded in addition to a penal sanction.

\textbf{(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 Victim Support Act does not concern itself with compensation as a financial condition for a deferred or suspended sentence, a probation order or any other measure. However, on the basis of the Swiss Penal Code, the judge may put the convicted person under supervision and attach certain conditions on his behaviour during the length of his probation. One of these conditions may be that he settles the damages within a certain period of time (s. 41-2 StGB).

\textbf{7.3 Enforcement of Compensation}

\textbf{(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.

\textit{Legislation}

The Victim Support Act does not go into the enforcement of compensation awarded to the victim in adhesion to the criminal proceedings. This is a procedural matter that is left to the individual cantons. However, on the federal level the Penal Code does contain two relevant sections. First of all, section 37-1 StGB determines that 'the enforcement of prison or detention sentences must have an educational impact on the prisoner and prepare him for his return to civilian life. Moreover, it must aim to make good the harm inflicted on the injured person.' Secondly, section 60 StGB provides that if someone suffers damages as a consequence of an offence or a misdemeanour, that is not covered by insurance, and it seems likely that the offender will not cover the damages either, the judge may at the request of the injured person award him a comparable amount from (a) the fine paid by the offender; (b) confiscated goods and valuables or their sale; (c) compensation claims, or; (d) bail money (s. 60-1 StGB), on the condition that the injured person transfers the corresponding part of his claim to the state (s. 60-2 StGB). In those cases where it is not possible to make the necessary arrangements already in the verdict, the cantons must arrange for simple and speedy proceedings (s. 60-3 StGB).

\textsuperscript{124} U. Weder (1995), p. 52. It is surprising that nothing is known about the effects that this option has had in the cantons of Schwyz, Aargau, Neuchâtel and Geneva, where it was already in existence before the Victim Support Act came into force.
Practice
There is no information available on how these provisions work in practice. It appears that neither the authorities nor the academics pay any attention as yet to the problems that victims may encounter in the collection of compensation awarded to them in the criminal proceedings. For victims of a sexual or violent offence, there is always the option of applying for cantonal compensation. Victims of other offences must go it alone.

In Zürich, the following procedure has been adopted in relation to victims of a violent or sexual offence who have been awarded compensation in adhesion to the criminal proceedings, and who have also applied for cantonal compensation. For cantonal compensation to be paid out, the victim must be able to show the Cantonal Victim Support Point of the Judicial Directorate (the body that administers cantonal compensation) that he, his lawyer or the counselling service has written to the offender at least once, summoning him to pay, but that the offender has not reacted. The Cantonal Victim Support Point will then summon the offender to pay the compensation, and if there is still no reaction, cantonal compensation is paid to the victim. Any payments that the victim may have received from the offender by way of compensation or reparation are deducted from the cantonal compensation (s. 14-1 OHG). The compensation and reparation claims that the victim has against the offender are transferred to the canton (s. 14-2 OHG). It should be noted that a victim of a violent or sexual offence may apply for cantonal compensation, even if he has not presented any civil claim in adhesion to the criminal proceedings. If no suspect has been apprehended, it is obviously impossible to do so. However, even in cases where a full criminal trial takes place, practical considerations may prevent civil claims from being presented. If it is obvious that the accused does not have a penny, then there is little point in employing an expensive lawyer to sit in court in pursuit of a claim that will never be paid. Cantonal compensation may be paid in advance if the victim is in need of immediate financial support, or if it is impossible to establish the consequences of the offence in the short term with sufficient certainty (s. 15 OHG).

8 Treatment and Protection

8.1 Training

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

Besides the cantonal police academies, there is also a central Swiss Police Academy in Neuenburg. Following the introduction of the Victim Support Act in 1991, the Swiss Police Academy organized a course on the new regulations concerning victims of crime. The course was attended by representatives of the cantonal police forces who were responsible for the further diffusion of the acquired knowledge regarding victims of crime in their respective cantons. In Zürich, this led to the introduction in 1993 of a two-hour training course on victims of crime in the basic training programme offered at the Zürich police academy. During this course, the victim support act is explained, and its implications for

---

125 Information provided by S. Stähelin, of the Judicial Directorate of Zürich, 17 February 1998.
126 For training of the Zürich cantonal police, see part III of the Dienstreglement für das Kantonspolizeikorps.
the position of the victim of crime. The police recruits are instructed on the victim’s rights, on compensation and reparation, and on the duties of the police towards victims, in particular the duty to refer victims of violent crime to a victim advice centre (see § 4.5 and further on legislation concerning the victim of crime, and 6.1 under A.2).

8.2 Questioning

(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.

Legislation: Victim Support Act
It is important to realize that in most of the Swiss cantons the main court proceedings are not conducted on the basis of the principle of immediacy or orality. Generally, the judge reaches his decision on the basis of the files, and all questioning of the witnesses takes place during the pre-trial, investigative stages.

With the introduction of the Victim Support Act, victims of a sexual offence may now request to be questioned by someone of the same sex throughout the investigative stages of the proceedings (s. 6-3 OHG). Victims of a sexual offence may also require that the court dealing with their case consists of at least one member of their own sex (s. 10 OHG). All victims covered by the Victim Support Act have the right to be accompanied by a person of confidence when they are being questioned as witness or informant (Auskunftsperson) (s. 7-1 OHG) and may refuse to answer questions touching on their private life (Intimsphäre) (s. 7-2 OHG).

The authorities must avoid a confrontation between the victim of a sexual and/or violent offence and the accused, if the victim so requests. They must accommodate the offender’s right to a fair hearing (rechtliches Gehör) in a different way. A confrontation may be ordered if the offender’s right to a fair hearing or a predominant interest of the criminal proceedings compellingly require so (s. 5-4 OHG), but where sexual offences are concerned, a confrontation may only be ordered against the will of the victim if the right of the accused to a fair hearing compellingly requires so (s. 5-5 OHG).

In relation to the questioning of children, it is left entirely to the individual cantons to make whatever arrangements they deem necessary. There are no special provisions for the questioning of handicapped persons.

Legislation: Zürich
During proceedings concerning an offence which has caused the victim physical, sexual or psychological harm, i.e., victims covered by the Victim Support Act, the victim may be accompanied by a person of confidence when questioned as a witness or source of information. Where a sexual offence is concerned, the victim must be questioned by a person of the same sex, if he so desires (s. 10-7 ZStPO). The injured person may only be questioned in as far as this is necessary to solve the case (s. 10-6 ZStPO).

127 Information provided by J. Streuli of the Youth and Sexual Offences Department of the Zürich cantonal police force, 18 February 1998.
In principle, the accused and his lawyer have the right to be present during the questioning by the investigating authorities of witnesses, informants and expert witnesses, and to ask them questions aimed at solving the case (s. 14-1 ZStPO). However, victims in the sense of the Victim Support Act may at their request be questioned without the presence of the accused. Where sexual offences are concerned, a confrontation may not be arranged against the will of the victim (s. 14-2 OHG). If the accused is excluded from participation in the questioning, he must be given the opportunity to follow the questioning by transmission in another room and to ask the victim additional questions from there. The accused’s lawyer may participate in the questioning and exercise his client’s rights (s. 14-3 ZStPO). The provisions of section 14-2 and 14-3 also have a bearing on the questioning of third persons where the presence of the victim is necessary in the interests of the criminal proceedings (s. 14-4 ZStPO). If it is not possible to adhere to section 14-1/2/3 ZStPO for compelling actual or legal reasons, the official report of the questioning must be read to the accused as soon as possible, and he must be asked whether he has particular additional questions he would like to ask. These must be noted down in the official report (s. 14-5 ZStPO).

The provisions of section 14 ZStPO also have a bearing on the questioning of third persons where the presence of the victim is necessary in the interests of the criminal proceedings (s. 14-4 ZStPO). If it is not possible to adhere to section 14-1/2/3 ZStPO for compelling actual or legal reasons, the official report of the questioning must be read to the accused as soon as possible, and he must be asked whether he has particular additional questions he would like to ask. These must be noted down in the official report (s. 14-5 ZStPO). Where the provisions of section 14 ZStPO have not been adhered to, the questioning of witnesses, informants or expert witnesses are void in so far as they contain incriminating evidence against the accused (s. 15 ZStPO).

Regarding the questioning of children, in Zürich children below the age of twelve are heard as informants rather than as witnesses (s. 149a ZStPO). The informant is not under the same strict obligations to speak the truth and to answer all the questions as the witness.

Practice

According to the lawyers interviewed for the second CETEL report, a fair number of victims asked to be questioned by someone of the same sex during the investigation, although there were differences between the four cantons examined for the report. Such a request was made most frequently in Neuchâtel, whereas it was not commonly made in Ticino. In Lucerne, where there were no female examining magistrates, the questioning of female victims had to be delegated to female clerks of the court. This meant that not only the trial judge, but also the examining magistrate, had to assess the credibility of the victim on the basis of the file. This development has been severely criticized. According to the judges and lawyers interviewed for the second CETEL report, they routinely informed victims of a sexual offence about their right to be questioned by a person of the same sex during the investigative stages. However, judges rarely inform such victims of their right to have at least one member of their own sex as part of the court dealing with their case. In Basel and Lucerne, this problem is compensated by the fact that someone of the same sex was included in the court automatically, whether the victim had asked for this or not. In Neuchâtel,
the court that dealt with a sexual offence included a member of the same sex as the victim, if the victim requested this.

Although the judges and lawyers more or less routinely informed victims of their right to refuse to answer questions about intimate private matters, victims rarely refused to do so.¹³⁴

In Basel, even before the Victim Support act came into force, it was standard practice to avoid any confrontation between the victim and the offender. A confrontation is only arranged if the victim agrees to this, in which case it is conducted in court. If the victim does not give his consent, the accused must leave the courtroom during the questioning of the victim. This sometimes causes problems if the accused is not represented by a lawyer who can be present during the questioning on behalf of his client. Across the cantons examined for the CETEL report, the investigating magistrates were of the opinion that it was quite well possible to conduct a satisfactory investigation without confronting the victim and the offender with each other.¹³⁵

8.3 Protection

(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.

Federal Legislation: Victim Support Act

Section 5 of the Victim Support Act deals exclusively with the protection of the privacy of the victim (Persönlichkeitsschutz) throughout the criminal proceedings. The three instruments offered by this section are the right to anonymity, the possibility to hold the trial in camera, and the duty of the authorities to avoid any unnecessary confrontations between the victim and the accused. This last instrument was dealt with in the previous section on questioning the victim. Regarding the right to anonymity, the authorities and private persons may only reveal the identity of the victim outside of a public court hearing if this is necessary in the interest of the criminal proceedings or if the victim agrees to this (s. 5-2 OHG). The right to anonymity aims to combat the previously common practice of the police and investigating authorities to announce the names and addresses of victims to the press.¹³⁶ The trial may be held in camera if predominant interests of the victim so require. Where sexual offences are concerned, the hearing must always be held in camera if the victim so requests (s. 5-3 OHG). The Victim Support Act does not impose any sanctions on non-adherence to these rules. However, an official who reveals the name and personal details of a victim without any justification is in breach of professional secrecy and may be prosecuted on the basis of section 320-1 StGB. Individuals and the press can only be called to account on the basis of private law.¹³⁷

Zürich legislation

The trial may be held in camera in the interests of a victim whose physical, sexual or mental integrity has been damaged, and must be held in camera at the request of a victim of a sexual offence (s. 135-3 GVG). The section adds that the (request for) an in-camera hearing may be limited to particular parts of the proceedings, or it may be decided that it has no bearing on the court recorder (Gerichtsberichterstatter). The condition that the identity of the victim may not be made public may be attached by the court to the admittance of the court recorder. The court must inform the victim of these opportunities at the beginning of the hearing (s. 135-4 GVG). The trial may also be held in camera to protect public security and public order, morals and decency, or interests of one of the parties (s. 135-5 GVG). If a trial is held in camera, every party may be accompanied by his legal representative and two confidantes. The court may order the accompanying persons to leave if their presence is unfair to one of the parties (s. 135-6 GVG).

Throughout the proceedings, in special circumstances the personal details of the victim are not made known to the accused, as long as this is not in conflict with the main interests of the criminal proceedings, section 19-3 ZStPO. Court proceedings against minors and young adults under the age of 20 are held in camera, as long as the proceedings are not directed against an adult. Injured persons may attend such a hearing but as a rule only in so far as their private claims are concerned (s. 372-1 ZStPO).

Practice

Bantli Keller, Weder and Meier remark that in practice, as before the introduction of the Victim Support Act, the prohibition to reveal the identity of the victim is insufficiently observed. They contend that if the right to anonymity were threatened by an explicit sanction, compliance would undoubtedly be greater.¹³⁸

(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.

Legislation: Victim Support Act

Section 5-2 OHG on the anonymity of the victim is aimed primarily at protecting the victim from the press and the public, rather than from the offender. The starting-point for this particular section was the presumption of the federal legislator that within the framework of the criminal proceedings, the identity of the victim is no secret. Those involved in the proceedings, which includes the offender, have access to the personal details of the victim. The section on anonymity aims to prevent the identity of the victim from becoming known beyond the context of the criminal proceedings.¹³⁹

Although the right not to be confronted with the offender gives the victim a small measure of protection against direct intimidation by the offender during the hearings, the Victim Support Act does not provide him with any form of protection prior to, or after, the hearings, for example in the form of protection or safety orders. This is a matter for the individual cantons. Nor does it give the victim a voice in relation to decisions on (a release from) custody (Haft) of the offender. The Victim Support Act does not provide him with an

official channel through which he can express any fears of retaliation by the offender upon his release.  

Legislation: Zürich

Section 58 ZStPO: A suspect may be remanded in custody to prevent him from fleeing (58-1.1), from removing tracks or evidence, persuading others to give false testimony or obstructing the course of justice in any other way (58-1.2), to prevent the notorious re-offender from committing further offences (58-1.3) or to prevent him from completing an offence he was in the process of committing when apprehended (58-2). The risk of intimidation of, or retaliation against, the victim can be taken into consideration on the basis of the above, but the victim does not have a voice in the custody proceedings. A certain degree of protection can be provided through a prohibition order (Weisung), which may be imposed on the suspect as an alternative measure (Ersatzanordnung) to preventive custody (s. 73-2 ZStP0). Such an order may prohibit the offender from going to his home or from entering certain areas. In practice such measures are rarely used at present.  

Legislation provides that the victim of a sexual and/or violent offence should be informed by the prison authorities of the commencement of the sentence or measure imposed on the offender, of his temporary release and of his final release, if the victim wants to receive this information. The offender is not to be told of this arrangement (s. 23-3 Kantonales Straf- und Vollzugsgesetz, StVG). Section 10-4 ZStP0 contains a similar provision for informing such victims of the release from (or taking into) custody of the accused during the early stages of the proceedings.

Practice

Although the original aim of the section on anonymity was to protect the victim from the press and the public, lawyers representing victims also ask that the identity of their client is kept from the offender to avoid retaliation, repeat offending or threats. In particular, these requests are made in relation to victims of sexual offences or child victims. The judges withhold the address of the victim if there is fear of retaliation. The personal details of the victim are noted down under a closed flap (plis ferme) which may only be accessed by the court.

Switzerland is unique in that it is a confederation of 26 autonomous cantons, each with its own legal system. Substantive criminal law is a federal matter, but criminal procedure is the prerogative of the individual cantons.

The victim of crime has been given a separate section in the Federal Constitution, and a legal right to support through the Victim Support Act of 1993. This federal act contains

---

140 For a review of custody in relation to violence against women see P. Dienst, 'Plädoyer für eine stärkere Stellung der Opfer von Gewalt und Sexualdelikten bei strafprozessualen Zwangsmassnahmen gegenüber dem Beschuldigten', February 1998 (at the time of writing awaiting publication in the Neue Zürcher Zeitung).

141 Information provided by U. Weder, public prosecutor in the canton of Zürich, 18 February 1998.

a package of provisions for victims of sexual and/or violent offences ranging from the support to be offered by counselling services, to procedural rights and state/cantonal compensation. The implementation of this act in the cantons is to be evaluated over a six-year period. This process of evaluation is a unique one.

There are significant differences in the position of the victim between the different cantons. We have concentrated mainly on the canton of Zürich. In this canton – as in most Swiss cantons – the main proceedings in a criminal trial are rarely oral and the accent lies strongly on the pre-trial, investigative stages. In some respects, Zürich has gone further than strictly required by the federal Victim Support Act – or Recommendation R (85) 11 of the Council of Europe – in its translation into its own legislation of rights and services for the victim. Within Switzerland, it is one of the frontrunners, although many improvements can still be made regarding the putting into practice of the provisions. In an international context, the criminal procedure of Zürich is comparable to that of Germany and Liechtenstein. One significant difference regarding the position of the victim is that in Zürich, in contrast to Germany and Liechtenstein, the victim's right to information does not depend on whether he has made a claim for compensation. Particular mention should also be made of the institution of judicial review for a discretionary decision not to prosecute, which has replaced the right to private prosecution in the canton of Zürich. This development, which has also been signalled in France, is a sure sign of sophistication (see chapter 26 under B.7), and one the researchers recommend for all jurisdictions. Special mention should also be made of the right of the victim of a serious sexual or violent offence to be questioned by a judge of his or her own gender.
Supplements

ABBREVIATIONS:

BGE - (Official Collection of the Decisions of the Federal Supreme Court)
BSStP - Bundesgesetz über die Bundesstrafrechtspflege (Federal Code of Criminal Procedure)
CCP - Code of Criminal Procedure
CETEL - Centre d'étude, de technique et d'évaluation législatives
CH - Swiss Confederation
CHF - Swiss Franc
ECHR - European Court of Human Rights
EDJP - Eidgenössische Departement für Justiz und Polizei (Federal Department for Justice and Police)
EEA - European Economic Area
EFTA - European Free Trade Association
EU - European Union
FC - Federal Constitution
FCCP - Federal Code of Criminal Procedure
GVG - Gerichtsverfassungsgesetz (Constitution of the Courts Act)
KV - Kantonsverfassung
MStP - Militärstrafprozess (Military Code of Criminal Procedure)
no. - number
OBG - Bundesgesetz über Ordnungsbussen im Strassenverkehr (Federal Act on Petty Traffic Fines)
OBV - Verordnung über die Ordnungsbussen im Strassenverkehr (Regulation on Petty Traffic Fines)
OG - Bundesgesetz über die Organisation der Bundesrechtspflege (Federal Code on the Judiciary System)
OHG - Opferhilfegesetz (Victim Support Act)
p. - page
pp. - pages
RS - Rechtsprechung in Strafsachen (Case-law in Criminal Cases)
s. - section
StGB - Schweizerisches Strafgesetzbuch (Swiss Penal Code)
StVG - Gesetz über das kantonale Strafrecht und den Vollzug von Strafen und Massnahmen (Act on Cantonal Criminal Law and the Enforcement of Punishments and Measures)
SVK-OHG - Schweizerische Verbindungsstellen-Konferenz – Opferhilfegesetz (Swiss Liaison Conference on Victim Support)
SZPB - Schweizerisches Zentralpolizeibüro (Central police office)
UN - United Nations
UNESCO - United Nations Educational, Scientific and Cultural Organization
US$ - American Dollar
v. - versus
vol. - volume
VStA - Verordnung über die Staatsanwaltschaft (Regulation on the Public Prosecutor)
VStR - Bundesgesetz über das Verwaltungsstrafrecht (Administrative Penal Code)
<table>
<thead>
<tr>
<th>VZu</th>
<th>Verordnung über die Zuständigkeit im Jugendstrafverfahren (Regulation on the Competence in Juvenile Criminal Proceedings)</th>
</tr>
</thead>
<tbody>
<tr>
<td>WBA</td>
<td>Weisungen der Staatsanwaltschaft für die Untersuchungsführung (Instructions of the Public Prosecutor on the Investigation Proceedings)</td>
</tr>
<tr>
<td>ZGB</td>
<td>Zivilgesetzbuch (Swiss Civil Code)</td>
</tr>
<tr>
<td>ZR</td>
<td>Blätter für die Untersuchungsführung (Journal for Zürich Case-law)</td>
</tr>
<tr>
<td>ZStPO</td>
<td>Zürcher Strafprozessordnung (Zürich Code of Criminal Procedure)</td>
</tr>
<tr>
<td>ZStR</td>
<td>Schweizerische Zeitschrift für Strafrecht (Swiss Journal for Criminal Law)</td>
</tr>
</tbody>
</table>

**BIBLIOGRAPHY:**


Bundesamt für Statistik/Office fédéral de la statistique (1997), Rechtspflege/Droit et justice;


Dienst, P. (February 1998) 'Plädiyer für eine stärkere Stellung der Opfer von Gewalt und Sexualdelikten bei strafprozessualen Zwangmassnahmen gegenüber dem Beschuldigten' (at the time of writing awaiting publication in the *Neue Zürcher Zeitung*);


Kuhn, A. (1993), L'aide aux victimes en Suisse, Lausanne;

Maurer, T. (1993), 'Das Opferhilfegesetz und die kantonalen Strafprozessordnungen', in: ZStR 111, pp. 375-396;

Piquerez, G. (1994), Précis de Procédure Pénale Suisse, Lausanne;

Raselli, N. (1997), 'Die Reform des Bundesrechtspflege darf nicht scheitern', in: Plädoyer, 5/97, pp. 36-43;


Schmoll, G.A. (1990), (Herausgeber), Geschichte der Schweizer Polizei/Histoire de la Police en Suisse, Band 1, Ursprünge und Traditionen, VBP Verlag Bürger und Polizei, AG Muttenz BL;


**Circulars and forms:**
Bezirksanwaltschaft I für den Kanton Zürich (14. Juli 1997), Geltendmachung von Verfahrensrechten als Opfer;
Bezirksanwaltschaft I für den Kanton Zürich, Wichtige Hinweise für Opferbefragungen;
Direktion der Justiz des Kantons Zürich Opferhilfe, Gesuch um finanzielle Leistungen (form);
Kantonspolizei Zürich, Merkblatt zur Opferhilfe (form);
Kantonspolizei Zürich, Orientierung des Opfers/Meldung an Beratungsstelle (form);
Staatsanwaltschaft des Kantons Zürich, Kreisschreiben vom 14. Januar 1998 an die Bezirksanwaltschaften im Kanton Zürich, Vorgehen bei Kindsmisshandlungen;

**WITH MANY THANKS TO:**
Yann Boggio, University of Geneva;
Pierre Dienst, Haftrichter Zürich;
Daniel Fink, Bundesamt für Statistik;
Marc Hauser, Weisser Ring Switzerland;
Martin Killias, Professor at the University of Lausanne;
Andrea Maeusli, Fürsorgedirektion Bern
Robert Roth, Professor at the University of Geneva;
Suzanne Stähelin, Justizdirektion Zürich;
Jakob Streuli, Kantonspolizei Zürich, Jugendstrafrecht/Sexualdelikte
Ulrich Weder, Staatsanwalt Zürich;
Kurt Weirich, Weiser Ring Switzerland;
Ernst Zürcher, Fürsorgedirektion Bern.