

# **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**

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# Summary

## INTRODUCTION

This study is an analysis of the position of the victim of crime in 22 European criminal justice systems. The guiding light throughout the study is Recommendation (85) 11 of the Council of Europe on the position of the victim in the framework of criminal law and procedure. This Recommendation contains guidelines on the way the victim of crime should be treated by the criminal justice authorities in the course of criminal proceedings against the offender. It focuses on three key issues, namely *information*, *compensation*, and *treatment and protection*. The study examines the implementation of the body of thought contained in the Recommendation in 22 jurisdictions that were all a member of the Council of Europe when the Recommendation was first adopted in 1985.

## CHAPTERS 1 AND 2: COMPARATIVE FRAMEWORK AND METHODOLOGY

The comparative framework of the study is established in the first two chapters. *Chapter 1* focuses on the Recommendation. It opens with a general introduction to the study and then continues with a brief description of the Council of Europe, its history and aims, and the historical context within which the Recommendation should be viewed. This is followed by an analysis of the body of thought encompassed by the Recommendation, and its tacit and explicit premises and presuppositions. Four conspicuous features catch the eye. First of all, the guidelines of the Recommendation appear to be simple and basic rules. However, closer analysis reveals that they form a package of ambitious targets that are quite difficult to achieve. This observation is confirmed in the course of the study. None of the jurisdictions involved have, as yet, managed to fully implement the Recommendation. A second striking feature is the neutrality of the Recommendation. It is designed to suit a variety of criminal justice systems based on different legal traditions. Thirdly, the Recommendation embodies a dual line of action, namely the improvement of the procedural position of the victim and the prevention of secondary victimization. Finally, the Recommendation advocates providing both rights and services to the victim.

Chapter 1 closes with an examination of the conceptualization of the victim. It is striking that in criminal proceedings the victim is generally redefined in a particular role such as that of complainant, civil claimant, private prosecutor or witness. In many jurisdictions, the word 'victim' does not even feature in legislation. Painful is the situation in which the victim is regularly viewed as an *alleged* victim by the criminal justice authorities.

In *Chapter 2*, the 22 criminal justice systems are drawn into the comparative framework using the concept of local realities. Each legal system is embedded in historical, political, cultural

and socioeconomic surroundings that affect the way it works. Internal dynamics such as the nature of the legal system, the governing principles and procedures, the sources of law and legal traditions also influence the functioning of the system. These external and internal elements together form the local reality.

Having highlighted the different elements of the local realities, Chapter 2 continues with a description of the methodology used in this study. The study was conducted in four stages. In the inception stage, the aim of the study and the objectives of comparison were developed. The aim is two-fold: first of all, to acquire knowledge of the state of affairs in the different member states of the Council of Europe regarding the legal rights of, and opportunities for, victims of crime within criminal proceedings; and secondly, to assess the impact of the range of thought of the Recommendation. These two elements are translated into the following five concrete objectives of comparison or research questions: first of all, have the jurisdictions formally implemented the guidelines contained in the Recommendation; secondly, if so, by what means; thirdly, has formal implementation also led to actual implementation; fourthly, if so, how has this been achieved; and, finally, how effective is the implementation. Key notions here are *formal* and *actual* implementation. Formal implementation refers to the law-in-the-books, whereas actual implementation refers to the law-in-action. Besides establishing the aim of the study and the objectives of comparison, the choice for a thematic approach along the lines of information, compensation, and treatment and protection was also made in the inception stage.

The second stage of the study involved data collection. The 22 jurisdictions were divided among the two researchers on the basis of language proficiency. To examine not only the law-in-the-books, but also the law-in-action, fieldwork was conducted in each jurisdiction. Primary and secondary sources of law were consulted and face-to-face interviews conducted with representatives of the different criminal justice agencies and partners, Victim Support, researchers and academics. Furthermore, local surveys, (socio)legal and criminological research as well as statistics were drawn on where available. Finally, personal observations were made about courtroom practices and routines.

Stage three involved the writing of the reports on the individual criminal justice systems. Each report commences with a section entitled 'scenery', which describes the external elements of the local reality that are significant for the way the legal system in that country works. Part I of each report then examines the internal dynamics of the criminal justice system and the roles that the victim may play within that system. Part II of each report contains an inventory of the formal and actual implementation of Recommendation (85) 11 in that jurisdiction on the basis of the three themes. The reports on the individual member states are laid down in *Chapters 3-24*.

In stage four of the study, the comparative analyses on information, compensation, and treatment and protection were made, and the conclusions drawn. The analyses and conclusions on the three themes are given in *Chapters 25, 26 and 27*, respectively. The most important conceptual tool used in these chapters is the *developmental scheme*. This is a scheme that reflects all the different stages of development that the individual jurisdictions find themselves in regarding the implementation of (an element of) one of the guidelines of the Recommendation. Besides providing an overview of the rate of implementation of a given guideline, the developmental schemes also allow for easy comparison of the individual jurisdictions. In addition, the schemes can be used as a guide to successful implementation of the Recommendation.

## CHAPTERS 3-24: THE 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS

The implementation of Recommendation (85) 11 is examined in *Austria, Belgium, Cyprus, Denmark, England and Wales, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Switzerland (Zurich) and Turkey*. Some of the jurisdictions, in contrast to others, are affluent, modern and economically powerful countries. Populations also vary from a mere 32,000 in Liechtenstein to 64,479,000 in Turkey. The legal systems include members of both the *civil law*, *common law* and *Nordic* legal families. These systems have developed in diverse legal traditions, and as a consequence there are significant differences in their approach to victims of crime within the framework of criminal law and procedure. On a procedural level, the opportunities for the victim to participate actively in the criminal proceedings have always been much more extensive in the civil law and Nordic jurisdictions than in the common law ones. The 'partie civile', or 'Adhäsionsverfahren', which is wide-spread on the continent, is unknown in the common law jurisdictions which have, instead, introduced the compensation order. Characteristic of the Nordic jurisdictions is the right of victims of serious sexual and other violent offences to a state-paid lawyer which is a construction not found (on the same scale) in other jurisdictions. On an executive level, the local realities of the legal systems on occasion prompt them to adopt different solutions to similar problems. In the reports on the individual jurisdictions, each system is judged according to its own merits and viewed against the background of its own local reality.

## CHAPTERS 25-27: COMPARATIVE ANALYSES AND CONCLUSIONS

In *Chapters 25, 26 and 27*, the focus on the individual jurisdictions is exchanged for a comparative, supra-national one. In the three chapters on information, compensation, and treatment and protection respectively, the performances of the jurisdictions are cumulatively held against the measuring rod of the developmental schemes. All levels and methods of implementation are laid beside each other. This not only allows for a comparison of rates of success or failure in implementation in the individual jurisdictions, but also for a critical examination of the guidelines themselves viewed in the light of legal practice. Examples of worst and best practice surface, and general and specific problems and solutions are isolated. Each chapter culminates in a table providing an overview of the rate of implementation of the respective guidelines in all the jurisdictions. Implementation is either 'poor', 'in compliance with the Recommendation', 'good' or 'very good'. The tables demonstrate that some guidelines have been widely implemented, whereas others have only occasionally been implemented. The three chapters containing the comparative analyses aim to isolate the reasons behind the relative success or failure, and to provide a variety of solutions to existing problems, taking into account the local realities.

## CHAPTER 28: CONCLUSIONS

In the final chapter, an overview is given of the most significant findings of this study. The overall rate of implementation of the guidelines of Recommendation (85) 11 is disappointing. In 85% of the jurisdictions, the police provide the victim with general information concerning

his rights and interests. In 18% of the jurisdictions, the victim stands a fair chance of being informed about the final decision concerning prosecution. Twenty-seven per cent of the criminal justice systems have set up standard procedures to notify victims of the date and place of a hearing concerning an offence which caused them suffering. Regarding compensation, the main conclusion is that the compensation order is significantly more successful than the adhesion procedure in as far as the awarding and actual receiving of compensation from the offender is concerned. Another clear result is that the private prosecution is an antiquated institution that should be supplemented with, or even replaced by, the right to judicial review of a decision to discontinue a prosecution. Significant is furthermore that 59% of the jurisdictions fail to train the police adequately on how to deal with victims. Fifty per cent of the jurisdictions have limited repetitive questioning of vulnerable victims as much as possible. Reforms to limit the disclosure of personal details of the victim in the media have been established in 36% of the jurisdictions, and in 18% victims are informed of (early) release dates of the offender.

Regarding the performance of the individual jurisdictions, league tables are drawn up for the category 'best fulfilment of the obligation of means', 'best practice on the basis of genuine progress indicators' and 'best practice on the basis of implementation ratings'. Best fulfilment of the obligation of means is established on the basis of the number of victim-oriented reforms, measures and policies that have been introduced between 1985 and 1999 which have significantly improved the position of the victim. The jurisdictions that come out top in this category are *Belgium, England and Wales, France, Ireland, the Netherlands* and *Sweden*. Best practice on the basis of genuine progress indicators looks at the occurrence of measures that indicate true sophistication, as established in the Chapters 25, 26 and 27. Top in this group are *England and Wales, the Netherlands and Sweden*, followed closely by *Zurich (Switzerland)*. Finally, in the category of best practice on the basis of ratings, *the Netherlands* has achieved the best score, followed by *England and Wales, Norway* and *Belgium*. To summarize, best overall practice in relation to the standards set by the Recommendation has been achieved in *England and Wales* and in *the Netherlands*. On average, *Malta, Greece, Cyprus, Italy* and *Turkey* score the poorest.

Chapter 28 culminates in a set of practical recommendations for a better implementation of Recommendation (85) 11 and a list of general recommendations.



# Chapter 1

## Recommendation (85) 11 and Victims of Crime

### 1 INTRODUCTION TO A COMPARATIVE STUDY

On 28 June 1985, the Committee of Ministers of the Council of Europe adopted Recommendation (85) 11 on The Position of the Victim in the Framework of Criminal Law and Procedure, as part of its campaign to improve the treatment of victims of crime and to reduce instances of secondary victimization. To this end, the 1985 Recommendation contains 16 guidelines for the way the police, prosecution service and courts of the member states of the Council of Europe should deal with victims of crime. The Council of Europe, however, does not consider the implementation of the Recommendation to be the final answer and realizes that more needs to be done: it is part of a long-term campaign to improve the position of victims within the framework of criminal law and procedure. The Council ends the Recommendation with the advice to undertake further studies in this field. In the past, research has been at the origin of a re-discovery and re-evaluation of the role of the victim, and has identified important gaps in the protection of the victim's interests in traditional systems of criminal justice. For the future, the Council of Europe considers it necessary to study the effects of new measures and policies. In particular, it recommends that member states encourage comparative research on practical consequences of different solutions in the different legal systems.

The Dutch Ministry of Justice has taken this advice to heart. Over the years, it has taken a number of initiatives in the area of both international victim surveys and the advancement of the victim's rights in a supra-national perspective.<sup>1</sup> Nearly a decade after the Recommendation was issued, Tilburg University, supported by the Dutch Ministry of Justice, launched a comparative study to examine the implementation of the 1985 Recommendation in those states that were a member of the Council of Europe when the Recommendation was first adopted. The requirement of membership at the time of issuing (1985) is, first of all, applied because these 22 member states were involved in the formulation and adoption of the Recommendation. Second, the requirement is adopted in order to safeguard equal terms of comparison regarding the degree of implementation of the Recommendation. It would

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<sup>1</sup> C.D. Spinellis, A. Chaidou, T. Serrasis, 'Victim theory and research in Greece', in: G. Kaiser, H. Kury, H.J. Albrecht, *Victims and criminal justice*, Freiburg im Breisgau, 1991, p.128.

be difficult, if not impossible, to compare criminal justice systems of member states which would have had the opportunity to ensure compliance over more than a decade with those that only recently joined the Council of Europe.<sup>2</sup> As a result, a total of 22 jurisdictions<sup>3</sup> are involved in the study to map out the efforts being made to implement the guidelines of Recommendation (85) 11.<sup>4</sup>

The aim of the study is, first of all, to acquire knowledge on the state of affairs in the different member states: the legal rights of, and opportunities for, victims of crime within criminal proceedings. A second purpose of the underlying study is to make a cross-national analysis of the implementation of Recommendation (85) 11, or, at least, of its range of thought, in the laws and regulations as well as legal practices of individual member states.

The necessity of a broader perspective for impact analysis, i.e., that of the Recommendation's body of thought rather than the Recommendation *sec*, was soon felt because it proved impossible to detect a direct and clear relation of cause and effect between the issuing of victim-oriented laws, guidelines or policies, and the Recommendation.<sup>5</sup> Where reforms have been inspired by the Recommendation, it is hardly ever explicitly referred to. The relation between reforms and the Recommendation can, however, be construed on the basis that its standards are a reflection of a universal agreement among nations. The Recommendation is not only a reflection of a regional western European consensus regarding the position of victims of crime and their basic rights, but also of a global accord, as laid down in the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (see § 3).<sup>6</sup>

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<sup>2</sup> Today, the Council of Europe consists of 41 member states. It could be argued that compliance should have been studied in all these member states. The member states who joined the Council of Europe went through the process of reviewing their legal system in the light of the obligations as new members. However, we feel that there are two main arguments against including all present member states. First, the new member states were not involved in the drafting of the Recommendation. Second, these states had far less time to adapt their criminal justice systems to the standards set in the Recommendation in comparison with the 22 included jurisdictions. Each of these had the same period of time to ensure compliance (1985-mid 1999).

<sup>3</sup> Austria, Belgium, Cyprus, Denmark, England and Wales, France, Germany, Greece, Iceland, Italy, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Switzerland and Turkey.

<sup>4</sup> The number of countries compared could be faulted as being too large. Covering 22 jurisdictions in the course of one study leads to a different type of analysis than a comparison of two or three jurisdictions adhering to the same legal system and culture. However, comparing 22 jurisdictions is a unique opportunity to study the implementation of an international instrument in a wide range of criminal justice systems (including common law, civil law and the Nordic systems, as well as adversarial and inquisitorial criminal justice processes) which vary not only in size, but are also coloured by different political, historical, cultural and socioeconomic and demographic circumstances. Where possible the effects of such local realities are included in the study (see Chapter 2, and the Chapters 3 to 24). Furthermore, a study conducted in 22 jurisdictions enhances the knowledge of various aspects of criminal proceedings in criminal justice systems that are, as a rule, not included in comparative research.

<sup>5</sup> Such a relation could only be established if we were able to distinguish between the impact of this one instrument and the impact of other possible factors of influence, e.g. public discussion or pressure to improve the position of victims, or other (inter)national instruments.

<sup>6</sup> Another hypothesis for the great similarities between the Recommendation and the Declaration is that, given the drafting process of international instruments, a small group of experts have simultaneously though the Council of Europe and the United Nations to establish what the

The assessment in this study of the impact of Recommendation (85) 11 and its underlying range of thought, is primarily based on the following fundamental questions. Did the body of thought included in the Recommendation influence:

- (1) the provision of information to victims;
- (2) the opportunities of the victim to receive compensation from the offender (or the state);
- (3) the treatment and protection of victims by the criminal justice authorities?

And if so, in what way did it influence the law in the books and the law in action?

These questions are reflected in our thematic approach. The main themes throughout the study are: 1) information, 2) compensation, and 3) treatment and protection. The main advantage of a thematic approach is that it allows for a more structured analysis. The composition of the Recommendation is not as systematic as it seems at first glance. It follows, on the one hand, the stages of the criminal process, but on the other hand it includes elements which are common to all stages of the proceedings. A thematic approach thus not only avoids irksome repetitions of descriptions and arguments, it also permits us to concentrate on the dominant issues (see Chapter 2, § 3.1.2).

Answers to the questions are sought by studying formal and actual implementation of the Recommendation. The term formal implementation is used to refer to the law in the books (the existence of legislation, guidelines, internal circulars or policy agreements). Actual implementation refers to the law in action, or the realization of its standards in day-to-day legal practice. The formal and actual implementation in each jurisdiction is assessed in the country reports (Chapters 3 through 24). The final analysis of implementation of the Recommendation in a comparative perspective is presented in the concluding chapters (Chapters 25 through 27: Information, Compensation, and Treatment and Protection: Comparative Analysis and Conclusions).<sup>7</sup>

Before discussing the content of Recommendation (85) 11 and the conceptualization of the victim of crime, we will describe the Council of Europe's organization and functioning, as well as the status of its conventions and recommendations.<sup>8</sup> Furthermore, we will assess the relation between the 1985 Recommendation of the Council of Europe and the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

## 2 THE COUNCIL OF EUROPE AND RECOMMENDATION (85) 11

The Council of Europe is an intergovernmental European organization. It was established by ten states in the wake of the Second World War, with the signing of its Statute in London on 5 May, 1949. The treaty came into force on 3 August of the same year, heralding the

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appropriate standards for the treatment of victims are in criminal proceedings. Nevertheless, due to the fact that their proposals were accepted by their member states, these standards can be considered to be a reflection of a body of thought that is accepted and promoted on a universal scale.

<sup>7</sup> For the comparative analysis, we used *developmental schemes*. For a detailed description of the developmental schemes, see Chapter 2, § 3.4, and the brief introduction in Chapter 25.

<sup>8</sup> See M. Joutsen, *The role of the victim in of crime in European criminal justice systems*, Heuni, Helsinki, 1987, pp. 69-71.

advent of the first European political organization which would pursue peace, based upon justice and international cooperation. The Council of Europe has no organic links with the European Union. In contrast to the European Union, which has as its primary goal the enhancement of a durable economic and social progress by creating a supra-national territory without frontiers, the Council of Europe's main objective is to strengthen democracy, human rights and the rule of law. According to the Council of Europe's Statute, it strives to achieve greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage, and facilitating their economic and social progress (art. 1 Statute). The promotion of these fundamental values is a shared and collective responsibility of the member states. To this end, cooperation among its member states is organized in, inter alia, the fields of human rights, law, public health and socio-economics.

Since 1949, many countries have joined the Council of Europe. Currently, 41 states have acceded to the Council (1999). The main condition for joining is that states must accept the principles of the rule of law, and that all persons within their jurisdictions must enjoy human rights and fundamental freedoms. Furthermore, they should be willing to collaborate sincerely and effectively in the realization of the aim as specified in article 1 of the Statute (art. 3 Statute). The first and foremost concern of member states of the Council of Europe should therefore be the protection and promotion of the individual, his liberties and rights.<sup>9</sup>

The activities of the Council of Europe revolve around the harmonization of the policies of its member states. It brings together parliamentarians, ministers, government experts, local and regional elected members in order to share their expertise and experience with the goal of encouraging the acceptance of common practices and standards. This aim is pursued through the bodies of the Council by discussing matters of common concern, by forging agreements and common plans of action in, inter alia, legal matters (art. 1 Statute). There are three main bodies within the Council of Europe. The Parliamentary Assembly is the deliberative body, the Congress of Local and Regional Authorities of Europe is the body for local democracy, and finally the Committee of Ministers is the decision-making body. All three bodies are served by the International Secretariat.<sup>10</sup> The Committee of Ministers, made up of the Ministers of Foreign Affairs of the member states, is the executive body of the Council of Europe and in this context the most important one.<sup>11</sup> In its realization of the aim to adopt agreements and common standards, the Committee may employ several instruments such as the conclusion of conventions and the adoption of recommendations.

<sup>9</sup> In a larger political context the Council has acted, and still acts, as a feeding ground for the grand unifying movements of Europe. It sees itself as 'the general framework of European Policy' and although it is not the formal creator of the various European organizations that have emerged since the Second World War, many of the founding concepts of those organizations originated within the Council. See the 1949 Resolution of the Consultative Assembly and L. Marchal, *Le Conseil de l'Europe*, European Yearbook, vol. 1, 1955, p. 56.

<sup>10</sup> The Secretariat consists of a Secretary-General, a Deputy Secretary-General and staff. Its task is to serve the Committee of Ministers, the Consultative Assembly and the various Conferences of Specialised Ministers. It is located in Strasbourg, France, the seat of the Council of Europe. See art. 36 of the Statute.

<sup>11</sup> It has law-making powers, although often the main political stimulus for the work of the Committee is provided by the Council's Parliamentary Assembly. Its representatives are elected or appointed by the national parliaments from among their own members. In addition to holding public debates on major issues of European unification, the Assembly promotes cooperation among member states by proposing recommendations to the Committee of Foreign Ministers. See the articles 13 and 14 of the Statute.

The actual texts of the conventions are drawn up by Select Committees of Experts. The members of these committees are appointed by the governments of member states, based on their expertise on a particular subject. The ensuing drafts are then adopted by the Committee of Ministers, under whose authority the Select Committees reside. The formal approbation by the Committee of Ministers alone does not give conventions force of law. It requires the ratification by its member states.<sup>12</sup> Ratification is at the sole discretion of the member states. Probably the most important Convention that has ever been drafted by the Council of Europe is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which founded the European Court of Human Rights. The decisions of the European Court of Human Rights can be enforced by the Committee of Ministers. Other important conventions include the European Social Statute, and the Convention for the Prevention of Torture. For issues that do not lend themselves to conventions, the Committee of Ministers adopts recommendations to governments on what line of action to take.<sup>13</sup> It is important to note that, contrary to conventions, the recommendations of the Council of Europe have no force of law, and are not binding on its member states. At the very most, member states can be said to have a moral commitment to comply with the recommendations. Nonetheless, the Committee of Ministers can exercise some pressure by making use of its right to request the member governments to inform it of the action taken with regard to such recommendations.<sup>14</sup> To date, no such action has been undertaken regarding Recommendation (85) 11.<sup>15</sup>

Recommendation 85 (11) of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure is a clear exponent of the grand underlying aim of the activities of the Council of Europe: the consolidation of human rights. It should be placed in the larger framework of attention given to crime and the victims by the Council of Europe over the years. In 1981, the European Committee on Crime Problems (*Le Comité européen pour les problèmes criminels*: officially referred to as CDPC) decided to create a Select Committee of Experts on the victim and criminal and social policy. The Select Committee has a threefold task:

- (1) elaboration of a European convention on compensation of victims of crime;
- (2) subsequent examination of the victim's position in the framework of criminal law and procedure;
- (3) examination of the problems of victimization as a whole and, among other things, of victimization prevention and victim assistance programmes.<sup>16</sup>

<sup>12</sup> Art. 2 (iv) Resolution adopted by the Committee of Ministers May 1951.

<sup>13</sup> Art. 15 Statute.

<sup>14</sup> Art. 15(b) Statute.

<sup>15</sup> The United Nations, however, has undertaken action to evaluate the implementation of the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (see § 3). In 1994, the Vienna UN Office requested its member states to fill out a questionnaire on the implementation of the Declaration. Even though this is a very good initiative, such an evaluation has certain disadvantages, for instance (1) the questions are not always suitable to describe implementation in a jurisdiction, (2) the questions lack specificity; and (3) the answers depend on who is completing the questionnaire: his profession (e.g. is he an official at the Ministry of Justice or an outsider) and his critical appreciation of the position of victims within criminal law and procedure, or lack thereof.

<sup>16</sup> Report of the European Committee on Crime Problems (CDPC), *The Position of the victim in the framework of criminal law and procedure*, prepared by the Select Committee of experts on the victim and criminal and social policy, Strasbourg, 1985, p. 13.

The three assignments have resulted in a package of conventions, resolutions and recommendations aimed at alleviating the predicament of the victim of crime (see Annex). The first step of the Select Committee was to draw up the Convention on the Compensation of Victims of Violent Crimes, which was opened for signature by member states on 24 November 1983. In the same year, the Select Committee embarked on the second stage of its activities. It produced a draft recommendation, together with a draft explanatory report, on the position of victims within criminal law and procedure. In June 1985, the Committee of Ministers adopted the Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure and authorized the publication of the report.

In the general considerations of the explanatory report, the victim's role in the traditional criminal justice system is described as secondary to its main objective: the state's action with respect to the offender. The point of departure of R (85) 11 is, however, that a criminal justice system should do justice to the interests of the victim without undermining the other objectives of the system such as the upholding of social norms, the rights and rehabilitation of offenders, and the possible reconciliation between the victim and the offender.<sup>17</sup> In other words, the criminal justice system should safeguard the rights and interests of all parties concerned. At the same time, any further suffering of the victim caused by the criminal justice system should be reduced to the absolute minimum. The Recommendation calls for improvements in national legislation, such that the criminal justice system could take more fully into account the wrongs suffered by the victim. Legislation of the member states should give special consideration to physical, psychological, material or social damage at every stage of the proceedings.<sup>18</sup>

### 3 RECOMMENDATION (85) 11 AND THE 1985 UNITED NATIONS DECLARATION

The Council of Europe is not the only supra-national organization that has undertaken initiatives to improve the position of victims of crime in criminal law and procedure. In the same year, the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration is a resolution of the General Assembly of the United Nations (Resolution nr. 40/34). It was adopted on 29 November 1985 by the General Assembly, just a few months after the Committee of Ministers of the Council of Europe adopted Recommendation (85) 11. The General Assembly is the main deliberative organ of the United Nations. Under the UN Charter, the functions and powers of the General Assembly include the right to initiate studies and adopt declarations to promote the realization of human rights. While the decisions and declarations of the General Assembly have no legally binding force for governments, they carry the weight of world opinion as well as the moral authority of the world community. The declarations of the General Assembly are important international instruments because they are adopted by consensus and contain a common standard of achievement for its member states.<sup>19</sup>

The obvious question whether the Declaration is influenced by the Recommendation,

<sup>17</sup> Report of the European Committee on Crime Problems (1985), p. 16.

<sup>18</sup> Report of the European Committee on Crime Problems (1985), pp. 15-16.

<sup>19</sup> United Nations, *Basic Facts about the United Nations*, UN Publications, New York, 1998, pp. 6-8, 218 and 223.

or vice versa, cannot easily be answered. Neither text, nor the preparatory reports contain any reference to the other. The individual guidelines of Recommendation (85) 11 of the Council of Europe show considerable overlap with the provisions of the UN Declaration dealing with victims of crime (see § 1).<sup>20</sup>

The choice to study the implementation of the 1985 Recommendation of the Council of Europe, and not the implementation of the UN Declaration, is basically influenced by three important differences.

First, the design of the guidelines contained in the two international instruments differs. The guidelines laid down in Recommendation (85) 11 are more concrete and specific than those in the UN Declaration, making them easier to apply for individual states. According to Joutsen, '(t)he strong practical orientation of the work on this Recommendation as well as the intensive cooperation of decision makers from Member States of the Council of Europe imply that it may have a more immediate and direct effect on the operation of the criminal justice systems of these Member states than is the case with, correspondingly, the United Nations Declaration and the Member states of the United Nations.'<sup>21</sup> The fact that the Council of Europe's Recommendation is designed for immediate implementation in practice can also be derived from the fact that it urges member states to review their legislation and practice in accordance with a set of sixteen guidelines.<sup>22</sup>

A second difference concerns the number of member states. The relatively limited number of member states of the Council of Europe at the time of the issuing of the Recommendation permits a study of every jurisdiction involved in the drafting and issuing of the Recommendation, which would have been impossible for the UN Declaration.

Thirdly, an important difference concerns the degree of socioeconomic and cultural diversity among the member states of the Council of Europe and the United Nations. The region to which the member states of the Council of Europe belong has a relatively homogeneous culture, as well as a more uniform socioeconomic development compared to the regions and member states assembled in the United Nations. The greater homogeneity among the member states of the Council of Europe allows for a more conclusive comparison.<sup>23</sup> In view of the aim of the underlying comparative study: a cross-national evaluation of the impact of an international instrument and its range of thought on the

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<sup>20</sup> As said earlier, the drafting process of international instruments is one of the factors which have contributed to the similarities of the two instruments.

<sup>21</sup> M. Joutsen (1987), p. 71.

<sup>22</sup> M. Joutsen (1987), p. 70.

<sup>23</sup> Whether more telling conclusions can be drawn if the number of differences increases between the jurisdictions being compared remains a subject of debate in comparative law. However, in practical terms, what is needed to be able to make a valid comparison between jurisdictions is for the researchers to be able to study and understand the (legal) culture, the historical, political and socioeconomic backgrounds and to, preferably, be able to read the laws and regulations. If the number of jurisdictions increases, and especially those that are foreign and/or unknown to the researchers, the validity of the comparison decreases and at the same time the risk of drawing invalid conclusions significantly increases, unless a team of researchers is formed that consists of persons knowledgeable in Western and Eastern European, Northern, Middle and Southern American, the various Asian, and African (legal) cultures.

legislation and legal practice of individual member states, the focus in this study on Recommendation (85) 11 of the Council of Europe is vindicated.<sup>24</sup>

#### 4 RECOMMENDATION (85) 11 IN DETAIL

The content of Recommendation (85) 11 is split into two distinct parts. The first contains fairly explicit guidelines for reviewing legislation and the recommended course of action in the member states of the Council of Europe. The second part consists of a call to the governments to examine the possible advantages of mediation and conciliation, and to promote research on the efficacy of provisions affecting victims. Strictly speaking, the latter part of the Recommendation lies outside the framework of criminal law and procedure, and will not be discussed further in the context of this study.

The Recommendation encompasses guidelines targeting the elements from the different stages of the criminal proceedings – from the pre-trial stage to the enforcement stage – as well as the treatment of victims by the criminal justice authorities and in particular by the police, the questioning of victims, and their protection. In Recommendation (85) 11 the elements, practices and decisive moments of the criminal proceedings have been accorded a letter of the alphabet. The guidelines, which are spread across the different stages, are numbered from 1 to 16 and grouped into 7 blocks, lettered A through G. Group A contains four guidelines concerning the police, while the three guidelines in Group B deal with the prosecution service. Category C contains one general guideline on the questioning of the victim throughout the criminal proceedings. The five guidelines grouped under D concern the powers of the court and court practice. The categories E, F and G contain one guideline each, dealing with the enforcement of compensation as awarded by the court to the victim or ordered by the court, protection from publicity, and the physical protection of the victim respectively.

##### A At the level of the police:

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

Training of police officers is commonly perceived as an important instrument to prevent secondary victimization and to minimize inconveniences. The reason police training is so strongly emphasized is that they are likely to be the first, and in many cases the only, representative of the criminal justice system to come into contact with the victim after an offence has been committed. Moreover, they are likely to have to deal with the victim at a time when he is still suffering from the immediate shock of the offence. The attitude of the police towards victims is critical to their impression of, and confidence in, the criminal justice system, as well as their willingness to cooperate with (future) investigations and

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In his study of the role of the victim in European criminal justice systems, Matti Joutsen reversed the choice and focussed on the UN Resolution rather than the Recommendation of the Council of Europe. The main reason for his choice seems to be the wish to include several non-members of the Council of Europe (at the time of the study). See M. Joutsen (1987), p. 71.



prosecutions.<sup>25</sup> The victim's belief that the police belittles his experience, casts doubt on his version of events, or blames him for the occurrence of the crime will shatter his beliefs in police performance. It may even have an unfavourable effect on the victim's perception of the criminal justice system as a whole.

Training is furthermore an instrument to enhance awareness among police officers of common behaviour that may conflict with the expectations, rights and interests of victims. This is necessary because police officers by necessity develop some degree of emotional detachment in order to avoid burn-out. Victims, on the other hand, expect to be treated with sympathy and understanding. In the eyes of the police certain types of crimes are a matter of routine and no longer shock them. As a result, they often have difficulty empathizing with a victim of what they see as frequent or 'ordinary' crime. The victim, however, experiences the crime as a unique and disturbing event.

Training may also be required to bring about changes in police culture. All too often members of the police force perform their duties according to the requirements of police culture which favours a tough attitude and frowns upon softheartedness and sensitivity. These indurate rules of conduct may prevent the police from treating victims in a sympathetic and reassuring manner. It may even prevent a constructive interaction between the victim and the police. Statements of a victim who is under the impression that the police have no understanding of his emotions, or do not take him seriously, will be less coherent and will, without a doubt, contain fewer clues for further investigation than statements of a victim who is treated with sympathy and understanding. Adequate police training and combatting traditional behavioural patterns will therefore not only benefit victims, but also the criminal justice system as a whole and its fight against crime.

Finally, the police represent a crucial factor in the provision of information to the victim (see guideline A.2). Training, and thus making them aware of the needs and interests of victims, will also facilitate an effective provision of information to 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 provision of information to victims is the most important instrument to safeguard an effective use of the victim's legal rights and opportunities within the criminal justice system. Few victims are aware of their legal rights and obligations, as well as the possibilities of assistance available to them. Only if victims are informed can they protect their interests. The Recommendation places the basic responsibility for information with the police for one main reason. Information should be given to victims at the earliest possible stage. The police are, as a rule, the first authority whom the victim will encounter. Moreover, they meet the victim face to face, which allows the police to ascertain what information is needed to best assist the victim. Placing the responsibility for the provision with the police is thus a matter of common sense.

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<sup>25</sup> See, for example J.M. Wemmers, *Victims in the criminal justice system*, Kugler Publications, Amsterdam/New York, 1996.

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

First of all, when the right to obtain information about the outcome of the police investigation is addressed, one should reflect on the phrasing of guideline A.3.

In contrast to the former guideline, and many others, this one does not establish a duty. It merely stipulates that a victim should be able to learn the results of the police investigation. Consequently, the criminal justice authorities may leave the initiative with the victim. They are only obliged to cooperate with the victim's requests for information and tell him the outcome of the police investigation, irrespective of whether the results are negative or positive. The outcome may be negative if the police have come up empty, not enough evidence has been disclosed to formulate a formal charge, or no suspect has been identified. This will usually lead to the decision to close the investigation, but it may also mean putting the case on hold. The police investigation has a positive outcome if a suspect is identified and charged.

It is unfortunate that the Recommendation does not establish a duty to notify victims of the outcome of the investigation. For numerous victims it is not easy to obtain information about the success or failure of the police investigation, for instance if the pre-trial stage is governed by the secrecy principle. From the point of view of the victim, however, it is crucial to know whether the police have been able to gather enough evidence. Moreover, without such an obligation, the risk is high that victims either never learn the results – if the outcome is negative or if the case is put on hold – or learn it only when they are summoned to court to testify.<sup>26</sup>

(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 responsibility of the police to give as clear and complete a statement as possible of the losses and injuries of the victim is essential to his chances of obtaining compensation. Without an adequate police statement, the responsibility to demonstrate material and moral damages to the court is on the victim. This has two main disadvantages. First of all, the victim has an interest in obtaining compensation. Many courts therefore tend to be suspicious of the victim's assessment of any losses. Secondly, many victims lack the experience and/or expertise to give as clear and complete a statement as possible and to give an indication of what the losses and injuries amount to. The effects of a statement that does not live up to the requirements of the court are that the victim will either not be compensated or receive only partial compensation for the damages suffered.

This does not mean, however, that giving an accurate statement is always easy. This is also expressed by the phrasing 'as clear and complete a statement as possible'. For instance, the extent of the injuries of the victim may not be ascertainable at the time of the police investigation. Or, the losses of the victim can only be estimated because items of proof to establish the value of stolen or damaged property are lacking. Nevertheless, a statement of the police that is as accurate as possible under the circumstances will generally increase the victim's chances of receiving compensation.

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As the study will show (Chapter 25), the obligation to inform victims of a decision to prosecute (guideline B.6) is rarely respected. This means, in fact, that numerous victims are notified by means of the summons, which is often too late to allow them to make use of their rights.

**B** In respect of prosecution:

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

In jurisdictions where the expediency principle<sup>27</sup> – also referred to as the principle of discretionary prosecution – applies, the public prosecutor can refrain from prosecuting, within legal boundaries, even when there is sufficient evidence to substantiate a charge. The expediency principle may obstruct the opportunity of the victim to obtain compensation from the offender because it prevents the criminal court from taking a decision on the matter of compensation. A criminal justice system adhering to this principle and that wants to protect the interests of victims, should therefore take the question of compensation into account when deciding not to prosecute. In addition, the guideline states that the serious efforts of the offender to compensate the victim should also be taken into consideration by the public prosecutor. The phrase ‘serious efforts’ indicates that the willingness of the offender is not sufficient. This is crucial because once the decision not to prosecute has been taken, his willingness to pay may significantly decrease, and the victim may stay empty-handed, unless additional safeguards are set up. A common safeguard is that the public prosecutor attaches the obligation to fully compensate the victim as a condition of his decision not to prosecute. The payment of compensation or any serious effort at redress is beneficial both to the offender and the victim: the offender is not prosecuted and the victim receives compensation from his losses and injuries.

It is important to note that in jurisdictions that formally adhere to the principle of legality, in practice not every case is, in fact, prosecuted. This is particularly true regarding certain misdemeanours. Evidently, in these jurisdictions the decision not to prosecute should also be taken with due regard for the question of compensation of the victim, including any serious efforts made to that end by the offender.

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

Guideline B.6 states that victims who have reported a crime to the police, or who have otherwise cooperated with the authorities, have the right to be notified of the final decision concerning prosecution. The term *final decision concerning prosecution* as used in the Recommendation comprises both a negative final decision (i.e., not to prosecute), and a positive final decision (i.e., to prosecute). It is very relevant that not just one of these decisions needs to be relayed to the victim. Notification of a negative decision is important to prevent the victim from believing or hoping that the offender will be tried for an unnecessarily long time. Being informed of the decision to start public action against a suspect is equally important. Victims generally need time to prepare for the trial, for instance to seek legal or practical assistance, in order to effectively exercise their rights.

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In jurisdictions governed by the expediency principle, the prosecution service may take a discretionary decision regarding prosecution. The expediency principle is the opposite of the legality principle. In jurisdictions governed by the latter principle, crimes in which there is a prima facie case against the accused must be prosecuted (See Chapter 26).

What is striking about this guideline is that it establishes a duty but fails to indicate a responsible agent, nor does it include reference to the manner in which the victim should be informed. These questions are left entirely to the discretion of the member states. Guideline B.6 includes, however, a condition for the notification duty. The information should not be given to victims who do not want to learn the final decision on prosecution. The phrase *unless he indicates that he does not want this information* implies that member states should make sure that victims have the opportunity to express their wish not to be informed, and that this wish is subsequently respected by the criminal justice authorities. Most victims, however, do not even know that they may waive the right to be notified unless they are told. In practice, this implies, therefore, that the authorities should ask the victim whether he wishes to be informed of the final decision and follow through on his wishes.

- (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.*

This guideline is relevant to those cases where the discretionary decision not to prosecute is taken. The victim should then have the opportunity to challenge this decision, either by asking an authority to review this decision, or by starting a private prosecution. Guideline B.7 is phrased in this manner because some jurisdictions have a state monopoly on the right to prosecute and thus do not allow private prosecution. In such jurisdictions, the victim should have the right to ask for a review of the decision. From this perspective, private prosecution and the right to ask for a review are perceived as equal alternatives. However, the phrasing of the guideline may also express a preference for the review of the decision not to prosecute over the right to instigate private prosecution. The latter explanation is more likely because the right to ask for a review is generally a better safeguard of the right to challenge the decision not to prosecute. The right to institute private prosecution is all too often restricted by various conditions and limitations, varying from paying a deposit, to a ban on private prosecution for certain offences.

### C Questioning of the Victim:

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

During the processing of the case, the statements of the victim and the evidence he produces are, as a rule, critical to the investigation of the offence and furnishing proof. Unfortunately, this frequently leads to an instrumental view of the victim. The conjecture that the victim is a cat's paw to obtain evidence is detrimental to the treatment of victims during the process of questioning. It easily leads to the practice of questioning victims without regard for their personal situation and dignity. The instrumental perception of the victim may also contribute to the practice of repeated questioning. Although not every repetition of hearings can be avoided, e.g. in legal systems in which the orality and/or immediacy principle governs the trial proceedings, it should be reduced to an absolute minimum. The decision to re-examine the victim should not be taken too lightly. The first hearing of the victim should, in principle, be as thorough as possible and conducted in a manner that does not anticipate further questioning at a later date.

Certain groups of victims deserve especially considerate treatment by the authorities. The guideline makes special reference to children and the mentally ill or handicapped. For these two categories of particularly vulnerable victims, the authorities should undertake special efforts to reduce secondary victimization and make the questioning process a less traumatic experience. As is expressed in the guideline, the presence and assistance of a person of confidence is one way to achieve this. It is unfortunate that the guideline does not make reference to the category of victims of sexual crimes and domestic violence. It states that victims should be questioned in manner that gives due consideration to their personal situation but fails to specifically designate the two groups of victims that are widely recognized as suffering most from inconsiderate questioning, apart from children and persons with mental disabilities, i.e., victims of sexual offences and domestic violence. These groups represent, in an outstanding manner, victims who must be questioned in a manner that respects their personal situation and dignity.

#### D Court proceedings:

##### *(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 reasons for keeping the victim informed during the pre-trial stage are also relevant to the trial stage. Traditionally, only victims who act as witnesses or victims who play a formally recognized role, such as the civil claimant, were informed of the date and place of the trial. According to the guideline, this duty should be extended to include all victims of crime whose case will be tried. The extension of the notification duty is extremely relevant because not all victims assume a formal role. Victims who are not informed of the date and place of a trial may learn that their case is (to be) tried from third persons or the media, which may be a deeply offending and belittling experience and a well-known source of secondary victimization.

The victim has the right to be compensated by the offender. It is therefore of the utmost importance that the victim is instructed in how to present a claim to the criminal court, or otherwise pursue this right. In principle, the police should already have given the victim this information (see guideline A.2). The fact that the Recommendation repeats this obligation implies that this duty is extended to the other criminal justice authorities as well.

Victims are interested in learning the court's decision in the case. Contrary to the date and place of a hearing and the opportunity to obtain compensation, the guideline does not establish a duty to notify victims of the outcome of the case. It only says that victims should be told how to find out the court's decision. Why no such duty was established remains a mystery. Perhaps it was felt that this was an unnecessary step since most victims will be able to find out the court's decision, provided that they are told what to do. However, this assumes that all previously mentioned information duties are carried out by the authorities. In order to be able to learn the outcome of the trial, one has to know, first of all, that a trial has taken place. From a victimological, research-based perspective, this is an erroneous assumption. In practice, it is an almost illusory stance for not every single victim will be duly informed. Furthermore, if the criminal justice authorities wish to take the position of victims seriously, and wish to enhance their willingness to cooperate in the future, they should at least notify

those victims who acted as witnesses or reporters of a crime of the most important decisions in their case. Besides, it is not an extremely taxing responsibility, certainly not compared to other duties established by the Recommendation. The authority responsible for informing, *inter alia*, the defendant of the court's decision, usually the clerk of the court's office, could be made responsible for informing the victim. It would not require setting up new systems, it would only mean adding the victim to the list of people to be notified.

*(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.*

Compensating the victim plays an important part in re-establishing social order, and will generally rank high among the interests of victims. Member states should therefore make sure that their criminal justice systems allow the criminal court to deal with the question of compensation. In the common law jurisdictions, the courts may impose a compensation order, which is a penal sanction. In continental Europe, compensation is traditionally awarded by the criminal court after the victim has joined his civil claim for damages to the criminal proceedings (*action civile*). In this adhesion procedure,<sup>28</sup> the court's authority to order compensation is dependant on the victim's formal application and request. The CDPC noted that in some states, victims seldom make use of this procedure. Therefore, it recommends that impediments be removed and judges as well as lawyers be encouraged to inspire the law with life.<sup>29</sup> Today, fifteen years later, the recommendation of the CDPC is no less relevant.

Furthermore, the guideline stipulates that limitations, restrictions and technical impediments which generally prevent the court from ordering compensation should be abolished. Specific examples are not indicated, though the practice of attaching compensation to a suspended or deferred sentence comes to mind; or perhaps the case where the court cannot order compensation of its own accord when the victim clearly needs compensation but has failed to meet the formal requirements. However, the latter may not meet the criteria of *generally* preventing the court from ordering compensation.

*(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.*

Guideline D.11 contains a minimum requirement concerning compensation. The member states should either incorporate the possibility to order the payment of compensation as a penal sanction, or as a substitute, or in addition to a penal sanction. Incorporating one of the three possibilities is enough to meet the requirements of the Recommendation. The CDPC, however, emphasizes that the use of the penal sanction (the compensation order) may be in the interest of both the offender, who is given a less stigmatizing punishment, and the victim.<sup>30</sup> The advantages for the victim are that he does not need to prepare, substantiate or present a civil claim for compensation, nor bear responsibility for its

<sup>28</sup> With the term adhesion procedure, reference is made to both the Romanistic *action civile* and the Germanistic *Adhäsionsverfahren*, and the similar procedure of the Nordic jurisdictions.

<sup>29</sup> Report of the European Committee on Crime Problems (1985), p. 20.

<sup>30</sup> Report of the European Committee on Crime Problems (1985), p. 20.

enforcement. Although he may be required to indicate what damages he has suffered. As with every other penal sanction, the compensation order is enforced by the state.

In practice, in jurisdictions where compensation is a penal sanction, the courts may impose a compensation order either as the only sanction, or in addition to other sanctions such as imprisonment. In jurisdictions adhering to the adhesion model, compensation is essentially awarded in addition to a penal sanction. But compensation may also be a substitute for a penal sanction if the authorities decide not to prosecute on the condition that the victim is compensated, e.g. after a successful mediation or claim-settlement procedure.

*(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.*

Guideline D.12 is closely connected to guideline A.4, which obliges the police to record the injuries and losses suffered by the victim in as clear and complete a manner as possible. The police statement, and if necessary additional information provided by the prosecution service and/or the victim, should be made available to the court. The guideline is both an expression of the relevancy of supplying the court with data that will allow it to decide on the question of compensation, and an instrument to remedy the practice that criminal courts do not or cannot award compensation to the victim because judges claim not to have sufficient evidence of the victim's losses and injuries. With respect to the interpretation of the phrasing of the *victim's need for compensation*, the report of the CDPC does not offer much help.<sup>31</sup> It does not say whether this refers to the actual financial need of the victim as a result of the crime, or the moral and material damages valued in terms of money. In this study, the latter interpretation is used.

The second part of the guideline makes reference to the payment of compensation as a mitigating circumstance which may lead to a reduction of the sentence. The aim of the *genuine effort* clause is to ensure that insolvent offenders, or those with limited financial capacities, are not placed in a disadvantageous position purely because of their lack of funds. Their efforts to remedy the harm to the best of their abilities should be taken into consideration by the courts.

*(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 of any other measure, great importance should be given among these conditions to compensation by the offender to the victim.*

The purpose of this guideline is to emphasize that if the courts decide to defer or suspend a sentence, or to make use of other sanctions that are an alternative to imprisonment, both the interests of the offender and the victim should be taken to heart. As is expressed in the guideline, the courts can only attach great importance to the question of compensation if the national legislature has made it possible to attach the payment of compensation as a

<sup>31</sup> Report of the European Committee on Crime Problems (1985), p. 20.

condition of such a sentence. In contrast to guideline D.11, for example, this guideline does not go so far as to recommend that *legislation should provide* for the possibility to attach the payment of compensation as a condition to a deferred or suspended sentence or a probation order or any other measure. This may be a missed opportunity. Victims in jurisdictions where the court cannot make certain sentences or measures conditional to the payment of compensation have a lesser chance of being compensated for their losses and injuries.

E At the enforcement stage:

(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 the CDPC's report, research shows that the collection rate is very low.<sup>32</sup> It proposes three measures to improve the effectiveness of enforcement. Firstly, concerning the compensation as a penal sanction, payments by the offender on behalf of the victim should be collected in the same way as fines. This means that the state should assume responsibility for the enforcement of the compensation order. Normally under criminal law, an offender who fails to pay a financial sanction is imprisoned by default. The CDPC recommends, however, that imprisonment for non-payment of a compensation order should be avoided.<sup>33</sup> Secondly, the enforcement of compensation orders should be given priority over the collection of other financial sanctions, such as fines. This stipulation is essential to safeguard the victim's right to obtain compensation for his losses and injuries. Offenders who, first of all, are obliged to make payments to the state and subsequently to the victim will usually have little money left to pay the latter.

In jurisdictions where compensation is a matter of private law (i.e. a civil claim for compensation) the victim is entitled to enforce it if his claim has been honoured by the court. To remedy, to a certain extent, the problems that are caused by the fact that enforcement is the responsibility of the victim, he should be assisted by the state in the collection of the money as much as possible. In its report, the CDPC recommends that the state should pay the enforcement expenses if the victim has a low income, and communicate the administration of personal data of the debtor to the victim. In addition, the probation services should provide assistance to victims in the collection of the money.<sup>34</sup> The CDPC does not mention the assistance of the prison services to their clients' victims. However, in jurisdictions where inmates are paid for their work in prison, the prison services can help the victims by

<sup>32</sup> The CDPC bases the conclusion on the Council of Europe's report '*Compensation of victims of crime*', 1978, p. 13. See Report of the European Committee on Crime Problems (1985), p. 21. Since that time, the low collection rate has been cited and demonstrated in many other studies, e.g. M. Junger, T. van Hecke, *Schadevergoeding binnen het strafrecht*, WODC, Den Haag, 1988; B&A Groep, *Slachtofferzorg in Nederland. Eindrapportage*, Den Haag, 1998; G. Piffaut, 'Concrete achievements toward the implementation of the fundamental principles of justice for victims, in: Heuni report nr.16, *Changing the United Nations Victim Declaration and recent developments in Europe*, 1989; A. d'Hauteville, 'Victimes mieux aidées, mieux indemnisées. Des perspectives nouvelles', *Revue des sciences criminelles et de droit comparé*, 1989; Swedish report of the Statens Offentliga Utredningar, *Brottsoffer. Vad har gjorts? Vad bör göras?*, Stockholm, 1998.

<sup>33</sup> Report of the European Committee on Crime Problems (1985), p. 21.

<sup>34</sup> Report of the European Committee on Crime Problems (1985), p.21.



transferring part of the wages to the victims' bank account. Obviously, this means that the probation and prison services must be informed of the relevant court decisions on compensation.<sup>35</sup>

Today, the collection of compensation still raises various problems and the remedies proposed have not lost their relevance, in particular in jurisdictions where compensation is not collected by the state on behalf of the victim. Here, enforcement is still a cumbersome and costly process for the victim. Few offenders are willing to pay compensation without pressure from the victim. Usually, if all attempts by the individual fail, he has to send in the bailiffs and pay enforcement expenses. Furthermore, it is often uncertain whether the costs justify the attempts to collect the money because of the offender's limited resources or his unwillingness to pay. Offenders are known to have found many creative ways to stash away their assets.

#### F Protection of privacy:

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

The content of this guideline is very carefully constructed. It addresses the information policies of the criminal justice authorities, the principle of publicity governing criminal hearings, and media coverage.

The disclosure of personal information before or during criminal proceedings through statements of the criminal justice authorities to the press may not only cause harm to the victim, but may also seriously impede or prejudice the course of justice. The authorities therefore need to carefully consider the impact of their information and public relations policies.

A second aspect of the guideline concerns the question of the protection of information within the framework of criminal trials. The complexity of this question lies in the tension between the protection of personal details, and the principle of publicity which governs the trial. The public character of criminal proceedings is embodied in international conventions, as well as in national constitutions and codes of criminal procedure. It is meant to ensure a fair trial for the accused and inspire public confidence in the administration of justice. Nonetheless, it is widely accepted that certain exceptions to this principle should be made in order to protect the privacy of persons involved in criminal proceedings, in particular concerning crimes which may cause serious psychological suffering to the victim. But it is equally relevant where publicity may cause social or cultural disgrace, or stigmatization based on (culturally co-determined) religious dogmas for the victim.

The publicity of hearings is not only related to the presence of the public in the courtroom, but also to the presence of the media. The protection of victims against unwanted and undue media coverage is complicated by the fact that freedom of the press and freedom of expression are important democratic principles. Still, there is a growing awareness of

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See Chapter 8.

the need to protect the victim against any undue loss of privacy or dignity caused by television or press coverage. As a result, legislation may furnish the court with the power to restrict publication of personal information. Here, too, special consideration should be given to crimes where publication of personal details leading to the identification of the victim may cause additional suffering or stigmatization, or even jeopardize his safety. The inclination of the media to publish personal information or to cover crimes and trials in a sensational manner is a critical local reality.<sup>36</sup> If the media in a particular jurisdiction regularly publish names, addresses and other personal details of victims, legislation may be called for to forbid publication of certain types of information. In other jurisdictions, codes of conduct for the media may be sufficient to protect the victim's privacy.

It is important to note that guideline F.15 has one important shortcoming. It implies that holding a trial in camera offers the same protection as limited disclosure of publication of the victim's personal details, by stating that *either* the trial should be held in camera *or* disclosure or publication of personal information should be restricted. In our opinion, this is not the case. Holding a trial in camera cannot be equated with a prohibition or any other restriction to disclose personal details of the victim. To provide the best possible protection to the victim, both measures should be applied.

#### G Special protection of the victim:

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

The right of the victim to be protected against intimidation and the risk of retaliation by the offender seems self-evident. A proper functioning of the justice system demands that the investigation and prosecution are not hindered by attempts of the offender to deter the victim from reporting the crime to the authorities, cooperating with the authorities, or testifying in court. The realization of the right to effective protection is, however, quite problematic. The intricacy of the right of the victim to be protected against intimidation and retaliation is closely connected to the suspect's rights to inspect the legal files to learn the evidence that has been gathered against him as well as the identity of witnesses who will testify against him. The problematic realization of the victim's right to protection from intimidation or retaliation by the offender, his friends and family is furthermore caused by the fact that few of the measures to protect the victim are foolproof. As a result, the swiftness and accuracy of the criminal justice authorities' response to threats, and in particular that of the police, is critical to effectively protecting the victim. Also, the criminal justice authorities should take the victim's anxieties seriously and act accordingly.

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The context within which a given criminal justice system operates is to be understood as the local reality of that system. See Chapter 2. See also M.E.I. Brien, E.H. Hoegen, 'Victims of crime in different jurisdictions and the influence of local realities', in J.J.M. van Dijk c.s. (eds.), *Caring for crime victims*, Criminal Justice Press, Monsey, New York, USA, 1999, pp. 159-166; M.E.I. Brien, E.H. Hoegen, 'Information systems for victims of crime: results of comparative research', *International Review of Victimology*, vol. 5, 1998, pp. 163-188.

## 5 GENERAL ANALYSIS OF RECOMMENDATION (85) 11

After having examined the Recommendation in detail, a more general analysis reveals four striking features:

- the seemingly basic and simple rules;
- the neutral formulation of the guidelines;
- the dual line of action: improvement of the procedural position of the victim and the prevention of secondary victimization;
- the combination of rights and services.

At first glance the guidelines of Recommendation (85) 11 appear to be minimum standards that any jurisdiction willing to improve the position of victims of crime in criminal proceedings should be able to meet. In reality, the total set of guidelines represent high targets that are quite difficult to achieve. One of the reasons is that the implementation of many of the guidelines not only requires legal reforms, but also a change of legal culture as well as of the mentality of the criminal justice authorities. Guideline A.2, for instance, places a broad informatory duty on the members of the police force. In order to make sure that every victim receives information from the police about obtaining assistance, practical and legal advice, compensation by the offender and the state, it is insufficient to issue legislation or guidelines directed at the police. It involves not only better police training, but also a change in police culture, organization and funding. A change in funding is needed because it should not only focus on crime-fighting but also on victim-related activities to ensure that they meet the standards. Furthermore, the police will have to know what services are available to victims and set up extensive cooperation agreements with other criminal justice partners and social services. Consequently, even in jurisdictions where the national and criminal justice authorities place the greatest emphasis on compliance with the guideline, and where the police are willing to inform victims to the best of their abilities, full compliance will remain the goal.

The second striking feature of Recommendation (85) 11 is its neutrality. Its guidelines are written to suit many different legal systems and are based on the reality that the member states of the Council of Europe adhere to different legal traditions. The Recommendation focuses mainly on common designations. It rarely expresses preferences for certain legal traditions or procedural solutions for victims. It often includes various solutions suitable for different criminal justice systems. Likewise, it highlights areas for special attention is needed in certain criminal justice systems, e.g. those governed by the expediency principle, without passing judgment. As a result, commonly recognized problems that victims encounter within a certain type of legal system are not addressed. For instance, cross-examination in adversarial systems is a well-known source of secondary victimization, but in guideline C.8 nothing is said about it directly. On the one hand, this approach is understandable, for a non-binding document. It cannot challenge legal traditions or policies of the different criminal legal systems because it would undermine its implementation. On the other hand, it lacks any reflection on essential features of the different European criminal justice systems having a direct effect on the position of victims within criminal proceedings.<sup>37</sup>

Thirdly, Recommendation (85) 11 represents a dual line of action: the reinforcement

<sup>37</sup> L. Zedner, 'Victims', in: M. Maguire c.s. (eds.), *The Oxford Handbook of Criminology*, Clarendon Press, Oxford, 1994, p. 1208.

of the procedural rights of the victim within the criminal justice system and the prevention of secondary victimization. As the term implies, secondary victimization refers to the phenomenon that someone who has been victimized for the first time by an offence, may suffer a further, very real form of victimization by the functioning of the criminal justice system and the way he is treated by the criminal justice authorities. The CDPC correctly holds that the operation of the criminal justice system has sometimes tended to add to, rather than diminish, the problems of the victim. In fact, even though the victim's role in the criminal justice process may vary from one legal system to the next, he faces difficulties which may be liable to cause secondary victimization in every jurisdiction, irrespective of its nature. The victim of crime may, for instance, be treated disrespectfully. He may be obliged to undergo several questioning sessions which force him to tell and relive the memories of the offence over and over again. He may even have his character called into question.

A closer inspection of the 16 guidelines of R (85) 11 reveals that the Recommendation harbours several premises about the causes of secondary victimization. The first and fundamental premise is that the general lack of consideration for the needs and interests of the victim by the criminal justice authorities leads to secondary victimization. This general premise can be subdivided into premises relating to its direct and indirect causes:

**Direct secondary victimization:**

- insensitive treatment by the police;
- repetitive and insensitive questioning;
- insufficient protection from undue publicity
- insufficient protection against intimidation or retaliation;

**Indirect secondary victimization:**

- insufficient information flows to and from the victim;
- difficulties surrounding the right of the victim to be compensated;
- problems in collecting compensation from the offender.

To prevent instances of secondary victimization, the fundamental function of criminal justice should be redefined; the system should no longer exclusively concern the relationship between the state and the offender, but should also safeguard the victim's rights and meet his needs and interests at all stages of the criminal procedure.<sup>38</sup> As expressed by the Recommendation, secondary victimization can best be combatted by setting standards for the special needs and interests of victims, and trying to raise the level of awareness. The reinforcement of procedural rights and the prevention of secondary victimization should not be seen as separate issues, as articulated by the Recommendation's dual line of action. A proper implementation of the guidelines will enhance the victim's position within criminal proceedings and at the same time make a considerable contribution to reducing the risk of secondary victimization. In return, this will lift the victim's confidence in the criminal justice system and have a positive effect on his future willingness to report crimes and give evidence. Hence, the Recommendation can also serve as a public relations instrument for member states by means of which they can improve the image of their respective criminal justice systems.

Finally, we should mention the Recommendation's perception of what concerns a centrepiece of victimological debate: whether to pursue victims' rights, or strive for more

<sup>38</sup>

Report of the European Committee on Crime Problems (1985), p.7.

services for victims.<sup>39</sup> The debate over the rights model or the service model revolves around the question of what shape the participation of the victim is to have within the criminal justice system. In the various legal systems, this question is answered differently. Some put emphasis on the victim's legal rights, others, in particular the common law jurisdictions, have adopted the services model. Far fewer jurisdictions have adequately implemented both models into their criminal justice system. The Recommendation, however, recognizes and stresses the need to provide victims with legal rights in the criminal proceedings and with services enabling them to exercise these rights. This perception of the rights and services issue is beyond dispute. Rights are important to victims, and even more rights are needed to further improve their position. But as Groenhuijsen said: 'No legal right is worth the paper it is written on, unless it is supported by a superstructure providing key services to victims of crime. One couldn't enforce rights one isn't aware of. Hence the need for legal assistance and servicing information.'<sup>40</sup>

## 6 THE CONCEPTUALIZATION OF THE VICTIM AND RECOMMENDATION (85)11

Our study focusses on victims of crime. However, the concept 'victim' is not as clear-cut as it may seem at first glance. Therefore it is important to determine *who* can be designated by the term victim, *what* legal concepts are used to denote the victim in criminal law and procedure, and *when* a person should be recognized as a victim in accordance with the Recommendation.

### 6.1 The Designation of the Victim

To determine who is a victim within the context of criminal proceedings, it is useful to look at the common features of persons victimized by an offence who are entitled to enforce their rights or pursue their interests in court.

A common feature of all jurisdictions is that private persons who want to act within criminal proceedings have to fulfill certain conditions. First of all, their legal rights or interests must be affected, or at least jeopardized, by an act punishable under criminal law. Secondly, the damage suffered should be caused by the criminal offence.<sup>41</sup> This conceptualization allows for not only the recognition of the directly harmed person as a victim, but also of his immediate family or those who are directly dependant on the deceased victim.

Furthermore, a distinction can be made between victims on the basis of whether they have been victimized as individuals or as part of a collective body. Collective victimization involves groups of individuals linked by special factors or circumstances that make them

<sup>39</sup> See J.J.M van Dijk, 'Victim rights: a right to better services or a right to active participation?', in: J.J.M van Dijk c.s., *Criminal law in action*, Gouda Quint, Arnhem, 1986, pp. 351-357; and J.J.M. van Dijk, 'Towards a research-based victim policy', in: S. Ben David, G.F. Kirchhoff (eds.), *International faces of victimology*, Möndchengladbach, 1992, pp. 196-219.

<sup>40</sup> M.S. Groenhuijsen, 'The development of victimology and its impact on criminal justice policy in the Netherlands', in: E. Fattah, T. Peters, *Support for crime victims in a comparative perspective*, Leuven University Press, 1998, p. 54.

<sup>41</sup> In this study no special attention is paid to victims of traffic offences.

the target of criminal offences. In this study, the scope is limited to victims of terrorism, insofar as protective measures have been introduced and/or state compensation funds have been set up.

## 6.2 The Conceptualization of the Victim

It is essential to address the conceptualization of the victim in criminal (procedural) law. The denotation 'victim' as such is generally not found in law. The legislature uses more technical, legal concepts to denote a victim of a crime. Legal terminology refers to the victim in terms which describe the different roles he can play within criminal proceedings. The victim may reporter and offence or act as an complainant, a civil claimant, a compensation order beneficiary, a private prosecutor, an auxiliary prosecutor and/or a witness. In the following, a general description of the meaning of these terms within criminal proceedings is given. The description of the legal concepts of the victim is relevant because these legal denotations are key terms in this study.<sup>42</sup>

### *Reporting the offence*

The legal notion of a person who reports an offence does not refer exclusively to the person who was harmed as a result of the offence, i.e., the victim. Indirect victims and third parties who have knowledge of a crime may also report it to the criminal justice authorities. But usually the direct victim will be most likely to inform the authorities, i.e. the police, the public prosecutor or the examining magistrate, depending on prevailing law.

### *The complainant*

In the common law jurisdictions, the term 'complainant' is properly used to refer to the victim for the duration of the criminal proceedings. In practice, it is mostly used in reference to victims of sexual offences whose cases are under consideration. There are no specific rights attached to the common law position of the complainant.

In the continental legal systems, however, the notion of 'complainant' is a legal term which refers to the person who is required by law to inform the criminal justice authorities of his wish to prosecute the offender, with respect of certain specific crimes. These crimes are called 'complainant offences' because filing a formal complaint with the authorities is the condition sine qua non to start public prosecution. Without a complaint from the victim, the public prosecutor is not empowered to start public prosecution. In addition, the complainant can stop the criminal proceedings by withdrawing the complaint at any moment of the proceedings until the sentencing stage. In general, the offences which require a formal complaint by the direct victim are crimes against his honour and reputation. In some jurisdictions, sexual offences, domestic violence, theft among relatives and common assault also fall within this category. Generally, complainant offences are perceived as a measure that protects the private life of victims. Complainants cannot be forced against their will to be involved in criminal proceedings, or to testify in (open) court against the accused because they can prevent the criminal justice authorities from starting public action, or stop the

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<sup>42</sup> The various roles of the victim in a certain jurisdiction are described in § 5 of the respective country reports.

proceedings. On the other hand, complainants can be pressured to withdraw their complaint.<sup>43</sup>

### *The civil claimant*

The role of civil claimant can be assumed by all victims in Germanic, Romanistic and Nordic jurisdictions if they want to receive compensation from the offender in the course of the criminal process. The victim's presentation of the claim before the criminal court is a civil action for compensation which is integrated into the criminal proceedings, with the aim of providing the victim with a relatively easy, fast and cheap procedure for recovering his losses from the person who may be held liable for causing the damage under private law, i.e., the offender. In other words, civil claimants are those persons who are entitled under private law to claim compensation from the offender for the material and moral losses – economic loss, injuries, and psychological sufferings – caused by the offence, but who present their claim in criminal court. In general, not only is the direct victim entitled to claim damages from the offender, but the immediate relatives or direct dependants of the deceased victim as well.

An advantage for the victim of assuming the role of civil claimant rather than going to the civil court to claim compensation is that he profits from the burden of proof which lies with the prosecution service. Also, he no longer has to be involved in both criminal and civil proceedings based on the same facts as well as one and the same unlawful act. A disadvantage of the adhesion model is that the victim who wants to claim compensation has to take the initiative and explicitly request the court to award him compensation. He must make a formal request for compensation, substantiate the claim, and execute the court's decision.

The legislature has given the civil claimant several procedural rights to enable him to exercise the right to be compensated by the offender and to prove his material and moral damages. Although the procedural rights vary from jurisdiction to jurisdiction, certain basic features can be distinguished. First of all, the civil party not only has procedural rights in the trial stage but also in the pre-trial stage. In general, the civil claimant has the right to be questioned in the presence of his lawyer, to ask the authorities to perform certain investigative acts, demand that experts are consulted, and he may appeal any decision that interferes with his civil interests. In some jurisdictions, the civil claimant has even more rights, such as the right to inspect the legal file and obtain photocopies. During the trial, the civil claimant has the right to present, substantiate and clarify his claim for compensation to the court (i.e. each time the public prosecutor is given the floor for his reply and rejoinder), put questions to witnesses and experts, and appeal decisions of the court that affect his civil interests.<sup>44</sup> In addition to these rights, the civil claimant has the legal right to be informed or notified by the authorities of certain decisions that affect his right to claim compensation. The emphasis of the right to be kept informed lies in the pre- and post-trial stage rather than the trial stage itself. In the pre-trial stage, for instance, he always has the right to be informed of the date and place of the trial and he usually has the right to be informed of the decision not to prosecute. In the post-trial stage, he has the right to hear the court's decision and to obtain the verdict, or that part that concerns his civil claim for damages.

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<sup>43</sup> See Chapter 19.

<sup>44</sup> He cannot appeal the verdict concerning the guilt or innocence of the offender.

*The compensation order beneficiary*

In common law jurisdictions, the role of civil claimant is unknown. Here, compensation from the offender to the victim may be awarded in the course of the criminal proceedings in the form of a compensation order, which is a penal sanction. In that case, the victim is referred to as the compensation order beneficiary or compensatee. Because the compensation order is a penal sanction, the compensatee does not need to present a claim for civil damages. Prior to the trial, the victim may indicate (on a form) that he desires compensation, but he cannot formally file a claim like in the adhesion procedure, nor does he generally have an enforceable right to present and clarify his claim in court. This is done by the public prosecutor.<sup>45</sup>

The main disadvantage of this system is that the victim has no voice in the proceedings. He is completely dependant on the criminal justice authorities and does not have the right to intervene if the public prosecutor fails to inform the court of his sustained losses and injuries, or does not seem to represent his interests. On the other hand, the compensation order model has two very important advantages over all other compensation models. First, the compensation order is a real penal sanction which the court may impose *ex officio*. Second, it is enforced by the state on behalf of the compensation order beneficiary.

*The private prosecutor*

The victim who acts as a private prosecutor initiates the criminal proceedings, either by summoning the accused directly to court (direct action) or by going to the examining magistrate and requesting him to conduct a judicial investigation (indirect action). The latter form is combined with the role of civil claimant: the victim constitutes himself as civil claimant before the examining magistrate and requests the judicial investigation be opened to collect evidence against the suspect. Depending on the outcome of the investigation, prosecution may be initiated. Indirect action is usually obligatory if the offender is unknown, not enough evidence has been gathered to summon the perpetrator to court, or if it concerns a crime for which the involvement of the examining magistrate is required by law. The former option, direct action, is usually only allowed concerning misdemeanours, with the exception of the common law jurisdictions.

*The subsidiary prosecutor*

The subsidiary right to prosecution refers to the situation where, in principle, the offence falls within the domain of the public prosecutor, but if he decides to refrain from prosecution, a private prosecution may be initiated. To prevent malicious litigation, the subsidiary right to prosecution is never absolute. In some jurisdictions, the permission of the court or of the highest ranking public prosecutor is needed to proceed. In others, the public prosecutor may or must take over.

*The auxiliary prosecutor*

In Austria, Germany, Liechtenstein, the Nordic jurisdictions, and Portugal, the victim can play the role of auxiliary prosecutor. The main reason why this is an attractive option is that he stands next to the public prosecutor. He has a position comparable to that of the public prosecutor, but at the same time, he may leave the burden of proof in the professional's

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<sup>45</sup> In Ireland, however, the victim may address the court regarding his compensation claim. See Chapter 12.



hands and profit from his expertise. In general, one can say that the auxiliary prosecutor has the right to claim compensation, be present during the hearings, refuse a judge or an expert witness, put questions to witnesses, object to decisions of the presiding judge, contest the permissibility of questions, bring evidence into the proceedings, and make statements. He may be represented by a lawyer and is entitled to legal aid.

It is important to stress that, contrary to the civil claimant, the auxiliary prosecutor's participatory rights are not restricted to the reach of his civil claim for compensation. He is someone who assists the public prosecutor and who may make comments each time it is his turn to speak, usually after the public prosecutor has spoken. The court will then address the victim or his counsel, and give him the chance to react to what happens in the courtroom.

Equally important to the victim in his role as auxiliary-prosecutor is that the legislature has given him the autonomous right to be informed of various decisions taken during the criminal proceedings. Final decisions as well as concerning which court is competent to handle the case, and decisions regarding the expert-witnesses and the object of their statement. Furthermore, in the preliminary stage, the auxiliary prosecutor must be informed about the date of the contest of arguments and the hearings, plus he is entitled to be notified of hearings outside the court's jurisdiction, of other auxiliary prosecutors, civil claimants and witnesses.

#### *The witness*

Acting as a witness for the prosecution is, just like reporting the crime to the criminal justice authorities, one of the most basic roles of the victim. In most cases, the victim is the most important witness against the accused. As a result, he is heard in the pre-trial stage by the police and/or the examining magistrate, after which he is usually summoned to testify in court, in particular in jurisdictions which are governed by strictly interpreted principles of legality, orality and immediacy. However, there are some jurisdictions in which the victim-witness is not, as a rule, required to give evidence in court. In these jurisdictions, the pre-trial testimony of the victim-witness can be used as evidence in court.

Apart from the emotional burden of having to act as a witness, a further burden for victims is the fact that in certain jurisdictions victims who want to act as a civil claimant are not allowed to testify as a witness. The reasoning behind this rule is that a civil claimant has a financial interest in the case and is therefore no longer an unbiased witness. This is a rather peculiar reasoning because the victim, whether he acts as civil claimant or not, always has an interest in the case, if only to get the offender convicted and punished. The effect of the reasoning should then be that victims can never act as witnesses because they have by nature a biased opinion of what happened. This, however, is a consequence that is not drawn in any jurisdiction, most probably because the victim is an important witness, and sometimes the only witness for the prosecution. Notwithstanding the somewhat erroneous reasoning, the fact remains that the rule on not being able to constitute oneself as a civil claimant prior to testifying prejudices the position of victims during the trial proceedings. If the public prosecutor needs the victim's testimony in court, the victim cannot benefit from the rights given to him by the legislature during the pre-trial stage. In practice, the victim will be allowed to testify in court first, and then constitute himself as a civil claimant but this does not remedy the loss of his rights in the pre-trial stage. Other jurisdictions hold a more relaxed opinion about the incompatibility of these two roles. They do not consider the civil claimant to be more biased than other witnesses.

### 6.3 Recognition as a Victim

Finally, the issue of when a person should be recognized as a victim should be addressed. There are three main prevailing opinions on this subject matter. Firstly, a person can be recognized as a victim within criminal proceedings from the moment he reports a crime to the criminal justice authorities. A second option is to recognize him from the moment he acquires a formal position and role within the criminal justice system. With the third option, one is only recognized as a victim after the court has established the guilt of the accused.

In the latter perspective, the person harmed by an offence retains the status of an *alleged* victim during the entire criminal proceedings until a guilty verdict has been pronounced. This line of reasoning is analogous to the presumption of innocence of the offender during the criminal proceedings. The accused is presumed innocent until the moment the court finds him guilty. This presumption of being a 'non-offender' is necessary to protect the rights and interest of the accused and to enable him to effectively exercise his right of defence. However, if the presumption of being a 'non-victim' is used, it does not advance the interests of the victim. On the contrary, it prevents him from effectively exercising the defence of his rights, and has a definite detrimental effect on his position in the pre-trial and trial stages. For this very reason, the analogy with the defendant's status of a 'non-offender' until proven otherwise should not be followed with respect to the victim of crime. A person who reports to the authorities and claims to be a victim should be presumed as such until proven otherwise in order to safeguard his legal rights. Although it is clear that jurisdictions wishing to improve the position of the victim within criminal proceedings should not consider him an *alleged* victim until proven otherwise, it is a conceptualization of the victim which is still very much alive among criminal justice authorities in some of the jurisdictions involved in this study.

The second option – to recognize a victim when he has assumed a formal position – is also quite frequently encountered. In this conceptualization, the rights of the victim can only be exercised if he assumes a formally recognized role, in particular that of the civil claimant or auxiliary prosecutor. The need to assume such formal roles cause particular problems with regard to the provision of information. This conceptualization of the victim prevents, for instance, the provision of information by the police at the moment the victim reports a crime. Moreover, if the victim is not informed by the authorities of his rights and opportunities within the criminal process, the risk that he will not be able to assume the required formal role is not imaginary.

The first option offers the best possible protection of the rights and interests of the victim. The recognition of a person as a victim from the moment he reports the crime to the authorities not only gives him the best chance of being informed of his rights and opportunities and to be kept notified of relevant developments as described in the above guidelines, but also the best chance of effectively exercising his right to pursue his interests throughout the criminal process.

The guidelines of the Recommendation clearly show that it embraces the first conceptualization of the victim, which is theoretically justified by the victimological ground rule that the victim should be allowed to seek redress and participate in the criminal justice system. A crime is, first and foremost, to be regarded as a violation of the individual rights of the victim.

No longer should a crime be seen only as an intrusion on public order, nor should the state be the sole agent seeking redress for the act committed. The change in criminal justice concepts in perceiving crime as a hostile act by one citizen against another, demands that the latter individual, i.e., the victim, also play a part in the aftermath of crime.<sup>46</sup>

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<sup>46</sup> M.S.Groenhuijsen, *Victims' rights in the criminal justice system*, in: J.M. van Dijk c.s., *Caring for crime victims*, Selected proceedings of the 9<sup>th</sup> International Symposium on Victimology, Criminal Justice Press, Monsey, NY, USA, 1999, p. 86.

# Supplements

## CHRONOLOGY OF RELEVANT MATERIALS OF THE COUNCIL OF EUROPE

### *State Compensation*

- Resolution (77) 27 on compensation of victims of crime, and explanatory memorandum;
- European Convention on the compensation of victims of violent crimes, and explanatory report; approved by CDPC in April 1983, adopted by the Committee of Ministers in June 1983, opened for signature by Member states on 24 November 1983.

The underlying principle of these documents is that social justice requires a State to compensate victims of crime, particularly in view of the fact that, even if they can be brought to justice, most offenders are probably insolvent. The convention determines the minimum requirements for state compensation schemes for victims of violent crime.

### *Criminal Law and Procedure*

- Recommendation No. R (79) 16 concerning the promotion of human rights research in the member states of the Council of Europe;
- Recommendation No. R (81) 7 on measures facilitating access to justice;
- Recommendation No. R (82) 1 concerning international co-operation in the prosecution and punishment of acts of terrorism;
- Recommendation No. R (84) 10 on the criminal record and rehabilitation of convicted persons;
- Recommendation No. R (85) 4 on violence in the family;
- Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure;
- Recommendation No. R (87) 1 on European inter-state co-operation in penal matters;
- Recommendation No. R (87) 18 concerning the simplification of criminal justice;
- Recommendation No. R (87) 20 on social reactions to juvenile delinquency;
- Recommendation No. R (87) 21 on assistance to victim and the prevention of victimisation;
- Recommendation No. R (91) 12 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults;
- Recommendation No. R (92) 16 concerning consistency in sentencing;
- Recommendation No. R (93) 1 on effective access to the law and to justice for the very poor;
- Recommendation No. R (94) 12 on the independence, efficiency and role of judges;
- Recommendation No. R (95) 13 on the problems of criminal procedural law connected with information technology;
- Recommendation No. R (95) 19 on the implementation of the principle of subsidiarity;
- Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence;
- Recommendation No. R (99) 19 concerning mediation in penal matters.

***Outside the Framework of Criminal Procedure and Barring State Compensation***

- Recommendation No. R (79) 17 concerning the protection of children against ill-treatment;
- Recommendation No. R (83) 7 on participation of the public in crime policy;
- Recommendation No. R (84) 24 on the contribution of social security to preventive measures;
- Report of the 16th Criminological Research Conference in 1984 devoted to the study of victimisation;
- Recommendation No. R (85) 13 on the institution of the Ombudsman;
- Research on victimisation, Collected studies in criminological research, Volume XXIII (1985);
- Recommendation No. R (87) 19 on the organization of crime prevention;
- Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation;
- Recommendation No. R (90) 2 on social measures concerning violence in the family;
- Recommendation No. R (92) 15 concerning teaching, research and training in the field of law and information technology;
- Recommendation No. R (92) 16 on the European rules on community sanctions and measures;
- Recommendation No. R (95) 11 on the selection, processing, presentation and archiving of court decisions in legal information retrieval systems;
- Recommendation No. R (95) 12 on the management of criminal justice;
- Recommendation No. R (96) 8 on crime policy in Europe in a time of change;
- Recommendation No. R (98) 1 on family mediation;
- Recommendation No. R (99) 19 concerning mediation in penal matters.

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# Chapter 2

## Comparative Framework and Methodology

### 1 INTRODUCTION

This study examines the implementation of Recommendation (85) 11 of the Council of Europe in the jurisdictions of *Austria, Belgium, Cyprus, Denmark, England and Wales, France, Germany, Greece, Iceland, Italy, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Switzerland and Turkey*. In the previous chapter we established the basis for the comparative framework by analyzing the Recommendation, and examining the conceptualization of the victim. In this second chapter, the focus is turned to the jurisdictions, which are drawn into the comparative framework using the concept of local realities. Subsequently, the methods of comparison are described.

### 2 COMPARATIVE FRAMEWORK

A legal system is shaped and coloured by historical, political, cultural and socioeconomic circumstances. These external factors all have their bearing on the nature of the legal system, its principles and procedures, and its sources of law. The external factors and the internal dynamics of each system together form the 'local reality' of that system, and this must be assessed and included in any comparative analysis of the position of the victim.<sup>1</sup>

#### 2.1 External factors

##### *Demographic size*

One element that immediately meets the eye when one examines the group of jurisdictions listed above is the difference in demographic size, with populations varying from a mere 32,000 in *Liechtenstein*, to an overwhelming 82,133,000 in *Germany*. *Cyprus, Iceland, Liechtenstein*,

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<sup>1</sup> See M.E.I. Brienens and E.H. Hoegen, 'Victims of Crime in Different Jurisdictions and the Influence of Local Realities', in: J.J.M. van Dijk, R.G.H. van Kaam and J.A. Wemmers (eds.), *Caring for Crime Victims, Selected Proceedings of the 9<sup>th</sup> International Symposium on Victimology*, Criminal Justice Press, Monsey, New York USA, 1999, pp. 157-166.

*Luxembourg* and *Malta* are micro-states, all with a population of well under 1 million.<sup>2</sup> At the other end of the scale, with populations of 40 million upwards, we find *England and Wales*, *France*, *Germany*, *Italy*, *Turkey* and *Spain*. The populations of the remaining jurisdictions range from 3,681,000 in *Ireland*, to 15,678,000 in *the Netherlands*. For figures on all the jurisdictions see appendix 1.

The lines of communication within, and between, the criminal justice agencies are shorter and speedier in the micro-jurisdictions than in the large jurisdictions. This is because in a small jurisdiction only a limited number of people are professionally involved in the criminal justice system, and members of the individual agencies tend to personally know the people working in the other agencies, as well as those of their own agency. Furthermore, the public also often knows their officials by name and face. It was therefore anticipated that in these states the victim would have a much more personal and easier contact with the authorities, that he would be better informed, and that communication between the authorities regarding matters concerning the victim would be more effective. But, contrary to expectations, the researchers found that, on the whole, the diminutive size of the micro-states does *not* appear to have a significant positive effect on the position of the victim. In practice, awareness of, and attitudes towards, victims can be equally poor in all jurisdictions, regardless of their size. Furthermore, knowing the police officer due to receive the report may actually discourage, rather than stimulate, victims from reporting certain types of crime, in particular sexual offences.

#### *Political, historical and cultural influences*

The way the legal system works, and the position of the victim therein, must be seen in a political and historical context. Significant is, first of all, the way in which the state is organized. *Switzerland*, for example, consists of 26 autonomous cantons. Each canton has its own unique character, and an independent legal system. Some of the cantonal criminal justice systems have a Germanic orientation, whereas others lean more towards the French legal system. This means that, throughout Switzerland, there are substantial differences in the formal and material position of the victim of crime: to know the position of the victim in Zurich is not to know the position of the victim in Geneva.<sup>3</sup> Another example of the significance of the state organization in relation to the position of the victim is formed by *Belgium*. In recent times, the Belgian polity has proven itself capable of more or less paralysing the criminal justice system. Although forming one national state, Belgium is in effect deeply divided along linguistic and political lines. The Flemish, the Walloon, the Brussels and the German-speaking contingents form four separate communities that are in turn segregated into a liberal, a unionist, and a nationalist or communitarian block. This segregation initially seriously undermined the power of both the central and the three communitarian governments to take effective legislative action aimed at improving the position of the victim, which was sorely needed in the immediate wake of the 'Dutroux' case.<sup>4</sup>

Besides being aware of the impact of the polity, it is also instructive to develop an

<sup>2</sup> For the criteria for a micro-state see J. Duursma, *Self-Determination, Statehood and International Relations of Micro-States, The Cases of Liechtenstein, San Marino, Monaco, Andorra and the Vatican City*, University of Leyden (Netherlands), 1994.

<sup>3</sup> Each canton therefore deserves to be studied in its own right. However, because of the impossibility of adequately researching all 26 cantons, it was decided to focus primarily on the canton of Zurich, see Chapter 23 § 1 for a justification.

<sup>4</sup> For the subsequent developments see Chapter 4.



understanding of how the historical and political experience of a country can influence the mutual attitudes of the criminal justice authorities and (members of) the general public. For example, the dictatorship of Salazar in *Portugal* has left the Portugese people with a deep-rooted suspicion of the authorities and a distinct hesitation to stand up for their rights. This means that Portugese victims of crime are extremely reluctant to make enquiries about their case, or to exercise their rights.

In many countries, in particular in the south of Europe, cultural beliefs regarding the position of women have a significant negative impact on the reporting rates of sexual offences, and the way such cases are dealt with. Victims may be severely discouraged from making a report by the disbelieving attitudes of the authorities, and the social stigma that is still attached to being sexually assaulted. These attitudes are not limited to the police but can prevail right through to the highest echelons of the criminal justice system. Illustrative is a recent decision of the Supreme Court of *Italy* which held that a driving instructor could not have raped a young female student wearing jeans because it was 'common knowledge' that a pair of jeans cannot be removed without the voluntary cooperation of the wearer.<sup>5</sup>

#### *Socioeconomic context*

There are enormous differences in the levels of prosperity, the welfare systems and social security in the different jurisdictions. Where victims of crime in the richer northern European states can fall back on public services and supplementary benefits in times of need, there are often no financial or other support mechanisms available to victims in the poorer southern countries. In that case, recourse against the offender through the legal system is the victim's *only* chance of any form of redress.

## **2.2 Internal Dynamics**

Significant internal dynamics of a legal system include the nature of the system, the governing principles and procedures, the role and organization of its agencies, and the sources of law.

#### *Nature of the legal system: Common law, civil law or Nordic*

In our study, we examine the position of the victim in both *common law*, *civil law* and *Nordic* jurisdictions.<sup>6</sup> The 'common law' is the body of law developed by the English courts from

<sup>5</sup> See Chapter 13.

<sup>6</sup> There are many different approaches to the matter of taxonomy of legal systems. See, for example, K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd revised edition, Clarendon Press, Oxford, 1998. Zweigert and Kötz base their division into legal families on criteria of 'style'. The five criteria determining the style of a legal system or family are:

- (1) the historical background and development;
- (2) the predominant and characteristic mode of thought in legal matters;
- (3) especially distinctive institutions;
- (4) the kind of legal sources acknowledged by the legal system or family, and the way they are handled;
- (5) ideology (p. 68).

For a different approach see U. Mattei, 'Taxonomy and the World's Legal Systems', in: *The American Journal of Comparative Law* Vol. 45 1997, pp. 5-44. According to Mattei there are three patterns of social incentives at play in all legal systems simultaneously. These three patterns are

- (1) professional law;
- (2) political law; and

the end of the 11<sup>th</sup> century onwards. 'Common' is to say applicable to the whole country, as opposed to the local customs that were adhered to prior to the Norman Conquest of 1066. Common law jurisdictions are countries where the law as it stands today is historically traceable to medieval English law.<sup>7</sup> The common law jurisdictions in our study are *England and Wales, Ireland, Scotland, Malta and Cyprus*. As regards Scotland, Malta and Cyprus, it should be noted that, although their systems are essentially based on common law, they have also been significantly influenced by the continental civil law systems as is demonstrated in the respective reports. They are therefore generally referred to as 'mixed' jurisdictions.

A civil law system is a legal system based on Roman Law. The jurisdictions of *Austria, Belgium, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, Portugal, Spain, Switzerland and Turkey* have civil law systems. Within this group a rough distinction can be made between the Romanistic and the Germanic legal family. The French legal system is the parent system of the Romanistic family, which further comprises Belgium, Luxembourg, the Netherlands, Portugal, Spain and the French-speaking Swiss cantons. Determinative of the Romanistic systems is the lasting impact of the Napoleonic codes of the early 19<sup>th</sup> century. In the Germanic systems of Austria, Italy, Liechtenstein, the German-speaking Swiss cantons and Turkey, influences of the parent legal system of Germany have the upper hand. Greece exhibits a mixed Romanistic/Germanic system.

Finally, we also examine the position of the victim in the Nordic systems of *Denmark, Iceland, Norway and Sweden*.<sup>8</sup> Some taxonomists regard the Nordic systems as a sub-variation of the civil law systems,<sup>9</sup> whereas others see them as an independent group alongside the common law and civil law categories.<sup>10</sup> Although Roman law has had only minimal impact on the Nordic systems, they do have much in common with the continental legal systems. However, in the light of the present study on the position of the victim of crime, the Nordic systems can be regarded as a separate group distinct from the common law, Romanistic and Germanic groups.

Taxonomy such as the above can serve as a useful tool for comparing and understanding criminal justice systems. The origins of a particular institution, and subsequent legal developments in one criminal justice system can often be traced through historical links to another jurisdiction. For example, much of *Icelandic* law is a copy of *Danish* law, and Icelandic developments still tend to follow Danish developments. Similarly, the criminal

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(3) traditional law.

The difference between the legal systems is in terms of quantity, acceptability and in particular hegemony of these patterns. In Mattei's view, each system belongs to the family of legal systems named after its hegemonic pattern, i.e., either the family of the rule of professional law, the family of the rule of political law or the family of the rule of traditional law. The family of the rule of professional law can be sub-divided into common law, civil law and mixed systems.

<sup>7</sup> Zweigert and Kötz (1998), p. 277.

<sup>8</sup> 'Nordic' is more accurate than Scandinavian because, geographically speaking, neither Denmark nor Iceland is part of Scandinavia.

<sup>9</sup> See, for example, Zweigert and Kötz (1998), who regard the Nordic systems as a separate category within the continental civil law systems, alongside the Romanistic and German legal families (1998, p. 277).

<sup>10</sup> J. Andenæs Part 1 (1984), pp. 31-35, as recounted by C.F. Mulder and P.J.P. Tak, *De bekende verdachte. Een onderzoek naar de procedure voor de bekende verdachte in het Deense en Noorse (straf)procesrecht*, Gouda Quint bv, Arnhem, 1993, p. 69. Mattei classifies the Scandinavian systems as a sub-division of the mixed systems.

justice system of *Liechtenstein* has strong historical ties with the *Austrian* system, and *Austrian* developments are closely monitored, and more often than not copied, by the *Liechtensteiners*. But the value of taxonomy in relation to the current study on the position of victims of crime should not be overrated. Granted that it may further one's understanding of the origins and history of the different legal systems, it also harbours an inherent bias that the denominator of a legal system is of major influence on the position of the victim of crime. To avoid prejudice, the reports on the individual jurisdictions are presented in alphabetical order.

### *Adversarial or inquisitorial*

Besides the distinction between common law, civil law and Nordic law, one should also be aware of the difference between an *adversarial* and an *inquisitorial* criminal justice process. In an adversarial criminal justice system – known in short as an *accusatorial* system<sup>11</sup> – two parties contest each other before an impartial judge, whereby a procedural truth emerges. The victim has no place, other than as a witness, in such a strict two-party system. Furthermore, the tradition of cross-examination in the adversarial system is thought to be particularly debilitating for victims of crime. In an inquisitorial system the search is for the material, as opposed to a procedural truth, and the judge has a much more active role in the proceedings. In the archetype of the inquisitorial system, pre-trial investigations are carried out by an examining magistrate. Contrary to his non-existence as an individual party in a purely adversarial criminal justice system, the victim of crime has a potentially much more active role in an inquisitorial system, along with a right to legal representation. Furthermore, the inquisitorial system does not recognize the tradition of cross-examination as practised in an adversarial system. In view of these differences between an adversarial and an inquisitorial system, it is a popular contention that the victim of crime is worse off in the former than in the latter system. In the course of this study the researchers will examine whether this common assumption is true.

The main trial proceedings of the *common law* jurisdictions are adversarial by nature, whereas the main hearings of the *civil law* and *Nordic* jurisdictions constitute a mixture of inquisitorial and adversarial elements. It should be noted that within each system there can be substantial differences between the pre-trial and trial stages. Even in adversarial criminal justice systems the pre-trial stage is of a more or less inquisitorial nature, characterized by the coercive measures that may be used by the police against the suspect. Likewise, the main hearing of an otherwise inquisitorial system is at least semi-adversarial.

### *Principles and procedures*

Besides paying attention to the nature of the legal system, one should also be aware of the main principles and procedures governing the criminal process in each jurisdiction. In guideline B.5, the Recommendation already points us towards the distinction between the principle of expediency versus the principle of legality (see Chapter 1, § 4, commentary to guideline B.5), and how the matter of compensation of the victim should be kept in mind if the decision whether to prosecute is a discretionary one. Examples of two other principles that are directly relevant to the position of the victim are the principle of orality and the principle of immediacy. Strict adherence to these two principles means that the victim is

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<sup>11</sup> An *accusatorial* system is an adversarial system whereby one of the parties – the prosecutor – formally accuses the other, i.e., an adversarial *criminal* trial.

compelled to make a personal appearance during the main court hearing to relay his version of events. In jurisdictions where this is not the case, his written testimony often suffices.

Procedural characteristics can obviously greatly influence the position of the victim. Where unusual features of the criminal process have a particular impact in relation to the victim these are brought explicitly to the forefront in the respective reports. An example is the 'precognition process' in *Scotland*, which allows both the prosecution and the defense to independently question the victim/witness in the pre-trial stages, without any form of (judicial) supervision.

#### *Criminal justice authorities and partners*

The nature and organization of the agencies and organizations that the victim of crime may come into contact with in the course of the criminal proceedings differ from one jurisdiction to the next. Significant agencies include the police, the prosecution service, the judiciary, Victim Support, the probation service and the State Compensation Board or Committee. There are also other agencies that generally remain invisible to the victim, but may still have a direct or indirect impact on his position, such as the Ministry of Justice and of the Interior.

In this study the focus is mostly on the organizational structures and the powers of the different agencies, in as far as these are relevant to the position of the victim. Other points of interest are whether the members of a particular agency are sensitized to the rights and needs of victims through pointed training, and whether there is any performance assessment of the way they treat victims of crime.

#### *Sources of law*

The relations between, and the relative importance of, the different sources of law vary from one jurisdiction to the next. Whereas wide-scale codification of criminal law and procedure is typical for the continental legal systems, it is case law that has traditionally lain at the heart of the common law, and there is still no such thing as a Code of Criminal Procedure in *England, Ireland or Scotland*. Nevertheless, primary legislation (acts passed by parliament) does nowadays play an increasingly important role in the common law jurisdictions as is demonstrated in England by the many Criminal Justice Acts that have been passed in the last couple of decades. The significance of doctrine also varies from country to country. In some jurisdictions, in particular the *Germanic* but also the *Romanistic* jurisdictions, doctrine has always been an important source of law. But in the common law countries it is traditionally of low standing, with the exception of the 'mixed' jurisdiction of Scotland where 'institutional writings' have always been awarded considerable respect.

### 3 METHODOLOGY

We now move to the methods used in this research. The study was conducted in four stages:

- Stage 1: Inception
- Stage 2: Data collection
- Stage 3: Report writing
- Stage 4: Comparative analyses and conclusions

#### 3.1 Stage 1: Inception

During the inception stage we developed the comparative framework. In the above, we have already introduced some of the fundamental elements underpinning this framework. First of all, there is the body of thought of the Recommendation as analysed in Chapter 1, and the subsequent conceptualization of the victim. A second building stone is formed by the individual jurisdictions and their local realities, as described in § 2 of the present chapter. Together these factors form the rough contours of a comparative framework, to which the following elements must still be added.

##### *Objectives of comparison*

In the introduction to Chapter 1 we described the aim of this study as being, first of all, to acquire knowledge of the state of affairs in the different member states regarding the legal rights of, and opportunities for, victims of crime within criminal proceedings; and, secondly, to assess the impact of the range of thought of the Recommendation. These dual tracks can be broken down into five concrete objectives that guide our comparisons. First of all, we are interested in whether the jurisdictions have formally implemented the guidelines contained in the Recommendation. That is to say: have efforts been made to incorporate the measures suggested in the guidelines into the official body of law? The second question that then arises is how this formal implementation has been brought about, i.e. what legal instruments have been used to introduce the measures? Thirdly, we want to know whether formal implementation has also led to actual implementation, meaning that the law in the books has become the law in practice. Fourthly, if this is the case, how has this actual implementation been achieved, and finally, how effective is the implementation?

##### *Thematic approach*

The decision to approach the Recommendation from a thematic rather than a chronological perspective, which was taken in the early stages of the inception stage, had considerable influence on the final form of the comparative framework (see also Chapter 1). The order of the guidelines of the Recommendation follows the standard sequence of criminal proceedings, i.e., the activities of the police, then the prosecution and finally the court. But the guidelines also invite an alternative approach based on the following three themes:

- (1) the victim and information
- (2) the victim and compensation
- (3) treatment and protection of the victim

These are the three leitmotiv's that run as threads through the Recommendation, and reflect the most fundamental issues around which the Recommendation is construed. They are

not restricted to one stage of the proceedings, or to a particular agency, but run their separate courses from the moment the offence is reported to after the proceedings have ended. In this study these three threads are untangled, one by one.

*Prima inter pares* is the information theme, which forms the backbone of the Recommendation. There are two subcategories of information: firstly information passing from the criminal justice system to the victim, and secondly information concerning the victim circulating within the system itself. Regarding the first sub-category, both the police, the prosecution and the court have the duty to inform the victim of crime of his rights and opportunities, and of the progress in his case. As already contended in Chapter 1, it is essential that the authorities fulfil these duties because the victim can only exercise his rights effectively if he is made aware of them. The second subcategory refers to information concerning the victim that one agency must pass on to the next, in particular information on the injuries and losses of the victim that facilitate his claim for compensation.

With that we touch on the second leitmotiv of the victim and compensation. This theme is also divided into subcategories, namely the expediency principle and compensation, the court and compensation, and the collection of compensation. A successful application for compensation within the criminal proceedings involves several decisive moments. First of all, the victim must be (made) aware of his opportunities for claiming compensation. Secondly, the prosecution must keep the victim's interest in claiming compensation in mind when deciding on the prosecution. Then the court must decide on the claim, and to do so it must have at its disposal all essential information. Finally, where compensation has been awarded, it still needs to be collected. Only if all these hurdles have been successfully overcome can the victim be said to have been actually compensated.

The third leitmotiv concerns the treatment and protection of the victim. Under this heading we first discuss whether the police are sensitized through pointed training to the way they should treat the victim. Then we look at the questioning of the victim throughout the criminal process. The protection element is concerned with protection against publicity as well as protection against intimidation and retaliation by the offender.

For an overview of the Recommendation broken down into the three themes, with the matching guidelines, see appendix 2.

### *Instruments of comparison*

Another significant part of the inception stage was the development of instruments of comparison. Starting point was the concept of *implementation indicators*. An implementation indicator is a factor that has direct or indirect influence on, or is significant in relation to, the formal and/or actual implementation in a given jurisdiction of the standards set by the Recommendation. Separate sets of indicators were established for each of the three themes embodied in the Recommendation, as well as a general set dealing with the broader context of the formal position of the victim in each jurisdiction. Many of the indicators included in this last set have already been reviewed as elements of the local realities of the individual jurisdictions. For example, it has already been argued above that cultural influences, the state polity, the nature of the legal system, principles and procedures, and the organization and powers of the criminal justice agencies can all have an impact on the position of the victim. As far as the first theme of the victim and information is concerned, the indicators include the systems used to inform the victim (automatic or manually, by mail, in person or by phone) and the distribution of responsibilities in transmitting information. In relation to compensation, significant factors are the status of compensation (a penal sanction versus a decision in civil law), the role of state compensation, and the responsibility for the collecting

of compensation that has been awarded (the authorities or the victim himself). Influential in relation to treatment and protection is, among others, whether there are special units trained to deal with particular types of crime such as sexual offences, and if there are prohibitions as regards certain types of questions, for example questions about the past sexual history of the victim in the case of sexual offences. Another indicator is whether the criminal justice authorities have any special powers or measures at their disposal to use for the protection of the victim, and whether there are specific protective programmes geared towards meeting the needs of threatened or intimidated victims and/or witnesses.

Secondly, it soon became clear that an element allowing for the appreciation of *progress* made over a given period of time needed to be added. Significant efforts to make improvements in a jurisdiction with a considerable backlog at the outset should count for something, even though the intermediary results measured at the end of the time-span may not (yet) be able to compete with the situation in other jurisdictions. In this study the time-span ran from 1985 – the year the Recommendation was adopted – until 1 July 1999.

The working tools of the implementation indicators combined with the appreciation of progress were eventually absorbed into the definitive measuring instrument of the *developmental scheme*. This scheme was evolved in stage 4 of the study, see § 3.4.

### 3.2 Stage 2: Data Collection

Having thus established the comparative framework in the inception stage, the second stage of the study consisted of data collection. From the outset it was the researchers' ambition to look beyond the 'law in the books' to the 'law in practice'. This is clearly reflected in the five objectives of comparison described in § 3.1 of this chapter which refer to both the 'formal' and the 'actual' implementation of the Recommendation. In relation to the guidelines embodied in the Recommendation, this distinction between formal and actual implementation is a fundamental one. It is a common occurrence that the position of the victim as envisaged by the law in the books is simply not reflected by the law in practice. To evaluate the law in the books and the law in practice the researchers used legal materials as well as other sources of information. These other sources included material acquired as a result of (structured) interviews, available sociological and other research results, and finally personal observations.

Each researcher took responsibility for data collection in 11 of the 22 jurisdictions.<sup>12</sup> The division of the jurisdictions was made on the basis of language proficiency. In 16 of the 22 jurisdictions the researchers had sufficient command of the language to be able to read all written material in the original as well as conduct interviews in the native language.<sup>13</sup> In a further 3 jurisdictions written material could be read in the original, but the interviews

<sup>12</sup> Data on *Belgium, Cyprus, France, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Spain and Turkey* was collected by Marion Brien. Data on *Austria, Denmark, England and Wales, Germany, Iceland, Ireland, Liechtenstein, Norway, Scotland, Sweden and Switzerland* was collected by Ernestine Hoegen.

<sup>13</sup> Austria, Belgium, Cyprus, England and Wales, France, Germany, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Portugal, Scotland, Spain and Switzerland. Due to their colonial history, all legal material in Cyprus and Malta is written in English. The interviews were also conducted in this language. In Portugal, the researcher posed the questions in English or French, and the interviewees responded in Portuguese.

were conducted in English.<sup>14</sup> Of the three remaining jurisdictions of *Greece, Iceland and Turkey*, it was not possible to read or speak the language. In Greece, relevant legal material was meticulously translated by a judge of the Supreme Court, and the interviews were conducted in English or French. In Iceland, there is a substantial amount of material available in Swedish, which the relevant researcher could read. All interviews in this jurisdiction were conducted in English. Finally, for Turkey the researcher resorted to a translator who accompanied her to Turkey, translated during all interviews and also translated written material.

### *Legal materials*

Legal materials were used to meet the first two objectives of comparison, namely to see whether the measures suggested in the guidelines had been incorporated into the official body of law, and secondly, if so, by what means.

For each jurisdiction, the primary and secondary sources of law described in § 2.2 were consulted. Preliminary orientation on the legal material of most jurisdictions was carried out in the Max-Planck-Institute of Foreign and International Criminal Law in Freiburg-im-Breisgau, Germany, which houses an extensive collection of material on criminal law and criminology.<sup>15</sup> Further in-depth studies were made during working visits to each individual jurisdiction. Interim updates were again made in the Max-Planck-Institute.<sup>16</sup>

### *Interviews*

A substantial part of each working visit was devoted to conducting (structured) face-to-face interviews with representatives of the different criminal justice agencies and partners, as well as with researchers and academics. The interviews were conducted on the basis of a questionnaire which was drawn up during the inception stage. This questionnaire, which is included as appendix 4 to this chapter, consists of a list of questions regarding the roles of the different (criminal justice) agencies interrelated with the three themes of the Recommendation. The questions pertinent to each individual organization were put to the representative(s) of the respective agencies in the course of each interview. There was also ample room to pose additional questions reaching beyond the scope of the questionnaire. A list of interviewees is included as an appendix to each individual country report.<sup>17</sup>

The interviews were primarily used as an aid in the quest for essential written materials. Experts in the field were invited to give a run-down of the relevant provisions, and where they could be found. This is an efficient and effective way of finding what one needs. Also,

<sup>14</sup> Denmark, Norway and Sweden.

<sup>15</sup> Although voluminous material on many of the jurisdictions included in this study is available in the institute, it should be noted that little to nothing is stocked on Cyprus, Iceland, Luxembourg and Malta.

<sup>16</sup> The researchers would like to thank the Max-Planck-Institute, and all those who work there, for the exceptional hospitality and support extended towards them throughout the study.

<sup>17</sup> The researchers did not, at any time, personally interview victims of crime for two reasons. First of all, regarding the specific questions raised in this study, victim support organizations were capable of providing us with much more information based on their wealth of experience of working with victims of crime than we could ever have amassed on our own accord. In this sense they acted as mouthpiece of victims. Secondly, this study aims to make an inventory and analysis of material that is *already available* in each jurisdiction – it was never the intention to stray into the complex field of designing and conducting victim surveys.



some material is simply not available to the general public. The only way to find out about the existence of a confidential internal guideline, let alone actually getting hold of it, is through a contact in the respective agency.

Secondly, (parts of) interviews sometimes also served as autonomous sources of information for the evaluation of the actual implementation of the guidelines. In particular, this was the case where there was simply no other material available. In many jurisdictions research has been done concerning the position of the victim of crime and it is therefore not necessary to use interviews as an autonomous source. But in other jurisdictions there is still very little awareness of the problems encountered by victims, and no relevant studies or research results are available. In that case an interview may be the only way of finding out anything significant about the position of the victim. It is self-evident that material derived exclusively from an interview should be treated with the utmost care because the information given by the interviewee is likely to be based on his personal and subjective opinion. To test the value of information derived from an interview, it was always verified by laying it before other interviewees representing different agencies. Furthermore, such information was only used as an indication, and not as proof, of what practice may be like. Where an interview is used as an autonomous source, this is explicitly mentioned in the text.

#### *Local surveys, sociological and psychological research, statistics*

This type of material forms a significant part of the sources of information regarding actual implementation. However, it should be noted that, whereas in some jurisdictions there are ample victim surveys available, other jurisdictions have yet to start on this type of research. Where such surveys are available, great care must be taken when comparing one survey to another. A conclusion drawn from a cursory survey of 1,000 victims is qualitatively totally different from conclusions based on in-depth interviews of 20 victims. Wherever such research is drawn on, the methods and the amount of respondents are stated.

#### *Personal observation*

Personal observation was used as a way of discerning courtroom practices and routines. Ostensibly small details such as the way the legal actors dress (robes and wigs, business suits or casual clothing) can have significant influence on the victim's courtroom experience. Personal observation also enabled us to make tentative remarks about the style of questioning in some courts – cross-examination in one jurisdiction is the same as cross-examination in another only by name. In some cases, seeing was believing.

### **3.3 Report Writing**

In the third stage of the study, the reports were written on the implementation of the body of thought of the Recommendation in each individual jurisdiction (Chapters 3 on *Austria* to 24 on *Turkey*). The contours of the report structure had been set up during the inception stage. In due course this structure underwent some minor adjustments. The final version of each country report consists of two parts.

#### *Part I*

Part I of each report concentrates on significant aspects of the local reality of the criminal justice system, and on the formal position of the victim within that framework. The prelude on 'Scenery' highlights significant aspects of the history, politics and socioeconomic circumstances of the jurisdiction. This is followed by introductory remarks (§ 1) and an

analysis of significant principles governing the legal system (§ 2). In § 3, the most important criminal justice authorities and criminal justice partners are introduced, and their position in the criminal proceedings examined. This is followed by a run-down of sources of (criminal) law (and procedure) in § 4, and a summary of legislation, circulars and other provisions that deal exclusively with victims of crime (§ 4.3). This last section indicates how active the legislature has been between regarding the improvement of the position of the victim. Part I ends with an exposition of the roles that the victim may play in each jurisdiction (§5, see Chapter 1 § 6).<sup>18</sup>

### *Part II*

Part II of each report examines the formal and actual implementation of the Recommendation on the basis of the three themes. First we discuss the victim and information (§ 6), then the victim and compensation (§ 7) and finally the treatment and protection of the victim (§ 8). Section 9 contains the conclusions. An itemized chapter structure is included as appendix 5 to this chapter. It should be noted that the individual country reports sometimes contain minor deviations from the basic chapter structure, depending on the peculiarities of the system and the position of the victim therein.

### *Order of events*

Following the data collection in a particular jurisdiction, the researcher immediately wrote the report while the experiences and impressions were still fresh in her mind. As a result, the individual jurisdictions went through stages 2 (data collection) and 3 (report writing) at different times, i.e., the report on jurisdiction A was written before data was collected on jurisdiction B, the report on jurisdiction B was written before data was collected on jurisdiction C, and so on. However, the conclusions to each report (§ 9 of Part II) were not drawn until all the reports on the individual jurisdictions had been written up and up-dated, and the comparative analyses completed, see stage 4 below.

The finished reports were sent to one or more of the interviewees of each jurisdiction for comments and corrections. No response was received from *Cyprus*, *Liechtenstein* or *Turkey*.

## **3.4 Stage 4: Comparative Analysis and Conclusions**

Stage 4 consisted of the comparative analysis of the formal and actual implementation of the Recommendation in the 22 individual jurisdictions. This process was thematically structured, and the results laid down in three chapters, namely Chapter 25 on the victim and information, Chapter 26 on the victim and compensation, and Chapter 27 on the treatment and protection of the victim. It should be stressed that the accent here is on *analysis*, rather than comparison, because the process of comparison was inevitably set into motion the moment the study was commenced. It would, in fact, have been impossible *not* to make continuous comparisons in a study such as this. The comparison is not only an end in itself – the obvious and necessary conclusion of all ‘comparative research’ – but also an instrument to help the researcher understand the phenomena he is confronted with, and to bring them into some kind of order. This ‘ongoing’ process of comparison was guided by the instruments

<sup>18</sup> See also M.E.I. Brienens and E.H. Hoegen, ‘What Should the Victim’s Role Be? The European Context’, in: Home Office Conference Report, *The Role of Victims in the Criminal Justice Process*, 13-15 September 1999, Shrigley Hall Hotel, Macclesfield, pp. 2-18.

of comparison described above which should be distinguished from the definitive measuring instrument of the *developmental scheme*.

*Structure of the developmental scheme:*

1 - underachievement	-
----- <i>R (85)11</i>	
2 - fulfilling the standard set by the Recommendation	R
----- <i>R (85)11</i>	
3 - superseding the standard set by the Recommendation	+
4 - best practice	++

The developmental scheme contains an overview of all the different stages of development that the individual jurisdictions find themselves in regarding the formal and/or actual implementation of (an element within) one of the guidelines of the Recommendation. It reflects not only under-achievement (symbolized by '-') or compliance ('R') with an individual guideline, but also levels of sophistication that supersede the standard set by the Recommendation ('+'). The supreme level of achievement is referred to as 'best practice' ('++'). If the highest conceivable level of sophistication has not (yet) been achieved by any of the jurisdictions, this is symbolized by placing it in italics (for a more detailed guide to reading the developmental scheme, see § 1 of Chapter 25).

The developmental scheme has three main strengths. First of all, it provides an overview of the rate of implementation of a given guideline, and of all possible stages of sophistication encountered in practice in Europe. Secondly, each individual jurisdiction can be easily located in the scheme, and its stage of development compared with the standard set by the Recommendation, and with those of the other jurisdictions included in the study. Finally, the developmental scheme is, in fact, a 'manual of development', with a step-by-step guide to successful implementation. As a result, the developmental scheme is not only the primary instrument of measurement, but also the key result of the comparative analyses, and thereby of this study.

Developmental schemes of formal and/or actual implementation have been woven into the three chapters containing the comparative analysis of the victim and information, the victim and compensation, and the treatment and protection of the victim, respectively. Each of these three chapters is concluded with a table providing an overview of the overall performance of the individual jurisdictions in relation to the guidelines dealt with in that chapter. The study culminates in Chapter 28, which contains an overview of the main findings, assesses legislative activity and best practice, and makes recommendations for a better implementation of R (85) 11.

# Supplements

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# Appendixes

## APPENDIX 1:

### OVERVIEW CHARACTERISTICS JURISDICTIONS

<i>Country/Criterion</i>	<i>Population</i>	<i>Nature</i>
<b>Austria</b>	8,140,000	civil law, Germanic
<b>Belgium</b>	10,141,000	civil law, Romanistic
<b>Cyprus</b>	771,000	mixed common/civil law
<b>Denmark</b>	5,270,000	Nordic
<b>England and Wales</b>	48,000,000	common law
<b>France</b>	58,683,000	civil law, Romanistic
<b>Germany</b>	82,133,000	civil law, Germanic
<b>Greece</b>	10,600,000	civil law, Romanistic/Germanic
<b>Iceland</b>	276,000	Nordic
<b>Ireland</b>	3,681,000	common law
<b>Italy</b>	57,369,000	civil law, Romanistic
<b>Liechtenstein</b>	32,000	civil law, Germanic
<b>Luxembourg</b>	422,000	civil law, Romanistic
<b>Malta</b>	384,000	mixed common/civil law
<b>Netherlands</b>	15,678,000	civil law, Romanistic
<b>Norway</b>	4,419,000	Nordic
<b>Portugal</b>	9,869,000	civil law, Romanistic
<b>Scotland</b>	5,000,000	mixed common/civil law
<b>Spain</b>	39,628,000	civil law, Romanistic
<b>Sweden</b>	8,875,000	Nordic
<b>Switzerland</b>	7,299,000	civil law, Germanic/Romanistic
<b>Turkey</b>	64,479,000	civil law, Germanic

**APPENDIX 2:****RECOMMENDATION (85) 11 BROKEN DOWN INTO THEMES****1 THE VICTIM AND INFORMATION****1.1 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.
- (A.3) The victim should be able to obtain information on the outcome of the police investigation.
- (B.6) The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.
- (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.

**1.2 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.
- (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.

**2 THE VICTIM AND COMPENSATION****2.1 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;
- (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.

## **2.2 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.
- (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.
- (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 of any other measure, great importance should be given – among these conditions – to compensation by the offender to the victim.

## **2.3 The 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.

# **3 TREATMENT AND PROTECTION**

## **3.1 Victim-Awareness Training**

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

## **3.2 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 or other persons qualified to assist them.

## **3.3 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.
- (G.16) Whenever this appears necessary, and especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender.

**APPENDIX 3:****QUESTIONNAIRE****1 GENERAL QUESTIONS**

- 1.1 Which laws / guidelines mention the victim of crime?
- 1.2 Are there (evaluation) studies?
- 1.3 What kind of services are involved with victims of crime? What is the role of victim support / probation service / penitentiary services?
- 1.4 What roles do victims play during the criminal proceedings?

*reporting the offence*

- 1 to whom can a victim report a crime and can it be done easily?
- 2 do special regulations or procedures exist regarding the treatment of those reporting sexual crimes / abuse or domestic violence?

*complainant*

- 1 which crimes require a formal complaint by the victim?
- 2 with whom can the victim file a formal complaint?

*civil claimant*

- 1 can the victim claim compensation from the offender in the course of the criminal proceedings? Do many victims use this right?
- 2 how does a victim become a civil claimant?

*private prosecution*

- 1 are there certain types of crime which are reserved for private prosecution by the victim?
- 2 how often do private prosecutions occur, and are they successful?
- 3 is a private prosecution expensive?

*witness*

- 1 are victims often called to testify in court?
- 2 are they given protection of any kind?
- 3 are there alternative ways of giving evidence? For instance in chambers, by video link etc.
- 4 are there special procedures for hearing vulnerable victims, such as rape victims and children?

- 1.5 Does the role the victim has, or chooses to play, an effect on his legal rights?

**2 QUESTIONS REGARDING THE POLICE**

- 2.1 General questions regarding the police:

- 1 Do specific laws / guidelines exist which govern the relationship between the police and victims of crime?
- 2 Are there special branches to deal with victims, such as children / victims of sexual or violent crime?
- 3 Are particular police officers responsible for dealing with victims?
- 4 Does community policing (police in the neighbourhood) exist? If so, does it facilitate assistance to victims?



## 2.2 Training of police officers (guideline A.1):

- 1 Does the police receive training? If so, how is the training organized: theoretical and/or practical training?
- 2 is there knowledge about actual needs of victims within the police? Does mediation exist? If so, is the police trained to mediate?
- 3 do the police try to create incentives to promote a better treatment of victims, for instance by making it a basic police-duty and/or including it in their annual evaluation of the functioning of a police officer?
- 4 does the fact that the police treats victims properly get them additional funding?
- 5 regarding the effects of training: has the training changed police mentality in any way?

## 2.3 Information provided by the police (guideline A.2):

- 1 do the police inform the victim about assistance, possibilities to obtain compensation by the offender?
- 2 do the police inform the victim about the possibilities of legal assistance or practical advice?
- 3 does the police refer victims to victim support? If so, which victims are referred?
- 4 is there an information system? (Automatic / brochures / leaflets / victim letter), and do the authorities check if victims have been informed?

## 2.4 Information provided by the police (guideline A.3):

- 1 do the police (or the public prosecutor) inform the victim about progress or outcome of the police investigation?
- 2 do the police (or the public prosecutor) inform the victim about the decision to prosecute or not?

## 2.5 The police and compensation (guideline A.4):

- 1 do the police inform the prosecutor about the wishes of the victim in respect of compensation by the offender?
- 2 do the police inform the prosecutor about the injuries and losses suffered by the victim?
- 3 how effective is the system?

## 2.6 The police and questioning of the victim (guideline C.8):

- 1 do the police give due consideration of the victim's personal situation and his dignity during questioning sessions?
- 2 does the victim have rights during questioning? (eg. have a lawyer)
- 3 are the police/ judicial authorities aware of the risk of secondary victimization?
- 4 how are the facilities? Is the victim questioned in a private room at the police station / prosecution service?
- 5 how often is a victim questioned?
  - 1 does repeated questioning occur often?
  - 2 does the victim has to be questioned again during the trial? (always / often)
- 6 are there special questioning techniques regarding vulnerable victims, such as children and victims of sexual or violent crime?

## 2.7 Co-operation of the police with the public prosecutor:

- 1 how do the police communicate with the prosecution service?
- 2 are the contacts frequent ?
- 3 is there new (future) legislation which changed (will change) this relationship?

### 3 QUESTIONS REGARDING THE PROSECUTION

#### 3.1 General questions regarding the prosecution:

- 1 Are there any laws / guidelines regarding the prosecution and the victim?

#### 3.2 Information about the decision whether to prosecute (guideline B.6):

- 1 is the victim informed if the prosecutor decides not to prosecute the case? (always, often, never?)
- 2 is the victim informed if the public prosecutor decides to go ahead with the prosecution?
- 3 is it his duty to inform the victim of the date of the hearings / trial?
- 4 does the public prosecutor have the right to drop the charges? When?

#### 3.3 Review/private prosecution (guideline B.7):

- 1 does the prosecutor inform the victim of the possibility of review or appeal against a decision not to prosecute?
- 2 does the prosecutor take the victim's interests into account if he decides not to prosecute?

#### 3.4 Questioning by the prosecution (guideline C.8):

- 1 is there any training to make prosecutors aware of the needs of victims, and how to question victims?
- 2 is there often personal contact with victims of serious crime?
- 3 does the public prosecutor question the victim in person during the pre-trial stage, or does he leave this to an examining magistrate?
- 4 does the public prosecutor question the victim in court?
- 5 If the prosecutor questions the victim, does he do it in the same manner as he questions the accused?
- 6 does he protect the victim's interests (e.g. during examination by the defence counsel) or is that the task of the court?

#### 3.5 Compensation by the offender (guideline B.5):

- 1 does the public prosecutor take the (monetary) interest of the victim into account if he does not prosecute?
- 2 are there opportunities to obtain compensation before and/or during the criminal proceedings?
- 3 does the public prosecutor himself take any steps to secure compensation of the victim?
- 4 is compensation mentioned in the law as one of the condition for a suspension / waiver / lesser punishment?
- 5 what is the percentage of victims claiming compensation in criminal court?
- 6 does the victim always/often/rarely get the compensation he claimed?
- 7 does State compensation exist? If so, which victims can apply?

### 4 MAIN COURT PROCEEDINGS

#### 4.1 Position of the victim during the court proceedings:

- 1 is the victim an outsider or a party to the proceedings?
- 2 does the victim has the right to legal assistance or advice? If so, does he have to pay for a lawyer?
- 3 does he have the right to present his claim during the preliminary stage? If so, does this mean that he is not obliged to also appear in court?

**4.2 Respectful treatment:**

- 1 how and by whom and how often is the victim questioned?
- 2 does cross examination exist?
- 3 does the court protect the victim against hostile questioning by the defence?
- 4 can the victim express his points of view regarding the accused / the crime / the punishment / the claim for compensation?
- 5 can he bring his own witnesses and experts into the case?

**4.4 Information (guideline D.9):**

- 1 does the court inform the victim of the matters listed in guideline D.9? Or is this the task of the public prosecutor?

**4.5 Information (guideline D.12):**

- 1 does the court receive information about:
  - 1 the victim's wishes to obtain compensation?
  - 2 the injuries and losses suffered by the victim?
  - 3 the victim's need for compensation?
  - 4 any compensation/restitution received from the offender prior to the trial?

**4.6 Compensation by the offender (guideline D.10):**

- 1 does the court have the possibility to order compensation by the offender?
- 2 what are the existing limitations, restrictions or technical impediments?

**4.7 Status of compensation (guideline D.11):**

- 1 does the legislation provide for the possibility of compensation:
  - 1 as a compensation order?
  - 2 as a substitute for a penal sanction?
  - 3 in addition to a penal sanction?

**4.8 Compensation as a condition (guideline D.13):**

- 1 does the possibility to attach financial conditions exist?
  - 1 as a condition to a deferred or suspended sentence?
  - 2 as a probation order?
  - 3 or any other measure?

**4.9 Enforcement of compensation (guideline E.14):**

- 1 which possibilities exist to enforce the payment of compensation by the offender?
- 2 who is responsible for enforcement of the sentence?
- 3 can the victim get help to collect compensation from the offender?

**5 PROTECTION OF THE VICTIM****5.1 Protection from publicity (guideline E.15):**

- 1 do photographs, names and addresses of victims appear in the newspapers or on t.v.? (often, sometimes?)
- 2 are television camera's allowed in the courtroom? (always, sometimes, never?)
- 3 can the victim be protected against the press or other media, and can the trial be held in camera?
- 4 are there other measures to protect the victim from publicity before and during the trial?

### 5.2 Protection from threats and intimidation (guideline G.16):

- 1 protection during the pre-trial stage (investigation):
  - 1 are there ways to protect the victim against intimidation/retaliation by the offender?
  - 2 are there ways to protect the victim during the hearings?
  - 3 what type of victims has the right to police protection?
- 2 protection during the main trial proceedings:
  - 1 can the victim be protected against intimidation by the offender in the court-room?
  - 2 are there ways to protect the victim during the questioning by the defence counsel/offender?
  - 3 can the victim be heard without the presence of the offender?
- 3 protection after the judgement:
  - 1 do possibilities to obtain restraining orders exist? (eg. orders not to frequent the street or the area in which the victim lives etc.)

**APPENDIX 4:****CHAPTER STRUCTURE****Scenery****PART 1:****THE CRIMINAL JUSTICE SYSTEM OF (RESPECTIVE JURISDICTION)**

- 1 INTRODUCTION**
- 2 GENERAL REMARKS AND BASIC PRINCIPLES**
- 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS**
  - 3.1 Investigating Authorities**
  - 3.2 Prosecuting Authorities**
  - 3.3 Judiciary**
    - 3.3.1 Criminal Proceedings
  - 3.4 Enforcement Authorities**
  - 3.5 Probation Services**
  - 3.6 Victim Services**
  - 3.7 Other authorities and agencies**
- 4 SOURCES OF LAW**
  - 4.1 General Sources of Law**
  - 4.2 Sources of Criminal Law and Procedure**
  - 4.3 Specific Victim-Oriented Sources of Law and Guidelines**
- 5 ROLES OF THE VICTIM**
  - 5.1 Reporting the Offence**
  - 5.2 Complainant**
  - 5.3 Civil Claimant**
  - 5.4 Private Prosecutor**
  - 5.5 Auxiliary Prosecutor**
  - 5.6 Witness**

**PART II:****THE IMPLEMENTATION OF RECOMMENDATION (85) 11**

- 6 THE VICTIM AND INFORMATION**
  - 6.1 Informing the Victim**
    - Guideline A.2
    - Guideline A.3
    - Guideline B.6
    - Guideline D.9

**6.2 Information About the Victim**

Guideline A.4

Guideline D.12

**7 THE VICTIM AND COMPENSATION****7.1 The Expediency Principle and Compensation**

Guideline B.5

Guideline B.7

**7.2 The Court and Compensation**

Guideline D.10

Guideline D.11

Guideline D.13

**7.3 Enforcement of compensation**

Guideline E.14

**8 TREATMENT AND PROTECTION OF THE VICTIM****8.1 Victim-Awareness Training**

Guideline A.1

**8.2 Questioning the Victim**

Guideline C.8

**8.3 Protection of the victim**

Guideline F.15

Guideline G.16

**9 CONCLUSIONS****SUPPLEMENTS****ABBREVIATIONS****BIBLIOGRAPHY****WITH MANY THANKS TO:** (list of interviewees and others who rendered substantial support)

# Chapter 3

## Austria

### SCENERY

Now a modest federal republic of just over 8 million people, Austria was once at the centre of European power. Through the house of Habsburg, monarchs of Austria from 1282 until 1918, the imperial crown of the Holy Roman Empire was in Austrian hands from 1438 until 1806. Eventually the Austrian army was defeated by the French in 1805, and when Napoleon established the Confederation of the Rhine in 1806, the Habsburg Emperor Francis II renounced his title and the Holy Roman Empire was dissolved. Despite the loss of this imperial crown, the Austrian empire was still substantial, and in 1867 the *Ausgleich*, or compromise, between the Austrian and Hungarian states made the Habsburg Emperor Franz-Joseph Dual Monarch of Austro-Hungary. In protest against the Habsburg rule, a young Serb nationalist assassinated Archduke Franz-Ferdinand, heir to the throne of Austro-Hungary, and his wife, in Sarajevo on 28 July 1914. Austro-Hungary promptly declared war on Serbia, thereby triggering the events that led to World War I, and the eventual downfall of the Habsburgs. On 12 November 1918, the Republic of Austria was established. The 1919 peace treaty of Saint-Germain set the new Austria at one-quarter of its former size and one-fifth of its former population. A constitution was drawn up in 1920, and revised in 1929, but independence was relatively short-lived, and in 1938 Austria was absorbed into Nazi Germany by the *Anschluß*, or union, of 1938.<sup>1</sup>

The constitution was reinstated on 1 May 1945, and the Republic of Austria is now a federal republic encompassing 9 states. The federal government is headed by the Chancellor, with the President as Chief of State. The legislative branch consists of a bicameral Federal Assembly made up of a Federal Council and a National Council. The Federal Council has 63 members, all representatives of the different states. The 183 members of the National Council are elected by popular vote.<sup>2</sup> The Constitutional Court is responsible for constitutional review. Each of the 9 states also has its own state government and parliament. The Federal Constitution determines which matters are the prerogative of the federal government, and which are to be dealt with by the individual states.

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<sup>1</sup> R. Stewart, *The Illustrated Encyclopedia of Historical Facts From the Dawn of the Christian Era to the New World Order*, Marshall Editions, London, 1992.

<sup>2</sup> The World Factbook page on Austria, <http://www.odci.gov/cia/publications/nsolo/factbook/au.htm#Geography>.

Originally a member of the European Free Trade Association (EFTA), Austria joined the European Union (EU) on 1 January 1995. Popular for its convivial skiing resorts, Austria is also the country of Mozart, the Wiener Waltz, the Blue Danube and the Vienna riding school. In scientific circles, Austria is known for, among others, Gregor Mendel, the father of genetics.

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## PART I: THE AUSTRIAN CRIMINAL JUSTICE SYSTEM

### 1 INTRODUCTION

When Archduchess Maria Theresia ascended to the imperial throne in 1740, a series of administrative reforms designed to modernise Austria were initiated. One of the aims was to codify Austrian law, which at the time consisted of a multitude of different laws spread throughout the Austrian territories. In 1753, a Commission was given the task of preparing a draft Civil Code, but it took until 1811 for the eventual General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) to come into force. Strongly influenced by the then prevalent 'law of reason', the code contains elements of the provincial laws and of Roman law.<sup>3</sup> Meanwhile, Criminal Codes had been promulgated by the successors of Maria Theresia in 1786 and 1787. Through these codes, Austria became the first Western state to abolish capital punishment, although this was later reversed.<sup>4</sup>

After the collapse of the Habsburg empire and the establishment of the Republic of Austria, most of the old legislation was taken over by the new state. This included the most recent Penal Code of 1852, which was replaced in 1974 by the present Penal Code (*Strafgesetzbuch*, StGB).

Until the late 1980s, Austria averaged more than 100 inmates per 100,000 members of the population, giving it one of the highest prison rates in Europe. The pre-trial detention rate was high, as was the proportion of unconditional sentences. Moreover, prison sentences were relatively long, with only sparse use being made of parole.<sup>5</sup> To combat the high incarceration rate, changes in the sanctions system were introduced to encourage judges to make more use of suspended sentences, and stimulate the release on parole.<sup>6</sup> On average, the prison rate has been steadily decreasing, with a daily average of 6,754 prisoners in the first half of 1996, compared to the 8050 of 1986.<sup>7</sup>

According to the 1996 International Crime Victims Survey, the Austrian crime rate

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<sup>3</sup> K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, Third Edition, Clarendon Press, Oxford, 1988, pp. 158-160. See p. 159 for a wonderful section on the importance of 'local realities'!

<sup>4</sup> K. Kangaspunta, *Profiles of Criminal Justice Systems in Europe and North America*, European Institute for Crime Prevention and Control, affiliated with the United Nations, Publication Series No. 26, Helsinki, 1995, pp. 12-13. The death penalty was abolished for the second time in 1919, only to be reinstated in 1934 and again abolished in 1950. See A.M. van Kalmthout and P.J.P. Tak, *Sanctions-Systems in the Member-States of the Council of Europe Part II, Deprivation of Liberty, Community Service and Other Substitutes*, Kluwer Law and Taxation Publishers, Deventer, Boston, 1992, p. 365.

<sup>5</sup> A.M. van Kalmthout and P.J.P. Tak (1992), pp. 366-368.

<sup>6</sup> As of 1 March 1988, by the penal law amendment act (*Strafrechtsänderungsgesetz*) of 1987. A.M. van Kalmthout and P.J.P. Tak (1992), p. 367.

<sup>7</sup> *Sicherheitsbericht* 1995, p. 307. The 1986 daily average of 8,050 consists of 6,265 sentenced prisoners and 1,785 persons held in custody. It is interesting to note that the lowest number of prisoners so far (5,946, of which 4,344 were sentenced prisoners and 1,602 were persons held in custody) was recorded in 1989, the year after the measures aimed at reducing prison rates were introduced. But the rates then steadily increased, before dropping again in 1994.

is relatively low in comparison to other industrialized countries in Europe. 19% of the population were victimized once or more in 1995 compared to, for instance, 31% for England and Wales and the Netherlands, 27% for Switzerland and 24% for Sweden.<sup>8</sup> Austria does not have a significant drug problem, which may in part explain the relatively low crime rate.<sup>9</sup>

## 2 GENERAL REMARKS AND BASIC PRINCIPLES

The Austrian legal system may be considered part of the Germanic legal family,<sup>10</sup> and is described as a civil law system with Roman law origin.<sup>11</sup> The main principles governing the Austrian criminal justice process are found in the Constitution (*Bundes-Verfassungsgesetz 1929, B-VG*)<sup>12</sup> and the Code of Criminal Procedure (*Strafprozeßordnung, StPO*). First of all, punishment for acts laid before the court may only be inflicted following a criminal trial in accordance with the code of criminal procedure and by verdict of an authorised judge (s. 83-2 B-VG, s. 1 StPO). Secondly, the administration of justice must proceed independently (s. 87-1 B-VG). The principle of indictment (s. 90-2 B-VG, s. 2-1 StPO) determines that judicial prosecution may only be commenced following a charge by an accuser. Generally speaking it is the public prosecutor who indicts the accused, for the principle of officiality (s. 2 StPO) dictates that, as a general rule, criminal proceedings are initiated by the authorities. Most offences are therefore *Offizialdelikte*,<sup>13</sup> i.e., offences where the right to prosecute is reserved for the public prosecutor. Only a limited amount of offences are subject to private prosecution (*Privatanklagedelikte*), in which case a charge brought by a private person precedes the judicial prosecution. A further distinction is made between crimes (*Verbrechen*) and misdemeanours (*Vergehen*). In accordance with section 17 of the Penal Code, a crime is a deliberate act that may be punished with a life sentence or with more than three years imprisonment. All other punishable acts are misdemeanours.

Closely related to the principle of indictment is the principle of legality (s. 34-1 StPO),<sup>14</sup> which embraces the duty of the public prosecutor to prosecute all offences formally brought to his attention. Traditionally, the principle of legality is very firmly adhered to in Austria. To keep this principle ostensibly intact, the preferred alternative way for dealing with minor offences has always been to decriminalize those minor offences where certain requirements

<sup>8</sup> P. Mayhew and J.J.M. van Dijk, *Criminal Victimisation in Eleven Industrialised Countries, Key findings from the 1996 International Crime Victims Survey*, WODC Research and Documentation Centre, Research and Policy series 162, 1997, p. 29. Only Northern Ireland has a lower rate of 17%. The report also gives figures for the USA and Canada, 24% and 25% respectively.

<sup>9</sup> P. Mayhew and J.J.M. van Dijk (1997), p. 67.

<sup>10</sup> Zweigert and Kötz (1998), pp. 157-166. Strictly speaking, Zweigert and Kötz deal only with civil law, but Austrian penal law is as Germanic as its civil law.

<sup>11</sup> CIA factbook.

<sup>12</sup> One should distinguish between the *Bundesverfassungsgesetz (BVG)* and the *Bundes-Verfassungsgesetz 1929 (B-VG)*. See Bertel (1997), p. XIII.

<sup>13</sup> The *Antragsdelikte* (complainant offences) and *Ermächtigungsdelikte* (offences prosecuted by permission of an authorised person) are also *Offizialdelikte*. Although prosecution requires a complaint or permission of a private individual respectively, the right to conduct the actual prosecution is still reserved for the public prosecutor. See § 5.2.

<sup>14</sup> As in *Legalitätsprinzip*. The *Gesetzlichkeitsprinzip* also translates as principle of legality. This 'strain' of the principle of legality embraces the '*nullum crimen, nulla poena sine lege*' rule.

are met (s. 42 StGB), rather than to formally divert them from the criminal justice process. In this way, a practice whereby in effect certain offences are diverted can still be said to formally respect the principle of legality.<sup>15</sup> However, in February 1999 an amendment to the Code of Criminal Procedure was passed providing for diversion, both in the form of non-intervention, as well as in combination with the imposition on the offender of conditions such as victim-offender mediation, a fine or community service (see § 4.3 and § 6.1 under B.5).<sup>16</sup> These provisions for diversion were introduced into juvenile criminal law some time ago, but are a novelty in adult criminal law. The new measures entered into force in January 2000.<sup>17</sup>

Although their role has been substantially reduced, the participation of laymen in the criminal proceedings is still important (s. 91 B-VG, ss. 13, 14 StPO) (see § 3.3). The court is obliged to establish the material truth (s. 3 StPO), and may therefore, by virtue of its office, consider all essential circumstances, regardless of what the parties present as evidence. (This is also true concerning the civil claims of the victim.) In fact, it is the duty of the court to undertake the necessary investigations to determine the material truth. The court is free in its evaluation of the evidence (s. 258-2 StPO), but must explicate in the verdict the grounds on which its decision is based (s. 270-2.5).<sup>18</sup> According to the principle of orality (s. 90-1 B-VG, ss. 252, 258 StPO), the court may only consider testimonies made before the court during the main proceedings. The principle of immediacy (ss. 252 and 258 StPO) requires that the accused and witnesses are heard by the court, and that expert witnesses read out their reports. The trial must be conducted in public (s. 90-1 B-VG, s. 228ff StPO).

### 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

#### 3.1 Investigating Authorities

In most major towns, security is in the hands of the federal police department (*Bundespolizeidirektion*, BPD). Each department is headed by a Director of Police, with the exception of the Vienna police department where the highest ranking officer is referred to as Chief of Police. The police departments are divided into *Kommisariate*, which are, in turn, divided into *Wachzimmer*. Within the federal police force there is the constabulary (*Sicherheitswache*, the equivalent of the *Schutzpolizei* in Germany)<sup>19</sup> and officers belonging to the criminal investigations division (*Kriminalbeamten-Korps*). Furthermore, there are special

<sup>15</sup> M. Löschnig-Gspandl, *Die Wiedergutmachung im Österreichischen Strafrecht, Auf dem Weg zu einem neuen Kriminalrecht?* Juristische Schriftenreihe Band 87, Verlag Österreich, Wien, 1996, p. 122.

<sup>16</sup> *Strafprozeßnovelle 1999*. See M. A. Eder-Rieder, *Der Opferschutz, Schutz und Hilfe für Opfer einer Straftat in Österreich*, Springer Praxis Recht, Springer Wien New York, 1998, pp. 46-56 for an analysis of what was then referred to as *Strafprozeßnovelle 1998*.

<sup>17</sup> M. Löschnig-Gspandl (1996, p. 25) sees the diversion movement as the expression of an increasing recognition of two other principles, namely the principles of subsidiarity and proportionality.

<sup>18</sup> At present, there is no rule forbidding the court to base its decision on unlawfully acquired proof – in principle, a confession made under the duress of torture counts as valid proof. This situation is under discussion.

<sup>19</sup> W. Stangl, "Wir sind gegen alles aufgeschlossen." Über die Schwierigkeiten, Polizist zu werden', in: *Kriminologisches Journal*, 1993, p. 99.

task-forces called mobile operational units. The constabulary has middle duty, higher duty and senior duty officers, also referred to as W3, W2 and W1 officers respectively.

The rural constabulary (*Gendarmerie*) operates in rural areas. In each state the district police divisions, which are, in turn, divided into police stations, are headed by a commander.<sup>20</sup> The rural constabulary has special task-forces referred to as special mobile groups. The anti-terror squad is one of the special task-forces of the rural constabulary. One important distinction between the federal police and the rural constabulary, apart from different uniforms, is the difference in authority. Federal police officers are government officials/civil servants who may summon and bring in the accused and the witnesses. Rural constabulary officers do not have the same status. They are not government officials/civil servants, and may only request, rather than demand, the accused and the witnesses to come in for questioning.<sup>21</sup>

The rural constabulary, the constabulary and the criminal investigators are referred to as *Wachkörper*, that is to say they are armed, uniformed or part of an organization run along military lines whose tasks are of a policing nature.<sup>22</sup>

### 3.2 Prosecuting Authorities

The principle regulations concerning the organization and tasks of the prosecution service (*Staatsanwaltschaft*) are found in the Act on the Prosecution Service (*Staatsanwaltschaftsgesetz*, StAG) and Chapter III (ss. 29-36) of the Code of Criminal Procedure. The Attorney General (*Generalprokurator*) is responsible for the prosecution of cases brought before the Supreme Court, the Chief Prosecutor (*Oberstaatsanwalt*) for High Court cases and the Prosecutor (*Staatsanwalt*) for Regional Court cases. These officials may be represented in court by substitutes (s. 29 StPO). District court cases are prosecuted by district attorneys (*Bezirksanwälte*).

The prosecution service is a hierarchical organization. It is headed by the Ministry of Justice, which has the right to supervise and instruct all members of the prosecuting authorities (ss. 2-1 and 29-1 StAG). There are surprisingly few internal instructions or guidelines within the prosecution service. One explanation may be that negotiations/meetings can make instructions dispensable (s. 29-2 StAG).<sup>23</sup>

The prosecutors operate from behind their desks. They have the duty to be objective, and must therefore take both incriminating and disculpating circumstances into consideration (ss. 3 and 34-3 StPO). In court they may not put forward their view on what punishment they feel would be appropriate (s. 255-1 StPO), so that they are not tempted to exaggerate the punishability of the offence or the culpability of the offender.<sup>24</sup>

### 3.3 Judiciary

At the bottom of the judicial hierarchy are the district courts (*Bezirksgerichte*, BG) which deal with (most of the) offences punishable by a fine or a prison sentence of not more than 1 year (s. 9-1 StPO). A district court consists of a professional judge sitting alone (s. 9-2 StPO).

<sup>20</sup> Source: <http://members.aon.at/polizei-at/stadt.htm>

<sup>21</sup> C. Bertel, *Grundriß des österreichischen Strafprozeßrechts*, Manzsche Kurzlehrbuch-Reihe 4, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 1997, p. 138.

<sup>22</sup> See W. Stangl (1993), p. 99.

<sup>23</sup> Bertel (1997), p. 55.

<sup>24</sup> Bertel (1997), no. 235, p. 56.

Offences not heard by the district court are dealt with by the courts of first instance (*Gerichtshöfe erster Instanz*, GH I. Instanz, s. 10-2 StPO), also known as the regional courts (*Landesgerichte*).<sup>25</sup> (The regional court is also a court of second instance for cases dealt with by the district courts.) In cases concerning, e.g., murder, armed or gang robbery, or offences carrying life imprisonment or a sentence of a minimum of five, a maximum of more than ten years, the court of first instance sits as a jury court (*Geschworenengericht*, s. 14 StPO). A jury court consists of three professional judges (*Schwurgerichtshof*) and eight jury members (*Geschworenenbank*, s. 300 StPO). The jury decides the question of guilt, and the sentence is determined by the jury together with the three professional judges (s. 338 StPO). Offences carrying a maximum prison sentence of more than five years are dealt with by a laymen's court (*Schöffengericht*, s. 13-2 StPO). In this court all decisions are taken by the bench consisting of two professional and two lay judges. Finally, the remaining category of offences is heard by a judge sitting alone (*Einzelrichter*, s. 13-2 StPO). Another embodiment of the regional court is the examining magistrate (*Untersuchungsrichter*, s. 11-2 StPO) who is responsible for the preliminary investigations as described in § 3.3.1.

The four regional high courts (*Oberlandesgerichte*, OLG), which are situated in Vienna, Graz, Linz and Innsbruck respectively, are the courts of second instance (*Gerichtshöfe zweiter Instanz*, GH II. Instanz, s. 25 StPO). The high court sits in benches of three professional judges. The Supreme Court (*Oberster Gerichtshof*, s. 16 StPO) is the highest judiciary instance for civil and criminal cases. It sits in benches of three, five or eleven depending on the nature and importance of the appeal put before it.

Finally, mention should be made of the three special youth courts (*Jugendgerichte*). The youth court (*Jugendgericht*) in Graz and the district court (*Bezirksgericht*) of Linzland act as district youth courts, with the youth court in Vienna (*Jugendgerichtshof*) acting as both district youth court and regional court.<sup>26</sup>

### 3.3.1 Criminal Proceedings<sup>27</sup>

The Austrian criminal justice process is complex, consisting of several phases involving many different decisions. Generally speaking it is initiated by the reporting of a crime to the federal or rural constabulary (see §6.1). The police write up the official report (*Anzeige*), and forward this to the public prosecutor. While awaiting further instructions from the prosecutor, the police may proceed with any investigations requiring immediate action (s. 24 StPO).

The prosecutor is responsible for collecting initial information (*Vorerhebungen*) but may not himself examine witnesses or undertake any other investigative actions (ss. 88-3 and 97-2 StPO). Instead, he instructs the police, the examining magistrate or the district court to conduct the investigations he considers necessary. If, on the basis of the initial information, the prosecutor finds that there are sufficient grounds to suspect that a particular person has committed an offence, he may apply for the initiation of a preliminary investigation (*Einleitung der Voruntersuchung beantragen*, s. 90-1 StPO). Alternatively he may end the proceedings by 'putting aside the report' (*die Anzeige zurücklegen*, s. 90-1 StPO). In all cases dealt with by a jury – i.e. the most serious offences – or in cases where the proceedings are directed against

<sup>25</sup> The term '*Landesgerichte*' is not used in the Code of Criminal Procedure.

<sup>26</sup> Bertel (1997), p. 34.

<sup>27</sup> The starting point of the following description is a criminal justice process conducted before the court of first instance sitting as a laymen's court. See Bertel (1997), pp. 2-4.

an absent person, a preliminary investigation must be conducted before the suspect may be formally charged (s. 91-1 StPO). In all other cases it is left to the discretion of the public (or private) prosecutor whether a preliminary investigation is necessary before charging the suspect.

Following an application by the prosecutor – whether public, private or subsidiary<sup>28</sup> – the examining magistrate (rather than the public prosecutor) decides whether or not to initiate a preliminary investigation (s. 92-1 and -3 StPO). As soon as a preliminary investigation has been initiated, the examining magistrate is in charge of the proceedings. A preliminary investigation may either result in ‘closure’ (*Schließung*) or ‘termination’ (*Einstellung*).<sup>29</sup> An investigation is closed if sufficient evidence has been gathered to substantiate the accusation in a court of law (s. 111 StPO). The decision to terminate is taken if the prosecutor – public, private or subsidiary – has decided to withdraw his request for prosecution or has declared that he sees no grounds for further judicial proceedings (s. 109-1 StPO).

If, following the preliminary investigation,<sup>30</sup> the prosecutor feels he has a case against the suspect, he may indict the suspect, who thereby becomes the accused (*Angeklagte*, s. 207-1 StPO).<sup>31</sup> The indictment (*Anklageschrift*), which must meet the requirements listed in section 207-2 StPO, is filed with the examining magistrate, who informs the suspect (s. 208 StPO). In cases heard by a judge sitting alone, or the district court, a written summons (*schriftlicher Strafantrag*) rather than an indictment suffices, the main difference being that the summons need not contain the level of justification that is required of an indictment.

The phase of the intermediary proceedings (*Zwischenverfahren*) is used to prepare the main proceedings (*Hauptverhandlung*). The presiding judge sets the trial date and summons those whose presence is required during the main proceedings (s. 221-1 StPO). He may also honour a request by one of the parties for further preliminary investigations (s. 224 StPO).

The main trial of the criminal proceedings takes place before the court. The presiding judge establishes the defendant’s personalia (s. 240 StPO) and swears in the laymen after which the prosecutor reads out the indictment. The defendant is then questioned by the presiding judge (s. 245-1 StPO) before the other judges, the prosecutor, the counsel for the defence and the civil claimant (*Privatbeteiligter*, see opening to §5 and §5.3 for an explanation of this term) are allowed to direct questions to the defendant (ss. 249, 47-2.3 StPO). Witnesses and expert witnesses are likewise first questioned by the presiding judge, then by the other legal actors. The prosecutor, the defendant and the counsel for the defence may then offer their closing statements (*Schlussvorträge*, s. 255 StPO) before the presiding judge closes the proceedings (s. 257 StPO). The verdict reached by the court, and the argument for the verdict, is presented by the presiding judge (s. 268 StPO).

A case can only be appealed once, because Austrian criminal procedure has only two instances. There are two types of appeal. Basically, an appeal may involve alleged mistakes in the interpretation or application of the law (*Nichtigkeitsbeschwerde*, nullities, ss. 281, 345

<sup>28</sup> Section 92-1 speaks of ‘an authorised prosecutor’ (*ein berechtigter Ankläger*). In the following, whenever the word ‘prosecutor’ is used without the specification public/private/subsidiary prosecutor, we are referring to prosecutor in the generic sense, i.e. any one of the three.

<sup>29</sup> The German *einstellen*, which means, among other things, ‘to close’, should not be confused with the Dutch *instellen*, meaning ‘to open’.

<sup>30</sup> Or the initial gathering of information, if a preliminary investigation is not required, see above.

<sup>31</sup> The Austrian terminology for this is *Versetzung in den Anklagestand* (see Chapter XVI StPO) which means as much as ‘promotion to the position of accused’.

StPO), or it may concern the determination of the sentence (*Berufung*, s. 283-1 StPO). These types of appeals may be made against verdicts of the laymen or jury courts. An appeal involving alleged nullities is heard by the Supreme Court (s. 280 StPO). If the appeal is only against the determination of the sentence, it is heard by the Court of Appeal (s. 280). A 'full' appeal (*volle Berufung*) may be brought against the verdict of a judge sitting alone or the district court. In that case both the interpretation or application of the law, the determination of the sentence and the question of guilt (*Schuldberufung*) may be appealed. Appeals against verdicts of the district court are heard by the regional court (*Landesgericht*), whereas appeals against verdicts of the judge sitting alone are heard by the Court of Appeal.

### 3.4 Probation Service

The Probation Service (*Bewährungshilfe*, in full the Association for Probation and Social Work – *Verein für Bewährungshilfe und Soziale Arbeit*) is a private organization subsidized by the Austrian Ministry of Justice. It was first set up in 1957 as a private initiative and was initially aimed solely at juvenile delinquents. The probation service was put on a statutory footing by the Probation Act (*Bewährungshilfegesetz*) of 1969 but at first continued to work only with children, until probation for adults was introduced in 1975 by the new Penal Code.<sup>32</sup> The main tasks of the probation service are described in section 52 StGB.

### 3.5 Ministry of Justice

Together with the federal Ministry of Internal Affairs (*Bundesministerium für Inneres*), the federal Ministry of Justice (*Bundesministerium für Justiz*), which is located in Vienna, is responsible for security within Austria.<sup>33</sup> To be leader of a department (*Referent*) in the Ministry of Justice, one needs to have passed the professional judge exams. It is possible to switch between the prosecution service, the judiciary and the ministry. The Ministry of Justice does not have its own research department but works closely with the Institute for Legal and Criminal Sociology (*Institut für Recht und Kriminalsoziologie*) in Vienna.

As said in § 3.2, the Ministry of Justice heads the prosecution service, but despite its authority to do so, rarely gives instructions to the prosecuting authorities.

### 3.6 Federal Social Agencies

Pursuant to section 9-1 of the Victim Compensation Act (*Verbrechensopfergesetz über die Gewährung von Hilfeleistungen an Opfer von Verbrechen*, VOG, see § 4.3), applications by victims of violent crime for state compensation should be made to the local Federal Social Agency (*Bundessozialamt*). The seven Federal Social Agencies – the one in Vienna covers Lower Austria and Burgenland as well as Vienna – are subordinate to the Federal Ministry of Labour and Social

<sup>32</sup> A.M. van Kalmthout and P.J.P. Tak (1993), pp. 387-389.

<sup>33</sup> See the government statement of 30 November 1994, reproduced in the *Sicherheitsbericht* 1995 pp. 9-10.

Affairs.<sup>34</sup> The compensation claims are dealt with by a special department within each Agency, with the head of the department acting as decision-maker.<sup>35</sup>

Upon receiving an application, the Federal Social Agency must determine whether criminal proceedings have been instituted for the offence concerned (s. 9-3 VOG). Obviously, a conviction by a criminal court provides substantial support for the injured person's state compensation claim, but to be able to provide swift financial assistance, the claim must often be decided on before a verdict is reached – two-thirds of all Austrian state compensation claims are settled before the criminal proceedings are concluded.<sup>36</sup> Therefore, the relevant authorities are obliged to comply with any requests for information made by the Federal Social Agency, and if the prosecutor has withdrawn charges or dropped the case he must report his reasons for doing so (s. 9-3 VOG).

Initially, the Federal Social Agency investigated a claim, and then passed the file on to the Federal Ministry for Labour and Social Affairs, which then took the final decision whether or not compensation was to be awarded. In 1991, the VOG was amended, so that the final decision is now taken by the Federal Social Agency itself (s. 9-2 VOG). Written notification is sent to the applicant, who may appeal the decision in a civil court. Moulded into the legal institution of a 'public offer of a reward',<sup>37</sup> a claim for state compensation that meets all the formal requirements is enforceable in a court of law.

### 3.7 Victim Support

The Austrian *Weisser Ring* victim support organization is also involved in the payment of compensation to victims of violent crimes, and to that end cooperates extensively with the Federal Social Agencies.<sup>38</sup> The *Weisser Ring*, which was founded in 1979 and has 600 members, is a non-profit organization for assistance to victims of crime and the prevention of criminal offences. The main office is in Vienna, with branch offices in Oberösterreich, Salzburg, Tirol-Vorarlberg and Steiermark. Besides offering financial support – in total around ÖS 500,000 i.e. around EUR 36,336 per year<sup>39</sup> – the *Weisser Ring* informs victims of their rights and offers them legal advice. The *Weisser Ring* is not in the phone book.

<sup>34</sup> The name Federal Social Agency dates from July 1994. Before that, the agencies were rather insensitively called State Agencies for Invalidity (*Landesinvalidenämter*). See W. Raschka, 'Austria', in: D. Greer (ed.), *Compensating Victims of Crime, a European Survey*, Max-Planck-Institut für Ausländisches und Internationales Strafrecht, edition iuscrim, Freiburg im Breisgau, 1996, p. 43 footnote 45.

<sup>35</sup> W. Raschka (1996), p. 45 footnote 47.

<sup>36</sup> Raschka (1996), pp. 45-46.

<sup>37</sup> A 'public offer of a reward' is defined as the promise of a reward, not directed to a special group of people, for the performance of an act or a result (s. 860 ABGB, Civil Code). Section 1-1 VOG determines that 'The Federal Minister for Social Affairs must oblige the Federal Republic by means of a public offer of a reward to grant assistance under this Act to victims of crime or their surviving dependants. This public offer of a reward is to be announced by publication in the Federal Law Gazette.' Such an obligation was put on the Federal Republic by the Minister for Social Affairs on 13 September 1973, by official announcement in the Federal Gazette BGBl. Nr. 497/1973 (see Raschka (1996), p. 32, footnote 35 for the text of the announcement). The condition of not being directed to a special group is met by addressing victims of violent crimes *in general*, p. 32 footnote 34.

<sup>38</sup> Raschka (1996), p. 46.

<sup>39</sup> Journal of the Weisser Ring, Heft 1 1997, p. 6.



In 1997 an organization called 'Victims First' was founded by a group of psychologists, doctors and lawyers. According to this organization, many offenders were themselves first victimized. 'Victims First', which works with 30 volunteers, aims to prevent present-day victims turning into future offenders by offering them psychological support. Starting with victims of physical and mental abuse, the organization hopes to eventually extend its services to other groups of victims such as drug addicts, battered women and neglected elderly.<sup>40</sup>

The victim's movement in Austria is modest. The shelters for battered women, and the *Frauennotruf* 24-hour emergency call line for victims of rape and sexual assault<sup>41</sup> are the result of the women's movement rather than of a victim's movement. The Weisser Ring concentrates mainly on offering financial support, but its means are limited. The 'Victim's First' group was initiated in 1997, and therefore needs time to get going. Another recent initiative undertaken by the ÖGB (*Österreichische Gewerkschaftsbund*, labour union) was to set up help-points for victims of harassment at work (*Mobbing-Opfer*).<sup>42</sup>

### 3.8 Lawyers

The injured person with a particular role to play in court (civil claimant, private prosecutor, subsidiary prosecutor, see below for an explanation of these roles) may be represented by a lawyer if he so wishes (s. 50-1 StPO). However, there is no legal aid for the victim, and he must therefore pay all legal fees himself. Particularly interesting is that the research conducted by Krainz (see § 4.5) seems to indicate that the presence of a lawyer may be detrimental, rather than beneficial, to the position of the victim in the Austrian framework. This is in stark contrast to our observations in the Nordic countries, where lawyers for victims of sexual offences and serious violence may be subsidized by the state, and appear to have a generally positive effect.<sup>43</sup>

## 4 SOURCES OF LAW

### 4.1 General Sources of Law

The primary source of law is legislation (*Gesetzgebung*). Matters that are the prerogative of the federal government may be arranged by federal legislation (*Bundesgesetz*), whereas the states are free to order their own affairs by national legislation (*Landesgesetz*).

<sup>40</sup> [http://www.vol.at/tmh/news/aus\\_aller\\_weltvol/1997\\_08\\_05\\_10\\_30\\_wwn\\_13.asp](http://www.vol.at/tmh/news/aus_aller_weltvol/1997_08_05_10_30_wwn_13.asp)

<sup>41</sup> This emergency call line is advertised in the tube in Vienna. In small letters it reads *Magistrat Wien*, implying that the emergency call line is funded by the city council of Vienna (*Magistrat* is city council).

<sup>42</sup> *Weisser Ring* journal, Heft 1 1997, pp. 15-16.

<sup>43</sup> One exception is the speed with which state compensation claims can be dealt with in Denmark. The Danish state compensation board remarked that it takes considerably longer to gather all the necessary evidence when a lawyer is involved in the case.

Bills (*Gesetzesvorschläge*) may be put before the National Council by (one of) its own members, by (a third of the members of) the Federal Council or by the Federal government.<sup>44</sup> The bill must be passed by both the National Council and the Federal Council. However, the National Council may overrule a refusal of the bill by the Federal Council by voting in favour of the bill a second time.<sup>45</sup> Once passed, the new act must be signed by the President and countersigned by the Chancellor before being published in the official federal bulletin (*Bundesgesetzblatt*, BGBl).<sup>46</sup> State legislation is passed by the respective state parliaments. It must be signed and countersigned in accordance with state rules before being published in the state official bulletin (*Landesgesetzblatt*) (s. 97-1 B-VG). The explanatory memoranda accompanying a bill are important sources of future reference for the interpretation of ambiguous statutory provisions.<sup>47</sup> Legislation is amended by means of acts of amendment (*Änderungsgesetze*). A federal law adding to, or amending, existing legislation is referred to as a 'Novelle', for example the 'Novelle zum B-VG' of 1988 which introduced new administrative bodies in the states.

Other important Austrian sources of law are case-law (*Rechtsprechung*) and doctrine (*Doktrin*). In pursuance of the Constitution, the generally recognised rules of international law (*Völkerrecht*) are part of Austrian federal law (s. 9-1 B-VG).

## 4.2 Sources of Criminal Law and Procedure

In principle, criminal law and procedure is the prerogative of the federation (s. 10-6 B-VG), and therefore the criminal justice process is regulated by federal law. The present Austrian Penal Code (*Strafgesetzbuch*, StGB) dates from 23 January 1974.<sup>48</sup> It replaced the Penal Code of 1852, which until then had remained largely unchanged although amendments had of course been made. Before the new Penal Code of 1974, five other bills for a new code had been presented to parliament, but none of them ever made it into the official bulletin.<sup>49</sup>

Apart from in the Penal Code, rules of criminal law are also found in other federal legislation such as the Financial Criminal Act (*Finanzstrafgesetz*) and the Data Protection Act (*Datenschutzgesetz*). The main source of criminal procedural law is the Code of Criminal Procedure (*Strafprozeßordnung*, StPO) which was enacted on 9 December 1975. Regulations concerning Juveniles are found in the Act on the Juvenile Court (*Jugendgerichtsgesetz*, JGG).

<sup>44</sup> Bills drafted by the Ministry of Justice are first sent out to the judicial authorities and any relevant interest groups to be commented on. The Minister of Justice then takes the draft bill to the Council of Ministers. If the Council of Ministers accepts the draft bill, it becomes a government bill, or *Regierungsvorlage*.

<sup>45</sup> At least half of its members must be present for this second vote.

<sup>46</sup> S. 2-1 Act on the Federal Bulletin (*Gesetz über das Bundesgesetzblatt*) of 1972. See A. Dearing, 'Österreich', in: Eser, A., Huber, B. (eds.), *Strafrechtsentwicklung in Europa, Landesberichte 1982/1984 über Gesetzgebung, Rechtsprechung und Literatur*, Max-Planck-Institut für Ausländisches und Internationales Strafrecht, Band S 2, Freiburg im Breisgau, 1985, p. 535. *Bundesgesetzblatt* is translated by Raschka as 'Federal Law Gazette' (Raschka, 1996, p. 18).

<sup>47</sup> W. Raschka (1996), p. 34 footnote 38. A government bill is accompanied by an explanatory memorandum (*Erläuterende Bemerkungen zur Regierungsvorlage*, EBRV) which is published in the appendix to the stenographical protocol of the National Council (*Beilagen zu den Stenographischen Protokollen des Nationalrates*, BlgNR).

<sup>48</sup> *Bundesgesetz vom 23. Jänner 1974 BGBl. 60, über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch - StGB)*.

<sup>49</sup> A.M. van Kalinhout and P.J.P. Tak (1992), p. 365.

Regarding case-law,<sup>50</sup> decisions of the Supreme Court concerning criminal law cases have been published since 1920 in the 'SSt' series.<sup>51</sup> Cases published in this series are cited by volume and number – 'SSt 3/5' is case number 5 in volume 3. Of late, this series has been published increasingly sporadically. However, judgements of the Supreme Court are also found in the Gazette of Judgements on Appeal (*Evidenzblatt der Rechtsmittelscheidungen*, EvBl.)<sup>52</sup>, which is part of the Austrian Lawyer's Journal (*Österreichische Juristen-Zeitung*, ÖJZ). Since 1988, this journal also has a weekly section 'new case-law of the Supreme Court' (*Neue Rechtsprechung des OGH*, Nrsp), replacing the earlier card index (*ÖJZ-Leitsatzkartei*, ÖJZ-LSK) which it provided to its readers. Case-law concerning criminal law is furthermore found in the 'Jus-Extra' series (JE-St) of the state printing house, the Judicial Gazette (*Juristische Blätter*, JBl) and in the Magistrates' Journal (*Richterzeitung*, RZ).

In keeping with Germanic tradition, doctrine in the field of criminal law (*Strafrechtsdogmatik*) enjoys considerable authority in Austria. The exchange between practitioners and scholars is stimulated in a variety of ways. Scholars are involved in training programmes for practitioners, and provide commentaries to Supreme Court decisions that are published along with the decision itself. In Vienna, a meeting is held every month between judges and law professors to discuss verdicts. Contrary to the situation in Germany, where one all but drowns in the sheer amount of monographs and journals, scholarly literature in Austria is (still) relatively modest in size.<sup>53</sup> The Foregger editions of the Penal Code and the Code of Criminal Procedure, with commentary, are extremely popular. In this chapter, the handbooks of Kienapfel (substantive criminal law) and Bertel (criminal procedure) are referred to.

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

In the Code of Criminal Procedure, there are two chapters dealing exclusively with the position of the victim, namely Chapter V (ss. 46-50) on the private prosecutor and the civil claimant, and Chapter XXI (ss. 365-379) on the verdict and decisions of the criminal court in regard to the civil claim. In his capacity as witness, Chapter XIII (ss. 150-172) is also important for the victim. Other relevant sections are, for example, section 2 on private prosecution and complainant offences, and sections 4-5 on the civil claim in adhesion to the criminal trial.

As said in § 2, there is a distinction between offences to be prosecuted by the public prosecutor (*Offizialdelikte*) – which include the complainant offences (*Antragsdelikte*) and offences requiring permission from an authorised person to prosecute (*Ermächtigungsdelikte*) – and those subject to private prosecution (*Privatanklagedelikte*).<sup>54</sup> The Penal Code indicates to which

<sup>50</sup> Much of the information on the Austrian sources of (criminal) law (and procedure), in particular regarding the following section on case-law, is derived from A. Dearing (1985), and F. Höpfel, 'Die Strafbefreiende Tätige Reue und Verwandte Einrichtungen des Österreichischen Rechts', in: Eser, A., Kaiser, G., Madlener, K. (eds.), *Neue Wege der Wiedergutmachung im Strafrecht*, Internationales strafrechtlich-kriminologisches Kolloquium in Freiburg im Breisgau, Max-Planck-Institut für Ausländisches und Internationales Strafrecht, Freiburg im Breisgau, pp. 171-196.

<sup>51</sup> *Entscheidungen des Österreichischen Obersten Gerichtshofes in Strafsachen und Disziplinarangelegenheiten*.

<sup>52</sup> Translated by W. Raschka (1996) as 'Gazette of Judgments of the Courts of Appeal', p. 18.

<sup>53</sup> A. Dearing (1985), p. 552.

<sup>54</sup> See § 5.2 on the victim as complainant.

category the different offences belong.<sup>55</sup>

In the Code of Civil Procedure, section 268 concerns the validity of criminal law verdicts in a civil court of law, which is relevant to victims claiming compensation in a civil court after the criminal trial has taken place. However, this section was nullified by a 1990 decision of the Constitutional Court.<sup>56</sup> In practice, its effect has in part been reinstated by a decision taken in 1995 by the Supreme Court.<sup>57</sup> The amount of damages to be paid in compensation is determined on the basis of Chapter 30 of the General Civil Code (*Allgemeine Bürgerliche Gesetzbuch*, ABGB), which deals with civil liability for injury and damage.

In accordance with the Victim Support Act (*Verbrechensopfergesetz über die Gewährung von Hilfeleistungen an Opfer von Verbrechen*, VOG) of 9 June 1972, BGBl. Nr. 288,<sup>58</sup> victims who have suffered physical injury or impairment of health as a result of an offence punishable by more than six months' imprisonment, and who have, as a consequence, incurred medical costs or suffered a reduction in their ability to work, are eligible for state compensation.<sup>59</sup>

On 1 May 1997 sections I Z and II of the Act on the Protection Against Violence in the Family (*Bundesgesetz zum Schutz vor Gewalt in der Familie*, also known as the Protection Against Violence Act – *Gewaltschutzgesetz*, GeSchG) came into force.<sup>60</sup> By broadening the scope of the protection order and increasing the involvement of the police and security forces in the establishment and enforcement of this civil law measure, the authorities hope to be able to provide better protection to persons threatened by physical, mental or sexual violence within the family<sup>61</sup> (see § 8.3.2 under G.16).

#### 4.4 Noteworthy Developments, Changes and Initiatives

Of particular interest was the *Strafprozeßnovelle* of 1978, which introduced section 373a on advance payment of compensation to victims of crime in the Code of Criminal Procedure. Unfortunately, the stipulations for qualifying for advance payment are so strict that in practice almost no use is made of this potentially progressive measure. See § 7.3.

1987 saw the introduction of a legislative duty for all criminal justice authorities to inform injured persons of their rights in the criminal proceedings (s. 47a StPO, introduced by *Strafrechtsänderungsgesetz* 1987), see § 6.1, under A.2. and D.9. New regulations concerning the questioning of witnesses and their protection were introduced by the criminal procedure amendment act of 1993, most notably allowing for questioning via a video link, and the

<sup>55</sup> See, for example, sections 107, 117, 118, 119, 139, 141, 149 and 150 (offences requiring permission) and sections 110, 117-123, 152, 166, 193 and 287 (private prosecution).

<sup>56</sup> VfGH 12.10.90, JbI 1990, 104.

<sup>57</sup> OGH 17.10.95, JbI 1996, 117. See, among others, H. Fuchs, *Die strafprozessuale Stellung des Verbrechensoffers und die Durchsetzung seiner Ersatzansprüche im Strafverfahren*, Gutachten, Verhandlungen des Dreizehnten Österreichischen Juristentages Salzburg 1997, Band IV/1 Strafrecht, Wien, 1997, pp. 11-17.

<sup>58</sup> This act was initially called the *Verbrechensopfer-Entschädigungsgesetz über die Gewährung von Hilfeleistungen an Opfer von Verbrechen*, but its name was changed as part of an amendment made in January 1999.

<sup>59</sup> S. 1-2-1 VOG. Innocent bystanders of such an act who have likewise suffered injury as a consequence of that act are also eligible, section 1-2-2 VOG.

<sup>60</sup> BGBl. Nr. 759/1996. The new sections also brought about some changes in the Police Act (*Sicherheitspolizeigesetz*).

<sup>61</sup> See the commentary in *Amtsblatt der Österreichischen Justizverwaltung* Jahrgang 1997 Stück 5, Wien, am 18. Juli 1997, pp. 57-62.

anonymous testimony of threatened witnesses, see §§ 8.2 and 8.3 under F.15. Another interesting development was brought about via the criminal procedure amendment act of 27 November 1996. Where serious sexual offences are concerned, at least one of the professional or lay judges in a laymen's court, and two of the jury members of the jury court, must be of the same sex as the victim.<sup>62</sup> Furthermore, police officers may now intervene in situations involving domestic violence by issuing a prohibition order (*Wegweisung* or *Rückkehrverbot*, s. 38a SPG, see § 8.3 under G.16).

As discussed in § 2, in February 1999 the Austrian parliament adopted an amendment to the Code of Criminal Procedure concerning refrainment from prosecution, non-judicial mediation and diversion (*Strafprozeßnovelle 1999*), see § 6.2 under B.5. The Ministry of Justice is also in the throes of preparing legislation to re-organize the relations between the authorities involved in the preliminary proceedings (*Vorverfahren*), i.e. the police, the examining magistrate and the public prosecutor. The existing rules are more than a hundred years old and the ministry feels they are no longer in touch with reality. The aim is to establish a clearer balance between the investigative activities of the police, the role of the prosecutor as leader of the investigation and the controlling function of the examining magistrate.<sup>63</sup>

The 13th Austrian Juristentag held in Salzburg in 1997 revolved around a memo prepared by H. Fuchs on the procedural position of the victim of crime and the pursuance of his civil claims within the criminal proceedings.<sup>64</sup> In Austria, the victim of crime only has active participatory rights in the criminal proceedings if he has a civil claim against the accused. In his memo, Fuchs proposes, among other things, the removal of the prerequisite of having a civil claim to be able to exercise active rights.<sup>65</sup> Furthermore, he recommends splitting the main hearing into two parts, with the civil claim being dealt with after the question of guilt has been decided on (compare, for instance, Norway).<sup>66</sup> Also, to combat the reluctance of criminal law judges to decide on the civil law claim for compensation, judges should be given a mixed practice rather than allowing them to specialize in a particular field of law. Fuchs' proposals will be dealt with in more detail below.

#### 4.5 Empirical research

In 1991, K.W. Krainz presented the preliminary results of an empirical investigation of the position of injured parties in the Austrian Criminal Procedure.<sup>67</sup> A total of 624 cases including deliberate offences of violence, property offences and offences against public decency were analysed on the basis of file evaluation and observation of the main proceedings, if possible supplemented with interviews of the injured party and the accused.<sup>68</sup> The aim

<sup>62</sup> *Sicherheitsbericht 1995*, pp. 317-319.

<sup>63</sup> Information provided by Herr Grünwald, Ministry of Justice, 9 October 1997.

<sup>64</sup> H. Fuchs (1997).

<sup>65</sup> H. Fuchs (1997), p. 97.

<sup>66</sup> H. Fuchs (1997), pp. 103-104. See also R. Moos, 'Die Zweiteilung der Hauptverhandlung im Strafprozeß', in: *Österreichische Juristen-Zeitung*, 38. Jahrgang, Heft 21, pp. 561-569.

<sup>67</sup> K.W. Krainz, *The Position of Injured Parties in the Austrian Criminal Procedure – First Results of an Empirical Investigation*, in: Kaiser/Kury/Albrecht, *Victims and Criminal Justice*, Freiburg i. Br., 1991.

<sup>68</sup> The cases originated with district courts and courts of first instance in all four of the seats of the regional courts of appeal. In 128 cases evaluation of the files, observation of the main proceedings and interviews with both the injured person and the accused took place. Thirty-one

of the research was to assess how often injured parties actually use their active participatory rights, and whether the authorities fulfill their duties towards the injured party/civil claimant. These are the main questions dealt with in the 1991 article, to which we will frequently refer. Unfortunately, the 'first results' published in 1991 are for the time being also the last. The material on further questions such as the personal aims of the injured party in the criminal procedure and the attitude of offender and victim to alternative forms of response such as diversion has never been published.<sup>69</sup>

At present in Austria, it does not seem that much empirical research on the position of the victim is being conducted, but because of similarities in the two judicial systems the Austrians frequently refer to research conducted in Germany.<sup>70</sup>

## 5 ROLES OF THE VICTIM

In Austrian legislation, one sees the victim referred to as *Opfer*, *Verletzter*, *Geschädigter*, *Privatbeteiligter*, *Subsidiarankläger* and *Nebenkläger*.

The term *Opfer* needs little explanation, referring as it does to the victim in the broadest sense of the word. Although it is not used in the Code of Criminal Procedure or the Penal Code, it does feature in the Victim Support Act (*Verbrechensopfergesetz über die Gewährung von Hilfeleistungen an Opfer von Verbrechen*, VOG, see § 4.3). *Verletzter* or *Geschädigter*, i.e. injured person, has a slightly narrower connotation. The injured person is the individual who has suffered damages as a consequence of the offence.<sup>71</sup> The term 'injured person' features sporadically in the Code of Criminal Procedure, see for example sections 47-1, 47a-1, 230-2 StPO. Narrower still is the connotation of *Privatbeteiligter* which translates literally as 'private participant'. An 'private participant' is an injured person who joins the criminal proceedings as a civil claimant (s. 47-1 StPO). For the active participatory rights awarded to the civil claimant see § 5.3. The civil claimant has a civil claim which he may present in conjunction with the criminal proceedings which are conducted by the public prosecutor. However, the Penal Code reserves some offences for private rather than public prosecution, meaning that they can only be prosecuted by a private individual – the private prosecutor – and not by the state prosecutor (see §§ 2 and 5.4). Where the prosecution of an offence is the prerogative of the public prosecutor, but the public prosecutor has decided not to prosecute, or to drop the prosecution, a civil claimant may initiate or take over the prosecution, thereby becoming a subsidiary prosecutor (*Subsidiarankläger*, s. 48 StPO, see § 5.5).

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cases were analysed by evaluation, observation and interview with the injured person only, 38 by evaluation, observation and interview of the accused only, whereas in 427 cases no interviews could be conducted at all. Of the originally targeted 630 cases, 6 were discounted from the final analysis because only evaluation of the files had taken place, and the amount of data was incomplete.

<sup>69</sup> K. Krainz gave presentations of the results at the Symposia of the World Society of Victimology in Rio de Janeiro (1991) and Adelaide (1994) but the final results have not been worked out into an article.

<sup>70</sup> See, for instance, the references in K.W. Krainz (1991) and M. Löschig-Gspandl (1996).

<sup>71</sup> Bertel (1996), p. 58, number 249: *Verletzt ist, wer durch die Tat einen Nachteil erlitten hat*. Section 47-1 StPO speaks of *'Jeder durch ein Verbrechen oder durch ein von Amts wegen zu verfolgendes Vergehen in seinen Rechten Verletzte (...)'*.

There is also one instance where the civil claimant may act as auxiliary prosecutor or joint plaintiff (*Nebenkläger*).

### 5.1 Reporting the Offence

Anyone who becomes aware of the fact that a criminal offence has been committed, may report this offence to either the public prosecutor, the examining magistrate, the district court or the police<sup>72</sup> (s. 86-1 StPO). The police, the district court and the examining magistrate must inform the public prosecutor of any such report made to them (s. 86-1 StPO). In principle, public officials have the *duty* to report any offence falling within the scope of their work that has come to their notice (s. 84-1 StPO), unless a professional confidential relationship is involved or it is to be expected that the damage will shortly be compensated, thereby removing the punishability of the offence (s. 84-2 StPO). These two exceptions were introduced in 1993.<sup>73</sup> In the first case, it is hoped that victims of sexual and violent offences who do not want to go through a court case will now seek help without fear of the crime being reported. The second exception is aimed at stimulating attempts to bring about *tätige Reue* (167 StGB) and to make use of diversion methods such as *außergerichtlichen Tatausgleich*.<sup>74</sup>

There are several interesting questions to be asked in relation to the reporting of crimes to the authorities. First of all, (1) what percentage of all offences committed are reported to the authorities, i.e. how large is the 'dark figure'. Secondly, (2) what are the reasons for reporting/not reporting offences. Thirdly, (3) of those offences that are reported, how many are reported by the victims themselves, and finally, (4) to whom are the offences reported.

(1) The 1996 International Crime Victims Survey (ICVS) focusses on the reporting of offences to the police. It concludes that of all the offences committed in Austria, 52% are reported to this authority.<sup>75</sup> This is slightly higher than the average of 50% in the eleven industrialised countries included in the key findings publication of 1997.

(2) The primary reason given by victims in Austria for not reporting an offence was that the offence was not considered serious enough/no loss had been suffered. Although this was the main reason given in all eleven countries compared, it was given most often in Austria, namely by 52% of the victims. Thirty percent of the Austrian victims stated that they had solved the offence themselves/thought it inappropriate to call the police, 17% felt the police could do nothing anyway, and 5% felt that the police would refuse to do

<sup>72</sup> Here, we have translated the Austrian *Sicherheitsbehörde* as police (in the generic sense of the word, i.e. including *Polizei*, *Gendarmerie* and special units) rather than the more literal security authorities. S 24 StPO explicitly states that the mayor is also part of the security authorities.

<sup>73</sup> Criminal Procedure Amendment Act of 1993 (StPÄG 1993, BGBl 1993/526).

<sup>74</sup> See, for a commentary, U. Jesionek, 'Strafprozessuale Verschwiegenheitsrechte und Opferschutz, Die Neuregelungen von Mitteilungs- und Verschwiegenheitspflichten sowie zum Schutz minderjähriger Opfer im Strafprozeß durch das österreichische Strafprozeßänderungsgesetz 1993', in: *Bewährungshilfe*, Fachzeitschrift für Bewährungs-, Gerichts- und Straffälligenhilfe, Jahrgang 44 Nummer 1 I. Vierteljahr 1997, pp. 31-32; and U. Jesionek, 'Die Stellung des Opfers im österreichischen Strafprozeß', in: Huber, Jesionek, Miklau (eds.), *Festschrift für Reinhard Moos zum 65. Geburtstag*, Verlag Österreich, Wien, pp. 244-246. For the reporting of offences in relation to child abuse, see U. Jesionek, 'Anzeige- und Aussageverhalten bei Kindesmißbrauch', in: Fuchs, H., Brandstetter, W. (eds.), *Festschrift für Winfried Platzgummer zum 65. Geburtstag*, Springer-Verlag Wien New York, 1995.

<sup>75</sup> P. Mayhew and J.J.M. van Dijk (1997), p. 40.

anything.<sup>76</sup> Of the victims who had reported the offence, 35% said it was to recover property, 33% that they considered the offence serious, 29% did so for retributive reasons, 26% to recover insurance, 20% to get help, 18% to stop the occurrence of the offence and 9% to get compensation from the offender. It is interesting that, in terms of the numbers of victims who gave compensation as a reason for reporting the offence – only the U.S.A. scored higher with 11%.<sup>77</sup>

(3) Krainz found that in 56.3% of the cases analysed in his research, the reporting of the offence was done by the victim himself. 11.7% of the offences were reported by uninvolved witnesses, 6.9% by friends or acquaintances of the victim, 5.1% by the hospital or doctor and 3.5% by family members. In 11.2% of the cases, the authorities became aware of the offence themselves, 2.2% involved self-reporting by the offender and another 2.2% were anonymous or pseudonym reports.<sup>78</sup> Perhaps even more interesting are the reporting rates specified per offence, in particular concerning sexual offences. Of the 17 sexual offences that were investigated, 47.1% were reported by the victims themselves, and 35.3% by family members, against the average for all offences of 56.3% and 3.5% respectively.<sup>79</sup>

(4) Regarding the authority to whom the offences were reported, Krainz found that 90.8% of the reports were made to the police and 5.9% to the public prosecutor's office.<sup>80</sup> The 2.6% reported to the district court and the 0.3% given to the examining magistrate concerned private prosecution cases.<sup>81</sup>

## 5.2 Complainant

Complainant offences (*Antragsdelikte*) are offences that can only be investigated and prosecuted if a formal complaint has been made by the person entitled to do so to the authorities (s. 2-4 StPO).<sup>82</sup> The prosecution itself is conducted by the public prosecutor. The complainant may withdraw the complaint right up to the end of the proceedings (s. 2-4 StPO). In the context of this research, the most important complainant offences are rape or sexual abuse of one's spouse or partner (s. 203-1 in conjunction with 201-2 and 202 StGB).<sup>83</sup> Only 'non-violent' rape or sexual abuse are complainant offences – if the rape is accompanied by serious violence or threat of violence, or if the victim suffers serious bodily or other harm, the offence may be prosecuted irrespective of the wishes of the victim. Until 1989, when the present

<sup>76</sup> P. Mayhew and J.J.M. van Dijk (1997), p. 41. That the offence had been reported to other authorities, that there was no insurance, and fear of reprisals were each mentioned by 1%.

<sup>77</sup> P. Mayhew and J.J.M. van Dijk (1997), p. 43.

<sup>78</sup> K.W. Krainz (1991), pp. 633-634.

<sup>79</sup> Of course, the number of sexual offences analysed is low compared to, for instance, the number of assault cases (212) and property offences (153), see K.W. Krainz (1991), p. 634. This should be kept in mind when comparing figures for categories of offences.

<sup>80</sup> In the Graz district, a surprising 11.3% of the reports were made to the public prosecutor. It is unclear why.

<sup>81</sup> The key findings from the 1996 ICVS also include figures on reporting to authorities other than the police. It is not specified who these other authorities are, see P. Mayhew and J.J.M. van Dijk (1997), Appendix 4 Table 11.

<sup>82</sup> Bertel (1997), no. 38, p. 11. The complaint may be made to the federal or rural constabulary, 11 Os 54/84.

<sup>83</sup> Examples of other complainant offences are: hiding, or helping to hide, a child from the educational authorities (s. 195 StGB) and preventing a child from submitting to, or helping him hide from, educational measures (s. 196 StGB).



rules on marital rape were introduced by amendment (StGNov. 1989), incidents of marital rape and sexual abuse were not qualified as sexual offences but were instead treated as cases of coercion, causing of bodily harm or deprivation of personal freedom.<sup>84</sup> With the 1989 amendment these were recognised as sexual offences, but because prosecution of the offender may be in conflict with the best interests of the victim, the 'less serious' forms of rape and sexual abuse within the marriage have been classified as complainant offences, thereby giving the victim some say in the decision whether or not to prosecute.<sup>85</sup> Also in view of the interests of the victim, the sentence may be mitigated if the victim declares that he or she wants to carry on living with the offender (ss. 203-2 in conjunction with 41 StGB).

It is interesting to compare the developments concerning marital rape as a complainant offence in Austria to the developments concerning domestic violence in Norway (see § 5.2 of Chapter 18). In Norway, domestic violence was originally a complainant offence. Women who had filed a complaint against their husbands would return later to withdraw the complaint, much to the frustration of the police and prosecutors working on the case, and therefore it was decided to make domestic violence a non-complainant offence in 1988. What is 'in the best interests of the victim' is often difficult to say. Prosecution of the spouse/partner against the explicit wishes of the victim may be undesirable, but so is the situation in which the victim may be more or less forced to withdraw the complaint by the offender or personal circumstances.

### 5.3 Civil claimant

An injured person who, as a result of the offence, has civil claims against the perpetrator, may join the proceedings as a civil claimant (*Privatbeteiligter*) (s. 47-1 StPO). To join the proceedings, the injured person need simply declare that he wishes to do so. Although section 47-1 StPO states explicitly that the declaration may be made until the start of the main proceedings, Foregger/Kodek assure us that the declaration may in fact be made until the closing of the gathering of evidence.<sup>86</sup> In 509 (81.6%) of the 624 cases analysed by Krainz in 1991, the victim was a private person. 199 (39.1%) of these private persons joined the proceedings as a civil claimant prior to the main proceedings.<sup>87</sup> Eventually, of the 413 victims putting in an appearance at the main hearing, 223 (54%) did so as a civil claimant. One hundred and twenty-four (30%) had joined during the preliminary proceedings. Thirty-five (8.5%) joined both during the preliminary proceedings and again during the main trial. Ninety-four (22.8%) joined only during the main trial; 190 (46%) did not join at all.<sup>88</sup>

<sup>84</sup> Rape or sexual abuse between partners, i.e., non-married cohabitantes, has always been recognised as a sexual offence.

<sup>85</sup> Commentary Foregger Straßengesetzbuch, Stand 1.3.1997, to section 203 StGB.

<sup>86</sup> Bertel (1997), no. 252, p. 59, with reference to Foregger/Kodek commentary IV to section 47 StPO.

<sup>87</sup> Eighty-two (41.2%) did so when reporting the offence, 95 (47.7%) during the preliminary proceedings and 22 (11.1%) during the intermediate proceedings. Firms who have suffered property offences join the proceedings about 10% more often than private persons. K.W. Krainz (1991), pp. 635-636.

<sup>88</sup> K.W. Krainz (1991), pp. 644-645. Five (1.2%) of the victims joined in another (undefined) way. The figures given by Krainz on the percentage of victims joining during the main proceedings are a little confusing. I assume that of the original 199 who joined during the preliminary proceedings, only 124 were involved in the main proceedings.

Particularly interesting is the fact that most private participations, whether joining prior to, or at the start of, the main proceedings, concern cases of negligent physical injury, property offences and property offences where violence is involved. Only rarely do victims of sexual offences or violent offences join as a civil claimant. These victims clearly either do not want an active part in the proceedings, or do not want to receive compensation from the offender.<sup>89</sup>

The position of civil claimant is accompanied by a series of active participatory rights. The civil claimant may pass evidence that may lead to the conviction of the accused or substantiate his compensation claim to the public prosecutor and the examining magistrate (s. 47-2-1 StPO); he may view the files, even during the preliminary proceedings and investigations, unless there are special reasons not to (s. 47-2-2 StPO); he must be invited to the main proceedings, with the apposition that if he does not appear at the trial the proceedings will continue without him and his claim will be read to the court from the file. He may put questions to the accused, the witnesses and expert-witnesses, or speak out during the hearing to make other remarks. At the end of the hearing, after the public prosecutor has made and substantiated his closing statement, he has the irrefutable right to present and substantiate his claim, and to put forward the issue (*Anträge*) that he wants the court to decide on in the main verdict (s. 47-2-3 StPO). The options open to the court in deciding the compensation claim are to either totally accept the claim, partially accept it or refer it to the civil courts. The claim may not be referred if the evidence produced in the context of the criminal trial is enough to support the civil claim for damages. If, despite sufficient evidence, the claim is referred, the civil claimant may appeal (s. 283-4 in conjunction with 366-3 StPO).

#### 5.4 Private Prosecutor

A private prosecution must be instigated within six weeks of the day on which the offence and the suspect became known to the private prosecutor. The prosecution is initiated by charging the accused. The charge must be made orally or in writing by the private prosecutor at the criminal court (s. 46-1 StPO). During the collection of the initial information (*Vorerhebungen*) and the preliminary investigation (*Voruntersuchung*) the private prosecutor may pass on to the court anything that supports his charge. He may view the files and may take any steps necessary to substantiate his charge that the public prosecutor would otherwise be entitled to take (s. 46-2 StPO). The investigations conducted by the private prosecutor are supervised by the court. If necessary, the private prosecutor may be heard as a witness (s. 172-2 StPO). Private prosecution is not possible against juveniles (s. 44 JGG 1988), although the state prosecutor may prosecute a juvenile at the request of the injured person (s. 44-1 JGG 1988). If the private prosecution does not result in a conviction, the private prosecutor must bear the costs of the trial himself (s. 390-1 StPO).<sup>90</sup> This considerable financial risk may be one of the explanations for the modest use that is made of the private prosecution. Of all the cases analysed by Krainz, only 22 (3.5%) were private prosecutions.<sup>91</sup> Another possible reason may be the poor provision of information about the private prosecution to the injured person. This point is dealt with more extensively in Part II of

<sup>89</sup> K.W. Krainz (1991), pp. 635-636 and 644.

<sup>90</sup> A subsidiary prosecutor runs a similar financial risk, see § 5.5.

<sup>91</sup> K.W. Krainz (1991), p. 632.

this chapter. At the request of the private prosecutor, the public prosecutor may take over the case (s. 46-4 StPO).

Examples of offences reserved for private prosecution are the medical treatment of a person without his permission (s. 110 StPO), offences concerning privacy such as opening another person's mail, intercepting telephone exchanges, eavesdropping and revealing professional secrets (ss. 118-123 StPO), (minor) offences committed within the family circle (s. 166 StPO) and deception of one's spouse in relation to matters that could affect the validity of the marriage (s. 193 StPO). See § 7.1 under guideline B.7.

### 5.5 Subsidiary Prosecutor

In cases where an injured person has joined, or is willing to join, the proceedings as a civil claimant, and the prosecutor decides to refrain from, or to discontinue, a prosecution, the civil claimant may take over the prosecution of the offence as subsidiary prosecutor (*Subsidiarankläger*, s. 48 StPO). However, if the accused is a juvenile, subsidiary prosecution is not possible (s. 44-2 JGG). It is important to realize that *only* a civil claimant, i.e. someone who introduces his civil claims in the criminal proceedings, is entitled to subsidiary prosecution.<sup>92</sup>

Subsidiary prosecutions are instigated even less often than private prosecutions – Krainz encountered only one case of a subsidiary prosecution during his research.<sup>93</sup> This may again be caused in part by the financial risk that the subsidiary prosecutor runs – like the private prosecutor, he must bear the costs of a trial not resulting in a conviction (s. 390-1 StPO). Another reason may be the 'unnecessary complexity' of the rules governing the subsidiary prosecution.<sup>94</sup> These rules differ depending on the phase of the criminal proceedings. Finally, the lack of information for the civil claimants about becoming a subsidiary prosecutor also contribute to the poor use made of subsidiary prosecution. Again, the point about information is dealt with in more detail in Part II of this chapter.

The legal position of the subsidiary prosecutor is that of the state prosecutor, although the subsidiary prosecutor does not have the same rights of appeal. He may participate actively in the preliminary proceedings by, for example, investigating the scene of the crime and being present during the searching of premises (s. 97-2 StPO). The participatory rights of the subsidiary prosecutor are more extensive than those of the civil claimant – a civil claimant may not, for example, investigate the scene of the crime.<sup>95</sup> The institution of the subsidiary

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<sup>92</sup> Most of the active participatory rights awarded victims of crime hinge on whether or not they have joined the proceedings as a civil claimant. In his memo written for the Austrian Juristentag, Helmut Fuchs proposes to allow certain victims of crime to participate in the proceedings without the prerequisite of pursuing civil claims. There are many conceivable situations where the victim has no interest in receiving damages from the offender, but does have other interests in the case. Fuchs gives the example of the parents of a murdered child, who do not wish to receive compensation because their suffering cannot be measured in money anyway, but who would still like to be recognized within the proceedings (1997, p. 97). (In some jurisdictions, 'indirect' victims such as family members of the deceased are not legally recognized as victims. In that case, the example of the rape victim who cannot bear the thought of being 'paid off' by the offender for what he has done also illustrates the point.)

<sup>93</sup> K.W. Krainz (1991), p. 632.

<sup>94</sup> Bertel (1997), no. 265, p. 62.

<sup>95</sup> K.W. Krainz (1991), p. 639.

prosecution is intended as a corrective against the monopoly that the public prosecutor has over the prosecution of offences.<sup>96</sup> This is comparable to the philosophy behind the private prosecution in England and Ireland, where it is intended to function as a constitutional safeguard against arbitrary prosecution policies of the Crown Prosecution Service and Director of Public Prosecutions respectively. Great care should be taken with intrinsic differences between institutions carrying the same name – private prosecution in England and Ireland is a much broader concept than private prosecution in Austria and Germany.

In fact, the common law private prosecution embraces both the private and the subsidiary prosecution of Germanic law.

## 5.6 Auxiliary Prosecutor

Section 117-4 StGB provides for a (very limited) possibility for the injured person to join the criminal proceedings as an accessory prosecutor (*Nebenkläger*). This opportunity is only available in relation to offences against the honour, and (threatening with) assault. The auxiliary prosecutor has the same legal position as the private prosecutor, but runs no financial risk.

## 5.7 Witness

In many cases, the victim has an important role to play as a direct witness of the offence (*unmittelbarer Zeuge*). Whatever other roles the victim intends to play in the criminal proceedings is irrelevant to his duty to testify – a private prosecutor, civil claimant and a subsidiary prosecutor may all be called as a witness.<sup>97</sup> In principle, the rules governing the testimony by witnesses are as follows.

A witness may be called to testify by the examining magistrate during the preliminary proceedings (ch. 3, ss. 150-173 StPO) and again by the presiding judge during the main proceedings (see, for example, the relevant sections in ch. XVIII StPO). During the preliminary proceedings, the questioning is conducted by the examining magistrate without the presence of the prosecutor, the civil claimant, the accused, their representatives or other witnesses (s. 162-1 StPO). The witness may be accompanied by a confidant (s. 162-2 StPO).

The main hearing before a court of first instance is commenced by the calling of the case by the clerk/reporter (s. 239 StPO). The presiding judge establishes the personal details of the accused and reminds him to pay attention to the charges and the proceedings (s. 240 StPO). Then the witnesses are called into the courtroom and informed where they can wait and at what time they are expected in court to testify (s. 241 StPO). The private prosecutor or civil claimant may also be required to leave the courtroom until called as a witness, but this does not affect their right to be represented in court (s. 241-1 StPO). The witnesses are questioned individually in the presence of the accused (s. 247-1 StPO). They are reminded that they should speak the truth, and may be put under oath if the court considers this necessary (s. 247-2 StPO).<sup>98</sup> The questioning is carried out by the presiding judge. The other

<sup>96</sup> See Foregger's commentary on section 48.

<sup>97</sup> Bertel (1997), no. 365 pp. 88-89.

<sup>98</sup> A witness meeting one of the conditions set out in section 170 StPO may *not* be put under oath. These conditions are, among others, if the witness is under the age of 14, if he has already been sentenced for perjury and if he has such a hateful relationship with the accused that he cannot be considered a credible witness.

members of the judiciary, the prosecutor, the accused and the civil claimant may subsequently ask additional questions (s. 249-1 StPO). The witness may again be accompanied by a confidant.<sup>99</sup>

Several exceptions have been made to the basic rules described above. For example, vulnerable witnesses may testify in the absence of the accused, or by video link, and in some cases, a witness is allowed to remain anonymous. See §§ 8.3 under F.15, 8.2 under C.8, and 8.3 under G.16, respectively.

## 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.*

##### *Legislation*

S 47a-1 StPO determines that all authorities involved in the criminal justice process have the duty to inform the injured person of his rights in the criminal proceedings, insofar as this seems necessary in the given circumstances. This section was introduced by amendment in 1987 (StRÄG 1987) and is modelled on section 3 StPO which describes comparable duties that the authorities have towards the accused (s. 3 StPO).<sup>100</sup> Regarding the police, section 47a-1 StPO implies that they should at least explain to an injured person how he can become a civil claimant (i.e. claim compensation from the offender) or, if the offence is reserved for private prosecution, how to instigate such a prosecution. It does *not* specify that they are to inform the victim about the possibilities of obtaining assistance, or practical and legal advice.<sup>101</sup> Furthermore, the police are specified in section 14 VOG as one of the agencies responsible for informing the injured person of his opportunities for applying for state compensation.<sup>102</sup>

##### *Practice*

At the time of writing, whether or not the victim received information from the police, and what the information was about, depended very much on the individual officer. There was no standard brochure or booklet summarizing organizations offering help, procedures, rights

<sup>99</sup> Bertel (1997), no. 386, p. 94.

<sup>100</sup> See Foregger's commentary on section 47a-1 StPO.

<sup>101</sup> See Foregger's commentary emphasizing that only the *rights* of the injured person in the criminal proceedings need be imparted.

<sup>102</sup> The other two agencies are the criminal court of first instance and the public prosecutor, although section 14 VOG determines that the latter only has to fulfill this duty when dropping the prosecution. See § 6.1 under B.6 and D.9.

and duties that the police could hand to the victim, and the only thing that was noted down in the police report is whether or not the injured person had any civil claim to make against the offender.<sup>103</sup> However, the Ministry of Justice was due to finish a brochure in the first half of 1999, and the *Weißer Ring* in Styria has produced a leaflet referring to support groups in Styria.

The police often leave it to the courts to inform victims of their rights (see under D.9). This is unfortunate because the police are the first to come into contact with the victim, and are therefore the authority *par excellence* to at least provide the victim with some initial information. But according to the president of the juvenile court in Vienna the victim's rights in Austria are so complicated that 80% of the qualified lawyers do not know them, in which case one can hardly expect the police who are not properly instructed about these rights in the police academy to know about them.<sup>104</sup>

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

As described in § 3.3.1, the Austrian criminal process consists of several phases involving a variety of decisions and decision-makers. In the investigative stage, in addition to the police, the prosecutor and, in cases where a preliminary investigation is required, the examining magistrate are also involved. Also, it should be noted that the uniformed officers of the federal and rural constabulary summarily investigate any criminal offence reported to them before sending the case on to the criminal investigations department (*Kriminalpolizei*) for further investigation. This means that four instances may be involved in the investigation – uniformed police, criminal investigations department, prosecutor and examining magistrate. There is no personal communication between the four authorities, it is simply a matter of sending the file on to the next authority.<sup>105</sup>

In principle, the investigative stages of the criminal proceedings are kept secret to protect the accused. This means that no information about the progress of the case is volunteered to the injured person during these stages. Although the victim is provided with the name and telephone number of a police officer involved in his case,<sup>106</sup> the confusing array of authorities and persons involved in the investigation, combined with their non-personal modes of communication, make it difficult for an injured person to acquire information about developments, or even to establish which authority is currently working on his case.

The civil claimant – i.e. the injured person who has entered a claim for compensation – has the right to view the files, even during the preliminary proceedings and investigations unless there are special reasons to oppose this (s. 47-2-2 StPO), and could in this way find out about the progress of his case and the outcome of the police investigation. It should be noted that unlike in Germany, the victim does *not* have to have a lawyer to view the files. Krainz remarks that it was difficult to establish the frequency with which this right was exercised in his research because no note is made on the file that it has been viewed. However, based on the statements of the 'manager of the branch', he does conclude that civil claimants themselves rarely make use of the right to inspect the file, unlike legal representatives of civil claimants who, as a rule, do inspect the file.<sup>107</sup> In this respect it should be noted that

<sup>103</sup> Information provided by inspector Ebenschweiger and colleague, 8 October 1997.

<sup>104</sup> Information provided by Dr. U. Jesionek, president of the juvenile court, 1 October 1997.

<sup>105</sup> Information provided by inspector Ebenschweiger and colleague, 8 October 1997.

<sup>106</sup> Information provided by inspector Ebenschweiger and colleague, 8 October 1997.

<sup>107</sup> K.W. Krainz (1991), p. 637.

firms tend to join the criminal proceedings as civil claimants about 10% more frequently than private persons, and that firms also make use of legal assistance twice as much.<sup>108</sup> In other words, it is firms rather than private individuals who are most likely to benefit from the right to view the files.

The subsidiary prosecutor – i.e. a civil claimant who has taken over a prosecution dropped by the public prosecutor – has the right to be present during the inspection of the scene of the crime, the searching of premises or searching through paperwork (s. 97-2 StPO).<sup>109</sup> To allow the subsidiary prosecutor to exercise these rights, it is stipulated in the same section that the examining magistrate should, in principle, inform the subsidiary prosecutor beforehand of his intentions to perform such acts, although he may proceed without prior informing the subsidiary prosecutor if delay could be detrimental. Of the 624 cases evaluated by Krainz, 11 involved an investigation of the scene of the crime. The injured party was notified beforehand in 2 cases, and took part in the investigation of the scene of the crime in 5 cases, despite the fact that only one subsidiary prosecution was involved, and that the civil claimant as such has no right to inspect the scene of the crime!<sup>110</sup> House searches were carried out in 40 cases, with prior notification sent to the injured party in 5 of these. Seven civil claimants took part in the house search, again despite the fact that only one subsidiary prosecution was involved.<sup>111</sup>

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

#### *Non-prosecution – formal situation*

The following actions all result in non-prosecution:

- (1) In the early stages of the criminal process, prior to a preliminary investigation being initiated, the public prosecutor may end the proceedings by 'putting aside the report' (*die Anzeige zurücklegen*) if he feels there are insufficient grounds to prosecute a particular person (s. 90-1 StPO).
- (2) At any given moment after a preliminary investigation has been initiated, the (public) prosecutor<sup>112</sup> may decide to withdraw his request for prosecution or declare that he sees no grounds for further judicial proceedings, thereby compelling the examining magistrate to terminate the preliminary investigation (109-1 StPO).
- (3) The examining magistrate and the court of second instance may themselves decide to terminate the preliminary investigations (109-2 StPO).
- (4) After the preliminary investigation has been closed,<sup>113</sup> the file is sent to the public prosecutor who then has 14 days in which to decide whether or not to prosecute. If he decides not to prosecute, he must send the file back to the examining magistrate with a note that he sees no grounds for further legal action (112-1 StPO).

In cases where the decision is made not to prosecute, the authorities have the following

<sup>108</sup> K.W. Krainz (1991), p. 636.

<sup>109</sup> The section does not speak of 'subsidiary prosecutor' as such, but of *Ankläger*.

<sup>110</sup> K.W. Krainz (1991), p. 639.

<sup>111</sup> K.W. Krainz (1991), p. 640.

<sup>112</sup> N.B. *Ankläger*, not *Staatsanwalt*.

<sup>113</sup> For the difference between 'closing' and 'terminating' a preliminary investigation see § 3.3.1.

informative duties towards the injured party:<sup>114</sup>

(1) If the public prosecutor remits the report of the injured party and refuses to prosecute, either right at the start or after initial information has been collected, he must inform the injured party of his decision. The injured party who is willing to join the proceedings (i.e. become a civil claimant) may then request the court to initiate preliminary investigations himself (s. 48-1 StPO).

(2) If the public prosecutor drops the prosecution *before* a suspect has been formally accused, the civil claimant must be informed of this decision. The civil claimant may then decide to continue the prosecution himself – i.e. become a subsidiary prosecutor. In that case he must inform the examining magistrate orally or in writing within fourteen days of being notified of the decision of the public prosecutor (s. 48-2 StPO).

(3) The same goes for the public prosecutor dropping the prosecution *after* a suspect has been formally accused. In that case the civil claimant has to send his notification that he intends to continue the prosecution to the court of first instance rather than to the examining magistrate (s. 48-3 StPO).

(4) If the examining magistrate or the court of second instance decide to terminate the preliminary investigation, the prosecutor, the civil claimant and the accused must be informed (s. 110-1 StPO). At his request, an injured party who has not joined the proceedings as a civil claimant is to be sent confirmation of the termination of the preliminary proceedings (110-3 StPO).

Failure to inform the injured party/civil claimant of the decision of the public prosecutor to drop the prosecution carries no sanction.<sup>115</sup>

#### *Non-prosecution – practice*

The injured party is notified that the report has been laid aside by means of a standard form. The standard form of the prosecution service of Graz announces that 'the prosecution service has examined the report and found no grounds (s. 90-1 StPO) to open criminal proceedings against the suspect', and points out that the injured party who joins the proceedings as a civil claimant may request the court sitting in chambers to initiate the preliminary investigations. The injured party is warned that if the criminal proceedings do not result in a conviction, he must pay all the trial costs himself, and reminded that civil damages may also be claimed via the civil court. Finally, he is informed that he can turn to a lawyer or notary, one of the free information centres of the bar, or to the local district court for more information. The letter is formal and rather terse, and offers no explanation whatsoever about the reasons for laying aside the report. Nor does it inform the injured party of the provisions of the Victim Support Act, despite the fact that 'the State prosecutor is responsible for providing such advice if he withdraws the complaint' (s. 14VOG). Regarding the (lack

<sup>114</sup> If requested, information about the stage which the proceedings have reached must also be imparted to the Federal Social Agency dealing with any claim for state compensation. The criminal court of first instance and the state prosecutor must answer such a request without delay. If the state prosecutor has withdrawn the complaint or dropped the charges, he must report his reasons for doing so (s. 9-3 VOG).

<sup>115</sup> See U. Jesionek (1997b), pp. 240-241. However, if the injured party has not been informed of the decision of the public prosecutor to drop the prosecution in cases where a suspect has not yet been formally accused, the injured party may inform the examining magistrate that he will continue the prosecution himself up to a year after the case was closed (s. 48-2 StPO), instead of within two weeks of being notified that the prosecution has been dropped.



of) explanations for non-prosecution, the victim has the right to ask the prosecution service for a more substantial explanation (s. 48a StPO), which he will receive in writing.<sup>116</sup>

### *Prosecution*

If the state prosecutor decides to go ahead with the prosecution, the authorities have no informative duties towards the injured party.

### *Other Prosecutors*

If the prosecutor is a private or subsidiary prosecutor, the decision whether or not to prosecute is his own. A private prosecutor must be informed of the discontinuation of the preliminary investigation. He must be instructed to enter the indictment within 14 days, and reminded that failure to comply with this term is interpreted as a withdrawal from the prosecution (112-2 StPO).

#### *(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 private prosecutor and the civil claimant are to be informed of the date of the main hearing (s. 221-1 StPO). The summons must be sent to them in person or to their legal representatives (s. 79-2 StPO). The summons sent to the civil claimant contains the apposition that if the civil claimant does not appear at the trial, the hearing will proceed without him, and his claims will be read out from the file (s. 47-2-3 StPO).

By virtue of its office, the criminal court must bear in mind the damages caused by the offence and other circumstances that are of relevance to the civil claim (s. 365-1 StPO). The section adds that if there is any doubt whether the injured person is aware that a criminal trial will take place, he must be duly informed to enable him to exercise his rights to join the proceedings as a civil claimant. An injured person may also be informed of the date and place of a hearing if he is summoned to appear as a witness. The informative duties of the authorities regarding the rights of the victim/witness to refuse to give evidence are discussed in § 8.2.

Sections 471-1, 471-4, 471-5, 471-6 StPO concern summons of the private prosecutor and civil claimant where an appeal is concerned.

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

The examining magistrate who questions the injured party as a witness during the preliminary investigations must ask him whether he wishes to join the proceedings as a civil claimant (s. 172-1 StPO). Krainz reports that of a total of 153 eligible cases, the examining magistrate

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<sup>116</sup> Information provided by Dr. Valentin Schroll, Generalanwalt, 30 November 1997. See Foregger's commentary on section 48a StPO for the level of explanation required for the different grounds for non-prosecution.

fulfilled this legal obligation in only 31 cases (20.3%).<sup>117</sup>

The general obligation imposed by section 47a-1 StPO, that all authorities involved in the criminal justice process must inform the injured person of his rights in the criminal proceedings (see § 6.1 under A.2), extends to the courts. Therefore, an injured person being questioned as a witness during the main hearing, who has not already joined the proceedings as a civil claimant, must be made aware of his opportunities for doing so by the court. Krainz found that the presiding judge asked 53.5% of the injured persons appearing in the trial whether they wanted to join the proceedings as a civil claimant. Victims of violent property offences were asked most often (69.8%), followed by victims of property offences (62.2%), negligent physical injuries (55.7%) and assaults (49.4%). Victims of sexual offences were asked whether they wanted to join as a civil claimant in only 14.3% of the cases.<sup>118</sup> None of the injured persons asked whether they wanted to join as civil claimants were offered any explanation as to the associated rights and opportunities.

Finally, section 14 VOG explicitly instructs the criminal court of first instance to advise the injured person that he may claim state compensation.

This second element of guideline D.9 is intended to act as a back-up for the primary duty of the police to inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation. In practice in Austria, both informatory duties are poorly exercised. It is contended that the victim's rights are too complicated for the police to be able to understand and explain (see under A.2), and the presiding judges simply seem to forget. There is no sanction on such an omission. Solutions that have been suggested are to introduce a victim's information point (*Opferberatungsstelle*) at every court,<sup>119</sup> or to keep records of mistakes made by court officials regarding their informatory duties so that a warning may be issued after a certain number of omissions.<sup>120</sup>

#### *Outcome of the case*

The decision on the civil claims must be recorded in the verdict given by the criminal court (260-1-5 StPO). The civil claimant has the right to ask for a copy (77-2 StPO).

Within fourteen days of the announcement of the verdict, the private prosecutor and the civil claimant may ask to be sent a copy of the protocol, if they can prove they have a legal interest (s. 458-2 StPO).

## **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.*

In general, the police will record the injuries and losses suffered by the victim insofar as this constitutes part of the evidence of the case. Medical reports should be made by a police doctor or a doctor at a public hospital, but not by a General Practitioner. There are standard

<sup>117</sup> K.W. Krainz (1991), p. 636.

<sup>118</sup> K.W. Krainz (1991), pp. 644-645.

<sup>119</sup> Information provided by Dr. U. Jesioneck, president of the juvenile court, 1 October 1997.

<sup>120</sup> This point was discussed at the 1997 *Juristenlag*, where the latter suggestion was put forward.

forms for the examining doctor to fill out<sup>121</sup>. All the appropriate documents should be included in the case file, which is duly sent to the prosecuting authorities.

*(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 matter of the offender compensating the victim is only addressed by the court if the injured person has joined the proceedings as a civil claimant.<sup>122</sup> In that case, it is up to the civil claimant himself to provide the court with all the relevant information concerning his injuries and losses (s. 365-2 StPO). The compensation claim is a strictly civil law issue, and the victim's need for compensation has no bearing whatsoever on the form and quantum of the criminal law sentence. However, a genuine effort by the offender to compensate for the damage he has caused is recognised as a factor in mitigation of the sentence (s. 34-1-15 StGB).

#### *Provision of information to the court – formal situation*

Prior to the main hearing, the civil claimant has the right to give any information that may lead to the conviction of the offender, or that speaks in support of his compensation claim, to the public prosecutor or the examining magistrate, and to make a motion to take evidence, i.e. prompt the examining magistrate to collect particular evidence (s. 47-2 StPO). This documentation should reach the court as part of the file. During the main hearing, the civil claimant may question the accused, the witnesses and expert witnesses (s. 249-1 StPO), and may speak out if he has any remarks he would like to make. He may also demand the summoning of further witnesses.<sup>123</sup> Right at the end of the proceedings, after the public prosecutor has made his final statement, the civil claimant may present and substantiate his claim for compensation (s. 47-2-3 and 255-2 StPO).

#### *Provision of information to the court – in practice*

In his research, Krainz found that out of a total of 199 cases involving a civil claimant during the preliminary proceedings, only 25 of these (approximately 12.5%) supplied their own evidence in support of their compensation claim during this phase. Seventeen of these were

<sup>121</sup> Information provided by inspector Ebenschweiger and colleague, 8 October 1998.

<sup>122</sup> Confusion may be caused by section 365-1 StPO, see § 6.1 under D.9 (date and place of a hearing), determining that the court must, by virtue of its office, pay heed to the damage caused by the offence and other circumstances that are relevant to the consequences in civil law, of the offence (s. 365-1 StPO). This could be read as implying that even if the victim has not entered a claim for compensation, the court should take a decision regarding compensation. However, the duty of the court to bear in mind the matter of compensation appears to go no further than informing an injured party, who is apparently unaware of the fact that a criminal trial is scheduled – i.e. he has not joined the proceedings as a civil claimant even though there are damages for which compensation could be claimed – that such a trial will indeed take place, thereby enabling him to exercise his right to make a claim for compensation (s. 365-1 StPO).

<sup>123</sup> K.W. Krainz (1991), p. 640.

victims of (violent) property offences.<sup>124</sup> Of the 223 civil claimants who took part in the trial itself, 9 (4%) put questions to a witness and 2 (0.8%) to the accused. Fifty-one (22.8%) made use of their right to make comments and 5 (2.2%) made a closing statement. It should be noted that, in cases where a civil claimant was represented by a lawyer, the use made of active informatory rights is significantly different. Although these lawyers also made little use of their right to put questions to witnesses, they did question the accused in 57.3% of the cases, and made a closing statement in more than 60% of the cases.<sup>125</sup> Motions to take evidence were rarely made.<sup>126</sup>

Of course, the civil claimant can only provide the necessary information or make use of his active informatory rights if he is aware of these rights and is awarded the opportunity to actually make use of them. It is particularly interesting to note in Krainz' research that presiding judges completely ignore their duty to inform the civil claimant of the rights under consideration in this section if the civil claimant is accompanied by a lawyer.<sup>127</sup> The judges obviously presume that the victim's lawyer will ensure that his client is aware of his rights. Civil claimants who were *not* accompanied by a lawyer were informed of their right to comment in 15 cases (6.7%) and of their right to ask questions in 8 cases (3.6%). Regarding the opportunities granted for exercising their rights, 18 civil claimants (8.1%) were given the opportunity to question a witness, 39 (17.5%) to question the accused and 50 (22.4%) to make a final statement.<sup>128</sup>

## 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.*

At the time of writing, the decision whether to prosecute the offender was not a discretionary one. As said in § 2, prosecution takes place on the principle of legality (s. 34-1 StPO), and the question of compensation of the victim is, in principle, not a factor that is taken into

<sup>124</sup> K.W. Krainz (1991), pp. 637-638. There is an interesting difference between districts in the willingness of victims to provide information: 28% of the victims in Vienna were prepared to provide their own evidence, whereas the figure in Innsbruck was 9.7%, and in both Graz and Linz around 5%. Also, male victims are twice as likely to bring along their own evidence as are female victims.

<sup>125</sup> K.W. Krainz (1991), 655-659. The way Krainz has reproduced his figures is confusing, in particular where a distinction is made between civil claimants who are represented by a lawyer, and those who are not. There are no totals of the use made by civil claimants of their rights, regardless of whether they have a lawyer or not.

<sup>126</sup> K.W. Krainz (1991), pp. 638-639.

<sup>127</sup> K.W. Krainz (1991), p. 652.

<sup>128</sup> K.W. Krainz (1991), pp. 652-654. It should be noted that there are significant differences between the districts, and depending on the type of offence involved. For instance, regarding the obligation of the presiding judge to inform the victim of his right to comment, none of the civil claimants in Vienna or Innsbruck were informed of this right, as opposed to the 12% that were informed in Linz.

consideration when deciding whether to prosecute.

However, there are several ways in which a serious effort to pay compensation by the offender may influence the proceedings. First of all, where minor offences (*Bagatelldelikte*) are concerned – offences punishable only with a fine and/or a maximum prison sentence of three years – the act is no longer punishable if the damage has been compensated due to the efforts of the offender (s. 42-2 StGB). Secondly, the construction of *Tätige Reue* – ‘manifested repentance’ – allows the offender to avoid prosecution by either fully compensating the damage caused by his act, or committing himself by contract to fully compensate the damage within a certain period of time, providing that these arrangements are made before the offence becomes known to the authorities (s. 167-2 StPO). It is not necessary for the compensation to be paid at the offender’s own initiative – a payment at the urging of the injured person may also qualify as ‘true regret’, as long as the offender has not been forced to make the payment. However, the element of *Vollständigkeit*, i.e., ‘completeness’, is strictly adhered to. Only if the damage is *fully* compensated, is manifested repentance recognized. Manifested repentance may also be demonstrated by an offender who turns himself in, and leaves a deposit for the injured person with the authorities (s. 167-3 StPO). Finally, if the offender has made a serious attempt to compensate the damage, and the compensation is then paid by a third party, or by an accomplice to the act, he may likewise avoid prosecution (s. 167-4 StPO).

Thirdly, young offenders may avoid prosecution via *Außergerichtlicher Tatausgleich für Jugendliche* – extra-judicial compensation for the act (ss. 6-8 Jugendgerichtsgesetz 1988, JGG) – abbreviated as ATA-J. ATA-J is more, and at the same time, less than ‘compensation’. Usually, it is victim-offender mediation. It is sufficient for the offender to demonstrate his willingness to make good the damages, in particular by making a (symbolic) payment within his means. It is *not* necessary for the damage to have been paid in full. In some cases, an apology or even just a conversation between victim or offender, where the victim is able to explain to the offender what he has suffered, may suffice.<sup>129</sup> Following the success of ATA-J, similar arrangements for adults (*Außergerichtlicher Tatausgleich für Erwachsene*, ATA-E) came into force on 1 January 2000. It should be noted that the Austrian ATA is broader than the German Täter-Opfer Ausgleich (TOA, see Chapter 9). ATA is an out-of-court settlement that focusses on the offence, rather than on the actors. It is not even necessary for the victim to give his consent for ATA to be achieved. Also, the offender is the first to be contacted by the authorities to propose an arrangement, in contrast with the German TOA where in some areas the victim is the first to be contacted, and in others the offender.<sup>130</sup>

(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.*

Where a decision not to prosecute has been taken, the civil claimant, or the injured party who is willing to become a civil claimant, may take over the prosecution as a subsidiary prosecutor (s. 48 StPO). Subsidiary prosecution – comparable to the English connotation of ‘private prosecution’ – has already been dealt with in some detail in § 5.5. Victims of

<sup>129</sup> W. Szymanski (1995), p. 21.

<sup>130</sup> For a very detailed and thorough exposition of ATA-J and ATA-E see M. Löschnig-Gspandl (1996).

crime very rarely make use of this right.<sup>131</sup>

## 7.2 The Court and Compensation

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

The injured party may claim compensation in adhesion to the criminal proceedings as a 'civil claimant' (s. 47 StPO). Injured parties can join the proceedings at different stages: when reporting the offence, during the preliminary proceedings, the intermediate proceedings or during the main trial. In Krainz's research, of the 413 victims who put in an appearance during the main proceedings, 223 (54%) did so as a civil claimant. Of these, 124 joined at some stage during the preliminary proceedings, and 94 waited until the main hearing.<sup>132</sup> Most of the injured parties who joined as a civil claimant had suffered from a property offence (70-75%). Victims of a deliberate violent crime pursued civil claims much less frequently (34.8%), and victims of sexual offences rarely joined (7.1% = 1 case).<sup>133</sup>

The criminal court may only award compensation by the offender to the victim if the injured party has joined the proceedings as a civil claimant. It is intriguing that in Krainz's research injured persons who were *not* represented by legal counsel pursued their civil claims within the criminal proceedings twice as often as those who *were* represented!<sup>134</sup> In Austria, there are no specialized victim's lawyers who are interested only in achieving the best results for the victim rather than pursuing other more personal aims. An Austrian lawyer earns twice as much in civil proceedings as in criminal proceedings, and will therefore be tempted to advise his client to pursue civil claims before a civil court rather than in conjunction with the criminal proceedings.<sup>135</sup> In that case the victim's lawyer only delays matters for the injured person instead of helping him to exercise his rights as quickly and effectively as possible. In Scandinavia the experiences with victim's lawyers are generally more positive,<sup>136</sup> but there, too, it is financially unattractive to represent an injured party in criminal proceedings. The lawyers doing a good job on behalf of victims are mostly young and idealistic, and not

<sup>131</sup> Apparently, the victim does not have the right to ask for a review by a competent authority, but see sections 109-2, 112-3 and 113-1 StPO.

<sup>132</sup> K.W. Krainz (1991), p. 645. 35 of those who joined during the preliminary proceedings reconfirmed their intention to join during the main hearing. Five injured parties are classified as 'others', whatever that means. Earlier on in the report (pp. 635-636) Krainz gives figures for the civil claimants joining the proceedings in relation to the absolute number of private injured persons rather than the number of injured persons putting in an appearance at the trial. Of a total of 509 private injured persons, 199 (39.1%) joined at some stage during the pre-trial procedure. Of these, 82 (41.2%) stated their intention to join at the time of reporting the offence, 95 (47.7%) during the preliminary proceedings and 22 (11.1%) during the intermediate proceedings. It is unclear why Krainz relates the figures of private participation in the main hearing to the number of injured persons putting in an appearance rather than to the absolute number of injured persons.

<sup>133</sup> K.W. Krainz (1991), pp. 644-645.

<sup>134</sup> K.W. Krainz (1991), p. 646.

<sup>135</sup> Information provided by K.W. Krainz, 7 October 1997

<sup>136</sup> However, in Denmark the Compensation Board finds that the processing of claims takes longer if a lawyer is involved than if they are dealing directly with the victim.

(yet) interested in earning a huge salary. If the institution of the victim's counsel is to be a success, it must be made much more attractive to good lawyers. One option is to level out the salaries earned in criminal and civil proceedings.

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

Compensation awarded during criminal proceedings is a decision taken in a civil law matter – it is not a penal sanction, nor is it a substitute for a penal sanction. Although by nature it belongs to different areas of law, there are ties between compensation and the penal sanction: compensation may serve as a factor in mitigation of the sentence, and may only be awarded if the accused is convicted (unless it is awarded via ATA).

In Krainz's research, 223 injured parties entered civil claims during the main criminal proceedings. Thirteen of these (5.8%) were later dropped by the injured party himself; 86 claims (38.6%) were unconditionally accepted and 22 (9.9%) were partly accepted; 32 (14.3%) were accepted 'according to grounds',<sup>137</sup> 59 (26.4%) were transferred to the civil court and 11 (5%) were not mentioned at all in the final judgement.<sup>138</sup>

There are significant differences in the recognition of compensation claims depending on the type of offence; 61.4% of the claims presented for property offences were unconditionally accepted compared to 19.7% of the claims related to negligent physical injuries (traffic accidents). The highest rate of referral to civil proceedings concerned claims presented for assault (33.3%), followed by negligent physical injuries (28.2%).

There are also substantial differences depending on the judicial district in which the claim is presented. In Vienna, only 19.6% of the compensation claims were unconditionally accepted, and 49% were transferred to the civil courts. In Graz, the figures are reversed: 52.5% of the compensation claims were unconditionally accepted and only 13.6% were transferred to the civil courts.<sup>139</sup>

Turning compensation into a penal sanction such as the compensation order in England or the *schadevergoedingsmaatregel* in the Netherlands is not an option in Austria.<sup>140</sup> The Austrian legal world regards compensation as an issue of civil law, very much separate from the questions of criminal law dealt with during criminal proceedings, and wishes to keep it that way. Many criminal law judges are still uncomfortable about having to deal with compensation during a criminal trial. Proposals have been put forward to resolve this problem. Fuchs suggests integrating the present criminal and civil courts into one court dealing with both types of cases, and giving the judges a mixed practice.<sup>141</sup> This has met with fierce resistance from Austrian judges. Furthermore, Fuchs proposes dividing the main hearing in a criminal case where a compensation claim has been presented into two sections. The guilt of the offender is addressed in the first part, and the matter of compensation in the second part. This enables the judge to gather all the evidence that is necessary to substantiate the compensation claim without running the risk of seeming biased to the

<sup>137</sup> Although it is not clear exactly what this means – on condition, perhaps? – no final decision was taken, see Krainz (1991), p. 649.

<sup>138</sup> K.W. Krainz (1991), p. 648.

<sup>139</sup> K.W. Krainz (1991), p. 648.

<sup>140</sup> Information provided by H. Fuchs, 3 September 1997.

<sup>141</sup> H. Fuchs (1997), p. 103.

accused. Thorough enquiries about the compensation claim made before the guilt of the accused is established may be interpreted as anticipating a guilty verdict.<sup>142</sup> Split main proceedings as suggested by Fuchs already exist in Norway.

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

Compensation may be imposed by the court as a condition to a suspended sentence, or a conditional release from prison (s. 50 and 51 StGB). It is unknown what importance Austrian criminal courts attach to this possibility.

### 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 not a penal sanction but a civil law decision. The victim is, in principle, not assisted by the authorities in collecting the money. He may ask a civil court for the enforcement of his damages (s. 373 StPO). Also, if the damages awarded the injured person have not yet been paid by the offender, and the proceeds of the crime have been seized by the authorities in accordance with section 20 StGB, he may demand that his damages are paid from this money (s. 373b StPO). Finally, section 373a StPO allows for an advance payment to victims of serious offences. Unfortunately, this potentially progressive opportunity to offer victims of crime payment 'up front' is almost never used.<sup>143</sup> Not one of the injured parties in Krainz's research made such an application. The conditions attached to an advance payment are stringent,<sup>144</sup> and the sections dealing with this right are so complicated that even Austrian lawyers do not understand them.<sup>145</sup> Furthermore, it is doubtful whether injured parties are properly informed of this opportunity.

## 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.*

Austria has five police academies, in Vienna, Graz, Linz, Salzburg and Innsbrück respectively,

<sup>142</sup> H. Fuchs (1997), pp. 103-104.

<sup>143</sup> *Sicherheitsbericht 1995* p. 317.

<sup>144</sup> See Raschka (1996), pp. 50-51.

<sup>145</sup> Information provided by K. Krainz, 7 October 1997 and K.W. Krainz (1991) p. 660 which refers to Krainz (1990).



which are run along military lines.<sup>146</sup> The basic training of a W3 officer – the lowest-ranking group of the constabulary – consists of 18 months of theoretical work at one of the academies and 6 months of practical experience. Basic training for the rural constabulary is identical to that of the constabulary. Those who have 6 years' experience as a W3 officer may then apply for the W2 course. Candidates for the W2 course are selected on the basis of an entrance exam, and receive a further 10 months' part-theoretical, part-practical training. They must then pass a written and oral examination.<sup>147</sup> Finally, there is an officers' training course.

According to the criminal investigations department of the federal police in Graz, police officers already receive training on how to deal with victims (defined as ethnic minorities, children, sexually abused children and women) during basic training. The matter is dealt with during seminars and in a psychology course. Seminars are also being introduced in the additional training courses offered to already qualified police officers.<sup>148</sup> However, two officers of the Graz police recounted that candidates in basic training are not specifically instructed on how to deal with 'the victim', but rather how to deal with members of the public in general – which may or may not be someone who has been victimized.<sup>149</sup> In other words, the police are not educated to view victims of crime as a separate category, rather, the victim falls within the larger category of 'the public'. In an effort to improve its dealings with the public, representatives of the Austrian police have been to New York to study the principles of community policing.

## 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.*

Because of the way the authorities relate to each other, and the fact that Austrian criminal procedure has pre-trial proceedings, a victim of a serious offence who has to testify in court will be questioned a minimum of four times by the authorities: first by the federal or rural constabulary to whom he reported the offence, then the criminal investigations department, the examining magistrate and finally in court. Jesionek reports that until recently children were sometimes questioned up to 15(!) times.<sup>150</sup> To combat the additional trauma that questioning of the victim may cause, several measures have been introduced. It should be noted that some of the following measures are not aimed specifically at the injured person, but at the witness in general. However, in pursuance of section 172-2 StPO, all regulations concerning the questioning of witnesses are also valid for the injured person who is to be questioned as a witness, even if he has joined the criminal proceedings as a civil claimant or is acting as prosecutor.

<sup>146</sup> See the observations and criticism of W. Stangl (1993) on the training given at the police academies.

<sup>147</sup> W. Stangl (1993), pp. 99-100.

<sup>148</sup> Letter of 26 September 1997 in reply to a request for information made by prosecutor Sutter of the Graz prosecution service.

<sup>149</sup> Information provided by Inspector Ebenschweiger and colleague, Graz police, 8 October 1997.

<sup>150</sup> U. Jesionek (1997b), p. 239 footnote 1 in reference to *Salzburger Nachrichten* 5.3.1996, 17.

Relatives of the accused may refuse to testify (s. 152-1.2 StPO in conjunction with 72 StGB). During the preliminary proceedings the examining magistrate must inform them of this right before they are questioned – or as soon as he is aware of the family relationships – and must note down the answer of the witness in the protocol (s. 152-5 StPO). Failure to inform the witness and to note down his reply in the protocol means the nullity of the evidence may be invoked. If the trial has reached the main proceedings stage, the presiding judge must inform relatives of the accused of their right to refuse to testify.

In Krainz's research, there were 65 injured parties who were related to the accused. The files showed that of the 54 who were interrogated by the police, only 18 (33.3%) had been advised of their right to refuse to give evidence.<sup>151</sup> The reply of the injured person to the caution was protocolled in only 9 cases – half of the amount of cautions given and 16.7% of the total amount of injured persons questioned. The examining magistrate informed related injured parties in 83.3% of the cases, but noted down the reply of the injured person in the protocol in only 48.3% of the relevant cases.<sup>152</sup> Fifty-six injured persons who were related to the accused were called to testify in court during the main proceedings, and 49 (86.6%) of these were cautioned in this respect.<sup>153</sup> Notification of the injured party who is related to the accused of his right to refuse to testify improves as the criminal proceedings progress.

Only in a few cases did the injured person who was related to the accused actually make use of his right to refuse to testify during the preliminary proceedings. Of the 18 advised of this right by the police, 1 refused to make a statement. Of the 10 cautioned by the examining magistrate, 2 refused to testify. However, 26 injured parties related to the accused (46.4%) refused to testify during the main proceedings.<sup>154</sup> As the rate of notification of the injured party increases, so does the active use made of his rights. Krainz demonstrates that failing to provide the injured party with all the necessary information jeopardizes the exercise of his legitimate rights: in Vienna the presiding judge informed the injured party related to the accused of his right to refuse to testify in 75% of the cases. Twenty-five percent of all the related injured parties made use of this right. In Innsbruck the rates were 83.3% versus 41.7%; in Graz 92.9% versus 57.1% and in Linz 100% versus 64.3%. A higher rate of notification leads to a substantial increase in the active exercise of rights.<sup>155</sup>

In pursuance of section 153-1 StPO a witness may refuse to testify or answer certain questions if by doing so he would disgrace himself or a relative, or run the risk of direct and considerable damage to his property. In 1987, section 153-2 StPO was introduced allowing victims of sexual offences to refuse to answer questions concerning their private life and concerning details of the offence which they cannot bear to describe (s. 153-2 StPO).<sup>156</sup> The examining magistrate must inform the witness of his right to refuse to give evidence on the basis of one of these two reasons as soon as the situation arises (s. 153-3 StPO). However,

<sup>151</sup> There are interesting variations depending on the age and sex of the victims: 83.3% of the victims who were not advised of their right to refuse to testify were between 20-30 years old; 90% of the males were not cautioned versus 61.4% of the females. K.W. Krainz (1991), pp. 641-642.

<sup>152</sup> K.W. Krainz (1991) p. 643.

<sup>153</sup> K.W. Krainz (1991), pp. 661-662.

<sup>154</sup> K.W. Krainz (1991), p. 662.

<sup>155</sup> K.W. Krainz (1991) p. 662.

<sup>156</sup> The second half of this section literally reads: "and details of the offence whose description they regard as unacceptable".

the witness' right to refuse to testify in these situations is not absolute – in very important cases the court may force the witness to answer the question.<sup>157</sup>

In Krainz's research, 2 (0.5%) of the 433 injured parties called as a witness during the preliminary proceedings made use of their right to refuse to testify on the basis of section 153-1 StPO.<sup>158</sup> Regarding section 153-2 StPO there were 15 eligible injured parties, and 2 (13.3%) invoked this section. One of these was made to answer the question by the examining magistrate.

Individuals who are prevented from appearing in court by illness or infirmity may be questioned at home (s. 154 StPO). If it is feared that a witness will not be able to testify during the main proceedings, the examining magistrate must offer the prosecutor, the civil claimant and the accused as well as their legal representatives the opportunity to participate in the examination of the witness during the preliminary proceedings and to put questions to the witness (s. 162a-1 StPO). The examining magistrate may have the accused removed during the testimony of the witness (s. 162a-1 in conjunction with 250-1 StPO). In the interest of the witness, in particular with regard to his youth or his mental or physical health, or with regard to the establishment of the truth, the examining magistrate may decide that such questioning of the witness during the preliminary proceedings by the parties and their legal representatives should be conducted indirectly, for instance via audio-/visual equipment. If the witness is under the age of 14, the questioning may be done by an expert such as a child psychologist (s. 162a-2 StPO).<sup>159</sup> At their request, witnesses who are related to the accused, and injured persons under the age of 14 have the right to be questioned in the manner described above – i.e., during the preliminary proceedings only (s. 162a-3 in conjunction with 153-1-2/3 StPO). If these witnesses are willing to testify during the main proceedings, they may do so via a video-link from a room adjacent to the courtroom (s. 250-3 in conjunction with 162a StPO). All Austrian courts now have the necessary equipment, and although there were some initial hurdles to overcome, mostly of a technical nature, these measures are now generally in operation.<sup>160</sup> The video-room in the juvenile court in Vienna is pleasantly furnished, with colourful pictures from popular children's movies decorating the walls, a playhouse on a small table, toys and a television for showing children's movies. Anatomical dolls are kept in a box in a cupboard, and there are two video cameras that are operated by technicians outside the room. The cameras can be silently zoomed in and out and are mounted unobtrusively on the wall. Questions that the officials in the courtroom want put to the child are relayed to the person examining the child via an earplug.

The witness testifying in court during the main proceedings may ask for the removal of the accused during his testimony (250-1 StPO), but in practice this never happens. Most judges insist that all courtroom proceedings take place in one place centred around the judge so that he can observe everyone's reactions to the events.<sup>161</sup>

<sup>157</sup> See Foregger's commentary to section 153 StPO.

<sup>158</sup> K.W. Krainz (1991), p. 643.

<sup>159</sup> In some countries where it is common practice to have children questioned by a psychologist or child specialist, doubts have arisen as to whether this is the best alternative. In Norway the police have gone back to having children questioned by a specially trained police officer rather than a child specialist.

<sup>160</sup> Jesionek (1997a) p. 34.

<sup>161</sup> Information provided by Dr. U. Jesionek, president of the juvenile court, 1 October 1997.

A witness may be accompanied by a confidant when questioned by the examining magistrate (162-2 StPO) or the police.<sup>162</sup> Children under the age of 14, the mentally ill, or mentally handicapped should always be accompanied by someone they trust during questioning, if this is in their best interest (s. 162-3 StPO).

### 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.*

According to section 47a-2 StPO, when fulfilling their duties or imparting information to third parties, all officials involved in the criminal justice process must bear in mind the interest the injured person has in the protection of his privacy. Particular caution should be taken with the distribution of photo images or announcement of personal details, that could lead to the wide-spread identification of the injured person, without this being warranted by the aims of criminal justice.

The personal details of any witness being questioned in court should be kept from the public as much as possible (s. 166-1 StPO), and television, radio, film and photo equipment is not allowed into the courtroom (s. 228-4 StPO, see also s. 22 *Mediengesetz*).<sup>163</sup> If necessary for the protection of the accused, a witness or a third party, the doors may be closed during the recounting of personal details of one of these parties (229-2 StPO). In that case, the accused, the civil claimant and the private prosecutor may request the presence of up to three confidants (s. 230-2 StPO). Only in the interests of morality or public order may a trial in its totality be held in camera (229-1 StPO). This situation occurred 14 times in Kraniz's research, but only once was the injured party informed of this right.<sup>164</sup> It is also possible for a witness to remain anonymous if there are grounds to fear for his, or a third person's, life, health, physical well-being or freedom (s. 166a StPO, see § 8.3 under G.16).

<sup>162</sup> See commentary Bertel (1997), no. 386.

<sup>163</sup> See U. Jesionek (1997b), p. 253 for a commentary on section 288-s StPO. Jesionek expresses his concern that there are no sanctions on transgressions of this section, and that no protection is offered to a victim waiting outside the courtroom. Also, if the presiding judge gives permission to the press to make audio or visual recordings in the courtroom before the opening or after the closing of the case, a victim inside the courtroom at that time may also be photographed/filmed.

<sup>164</sup> K.W. Kraniz (1991), p. 661.

<sup>165</sup> See U. Jesionek (1997b), p. 252 for a commentary on s. 166a StPO.

(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.*

A victim who runs the risk of being intimidated or threatened by the offender may be offered protection on the basis of sections 175 and 177 StPO. These sections determine that a suspect who has tried to influence a witness, or may do so, may be taken into preventive custody.

Since the Act on the Protection Against Violence in the Family came into force on 1 May 1997,<sup>166</sup> persons threatened by physical, mental or sexual violence within the family may now be offered special protection through the use of prohibition orders. These orders which remove a person suspected of domestic violence from his home and prohibit him returning for a certain length of time (*Wegweisung und Rückkehrverbot*) may be given by the police summoned to a domestic violence situation (s. 38a SPG). The police do not require the permission of the court to issue such an order. The suspect is allowed to take essential toilet requisites and clothing with him, and informed of where he may find a place to stay. His house key may be taken from him. If the suspect refuses to be sent away, he may be forced to do so (s. 50 SPG). If he breaks the prohibition order and returns to the house he may be sent away again, fined or taken into custody (s. 84-1-2 SPG). Although relatively new, the prohibition order is now regularly used by the police.<sup>167</sup>

Finally, if there are grounds to fear for the life, health, physical well-being or freedom of a witness or a third person if the witness makes his identity known, he may be allowed to remain anonymous (s. 166a StPO).<sup>168</sup>

## 9 CONCLUSIONS

The victim's movement in Austria is still in the early stages of development. Although there are shelters for battered women, and a 24-hour emergency call line for victims of rape and sexual assault, there is only limited support available for victims of other types of offences. Victims have a potentially strong procedural position in Austrian criminal proceedings, but active participatory rights can only be exercised if the victim makes a civil claim against the accused.

Placed in an international perspective, the implementation of Recommendation (85) 11 in Austria is above average although not up to the standard set by the most successful jurisdictions. Regarding the provision of information, the legislature has given all authorities involved in the criminal justice process the duty to inform the injured person of his rights in the criminal proceedings insofar as this seems necessary in the given circumstances. In practice, both the police and the courts exercise their informatory duties poorly. More written material explaining the victim's rights and opportunities should be made available to give to victims reporting an offence. Furthermore, the general lack of awareness among the authorities of the victim's position and rights should be combated and standard information strategies introduced. The injured party is informed of an action resulting in non-prosecution by means of a standard form, but he is not informed of a decision to proceed with a

<sup>166</sup> See § 4.3.

<sup>167</sup> Information provided by inspector Ebenschweiger and colleague, 8 October 1997.

<sup>168</sup> See § 8.3 under F.15.

prosecution which means he may be left in uncertainty about the developments in his case for an unnecessarily long period of time. Both the civil claimant and the private prosecutor are to be informed of the date of the main hearing. Only the civil claimant has a subsidiary right to private prosecution but very little use is made of this right.

Regarding compensation from the offender to the victim, young offenders can avoid prosecution by agreeing to an out-of-court settlement referred to as ATA-J (*Außergerichtlicher Tatausgleich für Jugendliche*). Following the success of ATA-J, similar arrangements have now been introduced for adults. As far as claiming compensation through the adhesion procedure is concerned, it appears that injured persons not represented by legal counsel pursue their civil claims within criminal proceedings twice as often as those who are represented. Significantly, Austrian lawyers earn twice as much in civil proceedings as they do in criminal proceedings. Victims should receive more assistance with the enforcement of compensation, and the potentially progressive provisions for advance payments should be made better known, and applied much more readily.

Victim-oriented training for the police is still minimal, and consideration should be given to the introduction of separate modules on how to deal with (specific groups of) victims of crime during basic training and in follow-up courses. Repeat questioning is in principle embedded in Austrian criminal proceedings, but significant steps have now been taken to reduce the strain suffered by children when being questioned. Video-link equipment has been installed in all Austrian courthouses and a witness may ask for the removal of the accused during his testimony, although in practice this never happens. In pursuance of the Code of Criminal Procedure, victims of sexual offences may refuse to answer questions concerning their private life or details of the offence which they cannot bear to describe unless the court considers it essential to the case that the victim does answer these questions. Unusual is the regulation introduced in November 1996 that, where serious sexual offences are concerned, at least one of the professional or lay judges in the laymen's court, and two of the jury members of the jury court, must be of the same sex as the victim. Of the jurisdictions included in this study, only Switzerland has a comparable measure. Although such a regulation may lessen the semblance of gender-oriented bias, it is unclear whether it has a positive affect on the victim's experience of the trial proceedings. Finally, the Act on the Protection Against Violence in the Family, which came into force on 1 May 1997, has made welcome additions to the arsenal of measures that can be used to offer protection to persons threatened by physical, mental or sexual violence within the family.

# Supplements

## ABBREVIATIONS

ABGB	-	<i>Allgemeine Bürgerliche Gesetzbuch</i>
ATA-E	-	<i>Außergerichtliche Tatausgleich für Erwachsene</i>
ATA-J	-	<i>Außergerichtliche Tatausgleich für Jugendlichen</i>
BG	-	<i>Bezirksgerichte</i>
BlgNR	-	<i>Beilagen zu den Stenographischen Protokollen des Nationalrates</i>
BPD	-	<i>Bundespolizeidirektion</i>
BVG	-	<i>Bundesverfassungsgesetz</i>
B-VG	-	<i>Bundes-Verfassungsgesetz 1929</i>
CIA	-	<i>Central Intelligence Agency</i>
EBRV	-	<i>Erläuterende Bemerkungen zur Regierungsvorlage</i>
EFTA	-	<i>European Free Trade Association</i>
EU	-	<i>European Union</i>
EvBl	-	<i>Evidenzblatt der Rechtsmittellentscheidungen</i>
GH I. Instanz	-	<i>Gerichtshof erster Instanz</i>
GH II. Instanz	-	<i>Gerichtshof zweiter Instanz</i>
ICVS	-	<i>International Crime Victims Survey</i>
Jbl	-	<i>Juristische Blätter</i>
JE-St	-	<i>Jus-Extra series</i>
JGG	-	<i>Jugendgerichtsgesetz</i>
OGH	-	<i>Oberster Gerichtshof</i>
ÖGB	-	<i>Österreichische Gewerkschaft Beratungsstelle</i>
OLG	-	<i>Oberlandesgericht</i>
ÖJZ	-	<i>Österreichische Juristen-Zeitung</i>
ÖJZ-LSK	-	<i>Österreichische Juristen-Zeitung Leitsatzkartei</i>
ÖS	-	<i>Austrian Schillings</i>
p.	-	<i>page</i>
pp.	-	<i>pages</i>
RZ	-	<i>Richterzeitung</i>
s.	-	<i>section</i>
ss.	-	<i>sections</i>
SPG	-	<i>Sicherheitspolizeigesetz</i>
Sst	-	<i>Entscheidungen des Österreichischen Obersten Gerichtshofes in Strafsachen und Disziplinarangelegenheiten</i>
StAG	-	<i>Staatsanwaltschaftsgesetz</i>
StGB	-	<i>Strafgesetzbuch</i>
StGNov.	-	<i>Strafgesetz Novelle</i>
StPO	-	<i>Strafprozeßordnung</i>
StRÄG	-	<i>Strafrechtsänderungsgesetz</i>
TOA	-	<i>Täter-Opfer Ausgleich</i>
US\$	-	<i>United States dollars</i>
VfGH	-	<i>Verfassungsgerichtshof</i>
VOG	-	<i>Verbrechensopfer Entschädigungsgesetz</i>
W3, W2, W1	-	<i>federal police constabulary rankings</i>

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# Chapter 4

## Belgium

### SCENERY

*'First, Belgium is not a country, it is an accident of history. Mostly I tell strangers, that the best way to understand Belgium is to imagine a Belgian road junction. Four drivers coming from four directions, none of them giving way. One of the cars contains the Flemish, the second the Walloons, the third the Brussels Community and the fourth the German speakers from the Ost-Kantone. They all meet in the middle, but they do not crash. They simply block one another's way, including their own. In each car sit a catholic, a liberal, a unionist and a nationalist. They all start to discuss which way they should take to avoid traffic problems in the future. And, very exceptional in the world, nobody is starting a war [...] The true Belgium is a politically elusive and geographically complicated entity [...] The good side of it is that Belgians proceed pragmatically and always look for consensus, the bad side is that they usually just muddle along for lack of cohesion.'*<sup>1</sup>

Van Kerckhoven, 1996

The Kingdom of Belgium was founded in 1830 after a liberal revolution which ended the short period of incorporation into the Netherlands from 1815 until 1830. The rebellious citizens of the new state pressed for a modern and rational structure and they also imposed the language of progress: French. The new structures, however, did not take into account that the country has been divided by language boundaries for more than a thousand years. During hundreds of years, Flemish had been a completely unaccepted language. The country's rulers spoke French and did not and would not understand one word of Flemish or German. Since the German-speaking citizens are a minority group, constitutional changes were set in motion by the Flemish citizens who demanded rights equal to their French-speaking compatriots. The gradual democratization of the Belgian institutions turned the Flemish emancipation movement to political power. The Flemish demanded an official status for their language and they wanted education in Flemish and their own cultural policy. The emancipation struggle revealed that Flanders differed from the French-speaking or Walloon provinces in Belgium and not only with respect to the language. In 1963, a law was passed which recognized the existence of three official languages within Belgium. Flemish (Dutch) was recognised as the official language in the north, French in the south, and German along the eastern border. In the city and suburbs of Brussels, both French and Flemish are

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<sup>1</sup> E. Van Kerckhoven, *Victim Support in Flanders*, Lecture at the Annual Meeting of the European Forum for Victim Services, Brussels, 1996, p. 1

officially recognized although the French-speaking community is now the larger group. From the late 1960s on, the political leaders drew the logical conclusion from these developments and the unitarian, centralized Belgian state had to be converted into a federal state. In 1971, a constitutional change was enacted, granting political recognition to the three language communities, providing cultural autonomy and also revising the bilingual and administrative status of Brussels, an enclave in the Flemish area.

The state reform process and the growing independence of the Belgian communities have proceeded almost without interruption ever since. In the late 1980s the implementation of a three-stage programme began to increase the fiscal autonomy of the three ethno-linguistic regions. In 1993, it culminated in the formation of a federal state. What used to be a Kingdom with central authorities was replaced by the current federal authorities: the King, the council of Ministers and Parliament. However the majority of essential governmental powers were referred to the three regions:<sup>2</sup> Flanders, the Walloon provinces and Brussels, and the Flemish, French and German-speaking communities. To some extent the Belgian regions are similar to the American states or the German '*Länder*'.

It is difficult to understand for outsiders that these regions and communities do not always coincide. In 1980, only the Flemish community and the Flemish region merged into one Flemish state. The French-speaking part, on the other hand, is divided into the Walloon region, the Walloon community, and the French-speaking part of Brussels. As a result, the state is divided into a federal state and another five distinct entities: Brussels, the German-speaking region, the Walloon region, the French-speaking community, the Flemish-speaking community and region. It is typical of Belgian federalism that these five entities have widely diverging powers. The decision-making powers are no longer exclusively in the hands of the federal government and parliament. The management of the country falls to the federal state and the five communities and region-based states. The different regions and communities have been given their own regional Parliaments. As a result, six governments (the federal government and those of the five regional states) run the country.<sup>3</sup> The federal level is responsible for the national economic and monetary policies, fiscal policy, diplomacy, defence, social security, justice, and the police. The three Parliaments of the regions (Brussels, the Walloon provinces, and Flanders) are responsible for 'community affairs', such as education, health care, social welfare, and other areas of policy within the region.<sup>4</sup> The community affairs cause much confusion about the form of government and institutions.

<sup>2</sup> Each region is subdivided into provinces which have a council of 50 to 90 members who are chosen by direct vote. The provinces are subdivided into administrative districts, often based in cities and towns, called communes. Each commune is administered by a burgomaster appointed by the King. Local government on all levels possesses a large degree of autonomy, a tradition that originated in feudal times. See, for instance, the English text *Belgium and Flanders* published for the European Forum for Victim Services, Brussels 5-8 June 1996, p. 8. Or the internet sites: <http://www.tradecompass.com/library/books/com-guide/BELGIUM03.html>; <http://belgium.fgov.be/abtb/engels/41708.htm>

<sup>3</sup> Unsurprisingly, this state of affairs often causes misunderstandings and difficulties. For instance, a few years ago during the world exhibition in Spain, five Belgian Prime Ministers – the Flemish, the German-speaking, the two French-speaking (of the Walloon region and the Walloon community) Prime Ministers, and the federal Prime Minister – turned up at the same time and to their complete surprise.

<sup>4</sup> See Ministry of Flanders, Ministerie van de Vlaamse Gemeenschap, *Flanders fact sheet. Flanders today*, 1994a. See also the booklet: *Belgium and Flanders*, Funk & Wagnall's Corporation, adapted and corrected by E. van Kerckhoven, 1994b.

Moreover, reconciling the federal structure and the regional and cultural identity is not an easy task. To make this federation somewhat workable, a net of judicial and consultative bodies is provided for these complicated structures. The Court of Arbitration<sup>5</sup> is increasingly assuming the tasks of a constitutional court. At its monthly meetings, the consultation body of the federal authorities and the states attempt to come to agreements and to settle disputes between the administrative authorities. Additionally, many agreements have been given a legal basis through so-called Cooperation Agreements (*samenwerkingsakkoorden*, *accords de coopération*) between the federal government and the Flemish community and the federal government and between the Walloon community and region, which are in fact treaties between states. The Cooperation Agreements concerning the provision of assistance to victims have gained power of law by the statutes of 11 April 1999.<sup>6</sup> The essence of the Agreements is the referral model between the authorities and services involved.

The historic 'crossroad problems' are most important to understand present-day Belgian society,<sup>7</sup> and help to understand the lack of cohesion in almost every conceivable field. Regionalism and community-oriented thinking is a trait of Belgian society that has been accentuated by decentralization, as a result of linguistic and cultural quarrels. The decentralisation has left the central, federal government virtually powerless in the field of assistance to persons. The regional Parliaments are responsible for social welfare. As a result, victim support falls within the exclusive competence of the communities (see § 3.6). However, the federal government is competent with respect to the police and criminal justice. The Ministry of the Interior is responsible for the police and its victims' policy, including the victim units and justice assistants (see §§ 3.6-3.8). The Ministry of Justice is competent for a judicial victim policy, and should safeguard the rights of victims within the criminal justice system. This has caused problems in the past, especially with respect of referrals, but the Cooperation Agreements should remedy this (see above), and guarantee a fluent transition from the assistance to victims provided by the police and criminal justice authorities to the communal victim support services and other social services for victims. The Cooperation Agreements with the communities and regions are expected to contribute to a more coherent Belgian victim policy.

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<sup>5</sup> Half of its members are judges whereas the other half consists of former politicians.

<sup>6</sup> Acts of 11 April 1999, *Wet houdende de goedkeuring van het samenwerkingsakkoord tussen de federale Staat en de Vlaamse Gemeenschap inzake slachtofferzorg; Accord de coopération entre l'Etat fédéral, la Communauté française et la Région wallonne en matière d'assistance aux victimes.*

<sup>7</sup> E. Van Kerckhoven (1996), p. 1.

## PART I: THE BELGIAN CRIMINAL JUSTICE SYSTEM

### 1 INTRODUCTION

In the last few years, Belgian society and the faith of the ordinary Belgians in the criminal justice system were shocked by several incidents. Of course most countries are now and again faced with murder cases which cause a wave of public outrage. However, it will only have political consequences if the public feels that the affairs are either the result of failures in the political and criminal justice system, or symptomatic of its inefficiency. In Belgium, there is widespread belief that too many scandals have gone unanswered, and too many crimes remained unsolved. In the 1980s, there were the violent and brutal attacks of a gang known as 'the Nijvel gang' which made several raids on department stores and killed many persons. Despite the killings, the Belgian police were unable to make arrests. Rumour has it that officers of the state police force were involved and that the investigation had been manipulated and hindered over many years.<sup>8</sup> Then there was a whole series of criminal scandals involving politicians, from the unsolved murder of the politician André Cools in 1991 to the massive Augusta bribe affair in 1994, which claimed the careers of several ministers and brought down the Belgian Secretary-General of NATO, Willy Claes in 1995. But Belgian society and its criminal justice system were finally shaken to the core by the 'Dutroux scandal'<sup>9</sup> during the summer and fall of 1996.<sup>10</sup>

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<sup>8</sup> Minister of Justice De Clerck ordered an investigation into the investigation in the *Nijvel gang* case. The investigating committee comprised the professors Fijnaut and Verstraeten. In October 1996, the committee published its first report on the criminal justice authorities. The report is a 186 page long black book on the police, prosecution service and magistrates and their cooperation, or rather lack thereof. The investigating committee will continue its work and make preparation for the national Parliamentary investigating committee (*Comité P*, 1997), twelve years after the last attack of the gang on 9 November 1985.

<sup>9</sup> The horrendous Dutroux case has brought Belgians together across their sharp linguistic and cultural divide in their doubt about the criminal justice system as a whole. The affair started when two missing girls were found alive in a basement. The relief faded quickly when it was discovered that they had been sexually abused by their captors, and that probably other children had been abused as well. The police started the search for other missing children and found the corpses of two eight-year-old girls who had been starved to death by Dutroux, soon followed by the discovery of the bodies of two missing teenage girls. The Dutroux scandal in which children were abducted, abused, and murdered for pornographic films, caused a great outflow of public mourning followed by a mood of mounting revolt, and collective anger against the authorities that was unheard of in Belgian society.

<sup>10</sup> Public outcry started over the news that the main suspect Dutroux, a convicted multiple rapist sentenced to 13 years imprisonment, was granted early release – together with his wife and partner in crime – after serving only three years. Their release was against the explicit advice of the prosecution service, which led to the wide-spread conviction that Dutroux benefitted from official protection. The rumors were reinforced when it became known that one of the former suspects in the case, Thirault, had reported the plans and activities of Dutroux and his ring of associates to the police in 1993. In August 1996, the Minister of Justice had to admit that the criminal justice authorities had had knowledge about the activities of Dutroux and acknowledged the existence of documents within the state police force about the gang's

People united in disgust with their fractured, scandal-ridden and incompetent political and criminal justice system. On October 20, 1996, thousands of Belgians took to the streets in anger, frustration, and shame. They protested against the rivalry among the three regular police forces (see § 3.1.), referred to by the newspapers as the 'police war' (*politie oorlog, guerre de police*). The same competitive attitude existed among the judicial authorities, similarly referred to as the 'war between the magistrates' (*magistraten oorlog, guerre des juges*).<sup>11</sup> The public demanded an end of the situation in which public prosecutors and examining magistrates are able to rule like emperors in their own districts, which naturally affects the information flows between the police and the examining magistrates, as well as between the different legal districts. The mass demonstration in Brussels was one of the largest any European city had ever seen. More than 250,000 people, some newspapers even mention the number of 320,000 people (one in every 35 Belgians), filled the streets in a silent, dignified demand for justice. They called for an end to the political system based on cronyism, to the inefficiency of the judicial system, as well as the political nomination of judges. The demonstration exerted great pressure on the government. The federal Prime Minister Dehaene promised that a Parliamentary investigative committee (*Parlementaire onderzoekscommissie Verwilgen*) would examine the working methods of the police. More significantly, he promised that the tradition

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activities. The government's initial misjudgment of the public mood, disgusted with politics and the criminal justice authorities after too many scandals and unsolved criminal affairs, fanned the already existing suspicions of a cover-up. Moreover, Minister of Justice De Clerck had difficulty to explain the catalogue of blunders that had led to the children's abduction and murder. In September 1996, the Minister told the Parliamentary investigation committee that the state police force had made many, possibly even fatal, mistakes. The police had never included the parents in their search of the missing children, even though they had information which could have been useful, and despite tips known to the police about Dutroux and his gang. After Dutroux had been released, he was not monitored in any way. He was unemployed but owned a dozen houses, apparently paid for by illegal activities. He was known to roam the country and was arrested a few times for petty crime charges but released again. He was never thoroughly investigated in connection with the disappearance of children despite a mass of evidence available to the police. However, the police never put two and two together. The police twice searched the house where the eight-year-old girls were held and died of starvation, and found nothing. The newspaper *Le Soir* wrote the headline: 'Everything was known and nothing was done'. It was a verdict that sent tremors through the fractious Belgian state. However slight the evidence that the cover-up reaches higher than the local police, a revived suspicion of the political and criminal justice authorities has weakened their position. Most Belgians feel that the state and the criminal justice system have failed to protect young children from a criminal conspiracy that could and should have been detected not months but years ago.

<sup>11</sup> The war amongst examining magistrates started in 1995, between the judicial districts of Liège (Luik) and Neufchâteau. The war between examining magistrates came out in the open during the murder investigation of André Cools. The main issue of the dispute was the suspicion that examining magistrates in Liège tried to disguise the facts while those in Neufchâteau claimed to be on the murderers' track. In the end Liège won the war and got the investigation but could not solve the case. The second war of the judges started the following year during the Dutroux scandal. Again the examining magistrates of Neufchâteau, amongst whom Connerotte, fought with their colleagues of Liège. The public had not forgotten the former war and wanted the magistrates of Neufchâteau to handle the case, because it feared another cover-up by the magistrates of Liège. See the report of the parliamentary investigative committee Verwilgen.



of political appointments of judges would end.<sup>12</sup> The Dutroux scandal has functioned as a catalyst for political and criminal justice reforms, which were often already envisaged but not implemented. The future will learn whether the Ministers of Justice and of the Interior are able to bring about real changes in the criminal justice system. The first important results are already there. The appointment of new members of the judiciary can no longer be a political decision. Numerous Acts and guidelines have come into effect to improve the position of victims (see § 4.3). The reform Act by the Franchimont Committee, which was initially destined to improve the position of the defendant, has also systematically reinforced the position of the victim within criminal proceedings (see §§ 4.3, 5.3, 5.6). Finally, the federal government has established a long-term national victim policy. The victim is no longer an invisible person within the political arena and the criminal justice system. On the contrary, in Belgium it is nowadays rare that victims are not mentioned in government documents or reports on the criminal justice system.<sup>13</sup>

## 2 GENERAL REMARKS AND BASIC PRINCIPLES

In spite of the fact that the Belgians defeated Napoleon at Waterloo, the Napoleonic Codes have greatly influenced the Belgian criminal justice system. Although the Belgian legislature mentioned explicitly in the Constitution that new Codes would be introduced, pending which the Napoleonic Codes – *inter alia* the Penal Code (PC) and the Code of Criminal Procedure (CCP) – would remain in force, legal reforms proved to be very difficult to realize. Since 1830, numerous reform proposals for new Codes have been drafted but none has yet been promulgated. Except for some relevant changes, the French *Code d'Instruction Criminelle* is still applicable in Belgium, but this may end in the very near future. In 1991, the Minister of Justice introduced a committee on criminal procedure to make an inventory of the problems within criminal proceedings and to investigate the possibilities for fundamental reforms. In 1995, the Committee – commonly referred to as the 'Franchimont Committee' after its chair – presented the rough draft of a new Code of Criminal Procedure.<sup>14</sup> In 1998, the Franchimont Act was promulgated (see § 4).

With respect to criminal law, the current Penal Code dates from 1867. In spite of a number of innovations concerning the sanction system, it is still in need of reform to meet the demands of modern society.<sup>15</sup>

### 2.1 Basic Principles

The pre-trial stage is governed by the *x-officio* principle and the expediency principle. According to the former, the prosecution service has the authority to start public action (*strafvordering, action publique*) in the name of the people (s. 1 preliminary title CCP). There

<sup>12</sup> See the various newspaper sections on the Dutroux scandal, for instance *The Times* of August 20, 23, 25, 29 and 31 1996; September 11 1996; October 15, 19, 21, 22 and 27 1996.

<sup>13</sup> For instance, the Memorandum on criminal policy, *Orientatie nota over het strafrechtelijk beleid / Note d'orientation sur la politique criminelle*, October 1998.

<sup>14</sup> See Ph. Traest, 'Hervorming van het strafprocesrecht: een stap in de goede richting?', *Panopticon*, 1996, pp. 209-217.

<sup>15</sup> See A.M. van Kalmthout, P.J.P. Tak, *Sanctions-systems in the member-states of the Council of Europe*, part II, Kluwer, Deventer, Boston, 1992, p. 395.

are, however, a number of exceptions to the ex-officio principle. Certain offences can only be prosecuted after the victim has filed a complaint (s. 2 preliminary title CCP, see § 5.2). Another exception is that Ministers of the government can only be prosecuted after an indictment by the House of Representatives (ss. 90, 91 Const.). According to the expediency principle (see § 7.1), the public prosecutor enjoys a wide measure of discretion on whether to prosecute a punishable act. This is not provided by law, but has grown from practice. It has become impossible to prosecute all crimes that come to the attention of the criminal justice authorities, and therefore, the public prosecutor has been given the right to dismiss the case conditionally or unconditionally. For instance, he may propose that the offender pay a fine or compensation to the victim in exchange for dismissal, or simply drop the charges.

The trial stage is governed firstly by the principle of publicity (s. 96 Const.). This means that the trial proceedings are public, as opposed to the pre-trial proceedings which are governed by the principle of secrecy. However, the court may exclude the public from (part of) the hearing if public order or morality is jeopardized (see § 8.3). In derogation of this rule, the hearings in juvenile court are always held *in camera*. The judgment, however, must always be pronounced in public. Second, the principle of orality is relevant. Proceedings in court are always oral. The parties have to submit their evidence orally to the court and cannot simply refer to the written records of the pre-trial stage. However, the consequences of this principle are restricted by the fact that the Belgian courts are not strictly bound by the principle of immediacy. As a result, the evidence does not need to be produce 'live' in front of the judges. The courts rely heavily on the records of the case which have been established during the pre-trial stage. If the court finds that the elements included in the file are sufficient to convince them of the guilt of the accused, it may, for instance, refuse to reexamine witnesses who already gave evidence in the pre-trial stage (see § 8.2). The defence counsel, however, should be given the genuine opportunity to challenge the evidence included in the legal file.<sup>16</sup>

### 3 JUDICIAL AUTHORITIES AND CRIMINAL JUSTICE PARTNERS

#### 3.1 Investigating Authorities

Before 1998, the investigative authorities were subdivided into three general police forces: the national police force (*rijkswacht, gendarmerie*), the municipal police (*gemeentepolitie, police municipale*), and finally the judicial police (*gerechtelijke politie, police judiciaire*).<sup>17</sup> In practice, the

<sup>16</sup> Chr. Van den Wyngaert, 'Belgium', in: Chr. Van den Wyngaert (ed.), *Criminal procedure systems in the European Community*, Butterworths, London, 1993, pp. 19-32.

<sup>17</sup> See Police Act of 5 August 1992; *Wet op het Politieambt van 1992*, Belgisch Staatsblad (B.S.) 22 December 1992. The national police force fell under the sole authority of the Ministries of Justice and of the Interior (ss. 2, 45 Police Act). The municipal police was organized on the level of towns and communes. Therefore the structures of authority were more complicated. On a national level, the Minister of the Interior was responsible for the municipal police, but, on the local level the mayor was in charge of the municipal police. Criminal judicial investigations are the exclusive competence of the judicial police (ss. 8, 9 CCP). The responsibility for judicial investigations lies primarily with the chief public prosecutor at the district court (*Procureur des Konings, Procureur du Roi*). The judicial police is competent in the entire

overlapping competences of the police forces created problems. According to Van den Wyngaert, coordination between the police forces was frequently lacking, or, worse, an unhealthy competition existed.<sup>18</sup> The media referred to this chaos and rivalry within the police with the term police war<sup>19</sup> (see § 1). Particularly the judicial police and the national police disputed each others powers which lead regularly to conflicts and stagnation of criminal investigations.<sup>20</sup> To remedy these problems, a reorganization of the police was called for. The fear among academics was that the one police force would be organized along the structures of the municipal police. Mainly, because this will be detrimental to the position of victims of crime. The national police force was the most victim-oriented force. Academics fear that all its efforts will be lost, and that the victim policy of the one police force will be downgraded to the practice of the municipal police. In December 1998, the Act on the Creation of One Police Force was promulgated.<sup>21</sup> This Act creates one integrated police force, instead of the national, municipal, and judicial police forces, which is structured on two separate levels: a local and a federal level. The police duties on a local level represent the basic police duties, linked to local circumstances and events. The police forces operate under the guidance of the mayor of the municipality and/or the prosecution service depending on the task at hand. The police on the federal level are responsible for the specialized duties, federal police activities, and the provision of support for the local police duties. The federal office of public prosecutors supervises the functioning of the police on the federal level (see § 3.2). The Act incorporates several integration and harmonization measures, such as one disciplinary, administrative, and financial statute, and a uniform training programme. (For training of the police see § 8.1, the description still represents the old situation because the uniform training still has to be set up. The basic ingredients, however, will remain unchanged). Only the future will learn whether the one, integrated police force will be an improvement or be as detrimental to the position of victims of crime as is feared.

In practice, the police are obliged to make written reports of their findings relating to crime and of the statements of victims (*processen-verbaal*, *procès verbaux*), and they should

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Kingdom of Belgium (s. 45 Police Act), but in practice it mainly operates at the level of the legal district (*arrondissement*, *arrondissement*) which is the territorial competence of the prosecutor's office (*parket*, *parquet*).

<sup>18</sup> Chr. Van den Wyngaert (1993), pp. 5-6.

<sup>19</sup> The Parliamentary investigative committee in the case of the Nijvel gang was the first to mention the police war. After the investigation into this affair, supervision over the national police was transferred from the Ministry of Defence to the Ministry of the Interior as an attempt to improve the cooperation between the police forces. In addition, a supervising committee was installed to control the police (*Comité P*) and an enactment was promulgated to regulate the cooperation between the different police forces.

<sup>20</sup> The many scandals (see § 1) clearly demonstrate the negative consequences an unhealthy competition may have for (potential) victims of crime. The state police supposedly did not provide crucial information to the judicial police, nor to the prosecution services. The national police claims that certain data have been reported and that other facts seemed irrelevant at the time. See the Dutch newspaper *NRC*, 20 September 1996. Furthermore, critics claim that the two police forces wanted to score points with their knowledge of certain facts relating to the Dutroux gang. Both police forces are accused of withholding crucial information and evidence. See the Belgian newspaper *De Standaard*, 20 September 1996.

<sup>21</sup> Act on the Creation of One Police Force of 7 December 1998, *Wet tot organisatie van een geïntegreerde politiedienst, gestructureerd op twee niveaus*, B.S. 5-1-1999.

immediately inform the public prosecutor (s. 29 CCP). Failing to report or record an offence constitutes a breach of duty for which the police may be reprimanded by the Procurator General of the court of appeal, which is the disciplinary authority. The police have no discretionary powers concerning any further action in the case. Once they have informed the prosecution service of the occurrence of a crime, the police should wait for further instructions.

### 3.2 Prosecuting Authorities

Every member of the prosecution service (*Openbaar Ministerie, Ministère Public*) is also a member of the judiciary and therefore appointed by the King (s.153 Constitution). In contrast to judges, public prosecutors belong to a hierarchically organised body, which operates externally as an indivisible unity. At the top of the pyramid stands the Procurator General (*Procureur Generaal, Procureur Général*). He is assisted by the Solicitors General and the Deputy Procurators General. There are five Procurators General; one at each court of appeal, followed in hierarchy by the public prosecutors at the district court. Because the prosecution service is one and indivisible, the individual members do not act in their own names but in the name of their function and they can act for each other at any time.<sup>22</sup> They are bound by instructions during the pre-trial stage, for instance guidelines from the Procurator-General.

Like the police, the prosecution service has recently been reorganized. The 1998 Act on the Vertical Integration of the Prosecution Service, the Federal Offices of the Prosecutor, and the Council of Public Prosecutors<sup>23</sup> provides for the creation of a more efficiently functioning prosecution service. The prosecution service is responsible for setting up criminal policies and quality control. The federal prosecutor's offices should coordinate the exercise of public action, facilitate international cooperation, and exercise control over the police on a federal level. Finally, the Council of Public Prosecutors should advise the Council of Procurators General.

The prosecution service has the following tasks: 1) to collect evidence with the assistance of the judicial police; 2) to bring the case before the court in order to initiate criminal proceedings; and 3) to initiate the enforcement of court sentences. To facilitate the collection of evidence, public prosecutors are also members of the judicial police (*officier van de gerechtelijke politie, officier de police judiciaire*, s. 9 CCP) and have the power to investigate crimes. In theory, they may perform all investigations but in practice these are always carried out by the police, according to the instructions of the public prosecutor. In contrast to most jurisdictions, the public prosecutor waits for results and if necessary he requests additional judicial investigations.<sup>24</sup> During the judicial investigation (*gerechtelijk vooronderzoek, information*), the public prosecutor may order every investigative activity necessary to find the truth. The only limitations are that he must operate within the boundaries of the law, and that he is not entitled to take coercive measures, without the approval of the examining magistrate

<sup>22</sup> But not when acting as prosecutors during the trial, pursuant to the dictum '*La plume est servie, la parole est libre.*'

<sup>23</sup> Act on the Vertical Integration of the Prosecution Service [...] of 22 December 1998, *Wet betreffende de verticale integratie van het openbaar ministerie, het federale parket en de raad van procureurs des Konings*, B.S. 10-2-1998.

<sup>24</sup> V. Lebesque, *Belgische onderzoekers vervullen een dubbelrol*, in the Dutch newspaper *De Volkskrant*, 16 October 1996.

(see § 3.3).<sup>25</sup> The second duty of the prosecution service is to prosecute criminal offences (ss. 1 and 3 prel. title CCP). After the judicial investigation, the public prosecutor decides what action should be taken. At any time during the pre-trial stage, he may decide to prosecute or not (see § 7.2).<sup>26</sup> If the public prosecutor decides to prosecute, he summons the accused to appear in court. Although the actual prosecution is carried out by the state, the victim may initiate prosecution (see § 5.4). Finally, the public prosecutor enforces the court's judgements. This duty does not include a responsibility regarding the enforcement of a decision of the court to award compensation to the victim (see § 7.3.).

### 3.3 Judiciary

The judiciary consists of public prosecutors (see § 3.2), examining magistrates, and the judges of the pre-trial and trial courts.<sup>27</sup>

The examining magistrates (*onderzoeksrechter, juge d'instruction*) is involved in the judicial investigation regarding serious offences, and also in most difficult or complex cases. Preliminary judicial investigations are mandatory for all offences tried by the Court of Assizes and facultative in all other cases. The examining magistrate may not start the investigations by virtue of his office, in contrast to the public prosecutor. He may only proceed if this has been formally requested by the public prosecutor (*vordering tot onderzoek, mandat d'instruction*). The only exception to this rule concerns offenders who have been caught in the act. Moreover, he is always limited by the terms of the investigation request (*saisine*).<sup>28</sup> The examining magistrate fulfills a double role. On the one hand, he makes sure the judicial investigation and the application of coercive measures take place according to the law. On the other hand, he directs the police during the judicial investigation of cases in which his cooperation has been requested. Hence, he has duties that, in other jurisdictions, are carried out by both the examining magistrate, the public prosecutor and the police commissioner.<sup>29</sup> In his investigative activities, the examining magistrate is supervised by the Procurator General, but the disciplinary control relates only to his activities as a police officer, not to his judicial acts which he may perform freely as an independent and impartial judge (s. 279 CCP). In complicated and lengthy investigations, the public prosecutor acts as an intermediary between the Procurator General and the examining magistrate. In practice, the disciplinary control creates tensions; the supervision is often perceived by examining magistrates as an unwarranted interference in their judicial activities,<sup>30</sup> because it may suggest

<sup>25</sup> Chr. Van den Wyngaert (1993), p. 6.

<sup>26</sup> Until the Act on Penal Mediation (1994) and the Franchimont Act (1998), Belgian law did not contain any provision concerning the expediency principle. Before 1994, however, its existence had been confirmed by the Supreme Court. Supreme Court; Cass., 13 April 1896, pas., 1896, I, 161. See R. Verstraeten, *De burgerlijke partij en het gerechtelijk onderzoek: het slachtoffer in het strafproces*, Maklu, Antwerpen, 1990, p. 69.

<sup>27</sup> It used to be common practice that an examining magistrate would act as well as the trial judge during the court proceedings until 1984. In that year the European Court of Human Rights decided that this was unacceptable because magistrates should avoid even the slightest semblance of partiality.

<sup>28</sup> Chr. Van den Wyngaert (1993), p. 7.

<sup>29</sup> V. Lebesque (1996).

<sup>30</sup> Chr. Van den Wyngaert (1993), p. 7.

partiality.<sup>31</sup>

Within the organization of the judiciary,<sup>32</sup> a distinction can be made between judges and courts operating in the pre-trial and the trial stage. During the pre-trial stage, the jurisdiction lies with the investigative courts. Investigative courts are divisions of the district court in first instance (*raadkamers, chambres de conseil*) and of the court of appeal (*kamers van inbeschuldigingstelling, chambres d'accusation*) acting within the framework of the preliminary judicial investigation. In principle, judges of the pre-trial courts do not deliberate on the judicial finding of facts; this task is reserved to the trial courts. Courts of investigation pass court orders in chambers (*beschikkingen, arrêtés*). Sessions of the investigative court take place *in camera*.<sup>33</sup>

The trial courts (*vonnisgerichten, tribunaux de jugement*) consist of the subdistrict courts, district courts, and the Court of Assizes. Trial courts pass judgments on the merits of the case and they are involved with the judicial finding of facts. The organization of the trial courts is influenced by the trichotomic classification of criminal offences: misdemeanours (*overtredingen, contraventions*), serious misdemeanours (*wanbedrijven, délits*) and felonies (*misdrijven, crimes*). This classification is reflected in the organization and competence of the judiciary, which consists of the subdistrict courts (or police courts), the criminal courts in first instance (*rechtbank in eerste aanleg, tribunal d'instance*) and the Court of Assizes.<sup>34</sup> Police courts have jurisdiction over misdemeanours, which is the least serious type of crime, punishable by a small fine or imprisonment not exceeding seven days. Criminal courts of first instance have jurisdiction

<sup>31</sup> Recently, the alleged partiality of examining magistrates and their subsequent removal from the case has caused some uproar. In the judicial investigations of the Dutroux case, for instance, the examining magistrate Connerotte, much respected by the public, was challenged by the defence counsel for being partial. The reason behind the challenging was that the examining magistrate had accepted an invitation for a benefit evening in honour of the two girls who were found alive in the defendants house. The victims were also present during the festivities, which included a benefit spaghetti supper. The magistrate consumed the offered meal and accepted a pencil from the foundation. The defence claimed that he was thus sympathising with the victims, and could no longer be impartial. The Supreme Court upheld the complaints of the lawyer that the examining magistrate had compromised his objectivity. In this so-called 'spaghetti judgement', the Supreme Court decided that he should be removed from the case, much to the annoyance and outrage of the public who could not understand that this successful and honest judge should be removed over such a 'triviality'. In fact, it was a just decision. To prevent that the defence counsel would claim that the accused did not have a fair trial, which could lead to the release of the suspect, no other decision could have been made. The public outrage was, however, mainly caused by the fact that again a successful examining magistrates was removed from a case. This had happened before during the investigation of the gang of Nijvel, and in the investigation regarding the murder of the politician André Cools. The official reason for their removal in these cases was that the different legal files were put together (*samenwoegen van de dossiers*). The removals of competent examining magistrates have enhanced the speculations and theories about conspiracies and 'protection from above' for certain offenders. See e.g. 'Anger as child sex case judge is dismissed', in the English newspaper *The Times*, October 15, 1996.

<sup>32</sup> This organization of the judiciary is determined by the Act on the Judiciary (Aoj) of 10 October 1967.

<sup>33</sup> Chr. van den Wyngaert, *Strafrecht en strafprocesrecht in hoofdlijnen*, Maklu Antwerpen, 1994, pp. 442-444.

<sup>34</sup> The Belgian territory is divided into 26 judicial districts and each judicial district comprises several judicial sub-districts or cantons. Every sub-district has a police court. The districts all have a court of first instance. Belgium has nine Courts of Assizes, and five courts of appeal.

over serious misdemeanours and some other crimes specified by law. These courts are generally composed of a single judge or, in exceptional cases, of three judges. The Court of Assizes is a court of law on a non-permanent basis and it tries felonies. Felonies are political and press offences and those crimes which are punishable with more than five years imprisonment. The Court of Assizes consists of three full-time judges and twelve lay judges (the jury).<sup>35</sup> Convictions by the Court of Assizes only may be appealed to the Supreme Court (*Hof van Cassatie, Cour de Cassation*).<sup>36</sup> This court stands at the top of the judicial hierarchy. The independence of the judiciary working at the courts is guaranteed by the Constitution (ss. 30, 100-104 Const.).

### 3.3.1 Criminal Proceedings

During criminal proceedings, the accused is informed of the offence with which he is charged by the introductory summons. The burden of proof regarding the criminal offence rests with the public prosecutor. The burden of proof concerning the civil claim for compensation lies with the victim. In contrast to the inquisitorial nature of the preliminary stage, the trial is adversarial.

During the trial, the court assesses the value of any evidence in its own discretion and plays an active role in fact-finding. The court may examine the parties, including the civil claimant, call in experts and witnesses and even visit the place where the offence allegedly took place. The proceedings in criminal court start with the examination by the court of the accused, followed by the questioning and hearing of the witnesses, the experts, and the victim. Then the civil claimant may present his pleadings, after which the public prosecutor gives a summary overview of the facts and the charge. The defence may react as to the level of guilt or penalty or the civil claim of the victim. Finally, the court will give a statement of reasons for a judgement followed by the sentence.

In the Assize court, the proceedings are similar except for the fact that the jury decides on the matter of guilt. After the jury decision, the Procurator General request the court to impose a certain criminal sanction. The defence counsel may then give its opinion regarding the punishment. The actual penalty is decided by the jury and three professional judges.<sup>37</sup>

<sup>35</sup> Chr. van den Wyngaert (1994), pp. 447-451.

<sup>36</sup> As a rule, decisions in first instance of a lower court can be appealed to the court of the next level, which hears the case as before the lower court, both concerning the facts and legal issues. However, this is not possible in cases tried by the Court of Assizes because the Supreme Court only checks whether it correctly applied the law (s. 608 Aof). It does not reconsider the facts. See M. Sheridan, J. Cameron, *EC Legal systems, an introductory guide*, Butterworths, London, 1992, pp. 7-18. The absence of a possibility of full appeal is remarkable because here the stakes are highest: trials before the Court of Assizes concern the most serious offences, and therefore the highest possible penalties.

<sup>37</sup> Leaflet available in the courts of Leuven/Louvain on the functioning of the Assize court. See also M. Sheridan, J. Cameron (1992), pp. 30-36.

### 3.4 Enforcement Authorities

The public prosecutor is responsible for the enforcement of court decisions. However, the enforcement of the part of the decision which concerns the civil claim for damages does not fall within his competence (see § 7.3).

### 3.5 Probation Services

The probation services are exclusively involved with offenders, although in the Walloon region, victim services have been incorporated into the probation services, see § 3.6.

### 3.6 Victim Services

The history of Belgian victim support services<sup>38</sup> started in the mid-1980s.<sup>39</sup> Victim support services started to receive public (community) funding at the end of the 1980s in Flanders, and even later in the French-speaking community. Because victim support falls within the competence of the Flemish and the Walloon communities (see Scenery)<sup>40</sup> it is dependent on the financial capacity of the community. In practice, this means that, in the less affluent French-speaking part of Belgium, a smaller amount of money is spent on victim support and fewer services are provided.

Victim Support Flanders (*Slachtofferhulp Vlaanderen*)<sup>41</sup> is the national victim support organization in the Flemish-speaking part of Belgium. The preparations for Victim Support Flanders started in 1988. At the time, the Flemish working group tried to achieve a federation between the few local victim services that existed in Flanders. The main objective was to reunite forces, in order to provide better services for a larger number of victims, and to try

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<sup>38</sup> The 1991 Parliamentary elections were very important to the position of victims and victim support services. One of the reasons why the electorate deserted the traditional political parties was the way in which citizens in general, and victims in particular were treated by the government, the police, and the judicial system. Because of the outcome of the elections, the Belgian federal government started the draft of a Citizen's Charter. See E. Van Kerckhoven (1996), p. 3.

<sup>39</sup> Victim support services were mentioned for the first time in regional decision making of Flanders in 1985 (*Besluit van de Vlaamse Executieve van 24 juli 1985*) and of the Walloon provinces in 1989 (*Arrêté de l'Exécutif de la Communauté française, 15 décembre 1989*). However, the French speaking service, which is originally a probation service, has undertaken activities regarding victims since 1979.

<sup>40</sup> Nonetheless, victim support schemes have many links with the federal justice authorities. As a result, seven Ministries are competent with respect to the position of victims. The Flemish Victim Support always has to negotiate with six Ministers of different political parties and in two languages, Dutch and French, in order to try to improve the assistance available to victims. In Flanders alone, four subsequent Ministers have been responsible for victim support in the last ten years, each one having his own policy on victim support. The many parties involved and the many changes among the competent policy-makers do not encourage a consistent victim policy. An example of which is the fact that Victim Support Flanders is now officially a part of the social services, which affects both its ability to independent policy-making and its funding (see further on in this section).

<sup>41</sup> Victim Support Flanders can be contacted via the social services (*Steunpunt Algemeen Welzijnswerk*), section victim support: Diksmuidenlaan 50, 2600 Berchem. Phone: +32 (0)3 - 3661540.



to get more attention for their position in society and the legal system. The national Flemish organization was officially established in January 1991. What is truly remarkable about Victim Support Flanders – a relatively small organization – is its influence on national and regional politics. In the year the organization was created, there was no victim-oriented legislation and only one guideline for the police on how to treat victims. In practice, the position of victims within the criminal justice system hardly received any attention. Through the years, Victim Support Flanders has made a significant contribution to legal reforms and the issuing of victim-oriented guidelines. Often, it has even laid the foundation for legal reform. Summarizing, Victim Support Flanders has played an important role in getting the position of victims of crime on the political agenda in Belgium.

Five years after its creation in 1991, Victim Support Flanders comprised ten victim services and twenty victim support centres in twenty Flemish towns. In 1996, the schemes were served by 16 professionals and some volunteers. This was clearly not sufficient, and the Flemish Minister of Social Affairs promised more money to increase the number of schemes, and the number of victim workers. As a result, the number of professionals has grown to a total of 35, and some 200 volunteers. Today, all of the 13 Flemish legal districts are covered by Victim Support Flanders. A most unfortunate recent development, however, is that the Flemish Minister for Social Affairs has decided that Victim Support Flanders should become an official part of the social services network. This decision has made Victim Support Flanders dependent on the priorities that are formulated within the social services department. At the same time, it has downgraded Victim Support from an independent service to a (small) service which has to compete with other bigger services, such as probation or mental health services. The competition among these services is especially fierce with regard to funding. Obviously, this hinders its functioning as a service for victims of crime. Moreover, it can no longer independently raise money for the benefit of the local centres or training of volunteers because all funds are shared among the various social services.

Victim Support Flanders provides support, information, practical help, psychological assistance to victims. The support is provided by staff members and volunteers, or rather it is its official policy is to work with volunteers. However, currently, the number of volunteers working at Victim Support Flanders is still limited. There is not enough money to create adequate working conditions for volunteers, nor to organize a proper supervision structure,<sup>42</sup> or to provide adequate training for the volunteers. The Flemish government now supports the volunteer model but since the funding has to be shared with other services, the future of the volunteer model remains uncertain. In addition, Victim Support Flanders works closely together with other social services, the police, the prosecution service, the probation service, and the reception and information services (see §§ 3.1-3.8.).<sup>43</sup> To enhance the provision of information, the Ministry of the Interior prints leaflets on the services provided by Victim Support which are i.e. distributed at the police stations in Flanders. The leaflets are printed in the three official languages: Dutch, French, and German. In practice, the distribution of the leaflets is very effective. They can be found in every police station, together with a lot of other useful leaflets about the criminal proceedings.

In 1994, Victim Support Flanders assisted 1567 victims of crime. This number has risen

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<sup>42</sup> E. Van Kerckhoven (1996), pp. 3-8.

<sup>43</sup> See the brochure of Victim Support Flanders, and the brochure *De rechten van het slachtoffer. Gids voor politiediensten, magistraten, advocaten, hulpverleners*, published by the Ministry of Justice and the National Forum for Victim Policy, Brussels, 1998.

to 2,546 in 1995, and to 3,786 victims in 1997.<sup>44</sup> Unfortunately, no more recent statistics are available due to the fact that Victim Support Flanders has been integrated into the social services network. Considering that Flanders has 5.7 million citizens, the number of victims reached are still relatively few in numbers. However, Victim Support Flanders increasingly has to compete with the victim services created by the police and the courts. It is therefore interesting to see how victims learned about the assistance provided by Victim Support. In 1996, 43.9% were referred by the police, 15.6% by other social services and 5.2% by the criminal justice authorities. 21.6% of the clients contacted Victim Support Flanders on their own initiative. The remaining part was advised to seek the help of Victim Support Flanders by friends and family.<sup>45</sup>

In the French-speaking community, the situation with respect to victim support is very different from the Flemish one. In contrast to Victim Support Flanders, which is an independent organization, support for victims in the French-speaking region is integrated into existing services for offenders (*aide sociale aux justiciables: 13 centres*). The reason why victim support schemes are integrated into the services for offenders is mainly related to their funding. Formerly, these services used to fund separate victim services which could operate from the buildings of services for offenders to save costs. Today, the Walloon government funds victim services through the services for offenders. This is not likely to change in the near future because the focal point in the Walloon region has always been to provide services for offenders rather than on victim support.

The first services for victims in the French-speaking community were created in Huy, Liège, and Namur. At first, the community wanted to create services in every Walloon province but the Minister<sup>46</sup> decided that the best allocation of victim schemes over the territory could be achieved by creating one centre in every judicial district. Within the legal districts, victim support services usually cooperate with the Bar Association (*orde van advocaten, le barreau*), the prosecutor's office, the police, and the prisons. The decentralisation of the victim services to all judicial districts implied the creation of new services in Tournai and Verviers in 1992. The following year, services were created in Liège, Brussels, and Charleroi.<sup>47</sup> Usually, the services for victims are provided by professionals, such as social workers and psychologists. The victim workers are, in general, paid for by the French-speaking community.<sup>48</sup> Due to a structural lack of funding by the French-speaking community, the services experienced great difficulty in trying to pay for its full-time employees. The federal government has tried to remedy the budget problems through employment schemes for social workers and psychologists, a territory which falls within the federal competence. The employment scheme allows the federal government to offer

<sup>44</sup> Minister of Justice, *Nota aan de Ministerraad*, Brussels, 1997, p. 10.

<sup>45</sup> Information supplied by Mrs. M. Puttaert, Director of Victim Support Flanders. Data are based on Victim Support Flanders' statistics over the years 1994-1996.

<sup>46</sup> Minister Michel Lebrun of the Executive of the French speaking community, *Ministre de l'enseignement supérieur, de la recherche scientifique, de l'aide à la jeunesse et des relations internationales*.

<sup>47</sup> J. Milquet of the cabinet of Minister Lebrun, presentation on the Day of the Victims, *La journée des victimes*, 17 February 1993, in: *Journée des Victimes*, 1993, pp. 16-18.

<sup>48</sup> Typical for the complexity of the Belgian situation is that the administrative personnel is paid for by the much richer Walloon region.

the unemployed a job within the victim schemes.<sup>49</sup>

As said, Walloon victim support schemes (*service d'aide aux victimes*) are part of a service for offenders. The objectives of these centres are first of all: a) to provide social and psychological support to suspects and persons held on remand; b) to assist convicts and their families socially and psychologically; c) to provide social and psychological support to ex-convicts and to persons on early release; and d) to assist victims of crime and their relatives, on a social and psychological level.<sup>50</sup> In the French-speaking community, no regional standard has been established determining what services should be provided to victims, and by what means. In most centres, victim support is provided by the same persons who assist delinquents. Only few services have created a separate victim support scheme within the more general service. The victim support schemes in the French-speaking part of Belgium provide services which are largely comparable to those in Flanders, although some schemes emphasize psychological help and therapeutic (group) sessions. This working method is dictated by the large number of psychologists working at victim support schemes in the French-speaking community.

Victims come to the centres on their own initiative, or because they were referred to victim support by the police, hospitals, medical doctors and other social services. There are no regional statistics for the French-speaking region. However, local statistics may give an indication of daily practice. In Brussels (1997), the referral by the police amounted to 37% (municipal police 7%, and national police 14%, victim units at the police 16% -see § 3.7). The number of referrals by the recently established victim units is remarkable, and suggests that referrals at the municipal police are no longer a priority of the individual police officers taking down the complaint. Also, the reception and information services at the courts and offices of the public prosecutor (see § 3.8) contribute substantially to a rise in referrals. In Brussels, 24% of the clients of the victim support scheme were referred by these services.<sup>51</sup>

### 3.7 Victim Units at the Police

Pursuant to the coalition agreement of 1992, the report on the Police and Security (*Nota Politie en Veiligheid*) includes an Appendix (F)<sup>52</sup> on the treatment of victims by the police. The police should provide information and practical aid, as well as refer victims to victim support or social services. The importance of getting in touch with some victims of crime for a second time was underscored by the government. Recontacting victims will lead to a reduction of their feelings of fear, and offers an opportunity for the police to supply them with additional information.<sup>53</sup> However, these tasks can become time-consuming. Therefore, the idea was

<sup>49</sup> Information supplied by staff of the Brussels victim support scheme *Service d'aide aux victimes*, 1 December 1998; E. Van Kerckhoven, Counsellor of the Minister of Justice (and former Director of Victim Support Flanders), 30 November 1998.

<sup>50</sup> Decision of the French-speaking Community of 15 December 1989 (*Arrêté réglant l'agrément et les subventions aux Services d'Aide Sociale aux Justiciables*).

<sup>51</sup> Statistics provided by the *aide aux justiciables* in Brussels (rue des Bordeaux) in their annual report of 1997, pp. 20-21.

<sup>52</sup> Ministry of the Interior, *Nota 'Politie en Veiligheid'* (Report on the Police and Security), 1992, Appendix F. (In the following quoted as *Report on Police and Security* (1992).

<sup>53</sup> Flemish Ministry of Finance, Health and Social Services, Welfare and Family Affairs, *Nota slachtofferbeleid: het standpunt van de Vlaamse Regering*, Report on Flemish victim policy of Minister W. Demeester, January 1995, p. 30. (quoted as: *Nota Slachtofferbeleid* (1995).

conceived to create services within the police forces to assist individual officers with their duties regarding victims. The services should not provide support, which is the prerogative of the victim support services (§ 3.6).

The victim units at the municipal police are funded by the federal government through the so-called 'security and prevention agreements' (*veiligheids- en preventie contracten*). In the different communities, special employees, social workers, criminologists and psychologists, were recruited to give form and content to the new duties of the police. Training of victim unit workers (referred to as justice assistance) takes place at the provincial police academies.<sup>54</sup> Their primary duties consist of the sensitization, training (on the job), and coaching of individual policemen. The victim units should prevent complaints by victims about the treatment of victims by the police. At the national police, a different approach has been chosen. The national police have not created a multiple-staffed victim unit at each police station, but have appointed one social assistant per district. The social assistant (*maatschappelijk assistent, assistant social*) has similar duties as the victim units at the municipal police. Moreover, he should maintain contacts with other services and organize the referral from the police to the different services.

In practice, the victim units at the municipal and national police make a significant contribution to the implementation of the federal victim policy. However, the functioning and the effectivity of the victim units vary. Within the police, three different models of working with victims have developed: (1) police forces which, like the national police and the municipal police forces in Ghent, Kortrijk, Oostend and Leuven (Louvain), have newly created victim units who function between the set boundaries and assist the individual officer with a constructive treatment of victims; (2) other municipal police forces have integrated the victim units into their social departments; (3) the Brussels municipal police house their social departments for victim support outside the police stations. The organizational model of Brussels causes a lot of problems. In fact, the Brussels' victim units function like other social services, the only difference is that they work under the direction of the chief of police.<sup>55</sup> These units and, to a lesser degree, the units in the second model do not limit their activities to the facilitation of the duties of police officers towards victims. They have become victim support centres, a function which falls outside the scope of the security agreements, frustrates the implementation of Guideline OOP 15bis<sup>56</sup> (see § 3.6), and interferes with the activities of the 'real' victim support services.<sup>57</sup> The National Forum for Victim Policy has explicitly stated that it opposes the tendency to create victim support services at the level of the police because this leads to fragmentation, competition, and an inefficient use of financial means.<sup>58</sup> Furthermore, victim units which do not work within the formally set boundaries cause a lot of confusion for victims. Even more importantly, they take over the informatory duties

<sup>54</sup> *Nota slachtofferbeleid* (1995), p. 30.

<sup>55</sup> *Nota slachtofferbeleid* (1995), p. 31.

<sup>56</sup> The abbreviation OOP stands for *Omzendbrief Operationele Politietaken* (Circular Operational Police Duties).

<sup>57</sup> Nevertheless, it must be said that, for victim units operating in the Walloon provinces, the temptation and pressure to offer assistance to victims may be very high. Because the victim support centres in this part of Belgium are not very well organized, and often understaffed. For the assistants working at the victim units, who are professionally qualified to offer assistance, it may become too difficult and seem too cruel to send victims away empty-handed.

<sup>58</sup> Ministry of Justice and the National Forum for Victim Policy, Strategic Plan for a National Victim Policy, *Strategisch plan voor een nationaal slachtofferbeleid*, Brussels 1996, p. 15.

of individual policemen. This is a development which may be detrimental to the position of victims, and their right to be informed. The functioning of the victim units at the national police is therefore to be preferred. There is only one assistant and this person cannot possibly take over the duties of individual officers in the entire legal district, nor offer assistance to victims, a danger which will always remain if a victim unit consists of several assistants who are, moreover, trained as social workers and psychologists. Some victim units even consist of eight persons. At first glance, this seems favourable for victims but it enhances the tendency of individual police officers to dispose of all victim-related activities and transfer them to the victim unit. The model of the national police is thus the best guarantee that the victim unit functions within its scope of competence, without interfering with other parts of the national victim policy.

The official organization of the victim units will change as soon as the Cooperation Agreements are implemented in practice (see Scenery). However, it remains an open question whether these differences will disappear in practice. In one aspect practice will change though, the Cooperation Agreements require the police and victim units to work with a uniform referral system.

### 3.8 Reception and Information Services at the Prosecutor's Offices and the Courts

A recent development within the prosecutor's offices and the courts are the 'reception and information services for victims' (*slachtofferonthaal op de parketten en rechtbanken, accueil des victimes dans les tribunaux et parquets*). According to the Minister of Justice, the reception and information services at the prosecutor's offices and courts are particularly relevant in the national policy to prevent secondary victimization as much as possible.<sup>59</sup>

In 1993, the reception and information services were created on an experimental basis in seven pilot court buildings and prosecutors' offices. Victim Support Flanders took the initiative for the reception and information services and managed the first year of the experiment. The primary idea was to give more attention to the experiences of victims during the criminal proceedings, and to meet their needs for advice and emotional support. After the initial stage, the Ministry of Justice took over to ensure a nationwide implementation. Since 1996, every legal district has its own reception and information service. The service is managed by one or more justice assistants (*justitie assistenten, assistantes judiciaires*) paid for by the Ministry of Justice and trained and assisted by Victim Support Flanders. Already in 1997, the services in the bigger legal districts such as Brussels, Antwerp, and Ghent employed three full-time justice assistants.<sup>60</sup> According to the spokesperson of the Minister, the justice assistants can be compared with Trojan horses placed within the justice system in order to change the mentality of the criminal justice authorities, and to assist them with the implementation of the new victim policy.<sup>61</sup>

The justice assistants have two main tasks which have the objective to change the attitude of magistrates and prosecutors: 1) to make judges and public prosecutors aware of the daily

<sup>59</sup> Minister of Justice, Memorandum on criminal justice policy, *Orientatienota over het strafrechtelijk beleid*, October 1998, p. 30.

<sup>60</sup> Information supplied by N. Van Eynde, justice assistant at the reception and information service in Antwerp, 4 December 1998.

<sup>61</sup> Information supplied by Mr. E. van Kerckhoven, spokesperson of the Minister of Justice, Brussels, 30 November 1998.

problems of victims and the importance of a sympathetic and considerate treatment; 2) to record the structural and general problems victims face during the criminal procedure and to notify the chief public prosecutor and the Minister of Justice of their findings. In addition, the justice assistants have duties towards victims. They should: 3) direct and structure the flows of information to and from victims during the criminal process; and 4) refer victims to victim services or other social services. On a daily basis, this means that the justice assistants should organize the support of victims during hearings. They should organize and facilitate the right of civil claimants and injured persons to inspect the legal file. Also, the justice assistants have access to the legal file in order to answer specific questions of victims about developments in their case. Before the trial, the justice assistants organize the accompanying of victims in court, which will then be provided by victim support services. They prepare victims for the criminal proceedings; they may, for instance, show them the courtroom. During the trial, the justice assistants may also accompany victims themselves, if this has been requested. This may be particularly relevant if the trial takes place behind closed doors. The justice assistants may then be permitted by the court to be present to support the victim.<sup>62</sup> Finally, on the basis of the 1998 Guideline, they have the task of organizing a dignified last farewell of relatives of a deceased victim if an autopsy has been necessary (see § 4.3.2).

In practice, because of the many tasks regarding victims, the justice assistants feel they lack time for a proper implementation of their more structural duties involving the sensibilization of the criminal justice authorities, and changing their mentality and working methods.<sup>63</sup> Hopefully, the promised evaluation of the functioning of the reception and information services, and of the effects of the guideline on these services, will bring forth some changes. To perform all the assigned duties, more justice assistants should be employed, in particular, if they should function as Trojan horses within the criminal justice system.

From the earliest stage on, an infrastructure has been created to embed the service into the existing structures, to facilitate the work of the justice assistants and to guarantee that they can do their work and have access to legal files. First of all, liaison magistrates (*verbindingsmagistraten*, *officiers de liaison*) have been appointed to coordinate the duties of the justice assistants, public prosecutors, magistrates, and lawyers. The chief prosecutors together with the liaison magistrates are responsible for the implementation of the national victim policy.<sup>64</sup> Besides this primary assignment, the liaison magistrate operates also in the local steering committee with the following partners: the reception and information service's justice assistants, the local victim scheme, the social services, and the police. The steering committee coordinates the local legal district's victim policy, directs new developments, and gives guidance to the parties involved. In addition, there is a national steering committee which has basically same tasks as the local committees. The national steering committee has to evaluate the functioning of the services. However, it cannot direct the victim policy, which is the competence of the National Forum for Victim Services and the Ministers concerned.<sup>65</sup>

The establishment and functioning of the reception and information desks at the courts were initially rather difficult. The Belgian courts and prosecution services have strong

<sup>62</sup> Ministerial Guideline on the Reception and Information Services, 15 September 1997.

<sup>63</sup> Information supplied by N. Van Eynde, justice assistant at the reception and information service in Antwerp, 4 December 1998.

<sup>64</sup> Ministry of Justice and the National Forum for Victim Policy (1996), p. 15.

<sup>65</sup> In addition, there are 23 full time policy officials at the Ministry of Justice to prepare victim oriented Acts and guidelines.

traditions and are very closed institutions with respect to outsiders. It is hard for persons with a non-legal background to establish good working relationships, particularly for persons of the social professions. Convincing the sceptical criminal justice authorities that such a service is needed is maybe even more difficult. In June 1995, the first evaluation report was published on the reception and information services. It stated that the services were rather successful although some improvements had to be made.<sup>66</sup> The report alluded to the reluctance of magistrates to inform victims. The reasons given for the magistrates' behaviour are that they do not see it as their duty, they are already overworked, and on top of that, they are not trained to work with victims. Even today, the justice assistants at the reception and information services find it especially problematic to sensitize the magistrates and to change the existing ideas and working-methods. As a result, the temptation to take over duties of magistrates is great because performing certain duties oneself may be less time-consuming than convincing public prosecutors and judges to do them. The 1995 report also contained the advice to establish guidelines regarding the duties of the magistrates with respect to the treatment of victims. Such guidelines would emphasize the fact that they have certain obligations towards victims, and at the same time reduce the practical differences in the legal districts.<sup>67</sup>

In 1997, in Flanders, a total of 5914 victims were welcomed at the reception and information services. The justice assistants handled a total of 5062 files. If the justice assistants were requested to look up certain information in the files, in 75% of the cases victims were concerned who came to the services for information, and in 25% of the cases information was requested by the police, on behalf of a victim. The vast majority of the cases, in which the justice assistants are involved, concern crimes against the person, a significant number concern sexual offences. Victims of these crimes are particularly anxious to receive general information about the criminal proceedings, and the developments in their case. Regarding offences which will be tried in the Courts of Assizes, the justice assistants play an important role in preparation for the trial and support during the hearings.<sup>68</sup>

### 3.9 National Forum for Victim Policy

The creation and functioning of victim services, which fall within the competence of the communities, causes several problems, not only regarding funding but also with respect to the creation of a national standard in victim support and assistance. Therefore, Victim Support Flanders and the Walloon victim services launched the idea of a National Forum in 1991. Two years later, the Belgian federal Parliament voted with a huge majority in favour of the establishment of the National Forum on Victim Policy (*Nationaal Forum voor Slachtofferbeleid*). The National Forum was installed on the 16 June 1994. The objective of the National Forum is to coordinate the community-based victim policies. This is a rather daunting assignment since there are 15 authorities and 7 Ministries to consult and the negotiations have to be conducted in three languages. Moreover, the National Forum on Victim Policy is an advisory body that makes recommendations for improvements to the

<sup>66</sup> E. Van Kerckhoven (1996), pp. 5-6.

<sup>67</sup> D. Martin, E. Van Kerckhoven, *Slachtofferonthaal op de parketten en rechtbanken, kwantitatieve analyse van het eerste werkingsjaar/Accueil des victimes dans les tribunaux et parquets, analyse quantitative et qualitative de la première année d'activité*, Ministry of Justice, Brussels, June 1995, pp. 42-45.

<sup>68</sup> Information supplied by N. Van Eynde, justice assistant at the reception and information service in Antwerp, 4 December 1998.

Minister of Justice. It is also involved in the preparation of new legislation and guidelines regarding victims of crime. In 1996, it published the Strategic Plan on a National Victim Policy. This document consists of three parts: an inventory of all previous actions to improve the position of victims, the principles of the victim policy (what can victims expect from the criminal justice system), and a checklist for all authorities working with victims. The purpose of the checklist is to assist the authorities and services in evaluating their performance regarding victims. At the same time, the Strategic Plan lays the foundation for a National Victim's Charter which is expected to be published shortly.

## 4 SOURCES OF LAW

### 4.1 General Sources of Law

The Belgian Constitution was one of the first liberal constitutions of the 19th century (1830). The second title of the Constitution contains an enumeration of fundamental rights and freedoms, some of which relate to criminal procedure. The chapter on the judiciary determines the fundamental principles of court proceedings. It determines, e.g. that the most serious crimes should be tried by jury in the Court of Assizes (s. 98 Const.). The constitutional revision of 1993 introduced the federalization of Belgium which may change the Belgian justice system completely in the future. Criminal law and procedure fall traditionally within the exclusive competence of the federal authorities. The new Constitution, however, leaves room for deviation from this principle. Accordingly, it may become possible for the three economic regions and the three cultural communities to develop their own procedural law. So far, this has not occurred. The European Convention of Human Rights has had a great impact on Belgian criminal procedural law because of the right of individual application and the direct effect of the Convention in the Belgian legal system. The latter has been accepted by the Supreme Court in the 1971, and allows the courts to set aside national laws whose content is incompatible with the European Convention. In practice, this enabled the courts to soften the severe inquisitorial aspects of the 1878 Code of Criminal Procedure. Case law and legal doctrine are not recognized as sources of law. Even decisions of the Supreme Court are not binding upon the lower courts. Nevertheless, the decisions of the Supreme Court tend to have great intellectual authority. In practice, the lower courts tend to follow its case law.<sup>69</sup>

### 4.2 Sources of Criminal Law and Procedure

The principal sources of criminal law are the Belgian Constitution of 1830 as revised in 1993, the Code of Criminal Procedure (*Wetboek van Strafvordering*, *Code de procédure pénale*) of 1878<sup>70</sup> and its complementary Acts, e.g. the Police Act, and the 1967 Penal Code (*Strafwetboek*, *Code Pénal*).<sup>71</sup> Other sources of criminal law are judge-made law and customary law. The

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<sup>69</sup> Chr. Van den Wyngaert (1993), pp. 1-4.

<sup>70</sup> The Code of Criminal Procedure (1878) stems from the Napoleonic *Code d'instruction criminelle* (1808), which corresponds literally to its predecessor: *Code des Délits et des Peines* (year IV).

<sup>71</sup> The 1967 Penal Code shows still great resemblance to the Napoleonic *Code Pénal* (1810).



guidelines and circulars of the Procurators General may also constitute a source of law<sup>72</sup> if they are published. However, this does not happen frequently. As a result, most guidelines only have an internal binding effect.

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

Due to the sheer number of laws and guidelines relating to victims of crime, a subdivision is made into Victim Acts and Guidelines.

#### 4.3.1 Victim-Oriented Acts

##### *Franchimont Act*

The Code of Criminal Procedure contains several provisions which are relevant to the position of victims within the criminal justice system. Recently, this Code has been modified by the 1998 Franchimont Act.<sup>73</sup> This Act improves both the position of the accused and that of victims within criminal proceedings. Especially relevant is the new section 3bis of the preliminary title CCP, which states that 'victims of crime and their relatives should be treated with courtesy and respect, in particular through the provision of information and, if necessary, the referral to other specialized services and especially justice assistants'.<sup>74</sup> The 1998 Act also introduced the 'injured person' (*benadeelde persoon*, see § 5.5), an intermediary step between the victim as a reporter of crime and the civil claimant. The victim who registers as an injured person has the right to be notified regarding certain developments in his case (see §§ 5.5 and 6).

##### *State compensation*

The 1985 Act on State Compensation<sup>75</sup> is relevant to a growing number of victims of intentional violent crimes.<sup>76</sup> The number of applicants is still quite limited but steadily increasing. The reform Acts regarding State Compensation of 1997<sup>77</sup> have been very important because they facilitated the application procedure and enlarged the maximum sums the Fund may award to a victim of violent crime.<sup>78</sup> The relevance of the reform Acts

<sup>72</sup> Chr. van den Wyngaert (1994), pp. 413-414.

<sup>73</sup> The Franchimont Act was promulgated on 12 March, 1998, *Wet tot verbetering van de strafrechtspleging in het stadium van het opsporingsonderzoek en het gerechtelijke vooronderzoek*, B.S. 2-4-1998.

<sup>74</sup> According to the Parliamentary texts on the Franchimont Act, justice assistants are persons who assist the criminal justice authorities, such as the social assistants at the police (see § 3.7), the assistants at the reception and information services at the courts and offices of the public prosecutor (see § 3.8). See Amendment nr. 151, Parliamentary Documents, 1996-7, nr. 857/14. Act of 1 August 1985, as amended in 1997.

<sup>75</sup> Belgium has not yet ratified the European Convention on the Compensation of Victims of Violent Crime. The main issue preventing ratification seems to be that the Convention requires that the central authority should be indicated. A simple fact, but in Belgium it has caused interminable debates on who this authority should be.

<sup>76</sup> The Acts on the Fund and the Commission for Help to Victims of Intentional Violent Crime, of 17 and 18 February 1997, respectively.

<sup>77</sup> In June 1998, a further reform Act was promulgated in order to allow victims who were victimized before August 1985 to claim state compensation, if a connection between the punishable act and facts occurring after August 1985 could be established. *Wet tot wijziging, wat de vergoeding van slachtoffers van opzettelijke geweldsdaden gepleegd voor 6 augustus 1985 betreft, van de wet van*

can be illustrated by the number of applicants. On 1 December 1998, the total number of applications of that year amounted to 820, whereas, in the previous year, only 391 applications were made. This is still a marginal number, but it has doubled after the legal reform. In 1994, 193 applications were made, in 1996 they had risen to 269, and to 391 in the next year. After the reform Acts, the number rose to 820 applications in 1998 (situation on 2 December 1998).<sup>79</sup> The State Fund does not give victims an automatic right to be compensated. The Committee for Help to Victims of Intentional Violent Crimes<sup>80</sup> has discretionary power regarding the claims and may award fixed sums. This means that full compensation by the State is not guaranteed. Moreover, financial assistance will only be awarded by the Committee if the victim has constituted himself as a civil claimant in the criminal proceedings and has not been compensated by the offender<sup>81</sup> or by an insurance company. The same applies to the victim's heirs (s. 31). The Committee may decide to grant the victim or his heirs compensation up to a certain maximum<sup>82</sup> (s. 32) and can also award emergency relief<sup>83</sup> (s. 36). Compensation can be asked for permanent or temporary disability, moral damages, physical and psychological suffering, medical costs, loss of income, costs relating to the criminal proceedings, and material costs<sup>84</sup> (s. 32). Compensation is determined, amongst other things, by the financial position of the applicant, in the sense that if the amount of damages is relatively low compared to the resources of the applicant, the application may be dismissed (see § 7).<sup>85</sup>

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*1 augustus 1985 houdende fiscale en andere bepalingen*, WV B.S. 31-7-1998.

<sup>79</sup> Information supplied by Mr. Ph. Verhoeven of the State Fund, Brussels, 2 December 1998. Verhoeven feels that the very limited number of applicants is due to ignorance about the existence of the State Fund. In 1998, this started to change because of the publicity campaigns. He also mentioned the fact that many lawyers are still (after ten years!) unaware of the existence of the State Fund, and do not always seem aware of the procedure which has to be followed, despite the fact that a brochure for experts (i.e. lawyers) has been published. In this respect, it is interesting to mention that 35% of the applications are made by Victim Support Flanders on behalf of their clients. The quality of their applications is excellent, in contrast to the applications made by most lawyers. After the new legislation to improve the functioning of the State Fund and its Committee, one of the remaining problems is that the infrastructure of the Committee has not been changed. The new Act, and the media attention for State Compensation has been a success; the number of applications has increased twofold. However, there are only ad-hoc functioning divisions of the Committee dealing with applications. As a result, the backlogs are steadily growing. A solution would be the installation of fixed chambers of the Committee. However, legal reforms are necessary to change the infrastructure.

<sup>80</sup> *Commissie voor hulp aan slachtoffers van opzettelijke gewelddaden*, address: Waterloolaan 115, 1000 Brussel. Phone: +00 32 (0)2 542 65 11.

<sup>81</sup> The victim may also apply for State Compensation if the offender is unknown (s. 34).

<sup>82</sup> In 1998, the maximum amount of compensation is 2,500,000 BEF (approximately EUR 50,000).

<sup>83</sup> The maximum amount is 300,000 BEF (approximately EUR 6,000).

<sup>84</sup> Material costs can be compensated up to the amount of 50,000 BEF (approximately EUR 1,000).

<sup>85</sup> See the 1998 brochures for applicants and experts of the Ministry of Justice (*Financiële hulp aan slachtoffers van opzettelijke gewelddaden*).

### *Act on Conditional Release*

The Act on Conditional Release<sup>86</sup> (*Wet betreffende de voorlopige invrijheidstelling, Loi relative à la libération conditionnelle*) was published in April 1998<sup>87</sup> and has come into effect on 1 January 1999. It gives victims the right to be consulted by the reception and information service at the prosecutor's offices in order to make their interests known concerning the early release of offenders. In every legal district, a Conditional Release Committee will be installed at the courts of appeal. The Committee consists of two magistrates and two persons from the probation services. Despite the fact that this suggests an offender-oriented approach, the Committee is required to take the interests of the victim into consideration. The Committee should check whether there are indications that an early release of the offender entails a serious risk for society as a whole and for the victim. The prosecution service has to gather information concerning possible conditions to the early release in the interest of the victim. If conditions are imposed on the early released offender, these should take the interests of the victim into consideration. In addition, victims of certain serious offences may request that they are heard by the Committee and they may express their wishes and concerns with respect to an early release. Furthermore, the Act contains an opt-in notifying mechanism: the Committee must notify every victim about a decision to release the offender early, if the victim expresses a wish to be notified and if he has a legitimate and direct interest in the case. After the initial notification, the victim should also be notified if the early release has been revoked, and if the conditions – imposed to protect the victim, have changed.<sup>88</sup> The Act on Early Release has been much criticized because it has come into existence after much public pressure, which is not always a guarantee for a sound statute. The criticism focusses on the fact that no representatives of victim services are represented in the Committee. Also, the victim should present himself in person to the Committee. He cannot be represented by his lawyer. Moreover, the Act does not mention how the hearings should proceed. It is feared that the victim and offender are summoned to appear at the same time before the Committee, and that they are confronted with each other during the hearing (see further § 7.2, D.13).

### *Miscellaneous Acts*

In 1989, the Act on Victims of Sexual Offences came into effect.<sup>89</sup> This enactment not only redefines rape, but also offers more protection to victims of rape with respect to media exposure (see § 6.3). This Act is accompanied by Guidelines, known as the 'set on sexual

<sup>86</sup> Act on Conditional Release and the Act on the Installation of Committees on Early Release of 2 April 1998.

<sup>87</sup> Act of 2 April 1998 on the Awarding of Early Release.

<sup>88</sup> With respect of the new Act on Early Release, it is interesting to remember that, already in 1984, a guideline (1483/LX) was issued to safeguard the financial interests of victims in the framework of early release. Furthermore, *inter alia* in 1987 guidelines to the social services were issued on this subject. However, there are no data available to analyse the implementation of the guideline. See I. Aertsen, *Het slachtoffer en de strafuitvoering: herstel als mogelijke opdracht van de penitentiaire praxis*, Leuven, March 1996, p. 30. In the legal district of Ghent, an experiment was launched regarding the notification of victims on the early release of offenders, in 1997. See circular of the Procurator General of Gent, 10 June 1997. In Ghent, a protocol is used to collect information about the offender, the victim and their relationship, and the nature of the offence. The justice assistants of the reception and information services at the courts play an important role in the gathering of information and the notification.

<sup>89</sup> Act on Sexual Offences, *Wet op de Verkrachting*, of 18 July 1989.

aggression.' The Guideline is currently being revised (1999, see § 4.3.2).

The 1992 Police Act<sup>90</sup> is relevant for victims of crime because section 46 obliges the police forces to assist victims and to refer them to specialized services. This duty has been specified in guidelines (see § 4.3.2, Guideline OOP 15bis).

In 1994, the Act of Penal Mediation<sup>91</sup> (*Wet op de strafbemiddeling/Loi sur la médiation pénale*)<sup>92</sup> was promulgated. Its purpose was to enhance the payment of compensation to victims and to create more latitude for the public prosecutor to give priority to the interests of the victim.<sup>93</sup> Traditionally, the public prosecutor is allowed to dismiss an offence punishable with a maximum of five years imprisonment. The 1994 Act introduced a legal framework for mediation. The prosecution service can try mediation in cases for which it would demand the court to impose a maximum prison sentence of two years. The main purpose of penal mediation is the reparation of the material or moral damages caused by the offence. However, mediation may also result in the condition that the offender follows therapy, or will do community service. The consent of the offender and the victim is prerequisite to the mediation proceedings (see further § 3.4.2 for the guideline on penal mediation).

In 1997, the Act on the Prevention of Violence between Spouses and Partners (*geweld tussen partners, violence au sein du couple*) came into effect<sup>94</sup> and will be incorporated in the Penal Codes and the Code of Criminal Procedure (s. 410 PC, 46 CCP). As a result of this law, domestic violence is now a criminal offence. According to s. 46 CCP, the public prosecutor may start public action after a request of the head of the household, or the victim (s. 46-4 CCP). Associations against domestic violence, may represent the victim in court after permission of the victim. If the victim revokes his permission, the right of the associations to legally represent the victim ends (s. 46-7 CCP).

Finally, the Act on Stalking (*Wet betreffende de strafbaarstelling van belaging, Loi relative à l'incrimination d'harcellement*) was promulgated in October 1998.<sup>95</sup> The Act has been incorporated into the Penal Code (s. 442 bis PC). It states that if the stalker knew or should have known that his behaviour would seriously disturb the peace of another person, he may be punished with imprisonment up to a maximum of two years, and/or a fine. Stalking can only be prosecuted after a formal complaint by the victim (complainant offence, see § 5.2).

<sup>90</sup> Police Act, *Wet op het Politieambt*, of 5 August 1992.

<sup>91</sup> Act of 10 February 1994 on Mediation in Criminal Cases; *Wet van 10 February 1994 houdende regeling van een procedure voor de bemiddeling in strafzaken*. Royal Decree of 24 October 1994 on Implementation procedures in Penal Mediation; *Koninklijk Besluit van 24 oktober 1994 houdende uitvoeringsmaatregelen inzake de procedure voor bemiddeling in strafzaken*.

<sup>92</sup> In October 1991, an experiment was launched by the Procurator General in Ghent in order to apply summary justice in a practical manner. A public prosecutor was appointed as mediator and he would propose certain conditions to an offender to avoid prosecution. During the experiment negotiations involved primarily the prosecution service and the offender. Attempts to compensate the victim were not as prominent. The offender had to agree with the conditions imposed upon him. If the conditions were fulfilled, the prosecution lapsed. See Samenspraak, 'Strafbemiddeling en herstelbemiddeling, Justitie op nieuwe wegen', *Pretekst*, 1995, nr. 6, p. 10. The experiment in Ghent inspired the legislature to constitute the Act of 1994.

<sup>93</sup> Explanatory Memorandum; *Memorie van toelichting*, Gedr.St., Senaat, 1992-1993, nr. 625/1, 4.

<sup>94</sup> The Act of 24 November 1997 on the Prevention of Violence between Spouses and Partners.

<sup>95</sup> Act on Stalking, WV B.S. 17-12-1998.

#### 4.3.2 Victim-Oriented Guidelines

In addition to the above-mentioned Acts, several victim-oriented guidelines are in force. One of the oldest guidelines concerns the treatment of victims by the police and criminal justice authorities. In January 1990, the prosecution service issued a guideline which contains, in a nutshell, the duties of police and judicial authorities regarding victims.<sup>96</sup> Regarding the prosecutor's office (*parket, parquet*), the 1990 Guideline states that every victim who wants to be informed should be notified about the progress of the investigation. Public prosecutors were made responsible for the quality of personal and written contacts with victims.

In 1991, the Minister of the Interior published a guideline for the police (referred to by the name of *OOP 15*), which was replaced on 29 March 1994<sup>97</sup> (*OOP 15bis*, see § 3.1). According to the Guideline *OOP 15bis*, police management should provide training for police officers on the correct treatment of victims and adequate funding to visit victims at home (see § 3.1, A.1.). Police executives are responsible for the adequate reception of victims at police stations. Guideline *OOP 15bis* contains duties for the ordinary police officers as well. They are made accountable for the respectful treatment of victims and for informing them (see § 6). In the near future, Guideline *OOP 15 ter* will be published and will concern the implementation of the Cooperation Agreements (see Scenery).

Also in 1994, a Guideline on Penal Mediation<sup>98</sup> accompanying the Act of the same name, came into effect (see § 7). It describes the mediation procedure: the prosecution service hands over a file which qualifies for mediation to the mediation assistant (*bemiddelingassistent, assistant de médiation*),<sup>99</sup> who will contact the victim and the offender.<sup>100</sup> The mediation assistant is responsible for the enforcement of the agreement.<sup>101</sup>

In 1997 and 1998, several guidelines have been published to make the Belgian victim policy more explicit. Although, the foundation of most guidelines had been laid before the Dutroux scandal, the latter has in fact given a great impulse to the publication of guidelines. With respect of one particular guideline, the connection with the Dutroux scandal is quite

<sup>96</sup> Regarding the police, the guideline requires: appreciation for the plight of victims; adequate oral and written information about the criminal proceedings and possibilities to receive compensation; practical support to victims and their relatives and registration in the police report of all relevant information about material or moral damages, including the willingness of the offender to pay compensation; giving victims the number of the report, which is essential because they can only obtain information regarding their case if they know the report number.

<sup>97</sup> Guideline *OOP 15 bis* of the Minister of the Interior regarding the Treatment of Victims by the Police, 29 March 1994; *Omzendbrief OOP 15bis betreffende slachtofferbejegening door de politie*, Ministerie van Binnenlandse Zaken en Ambtenarenzaken.

<sup>98</sup> Guideline on Penal Mediation, *Omzendbrief: bemiddeling in strafzaken*, of 28 October 1994.

<sup>99</sup> There are two mediation assistants in each legal district. See Guideline on Penal Mediation (1994), p. 6.

<sup>100</sup> The justice assistant responsible for mediation suggest the conditions of penal mediation to the liaison magistrate. The latter will summon the parties (who may bring their lawyers) to appear in his office. The mediation assistant will inform the public prosecutor of the success or failure of the negotiations. A disadvantage of the mediation procedure is that victims do not have to be involved in the application of all conditions. The victim will usually only be summoned and heard by the mediators if the offender should pay compensation. Only then the victim receives the minutes of the proceedings. However if it is decided that the offender should go in therapy or do community service, the victim is not heard and usually not notified.

<sup>101</sup> Guideline on Penal Mediation (1994), pp. 1-3.

obvious. In July 1997, Minister of Justice De Clerck published the Ministerial Guideline Concerning the Tracing of Missing Persons.<sup>102</sup> This guideline in fact most resembles a manual for all the authorities involved. It consists of 97 pages, with extensive checklist regarding the hearing of the suspect, the witnesses, and people from the neighbourhood, as well as the way in which they should provide assistance to the victims and how the media should be handled.

In September 1997,<sup>103</sup> the Ministerial Guideline regarding the Reception of Victims at the Prosecutor's Offices and the Courts<sup>104</sup> was published (see § 3.8). The core of the guideline concerns the duty of public prosecutors, magistrates, and judges to treat victims properly. This includes the provision of information and the referral to services. The authorities may be assisted in the implementation of the guideline by the justice assistants of the reception and information services (see § 3.4.5). Furthermore, it explicitly states that the rights of victims should be respected in the same way as the rights of the suspect. Victims' rights are defined as the right to be treated properly, the right to provide and to receive information, the right to be compensated and protected, as well as the right to be given legal aid and assistance. This national victim policy should be implemented by all levels of the organization of the prosecution service.<sup>105</sup> The district council for victim policy (a network of police commissioners, judicial authorities, lawyers, justice assistants, and victim support workers, etc.), and the National Forum for Victim Policy (see § 3.9) are involved in the follow-up of the guideline, as well as in the evaluation of its implementation. In addition, these district councils should harmonize the national victim policy with the local practice in the legal districts.<sup>106</sup>

The Ministerial Guideline entitled 'Bidding a Dignified Farewell to a Deceased Person in Case of Intervention by the Judicial Authorities'<sup>107</sup> was published in 1998. This guideline applies to cases in which an autopsy on the victim has to be performed, or when the victim's body is claimed by the authorities. In fact, this guideline is a specification of the guideline of September 1997, in which it was stated that the justice assistants should support the relatives of a deceased victim if an autopsy must be carried out. The 1998 guideline gives relatives the right to see the deceased victim, both before and after an autopsy.<sup>108</sup> In addition, the institutes for legal forensic medicine should create a room suitable to receive the relatives,

<sup>102</sup> *Ministeriële richtlijn met betrekking tot de opsporing van vermiste personen*, Dir 1/97, July 1997. The Guideline came into force on 15 September, 1997.

<sup>103</sup> Also in 1997 (July), a Ministerial Guideline on the Criminal Investigation of Missing Persons was issued. This Guideline is directly related to the Dutroux scandal and the inefficient communication between the different authorities.

<sup>104</sup> *Ministeriële richtlijn inzake het onthaal van slachtoffers op parketten en rechtbanken*, Dir 2/97, September 1997. The Guideline became operative on 1 October, 1997.

<sup>105</sup> The Council of Procurators General, the chief public prosecutors, the liaison magistrates, the chief secretaries at the prosecutor's office and the chief clerk of the court, and the justice assistants. The guideline gives a minute description of the duties and responsibilities of all parties involved.

<sup>106</sup> The Belgian district councils resemble the Dutch Terwee Network of criminal justice partners which also operate on the level of the local legal districts (see chapter on the Netherlands).

<sup>107</sup> *Ministeriële richtlijn inzake het waardig afscheid nemen van een overledene in geval van interventie door de gerechtelijke overheden*, 2 October 1998.

<sup>108</sup> However, it does not give a definition of who fall within the category of 'relatives'. Now, the public prosecutor determines who are relatives of the deceased. This may cause problems due to a different or very strict interpretation of the term 'relatives'.

and for them to bid farewell to the victim (s. 3.4.3.2 of the Guideline). In theory, relatives already had the right to see the deceased victim in accordance with s. 44 CCP. In practice, however, no national policy existed. In some legal districts, relatives were, as a rule, discouraged of seeing the deceased victim. Sometimes, relatives were even prevented from bidding farewell because the pathologists had not made the victim's body presentable again (despite the medical deontological code). Under the new guideline, the latter practice is no longer acceptable. The chief public prosecutor should make sure the pathologists implement the guideline (s. 3.4.3.3). The public prosecutor should inform the relatives that they have the right to see the records. The justice assistants should prepare and assist the relatives, and warn them of potentially distressing photographs included in the legal file. The support for the victim's relatives before and after the farewell should be organized by the justice assistants, and should be provided for by either the justice assistants themselves, a police officer, professionals, or volunteers of, for instance, victim support services (s. 3.4.3.1). According to many legal practitioners and victim support workers, the question who should actually assist and support the relatives will pose serious problems because the guideline is rather vague on whom should actually provide the support. The future will learn whether this potential problem will materialize.

A Ministerial Guideline on the Audiovisual Recording of Interrogations of Underage Victims<sup>109</sup> will be published shortly. In the past few years, the examination of underage victims of sexual abuse was already recorded with audiovisual techniques (see § 8.2). This practice was encouraged by the federal authorities, who supported two initiatives in Brussels and Charleroi. The main advantage of this manner of interrogation is that it reduces the number of hearings and that the confrontation with the offender can be avoided.<sup>110</sup> In several police forces and legal districts, special interrogation rooms for children were set up, and training courses on interrogation techniques for children were organized. The diversity of initiatives and practices may be very stimulating, but it may also have negative effects. The Guideline on Audiovisual Recording therefore tries to harmonize the examination practice and interrogation methods, and wants to create a framework for audiovisual registration of the questioning of children. The chief public prosecutor should guarantee the effective cooperation between magistrates, police officers, and social services. The public prosecutor is responsible for the interrogation of minors, in accordance with the new section 28bis CCP (see § 8.2). Finally, a guideline has been issued for the treatment and questioning of victims of sexual offences in 1999. This guideline is referred to as the Set on Sexual Aggression (see § 8.2). It is a voluminous set of very specific rules on how the criminal justice authorities must deal with this group of vulnerable victims.

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

### 5.1 Reporting the Offence

According to the law, everyone who has been the witness of a crime committed against the state, someone's life, or property, should notify the public prosecutor (s. 30 CCP). Although

<sup>109</sup> Ministerial Guideline on Audiovisual Interrogations of Minors, *Ministeriële richtlijn over de opname van het audiovisuele verhoor van minderjarige slachtoffers*.

<sup>110</sup> Introduction to the Ministerial Guideline on Audiovisual Interrogations of Minors.

the law only speaks of witnesses in relation to reporting a crime, punishable acts may be reported by direct and indirect victims, and other persons. Furthermore, the duty to notify the public prosecutor is usually not followed. In practice, the police function as an intermediary between the reporter of crime and the prosecution service. The police take down the report, after which it is sent to the public prosecutor (see § 6.1). Victims may report directly to the public prosecutor but the vast majority of victims will contact the police. According to a Memorandum of the Minister of Justice to the government, only 40% of the victims actually report crime to the authorities. This is partly due to the trivial nature of the crime, the limited financial consequences, and the idea that reporting the crime will be useless. The latter argument is closely linked with the public's confidence in the criminal justice authorities. This is the reason why the Minister of Justice stresses the importance of the Cooperation Agreements (see, *inter alia*, Scenery), which are aimed to improve the treatment of victims, establish a referral system from the authorities to victim services, and coordinate services available to victims.<sup>111</sup>

If the victim reports a crime, he is officially said to file a complaint (*klacht, plainte*) which indicates his wish to notify the authorities and have the offender prosecuted. Persons reporting a crime, even the victim, may limit their involvement to notifying the authorities. They have the right to remain distant from the criminal proceedings initiated by the prosecution service, unless they are required to testify in court.<sup>112</sup> As a result, the victim who reports a crime does not become automatically entitled to claim compensation from the offender during the criminal proceedings. If the victim wishes to claim damages, he should in addition bring action as a civil claimant (see § 5.3). This may be done simultaneously or, as the ss. 66 and 67 CCP indicate, one may file first a complaint and take action as a civil claimant later on during the criminal proceedings.

It is interesting to mention that, as a result of the new victim policy and the increased attention for victims within the criminal justice system, the rate of reported crime has increased with 10%. The majority of the increased number of crimes relates to sexual offences, and cases of child abuse.<sup>113</sup>

## 5.2 Complainant

Complaints may be filed by anyone who claims to be a victim of crime. In practice, complaints may be filed orally or in written form with an officer of the judicial police or with the public prosecutor (see § 5.1).<sup>114</sup> With respect to certain crimes, however, a complaint by the victim is the legal prerequisite to instigate criminal proceedings against the suspect. These crimes are referred to as complainant offences (*klachtmisdrijven, plainte nécessaire à l'exercice des poursuites*) and the victim is referred to as the complainant. They include crimes against the honour, and the newly introduced offence of stalking. The latter is rather remarkable because harassment and sexual offences are no longer classified as complainant offences. The fact that a crime requires a complaint to authorize prosecution does not mean, however,

<sup>111</sup> Minister of Justice De Clerck, *Nota aan de Ministerraad*, Brussels, 1997, p. 3 and p. 7.

<sup>112</sup> R. Verstraeten (1990), pp. 34-35.

<sup>113</sup> Information supplied by the Counsellor of the Minister of Justice, Mr. E. van Kerckhoven, Brussels, 30 November 1998.

<sup>114</sup> R. Verstraeten (1990), pp. 34-41.



that the prosecution service is compelled to prosecute. If the public prosecutor does not start public action, the victim may act as a private prosecutor (see § 5.4 and § 7.1, B.7).<sup>115</sup>

### 5.3 Civil Claimant

According to s. 67 CCP, the victim may join the criminal proceedings as a civil claimant (*burgerlijke partij, partie civile*) during every stage of the trial, up to the presentation of the charges by the public prosecutor. The injuries and damage should be caused by the prosecuted offence. Furthermore, the victim should explicitly express the wish to receive damages from the offender.<sup>116</sup> The victim may indicate his wish to claim damages during the criminal process, either in a verbal or written statement.<sup>117</sup> An explicit expression of the will in a writ is required. It must clearly state the intention of the victim to constitute himself as a civil claimant and to bring the civil suit for damages before the criminal court.<sup>118</sup> If the victim joins the criminal proceedings, he can only present a claim regarding the facts and persons as described in the indictment.<sup>119</sup> This may be a disadvantage, for instance, with a joinder of charges, i.e., if the defendant has committed several crimes and the public prosecutor decides to prosecute only one or two of these offences. Then it may happen that the public prosecutor only prosecutes offences which did not cause any harm to this particular victim.<sup>120</sup>

A victim's claim for compensation in criminal court is of a private law nature and the victim's right to claim compensation in criminal court is therefore governed by rules of civil law. Another consequence is that such a civil suit for damages is ancillary to the criminal proceedings,<sup>121</sup> as was emphasized by the Supreme Court in 1986.<sup>122</sup> The submission of a claim for damages within criminal proceedings is open for those who have suffered real losses (s. 3 prel. title CCP) and whose personal rights have been infringed.<sup>123</sup> This does not necessarily mean that the crime must have been aimed directly at the victim. Heirs of the victims may institute action as civil claimants too. Third parties, by virtue of subrogation or cession, also have the right to claim compensation.<sup>124</sup> As a rule associations do not have the right to act as civil claimants. However, there are certain exceptions. Associations who have the statutory objective to defend human rights or fight against discrimination may constitute themselves as civil claimants within criminal proceedings since 1981.<sup>125</sup> The same applies to associations which fight trafficking of humans and child pornography,<sup>126</sup> and those which aim to prevent domestic violence or offer protection to victims of intra familiar

<sup>115</sup> T. Peters, J. Goethals (ed.), *De achterkant van de criminaliteit. Over victimologie, slachtofferhulp en strafrechtsbedeling*, Kluwer, Antwerpen, 1993, pp. 271-273.

<sup>116</sup> R. Verstraeten (1990), pp. 87-94.

<sup>117</sup> R. Verstraeten (1990), pp. 169-171, 180-182.

<sup>118</sup> R. Verstraeten (1990), pp. 94-95.

<sup>119</sup> R. Verstraeten (1990), p. 175.

<sup>120</sup> T. Peters, J. Goethals (1993), p. 275.

<sup>121</sup> R. Verstraeten (1990), p. 64.

<sup>122</sup> Supreme Court, 13 May 1986; *Cass., 13 mei 1986, A.C., 1985-86, 1234*.

<sup>123</sup> R. Verstraeten (1990), pp. 78-87.

<sup>124</sup> R. Verstraeten (1990), pp. 42-43.

<sup>125</sup> S. 5 of the Act of 30 July 1981 regarding the Punishment of Crimes inspired by Racism or Xenophobia.

<sup>126</sup> Act of 13 April 1995, s. 11 § 5.

violence.<sup>127</sup>

Traditionally, the civil claimant has several rights during the criminal proceedings. He is, for instance, empowered to introduce witnesses and experts into the legal proceedings and to question them. He also has the right to be represented by a lawyer. However, all these rights of the civil claimant are linked to the losses and injuries suffered, as well as to the offence which caused the loss. The rights of the civil claimant were substantially extended by the 1998 Franchimont Act. According to the new s. 61 ter CCP, the civil claimant has the right to examine those parts of the legal file (*processtukken, dossier*) which are relevant to the exercise of his rights. Due to the strict application of the secrecy principle during the pre-trial stage, access to the legal file was previously denied to both the defendant and the civil claimant. Only the suspect who was in preventive custody could see the file. Section 61 ter CCP, however, introduces the possibility for the victim, with a legitimate and direct interest in the case, of requesting the examining magistrate to have access to the legal file during the judicial investigation, to which the examining magistrate must react. If the examining magistrate denies the victim access to the file,<sup>128</sup> he has the right to ask a review from the chamber of indictment (*kamer van inbeschuldigingstelling, chambre d'accusation*) of a negative decision by the examining magistrate. Furthermore, s. 61quinquies CCP entitles the civil claimant to request the examining magistrate to perform additional investigations. Before 1998, the civil claimant could only make suggestions for additional investigative actions, and the examining magistrate was not compelled to answer him or react in any way. Now, the civil claimant has the right to request the examining magistrate to perform a certain investigation. He should write a motivation petition and send it to the court's office. The examining magistrate should react within one month, and review of his decision is possible with the chamber of indictment.<sup>129</sup> The civil claimant has the right to get the judicial investigation afloat again if it has not been closed within one year (s. 136 CCP). This means that the civil claimant may bring the case before the chamber of indictment, by a motivated request sent to the office of the court of appeal. The chamber of indictment may then exercise its rights to hear the Procurator General, the examining magistrate, the suspect, and the civil claimant, and it may order the examining magistrate to carry out additional investigations. The Franchimont Act allows the civil claimant to benefit from the new rights

<sup>127</sup> Act of 24 November 1997 with the aim of Preventing Domestic Violence between Spouses and Partners.

<sup>128</sup> This request can be made at the court's office, at the earliest after one month after having instituted an action as a civil claimant. The examining magistrate should respond to the request within one month. If the examining magistrate does not respond within this period, the civil claimant has the right to go directly to the chamber of indictment, and demand access to the file. The examining magistrate may refuse access to the file on four grounds: if access to the file would 1) endanger the investigation, 2) cause danger to, or affect the private life of persons concerned, 3) be uncalled for because the action as a civil claimant appears to be inadmissible, and 4) be unjustified because the civil claimant has no legitimate interests to consult the file. Finally, the examining magistrate may deny access to certain parts of the file (s. 61 ter CCP). The power of the examining magistrate to refuse access to the file are great. Again, the civil claimant may ask the chamber of indictment to review the examining magistrate's decision not to see (parts of) the file.

<sup>129</sup> The examining magistrate may turn down the request if he does not consider the investigation necessary, or if he is of the opinion that it could harm the investigation. The idea to give the civil claimant and the defendant the right to appeal a negative decision of the examining magistrate was abandoned because it may cause unnecessary delays.

that are granted to all persons involved in the criminal procedure. This regards the new safeguards during the interrogation and the drawing-up of the record of the hearing (ss. 47 bis, 70 bis CCP). The interrogated persons may, for instance, obtain a free copy of the record, but they should always ask for it. In conclusion, one can say that the Franchimont Act has much improved the position of the civil claimant within the criminal proceedings.

The civil claimant has several means of redress, but only if he joins the proceedings in first instance. For example, during the pre-trial stage, it may occur that the judges chamber (*raadkamer, chambre du conseil*) declares that the public action or the claim of the victim is inadmissible. Then both the prosecution service and the victim have the right to ask a review of this decision from the chamber of indictment (ss. 29-1 and 135 CCP). The chamber of indictment may reject either the inadmissibility and order further investigations, or it may confirm the decision taken. In the latter situation, the victim may lodge an appeal with the Court of Cassation because it concerns a final decision in last instance.<sup>130</sup> During the trial stage, the victim in his capacity as a civil claimant is a real party to the proceedings (s. 66 CCP). Accordingly he has the right to lodge appeals against decisions of the examining magistrate and of the criminal court.<sup>131</sup> The civil claimant may appeal those parts of the judgment of the criminal court which regard the civil claim for damages. He cannot lodge an appeal against a verdict which he feels is too low. Because the appeal only relates to the private claim for compensation, the curious circumstance arises that the appeal before a criminal court regards an exclusively civil matter. In the Court of Assizes, the situation is somewhat different. This court is competent concerning felonies and it is the first and only court that tries the case on its merits. Therefore, victims of serious crime have no means of lodging an appeal. The civil claimant can only go to the Supreme Court for a review of all the parts of the judgment regarding the claim for compensation (s. 216 CCP).<sup>132</sup>

In practice, being a civil claimant has several advantages for a victim. It does not only save him time and money. He can also profit from the fact that the burden of proof is placed with the public prosecutor. Besides, civil claimants who joined the proceedings cannot be ordered to pay legal and procedural costs if the accused is acquitted (contrary to victims acting as private prosecutors, see § 5.4). However, it may also comprise certain disadvantages. First, the right to join the proceedings during the trial presupposes that victims are informed about the date of the trial. However, victims who do not act as a civil claimant or registered as an injured person (see § 5.6) are not automatically notified (see § 6.1, D.9). Second, for some victims, being a civil claimant still may be a financial burden. The costs of instituting civil action vary a lot from one legal district to another. In some legal districts, the costs amount to 5,000 BF (EUR 124), while, in others, ten times this amount must be paid. This is a rather astonishing and inequitable situation. The courts have the right to determine how much it will cost to participate in a trial. Although these costs can be reclaimed from the offender, the fact remains that the higher the costs, the more difficult it is for victims to decide whether to become a civil claimant or not. They can never be sure whether the investment will turn out to be worthwhile. In addition, the courts refuse to accept the victim's claims regarding legal costs, and the wages and expenses of expert witnesses. These costs cannot be incorporated in the civil claim for damages.<sup>133</sup> They can only be reclaimed from

<sup>130</sup> R. Verstraeten (1990), p. 166.

<sup>131</sup> R. Verstraeten (1990), pp. 167-168.

<sup>132</sup> M.S. Groenhuijsen, *Schadevergoeding voor slachtoffers van delicten in het strafgeding*, Ars Aequi Libri, Nijmegen, 1985, p. 231.

<sup>133</sup> M.S. Groenhuijsen (1985), p. 230.

the State Fund for Victims of Violent Crime (see § 4.3.1), but not from the offender. Finally, the burden of proof with regard to the damages lies entirely with the victim,<sup>134</sup> as well as the enforcement of the awarded sum of compensation (see § 7.3).

#### 5.4 Private Prosecutor

The victim may institute private proceedings, either by issuing a direct summons (*rechtstreekse dagvaarding, citation directe*, s. 64 CCP), or by filing a complaint to the examining magistrate and simultaneously bring an action as a civil claimant (s. 63 CCP). The first option allows the victim, under certain conditions, to summon the offender directly before the police court (*politie rechtbank, tribunal de police*), or the criminal court of first instance (the correctional district court, *correctionele rechtbank, tribunal d'instance*).<sup>135</sup> The victim may summon the offender directly to court if he has been the victim of a misdemeanour, but not if he was the victim of a felony. The two most relevant conditions for a direct summoning procedure are that no writ of summons has been presented previously by the public prosecutor, and that no decision has been taken by the examining magistrate to bring the case to court.<sup>136</sup> The first objective of the direct summoning is to ensure the victim's right to be compensated by the offender, but it also obliges the court to decide on the case, even if the claim for damages is found inadmissible. The effect of the direct action is that victims can bypass the decision of the public prosecutor not to prosecute (see § 7.1). The legislature has taken several measures to discourage an unbridled use of the criminal justice system. First of all, the victim has to pay a deposit. The deposit again varies from one legal district to another, and may exceed the sum of 50,000 BF (EUR 1,240).<sup>137</sup> Furthermore, the private prosecutor may be ordered to pay legal and procedural costs. These comprise the costs made by the state, as well as those made by the accused if the court acquits the latter (ss. 162 and 194 CCP). Finally, the private prosecutor may be confronted with a claim for compensation by the wrongfully accused. He can even be charged with slanderous reporting of a crime (*lasterlijke aangifte, dénonciation calomnieuse*, s. 455 PC).<sup>138</sup>

The second option allows the victim to act as a civil claimant before the examining magistrate by giving the latter an explicit expression of his will in a writ (*akte van burgerlijke partijstelling, saisine*). The victim may also do this by intervention of his lawyer.<sup>139</sup> The prerequisite are that the victim has to be prejudiced by a more serious misdemeanour or a felony (see § 3.3)<sup>140</sup> which has not been brought before the court. Also, no civil suit for damages may be pending before the civil court.<sup>141</sup> The effect of this action is the seizure (*saisine*) of the examining magistrate, who is then under the obligation to investigate the

<sup>134</sup> *Nota slachtofferbeleid* (1995), p. 39.

<sup>135</sup> M.S. Groenhuijsen (1985), p. 229.

<sup>136</sup> M. Sheridan, J. Cameron (1992), Belgium-pp. 28-29.

<sup>137</sup> T. Peters, J. Goethals (1993), pp. 273-276.

<sup>138</sup> R. Verstraeten (1990), p. 168.

<sup>139</sup> R. Verstraeten (1990), p. 100.

<sup>140</sup> R. Verstraeten (1990), p. 47.

<sup>141</sup> R. Verstraeten (1990), p. 42.

case<sup>142</sup> as presented in the writ.<sup>143</sup> He is, however, not obliged by law to gather evidence regarding the damages suffered by the victim and may decide that the investigation will be summarily dealt with. After the summary investigation, the public prosecutor may still decide to nonsuit (*buitenvervolgstelling, cesser les poursuites*).

## 5.5 Injured Person

This new role of the victim has been introduced by the first Franchimont Act (1998). The reason to introduce the injured person (*benadeelde persoon, personne préjudicié*) is that the law did not grant rights to victims who had not (yet) assumed the role of civil claimant. This posed many problems because all these victims had no right to be informed about developments in their case. They were not even notified of the date and place of the trial (see § 6.1, D.9). Today, victims who register as an injured person have an autonomous right to information, as well as certain procedural rights. The injured person has the right to be notified about relevant developments in his case, such as the dismissal of the case (see § 6.1, B.6), the opening of a judicial inquiry by the examining magistrate, and the date, time, and place of a hearing (see § 6.1, D.9). Furthermore, the injured person has the right to formally request that certain investigative activities will either be closed, or undertaken (ss. 61 quater and 61 quinquies CCP). The decision on a request to close an investigative activity should be given within 15 days, and on a request to undertake a particular investigation within one month by the examining magistrate. The requests concerning investigative activities function as a discussion in summary proceedings during the judicial investigation (*strafrechtelijk kortgeding in opsporingsonderzoek, un référé pendant l'enquête préliminaire*).<sup>144</sup> Finally, the injured person has the right to be legally represented by a lawyer.

According to the new s. 5bis CCP, victims who have suffered injuries and losses caused by a criminal offence may register as injured persons. The victim should give a statement, in person or through his lawyer, which includes his name, address, the offence causing the damages, and his injuries and losses. A potential problem is that the validity of the statement is not checked.<sup>145</sup> The statement should be made at the secretariat of the prosecutor's office. This aspect of the law is much criticised. Originally, the law mentioned that the victim should register at the prosecution service but the legislature expected this would place too big a burden on the public prosecutors. In 1997,<sup>146</sup> it was decided that the role of the secretariat should be upgraded and this new function would fit into this concept. However, many legal

<sup>142</sup> Judgment in the *Laurent-Atthalin* or *Thirion*-case of the French Supreme Court, 8 December 1906, Cass. fr. 8 dec. 1906, D.P., 1907, 1, 207, note F.T., verslag Laurent-Atthalin, S., 1907, 1, 337. See R. Verstraeten (1990), pp. 121-126.

<sup>143</sup> The judgment in the *Bencker*-case of the French Supreme Court, 28 May 1925, Cass. fr., 28 mei 1925, D.P., 1926, 1, 121, S., 1926, 1, 140. See R. Verstraeten (1990), pp. 130-135.

<sup>144</sup> Regarding the discussion in summary proceedings, see also the comprehensive Guideline COL 12/98 of the Procurators-General at the Courts of Appeal (154 pages) on the Franchimont Act, Brussels, 5 October 1998, pp. 35-43, and pp. 73-85.

<sup>145</sup> It has already occurred that the offender registered as an injured person. This frustrated the judicial investigation. However, it must be said that this was also caused by the practice of allowing the injured person to inspect the entire file, which is in fact contrary to the law. The law only allows the injured person to see those parts of the file which are relevant to him. Information supplied by Mr. Jaspaert, lawyer in Leuven, 3 December 1998.

<sup>146</sup> Act of 17 February 1997 regarding Personnel of the Prosecutor's Office.

practitioners and support workers would have preferred that the victim had been allowed to register at the police station, at the same time as reporting the crime. The legislature, however, felt that a certain additional effort should be made by victims who want to be notified, and that they should go to the secretariat to register. This is a very ambivalent point of view, because on the one hand the legislature feels that victims should be notified, and on the other hand this right should not be available with a minimal effort. The Minister feared that the registration of injured persons at the police station would give problems. The statement would then be included in all files, including those in which the offender is unknown. This would have too far-reaching consequences for the notification duty, especially regarding the final decision not to prosecute which compels magistrates and public prosecutors to motivate their decision. Moreover, the new role grants many rights to the injured person and 'a certain reflection' by the victim would be preferable.<sup>147</sup> Or, in other words, 'the statute of the injured person should not become commonplace'. Notification would then be required in all cases, even if it concerned a 'trifle incident'.<sup>148</sup> In practice, however, an additional legal barrier has been put up contrary to the spirit and letter of R(85)11, in particular, because the law requires that the statement should be made in person and cannot be made by letter.<sup>149</sup>

## 5.6 Witness

Everyone with information about a crime can be heard as a witness, except for the accused's spouse, some of his other relatives, and the civil claimant. The victim who acts as a civil claimant can no longer be heard as a witness because he is a full party to the proceedings, and may (financially) benefit from a conviction. However, the purpose of this rule is frequently frustrated because victims are often advised to bring an action as a civil claimant after they have testified as a witness.<sup>150</sup> This prevents the loss of a potentially valuable testimony, especially relevant in certain cases where the victim is the main and only witness, e.g. in sexual offences. A fact which is particularly true in Belgium because here the rule one witness, no witness (*unus testis nullus testis*) is not followed. Accordingly, a person may be convicted on the basis of the testimony of only one witness, if the judge is convinced that the accused is guilty.<sup>151</sup> However pragmatically sound this approach may be, the fact remains that a victim whose testimony is needed cannot act as a civil claimant and thus misses out on a lot of the rights attached to this role. This is particularly true since the promulgation of the Franchimont Act.

Witnesses may be heard both during the preliminary stage, by the examining magistrate, and during the trial (see § 8.2). Witnesses are usually heard under oath, unless they are under the age of 15 (s. 79 CCP), or if they were previously convicted and deprived of their right to testify (s. 31 PC). However, persons falling within these two categories may be heard without taking an oath. With respect to the examination of witnesses during the pre-trial stage, the Supreme Court has accepted that if the examining magistrate does not include

<sup>147</sup> Discussion in Parliament, 1997-98, nr. 1-704/4, 338-340 and 347-349.

<sup>148</sup> Parliamentary Documents, Senate 1997-98, nr. 1-704/4, 349.

<sup>149</sup> See R. Verstraeten, 'Nieuwe rechten voor het slachtoffer tijdens het vooronderzoek', in: CBR, *Het vernieuwde strafprocesrecht; een eerste commentaar bij de wet van 12 maart 1998*, Maklu, Antwerpen, 1998, pp. 194-200.

<sup>150</sup> M. S. Groenhuijsen (1985), pp. 229-230.

<sup>151</sup> Chr. van den Wyngaert (1993), p. 40.

the identity of the witness in the record, as prescribed by law, this does no longer entail the nullity of the statement. The question of the acceptability of the statements of anonymous witnesses in court, however, is still uncertain.<sup>152</sup>

## PART II: THE IMPLEMENTATION OF RECOMMENDATION (85) 11

### 6 THE VICTIM AND INFORMATION

In Belgium, many initiatives have been taken to improve the provision of information from the authorities to the victim. The Franchimont Act (see § 4.3.1.) has introduced the injured person, a role which, when assumed by the victim, gives him the right to be notified about certain developments in the case, as well as the right to inspect the legal file. Moreover, the newly created victim units (see § 3.7) and the reception and information services at the prosecutor's offices and the courts (see § 3.8) make a significant contribution to the provision of information to the victim about the criminal proceedings, and his opportunities in this context.

With respect to the flow of information from the victim to the authorities, the Franchimont Act has given the victim more opportunities, e.g. he has now the right to add documents to the legal file, and to request certain investigative activities. Also, the Act on Early Release (see § 4.3.1.) should be mentioned. If victims opt-in to the notification system, they will be notified about early release. Certain groups of victims have the right to be heard by the Committee granting early release. Finally, following the example of neighbouring France, houses of justice (*justitie huizen*, *maisons de justice*) have been set up in order to bring the judicial system closer to the public. In these houses of justice, lawyers and justice assistance are present to guide citizens, and more specifically victims and accused persons through the (criminal) justice process. Justice assistance provide general information to victims about criminal proceedings. They may also be involved in notifying certain victims of violent crime of the release of the offender. Furthermore, they cooperate in mediation programmes and the effectuation of alternative sanctions.<sup>153</sup>

#### 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 1992 Police Act lays the legal foundation for the police duty to inform victims:<sup>154</sup> 'The police should assist victims of crime, in particular by providing them with the necessary information' (s. 46 Police Act). This general statutory duty has been specified in guidelines

<sup>152</sup> Chr. van den Wyngaert, o.c., p. 41.

<sup>153</sup> Ministry of Justice, *Justitie huus. Een open deur*, Brussels, 1998b.

<sup>154</sup> Yet any indication as to its implementation was lacking until the presentation of the Guideline OOP 15bis in 1994. See T. Peters, J. Goethals (1993), p. 314.

(see § 4.3.2.). The 1994 Guideline OOP 15bis specifically obliges policemen to give victims information about the criminal proceedings, their possibilities to obtain compensation, and legal assistance. It also contains the duty for police officers to refer victims of crime to victim services.<sup>155</sup> This Guideline also specifies when information should be provided. As a rule, it should be given during the first contact at the police station. However, situations may occur in which it will be necessary to contact victims a second time (*hercontactname, récontacter*). Recontacting and visiting victims at home is a special and unique feature of the Belgian guidelines. The purpose of visiting victims at their home is to inform them about actions undertaken by the police, the progress in their case, and to supply victims with information on what measures can be taken to prevent similar crimes in the future (the latter concerns property crimes in particular). Recontacting can also be used by the police to receive further information about the case. Victims should be contacted by the police within a few weeks after the crime. The main advantages are that victims do not have to come to the police station if additional information on the case is needed, and that they are acknowledged and do not feel neglected or forgotten by the criminal justice authorities. Moreover, the police have the opportunity to check whether the victim needs additional help and assistance, and may refer the victim to social or victim services. It is a sympathetic and constructive way of dealing with victims. In practice, this policy is not applied nationwide. Only in certain legal districts, the police contact victims a second time. Often, these districts have received additional funding via the security and prevention agreements (see § 3.7). Mostly, the recontacting of victims is used to give them advice on how to prevent crimes from happening in the future, rather than give them information about relevant developments in their case. In addition, the police do not always contact victims in the prescribed way. For instance, in the legal district of Kortrijk, the police have developed another strategy. They telephone victims instead of visiting them at home, which would be too time consuming.<sup>156</sup>

When a victim reports a crime, the police take down his statement and give him a copy of the report. The police should also give him a copy of the attestation of the complaint (*attest van klachtneerlegging, attestation de dépôt de plainte*). The front cover of the attestation mentions the name of the police officer, opening hours and telephone number, as well as the registration number of the report, and the number of the notice sent to the prosecutor's office (if the latter is already known). Furthermore, it says that by reporting the crime, the victim has indicated his wish to receive compensation and that the report will be sent to the public prosecutor, who will decide what action will be taken. The attestation also advises victims who want to be informed to write to the prosecutor's office (address is included) and to mention the registration number. The back cover contains practical information about the criminal proceedings, and explains what the public prosecutor may decide (prosecute, mediation/claim settlement, or dismissal of the case). It also informs the victim on what actions to take if his case is dismissed. The back cover contains a glossary explaining the different legal terms. The police are obliged to explain the content of the attestation to the victim.

Unfortunately, in practice, the attestation is not used in all legal districts. It is generally used much more by the national police than by the municipal police. However, in those legal districts where it is frequently used by both the national and municipal police, the

<sup>155</sup> E. Van Kerckhoven (1996), p. 4

<sup>156</sup> Information supplied by M. Puttaert, Director of Victim Support Flanders, Berchem/Tilburg, 23 April 1999.



attestation is a success. It must be said that, in general, these districts are rather well advanced in the implementation of the national victim policy. Here one sees other, self-imposed measures to inform victims. In the legal district of Leuven (Louvain), for instance, the national police and the municipal police have made a checklist containing the items of information which should be given to victims. This checklist facilitates and structures the provision of information.<sup>157</sup> Furthermore, they provide the victim with a model form on how to bring an action as a civil claimant. The Leuven national police force additionally supplies the victim with a model letter to request information from the public prosecutor.

In 1996, the police forces in this legal district have designed an opt-in procedure for referral to victim support. The victim signs a paper which authorizes the police to give their name and telephone number to victim support. In practice, approximately 70% of the victims opt in to the referral system to victim support.<sup>158</sup> As a result of the Cooperation Agreements, this referral system will be applicable in all legal districts in the year 2000. The referral system is in fact the essence of the Cooperation Agreements between the federal government and the communities (see Scenery).<sup>159</sup>

Besides the attestation forms, the federal government has printed leaflets and brochures to help the police with their information duty. The leaflets 'You are a victim of crime' and 'You are a witness' explain in a few pages the essential facts, rights, and obligations in relation to the victim's interests. The brochures 'You, the victim' and 'Your rights as a victim of crime' explain in very simple words what steps the victim may take, from reporting the crime to obtaining compensation by the State. In addition to these leaflets, victim support centres also print leaflets, such as the leaflet 'Victim guide' (*Slachtoffer wegwijs*). In 1998, the Minister has furthermore published a brochure called 'The rights of the victim of crime' for the police, magistrates, lawyers, and social workers. In practice, individual officers like to use the leaflets and brochures. Usually the victim units make sure that enough leaflets and brochures are in stock.<sup>160</sup>

The federal government has stimulated the establishment of victim units at the municipal police and the appointment of social assistants at the national police (see § 3.7), and the creation of reception and information services at the prosecutor's offices and courts (see § 3.8). The main purpose of these services is to assist the police, public prosecutors, and magistrates with their informatory duties.

The conclusion that substantial progress has been made seems to be justified. However, it cannot be backed with scientific data or statistics. The only research available is based

<sup>157</sup> The checklist of the municipal police mentions the following items which have to be marked by the police officer: (1) I handed over the victim brochure, (2) I explained its contents, (3) I provided specific information, (4) I provided information about victim support, (5) I discussed the possibility of assistance by victim support, (6) I contacted victim support on behalf of the victim, (7) I gave the registration number of the report, (8) I asked if the victim wanted to be informed about the proceedings and the final decision regarding prosecution, (9) I recontacted the victim, (10) I offered practical help to the victim. The checklist of the national police is not the same as that of the municipal police, but the content is comparable.

<sup>158</sup> Information supplied by Mr. S. Omblets, social assistant national police Leuven, 1 December 1998.

<sup>159</sup> See M. Verhelst, *Nood aan een welzijnsgerichte benadering van criminaliteit, onveiligheid (sgevoelens) en slachtofferzorg, een tussentijds verslag als aandachtsambtenaar relatie welzijn-justitie*, Brussels, November 1998, pp. 10-12.

<sup>160</sup> Information provided by the police forces in Leuven, 3 December 1998.

on data from 1986.<sup>161</sup> At that time, only a small percentage of the interviewed victims claimed to have been informed by the police during the first contact or during the visit at home.<sup>162</sup> Nowadays, the number of victims who receive information by the police should be much higher. The authorities demonstrate an increasing attention for the position of victims, and stress the relevance of information for victims in many ways. The training of recruits and incumbent personnel has been improved (see § 3.1). Several guidelines (see § 4.3.) have been published regarding the information duties of the police. The federal government and police forces have developed and implemented information strategies, such as the victim leaflets and brochures. Moreover, the victim units and reception and information services (see § 3.7 and § 3.8) have been set up to assist the police forces with their informatory tasks. Finally, the victim's rights to information have been incorporated in the 1998 Franchimont Act (see § 4.3.). However, no evaluation study has yet been carried out to measure the actual progress made in this respect.

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

Before 1998, victims could obtain information about the outcome of the police investigation by means of the number of the report (see A.2.) or registration number of the prosecutor's office. With this number, the victim could contact the prosecution service. The victim was not notified automatically by the authorities. In practice, it tended to be difficult for victims to obtain information on the outcome of the police investigation. First of all, because the prosecution service was often unwilling to provide the victim with information under the pretext of the secrecy of the investigation. It is known that in many cases, letters of victims in which they requested to be informed were left unanswered. The secrecy of the pre-trial stage has been for a long time an easy barrier for the authorities to make communication with victims difficult, or even impossible.<sup>163</sup> The 1998 Franchimont Act improved this situation for victims who register themselves as an injured person (see § 5.6). Injured persons have the right to be informed on the outcome of the investigation, on whether their case will be dismissed, and whether a judicial inquiry will be conducted by the examining magistrate (s. 5bis prel.title CCP, see B.6.). The Franchimont Act has even gone further than the right of the injured person to be informed about the outcome of the police investigation. Injured persons have also been granted the right to inspect the legal file, and to see for themselves what evidence has been collected (see § 5.5).<sup>164</sup>

<sup>161</sup> This research is based on a small scale victim survey, carried out among 99 victims of violent property offences who reported the crime to the police in 1986. The data should therefore be interpreted with some caution. The results of the survey are only being presented as an indication of daily practice at that time. The research is published in T. Peters, J. Goethals (1993), pp. 133-176.

<sup>162</sup> According to the survey, only 16% of the victims interviewed claimed they had been assisted and /or informed by the police. 27% of the victims indicated that police was only involved with investigative activities. Revisiting victims was more often undertaken to get information from victims (17%) than to provide them with information (10%). See T. Peters, J. Goethals (1993), pp. 171-176.

<sup>163</sup> R.Verstraeten (1998), p. 212.

<sup>164</sup> In the first months after the Act came into effect, injured persons were generally granted the right to study the file. However, the manner of implementation might need to be reconsidered. In the legal district of Leuven, victims who want to use their right were given the entire file instead of the relevant parts, mainly because the authorities found it too difficult or too time-

The statute of the injured person gives victims who want to act as civil claimants in a later stage or not at all, the same rights to information as the civil claimant. However, victims who do not assume one of these roles are not informed by the authorities. They will still have to contact the prosecution service themselves to obtain information about the outcome of the police investigation. Only the future will learn whether the role of the injured person will turn out to be a success. In theory, it is an attractive option for victims who want to be notified about what happens in their case following the police investigation, especially, for victims who need to testify in court (see §§ 5.3, 5.6). But the barrier which has been put up – registration at the prosecutor's office – may turn out to be inhibiting, which is perhaps what the legislature aimed for.

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

Before the 1998 Franchimont Act, the victim who did not act as a civil claimant was usually not notified about a dismissal of the case, nor was he notified of the decision to prosecute. He was often not even informed about the date of the trial. In general, as soon as the police file was transferred from the police to the prosecutor's office (*parket, parquet*), the victim was no longer kept informed. This reign of silence was not even broken if the victim asked for information about a specific event, such as the date of a hearing of the suspect. Since October 1998, however, every victim may register as an injured person. The registration is a clear and official expression of his wish to be notified about, *inter alia*, the final decision concerning prosecution. As stated above, he has the right to be notified if the case is dismissed (*klasseren zonder gevolg, classement sans suite*). Furthermore, the public prosecutor should state the reasons for dismissal (s. 28quater CCP). The reasons are formalised and grouped into three categories: the offender is unknown, or the case is dismissed for technical or policy reasons.<sup>165</sup> The fact that victims registered as injured persons are notified gives them the possibility to consider their options. They may, for instance, decide to prosecute the suspect themselves (see § 5.4 and § 7.2, B.7). As regards the public prosecutor's decision to prosecute the case, not every victim is informed. Again, the right is differentiated according to the role of the victim. If the prosecutor decides to prosecute, the victim who plays the role of civil claimant, has registered as an injured person,<sup>166</sup> or has engaged a lawyer will be informed. However, victims who do not fall into these categories are not informed.

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consuming to select these parts. This practice may cause additional suffering. For example, the father of a child who had been sexually abused by an uncle was given the entire file to read. The file included the results of an investigation in the neighbourhood, which stated that many of the neighbours believed the father to be the perpetrator. Information supplied by Mr. G. Jaspaert, lawyer in Leuven, 1 December 1998.

<sup>165</sup> A technical dismissal concerns cases in which there is insufficient evidence against the suspect to prosecute the case. A policy dismissal means that prosecution is uncalled for due to the internal guidelines of the prosecution service.

<sup>166</sup> The right of the injured person to be informed about a decision to prosecute can be derived from the fact that he will be notified about the decision to perform a judicial investigation, and the decision to have a hearing before the investigative or trial court (s. 5bis preliminary title CCP).

There is thus no general right to be informed about the final decision concerning prosecution. The victim always has to undertake some kind of action (assume the role of claimant/injured person, or hire a lawyer) to be notified.

*(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 right to join the proceedings as a civil claimant during the criminal process presupposes that victims are informed about the date of the trial. According to guidelines of the prosecution service (see § 4.3.2), the victim of crime should be notified of the place and date of the trial. In practice, the information is given by means of a small-sized letter, written in official legal language. Moreover, the content of the letter is not very victim-friendly. The letter states that the information about the date and place of the trial is merely intended as an announcement. According to Eugene, the letter suggests that the information is given for the improbable event that the victim might wish to attend the proceedings. Should the victim still have some doubts about going to court or not, the letter tells him that he has to pay his own travelling expenses.<sup>167</sup> A problem here is that before the 1998 Franchimont Act, not all legal districts complied with the requirement to inform victims of the date of the trial. The victim's lawyer, if he has engaged one, was always informed, but without legal representation, no information was supplied. In 1998, the legislature therefore decided that coherence in victim policy should be reinstated. This has been done through the registration as an injured person (see § 5.6). Every victim who registers as an injured person is informed about the date and the place of the hearings, both during the trial and in the pre-trial stage. Today, this is still done by means of the same small-sized letter.

With respect of the possibilities regarding compensation, the 1994 Guideline OOP 15bis obliges the police to give victims information about their possibilities to obtain compensation and legal assistance, and the various support schemes (see § 6.1, A.1). It has to be noted that only the police are obliged to inform a victim about his possibilities to obtain compensation and restitution.<sup>168</sup> A practical hindrance regarding compensation is that police officers find it quite difficult to explain the criminal proceedings to victims and the formalities they have to fulfill in order to be able to claim compensation. This has not changed, in spite of the leaflets, brochures, and model forms (see § 6.1, A.2). However, since the installation of the victim units at the police, the justice assistants can step in and take over. In particular with respect to compensation and the explication of the procedures, their contribution should not be underestimated. One critical remark should nevertheless be made. The services provided by the victim units thwart the legislature's point of departure that every police officer should be able to inform victims. Now, the danger is present that the police will increasingly transfer all their duties regarding victims to these units. At the municipal police, this danger is the greatest because here the victim units are usually well-staffed (see § 3.8).

<sup>167</sup> R. Eugene, 'Nodig, maar niet genodigd: het slachtoffer', *Rechtskundig Weekblad*, 1990-1991, nr. 31, p. 1045.

<sup>168</sup> However, due to recent changes in mentality, it is not uncommon for examining magistrates and public prosecutors to inform victims spontaneously about their rights within the criminal proceedings. They also refer victims to the reception and information services (see § 3.8).

The national police only employs one social worker who can be consulted, so it is physically impossible for this person to take over all information duties of the police. The national police social worker therefore remains closest to the actual task of supporting individual police officers in their victim-oriented tasks.

Concerning the outcome of the trial, the victim's right to be informed is again dependant on his role. Unless the victim is a civil claimant and thus a party to the proceedings, he is rarely informed about the outcome of the trial. The injured person does not have the legal right to be informed about the outcome of the trial. He is only notified of the date of the trial. This means that he should contact the authorities to learn the court's decision.

## 6.2 Information About the Victim

With respect to the transmission of information between the criminal justice authorities, it is important to bear in mind that this is one aspect of information that has caused severe problems in the past. The lack of communication and cooperation between the police forces and between the legal districts were referred to as the police war and the war between magistrates, respectively (see § 1)

- (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 guidelines of 1990, 1991, and 1994, oblige the police to give a meticulous and accurate statement of the injuries and losses of the victim (see § 4.3.2). The 1994 Guideline OOP 15bis states that the police should include all relevant information about the damages and losses of victims. Besides information on the losses and injuries sustained by the victim, the report should also contain the wish of victims to obtain information by the offender and the willingness of offenders to pay for damages. In practice, however, the injuries and losses of the victim are not systematically included in the file, nor are the police always as comprehensive as they should be.<sup>169</sup> This is also mentioned in the Memorandum on Victim Policy of the Flemish Minister. It states that the police and magistrates are not always as meticulous as they should be when writing down the losses and injuries sustained by the victim. Or, even worse, the police often suspect that victims try to cash in on the situation.<sup>170</sup> If this feeling is reflected in the way the losses and injuries are noted down in the report, this is bound to have a negative impact on the victim's chances to be awarded compensation by the court.

<sup>169</sup> Information supplied by Mrs. I. Koks, police assistant, Leuven municipal police, 3 December 1998. The police may argue that it is the victim's responsibility to prove his damages, and therefore it is not harmful to the case if they are not very meticulous about the items and value of the losses. Sometimes, the victims are also partly to blame. It frequently occurs that the police ask victims to provide information about their losses but to no avail.

<sup>170</sup> *Nota slachtofferbeleid* (1995), p. 39.

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

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

In theory, the legal file should include ample information about the injuries and losses suffered by the victim. In practice, however, it is usually the responsibility of the civil claimant or his lawyer to substantiate the claim (see A.4). With respect to any payments of compensation made by the offender, or his willingness to do so, the public prosecutor will normally mention this to the court. The defence counsel will always inform the court of the willingness of his client to compensate the victim. In many cases in which the offender has promised to compensate the victim, or has compensated the victim, the case will no longer be prosecuted in accordance with the Act on Penal Mediation (see § 4.3.1). If a legal district participates in a restorative mediation project (see § 7.1), the public prosecutor informs the court about the offender's cooperation with the mediation programme, and the payment of compensation. As a rule, this is taken into account by the court when deciding upon the form and quantum of the sentence.

## 7 THE VICTIM AND COMPENSATION

The victim may claim compensation from the offender within criminal or civil proceedings. Victims of intentional violent crime, who have not been compensated by the offender or insurance companies, may claim compensation from the State (Act of 1985, revised in 1997). The number of applicants is still rather limited today (see § 4.3).<sup>171</sup> Finally, compensation can be obtained through pre-trial mediation and claim-settlement (see § 7.1).<sup>172</sup>

### 7.1 The Expediency Principle and Compensation

Until the 1994 Act on Penal Mediation (see §§ 3.2, 4.3.1), the expediency principle governed the criminal procedure without an explicit legal foundation.<sup>173</sup> Since 1998, the expediency principle is also included in the Code of Criminal Procedure (s. 28quater CCP). According to estimations of legal practitioners, 70 to 80% of the reported crimes are dismissed. To remedy the negative impact of the expediency principle on the victim's right to receive

<sup>171</sup> State Compensation Act of 1 August 1985, *Belgisch Staatsblad*, 6 aug. 1985, as adjusted by the Programme Act van 24 December 1993.

<sup>172</sup> In 1998, Suggnomè, a National Forum for Reparative Justice and Mediation (*Suggnomè: Forum voor herstelrecht en bemiddeling*) was set up. The Forum is subsidized by the federal authorities and has the following objectives: to contribute to a humanization of the criminal justice system and society in general, by stimulating projects and methods which offer victims and offenders the opportunity to actively participate in conflict-settlement and reparation through communication, on a voluntary basis (s. 3 Suggnomè Statute).

<sup>173</sup> Supreme Court, 13th April 1896; Cass., 1896, I, 161. See R. Verstraeten (1990), p.35.

compensation, mediation<sup>174</sup> may be an important instrument. The 1994 Act and Guideline on Penal Mediation (*Wet op de strafbemiddeling/ Loi sur la médiation pénale*)<sup>175</sup> was promulgated to enhance the payment of compensation to victims and to create more latitude for the public prosecutor to give priority to the interests of the victim.<sup>176</sup> The Act comprises two options: claim settlement (*minnelijke schikking, un accord à l'amiable*, s. 216bis CCP) and penal mediation (*strafbemiddeling, médiation pénale*, s. 216ter CCP). Claim settlement can be used for crimes punishable with a maximum sentence of five years imprisonment. If the offender fully compensates the victim, he will not be prosecuted. In practice, this option is hardly ever used for crimes other than traffic offences and shoplifting.<sup>177</sup> The offender receives a letter from the public prosecutor, to which an accept Giro form is attached. In the accompanying letter, the public prosecutor states that there is sufficient evidence to prosecute for a certain offence, but he is willing to dismiss the case if the defendant pays the mentioned sum, either by means of the enclosed accept Giro form or in person at the debt collection office at the court. Penal mediation can be applied for offences that carry a prison sentence of two years or less. Furthermore, it is necessary that the offender does not dispute the damages or part of it. The result of successful mediation is also the dismissal of the case. The use of penal mediation has been stimulated by the decision to appoint justice assistants responsible for mediation<sup>178</sup> to perform the actual work. Since that time, penal mediation has been used increasingly. In 1997, 6,387 cases were mediated nationwide, a marginal number if compared with the large number of cases which are dismissed by the prosecution service.<sup>179</sup> However, the Minister of Justice and the National Forum feel that it is too early to conclusively assess the mediation system and the work of the mediation assistants.<sup>180</sup>

In 1998, a total of 80 justice assistants for mediation were appointed. In practice, however,

<sup>174</sup> Act of 10 February 1994 regarding a procedure for mediation in criminal cases, *Wet van 10 Februari 1994 houdende regeling van een procedure voor de bemiddeling in strafzaken*, B. S. 27 April 1994. Royal Decree of 24 October 1994 concerning implementation of mediation procedures in criminal cases, *Koninklijk Besluit van 24 oktober 1994 houdende uitvoeringsmaatregelen inzake de procedure voor bemiddeling in strafzaken*, *Belgisch Staatsblad*, 1 November 1994.

<sup>175</sup> In October 1991, a mediation experiment was launched by the Procurator General in Ghent in order to apply summary justice in a practical manner. A public prosecutor was appointed as mediator and he would suggest to an offender to avoid prosecution by fulfilling certain conditions. During the experiment, negotiations involved primarily the prosecution service and the offender. Attempts to compensate the victim were not as prominent. The offender had to agree with the conditions imposed upon him. If the conditions were fulfilled, prosecution lapsed. See Samenspraak (1995), p. 10. The experiment in Ghent inspired the legislature to constitute the 1994 Act.

<sup>176</sup> Explanatory Memorandum, *Memorie van toelichting*, *Gedr.St., Senaat*, 1992-1993, nr. 625/1, 4.

<sup>177</sup> Information supplied by Prof. T. Peters and Mr. I. Aertsen, Leuven University, 26 April 1995, and by Prof. R. Verstraeten, Leuven University, 2 December 1998. See also S. Christiaensen, 'Afdoening buiten proces door middel van transactie: een probleemstelling', in S. Parmentier, B. Hubeau, *De rechter buiten spel*, Tegenspraak cahier, Kluwer, Antwerpen, 1990, pp. 59-90.

<sup>178</sup> Before the Franchimont Act, these assistants were called 'mediation assistants'.

<sup>179</sup> Ministry of Justice and the National Forum for Victim Policy (1996), p. 17. In the same document on p. 31 some data are provided. From November 1995 until April 1996, the mediation assistants mediated in 2,030 cases. However, the success rate is not provided. According to information supplied by the Ministry of Justice, 6837 cases were handled in 1997. The Ministry aims at 10,000 cases in the year 2000. Information supplied by the Councillor of the Minister of Justice, E. van Kerckhoven, Brussels, 30 November 1998.

<sup>180</sup> Ministry of Justice and the National Forum for Victim Policy (1996), pp. 17-18.

the implementation is not as victim-friendly as one might expect.<sup>181</sup> A negative aspect of the mediation procedure is that the victim is not automatically notified of the decision of the public prosecutor to try mediation. According to the guideline, the public prosecutor may decide to what extent the victim should be informed. The victim is always informed about the fact that the offender has agreed to pay compensation. Yet, if the other three possible conditions (education, therapy, and community service) are applied, the interests of the victim and the offender are to be weighed as well as the latter's right to privacy.<sup>182</sup> Also, the Minister of Justice and the National Forum for Victim Policy have made some critical remarks. They mention that victims should never be compelled to cooperate with mediation. Also, the prosecutor's offices should apply objective selection criteria to avoid too many unsuccessful attempts.<sup>183</sup>

In addition to Penal Mediation, Belgium also has another – rather unusual – form of mediation. This type of mediation is called Restorative Mediation (*herstelmiddeling, médiation réparatrice*)<sup>184</sup> and is developed by chief public prosecutor Carmen and Professor Peters in the district of Leuven in 1993. The most remarkable feature of restorative mediation programmes is that mediation does not replace prosecution.<sup>185</sup> This makes it possible to mediate in very serious cases, such as murder and rape, because the case will be tried. The court may take the agreement and the attitude of the offender into account.<sup>186</sup> The main objective<sup>187</sup> of the project is to create a criminal justice system with a restorative countenance,

<sup>181</sup> R. Eugene (1990-1991), p. 1043.

<sup>182</sup> Guideline on Penal Mediation, under item V, p. 8.

<sup>183</sup> Ministry of Justice and the National Forum for Victim Policy (1996), p. 17.

<sup>184</sup> The experiment began on May 1993 and ended in December 1994.

<sup>185</sup> The project was called 'restorative mediation' (*herstelmiddeling*) and is a result of reflection upon the function and role of punishment. See T. Peters, I. Aertsen, 'Herstelmiddeling', in: Koning Boudewijn Stichting, *Gevangenis en samenleving II*, 1994, p. 168.

<sup>186</sup> Samenspraak (1995), p. 11.

<sup>187</sup> The mediation project has the following three-fold aim: to offer the victim material as well as immaterial restitution; to offer the offender the opportunity to compensate the victim; to offer the criminal justice system the chance to take the results of mediation into account, within the context of its decision-making process. The meetings between the parties may result in a written contract, if the talks are successful. Enforcement of the contract is supervised by persons involved in the project and the criminal justice authorities are informed. The mediation procedure is well structured and conducted by a neutral third party. Contrary to most mediation projects, the cases included into the project were of a more serious nature (serious misdemeanors and felonies) in which the public prosecutor has decided to proceed with prosecution. The average duration of mediation proceedings is three and an half months. The experiment included 36 files, 72% of which involved violent crime. A written contract was reached in 43% of the cases, only once the contract was not respected. Mediation started in half of the cases as indirect talks. However, in 40% of these cases, the indirect mediation evolved into direct talks, which gives a surplus value to the proceedings. According to the researchers, the value of the experiment is also to be found in the way the mediation process is designed. It appeals to the responsibility of the offender and demands an active participation in order to find a fair solution. In general, a financial settlement of the material losses was relatively easy to achieve, contrary to compensation of immaterial harm which is more complex. Evaluation of the motives of offenders and victims have shown that victims participate mainly for the very reason that they wish to make the offender answer to them for their actions and because of the damages suffered. Victims also expect the mediation talks to have a certain beneficial effect on the offenders. Offenders participate *inter alia* in the hope of getting a less severe sentence because



and to restore the material and immaterial losses suffered by the victim by means of direct or indirect communication between the offender and his victim. Recently, this project was implemented in other legal districts as well. In a quantitative sense, the restorative mediation programmes are not very successful yet, but this may improve if the project is extended to more, or even all, legal districts.<sup>188</sup>

- (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 prosecution service has discretionary powers to assess the necessity or desirability of prosecution. This margin of appreciation was for the first time laid down in the Act on Penal Mediation (see above and § 4.3.). This Act stipulates the public prosecutor's right not to prosecute the offender, *inter alia* on the condition that he compensates the victim's losses (s. 216ter CCP).<sup>189</sup> There are few indications in practice that the question of compensation is a primary consideration for public prosecutors in their final decision on prosecution. However, the prosecution policy in this respect varies from legal district to legal district.<sup>190</sup> The Franchimont Act may lead to improvements, because the public prosecutor must notify the injured person of his decision not to prosecute. Furthermore, he must motivate his decision (s. 5bis prel.title CCP). The duty to give reasons for the dismissal of the claim may indirectly cause the public prosecutor to take the question of compensation more frequently into consideration. However, the expectations should not be too high because the legislator does not mention that the public prosecutor should consider compensation. Public prosecutors have traditionally based their decision to dismiss a case on technical and policy reasons. It is unlikely that this will change.

- (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.*

Traditionally, the victim has the right to initiate private criminal proceedings. He may summon the offender directly to court, or take an action as a civil claimant before the examining magistrate (see § 5.4). He cannot ask for a review by a judicial authority of the final decision not to prosecute.

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they regret what happened and because they wish to compensate the victim, materially and/or morally. A majority of the victims claims the mediation proceedings has had a positive effect on their feelings. It helped them to come to terms with the offence and its consequences. See T. Peters, I. Aertsen (1994), pp. 168-204.

<sup>188</sup> Information supplied by I. Carmen, chief public prosecutor, Leuven, 3 December 1998.

<sup>189</sup> R. Eugene (1990-1991), nr. 31, p. 1043. But the law also gives the public prosecutor the authority to apply three other modalities, aimed at assisting the offender to deal with his problems.

<sup>190</sup> Information supplied by the Ministry of Justice, Ph. Verhoeven of the State Fund, Brussels, 2 December 1998, and chief public prosecutor I. Carmen of the legal district of Leuven, 3 December 1998.

## 7.2 The Court and Compensation

The right to claim compensation may be exercised before the criminal court but it may also be exercised in civil court (s. 4 prel.title CCP). Different options are available since Belgian criminal law has not adopted the principle of *electa una via non datur recursus ad alteram*.<sup>191</sup> Firstly, the victim may ask for compensation before the civil court and join a criminal procedure afterwards or even initiate private proceedings. The criminal court, however, cannot sentence the offender to pay compensation if the civil court has denied compensation, unless the object of the claim differs from the civil suit. Secondly, the civil claimant may relinquish his rights in civil court and take an action as civil claimant within the criminal process, or *vice versa*. Thirdly, criminal proceedings may be brought against the offender before or during civil proceedings. The civil proceedings will then be suspended for the duration of the criminal process according to the dictum: *le criminel tient le civil en état*.<sup>192</sup> Usually though, victims will act as civil parties in criminal proceedings. Joining the criminal proceedings has many advantages for victims. It is cheaper and faster, and the civil claimant can rely on the demonstration of guilt by the prosecution service (see also § 5.3).<sup>193</sup>

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

The court may award compensation to victims who take an action as a civil claimant in criminal proceedings (see § 5.3). The initiative to claim compensation lies with the victim. He should bring an action as a civil claimant, and take care of the proof of the claim. If the victim took civil action in the criminal trial and did not bring all the proof for the claim, he may ask the court to adjourn. The court may decide to set a date for a new hearing to deal exclusively with the civil claim of the victim. This is a very remarkable and important right of the civil claimant which facilitates the realization of the right to claim compensation from the offender during the criminal proceedings.<sup>194</sup>

The court has great discretionary powers to determine the injuries and losses of the victim, as well as the amount of compensation which the offender should pay. The foundation of the decision is the claim of the victim and the items of proof to sustain the claim. The court cannot award more damages than claimed by the victim, but the court may always moderate the amount of compensation that the offender has to pay to the victim, compared to the claim, and determine the sum *ex aequo et bono*. In this case, the court is obliged to indicate its motives in the judgement. According to s. 191 CCP, the court should even decide on the claim for compensation if the offender is not found guilty of the charge and is acquitted. Furthermore, the court's judgement must contain the reasons for its decision on compensation.

<sup>191</sup> Supreme Court, 27 May 1943; *Cass.*, 27 mei 1943, *Pas.*, 1943, I, 207. See R. Verstraeten (1990), p. 69.

<sup>192</sup> R. Verstraeten (1990), pp. 21-25; 70-73.

<sup>193</sup> R. Verstraeten (1990), pp. 24-25.

<sup>194</sup> Information supplied by Ph. Verhoeven, State Fund for Victims of Intentional Violent Crime, Brussels, 2 December 1998.

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

Within criminal proceedings, compensation remains a matter of civil law. The victim's civil claim for damages is joined to the criminal proceedings. Therefore, compensation is not a penal sanction. However, it may be a substitute for a penal sanction in the framework of the Act on Penal Mediation (see §§ 4.3.1, 7.1). Usually, the court awards compensation in addition to a penal sanction. If the court finds the accused guilty and the victim took an action as a civil claimant, it may impose a penal sanction and at the same time award compensation to the victim (s. 192 CCP).

- (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 court may defer the pronouncement of the sentence or defer the enforcement of the imposed penalty provided that the offender meets certain conditions, according to the Act on the Deferred Sentence, Stay of Execution, and Probation.<sup>195</sup> The Act does not contain an exhaustive list of conditions, and does not mention compensation explicitly. Nonetheless, the court may decide to defer the sentence or the enforcement of the punishment on the condition that the victim is compensated. In addition to these possibilities of the court, the legislature has also created possibilities to attach the condition to compensate the victim to decision in the pre- and post-trial stage. Before the trial, the public prosecutor may decide to summon the offender if he is not going to demand a penalty higher than two years imprisonment and propose that the offender will pay compensation to the victim or return any stolen goods. If the offender accepts and hands over proof of having fulfilled the conditions, the public prosecutor will dismiss the case (s. 216ter CCP). After the trial, the Conditional Release Committee (see § 4.3.1) may grant the release of the offender on the condition that the victim is compensated. Compensation is not explicitly mentioned in the Act on Conditional Release because it allows a wide margin of discretion to the Committee to take the interests of the victim into consideration (s. 4). The Act determines that the conditions should concern the reintegration of the offender into society, the protection of the society and the interests of the victim. The latter may comprise his financial interests. The offender may request to be rehabilitated. The main condition for rehabilitation is that the offender has compensated the victim or returned stolen goods in accordance with the court's verdict (s. 623 CCP). Whether the Committee regularly grants release on the condition of compensating the victim has not yet been the subject of research.

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*Wet betreffende de opschorting, het uitstel en de probatie*, 29 June 1964, B.S. 24 July 1964, as revised by the Franchimont Act.

### 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 by nature a matter of private law and is not collected by the State. According to the rules of private law, the collection of the awarded sum of money is the responsibility of the victim (s. 197 CCP). Section 49 PC, however, determines that payment of compensation to the victim and the restitution of goods have priority over the payment of fines. Concerning the collection of the awarded sums, the victim can ask the assistance of a bailiff but the costs of his services must be paid by the victim. It has been suggested by the National Forum for Victim Policy that the legislature should consider the introduction of enforcement by the state on behalf of the victim, for instance, to allow the debt collection agency to enforce the awarded claim of damages on behalf of the victim. So far, this suggestion has not been followed. Today, if a court awards a claim for compensation, this does not mean that the victim's financial problems are over. Victims often do not succeed in collecting the money because he is not assisted by the authorities in the enforcement. Only victims of intentional violent crimes may turn to the State Fund. This Fund pays compensation to victims who have acted as civil claimants but were unable to collect the money from the offender or insurance companies to cover their losses (see § 4.3.1, state compensation).

## 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 Belgian legislature appreciates the fact that the police are likely to be the first official body to come into contact with the victim after the crime has been committed. The police should therefore be trained to acquire the necessary skills to deal with victims in a respectful and considerate manner. These basic skills are regarded as essential elements of police training. On a national level, this new policy was implemented by the Minister of the Interior by drawing up a manual for teachers at police schools and academies on the subject of treatment of victims by the police (*Syllabus Politie Slachtofferbejegening*). The training of new recruits is extensive and deals with the following subjects: 1) victimization: perceptions and effects; 2) victims: expectations and needs; 3) evolution in legal provisions regarding the treatment of victims by the police; 4) treatment of victims: *basic duty* of the individual police officer; 5) provision of information to the victim during the first contact with the police; 6) possibilities of compensation; 7) cooperation between the police and the social services; 8) special cases of victimization: abuse of women, rape, children as victims and witnesses.<sup>196</sup>

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M.Th. Casman, *Politie slachtofferbejegening, syllabus*, Uitgeverij Politeia VZW, 1995.

The victim support services are also involved in the training of police officers.<sup>197</sup>

The training of incumbent personnel is left to the different police forces. The 1994 Guideline OOP 15bis states that police executives are responsible for training their personnel on the treatment of victims. Moreover, the Minister has formulated a guide (*Vademecum*) for daily police practice concerning victims.<sup>198</sup> Nevertheless, the local forces have a wide margin of appreciation on how, and to what extent, police officers should be trained. Unsurprisingly, different perceptions regarding training of incumbent personnel exist. Some police forces<sup>199</sup> perceive victim support as a duty of all individual members of the police force. For incumbent personnel, they started training programmes and developed a system of guidelines indicating how individual police officers should treat victims, and what services should be provided.<sup>200</sup> Others leave the responsibility to train police officers mainly to the victim units (see § 3.7). It is clear that, without the training of every member of the police, and without a proper integration of a victim policy within the organization, measures to try to upgrade the performance of the police regarding victims are not easily implemented. In the past, the low status accorded to non-enforcement police work, to those who practice it, and to the sections concerned have led to a crude separation of thinking.<sup>201</sup> This is hard to overcome without making every police officer aware of the rights and legitimate needs of victims.

According to the international victim survey, one-third of the victims interviewed were dissatisfied with the police in 1992. The most frequently uttered grievances related to the impressions of victims that the Belgian police did not take their report seriously (41.9%) and – most relevant here – to the lack of interest displayed by the police (39.6%). Explicit complaints about the treatment by the police were given by 13% of the victims.<sup>202</sup> In 1998, according to the Survey on Security (*Veiligheidsmonitor 1998*),<sup>203</sup> 44.5% of the victims were satisfied with the performance of the police, 32.7% were dissatisfied, and 22.8% of the victims were neither dissatisfied nor satisfied.<sup>204</sup> Victims in Flanders are more often satisfied (49.8%) than those in the Walloon provinces (37%).<sup>205</sup> Concerning the way they were treated by

<sup>197</sup> W. Meyvis, 'Ontwikkelingen in de hulpverlening aan slachtoffers van misdrijven in België', in: S. Snacken, D. Martin, *Slachtofferhulp en strafrechtsbedeling, Aide aux victimes et justice pénale*, Kluwer, Antwerpen, 1992, p. 101.

<sup>198</sup> *Nota slachtofferbeleid* (1995), p. 31.

<sup>199</sup> For instance, the national police force (*rijkswachtkorps*) and several municipal police forces in e.g. Gent, Kortrijk, Oostende and Leuven.

<sup>200</sup> However, because of the very general content of the guidelines, policemen find them difficult to work with. Moreover, any supervision over their implementation is lacking. See T. Peters, J. Goethals (1993), p. 263.

<sup>201</sup> Police officers who perform law enforcing duties are looked upon as 'real policemen' and 'crime fighters' to whom a helpful and understanding attitude towards victims is unthinkable. While the others are stigmatized as soft, inefficient or lazy. See S. Christiaansen, W. Meyvis (1990), pp. 118-119.

<sup>202</sup> J. van Kerckvoorde, T. Peters, 'De internationale crime survey. Een voorstelling van de resultaten voor België', *Panopticon*, 1993, p. 347.

<sup>203</sup> For the survey, 6000 persons over the age of 15 were interviewed. These persons are a representative sample of the population. Algemene Politieonderzoek, *De veiligheidsmonitor 1998. Beschrijving van de federale bevestiging*, Kluwer Editorial, Brussel, 1998b, p. 106.

<sup>204</sup> Algemene Politieonderzoek (1998b), pp. 63-64.

<sup>205</sup> Algemene Politieonderzoek (1998b), p. 67.

the police, however, 69.3% of the victims were satisfied.<sup>206</sup> In a few years time, the number of satisfied victims almost doubled, which is a considerable achievement. The probable reasons for this improvement are the effects of the changes in police training (introduced in 1995), in combination with the growing public pressure to take victims seriously (see § 1), the creation of victim units (see § 3.7), and initiatives to evaluate and enhance performance. To illustrate the latter, the national police have printed a questionnaire (*opiniekaart onthaal*) on which the victim can indicate his level of satisfaction with the reception at the station and the service provided by the police.<sup>207</sup> As regard the questionnaire, the national police have stated that they will use the victim's responses to improve the quality of the services. This type of initiative is crucial because it is an expression of the police management's concern with the treatment of victims, which is still probably the best method to bring about real change in the behaviour and attitude of police officers.

## 8.2 Questioning the Victim

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

The questioning of victims may take place in both the pre-trial and the trial stage. The questioning in the pre-trial stage is more important and more frequent than examinations during the trial, which is rather exceptional. Therefore, it is not surprising that the legislation and guidelines focus on the manner of questioning during the pre-trial stage.

The 1998 Franchimont Act includes some sections regarding the questioning of victims and other persons. The legislature does not stipulate the manner in which persons should be questioned during the (judicial) investigation. The way in which a victim is interrogated is still determined by the sensitivity and social skills of the examiner. However, the Act Franchimont gives victims the right to obtain a copy of the report of the examination, and the right to ask for additional investigative actions. During the questioning, they have the right to consult documents and join them to the file (ss. 47bis and 57 CCP).

According to guidelines and internal circulars, the police should make sure to create the right atmosphere to question the victim. Police officers should show understanding for the feelings of the victim, even if the case does not appear to be very serious. They should make sure not to trivialize the events and avoid blaming the victim or stimulate feelings of guilt. With respect to certain offences, they should furthermore explain why certain questions must be asked and prepare the victim for a confrontation with the offender.<sup>208</sup> Victims of sexual crimes should be questioned in accordance with the specific guidelines in this respect, referred to as the Set on Sexual Aggression. With respect to the questioning

<sup>206</sup> Algemene Politieundienst (1998b), p. 65.

<sup>207</sup> The victim can give his opinion on the waiting time (how many minutes did you have to wait before you were addressed by an officer, how many minutes did you have to wait before you could report the crime, or discuss your problem), interruptions (were you interrupted during your conversation/report and by whom), referral (were you referred to a social service or a victim support service), and the victim's general opinion about the way he was treated.

<sup>208</sup> Guideline OOP 15bis, and circulars of the police, such as the Memorandum of July 1991 of the national police (HDO/DOAD/803).

of minors, the Guideline on Audiovisual Recording (see § 4.3.2) is of particular importance. The audiovisual registration of an interrogation is particularly advised when a victim under the age of 14 may be a witness or a victim of sexual abuse, or in other cases of serious abuse (ss. 2.2 and 2.3 of the Guideline). The public prosecutor will determine in cooperation with the police where the examination will take place, and by whom it will be conducted (s. 1.1). The Guideline furthermore contains the basic duties of the interrogating police officer regarding the preparation of the witness and the actual interrogation. Also, the practical modalities of the interrogations are stated, such as the recommended duration of the examination, and the presence of a person of confidence. An expert may be requested to assess the validity of the witness' statements according to the Statement Validity Analysis (S.V.A.). The recording of the interrogation can be watched by those persons who are professionally involved in the case, such as magistrates, lawyers, experts and the civil parties (§ 7.3.1, s. 61ter CCP. In court, the videotape is watched behind closed doors (§ 7.3.3, s. 190 CCP). In practice, specialized judicial police units have already been operative for some time to question children in examination studios designed for this purpose, for instance in Brussels. As a result of the Guideline, more special units have been created. During all hearings, children and handicapped persons can be accompanied by their parents, guardians or other confidants. The only exception to this rule concerns crimes in which these persons are the possible offenders. The child may then be accompanied by another person whom it trusts, for instance a social worker.

As said in § 2.1, the trial stage is not governed by a strict immediacy principle. Consequently, the victim is usually not asked to testify in court. The pre-trial statements can be used as evidence by the court (s. 47bis-1c CCP). Likewise, audio-visual recorded statements are recognized as evidence. In the exceptional case that the victim will have to testify, he is protected to some extent by the rule that the questioning is always done via the presiding judge. The public prosecutor, the accused or his defence counsel may put questions to the judge, who may ask the victim to answer the question. The victim also addresses the presiding judge when answering the questions put to him by other parties to the proceedings. One particular aspect of court practice may be quite frustrating for victims and all other persons involved in criminal proceedings: the uncertainty at what time a trial will take place. An indication of the time of a hearing cannot be given because of the tradition, of the cases set for a particular day, that the case of the oldest defence lawyer present is tried first. Therefore, if the accused has a young lawyer, everyone, including the victim-witness, will have to wait a very long time before the case is tried, or they may even have to come back another day.<sup>209</sup>

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At the beginning of the day, everyone gathers at the court. Then the ritual starts when the lawyers try to assess the age of their brother counsels and estimate their waiting time at the court. Information supplied by prof. R. Verstraeten of the University of Leuven, who also practices as a defence lawyer.

### 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.*

Legislation provides for the opportunity to hold the trial *in camera*. The victim may request that the court tries the case behind closed doors, even if he will not attend the trial or act as a civil claimant. The decision of the court on this request is based on grounds of maintaining public order, or safeguarding the privacy of victims and other persons involved.<sup>210</sup>

The legislature has also recognized the negative effects publicity may have on victims. Press exposure is recognized as an important source of secondary victimization. The 1989 Act regarding Sexual Offences<sup>211</sup> puts a strict ban on publication of facts regarding the identity of those victims and guarantees their anonymity. This injunction on publicity can only be lifted for reasons concerning the investigation. Even then, the examining magistrate's consent or the victim's written permission is required (s. 378bis PC).<sup>212</sup> With respect to other victims, they are protected before the trial by the confidential, non-contradictory and non-oral character of the proceedings at this stage. However, for some time now, the prosecution service has tended to deviate from the rule of confidentiality in criminal investigations to improve the quality of press coverage. Press conferences on delinquency and criminal proceedings may cause many grievances to victims.<sup>213</sup> Sometimes victims who were denied information ostensibly for reasons of confidentiality learned particulars about the crime, the offender, or criminal proceedings from the press. Also, the police have been known to give information to the press, irrespective of the opinion of victims on publicity. This practice entails the risk that information, which victims would have liked to have kept secret, is made public.<sup>214</sup> Consequently, many victims feel affronted by such press conferences of the authorities.<sup>215</sup> The legislature has drawn lessons from the past, and in the 1998 Franchimont Act, some provisions have been included with respect to press releases by the criminal justice authorities. It stresses first of all that the pre-trial stage should remain secret, and that breaches are punishable crimes. At the same time, it recognises the need, in certain situations, to give information to the press. During the preliminary stage, the public prosecutor is therefore allowed to give information to the press for the sake of the public interest. However,

<sup>210</sup> T. Peters, J. Goethals (1993), pp. 312-313.

<sup>211</sup> Act of 4 July 1989 on Sexual Offences; *Wet op de verkrachting*, B. S. 18 July 1989.

<sup>212</sup> The victim also has been given the right to have a physician of his choice present during the physical examination. The costs of this examination are no longer for the account of the victim (s. 90bis CCP).

<sup>213</sup> In particular, if, despite requests, no information was provided to the victim but is provided to the press. As a result, the press is often an important source of information to victims and their families. Chr. van den Wyngaert (1994), p. 425.

<sup>214</sup> *Nota slachtofferbeleid* (1995), p. 40.

<sup>215</sup> The relationship between the criminal justice authorities and the press has been the subject of various ministerial guidelines. The first of these dates from 24 July 1953.



he should take care not to jeopardize the rights of the accused, the victim, and other persons involved, nor their private life and dignity. Insofar as possible, the identity of persons mentioned in the legal file are not given to the media (s. 28 quinquies-3, and 57-3 CCP). The same sections also oblige the defence counsel to respect the rights, private life and dignity of his client, the victim, and other persons involved in the proceedings (s. 28 quinquies-4, 57-4 CCP). The police are no longer allowed to give statements to the press. The accused, the civil claimant, and the injured person are also prohibited to use data, which they obtained through their right to inspect the legal file, to harm the private life or the physical or moral integrity of persons named in the file. Abuse of this kind of information is punishable with a maximum of one year imprisonment or a fine (s. 460ter PC). These legal provisions are certainly a great step forward towards the prevention of any publications of (inaccurate) information which unduly affects the private life and dignity of victims. In the past, this has sometimes occurred even when the preliminary stage had only just begun.<sup>216</sup>

Despite the new legislation, not all aspects of the disclosure of personal information by the media are regulated by laws or guidelines. In particular, violent crimes are being covered by the tabloids with a great longing for sensational stories. Moreover, certain journalists manifest a considerable lack of common decency in their press reports. Not only are the victim's name and place of residence included but photographs are published as well without the victim's permission.<sup>217</sup> Approximately 25% of such publications include names and addresses. The fact that victims are offended by such articles is reinforced by the portrayal of victims and their role in the incident.<sup>218</sup> Research (1991)<sup>219</sup> shows that the press covers 50% of the violent crimes.<sup>220</sup> Without exception, the coverage was done without prior knowledge of the victims concerned. A vast majority of the victims were very unhappy about the reporting, especially about the way the crime was represented, and the information published about them. As a result of publications in the press, some victims feared retaliation by the offender and/or his acquaintances. Others felt they were portrayed as if they were to blame for the offence.<sup>221</sup> Based on these findings, the conclusion appears to be justified that the legislature should either consider the introduction of legislation to protect victims

<sup>216</sup> Memorandum on the Franchimont Act, *De nieuwe wet Franchimont*, Kluwer Rechtswetenschappen België, 1998, p. 30.

<sup>217</sup> *Nota slachtofferbeleid* (1995), p. 40.

<sup>218</sup> T. Peters, J. Goethals (1993), pp. 64-65.

<sup>219</sup> I. Aertsen, *Slachtoffers van crimineel geweld: een kwalitatief-fenomenologische analyse*, in T. Peters, J. Goethals (1993), pp. 177-229.

<sup>220</sup> See also Cuyvers, who performed a study about the portrayal of victims by the media in 1985. He clearly proved the secondary victimization as a result of the judicial coverages. One of the interviewed persons for instance, stated that her husband was killed a second time in the press. Cuyvers recorded that press coverages included ample information on the private life of victims without any relevance to the understanding of the facts. Cuyvers claims that judicial coverages are often to the detriment of victims. Victims are victimized a second time and the press confirms his marginal position in society, which does not encourages healing processes. G. Cuyvers, *De maatschappelijke marginalisering van het slachtoffer van misdrijven. Een inhoudsanalyse van de berichtgeving over slachtoffers van levensdelicten*, K.U. Leuven, Leuven, 1985.

<sup>221</sup> Or as one of the interviewed victims asserted: 'It all comes down to the fact that the offender is presented as a hero and the victim is given the part of the ignorant, afraid and daft person.' Press coverage may also instigate negative reactions in the circle of acquaintances of the victim; the press releases made the victim look like a fool, or the victim was confronted with rebuke. T. Peters, J. Goethals (1993), pp. 195-196.

against sensational press reports, or insist on a code of conduct upheld by the media themselves. However, the latter option would require the guarantee that the media will live up to the agreement. This is most probably an unrealistic expectation if the very existence of a newspaper, magazine, or television programme depends on publishing sensational news items.<sup>222</sup>

*(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.*

No specific legislation exists to protect victims and their families against intimidation or retaliation. The only exception is the new Act on Stalking<sup>223</sup> which offers protection for victims of harassment. The Act on Stalking penalizes the repeated tailing of, spying on and beleaguering of another person (s. 442bis PC). Likewise, there are no specific provisions with respect to the protection of victims or witnesses involved in organised crime cases. However, there are some other regulations which offer some protection to victims. With respect to the police, Guideline OOP 15bis stipulates that police stations should provide separate reception rooms as to protect the privacy of victims.<sup>224</sup> The reception rooms should be separated from the spaces in which offenders, witnesses, and other persons may be waiting. In practice, not all police stations meet these requirements, usually because the buildings do not permit the creation of such a reception room. A second protective measure is the victim's right to ask police protection if he is intimidated or fears retaliation by the offender. The problem of this option is mainly that police protection is usually quite limited in time. Moreover, whether protection will be actually provided depends on the authorities' evaluation of the actual need for protection. If they decide that the victim should be protected, they may either offer the victim police protection, or take the accused in preventive custody, provided that the law allows this. A third option is the application of security measures. In practice, however, security measures are only applied in situations of clear and imminent danger to victims. Many cases are perceived not to meet these strict standards. A final factor that should be addressed is the presence of the victim's personal details in the legal records, to which the accused has access. Contrary to the personal details of the accused, the victim's particulars are not excluded from the file. This may lead to serious problems in practice.<sup>225</sup>

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<sup>222</sup> The legislature could consider to introduce measures as are applied in England (see Chapter 7).

<sup>223</sup> Act on Stalking of 30 October 1998, *Wet op de strafbaarstelling van belaging*, B.S. 17-12-1998.

<sup>224</sup> The explicit reference to the responsibility of police executives is often lacking in victim guidelines for the police. It may be very important to mention not only the duties of the ordinary police officers but also those of their superiors.

<sup>225</sup> In particular for victims of domestic violence, who fled the home and started a new life at a place unknown to the offender. Through the legal records, these offenders may gain knowledge of the whereabouts of their victims and the intimidation may start again. Information supplied by Mrs. M. Puttaert, director of Victim Support Flanders, 4 December 1998.

## 9 CONCLUSIONS

The local reality of mass protests against the dysfunctional Belgian criminal justice system and the need of the government to respond by reforms has been decisive in the recent significant improvement of the position of victims in criminal proceedings. The mass protests demonstrated beyond a doubt that the confidence of the public in the functioning of the criminal justice system had reached an all time low. The protests were not only a huge incentive to bring about changes but also an excellent opportunity to unify all factions and political parties in society to genuinely bring about reforms in the criminal justice system. The latter is crucial to a nation that is as divided as Belgium, where reform processes are particularly cumbersome and time-consuming. The efforts of the federal and communitarian government to remedy the lack of attention for victims and the lack of cooperation displayed by the criminal justice authorities have been enormous as well as exemplary of what can be achieved in a relatively short period of time. Furthermore, the changes have not only been brought about in the legal domain but also in daily practice. Examples of the former are the promulgation of the Franchimont Act, the Act on the Prevention of Violence between Spouses and Partners, the Act on Early Release and the Act on Stalking. Concerning the latter, for instance, the reorganizations of the police and prosecution service, the creation of police victim units and reception desks at the prosecution services and the courts are worth mentioning. Summarizing, in a few years, the position of victims in Belgium has improved to the extent that it ranks among the best in Europe.

For the purpose of this research, the reforms are too recent to make a valid assessment of their impact and effectiveness. Further study is therefore recommended, especially since the reforms make such an excellent point of departure to improve the position of victims within criminal proceedings. However, one conclusion can be drawn: the way the Belgian state is structured frequently prevents the development of consistent victim policies and the rational distribution of duties or responsibilities. The creation of victim units at the police, for instance, is a well-intended and highly praise-worthy initiative, but the services provided rather overlap those provided by victim support services. This makes one wonder whether setting up a sound and systematic referral system to victim services combined with the creation of a national Victim Support organization in the Walloon provinces (similar to that in Flanders) would not have been a better option. This would have been a less unsystematic, confusing, and expensive approach. The main lesson to be learned is that the fragmentation of initiatives of the federal and regional or communitarian governments stimulates neither a coherent victim policy nor a proper distribution of public funding. However, the fragmentation is not easily overcome in a nation like Belgium.

Although many reforms have been implemented, certain aspects of the functioning of the criminal justice system need to be revised. The court practice in which the seniority of lawyers determines the timing of the trial is outdated and bad practice. Also, the presence of the victim's personal details and the unrestricted access of the accused to the legal file should be addressed. One might consider introducing the obligation for the criminal justice authorities to make the victim's personal details illegible in order to protect the privacy of certain victims. Also, the enforcement of civil claims should be addressed. The victim should be able to obtain assistance from the authorities, or the national debt collection agency should

be allowed to enforce awarded claims on behalf of the victim.<sup>226</sup>

To conclude, the Belgian (judicial) authorities have made a tremendous effort to enhance the position of victims within the criminal justice system. They realized that they can no longer afford to ignore victims of crime. This awareness is a critical condition to bring about true change for the better.

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See Chapters 22 (Sweden: civil claim for compensation) and 17 (the Netherlands: compensation measure).

# Supplements

## ABBREVIATIONS

ASC	-	Act on State Compensation
B.S.	-	Belgium Gazette ( <i>Belgisch Staatsblad</i> )
Const.	-	Constitution
CCP	-	Code of Criminal Procedure ( <i>Wetboek van Strafvordering, Code de procédure pénale</i> )
PC	-	Penal Code ( <i>Wetboek van Strafrecht, Code Pénal</i> )

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# Chapter 5

## Cyprus

### SCENERY

Cyprus is the third largest island in the Mediterranean and stands at the crossroads of Europe, Asia, and Africa. Perhaps this is the reason why it has had such a tumultuous history. Many peoples passed through, including the Phoenicians, the Assyrians, the Egyptians, the Persians, the Romans, the Crusaders, the Venetians, the Ottomans and the British. The Mycenaean Achaeans, however, formed Cyprus' first Greek roots. Today, Greek is still the main language of the Cypriots on the unoccupied part of the country.

While, ethnically the Cypriot people were of Egyptian-Asiatic origin, they fell under Greek influence at an early stage in their history. The first Greek colonies were established after the Trojan wars (1200-1000 BC). The strengthening of the Greek institutions and the establishment of the Greek language and culture took place during Cyprus' long status as a Greek city-state, beginning with Alexander the Great. Cyprus found relative stability within the Byzantine Empire. Then again it suffered invasions at the hands of the Muslims, the Crusaders, the Mamluks, and the Republics of Venice and Genoa. One of Cyprus worst eras was a lengthy domination by the Church of Rome during and after the crusades because it sought to destroy the worldly and spiritual power of the Greek Orthodox Church. The Venetians were ousted by the Ottoman Turks in 1570. Initially Turkish rule was benevolent. It granted independence and support to the Greek Orthodox Church. However, animosity between Turks and Greeks grew and eventually led to a massacre of Greek-Cypriot Christians in 1821. Hostility between them has rarely abated since then.

Three hundred years after the beginning of Ottoman rule in Cyprus, the empire became increasingly difficult to govern. Control over Cyprus was then traded to Britain in 1878 in return for a promise of assistance against Russia. Britain itself needed the island for the protection of the Suez Canal (opened in 1869). Nominally, Cyprus remained part of the Ottoman Empire until 1919 when the British annexed it in the war against Turkey. In the treaty of Lausanne, Turkey recognised this annexation. Finally, Britain granted Cyprus the status of a crown colony in 1925.

The Greek Cypriot population has often striven for union with Greece (*enosis*). The call for enosis started in 1832, the year in which Greece won its independence from the Ottomans. Enosis has ever since been the most perplexing feature of Cyprus' political existence. Almost a hundred years later (1931), severe violence erupted in a struggle for union with Greece. After the violence, the Legislative Council was dissolved and all legislative and executive authority became vested in the British Governor. However, the Greek Cypriots struggle for enosis was far from over. Nationalists founded a guerilla army called EOKA (National

Organization of the Struggle for the Freedom of Cyprus). It was led by Colonel Grivas, and fought both the Turks and the British. The British were unable to put an end to the civil war. The stalemate was finally broken through agreement between Greece and Turkey at the Zurich Conference in 1959 and an uneasy peace returned to the island. The Zurich Conference laid the foundation for Cyprus' present status and governmental structure in that it provided for an independent Republic with a proportionate division of power between the Greek and Turkish communities on the island. Cyprus finally became a Republic on 16 August 1960. In the following year, it became a member of the British Commonwealth and the Council of Europe.<sup>1</sup> However, quarrels over resources between the government and the executive continued. Little interest was shown in genuine cooperation. Indeed, many of the political representatives saw the collective state as only a temporary solution. Greek nationalists continued to demand enosis, while the Turks increasingly called for taksim, or partition of the island. This uneasy period lasted for three years. At the end of 1963, President Makarios planned a revision of the Constitution to prevent the apparent crises. However, the revision threatened to deprive the Turkish Cypriots of many of their guaranteed rights. The Turkish government therefore threatened to intervene if the revision was introduced unilaterally. This marked the beginning of widespread civil violence. Over 500 persons were killed during the summer of 1964. It was only after a UN peacekeeping force arrived that the violence was brought to a halt. By 1968, the situation began to relax.

Unfortunately, as the situation of Cyprus calmed, tensions rose between Athens and Nicosia. The Greek military dictatorship felt provoked by the fact that Makarios offered asylum to persecuted democrats and did not impose press censorship. The Greek junta decided to rid itself of the Cypriot President. On 15 July 1974, the island's capital was rocked by gunfire, and attacks all over the island followed. The long-sought enosis happened overnight, but it was a very different union from the one that the Cypriots had imagined. During the attacks, only the Turkish Cypriots were left unscathed by the junta so as not to provoke Ankara to intervene. However, at daybreak on 20 July, five days after the coup by the junta, Turkish torpedo boats landed on the north coast. The Turkish air force bombed the island's capital. The 'mini junta' in Nicosia was just as surprised as the military junta in Athens. After two days, the Greek junta fell because officers refused to go to war with Turkey. In the meantime, Turkish troops quickly succeeded in occupying an area to the north of Nicosia where many Turkish Cypriots lived. Defying the resolutions of the UN Security Council, the Turkish army refused to withdraw. On August 14, it even marched onwards despite intensive peace talks held in Geneva. Two days later, the Turks had achieved the objective of the operation: 37% of the island was occupied. Partition was a reality. Nearly 165,000 Greek Cypriots fled from the north to the south. For years afterwards they were forced to live in refugee settlements, housed in barracks. Another 55,000 Turkish Cypriots fled from the bloody reprisals on Muslim communities to the safe haven in the occupied north. The war of 1974 radically changed Cyprus. Since that time, an impenetrable line extends across the island. The Greek and Turkish Cypriots have lived in strict separation from one another ever since.<sup>2</sup>

The Republic of Cyprus (the Greek Cypriot part of the island) is the only internationally

<sup>1</sup> Foreign law Branch of the U.S. Department of the Army, *The criminal law system of the Republic of Cyprus*, Foreign Law Study, Washington, 1964, pp. 4-8.

<sup>2</sup> H. Berg, C. Miller, *Cyprus*, Insight Guide, 1993, pp. 79-86.

recognised, legitimate authority in Cyprus.<sup>3</sup> Its sovereignty, however, is seriously affected by the foreign occupation of one-third of its territory, which also split the capital in half. Today, Nicosia is the only divided capital in the world. Ever since 1974, UN Security Council resolutions and those of the General Assembly unite in calls for the withdrawal of Turkish troops. The text of the UN resolution of 20 July 1974, the very day the Turkish invasion began, reads: 'The Security Council requires that all states acknowledge the sovereignty and territorial integrity of Cyprus [...] (and) demands that foreign military intervention in Cyprus cease immediately.' The UN Security Council also condemned the self-proclaimed 'Turkish Republic of Northern Cyprus' on November 18, 1983. Resolution 541 considers the TRNC unilateral declaration of independence 'legally invalid'. These and many, many other resolutions have been quite useless, and all talks, direct or indirect, between the Greek and Turkish Cypriots have so far failed, despite far-reaching compromises offered by the Greek Cypriots.

The declared intention of the government of the Republic of Cyprus remains the reunification of Cyprus. The 'Cyprus Question' dominates parliamentary discussion and overshadows all ideological debates. Disagreement among the Greek Cypriots on how a solution can be reached has produced two factions: on one side those ready to compromise and seek dialogue with the representatives of the occupied territory, on the other side those who favour a harder line. Understandably, politics permeates life in the Republic of Cyprus in many ways. People drink their coffees in a café of their political colour, and even products are associated with politics – there is, for instance, leftish brandy, produced by the cooperatives, and rightish brandy, produced by private firms.<sup>4</sup>

However the real tragedy of Cyprus is the fact that two ethnic (and religious) groups find it difficult to live in harmony together on the island. From time immemorial, Cypriots are never described, and never describe themselves simply as Cypriots. The word is always prefaced by the qualification Greek or Turkish, in recognition of the two ethnic groups.

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<sup>3</sup> For the very reason that the World Community does not recognize the occupation and the self-proclaimed Turkish Republic of Northern Cyprus, this research concerns only the Republic of Cyprus and not the occupied territories.

<sup>4</sup> H. Berg, C. Miller (1993), pp. 95-96.

## PART I: THE CYPRIOT CRIMINAL JUSTICE SYSTEM

### 1 INTRODUCTION

Cyprus has a very low crime rate. Both serious and organized crime is quite limited in number, even though the crime rate has risen over the years. In 1974, there were so few crimes that, in the district court of Nicosia, there was only one judge who tried cases from 9:00 until 11:00 am. Now, the Nicosia district court has three judges, but still, the crime rate is low compared to other European countries. For instance, in 1997, a total of seven murders were reported, of which five cases were solved, and five attempted murder cases, which were all solved and prosecuted. There were ten reported case of rape of which eight were prosecuted.<sup>5</sup> Furthermore, 24 cases of robbery and extortion were reported, 1,079 burglary cases and 910 thefts.<sup>6</sup> In total, 3,909 serious crimes were reported, which represents 594 serious crimes per 100,000 inhabitants.<sup>7</sup> According to the International Crime Statistics, criminality on Cyprus is one of the lowest in the world. While the average per capita crime rate in Europe is approximately 5,000 crimes per 100,000 persons, it is only about 650 crimes per 100,000 persons in Cyprus. The detection rate is also considered to be very satisfactory. In the last years, it ranged around 70%, and in 1997 it was 75.26%.<sup>8</sup>

### 2 GENERAL REMARKS AND BASIC PRINCIPLES

Cyprus has been ruled by many foreign nations, who all had their own legal systems. Cyprus was, for instance, part of the Roman and Byzantine Empires and as such came under Roman law and its Byzantine successor. However, the most relevant legal systems for the proper appreciation of the present day administration of criminal justice are those of the last

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<sup>5</sup> The other two cases, which were reported by Swedish tourists, turned out to be false reports. Many Swedish women have a health insurance policy which awards them a rather large sum of money if they can show a police report stating they were raped. Until recently, the Cyprus police never really investigated the rape cases in depth because the women wanted to return to their countries immediately, instead of after the trial. This changed after the police were contacted by Swedish insurance companies and the Ministry with the request to investigate the cases thoroughly because such a large number of claims were being made. Since that time, the police investigates and found a number of cases indicating the report was made for the purpose of claiming insurance. Information provided by Chief Superintendent of Police, 1 July 1998, Nicosia Police Head Quarters.

<sup>6</sup> Thefts, burglaries and other property offences are usually committed by young persons, but there is no juvenile court to try these cases, nor is there a special detention facility for young offenders on the island.

<sup>7</sup> Police statistics for serious crimes by district for the year 1997, appendix 1. Published on 12 June 1998. The serious crime index covers crimes which are in most countries not considered serious crimes, such as theft. A very common crime is the use of false cheques. This is not included in these statistics.

<sup>8</sup> B. Charalambos Koulendis, *The current developments and innovations taking place at the Cyprus police*, presentation given during the 10th European Police summer course, 21-27 June 1998, pp. 7-8.

conquerors: the Turks and the British. In the Ottoman Empire, the determination of what constituted an offence and its proper punishment were based substantially on the Sher Law (*Sharia*, the Law of God). It was not until 1858 that a variety of circumstances led to the enactment of a comprehensive Criminal Code, the Imperial Ottoman Penal Code. Its general arrangement followed that of the French Penal Code. This Ottoman Code was retained by the British administration as the law to which the Ottomans were subject. This was in agreement with the settled principles of English law and policy that colonies retained their traditional laws as long as they were not repealed. With various amendments, the Ottoman Code remained in force until 1928, when by an Order in Council, the current Criminal Code was introduced.

The state of the administration of justice at the time the British took over was in great need of reform.<sup>9</sup> The first step of the British was to reorganize the courts. They set up a High Court, which in the case of foreigners applied English law. And in 1882 the first major reorganization took place. A Supreme Court was set up with district courts and an Assize Court, composed of professional judges, English and Cypriot. The latter retained the element of equal representation of the two ethnic groups. In 1935, the Courts of Justice Act introduced a modern system of courts, where the ethnic origin of the judge had no significance whatsoever. Under this Act, there was a Supreme Court and district courts composed of a president, district judges and magistrates. Courts of Assizes were also set up in each district, sitting three times a year, composed of three judges, the president one being of a Supreme Court judge. The Assize Courts had jurisdiction over all indictable offences. Furthermore, the British introduced the basic principles of English criminal procedure and established a modern police force.

In August 1960, Cyprus became independent. At the London Conference a draft Constitution was completed. This draft became the Constitution of the Republic of Cyprus. It was a text full of compromises, for instance the communal/ethnic basis of jurisdiction of the courts was introduced and the requirement of a neutral president of the High court became constitutionally imperative. The political events of 1963 led to the enactment of the Administration of Justice Act of 1964, whereby the communal element was abolished. This meant that a judge of any community could again try any offender irrespective of the community he belonged to.<sup>10</sup> Nowadays, due to the separation of the two ethnic groups, the courts of the Republic of Cyprus are only presided by Greek Cypriots.

## 2.1 Basic Principles

The principles which govern the preliminary criminal proceedings are very similar to the principles which govern the English proceedings. the legality and secrecy principle. The

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<sup>9</sup> The Ottoman Courts were the *Daavi* courts in each district, composed of a *Cadi* as president and four members, of whom two were Muslim and two Christian, all underpaid. At Nicosia, there was a Superior Court (*Medjliss Temyiz Houkuk* and *Genaiet*). It consisted of a *Cadi* as president and six members, of whom three were Muslim and three Christian. It was competent to try offences punishable with more than three months imprisonment, but the Governor could not confirm any sentences over three years. This had to be done by the highest Governor of the province (*vilayet*) or of Constantinople. See A.N. Loizou, G.M. Pikiş, *Criminal Procedure in Cyprus*, Proodos Press, Nicosia, 1975, p. 2

<sup>10</sup> A.N. Loizou, G.M. Pikiş (1975), pp. 1-3.

trial stage is governed by the principles of publicity, orality and immediacy. The principle of publicity does not prevent, however, that trials are held *in camera* (see § 8.3).

### 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

#### 3.1 Investigating Authorities

The structure of the police is basically identical to that of the English police service and most of the existing rules and regulations are based on English legislation. Following the independence, policing was carried out by way of two separate forces; one for the urban areas, called 'police' and one for the rural areas, referred to as 'gendarmerie'. Both forces were headed by a Greek Cypriot and a Turkish Cypriot chief of police. During the 1963-1964 inter-communal troubles, all Turkish Cypriot police and gendarmerie officers left their posts and withdrew to the enclaves. Shortly afterwards, the two forces were united to form the present police service.<sup>11</sup>

Today, there is only one police force for the entire territory of the Republic, and it consists of approximately 5,000 officers in six police divisions. The divisions coincide with a territorial district.<sup>12</sup> The police force consists of six departments, two of which are especially worth mentioning here: the criminal investigation department, which also includes the prosecution branch, and the training department which is responsible for the training of all officers and the supervision of the Police Academy (see § 8.1).<sup>13</sup> The Cypriot police thus have two distinct functions: they investigate crimes and prosecute crimes. But they are only empowered to prosecute the less serious crimes before the district court (see §§ 3.2 and 3.3). All policemen are empowered to investigate (s. 4 CCP, Cap. 155), but not every member of the police can prosecute crimes in court. Only police officers who also have a degree in law<sup>14</sup> can be a member of the police prosecution department (see § 3.2).

#### 3.2 Prosecuting Authorities

The prosecuting authorities comprise both members of the police prosecution department for the less serious offences, and the members of the Attorney General's office for serious offences. In order to become a public prosecutor, it is required that one has practised as a lawyer for at least one year.<sup>15</sup>

<sup>11</sup> B. Charalambos Koulendis (1998), pp. 1-2.

<sup>12</sup> Nicosia, Pafos, Limassol, Larnaca, Morphou, and Famagusta. The latter two district are divided by the demarcation line of the occupied territories and are relatively small. That is why there are only four legal districts. The Larnaca court is also competent for the Morphou and Famagusta district.

<sup>13</sup> B. Charalambos Koulendis (1998), pp. 4-5.

<sup>14</sup> There is no law faculty on the island, so in order to study law one has to go abroad, which usually means going either to Greece or England. Most people go to Greece, first of all because the education there is free for Greeks and Cypriots and secondly, it is closer to home. However, studying in England is more convenient in the sense that the legal systems are more alike. After having finished law school, candidates have to do a one-year course in Cypriot law and pass exams in order to be able to practice law on the island.

<sup>15</sup> Information supplied by M. Kyrmizi of the Attorney General's office, Nicosia, 30 June 1998.

As explained above (see § 3.1), the police has the right to institute criminal proceedings in the interest of law enforcement. This right derives from the wide powers vested in the police to ensure law enforcement (Police Law, Cap. 285). However, the process of police prosecution remains under the supervision of the Attorney-General. Although in practice, if the offence carries a penalty of less than three years, the Attorney-General is not consulted.<sup>16</sup> The members of the police prosecution department receive all the police files from their colleagues. Cases involving a maximum penalty of less than three years imprisonment are always prosecuted by police prosecutors. If the case concerns a crime that carries a penalty of three years to seven years, the prosecuting police officers send the file to the Attorney-General and ask for his opinion on the case. If the Attorney-General consents to prosecution before the district court, he sends the file back to the police and they will be the prosecuting officers. This means that the offender can only be punished with a maximum of three years imprisonment (the maximum for which the district court is competent), a fine,<sup>17</sup> or both. If the Attorney-General is of the opinion that the case falling into this category should be prosecuted in the Court of Assizes, the Attorney-General's office will handle the prosecution. If the law states that the maximum sentence is more than seven years imprisonment, the case has to be prosecuted by the office of the Attorney-General before the Assize Court.

The Attorney-General is an independent officer under the Constitution and he can only be removed for the same reasons as a judge. Independency is a safeguard against the possibility of interference or influence by the executive. This safeguard also applies to the Attorney-General's office and is conducive to the exercise of its duties. The office of the Attorney-General was in existence throughout the British rule. Its functions are laid down in s. 113 of the Constitution. Its main functions are that of legal advisor to the Republic (s. 113-1 Const.) and public prosecutor before the Assize Court. The Attorney-General heads the legal service of the Republic. He has furthermore the power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any criminal proceedings against any person in the Republic (s. 113-2 Const.). Firstly, the phrase that he can 'take over' the proceedings indicates that the existence of the Attorney-General's office does not exclude the right of an individual to institute private prosecution (see § 5.4). The Attorney-General can take over if he feels that the public interest should prevail. In practice, however, the Attorney-General rarely interferes with private prosecution. Secondly, both under the Constitution and the Code of Criminal Procedure, he has the power to terminate criminal proceedings by filing a *nolle prosequi* (s. 154, Cap 155). This means that he can dismiss a case and discharge the accused. Such discharge is no bar to the re-institution in the future of the same charge based on the same facts, since the accused was not acquitted

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<sup>16</sup> Until 1989, the prosecuting police officers were specially trained police officers who had a different status from the other prosecuting authorities and lawyers. They were police officers first and had to wear their uniforms. In 1989, this was changed in order to give them a more equal status to the other participants holding a law degree. Recently, a reform proposal has been entered to bring all the prosecuting authorities within the office of the Attorney-General. This is the proposal most favored by the police prosecutors.

<sup>17</sup> The fines and compensation orders are mentioned in the Courts of Justice Law, 14/60. Until Law 90 (1)/97, the maximum amounts were C£2,000 in the district court and C£3,000 in the Assize Court (fixed by Law 83/94). However, this Law changed the fine in the lower court into C£50,000 (EUR 80,650), but the maximum amount of the Assize Court remained unchanged. The reason for this amendment was that the district court heard many cases of illegal gambling and the fine or compensation order of C£2,000 proved to be insufficient.

on the merits of the case. All the powers of the Attorney-General may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions.

In trials on information (see § 3.3.1), the Attorney-General is usually represented by a counsel of the Republic, and in any event by an advocate. Finally, prosecution for violations of particular laws, such as the Social Insurance Act, Street and Building Regulation Laws, are instituted by the government departments or other bodies entrusted with their application and enforcement. The proceedings are conducted by advocates or officers of the government authorized by the Attorney-General to appear and Law in any proceedings to which the state in its official capacity is a party.<sup>18</sup>

### 3.3 Judiciary

There is no specific training programme to become a judge. Any lawyer who has at least five years experience can be asked to become a judge. The rule is that a judge must have worked for at least seven years as a lawyer, but the Supreme Court can limit this requirement to five years. This has been done quite often in the last few years because there was a great need for new judges in the different courts. As a consequence of additional recruitment, the number of judges has risen with approximately 25% in recent years.<sup>19</sup>

According to the Constitution, the courts exercising criminal jurisdiction are: the Supreme Constitutional Court, the High Court of Justice, the Assize Court and the district courts. In 1963, however, the Administration of Justice Law was adopted which merged the two superior courts: the Supreme Court of Cyprus, which hears all the appeals. There are no examining magistrates. Nonetheless, preliminary inquiries do take place (see § 3.3.1). There are four district courts<sup>20</sup> for minor offences and two Courts of Assizes<sup>21</sup> for more serious criminal offences. Furthermore, Cyprus has both a Supreme Court and a Constitutional Court.<sup>22</sup> The jurisdiction of the courts is provided for in the Courts of Justice Act (CJA) Law 14/60, as amended by subsequent enactments. The competence of the Supreme Court to hear appeals is exercised by at least three of its members. The Constitutional Court has jurisdiction over certain offences directed against the security of the state and constitutional order. Since 1973, however, these offences may be tried by the Assize Court.<sup>23</sup> The jurisdiction of the first instance courts depend on the classification of the offence. The least serious crimes are always tried by the district court and the most serious crimes by the Court of Assizes. Then there is a category of crimes triable either way, i.e. either by the district court or the Assize Court. The district courts may also try summarily, with the consent of the Attorney General, any offence punishable with imprisonment not exceeding seven years if the court holds the opinion that it is expedient to do so.

<sup>18</sup> A.N. Loizou, G.M. Piki (1975), pp. 3-4; 63-64.

<sup>19</sup> Information supplied by Mr. Papadopoulos, lawyer in Nicosia, 3 July 1998.

<sup>20</sup> The district court is the equivalent of the common law concept of the magistrates court. The districts courts are situated in Nicosia, Paphos, Limassol and Larnaca.

<sup>21</sup> The Assize Court is the equivalent of the English Crown courts. There are two Assize Courts, one for the towns of Nicosia and Larnaca and one for the towns of Limasol and Paphos.

<sup>22</sup> Its official name is *the Court created by s. 156 of the Constitution*.

<sup>23</sup> *The Republic versus Liassis*, 10 J.S.C. 1314, 1973.



*Competence of the courts:*

crime of category I (less than 3 years imprisonment)	District Court
crime of category II (three years to seven years imprisonment)	District Court or Assize Court, depending on the decision of the Attorney-General
crime of category III (more than seven years imprisonment)	Court of Assizes
appeal for all crimes	Supreme Court of Cyprus

The Assize Court is a court of first instance with unlimited criminal jurisdiction (s. 20 CJA). However, in practice, it usually deals with the most serious cases which carry a penalty of seven years or more imprisonment. It is composed of three judges of the district court (s. 5 CJA) and the Supreme Court determines its composition. The Assize Courts handle cases everyday but travelling on circuits. According to its schedule, the Court tries cases, for instance, on the first three days of the week in Nicosia and the two last days of the week in Larnaca.

The district court is a single-judge court that has jurisdiction to try summarily any offence not exceeding three years imprisonment, or not exceeding seven years with the consent of the Attorney-General (s. 155b CCP). The judge may stop the summary proceedings and order that a preliminary inquiry be held, if he feels the case is more suitable for trial by the Assize Court. The judge must be satisfied that the summary proceedings are the expedient course, considering the circumstances of the case and taking into account the punishment which is likely to be imposed. If he feels the punishment should be more than three years, which he cannot impose, he may refer the case to the Assize Court.

In correspondence with the jurisdiction of the courts, two types of trials in first instance can be distinguished, viz., the summary trial and the trial on information. Summary trials are held before a judge sitting alone in the exercise of summary jurisdiction (s. 2 CCP). The summary trial begins with the filing of a charge with the district court, whereupon the case proceeds to trial without advance notice being given to the accused of the evidence that will be presented against him. This feature really distinguishes it from the trial on information and justifies the term 'summary'. The prosecutor presents the charge to the court after which the defence counsel may react. The prosecutor may, in addition to the power of the Attorney-General to terminate the case by filing a *nolle prosequi*, withdraw the charges if he can satisfy the court that there are sufficient grounds for doing so. The judge then may accede to the application and acquit or discharge the accused on condition that the withdrawal is done before the accused pleads to the charge (s. 51 CCP).

A trial on information takes place in the Court of Assizes. The designation 'information' refers to the fact that prior to the trial, the written accusation of an offence is filed by, or on behalf of, the Attorney-General in the Assize Court against the accused. Offences not triable summarily can only be tried on information before the Assize Court, with the exception of certain special offences, treason and offences against the security of the Republic and offences against the Constitution (s. 256 Const.). The trial on information starts with the filing of an information by the Attorney-General with the Court of Assizes. This is an indispensable prerequisite, as well as holding a preliminary inquiry. The accused, unlike

in summary proceedings, has the right to obtain a copy of the charge, the depositions and statements and names of witnesses, or any other document submitted as evidence.<sup>24</sup>

### 3.3.1 Criminal Proceedings

Whenever a charge has been brought against a person for an offence not triable summarily, or not suitable for such a trial, a preliminary inquiry must be held by a judge (ss. 93, 94 CCP).<sup>25</sup> Every district court judge has jurisdiction to hold a preliminary inquiry in order to decide whether the case is suitable for a trial before the Court of Assizes. It must be held in the presence of the accused. During the preliminary inquiry, the evidence of witnesses is taken in the form of a deposition. It must be signed by the witness and attested by the judge. The accused has the right to cross-examine every witness who testifies during the inquiry. A judge holding the preliminary inquiry is not precluded from sitting as an Assize judge because the judge is not acquired to evaluate the evidence and make findings of fact.<sup>26</sup> The accused can be granted bail pending the trial. The question of bail arises as soon as a person is charged with the commission of a criminal offence and also at later stages in cases where he is committed to trial before the Court of Assizes. The court has power to grant bail at any stage of the proceedings. The starting point is that every person charged with an offence is entitled to bail, unless there are cogent reasons to the contrary. The factors that may influence the court in its decision can be found in the Robinson case.<sup>27</sup> The most important factor is whether it is probable that the party will appear in court to be tried. In addition, the court must consider the nature of the crime and the probability of conviction and the severity of the possible conviction. The most common bail condition that may be imposed is a deposit. However, also any other condition the court feels reasonably necessary to secure his attendance at the trial may be imposed.<sup>28</sup>

The trial proceedings are regulated by s. 74 CCP, which reproduces the main features of trial under the common law system. The trial is adversarial by nature, involving a contest of evidence developed along well defined rules of procedure regulated by a judge. The function of the judge is to supervise the contest and ensure that the rules are observed. Although there are minor differences, the same procedure applies to trials on information and summary trials. The opening of the trial is performed by the public prosecutor and foreshadows the charges he will present, and brief reference is made to the evidence that will be adduced to substantiate the charge. In the Court of Assizes, this right of the public prosecutor is customary; in summary trials, however, this right is rarely, if ever, exercised. Then the accused has the right to start his defence. This right is rarely exercised, probably because the accused does not want the prosecution to know his line of defence.

After the opening statements, the prosecutor calls the witnesses of the prosecution. The first witness is usually the victim. However, the prosecutor is not obliged to call the victim (officially referred to as complainant, see § 5.2) to testify as his first witness. The examination of witnesses is divided into three parts: the examination-in-chief, the cross-examination and

<sup>24</sup> A.N. Loizou, G.M. Piki (1975), pp. 64-69.

<sup>25</sup> The only exception is that an Court of Assizes may without preliminary inquiry commit for trial any person for giving false evidence in any proceedings before it and such a person may be committed for trial and tried at the same sitting of the court.

<sup>26</sup> A.N. Loizou, G.M. Piki (1975), pp. 159-160, 174.

<sup>27</sup> Robinson case, 1854, see 23 C.L.Q.B. 1854, 286.

<sup>28</sup> A.N. Loizou, G.M. Piki (1975), pp. 35-37.

re-examination (s. 56 CCP). The examination-in-chief is the process whereby the party calling a witness elicits, in the form of questions and answers, the evidence of the witness he relies on to support his case. The prosecutor has no duty to disclose the character of his witness, but if he brings the character of the witness into his line of prosecution, the defence may include the witness's character in his cross-examination. The objective of the cross-examination is twofold: to test the truthfulness and reliability of the testimony of the witness and to confront the witness with the version of the other side. After the close of the cross-examination of a witness, the party who called him has the right to re-examine him on matters arising from the cross-examination. The object of re-examination is to give the witness an opportunity to complete his evidence or to give further explanation of his answers in cross-examination. In essence, the witness is given the opportunity to give a full account of his side of the story and to restore his credibility to whatever degree it may have been shaken in cross-examination. The judge may put questions to the witness, at any stage of the examination. However, a too active and directing role of the judge, for instance by displaying 'discourteous impatience' and 'unjustified interruptions of the examination', are not appreciated. Even so, it cannot lead to the quashing of a conviction, unless the conduct of the judge had the effect of being disparaging to the defence of the accused. After the close of the case for the prosecution, the court must decide whether there is a *prima facie* case (s. 74-c CCP). The test for deciding whether there is a *prima facie* case is whether sufficient evidence has been gathered against the accused to allow for public action to proceed. If the court rules that the prosecution failed to make out a *prima facie* case, then the court must acquit and discharge the accused.

If there is a *prima facie* case, and the accused is required to exercise his right of defence (s. 74-c CCP), the judge should explain his rights to him. Subsequently, the witnesses for the defence may be called (s. 74-d CCP). The court may also call any person as a witness or recall and further examine any witness already examined if this appears to the court to be essential to the case. The accused may plea to the charges. However, the court must make sure that the accused has sufficient intellect enabling him to understand the proceedings. He must be able to understand the details of the charge. The accused may make three pleas: he may plea guilty or not guilty (s. 68 CCP), or he may make a special plea (s. 69 CCP). The latter is more or less a preliminary objection to the charge. A guilty plea has the effect of a conviction by the judgment of the court and can only be set aside if the conviction is vulnerable on the ground that the facts alleged in the charge or information do not disclose an offence.<sup>29</sup> As a matter of principle, the plea of the accused cannot be made subject to a bargain between the prosecutor and the accused. If the prosecutor agrees to withdraw a count in return for a guilty plea to a lesser offence or some other counts of the charge, the plea-bargaining agreement is not binding on the court. Furthermore it is forbidden for a judge to influence the plea of the accused.<sup>30</sup>

At the conclusion of the trial, the prosecution and the defence have the right to address the court. The party who called the last witness, has the right to address the court first, and the other side has the right to reply (s. 74-2 CCP). At the conclusion of the hearing, the court considers the whole case and delivers its judgment, and may for this purpose adjourn the trial (s. 71 CCP). The judgment must contain the court's reasoning (s. 30 Const., s. 113 CCP).

<sup>29</sup> A.N. Loizou, G.M. Pikiş (1975), pp. 84-85.

<sup>30</sup> A.N. Loizou, G.M. Pikiş (1975), pp. 88-89.

The court may find the accused guilty or not guilty. In the former case, the court must proceed to consider the sentence to be imposed on the offender (s. 78-80 CCP).

During the sentencing stage, it is common practice in certain cases to make a social inquiry or probation report, making details of the background and personal circumstances of the accused available to the court after conviction. It is very often used concerning offenders under the age of 21 or in family disputes.<sup>31</sup>

### **3.4 Enforcement Authorities**

The courts are responsible for the enforcement of the financial penalties, including the payment of compensation to victims (see § 7.3).

### **3.5 Probation Services**

Cypriot law allows the court to impose a probation order, if the court is of the opinion that the offender requires supervision by a probation officer for a period of at least one year and not more than three years. The probation service has to make sure that the probationer observes the conditions of the probation order. It has to visit probationers, or receive their reports. Finally, the probation officer reports to the court and assist or advise the court concerning any decision on probation (s. 4 and 5-1 Probation of Offenders Act (POA), Cap. 162.). The Law explicitly excludes the payment of sums by way of damages for injury or compensation for loss as a requirement under the probation order (s. 5-3 POA). This provision, however, is without prejudice to the power of the court to make a compensation order (s. 10-2 of the POA) (see § 7.2, D. 13).

### **3.6 Victim Services**

To date, no national victim support service exists on the island. However, victims may get support and assistance from various social welfare services. There is, for instance, a domestic violence service (Association for Prevention and Response to Domestic Violence) which offers assistance to victims of domestic violence in many ways. Their services include social and psychological assistance but also the payment of the costs of a hotel if the victim cannot or will not go home. A shelter for women is not yet available on the island, but it is currently under construction (1998). Furthermore, a telephone hotline has been opened for women who need advice or moral support. The hotline also refers victims to the different services for further assistance. The domestic violence service also works in close co-operation with the police, in particular with one female police officer at the police prosecution department who is specialized in domestic violence cases.

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<sup>31</sup> A.N. Loizou, G.M. Pikis (1975), pp. 96-134.

## 4 SOURCES OF LAW

### 4.1 General Sources of Law

The main sources of law are the Constitution, the Statute Law of Cyprus, and the case law of the high courts. The Statute Law is subdivided into numerous chapters. Each chapter (indicated as *Cap. no. X*) represents a separate Code or Law. Case law is considered to be a source of law, according to the doctrine of legal precedent.

Court judgements form binding precedents of law if issued by the courts standing higher in the hierarchy of the courts. A ruling of the district court can be followed by the higher courts, but it has no binding effect.<sup>32</sup> The judgements of the Supreme Court are binding on all courts.

The courts still often use case law and common law rules that were applicable before the independence of 1960. Since 1960, English case law is no longer a source of law in Cyprus, but it is used as a highly persuasive argument. England is the place of origin and development of common law. Therefore, the judgements of the English courts are respected by the courts of Cyprus and also have highly persuasive authority. In practice, English case law is followed, including recent case law, if no arguments can be found in Cyprus' common law, unless, of course, application of the English judgement would be contrary to and inconsistent with the special conditions prevailing in Cyprus, such as customs, morals, and culture.<sup>33</sup> The same type of solution is chosen by the legislature with regard to the enactments. The Constitution specifies that all laws in existence before independence remain in effect until amended or repealed by another law. The older enactments, however, must be applied in accordance with the Constitution (s. 188 Const.). Pursuant to s. 3 CCP, 'matters of criminal procedure for which there is no special provision in this Law or in any other enactment every court shall for the time being, in criminal proceedings, apply the law and rules of practice relating to criminal procedure for the time being in force in England.' As a consequence, if there is no answer to be found in the common law of Cyprus, the court can turn to the English common law. The application of English case law or common law does not pose many difficulties because Cypriot law is still substantially the same as under the rule of the British.<sup>34</sup> Legal doctrine is no source of law but it is being used as a persuasive argument in criminal proceedings.<sup>35</sup>

### 4.2 Sources of Criminal Law and Procedure

The most important sources of criminal law and procedure are the Penal Code and the Code of Criminal Procedure. However, other enactments are also relevant in this respect, such as the Courts of Justice Act, the Police Act, the Compounding of Offences Act and

<sup>32</sup> Cyprus case law is published in the Cyprus Law Review (CLR) and criminal cases are published under number 2 as follows: 2 CLR., and are quoted as *X v. Y*.

<sup>33</sup> H. Solomonides, 'Zypern', in: A. Eser, B. Huber, *Strafrechtsentwicklung in Europa*, Landesberichte 86/88 über Gesetzgebung, Rechtsprechung und Literatur, Freiburg i. Br., 1989, p. 1307.

<sup>34</sup> The application of English common law may furthermore be facilitated by the fact that many legal practitioner studied law in England. Also, a great deal of the doctrine is taken from English literature, since there is no law faculty on the island.

<sup>35</sup> As stated above, Cyprus has no university. As a result, only two rather old text books on Cyprus criminal law and procedure exist.

the Juveniles Offenders Act. All Acts passed after the Independence of 1960 are published in Greek in the Gazette of the Republic and identified by the number of the statute followed by the year of publication.

The Penal Code, officially cited as Criminal Code, Cap. 154 of the Statute Laws of Cyprus, dates from January 1929.<sup>36</sup> It is divided into ten parts. The first one contains general provisions and the other nine parts refer to specific categories of crime, such as offences against public order (part II), offences against the person (part V) and offences relating to property (part VI).

The Act regulating criminal procedure is embodied in the Code of Criminal Procedure of December 1948. It is officially cited as Criminal Procedure Law, Cap. 155 of the Statute Laws of Cyprus. This Code basically consists of English criminal procedural law with some minor modifications. In interpreting this Code, reference is freely made to English precedent on the interpretation of corresponding provisions in English law.<sup>37</sup> Also some areas of criminal evidence are governed by the Evidence Act (Cap. 9 of the Statute Laws of Cyprus). This Act regulates, *inter alia*, the rules for formal admission of proof in criminal trials (s. 19) and the admissibility of written statements (s. 20). In addition to these basic statutes, there are numerous subsidiary Acts, such as the Traffic Act or the Enforcement of Sentences Act.

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

An important victim-oriented Law is the Violence in the Family Act of 1994 (Law 47 (I)/94).<sup>38</sup> This Law (VFA) criminalizes domestic violence, which is defined as any unlawful Law or behaviour which results in direct actual physical, sexual or psychological injury to any member of the family<sup>39</sup> and includes violence used for the purpose of sexual intercourse without the consent of the victim as well as for the purpose of restricting his liberty (s. 3-1 VFA). Any such Law or behaviour constitutes an offence under the Penal Code (s. 3-3 VFA). The offender is punishable with five years' imprisonment, or a fine of C£3,000 (EUR 4840), or both.<sup>40</sup> It is rather remarkable that the law gives this particular and exclusive enumeration of penal sanctions. In fact, this precludes the court from imposing a compensation order. However, as we will discuss in § 7, this is not surprising for, in Cyprus, the compensation order is rarely, if ever, used. With respect to rape within the family or attempted rape, the sentences can be higher, according to the provisions in the Penal Code (s. 5 VFA). Incest is punishable with life imprisonment (s. 6 VFA). If an act of domestic violence also constitutes another crime under the Penal Code cited in s. 4-2 VFA, violence in the family is considered an aggravating circumstance. For instance, grievous bodily harm normally carries a penalty of seven years but as a result of domestic violence it is increased to ten years' imprisonment

<sup>36</sup> The Penal Code, as well as the Code of Criminal Procedure, is originally written in English. However, the most recent amendments are published in Greek. If the Codes are quoted literally, the original version is used.

<sup>37</sup> A.N. Loizou, G.M. Piki (1975), p. 3.

<sup>38</sup> The translation into English of this Law is being prepared by the Service for the Revision and Consolidation of the Cyprus Legislation.

<sup>39</sup> Members of the family means a husband and wife who are legally married or who are cohabiting as husband and wife and includes the parents as well as the children (s. 2).

<sup>40</sup> According to inspector Papatheodorou of the Nicosia police prosecution department, the usual penalty inflicted on the offender is a fine. Of all the cases of domestic violence he prosecuted, not a day of imprisonment was ever imposed. Information supplied on 1 July 1998.

or a fine, or both. If the offence was committed in the presence of the children, it shall be considered as violence exercised against the children likely to cause them psychological injury (s. 3-3 VFA). Apart from the above-mentioned penalties the court may also order a probation order or suspension of the sentence with the special requirement that the offender shall submit himself to treatment for self-control by specialists or with other conditions as the court may consider necessary to prevent the repetition of Laws of violence within the family (s. 7 VFA). Furthermore, the court can impose an inhibition order<sup>41</sup> on the offender, prohibiting him from entering or staying in the marital home (s. 8 VFA, see § 8.3). Finally, the investigation and the trial of the case have to be conducted without delay (s. 11-3 VFA).

In practice, according to the officers of the police prosecution department, the Violence in the Family Act has made a great difference for victims of domestic violence. After the implementation of the Act, the number of reported cases increased significantly, as well as the cases that actually went to court.<sup>42</sup> However, this positive result is not only due to the Violence in the Family Law. Rather, it is the combination of the implementation of the Law and the activities of the social services, in particular the hotline of the domestic violence service (see § 3.6).<sup>43</sup>

Another important Act is the one on State Compensation. Cyprus signed the European Convention on State Compensation for Victims of Violent Crime in 1991. The Convention was ratified in January 1997 by Law 2/97. For its implementation, Law 51(1) of 1997 was enacted, introducing a compensation scheme for persons who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence committed in the Republic, and for the dependants of persons who have died as a result of such offences. The scheme makes provision for the basic elements of compensation set out in the Convention, in a mode corresponding to protection in the form of benefits and full basic allowances provided for in the Social Insurance Laws of the Republic. The scheme is administered by the director of the social benefits department. Compensation also covers medical and hospitalization expenses in public institutions, loss of earnings, disability pensions, dependants' pensions, and funeral expenses.<sup>44</sup>

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

### 5.1 Reporting the Offence

Every citizen may report crimes to the police. The reporter is from then on officially referred to as the complainant (see § 5.2). In order to take criminal action against a suspect, someone must have reported the crime in order to bring charges. Crimes are not prosecuted *ex officio*

<sup>41</sup> Information supplied by judge A. Pashalides of the Nicosia district court, on 8 July 1998.

<sup>42</sup> Although experience learns that if the victim, usually the wife, does not want a divorce she will withdraw the complaint by stating that she does not want the case to be prosecuted. This may be due to many reasons, eg. the children, financial dependence on the assailant, etc. The public prosecutor may go ahead with the case in theory, but in practice he will need the testimony of the victim in court. As a consequence, only a small percentage of the reports will actually be prosecuted.

<sup>43</sup> Information supplied by Mr. S. Papatheodorou and Mrs. S. Nathanael of the police prosecution department, Police Head Quarters, Nicosia, 1 July 1998.

<sup>44</sup> The Permanent Secretary of the Minister of Justice and Public Order, letter of 16 June 1998.

by the police or Attorney-General's office. This can be explained by the fact that the victim of crime, or another reporter of crime, has to testify in court. Criminal proceedings are oral proceedings, which means that all the evidence has to be presented in the court room. In such a system, the evidence of witnesses is of crucial importance to support the charges (see § 5.5).

## 5.2 Complainant

In the common law jurisdictions, the term 'complainant' is properly used to refer to the victim for the duration of the criminal proceedings. In practice, it is mostly used in reference to victims of sexual offences whose cases are under consideration. There are no specific rights attached to the common law position of the complainant.

Although there are no complainant offences in the continental tradition, the vast majority of offences are treated in the exact same way. There are virtually no cases in which charges are brought without the victim reporting the case, or otherwise cooperating with the judicial authorities.

## 5.3 Compensation Order Beneficiary

The role of the victim as a civil claimant does not exist in the common law system and therefore is unknown in Cyprus. Compensation within criminal proceedings is a penal sanction and can be imposed by the court. In practice, victims are rarely compensation order beneficiaries. This is caused by the fact that, under common law, the payment of compensation was traditionally only applied concerning malicious property damage. This is still the present state of affairs in Cyprus today (see § 7).<sup>45</sup>

## 5.4 Private Prosecutor

The victim who is directly affected by a crime has the right to institute a private prosecution before the court. Unlike Roman law, common law never recognised *Lawio popularis* in any sphere of the law. In case law, the courts stress that not every individual has the right to institute private prosecution. Only the victim of crime may act as a private prosecutor. The courts hold that private prosecution guarantees the right of victims to invoke the strong arm of the law for their protection, a right not subordinated to the exercise of discretionary powers by a public authority. The only rule private prosecution is subject to is scrutiny in the hands of an independent officer of the state, or the Attorney-General in the event of serious offences.<sup>46</sup> Consequently, the private prosecutor has to send an application for consent of the Attorney-General before he may instigate a private prosecution. In practice, the Attorney-General will have an interest in taking over the prosecution. This will end all private prosecutions (s. 113 Const.).

To institute private prosecution, no sum of money has to be deposited in advance in order to prevent abuse. There is no such precondition because private prosecution safeguards

<sup>45</sup> In England and Ireland, the common law has been changed. As a consequence, the range of offences for which the compensation order can be imposed has been broadened. Today, the court can order the payment of compensation with respect to every type of offence, and even for moral damages. (See Chapters 7 and 12).

<sup>46</sup> A.N. Loizou, G.M. Piki (1975), p. 64.



the victim's unimpeded access to the court. According to the law, the right is not restricted to any type of offence. In practice, however, private prosecution by the victim of crime is confined to minor summary offences such as insult, assault, etc.<sup>47</sup> The most common instances in which victims start a private prosecution is with regard to bad cheques. Here, private prosecution is preferred because there are too many of such cases for the police to prosecute all of them within a reasonable time. Therefore, most Cypriots prefer to go to court themselves with a lawyer. Theoretically speaking, it is not required to have legal representation but it is advisable and common practice to bring a lawyer because of the complicated legal formalities.<sup>48</sup>

### 5.5 Witness

All persons are competent witnesses unless, in the opinion of the court, a witness is prevented by reason of young age, mental incapacity or any other cause of the same kind, from knowing that he ought to speak the truth or from understanding questions put to him or from giving rational answers to these questions (s. 13 Evidence Act, Cap. 9). Spouses are in certain cases incompetent to act as a witness. They cannot be compelled to testify against one another. However, the spouse of a person who is charged with inflicting or attempting to inflict bodily injury upon him or her, or his or her children (and some other specific offences, mentioned in the law) shall be competent to act as a witness for the prosecution (s. 14 Evidence Act).

Witnesses must be examined on oath, except for a child who may not understand the meaning of an oath.<sup>49</sup> Witnesses are summoned by the court to appear before the court to give evidence and to bring with them any document or item of proof related to the case which may be in their possession or under their control (s. 49 CCP). If a summons to a witness is disobeyed without lawful excuse, a warrant of his arrest may be issued (s. 50 CCP) and he may be imprisoned for up to two months or fined, or both (s. 52 CCP).

Whenever a charge has been brought against a person for an offence that will be tried in the Court of Assizes, a preliminary court hearing must be held in the presence of the accused. The evidence of a witness testifying at the preliminary hearing is taken in the form of a deposition and the judge records the substance of the evidence. The witness must sign it, after which it must be attested by the judge (s. 96 CCP). Only when a witness is dangerously ill, the judge may take the deposition in another place than the court, but he has to notify the accused and the prosecutor of the time and the place (s. 97 CCP). The accused must have the chance to cross-examine the witness because he may be deprived of any further opportunity during the trial, if the witness dies or is too ill to attend the trial.

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<sup>47</sup> A.N. Loizou, G.M. Pikiş (1975), pp. 4, 63. According to judge Pashalides of the Nicosia district court, private prosecution is not very often used by ordinary victims. In every day practice, it is mostly societies and public services which instigate private prosecution. For instance, building societies against persons who are building without a permit; the tax authorities against persons who have not paid their taxes; and the social services against persons who have not paid their health insurance. In Nicosia, there is even a judge who is specialized in hearing such cases, five days a week.

<sup>48</sup> Information supplied by Mr. Papadopoulos, lawyer in Nicosia, 3 July 1998.

<sup>49</sup> See A.N. Loizou, G.M. Pikiş (1975), pp. 98-101.

Victims are always a witness for the prosecution,<sup>50</sup> both in the district and the Court of Assizes. All persons who made a statement or laid down a deposition are required to give evidence at the trial. The final decision regarding testimony is taken by the court. Only in exceptional circumstances may a witness be excused by the court, for instance those who are insane, too ill, those who reside abroad, or are conditionally bound over and have not been notified (s. 93 CCP). The judge conducting the preliminary inquiry has a duty to bind over every witness whose deposition has been taken to attend and give evidence at the trial (s. 99-1 CCP). The judge may also decide to bind over a witness conditionally, which means that further notice to attend be served upon him before he be obliged to attend (s. 100 CCP). He may do so if the accused's statement makes the testimony unnecessary or if the evidence is merely of a formal nature. The object of this rule is to save witnesses from unnecessary attendance before the court, considering that the public has a vital interest in sustaining the willingness of citizens to come forward and report crime.<sup>51</sup>

The court may at any stage of the proceedings order payment of costs and expenses to witnesses together with compensation for their trouble and loss of time (s. 60 CCP). The costs of witnesses who were bound over to testify at the trial are paid from public funds (s. 167 CCP). With respect to private prosecution, witnesses are not bound to attend the trial unless their reasonable travelling and subsistence expenses are paid to them, or deposited with the Registrar of the court that issued the summons (s. 49 CCP). With respect of the examination of witnesses, see § 3.3.1 and § 8.2.

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A witness can be qualified as 'hostile' if he willfully refuses to testify truthfully on behalf of the party calling him, or contradicts his deposition made prior to the testimony in court (s. 3 CCP). The judge will decide whether a witness is hostile to the party calling him. The effect is that the party calling the witness no longer assumes responsibility for his evidence. A forgetful witness cannot be declared hostile. A different situation arises when a witness for the prosecution testifies differently in comparison with the statement made to the police. In such a case, the witness may be cross-examined as to the contents of his statement and be treated as hostile, independently of the existence of hostile behaviour. Moreover, a person giving evidence inconsistent with or contrary to a previous statement to the police is guilty of a misdemeanour (s. 113-2 CCP). The same applies to a witness who testifies differently before the Court of Assizes from what he testified at the preliminary hearing, but the court may accept the contents of the deposition as true in the light of the circumstances of the case, provided that the facts stated in the deposition are corroborated by other evidence (s. 98 CCP). See A.N. Loizou, G.M. Pikiş (1975), pp. 102-103.

<sup>51</sup>

A.N. Loizou, G.M. Pikiş (1975), pp. 159-166, 174-178.

## 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.*

The police are not under any obligation to inform victims. In practice, however, the police give information to victims who ask for it, unless it concerns a child. In that case, the police contact the social welfare department to assist the child in practical, social and legal matters. With respect to practical and legal advice and compensation, the victim will be advised to seek the advice of a lawyer. Whatever information is provided is usually not given at the police station but at the scene of the crime or at the home of the victim. The reason for this practice is that victims who want to report a crime call the police and the police will come to them. Not many victims come to the police station to report a crime.

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

Cyprus is a small island with relatively few inhabitants, approximately 700,000, and a low crime rate (see § 1). As a consequence, it is relatively easy for victims to contact the police or the Attorney-General's office, at any time, to obtain information on the outcome of the investigation and the possibilities of public prosecution. As a rule, the police will provide the victim with information on the police investigation, even on an ongoing investigation, unless the information is confidential and may jeopardize the investigation or if the file has been passed on to the Attorney General's office. In the latter case, the police advise the victim to contact the Attorney General's office.

- (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 is taken by either the court for cases prosecuted by the police (see § 3.3.1) or by the Attorney General or a representative of the office concerning all other cases (see § 7.1). If the final decision of the prosecuting authorities is a positive decision, and charges are brought against the suspect, the victim will be informed, by means of the summons, to give evidence in court. Although there is no legal obligation to inform victims on the decision not to prosecute, in practice, the victim will be informed by the prosecuting authorities.

Usually, the victim will be telephoned by the authorities. At all times, the victim may contact the police or prosecutor himself. This is surprisingly easy for almost all victims. According to Cypriots, if one asks around, there is always someone who knows someone

within the organization one needs information from.<sup>52</sup> Besides, members of the prosecution service and their telephone numbers are well-known in their communities.<sup>53</sup>

(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 is always a witness for the prosecution; therefore, he will be summoned to appear in court to testify. The summons inform the victim of the date and the place of the hearing. It is the duty of the prosecutor to secure the attendance of all the witnesses, including the victim-witness.

With respect to restitution and compensation, legal assistance and advice, the victim is not informed by the judicial authorities. The reason is that the victim plays no part in the proceedings. Even if he has a lawyer, his counsel cannot speak during the proceedings. Moreover, compensation is a penal sanction, the application of which is to the discretion of the court, and limited to malicious property damage (see § 7).

The victim is informed about the outcome of the case, either by the judge himself during the sentencing stage of the criminal proceedings or by the prosecuting authority. If by any chance, he is not informed, the victim may contact the prosecutor in person or by telephone to find out what the court decided. The victim can request a copy of the verdict from the public prosecutor.<sup>54</sup>

## 6.2 Information About the Victim

Contacts between the police and the police prosecution department are frequent and rather informal. As it is a department within the police, it is very easy for police officers to contact a police prosecutor and ask his advice on a case. Much of the work at the prosecution department is to check police files and, in regard to certain misdemeanours, to decide whether the case can be prosecuted successfully.

Likewise, contacts between the police prosecution department and the Attorney-General's office are maintained on a daily basis. In difficult or complex cases, the police will seek the advice of the Attorney-General during the investigative stage. The Attorney-General's office sees every police file, sent to it by the police prosecution department, and gives its opinion on the evidence included in the file.

There is an ongoing discussion about the position of the police prosecutors. Some argue that they should be part of the Attorney-General's office and work in the same building. Arguments in favour are that all prosecutors should be in each others' vicinity to facilitate the daily contacts, and to prevent piles of legal dossiers being transported every day between the police stations and the Attorney General's office. Others prefer the situation as it is today.

<sup>52</sup> Information provided by ordinary citizens met in shops, bars and restaurants.

<sup>53</sup> Lists of the members of the judiciary and prosecution service are even available through Internet. See <http://www.pio.gov.cy/directory/html>.

<sup>54</sup> Information supplied by M. Kyrmizi of the Attorney General's office, Nicosia, 30 June 1998.

Police prosecutors handle the vast majority of criminal cases, and the department is easily accessible to investigating officers.

- (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;*

Police reports generally include a statement of the injuries and losses suffered by the victim. However, the purpose of this statement is not to facilitate the court's decision on compensation. It is included as evidence for the case of the prosecution. This can be explained by the fact that the court can only order payment of compensation with respect to malicious property damage, i.e., damage which results from property which was willfully and unlawfully destroyed (s. 324 PC). For all other losses and injuries, the victim has to go to a civil court and pursue his claim there (see § 7).

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

It is usually not considered relevant to inform the court of the victim's need for compensation, mainly because the court has very limited powers to make a compensation order. However, if the accused has paid compensation to the victim on his own account, the defence counsel will inform the court and the court will take this into consideration. This rarely occurs for two reasons. Mediation or pre-trial settlement is unknown and accused persons are not easily persuaded to pay compensation to the victim before the trial. This would mean that they admit guilt, which is usually denied even in the most hopeless of cases (see § 7).<sup>55</sup>

## 7 THE VICTIM AND COMPENSATION

According to the definition in s. 2 CCP, compensation is a penal sanction and refers to 'any sum adjudged in any criminal proceedings to be paid by any person by way of compensation, damages, costs or otherwise and includes the costs of enforcement for the recovery of the same.'<sup>56</sup> The fact that compensation within criminal proceedings is a penal sanction<sup>57</sup> (s. 26 CCP) does not prevent victims from going to a civil court. 'No civil remedy which any person may have against any other person for any fact or omission shall be suspended or in any way affected by the fact that such an act or omission amounts to an offence' (s. 36 CCP).

<sup>55</sup> Information supplied by Mrs. M. Kymizi, Counsel of the Republic, Nicosia, 30 June 1998, and D. Papadopoulou, lawyer in Nicosia, 3 July 1998.

<sup>56</sup> The English edition of the Code of Criminal Procedure of 15 December 1948, as amended by Law 37/58, Cap. 155.

<sup>57</sup> The penalties the court can impose are: imprisonment, fine, payment of compensation, finding security to keep the peace and be of good behaviour, and supervision. Law 92/72.

In practice, many victims have to take civil action because moral and material damages which were not the result of offences falling within the category of malicious property damage cannot be compensated through the criminal court. Even in cases that do fall within this category, compensation orders are rarely imposed.<sup>58</sup> The victim therefore has to go to a civil court to obtain compensation from the offender. Contrary to most jurisdictions, however, civil proceedings are relatively quick. After the filing of a civil case, the waiting time until the first hearing is approximately one year. A victim is not obliged to have a lawyer in civil nor in criminal proceedings, which may help to keep the costs down. In a criminal court, the victim's lawyer is not allowed to say anything on behalf of the victim because the latter has no role or status within the proceedings. As a result, victims rarely bring their own lawyer. In civil court, however, it is advisable to have a lawyer. As a rule, the costs of legal representation have to be paid by the victim, unless the defendant is ordered by the court to pay the plaintiff's costs.<sup>59</sup> No legal aid provisions exist for victims of crime, nor are there any state compensation schemes.

### 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 taken by either the court for cases prosecuted by the police, or by the Attorney General or a representative of the office concerning all other cases (see § 3.3.1). In every legal district, one member of the office sees all the files and decides whether the case will be brought before the court. The decision not to prosecute may be taken if there is no *prima facie* case, or because the accused is very ill or is deceased. The grounds are limited because the criminal proceedings are governed by the legality principle (see § 2.1). The prosecutor does not (need to) take the question of compensating the victim into account because compensation is a penal sanction and no form of pre-trial mediation exists. It is up to the court to decide what penalty should be imposed on the offender.

- (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 does not have the right to ask for a review of a decision of the Attorney-General's office not to prosecute, but he does have the right to instigate private proceedings (see § 5.4). In a sense, the decision of the Attorney General in itself constitutes a sort of review. The Attorney General or special members of his office see every legal file and give their opinion regarding the question of prosecution to the prosecuting officers. Furthermore, the decision not to prosecute is not really a policy decision but a decision based on the merits

<sup>58</sup> Every judge has experience in civil as well as criminal cases. On average, every two years, judges change from criminal to civil divisions. Nevertheless, the compensation order is little known even among judges whom I interviewed. As a result, compensation plays but a marginal to non-existent role within criminal proceedings, a situation that is not likely to change in the near future.

<sup>59</sup> Information supplied by D. Papadopoulou, lawyer, Nicosia, 3 July 1998.

of the case. In practice, this means that if there is enough evidence, the case will be prosecuted unless the health of the accused impedes prosecution or serving time in prison.

## 7.2 The Court and Compensation

The criminal court cannot order the payment of compensation regarding all crimes and all losses. The compensation order is only used in instances of willful, malicious harm to property (s. 324 CCP).<sup>60</sup> Furthermore, the sum should not be contested by the accused. Whenever the calculation of damages is perceived by the court to be a long, complicated, and contested procedure, it should be left to the civil courts.<sup>61</sup> Other losses and injuries cannot be compensated within criminal proceedings. Unsurprisingly, compensation plays but a marginal role in practice, if at all. It is highly exceptional for criminal courts to impose a compensation order.

Also, prior to the court proceedings, there are no incentives to pay; mediation programmes do not yet exist. Concerning specific offences like traffic offences, however, the offender or his lawyer can ask for a discontinuance of the case if the victim has been compensated fully and the victim agrees. The charges against the offender will then be dropped. This is not an official procedure, but rather an informal one. Another possibility seen in practice is that after the accused is found guilty but before a sentence is passed, the defendant offers to pay compensation to the victim. In this case, compensation may be a mitigating factor.

*(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.*

Compensation is a penal sanction and as such 'the court, on making a probation order or an order for conditional discharge or on discharging the offender absolutely, may, without prejudice to its power of awarding costs against him, order the offender to pay such damages for injury or compensation for loss as the court thinks reasonable; but the damages and compensation together shall not exceed the sum which the court has jurisdiction to award' (s. 10-2 Probation of Offenders Act (POA), Cap. 162). However, it can only be ordered concerning crimes causing intentional damage to property. Concerning material loss, the power of the court to order compensation is limited. Compensation orders for moral damages therefore do not exist. The amount of compensation that can be ordered is the same as the fines that can be imposed. In the Court of Assizes, the amount of compensation is limited to C£3,000 (EUR 4849), whereas in the district courts a payment of compensation of C£50,000 (EUR 80,650) can be ordered (s. 20 and 24 of the CJA, as amended by Law 90 (I)/1997).<sup>62</sup> In the Juvenile Court, the child, his parents or guardians can be also ordered to pay a fine, compensation, or costs for which he is liable (s. 12-1f Juvenile Offenders Act (JOA), Cap. 157). The enforcement of such an order will take place as if the order had been

<sup>60</sup> Information supplied by Mrs. Kyrmizi, Counsel of the Republic, Nicosia, 30 June 1998.

<sup>61</sup> The Permanent Secretary of the Minister of Justice and Public Order, letter of 16 June 1998.

<sup>62</sup> The sums for fines and compensation orders are the same. The district court can impose higher fines and compensation orders because this court tries most illegal gambling and fraud cases, such as the use of bad cheques. The sums for the district courts were raised from C£ 2,000 to C£ 50,000 by Law 90 (I)/97.

made on conviction of the parent or guardian (s. 16 POA). Where an order is made as to the restitution of goods or delivery of property to the owner and as to payments of money upon, or in connection with, such restitution or delivery, it has the effect of a conviction (s. 12-4 JOA).

*(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 payment of compensation is a penal sanction and can either be the only punishment or it can be awarded in addition to another penal sanction, such as imprisonment, but only regarding malicious damage to property. Regarding losses and injuries resulting from other types of crime, no compensation can be obtained within criminal proceedings. In practice, the payment of compensation is hardly ever used. In the crime statistics of the year 1995, this sanction is not named once, even though the payment of compensation is mentioned as a possible sanction in the introduction to the statistical yearbook. The most commonly used sentence for convictions is the imposition of fines (97.7%).<sup>63</sup> These data are confirmed by legal practitioners, who often had to check the relevant provisions regarding the payment of compensation. This clearly shows that the legal provision is not used by the courts. The only way in which victims can obtain compensation is to go to a civil court. However, victims seldom instigate civil proceedings to obtain compensation but not because it is too time-consuming or too expensive, for access to the civil courts is relatively simple. According to most legal practitioners, it is presumably a matter of culture which cause victims to seek conviction of perpetrators rather than compensation. One may wonder, however, whether this is not also caused by a lack of information, the practice of the courts, and/or the fact that civil proceedings may not be a viable option for numerous victims of crime. It is highly probable that if the criminal courts were allowed to order compensation regarding all crimes, victims would much appreciate being a compensation order beneficiary.

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

Compensation cannot be imposed as a condition to a suspended sentence, a probation order or any other measure (see § 3.5).<sup>64</sup> The court, however, has the power to make a restitution order, upon such terms and conditions as it may deem appropriate (s. 171 CCP). Restitution orders can be made in respect of both movable and immovable property, with or without payment by the owner to the person who is in possession of the property. The power to make a restitution order is discretionary and the court should refrain from making such an order where there are serious competing claims of ownership, involving third parties. Then it is acknowledged that the civil courts are better equipped.<sup>65</sup> Likewise, the court may

<sup>63</sup> Criminal Statistics 1995, Printing office of the Republic of Cyprus.

<sup>64</sup> It is striking that a convicted person may be ordered to pay prosecution costs in addition to any other sentence, to cover the expenses of the state (s. 168 CCP). See A.N. Loizou, G.M. Pikis (1975), pp. 215.

<sup>65</sup> *Stamp v. United Dominion Trust Ltd.*, (1967), 1 All E.R. 251. See A.N. Loizou, G.M. Pikis (1975), p. 220.



order the return of property in possession of the police to the owner or, if the owner cannot be ascertained, make any order the court may deem fit (s. 170 CCP). An application to recover property may be made either by a person claiming the goods or the police.<sup>66</sup>

### 7.3 Enforcement of Compensation

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

The enforcement and recovery of financial penalties is governed by the provisions of part IV of the Code of Criminal Procedure (Cap. 155) and the Probation of Offenders Act (POA).<sup>67</sup> In the former, detailed provisions are made regarding the ranking of financial penalties and the manner of enforcement of financial penalties.

With respect to priority, the law only gives compensation to victims priority over fines. Compensation has no priority over costs made by the state for the enforcement or the proceedings: 'Where a sum has been received in part satisfaction of a sum due under a warrant of commitment, such sum shall be applied towards the payment of the following in the following order:

- (a) costs of enforcement;
- (b) costs of the proceedings;
- (c) compensation or damages;
- (d) fine or any other amount payable into public revenue.'

(s. 126 CCP).

Concerning the manner of enforcement, the district court has discretionary powers to regulate the manner of payment (see § 3.4). The court may order that compensation be paid forthwith or in instalments (s. 118-1 CCP). The court is vested with the power to inquire into the means of the offender with a view to determining the ability of the accused to pay a financial penalty, such as compensation, and may decide to extend the time-frame for payment. If, upon the apprehension of the offender, money was taken from him, the court may order that the whole or part of the sum be applied for the payment of a financial penalty (s. 118-2 CCP). The court which orders the payment of a financial penal sanction may interrogate the offender as to his means and the court may compel the offender to appear before him to be interrogated (s. 119 CCP). Every order for the payment of compensation made by the Court of Assizes is enforced by the district court (s. 130 CCP). In practice, the police make sure the offender pays his debts to the state or the victim. Since compensation orders are not frequent, the police have the means to enforce them. Failure to pay compensation at the appointed time entails the imprisonment of the offender, for a period corresponding to the amount of the financial sanction, laid down in the table of s. 128 CCP, unless the court has specified the period of imprisonment which the offender should undergo

<sup>66</sup> See A.N. Loizou, G.M. Pikiş (1975), pp. 219-220.

<sup>67</sup> According to the POL, 'an order for the payment of damages of compensation may be enforced in like manner as an order for the payment of a penalty by the offender; and where the court, in addition to making such an order orders the offender to pay to that person any costs, the orders for the payment of damages or compensation and for the payment of costs may be enforced as if they constituted a single order for the payment of a penalty' (s. 10-3 POL, Cap. 162).

in default of payment of the penalty, at the time of issuing the order (ss. 120-1 and 128 CCP).<sup>68</sup> If part of the sum is paid, the imprisonment is reduced by a number of days proportionate to the total number of days as the sum already paid (s. 127(a) CCP).<sup>69</sup> The payment may also be ensured under a warrant of enforcement on the movable and immovable property of the offender. Immovable goods can only be sold to recover the money to pay the penalty if the movable goods are not sufficient to satisfy the order (s. 120-2 CCP).

## 8 TREATMENT AND PROTECTION

### 8.1 Victim-Awareness Training

#### *General training*

In 1991, the Police Academy was established and the whole training process was revised in order to be able to meet the demands of a modern society. Before that time, policemen were trained for six months in police school. With the establishment of the Police Academy, a more solid basis for training has been created. New subjects were added to the curriculum, such as psychology, sociology, public relations and criminology. Also, the training period itself was extended to three years. Today, training courses combine theoretical training and practical issues including on-the-job training. The training period of three years alternates theory and practical training at the police stations.<sup>70</sup> The Academy provides basic training for new recruits, and advanced training for sergeants, inspectors, chief inspectors, and other senior officers, as well as for specific groups of incumbent personnel, such as refresher courses for police officers of a specific rank and courses on particular topics.<sup>71</sup> The training for new recruits consists of four stages. During the first stage of three months' training at the Academy, the recruits get a sort of para-military training from the emergency response unit and theoretical training on different subjects, including the basics of the above-mentioned subjects. Hereafter, the cadets go to the different police stations for a number of months and return again to the Academy for the second stage of training during a three-month period, etc.

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

According to the teaching staff, the issue of the treatment of victims of crime is often discussed in these courses. For instance, in the courses on human rights, human beings and violence, anti-social behaviour, and family problems.<sup>72</sup> During the third stage of theoretical training, all cadets get an eight-hour course on domestic violence, given by a multi-disciplinary staff

<sup>68</sup> See G.M. Pikis, *Sentencing in Cyprus*, Nicosia, Proodos Press, 1978, pp. 14-15.

<sup>69</sup> S.128 CCP contains a column in which the terms of imprisonment are set out for offenders in default of payment of the penalty.

<sup>70</sup> According to the Director of the Police Academy, the Academy had planned to change the educational system and introduce, first, a theoretical training period of one year at the Academy, followed by two years of practice. However, the students of the Academy did not agree and wanted the system to remain unchanged. Information supplied 2 July 1998, Police Academy, Nicosia.

<sup>71</sup> B. Charalambos Koulendis (1998), pp. 9-10.

<sup>72</sup> Curriculum of the inspector course of 1998.

(a lawyer, a sociologist and a psychologist) on the treatment of victims of domestic violence. They are instructed on the way the police should deal with these victims. Police officers are instructed to investigate each case thoroughly and in great detail, and to always seek corroborating evidence. Due to the nature of most incidences of violence, all reasonable measures are to be taken to provide and secure privacy. Furthermore, they receive training on the legal and practical information that they may give to victims of domestic violence, and the services the police may refer them to. All victims are to be referred or escorted to the nearest hospital, if necessary, or to other social services. Policemen are instructed to inform victims of domestic violence about the existence of, and services provided by other related agencies or departments, which can provide professional psychological support, counselling, shelter, etc. This course is really a 'miniature' course of the one given to incumbent personnel. Certain incumbent police officers are given a one or two-week training course on assistance to women and children. These courses are organized on a regular basis and are attended by twenty to thirty police officers at a time. The courses deal with the assistance and treatment of victims of (sexual) violence, the relevant laws and their enforcement, the different aspects of domestic violence, and victimology. All the courses are presented by professionals in the respective fields.<sup>73</sup> A pre- and post-training attitude questionnaire is administered to monitor any changes in stereotypical perceptions and attitudes towards violence against women and children as a result of the training.

The police, in particular police officers working at the specialized unit, have good relations with the Association for Prevention of and Response to Domestic Violence, which provides assistance and temporary shelter for women. In the context of this cooperation, professionals of each side provide training for the other side. In addition, feedback is continuously provided in both directions, and progress is monitored. In practice, although there is some resistance on the work floor, information collected from independent non-police agencies concerned and involved with violence against women and children indicates significant improvements, in attitude as well as in assistance and treatment of victims after training. Currently, statistics are maintained by the research and development department of the Cyprus police and cover the specific types of (attempted) crimes of violence, including sexual and domestic violence. A project is underway to use the collected data, which also include the social, economic, and educational status of victims and offenders, in order to profile them and to improve police activities. Additional training programmes for specialists are currently being organized and scheduled (1998). These courses will be attended by a selected group of the officers who attended the initial training programme. The aim of the courses is to establish a well trained unit of specialized personnel that will be handling cases of (sexual) violence.<sup>74</sup>

In Cyprus, there are no claim settlements or mediation schemes. However, the police is planning to set up a mediation scheme in the near future.<sup>75</sup>

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<sup>73</sup> Sociologists, psychologists, criminologists, lawyers, psychiatrists, and social workers.

<sup>74</sup> Data taken from an internal memorandum on *The Production of a Revised Edition of the Manual on Guidelines for Police Training on Violence against Women and Child Sexual Abuse*, December 1997.

<sup>75</sup> In February 1998, two two-week seminars/workshops were given on mediation. A total of forty police officers of various departments attended the course.

## 8.2 Questioning of the Victim

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

According to the Administrative Directions accompanying the 1964 Judges Rules (s. 8 CCP), reasonable arrangements should be made for the comfort and refreshment (drinks) of persons being questioned. Whenever practicable, both the person being questioned or making a statement and the officer asking the questions or taking down the statement should be seated. As far as possible, children (whether suspects or victims) should only be interviewed in the presence of a parent or a guardian or, in their absence, some person who is not a police officer and is of the same sex as the child.<sup>76</sup> Regarding women who have become the victim of domestic violence, questioning should be done by a female police officer. However, in practice, this is not always possible because of the limited number of female officers. In the Nicosia criminal investigation department there are no female officers. Therefore, they have to ask for an officer from another district. As a result, it is in some cases difficult to comply with the official police requirements.

The police have a special policy concerning victims of domestic violence. These victims must be questioned in a private room and confidentiality should be maintained at all times, also within the force. In cases of domestic violence, the police are advised to refrain from asking direct questions about the causes of violent behaviour (e.g. 'What did you do to your spouse to trigger the violence?'). Instead they are trained to ask more general questions ('What happened between you the two of you?') that can elicit the same information without making inference about causality and, more importantly, without blaming the victim. According to police policy, the same manner of treatment and questioning applies to victims of sexual crime.

During the further stages of the criminal proceedings, the victim-witness is, as a rule, subjected to examination and cross-examination (see § 3.3.1). During the preliminary inquiry, the accused has the right to cross-examine the witnesses. Usually, however, the accused prefers to preserve this right for the actual trial.

During the trial, the victim is, usually, questioned as a witness for the prosecution. Victims have to give evidence in court because of the strict rules of admissibility of written statements. According to the Evidence Act (Law 86/86), a written statement of a witness is only admissible if the following conditions are met: it must be signed by the witness, it must contain a declaration by the witness as to its truth, the parties or their lawyers must consent to its admissibility and the court must approve the same (s. 20-2 Evidence Act). The crucial element of these requirements is the obligatory consent of the defence counsel. In an adversarial system, chances are slim that a defence counsel will agree to the admissibility of a statement without having had the opportunity to question the witness about the content of the

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The Administrative Rules accompanying the 1964 Judges Rules. The Judges Rules are practical rules, primarily intended to guide the police as to the manner in which statements should be taken down. Their infringement allows the court to reject a statement. S. 8 CCP incorporates the Judges Rules. See A.N. Loizou, G.M. Piki (1975), pp. 135, 152.

statement. Furthermore, the Evidence Act states that notwithstanding the fact that the conditions are fulfilled, the witness may still be required to attend court to give evidence.

The victim acting as a witness is examined in chief by the prosecutor, cross-examined by the defence counsel or the accused himself (if he chooses not to be represented by counsel), and re-examined by the prosecutor. The cross-examination does not need to be confined to facts contained in the testimony of the witness during the examination. The re-examination, on the other hand, must be restricted to the explanation of matters referred to in cross-examination. The character of a witness is in itself not considered to be a fact at issue. However, in the case *R. v. Longman and Richardson* (1968, Cyprus Law Review (CLR) 32), it was decided that another witness may give evidence as to the credibility of the witness from personal knowledge or reputation. The prosecutor has no duty to disclose the character of a prosecution witness, though he may do so at his discretion. If he discloses the character, the defence may cross-examine on the character of the witness. The judge should allow a reasonable latitude but he always has a discretion as to how far the questioning may go or how long it may continue. A fair and reasonably exercised margin of discretion of the court is generally not questioned by the court of appeal.<sup>77</sup> The defence counsel cannot, however, embark on lengthy cross-examinations and must take points neatly. Repetitive questions are not permitted and the questions must relate to evidence relevant to the issues. However, it is permissible to ask questions that are not strictly relevant. Leading questions may be asked, since the purpose of cross-examination is to weaken the evidence of the witness. Re-examination serves to explain the answers of the witness during the cross-examination.<sup>78</sup> It follows that, in practice, the manner of questioning in the Cypriot courts is similar to that in the English courts, also in the sense that the judge will not easily intervene during the cross-examination. The victim may be questioned by the judge at any stage of the proceedings. Nevertheless, it is rather unusual for judges to adopt such an active attitude.<sup>79</sup>

In most countries, the long waiting times in the hallway before giving evidence is considered to be a problem for victims. In Cyprus, the waiting times are not considered to be a problem. The courts try cases from 9:00 am until 2:00 pm. Trials in which a victim has to testify are scheduled as the first cases of the day and the witness is the first to be heard, usually 10 minutes after the trial starts. Therefore, unless the case is adjourned, the waiting times are reasonable.<sup>80</sup> For certain victims, it may, however, be a problem that there is no possibility to wait anywhere but in the hallway of the court in the presence of the accused, his relatives and friends. It should be possible to allow particularly vulnerable victims to wait elsewhere for instance in the office of the judge at the court.

<sup>77</sup> *Aphrodite Vassiliades v. Artemis Vassiliades*, 18 CLR 10.

<sup>78</sup> If a victim is cross-examined, this is done by the defence counsel. Re-examination, on the other hand, is done by the prosecutor. See further A.N. Loizou, G.M. Pikiş (1975), pp. 174, 101-111. Information supplied by Mr. D. Papadopolou, lawyer, Nicosia, 3 July 1998.

<sup>80</sup> Information supplied by S. Papatheodorou, police officer and prosecutor at the district court in Nicosia, 6 July 1998.

### 8.3 Protection of the Victim

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

As a general rule, the trial should be held in public to safeguard the proper administration of justice. However, the Supreme Court pointed out that the right to a public hearing is not absolute and is, in accordance with s. 30-2 of the Constitution, subject to limitations. This provision of the Constitution says that 'the press and the public may be excluded from all or any part of the trial upon a decision of the court where it is in the interest of the security of the Republic, constitutional order, the public order, public safety, public morals, where the interests of juveniles or the protection of the private life of the parties so require, or in special circumstances where, in the opinion of the court, publicity would prejudice the interests of justice.' The Supreme Court stresses that holding the trial *in camera* is an exceptional measure that should be resorted to only where such a course is dictated by cogent reasons.<sup>81</sup> In practice, judges rarely hold trials or parts of the trial *in camera*. Only if the offender is a juvenile, the trial must be held behind closed doors, pursuant to the Juvenile Offenders Act. In all other cases, the prosecutor, the defence counsel, and the victim-witness have the right to ask for a trial *in camera*. If the prosecutor or the victim make such a request, the judge will hear the opinion of the defence counsel and then decide whether or not to give his permission to hear the case without public. According to legal practitioners, trials *in camera* are an exception; the court will not readily decide to grant such requests. Furthermore, the accused is always present during the questioning of witnesses, including the victim, unless he behaves badly in court (see G. 16).

In order to prevent undue publicity, no television cameras are allowed in court, nor is it allowed to make drawings of the persons involved in the court proceedings. The press can only take notes during the trial, tape recording machines are barred. In addition, the press can be excluded from the trial, or part of it (s. 30-2 Const.). Finally, the court can issue an order to prohibit the publication of names of persons involved in the criminal proceedings (s. 32 Const.). In practice, however, the press can and does take pictures if persons leave the court building, unless this has been prohibited. The press however is more focussed on the accused than on the victim. Photographs, names and place of residence of accused persons are printed regularly. Pictures of victims rarely appear in the media.<sup>82</sup>

<sup>81</sup> The Supreme Court in *Theodorou v. The Police* (1971) 11 J.S.C. 1404. See A.N. Loizou, G.M. Pikis (1975), p. 133.

<sup>82</sup> Information supplied by Mrs. Kyrmizi, Counsel of the Republic, Nicosia, 30 June 1998, and later confirmed by all other persons with whom I have spoken during my stay in Cyprus.

(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.*

There are no witness protection programmes. This may be explained by the fact that Cyprus is too small an island and that there is hardly any organized crime.<sup>83</sup>

Only concerning domestic violence, the legislature has taken action and has provided for protection of victims of violence within the family. Under the Violence in the Family Act (VFA),<sup>84</sup> the court may impose a probation order, a conditional suspension, or an inhibition order (see § 4.3). When the court issues such a probation or restraining order, the court will set a date for an inquiry before the expiry date of the order in order to be able to extend or vary the order. During this inquiry, the defence counsel, the complainant, and any other person affected by the order will be heard, as well as representatives of the appropriate services (s. 8-2 VFA). The court may also, upon application of the police, issue a warrant for the arrest of any person accused of any act of violence within the family. The accused is brought before the court within 24 hours and the trial is held without delay (speedy trial, s. 11 VFA). Additional protection for victims who are minors can be given by an injunction for the removal of the child-victim of violence from the family and to place him in a safe place under the care of the social welfare services (s. 12 VFA). This can also be done before the trial, upon application of a member of the family, the police, the prosecutor or a social worker, or family counsellor (s. 13 VFA).

During the trial, the court may protect witnesses by ordering that the evidence of the victim, or the other witnesses, be heard *in camera* (see F.15), or issue any order or direction necessary for the protection of the victim or other persons, without prejudice to the right of the accused of a fair trial (s. 14-1 VFA).<sup>85</sup> The court may also decide to remove the accused from the court room if his presence intimidates the victim or any other witness. In practice, however, the court hardly ever issues the order of removal of the accused from the court room. Furthermore, the names, addresses, or other particulars of the victims are not to be disclosed or included into any written publication available to the public. The name and other particulars of the victim are not to be disclosed or included in any written publication available to the public, including the judgment of the court, if it is likely that such particulars lead to the identification of the victim (s. 14-2 VFA).

Finally, it is important to note that an advisory committee from the Ministry of Health and Justice and Public Order, the judiciary and the police, as well as a multi-disciplinary

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<sup>83</sup> There has been one case of organized crime. The protection given to the witnesses consisted of 24 hour police protection before the trial.

<sup>84</sup> The Violence in the Family (Prevention and Protection of Victims) Act 1994, Law 47(I)/94 (translation into English by the Service for the Revision and Consolidation of the Cyprus Legislation).

<sup>85</sup> In practice, this means that the court can protect the victim-witness but the right of the accused to cross-examine the victim and other witnesses will not be affected. Especially in domestic violence cases, the cross examination of the children who have witnessed the violence by the violent person himself (usually the father) or his lawyer can be very difficult. Children often still feel a loyalty towards their father and can suffer a lot from having to testify. In common law countries, it is very usual that the battered wife needs the testimony of the children as witnesses of the violence.

group were established by this enactment to improve the treatment of victims of violence in the family, and in particular those under the age of eighteen (s. 16 and 17 VFA).

## 9 CONCLUSIONS

It is highly remarkable and intriguing at the same time that so much effort is being made to improve the situation of victims of domestic violence. The problem can hardly be worse in absolute terms than in other jurisdictions. The only plausible explanation is that it is the only 'real' issue concerning victims of crime on Cyprus. Crime statistics show that relatively few crimes are committed on the island, and sexual crimes in particular seem to be highly infrequent unless the dark number is particularly great. Both the treatment and protection of victims of domestic violence are given much emphasis by the legislature and the judicial authorities in general. The only exception concerns the members of the judiciary who fail to impose other, more severe, sanctions than fines on the perpetrators.

Apart from improving the position of this particular group of victims, no apparent effort is made to improve the position of victims within criminal law and procedure. In particular, the victim's right to be compensated by the offender in the course of criminal proceedings falls definitely short of the standards set in the Recommendation. Formal and actual implementation of the Recommendation's guidelines on compensation and information is among the lowest among the included jurisdictions. It is necessary to upgrade the rules and practice concerning the compensation order to the standards used today in England and Wales. Also the provision of information to victims should be significantly improved. Today, the provision of information to victims is not considered to be a core service of the criminal justice system. The lack of information is all the more a problem because no victim support service has been created on the island. Again, victims of domestic violence receive the most attention from the social services. For this group of victims, specific services and shelters have been set up. Given the island's singularities, it is possible that the protection of victims against undue publicity, intimidation, or retaliation is adequate. However, the criminal justice authorities may need to give more attention to the protection of the victim against intimidation.

More generally speaking, it would be advisable if the information, treatment and protection provided to victims of domestic violence would also be provided to victims of other types of crime. The same applies to training of the police. It is a first and important step to train police officers how to deal with victims of domestic violence but it should be followed by training programmes which concern the treatment of other vulnerable victims, such as children and victims of sexual crimes, and the 'ordinary' victim of crime in his capacity of reporter of crime and witness. Concerning vulnerable victims, the setting up of child interviewing studios or special suites for victims of rape or domestic violence would be recommended. In addition, the legislature should study the opportunity to allow questioning via a live television link (see, *inter alia*, chapters on England and Wales and the Netherlands). Finally, it is advisable that legal aid and state compensation schemes be set up for victims of crime.

To conclude, the position of victims within Cypriot criminal law and procedure needs to be considerably improved. If the accidental advantages of being a small-scale jurisdiction with a low crime rate, where informal contacts are relatively easily established between the



authorities and victims would not be taken into account, actual implementation of the Recommendation would be virtually non-existent.

# Supplements

## ABBREVIATIONS

Cap.	-	Chapter of the Statute Law of Cyprus
Const.	-	Constitution
CCP	-	Code of Criminal Procedure (Cap. 155 of the Statute Law of Cyprus)
CJA	-	Courts of Justice Act
CLR	-	Cyprus Law Review
JOA	-	Juvenile Offenders Act
JSC	-	Jurisprudence of the Supreme Court
PC	-	Penal Code
POA	-	Probation of Offenders Act
VFA	-	Violence within the Family Act

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# Chapter 6

## Denmark

### SCENERY

The Kingdom of Denmark (*Kongeriget Danmark*) comprises Denmark (*Danmark*), the Faroe Islands (*Færøerne*) and Greenland (*Grønland*). Denmark consists of the Jutland peninsula (*Jylland*) and approximately 500 islands, of which about 100 are inhabited. The largest of these are Zealand (*Sjælland*), Fuenen (*Fyn*), Lolland, Falster, Bornholm, Langeland, Mors and Als. The Faroes, with a total area of 1,399 square km and a population of 43,784,<sup>1</sup> consist of 18 islands situated in the North Atlantic, 430 km south-east of Iceland, 600 km west of Norway and more than 300 km north-west of Scotland. Greenland, with its 2,175,600 sq.km., is the largest island in the world, but it is inhabited by only 55,000 people, which is hardly surprising considering that 85% of the island is covered by ice.

Notorious Vikings, the Danes had established a considerable kingdom by 1016, when King Canute added the English crown to his realm of Denmark, Norway, southern Sweden and parts of Finland. The empire collapsed upon Canute's death in 1035, and after that Danish fortunes were mixed until Queen Margaret I, who ruled from 1387-1412, established the Kalmar Union. This union included, among others, Denmark, Norway, Sweden, the Faroe Islands, Iceland, Greenland and part of Finland. In 1523 rebellious Sweden and Finland seceded, but the rest of the union lasted until 1814. In that year Denmark was forced to cede Norway to Sweden. Iceland remained under Danish domination until its independence in 1944, and the Faroe Islands and Greenland have had home rule since 1948 and 1978 respectively.

The Kingdom of Denmark has been an independent constitutional monarchy since 1849, when a new constitution establishing a representative form of government was introduced during the reign of King Frederick VII. Copenhagen is the capital city and the country is split into 15 administrative divisions – 14 counties and 1 city. As independent parts of the Kingdom of Denmark,<sup>2</sup> the Faroe Islands and Greenland each have 2 seats in the Danish unicameral parliament (*Folketing*). In general, the legal system is applied in a more or less uniform way throughout the realm, and both the Faroe Islands and Greenland are integrated into the general organization of the Danish police force and the judicial structure. Decisions taken by the courts on the Faroe Islands and on Greenland may be taken to the Court of

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<sup>1</sup> Population per 1 December 1996.

<sup>2</sup> The situation is comparable to that of the Dutch Antilles and Aruba which are now part of the Kingdom of the Netherlands.

Appeal in Copenhagen. Regarding criminal procedure, the system of the Faroe Islands is more or less identical to that of Denmark, whereas the criminal procedure of Greenland is markedly different. In this chapter we will deal exclusively with Denmark.

Denmark was the first Nordic country to become a member of the European Community, on 1 January 1973.<sup>3</sup> Furthermore it was a founding member of the UN, the Council of Europe and NATO. It was one of the original signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms on 4 November 1950 and ratified the Convention on 13 April 1953.

With a population of 5,333,617,<sup>4</sup> of which one million live in Copenhagen, Danish society is relatively small and coherent, and the dominant features of Danish political culture are consensus building and pragmatism.<sup>5</sup> The State welfare system is extensive.

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<sup>3</sup> The Faroe Islands and Greenland are *not* members of the EU.

<sup>4</sup> 1 July 1998.

<sup>5</sup> B. Dahl, T. Melchior, L.A. Rehof, D. Tamm (eds.), *Danish Law in a European Perspective*, Gadjura, Copenhagen, 1996, p. 56. One fascinating exception to the 'consensus building' attitude was the establishment of the Freetown state-within-a-state Christiania city near Christian's Havn in Copenhagen. The hippie city Christiania was born in 1971 when a group of people looking for a different life based on communal living and freedom occupied the abandoned *Bådmandsstrædes* army barracks. Despite initial attempts by the Government to clear the area, Christiania has survived and now boasts a population of around 1,000. See Christiania Guide, 3<sup>rd</sup> edition summer 1996; also the article 'Joint Venture' in *Scanorama*, June 1997.

## PART I: THE DANISH CRIMINAL JUSTICE SYSTEM

### 1 INTRODUCTION

For the purpose of this study, Danish law may be considered part of the legal family of Nordic law, which was never really influenced by Roman Law and is characterized, first of all, by a use of tradition. Furthermore there is a distinct lack of legal formalities and an ideal of simplicity. Finally, the Danes have a generally pragmatic approach to law.<sup>6</sup> Proceedings are sober and court sessions to the point. In the district courts no robes are worn. Judges may actively take part in the questioning of witnesses (s. 183-2 Administration of Justice Act, AJA, *Retsplejelov, Rpl*).

Due to historical ties, Danish law has exercised considerable influence beyond its national boundaries. Much of Icelandic law is a copy of Danish law, and the transition that the Icelandic criminal justice system made in the late eighties and early nineties of this century from an inquisitorial system to a more accusatorial one had already been made by the Danish system in the fifties. Icelandic developments still tend to follow Danish developments – see for instance the respective acts on state compensation for victims of crime. In Norway, too, Danish legal influence has been considerable, although after the union with Denmark was dissolved in 1814 the Norwegians were keen to replace the codes the Danes had introduced in their country by new, Norwegian legislation.

Danish crime rates are going down dramatically at the moment, in particular violent crime and burglary (see further Van Dijk's International Victim Surveys). At present, the main problem that the Copenhagen police are faced with is the rising crime rate among second generation immigrants, in particular street robberies and violence.

The fieldwork for this report was conducted in April 1997.

### 2 GENERAL REMARKS AND BASIC PRINCIPLES

Danish courts are considered to have the right of judicial review of the constitutionality of acts of parliament, even though the Constitution does not explicitly grant them such a right.<sup>7</sup> However, extreme reticence is practised by the courts in exercising this right. To date, only one statute has been declared unconstitutional.<sup>8</sup>

The principle of immediacy (*bevisumiddelbarhedsprincippet*) (s. 896 AJA) determines that all evidence must be presented in its most original form to the judicial instance deciding the question of guilt. Witnesses must appear in person before the court dealing with the case, although the court may determine that the testimony should be made instead before a city court that it considers to be more suitable (s. 174 AJA). It is not sufficient to read a statement to the court made by a witness during the preliminary investigation. The principle

<sup>6</sup> B. Dahl et al (1996), pp. 35-38.

<sup>7</sup> L.B. Langsted, V. Greve and P. Garde, *Criminal Law in Denmark*, Kluwer Law International, The Hague/London/Boston, 1998, nr. 46 p. 30; B. Dahl et al., (1996), p. 85.

<sup>8</sup> Statute No. 506 of 12 June 1996 on *Tvind*-schools, which was found to be unconstitutional by the Supreme Court on 19 February 1999.

of orality (*mundtlighedsprincippet*) is anchored in section 65 of the Constitution and section 148 AJA. The principle of the search for the material truth or of instruction (*objektivitetsprincippet*) has several implications. First of all, the police must collect both incriminating and exculpating evidence. Secondly, plea-bargaining is not allowed; the court is also not bound by a guilty plea nor is a guilty plea automatically rewarded with a sentence reduction. Thirdly, the judiciary may participate actively in the search for material truth – section 873 AJA determines that the judge is obliged to question whoever is on the stand if he considers this necessary in the interest of finding the truth.

In the search for the substantive truth a free evaluation of evidence (*bevisbedømmelsens frihed*) is made, and this evidence is not bound by any rules (s. 896 AJA). Evidence acquired in an illegal way is not necessarily void, although the offending police officer or prosecutor may be indicted for breach of duty. The decision to prosecute is a discretionary one following the principle of expediency (*opportunitetsprincippet*), and most offences are prosecuted 'ex-officio' – in other words they may be prosecuted irrespective of whether the victim so desires, with the exception of the complainant offences and offences subjected to private prosecution (see §§ 5.2 and 5.4). Finally, the principle of publicity (*offentlighedsprincippet*) is found in section 29 AJA.

### 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

#### 3.1 Investigating Authorities

Investigations concerning criminal offences are handled by the police and only rarely by other authorities. There is no such thing as an examining magistrate. There is one state police force in Denmark which covers the 54 police districts in the country, as well as Greenland and the Faroe Islands, which are independent police districts. Ultimate responsibility for the police force lies with the Minister of Justice (*justitsministeren*). The highest ranking police officer is the National Commissioner (*rigspolitichefen*) who is responsible for the administration of police personnel and finances (s. 110 AJA). Each district is headed by a Chief of Police (*politimester*), with the exception of the Copenhagen police district which has its own Commissioner (*politidirektør*) (s. 111-2 AJA). The Chiefs of Police, who are also head of the prosecutors attached to the police force for the administration of less serious offences (see § 3.2), are themselves lawyers trained in the prosecution service. At the end of 1991 the Danish police force totalled 13,600, comprising 10,300 regular police officers, 350 police prosecutors, 2,300 civilian clerical staff and 650 ancillary staff.<sup>9</sup> First brought into the force in the '70's, women still only made up 5.6% of the police force in 1995.<sup>10</sup>

In pursuance of section 108-1 AJA the main tasks of the police are to maintain public order, enforce the law, prevent and investigate crime and prosecute offenders. Other duties that have been imposed in accordance with section 108-2 AJA are to conduct driving tests and issue driving licences and passports, the administration of lost property, the registration of motor vehicles and the rendering of services to other agencies. This last task includes serving summonses and court orders (judgements) to offenders and witnesses.

In the mid-nineties the Danish police were in the news following a very critical Amnesty

<sup>9</sup> The National Commissioner (1992), pp. 16-18.

<sup>10</sup> *Dansk Politii* 3/95, as reported in NSIK's *Nyhedsbrev: Nordisk Kriminologi* 21(2) 1995, p. 4.

International report of the way they treat suspects, and a subsequent report from the Council of Europe. Although part of the Amnesty report has been proven to be incorrect, changes in working methods have been made.

### 3.2 Prosecuting Authorities

The Prosecuting Authority consists of a Director of Public Prosecutions (*Rigsadvokaten*), the state prosecutors (*statsadvokaterne*), the Chiefs of Police (*politimestrene*) and 'persons appointed to assist these with their prosecuting tasks', i.e., the police prosecutors (s. 95 AJA).<sup>11</sup> The Chief of Police is responsible for the prosecution of offences heard in the district court. In practice this task is delegated to the police prosecutors.

More serious offences heard in the High Court are prosecuted by the State Prosecution Service. There are six state prosecutors headed by the Director of Public Prosecutions. Three of them are based in Jutland and three in Copenhagen. The state prosecutors are responsible for the prosecution of offences heard by the High Court as court of first instance, or as Court of Appeal (s. 719-1 AJA).<sup>12</sup> The Director of Public Prosecutions appears before the Supreme Court in criminal cases, supervises the state prosecutors and puts out general prosecution guidelines which both the state prosecutors and the police prosecutors must adhere to (ss. 99-1 and 99-2 AJA). Because the police prosecutors are part of the police force they have two bosses. On the one hand there is the state prosecutor and the Director of Public Prosecutions, and on the other hand the local Chief of Police and the National Commissioner. Above both of these is the Minister of Justice.<sup>13</sup>

Generally speaking, a state prosecutor will have worked as a prosecutor in a police district for several years, before moving to another area to gain further experience. A successful applicant for the position of state prosecutor will then receive a further two-year on-the-job training with the state prosecution service.

Prosecution by both the Chiefs of Police and the State Prosecution Service are governed by the principle of opportunity (ss. 721 and 722 AJA).

### 3.3 Judiciary

The regular court of first instance in Denmark is the municipal or city court (*byret*). There are 84 city court districts. Most city courts are held by only one judge dealing with both civil and criminal matters. In the bigger cities several judges work in one district, often headed by a president. There are two High Courts, or Courts of Appeal (*Landsretter*). The Eastern High Court (*Østre Landsret*), which has 46 judges and is seated in Copenhagen, is for the Islands. The Western High Court (*Vestre Landsret*) which has 23 judges and is seated in Viborg, is for the peninsula of Jutland. The high courts also function as court of first instance for criminal cases requiring trial by jury, i.e. where the prosecution is asking for a penalty of

<sup>11</sup> Copenhagen has a Commissioner (*politidirektor*) rather than a Chief of Police.

<sup>12</sup> The state prosecutors are also responsible for the prosecution of some special categories of offences such as offences against the state (s. 719-2 AJA).

<sup>13</sup> The Danish, Norwegian and Icelandic system of having (part of) the prosecution service integrated in the police force seems comparable to English system before the establishment of the Crown Prosecution Service in 1985.



more than 4 years (s. 687-2 AJA).<sup>14</sup>

The Supreme Court (*Højesteret*) is composed of a President and 15 other judges and is seated in Copenhagen. It is not a court of cassation but an appellate court for judgments rendered by the two regional courts of appeal and by the Maritime and Commercial Court in Copenhagen.

In principle, a case may be tried at two instances. A judgment by the city court may be appealed to the High Court, and a decision against a sentence (but not against the verdict) of that court acting as a court of first instance may be appealed to the Supreme Court. More and more cases are being heard in first instance by the district courts, meaning that there are fewer parties with a right of appeal to the Supreme Court. To bring a case before the Supreme Court on a second appeal, leave must be granted by a board chaired by a Supreme Court judge and composed of two judges from the lower courts, a practising lawyer and a professor of law.

In the city court, misdemeanour cases and cases where the suspect has confessed are heard by one professional judge. A professional judge has a university law degree, and will normally have started his professional career as a deputy judge or a civil servant in the Ministry of Justice.

Where more serious offences are involved, the professional judge in the district court sits with two lay judges. Cases being tried before the High Court as a court of first instance are heard by three judges and a jury of 12 laymen. The Danish way of selecting jurors differs significantly from the English or American system. Every four years a committee appointed by the municipal council makes a list of potential jurors. The courts re-order the names on the list drawn up by the municipal council by drawing lots, and the jurors are called to their local court in this new order. The jury decides the question of guilt without offering reasons. If the jury acquits the defendant he is free to go, but if he is convicted the three judges may overturn the verdict of the jury in which case there will be a new trial. In practice, verdicts are only occasionally overruled in this way. The defendant himself has no right to appeal a guilty verdict, only the sentence. Confessing defendants are convicted and sentenced by a professional judge according to well-designated sentencing standards.<sup>15</sup> Nowadays in practice, trials by jury occur only occasionally.<sup>16</sup>

Like Norway, Denmark has no administrative courts, although in many fields quasi-judicial boards of appeal have been established between the normal administrative authorities and the courts.<sup>17</sup>

### 3.4 Ministry of Justice

In keeping with most other Western European governments, the Danish government has

<sup>14</sup> Cf Norway which until 1995 had a similar system. Cases concerning an offence with a maximum prison sentence of more than six years were dealt with in the High Court as a court of first instance sitting with a jury, until the two-instance legislation came into force in 1995. Now all cases are first dealt with in the district court.

<sup>15</sup> C.F. Mulder en P.J.P. Tak, *De bekende verdachte. Een onderzoek naar de procedure voor de bekende verdachte in het Deense en Noorse (straf-)procesrecht*, Gouda Quint bv, Arnhem, 1993, p. 61.

<sup>16</sup> In 1986 there were 42 jury trials in the Eastern High Court and 14 in the Western High Court. The total of 56 trials by jury means an average of barely more than one trial a week. Anderson (1990) p. 856.

<sup>17</sup> B. Dahl et al. (1996), p. 103.

in recent years focussed on, among other things, fighting crime. In October 1993 it published a policy document called 'The Fight Against Violence. A plan of action from the government' (*Bekæmpelse af Vold. En handlingsplan fra regeringen*). Many of the government plans are executed by the Ministry of Justice which is, after all, head of both the police force and the prosecution service. Regarding victims, the Ministry of Justice has taken several initiatives. Among them were the introduction on 6 June 1983 of a committee that subsequently produced a report on the position of the injured party in cases of rape and violence (*Betænkning nr. 1102, 1987, om den forurettedes stilling i voldtægts- og voldssager*) and the publication of the more recent violence package (*voldspakke*), which is discussed in more detail in § 4.3. However, one criticism expressed more than once during the interviews conducted for this study was that the Ministry is very out-of-touch with reality, and that many of the proposed measures lack any scientific base. When the field-work for this report was conducted, the Ministry did not yet have its own research department. A working group set up by the Ministry in the spring of 1997 subsequently proposed the establishment of a Political Research Committee of the Ministry of Justice, to stimulate and coordinate research in the criminal political field. This Research Committee has now been established.

### 3.5 Compensation Board

The Danish Board for Compensation from the State for Victims of Crime (*Det danske nævn til erstatning fra staten til ofre for forbrydelser*) is responsible for awarding and assessing state compensation for victims of crime who have suffered personal injury as a result of an offence committed against them. The three-member board is appointed by the Minister of Justice. The chairman of the board is a judge. To ensure that there is expertise in the field of social security legislation the second member is appointed on the recommendation of the Minister of Social Affairs. The third member of the board is appointed on the recommendation of the General Council of the Danish Bar. Each member serves for four years.<sup>18</sup>

State compensation was introduced in Denmark in 1976, and is now awarded on the basis of the Act on State Compensation for Victims of Crime (*Lov om erstatning fra staten til ofre for forbrydelser*, consolidation act no. 470 of 1 November 1985 with subsequent amendments, also known as the Victim Compensation Act, *offererstatningsloven*). See § 4.3.

In 1998 the board received 3135 claims for state compensation, which is 44 more than in the previous year (a rise of 1.5%). Compensation was awarded in a total of 2,332 cases, for a total sum of approximately 31,000,000 Kronor (EUR 4,170,288). Seven hundred cases had still not been decided by the end of 1998. On average, uncomplicated cases are dealt with within 3½ months.<sup>19</sup>

The State Compensation Board is intended to act as a safety net, as a last resort if the victim fails to get compensation from either the offender or private insurance. In practice, because there is no procedure encouraging the victim to first try to collect compensation from the offender, the board is often the first place victims turn to rather than the last. In both Denmark and Norway the prevalent attitude is that the state, rather than the offender, should and will take care of compensation. In Denmark, State compensation was originally

<sup>18</sup> M. Lerche, 'Denmark', in: D. Greer (ed.), *Compensating Crime Victims, a European Survey*, Max-Planck-Institut für Ausländisches und Internationales Strafrecht, edition iuscrim, Freiburg im Breisgau, 1996, p. 149.

<sup>19</sup> See *Årsberetning for 1998 Fra Erstatningsnævnet*.

based on the principle of equity – the State was not under a formal legal obligation to pay compensation. But in 1985 the Act was amended so that victims of crime now have an actual legal right (*retskrav*) to claim compensation from the state.<sup>20</sup> The general opinion that it is first and foremost the duty of the State to pay compensation to victims explains why a claim against the offender in adhesion to the criminal proceedings is so ineffective in Danish legal practice (see § 7.2 under D.10).

### 3.6 Victim Support

Victim support organizations in Denmark are primarily focussed on victims of sexual offences and children. The oldest organization is called the Joan Sisters. Named after Joan Liddle, a black woman acquitted of murdering a guard who had raped her in prison, and founded in 1976, the Joan Sisters offer help and support to victims of rape and other sexual violence. There are two branches, one in Copenhagen and one in Århus, but there is hardly any communication between the two. Furthermore, there are approximately 35 shelters for battered women around the country, one in almost every Danish city or town.<sup>21</sup> There are also two special medical/forensic units for dealing with rape cases located at the University of Copenhagen and in Jutland, respectively.<sup>22</sup> A more recent development is the move to establish regional Rape Crisis Centres. On 1 November 1999 the first of these was due to commence operation in Aarhus, with a further Centre planned for Copenhagen.<sup>23</sup>

The only group involved with other types of victims is the relatively little-known Danish National Association for Support for Victims of Violence (*Landsforeningen Hjælp Voldsofre*, LHV). According to its own manifest, this organization aims to help innocent victims of crime and to raise the awareness of the authorities concerning the problems of victims. LHV has 1200 members and is an umbrella organization with five local offices. The main office is in Randers near Århus and is staffed by three people who work daily from 8 until 2. Contact with the victims is handled only by telephone; the organization does not visit victims at home. To receive help from the LHV, a victim must have reported the crime to the police.<sup>24</sup> The LHV also offers insurance policies. There are LHV brochures in all the police stations and approximately 800 victims 'phone each year for help and advice, for instance on where to find a lawyer. There are 2 lawyers associated with the organization, one in Randers and one in Copenhagen. The LHV receives subsidy from the Ministry of Justice.

Impressed by the network of local victim support organizations in Sweden, the Danish Minister of Justice proposed in its 1997 violence package, establishing a similar voluntary

<sup>20</sup> M. Lerche (1996), p. 133.

<sup>21</sup> See B.G. Nielsen and A. Snare, *Viktimologi, Om forbrydelsens ofre: teori og praksis*, Aarhus Universitetsforlag, 1998, pp. 90-92. Denmark does not have a tradition of private charity and individual commitment to helping one's fellow human beings. Helping people deal with a variety of problems is generally considered to be the task of the state. Unfortunately, the Danish state has not been overzealous in providing support to victims of crime. Information provided by B. G. Nielsen and S. Jørgensen, University of Århus, 28 April 1997.

<sup>22</sup> I. Bacik, C. Maunsell, S. Gogan (1998), *The Legal Process and Victims of Rape. A comparative analysis of the laws and legal procedures relating to rape, and their impact upon victims of rape, in the fifteen member states of the European Union*, The Dublin Rape Crisis Centre, Dublin, 1998, p. 187.

<sup>23</sup> Information provided by A. Elklit, Aarhus University, 24 August 1999. There are also plans to establish a National Knowledge Centre for Victims of Rape.

<sup>24</sup> See their red and white folder, p. 3.

network in Denmark.<sup>25</sup> At the time, it was unclear whether the responsibility for establishing this network would be with the National Commissioner of Police, or with the Directorate of the Prisons and Probation Service. By October 1999, the network was being put in place under responsibility of the local police.<sup>26</sup>

### 3.7 Enforcement Authorities

Fines and confiscation orders are recovered by the police. The Directorate of the Prisons and Probation Service (*Kriminalforsorgen*) is responsible for the enforcement of custodial and conditional sentences, including the payment of compensation as a condition to a suspended sentence (s. 57-1 no. 7 Penal Code, see § 7.2 under D.13 and § 7.3 under E.14).<sup>27</sup> The Directorate is also responsible for finding suitable community service projects. The Ministry of Justice has also proposed that either the Directorate of the Prisons and Probation Service, or the National Commissioner, be made responsible for the establishment of a national network of voluntary victim support organizations (see § 3.6).

### 3.8 Lawyers

In Denmark there is no distinction between barristers and solicitors, notaries or other practising lawyers. They are all referred to as *advokat*. The governing body of the Danish lawyers is the Danish Law Society (*Advokatrådet*). Victims of violent and/or sexual offences are entitled to a state-paid lawyer. Most victim's lawyers usually do defence work, with the occasional appointment as a victim's lawyer. See § 5.8.

### 3.9 Standing Committee on Criminal Law

The Standing Committee on Criminal Law (*Straffelovrådet*) consists of persons from different sectors of the criminal justice system and of professors in penal law. Since 1950 this committee in the Ministry of Justice has prepared the principal amendments of the criminal laws.<sup>28</sup>

### 3.10 The Parliamentary Ombudsman

Since 1955, Denmark has had a Parliamentary Ombudsman (*Folketingets Ombudsmand*), to whom all citizens may appeal government actions. In relation to victims of crime, the Parliamentary Ombudsman has taken a decision on the interpretation of section 7-1 of the Victim Compensation Act.<sup>29</sup>

### 3.11 The Crime Prevention Council

The Crime Prevention Council (*Det Kriminalpræventive Råd*) was established in 1971. The police as well as schools and the municipal social services participate.

<sup>25</sup> Accompanying commentary to the legislative proposal of 22 January 1997, under 6.1, p.11.

<sup>26</sup> Information provided by E. Smith, University of Copenhagen, 18 October 1999.

<sup>27</sup> L.B. Langsted et al. (1998), no. 415 p. 412.

<sup>28</sup> B. Dahl et al. (1996), p. 509.

<sup>29</sup> j.nr. 1988-1399-66.

### 3.12 Conflict Resolution Boards

Following the successes of the conflict resolution boards (*konfliktråd*) set up in Norway, a pilot project was initiated in Denmark in 1994, with four boards opening for business in February 1995. Although the first experiences with the boards were little short of a disaster – only 4 cases came forward for mediation in a whole year<sup>30</sup> – the project has been continued. The lack of success seems to have due to the fact that the targeted group involved serious offences of violence rather than petty crime. The Conflict Resolution Boards are coordinated by the Crime Prevention Council (*Det Kriminalpræventive Råd*) and the police.<sup>31</sup>

## 4 SOURCES OF LAW

### 4.1 General

Although in several instances, in particular in the field of private law, Danish law has not been codified, *statutes* passed by the Danish Parliament are the most important source of Danish law.<sup>32</sup> Nowadays, the use of delegation of rule-making and discretionary powers to administrative authorities is widespread.<sup>33</sup> A *lovbekendtgørelse* is a Consolidation Act and a *bekendtgørelse* is an Executive Order. A *Betænkning* is a report in the Official Report Series of Danish Legislative and Investigation Commissions, and a *meddelelse* – which literally translates as announcement – is a circular.

Great importance is attached to the *preparatory works*, the report of the experts' commission that prepared a certain law and all that was presented and discussed in Parliament. *Precedents* are a third source of law, and although not formally binding, any departure from a decision of the Supreme Court will be noted as a major change.<sup>34</sup> Because of the detailed and explicit nature of the Administration of Justice Act, case law plays a more modest role in the field of criminal procedure than in most other parts of Danish law.<sup>35</sup>

As is the case in Iceland, *analogy* forms a fourth source of law. Other sources are *custom* and *legal science*.

<sup>30</sup> Accompanying commentary to the legislative proposals of 22 January 1997, under 7, p. 13-14.

<sup>31</sup> See C. Holt, 'Møde mellem offer og geningsmand', in: *Nyt fra Kriminal Forsorgen* Nr. 2 April 1995, 8. Årg., pp. 12-13; J. Lund, 'Positiv stemning for konfliktråd', in: *Nyt fra Kriminal Forsorgen* Nr. 3 Juni 1996, 9. Årg., pp. 18-19; B.G. Nielsen and A. Snare (1998), pp. 122-126.

<sup>32</sup> Statutes can be found in *Lovtidende* (the official law gazette) and are indicated by a number and the year in which they were issued, followed by a name. The Danish Constitution, for example, is listed as *Lov nr 169, 5 June 1953, Danmarks Riges Grundlov*.

<sup>33</sup> B. Dahl et al. (1996), p. 69.

<sup>34</sup> B. Dahl et al. (1996), pp. 49-50. Judgments by Danish courts are published in the weekly law review '*Ugeskrift for Retsvæsen*' (UfR or simply U). A case is cited with reference to the year and page of UfR on which it is reported, followed by an abbreviation for the court which passed the judgment. The Supreme Court (*Højesteret*) is denoted as H, the Eastern High Court (*Østre Landsret*) as Ø and the Western High Court (*Vestre Landsret*) as V. The citation 'UfR 1990 p. 594 H' refers to a judgement passed by the Supreme Court and reported on page 594 of the *Ugeskrift for Retsvæsen* of 1990. See B. Dahl et al. (1996), p. 10; V. Greve, *Criminal Procedure in Denmark, An Outline*, 2<sup>nd</sup> Edition, Kriminalistisk Instituts Stencilserie Nr. 59, 1992, p. 6.

<sup>35</sup> V. Greve (1992), p. 5.

## 4.2 Sources of Criminal Law and Procedure

Like Sweden, Denmark does not have a separate code of criminal procedure. Several rules on criminal procedure are to be found in the Danish Constitution (*Grundloven*) which was adopted in 1953. Most other rules are found in the Administration of Justice Act (AJA) (*Lov om rettens pleje*, generally referred to as *Retsplejeloven*, *rpl*) of 1916, which deals with both civil and criminal procedure. This Act was implemented in 1919 and has since been subjected to many changes. As mentioned above, case-law is overly important in the area of criminal procedure, because of the detailed nature of the AJA.

The primary source of criminal law is the present Penal Code (*straffelov*) of 1930 which came into force on 1 January 1933. This code has been heavily amended, with the most significant changes dating from the beginning of the 1970's. In 1949 a standing criminal law commission was introduced which has subsequently prepared all the most important changes in the Criminal Code.

S. 1 of the Criminal Code recognizes analogy as a source of criminal law: 'Only acts punishable under a statute or entirely comparable acts shall be punished.' In practice, analogy is rarely used as a source of law.<sup>36</sup> Circulars published by the Director of Public Prosecutions also function as a source of criminal law.

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

### Legislation

Many provisions concerning victims of crime are found in the Administration of Justice Act. The victim's right to a lawyer is regulated in Chapter 66a, sections 741a-741e. Chapter 88, sections 989-990, deals with private prosecution and Chapter 89, sections 991-996a with civil claims made in conjunction with the criminal proceedings. Compensation from the offender to the victim is decided on the basis of the Damages Liability Act (DLA) (*lov om erstatningsansvar*), Act. no. 228 of 23 May 1984, together with the Damages Liability (Consolidation) Act no. 599 of 8 September 1986, as amended by Act no. 196 of 29 March 1989 and Act no. 389 of 7 June 1989. Following a preparatory government report published in 1975,<sup>37</sup> state compensation was introduced in 1976 by the Act on Compensation from the State for Victims of Crime (*lov om erstatning fra staten til ofre for forbrydelser*). A second preparatory report in 1984<sup>38</sup> proposed that claiming state compensation should be made into a legal right, and the AJA was subsequently amended by Act no. 233 of 6 June 1985, which came into force on 1 July 1985. The regulations on state compensation are now found in the Act on Compensation from the State for Victims of Crime (Consolidation) Act 1985 (Act no. 470 of 1 November 1985), as amended by Act No. 366 of 18 May 1994 and more recently by executive order no. 808 of 19 November 1998, which came into force on 1

<sup>36</sup> Compare Iceland, where analogy is also recognized as a source of criminal law. In Denmark, relevant cases are U 1938 p. 640 Court of Appeal, U 1970 p. 851 Court of Appeal, 1974, unpublished Court of Appeal, U 1994 p. 520. See B. Dahl et al. (1996), pp. 511-512.

<sup>37</sup> Report no. 751 on state compensation for victims of offences (*Betænkning om erstatning fra staten til ofre for forbrydelser*) issued by the committee set up by the Ministry of Justice on 8 January 1974, Copenhagen 1975.

<sup>38</sup> Report no. 1019 on the legal right to compensation for the victim of offences (*Betænkning om retskrav på erstatning til ofre for forbrydelser*), published by a working group set up by the Ministry of Justice, Copenhagen 1984.

December 1998.

Another important preparatory government report is report no. 1 102 published in 1987 on the position of the injured person in rape cases and cases of violence (*Betænkning om den forurettedes stilling i voldtægts- og voldssager*).

On 22 January 1997, the Danish Ministry of Justice announced a 'violence pack' (*voldspakke*) which embodied the proposal to pass legislation changing the Administration of Justice Act, the Penal Code and the Damage Liability Act, with the aim of strengthening the position of the victim of crime.<sup>39</sup> The suggestions included, among other things, the widening of the group of victims eligible for state-paid legal support as well as an extension of liability for compensation of damage of a non-economic nature (fear and mental anguish), where injury has occurred due to a crime involving a particularly brutal attack against another's freedom or person. The amendments were subsequently introduced by Act of 23 May 1997.<sup>40</sup>

### *Circulars*

In the government's action plan of October 1993 on the fight against violence (*handlingsplan om bekæmpelse af vold*), explicit mention is made of the relationship between the police and, among others, victims of crime. The explanatory notes to the ensuing bill on the fight against crime no. L 78, 1993-94, which was passed by parliament on 18 May 1994, state that the ministry of justice will discuss with the police whether further guidelines on the way the police should deal with civilians in 'unfortunate situations' are necessary. To that end an informal working group was set up in which the National Commissioner, the association of police chiefs, the Copenhagen police commissioner and the Ministry of Justice were represented. The Police Academy then prepared a memo concerning the treatment by the police of victims of crime and of accidents and their relatives (*Notat vedrørende politiets behandling af ofre for forbrydelser og ulykker og deres pårørende*). This memo contains guidelines for the police on such matters as the approach towards victims of crime and of accidents, stress and crisis reactions, psychological first-aid and crisis intervention, information and orientation, questioning, and dealing with the victim's relatives, as well as offering an overview of all relevant legislation and guidelines. Following a decision of the working group, the Ministry of Justice subsequently issued a circular to the police and prosecution authorities (*Cirkulæreskrivelse til politiet og anklagemyndigheden*) on 25 November 1996, with the Police Academy memo attached as an appendix.

On 22 May 1990, the Director of Public Prosecutions issued circular no. 4/1990 'Police guidance for the victim of crime' (*Politiets vejledning til ofre for forbrydelser*). This was replaced on 6 November 1996 by circular no. 4/1996 bearing the same name. The circular instructs the police to inform the victim of his rights to claim compensation, and where relevant of his right to ask for the appointment of a state-paid lawyer (see § 6.1 under guideline A.2).

### *Other*

Regarding children, section 4 of the Executive Order no. 214 of 13-04-1987 issued by the Ministry of Social Affairs determines that a representative of the social services must be

<sup>39</sup> Forslag nr. L 144 til Lov om ændring af retsplejeloven, straffeloven og erstatningsansvarsloven – Styrkelse af retsstillingen for ofre for forbrydelser m.v.

<sup>40</sup> Lov nr. 349 af 23. Maj 1997 om ændring af retsplejeloven, straffeloven og erstatningsansvarsloven (Styrkelse af retsstillingen for ofre for forbrydelser m.v.)

present during the questioning of a child under the age of 15, for example, when being questioned as a witness in a criminal case. In 1993 the Council for the Prevention of Crime issued a handbook called 'Offences against children – do we see it? – do we do anything about it' (*Overgreb mod børn – ser vi det? – gør vi noget*). The questioning of children is dealt with extensively in a May 1995 report written by a special working group on the examination of children using video equipment (*arbejdsgruppen vedrørende videoafhøring af børn*). The working group was set up in the Autumn of 1992 on the initiative of the Glostrup police. This police district was the first to establish a special child video questioning room, and felt that it was worth making an overview and analysis of their experiences.

The Ministry of Health has issued an Executive Order no. 548 of 30-06-1995 on psychological help for victims of certain offences, among them victims of violence and, if the victim has died, the closest relatives. A victim who has been referred by a practising doctor has a right to subsidy for 70% of the costs of up to 12 sessions with a psychologist. The subsidy is paid by the local council. The council need not pay out more in subsidies than has been reserved in the council budget.<sup>41</sup> Once the amount reserved for a particular year has been paid out, all further requests for subsidy made in that year may be refused.

## 5 THE ROLES OF THE VICTIM

### *Terminology*

The Danish word *offer* (plural: *ofre*) means victim. The term used in legislation is *forurettede* which translates as injured party. There is no legislative definition of *forurettede*. In their commentary to the AJA, Gomard and Møller state that it is commonly assumed that the term *forurettede* must be interpreted narrowly.<sup>42</sup> Only those whom the penal provisions specifically aim to protect are considered an injured party.

### 5.1 Reporting the Offence

A report (*anmeldelse*) of a criminal offence should be made to the police (s. 742-1 AJA). For victims of violent offences seeking to claim compensation from the state, it is important to report the offence to the police as soon as possible: only if the offence is reported 'without undue delay' is the victim eligible for state compensation (s. 10 of the Victim Compensation Act). 'Without undue delay' is interpreted as meaning within 24 hours (see the explanatory notes to the act). This provision is applied very strictly.<sup>43</sup> In special circumstances compensation may be awarded even though the offence has not been reported in a timely manner (s. 10-3 VCA). A false report is liable to a fine or to simple detention or, in aggravating circumstances, to a maximum of one year imprisonment (s. 165 PC).

<sup>41</sup> Memo concerning the treatment of victims of offences and of accidents and their relatives, 1996, 3.3.1, p. 13.

<sup>42</sup> B. Gomard and J. Møller, *Kommenteret Retsplejelov*, Jurist- og Økonomforbundets Forlag, 1994, p. 38, commentary to section 725-1 and -2, remark 3.

<sup>43</sup> M. Lerche, 'Denmark', in: D. Greer (ed.), *Compensating Crime Victims, A European Survey*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg im Breisgau, 1996, pp. 97-160: p. 139.



A victim survey conducted in 1995<sup>44</sup> found that 29.6% of criminal offences were reported to the police, vs. 64.4% that was not reported; 4.9% were brought to their attention by other means.<sup>45</sup> By comparison, in 1971, 16.9% of all offences were reported to the police, 2.4% came to their attention by other means and 80.7% remained unknown to the police. This means that the rate of reporting has grown substantially since 1971.<sup>46</sup> Those victims who indicated in the 1995 survey that they had not reported the offence to the police were asked why. One of the most common reasons offered was that they did not consider the offence particularly serious. Others said that they did not think it suitable or worthwhile to report the offence. Fear of reprisal was also occasionally mentioned. Other reasons were that the offence was committed abroad, that they knew the offender well (family), that there was a general fight, sympathy for the offender/social considerations, that it was part of the risk of working, that they didn't want to be an informer, shock, that it was reported to another authority and fear of the police.<sup>47</sup>

## 5.2 Complainant

Generally speaking, offences are prosecuted regardless of whether the victim so desires. However, some offences can only be prosecuted on complaint (*begæring om offentlig påtale*, i.e., a request for public prosecution).<sup>48</sup> In cases where public prosecution depends on a complaint, prosecution may only be initiated if such a complaint has been made by the appropriate person (s. 720-2 AJA). Only the injured person has the right to file a complaint. If the injured party is dead, or if an act directed against a deceased person is punishable, the right to file a complaint falls to the deceased's spouse, parents, children or siblings. (s. 725-1 AJA). The injured person must make his request for public prosecution within six months of acquiring sufficient information to make such a complaint, otherwise he loses his right (s. 96-1 PC). The right to request public prosecution also expires six months after the death of the injured party (s. 96-3 PC). A false complaint is liable to a fine or to simple detention or, in aggravating circumstances, to a maximum of one year in prison (s. 165 PC).

The prosecuting authorities may refuse to honour a request for public prosecution that excludes an accomplice. If there is a complaint against only one of the guilty parties without excluding a possible accomplice, the prosecuting authorities may extend the prosecution to this person, unless the complainant opposes this after he has been given the opportunity

<sup>44</sup> The 1993 action plan of the government assigned the National Commissioner's research unit the task of setting up a research project on the causes and extent of crime as well as the circumstances of assailants (*Bekæmpelse af vold, En handlingsplan fra regeringen*, October 1993, p. 41). This research unit, which is located in the Police Academy, subsequently initiated and financed a national victim survey which was conducted in 1995 in cooperation with 'Danish Statistics' and the University of Copenhagen. The results were published in 1997.

<sup>45</sup> *Voldens omfang og karakter i Danmark, Oversigt over resultater fra voldsofferundersøgelsen 1995, Information fra Rigspolitichefen (Genoptryk)*, p. 21. Of 1.1% it is unclear. The report adds that care should be taken with these figures because it is not clear exactly how the general public interprets the word 'crime'.

<sup>46</sup> *Voldens omfang og karakter i Danmark, Oversigt over resultater fra voldsofferundersøgelsen 1995, Information fra Rigspolitichefen (Genoptryk)*, p. 33.

<sup>47</sup> *Voldens omfang og karakter i Danmark, Oversigt over resultater fra voldsofferundersøgelsen 1995, Information fra Rigspolitichefen (Genoptryk)*, p. 23.

<sup>48</sup> Compare the Norwegian 251-1 CCP *påtale*s alone av det offentlige når det begjæres av fornærmede, see Chapter 18.

to offer his opinion on the matter (s. 720-2 AJA). If so, the prosecuting authorities will refuse to honour the request.

Complainant offences include, among other things, stealing or reading another's mail, telephone tapping, computer hacking and trespassing (s. 275-2 in conjunction with 263-265 PC), as well as vandalism and certain forms of swindling (s. 305-1 in conjunction with 291-1, 291-3, 298 and 299 PC). The first group of offences are not only complainant offences ('public prosecution shall be possible at the request of the injured party' (s. 275-2 PC)) but are also liable to private prosecution (s. 275-1 PC, see § 5.4). The second group of offences are prosecuted only at the request of the injured party, unless prosecution is demanded by considerations of public policy (s. 305-1 PC).

### 5.3 Civil Claimant

Civil claims against the accused, that are the result of criminal acts, can be pursued in conjunction with the criminal trial, pursuant to the rules given in Chapter 89 AJA (s. 685 AJA). This is called the adhesion procedure (*adhæsiionsproces*). According to Gomard and Møller, the term 'civil claims' refers mainly to property claims such as compensation and restitution.<sup>49</sup> Usually a claim made in this way is for damages as a result of personal injuries or damage to property inflicted by the offender through the criminal offence for which he is on trial. In Danish law there is a distinction between *erstatning* and *godtgørelse*. There is no precise English equivalent, although according to Lerche it corresponds roughly with how damages for pecuniary and non-pecuniary loss are assessed in English law.<sup>50</sup>

### 5.4 Private Prosecutor

The offences liable to private prosecution include stealing or reading another's mail, telephone tapping, computer hacking, trespassing and offences against the personal honour such as defamation and libel (s. 275-1 in conjunction with 263-265, 266c-274 PC), as well as 'putting obstacles in the way of any other person exercising his right of disposing of or retaining an object' (s. 305-2 in conjunction with 293-2 PC) and unlawfully taking the law into one's own hands (s. 305-2 in conjunction with 294 PC). The first four offences are also complainant offences (see § 6.2).

Only the injured person has the right to a private prosecution (s. 725-1 AJA). If the injured party is dead, or if an act directed against a deceased is punishable, the right to private prosecution falls to the deceased's spouse, parents, children or siblings. (s. 725-1 AJA). The injured person must initiate the private prosecution within six months of acquiring sufficient information to start proceedings, otherwise he loses his right to do so (s. 96-1 PC). The right to private prosecution also expires six months after the death of the injured party (s. 96-3 PC).

Criminal cases, that are privately prosecuted, are dealt with according to the rules of civil procedure (s. 989 AJA). However, if the accused who has been privately prosecuted is sentenced to simple detention or imprisonment, he can appeal in accordance with the

<sup>49</sup> B. Gomard and J. Møller (1994), commentary section 685 AJA. 'Civil claim' also includes the termination of a marriage in connection with a criminal case (*omstødelse af ægteskab i forbindelse med straffesag*, jf. section 996a AJA).

<sup>50</sup> M. Lerche (1996), p. 103.

rules of criminal proceedings (s. 990 AJA). In cases, that are privately prosecuted by the injured party, civil claims are presented in the same way as the request for punishment (s. 994 AJA). In other words, both the request for punishment and the compensation claim are incorporated in the claimant's demand for sentence (*sagsøgerens påstand*, eis) – there is no right to an additional adhesion procedure.<sup>51</sup>

Offences subject to private prosecution may be publicly prosecuted if it is in the public interest to do so (s. 727-2 AJA). In that case, a private prosecution is no longer possible, but if the prosecuting authorities subsequently drop the public prosecution, the private prosecutor may continue his prosecution (s. 727-3 AJA).<sup>52</sup>

### 5.5 Auxiliary Prosecutor

If an offence is subject to private prosecution, and the public prosecutor has taken over the case in accordance with section 727-2 AJA, the private person may join the prosecution as an assistant prosecutor, if he immediately submits a statement that he wishes to do so (s. 727-3 AJA). Section 990 contains a similar arrangement if an appeal is made to the High Court concerning a sentence resulting from a private prosecution. However, the private person may not ask for the proceedings to be postponed, and the accused or his counsel is not obliged to submit the prescribed announcements to the private person (s. 727-3 AJA). Unlike the Swedish or German auxiliary prosecutor, the Danish auxiliary prosecutor does not acquire any participatory or even symbolic rights. In fact, joining the prosecution in Denmark has no practical value whatsoever.

### 5.6 Witness

The role usually played by victims is that of witness (*vidne*). The most important regulations concerning witnesses are found in Chapter 18 (ss. 168–195) AJA. The victim has no special status in his role as witness. Even a private prosecutor can be heard as a witness in his case (s. 990-3 AJA).

The witness questioned in court is admonished to speak the truth, and reminded of the consequences of a false testimony (s. 181 AJA) but is not placed under oath. A false testimony before a court of law may be punished with up to 4 years in prison (s. 158-1 PC).

As in Norway, there is a special procedure for the confessing defendant, so that testimonies of witnesses are not necessary.

### 5.7 The Victim's Right to a Lawyer

Victims of rape and serious physical violence were first accorded the right to a lawyer in 1980, by the introduction of Chapter 66a (ss. 741a-e) in the AJA.<sup>53</sup> With this, Denmark became the first country to introduce the victim's lawyer. Expanded in 1988 and again in

<sup>51</sup> B. Gomard and J. Møller (1994), commentary to section 994 AJA.

<sup>52</sup> For more information on the history and development of the private prosecution see B.A. Frosell, 'De private straffesager – et processuelt smertensbarn', in: *Juristen* Nr. 10-1998, pp. 390-395.

<sup>53</sup> Act no. 253 of 16 June 1980 which came into force on 1 July 1980.

1994,<sup>54</sup> all victims of sexual offences, as well as victims of violence and other crimes directed against the person are now eligible for a state-paid lawyer. In the case of incest, rape, and other serious sexual offences the court is *obliged* to appoint a lawyer if the injured person so requests (741a-1 AJA in conjunction with relevant sections PC). For other sexual offences, (attempted) homicide, assault, a group of offences including robbery, and the threatening of a witness, the court *may* appoint a lawyer at the request of the injured party, if the circumstances warrant such an appointment (741a-2 AJA in conjunction with relevant sections PC). If the injured person has not requested a lawyer, one may be appointed at the request of the police during the preliminary examination (741a-3 AJA). This may be necessary if the victim is, for instance, too upset to make his own decisions.

The victim's lawyer has the right to attend any questioning of the victim and may himself put questions to the victim (s. 741c-1 AJA). He may acquaint himself with the statement of the victim included in the police report and, if a prosecution has been initiated, with other material collected by the police (s. 741c-2 AJA). The fact that the victim has requested a lawyer does not prevent him from being questioned without the presence of the lawyer if the victim is willing to do so. However, if the victim insists on the presence of a lawyer, and the court has not yet appointed one, the police can call in someone from the *pro-deo* list to act as a temporary lawyer (s. 741b-2 in conjunction with 733-1 AJA), who is paid in accordance with the rules for legal aid (s. 741e in conjunction with ch. 31 AJA).

A different – and older – section dealing with legal support for the injured person is section 995a AJA.<sup>55</sup> This section determines that the court may appoint a lawyer for the injured person who qualifies for legal aid and needs legal advice with the filing of his compensation claim in adhesion to the criminal proceedings. Obviously, a lawyer will not be appointed on the basis of 995a if one has already been appointed in accordance with section 741a AJA. Also, injured persons capable of paying the fees themselves are not entitled to a lawyer on the basis of 995a, contrary to a 741a lawyer who is appointed regardless of private means.

Although the tasks of the injured person's lawyer are not stated explicitly,<sup>56</sup> they are more or less implied by the rights accorded him in section 741c AJA (see above).<sup>57</sup> Gomard and Møller interpret this section as meaning that the lawyer must support the injured person during questioning by the police and in court, and should help him claim compensation. Furthermore, he should advise the injured person on the opportunities for getting special

<sup>54</sup> Act no. 730 of 7 December 1988 which came into force on 1 January 1989, Act no. 366 of 18 May 1994 which came into force on 1 June 1994 respectively.

<sup>55</sup> Introduced by act no. 253 of 4 June 1969 which came into force on 1 January 1970.

<sup>56</sup> Contrary to Norwegian legislation, for instance, which says that the victim's lawyer is there to guard the victim's interests and offer him the necessary help and support. This, of course, is fairly vague too. (See Chapter 18).

<sup>57</sup> J.F. Hansen suggests that including an explicit description of the tasks of the victim's lawyer in legislation, as proposed by a minority of the committee that published report 1102 (p. 53), would remedy some of the problems regarding the inadequate functioning of these lawyers, see J.F. Hansen, 'Bør retskrav på beskikkelse af bistandsadvokat udvides til at omfatte voldsofre m.fl.?', in: *Ugeskrift for Retsvesen* UfR 24 1994 18. Juni, pp. 257-260: p. 259. Whether this alone will solve the problems is doubtful; see the problems in Norway, where legislation does describe the tasks, albeit summarily. The Norwegian Law Society has even published a handbook for its members on the rights and duties of the victim's lawyers. The problems seem to lie more with the attitudes of the courts and the lack of motivation of many of the lawyers themselves.

forms of help, give him personal support and guidance and attend to other problems of a more general nature.<sup>58</sup> The victim's lawyer is *not* intended to function as a second prosecutor, and therefore he has no role in settling the issues of guilt and punishment. His job is to minimize the strain of the proceedings on the victim. He may ask the court to hear the case behind closed doors, or to allow the victim to testify in the absence of the accused, and he should assist with the compensation claim.

In practice, those who take their job as a victim's lawyer seriously see their task as two-fold. First of all, they have a pre-trial responsibility to explain the legal proceedings to the victim, keep him informed of the developments and prepare him for the main hearing. Secondly they must take care of the victim's compensation claim. Unfortunately, many lawyers limit their involvement to the second element, only putting in a court appearance when the matter of compensation is discussed.<sup>59</sup> In part this tendency has arisen from problems regarding the payment of the victim's lawyers. Their salary is determined on the basis of the time spent talking to the victim before the trial, preparing the compensation claim and presenting the claim in court. Victim's lawyers are not automatically reimbursed for the time spent in court supporting the victim during his testimony, although it is now accepted that in serious cases the presence of the victim's lawyer throughout the proceedings may be very important to the victim.

Hansen suggests a combination of including a summary of the lawyer's task in legislation, a new form of recruitment and better training to solve the practical problems of the victim's lawyers.<sup>60</sup>

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<sup>58</sup> B. Gornard and J. Møller (1994), commentary to section 741c AJA, with reference to FT 1979-80, tillæg A, sp. 466. FT is a preparatory work, *tillæg* is a supplement and sp. means page.

<sup>59</sup> See e.g. J.F. Hansen, *Straffeprocessens negative indflydelse på voldsorfes velfærd*, 'Obligatorisk Opgave' ved Juridisk Institut, Aarhus universitet, December 1993, and J.F. Hansen (1994). His observation that some victim's lawyers feel their job does not go further than arranging compensation is based on interviews with various victim's lawyers as well as personal observations and statements made by victims (1994, p. 259).

<sup>60</sup> J.F. Hansen (1994), pp. 259-260.

## 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.*

##### *Legislative duties*

Most of the informatory duties of the police are found in legislation, in circular no. 4/1996 'Police guidance for the victim of crime' issued by the Director of Public Prosecutions, and/or in the 1996 memo of the Police Academy appended to a circular of 25 November 1996 of the Ministry of Justice to the police and prosecuting authorities (see § 4.3).

Regarding *assistance and practical advice*, the police academy memo states that the policeman should inform the victim of the opportunities for receiving, among other things, medical aid and psychological support. Also, he should distribute relevant informative material,<sup>61</sup> i.e., one or more of several pamphlets that are available.<sup>62</sup> Also, the police may refer a victim to one of the crisis centres.<sup>63</sup>

Regarding *legal advice*, legislation obliges the police to inform eligible victims of the opportunity to ask for a lawyer to be appointed. The information must be given the first time the injured person is questioned, and must be repeated in connection with, and during, other questioning sessions. It must be apparent from the police report that the injured party has received this information (s. 741b AJA). The legislative duties are repeated in circular no. 4/1996 of the Director of Public Prosecutions, which adds that victims of rape, incest or another sexual offence must be given the relevant Ministry of Justice brochure which explains, for example, their right to a lawyer.

S. 10-3 of the Victim Compensation Act obliges the police to inform an injured person of his right to claim *compensation* from the State under this act. Circular no. 4/1996 adds that the injured person should be reminded that a general requirement for state compensation is that during a possible criminal trial of the person who has caused the damage, a claim for compensation from the offender is made. The injured person must be given a claim form, and told to send it to the chief of police of the town where the crime was reported. The injured person must also be informed that the claim should be made within two years of the commission of the offence, and that the police usually only sends the claim to the Compensation Board when the case has been closed. Finally, the injured person must be

<sup>61</sup> Police Academy memo (1996), p. 7.

<sup>62</sup> Pamphlet of the LHV on the help they offer and how to contact them; the folder 'For you, who has been stricken by rape, incest or another sexual offence' issued by the Ministry of Justice; the handbook 'Offences against case-workers – about violence, threats, harassment and vandalism' of the Council for the Prevention of Crime; the publication 'Violence and threats of violence' dealing with violence at work of the Foundation for Working Conditions; or material that some of the self-help groups produce.

<sup>63</sup> Police Academy memo (1996), pp. 13-14.

told that in special cases it is possible to get an advance payment from the Compensation Board.<sup>64</sup>

The Police Academy memo draws attention to the fact that victims may have difficulty remembering all the information imparted to them, and that it is therefore important to hand over written material and tell the victim where he can make further enquiries. Also, if a relative or someone else who is close to the victim is present, it may be a good idea to give the information to him, or at least repeat it to the victim in the presence of this person.<sup>65</sup>

### *Practice*

The prosecuting department of the Copenhagen police has a standard letter explaining the victim's right to a lawyer, with an additional section on (state) compensation. This is sent with the relevant request forms to eligible victims, meaning that they are informed both in person (when reporting the crime) and later in writing of these rights.<sup>66</sup> In the experience of one Copenhagen victim's lawyer, the eligible victims are, in practice, always correctly informed. This is also the opinion of a representative of the office of the Director of Public Prosecutions. However, when students of Århus University tried to find out whether the Århus police had any internal guidelines or established routines for informing victims of their more general rights and opportunities, they appeared to have none: informing the victim of such general things is left to the initiative of the individual police officer.<sup>67</sup> Part of the problem may lie in the fact that officers complain that they have no time to render 'extra services' to victims, and that they are judged on the basis of how many cases they solve rather than on how they treat victims, witnesses or suspects. Victims of sexual offences are referred to one of the two special medical centres in Copenhagen or Jutland.<sup>68</sup>

In the early 1990's, a research project was carried out in Randers, a town not far from Århus. During a 12-month period, 20 victims of violent assault were offered psychological assistance by the Police Department and the Emergency Ward of the City Hospital of Randers. The reactions of the intervention group (group I) were compared with a control group of 20 other victims of violent assault who did not receive psychological crisis intervention (group II). Both groups were asked about their satisfaction with information, help and support received from the police. The study showed that a high percentage of the victims (77%) were satisfied with the information, practical help and emotional support received from the police, vs 23% who were not. There were no significant differences between the intervention group and the control group.<sup>69</sup>

<sup>64</sup> Circular no. 4/1996 of the Director of Public Prosecutions, pp. 2-3.

<sup>65</sup> Police Academy memo (1996), p. 7.

<sup>66</sup> Information provided by Copenhagen police, who gave me a copy of the letter and the forms, 23 April 1997.

<sup>67</sup> Information provided by B.G. Nielsen and S. Jørgensen of the University of Århus, 28 April 1997. According to Nielsen, however, if the police are not too tired or busy, they treat people well.

<sup>68</sup> I. Bacik, C. Maunsell, S. Gogan, *The Legal Process and Victims of Rape. A comparative analysis of the laws and legal procedures relating to rape, and their impact upon victims of rape, in the fifteen member states of the European Union*, The Dublin Rape Crisis Centre, 1998, pp. 187-188.

<sup>69</sup> A. Elklit, *Offer For Vold. En psykologisk analyse af sagesløse voldsofre situation, oplevelser og efterreaktioner*, Aarhus Universitetsforlag, Århus, 1993, (1993a), pp. 33-34.

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

The police may refuse (to act on) a report that has been made if they find that there are insufficient grounds for initiating an investigation (s. 749-1 AJA). Likewise, they may decide to close an already initiated investigation, as long as a formal charge has not been made (s. 749-2 AJA). If a charge has been made, but has proven groundless, the decision to close the case is taken by the Chief of Police. In cases where the guilt of the suspect cannot be proven, or where the complications, costs or time needed to solve the case are not proportionate to the importance of the case and the punishment, the decision to close the investigation is taken by the prosecuting authority.<sup>70</sup> If a report is not acted upon, or the investigation is closed in one of ways mentioned above, anyone who has 'a reasonable interest' in the case must be informed (s. 749-3 AJA). An injured party who has made a report may be presumed to have 'a reasonable interest'. In practice, the police have a standard letter for informing the victim that his case has been closed. A decision to refuse to act upon a report or close an investigation may be appealed to the superior prosecuting body, see § 7.1 under guideline B.7.

Where the police investigation has been successful, the case is sent to the prosecuting authority for a decision on the prosecution. A victim is *not* explicitly informed of the decision to forward his case to the prosecuting authority. Instead, it is normal procedure to give a victim the name and telephone number of the officer in charge of the investigation, so victims can inquire for themselves how the investigation is progressing.

(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 concerning prosecution can be either to waive prosecution, to withdraw the summons after the offender has confessed and the court has agreed to the proposed conditions,<sup>71</sup> or to prosecute. If it is decided to waive prosecution, the accused and others who may be presumed to have 'a reasonable interest' in the case must be informed (s. 724-1 AJA). This should include the injured party. However, only the accused need be informed of a decision to withdraw the summons after a confession and an agreement on the conditions of withdrawal (s. 724-1 AJA).

In practice, it appears that victims of serious offences and victims who have made a compensation claim are informed by standard letter of the decision to drop the prosecution. The authorities are also obliged to state the reasons for their decision. The standard letter contains a formal statement why the prosecution has been waived, but there is room to add a personal justification. The extent to which the decisions to waive prosecution are justified differs per prosecuting area. A frequent problem is that victims often do not understand the legal jargon. In extreme cases the prosecutor may personally contact the victim, but

<sup>70</sup> In theory, the Minister of Justice may overrule the decision of the prosecuting authority to close the investigation (s. 749-2 in conjunction with section 721 AJA). In practice, the Minister never makes use of this power.

<sup>71</sup> See C.F. Mulder and P.J.P. Tak, *De bekende verdachte. Een onderzoek naar de procedure voor de bekende verdachte in het Deense en Noorse (straf-)procesrecht*, Gouda Quint bv, Arnhem, 1993, p. 26 for an explanation of the *tiltalefråfald*. Section 722 AJA lists the cases in which the summons may be withdrawn. Section 723 AJA gives the conditions which may be attached to the withdrawing of the summons.



a more distant approach is generally preferred. Victims and witnesses do, in practice, quite regularly telephone the prosecuting authorities on their own initiative.<sup>72</sup> If there is a victim's lawyer, it is his duty to explain to the victim why the prosecution has been dropped. But even for a lawyer it may be difficult to explain because the standard letter is very formal and terse, seldom revealing the 'real' reasons for discontinuing the proceedings. Whether or not the justification of the decision to drop the prosecution should be more down to earth and 'honest' is open to debate. Few victims understand the legal jargon and would prefer a note written in colloquial language. On the other hand, if the authorities simply do not believe the victim's story, it may be better to offer a more general reason than to coldly inform the victim that he is thought to be lying.

Regarding the other two possible decisions the prosecutor may take – to withdraw the summons or proceed with the prosecution – there is no obligation to inform victims of either of these decisions.

(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*

If the victim is to appear in court as a witness, he will be duly informed by mail of the date and place of the hearing. However, many cases where the offender has confessed are dealt with in a summary proceedings, where it is not necessary to hear witnesses.<sup>73</sup> In that case, whether or not the victim is informed depends on the service awareness of the individual police force, because there is no formal obligation to inform the victim. Information regarding the date and place of a hearing is issued just before the hearing, often leaving the victim-witness little time to make arrangements at work, or to prepare his compensation claim (see the next part). A victim's lawyer appointed by the court must also be informed of the time and place of a hearing (s. 741c-1 AJA).

*Restitution and compensation, legal assistance and advice*

If the police have performed their informatory duties, the victim should be well aware of his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice. If all goes according to the book, he will have filled in his compensation form and supplemented it with the appropriate documentation, and will have been appointed a lawyer if eligible. However, what we are most interested in here is the back-up system for when the police fail to adequately inform the victim.

Regarding legal advice, we have already seen under A.2 that the prosecuting department of the Copenhagen police sends eligible victims a letter reminding them of their right to ask for a court-appointed lawyer, meaning that the victim will have been informed once orally and once in writing of this. Also, if he is a victim of a sexual offence, he should have

<sup>72</sup> Information provided by the J. Hjortenbergh, Office of the Director of Public Prosecutions, 22 April 1997.

<sup>73</sup> See C.J. Mulder and P.J.P. Tak (1993), pp. 21-62.

been given the relevant information leaflet of the Ministry of Justice. If a state prosecutor gets a file on his desk where an eligible victim does not appear to have a lawyer, he will normally check whether this is intentional.<sup>74</sup>

Likewise, if there is reason to believe that a compensation claim would be justified but the appropriate forms are missing from the file of a serious case, the (state) prosecutor will normally check with the police. After all, the prosecutor does have a legislative duty to present a civil claim for damages during the criminal proceedings if the injured person so desires (s. 991-2 AJA, see § 7.2 under guideline D.10). However, in practice, if there is no victim's lawyer taking care of such matters, the documentation accompanying a compensation claim is often very poor, and certainly in minor cases the prosecutor may easily 'forget' to ask the police to look into the matter. The prosecutor's main concern is with the prosecution itself, and not with any civil claim the injured person may have. The police do not give priority to compensation claims in minor cases, either, because in their eyes, the generally diminutive size of the claims is hardly worth the effort. In more serious cases, the problem is not so much that the victim is not informed of his opportunities of obtaining restitution and compensation, but more that he receives the information about the date and time of a hearing at such late notice that there is hardly time to prepare the claim. This is particularly frustrating considering that the judge, the accused and the prosecutor are all informed well in advance.

#### *Outcome of the case*

The Copenhagen police never volunteer information about the outcome of a case, to protect the privacy of the offender. If a compensation claim has been made, the person who made the claim will get a copy of that part of the judgment, but otherwise victims are not informed of the results of a trial. It is up to them to make their own inquiries.<sup>75</sup> Courts are often very reluctant to release information on judgments. If a victim's lawyer is involved in a case, a copy of the judgement will be sent to him, but a victim who does not have a state-appointed lawyer will normally not be able to get a copy of the judgement.

## **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.*

Although information about the injuries and losses suffered by the victim is an important part of the evidence required to prove the criminal offence, especially in a case involving violence, the police do not compile this information with a view to supporting the victim's civil claim for damages, and significant information may therefore be missing. The victim is responsible for providing any additional documentation himself.

Problems have been identified regarding evidence to be provided by hospital emergency departments on injuries suffered by victims. There seem to be no standard procedures for recording the injuries of victims of violence who come to hospital emergency departments for treatment. No photographs are taken or forensic records kept unless the victim explicitly

<sup>74</sup> Information provided by J. Hjortenberget of the Office of the Director of Public Prosecutions, 22 April 1997.

<sup>75</sup> Information provided by the Copenhagen police, 23 April 1997.

requests this, nor is the information automatically sent to the investigative or prosecuting authorities.<sup>76</sup> However, for victims of sexual offences there are the two special medical/forensic units mentioned earlier.<sup>77</sup>

- (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.

### *Legislation*

In minor cases dealt with in summary proceedings, a compensation claim may be awarded against the accused if the injured person has let the court know that he wants to be compensated. In that case the court must give the victim the opportunity to personally present the compensation claim 'in as far as the nature of the case allows' (s. 991-1 AJA). In all other cases the prosecutor presents the compensation claim at the request of the injured person, as long as this can be done without substantial drawbacks (s. 991-2 AJA).

A civil claim for compensation must be substantiated by sufficient evidence. If the court finds that the information offered in support of the compensation claim is incomplete, it need not decide the claim (s. 992-1 AJA). In that case, the injured person may take his claim to a civil court (992-2 AJA). Evidence concerning a civil claim for compensation must be listed in one of the evidence records provided by the parties (s. 991-3 in conjunction with 834 and 836 AJA).

### *Practice*

In practice, many compensation claims are dismissed because the claims are insufficiently supported by proof of the injuries and losses suffered. Even though the case file will contain information about injuries and losses provided by the police and the prosecutor in support of the criminal charges, this will often be of a more descriptive nature ('the door had been forced and a window smashed', 'the victim had a broken arm and bruising'). To substantiate the compensation claim more concrete information on the damage suffered in pecuniary terms will be required such as bills from the hospital, dentist, optician, drycleaner's or carpenter.

In minor cases dealt with in summary proceedings a compensation claim is rarely put forward. For normal proceedings, the (police) prosecutor normally presents the compensation claim. The victim is sent a letter beforehand reminding him that he may claim compensation and instructing him to bring the necessary documentation to the court hearing. In court, the prosecutor asks the victim if he has a claim, and if so, to show the court the documentation. In practice, many victims do not have the necessary material with them because they did not understand the letter.<sup>78</sup> The dismissal of a compensation claim in court due to lack of evidence does not hamper the injured person's chance of claiming state compensation.

<sup>76</sup> A. Elklit, *Violent Assault – a field study of the psychology of violent assault*, 1985, p. 4, and information provided by Elklit in April 1997.

<sup>77</sup> I. Bacik et al. (1998), pp. 187-188.

<sup>78</sup> Personal observations made on 1 May 1997 in the Tåstrup district court, supplemented with the prosecutor's comments on the case.

The most well-prepared compensation claims are often those where a victim's lawyer is involved. He will ensure that the claim is substantiated and supported by all the necessary documentation. Whenever the injured person is questioned, either by the police during the pre-trial investigations or in court, the victim's lawyer is allowed to ask additional questions. By asking the right questions in court, he can ensure that all relevant information concerning the injuries and losses suffered by the victim is put across to the judge.

If the offender has made, or attempted to make, any compensation or restitution, his defence lawyer can put this forward in mitigation of the sentence.

## 7 THE VICTIM AND COMPENSATION

### 7.1 The Expediency Principle and Compensation

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

As we saw earlier, in Denmark the decision to prosecute is discretionary. The police and prosecuting authorities may deal with a case in a variety of ways. First of all, the police may refuse (to act upon) a report that has been made, or they may close an investigation (see § 6.1 under A.3). Another option is the waiver of prosecution (§ 6.1 under B.6). Section 721 AJA determines that prosecution may be completely or partly waived if:

- (1) the accusation has proven to be groundless;
- (2) further proceedings cannot be expected to lead to the establishment of the guilt of the accused, or;
- (3) going ahead with the case will entail such difficulties, costs or time that it is no longer proportionate to the seriousness of the case and the anticipated punishment.

The AJA does not mention the offender paying compensation, or attempting to do so, as a reason for waiving prosecution. In practice, many minor (traffic) offences are handled with a police fine system, whereby prosecution is waived if the offender agrees to pay a fine. Finally, the prosecuting authority may withdraw the summons after the offender has confessed and the court has agreed to the proposed conditions (§ 6.1 under B.6). Section 722-1 gives a series of grounds for withdrawal of the summons, e.g. that the offence cannot be punished with more than a fine and is not of a very culpable nature (722-1-1 AJA); that the offender was under the age of 18 at the time he committed the act, on condition of paying a fine or accepting confiscation (722-1-3 in conjunction with 723-1-1 AJA); and grounds determined by the Minister of Justice or the Director of Public Prosecutions (722-1-7 AJA). Section 722-2 AJA adds that in other cases summons may only be withdrawn if there are particularly mitigating circumstances or other special circumstances and prosecution is not considered necessary in the public interest. The conditions that may be set for withdrawing the summons are:

- (1) that the defendant pays a fine or agrees to confiscation, or;
- (2) the same conditions as in the conditional judgment (s. 723-1 AJA).

The conditions are set by the authority that has the right to withdraw the summons, in other words by the police prosecutor if the withdrawal is based on one of the points covered in section 722-2 AJA, or the superior prosecuting authority if the withdrawal is based on section

722-2 AJA (s. 723-3 AJA). Initially, a section 723a AJA added that the payment of compensation by the offender to the victim was one of the conditions that could be set for withdrawal of the summons, but this section was removed from the Administration of Justice Act in 1992. This does not mean that the judge can no longer set the payment of compensation as a condition, for he may still set 'the same conditions as in the conditional judgment'. However, my impression is that this is rarely done. An alternative way for the victim to get compensation if the summons are withdrawn is through section 77-1 PC which allows confiscated property to be used to satisfy a claim of damages.

Guideline B.5 suggests that if the offender has paid compensation, or at least attempted to do so, this could be a reason to drop the prosecution. And conversely, if no compensation has been paid, this could be a reason to go ahead with the prosecution, so that the victim is not denied the chance of claiming compensation via an adhesion procedure. In practice, whether or not compensation has been paid has absolutely no influence whatsoever on the decision of the prosecutor – the only thing that really counts is the evidence. Minor damages can usually be claimed from the insurance and larger claims resulting from violent and/or sexual offences can be sent straight to the State Compensation Board. There is a right to free treatment at public hospitals, and expenses for medical treatment by a general practitioner are mostly covered by the national health insurance system.<sup>79</sup> That it should be the offender who has primary responsibility for paying the damage he himself has caused does not seem to have any practical significance, in spite of the fact that formally 'the person directly responsible for the injury should be confronted with the financial consequences for the victim arising from the offence'.<sup>80</sup> Insurance is available (even the victim support organization LHV offers to arrange insurance policies, see § 3.6),<sup>81</sup> and to claim state compensation it is not necessary to first formally establish that the offender cannot or will not pay himself. If for some reason the question of damages has not been settled in adhesion to the criminal proceedings (the victim had forgotten to bring along the proper documentation, the court found the claim too complicated), the victim can go straight to the State Compensation Board without further civil proceedings.

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

The victim has the right to ask for a review of a decision not to prosecute, and in a limited number of cases he also has the right to institute private proceedings (see § 5.4).

There are several decisions resulting in non-prosecution that the victim has the right to ask for a review of. First of all, if the police refuses (to act upon) the report of an offence, or an investigation is closed, the decision may be appealed to the prosecuting authority directly above the one who took the decision (s. 749-3 AJA). This means that a decision to refuse (to act upon) a report of an offence as well as the closing of an investigation where

<sup>79</sup> B. Dahl et al. (1996), p. 281.

<sup>80</sup> M. Lerche (1996), p. 140. This is why section 10 of the VCA determines that the victim may only be awarded state compensation if he has filed a claim for damages or made a reservation to this effect in adhesion to the criminal proceedings.

<sup>81</sup> In the experience of the secretariat of the State Compensation Board, many victims of, e.g., theft turn out to be uninsured. The general lack of interest of the Danish authorities for the pursuance of compensation by the offender means that victims, who cannot claim from the State Compensation Board, which deals only with victims of violence, end up with nothing.

no formal charge has yet been made is appealed to the Chief of Police. If, in a case where a formal charge has been made, the investigation is closed because the charge has proven groundless, an appeal should be directed to the state prosecutor. Finally, in cases where the guilt of the suspect cannot be proven or the complications, costs or time needed to solve the case are disproportionate to the importance of the case and the punishment, the appeal is heard by the Director of Public Prosecutions.<sup>82</sup> The decisions taken on appeals are final – the decision on an appeal of the state prosecutor cannot be appealed to the Director of Public Prosecutions or the Minister of Justice (s. 101-2 AJA), nor can the decision of the Director of Public Prosecutions on an appeal be taken to the Minister (s. 99-3 AJA). However, the Director of Public Prosecutions and/or the Minister of Justice may take up the matter at their own initiative.

A decision to waive prosecution may also be appealed to the superior prosecuting authority (724-1 AJA). However, it is only the defendant who has a right to appeal against the withdrawal of the summons after he has confessed and the court has agreed to the proposed conditions (s. 724-1 AJA).

In practice, the right to ask for a review of a decision to close an investigation or waive a prosecution is used by victims of crime, and sometimes with success,<sup>83</sup> but unfortunately there are no statistics on this matter.

As recounted in § 5.4, some minor offences which are of little public interest are reserved for private prosecution. The following statistics reveal that the number of offences that are privately prosecuted is tiny in relation to the number of public prosecutions.

*Rates of private prosecution from 1990-1997.<sup>84</sup>*

<b>year</b>	<b>reported</b>	<b>criminal court cases</b>	<b>priv. pros.</b>
<b>1997</b>	531102	87208	54
<b>1996</b>	528488	84475	43
<b>1995</b>	538963	93087	64
<b>1994</b>	546926	92986	47
<b>1993</b>	546894	85409	45
<b>1992</b>	536821	91179	45
<b>1991</b>	519755	89557	56
<b>1990</b>	527421	98791	54

<sup>82</sup> In pursuance of section 721-2 AJA, the Minister of Justice may authorize a body other than the ones mentioned to take the decisions discussed. In that case, the body hearing a possible appeal will also differ.

<sup>83</sup> Information provided by J.M. Bie and N. Nium of the Victim Support organization LHV, Randers, 30 April 1997, and J. Hjortenberg of the Office of the Director of Public Prosecutions, 22 April 1997.

<sup>84</sup> Source: *Kriminalstatistik* 1997, Criminal statistics 1997, *Danmarks Statistik*. See also <http://www.dst.dk>.

## 7.2 The Court and Compensation

*(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.*

As we have seen, the victim may claim damages from the offender in adhesion to the criminal proceedings, in which case the court may order compensation by the offender to the victim. The court may not order compensation on its own initiative.<sup>85</sup> One technical impediment is that if the offender is acquitted in the criminal trial, no decision may be taken on the compensation claim (s. 992 AJA, see D.11 below). Furthermore, the court may refuse to decide on the compensation claim if it feels it will impede the criminal proceedings (s. 991-4 AJA).

Mostly compensation claims fail for lack of adequate documentation. Victims of minor offences are often unaware of their options, and those who have received a letter explaining this to them do not understand what it means. It is only where more serious offences are concerned that compensation claims are better substantiated and supported by evidence, often through the involvement of a victim's lawyer. However, even then there may be problems because the late notification of an impending trial leaves little time to prepare the claim. In practice, offenders rarely contest the claim for damages because they are incapable of paying, whatever the amount. Therefore, the Victim Compensation Act determines that, although the State Compensation Board should, in principle, award the same amount of compensation as decided by the judgement of a court (s. 11a-1 VCA), this does not apply if the offender 'is considered to have accepted the victim's claim or the amount thereof' (s. 11a-2 VCA). The damages are awarded by the professional judges alone.<sup>86</sup>

Perhaps another relevant point is that in Denmark court fees are rather high and may, in addition to the lawyer's fees, sometimes prevent a creditor from going to court to collect his claim. A Government Committee was established in 1995 to consider the introduction of a small claims procedure within the courts, which would operate under the active participation of a judge in order to minimize the need for lawyers.<sup>87</sup> However, the subsequent report was severely criticized and no further steps have (yet) been taken.

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

Compensation awarded during an adhesion procedure in conjunction with a criminal trial is not a penal sanction but a decision taken under the auspices of civil law. It may be awarded in addition to the penal sanction.<sup>88</sup> However, despite the fact that the main proceedings

<sup>85</sup> In one particularly flagrant case known to the State Compensation Board, despite repeated prodding from the presiding judge, the victim's lawyer insisted that there was no compensation claim because the attempted rape had not been successful.

<sup>86</sup> B. Dahl et al. (1996), p. 111.

<sup>87</sup> B. Dahl et. al., (1996), p. 104.

<sup>88</sup> Denmark has the following general penal sanctions: the prison sentence (*fængsel*), the simple detention (*hæfte*) and the fine (*bøde*) (s. 31 PC). The simple detention is for a minimum of 7 days and a maximum of 6 months (s. 44-1 PC), and was originally intended as a less severe form of custodial sentence, for instance, by allowing detainees to eat other than prison food (s. 44-2 PC).

deal with matters of criminal law (the state versus the accused), whereas the compensation claim is a strictly civil law matter (the injured party versus the accused), Danish law has firmly linked the two together: if the offender is acquitted in the criminal trial, no decision may be taken on the compensation claim (s. 992 AJA). This is markedly different from, for example, Norway where the compensation claim is also a civil law matter, but can be decided on regardless of the outcome of the criminal trial.

One suggestion that has been raised in Denmark is to introduce an alternative regulation enabling the court to order the offender to pay a fine (*Bod*) to the injured person instead of compensation.<sup>89</sup> This would mean that the offender can be ordered to pay a certain sum of money, without the exact amount of the damages having to be established. In this way, in all those cases where sufficient evidence in support of the claim is missing, or the court feels the claim is too complicated, the injured person need not be sent home empty-handed. The result would be comparable to the English system of compensation orders (see Chapter 7).

*(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.*

Pursuant to section 57-1-1 PC, the court may attach the financial condition to a suspended sentence that the offender pay compensation for any loss caused by his offence. Detailed regulations on this condition are laid down by the Minister of Justice (s. 57-2 PC). According to Van Kalmthout and Tak, the payment of compensation for any loss caused by the offence is, in practice, seldom imposed as a condition for a suspended sentence,<sup>90</sup> and practice does not appear to have changed since they made their observations.

### 7.3 Enforcement of Compensation

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

The victim who is awarded compensation from the offender is informed in writing. The form states that if the offender has not paid the money within fourteen days, the victim should himself claim the money from him. If the offender refuses to pay, the victim may ask the court for a writ of enforcement, after which he can approach a writ-server to try to get hold of the money for him. Where proceeds gained from the criminal act, or an equivalent sum, have been confiscated in pursuance of section 75 PC, the confiscated property may be applied to the claim.

In practice, where compensation has been awarded for violent and/or sexual offences,

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In practice, the prison regime is the same for detainees as it is for prisoners (A.M. van Kalmthout and P.J.P. Tak, *Sanctions-Systems in the Member-States of the Council of Europe* Part I, Kluwer/Gouda Quint, Arnhem, 1988, p. 23). The other sanctions are, among others, safe custody (*forvaring*) and the suspended sentence (*Betinget Dom*).

<sup>89</sup> S. Staun, 'Bod eller erstatning', in: *Dansk Politik* 15. April 1997, pp. 5-6.

<sup>90</sup> A.M. van Kalmthout and P.J.P. Tak (1988).



the claim is sent straight to the State Compensation Board, without first trying to get the money from the offender. The problems regarding enforcement are therefore, in effect, reserved for victims of other offences, who do not fall within the safety net of the State Compensation Board. These victims could be offered a lot more assistance in collecting the money due to them. State Compensation is paid out through the local police.

In § 6.1 under guideline A.2 we described how one of the results of research on crisis intervention with victims of violence was that there was a generally high level of satisfaction with information, help and support received from the police. It is interesting to note that by the time victims have been through a court case, their satisfaction has decreased substantially. In total, 17 court cases were conducted during the Randers research project, with 11 in the intervention group and 6 in the non-intervention group. In total, only 20% were generally satisfied with their court experiences, vs 80% who were generally dissatisfied. One of the reasons for dissatisfaction was that the compensation awarded was too low, or was never received (for the other reasons see § 8.2, Questioning in court). Interestingly, dissatisfaction was higher in the intervention group (94%) than in the non-intervention group (58%).<sup>91</sup> Perhaps victims in the intervention group had higher expectations because of the professional support they were receiving than those in the non-intervention group.

## 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.*

#### *Police training*

The Danish Police Academy (*Politiskolen*) headquarters is situated in Brøndby, which is a suburb of Copenhagen. All Danish police officers receive centralized training at a base a few kilometres from the headquarters as part of their three-year basic training programme. Officers later return for refresher and follow-up courses. The training is given not only by police officers but also by professionals from outside the forces such as prosecutors, defence lawyers, judges and even journalists. Victim-oriented training does not constitute a separate module, but features as part of the general course given during both mandatory training and the follow-up courses. Officers receive psychological training in how to deal with stress after violence as well as instruction in the rules and regulations to be followed in such a situation. A separate course has been devised for dealing with abused children. Furthermore, following criticism on how the police deal with rape voiced in a 1987 Ministry of Justice Report,<sup>92</sup> training for the police in this area has been introduced.<sup>93</sup>

The paradox that the police academy is constantly confronted with is that although

<sup>91</sup> A. Elklit (1993), pp. 36-39.

<sup>92</sup> *Betænkning om den forurettedes stilling i voldtægts- og voldssager*, 1987.

<sup>93</sup> I. Bacik et al. (1998), p. 187. In addition, a legislative proposal on witness protection introduced in 1999 foresees in the introduction of training for police officers on how to cope with anxiety of witnesses.

they can instruct an officer to do something in a certain way, they will inevitably receive the retort that a different procedure is followed back home. During training it is stressed that the police should make every effort to maintain a good relationship with the public, but officers complain that there is no time for 'extra services'. A police officer is judged on how many cases he solves and the number of arrests he makes, and not on how he treats victims, witnesses or suspects. However, according to the two police interviewees,<sup>94</sup> there has been a certain change of attitude thanks to the growing public attention and media focus on the plight of victims of crime. Also, knowledge and awareness of matters such as Post Traumatic Stress Syndrome has increased substantially.

#### *Training of other authorities*

To become a police prosecutor one must first complete a university law degree before joining the force as a lawyer and receiving further on-the-job training. The courses offered to police prosecutors have been left largely to the Police Academy and the National Commissioner, even though the main work of a young lawyer in a police district is the prosecution of offences. Police prosecutors receive no particular instruction on how to deal with victims of crime. Neither do the members of the Office of the Director of Public Prosecutions, nor the judiciary.<sup>95</sup>

## **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.*

#### *Questioning by the police*

Regarding the issue of whether female (rape) victims can ask to be questioned by a female police officer, there is no written rule on which a rape victim can base such a request, although according to the police interviewed it does constitute a clear *unwritten* rule. However, because women still only constituted 5.6% of the police force in 1995, the availability of a sufficient number of female officers trained to deal with this type of victim is unlikely.

Children have a right to be supported by a representative of the social services, but may not have their parents present during questioning. The Police Academy offers a special course on the questioning of children, and has published a report on the videotaping of child testimonies. Questioning sessions with children below the age of 10 or 11 are recorded on video-tape. On condition that the defence lawyer has been allowed to follow the interview on a monitor in an adjoining room, and has had the opportunity of having further questions put to the child, the video-tape may, on occasion, be shown in court and regarded as evidence.<sup>96</sup>

<sup>94</sup> A Deputy Chief Superintendent and a police training officer.

<sup>95</sup> The afore-mentioned legislative proposal on witness protection also proposes training for prosecutors and court personnel on how to cope with anxiety of witnesses.

<sup>96</sup> Information provided by B.G. Nielsen, 7 September 1999. There is some controversy as to whether this procedure is in accordance with the European Convention on Human Rights.

### *Questioning in court*

The principle of the search for the material truth allows the Danish judiciary to actively take part in the proceedings. Section 183-2 AJA determines that the court may question the witness. The court determines where and by whom children under the age of 15 are questioned (s. 183-3 AJA). One option that is now available is to question under-aged victims via a video link.<sup>97</sup> There is no detailed regulation concerning examination and cross-examination in court. Questioning is usually carried out by the prosecutor and the counsel for the defence. The court may ask supplementary questions and, in certain situations, take over the examination itself. The accused is not allowed to personally question the victim, even if he does not have a lawyer. If the victim is assisted by a victim's lawyer, the assisting counsel has the right to be present during the questioning of the injured party by the police and in court, section 741c(1) AJA. If the questioning session is particularly difficult for the victim, some judges allow the victim's lawyer to sit close to him to offer moral support. Victims of sexual abuse may request the court to testify in the absence of the defendant. The court is obliged to honour such a request.

As we saw above, a study published in 1993 showed that most victims are not satisfied with the court proceedings. One of the reasons is that the compensation awarded is too low, or never received. The other reasons given by the victims are the long waiting times; lack of personal attention paid to the victim; that the victim has the least rights of all the participants; the leniency of the judges; the lack of respect during the hearings; that it is extremely disconcerting to meet one's offender in the waiting room or to be together with him in the courtroom; that for fear of meeting the offender fathers took part in two cases on behalf of their victimized children; that a child had to testify in the presence of the sexual offender; and that the offender was released the day after the trial.<sup>98</sup>

### **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 principle, trials are open to the public unless otherwise prescribed (s. 29-1 AJA, principle of publicity). However, the court *may* close the doors for a variety of reasons, for instance, if it is feared that public proceedings will jeopardize anyone's safety or will cause someone irreparable damage, e.g., if information is given about someone's business or work (s. 29-4-1 AJA). In cases of incest, rape and other serious sexual offences, the court *must* close the doors during the testimony of the injured person if he has so requested (s. 29-6 AJA and relevant sections of the Penal Code).

The court may prohibit the publication of information about certain aspects of the case. It may also prohibit the publication of the name, address or occupation of the accused or any other person mentioned in the case, or prohibit the identity of the person being revealed

<sup>97</sup> I. Bacik et al. (1998), p. 194.

<sup>98</sup> A. Elklit (1993), p. 38.

in any other way. The sanction on transgression of such an order is a fine (s. 31-3 AJA). For victims of sexual offences there has been an absolute protection against the publication of personal information since 1980. It is forbidden to publish the name, address or occupation of such a victim or to reveal his identity in any other way (s. 1017b-1 AJA).<sup>99</sup> Again, the sanction is a fine. Finally, it is forbidden to take photographs or draw in court during the proceedings, unless the judge gives permission. Publication of photographs of the trial may be prohibited by the court at any time during the case. Infractions may be punished by a fine (s. 31-4 AJA). Otherwise, according to Mulder and Tak, the principle of publicity is practised extensively in Denmark in relation to criminal trials.<sup>100</sup> The cause list of the courts of appeal containing the names of the defendants and the offences they have been accused of are published before the trial in the newspapers. Also, the press often reports extensively on cases.<sup>101</sup> On the other hand, the courts are not very eager to reveal the results of court cases, even when asked by a victim's lawyer (see § 6.1 under guideline D.9). But victims can also use the press to their advantage, for instance to mobilize public sympathy and put pressure on the authorities.<sup>102</sup> On 17 November 1994, the Association of Judges (*Dommerforeningen*) decided to open the doors of the courtroom to TV. The TV-Fakta department of the DR received permission to broadcast civil cases. It is up to the Association of Judges to decide whether camera's should in future also be allowed in criminal courts.<sup>103</sup>

During the Randers crisis intervention research project, the researchers became increasingly aware of the negative effect of the newspaper coverage on the victims.<sup>104</sup> Several victims were upset and annoyed by inaccurate and/or insensitive reporting, but did not dare to complain to the papers for fear of making things worse.<sup>105</sup>

For more information on the relations between the legal system and the press see the extensive report no. 1130 of the Ministry of Justice on this subject.<sup>106</sup>

(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.*

A victim may be offered direct protection from the perpetrator through a protection order. Throughout the investigation, it is also possible for the police to write the name of the witness who wants to remain anonymous in the report, but to give the defence an order not to pass

<sup>99</sup> Introduced by act of 16 June 1980 no. 253, which came into force on 1 July 1980.

<sup>100</sup> C.F. Mulder and P.J.P. Tak (1993).

<sup>101</sup> C.F. Mulder and P.J.P. Tak (1993), p. 61. See also their reference to A. Eser, *Funktionswandel von Prozeßmaximum: Auf dem Weg zur 'Reprivatisierung' des Strafverfahrens?*, *ASTW* 1992, pp. 361-397.

<sup>102</sup> In one Danish case, a young boy died in a disco after one single unfortunate kick. The case was to be brought before the city court, meaning that the maximum prison sentence would be 4 years but the boy's mother generated such fierce public opposition via the press, that the case was transferred to the High Court acting as court of first instance. The eventual sentence was three years' imprisonment. Information provided by Professor E. Smith, 2 May 1997.

<sup>103</sup> *Berlingske Tidende* 22 November 1994). NSIK's *Nyhedsbrev: Nordisk Kriminologi* 21(1) 1995, p. 3. Since then, only about 10 civil law cases have been broadcast and no suggestion has yet been made to introduce camera's into criminal court.

<sup>104</sup> A. Elklit (1993), p. 41.

<sup>105</sup> See A. Elklit (1993), pp. 41-45, for examples.

<sup>106</sup> Justitsministeriet, *Betænkning vedrørende samarbejdet mellem retterne og pressen*, Betænkning nr. 1330, 1997.

on the name to the accused (s. 745-4 AJA). However, once the case gets to court the witness can no longer remain anonymous although his address may still be concealed from the defendant. Since 1994, legal counsel may be appointed to assist a threatened witness (s. 741a AJA). Furthermore, if an offender who has been sentenced to imprisonment is released from prison on a court order pending an appeal, the victim is informed of his release. Victims are not, however, notified if the offender is released after having completed his prison sentence. In individual cases, arrangements can be made with the police so that they warn the victim's lawyer if an offender is allowed home on weekend leave.

A working group under the auspices of the Ministry of Justice published a report on organized crime and 'rocker' crime in March 1995.<sup>107</sup> In 1998 the Ministry of Justice published a report on the protection of witnesses.<sup>108</sup> The report points out that it is already possible on the basis of existing provisions to offer particularly vulnerable witnesses a new identity, but that only a few witnesses are prepared to say goodbye to family and friends, which is necessary to safeguard the new identity. The report therefore makes alternative suggestions to ensure that the criminal proceedings are less intimidating for victims/witnesses. These include arrangements that witnesses should not have to wait in the same room as friends of the accused, that the witness should be reassured that the doors will be closed during his testimony, and that witnesses should be able to testify in court before the main trial proceedings.<sup>109</sup> Another suggestion that has been made is to prohibit the reporting of the names of parties involved in a case prior to the trial. All these suggestions have since been translated into legislative proposals.

## 9 CONCLUSIONS

In 1980, Denmark became the first jurisdiction included in this study to introduce the right to a state-paid lawyer for victims of sexual and/or violent offences, thereby setting a Nordic trend. A dedicated victim's lawyer can be instrumental in guiding the victim through the criminal proceedings. In practice, some problems have been identified regarding the functioning of the victim's lawyer. These problems can be solved by introducing a more generous system of payment for victim's lawyers, as well as defining their task more clearly and providing better training. Victim Support organizations in Denmark are primarily focussed on victims of sexual offences and children. However, inspired by the Swedish network of local victim support organizations who render support to victims of all types of offences, a similar voluntary network is now being established in Denmark. State compensation was introduced in Denmark in 1976. It was intended to act as a safety net for those cases where the victim fails to secure compensation from the offender or through

<sup>107</sup> As referred to by M. Holdgaard, 'Menneskeretlige krav ved brug af anonyme vidner', in: *Juristen* Nr. 8-1996, pp. 293-315. In the same article reference is made to ECHR Doorson against Holland, of 26 March 1996 (54/1994/501/583), point 70, where the court says of the interests of witnesses in general and victims in particular, that the criminal proceedings of the Contracting States should be organized in such a way that those interests are not unjustifiably imperilled, and that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (p. 305).

<sup>108</sup> Justitsministeriet, *Vidnebeskyttelse: en rapport fra en arbejdsgruppe under justitsministeriet*, Copenhagen, 1998.

<sup>109</sup> *Nordisk Kriminologi* 24(3) 1998, pp. 18-19.

private insurance, but in practice the State Compensation Board is often the first, rather than the last instance to be addressed by victims. As in Norway, the prevalent attitude is that the state, rather than the offender, should and will take care of compensation. Denmark is one of the few jurisdictions to keep statistics on the rate of private prosecution. The figures show that private prosecutions are rare. The role of auxiliary prosecutor has little practical value either, unlike its congener in, for example, Sweden and Germany.

Regarding the implementation of Recommendation (85) 11, efforts are being made to provide victims of crime with adequate information on their rights, the facilities available to them and significant negative decisions in their case. However, victims are not informed of a decision to forward their case to the prosecuting authorities, to withdraw the summons after the offender has confessed and the court has agreed to the proposed conditions, or to proceed with the prosecution. This means that victims are often left in uncertainty about what is happening in their case for an unduly long period of time. There is no formal obligation to inform the victim of the date and place of a hearing, either, unless he is required to testify in court. However, many cases where the offender has confessed are dealt with in a summary proceedings, where it is not necessary to hear witnesses. Furthermore, courts are often very reluctant to release information on judgements and victims are not generally informed of the results of a trial unless they have a state-appointed victim's lawyer.

The adhesion procedure is largely unsuccessful and most compensation claims fail for lack of adequate documentation. Although the authorities are not blatantly against awarding compensation to the victim in the course of the criminal proceedings, it has absolutely no priority. For victims of serious offences, the general attitude is that it is most efficient to send such claims directly to the State Compensation Board. Regarding the enforcement of compensation, Denmark lags behind the other Nordic jurisdictions of Norway and in particular Sweden, where a State Recovery Agency collects the compensation from the offender on behalf of the victim.

Police recruits receive victim-oriented training as part of the general course given during both mandatory training and the follow-up courses. Special police courses have been devised for dealing with victims of rape and abused children. However, prosecutors and judges receive no training whatsoever on how to deal with victims of crime. It is an unwritten rule that a victim of rape may ask to be questioned by a female police officer, but at present there are still only a limited number of women in the police force. For victims of sexual offences, there has been an absolute protection against the publication of personal information since 1980.

# Supplements

## ABBREVIATIONS

AJA	-	Administration of Justice Act
eds.	-	editors
H	-	Højesteret (Supreme Court)
LHV	-	Landsforeningen Hjælp Voldsofre
No.	-	number
nr.	-	number
p.	-	page
pp.	-	pages
s.	-	section
ss.	-	sections
sq. km.	-	square kilometres
pp.	-	pages
Rpl	-	Retsplejeloven, (Administration of Justice Act)
s.	-	section
Ufr	-	Ugeskrift for Retsvæsen
V	-	Vestre Landsret (Western High Court)
Vol.	-	volume
Ø	-	Østre Landsret (Eastern High Court)

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