

# **Victims of Crime in 22 European Criminal Justice Systems**

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

### **PROEFSCHRIFT**

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# Chapter 13

## Italy

### SCENERY

Italy is well known for its excellent wines, designer industry and football clubs. Another aspect of Italy's fame lies in its south, home of the mafia, *'ndranghetta* and *camorra*. But the main reasons why so many tourists flood Italy are its lovely climate, landscape and the beautiful remnants of its glorious past. Remnants, which can still be admired throughout the territory. In our memory, Italy is still closely linked with the times of the Roman Empire which unified large parts of the world. However, this unifying force could not be upheld, not even in its own territory. Italy had to wait many centuries before it was united again. Numerous small city states represented the interests of its people until the establishment of the Kingdom in 1870. But once the elation of being one nation wore off, age-old differences reasserted themselves. Northern regions wanted to protect their financial interests from the economic needs of the agrarian south. Moreover, cities were soon tired of surrendering their powers to the central administration.

This aspect of history still marks modern Italy's social and political reality, just as the Roman buildings still characterise its landscape. Although the Italian Republic – founded in 1948 – is formally one country, in the minds of the people it remains a divided territory. Italians consider themselves first of all Neapolitans, Bolognesi or Venetians. Secondly, they identify themselves with the region they live in: Campania, Emilia-Romagna or Veneto. And only in the third and last place do they feel Italian. Recent developments such as the creation of the Lega Nord to protect northern Italy's interests against the south are just a reflection of regional feelings and the historical division of the nation.

The Italian Constitution reflects these feelings and refers to the regions, provinces and communities (Title V). There are 19 regions, which are autonomous entities with their own powers and competences (s. 115 Const.). They have legislative powers in areas listed in the Constitutions, inter alia regarding the regional administration, municipal police forces and public assistance, social and health services (s. 117 Const.). In order to be able to create and uphold these bodies and services, the regions have been given administrative and financial autonomy. They have the right to receive certain sums from the Ministry of Finance, according to their needs, and they may collect regional taxes (s. 119 Const.). It is of the upmost importance to underline the consequences of these provisions for Italian society. Firstly, the industrial regions of the north will have relatively more money to spend on public services than the poorer regions. But the southern regions have more citizens needing welfare and social services. This in spite of the provision that rich regions will receive relatively smaller sums from the central government. The richer northern areas have many more tax-

paying citizens than the southern ones. Secondly, the fact that social services are primarily the responsibility of the 20 regions hinders the creation of nationally operating social services. This results in a great disparity in the field of welfare among the regions. Welfare systems of, for instance, Lombardia, one of the richest regions, and poor regions such as Calabria or Sicilia are incomparable.<sup>1</sup> This disparity is not likely to disappear, because feelings of social solidarity between the different regions are minimal. Most citizens of a rich town like Milano are not very interested in the fact that people in Palermo struggle every day to make ends meet, most of them without any benefits.<sup>2</sup> As it is, most Italians living in the north of Italy feel that too much of their money is going to the poor southern regions.

These differences throughout the Italian territory also affect victims of crime. There is no national victim policy, nor is there a national victim support service where victims can turn to for assistance (see § 3.6). An explanation for this phenomenon may be that all victim services or assistance schemes are classified as social services and thus the responsibility of the regional governments. In general it is not the region's primary concern to create services for victims. Services are therefore usually the result of private initiatives. They are locally based, small, and run on a low-budget. In Italy, there are not many services to turn to for practical help or legal support. Another aspect of Italian culture is the deep-rooted suspicion of bureaucracy. The small local centres all want to stay independent and do not want to cooperate with other centres out of fear of a take-over.

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<sup>1</sup> Information supplied by Presidente Magno of the Ministry of Justice, July 1997.

<sup>2</sup> Italians who lose their jobs are only entitled to a few months of social security benefits. If they are lucky and had a good contract with their former employer they will get benefits up to a year. After that period, they are on their own. Given the fact that in Italy unemployment is just as big a problem as in the rest of Europe, many people struggle to get by. And of course, unemployment is more frequent in the poor south than in the industrial north of Italy.

## PART I: THE ITALIAN CRIMINAL JUSTICE SYSTEM

### 1 INTRODUCTION

In 1988, criminal procedural law was drastically reformed. Such a change became necessary because, under the 1930 Code, it was not uncommon that the examining magistrate, the public prosecutor and the judge acted as bodies of both investigation and judgment during the pre-trial stages. For instance, in the subdistrict court (*pretore*) the judge personally exercised all these functions. During the criminal process, the court had access to all documents of the preliminary investigative stage. It made full use of them during the trial and based its sentence on these documents. Consequently, the distinction between the pre-trial and trial stages disappeared.

Also the roles of the public prosecutor and the examining magistrate merged and were no longer distinct. Examining magistrates were increasingly accused of being partial, since it was impossible to understand how they could do their utmost to prove the accused guilty and then give an impartial ruling in the case. Public prosecutors were criticized because their power of detention was felt to be incompatible with their duty to accuse and prosecute. Finally, it became obvious in the public's eyes that the court proceedings did not serve any practical purpose whatsoever. The court just verified the evidence collected during the previous stage and checked whether new evidence had been gathered in the mean time. In practice, the latter hardly ever occurred and the court proceedings seemed less and less important. In addition, the trials concerning terrorism and the mega mafia trials paralysed the courts for months or even years, resulting in interminable delays for all other cases and the choice between releasing alleged offenders and keeping them in preventive custody for too long. The steady increase in the number of persons in pre-trial detention was another matter of grave concern to many lawyers. By 1983, the prison population consisted largely (64%) of pre-trial detainees. The first reason for the large number of persons in preventive custody was the compulsory pre-trial detention for certain offences with a minimum sentence of five years. Secondly, the maximum duration of preventive custody increased constantly whereas the legal options for suspension were reduced. Depending on the seriousness of the offence, a suspect could be held in custody for up to 10,5 years.<sup>3</sup> All these factors, combined with the fact that the criminal justice system did not have the flexibility to apply different procedures to trivial and serious crimes, led to its downfall.<sup>4</sup> The criminal justice system was reduced to a malfunctioning machine, increasingly incapable of processing the caseload, leading to endless delays, exorbitant waiting times, lengthy holdings on remand and general discontent and distrust.

The 1988 Code of Criminal Procedure introduced an accusatorial system (see § 2 and § 3.3.1). This also place different demands on the parties involved. Judges no longer play a leading role during the hearings, although they still have some powers left, such as to indicate new themes for examination (s. 506 CCP) or to suggest directions to complete an examination (s. 507 CCP). The primary role during criminal proceedings is now placed

<sup>3</sup> See A.M. van Kalmthout, P.J.P. Tak, *Sanction-systems in the Member-States of the Council of Europe*, part II, Kluwer, Deventer, 1992, pp. 522-523.

<sup>4</sup> L. d'Ambrosio, 'The new Italian Code of Criminal Procedure', *ICPR*, 1992, nr. 434, pp. 8-9.

in the hands of the parties, primarily the public prosecutor and the defence, who have to produce the evidence and determine the contents of the trial. It is obvious that this transition is most difficult. The attitude of the persons involved still reflects the former system. Although the content of the process is determined by the parties, judges still intervene in cross-examinations if they feel their actions are called for. Public prosecutors and defence lawyers still perform cross-examination of witnesses in a more or less inquisitorial manner. The harsh examination of witnesses frequently encountered in common law countries such as England and Wales seems still foreign to Italian legal culture. Furthermore, the defence counsel has to develop new working methods, since the legislature has given them the right to conduct their own investigations – even to hire a private investigator – and to interview anyone who might be useful to their case. Finally, the police have a new role. Police officers will be called to the stand to give evidence concerning their investigative activities and can be subjected to severe cross-examination.<sup>5</sup>

Today, as a result of the 1988 reform, the criminal justice system functions in a much more satisfactory manner. However, if one considers the position of victims in this revised system, hardly any improvement can be detected. The position of the victim in criminal law and procedure is still given far too little attention by the legislature and the criminal justice authorities.

## 2 GENERAL REMARKS AND BASIC PRINCIPLES

On 24 October 1988, the current Code of Criminal Procedure replaced the 1930 Code, which was drafted under the fascist regime and was marked by an authoritarian nature, the punishment for criminal offences taking precedence over individual rights. The latter Code had been amended and modified many times and in the end, criminal procedural law became a very complex set of rules, difficult to work with, in practice (see § 1). Especially the modifications ordered by the Constitutional Court hindered the internal logic of the procedural rules. The primary incentive to drastic reform lies in the failure of the former system. The purpose of the legislature was therefore to shape an entirely new judicial system in which the excesses, so characteristic of the former period, were no longer possible.<sup>6</sup>

The 1988 Vassili Code, named after the Minister of Justice at the time, marks the introduction of the accusatorial system into Italian criminal proceedings. However, it would be more correct to say that it reintroduced the accusatorial system<sup>7</sup> because it was the way of ancient Roman criminal procedure. The legislature made this choice in order to be able to completely rearrange and redistribute the roles of the authorities and to rigorously separate the stages of the criminal proceedings. The role of the examining magistrate was a severely criticised one, and the legislature chose to abolish this function altogether. It created an entirely new judicial body within the preliminary stage: the pre-trial judge (*giudice per le indagini preliminari*, see § 3.3). Today, the prosecution service no longer combines the roles of accuser

<sup>5</sup> L. d'Ambrosio (1992), nr. 434, p. 11.

<sup>6</sup> L. d'Ambrosio (1992), p. 16.

<sup>7</sup> The strict accusatory system is essentially a two-sided contest between the public prosecutor and the defence counsel before an impartial judge. It has several distinctive features, *inter alia* the public and oral nature of the trial and the obligation of the court to reach a decision based upon the evidence as presented by the parties during the process, without any power to seek other or further evidence.

and judge. In its new role, it only bears responsibility for the instigation of criminal proceedings and the actual handling of the case in court. In other words, the public prosecutor has become the exact counterpart of the defence counsel.

In order to illustrate the fundamental changes in the roles of the criminal justice authorities, it is useful to compare the proceedings before the lower court (*pretore*) before and after the promulgation of the 1988 Code. Under the old system, in this single judge court, the magistrate fulfilled the roles of both prosecutor, examining magistrate and presiding judge. The Vassili Code provides for three different authorities with clearly distinct competences and functions: the public prosecutor gathers evidence in order to bring charges, the new pre-trial magistrate controls the judicial investigations and the judge pronounces sentence without being biased by the preceding stage (see §§ 3.3 and 4.2).<sup>8</sup>

The 1988 legislature established a sharp division between the procedural stages. The pre-trial investigations can no longer have a decisive effect on the trial. Documents and evidence gathered by the police and prosecution service during the preliminary judicial investigations are, as a rule, not put in the file used by the court. The criminal court is unaware of all the evidence until the trial proceedings start. As such, it is forced to decide the case on the evidence presented by the parties during the hearings (see § 4.2). Another novelty is the introduction of simplified and speedier trial proceedings (*giudizio immediato, giudizio direttissimo*). These simplified proceedings are primarily inspired by procedural economics. They omit either trial procedures and allow the case to be decided during the pre-trial stages, or no pre-trial investigations take place and the case goes directly to court. The purpose of these new ways of dealing with crime is to diminish delays which previously characterised the Italian criminal justice system (see § 1 and § 4.2). However, despite these reforms, waiting times are still considerable.<sup>9</sup>

## 2.1 Basic Principles

In the new criminal proceedings the preliminary stage remains inquisitorial and dominated by the principle of secrecy. The criminal justice system adheres furthermore to the legality principle, although the pre-trial court may decide not to prosecute the suspect. The trial stage is governed by the immediacy and orality principle. However, the evidence gathered during the pre-trial evidence hearings (*incidente probatorio*, see §§ 3.3, 8.2 and 8.3) may be used in court.<sup>10</sup>

<sup>8</sup> L. d'Ambrosio (1992), p. 9.

<sup>9</sup> Waiting times before the lower court (*pretura*) are the worst. To get a case to court usually takes more than five years. See paper of Lanza. According to victim associations, victims often get discouraged by the long waiting times and experience the long period before the verdict as particularly distressing.

<sup>10</sup> See M. Delmas-Marty, *Procédures pénales d'Europe*, Presses Universitaires de France, 1995, pp. 330-331; P. Corso, *Italy*, in: Chr. Van den Wyngaert, *Criminal procedure systems in Europe*, Butterworths, London, 1993, pp. 223-260.

### 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

#### 3.1 Investigating Authorities

The Italian police<sup>11</sup> consist of two national police forces: the state police force (*polizia di stato*) operating under the supervision of the Ministry of the Interior, and the paramilitary police force (*carabinieri*) normally functioning under the authority of the Ministry of Interior, but falling under the authority of the Ministry of Defence during wartime. The competences of the two police forces do not differ very much. Both forces have duties in the field of traffic regulation, patrol and criminal investigations. Besides these two basic police forces, there are other forces such as the municipal police (*polizia municipale* or *vigili urbani*), with mainly traffic control and business inspection functions<sup>12</sup>, and the specialized forces such as the financial police (*guardia di finanza*), the penitentiary police (*polizia penitenziaria*) and the forest police (*corpo forestale dello stato*). Women are not allowed to join the paramilitary police, the financial police, or the forest police force.<sup>13</sup>

Police officers of the state and paramilitary police are also members of the judicial police (*polizia giudiziaria*, s. 57 CCP). The judicial police are competent to receive complaints, to take down reports of crime, to search for evidence and apprehend suspects (s. 55-1 CCP). After taking down the complaint or the report of crime, the judicial police should notify the prosecution service of the facts and elements of proof within 48 hours (s. 347 CCP). Furthermore, they should notify the prosecution service as soon as possible of discovered evidence in a case, the identity of the suspect and his arrest (ss. 348-386 CCP).<sup>14</sup>

Since 1988, the police no longer have an auxiliary, servile role. This would have been unheard of before the promulgation of the new Code of Criminal Procedure. Nowadays, the police work in close cooperation with the prosecution service and are able to express its views on the investigative activities required in a case.<sup>15</sup> Nevertheless, the judicial police operate under the authority of the prosecution service, and should be available at all times to receive any orders regarding a case under investigation (ss. 59 and 327 CCP).<sup>16</sup> The main task of the police is to discover and identify the possible sources of evidence, after which the public prosecutor has to incorporate the elements of proof into his prosecution strategy. Under current procedural law, a close working relationship between the prosecution service and the police is presupposed. Decisions of the prosecution service should be based on assessments reached on the basis of close cooperation and coordination.<sup>17</sup> In practice, according to the police, the cooperation with the prosecution service is satisfactory. They have frequent contacts and the public prosecutors can be easily reached by police officers because they work in shifts and around the clock (*24 ore di turno*). If a crime has been brought

<sup>11</sup> The current state police force was established by the 1981 Police Act (*Legge 1-4-1981, nr. 121*) and the Act of November 1986 (*Legge 11-11-1986, nr. 668 sull'ordinamento dell'amministrazione della P.S.*).

<sup>12</sup> European Network of Policewomen, *Fact figures and general information*, ENP, Utrecht, 1996, p. 111.

<sup>13</sup> See M. Marinelli, A. Zampieri, *Le donne nelle forze di Polizia*, Agnelli, Roma, 1996, p. 18-35. The military police force does not have any female police officers (p. 26).

<sup>14</sup> F. Marino, F. Caringella, *Diritto di Polizia*, Simone, Napoli, 1992, pp. 235-237.

<sup>15</sup> L. d'Ambrosio (1992), p. 14.

<sup>16</sup> See further F. Marino, F. Caringella (1992), pp. 283-287 (*rapporti tra P.M. e polizia giudiziaria*).

<sup>17</sup> L. d'Ambrosio (1992), pp. 13-14.

to the knowledge of the police, the public prosecutor is immediately contacted if it is a very serious crime. The latter will then intervene at once and direct the investigation. In other cases, the police usually start investigating the offence themselves before contacting the public prosecutor.<sup>18</sup> Within the accusatory criminal proceedings, the public prosecution service is not the only body who supervises the police. The defence counsel has also been given the power to monitor police activities.<sup>19</sup>

### 3.2 Prosecuting Authorities

The judiciary comprises both judges and public prosecutors. The prosecution service (*pubblico ministero*) is a public office which has the duty to effectuate the collective interest by initiating judicial proceedings or by intervening in proceedings started by the private parties. The prosecution service acts through a network of offices (*procure della Repubblica*). Another important feature of the organizational structure of the prosecution service is its guidance and control of the judicial police. The judicial police are subordinated to the prosecution service and they have to follow its orders (s. 59 CCP). During the judicial investigations, the public prosecutor (*Procura della Repubblica*) is in direct and continuous contact with the police, not only because he has to direct the investigations, but also because the investigations must lead to a decision whether to prosecute or to request the pre-trial judge to dismiss the case (*richiesta di archiviazione*, s. 50 CCP).<sup>20</sup>

The principal function of the prosecuting authorities is the initiation of criminal proceedings, irrespective of whether they are initiated ex officio or after a complaint (*querela*, s. 336 CCP – see § 5.2).<sup>21</sup> A basic feature of Italian criminal procedure is that the public prosecutor instigates criminal proceedings (s. 112 Const. and s. 50 CCP). He is obliged to start criminal action as soon as he learns about a crime being committed, if only to ask the judge to waive prosecution, e.g. if there is not enough evidence to get a conviction. Another aspect of this obligation is that private prosecution is unknown (see § 5.2). The public prosecutor has a monopoly on prosecution. Nevertheless, the monopoly to initiate criminal proceedings has been restricted by law with respect to specific offences. For instance, a formal complaint by the victim is required when the crime is of minor importance or if criminal proceedings can cause further damage to the victim. This means that the legislature feels that regarding certain crimes, such as sexual offences, the choice to start criminal action should be left to the discretion of the victim. The victim should not be obliged to report a crime, or to testify, because giving evidence in these cases can be very painful and distressing. These provisions are particularly relevant in view of the rule that once the criminal process is put in motion, it is irreversible. It cannot be suspended, interrupted or ended but in the manners prescribed by law (ss. 50, 408, 411 and 415 CCP), all of which involve the intervention of a judge. The public prosecutor has no discretionary powers to decide whether criminal action should be initiated, or to end the proceedings (see § 7.1).<sup>22</sup> Only the pre-trial magistrate is competent to dismiss the proceedings. Besides the primary

<sup>18</sup> Information supplied by police inspector Nevone, State police, Rome, 25 June 1997.

<sup>19</sup> L. d'Ambrosio (1992), p. 15.

<sup>20</sup> L. d'Ambrosio (1992), p. 14.

<sup>21</sup> In addition, certain offences allow a formal request of the victim (*istanza*, s. 341 CCP and 130 PC) or the intervention of the Minister of Justice (*richiesta*, s. 342 CCP and ss. 127-129 PC) to initiate the criminal proceedings.

<sup>22</sup> See G. L. Certoma, *The Italian legal system*, London, Butterworths, 1985, pp. 220-222.



function to start criminal proceedings, the public prosecutor has a number of additional powers. He may, for instance, give summary instructions or issue measures to restrict the suspect's personal liberty by means of a warrant for arrest or a summons. Finally, he has functions in the enforcement stage such as the enforcement of penalties and the supervision of penitentiary services.<sup>23</sup>

Under the 1988 Code, the purpose of the pre-trial investigation is no longer to produce evidence. The documents of this stage are as a rule not used in the trial proceedings. Verdicts cannot be based on them, unless they concern evidence that cannot be reproduced in court. However, the pre-trial file is used during preliminary hearings to cross examine, or contest statements of, witnesses (see § 5.5), and during simplified trial procedures (see § 3.3.1).<sup>24</sup>

### 3.3 Judiciary

Members of the judiciary, public prosecutors and judges, are career magistrates. The only non-professional magistrates are the mediators (*conciliatori*), honorary magistrates and lay judges. Honorary judges can be criminal law professors, psychologists, medical doctors, etc. Lay judges are only active within the Court of Assizes (*corte di assise*, see below). For training of the judiciary, see § 8.1.

Today, two types of judges can be distinguished: the pre-trial judge and the trial judge. Although the 1988 legislature abolished the function of the examining magistrate (see § 2), the necessity was felt to hold on to the guarantee offered by a magistrate during the pre-trial stages. The legislature therefore introduced a new type of judge acting within the pre-trial stages. He is referred to as the judge of the preliminary stage (*G.I.P., giudice per le indagini preliminari*) and should not be confused with the examining magistrate of the former Code. The former has no powers of investigation whatsoever. The pre-trial magistrate only becomes involved if investigations may conflict with constitutional rights, e.g. the right to individual freedom and the protection of privacy. He controls the pre-trial stages and watches over individual rights by authorizing coercive measures, certain invasive investigation activities, like phone taps, or by validating the arrest of suspects and their detention. Moreover, it is his duty to decide whether or not to dismiss the case after a request of the public prosecutor. Also, the presence of the pre-trial magistrate is required when the gathering of evidence cannot be postponed until the trial. His presence is necessary if one of the parties wishes to bring evidence from the pre-trial stages into the trial proceedings by means of the probative procedure (s. 467 et seq. CCP, *incidente probatorio*). This purpose of this special procedure is to gather evidence which cannot wait until the trial. It allows the public prosecutor and the police to acquire evidence which can be used during the trial. Finally, the pre-trial magistrate assumes the role of an ordinary judge during the special trial procedures (see § 2).<sup>25</sup>

The trial judges work in the below-mentioned courts, their main duty being to hear and try criminal cases.

The Italian judicial courts are, in descending order of importance: the Supreme Court (*Corte Suprema di Cassazione*); the appeal courts (*corte di appello*), the court of Assizes (*corte di assise*), the district court (*tribunale*), the subdistrict court (*pretore*). In addition, there are the

<sup>23</sup> See G. L. Certoma (1985), pp. 68-71.

<sup>24</sup> L. d'Ambrosio (1992), p. 15.

<sup>25</sup> L. d'Ambrosio, *The new Italian Code of Criminal Procedure*, ICPR, 1992, nr. 434, p. 14.

specialized juvenile courts (*tribunale per i minorenni*). Each court is divided into sections, such as the civil and criminal section.

*The criminal courts:*

<b>Courts of First Instance:</b>	<i>Pretore</i> , subdistrict court	<i>Tribunale</i> , district court	<i>Corte d'Assise</i> , Court of Assizes
<b>Courts of Appeal:</b>	<i>Tribunale</i> , district court	<i>Corte d'Appello</i> , Court of Appeal	<i>Corte d'Assise d'Appello</i> , Appeal court in Assize Court-cases
<b>Supreme Court:</b>		<i>Corte Suprema di Cassazione</i> , Supreme Court	

Firstly, the lowest court in the hierarchy, the subdistrict court (*pretore*), is presided over by a single judge. Its territorial jurisdiction is limited to the smallest legal district (*mandamento*). This court is competent to deal with all crimes with a maximum penalty of four years and/or a fine and some specific crimes listed in the law (s. 7 CCP). An appeal from a judgment of the single judge court must be filed with the district court. Secondly, the district court (*tribunale*) consists of three judges. The legal district of this court (*circondario*) comprises several subdistricts. It is competent in all criminal matters which do not fall within the competence of the subdistrict or the assizes court (s. 6 CCP). Appeals against verdicts of the district court must be presented before the court of appeal, which is also composed of three judges. Thirdly, the Court of Assizes is composed of a bench of eight judges: two career judges and six selected lay judges. Its territorial jurisdiction lies within the *circolo*, which has no relation to the other judicial districts, and it is competent regarding certain serious felonies (s. 5 CCP). There is a special appeal court for assizes-cases (*corte d'assise d'appello*). This appeal court is also composed of two judges and six lay judges. In most countries with a Court of Assizes, jurors decide whether the accused is guilty or not. The Italian legal system, however, does not comprise a court in which the verdict (of guilty or not guilty) is given by jurors. The Constitution stipulates that a verdict should contain the reasons on which it is founded. The unreasoned decision of the jury thus fails to comply with this constitutional requirement. Finally, the Supreme Court consists of five magistrates when sitting as an ordinary section, or of nine when sitting as a full court. Its competence is limited to errors of law and procedure (s. 606 CCP).

With respect to victims, the judiciary is not known to be particularly concerned with secondary victimization. According to Scardaccione, judges are not aware of the possible traumas because they have a purely technical-legal, and distant, way of dealing with offences and victims of crime. To most victims, the courts seem to be more interested in the rights and interests of the accused. This detached attitude enhances the dissatisfaction of many victims with the criminal process.<sup>26</sup>

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Information supplied by G. Scardaccione, University of Rome, department of psychology and actively involved with proceedings before the juvenile court, 30 June 1997.

### 3.3.1 Criminal Proceedings

#### *New proceedings*

The 1988 Code of Criminal Procedure introduced several new criminal procedures. The first novelty is the abbreviated procedure (*giudizio abbreviato*, s. 438 ff. CCP) in which the parties agree to let the judge of the preliminary hearings (*G. U. P.: giudice dell'udienza preliminare*) reach a verdict in the case.<sup>27</sup> This type of proceeding comprises negotiations between the public prosecutor and the accused on the way the case will be sentenced. The public prosecutor may offer a reduction of one-third of the sentence if the suspect is found guilty, if the suspect agrees to a trial held by the pre-trial magistrate on the basis of the legal file prepared during the pre-trial stages. Apart from this feature, the abbreviated procedure is a normal criminal trial in which the suspect can be acquitted. The only agreement is that in case of a conviction, the sentence will be reduced by one-third (s. 442 CCP).

Another novelty is the charge bargaining (*patteggiamento della pena*, s. 444 ff. CCP). This is allowed for crimes punishable by a maximum penalty of two years imprisonment. The public prosecutor will offer the accused a lower charge in return for the accused renouncing his right to go to court. If the accused accepts this offer, the public prosecutor will reduce the sentence up to one third of the possible sentence and the alleged offender authorizes the pre-trial magistrate to use the documents and the evidence gathered in the preliminary stage. The magistrate cannot impose a higher sentence if the perpetrator is found guilty. However, his main duty is to make sure that the accused would not have been acquitted in a normal trial and that the definition and the calculation of the sentence are correct.

Thirdly, the direct trial proceedings (*giudizio direttissimo*, s. 449 ff. CCP) are only permitted if the offender is arrested in *flagrante delicto* and the evidence is conclusive. The direct trial is a process in which the preliminary stage is skipped. The case is brought immediately – within 48 hours after the arrest – before the trial judge (*giudice del dibattimento*). If the judge does not validate the arrest, the case is given back to the public prosecutor unless the parties agree to have a direct trial. If, on the other hand, the judge validates the arrest, the trial will start immediately.

The immediate trial procedure (*giudizio immediato*, s. 453 ff. CCP) looks like the opposite of the abbreviated procedure. In the former, the pre-trial stages are skipped and the case goes directly to court, whereas in the latter, the verdict is given during the pre-trial stages. The immediate trial was introduced in order to allow a speedy criminal process without the time-consuming preliminary stage if the evidence seems to be so conclusive that a conviction is rather obvious. The public prosecutor and the accused may both ask for the application of the immediate trial.

Finally, there is the sentence by decree (*procedimento per decreto*, s. 459 ff. CCP). The public prosecutor may ask the pre-trial judge to impose a financial penalty by decree, if he feels this is the appropriate sanction. The judge may however refuse to honour the request. The accused may oppose the sentencing by decree and may request that the abbreviated trial procedure will be applied (s. 461 CCP). (see further § 7.2).<sup>28</sup>

#### *Ordinary trial proceedings*

The trial starts by the presentation of the evidence by the public prosecutor, and continues with the presentations of the civil claimant and other participants (s. 496 CCP). This is

<sup>27</sup> L. d'Ambrosio (1992), p. 13.

<sup>28</sup> L. d'Ambrosio, *The new Italian Code of Criminal Procedure*, ICPR, 1992, nr. 434, pp. 12-13.

followed by the hearing of witnesses and experts. During the examination and cross-examination of witnesses, the questions are directly put by the public prosecutor or defence counsel. In addition, the witnesses can be questioned by the other participants (s. 498 CCP). The same rules are followed concerning the examination of the victim-witness and experts (s. 501 CCP). Although the questioning is performed by the parties to the proceedings, the judge controls the questioning in order to prevent suggestive and disrespectful questions. The court may intervene in the examination of witnesses to assure the pertinence of the questions put to the witnesses (s. 499 CCP). In addition, the court may decide to use pre-trial documents or to allow that evidence is read from the legal file (s. 511 CCP). Based on the evidence presented during the trial, the court may indicate that additional evidence is needed, and it may examine the witnesses and experts (s. 506 CCP). If the court has sufficient evidence to decide the case, it will give its reasoned verdict of guilty or not guilty, and impose, if necessary, a penal sanction on the offender and award compensation to the victim in his role of a civil claimant.<sup>29</sup>

### 3.4 Enforcement Authorities

Within each court, there is an office to assist public prosecutors with the enforcement of sentences (*ufficio giudiziario*).<sup>30</sup> The victim, however, is not assisted with the enforcement of the court's decision stating that the offender must pay him a certain sum in compensation (see § 7.3).

### 3.5 Probation Services

The services active in the field of probation deal exclusively with offenders and are not involved with victims of crime.

### 3.6 Victim Services

In Italy, no national victim support organization exists to assist victims with practical and legal matters. However, there are local or regional services offering help to victims of crime. Italian victim support organizations differ in many ways from those in other European countries because they are particularly active in politics, and try to reach their goals through lobbying. Consequently, the different organizations show a sectorial approach of crime victims. Each association has a specific target group and focuses exclusively on victims of a particular offence. Usually, victim support schemes are small and run by a limited number of dedicated persons, who assist victims of a particular crime, e.g. racism or violence against women. Not surprisingly, the most frequently encountered ones are services for victims of domestic or sexual violence. In 1996, there were 64 of this type of services for women throughout Italy. However, the large majority of them are situated in the northern regions; only a few schemes operate in the south.<sup>31</sup> These centres usually function as places where female victims of crimes or sexual violence can turn to for practical and legal support, or simply to talk with other

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<sup>29</sup> M. Delmas-Marty, *Procedures pénales d'Europe*, Presse Universitaire de France, 1995, pp. 323-325.

<sup>30</sup> Information supplied by professor Manna of the University of Bari, who also works as a lawyer in Rome, June 24, 1997.

<sup>31</sup> Gruppo di Lavoro e Ricerca sulla Violenza alle Donne, *Comecetroni. Guida ai luoghi di donne contro la violenza in Italia*, Bologna, 1996.

women about their problems. Most centres also offer free psychological help and legal assistance. In addition, several services function as emergency shelters for women and their children.<sup>32</sup>

Under the new Code, associations working with victims are allowed to intervene during the criminal proceedings on behalf of their clients. It is important to remark that children who have been victims of (sexual) abuse must be assisted by victim- or other social services during the trial.<sup>33</sup> The victim's organizations may join the proceedings as civil claimants (see § 5.3) or as simple participants (*intervenenti / parte ascoltante*), who may take part next to the victim and his lawyer. However, they rarely act as civil claimants, because they have to prove that they were directly affected by the offence. As a result, they usually function as participants. In that capacity, they are always asked by the public prosecutor to give evidence with respect to the case, the person of the victim and the effects of the offence. Even if they do not formally participate, the associations have a role as expert witnesses for the prosecution, because many volunteers are trained psychologists and lawyers. If the services are allowed to act as civil claimants, they are allowed to request the president of the court to take certain (protective) measures, or to order additional investigations. As civil claimants, the organizations are a party to the proceedings and as such they are *inter alia* allowed to cross-examine the accused.<sup>34</sup>

According to the persons involved in these victim support services, they have good working relationships with the police and public prosecutors. In practice, this means that they rely on a small number of dedicated individuals within the police and prosecution service who are willing to give them advice and help them to create the necessary conditions to help the victim to set the criminal justice system in motion. These police officers also refer certain victims to them and the services refer their clients to them to report crimes. The police profit from this cooperation. Police officers refer a victim to a particular service and expect the volunteers to gather evidence and fill in the form used to report a crime or file a complaint (see §§ 5.1 and 5.2).<sup>35</sup>

Since there is no national victim service, nor any national assistance policy, it is interesting to know how many victims get practical or legal aid and from whom. According to a 1992 study, a large group of victims (44%) do not get any help. Others (38.3%) are assisted by their family, friends or neighbours. The police gave some kind of assistance to 14.1% of the victims of crime. It is remarkable that less than 4% of all victims are assisted by social services. Of these 4%, only 0.6% receive any help from social welfare, 0.1% from victim support services, and 0.4% from other voluntary organizations.<sup>36</sup> According to this study, victim services and voluntary organizations only reach but a tiny fraction (0.5%) of victims of crime.

<sup>32</sup> Information supplied by Mrs. M.C. Zoffoli of the Anti violence against women service in Rome (Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze), Rome, June 25 1997.

<sup>33</sup> Information supplied by G. Scardaccione, psychologist working at the University of Rome and at the Juvenile Court, 30 June 1997.

<sup>34</sup> Information supplied by Mrs. Zoffoli of the Anti violence against women service in Rome (Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze), Rome, June 25 1997.

<sup>35</sup> Information supplied by Mrs. Zoffoli of the Anti violence against women service in Rome (Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze), Rome, June 25 1997.

<sup>36</sup> E.U. Savona, 'Experiences, fear and attitudes of victims of crime in Italy', in: UNICRI, *Understanding crime*, Publication nr. 49, Rome, 1993, p. 103.

Partly, this is due to their limited number, resources and capacity, but, more importantly, there is no national strategy to reach out to victims. Most victims learn about the existence of services from family, friends or neighbours and not because of some publicity campaign telling victims in a particular area where to get help. Even within one community or one region, associations do not cooperate or coordinate their services. They all have their own programme of available services, since they do not want to lose their (political) identity (see § 1).

### 3.7 Other National Services Relevant to Victims

Concerning the other national services available to victims, the new ad hoc institutions, like the State Funds to compensate victims of racket<sup>37</sup> and the Fund for victims of usury (*usura*), are worth mentioning.<sup>38</sup> With respect to minors, the juvenile department (*ufficio minori*) within police headquarters<sup>39</sup> and the social services for juvenile offenders (*uffici di servizio sociale per minorenni*) at the courts are getting increasingly important. They already have a lot of know-how concerning the assistance to minors. In practice, they work together with the local services.<sup>40</sup>

## 4 SOURCES OF LAW

### 4.1 General Sources of Law

The Constitution is the prime and most important formal source of law. Other sources are the ones listed in s. 1 of the preliminary provisions of the Civil Code: legislation (*legge*), regulations (*regolamenti*) and customary law (*usi*).<sup>41</sup> Legislation includes parliamentary legislation, legislative decrees, constitutions of the regions, delegated and regional legislation. Finally, it includes legislation of the provinces of Trento and Bolzano, which enjoy special legislative autonomy.

The secondary sources of law comprise normative acts of the national government and those of the municipalities, regions and provinces. Customary law is an unwritten source of law and therefore it can never be a source of criminal law according to the dictum *nullem crimen sine lege*. Finally, case-law (*giurisprudenza*) and legal doctrine (*dottrina*) have a strong influence on legal practice but formally they are not recognized as sources of law.<sup>42</sup>

### 4.2 Sources of Criminal Law and Procedure

Criminal law has fewer sources of law because of the fundamental principle that criminal law has to be established by parliamentary enactments (s. 25 Const.), including legislative

<sup>37</sup> L. Pepino, D. Scatolero, 'Vittime del delitto e vittimologia', *Dei Delitti e Delle Pene*, nr. 1, 1992, pp. 182-183.

<sup>38</sup> The service for assistance to victims of crime (s. 73 Penitentiary Act) has been abolished.

<sup>39</sup> In 1997, all police headquarters were supposed to have created offices for juveniles and to have trained officers to do the job. However, in practice this was still not the case.

<sup>40</sup> Information supplied by Presidente Magno, Ministry of Justice, Rome, July 1997.

<sup>41</sup> The source of law entitled 'corporate norms' (*norme corporative*) has no more practical value since the fall of the fascist regime.

<sup>42</sup> See G. L. Certoma (1985), pp. 79-89.

decrees. The Constitutional Court and the Supreme Court have decided that laws which are substantially legislative in character, such as regulations, may give a more specific definition of crimes already outlined by legislation.

The most important source of criminal law is the 1930 Penal Code, known as the Rocco Code (*Codice Rocco*). It consists of three books: book I contains the general principles of criminal law while the other two list felonies (book II) and misdemeanours (book III).<sup>43</sup> Recently, the legislature has prepared a reform of the Penal Code. According to the proposal, the victim will be given a right of his own to seek compensation, even without constituting himself as a civil claimant. The reform project also includes a new duty for judges, in that it proposes to make them responsible for enforcement of the awarded civil damages, therefore, eliminating the automatic referral to the civil court (see § 5.3). Finally, it provides for the creation of a solidarity fund for victims, which will be funded by financial penalties in those cases in which there are no (known) victims claiming damages.<sup>44</sup>

Criminal procedural law has been renewed in 1988<sup>45</sup> by the first Code of the Italian Republic. The 1988 Code of Criminal Procedure introduced numerous changes, for instance the abolition of the examining magistrate, the separation of the different stages, and the introduction of the accusatory system (see §§ 2 and 3.3), which revised the roles and competences of the judicial authorities. The legislature rigorously separated the preliminary stage from the trial stage. The pre-trial investigative stage is no longer closely linked to the court proceedings. The documents produced during the initial inquiry stage (*fase delle indagini preliminari*) do not automatically have the status of evidence in court. The findings will not be transferred automatically to the court files and as a rule the evidence will not be made available to the trial judge in order to avoid influencing him beforehand. The pre-trial documents, however, are always available to the defence. The court will only be given pre-trial documents containing facts which cannot be reproduced in the courtroom or concerning activities undertaken which could not be postponed until the trial without jeopardizing the case. These activities must be recorded in the presence of the examining magistrate and the defence counsel; otherwise, they cannot be accepted as evidence in court.<sup>46</sup>

Due to this double-file system, the liaison between the investigative stages and court proceedings under the former Code has ended. The pre-trial judicial investigations are performed by the police under the guidance of the public prosecutor for the sole purpose of instigating criminal proceedings by gathering evidence and identifying suspects. Judges can no longer take their decision based on evidence collected in the previous stage. The trial is the focal point of the criminal process. The burden of proof is on the parties and evidence is admitted at the request of the parties (s. 190 CCP). Evidence is first produced by the public prosecutor and then by the defence. The judge cannot alter this sequence of events, nor can he intervene in the oral investigation by the parties. He is an impartial spectator during the entire debate. It is up to the parties to highlight the relevant facts and circumstances of the case. Consequently, oral evidence given by witnesses, inter alia the victim of crime, experts and the parties involved constitutes the backbone of the trial.<sup>47</sup>

<sup>43</sup> See G. L. Certoma (1985), pp. 267-270.

<sup>44</sup> See D. Riponti, 'La vittima nel quadro della giustizia penale', in: G. Ponti (ed.), *Tutela della vittima e mediazione penale*, Giuffrè, Milano, 1995, pp. 63-64.

<sup>45</sup> The new Code of Criminal Procedure was approved on 22 September 1988 and published in the *Gazzetta Ufficiale*, nr. 477 of 24 October 1988.

<sup>46</sup> L. d'Ambrosio (1992), pp. 9-10.

<sup>47</sup> L. d'Ambrosio (1992), pp. 9-11.

The 1988 legislature was well aware of the risk of lengthy and complex trials within the accusatorial system. Therefore, it introduced judicial filters which have the purpose to avoid unnecessary trials and to control its content. The first filter is the decision of the public prosecutor that the accusation is well founded. Because of s. 112 of the Constitution, the legislature could not adopt the expediency principle. The filter allows the public prosecutor to request that the case be filed if he feels there is not enough evidence to get a conviction in court. The magistrate who has to take this decision may decide otherwise and order to start criminal proceedings. Once this stage is passed, the public prosecutor will send a request to the magistrate involved in the initial inquiry to try the case in court. This second filter is a judicial one, in which the magistrate hears both parties and verifies whether the charge would justify a trial. This preliminary hearing takes place *in camera*. After the hearing, the magistrate either dismisses the case or issues a decree fixing the date for trial. He may dismiss the case if the time limit for prosecution has expired, the act is not punishable, there is insufficient evidence or because the innocence of the accused can be proven. The third filter is introduced to avoid the costs of a full trial, if the parties allow a simplified trial. The freedom of the public prosecutor to opt for a simplified procedure is only subjected to the agreement of the parties involved. This system is very flexible, not only regarding the evidence but also with regard to the strategy of the parties, which may resemble civil law negotiations (see § 3.3).

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

The former Code of Criminal Procedure already granted several rights to the victim of crime (*persona offesa*). The 1988 Code repeated many of them, but, more importantly, introduced several new rights and powers of the victim. The 1987 Act<sup>48</sup> concerning the 1988 Code of Criminal Procedure comprises several guidelines concerning the victim of crime. Section 2 CCP contains instructions, such as the victim's right of the victim to indicate evidence to the court and to submit notes in every stage of the trial (point 3); it obliges the public prosecutor to send the victim a copy of the information sent to the accused (point 38); and it declares that the subjects and association protecting the interests of the victim enjoy the same rights as the victim who did not appear as a civil claimant (point 39, see book I title 6 CCP); and finally, point 51 states that the victim may ask the public prosecutor to inform him of any requests made by him to the pre-trial judge not to prosecute (see § 7.1).

The victim has been given several rights, not only during the trial proceedings but also during the pre-trial stages (s. 90 CCP).<sup>49</sup> It is remarkable that most rights are attributed to

<sup>48</sup> Legge 16.2.87, nr. 81 contenente la delega del Parlamento al Governo per l'emanazione del nuovo codice di procedura penale.

<sup>49</sup> The victim has the right to file notes (*memorie*) and to indicate sources of evidence (s. 90-1 CCP); to appoint a defence counsel (s. 101 CCP); to file a complaint (*querella*, s. 336 CCP); to ask the public prosecutor to take action after a complaint has been filed (ss. 341, 342 CCP); to participate in the appointment of experts by the public prosecutor (s. 360 CCP); to screen documents deposited by the public prosecutor or the judicial police at the court's office according to article 366 CCP; to present documents and requests to the public prosecutor (s. 367 CCP); to receive a copy of the indictment (*informazione di garanzia*, s. 369 CCP); to request the public prosecutor to have a pre-trial hearing regarding the evidence (*incidente probatorio*, s. 394 CCP); to participate in these 'evidence' hearings (ss. 398-3 and 401-1 and -3 CCP); to obtain a copy of the records of the pre-trial 'evidence' hearing (s. 401-8 CCP); to be notified of and participate in the hearing in chambers dealing with the public prosecutor's request to extend



the victim of crime, and not to the victim in his capacity as civil claimant, as in most other jurisdictions. The civil claimant (see § 5.3, book 1, title 5 CCP) is a party to the proceedings, unlike the victim to whom, notwithstanding, most rights are attributed (s. 96-1 CCP). The legislature emphasizes in many instances that the victim is not necessarily the same person as the one who suffered damage as a result of the offence (for instance: ss 11, 98 and 105 CCP). It is an expression of the point of view of the legislature not to encourage the participation of the person who suffered losses and/or injuries within the criminal proceedings. The legislature much prefers to separate the civil claim from the criminal process.<sup>50</sup> Traditionally, Italian legal culture has created and maintained many obstacles to prevent the victim from participating effectively in the criminal proceedings. He has but a limited right to be informed, he has to maintain silence in certain stages of the proceedings and is unable to contest certain decisions and measures.<sup>51</sup>

The 1996 Indecent Offences Act is an important victim-oriented enactment. It was issued after all women in Parliament cooperated to pass this law, despite their political differences. This in itself was a unique experience. Nevertheless, it is a highly controversial law, even among feminists or academics concerned with the subject.<sup>52</sup> The main criticism is that the law only prescribes higher penalties and does nothing else to improve the position of victims of sex offences within the criminal justice system, which is a justified criticism.

### *Legal Aid*

In 1992, the Act on Free Legal Aid was introduced.<sup>53</sup> Today it is incorporated in s. 98 CCP (*patrocinio dei non abbienti*). Within criminal proceedings, victims have to apply for legal aid at the court. It is the chief judicial administrative officer of the court before which the proceedings are pending who will decide on the request and may grant legal aid to the victim. The defence counsel may either be appointed by the pre-trial judge or the public prosecutor conducting the judicial investigations.

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the time limits of the pre-trial stages (*proroga del termine*, s. 406 CCP); to be notified of the public prosecutor's request to dismiss the case (*archiviazione*, s. 408-2 CCP); to be informed prior to the dismissal; to oppose the request to dismiss the case (*opposizione*); to submit a document containing reasons why the case should be tried and to request to carry out further investigations (arts. 408-2/3 CCP, 409 and 410 CCP); to participate in hearings in chambers called for by the judge refusing to accept the request to dismiss the case (s. 409-2 CCP); to ask the chief public prosecutor to bring charges if the public prosecutor handling the case fails to do so (ss. 412 and 413-1 CCP); to be notified by the judge of the date of the preliminary hearing (*udienza preliminare*, s. 419-1 CCP) and to participate to such hearings (ss. 420, 421 CCP); to present witnesses to the court without prior summons (s. 451 CCP); to be notified of the decision to try the case during the immediate trial proceedings (s. 456 CCP); to ask the judge to ask certain questions to the witnesses, experts, private parties and to submit new evidence (Victim organizations have the same right (s. 505 CCP); to request the public prosecutor to contest certain legal actions (*impugnazione*, s. 572 CCP).

<sup>50</sup> M. Corra, D. Riponti, *La vittima nel sistema italiano della giustizia penale. Un approccio criminologico*, Cedam, Padova, 1990, p. 107.

<sup>51</sup> L. Lanza, 'La tutela della vittima nel sistema penale italiano', in: G. Ponti (ed.), *Tutela della vittima e mediazione penale*, Giuffrè, Milano, 1995, p. 51.

<sup>52</sup> See for instance M. Virgilio, *Art. 8 legge 16 Febbraio 1996, n. 66, Commento*, in: *Commentario delle norme contro la violenza sessuale*, Cedam, Milano, 1996, pp. 219-234. Also, *Art. 16 legge 16 Febbraio 1996, n. 66*, by the same author, published in the same book.

<sup>53</sup> Act of 1990, nr. 217/1990.

### *State Compensation*

Italy has not set up a state compensation scheme for victims of violent crime.<sup>54</sup> It did, however, create special state compensation schemes for victims of terrorism and organized crime by the 1990 Act nr. 302 (*Norme a favore della vittime del terrorismo e della criminalità organizzata*). This Act may be seen as the latest response to the sharp increase in the incidence of violence in Italy over the last two decades, and to the dire consequences which have arisen for many individual victims. State compensation is payable concerning certain injuries or death caused by an act of terrorism or subversion of the democratic order, and wrongful acts that can be attributed to a mafia or other unlawful association falling within the scope of s. 416b PC. Where compensation is claimed in respect of personal injury, state compensation cannot be claimed unless the offence causes permanent disability, which reduces the capacity to work by 25% or more (s. 1). Family members or other dependants of the deceased victim may also claim state compensation (s. 4). The maximum payable sum amounts to L. 150 million (EUR 77,469) for total disability or death. Each percentage point of disability is assessed at L. 1.5 million (EUR 774,7). Under certain conditions, compensation may be paid by way of a fixed rate monthly sum (s. 8).

Applications for compensation must be made within two years from the date on which the injury or death occurred (s. 6). A special medical committee assesses the disability sustained. A Compensation Board decides upon the eligibility of applications. It may grant provisional sums to the applicants, which, and this is very remarkable, do not have to be returned to the state, whether a final compensation is awarded or not. The authority competent to make the final determination in respect of an application for state compensation is the Home Office. Its decision can be challenged before the administrative courts. As state compensation may be paid before a judgment of the criminal court, it is provided conditionally, i.e. under the condition that the criminal court determines the punishable act was indeed an act of terrorism or linked to the unlawful activities of a criminal organization. If the court decides otherwise, the award of compensation can be annulled.<sup>55</sup>

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<sup>54</sup> P. Piva, 'Italy', in: D. Greer, *Compensating crime victims. A European survey*, Ed. Iuscrim, Freiburg i.Br., 1996, pp. 377-380.

<sup>55</sup> P. Piva (1996), pp. 380-386.

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

### 5.1 Reporting the Offence

Victims or anyone who has knowledge about an offence can report in person or by proxy. Reports may be presented orally or in writing (s. 333 CCP). Reports must contain the facts and evidence with respect to the crime and the name of the victim (*persona offesa*, s. 332 CCP). Ordinary citizens, public servants and health workers, who do not report a crime, risk a fine up to 2 million Lire (ss. 361-366 PC). Hospital staff are under the legal obligation to report a crime, a rule which has been established mainly to be able to prosecute cases of maltreatment of children and violence against women. But in practice these victims often conceal the true reason behind their injuries out of fear or loyalty to the offender. Also, most medical doctors are reluctant to report abuse, even if they suspect the victim is not telling the truth.<sup>56</sup>

A victim who wants to report a crime (*denuncia*, ss. 330-334 CCP) normally contacts the state police or the paramilitary police, although he can also report directly to the prosecution service. In practice, the majority of the victims are unaware of their right to report directly to a public prosecutor. Many workers in the field of victims of crime, however, feel that victims are treated better and more efficiently when they report directly to the public prosecutor, and advise their clients to do so. The victim who reports to the police will be directed to the judicial police to take down the report. Although every police officer is a member of the judicial police according to the law, in practice there are separate divisions which perform the judicial police duties. Victims can usually report the crime in an environment which respects their privacy. If there are more victims wanting to report a crime, they are asked to step into the waiting room. Subsequently, they will be called into a separate room to report the crime one or two at the time. Victims always are given a copy of the report.<sup>57</sup> After the report the police have to inform the prosecution service within 48 hours. The public prosecutor has to register the report. The suspect, the victim and their lawyers are informed about the facts registered, unless the public prosecutor decides by motivated decree to keep it secret for a period not exceeding three months (s. 335 CCP).

A 1992 Italian study shows that the reporting rate is rather low. Only 0.4% of sexual crimes are reported and only 25.4% of the assaults and 42.6% of all robberies, to quote but a few of the percentages.<sup>58</sup> The reasons why so few victims report crimes varies from crime to crime. If victims of assault are asked why they have not reported the assault, the most frequent reasons given vary from negligible damage (35%), the fact that the offender is known to the victim (19%) and mistrust of the police (11%). Regarding sexual offences, the reasons given are very similar: negligible damages (31%), the fact that the offender is known to the victim (22%), lack of evidence (15%), fear of reprisal (7%) and other non-specified reasons (25%).<sup>59</sup> With respect to all offences, lack of trust in the police is named as one of the reasons why victims do not report the crime. In general about 10% of the victims claim not to report

<sup>56</sup> Information supplied by Mrs. Zoffoli of the Anti violence against women service in Rome (Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze), Rome, June 25 1997.

<sup>57</sup> Various visits to police stations in Rome, between 24 and 30 June 1997.

<sup>58</sup> See E.U. Savona (1993), pp. 96, 113-125 (figures 13-37). The percentages are taken from Figure 37 on page 125.

<sup>59</sup> See E.U. Savona (1993), p. 131 (Figures 47-48).

the crime out of mistrust of the police.<sup>60</sup>

## 5.2 Complainant

Within Italian criminal procedure, there are certain crimes which need a formal complaint from the victim in order to be able to press charges against the offender (ss. 120 ff PC and ss. 336 ff CCP, *querela*). Complainant offences are mainly misdemeanours affecting the reputation or honour of the victim (*ingiuria e diffamazione*, ss. 594-597 PC) and crimes for which the legislature felt the approval of the victims is required, such as sexual offences (*violenza sessuale*, ss. 609 bis – 609 septies PC and *violenza carnale*, ss. 519-526 PC).<sup>61</sup> There has been an ongoing discussion with respect to the requirement of the complaint.<sup>62</sup> Supporters claim it respects the privacy and free-will of the victim. Critics, on the other hand, say it puts victims in a vulnerable position in which they can be pressured not to contact the authorities. Besides, it may give the impression that these crimes are not as important as others as the police cannot take action if they have heard about this type of offences.<sup>63</sup>

Besides reporting a crime or filing a formal complaint, victims can also complain in an informal manner. Victims can go to the authorities and tell them about the crime without pressing charges. This practice is referred to as presenting a statement (*esposto*). The police have to register the statement in the police files but this, as such, has no legal consequences. The purpose of a statement is to let the authorities know a crime has been committed. The idea behind it is that the authorities can take legal steps if the offender continues to undertake punishable activities. In practice, the statement is often used by battered women who do not wish to press charges against their spouses or partners. However, they may wish to do so in the future. Therefore, they want the crime registered. Maybe they also feel safer if the police know the crime has taken place. The repeated statement permits the victim to combine all statements and subsequently press charges. Moreover, it allows these victims to prove patterns of violence, such as beating, which may be difficult to deal with if presented separately, but if combined, it can be prosecuted. It is the duty of the police or public prosecutor to check the file and combine the statements if there is proof that the victim is continually abused (*maltrattamento continuato*) and to bring charges ex officio. However, they rarely do so. More often than not, the authorities have to be pressured, by the victim or a victim association, to look into their files. It is not unusual for the police to seem to be surprised about how often the victim has come to make a statement. According to victim organizations (see § 3.6), the police should pay more attention to a victim who frequently comes to the station to inform them about abuse, violence or ill-treatment. They should notice the frequent visits and explain to victims what actions can be taken. The police seem to forget that most of these victims have no idea what can be done. An evil mind would think the police even

<sup>60</sup> See E.U. Savona (1993), p. 99.

<sup>61</sup> The sections 519-544 and 609- 623 bis PC have been changed or introduced by the Act of 15 February 1996, nr. 66 on sexual violence (*Norme contro la violenza sessuale*), G.U. 20-2-1996, nr. 42. This law has changed the qualification of sexual offences, e.g. rape (*stupro*) into crimes against a person instead of against public morals (*moralità pubblica e il buon costume*), which is perceived by feminists as a big step forward. See further F. Giunta, *Interessi privati e deflazione penale nell'uso della querela*, Giuffrè, Milano, 1993, pp. 5-23.

<sup>62</sup> See for a detailed discussion on the use of the *querela*: F. Giunta (1993).

<sup>63</sup> Information supplied by professor Manna of the University of Bari, who also works as a lawyer in Rome, June 24, 1997.

profit from this ignorance by taking down statements – and thus letting the victim think something is being done – without informing them that this police work has no legal consequences. It is not rare for victims to think they have reported a crime or filed an official complaint and wait for the police to do something about their situation, while the police have only registered a statement because they feel this is the best option to deal with the situation.<sup>64</sup>

### 5.3 Civil Claimant

Every criminal offence can also entail civil responsibility (s. 2043 Civil Code) of the offender. According to s. 185 PC 'every crime requires restoration, pursuant to civil law. Every crime which has caused material or moral loss obliges the perpetrator and the civilly responsible persons to compensate the person injured by the crime.' As such, two actions can result from one punishable act: the criminal and the civil one, therefore, one would expect that the legislature would favour the unification of the two judgments and provide for the insertion of the civil claim into the criminal procedure. This used to be the approach of the 1930 Code of Criminal Procedure. The 1988 law, however, made a completely different choice. The preparatory committee's report stated 'a specific intention not to encourage in any way the intention to appear as plaintiff and to foster the chances of a voluntary exodus from the criminal suit'.<sup>65</sup> The legislature's point of departure was to facilitate as much as possible the speedy course of the trial, and the simplification of procedures (see § 3.3.1). Pursuant to this line of reasoning, the presence of the civil claimant, which is not an essential element within criminal proceedings, might constitute a hindrance to a prompt decision in the criminal case. Nonetheless, the complainant and the civil claimant have been given the right to oppose a dismissal of the case or a request to use the special procedure of criminal negotiations (*patteggiamento*).<sup>66</sup>

Civil consequences of a crime have been divided into two parts by the legislature: the first book states the norms in Title V (ss. 74–89 CCP) and the tenth book regulates the effects of the sentence of the criminal court on the civil claim.

The relations between the civil and the criminal action are determined in s. 75 CCP. If the civil action was undertaken prior to the beginning of the criminal proceedings, the civil claimant may decide to transfer his action into the criminal proceedings, provided that no sentence has been pronounced in the civil suit. Alternatively, he may decide to carry on with the separate civil action (s. 75-1 CCP). In the latter case, contradictory sentences may occur, because the acquittal of the accused will not affect the judgment of the civil court (s. 652 CCP). On the other hand, if the civil action is undertaken after the moment the civil claimant appeared before the court, the civil suit is suspended (s. 75-2,3 CCP) and the decision of the criminal court will have effect in the civil proceedings (s. 652 CCP).<sup>67</sup>

The persons entitled to become civil claimants are those who have suffered damages

<sup>64</sup> Information supplied by Mrs. Zoffoli of the Anti violence against women service in Rome (Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze), Rome, June 25 1997.

<sup>65</sup> See V. Cirese, V. Bertucci, *The new Italian criminal procedure for foreign jurists*, Exen, Rome, 1993, p. 62.

<sup>66</sup> Curi, F., *Il patteggiamento della penal e la vittima del reato*, L'Indice Penale, nr. 2, 1991, pp. 427-434.

<sup>67</sup> See V. Cirese, V. Bertucci, *The new Italian criminal procedure for foreign jurists*, Exen, Rome, 1993, pp. 63-64.

as a result of the crime. They can be either physical or legal persons and even 'actual subjects' (s. 74 CCP). The law also provides for successors appearing as civil claimants, including entities which have taken the place of the damaged subject.<sup>68</sup>

The civil claimant who wants to claim compensation within the criminal proceedings should present a declaration to the court which includes the request for compensation or restitution and a description of the reasons justifying the claim. The statement should, moreover, include the name of the civil claimant, the particulars of the defendant and the name of the civil claimants' counsel.<sup>69</sup> The last prerequisite is necessary because the civil claimant acts through his counsel who is provided with a special power of attorney, in accordance with civil law (s. 100, 83 Code of civil procedure).<sup>70</sup> The civil claim against the accused joins the criminal proceedings by the statement by the civil claimant, submitted to the court either during the hearings or as a notification to the parties involved, expressing his wish to be compensated by the accused (s. 78 CCP). The right of the civil claimant becomes effective for all parties involved from the date on which he submitted his declaration to the court or notified each party of his wish to constitute himself as such within the criminal process (s. 95 CCP).

The declaration of the right to appear as a civil claimant is deposited in the chancery of the judge or submitted during the hearings. It has to be presented before the day when the parties have to appear in court (s. 79 CCP). If this appearance in court takes place during the pre-trial stages, article 468-1 CCP determines the expiry date after which the civil claimant can no longer submit witnesses, experts or technical consultants to the court.<sup>71</sup> The victim of crime who acts as a civil claimant will be informed of the preliminary hearings and appearances in court (s. 419 and 369 CCP), unlike the civil claimant who is not the direct victim of the offence.<sup>72</sup>

The right of the civil claimant to join the criminal procedure is always granted by the criminal court if the damage is caused by the offence.<sup>73</sup> Nevertheless, exclusion of the civil claimant and revocation of the right to claim damages are possible. The civil claimant can be excluded from the criminal process upon request of another party to the proceedings (s. 80 CCP) or by order of the court (s. 81 CCP). The right to ask for the exclusion of the civil claimant falls within the competence of the public prosecutor, the accused and, if summoned, the third person responsible. This request has to contain a justification based on legal or procedural elements and has to be filed before the parties' first appearances, either in the preliminary hearing or in court (s. 420 and 484 CCP). The court that wishes to exclude a civil claimant from the proceedings has to do so before the beginning of the trial. Since it is a provision with the purpose of avoiding disturbances or delays, it should be promptly issued. Another advantage of this timing is that decisions of the judge during the preliminary hearings should be well supported by documentary evidence.

<sup>68</sup> See V. Cirese, V. Bertucci, *The new Italian criminal procedure for foreign jurists*, Exen, Rome, 1993, pp. 64-65.

<sup>69</sup> See V. Cirese, V. Bertucci (1993), p. 65.

<sup>70</sup> See V. Cirese, V. Bertucci (1993), p. 69.

<sup>71</sup> See V. Cirese, V. Bertucci (1993), p. 68.

<sup>72</sup> If the civil claimant is not the victim, he is not notified. This practice is certainly discouraging for persons, who are not the direct victims, to constitute themselves as civil claimants. For instance, the civil claimant as such cannot interfere with the probatory incident (s. 392 - 394 CCP) since this right to involve the public prosecutor is exclusively attributed to the victim (*la persona offesa*).

<sup>73</sup> See V. Cirese, V. Bertucci (1993), p. 67.

The right to claim compensation can be revoked explicitly by the civil claimant himself or his attorney or by a declaration issued during the hearings or submitted to the parties. Implicit revocation of the civil claim for compensation takes place if the civil claimant does not act, for instance, if he does not produce conclusions during the trial. Passivity of the civil claimant does not preclude the fulfilment of the civil claim (s. 82-4 CCP) as it used to do in the former Code, but leads to a suspension of the civil suit (s. 75-3 CCP). The basic reason why a civil claim for compensation must be kept sustained is to keep the claim alive by acting, since non-promotion of the civil suit may lead to revocation of the claim. However, if the civil claimant has requested to appear as a civil claimant during the proceedings filed in first instance and has used his rights, the civil claim automatically remains effective in appeal (s. 76-2 CCP).

#### 5.4 Private Prosecutor

Only the state, as representative of the public interest, has the right to enforce criminal law. Therefore, Italian law does not provide for victims of crime acting as private prosecutors.<sup>74</sup>

#### 5.5 Witness

The victim who is also a witness in his case has more duties than rights. A witness has the legal obligation to present himself to the judge and to tell the truth (ss. 198 and 497 CCP). If he does not want to give evidence, the judge may order the police to take him to court against his will. An unwilling witness furthermore risks a fine (s. 133 CCP). Finally, during the trial he is subjected to direct questioning and cross-examination by the public prosecutor and the defence (s. 498 CCP). Apart from these duties, his only right is to be heard during the preliminary hearings (*udienza preliminare*, s. 422 CCP) and during the trial proceedings.<sup>75</sup> With respect to the right of witnesses to be protected from publicity, see § 8.3.

A victim who reports a crime to the police and whose case will be prosecuted has to give evidence in court. The victim will always be summoned to give evidence in his case. He is usually the most important witness in the case. The statements of witnesses given during the pre-trial stages to the police or the public prosecutor can never be joined to the legal file used in court, unless they have been made under conditions which safeguard their reliability. This means that they have to be questioned or even subjected to cross-examination during the pre-trial stages in the presence of the initial inquiry magistrate, who is able to ascertain the reliability of the statement of the witness.<sup>76</sup> Consequently, in Italian criminal proceedings victims have to give evidence in their case. It is very rare for a victim not to be called to the hearings to testify. Given the accusatory nature of the proceedings, involving cross-examination, one would expect the police to prepare victims for this task. The police, however, feel that preparing victims is the job of the court and the victim's defence counsel (for legal aid, see § 4.3). If a victim reports a crime, it is not considered necessary to inform him about this aspect of the criminal process.

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<sup>74</sup> See G. L. Certoma (1985), p. 221.

<sup>75</sup> L. Lanza (1995), p. 46.

<sup>76</sup> L. d'Ambrosio (1992), p. 15.

## 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.*

It is not considered to be the duty of the police, nor that of the public prosecutor, to inform victims about any kind of assistance, advice or compensation, although on rare occasions, the police may tell a victim of a local service where he can get help (see § 3.6). More common is the police's advice to victims to get a lawyer. Nonetheless, the police are not always aware of the victim's right to have free legal assistance<sup>77</sup> if he cannot pay a lawyer (see § 4.3). This is an important shortcoming because lawyers are the principle and usually the only source of information to victims within the Italian legal system. It is therefore highly regrettable that the police seem to be unaware of the fact that victims and civil claimants have been given the right to free legal assistance (*patrocino dei non abbienti*, s. 98-101 CCP, see § 4.3).

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

The victim has no right to be notified of the outcome of the police investigation. He may, however, contact the police or the prosecution service to find out what is the outcome of the police investigation. The only right the legislature has given the victim is to inspect the files that are deposited at the court's office (s. 367 CCP).

This right cannot be considered an adequate instrument to learn about the outcome of the police investigation, if only because of the time-span between the outcome of the police investigation and the time of inspection.

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

The public prosecutor has no power to discontinue criminal proceedings. He can, however, request the pre-trial magistrate (*G. U. P.*) to dismiss the case (see § 3.3). The victim of crime has the right to ask to be informed of any request by the public prosecutor to the pre-trial judge to waive prosecution (s. 408-2 CCP). Moreover, he has the right to be present during the pre-trial hearing concerning the evidence in the case (s. 401-8 CCP).

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<sup>77</sup> During interviews with police officers of different brigades, nobody seemed to know about this possibility. They all thought that free legal aid was only available to offenders. Showing the relevant provisions in the 1988 Code provoked genuine surprise.



- (D. 9) *The victim should be informed of:*
- *the date and the place of a hearing;*
  - *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 has the right to be present at all hearings, whether at the pre-trial or trial stage. He will be notified of any pre-trial hearings by the court (ss. 419-421 CCP) because he has the right to participate in these hearings. He will on the same grounds be informed of the date and place of a trial hearing, also if it concerns immediate trial proceedings (s. 456 CCP). The pre-trial judge carries out the notification duty with respect to the date and place of the trial (s. 429-4 CCP). The notification of the victim is mandatory, even if the victim was not present during the preliminary hearings.

Concerning compensation, neither the police, nor the public prosecutor or the court see it as their job to inform the victim about his right to obtain compensation. This is perceived as the task of the victim's defence counsel (see § 6.2).

The sentence of the court will be deposited at the court's office (*Cancelleria*) where it can be inspected by all those interested in the verdict. If the verdict is not deposited at the court's office within fifteen days, the date of the deposition will be sent to the public prosecutor, the private parties such as the victim, and the defence counsels involved (s. 548-2 CCP).

## 6.2 Information About the Victim

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

If the victim reports a crime to the police, this report will contain information about the injuries and losses suffered by the victim. The police statement is, however, primarily aimed at substantiating the fact that a crime was committed. It bears no relevance to the claim for compensation. It is the responsibility of the victim to present his claim for damages in court and to prove the losses and injuries suffered as a result of crime.

- (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.*

No formal obligation has been created to make sure that the court is informed about the victim's need for compensation. The victim and/or his lawyer should make sure the judge has sufficient evidence about the victim's losses and injuries. About any payments by the offender, the court is informed by the defence counsel.

## 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.*

Italian criminal procedural law does not adhere to the expediency principle. In 1988, the legislature was unable to introduce this principle because the Constitution laid down the compulsory nature of criminal proceedings (s. 112 Const.). Therefore, the public prosecutor does not have the power to decide whether or not the offender should be prosecuted. Nor has he the power to stop the proceedings once they are started. However, the legislature allows the public prosecutor to request the pre-trial judge to file or dismiss the case. This request can be made if prosecution is not likely to result in a conviction, based on the evidence collected during the initial inquiry. The decision to dismiss the case is taken by the judiciary. The magistrate may decide to continue the proceedings, despite the request of the public prosecutor, and order the instigation of criminal proceedings.<sup>78</sup>

With respect to complainant offences, the police have the power to try to reconcile victim and offender. Moreover, reconciliation is frequently used in situations in which victim and offender know each other, e.g. conflicts between neighbours and domestic violence, or if there is not enough evidence to prosecute. In practice, this means that the police visit the fighting parties at home, or order them to come to the police station. After some talks, the police will ask the victim if he wants to drop his charges. If the victim agrees, criminal proceedings end here. Associations for women, however, strongly oppose the use of this power by the police, since they feel it is often an easy way out. The police tell the offender not to do it again, or even blame the victim,<sup>79</sup> and afterwards they do not have to fill in all the paperwork.<sup>80</sup> Conciliation should not be confused with mediation<sup>81</sup> which usually involves some kind of compensation whereas this restorative element is completely absent in conciliation practice,<sup>82</sup> except for reconciliation as practised by the juvenile court. In the juvenile court, the trial proceedings may be suspended to promote the reparation of losses and injuries and conciliation (s. 28-2 Juvenile Code).<sup>83</sup>

<sup>78</sup> L. d'Ambrosio (1992), pp. 11-12.

<sup>79</sup> This is particularly true in situations of domestic violence when the battered woman is not the 'perfect victim' meaning that she is an alcoholic, neglects the house, spends too much money or can otherwise be criticised.

<sup>80</sup> Information supplied by police officers of the state police and woman services in Rome and Bologna.

<sup>81</sup> In 1997, mediation experiments were carried out in Rome.

<sup>82</sup> Information supplied by G. Scardaccione, psychologist working at the University of Rome and at the Juvenile Court, 30 June 1997.

<sup>83</sup> Juvenile Code, *Disposizione sul processo penale minorile*, D.P.R. 22 September 1988, nr. 448, G.U. 24 Oktober 1988, nr. 250.

- (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 prosecute by acting as a private prosecutor (see § 5.4). Nor is the prosecution service entitled to take the decision not to prosecute. The public prosecutor must request the pre-trial judge to dismiss the case (*archiviazione*). This request is the only manner in which the public prosecutor can express his conviction that no trial is called for.<sup>84</sup> Under the 1988 Code of Criminal Procedure, the victim is given the power to challenge this request and demand the case to be brought to court. Hereto, he may indicate which aspects of the case need to be investigated and he may indicate probable items of evidence (s. 410-1 CCP). If the victim opposes the public prosecutor's request, the pre-trial judge (*G.U.P.*, see § 3.3) is obliged to hold a hearing *in camera* in order to take a decision regarding the request of the public prosecutor. During this hearing, the victim has the right to participate (s. 410-3 CCP).<sup>85</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.*

According to the law, the judge who has to decide on the seriousness of the crime must consider the seriousness of the losses and injuries of the victims or the danger in which he has been as a result of the offence (s. 133 PC). The 'civil consequences' of an offence are described in Book I, title VII of the Penal Code, the most significant effects are: restitution, the payment of damages to the victim, reimbursement of maintenance expenses to the state. What is remarkable is the obligation for the offender to reimburse the state for up to two-thirds of his maintenance in penal institutions, with all his movable and immovable property (s. 188 PC). This cannot be favourable to compensation due to the victim.

According to s. 538 CCP, the criminal court has to decide on the civil claim for compensation if it finds the offender guilty.<sup>86</sup> At the request of the civil claimant (*parte civile*), the court can sentence the offender to pay a provisional sum for that part of the damages for which there is enough proof and refer the remaining part to the civil court (s. 539-2 CCP). The civil claimant should join the proceedings and present his claim at the beginning of the committal proceedings (*udienza preliminare*), or at the very beginning of the trial itself (*dibattimento*), but not during the trial (s. 79 CCP). The court should at the same time determine the ways in which the restitution or payment of compensation should take place (s. 539 CCP). At all times, the civil claimant may ask the court to declare that compensation can be provisionally enforced (*provvisoriamente esecutiva*, s. 540 CCP). If there is not enough evidence to determine the amount of losses suffered by the victim, the court may simply determine that the victim is entitled to compensation (*condanna generica*) and refer the claim to civil court

<sup>84</sup> See G. L. Certoma (1985), p. 221.

<sup>85</sup> G. Ponti, 'Il ruolo della persona offesa e della parte civile nel processo penale', in: G. Ponti (ed.), *Tutela della vittima e mediazione penale*, Giuffrè, Milano, 1995, p. 68.

<sup>86</sup> Concerning the assessment of compensation from the offender to the victim, see P. Piva (1996), pp. 387-389.

(s. 539-1 CCP). This tends to happen often.<sup>87</sup>

Generally speaking, the court may thus award compensation to the civil claimant. However, regarding the new special proceedings (see § 3.3.1), the victim's right to claim compensation is insufficiently safeguarded. Within the charge bargaining procedure (*patteggiamento*, see § 4.2) the victim cannot ask for damages (s. 444-2 CCP). He may only claim his legal costs, such as the salary of his lawyer. If he wants to be compensated by the offender, he has to start civil proceedings. In Italy, this is not an easy way to get your money (see § 7.2 under D10). But with respect to charge bargaining, this is even more complicated because the victim cannot take a verdict of the criminal court to the civil court and use this sentence to prove his claim for compensation (s. 445-1 CCP). Another disadvantage of this procedure is that the victim is not consulted and has no voice during the negotiations.<sup>88</sup> According to Paliero, charge bargaining is frequently used (in approximately 20% of all cases). This means that in about 20% of all criminal cases, the rights of the victim are eliminated. He has no right to intervene, nor can he ask for damages within the criminal process.<sup>89</sup>

The other special proceedings are much more favourable to the victim's right to claim compensation. During the abbreviated proceedings (*giudizio abbreviato*) the victim can ask for compensation. The court may award compensation to the victim, or award a provisional sum to the victim. A provisional sum can be executed as soon as the victim has a copy of the verdict.<sup>90</sup> The victim who opposes the application of this special procedure is allowed to present his claim directly in civil court, without waiting for the sentence (s. 441-3 j. 75-3 CCP). During the direct and the immediate trial procedures (*giudizio direttissimo e giudizio immediato*), the victim in his capacity as civil claimant may claim compensation, just as in an ordinary trial. During the direct trial procedure, the civil claimant is notified of the hearing taking place to safeguard his right to claim compensation. However, he can also present his claim without being notified formally. The criminal process must take place within 48 hours after the offence took place; therefore, the police are allowed to orally inform him of the date and place of the trial (s. 451-2 CCP).

In practice, to most criminal judges, ordering compensation to the victim is still a 'foreign' activity, which they feel is the competence of the civil court. As a result, they usually limit themselves to a general statement in which the ascertainment of the civil claim is postponed to a successive civil procedure. According to Lanza, the offender is rarely ordered by the criminal court to pay all damages of the victim (*condanna generica ai danni*, s. 539 CCP) without referring (part of) the claim to the civil court. When he was a member of the Assize Court of Appeal in Venice, this only occurred in two cases during eight years of court practice.<sup>91</sup> Paliero confirms these findings and underlines the problems for victims associated with this practice. The fact that the court will only award a provisional sum of damages to victims forces victims to go to the civil court to obtain (part of the) damages, which is frustrating to victims.<sup>92</sup> As in most other countries, going to the civil court involves additional costs and is time consuming. However, in Italy civil proceedings are in a deplorable state. A normal

<sup>87</sup> P. Piva (1996), p. 390.

<sup>88</sup> Information supplied by Professor Manna of the University of Bari, who also works as a lawyer in Rome, June 24, 1997.

<sup>89</sup> Information supplied by Professor Paliero of the University of Pavia, 10 July 1997.

<sup>90</sup> Information supplied by Professor Manna of the University of Bari, who also works as a lawyer in Rome, June 24, 1997.

<sup>91</sup> L. Lanza (1995), p. 45.

<sup>92</sup> Information supplied by Professor Paliero, University of Pavia, Pavia, 10 July 1997.

case will take eight to ten years before the court gives a final verdict. Complicated cases may take up to 20 years or more. Italians have become experts at delaying civil proceedings and will try to appeal as many times as possible. Chances are that the other side will lose interest and drop the case. In practice, this means that the majority of the victims will not even bother starting civil proceedings. Consequently, most victims leave the criminal court without a penny in damages.<sup>93</sup>

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

Compensation is not a penal sanction, nor can it substitute for a penal sanction. Common ways to substitute for a penal sanction are amnesty, and general or individual pardon. Amnesty is a means of the state to waive the proceedings or the enforcement of a penalty, and is frequently granted in Italy. This is the reason why defendants often protract criminal proceedings. The general pardon affects only the main sanction and not the accessory penalties. Both the general pardon and an amnesty are granted by the President upon request by Parliament (s. 79 Const.). The individual pardon is granted as an act of clemency directed at a particular person after his conviction. The individual pardon is issued by the President (s. 87 Const.). Moreover, punishments may be waived after the death of the offender. Here, however, the civil obligation to pay compensation to the victim remains in place and will be a burden to the heirs.<sup>94</sup> The only two ways in which compensation may play a part in criminal proceedings are as a court order to pay compensation, in addition to a penal sanction (see D.10), or when the payment of compensation is considered to be an attenuating circumstance (s. 62 PC, see § 7.2, D.13).

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

Within Italian criminal law, few opportunities exist to attach financial conditions to a sentence. Apart from the possibility for the court to consider the payment of compensation as an attenuating circumstance (s. 62 PC), not many options are open to the court. As a mitigating circumstance, the payment of compensation to the victim of crime will diminish the penalty by one third. The offender who wishes to profit from this provision has to fully compensate the victim for his losses and injuries or to restitute goods. And he has to pay compensation prior to the trial.<sup>95</sup>

With respect to the suspended sentence, parole or rehabilitation of the offender, no importance is attached to the payment of civil damages by the offender to the victim. Suspended sentences are only granted to first offenders who are given a sentence of two years

<sup>93</sup> Information supplied by Professor Paliero of the University of Pavia, on 10 July 1997.

<sup>94</sup> See G. L. Certoma (1985), pp. 300-301.

<sup>95</sup> The Penal Code also comprises a general attenuating circumstance which enables the court to take any circumstance into account which justifies a mitigation of the penalty (s. 62bis PC). On the other hand, causing significant loss to victims and the attempt to aggravate the effects of a crime, for instance hindering the emergency treatment of the victim, are aggravating circumstances (s. 61 PC).

imprisonment or less and minors who are sentenced to a maximum of three years in prison, provided that they do not have a criminal propensity (s. 163 PC). If the convicted person commits another crime within the period of a conditional suspended sentence, he will be tried for both offences. Parole suspends that part of the sentence which still has to be served and is granted when the conditions of the sections 163 – 168 PC are fulfilled. Rehabilitation (s. 178 PC) extinguishes all effects of the sentence and is granted after the expiration of a defined date from the date of conviction if certain conditions are met.<sup>96</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 court does not have many instruments to stimulate the payment of compensation by the offender to the victim. The only relevant legal provision is the rule that the payment of compensation reduces the sentence by one third (s. 62 PC). Many academics, like Manna, feel that other incentives for the offender to pay damages have to be created. But as it stands today, the victim is the only one who is responsible for enforcing the court's order that the offender should compensate him. He is not assisted in any way by the criminal justice authorities in the collection of the money. He may either get the help of a lawyer, or send in the bailiffs, whom he has to pay out of his own pocket, without knowing for sure that he will ever see any sum in compensation from the offender.

## 8 TREATMENT AND PROTECTION

### 8.1 Victim-Awareness Training

#### *Judiciary*

The ordinary way to become a judge or a public prosecutor is to take the national entrance exam (*concorso*), held by the Ministry of Justice. The written and oral examinations involve numerous legal fields and are supposed to be the most difficult of all the professional entrance examinations. Only those with the best test results are appointed as magistrates under training (*uditore giudiziario*). They are assigned to a court of appeal, where they serve an apprenticeship of six months. During this period, they assist other magistrates and attend certain courses. The Constitution mentions one other way to enter the judiciary: the direct appointment of university law professors or attorneys as members of the Supreme Court (s. 106 Const.). However, this opportunity is not used in practice.<sup>97</sup>

Neither judges nor examining magistrates and public prosecutors are trained in how

<sup>96</sup> The Penal Code explicitly provides in section 198 PC that the extinction of the crime, or of its sanction, does not end the civil obligation arising from the offence, except for the civilly responsible third party (s. 196 and 197 PC). Sections 189 and 195 PC contain provisions aimed at ensuring the fulfilment of the offender's civil obligations. However, they only ensure payments to the state, for instance a mortgage in favour of the state over the assets of the offender to secure payments. See G. L. Certoma (1985), pp. 301, 307-308.

<sup>97</sup> See G. L. Certoma (1985), pp. 71-75.

to deal with victims.

### *General police training*

Senior ranking officers of the military police are trained in military academies and the lower ranked policemen receive training in military and police functions in special military training facilities. Recruit training for the state police force is carried out at the police schools and the academy for senior police officers.<sup>98</sup> Within the police there are no internal career perspectives, in the sense that for a higher ranked position the officers have to pass external entrance exams (*concorsi*). In order to become an ordinary police officer (*agenti di polizia*), one has to follow a one-year training programme. The first six months are spent in school and the remaining time within a police station, as an apprentice policeman. The theoretical training consists of general and operational<sup>99</sup> courses on the one hand and judicial and professional training on the other. Professional training consists mainly of investigation and interrogation techniques. In order to become a police inspector, a 18-month course has to be taken, the first year of which is spent at the police institute. For the rank of chief of police (*commissari*), a university degree is required, and one has to be accepted at the police academy (*Istituto Superiore di Polizia*). Students of the academy have to take a 9-month course.<sup>100</sup>

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

There are no specific training courses concerning the treatment of victims of crime. Consequently, the treatment of victims depends on the sensitivity of the individual police officer. The only topic that is given any attention by the authorities concerns the treatment of juveniles by the police (both offenders and victims).<sup>101</sup> In 1996, the Minister of the Interior developed the idea to create juvenile brigades (*ufficio minor*) within police stations. The members of these specialized brigade should be trained to deal with children. The ministerial circular particularly stresses the importance of such units to deal in a better manner with juvenile victims of (sexual) abuse. It further states that the police forces have to appoint police officers responsible for the treatment of juvenile victims. To date, the officers working in the juvenile offices receive a one-week training at the police academy in Rome.<sup>102</sup>

As in most countries where the official police courses do not offer training to provide the know-how to treat victims constructively, private organizations step in. Services working with victims try to establish a working relationship with the police and try to get permission to tell officers about the effects of crime on victims and on how to be perceptive to victims' needs. The services notice that to the large majority of policemen, the notion of victims as

<sup>98</sup> European Network of Policewomen, *Fact figures and general information*, ENP, Utrecht, 1996, pp. 111-112.

<sup>99</sup> These courses are practical and consist of physical training, firing and driving lessons among others.

<sup>100</sup> M. Marinelli, A. Zampieri, *Le donne nelle forze di Polizia*, Agnelli, Milano, 1996, pp. 63-65. However, according to Mrs. Zarilli of the national Police training institute in Rome, the training programmes consist of only 9 months for the grade of inspector. Information supplied by Mrs. Zarilli, Direzione centrale per gli istituti di istruzione, Servizio scuole, Roma, 27 June 1997.

<sup>101</sup> Information supplied by Mrs. Zarilli, Direzione centrale per gli istituti di istruzione, Servizio scuole, Roma, 27 June 1997.

<sup>102</sup> Ministero dell'Interno, modulario interno nr. 123/A1/130/3/54 of 8 May 1996, p. 2 and 4.

persons with needs and interests is absolutely new to them.<sup>103</sup>

Pursuant to a 1992 Italian study, the number of victims who do not report crimes to the police is very high in absolute terms; for instance, only 25% of victims of assault report the crime. Even if compared with dark numbers in other countries, Italy scores high in non-reporting.<sup>104</sup> Lack of trust in the police was mentioned by an average of 10% of victims of all kinds of crimes as the reason why they did not report the offence (see § 5.1). When the researchers asked victims who did report to the police about the way they were treated by the police, 58% of them declared they were dissatisfied with the treatment received.<sup>105</sup> If one combines the low report rates, the lack of confidence in the police with the low levels of victim satisfaction, it is clear that most Italians do not think highly of the police. It is a well-known fact that training of police officers on how to treat victims according to their needs is one of the ways to improve the image of the police. A more positive view of the police may lead to higher report rates and consequently improve the effectivity of the police with respect to crime fighting. Training may be a valuable tool to reach this aim.

In practice, police officers often have an instrumental perception of victims. To them, victims are persons who report crimes and will function as witnesses to prove the guilt of the offender. The general perception of the police is that they are not very sensitive to the interests and needs of victims, which is hardly surprising if they are not trained to deal with victims of crime in a constructive way. Apart from the fact that the police culture is essentially a rather 'macho' culture, the fact that to police officers, the experiences of victims are routine is also critical. The police are not trained to realize that to the individual victim of crime, the experience, however common, may very well be shocking and painful. In addition, senior or commanding officers do not point out the importance of sympathetic, understanding treatment of victims. It has to be feared that, unless its importance is stressed during police training courses and on the work-floor, considerate treatment of victims will continue to remain depend on the innate sensitivity of the police officer on duty. However, even the most empathetic officer has to be quite strong-willed not to act according to mainstream rules of police culture, particularly since any incentive from the higher-ranking officers is lacking within the police organization.<sup>106</sup>

More generally speaking, the criticism of the police organization also applies to the other judicial bodies. Criminal justice authorities have hardly any appreciation for activities involving victims which are not related to crime fighting. In certain cities, such as Rome and Milan, offices have been created inside the courts to work with juveniles and victims of indecency offences. However, the work of these magistrates is not appreciated by their colleagues and not valued at all. Consequently, to work in these offices does not offer good

<sup>103</sup> For instance, the Associazione differenza Donne organized courses for the municipal police force in 1995 and 1996. The service would like to give courses to the police forces in Rome. However access to the state police and para military police is very hard to obtain.

<sup>104</sup> Researchers have compared Italy with Belgium, England and Wales, the Netherlands, Sweden and with Australia and Canada. For example, with respect to assault the highest number of reported cases can be found in Belgium : 46.4% of the cases are reported to the authorities., whereas England is in third position (41.8%), Canada in fifth (36.9%). However, in Italy, the lowest percentages can be found: only 25.4% of all cases of assault are reported. From: E.U. Savona (1993), p. 118 (Figure 23).

<sup>105</sup> E.U. Savona (1993), p. 103.

<sup>106</sup> Information supplied by Mrs. Zarilli, Ministry of the Interior, Rome, 25 June 1997. Her view was shared by every one I interviewed during my stay in Italy: from law professors to those working in women centres.



career perspectives.<sup>107</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.*

The police and magistrates should question victims in a different way than suspects. In practice, however, there is hardly any differentiation between these opposite groups. Although the young police officers and magistrates are said to be more sensitive to the feelings of victims, they are still frequently questioned in an inconsiderate manner. As a result, some victims feel treated by the police as if they were the suspects, and leave the police station without going through the motions of actually reporting the crime.<sup>108</sup> These negative experiences of victims are bound to have repercussions on the already low reporting rate (see § 8.1). The only initiative to improve the way in which children are questioned is the creation of juvenile brigades. However, it is doubtful whether one week of training is sufficient to improve the manner of questioning (see § 8.1).

In court, the Code of Criminal Procedure does provide for some protection of victims of crime against hostile questioning within the courtroom. Offensive and suggestive questions are forbidden. The president of the court should make sure no disrespectful questions are asked (s. 499 CCP). In practice, judges are inclined to apply this power in a rather restrictive manner. Generally, the court and lawyers feel that questioning by nature involves penetrating and tough examination. However, the court seldom allows questions which clearly concern the witness' character if the line of questioning is irrelevant to the case.<sup>109</sup> Young judges are supposedly more inclined to go a step further and protect the victim from hostile cross-examination or from questioning which is aimed at attacking the victim's credibility as a witness.<sup>110</sup> In practice, however, it is quite common for judges to allow attacks on the victim who has to give evidence. According to Lanza, a line of questioning implying that the victims provoked or helped to create the situation in which the crime occurred are part of the everyday court routine, particularly regarding sex offences. Here, the defence counsel will often successfully state that the victim accepted being in a situation in which the acts of the suspect were the logical or foreseeable implication of the victim's behaviour. The court will only disallow questions considered to be a character attack on the victim and irrelevant questions with respect to the victim's past.

<sup>107</sup> Information supplied by Mrs. Zoffoli, of the Anti violence against women service (Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze), Rome, 25 June 1997. This view was largely shared by others, *inter alia* professor A. Ceretti, Milano.

<sup>108</sup> Information supplied by Mrs. Zoffoli, Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze, Rome, 25 June 1997.

<sup>109</sup> Information supplied by Professor Manna of the University of Bari, who also works as a lawyer in Rome, 24 June 1997.

<sup>110</sup> Information supplied by Mrs. Zoffoli of the Anti violence against women service in Rome (Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze), Rome, June 25 1997.

Some problems relating to questioning are closely linked with Italian social and cultural realities. In Italian society, it is common for men to behave in a 'macho' way. Harassment of women is frequently seen and other abusive types of behaviour are not always viewed as objectionable. This attitude is closely connected with the social inequality which still exists between men and women. Inequality determines their relationships and may explain why violence against women is often not taken very seriously, especially if the violence occurred within a relationship. Quite a few police officers and magistrates have some degree of sympathy for the offender's behaviour and put part of the blame on the victim. Even with respect to the more serious indecency offences and cases of domestic violence, blaming the victim is a common response, particularly if the woman's behaviour or looks are considered to be a risk factor.<sup>111</sup> The Supreme Court's decision of February 11, 1999, that a woman wearing tight jeans cannot be raped is exemplary in this respect.<sup>112</sup>

The accusatory nature of the Italian criminal process also contributes to the negative effects of the authorities' inconsiderate attitude and insensitive methods of questioning. Within accusatory proceedings, the victim is always a witness in his own case and thus subjected to cross-examination by the defence (see §§ 2 and 3.3). In addition, most lawyers consider it their job to question the victim's credibility and to try to put some of the blame on the victim. Therefore, the defence counsel will investigate the victim's private life and all his actions even remotely related to the crime in order to try to discredit the victim as a reliable witness.<sup>113</sup> This forces the victim to tell and relive the facts of the crime over and over again in highly unfavourable circumstances. To a certain degree, the difficulty of questioning victims with respect to his emotions is a reflection of the problem of conciliating the demands of an accusatory trial and the interests of the victim. Nevertheless, it must be said that the manner in which victims are questioned within the Italian accusatory system is not harsh if compared to the often extremely insensitive or even hostile examination and questioning in England. In Italy, the accusatory legal system – including the way in which victims and witnesses are questioned – still reflects to a high degree the former more inquisitorial character of the proceedings (see § 2).<sup>114</sup>

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<sup>111</sup> According to Judge Lanza of the Court of Assizes in Venice, it frequently occurs that the courts dismiss cases or impose a much less severe penalty because the magistrates feel the victim's behaviour had provoked the offence or made its occurrence inevitable. He gave, *inter alia*, the example of a case in which the court acquitted a man who raped two girls who were hitchhiking at night and accepted to get into his car. The court felt that if two good looking girls took the risk of hitchhiking at that hour, they had accepted the risk that the driver might not be able to restrain himself.

<sup>112</sup> Wearing tight denim jeans implies in the opinion of the Supreme Court that the woman must have cooperated in removing them. It stated in its verdict that 'on the basis of common experience, a factor of collaboration is necessary on the part of a woman wearing jeans if they are to be pulled off. Therefore the woman has allowed herself to be undressed and the act must have had her consent'. They added the idea that she had cooperated out of fear of a worse fate, but had rejected this because it was difficult to imagine anything worse than rape. In Italy, a storm of protest broke out after this ruling, which overruled the decision of a lower court. The public prosecutor remarked that the Supreme Court seemed to have forgotten that jeans are designed to be taken off, as well as put on, no matter how tight they are.

<sup>113</sup> Information supplied by associates of the law firm of Mr. Guarino in Napoli, 2 July 1997. See D. Riponti (1995), pp. 58-59.

<sup>114</sup> Information supplied by Professor Manna of the University of Bari, who also works as a lawyer in Rome, June 24, 1997.

In this respect, the opinion of volunteers working in victim support centres (see § 3.6) is worthwhile mentioning. They feel the accusatory system advanced the situation of victims with respect to questioning. Under the former Code, the defence counsel also attacked the victim; however, at that time the victim was unable to defend himself. The defence counsel did not interrogate the victim, but generally depicted him as a bad person and incredible witness. The victim was forced to hear all remarks, half truth and half lies, but had no voice in the matter. Now the victim can have his own lawyer and has the opportunity to make himself heard. During the examination, the victim can react, show emotions, be angry and defend himself against attacks from the defence. The victim has become an active party, which is not always easy, but he usually feels he has been given the chance to tell his side of the story, an opportunity highly valued by most victims. Finally, hostile questioning may be counterproductive. Most judges are not particularly pleased with inconsiderate questioning and, although they do not interrupt the examination or disallow the line of questioning, they are known to punish the offender more severely out of discontent and irritation.<sup>115</sup> In this way, the offender and his defence counsel are punished for their defence strategy. Although one may question its fairness on the offender, it certainly teaches defence lawyers not to push too hard.<sup>116</sup> The president of the court does not easily stop hostile questioning of witnesses but does show evident signs of annoyance if parties behave contrary to his liking.<sup>117</sup>

Another feature of criminal proceedings which is generally perceived as a problem for victims, apart from the way victims are questioned, is the frequency of the questioning.<sup>118</sup> Victims have to tell their story over and over again; not only is it commonplace that they have to come back to the police station several times, also in later stages the victim is usually questioned by the public prosecutor, the pre-trial judge, and finally in court. To the most vulnerable victims such as children and victims of sexual crimes, these repetitive questioning sessions are a painful and humiliating experience. For some, it may even be painful to the extent that its negative effects outnumber those of the actual offence. This is exacerbated by the fact that, regarding these victims, the proceedings are very stigmatizing. Furthermore, the majority have great difficulty expressing themselves adequately. They often have the idea that the authorities are more concerned with safeguarding the rights of the accused and the future rehabilitation of the offender than with assisting them during the criminal process.<sup>119</sup>

With respect to children, the legislature has created special protective measures during the pre-trial and trial hearings. During the pre-trial stages, the public prosecutor may be assisted by experts to hear and question minors. During the trial stage, the legislature wants to protect children from hostile or intimidating examination and cross-examination. According to the law, children can only be questioned by the president of the court (s. 498-4 CCP). The parties may suggest questions to the president. In addition to the normal rules set by

<sup>115</sup> Information supplied by Mrs. Zoffoli of the Anti violence against women service in Rome (Associazione Differenza Donna, che gestisce il Centro Provinciale di Accoglienza per le Donne che non Vogliono più Subire Violenze), Rome, June 25 1997.

<sup>116</sup> Volunteers of women centres witnessed cases, as participants next to the victim or civil parties, in which this attitude of the court was particularly obvious. A clear example concerns a case in which a girl was raped by a two men. The evidence concerned both, and was beyond all doubts. The one with a defence lawyer who made an all-out effort to put the blame on the victim got a much more severe penalty than the offender whose lawyer had different tactics.

<sup>117</sup> Visits to the sub-district and district court in Rome and to the district court in Naples.

<sup>118</sup> All persons interviewed mentioned this as the main problem with respect to questioning.

<sup>119</sup> D. Riponti (1995), pp. 59-60.

the legislature, questions regarding children may never be aimed at throwing the victim/witness off balance (*nuocere alla serenità*). Questions regarding the private life and the sexuality of children which are not necessary to the reconstruction of the facts are not allowed (s. 472-3 CCP). During the questioning the judge can be assisted by a family member or a psychologist (s. 498-4 CCP). The legislature has also created the opportunity to question children by video-link. In practice, children who have to give evidence are not questioned in court but in a separate room by a psychologist, while those in the courtroom can hear and watch the interview by video-link. The psychologists serve not only as a go-between but also as an interpreter. He will put the questions of the parties to the child in a way he can understand. In this way, the questioning can be adapted to the child's age and capacities.

### 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.*

To the protect victims against publicity that may unduly affect their private life or dignity, the court may decide to hold the trial *in camera* (s. 472 CCP). Witnesses and victims may ask the court to hold the trial behind closed doors if the examination or testimony may cause them any prejudice (*causare pregiudizio*). Another reason to hold the trial behind closed doors is the protection of public morals (*pubblica igiene*). If the victim of a sexual crime is a child, the trial is always held behind closed doors. In all other cases, the court may decide to question young victims without public (s. 472-3bis CCP). Furthermore, it is important to mention that the practice to hear children in the presence of the offender has been abolished. Today, children are also protected from cross-examination (see G.16). In the pre-trial stages, additional protection of victims can be offered by making use of the special evidence hearings (*incidente probatorio*, s. 392 CCP). These hearings are not public and are aimed at safeguarding evidence that may vanish if one waits until the trial. The victim or the public prosecutor may request that such an evidence hearing takes place (s. 394 CCP). The public prosecutor, on his part, may request a pre-trial hearing if he is afraid the victim will not tell the court what he has said in the preliminary stage. The hearings are based on the principle of contradiction. The evidence gathered during this pre-trial hearing is directly transferred to the trial court, which can make full use of it, provided that the defence counsel was present during the hearing (s. 403 CCP). This means that testimony given before the pre-trial court does not have to be repeated in open court.<sup>120</sup>

With respect to protection of victims against any publications in the press that may unduly affect his private life or dignity, a Privacy Act was adopted in April 1997. The regulations enforcing the law, however, are still lacking. As a result, the enactment still only exists on paper.

<sup>120</sup>

M. Delmas-Marty, *Procédures pénales d'Europe*, Presses Universitaire de France, Paris, 1995, pp. 305-307.

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

In Italy, organised crime often involves criminal organizations such as the mafia, camorra and 'ndrangheta. Because of the especially high risks for witnesses who have to testify in a case against mafiosi, far-reaching protective measures have been created, including witness protection plans for *pentiti*, offenders who are willing to testify against the leaders of criminal organization, in exchange for immunity and participation in a witness protection programme. Ordinary victims generally don't want to take part in these programmes because this means not only changing identity and house, but leaving everything behind.

If the victim is a crucial witness in a case, he may be threatened and intimidated by the accused and his accomplices. However, the authorities have but few adequate means to protect the victim-witness in the pre-trial, trial or post-trial stages.<sup>121</sup> During the pre-trial stages, the possibility of having a hearing to validate evidence can be used (see F.15), or the trial can be held *in camera* (see F.15). With respect to child-victims, the trial is always held behind closed doors (s. 472-3 CCP).

## 9 CONCLUSIONS

With respect to the 1988 Code of Criminal Procedure and the position of victims, differing opinions exist. According to Manna, the Code has reinforced the powers of the victim in the criminal process. The victim has been given *inter alia* the right to have a lawyer, even during the preliminary stage and before his constitution as a civil claimant, and has the right to oppose a final decision not to prosecute. Furthermore, the examination and cross-examination strengthen the position of the victim. This opinion, which is quite remarkable in light of the view of most victimologists concerning cross-examination, is shared by many volunteers of victim associations (see § 3.6). They claim that the position of the victim has improved because he is now entitled to bring his own witnesses and experts into the trial, and to comment on, or deny, the defendant's line of defence.<sup>122</sup> Others, like Paliero and Ceretti, argue that, despite these apparent positive aspects, in practice the position of the victim is weakened by the introduction of the charge bargaining procedure (*patteggiamento*, see § 4.2). According to Paliero, charge bargaining is used in approximately 20% of all cases. One fifth of the victims are therefore deprived of the right to intervene in the proceedings, and to claim compensation.<sup>123</sup> Concerning treatment and protection, however, the law does not sufficiently safeguard the right of victims.

The law in the books grants the victim several rights, but the greatest shortcoming of the Italian criminal justice system is that the victim is not informed about these rights, or how he is to effectuate them. If the victim, for whatever reason, does not have his own lawyer to inform and instruct him on the criminal proceedings, he is entirely on his own. This is especially true for the victim's right to claim compensation. It is entirely up to the victim to inform the court of his losses and injuries, and to substantiate his claim for compensation.

<sup>121</sup> D. Riponti (1995), p. 59.

<sup>122</sup> Information supplied by Professor Manna of the University of Bari, who also works as a lawyer in Rome, on June 24, 1997.

<sup>123</sup> Information supplied by Professor Paliero of the University of Pavia, 10<sup>th</sup> of July 1997

Furthermore, he is not assisted in the collection of the money. In general, the judicial authorities are not interested in the losses suffered by the victim. At most, the public prosecutor will ask for a more severe punishment of the offender if the victim suffered serious damages or injuries. To quote Piva: 'From a certain perspective, it may be said that Italy often appears for some reason to be reluctant to take steps towards enhancing the quality of life of its own citizens by implementing measures which have been agreed upon and adopted at an international level.'<sup>124</sup>

It is highly recommended that the legislature and the criminal justice authorities give more attention to the provision of information to the victim. The state should stimulate the creation of a nationwide victim support service. Such a service is an important criminal justice partner, and may greatly contribute to the implementation of the criminal justice authorities' information strategies. Concerning compensation, the legislature may consider introducing the possibility of empowering the national debt collection agency to collect the victim's claim for compensation, or devise other ways of assisting the victim. It is further recommended that state compensation schemes are set up for victims of violent crime. Concerning treatment and protection, it is first and foremost necessary that the criminal justice authorities are adequately trained to deal with victims. Training is one of the key-instruments to change the instrumental view of the victim. However, police management and high-ranking police officers and public prosecutors should emphasize the importance of a respectful and empathetic treatment. In addition, training is essential to improve the manner of questioning. It is recommended that special units are created, after the example of the juvenile brigades in the big cities, to deal with victims of sexual crimes and domestic violence. Also, more special facilities should be created to hear and question victims in privacy and in a way that limits the frequency of questioning as much as possible. Finally, the legislature should issue enactments that allow the criminal justice authorities to protect the victim against publicity, intimidation and retaliation. And if enactments are issued, the issuing of implementation regulations should not be forgotten or postponed for too long a period.

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<sup>124</sup>

P. Piva (1996), p. 377.

# Supplements

## ABBREVIATIONS:

CCP	-	Code of Criminal Procedure
Const.	-	Constitution
G.U.P.	-	pre-trial judge ( <i>giudice dell'udienza preliminare</i> )
PC	-	Penal Code

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# Chapter 14

## Liechtenstein

### SCENERY

Nestled in between Switzerland and Austria, the Principality of Liechtenstein is a tiny Alpine state of no more than 160 square kilometres.<sup>1</sup> Inhabited by 31,389 people,<sup>2</sup> of which a third are foreign residents, the country is divided into the upper and lower regions of Vaduz and Schellenberg. The two regions cover eleven municipalities (*Gemeinde*), each with its own mayor. Liechtenstein is a constitutional hereditary monarchy upon a democratic and parliamentary basis (section 2 Constitution, s. 2 C.). The power of state is vested in the Prince, who is head of state, and the people, represented by the 25 members of the unicameral parliament (*Landtag*).

The present Prince, His Serene Highness Prince Johannes Adam von und zu Liechtenstein (Hans Adam) is the 13th reigning Prince of Liechtenstein. The royal family now lives in the castle poised against the mountainside above Vaduz, the capital of Liechtenstein, but for centuries the family seat was in Mödling Castle, near Vienna. The House of Liechtenstein was first mentioned in the first half of the 12th century, when reference was made to Knight Hugo of Liechtenstein. Traditionally, the members of the House of Liechtenstein held high offices in Austria, serving the Emperor as diplomats and generals. In 1608, although not owning a Principality, Charles I of Liechtenstein was elevated to the hereditary rank of Prince. Although owning substantial stretches of land in Austria, Hungary, Bohemia, and Moravia, the Prince of Liechtenstein did not have a seat or the right to vote in the Council of Electors (*Reichsfürstentag*) of the Holy Roman Empire, because he did not possess the necessary *reichsfrei* territory.<sup>3</sup> To remedy this, Prince Johann Adam of Liechtenstein purchased the Lordship of Schellenberg in 1699, and the County of Vaduz in 1712, which were together recognized as the new Principality of Liechtenstein on 23 January 1719 by decree of the Holy Roman

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<sup>1</sup> Liechtenstein claims a further 1,600 square kilometres of Czech territory confiscated from its royal family in 1918. The Czech Republic refuses to restitute territory seized before February 1948, which is when the communists took power. <http://www.odci.gov/cia/publications/factbook/ls.html>.

<sup>2</sup> July 1997, <http://www.odci.gov/cia/publications/factbook/ls.html>

<sup>3</sup> *Reichsfrei* territory is territory 'under the immediate authority of the Emperor without the intermediary of another liege lord'. 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, p. 142.

Emperor, Charles VI.<sup>4</sup> After the collapse of the Holy Roman Empire, Napoleon recognized Liechtenstein as a sovereign State and included it in his Rhine Confederation of 1806. Following Napoleon's 1815 abdication, Liechtenstein joined the German Federation (*Deutsche Bund*) and sought to establish ties with Austria. It had already adopted a new Civil and Criminal Code, modelled on the Austrian Codes in 1812 and, in 1852, the two states established a customs union. After the dissolving of the German Federation in 1866, Liechtenstein initially maintained its ties with Austria, and the two countries established a postal union in 1912. However, World War I meant the end of the formal alliance and Liechtenstein then turned to Switzerland.<sup>5</sup> A postal union was established with that country in 1921, and a customs union in 1923. The present-day Liechtensteiners use Swiss currency and the Swiss telephone net. Liechtenstein is represented by Switzerland abroad and in foreign policy, but does sometimes go its own way, as was the case regarding membership of the European Economic Area (EEA).<sup>6</sup> It has been a full member of the Council of Europe since 1978, joined the United Nations (UN) in 1990 and the European Free Trade Association (EFTA) in 1991.<sup>7</sup>

Modern Liechtenstein is one of the richest countries per capita in the world, and a well-known tax haven – it has some 70,000 mailbox companies. Unemployment is almost non-existent, the highest rate so far was an all-time 1.1% – 227 people – in 1996.<sup>8</sup> The official language is German and 80% of the population are Roman Catholic.<sup>9</sup> Picturesque and rural, it is best known for its wonderful array of postal stamps, its home-produced wine and the unpretentious skiing resort of Malbun.

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<sup>4</sup> It is unusual for a property to be named after the purchaser. Mostly, it works the other way round with the purchaser deriving his title from the name of the land. J. Duursma (1994), p. 143, footnote 16, with reference to O. Seger, *Überblick über die Liechtensteinische Geschichte* (1974), pp. 9–10.

<sup>5</sup> Liechtenstein remained neutral during both World Wars. In fact, its last involvement in armed conflict dates from 1866 when 'soldiers guarded an Alpine pass, and never once made contact with the enemy' (M. Honan, *Switzerland, a Lonely Planet Travel Survival Kit*, Lonely Planet Publications, May 1997, p. 354). Following this military feat, the Liechtenstein army was definitively disbanded in 1868. The defence of Liechtenstein is now the responsibility of Switzerland.

<sup>6</sup> The Liechtensteiners voted in favour of membership in December 1992, just after the Swiss had voted against joining. Liechtenstein was admitted to the EEA in 1995, but does not intend to seek full EU membership.

<sup>7</sup> The history recounted in this section is primarily derived from J. Duursma (1994), pp. 141–144 (who in turn refers to several other authors); M. Honan (May 1997), pp. 354–360; and brochures from the Tourist Information in Vaduz.

<sup>8</sup> M. Honan (1997), p. 355.

<sup>9</sup> On Sunday 21 December 1997, the Vatican declared Liechtenstein to be an archbishopric, and to loud cries of protest from the Liechtenstein population appointed the ultraconservative Wolfgang Haas as the first archbishop. *NRC Handelsblad* of 23 December 1997.

## PART I: THE CRIMINAL JUSTICE SYSTEM OF LIECHTENSTEIN

### 1 INTRODUCTION

Tiny as Liechtenstein may be, it does have a full-fledged and independent criminal justice system. Until 1921, Liechtenstein only had a court of first instance (*Landgericht*). Appeals in second instance were heard by a High Court in Vienna, and in last instance by a Supreme Court in Innsbruck,<sup>10</sup> but the Constitution of 1921 brought an end to this dependency on Austrian higher courts by establishing both a new High Court and a Supreme Court in Liechtenstein itself. However, regarding criminal law and procedure, the ties with Austrian law remain very strong. The present Liechtenstein codes of criminal law and procedure are still modelled on the Austrian codes, and the Austrian legal developments are closely monitored, and often copied.<sup>11</sup> Although legislation is adapted to suit local circumstances, the main principles and procedures are still identical to Austrian principles and procedures.<sup>12</sup> There is the occasional difference in terminology – the Austrian *Hauptverhandlung* (main proceedings) is called *Schlußverhandlung* (literally: final proceedings) in Liechtenstein – or a simplification of terms and/or procedures – the Liechtensteiners do not make a formal distinction between *Vorerhebungen* (initial information collected by the police) and *Voruntersuchungen* (preliminary investigations under direction of the examining magistrate) but speak simply of *Untersuchungsverfahren* (investigative proceedings). However, because of the overriding similarities, parallels will often be drawn in the following with the corresponding sections of Chapter 3 on Austria.

Most criminal offences committed in Liechtenstein are traffic offences. There are 24,000 cars on a population of around 31,000, and much foreign traffic passing through between Switzerland and Austria besides. Traffic along the main road through Vaduz is really extremely dense and there are many accidents. After traffic offences, property offences are the most common, although of an incidental rather than of an organized nature. There is relatively little violence, with a murder on average once every four years. With regard to sexual offences, it is thought that the dark number may well be very high. However, because no research on dark numbers has been done in Liechtenstein one can only guess at the figures although they are presumed to be similar to Swiss figures.

<sup>10</sup> J. Duursma (1994), p. 148, with reference to A. Oehry (1986), p. 145.

<sup>11</sup> The Liechtensteiners do not follow the Austrian example in all fields of law. Inspiration is also sought in the Swiss legal system, for example, where the law of property (*Sachenrecht*) is concerned. There is also authentic Liechtenstein law, for instance, in the field of company law.

<sup>12</sup> See the introduction to the government Bill of 31 May 1988 No. 22/88 for a new code of criminal procedure for a commentary on the relationship between Austrian and Liechtenstein law in the field of criminal law and criminal procedure (*Beilagen Zur Öffentlichen Landtagssitzung vom 29/30 Juni 1988, Regierung des Fürstentums Liechtenstein Bericht und Antrag der Fürstlichen Regierung an den Hohen Landtag zur Schaffung einer Strafprozessordnung (StPO)*), Vaduz, 31 May 1988, No. 22/88. Published in *Landtags-Protokolle 1988-II*.

## 2 GENERAL REMARKS AND BASIC PRINCIPLES

The principle of legality (*Legalitätsprinzip*), which obliges the public prosecutor to prosecute all offences brought to his or her attention (s. 21-1 StPO, *Strafprozess-ordnung*, Code of Criminal Procedure), is adhered to even more strongly in Liechtenstein than it is in Austria (compare § 2 Chapter 3). Only if an accused person is charged cumulatively with committing several criminal offences may the prosecutor drop the prosecution of one or more of these offences, while going ahead with the prosecution of the other offences (s. 21-2 StPO).<sup>13</sup> There is no policy or practice of diversion, although there is a 'veiled' opportunity for diversion through section 42 StGB (*Strafgesetzbuch*, Penal Code), see § 3.2.

Besides the principle of legality, other important principles are, among others things, the principle of publicity (*Öffentlichkeitsprinzip*), the principles of orality (*Mündlichkeit*) and immediacy (*Unmittelbarkeit*), and the principle of lay-participation (*Laienbeteiligung*).

Section 17 StGB distinguishes between crimes (*Verbrechen*) and misdemeanours (*Vergehen*). Crimes are punishable with a life sentence, or more than three years imprisonment (s. 17-1 StGB). All other offences are misdemeanours, unless determined otherwise by secondary legislation (*Nebengesetze*, s. 17-2 StGB). The offences laid down in secondary legislation are usually of a third category, viz., infractions (*Übertretungen*, s. III-3 StRAG, *Strafrechtsanpassungsgesetz*, criminal law amendment act). These are even less serious than misdemeanours, and punishable only by a fine. Examples are minor breaches of the traffic regulations or infractions in the administrative sphere (*Verwaltungsrecht*).<sup>14</sup>

Significant is also the distinction between public offences (*Offizialdelikte*, s. 2-3 StPO) and offences the prosecution of which is the prerogative of a private prosecutor (*Privatanklagedelikte*, s. 2-2 StPO). Regarding the former category, prosecution is reserved for the public prosecutor, although some offences require either a complaint by the injured person (complainant offences, *Antragsdelikte*, s. 2-4 StPO) or power of attorney (*Ermächtigungsdelikte*, 2-5 StPO). Compare Chapter 3.

## 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

### 3.1 Investigating Authorities

Liechtenstein has a national police force (*Landespolizei*) as well as a municipal police force (*Gemeindepolizei*). The national force is made up of a traffic department (*Verkehrspolizei*), a security and public order department (*Sicherheits- und Verwaltungspolizei*), and the criminal police (*Kriminalpolizei*). In November 1997, the national police force consisted of a total of 65 police officers. Two of these were women, with a further two women in training. One of the two female officers worked in the criminal police department, which had a total of thirteen officers. This is the department that investigates all criminal offences.

The municipal police deals only with local municipal matters – they have no criminal investigative powers, and all criminal offences are reported directly to the national police force (see § 5.1). The municipality of Vaduz, the capital, has two municipal police officers.

<sup>13</sup> Some requirements must be met, see § 7.1 under B.5.

<sup>14</sup> See R. Capaul and R. Dubs, *Einführung in das liechtensteinische Recht*, Verlag des Schweizerischen Kaufmännischen Verbandes, Zürich, 1992, p. 85.

Most of the other municipalities have one officer, some none. The relationship between the national force and the municipal force is nurtured by the national force, because the municipal police know the citizens and circumstances in their municipality best. There is also a citizen's corps called the supporting police (*Hilfspolizei*).

Formally speaking, the Liechtenstein police is not part of the criminal justice system but resides under the Department of Internal Affairs (*Ressort Inneres*). Their first and foremost task is to ensure safety within Liechtenstein.

### 3.2 Prosecuting Authorities

Liechtenstein has three public prosecutors. In November 1997, one of the public prosecutors was Austrian, the other two Liechtensteiners. In Austria, the most minor offences dealt with by the district court (*Bezirksgericht*) are prosecuted by special district court prosecutors (*Bezirksanwälte*). In Liechtenstein, all offences that are dealt with via the court of first instance (*Landgericht*) are prosecuted by one of the three public prosecutors.

### 3.3 Judiciary

#### *Organization*

Liechtenstein has a three-tiered criminal court structure, consisting of a court of first instance (*Landgericht*), a High Court (*Obergericht*), and a Supreme Court (*Oberste Gerichtshof*) (s. 12-1 StPO).

The court of first instance is responsible for conducting the preliminary investigation (*Untersuchung*) and the main hearing (*Schlussverhandlung*), and for passing judgment on all punishable acts (s. 13 StPO). The court of first instance sits as a judge sitting alone (*Einzelrichter*) or as a collegiate court (*Kollegialbesetzung*). The collegiate forms of the court of first instance are the criminal court (*Kriminalgericht*) and the laymen's court (*Schöffengericht*) (s. 15-1 StPO). The criminal court, which sits with five judges (two professional and three lay judges), hears the most serious offences, that is to say, all crimes (*Verbrechen*, i.e., offences punishable by a life sentence, or more than 3 years' imprisonment, s. 15-2 StPO in conjunction with s. 17-1 StGB) as well as theft with forced entry if punishable by more than five years (*Einbruchsdiebstahl*, s. 15-2 StPO in conjunction with ss. 17-1 StGB and 12-3 StPO). However, section 15-3 StPO reserves a number of crimes for the laymen's court which sits with one professional judge and two lay judges. These include, among other things, manslaughter, robbery resulting in death, abandoning a wounded person who subsequently dies, and abortion. All other offences are heard by the professional judge sitting alone (s. 15-4 StPO). The court must also appoint one or more of its professional judges as examining magistrates (*Untersuchungsrichter*) (s. 14 StPO).

The High Court hears appeals (*Berufungen*) and objections (*Beschwerden*) against judgments and decisions of the court of first instance (s. 16 StPO). It consists of two senates of five judges. The Supreme Court decides on revisions (*Revisionen*) of judgments and objections against decisions of the High Court (s. 17 StPO). The State Tribunal (*Staatsgerichtshof*) is the constitutional court of Liechtenstein. It hears cases where a violation of a constitutional right or a breach of a right set forth in a convention is claimed.<sup>15</sup> Offences committed by juveniles are heard by the Juvenile Court (*Jugendgericht*).

<sup>15</sup> J. Duursma (1994), pp. 148-151.

<b>Court of first instance</b>	→ examining magistrate
	→ judge sitting alone
	→ collegiate court → criminal court
	→ laymen's court
<b>High Court</b>	(appeals and objections)
<b>Supreme Court</b>	(revisions and objections)
<b>Juvenile Court</b>	

Further provisions on the organization of the courts are found in the Act on the Court Organization (*Gerichtsorganisationsgesetz*, GOG) of 7 April 1992, LGBl. 1992 No 16.

No robes are worn in any of the courts.

### *Training*

The training of the professional judges is the same as that of the public prosecutors. In Liechtenstein, great store is set by the fact that judges do not specialize in one particular field of law, but work in all fields of law, dealing with both civil and criminal cases.

### 3.3.1 Criminal Proceedings

#### *(Preliminary) Investigation*

Most offences are reported to the police, who conduct the initial investigations into the offence. Only in particularly serious cases do the police immediately involve the public prosecutor. In all other cases, the police first complete their own investigations and then send the file to the public prosecutor.

If, on the basis of the report or the file of investigations that have already been conducted, the public prosecutor finds there are sufficient grounds to prosecute, he formally requests the examining magistrate to open a preliminary investigation (*stellt den Antrag auf Einleitung der Untersuchung*, s. 22-1 StPO). If, on the other hand, he finds there are insufficient grounds to do so, the prosecutor may close the case (*Anzeige zurücklegen*, s. 22-2 StPO). The decision to close the case must be briefly motivated. Often it is not necessary to conduct a full preliminary investigation, particularly regarding (minor) offences that are dealt with by the judge sitting alone. In that case, the public prosecutor may initiate (summary) proceedings by sending a written request for punishment (*Antrag auf Bestrafung*) directly to the judge sitting alone (s. 22-2 in conjunction with 313-2 StPO). Finally, regarding minor offences punishable only by a fine or a maximum of one year imprisonment, where the guilt of the offender is minimal, the consequences of the offence are non-existent or negligible, and punishment of the offender is not considered necessary for reasons of special or general prevention, the public prosecutor may formally request the examining magistrate to end the proceedings (s. 22-3 StPO in conjunction with 42 StGB). This is a veiled way of diverting an offence from the criminal justice process. The decision not to punish a particular offence is taken by the examining magistrate, and not by the public prosecutor. The principle of legality, which obliges the public prosecutor to prosecute all offences brought to his attention, is therefore left intact.<sup>16</sup>

The aim of a preliminary investigation, led by an examining magistrate, is to establish precisely what offence has been committed and by whom, and to collect all the evidence necessary to determine the substantive truth (s. 41-1 StPO). The examining magistrate may

<sup>16</sup>

Compare section 42 LStGB to section 42 AStGB. See also § 2 of Chapter 3.

question the suspect, the injured person and any other witnesses, and use any other powers granted him by law (having premises searched, etc.).

Eventually, a preliminary investigation is either closed (*abgeschlossen*) or discontinued (*eingestellt*). The examining magistrate may close the preliminary investigation if the investigations conducted so far show that no criminal offence has been committed or that all suspicions against the suspect have been dropped, or if further investigations are not expected to lead to a better explanation, whether concerning the facts, or in respect of the offender (s. 66 StPO). The examining magistrate discontinues the preliminary investigation if the prosecutor (private or public) decides to drop the prosecution, or if the public prosecutor formally requests the discontinuance because he is of the opinion that the requirements for non-punishment listed in section 42 StGB have been met (s. 64 StPO).

### *Indictment, Summons*

As soon as the examining magistrate has closed the preliminary investigation, he must send the files to the prosecutor for indictment (*Antragestellung*) (s. 157 StPO). The prosecutor has 14 days to indict (s. 158-1 StPO). If he decides to prosecute the suspect, he must file a written indictment (*Anklage*) (s. 162 StPO) with the examining magistrate (s. 165-1 StPO). In cases to be heard by the criminal and laymen's court, the indictment must meet the formal requirements listed in section 163 StPO. The examining magistrate forwards the case files to the president of the competent court for perusal and for the setting of the trial (*Schlussverhandlung*) (s. 177 StPO). However, the vast majority of offences are heard by the judge sitting alone.<sup>17</sup> In these cases, the prosecutor initiates the court proceedings with a written summons rather than an indictment. A written summons is a concise version of an indictment, without the comprehensive motivation (s. 313-1 in conjunction with 163-2-1/3 StPO).

### *Criminal and Laymen's Court*

Pursuant to section 182-1 StPO, the presiding judge has a very active role to play during the court hearings. He directs the proceedings and questions the accused, the witnesses, and the expert witnesses. In stark contrast to the countries with a common law system, where the scope of the proceedings is determined almost exclusively by the parties, the presiding judge and the court in Liechtenstein may summon other witnesses and expert witnesses than those put forward by the prosecution or the defence (s. 182-1 StPO). This allows them to actively pursue their search for the material truth, as they are urged to do by section 182-2 StPO. Besides the presiding judge, the other members of the court may direct questions to any person examined during the main proceedings. Furthermore, the public prosecutor, the private prosecutor, the civil claimant, the defendant and his counsel also have this right, on the understanding that the president of the court may overrule any question that he deems to be inappropriate (s. 186 StPO).

After all the evidence has been heard, the prosecutor is the first to address the court to present and motivate the sentence demanded (*Strafantrag*) (s. 200-1 StPO).<sup>18</sup> Next, the civil

<sup>17</sup> In 1995, the Liechtenstein courts dealt with 2,300 criminal cases. Of these, 10 were heard by the criminal court, and none by the laymen's court.

<sup>18</sup> Another important difference with the countries with a common law system is that, in Liechtenstein and other countries with civil law systems, the prosecutor makes a demand for a particular sentence.



claimant may address the court (s. 200-2 StPO). The closing speech is the prerogative of the defendant and his counsel (s. 200-3 StPO).

### *Judge sitting alone*

In general, the procedural principles described above also stand for the proceedings before the judge sitting alone, unless determined otherwise in chapter XXI of the Code of Criminal Procedure (s. 312-2 StPO). The judge sitting alone has the same powers and obligations as (the presiding judge of) the criminal court (s. 314-4 StPO). One noteworthy difference in the proceedings is that if no preliminary examination has taken place in relation to an offence brought before the judge sitting alone, publicity must be excluded at the request of the accused (s. 314-3 StPO).

### *Appeals*

An appeal (*Berufung*) against a verdict of the criminal court or the laymen's court is made to the High Court (s. 218-1 StPO). The appeal may adduce procedural grounds for nullification (*prozessuale Nichtigkeitsgründe*) or substantive grounds for nullification (*materielle Nichtigkeitsgründe*). The former contend that principles or rules of criminal procedure have been violated (s. 220 StPO), the latter that the Penal Code or secondary criminal legislation has been incorrectly applied or violated (s. 221 StPO). A full appeal may be lodged by the defendant or his family, the public prosecutor, and the private prosecutor. The civil claimant and the subsidiary prosecutor may only appeal against those elements of the verdict that deal with their civil claims against the defendant (s. 218-5 StPO). Verdicts of the judge sitting alone may be appealed in the same way as verdicts of the criminal court (s. 316 StPO).

### *Revision*

Verdicts of the High Court may be put before the Supreme Court for revision, unless the verdict may not be contested (s. 234 StPO). Excluded from revision are, among other things, verdicts of the High Court which confirm the verdict of the court of first instance, whereby the imposed sentence does not exceed a maximum of one year's imprisonment (s. 235-1 StPO). The civil claimant and the subsidiary prosecutor do not have the right to ask for revision (s. 235-4 StPO).

## **3.4 Enforcement Authorities**

Prison sentences up to six months are served in the prison of Vaduz. Longer sentences are served in a Swiss prison under the agreements concluded with certain Swiss cantons.

## **3.5 After-Care and Resettlement/Probation Service**

The court must appoint a probation officer for a convicted person given a suspended sentence or released on probation, if this is necessary and effective to prevent the convicted person from committing further offences (s. 50-1 StGB). The tasks of the probation officer are described in section 52 StGB. However, Liechtenstein does not have any special provisions for the care and resettlement of offenders, and support for convicted persons is the task of

the social services, see section 5-i of the Act on Social Services (*Sozialhilfegesetz*) of 15 November 1984.<sup>19</sup> A motion to draw up an act on probation and after-care (*Gesetze über die Bewährungshilfe*) was introduced in parliament in November 1997. The motion is particularly concerned with the care, both during and after imprisonment, of drug addicts.

### 3.6 Department of Justice

The government of Liechtenstein consists of a Head of Government and four Members. There are 13 government departments, among them the Department of Justice (*Ressort Justiz*). The responsibility for these departments is divided among the head and members of the government, which means that these persons are usually minister of more than one area. For example, in the present government, which has a term of mandate from 1997 until 2001, the Minister of the Interior is also Minister of Education and Social Matters as well as Minister of Economic Affairs. The present Minister of Justice is the only one who has only one department to run.

### 3.7 Victim Support

There is no active victim support movement in Liechtenstein. Perhaps this is hardly surprising in view of the small number of natural persons that are victimized every year. It is thought by the authorities that the small communities and family ties generally offer sufficient support to help victims recover from the trauma of victimization.

However, the women's movement in Liechtenstein has recently gathered momentum, and a women's shelter (*Frauenhaus*) and a Point of Information and Contact for Women (*Informations- und Kontaktstelle für Frauen*, INFRA) have been established.<sup>20</sup>

## 4 SOURCES OF LAW

### 4.1 General Sources of Law

The primary source of Liechtenstein law is legislation (*Gesetzgebung*). That the power of state is vested in the Prince and the people is reflected in the legislative procedures. The Prince, the parliament, and the people all have the right of initiative<sup>21</sup> with regard to legislation (*Gesetzesinitiative*).<sup>22</sup> Bills are submitted to parliament, which convenes 5 or 6 times a year,

<sup>19</sup> S. 5-i of the Act on Social Services: '*Leistungen der Sozialhilfe sind insbesondere: (...) (i) Hilfe für Straffällige*'. Published in the LGBI. of 22 February 1985 (Volume 1985, No. 17).

<sup>20</sup> The women's shelter is advertised in the bus. This is by far the most popular mode of public transport in Liechtenstein. Only a few trains stop within Liechtenstein, and there is no airport.

<sup>21</sup> The right of initiative encompasses the initiative to introduce a new Bill, or to propose the amendment or annulment of existing legislation.

<sup>22</sup> The Prince exercises his right of initiative by way of Government Bills. The people may submit a Bill to a referendum if signed by at least 1,000 members of the public, or if the Bill is supported by at least three municipalities in the municipal council (*Gemeindeversammlung*). The Swiss people have a similar right to initiate or reject legislation by referendum. Compare, for instance, the genesis of the Swiss Victim Support Act of 1993 which started out as an initiative of a Swiss magazine (see § 4.5 of Chapter 23).

for sessions of two to three days.<sup>23</sup> After being passed by parliament, the bill must be approved by the Prince. It is then published in the Law Gazette (*Landesgesetzblatt*). At this stage, the coming into force of the new legislation may still be prevented by a public referendum, which may be called for by parliament or the people (s. 66 C.).<sup>24</sup> The most important piece of legislation is the Constitution (*Verfassung*). Procedures to amend the Constitution are more stringent than those to alter statutes (*Gesetze*). The legislative memoranda are found in the *Landtags-Protokolle*.

Regulations issued by the government (*Regierungsverordnungen*) are forms of pseudo-legislation, as are, for example, administrative regulations (*Verordnungen der Verwaltungsbehörden*) and municipality regulations (*Gemeindeordnungen*).<sup>25</sup>

The most important case-law (*Rechtsprechung*) is published in the *Liechtensteinische Entscheidungssammlung* (LES).<sup>26</sup> If there are gaps in the law, Liechtenstein judges are quite happy to fill them by analogy, or otherwise. If there is no legislative basis for a certain measure that is deemed necessary, the rule of thumb is to allow anything that is not expressly forbidden by law.

Doctrine (*Lehre*) is a happy mix of Austrian and Swiss doctrine, with a light Liechtenstein flavouring. There is no school/faculty of law in Liechtenstein. Therefore, all Liechtenstein legal professionals must complete a university law degree elsewhere – mostly in Austria or Switzerland, with an occasional deviation to Germany<sup>27</sup> – before receiving practical training in their home country (see §§ 3.2 and 3.3).

Finally, customary law (*Gewohnheit, Brauch und Sitte*) is allowed as a source of law, if explicitly recognised by written law.<sup>28</sup>

## 4.2 Sources of Criminal Law and Procedure

In 1988, the Liechtensteiners rounded off a grand overhaul of their criminal justice system, culminating in the introduction of three new codes and an amendment act which all came

<sup>23</sup> In the week I spent in Liechtenstein (16 to 21 November 1997), I was lucky enough to be able to watch parliament in session. This somewhat compensated for the fact that unfortunately (from the point of view of a researcher interested in the criminal process) there was not a single significant criminal case in court that week (oh wondrous country!). Liechtenstein has four part-time ministers, see § 3.6.

<sup>24</sup> By 1,000 members of the public or by three municipalities.

<sup>25</sup> For an extensive analysis of the *Verordnung*, see A. Schurti *Das Verordnungsrecht der Regierung des Fürstentums Liechtenstein*, St. Galler Beiträge zum öffentlichen Recht, Band 23 (edited by Y. Hangartner), Schweizerisches Institut für Verwaltungskurse an der Hochschule St. Gallen, St. Gallen, 1989. For a simplified overview of pseudo-legislation in Liechtenstein, see R. Capaul and R. Dubs (1992), pp. 68-69. It should be noted that on the basis of several bilateral conventions between Liechtenstein and Switzerland, many regulations issued by Swiss authorities also have force of law in Liechtenstein.

<sup>26</sup> An overview of all relevant case-law is provided by H. J. Stotter in his *Gesamtwverzeichnis liechtensteinischer Rechtsmittelentscheidungen* (GVLK), which had, at the time of writing, seen three volumes: 1946-1984, 1985-1987, and 1988-1990.

<sup>27</sup> For those eventually wanting to work in the area of criminal law, a university degree in Austria is best, because of the similarities between Austrian and Liechtenstein criminal law. For some other fields of law, for example law of property, it is wiser to go to university in Switzerland.

<sup>28</sup> See R. Capaul and R. Dubs (1992), pp. 38-48.

into force on 1 January 1989. A new Penal Code (*Strafgesetzbuch*, StGB), of 24 June 1987,<sup>29</sup> was accompanied by a new Code of Criminal Procedure (*Strafprozessordnung* (StPO) of 18 October 1988,<sup>30</sup> a Juvenile Court Act (*Jugendgerichtsgesetz*, JGG) and a criminal law amendment act (*Strafrechtsanpassungsgesetz*, StRAG) of 20 May 1987.<sup>31</sup> The Stotter series provides a commentary to these and many other acts.<sup>32</sup>

Examples of secondary legislation containing criminal regulations are the Tax Act (*Steuergesetz*), the Building Act (*Baugesetz*) and the Fauna Protection Act (*Gewässerschutzgesetz*). The offences defined in these acts are mostly infractions (see § 2).

#### *Revision of Criminal Law and Procedure*

In 1997, a government committee chaired by one of the prosecutors was formed with the task of revising and updating the present criminal law and procedure. The committee will look closely at recent Austrian developments to see which initiatives should be followed by Liechtenstein. One of the committee members was at the 1997 Austrian *Juristentag* which revolved around Fuchs' report on 'the procedural position of the victim of crime and the pursuance of his claims in the criminal procedure'.<sup>33</sup> The committee will be considering the proposals put forward at this *Juristentag*,<sup>34</sup> as well as other Austrian developments such as the possible introduction of diversion, and the introduction of mediation for adults. The final report of the committee is not expected until around 1999.<sup>35</sup>

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

The primary source of law regarding the position of the victim in Liechtenstein legal procedure is the Code of Criminal Procedure. There is no special legislation dealing with the victim, i.e., no Victim Support Act or Victim Compensation Act. Within the agencies operating in the Liechtenstein criminal justice system, there is not one single internal guideline, regulation, or memo on victims of crime. Neither has any empirical research been conducted in Liechtenstein on the position of the victim.<sup>36</sup>

<sup>29</sup> Published in the Law Gazette (*Landesgesetzblatt*, LGBl.) of 22 October 1988 (Volume 1988, No. 37).

<sup>30</sup> Published in the LGBl. of 31 December 1988 (Volume 1988, No. 62). This code replaced the previous code of 31 December 1913, LGBl. 1914 no. 3.

<sup>31</sup> Published in the LGBl. of 24 October 1988 (Volume 1988, No. 38).

<sup>32</sup> H.J. Stotter, *Liechtensteiner Gesetze*, among other things *Die neue liechtensteinische Strafprozessordnung (StPO)*, *ex jure Verlagsanstalt*, Vaduz 1988.

<sup>33</sup> H. Fuchs, *Die strafprozessuale Stellung des Verbrechensopfers und die Durchsetzung seiner Ersatzansprüche im Strafverfahren*, Gutachten, Verhandlungen des Dreizehnten Österreichischen Juristentages Salzburg 1997, Band IV/1 Strafrecht, Wien 1997. See § 4.4 Chapter 3.

<sup>34</sup> For instance, to disconnect the duty to inform victims of crime of the developments in their case from the present (Austrian and Liechtenstein) requirement that the victim has a formal role to play in the proceedings as a *Privatbeteiligter*, i.e. 'Private participant': someone who has joined the criminal proceedings as a civil claimant. Compare with the canton of Zürich in Switzerland, where a claim does not actually have to have been made for the victim to be informed.

<sup>35</sup> One of the issues that the committee will be considering is whether rape within marriage should be criminalized. See § 5.2.

<sup>36</sup> See, for instance, M. Brunner, 'Schweigen ist Gold: Gewalt gegen Frauen und Mädchen im Fürstentum Liechtenstein', in: *Trägerschaft des Frauenprojektes in Liechtenstein, Inventur zur Situation der Frauen in Liechtenstein*, eFeF-Verlag, Bern, Dortmund, 1994, pp. 133 and 135. Brunner reports that, until 1994, no research had been conducted on sexual abuse of girls, nor of violence

## 5 ROLES OF THE VICTIM

### *Terminology*

The victim of crime appears in several different guises in the Liechtenstein legal system. The most general designation is that of *Opfer* which translates literally as 'victim'. The connotation of *Verletzte* or *Beschädigte*, i.e., injured person, covers all those whose rights have been infringed as a consequence of the offence (s. 32-1 StPO). The injured person who presents his civil claims for damages in adhesion to the criminal proceedings is referred to as *Privatbeteiligter* ('private participant', or as we will refer to him: civil claimant) (s. 32-1 StPO). Some offences are prosecuted by the victim as *Privatankläger* (private prosecutor), and where the prosecutor decides to drop the prosecution, the victim may take over the prosecution as *Subsidiarankläger* (subsidiary prosecutor). Other roles that the victim may play are as complainant in relation to complainant offences, or as the person who reports an offence (*eine strafbare Handlung anzeigen*) to the authorities. Finally, the victim is often an important *Zeuge*, i.e., witness.

### 5.1 Reporting the Offence

An offence may be reported to the public prosecutor, the examining magistrate, or the police (s. 55-1 StPO).<sup>37</sup> In practice, almost all reports (*Anzeige*) are made to the national police. It is common knowledge in Liechtenstein that reports should be made to them, and not to the municipal police. It is such a small community that everyone knows everyone, and the public knows its police officers by name. Only occasionally are offences reported directly to the public prosecutor.

Members of the public coming into the national police station (there is only one in Vaduz) first enter the reception area cum waiting room. After briefly stating their reason for coming to the station to the police officer behind the reception counter, the officer on duty will take down the report. This is done in one of the offices through the sluice separating the reception and waiting room from the rest of the building. Reports made anonymously (for instance, by telephone) must also be investigated, if sufficiently credible (s. 58 StPO).

There are no statistics on the dark figure (i.e., the number of offences that do not come to the attention of the authorities, through reporting or otherwise) in Liechtenstein, but it is presumed to be similar to Swiss or Austrian figures.

### 5.2 Complainant

Complainant offences are prosecuted by the public prosecutor (s. 2-3 StPO), but only after a formal complaint has been made by the person authorised to do so (s. 2-4 StPO), i.e. the victim. The complaint may be withdrawn up to the end of the proceedings (s. 2-4 StPO). In the chapter on Austria, we discuss marital rape and sexual abuse as a complainant offence.

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against women in the workplace.

<sup>37</sup> As we did with the comparable section of the Austrian Code of Criminal Procedure (s. 86-1 ASStPO), we have translated *Sicherheitsbehörde* as police in the generic sense of the word rather than as security authorities. Compare the translation in the Chapter 3. The mayor of each municipality is also part of the security authorities (s. 8 StPO).

It should be noted that Liechtenstein does not yet even recognize rape within marriage as a criminal offence.<sup>38</sup>

Power of attorney offences are comparable to the complainant offences, but in these cases the offence has been committed against a public official or authority in the course of his public duties. See, for example, sections 109 and 117-2 StGB.

### 5.3 Civil Claimant

The injured person may present his civil claims against the offender in adhesion to the criminal proceedings (s. 32-1 StPO). The claim may be made up to the beginning of the main hearing (s. 32-1 StPO). The civil claimant may put at the disposal of the examining magistrate everything that may serve to convict the accused or to substantiate the compensation claims (s. 32-2-1 StPO). He may view the files, even during the investigation, unless the circumstances dictate otherwise (s. 32-2-2 StPO). He must be invited to the main proceedings, on the understanding that if he does not appear, the proceedings will continue without him and his claim will be read out from the file (ss. 32-2-3 and 179 StPO). He may ask the accused, the witnesses, and expert witnesses questions 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 claims, and to put forward the issues he also wants settled in the main verdict (other than the matter of the guilt of the accused, and a possible sentence) (s. 32-2-3 StPO).<sup>39</sup> The civil claimant may conduct the case himself, or leave it to an authorized representative (a lawyer) (s. 34-1 StPO).

If the defendant is not convicted, the civil claims of the civil claimant are automatically referred to the civil court (s. 258-1 StPO). If, on the other hand, the defendant is convicted, the court should in principle also decide on the civil claims of the injured person. However, if the court is of the opinion that what has come forward during the criminal proceedings is insufficient to allow the court to take a sound decision on the compensation claims, the civil claimant will be referred to the civil court. The civil claimant does not have the right to appeal against this decision to refer him (s. 258-2 StPO), but if the criminal court does decide on the civil claims, the civil claimant may appeal against those elements of the verdict dealing with his claims to the High Court (s. 218-5 StPO).

Another right of the civil claimant is to raise the public prosecution as subsidiary prosecutor, instead of the public prosecutor (s. 32-3 StPO). See § 5.5.

### 5.4 Private Prosecutor

A private prosecution must be initiated within six weeks of the offence and the accused becoming known to the private prosecutor, otherwise the right to prosecute is lost. The charge against the accused must be made orally or in writing in the criminal court, and may be aimed

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<sup>38</sup> See C. Büchel, M. Oehri, and N. Barouk-Hasler, 'Nicht Strafbar = Nicht Unrecht?' in: *Löwenzahn* 6/92, October, 1992, p. 5. In Switzerland, marital rape became a criminal offence on 1 October 1992.

<sup>39</sup> Compare these rights of the Liechtenstein civil claimant with the identical rights of the Austrian civil claimant (s. 47 AStPO). Sections 32-1 and 32-2 of the Liechtenstein Code of Criminal Procedure are an almost literal copy of sections 47-1 and 47-2 of the Austrian Code of Criminal Procedure.

at the opening of a preliminary investigation or the punishment of the offender (s. 31-1 StPO).<sup>40</sup> The injured person or other party concerned is no longer entitled to private prosecution if he has explicitly forgiven the criminal offence (31-1 StPO). During the preliminary investigation, the private prosecutor may put at the disposal of the court anything that may support his case. He may view the files and undertake any steps to substantiate his charge that the public prosecutor would otherwise have been entitled to take. If he withdraws his charge, he may not reopen the criminal proceedings (s. 31-2 StPO). If the public prosecutor has failed to bring his charge within the stipulated period, to appear at the main hearing, or to offer his closing statements (*Schlussanträge*), he is presumed to forego prosecution. The private prosecutor must be informed of these consequences (s. 32-3 StPO). The private prosecutor may conduct his case himself, or leave it to an authorized representative (a lawyer) (s. 34-1 StPO). If the criminal proceedings do not result in a conviction of the accused, the private prosecutor must bear all the costs of the trial himself (s. 306-1 StPO).

Examples of offences reserved for private prosecution are: giving medical treatment without permission of the patient (s. 110 StGB), offences against one's honour (ss. 111-115, in conjunction with 117-1 StGB) and offences against one's privacy (ss. 118-123 StGB).

### 5.5 Subsidiary Prosecutor

In cases where the criminal proceedings have not been initiated or have been dropped by the public prosecutor, the civil claimant has the right to continue the prosecution as subsidiary prosecutor. Within 14 days of being informed of the decision of the public prosecutor he must file his request for the opening or continuation of the preliminary examination, or the indictment, with the court of first instance (s. 173-1 StPO). The civil claimant does *not* have the right to act as subsidiary prosecutor if the court has ended the proceedings by proclaiming the offence not punishable on the basis of section 42 StGB. The High Court decides whether the subsidiary request of the civil claimant to open or continue the criminal proceedings should be honoured (s. 173-3 StPO). This decision of the High Court cannot be appealed (s. 173-3 StPO). The public prosecutor may at any time take over the prosecution from the subsidiary prosecutor (s. 32-3 StPO). Apart from this, the subsidiary prosecutor is in principle awarded the same procedural rights as the private prosecutor. One exception is that he may only appeal against the verdict of the criminal court in as far as the civil claimant is allowed to appeal, i.e., he may only appeal against those parts of the verdict that concern his civil claims against the accused (s. 32-4 StPO). The subsidiary prosecutor does not have the right to demand reopening of the criminal proceedings (s. 32-4 StPO). Furthermore, if the criminal proceedings do not result in a conviction of the accused, the subsidiary prosecutor must bear all the costs of the trial himself (s. 306-1 StPO).

### 5.6 Witness

The victim of crime who is required to testify as a witness is treated just as any other witness, even if he is involved in the case as civil claimant or subsidiary prosecutor (s. 124-2 StPO).

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It is sufficient for the private prosecutor to demand that the court questions the alleged offender as a suspect, see C. Bertel, *Grundriß des österreichischen Strafprozeßrechts*, Fünfte, neubearbeitete Auflage, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 1997, no. 238, pp. 56-57. Section 31-1 of the Liechtenstein StPO is identical to section 46-1 of the Austrian StPO.

The witness is first questioned by the examining magistrate without the presence of the prosecutor, the civil claimant, the accused or other witnesses (s. 115-1 StPO). However, if it seems likely, on the basis of particular circumstances, that the report of the questioning of the witness will have to be read out during the main court hearing, the examining magistrate must offer the prosecutor, the civil claimant, the accused, and his counsel the opportunity to be present during the examination and to put questions to the witness (s. 115-2 StPO), unless this is not possible in the interests of the investigation. In that case, the parties must be informed of the contents of the testimony (s. 115-3 StPO). In court, the witnesses are questioned one after the other, in principle in the presence of the accused. The private prosecutor or the civil claimant who is to be questioned as a witness may be removed from the courtroom (prior to being questioned). This does not affect his right to be represented during the hearing (s. 190-3 StPO).

A wonderful example of how legal practice may deviate from what the law prescribes is found in the way the oath is used in the Liechtenstein criminal process. According to the Code of Criminal Procedure, before being questioned by the examining magistrate, the witness is warned that he must answer the questions truthfully to the best of his knowledge, to keep back nothing, and to give his statement in such a way that he can take an oath on it if necessary (s. 118 StPO). After the statement has been given, every witness who has said something important in relation to the case, or for whom the examining magistrate feels it is necessary to take an oath to ensure that nothing is being kept back, must take an oath on his statement (s. 122 StPO). Section 123 StPO lists those witnesses who are exempted from taking an oath. This includes witnesses under the age of 14, but not the injured person, the civil claimant, or the private or subsidiary prosecutor. Before the witnesses are examined in court, they are warned that they must speak the truth, and those witnesses who have already taken an oath during the investigative stages are reminded of their oath (s. 195-1 StPO). All other witnesses, barring the exceptions of section 123 StPO, are required to take the oath between the answering of the general questions (personalia, etc.) and the further examination. The oath may be omitted, or left until later questioning of the witnesses if the prosecutor and the accused are in agreement about this (s. 195-2 StPO). In practice, the oath is never taken, and if the court requires a witness to do so, this is a clear motion of no confidence against the witness.



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

### 6 THE VICTIM AND INFORMATION

#### 6.1 Informing the Victim

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

##### *Legislation*

In 1987, the Austrian legislator amended the Austrian Code of Criminal Procedure by adding section 47a. The first part of this section instructs all authorities involved in the criminal justice process to inform the injured person of his rights in the criminal proceedings, in as far as this appears necessary in the given circumstances. However, this section was not incorporated into the Liechtenstein Code of Criminal Procedure of 18 October 1988.<sup>41</sup> There is no legislative duty for the police to inform the victim about the possibilities of obtaining assistance, practical and legal advice, or compensation from the offender. Regarding state compensation, there is simply nothing to inform the victim about because there is no state compensation scheme. Liechtenstein has not ratified the Convention of the Council of Europe on State Compensation for Victims of Crime because it could not meet the requirements set out in the Convention, and no efforts are being made to try to meet them.

Regarding compensation from the offender, it should be noted that, even though the *police* do not have a duty to inform the injured person of his rights in this respect, there is another investigating authority who does have this duty, viz., the *examining magistrate*. That is to say that if the injured person is questioned as a witness, he must be asked whether he is going to join the criminal proceedings (as a civil claimant) (s. 124-1 StPO).

##### *Practice*

According to the Liechtenstein national police force, the police officer who has taken down the report made by the victim will inform him of where he can get help, and what his rights are, even though there is no legislative duty for the police to do so. Female victims of sexual abuse are told about the women's shelter, and if medical or social support is necessary, the officer contacts a doctor or the social services. Where sexual offences against children or rape of adults are concerned, the police drive the victim to St. Gallen in Switzerland where there are medical experts specially trained to deal with these matters. Oral information is provided by the police. The police do have some brochures to give the victim which are available from a stand in the reception area of the national police station, but these are mostly Swiss brochures on matters such as crime prevention.<sup>42</sup>

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<sup>41</sup> By contrast, the preceding Austrian section 47 AStPO, which describes the rights of the injured person who joins the proceedings as a civil claimant, is copied almost word for word in section 32-1 and 32-2 LStPO.

<sup>42</sup> Information provided by R. Kindle of the national police force, 19 November 1997.

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

There are no standard procedures for keeping the victim informed of the progress in his case. Only if the victim has joined the proceedings as a civil claimant is it likely that he will receive any information from the police, but even then it will be modest because of the duty of the police to uphold the principle of secrecy to protect the accused. The victim who has joined the proceedings as a civil claimant can use his right to view the files to find out about the outcome of the police investigation. However, there is little reason to expect that a private individual in Liechtenstein will make any more use of this right than a private individual in Austria. Only if the victim has a lawyer is it likely that the files will be accessed on his behalf.<sup>43</sup>

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

#### *Legislation*

To summarize the decisions that the public prosecutor may make throughout the criminal process (see § 3.3.1):

*prior to the preliminary investigation*, he may:

- (1) request the examining magistrate to open a preliminary investigation (s. 22-1 StPO);
- (2) start proceedings before the judge sitting alone without a preliminary investigation (s. 22-2 in conjunction with 313-2 StPO);
- (3) drop the prosecution (s. 22-2 StPO);
- (4) ask the examining magistrate to dismiss the case with reference to section 42 StGB (s. 22-3 StPO);

*in the course of the preliminary investigation*, he may require the examining magistrate to discontinue the preliminary examination if he decides:

- (5) to drop the prosecution, or;
- (6) that the requirements of section 42 StGB have been met (s. 64 StPO);

*following indictment*, the prosecutor may:

- (7) ask the examining magistrate to dismiss the case on the basis of section 42 StGB (s. 158-2 StPO);
- (8) drop the case;
- (9) prosecute the offender (s. 161 StPO).

The public prosecutor must inform the civil claimant, i.e., the injured person who has civil claims he wishes to present in adhesion to the criminal proceedings, of a decision to summon the offender before the judge sitting alone without a preliminary investigation (decision 2)

<sup>43</sup>

In his research on the victim in Austrian criminal proceedings, Krainz concludes that individuals rarely make use of the right to inspect the file, unlike legal representatives of civil claimants who, as a rule, do inspect the file. K.W. Krainz, 'The Position of Injured Parties in the Austrian Criminal Procedure – First Results of an Empirical Investigation', in: G. Kaiser, H. Kury, H.-J. Albrecht (eds.), *Victims and Criminal Justice*, Freiburg im Breisgau, 1991, p. 637. See § 6.1 under A.3 of Chapter 3.

or to drop the prosecution (decisions 3 and 8) (s. 22-4 StPO). The examining magistrate must inform the civil claimant of any decision to dismiss the case or discontinue the preliminary examination at the request of the public prosecutor (decisions 4, 5, 6 and 7) (s. 22-4 in conjunction with 65-1 and 158-2 StPO). If the injured person has *not* joined the proceedings by filing a claim for damages in adhesion to the criminal proceedings, he may request that a confirmation of the discontinuance of the preliminary examination is sent to him (s. 65-3 StPO). As in Austria, the civil claimant does *not* have to be informed of decision 9 to go ahead with the prosecution of the offender by indicting him.<sup>44</sup>

### *Practice*

The public prosecutor informs the injured person of a decision to drop the case by means of a standard form. The form states that a decision not to prosecute has been taken on the basis of section 22-2 StPO; that if the injured person wants to, he may ask for a review of this decision or start a subsidiary prosecution; that to do so, he must first join the proceedings as a civil claimant; and that if a subsidiary prosecution fails, he must bear all the costs of the proceedings himself. No further explanations are offered as to why the prosecution has been dropped. There is no pre-trial personal contact between the victim and the prosecutor in Liechtenstein and, even in sensitive cases, the prosecutor will not invite the victim to his office to explain why a prosecution has been dropped. A civil claimant who telephones the prosecutor asking for reasons is reminded of his right to view the files, so that he can find out for himself. An injured person who has not yet joined the proceedings may be granted special permission by the court to view the files, if he can show that this is necessary to enable him to exercise his rights to claim compensation, to ask for a reopening of the case, or for other reasons (s. 39 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*

As a general rule, the victim is only informed of the date and place of the main hearing of the offence committed against him if he has an active part to play in the proceedings. Summons are sent to the victim in his capacity of witness (s. 179 StPO), civil claimant (ss. 32-2-3 and 179 StPO), or private or public prosecutor (179 StPO). The writ of summons for the private prosecutor and the civil claimant must be handed to them in person, or to their representatives (37-2 StPO). In the summons, the civil claimant is reminded that if he does not appear, the proceedings will continue without him, and his claim will be read out from the file (ss. 32-2-3 and 179 StPO).

One exception to the general rule is found in section 257-1 StPO which provides that if it is doubtful that the injured person (who has *not* constituted himself as a civil claimant, but who has grounds to do so) is aware of the occurrence of criminal proceedings, he must

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<sup>44</sup> It is striking that the civil claimant must be informed of a decision to directly summon the offender before the judge sitting alone without a preliminary investigation (decision 2) but not of the decision to indict him (decision 9).

be informed of this, to enable him to make use of his right to join the proceedings as a civil claimant (s. 257-1 StPO).

*Restitution, compensation, legal assistance, and advice*

When the injured person is questioned (by the examining magistrate) as a witness, he must be asked whether he wants to join the criminal proceedings as a civil claimant (s. 124-1 StPO). Although the court must ensure that the injured person who has not yet joined the proceedings as a civil claimant is invited to the main hearing, it does not have a further explicit duty to inform the victim of his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance, and advice. In practice, after an injured person has testified in court, the judge will ask him whether he has any civil claims he would like the criminal court to decide on.

*Outcome*

A copy of the verdict and the grounds on which it was reached must be made for the private prosecutor or civil claimant, to enable them to make an appeal (s. 218-3 StPO). No mention is made of the subsidiary prosecutor, even though he, too, is entitled to make an appeal (see § 3.3.1 under *appeals*).

## 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 cases involving physical injuries suffered as a consequence of the offence, the injured person must be examined by a doctor who gives an expert opinion on the nature and severity of the injuries (s. 85 StPO). If the injured person is a female, she should, if possible, be examined by a female doctor (s. 86 StPO). The doctor's report is included in the files forwarded to the prosecuting authorities.

Any information about the injuries and losses suffered by the victim that the police give to the prosecuting authorities is passed to them with the aim of substantiating the charges against the accused, and not of helping the victim in his pursuit of compensation from the offender.

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

*Legislation*

It is up to the civil claimant to provide the court with all the necessary information about his need for compensation. To that end, he may give all material in support of his claim to the examining magistrate (s. 32-2-1 StPO) and put questions to the accused and the (expert) witnesses during the main hearing, or speak out to make other remarks (s. 32-2-3 StPO). At the end of the hearing, he may address the court to present and substantiate his claims (s. 32-2-3 StPO).

Information about compensation or restitution made by the offender or any genuine effort to that end is provided by the (legal representative of the) defendant.

### *Practice*

In practice, civil claimants are often ill-prepared and incapable of handing to the court the appropriate documentation as evidence of their claim. This may be due in part to the fact that, although a speedy trial is considered desirable as part of an appropriate reaction to the criminal offence, more time may be required to establish the extent of the damages, especially where physical injuries and long term effects are concerned. However, a criminal trial is not adjourned just to enable the civil claimant to organize his case. Another reason is that the injured person is offered very little personal support during the run-up to the main hearing. Unless he consults a lawyer, there is really no-one to help him prepare his compensation claim.

## **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.*

In principle, the decision to prosecute is not a discretionary one. The prosecutor may only certain charges in case of cumulative charges on the basis of section 21-2 StPO, or ask the examining magistrate to end the proceedings on the basis of section 42 StGB because the offence does not justify punishment.

One or more of several charges may only be dropped if it does not seem likely that this will substantially effect either the sentence, or the detention measures (*sichernden Massnahmen*), or the legal consequences following from the judgement (s. 21-2-a StPO).<sup>45</sup> The decision to drop the prosecution of an offence in this way means that the victim of the offence loses his chance of claiming damages in adhesion to the criminal proceedings. The same can be said for cases in which the examining magistrate ends prosecution on the basis of section 42 StGB. Unfortunately, because this does not effect the victim's right to claim compensation via the civil court, the authorities do not feel that they are in any way curtailing the victim's opportunities for claiming compensation. The loss of the adhesion procedure is clearly not a legal consequence in the sense of section 21-2-1 StPO. In practice, suing the accused in civil court requires much additional effort from the victim. Furthermore, a conviction by the criminal court of the accused for the offence concerned helps substantiate the victim's claim for compensation, even if the claim is heard by a civil court. In a formal sense, the Liechtenstein prosecutor and examining magistrate may not curtail the victim's opportunities of claiming compensation when refraining from, or ending, prosecution on the basis of section 21-2 StPO or 42 StGB but, in a practical sense, the position of the victim is certainly affected.

Where offences such as theft, embezzlement, fraud, larceny, profiteering, fraudulent

<sup>45</sup> Section 21-2-b also allows the prosecutor to refrain from prosecution of one or more of several offences if the accused has been extradited to a foreign authority and the sentences and measures he could expect in Liechtenstein are negligible compared to what awaits him abroad.

bankruptcy and the receiving of stolen goods are concerned (s. 167-1 StGB), Liechtenstein has copied the construction of the *Tätige Reue* – ‘manifested repentance’ – found in Austria. An offender who has either fully compensated the damage caused by his offence, or who has committed himself by contract to do so within a certain period of time, may no longer be punished as long as these arrangements were made before the authorities became aware of his guilt (s. 167-2 StGB).<sup>46</sup> Although the (commitment to make the) payment may be made at the insistence of the injured person, the offender may not have been forced to do so. ‘Manifested repentance’ is also recognized if the offender turns himself in to the police and leaves a deposit covering the damages with the authorities for the injured person (s. 167-3 StGB). Likewise, if the offender has made a serious effort to compensate the damage, and the (commitment to make the) payment is eventually made in his name by a third person or an accessory to the offence, he may not be punished either (s. 167-4 StGB). In practice, *tätige Reue* is rarely encountered. Even in prosperous Liechtenstein, offenders who break into houses or commit theft rarely have money of their own to make good the losses suffered by the victim.

(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 private prosecution referred to in guideline B.7 of Recommendation R (85) 11, which allows the victim to prosecute the offender if the public prosecutor has decided not to do so, is called subsidiary prosecution in Liechtenstein. The right of the civil claimant to act as subsidiary prosecutor was described earlier in § 5.5. In practice, this right is almost never exercised. One reason may be that because the Liechtenstein criminal justice system is not overloaded as in many other countries, and because there is (therefore) no policy of diversion, most victims will find that, if at all feasible, prosecution is undertaken by the public prosecutor.<sup>47</sup> The financial risks that the subsidiary prosecutor runs are also a deterrent, as well as the effort involved in pursuing a subsidiary prosecution.

## 7.2 The Court and Compensation

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

The criminal court must, by virtue of its office, take into account the damage caused by the offence and any attendant circumstances that are important in relation to the civil consequences of the offence (s. 257-1 StPO).<sup>48</sup> The criminal court may order compensation by the offender to the victim if the victim, or, to be more precise, the injured person, has joined the proceedings as a civil claimant (see § 5.3). It is not possible to award compensation to an injured person who has not done so.

<sup>46</sup> Section 167-2 LStGB is an identical copy of section 167-2 AStGB. The offences for which ‘manifested repentance’ may be pleaded listed in the respective sections 167-1 are almost the same, too.

<sup>47</sup> ‘In Liechtenstein wird der Staatsanwalt eher in Zweifel anklagen, und der Richter wird in Zweifel freisprechen.’  
Quote of B. Marxer, President of the court of first instance.

<sup>48</sup> Compare the commentary to the comparable section 365-1 AStPO, see Chapter 3.

If an object belonging to the civil claimant is found among the possessions of the accused, an accomplice, or accessory, or is found in a place where it was left in storage by one of these people, the criminal court should order that the object is returned to the civil claimant when the judgement enters into force. With the explicit permission of the accused, the object may also be returned before the judgement enters into force (s. 259-1 StPO). If an object belonging to the injured person is not required as evidence in the case, it may already be returned to its rightful owner by the examining magistrate in the pre-trial stages, if the accused and the public prosecutor agree to this (s. 259-2 StPO). If there are any problems regarding the rightful ownership of an object, for example if a third person has legally acquired it, or the injured person cannot sufficiently substantiate his right to the object, the claim for restitution is referred to the civil court (s. 260 StPO).

If an object can no longer be returned, or if compensation for damages suffered or for loss of earnings, or reparation for insults, are involved, the compensation or reparation must be awarded in the verdict, if the amount as well as the person to whom it is due can be reliably established (s. 261-1 StPO). If there are grounds to suspect that the injured person is claiming more than he is due, the court may moderate the amount after taking all circumstances into account, if need be following an estimation by experts (s. 261-2 StPO).

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

Compensation awarded in the course of the criminal proceedings is a decision taken on a matter of civil law, that may be awarded in addition to a penal sanction. Regarding the ties between compensation and the penal sanction, it should be noted that compensation may only be awarded if the accused is convicted (s. 258-1 StPO). Also, compensation that has already been paid or serious attempts to do so may serve as a factor in mitigation of the sentence (s. 34-14 and 34-15 StGB). The civil claimant is free to take his claim to the civil court if he does not agree with the amount of compensation awarded him by the criminal court (s. 263 StPO).

*(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.*

### *Legislation*

Orders and prohibitions that seem appropriate in preventing the offender from committing further criminal acts may be attached as conditions (*Weisungen*) to a deferred or suspended sentence, or to a release on probation (s. 51-1 in conjunction with 50-1 StGB). Such a condition may be that the offender pays compensation to the injured person, but he may also be ordered to pay compensation to the best of his means if the completion of the sentence is necessary to prevent others from committing criminal acts (51-2 last sentence StGB).<sup>49</sup> This suggests that the payment of compensation to the injured party may be ordered as a general as well as a special deterrent.

<sup>49</sup> 'Den aus seiner Tat entstandenen Schaden nach Kräften gutzumachen, kann dem Rechtsbrecher auch dann aufgetragen werden, wenn das von Einfluss darauf ist, ob es der Vollstreckung der Strafe bedarf, um der Begehung strafbarer Handlungen durch andere entgegenzuwirken.'

*Practice*

Compensation is sporadically awarded as a financial condition to a deferred or suspended sentence, or to probation, but just as with compensation awarded following a claim made in adhesion to the criminal proceedings, the precise extent of the damages must be known. Only if the injured person can provide sufficient evidence to prove the amount of damages he has suffered can compensation be awarded as a financial condition.

**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 decision on a matter of civil law. The verdict of the criminal court is enforceable (s. 264 StPO), but the civil claimant is not assisted in the collection of the money. He must enforce payment through the civil court.

Payment up front of compensation, as provided for (at least in theory) in Austria by section 373a AStPO is not provided for in Liechtenstein.

**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.*

*Police*

Recruits of the national police force receive their basic training in Switzerland, at the *Innerschweizer Polizeischule*. This is a police academy set up by three of the 26 Swiss cantons. The course in Switzerland lasts fifteen months, and includes practical as well as theoretical training. The Penal Code of Switzerland differs from the one in Liechtenstein,<sup>50</sup> and, upon returning home, the newly qualified officers learn the Liechtenstein way of doing things by working for a certain period of time in each of the three departments of the national police. The force also offers its own follow-up courses. The national police do not offer any courses that are specially about victims. Victims are not seen as forming a separate category that requires specific attention, but more as part of the general public. If the Liechtenstein police receive any specific training on dealing with victims, then this must be provided by the Swiss police academy.<sup>51</sup> During their career, the national police officers are regularly assessed. Again, dealing with victims is not a separate point in the assessment, but incorporated in the appreciation of the way the officer deals with citizens in general.

Municipal police recruits need only follow a short course in Liechtenstein to prepare them for their duties.

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<sup>50</sup> Although each Swiss canton has its own Code of Criminal Procedure, there is a Federal Penal Code. See Chapter 23.

<sup>51</sup> See Chapter 23.



*Prosecutors, judges and lawyers*

All Liechtenstein legal professionals (prosecutors, judges, lawyers) must gain a law degree from a foreign university before commencing practical training in Liechtenstein for a minimum of two years. This training must include six months' court work (*Gerichtspraktikum*) and six months' administrative work (*Verwaltungspraktikum*). After two years' practical experience candidates may take the lawyer's examination. This is a part written, part oral exam in which the candidates' knowledge of all fields of Liechtenstein law is tested. Only after this test has been passed does the candidate choose whether he or she wants to become a judge, prosecutor, or lawyer. No training is given on how to deal with victims of crime.

**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.*

*Legislation*

There is very little by way of protective legislation in relation to the questioning of the victim/witness in Liechtenstein. Whereas the Austrian Code of Criminal Procedure provides that victims of sexual offences have the right to refuse to answer questions about their intimate private life or about details of the offence which they cannot bear to describe (s. 153-2 AStPO); that a confidant may be present during the questioning of the victim/witness (s. 162-2 StPO); that children may be questioned by a child expert (s. 162a-2 AStPO); and that vulnerable witnesses may be questioned through an audio-/video-link (162a-1 StPO), none of these measures have been adopted by the Liechtenstein Code of Criminal Procedure. Section 197 LStPO does allow the presiding judge to remove the accused from the courtroom during the questioning of a victim/witness.

*Practice*

Whether this lack of legislation is something to be regretted is open to discussion. In Austria and England, protective legislation has so far not been able to prevent victims of sexual offences from being made to answer questions about their intimate private life or their past sexual history (see § 8.2 of Chapters 3 and 7, respectively), and having children questioned by a child expert may actually cause more problems than it solves (see § 8.2 of Chapter 18 on Norway). In Liechtenstein, although not compelled to do so by law, the police do ask a female victim of a sexual offence whether she wants to be questioned by an officer of the same sex. Within the criminal police department, there are two officers who are specialized in dealing with sexual offences, and one of these is female.<sup>52</sup> If at all possible, this female officer is called up, if necessary from her day off. Children who are questioned by the police are allowed to have their parents with them if they want.<sup>53</sup> Finally, the Liechtenstein rule of thumb that anything is allowed that is not expressly forbidden by law (see § 2) allows the

<sup>52</sup> The two women who were in training in November 1997 were also to specialize in sexual offences.

<sup>53</sup> Information about questioning by the police provided by R. Kindle of the National Police Force, 19 November 1997.

court to immediately install a video-link for questioning a vulnerable witness if this is called for in a particular case.<sup>54</sup>

In court, the judges do not wear robes and the questioning atmosphere is not unduly harsh. Yet victims who have to testify in court during the main hearing as a witness are still often uncomfortable and nervous. There is no opportunity for a witness to see the courtroom beforehand to acquaint himself with the surroundings.

### 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*

As a rule, the main hearing is open to the public, unless the court decides to hold the trial behind closed doors for reasons of morality or public order. In that case, only the injured person and two confidants indicated by the prosecutor and the accused person are admitted into court (s. 181-1 StPO). There are no further provisions or standard procedures aimed at protecting the privacy of the victim, but again things can be improvised depending on the individual circumstances of a case. The judge could, for instance, allow the victim/witness to testify without the presence of the accused if this proves necessary. In that case, the legal representative of the accused remains in the courtroom during the questioning.

#### *Practice*

Liechtenstein is such a small country that it is almost impossible to keep people from guessing the identity of the victim in a particular case, even though the press does not generally publish the names of either the accused or the victim.

*(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 need to create special instruments and procedures to provide victims with protection against intimidation and the risk of retaliation by the offender has never been perceived in Liechtenstein. If such protection is necessary in the pre-trial stages, the victim can apply for an injunction based on civil law. Following a conviction, the criminal court may attach a condition to a deferred or suspended sentence, or a release on probation that the offender avoids a particular house, place or contact (51-2 StGB).

<sup>54</sup>

A comparable practical solution was found for questioning under cover agents. Information provided by Judge L. Hagen, 20 November 1997.

## 9 CONCLUSIONS

The Principality of Liechtenstein is a micro-state of no more than 160 square kilometres with only 31,389 inhabitants. Its criminal justice system is heavily inspired by the Austrian system, and the formal position of the victim in Liechtenstein is to a large extent a copy of the Austrian situation. Much depends on whether the victim chooses to exercise his participatory rights: only if he constitutes himself as a civil claimant, or adopts another active role, does he have a right to information and notification. There is no particular interest for the position of the victim. The women's movement has recently gathered momentum and a women's shelter has now been established, but as yet there is no active victim support movement in Liechtenstein. Neither is there a state compensation scheme.

Implementation of the body of thought of Recommendation (85) 11 in Liechtenstein is nothing to write home about. In fact, Liechtenstein is among the jurisdictions with the weakest score in this respect. There is no legislative duty for the police to inform the victim about the possibilities of obtaining assistance, practical and legal advice or compensation from the offender although the police do contend that victims are in practice informed of such matters upon making a report. Only victims who have joined the proceedings as a civil claimant are likely to receive any information on the progress of their case. Again, only if the victim has an active part to play in the proceedings is he informed of the date and place of the main hearing. Compensation may be claimed in adhesion to the criminal proceedings, but only if the precise extent of the damages is known. Enforcement is left entirely to the victim. Members of the Liechtenstein national police force receive their basic training in Switzerland. The national force offers its own follow-up courses but these do not include any training on dealing with victims of crime. Victims are not seen as forming a separate category requiring special attention, but more as part of the general public. Prosecutors, judges and lawyers generally gain their law degree in Austria, Germany or Switzerland because Liechtenstein does not have its own university. None of these legal professionals receive any training on dealing with victims of crime, either. Regarding the questioning of the victim, the judge may order the accused to be removed from the courtroom during the testimony of a victim/witness. Other than that, there are no special provisions for the treatment of the victim although an ad hoc solution such as the installation of a video-link is always possible given the Liechtenstein rule of thumb that anything is allowed that is not expressly forbidden by law. As far as the protection of the privacy of the victim is concerned, in such a tiny jurisdiction as Liechtenstein it is almost impossible to stop people from guessing the identity of the victim in a particular case even though the press does not generally publish the names of either the accused or the victim.

# Supplements

## ABBREVIATIONS

AStPO	-	Austrian Code of Criminal Procedure
EEA	-	European Economic Area
C.	-	Constitution
EEA	-	European Economic Area
EFTA	-	European Free Trade Association
GOG	-	<i>Gerichtsorganisationsgesetz</i> , Act on the Court Organization
GVLr	-	<i>Gesamtverzeichnis liechtensteinischer Rechtsmittel-entscheidungen</i>
INFRA	-	<i>Informations- und Kontaktstelle für Frauen</i> , Point of Information and Contact for Women
JGG	-	<i>Jugendgerichtsgesetz</i> , Juvenile Court Act
LES	-	<i>Liechtensteinische Entscheidungssammlung</i>
LGBI.	-	<i>Landesgesetzblatt</i>
LStPO	-	Liechtenstein Code of Criminal Procedure
No.	-	number
op.cit.	-	as cited above
p.	-	page
pp.	-	pages
s.	-	section
ss.	-	sections
StGB	-	<i>Strafgesetzbuch</i> , Penal Code
StPO	-	<i>Strafprozeßordnung</i> , Code of Criminal Procedure
StRAG	-	<i>Strafrechtsanpassungsgesetz</i> , Criminal Law Amendment Act
UN	-	United Nations

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# Chapter 15

## Luxembourg

### SCENERY

Visitors to the Grand Duchy will confirm that Luxembourg essentially remains a quiet country with a dreamlike feeling about it. It has great scenic beauty with rolling farmlands and woodlands. The inhabitants of Luxembourg have been able to combine French charm and 'savoir vivre' with German efficiency and straightforwardness, and turned it into a very pleasant and friendly way of living. They have held their own identity throughout history, maybe because they learned early on to manoeuvre carefully between neighbouring giants and got it their way in the end.

The Grand Duchy of Luxembourg is led by the dynasty of the Grand Dukes of Nassau-Weilburg. It lies tucked away between Belgium, France and Germany and is 51 miles long and 36 miles wide.<sup>1</sup> The every day spoken language in this small territory is the Lëtzebuergesch, which is the main symbol of the national identity. It is taught in schools and in language courses for the resident foreigners. However, Franco-German bilinguals are a typical feature of its social structure. Both French and German are used by the media and in political and religious life, but French is the official language of the administration, legal system, and parliament. This peculiar language situation is a direct result of the size of the country and its historic associations with France, Germany and Belgium. When going abroad, which is after all very nearby, Luxembourgers are forced to speak other languages, their own is not understood elsewhere. And many of them, especially in the capital, master the English language as well, which makes them virtually quadri-lingual.

The written history of Luxembourg started in the year 963, when Sigefroid Count of the Ardennes had a castle built, named Lützelburg, on the territory of the present-day capital of Luxembourg. This castle was the origin of a town, which developed into a formidable fortress, and is known by the name of 'Gibraltar of the North'. Its inhabitants were granted civil liberties in 1244. In the 14<sup>th</sup> century, four members of the House of Luxembourg<sup>2</sup> became Emperors of the Holy Roman Empire. However, this important position did not last. After a long period of foreign rule by the Spanish, French, Austrians and Dutch, Luxembourg regained its sovereignty albeit with a loss of territory. The Congress of Vienna (1815) settled

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<sup>1</sup> This amounts to approximately 80 by 60 km. The territory is divided into two clearly defined regions: the Eisléck in the north and the Good Country in the centre and the south. The Eisléck is part of the Ardennes mountains and covers one-third of the territory.

<sup>2</sup> The four emperors were Henri VII, Charles IV, Wencelas and Sigismund.

the destiny of the country by raising it to the rank of Grand Duchy. In 1867, Luxembourg was declared perpetually neutral, and the great powers agreed to guarantee and protect the neutrality of the Grand Duchy of Luxembourg. Nevertheless, it was occupied twice by German troops during the two World Wars. It is not widely known that the people of Luxembourg had a very strong resistance movement and registered the third highest percentage of human losses, after the Soviet Union and Poland.

After the Wars, Luxembourg's rise to prosperity began. Its important coal and steel industry in the southwestern corner of the country flourished and it succeeded in attracting the seat of the European Community for Coal and Steel in 1952. Luxembourg is a true European country and its residents really consider themselves to be European citizens. They consider Europe to be essential to their well-being. Luxembourg also houses many European institutions, such as the general Secretariat of the European Parliament, the European Court of Justice and the European Investment Bank. The importance of the European institutions to the Grand Duchy of Luxembourg notwithstanding, the real force behind its flourishing economy is the private service sector with its many banks and trusts. Because of Luxembourg's famous banking secrecy and fiscal legislation, there are now more than 220 banks and some 900 investment trusts which play a major role in the international financial world. At present, Luxembourg has the highest income per capita in Europe. It is the richest country in Europe and the third richest in the entire world.

In its territory of 999 square miles lives a population of 400,900 inhabitants, of which some 85,000 live in Luxembourg City.<sup>3</sup> The country's prosperity has attracted a relatively large number of foreign residents, mostly from within the European Union,<sup>4</sup> who migrated to work in Luxembourg's booming service sector and represent approximately one-third of the population. This is the highest proportion of foreigners of any EU country. Also more than 50,000 foreigners cross the border each day to work in Luxembourg. An intelligent policy of integration has thus far prevented friction between the various communities.<sup>5</sup>

Luxembourg's economic structure and geographical position have necessarily led to a close cooperation with other countries, and particularly with Belgium and the Netherlands with whom it forms the Benelux (an economic union) since 1960. The Grand Duchy also forms a monetary union with Belgium; the Luxembourg and the Belgian franc share the same rate and can be used in both countries. The Grand Duchy's cooperation with other nearby countries does not end here. It is too small to have its own university and students have to go abroad. This also explains the lack of handbooks on the Luxembourg criminal justice system. The first four semesters of a limited number of studies (not law) can be followed at the local University Centre in Luxembourg City, after which they have to go to a foreign university. The university centre does not offer legal studies. Students who want to study law, and in particular criminal law, usually go to a French-speaking Belgian university: firstly because its criminal justice system has the greatest resemblance with the Belgian legal system, and secondly the official judicial language in Luxembourg is French.<sup>6</sup>

<sup>3</sup> 1994 Statistics, see [http://www.restena.lu/gover/documents/population\\_e.html](http://www.restena.lu/gover/documents/population_e.html).

<sup>4</sup> The Belgians, Germans and French constitute the largest groups, closely followed by the Portuguese and the Italians.

<sup>5</sup> *A survey of Luxembourg*, [http://www.restena.lu/gover/documents/population\\_e.html](http://www.restena.lu/gover/documents/population_e.html)

<sup>6</sup> See <http://www.restana.lu/gover/documents/...>; and Marco Polo travel guide, *Luxembourg*, Standaard Uitgeverij, Antwerpen, 1996, pp. 5-17.

## PART I: THE LUXEMBOURG CRIMINAL JUSTICE SYSTEM

### 1 INTRODUCTION

The Grand Duchy's legislature is, and always has been, an intelligent copier of foreign legal provisions and a prudent follower of criminal law reforms abroad.

The legislature recognized that it was not in the country's interest to create a brand new legal system. They felt it was much less important to excel in new and original ideas than to establish wise rules which correspond with existing needs. The 19<sup>th</sup> century legislature, for instance, wanted to change the criminal justice system and looked for a Penal Code it could copy and adapt to local needs. The legal culture of that system had to be familiar, as well as the country's customs and institutions. Furthermore, Luxembourg is a very small state without a university and the choice for a foreign judicial system would also have to be determined by the accessibility of the universities in that state, as well as that of its legal doctrine and case law. Thus, the choice was soon narrowed down to the French, German or Belgian Penal Code. Copying the French system was out of the question at that time in history – the year 1814 marked the independence of the Grand Duchy from France – and the German system would constitute a breach with Latin legal traditions. The legislature eventually chose the Belgian Code as a model. The Belgian Penal Code has Romanistic origins (the Napoleonic Code) but was newly adapted to modern and humanist standards.<sup>7</sup> Another advantage was that the two countries already shared the same Code of Criminal Procedure of 1808 (*Code d'instruction criminelle*) and a unity in criminal law and procedure would be safeguarded. In the 20<sup>th</sup> century, the attitude of the legislature towards law reforms has remained largely untouched by time. The legislature will still leave experiments and inventions to other jurisdictions, and only if new measures or legal provisions have proven to be effective will Luxembourg follow. Mediation is a good example of the legislature's prudence. Until recently, contrary to surrounding states, the subject of mediation was not addressed in the Grand Duchy. For a long time, the legislature was not convinced of the necessity to introduce mediation, nor of the success of mediation schemes elsewhere. Recently, in March 1999, the first mediation centre was opened. Several years after its neighbours, the legislature felt it was time to copy the success of other laws on mediation and issued a Bill, which is expected to be promulgated shortly. At the same time, this illustrates that great innovations to improve the position of victims in criminal law and procedure will not originate in Luxembourg.

Before discussing the criminal justice system in depth, it is useful to discuss some statistical information to get an idea of the victimization rate and the burden of the criminal justice system. If one studies the crime statistics, it is immediately clear that Luxembourg still has a low crime rate even if one considers the number of residents. In the following summary not all crimes are included, for example certain types of theft, e.g. the number of car thefts and thefts from cars and coin operating machines, are left out.

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<sup>7</sup> L. Schaus, *Contribution à l'étude du droit pénal luxembourgeois*, Larquier, Brussels, 1954, pp. 10-11. For more specific differences between the Belgian and Luxembourg's Penal Code, see pp. 13 ff.



*Annual Crime Summaries (1994 - 1998):<sup>8</sup>*

<b>crime</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>
<b>homicide</b>	0	1	2	2	2
<b>rape</b>	24	30	46	43	45
<b>domestic violence</b>	384	345	218	297	311
<b>child abuse</b>	238	134	114	140	113
<b>robbery</b>	58	57	60	65	48
<b>arson</b>	69	3	1	11	11
<b>burglary offices</b>	178	185	218	161	167
<b>burglary residential</b>	413	413	319	411	426
<b>theft</b>	95	56	23	28	50
<b>felony assault</b>	177	174	138	105	121
<b>minor assault</b>	446	496	351	239	277
<b>pick pocketing</b>	3	1	1	2	3
<b>purse snatching</b>	7	1	0	4	1
<b>total arrests</b>	3,973	4,474	4,679	4,639	4,069

## 2 GENERAL REMARKS AND BASIC PRINCIPLES

Today the Luxembourg criminal justice system still greatly resembles the Belgian one. The Napoleonic *Code d'Instruction Criminelle* is still in force in both jurisdictions. The revised Belgian version of the Napoleonic Penal Code (1867), was implemented in almost identical form twelve years later in Luxembourg (1879). Apart from having the same origins, the reforms are also very similar, although Luxembourg is usually a few years behind (see § 1). As said before, Luxembourg does not have its own university or law faculty. The resemblance can therefore be illustrated on a very practical level by the fact that most law students coming from the Grand Duchy who would like to practice law go to study in Belgium, usually at the French-speaking universities. The reason for this is that after a Belgian criminal law study, the intricacies of the Luxembourg legal system are easier to understand and fewer new elements have to be learned than if one had studied in France or Germany.

Because the criminal justice systems of Luxembourg and Belgium are very similar, the essential elements will only be briefly addressed, unless they differ from the Belgian system (see Chapter 4).

<sup>8</sup> The Statistical information is based on UCR and CRIMES data. See <http://www.chico.ca.us/police/statinfo.html>.

## 2.1 Basic Principles

The basic principles governing the criminal justice system are the same as those governing the Belgian system. In short, the pre-trial stage is governed by the expediency principle, whereas the trial stage is governed by the principles of orality and immediacy (see Chapter 4, § 2.1). More generally speaking, the criminal proceedings are characterised by the search for the material truth.

## 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

### 3.1 Investigating Authorities

The investigating authorities consist of the gendarmerie (the military police) and the national police. Today there is hardly any difference between the two public order forces. The gendarmerie (*Königlich Grossherzogliche Gendarmerie Kompagnie*) was the first national police force, created in 1863. Later, in 1903, a brigade for criminal investigations was created. This is currently referred to as the judicial police force (*service de police judiciaire*).<sup>9</sup> Nowadays, the gendarmerie is a general police force with national authority, and placed under direction of the Ministry of Defence and the Ministry of Justice. The latter has authority over its public order and judicial investigative activities.<sup>10</sup>

The police force (*corps de la police*) was created in 1930.<sup>11</sup> The communities (*communes*) were given the right to protect their citizens. The 1930 Act fixed the required number of inhabitants required in order to be able to create a local police force, working under the guidance of the mayor. After the second World War, the members of the police were given a military ranking (*statut militaire*) and placed under the authority of the Ministry of Defence, just like the gendarmerie.<sup>12</sup> As a result, three Ministries have authority over the police, each with distinct and separate police functions. The Defence Ministry is responsible for the organization, administration, formation and discipline of the police. The Minister of the Interior is responsible for the administrative police and the Minister of Justice for all judiciary police activities. Since 1980, the police have had a nationwide authority to perform their administrative functions. Since 1989, the police are empowered to carry out their judicial police functions in every part of the Grand Duchy's territory.<sup>13</sup>

The gendarmerie and the police together consist of approximately one thousand members. As members of the judicial police (*police judiciaire*) they act under the direction of the prosecution service and are supervised by the chief public prosecutor (*Procureur Général -s.* 9 CCP). The judicial police are, moreover, subject to the control of the judicial council of the court of appeal (*chambre du conseil de la cour d'appel*, s. 9-1 CCP). It is the duty of the police to ascertain the perpetration of crime, to collect evidence and to search for perpetrators, as long as no official inquiry has been opened by the public prosecutor or the examining magistrate (s. 9-2 CCP). During such an inquiry, the police act under the supervision of the courts of investigation. The investigative courts include the examining magistrates and the

<sup>9</sup> Act of 29 May, 1992.

<sup>10</sup> Act of 23 July, 1952.

<sup>11</sup> Act of 29 July, 1930.

<sup>12</sup> Act of 23 July, 1952.

<sup>13</sup> Act of 16 June, 1989.

judicial council.<sup>14</sup> In practice there is little difference between the two police forces.<sup>15</sup> For training of the police, see § 8.1.

### 3.2 Prosecuting Authorities

The prosecution service (*ministère public*) is primarily involved with the investigation and prosecution of crimes. It is organised in a hierarchical manner. Furthermore, the prosecution service functions as an indivisible body. This means that public prosecutors can take over each others' duties without legal consequences. Lowest in the hierarchy are the public prosecutors at the police courts for misdemeanours (*substituts*), followed by those working at the courts of first instance (*procureurs d'Etat*). Highest in the hierarchy are the prosecutors competent to perform their tasks before the courts of appeal, the Attorney Generals (*procureurs général d'Etat*). Public prosecutors are competent to start criminal proceedings and to take recourse to legal remedies. In addition, they are responsible for the order of the criminal proceedings.

The public prosecutor can be directly or indirectly notified that a crime has occurred. Victim and any other person can report an offence directly to the public prosecutor, or the victim may file a complaint. The public prosecutor can also be notified indirectly by the police after the victim or others have informed the police of a crime. Prosecution is started either directly by the public prosecutor following police investigations, or on the request of the public prosecutor to the examining magistrate to open the preliminary investigation. The prosecution service usually starts public action, however, it does not have a monopoly on criminal proceedings. Public action can be set in motion by magistrates, certain civil servants and the victim (s. 1 CCP, see § 5.4). However, public prosecutors are not obliged to prosecute each offence that has come to their knowledge. Although there are no legal provisions in which this is laid down, in practice the expediency principle (*principe d'opportunité*) governs the criminal proceedings (see §§ 2.1 and 6.1, B6).

For training of public prosecutors and judges, see § 8.1.

### 3.3 Judiciary

As in Belgium, in Luxembourg a distinction exists between the members of the judiciary, and the courts, competent during the pre-trial or trial stage. Before the trial the examining magistrate and the judicial council are empowered to act. Examining magistrates are responsible for the judicial investigation of more serious offences. They collect clues and evidence against and in favour of the suspect, visit the scene of the crime, conduct the hearings of the parties and witnesses, and appoint experts if necessary. The examining magistrate is also the one who decides whether the suspect has to be kept in preventive custody. Except for offences in which the offender has been caught red handed (*in flagrante delicto*), the examining magistrate is only empowered to investigate the case after he has been requested to do so (*la saisine*) by the public prosecutor or the civil claimant (*plainte avec constitution de partie civile*). Unlike in Belgium, where the pre-trial stage is completely secret, the presence of the victim (civil claimant) is allowed during preliminary hearings (s. 81 CCP). In addition, the parties may request that certain investigative acts be carried out by the examining magistrate

<sup>14</sup> See the official Luxembourg web sites of the gendarmerie and police: <http://www.pt.lu/provider/gie/> and <http://www.pt.lu/provider/police/>.

<sup>15</sup> In the new proposals for reform, there will be only one police force in Luxembourg.

(see § 5.3).

The judicial council (*chambre du conseil*) exists both on the level of the court in first instance and the court of appeal. The judicial council is a pre-trial court and is composed of three judges. After the examining magistrate has finished his judicial investigations, he will hand the legal file over to the public prosecutor who will send the file to the examining council. The judicial council does not decide on the guilt or innocence of the accused. It is seized by the examining magistrate to determine whether there is enough evidence to bring public action against the accused. If the judicial council is of the opinion that the facts do not constitute a crime, or if the suspect is not caught, or if there is not enough evidence, it declares that the case should be dismissed (*ordonnance de non-lieu*) and orders the release of the suspect from preventive custody and decides on the restitution of goods (s. 128 CCP).<sup>16</sup> If the crime is a misdemeanour, the accused is sent immediately to the police court (s. 129 CCP). On the other hand, if the crime is of a more serious nature, the case is referred to the district court (s. 130 CCP).<sup>17</sup>

*Competence of the courts:*

<b>crime category:</b>	<b>misdemeanours: (contravention)</b>	<b>lesser felonies: (délits)</b>	<b>serious felonies: (crimes)</b>
<b>court in first instance:</b>	police courts	correctional chamber of the district court	criminal chamber of the district court
<b>lodge appeal with:</b>	correctional chamber of the court of first instance	correctional chamber of the court of appeal	criminal chamber of the court of appeal

The organization of the trial courts is determined by the seriousness of the crime. The jurisdiction of the courts is based on the tripartite classification of offences. The least serious crime is the misdemeanour (*contravention*), followed by the less serious crimes (*délits*) and the serious felonies (*crimes*). The court competent to judge misdemeanours is the police court (*tribunal de police*) presided over by a single judge. There are three such courts in Luxembourg City, Esch/Alzette and Diekirch. Secondly, the correctional chamber of the district court (*tribunal d'arrondissement* – ss. 10-31 AOJ) is competent to deal with the middle group of crimes. Thirdly, the criminal chambers of the same court sentences all serious felonies. Trials in the district court are presided over by a panel of three judges. Luxembourg has only two legal districts, Luxembourg and Diekirch, and thus the two district courts situated here. To take recourse to a legal remedy against a decision by the police court, one has to go to the correctional chamber of the district court. For judgements of the latter court, an appeal should be lodged with the correctional chamber of the court of appeal. Appeals in felony cases have to be lodged with the criminal chamber of the court of appeal (*cour d'appel*). The courts of appeal are part of the Superior Court of Justice (*Cour Supérieure de Justice*, ss. 32-47 AOJ), which also consists of the Supreme Court (*Cour de Cassation*). All criminal proceedings pending before

<sup>16</sup> In general, the judicial council will hear requests concerning the restitution of goods. The accused and the civil claimant can demand the restitution of goods seized by the criminal justice authorities (s. 68 CCP).

<sup>17</sup> J. Bour, *Cours de droit pénal pour les assistantes sociales*, November 1997, p. 14.

these high courts are presided over by a five-judge panel. Finally, a Constitutional Court was established in July 1997. This court has to make sure that laws are in conformity with the Constitution. The Constitutional Court reviews laws only after a prejudicial questions by a member of the judiciary.

According to the Act on the Judiciary,<sup>18</sup> no specific criminal courts exist, or court-sections which deal with exclusively with criminal cases. The courts try criminal cases, civil and commercial cases. In practice, however, the internal organization of the different courts demonstrates some degree of specialization. Certain judges are more frequently in charge of criminal proceedings than others but they never exclusively try criminal cases.<sup>19</sup> Police court and district court judges are nominated directly by the Grand Duke of Luxembourg. Judges of all other courts are appointed by the Grand Duke after a recommendation of the Supreme Court (s. 90 Const.).

### 3.3.1 Criminal Proceedings

The criminal trial is opened by the president of the court, after which he calls the witnesses and experts. He then asks the accused about his identity and interrogates him on the facts. This is followed by an examination of the witnesses, experts and the victim. The parties involved are subsequently given the chance to present their views. The victim – in his role as civil claimant – or his lawyer may present the civil claim for damages. The defence counsel of the accused is given the chance to react to the accusations. Then the public prosecutor presents a summary of the case and the charge. Subsequently, the defence counsel may react and present his oral plea as to the question of guilt, the penalty and the civil claim for damages. The victim, however, does not have the right to react.

Judges play an active role in the fact finding. They may examine the parties and witnesses, call experts and visit the places where the offence has allegedly happened. Usually experts are appointed during the pre-trial stage and present their findings to the court. The court can summon any witness to appear in court whenever this is necessary to find out the truth. The need to hear witnesses requested by a party will be assessed by the court. In general, hearings are open to the public but can be held *in camera* (see § 8.3). The judgment itself is always given in public. There is no special procedure for sentencing. Judges will deliberate in chambers to arrive at a decision. For all offences, the Penal Code provides for a minimum and a maximum. The court has a discretionary power as to which sentence it imposes, as long as it is a sentence provided for by law. There are no sentencing guidelines or manuals.<sup>20</sup>

<sup>18</sup> In 1989, the Jury Court (*Cour d' assizes*) in which lay judges decide on serious felony cases, was abolished in Luxembourg. This decision was taken because there was no opportunity to appeal a decision by the Jury Court which was considered contrary to the principle of double layered jurisdiction. Another reason was that the jury did not give a reasoned decision. However, the most important reason was a very practical one: in Luxembourg it is very difficult to find an objective and impartial jury because the community is too small. In practice, it was often difficult to find members of the jury who did not know the accused in some way or other.

<sup>19</sup> J. Bour (1997), p. 11.

<sup>20</sup> L. Schiltz, 'Luxembourg', in: M. Sheridan, J. Cameron, *EC Legal systems. An introductory guide*, Butterworths, London, 1992, pp. 29-30.

### 3.4 Enforcement Authorities

The prosecution service is the main enforcement authority. For the enforcement of judgements, public prosecutors are assisted by social workers and probation officers to perform this task (see § 3.5 and § 7.3).

### 3.5 Probation Services

The probation service as such has no responsibilities towards the victim of crime. Their task is to assist the offender, to promote his physical and psychological health, as well as his rehabilitation by offering educational programmes, and social assistance.<sup>21</sup> The probation service functions within the central support service (*service central d'assistance social*) at the level of the prosecution service. This service consists of four psychologists and sociologists and twenty-five probation workers. Originally, it was only concerned with offenders. In 1994, however, a victim support service was added to the central service to give victims of crime moral and psychological support (see § 3.7). The victim support unit is primarily run by social workers.

### 3.6 Victim Services

The national victim support service (*Wäisse Rank Lëtzebuerg – Hëllef fir Affer vu Verbrochen*)<sup>22</sup> is also a member of the European Forum of Victim Services and a member of victim services in Germany, Austria and Hungary (*Weisser Ring*). Luxembourg's victim support service has the same organizational structure as the German 'mother' organization and has more than 1600 paying members. It was founded in June 1979 on the initiative of police officers. It provides information to victims and the volunteers provide a listening ear to all who telephone or come to the office. All activities are offered by volunteers and free of charge. The volunteers do not provide legal or psychological help to victims themselves but refer them to other services, and if necessary pay for them. Whenever a victim is seriously affected by an offence and is unable to afford legal assistance, Luxembourg Victim Support pays the sum needed for legal assistance. Financial support is also given if a victim has economic difficulties as a result of crime. Financial help is an important part of the philosophy of the *Weisser Ring* victim organizations. According to the president of the Luxembourg victim service, it is a core activity (*wesentliche Punkt*) of victim support.<sup>23</sup> In Luxembourg, the members pay their membership fees on an annual basis and the service receives funding from other sources such as legacies and fairs. Financial assistance to victims is paid out of these funds. Besides financial help, victim support volunteers accompany victims during the criminal proceedings, for instance during hearings or if they have to testify in court. Finally, Victim Support publishes several leaflets, the contents of which vary from general information for victims to the prevention of crime. The leaflets are printed in several languages, usually in Lëtzebuerg, German, French and English.

In 1997 and 1998, 27 victims were assisted.<sup>24</sup> This number appears to be very small,

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<sup>21</sup> Act of 9 January, 1984.

<sup>22</sup> Address: 84, Rue Adolf Fischer, L-1521 Luxembourg, tel: + 352 402040, fax: +352 499880.

<sup>23</sup> F. de Waha, in: *Wäisser Rank Lëtzebuerg, 15 Joer*, 1994, p. 7.

<sup>24</sup> Information supplied by Mrs. M.J. Steil, Victim Support organization Wäisse Rank, 11 November 1999.

however, only victims who have been assisted throughout the criminal proceedings are counted, not the victims who have just a few questions about the criminal proceedings, or who are referred to other services for specialized assistance (see § 3.7). Furthermore, the population of Luxembourg is also very small in numbers (see Annex to Chapter 2).

### 3.7 Other Victim or Social Services

There are numerous services for various types of victims.<sup>25</sup> Some of the services are created by public institutions whilst others are born out of private initiative. A very important public service is the victim support service. The Act on the Organization of the Judiciary (June 1994) introduced a service within the legal system (s. 77 AOJ). This service, referred to as a victim support service (*service d'aide aux victimes*, or *SAV*) is part of the central support service (*service central d'assistance social*, see § 3.5). It is situated inside the court in the capital and falls under the authority of the prosecutor's office (*Parquet Général*) and provides moral and psychological assistance. It has three staff members, a psychologist, a probation officer and a sociologist. In July 1998, the SAV was given its first budget of 3 million FLux. (EUR 74,368). Also situated at the courts are the reception and information centres of the courts (*Services d'Accueil et d'Information Juridique*). These services can be found in the courts of Luxembourg, Diekirch and Esch/Alzette.

In addition to general services such as Medical and Social Action (*Ligue Luxembourgeoise de Prévention et d'Action Médico-sociales*), SOS distress (*SOS Détresse*) and social services (*offices sociaux*), there are many private, non-profit organizations which provide victim support. Some support centres give social, medical, psychological or legal assistance to victims of crime, irrespective of their age or gender. Others are specialized in assisting particular groups of victims, such as juveniles or (female) victims of sexual abuse. For victims of sex offences or domestic violence there are services such as the centre for women in distress (*Femmes en détresse*) which also has shelters for girls and women (*foyer Mederchershaus et Fraenhaus*) and the Rape centre (*Info viol*). There are several other shelters, all for specific groups, including those of the Open House (*Maison de la Porte Ouverte*), *Pro Familia* and *Noemi*. There are different services for juvenile victims: a telephone help line (*Kajutel*) and the Red Cross psycho-therapy centre for juveniles (*Croix-Rouge luxembourgeoise pour la Prévention des Sévices à Enfants*), to name a few.

It is fair to say that a lot of general and specific services are available for victims of crime. Moreover all services operate free of charge; they are either subsidized by the state or by donations from private individuals or institutions. There is such a range of services and specialized centres, that the greatest problem for victims seems to be to find the service which best meets their needs.

## 4 SOURCES OF LAW

### 4.1 General Sources of Law

The most important rules of criminal law and procedure are laid down in the Constitution of the Grand Duchy of Luxembourg of October 1868, as last modified in December 1994.

<sup>25</sup> There is also ample information for victims who need help. In most public buildings and service centres information brochures of (other) services can be found to direct the victim to the appropriate service centre.

The Constitution provides for the organization of the courts. It establishes a Superior Court of Justice (s. 87 Const.) and thus states in an indirect manner that citizens have the right to lodge appeals against sentences of lower courts. This provision required the introduction of legal remedies to allow appeals of judgements rendered by lower courts. It also stipulates that trials are held in public unless publicity is a threat to good order and morality, which the court can declare (s. 88 Const.). All judgments must be reasoned and pronounced in public court sessions (s. 89 Const.). Furthermore, justices of the peace (or police) courts, district court judges and members of the Superior Court of Justice are appointed for life. They can only be deprived of their posts by judicial decision (s. 91 Const.).<sup>26</sup> Other important sources of law are the enactments, such as the codes of law and statutes.

## 4.2 Sources of Criminal Law and Procedure

As in Belgium, criminal procedures in Luxembourg are still governed by the Napoleonic Code of Criminal Procedure of 1808. The similarity to the Belgian criminal justice system is further enhanced by the fact that the Luxembourg Penal Code is almost identical to the Belgian Code of 1867. However, the Luxembourg legislature has made thorough modifications, especially in recent years to adapt the code to modern times. According to Spielman and Spielman, the legislature has gradually shown its intellectual independence and is emancipated from its neighbours. Whereas the 19<sup>th</sup> century legislature mainly followed the example of legislative changes in the neighbouring states, the 20<sup>th</sup> century legislature has adopted a more progressive position and has introduced changes which well ahead of their time. Unlike in Belgium, where the Napoleonic Codes have remained virtually intact, Luxembourg has adapted the Codes to the changing time. For instance, in 1929 adversarial elements were introduced in the preliminary judicial investigations (*l'instruction*) to soften the harsh features of the inquisitorial proceedings in the pre-trial stage. In 1981, laws were introduced to allow for compensation for victims of miscarriages of justice and for persons unjustly detained on remand. In 1987, the jury court (or Assize Court) was abolished. And the preliminary investigative proceedings were modernised by the statute of 16 June 1989. Most of these laws were integrated into the Code, unlike in Belgium where they were codified in special Acts outside the Codes.<sup>27</sup>

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

Other sources of law which are important to victims are the Juvenile Act and the Act on the Judiciary. The 1992 Juvenile Act regulates every aspect of the trial proceedings in the special courts for minors.<sup>28</sup> It protects juveniles by prohibiting anything about what has been said in this court from being published (s. 38, see § 8.3). The 1994 Act on the Judiciary is relevant to all victims of crime because it has facilitated the creation of the assistance service for victims at the prosecutor's office (SAV, see § 3.7). Finally, in 1999 a Bill on Mediation was issued (see § 1).

<sup>26</sup> For the English text of the Constitution see [http://www.uni-wuerzburg.de/law/lu\\_/html](http://www.uni-wuerzburg.de/law/lu_/html)  
<sup>27</sup> A. Spielmann and D. Spielman, 'Luxembourg', in: Chr. Van den Wyngaert (ed.), *Criminal procedure systems in the European Community*, Butterworths, London, 1993, pp. 261-263.

<sup>28</sup> *Loi du 190 août 1992 relative à la protection de la jeunesse*, Memorial 1992, nr. 70, pp. 2195-2202.



### *Free legal aid*

The 1995 Free Legal Aid Act and Directive<sup>29</sup> is important to victims of crime who need a lawyer to exercise their rights in court but do not have the means to do it. As a rule, victims who have a minimum income (*revenu minimum garanti*) or live in circumstances equal to those earning the minimum wage are entitled to free legal assistance (s. 1 Directive). The free legal aid covers all expenses; from stamps, travel expenses of the victim and witnesses, to the costs of interpreters (s. 8 directive). Victims who want to apply for free legal aid have to fill in a questionnaire available at all the central services for social assistance (see §§ 3.5 and 3.7) and send it to the president of the Bar Association (*Bâtonnier de l'Ordre des avocats*, s. 2 Directive).

### *State compensation*

The State Compensation Act (SCA) of March 12<sup>th</sup> 1984 which established the State Compensation Fund (*Fonds National de Solidarité*) is worth mentioning.<sup>30</sup> Even though stringent conditions are attached to the right to request compensation from the State Fund, this law is very relevant to remedying some of the negative effects of crime. The scope of the Act is not restricted to victims of serious crimes as in most other jurisdictions. In order to apply for compensation, victims must prove they are residents of the Grand Duchy or of the European Union. The offence must have caused serious physical injuries which led to permanent or total incapacity to work for at least one month, and should seriously affect the victim's life, e.g. loss of income or physical or mental suffering. Finally, it must be impossible for the victim to receive compensation in any other way (s. 1 SCA). Requests for compensation from the Fund must be sent to the Minister of Justice within one year from the facts or the decision of the court (ss. 2 and 3 SCA). A Compensation Committee consisting of a magistrate, an advocate and a representative of the Ministry of Justice will decide whether the claim will be awarded and establish the amount of compensation. The applicant has the right to lodge an appeal against the dismissal of the claim before the district court and before the Supreme Court.

In practice, the Fund has only compensated a very limited number of victims. According to volunteers and professionals working with victims, it is, in practice, much too difficult to obtain compensation from the state.<sup>31</sup> From 12 March 1984 until 5 July 1991, 44 applications were presented to the Committee. Only 18 applications were granted for a total amount of 10,839,548 Flux. (EUR 268,705).<sup>32</sup> In 1997, three victims received state compensation (total amount 1,350,000 Flux (EUR 33,466), and in 1998, five victims received state compensation (3,093,245 Flux (EUR 766,071)).<sup>33</sup>

<sup>29</sup> Act on Free Legal Aid, *Loi sur l'assistance judiciaire*, 3 October 1995 and directive, *Règlement grand-ducal*, 18 September 1995, Memorandum, pp. 1913-1918.

<sup>30</sup> *Loi du 12 mars 1984 relative à l'indemnisation de certaines victimes de dommages corporels résultant d'une infraction et à la répression de l'insolvabilité frauduleuse*, Memorial 1984, pp. 336-339.

<sup>31</sup> For instance, the victims of a particularly violent crime – which was so shocking that years later almost everyone in Luxembourg remembers – failed to obtain compensation from the state. Information provided by the victim, Mrs. M.J. Steil of the national victim support organization.

<sup>32</sup> A. Robert, *Victimologie et aide aux victimes*, SAV, Luxembourg, 8 April 1999, p. 22.

<sup>33</sup> Information supplied by Mrs. M.J. Steil, Victim Support Wäisse Rank, 10 November 1999.

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

The roles of the victim in Luxembourg criminal proceedings are very similar to those in Belgium. In nearly all cases in which a victim wants to present civil damages, the victim may instigate criminal proceedings in order to link his claim to the prosecution of the accused in criminal court (see §§ 5.3, 5.4). In certain limited cases, public action can only be initiated after a formal complaint by the victim (see § 5.2).

### 5.1 Reporting the Offence

The person who reports a crime does not necessarily have to be the victim. Anybody who has knowledge of a crime can file a report (*dénonciation*) with the police or the prosecution service, whereas complaints can only be filed by the victim himself (see § 5.2). Usually, reports are filed with the police. According to the law, the members of the judicial police are the only policemen who can officially take down reports of offences (*procès-verbal*, s. 13 CCP). If a policeman who is not a member of the judicial police takes a report from the victim, it only has informatory value in enabling the public prosecutor to take action.<sup>34</sup> A victim who reports a crime is always provided with a copy of the official record. In practice, the conditions in the police stations are not always very good. According to victim support workers, there are still quite a number, particularly in rural areas, where there are no facilities to privately report the crime. Those police stations are really small and consist of one room only.

### 5.2 Complainant

For certain offences, indicated as such by law, prosecution can only be started after a formal complaint by the victim.<sup>35</sup> For instance with respect to calumny, criminal defamation and sex offences, the victim has the right to file a complaint (*poser plainte*). The complaint must be presented to the judicial police (s. 11 CCP) or the public prosecutor. The purpose of the complaint is to request the authorities to initiate public action. On the one hand, the public prosecutor is not obliged to actually start criminal proceedings against the suspect (see § 7.1). On the other hand, the public prosecutor has the right to pursue public action even if the victim withdraws the complaint. The latter will not often occur unless the public prosecutor feels that the crime is so severe that public action is called for. In this case, the public prosecutor will invite the victim to his office and explain his reasons and try to obtain the cooperation of the victim.<sup>36</sup> However, this is hardly ever done.<sup>37</sup>

<sup>34</sup> Ch. des mises 19 février 1962, 18.464.

<sup>35</sup> Associations, such as 'Femmes en Détresse (a.s.b.l)' who are active in fighting violence against women, are not allowed to file a complaint on behalf of the victim. There is currently discussion on whether this should be allowed, since many victims in a situation of dependency (family/work) find it difficult to initiate criminal proceedings on their own against their aggressors. Information supplied by Mrs. J. Planchette of the association *Femmes en Détresse*, 2 December 1997.

<sup>36</sup> Information supplied by Mr. Bour, public prosecutor, Diekirch, 4 December 1997.

<sup>37</sup> According to social workers, it would be recommendable for the prosecution service to take action after several complaints have been withdrawn by the victim. This is not done, as can be illustrated by the fact that one of their clients had repeatedly filed complaints against her husband and subsequently withdrew them over a twenty-year period. She never heard anything

In practice, few complaints about domestic violence are actually taken to court.<sup>38</sup> Apart from the fact that many women withdraw their complaint against their partner, legal culture also plays a role. It is common practice that after a complaint has been filed, the aggressor is called to the police station or the public prosecutor's office and is told to stop the violence. The victim is not present and cannot react to the statement of the assailant.

### 5.3 Civil Claimant

Luxembourg adheres to the '*partie civile*' system or adhesion model, and, as mentioned earlier, the criminal proceedings resemble those in Belgium. The procedural rights of the victim, however, are better protected in Luxembourg than in Belgium. The victim can constitute himself as a civil claimant during the pre-trial stage and enjoys certain rights from that moment on (ss. 56 et seq. CCP). For instance, the civil claimant has access to the file before the interrogation of the accused in the pre-trial stage (s. 85 CCP). The civil claimant has the right to be present at preliminary hearings of the accused (s. 85 CCP), and certain investigative activities on the scene of the crime (s. 63 CCP). In addition, he may lodge appeals with the judicial council of the appeal court against certain orders of the examining magistrate which affect his civil claim for compensation (s. 133 CCP). He also has the right to file a request for the nullity of the investigation or certain specific investigative acts (s. 126 CCP). He may demand that the examining magistrate hears certain witnesses. The victim may even ask to question the accused in the presence of a particular witness (s. 69 CCP).

During the trial stage, the civil claimant may also participate in the trial proceedings. He may speak after the public prosecutor has given his conclusions in the case (see for instance s. 153 CCP for the police courts). He furthermore has the right to appeal the judgement of the court, in as far as it affects his right to compensation (s. 202 CCP). According to Spielman and Spielman, he is a full party to the criminal proceedings – both in the pre-trial and trial stage – and enjoys all procedural rights that are given to the accused.<sup>39</sup>

The victim who wishes to act as a civil claimant and claim compensation from the offender is not obliged to have a lawyer.<sup>40</sup> In practice, however, victims who are not accustomed to be involved in criminal proceedings do need a lawyer to take them through the formalities of the process. Victims of violent crimes often become civil claimant. The same applies to victims of serious road accidents. Victims of thefts and robberies are less inclined to participate in the criminal proceedings. This can be explained by the fact that the insurance covers the damages or the goods have been returned to the victim.

### 5.4 Private Prosecutor

The victim (*partie lésée*) may initiate criminal proceedings in two ways if the public prosecutor decides not to prosecute. Firstly, just like in Belgium and France, he may file a complaint

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from the police or the prosecution service. The authorities do not understand the reasons behind such a pattern of filing and withdrawing a complaint, and do not take the complaints seriously any more.

<sup>38</sup> In the past 20 years, less than ten cases of domestic violence have actually been prosecuted according to social workers of the support centre *Femmes en Détresse*.

<sup>39</sup> A. Spielmann and D. Spielman (1993), p. 269.

<sup>40</sup> The legal aid provisions allow a victim to choose his own lawyer. This is a recent development; before this new option was introduced, the victim was assigned a lawyer by the Bar Association.

with the authorities and constitute himself as a civil claimant before the examining magistrate (*plainte avec constitution de partie civile*). However, he may only do so if the crime is serious, (*délit ou crime*) i.e. not if it is a misdemeanour. The examining magistrate then has to open a judicial investigation and start criminal proceedings. From that point, the victim is recognised as a civil claimant and enjoys the same rights as the accused. The procedure is rather simple, the victim -or his lawyer- writes a letter to the examining magistrate in which he states that he wants to act as a civil claimant. The victim subsequently sums up all the damages he suffered as a result of the crime and tries to substantiate them with proof.<sup>41</sup> The victim will have to deposit a certain amount of money before being able to commence proceedings. The average amount as set by the court is 25,000 BF (EUR 620).<sup>42</sup> This option is frequently used by victims to start criminal proceedings and claim damages from the offender. It also has clear advantages for victims because the examining magistrate conducts the investigation and collects the evidence. Secondly, the victim may start public prosecution by direct summoning (*citation directe*). The victim may decide to summon the suspect directly to court if he has reported a crime but the authorities refrain from taking action. In practice, it is difficult to start criminal proceedings if the public prosecutor is unwilling to prosecute. About 85% of victims need a lawyer to start criminal proceedings. Lawyers are usually not very eager to take such cases because they feel that the chances are very slim of winning which the public prosecutor chose not to follow up.<sup>43</sup> The most common offences for which the direct summoning procedure is used are defamation, calumnious offences, press crimes and illegal hunting.

## 5.5 Witness

For crimes which require a pre-trial investigation, witnesses are usually heard by the examining magistrate and subsequently by the court. During the pre-trial stage, the examining magistrate will summon every person whose statement may shed light in the case. Witnesses are obliged to appear after being summoned. If they refuse to give evidence, the examining magistrate may impose a fine. If a witness still refuses to testify, he may be taken by the police and brought before the magistrate (s. 77 CCP). Witnesses for whom it is impossible to come to the magistrate's office are heard in a more convenient place (s. 78 CCP). Witnesses may also appear without a summons before the magistrate. They can present themselves voluntarily, or their presence can be requested by the accused or the civil claimant (s. 69 CCP). All the same, they are heard separately by the examining magistrate, without the presence of the accused or the civil claimant (s. 70 CCP). Witnesses have to take an oath,

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<sup>41</sup> In Germany, lawyers do not necessarily have the interest of the victim at heart. They advise them to start two proceedings (civil and criminal) and claim too much compensation to be on the safe side. This may create a suspicious attitude among judges and have a negative effect on the award. German lawyers are not interested in claim settlement because this costs them in fees. In Luxembourg, this is not how lawyers or the court work (see § 7.2). According to the Advocate Act of 1993, lawyers may ask for payment on the basis of the hours put into the case, the results of their work and/or the assets of the client. They are not allowed to work on a 'no cure, no claim' basis. However, they may ask payment for a successful claim settlement between offender and victim. In practice, it is normal to ask for a certain (small) percentage of the compensation paid to the victim. Information supplied by Rodesch, Luxembourg, 1 December 1997.

<sup>42</sup> Information supplied by Mr. Rodesch, lawyer, Luxembourg, 1 December 1997.

<sup>43</sup> Information supplied by Mr. Rodesch, lawyer, Luxembourg, 1 December 1997.

unless they are under the age of 15 (s. 71, 75 CCP). It is noteworthy that witnesses and the civil claimant can be confronted with the suspect during the pre-trial stages (s. 82-1 CCP – see § 8.2).

During the trial stage, the victim is usually summoned to give evidence. However, if the victim needs to testify, he cannot act as a civil claimant at the same time (s. 72 CCP). In practice, this rule is easily avoided. Victims inform the public prosecutor that they want to claim damages. If the public prosecutor needs his testimony, he will constitute himself as a civil claimant during the trial after giving evidence. As soon as the victim has informed the public prosecutor he enjoys the rights of the civil claimant. The victim testifies and subsequently informs the court he wishes to present a claim for compensation.<sup>44</sup>

## 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 required by law, or guideline, to provide victims with information. In practice, however, the police usually refer victims to other services, since they have leaflets of all the services available in the community. Furthermore, the police advise the victim to get a lawyer. If the victim cannot afford legal assistance, he is informed about legal aid.<sup>45</sup> In Luxembourg, however, it is usually the prosecution service which has certain informatory duties towards victims (see § 6.1). For more general information, a support service with the office of the public prosecutor has been created (*service d'aide aux victimes*, SAV, see § 3.7),<sup>46</sup> where victims can go for information, for instance about the criminal proceedings and compensation from the offender and the state.<sup>47</sup> This support service also refers victims to other services for more practical assistance and advice (see §§ 3.6, 3.7). In practice, it is quite easy for victims to reach the social workers of the support service. If they do not want to go to there, they can also phone them and ask for information. Furthermore in a country and community as small as Luxembourg, it is fairly easy to get the required information.

Although there is no specific legal obligation for the police to inform victims about assistance or compensation, they have taken action to improve relations with the public and to facilitate the provision of information. They have established a programme of 'community

<sup>44</sup> See case law: 7 January 1911, 8, 268; 12 February 1916, 9, 561.

<sup>45</sup> In December 1997, a proposal was being discussed for an information leaflet on criminal proceedings and the relevant aspects of criminal procedural law.

<sup>46</sup> Based on the example of Belgium and, to a certain degree, France.

<sup>47</sup> Luxembourg has a State Compensation Fund. However, the state only covers material damages, such as the loss of income. Moreover, an often heard criticism is that the rules are applied very restrictively.

policing' (*police du quartier*) to improve relations with local communities in Luxembourg City. In the eight districts involved,<sup>48</sup> the police are more accessible and more open to the public. Much attention is given to the reception and treatment of citizens and victims by the police. The police organize meetings with the inhabitants of the districts to get a better understanding of the problems and needs of the neighbourhoods. These meetings are also used to give information about police services and what the public can expect from them.<sup>49</sup>

The police and gendarmerie have furthermore issued (identical) directives and circulars to improve assistance to victims as part of their crime prevention programme. The directives are aimed at different categories of victims, for instance victims of property crime and sex offences.<sup>50</sup> The information is primarily aimed at the prevention of future victimization, it does not provide the victim with information as required by the guideline (A.2). More recently, the police have established an assistance programme to victims of sex offences and domestic violence (1997), which has three components: training, prevention and investigations. A training programme has been established both for new recruits and incumbent personnel (see § 8.1). Individual officers as well as the prevention bureau are involved in the prevention of sexual violence and abuse. The police and gendarmerie distribute flyers for parents at the police stations and other public services, and leaflets for children at schools. If the victim is a woman and wants to report the offence or file a complaint, the police officer who has taken down the report will be assisted by a female colleague in questioning the victim.<sup>51</sup>

Despite all these efforts of the police to assist victims of property crime, large groups of

<sup>48</sup> Bonnevoie, Merl/Belair, Kirchberg, Ville-Haute, Gare/Hollerich, Eich, Limpertsberg and Gasperich.

<sup>49</sup> The police focus a lot of attention on relations with the public. For instance, they go to high-schools (*athénée et lycée technique*) to talk about the role of the police and specific subjects, such as violence at schools. Students can visit the local police station, the police school (EGP) and participate in small groups with the different courses or do a practical course of three days as a policeman/woman. Another initiative worth mentioning is the crime preventions bureau of the police and gendarmerie which gives practical information about how to prevent crime to citizens and victims of property crime. The information is given both in person and through brochures, posters and through the press.

See the official police site: [http://www.pt.lu/provider/police/html/polproxi/accueil.htm](http://www.pt.lu/provider/police/html/polproxi/accueil.htm;).; <http://www.pt.lu/provider/police/html/lpolice/relpub/pub.htm>. See also the brochure on 'le bureau du prévention du crime de la gendarmerie et de la police, August 1995.

<sup>50</sup> Directive (*instruction de service*) 24/95, of 27 October 1995. This directive has been issued to provide assistance to victims of burglary ( *cambriolage*). To most victims, breaking and entering in their house is very disturbing and is often their first contact with the criminal justice system as a victim of crime. Their ignorance about the functioning of the different authorities adds to their feeling of insecurity. The directive obliges the police to go to the scene of the crime as soon as possible to find evidence; support the victim; write down the report, and give information to the victim about preventing crime in the future. The directive stresses the importance of the assistance programme to victims (*action d'aide aux victimes*). As part of this programme, the police should send the victim an information letter consisting of the following four elements: identification of the police officer in charge of the file; personal details to facilitate the transmission of supplementary information; the address and telephone numbers of the prevention bureau; and a brochure on basic prevention measures. This information letter must be sent to the victim by mail within a week after notification or report of the crime.

<sup>51</sup> See letter to the Minister of the Police forces (*Ministre de la Force Publique*) on the state of affairs on police activities regarding sex offences and domestic violence, 4<sup>th</sup> of November 1997 (identical for the gendarmerie).

victims still fall outside the scope of the special assistance programmes. And even though there is help at the prosecution level, in practice many victims will need the services of a lawyer to obtain legal advice and information on how to receive compensation from the offender or the state. To date, lawyers are the prime source of practical and legal information to victims.<sup>52</sup> In the near future, after the reorganization of the police (1999) all this may change. The restructuring will create one police force, working in six police districts. In each police districts a victim support office (*bureau d'aide aux victimes*) will be created. These offices will be staffed by police officers and will provide legal and practical information to victims.<sup>53</sup>

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

Although the pre-trial judicial investigations are not completely governed by the secrecy principle, it may frustrate the victim's right to be informed about the outcome of the investigation. In practice, the police believe they cannot inform the victim about the outcome of the investigation. The victim is only informed of found or repossessed property. For the results the police investigation, the victim is referred to the public prosecutor handling the case. The victim's lawyer has access to the file under investigation and is notified about the outcome of the investigation. If a victim without legal representation wants to be informed, he should contact the public prosecutor. This is also true for a pre-trial judicial investigation performed by an examining magistrate. The prosecution service will usually inform the victim if a suspect has been apprehended and will most certainly inform him if charges are brought against the accused (see B.6).

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

The public prosecutor has the discretionary power not to prosecute. Very often, the public prosecutor will decide not to bring charges if prosecution is not necessary to protect the public interest. The decision not to prosecute may be based on several facts and circumstances, such as the youth of the offender and the lack of objective seriousness of the offence. But also the fact that the offence no longer meets public disapproval, e.g. the crime of abortion, may also play a role.<sup>54</sup> If the decision is taken to initiate public action, the victim is informed of the date and the place of the trial in writing (see D.9.). On the other hand, if the public prosecutor feels that the prosecution appears unlikely to succeed, or would be inopportune, the case will not be prosecuted. As a rule, the prosecution service will inform the victim's lawyer of the decision not to prosecute. If the victim does not have a lawyer, he will not be notified.<sup>55</sup> In Luxembourg however, it is fairly easy to contact the public prosecutor. According to the prosecution services in both Luxembourg City and Diekirch, it is very common for victims to call them or stop by to get information, for instance on the decision concerning prosecution. Personal contacts with victims are quite frequent, in particular with victims of serious crimes. Contacts with the prosecution service are facilitated by the standard practice

<sup>52</sup> Information supplied by Mr. Rodesch, lawyer, Luxembourg, 1 December 1997.

<sup>53</sup> Information supplied by colonel Schockweiler and Mr. Stebens of the police forces, 1 December 1997.

<sup>54</sup> A. Spielmann and D. Spielman, *Luxembourg*, in: Chr. Van den Wyngaert (ed.), *Criminal procedure systems in the European Community*, Butterworths, London, 1993, pp. 275-276.

<sup>55</sup> Mr. Rodesch, a lawyer, called a public prosecutor to find this out.

of the police giving the victim their file number. Furthermore, because it is such a small community, seeking contact with a public prosecutor is not as daunting as in other jurisdictions.<sup>56</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.

Lawyers of a civil claimant and the accused are notified by mail, at least 24 hours before a hearing takes place (s. 81-(10) CCP). If this requirement is not observed, the hearing will be null and void (s. 81-(11) CCP). In practice, this legal requirement is extended to other victims as well. As a rule, victims are notified by the public prosecutor of the date and time of a hearing. The victim receives a standardized letter from the public prosecution service.<sup>57</sup>

There is no standard practice with respect to the victim's opportunities regarding compensation. If the victim needs information, he may contact the public prosecutor's office. This lawyer is usually perceived as the source of information if he needs legal advice or help with his claim for damages. Neither the police (see A.2), nor the public prosecutor have developed a mechanism to inform victims about the options for obtaining compensation. There are, however, quite a few services where victims can get information (see § 3.6 and § 3.7).

Finally, the victim who is a party to the criminal proceedings will be notified about the outcome of the case. However, victims who have not constituted themselves as civil claimants are not notified and have to contact the court or the public prosecutor to find out the verdict in their case. In this age of computerization and information systems, it would be quite easy to create standard information procedures to notify victims of relevant developments, including the outcome of the case. The prosecution service and the courts have all their data computerized, nevertheless such an information system has not yet been put in place.<sup>58</sup> Victims who want a copy of the verdict can file a request with the prosecution service.

## 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 principle, the police include a certificate into the file in which the losses and injuries of the victim are stated. If the police have not included a detailed description of the injuries and losses of the victim, the public prosecutor will contact the police and order to include

<sup>56</sup> Information supplied by Mr. Biever, public prosecutor (*procureur d'Etat*), 2 December 1997.

<sup>57</sup> The letter from the public prosecutor will contain the following expression: 'you are mentioned in the legal file (*vous figurez dans le dossier*), and as such I inform you of the hearing in criminal court (place/ date/ hour).' According to all the legal practitioners interviewed, it is standard procedure to send such a letter to inform the victim of the date and place of a hearing.

<sup>58</sup> Information supplied by Mr. Biever, public prosecutor, 2 December 1997.



a complete statement into the file.<sup>59</sup> However, the purpose of this statement on the victim's damages is primarily to provide the prosecution service and the court with evidence on the offence. It is not intended to secure compensation by the offender to the victim. This is perceived to be the task of the civil claimant or his lawyer.<sup>60</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.

The legal file that contains all relevant information on the damages sustained by the victim is made available to the court as evidence to substantiate the charges against the suspect. The public prosecutor informs the court of the injuries and losses of the victim in general terms, usually referring to the statements included in the file. Only in very serious and traumatic cases, does the public prosecutor elaborate upon the impact of the crime on the victim. However, this is generally insufficient information for the court to take the victim's need for compensation into account. If he wants to receive compensation from the offender, he will have to make a formal request and submit evidence to the court, preferably with the help of an advocate.

If the victim wants to act as a civil claimant but arrives in court without a lawyer, the prosecutor and the court will advise him to get one. Usually, the court adjourns the proceedings in order to allow the victim to retain a lawyer. It is considered very important that the victim has the assistance of a lawyer to guide him through the proceedings. It is not the duty of the public prosecutor, nor of the court to safeguard the victim's financial interests.<sup>61</sup>

The court will take the willingness of the offender to pay compensation to the victim into account. In the exceptional case<sup>62</sup> that the offender has paid compensation to the victim before or during the trial, the defence lawyer will certainly inform the court in order to get a more lenient sentence for his client. The fact that the offender has already paid compensation is in itself not enough to stop criminal proceedings or to dismiss the case.<sup>63</sup>

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<sup>59</sup> Victims of violent or sexual crimes have to go to a medical doctor to obtain a certificate on the injuries suffered as a result of the crime. The police often accompany those victims to the hospital, but they are not obliged to do this. Information supplied by Schockweiler and Stebens, 1 December 1997.

<sup>60</sup> Information supplied by Mr. Rodesch, lawyer, Luxembourg, 1 December 1997.

<sup>61</sup> Information supplied by Mr. Rodesch, lawyer, Luxembourg, 1 December 1997.

<sup>62</sup> To date, no mediation or claim settlement programmes are in place to facilitate the payment of compensation during the pre-trial stage. There are initiatives and projects to create such programmes in the near future, especially for juvenile delinquents.

<sup>63</sup> The only exception to this rule concerns 'crivellerie', the offence of eating in a restaurant without paying the bill. If the offender pays the bill before the trial, criminal proceedings will not take place.

## 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*

Public prosecutors have a discretionary power not to prosecute (*décision de classement sans suite*) if it is not necessary to protect the public interest, if the crime is not socially disapproved of, and if prosecution is uncalled for given the special circumstances of the case.<sup>64</sup> In principle, the question of compensation does not play a role in the decision whether or not to prosecute.<sup>65</sup> However, the public prosecutor has the power to offer a conditional dismissal of the case (*classement conditionnel*). In practice, this decision will be taken in cases where normally no public action would be initiated but the victim has suffered damages. The public prosecutor will check the payment of compensation, either indirectly through the police, or directly. In the latter case, the offender will have to come to the office of the public prosecutor and show adequate proof of any payments. After the offender has compensated the victim the case will be dismissed.<sup>66</sup>

Closely related to this procedure, are the criminal orders proceedings (*ordonnances pénales*, ss. 216 ss CCP). A criminal order can be issued if a crime – a misdemeanour or a less serious crime – is a punishable act but the public prosecutor wants to impose a fine (s. 216 CCP). However, the public prosecutor cannot impose a fine if the civil claimant has claimed compensation, or if the damages of the victim have not been compensated (s. 216-2a and 216-2d CCP). Here, the legislature requires the public prosecutor to take the interests of the victim into account before simply imposing a fine as punishment for a crime.

- (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 can undertake two distinct actions if the public prosecutor is not willing to prosecute. He has the right to initiate private proceedings (see § 5.4). This is a very well-known right, but few people know that the victim also has the right to file a complaint with the Attorney General (*Procureur d'Etat*), in accordance with s. 23 CCP. The Attorney General has the right to review the decision of the public prosecutor and will decide whether public action should be instigated. An advantage of the review procedure is that it is rather simple. The victim only has to write a letter to the Attorney General. On the other hand, it usually takes a while before the Attorney General takes a decision.<sup>67</sup>

<sup>64</sup> J. Bour (1997), p. 14.

<sup>65</sup> A. Spielmann, D. Spielmann (1993), p. 264.

<sup>66</sup> Information supplied by Mr. Bour, public prosecutor, Diekirch, 4 December 1997.

<sup>67</sup> Information supplied by Mr. Biever, procureur d'Etat, 4 December 1997.

## 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 court may award compensation to victims who joined the criminal proceedings as a civil claimant and formally made a claim for compensation. The judiciary usually has a quite flexible approach towards compensation. The court may award provisional damages to the victim, even on the first day of the trial. It is very common for judges to grant provisional damages, for instance to cover hospital costs if a victim has suffered physical injuries, or if the assessment of the actual damages by experts will take a considerable amount of time. Judges are not known to award less damages, simply because they are suspicious that victims attempt to profit from the situation.<sup>68</sup>

It is important to mention that in Luxembourg, contrary to most jurisdictions, the victim may demand the restitution of goods at any stage of the proceedings. He may reclaim his property before the judicial council during the pre-trial stages (s. 68 CCP). Likewise during the trial, he may request the return of his goods. The court may also order restitution ex officio (s. 194 CCP).

- (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 Luxembourg criminal justice system has adopted the adhesion procedure in which the compensation is not an independent penal sanction, nor a substitute for one. However, the latter may have changed due to the creation of a mediation centre (March 1999, see § 1). Normally, the courts award compensation in addition to a penal sanction. Furthermore, legislation provides that compensation may be awarded as a financial condition to a suspended sentence or a probation order (see D.13).

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

Since 1986, the court has had the option to suspend a sentence and to impose a probation order.<sup>69</sup> Nowadays, both are frequently used to order the payment of compensation to the victim. The court can impose a suspended sentence if the offender has been sentenced to prison or payment of a fine. However, this must be a first offense (s. 626 CCP) or several years must have passed since the previous conviction (s. 627 CCP).<sup>70</sup> The court can attach financial conditions to the suspension of a prison sentence, the order to pay a fine, or compensation to the victim (*sursis à condition d'indemniser la victime*). But if the court has already

<sup>68</sup> Information supplied by Mr. Rodesch, lawyer, Luxembourg, 1 December 1997.

<sup>69</sup> Act of 26 July 1986.

<sup>70</sup> At least two years must have passed since a previous conviction by the police court; five years since a conviction by the correctional chamber; and seven years if the defendant was convicted by the criminal chamber.

decided that the offender must compensate the victim for his losses and legal costs, the suspension does not affect his duty to pay nor does it affect the court's decision regarding the payment of legal costs, compensation, or restitution (s. 628 CCP). In addition to the suspended sentence, the court can impose a probation order both during the pre-trial and sentencing stages. The former is called 'suspended sentence with probation' (*suspension probatoire*, s. 629-1 CCP) and puts the accused under the surveillance of the Attorney General and the probation service. A suspension can only be granted if the punishment entails a two year prison sentence or less (s. 621 CCP).<sup>71</sup> During the sentencing stage, a probation order (*sursis probatoire*, 629CCP) can be imposed on the convicted person for a period of at least three years. The only prerequisite is that the offender has not been imprisoned previously. Here too, the Attorney General, assisted by the probation service (*service central d'assistance social*, see § 3.5) should make sure that the offender fulfills the conditions imposed by the court and receives all the assistance needed for his rehabilitation (s. 633-4 up to 633-7 CCP). The probation regime imposed on the suspect or offender may include *inter alia* the payment of compensation to the victim (s. 633-7(5) CCP).

### 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 Attorney Generals also have, besides representing the public interest during trial, the responsibility to ensure the enforcement of court sentences.<sup>72</sup> Compensation, however, is not a penal sanction. It is of a strictly private law nature. Consequently, the awarded civil damages are not executed by the prosecution service. The victim bears sole responsibility for enforcing the granted claim for compensation. Usually, he sends in the bailiffs to collect of the money.

## 8 TREATMENT AND PROTECTION

### 8.1 Victim-Awareness Training

#### *Judiciary*

Members of the judiciary at large, public prosecutors and judges, after their university studies abroad (see Scenery and § 1), have to complete a four-month complementary course on criminal law and proceedings in Luxembourg, after which they have to pass an exam and work as a (trainee) lawyer for at least three years. To apply for a job as a public prosecutor or a judge another exam must be taken; only the graduates with the highest marks will become

<sup>71</sup> Another possibility during the pre-trial stage is to dismiss the case on the condition of paying compensation (*classement conditionnel avec indemnisation*).

<sup>72</sup> Act of 9 January 1984, *loi portant réorganisation des établissements pénitentiaires et des maisons d'éducation*, addresses the principle that sentences of criminal courts are executed by the chief public prosecutor (s. 2). He may delegate this power to his public prosecutors. The executive magistrate will be assisted by social workers (*service central d'assistance central*) and probation officers (*missions d'assistance à des personnes sous surveillance judiciaire*).

members of the judiciary. During the first year as members of the judiciary, they work for both the prosecution service and the courts. After this introductory year, they can choose to become a public prosecutor or a judge.<sup>73</sup> They are not given any victim-awareness training.

#### *General police training*

The two police forces get the same education at the '(military) police school' (*Ecole de gendarmerie et de police (EGP)*). As the name indicates, the school is for both police services. The school was established in January 1968. In the previous year, obligatory military service was abolished and replaced by an army of professional soldiers. The legislature wanted to stimulate people to join the army and created the opportunity -for those willing to sign up for at least two years- to become civil servants, for instance, to start a career with the police (national police force or gendarmerie). As a result, all members of the police have been in the army. To be allowed to do the entrance exam the cadets have to have at least a high school diploma, served their country for 24 months in the army and reached the grade of corporal. At the police school, ordinary low to middle ranked policemen receive six to twelve months training. During this period they are given theoretical and practical instruction. Apart from the necessary technical skills, emphasis is put on the psychological aspects of police work. The six-months course for ordinary policemen consists of theoretical training and practical training at a police station for six weeks. Training of the middle rank officers lasts for twelve months and consists mainly of the same subjects, but in a more profound manner

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

Since 1981, the gendarmes and policemen must take a six-month training course (*formation de base*). For non-commissioned officers of both forces (*sous-officiers*) the training lasts for 12 months.<sup>74</sup> Both courses can be divided into three parts. The first seven weeks are an initiation period in which recruits can decide whether they want a career with the police. Students are taught the basics of criminal law, the legal system and psychology. During the second stage, they receive a more elaborate theoretical training, followed by a practical training of six weeks with one of the branches of the gendarmerie or police. The theoretical parts consists of criminology, traffic law, public order training and a course entitled 'police and society' (*police et société*). The latter comprises 10 different subjects, *inter alia* a seminar about (social) assistance to the public; victims of crime – particular attention is given to the protection of children and violence against women; the press, and dispute settlement or conciliation (*gestion de conflits*).<sup>75</sup> The twelve-month training for the middle ranked policemen is comparable but somewhat more elaborate.<sup>76</sup> The higher ranked personnel, starting with the (military) rank of officers within the police and gendarmerie, receive additional training abroad. Luxembourg does not have its own police academy. These individuals are army officers who study criminology in Liège (France), after which they obtain the rank of lieutenant, and attend the *Ecole d'Application* (Melun/Paris) where they are trained as managers. At the same time,

<sup>73</sup> Legal practitioners consider it beneficial that public prosecutors and judges have worked as lawyers for three years.

<sup>74</sup> Many legal practitioners, including public prosecutors and social workers consider six or twelve months to be insufficient to adequately prepare the police for their duties.

<sup>75</sup> See <http://www.pt.lu/provider/gie/egp.htm>

<sup>76</sup> For more detailed information see the EGP website: <http://www.pt.lu/provider/gie/egp.html> or the recruitment site: <http://www.pt.lu/provider/police/html/police/recru/recru.htm>

they can study criminal law though this is not mandatory. During their study of criminology, attention is given to victimology as well as the position of victims in criminal proceedings.<sup>77</sup>

With respect to police training on the treatment of victims of sex crimes and domestic violence, a separate programme has been created both for students at the EGP (*Ecole de gendarmerie et de police*) and incumbent personnel. First, since 1994 a seminar of 6 sessions has been included on the subject of violence against women in each of the training programmes at the EGP (*formation de base*). Moreover the lower ranked policemen (*candidats sous-officiers*), who usually take down the victim's report, have to attend a series of lectures given by representatives of private organizations or people who work with this particular group of victims.<sup>78</sup> Second, students of the EGP are given practical training on how the police should react in situations of violence. Special attention is given to domestic violence or other situations of violence within the family.<sup>79</sup> The permanent training programme of incumbent police personnel comprises a module of two hours on victims of sexual offences to make the police aware of their special needs. Members of the police who are involved with (judicial) investigations, follow a course entitled 'cognitive interview' (*Kognitives interview*) given by the EGP and a private foundation,<sup>80</sup> in which they receive training on interviewing techniques, specially designed for victims of serious crime. The purpose of this training programme is to upgrade the quality of questioning and at the same time minimize the traumatic effects of the interrogations. Furthermore, several sections and investigation groups participate in a seminar on sex offences given by the police school in Fribourg (Germany).<sup>81</sup> In addition to this training, a new module was introduced in November 1997. Every member of the police force receives a three-day training in video recorded questioning of child victims of sexual crimes (*audition enregistrée moyennant vidéo de l'enfant mineur victime d'abus sexuel*).<sup>82</sup>

<sup>77</sup> Information supplied by Colonel Stockweiler of the gendarmerie and Mr. Stebens of the police, Luxembourg-city, 1 December 1997.

<sup>78</sup> For instance: information centers / open houses for women, family centers, shelters, medical doctors (*foyers 'porte ouverte', centre familial Bethlehem, femmes en détresse a.s.b.l., médecins*).

<sup>79</sup> See letter to the Minister of the Police forces (*Ministre de la Force Publique*) for the latest on police and gendarmerie activities regarding sex offences and domestic violence, 4 November 1997.

<sup>80</sup> *Fondation Kannerschlass Suessem*.

<sup>81</sup> Seminar entitled *Sexuelle Gewaltdelikte* of the Landespolizeischule in Baden-Württemberg (Fribourg).

<sup>82</sup> The video training was introduced because of critical questions to the government, in particular question nr. 226 by Rippinger (DP) of 21 February 1997. He asked why children still were requested to give evidence in court in the presence of the accused in Luxembourg, whereas in countries such as Belgium and Germany video registration was introduced some time ago. In April 1997, the Minister of Justice replied to the question saying that preparations for video registration and display in court had been made and that the techniques would be possible shortly (answer of 4 April 1997). in: *Questions au gouvernement - extrait du compte rendu*, nr. 9/96-97, pp. 428-430.

## 8.2 Questioning the Victim

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

In general, the victim and other witnesses are questioned in a calm, polite and considerate manner. The atmosphere in police stations and the courts is usually friendly and unagitated. In court, the presiding judge directs the questioning of the victim and other witnesses. He asks the questions and decides whether or not a certain question is allowed. The defence counsel is not allowed to question witnesses in an unmediated manner. In practice, the court often allows some sort of direct questioning: the defence voices his question and the president of the court asks the witness whether he understood the question and instructs him to answer it. In court, the active role of the judiciary in the examination of witnesses is usually an effective method against hostile questioning. Children are always questioned in the presence of one of their parents or another person of confidence. Also, use can be made of video-recorded statements (see § 8.2).<sup>83</sup>

There are no special guidelines with respect to the questioning of victims, but the attitude of the authorities does not necessitate stricter rules, although some other aspects of the questioning procedures can be improved as will be illustrated below.

At the stations, the questioning usually takes place in private. Nevertheless, there are still stations, especially in the villages, with only one room and no separate reception facility.<sup>84</sup> Furthermore, special attention should be given to the problem of repeated questioning. If a pre-trial investigation is carried out, the victim is questioned during this stage by the police and the examining magistrate, then questioned again during the trial proceedings by the public prosecutor, the defence counsel and the court. In addition, the victim may also be questioned more than once by the same authority. According to lawyers, victims are often annoyed and offended by the number of times they have to answer questions and tell their story. In 1997, the police took action and adopted a policy to avoid repeated questioning as much as possible by training the police on the use of video recorded questioning involving child-victims of sexual abuse.<sup>85</sup> A special police service for adult victims of sexual crimes has been created (*service des femmes battues*), consisting of specially trained officers who take down the reports and perform the questioning. The aim of this service is too try to avoid

<sup>83</sup> I have not been able to verify whether video-recorded questioning is used in day-to-day practice. During my visit, nobody made mention of any such possibility or practice. In May 1999 I met Mrs. Steil of Victim Support and Mr. Robert of the victim services at the court and they were unaware of any such Act being introduced, Annual Conference of the European Forum for Victim Support Services, Vienna. My letters for additional information have remained unanswered (December 1999).

<sup>84</sup> Information supplied by Colonel Schockweiler and Mr. Stebens of the two Luxembourg police forces, 1 December 1997; According to Mrs. Planchette from a centre for women (*Femmes en détresse*), the reception of victims at many police stations not very good. Also the manner in which women-victims of (domestic) violence are questioned can be improved. It is not uncommon that these victims are asked what they did to provoke the violence. As a result many women withdraw their complaint. Information supplied on 2 December 1997.

<sup>85</sup> Information supplied by Colonel Schockweiler and Mr. Stebens of the Luxembourg police forces, 1 December 1997.

the need for repeated questioning as well as reducing secondary victimization as much as possible. For serious offences, it is still quite common for the victim to be questioned by both the examining magistrate and the court.

During the pre-trial judicial stage, the examining magistrate may decide to confront the victim-witness with the accused. Furthermore, the public prosecutor, the accused and the civil claimant or their respective counsels, may interrogate witnesses through the intermediate person of the examining magistrate. None of the participants may speak or ask questions without permission of the examining magistrate (s. 81 CCP). The questions which the examining magistrate refuses to put to the witness will be taken down in the record of the examination (s. 82 CCP).

According to the law, the questioning of the victim during the trial proceedings is not strictly necessary. Depositions of statements made by the victim before the examining magistrate are valid in court. Therefore the interrogations by the examining magistrate could relieve the victim of the burden of an interrogation during the trial. Even so, most judges prefer to see and hear them themselves. They consider the right of the defence to question the victim as one of the essential elements of criminal proceedings. The manner in which the questioning takes place largely depends on the individual judges presiding the court. The court has the power to prevent certain questions being asked. In general, lawyers are not inclined to attack the victim because this will as a rule make a bad impression on the judge. However, judges may allow a defence lawyer to question a victim in a non-sympathetic manner.<sup>86</sup> Generally speaking, judges prefer to maintain an impartial and objective position. As a result, public prosecutors have assumed the task of protecting the victim – the witness for the prosecution – against hostile questioning. The public prosecutor will object to the line of questioning and the judge will decide whether or not the question can be put to the witness.<sup>87</sup>

In daily practice, two additional problems can be isolated. Firstly, the questioning of children poses several difficulties. The police have two special interrogation rooms for children,<sup>88</sup> but there are no experts to question them and assess the credibility of their statements.<sup>89</sup> The persons capable of being experts are, as a rule, already involved with the child as a therapist. The roles of the therapist and expert cannot be intermingled. Consequently foreign (mostly German) experts have to hear the child, which entails a language problem in certain cases. There is only one expert (psychologist of the Unikliniken Homburg/Saar) who is of Luxembourg origin and can speak the language. Other experts do not and therefore have to be assisted by interpreters. There is a certain danger that the translations undermine the spontaneity of the child's statements. However, according to

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<sup>86</sup> Information supplied by Mr. Rodesch, lawyer, 1 December 1997.

<sup>87</sup> Information supplied by Mr. Biever, public prosecutor, 2 December 1997.

<sup>88</sup> The police often have problems funding special facilities for victims. For instance, the police did not get any money to supply the interview rooms for children with toys. Accepting a donation for the toys caused a big scandal. This is certainly a frustrating situation. Information supplied by Mr. Majerus, Ministry of Family Affairs (*Ministère de la Famille*), 1 December 1997.

<sup>89</sup> The research was carried out in December 1997 and the questioning of children through audio-visual means and the use of the videotape in court was introduced in November 1997. In December 1997, none of the interviewed legal practitioners mentioned the possibility and I found out much later it existed. In May 1999 I met Mrs. Steil of Victim Support and Mr. Robert of the victim services at the court and they were unaware of any such practice being introduced, Annual Conference of the European Forum for Victim Support Services, Vienna. Nevertheless, practice may have changed since.



the Minister of Justice, this is not as big a problem as it may seem at first sight. Judges often want to hear the child-victim themselves in court,<sup>90</sup> irrespective of whether the child has been questioned by an expert and considered credible. As mentioned earlier, it is remarkable that most judges want the child-victim to give evidence again in court, even though he has been heard (repeatedly) before the trial and by experts. Judges do not seem to take the possible traumatic effect on the child into account. Nor, do they seem to consider the negative impact on the child's testimony if he has to be questioned in the presence of the offender.<sup>91</sup> Today, the questioning of children may be done with an audio-visual link to a room outside the courtroom where the trial takes place. The necessary equipment has been installed.<sup>92</sup>

Another problem is the lack of reception facilities for victims in the court buildings making it difficult to create separate waiting rooms for victims and suspects. The buildings are old and the only waiting space is the central hallways. According to the Minister this is most unfortunate but cannot be helped until new court complexes are built. However, the Minister is of the opinion that the victim could wait in the courtroom instead of the hallway, since the court is open to the public before the trial, which gives the victims some protection.<sup>93</sup> After personally having visited both courts, the conclusion seems justified that if the authorities really wanted to protect the victim from the accused can easily do this by inviting the victim into one of the private chambers of the public prosecutors or judges where there are usually rooms available. If not, the rooms of the administrative personnel might be an option. The poor reception and protection offered to victims in court is primarily due to a lack of awareness and ignorance rather than a problem of space.

### 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.*

Although hearings are usually open to the public, the president of the court may order a case to be heard *in camera* for reasons of public order or moral (s. 88 Const., s. 190 CCP), e.g. if the hearings concern indecency offences. A request by the public prosecutor or the victim for a trial *in camera* is always granted by the court. However, even if the trial is held behind closed doors, the oral submissions of the public prosecutor and the defence are presented in open court. It is hardly surprising that the press, which is always allowed in the court room, is eager to report on violent crimes or sex offences. There are no legal

<sup>90</sup> The social workers of the support service of the prosecution service (see § 3.7 and § 6.1) will show the child the court rooms and prepare him for what is going to happen during the trial.

<sup>91</sup> Question 226 of Rippinger, Member of Parliament, in *Questions au gouvernement – extrait du compte rendu*, nr. 9/96-97, p. 429.

<sup>92</sup> In April 1997, the Minister of Justice said that preparations for video registration and display in court were under way and video recorded questioning would be possible shortly. Answer of 4 April 1997, in *Questions au gouvernement – extrait du compte rendu*, nr. 9/96-97, p. 429-430.

<sup>93</sup> Answer of the Minister of Justice of 4 April 1997, in *Questions au gouvernement – extrait du compte rendu*, nr. 9/96-97, pp. 429-430.

provisions to protect the victim from unwanted publicity apart from holding a trial without the public and the press present. This is not so surprising since the media in Luxembourg are not as aggressive and sensationalist as elsewhere. Furthermore, in Luxembourg no boulevard press exists. The press hardly ever publishes the names of victims in the newspaper. Names are only published if they are already public information, for instance, because the victim sought media attention himself. The same rule applies to pictures or photographs in which the victim can be recognised.<sup>94</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.*

The law does not provide for protection of the victim before the trial. In practice, police protection is available to victim-witnesses. During the trial, there are few legal provisions to protect the victim against intimidation or retaliation by the offender. This is probably due to the fact that few incidents of intimidation have taken place in the past and there is no organised crime. In 1997, however, there was one incident where the victim was intimidated between two court hearings.<sup>95</sup> Subsequently, the Minister of Justice proposed to reform the law in order to protect victims from the risk of retaliation and intimidation by their aggressors. Until the enactment of such an Act,<sup>96</sup> the only protection available to victims during and after the trial is the conditional sentence (*sursis*) or the probation order (*libération conditionnelle*). A conditional sentence can be imposed by the court on its own initiative or after a request by the prosecution service. One of the conditions that can be imposed is not to appear in a certain area, such as the street where the victim lives or works. However, the conditional sentence can only be imposed if the defendant is a first offender. If he has been convicted before, the court cannot protect the victim (s. 626 CCP). If the offender has been found guilty and served a prison sentence, he can be released conditionally after having served half of his time (s. 100-1 PC).<sup>97</sup> The probation order can be accompanied by all sorts of conditions, considered appropriate in this particular case. The probation service will assist the released offender and make sure that the imposed conditions are respected. In case of less serious crime, the offender will remain on probation for the time of his initial prison sentence. This period can be extended by one additional year (s. 100-7 PC). The probation term serious offences is at least five years and not more than ten (s. 100-8 PC). In practice, the conditional release is often used, especially if the conduct of the detainee towards the victim may cause problems after his release.<sup>98</sup>

<sup>94</sup> Information supplied by Mr. Rodesch, lawyer, Luxembourg, 1 December 1997.

<sup>95</sup> The Colombaria case.

<sup>96</sup> In May 1999 I met Mrs. Steil of Victim Support and Mr. Robert of the victim services at the court and they were unaware of any such Act being introduced, Annual Conference of the European Forum for Victim Support Services, Vienna.

<sup>97</sup> The general rule is that the offender can be released conditionally after having served half of the imposed prison term. However, if the sentence is less than 6 months imprisonment, he must have served at least three months. And if the court imposed a life sentence, the offender must have served at least 15 years (s. 100 PC).

<sup>98</sup> Information supplied by Mr. Bour, public prosecutor, Diekirch, 4 December 1997.

## 9 CONCLUSIONS

There are three striking features about Luxembourg and its criminal justice system that benefit victims. First of all, there are a great number of victim services, varying from private initiatives, associated with victim support services abroad or nationally, to information services at the prosecutor's office in the courts. Secondly, though there are few legal provisions exist to protect victims against undue media exposure, intimidation or retaliation by the offender, in Luxembourg they are only rarely needed. The media hardly ever gives out any personal information on the victim and no boulevard press exists. Intimidation of witness has occurred only once or twice in the last decade. Thirdly, the criminal justice authorities have very informal and good relationships with one another, as well as with the victims. Victims have easy access to the authorities who generally take the victim's interest into account. Good examples are the common practice of the courts to postpone a hearing in order to allow the victim to find a lawyer, and the practice of holding a trial behind closed doors if such a request has been made.

Nevertheless, there is room for improvements. It would be advisable for the authorities to establish more initiatives to help the victim claim compensation, and collect the money from the offender. Although legal aid is available for victims with a minimum income, numerous others who earn more but are not rich have to pay for their advocate themselves if they want to participate in the criminal proceedings. Though a lawyer is not mandatory, in practice the victim is expected to have one. If a victim has no legal counsel, he is not informed of his opportunities to obtain compensation from the offender or from the state, although the police may give him a leaflet about victim support services. This is a shortcoming that should be remedied. Concerning state compensation, the conditions are too restrictive: only very few victims have benefited from the state compensation scheme. In a country as rich as Luxembourg, limiting the payment of money to victims of crime to an absolute minimum seems inappropriate.

# Supplements

## ABBREVIATIONS:

AOJ	-	Act on the Judiciary
BF	-	Belgian Francs
CCP	-	Code of Criminal Procedure
Const	-	Constitution
EGP	-	Police Academy ( <i>Ecole de gendarmerie et de police</i> )
Flux	-	Francs of Luxembourg
PC	-	Penal Code
SAV	-	Victim service at the courts ( <i>service d'aide aux victimes</i> )
SCA	-	State Compensation Act

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# Chapter 16

## Malta

### SCENERY

The Maltese people live on the islands of Malta (390 sq. km.) and Gozo (65 sq. km.). The total number of inhabitants of these islands is 350,000. Comino, the other island of the island group belonging to the Republic of Malta, is uninhabited.<sup>1</sup>

The islands had seen many conquerors, all of whom left their mark on the islands. As a result the islanders owe their faith to the Apostle Paul who was shipwrecked on Malta in AD 60; their language mainly to the Arabs, who ruled for 220 years; their culture to the Knights of St. John who stayed for 268 years; and their deep sense of democracy to 164 years of British rule. The islands gained independence in 1964, and the Maltese Republic was established in 1974. Despite the long and chequered history of foreign domination, the Maltese people are a proud nation distinct from any other with its own language. Even though many Maltese faces still reflect the powerful nations that conquered the islands, like the Phoenicians, the Normans and the Arabs, there is a strong feeling of identity born out of a mixture of self-preservation and stubbornness.

The small islands of Malta and Gozo have given shelter to people for a very long time. At Ghar Dalam remains of human habitations were found that date back to 4,000 BC. Malta entered recorded history in the power struggle between the Phoenicians, Greeks and Persians. Also the Maltese language, *il-Malti*, is a Semitic language with roots that go back to Phoenician and Carthaginian times. When the Arabs arrived in 870 A.D., they brought their own language and because of its Semitic roots many of the words were assimilated. Then when the European nations began imposing their influence on the islands, words were borrowed from the Roman languages and later from English. It is thought that the first attempts to commit *il-Malti* to paper were made by the Maltese knights of the Order of St. John after their arrival in 1530.

The Maltese Knights (Knights Hospitallers of the Order of St. John of Jerusalem, of Rhodes and Malta) are still remembered for another historical event with respect to the islands, namely their victory over the Turks who sailed onto Malta in May 1565. It took the knights and the local Maltese people, under the guidance of Grand Master Jean Parisott deLa Vallette, four months to end the siege with great loss of life on both sides. Finally on September 8 of the same year, the knights' cross flew again over the small fortress of St. Elmo. The fortification of St. Elmo, embellished and extended in the years subsequent to

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<sup>1</sup> Cominio is virtually uninhabited, only one family lives on the island and there is one hotel.

the Great Siege of 1565, can still be admired in the present capital Valletta, named after the brave La Vallette. The anniversary of the ending of the siege has since been the most important date on the calendar. And until the second great siege of 1940, it was felt that no other event could equal the 16th century siege's hardship, nor the glory of its victorious ending. On 10 June 1940, however, Italy's dictator Mussolini joined forces with Hitler. The following morning, Mussolini made his move against Malta. To face the enemy aircraft, the Royal Air Force had at first only three old planes, which came to be known as Faith, Hope and Charity. Folklore has it that only the last plane was lost during the first raid, because 'Malta never lost Hope nor Faith in the final victory'. One month later, more than 200 Italian air raids had been logged on the small island of Malta. Churchill was convinced of the strategic importance of Malta and insisted it should be held, whatever the cost. But also the Germans soon realised the benefits of capturing the island since its aircraft and ships were a constant threat to the supply lines of Hitler's Afrika Korps. The Germans could not allow this outpost to remain in allied hands. With the growing German involvement, the battle for Malta became grimmer by the day. To crush the population's will to fight on, Malta suffered 154 days of continuous day and night raids (London had 57), and 6,700 tons of bombs were dropped on the Grand Harbor area.<sup>2</sup> Furthermore, the blockade was complete: nothing could reach the islands. 'Victory kitchens' were set up to feed the starving population. Food and ammunition were rationed. On the 15th of April 1942, King George VI awarded the islands the George Cross for bravery.<sup>3</sup> Only on this day, the feast day of the Assumption of the Virgin Mary, did allied ships manage to get to Malta and its strength revived. The islands became the springboard for the allied invasion of Sicily. On 8 September of the following year the Italian fleet surrendered in Malta 'under the guns of the fortress of Malta' to quote Admiral Cunningham. By coincidence, that day was not only the feast day of Virgin Mary, it was also the anniversary of the victory of Malta over the Turks in 1565.

After having been under Britain's protection as a Crown Colony since 1800, independence was granted to the Maltese islands on the 21st of September 1964. The Malta Independence Constitution established that the islands would be within the Commonwealth as a liberal parliamentary democracy that guarded the fundamental rights of its citizens and guaranteed the separation of the executive, judicial and legislative powers. Until 1974, the islands were a Constitutional Monarchy with Queen Elizabeth II as Queen of Malta, represented by a Governor-General. In 1974, however, Parliament voted by a two-thirds majority to turn the islands into a Republic with a President as head of state.

It is no secret that politics play an important part in current daily life. All Maltese are politically aware and party allegiance is rewarded. As the two more predominant parties change hands – the Nationalist and the Labour party<sup>4</sup> – so do the persons in key positions in the civil service and government-run organizations. Like in all Latin countries, it is who you know that matters if you want things done. Another power in Maltese life is the Catholic Church, and although its influence is not as far reaching as it used to be, it is still omnipresent.

<sup>2</sup> By comparison, the worst night of destruction in Coventry was achieved with 260 tons.

<sup>3</sup> The citation reads: 'To honor her brave people I award the George Cross to the island fortress of Malta to bear witness to a heroism and devotion that will long be famous in history.' (The citation with George Cross can be seen in Valletta, on the wall of the Palace in Republic Street.)

<sup>4</sup> The two main political parties are the Nationalist and the Labour party. For the past two elections another party, the *Alternattiva Demokratika* (a Green party) has been contesting the elections, though with not much success.

Churches are well attended on a daily basis. The Church has played and still plays a key role in the social field, such as establishing popular housing, taking care of the disabled, supporting all sorts of groups, and sheltering victims of domestic violence. On the other side, the Church strongly opposes the introduction of divorce on the islands and battles with those groups which are in favour of its introduction. The women's movement is, however, gaining political ground. An important achievement of the movement is that a secretariat for the promotion of women's rights has been established as a department within the general framework of the Executive set up. The women's rights movement also plays a key role in establishing protective measures for women and children within the Maltese society and legal system.

The Maltese legal system is a curious mix of continental and common law. Also the position of the victim within criminal law and procedure is greatly influenced by this hybrid nature: before the lower courts the victim has a certain status that reflects the continental influence, but in the superior courts the victim has no standing, similar to the position of the victim in common law systems. In practice, this means that only during the preliminary inquiry before the magistrate's court as a court of criminal inquiry, and during the trial of offences before the magistrate's court as a court of criminal judicature, does the victim have the rights of an injured party, such as the right to a lawyer and to contribute to the compilation of evidence. In the superior courts, where the stakes are much higher because these courts try the most serious offences, the victim has no position and no voice.

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## PART I: THE MALTESE CRIMINAL JUSTICE SYSTEM

### 1 INTRODUCTION

The Maltese criminal justice system is the result of a blending of continental and common law systems. The Italian legal tradition has been the most influential of the continental legal systems, since it is the European jurisdiction which lies closest to Malta. British rule explains the strong influence of the English common law system. Substantive criminal law is mainly inspired by the Italian legal system, whereas the rules of procedure, especially the rules of evidence and the rules of procedure in trials by jury, are influenced by English common law.<sup>5</sup> The rules of procedure in the magistrate's courts are, apart from the adversarial nature of the trials, more influenced by continental law.

Students of the University of Malta are still referred to Italian textbooks and *digesta*'s to study legal doctrine, whereas they have to study English textbooks for procedural law and general legal principles. Recently, however, Maltese lecturers have shown an increasing interest in the Scottish legal tradition because, as it is based on the continental legal system, it is considered closer to the Maltese than the English.

There are no textbooks on Maltese criminal law and procedure. Not surprisingly, much importance is attached to lectures which are transcribed and used by students. The most famous notes are those by professor Mamo (see § 4). His notes, even though they are old and need updating,<sup>6</sup> are still being used today at the university. In the absence of textbooks, they are even quoted by the courts. Given the fact that neither textbooks nor any research was available, data is either a result of studying the Laws of Malta, or of interviewing legal practitioners.

Finally, it is important to note that crime rates on Malta are relatively low. As a result, the large majority of the Maltese feel safe to very safe at night (72%), while 86% feel secure during the daytime.<sup>7</sup> Furthermore, 80% of the public are quite satisfied with the performance of the police (see § 3.1).

### 2 GENERAL REMARKS AND BASIC PRINCIPLES

The Maltese criminal justice system is a curious mixture of continental and common law. Criminal substantial law is inspired mostly by Italian law and legal doctrine. Criminal procedure and especially the law on evidence, on the other hand, are influenced by English common law.<sup>8</sup> Insofar as criminal procedure is concerned there is still some influence from

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<sup>5</sup> The Napoleonic Codes only influenced civil and commercial law.

<sup>6</sup> The first three chapters of the Mamo notes have been revised and updated by Mr. De Gaetano, senior lecturer of Criminal Law and Procedure at Malta University.

<sup>7</sup> Survey of the general population, Malta Police Force modernization programme, May 1998, p. 20.

<sup>8</sup> Civil and commercial law were influenced by the French Napoleonic Codes. The Napoleonic legal tradition has not influenced procedural criminal law and as a result the adhesion or injured party model is to a large extent absent in Malta.

the continental system reflected in the powers and functions of the magistrate who has a strong investigative role in criminal proceedings. However, a criminal justice system based on case law, a distinct feature of common law countries, does not exist, as such, in Malta. Maltese laws were codified early on following the European continental tradition.

The dichotomy is also reflected in court practice. The lower courts have maintained some continental features; the most important is that the victim as an injured or civil party can participate in the proceedings, by making submissions, bringing evidence, examining and cross-examining evidence, even in those cases which are prosecuted by the police *ex officio* (see § 3.3 and § 5.3), whereas the proceedings in the superior courts take place in accordance with the English common law tradition. Despite the differences between the proceedings in the lower and superior courts, the adversarial nature of criminal proceedings is a characteristic common to all trial proceedings. Typical adversarial features in all Maltese criminal proceedings are the principles of orality and immediateness, the right of the parties to examine and cross-examine witnesses, the concept of an impartial judge who does not easily intervene with the parties' line of questioning, and the involvement before the superior courts of the public as a jury. In principle, the prosecution and the defence counsel contest each other in court before an impartial judge.

Another characteristic shared with the English legal system is that in practice most cases are dealt with in the magistrate's court, which is a single judge court and functions without a jury. Another typical English legacy is that the (executive) police<sup>9</sup> act as prosecutors in the magistrate's court.<sup>10</sup> In the criminal court which deals with the more serious offences, the Attorney General's office prosecutes in the name of the Republic of Malta. Unlike in England, there is no strong tendency toward trial avoidance (see 7.1, B.5).

## 2.1 Basic Principles

The pre-trial stage is governed by secrecy principle and the legality principle. According to the former, the preliminary investigation is conducted in secrecy. The latter stipulates that if there is a *prima facie* case against the accused, i.e. the evidence gathered in a particular case has every appearance of proving the fact though it may not constitute certain proof, the prosecuting authorities should start public action (see § 7.1). The trial proceedings are governed by the principles of immediacy and orality which require the direct testimony of the witness in court and the trial to be held orally, and not by means of the legal file and records of pre-trial witness' statements (see § 3.3.1). The principle of publicity dictates that

<sup>9</sup> There is a historic reason for calling them 'executive police'. Originally, the courts of magistrates in their criminal jurisdiction were called 'courts of magistrates of judicial police', the idea being that they had a policing function. The police force as such was the executive police, and, in fact, even today police officers are bound by law to execute all orders of the courts of magistrates (orders by the superior courts are executed by court ushers and marshals).

<sup>10</sup> Originally, the court of magistrates were designated as the 'court of magistrates of judicial police'. This was due to the strong investigative powers which the magistrates had and still have when they act as examining magistrates, with the function of collecting and preserving evidence when an offence has been committed. They also have similar investigative powers during the course of committal proceedings when a person is brought before them charged with a criminal offence triable on indictment, because it is liable to a punishment that exceeds that of the court of magistrates as a court of criminal adjudication. The term 'executive police' was therefore used to distinguish the functions of the police corps from the judicial police functions exercised by magistrates.

trials should be open to the public. However, the court can order that a trial is held behind closed doors, with no public present (see § 8.2).

### 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

#### 3.1 Investigating Authorities

The Malta police force consists of one single force operating in the entire territory of the Maltese islands. It employs 1800 policemen of which 200 are women.<sup>11</sup> The police force today is under the direction of the Commissioner of Police, who is assisted by a Deputy and several Assistant Commissioners. Politically, the police are answerable to the Minister for Home Affairs (until recently they were answerable to the Prime Minister). The police are easily accessible to the public. Every town and village traditionally has a police station. The police would, in some cases, prefer a mobile squad but the people are very attached to their local stations. There are 52 police stations in Malta and 23 stations in Gozo.<sup>12</sup>

Under section 346 (Cap. 9)<sup>13</sup> it is the duty of the executive police to preserve public order and peace, to prevent offences, to discover and investigate committed offences, to collect evidence and to bring the authors and accomplices before the judicial authorities. As a result, police officers not only investigate crimes but also prosecute many of them before the magistrate's court (see § 3.3). In practice, the members of the rank of inspectors act as prosecutors in the magistrate's court. The police do not have a formal relationship with the Attorney General's office (prosecution service acting in the criminal court), but they do seek the legal advice of the Attorney Generals and discuss cases. The contacts take place frequently and are informal.<sup>14</sup>

In family matters and regarding sexual offences, the police are under instruction to contact either a social worker or the victim support unit, situated at the police Headquarters. This instruction was issued because the police realize that not every constable is capable of handling such precarious cases in a constructive manner. The dark number in such cases is thought to be still rather high, for various reasons. Malta is a small island and some victims may refuse to go to the police because they do not want it to be known. Moreover, the people are very Latin in the sense that great importance is attached to the honour and good name of the family. Many women refuse to report abuse and sex offences, not because they are afraid of the police, but because they fear for their family's good name and reputation. It is suggested that this is changing and women are less inclined to keep silent to protect the family's honour. Victims are also said not to report a crime or to withdraw their complaint

<sup>11</sup> The first female members of the police entered the force in 1988.

<sup>12</sup> Information supplied by Police Commissioner Grech, Assistant Commissioner Rizzo, and inspector Muscat, Police HQ, Floriana, 5 May 1998.

<sup>13</sup> Chapter 9 of the Laws of Malta contains all the rules of Criminal Law and Procedure. Where only 's. x' is mentioned in this Chapter, without further reference, it is a section of Cap. 9.

<sup>14</sup> The police have easy access to the legal officers at the Attorney General's and simply come to the Attorney General's office, situated opposite the Valletta court. The police even have a habit of coming in at any time, expecting to discuss a case with legal counsel. Although the Attorney General would prefer them to make an appointment, it is very hard to change this custom. During an interview conducted with Dr. S. Camilleri of the Attorney General's office, we were interrupted twice by police officers wanting to discuss a case or seeking advice.

because they are not willing to go to court and give evidence in public or undergo cross-examination. This is particularly true with respect to sex offences and in those cases in which the victim is still a minor (see § 8.2).

Recently, the police initiated a modernisation programme. In this context, a community and media relations unit (CMRU) was created in August 1997, with the mandate to improve relations between the police force and the community at large. One of the core objectives of the modernisation programme is high visibility community policing. The unit periodically assesses public perceptions of the police services (see § 6.1, A.2).

### 3.2 Prosecuting Authorities

In Malta, the functions of public prosecution are exercised both by the executive police and by the members of the Attorney General's office. Police inspectors prosecute cases in the magistrate's court. The Attorneys General's office prosecutes in the superior courts. Pursuant to the Constitution, the Attorney General is appointed by the President in accordance with the advice of the Prime Minister. He must be qualified as a judge of the superior courts. In the exercise of his powers to institute, undertake and discontinue criminal proceedings, the Attorney General is not subjected to the direction or control of any other person or authority (s. 91 Const.). The office of the Attorney General is a public office, the members of which act as prosecutors before the criminal court (s. 430). The functions of the Attorney General start from the day on which he receives the record of the inquiry made by the magistrate's court (s. 431). The Attorney General is the only person with the power to discharge the person accused. If the Attorney General is of the opinion that there are not sufficient grounds for filing an indictment against the accused, he may order his discharge and file a declaration to that effect in the criminal court. He may furthermore withdraw an indictment which was already filed (s. 433). When the Attorney General takes such a discretionary decision, he must make a report to the President of Malta and state the reasons for his action (s. 433-4). The latter requirement is clearly included as a double check against any abuse of power vested in the Attorney General to discharge an accused or discontinue criminal proceedings. However, the margins of appreciation are already relatively small. The Attorney General can take the decision not to prosecute if there is sufficient evidence, however such a step is rarely taken (see § 7.1, B.5).

The police and Attorney General's office are independent of each other, not only in their function as prosecuting public officers but also regarding their other duties, such as the investigation of crimes and the collection of evidence. The Attorney General's office is not empowered to supervise or direct the police. Nonetheless, the police often consult the Attorney General's office on legal matters in a case. The contacts between the police and the Attorney General are quite informal and cordial. The police usually have to be in court anyway as prosecuting officers and so they frequently stop by the Attorney General's office which is opposite the court building.<sup>15</sup> (see § 7.1, B.5 and B.7; for training, see § 8.1)

<sup>15</sup>

This is on the island of Malta. With respect to the island of Gozo, contacts with the Attorney General's office are mostly conducted by telephone or fax, although occasionally the police officer in question may have to personally visit the office for consultation.

### 3.3 Judiciary

Members of the judiciary – magistrates and judges – are appointed by the President. The denomination ‘magistrate’ is used for those members of the judiciary who work in the lower criminal court or magistrate’s court. ‘Judges’ are those members of the judiciary who sit in the superior courts (for training see § 8.1).

The courts of criminal jurisdiction are divided into two separate tiers: the inferior and the superior courts. All the courts of criminal judicature are established by Cap. 9 of the Laws of Malta. The inferior courts are the two courts of magistrates of Malta and Gozo. The superior courts are the court of criminal appeal, and the criminal court. The superior courts are all situated in the capital Valletta, on the island of Malta. The Constitutional Court is not a court of criminal jurisdiction; it is regarded as a civil court.

#### *Courts of criminal jurisdiction:*

<b>superior courts:</b>	court of criminal appeal	final court in all criminal matters
	criminal court (or <i>jury court</i> )	tries serious offences as a court of first instance
<b>inferior courts:</b>	courts of magistrates ( <i>court of judicial police</i> )	a) at the pre-trial stage as a court of criminal inquiry concerning indictable offences (committal proceedings)
	dual jurisdiction	b) trial of summary offences: as a court of criminal judicature

The magistrate’s court is composed of one magistrate. It has a twofold jurisdiction, as a court of criminal judicature and a court of criminal inquiry. As a court of preliminary inquiry, the magistrate’s court is responsible for the compilation of evidence for cases punishable with more than six months’ imprisonment (s.370 and s. 389). During preliminary hearings, it will collect and conserve evidence which may eventually serve as the basis for a trial. On the conclusion of the inquiry, the magistrate’s court will decide whether there are sufficient grounds to commit the accused to trial on indictment (s. 401-2). If the answer to that question is affirmative, it is referred to as a *prima facie* case. This means that if the evidence is considered at its face value, there is enough evidence to bring charges against the suspect. If there is not enough evidence, the court will either discharge the accused or acquit him as the case may be. The latter decision can only be taken if it is not a complainant offence, and if the offence falls within its competence, i.e. as a rule, offences subject to the punishment of not more than six months.

In all cases, the court is bound to send the record of the inquiry to the Attorney General within three working days. If the court finds that there is not enough evidence it has to discharge the accused. If, in addition to the indictable offences, there are summary offences with the competence of the court as court of criminal judicature, then the court will examine the merits of those offences and will pronounce judgement convicting or acquitting the person charged. In pronouncing judgement in the latter case, the court functions as a court of first instance, and an appeal can be lodged with the superior court. With respect to the decision

to discharge the suspect, on grounds of lack of evidence, from the charge of an indictable offence the Attorney General may, within one month from the date in which he receives a record of the inquiry, issue a warrant to arrest the person discharged if the Attorney General and a judge not ordinarily sitting in the criminal court or in the court of criminal appeal concur that there are sufficient reasons to commit the person charged to stand trial on indictment (s. 433-3). If there is not enough evidence, the case of the discharged person is not closed and the police have to continue the investigation and search for more evidence. If fresh evidence is produced new proceedings may be instituted against the person who has been discharged (s. 434).

As a court of criminal judicature in first instance, the magistrate's court has competence over all contraventions and crimes punishable with a fine or imprisonment not exceeding six months. The competence of the magistrate's court can be expanded by some of the crimes which fall into the large category of offences 'triable either way' (between six months and 10 years of imprisonment). These crimes can, although formally they have to be tried in the criminal court, be tried in the magistrate's court if the Attorney General and the accused agree to it. If the accused objects, the case will be tried by a jury in the criminal court (s. 370-3d). In practice, this category of crimes is usually tried by the court of magistrates, where the public prosecutor is a police officer, and not a prosecutor from the Attorney General's office (see §§ 3.1 and 3.2).

During the pre-trial stages leading to an indictment and during the trial stage of summary offences in the magistrate's court, the victim who reported the crime to the authorities (the complainant, see § 5.2) can appear with a lawyer and submit evidence to the court of preliminary inquiry. He can cross-examine witnesses of the defence and bring his own witnesses as well (see § 5.3).

The criminal court has the authority to try all offences liable to a prison term longer than months. Offences liable to imprisonment between six months and 10 years, however, are triable either way, i.e., by the court of magistrates (subject to agreement between the Attorney General and the person charged) or by the criminal court should the Attorney General insist on a trial by jury or should the accused opt for a trial by his peers.

*Jurisdiction of the courts of criminal jurisdiction:*

contraventions and crimes punishable by a fine or imprisonment no longer than six months:	court of magistrates
crimes punishable by a prison term between six months and ten years:	magistrate's court <i>or</i> criminal court ( <i>triable either way</i> )
crimes punishable by more than ten years' imprisonment:	criminal court
appeals:	court of appeal

The criminal court is composed of one of the judges of the superior courts and sits with a jury of nine persons. The jurors decide on the issue of guilt (s. 436-2). The judge has to instruct the jury on the rules of law and justice by which the evidence is weighed (s. 465) and is competent to determine the sentence of the perpetrator, if he is found guilty. The criminal court may also sit with three judges, without a jury, in the case of certain offences under the Official Secrets Act.

There is also the possibility for the accused to opt to be tried by the criminal court *without a jury* in which case even the question of guilt would be determined by the single judge sitting on his own (s. 436-6). Such a request must be made by the accused not later than ten days after the date of service upon him of indictment by the Attorney General in the criminal court. Since this amendment was introduced in 1987, only three accused persons have opted to be tried by the criminal court without a jury.<sup>16</sup>

The court of appeal is composed of the Chief Justice, who is the president of the court, and two other judges. The court of appeal hears appeals from decisions of the criminal court and the court of magistrates. However, in the latter case, the court is presided by only one judge. Judges who are competent to sit as members of the court of appeal, can also sit in the Constitutional Court. The Constitutional Court has to be composed of three such judges (s. 95 Const.). The jurisdiction of the Constitutional Court is appellate in cases involving violations of human rights, interpretation of the Constitution and invalidity of laws.<sup>17</sup>

With respect to crimes committed by juveniles, a special court has been set up.<sup>18</sup> It consists of a magistrate sitting in a place different from that of the ordinary courts of criminal jurisdiction<sup>19</sup> and hears cases relating to persons under the age of 16. During its criminal proceedings, the juvenile court is assisted by two experts (psychologists or social workers), one of whom has to be a woman. The court consults the experts but is not bound by their opinion.

Finally, the small claims tribunal is worth mentioning even though it is not a court of criminal jurisdiction. However, this tribunal is important for those victims of crime who have a claim of less than 100 Liri Maltese (EUR 244) against the offender. The small claims tribunal has been set up recently by an Act of Parliament. It provides for the appointment of an adjudicator who decides these cases on principles of equity and the law. The adjudicator may be a lawyer with at least one year experience or a legal procurator with three years' experience. The proceedings before this court are summary and there is little formality. The intention is to deal with claims in one or two court sessions.<sup>20</sup>

### 3.3.1 Criminal Proceedings

Trial proceedings before the magistrate's court are usually said to be completed within one year after the report. However, some cases are finished within a day. Others take not one year but many. Cases before the criminal court may take approximately three to six years, mainly because of the obligatory preliminary inquiry. If after the preliminary inquiry the

<sup>16</sup> Information supplied by Mr. De Gaetano, senior lecturer at Malta University and judge at the superior courts, when correcting this chapter.

<sup>17</sup> For more information on the judiciary see K. Aquilina, P.E. Micallef, *A profile of the Maltese courts of justice*, Department of Information, Valletta, Malta, March 1992, p. 18-24. See also the official website of the Maltese government (<http://www.magnet.mt/info/state/court01.htm>)

<sup>18</sup> The Juvenile Court Ordinance was repealed by Act XXIV of 1980. The juvenile court is now provided for by this 1980 Juvenile Court Act (Cap. 287) as subsequently amended by Act XI of 1985.

<sup>19</sup> Sittings are currently held at the social center, 'Centru Hidma Socjali', in Santa Venera.

<sup>20</sup> In addition to this initiative to deal more quickly with crime, a small number of infringements of the law, such as minor traffic offences, illegal disposal of litter, non-compliance with the Education Act, etc., have been depenalised and are heard by commissioners of justice. The commissioners must hold a degree in law and are given a three-year appointment. Since they have been depenalised, cases may even be decided in the absence of the accused.

case is referred to the criminal court, the victim no longer holds a formal position. He is merely a witness for the prosecution. During the court proceedings, the victim does not need the services of a lawyer because as a rule the lawyer will not be allowed to speak on behalf of the victim or intervene in the proceedings.<sup>21</sup>

### 3.4 Enforcement Authorities

The enforcement authorities have no obligation to the victim to assist him with the enforcement of his civil claim for damages.

### 3.5 Probation Services

If compensation is ordered by the court in combination with a probation order or discharge, the victim may be assisted by the probation service in the collection of the money. The probation service, however, is very small-scale, with only four probation officers to cover the area of Malta and Gozo. Understandably, it is difficult for so few officers to deal with offenders and victims at the same time. The courts do not make use of the probation orders as much as they would like to, because they know the limitations of the probation service. Currently, more probation officers are being trained to be able to broaden the scope of their activities.

### 3.6 Victim Services

There is no national victim service in Malta. However, there are some services available for victims of crime. Firstly, police headquarters houses a victim support unit staffed by one male and four female police officers. The victim support unit handles mostly sex offences, including prostitution, and cases of domestic violence. Given the workload, the unit is rather understaffed, especially since within the Maltese criminal justice system, police officers -and thus also those of the victim support unit- are responsible for the prosecution of their cases. Hence, the victim support police officers have to go to court to prosecute the perpetrators of sexual crimes.<sup>22</sup> The victim support unit of the police works in close co-operation with other services and refers victims to them for social, legal and psychological assistance.

Another victim service is provided by the Social Welfare Development Programme, situated near the capital in Blata-l'Bajda. It is an agency set up by the Ministry of Social Development in 1994. It specializes in social work and service development.<sup>23</sup> It consists, *inter alia*, of a domestic violence unit, a child protection unit and a Butterfly centre. The purpose of the Butterfly centre is to enable quick emergency and post-emergency medical and psychological expert assistance for children. The domestic violence unit supports victims,

<sup>21</sup> Information supplied by Mr. De Gaetano, senior lecturer of Criminal Law at Malta University and judge of the superior criminal court, 9 May 1998.

<sup>22</sup> It proved to be quite difficult to get an appointment with one of the police officers of the victim support unit because they were absent from the office to prosecute cases in court. During my stay there was a court case in Gozo against a teacher who had allegedly abused several of his pupils. The case lasted several days during which the unit was virtually impossible to reach for me and all victims seeking help.

<sup>23</sup> Among the services created by the service development unit are: the health social officers, family therapy service, butterfly center (a child crises center), central functions support program, Gozo social task forces, ability social work unit for the disabled and others.



helps them to find shelter and, if necessary, refers them to other welfare services.<sup>24</sup> The unit is also committed to the prevention of violence through education and media.<sup>25</sup> The child protective services unit gets involved in cases where a child or a young person under 18 is suspected of being neglected, battered, injured or abused. The service includes investigations of the abuse, as well as assessment, counselling, and cooperation with other public agencies and experts. The units employ social workers, psychologists and a lawyer.

The domestic violence and child protection unit cover the entire territory of Malta. Nevertheless, they do not feel there is a problem distance-wise, even though it would be better to establish another unit at Gozo.<sup>26</sup> The lack of sufficient personnel to deal with the numerous cases is considered a far greater problem. Apart from the fact that a university degree to become a social worker is a recent development, the work is also not very well paid and consequently not very popular.

The unit's clients are referred by various organizations, such as the health department, the hospitals, teachers, the victim support unit of the police and concerned individuals. There is also a free phone help line run by trained staff which provides support, information and help in accessing emergency services for callers. The support line also refers to the social welfare units.<sup>27</sup>

### 3.7 The National Ombudsman

The National Ombudsman is an independent officer of Parliament appointed by the President. He investigates complaints about any action taken by persons or other authorities in the exercise of administrative functions by, or on behalf of, the government and local councils. The National Ombudsman reviews the circumstances giving rise to the complaint in order to establish the facts and forms an opinion as to whether the act or decision appears to be contrary to law, unreasonable, unjust, oppressive or wrong. He may make recommendations for a resolution of the complaint but he has no power to force acceptance of such a

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<sup>24</sup> Since the establishment of the center, the domestic violence unit has provided assistance to 1,010 clients, of which 22 were men. The unit consists of 5 social workers.

<sup>25</sup> Domestic violence is a serious problem and is increasingly recognized as such. However, in many layers of society domestic violence is still considered 'normal', though this attitude is starting to change. In particular young women do not accept it anymore. In spite of these developments, many policemen prefer to treat domestic violence as a private matter in which they do not want to interfere. It is not uncommon that women are advised to go home and make up 'under the sheets'. Also magistrates and judges suffer from lack of knowledge about and understanding of the concept of domestic violence and its effects on women. Often the excuses of the violent partners are accepted by the court. Information supplied by social workers of the domestic violence unit, Blata l-Bajda, 6 May 1998; and Sister Farrugia of the shelter for victims of domestic violence in Balzan, 6 May 1998.

<sup>26</sup> Crossing the sea between Malta and Gozo takes about forty minutes and another half an hour to reach the unit by bus. By car it takes less time. However, a domestic violence unit and a child protection unit on the island and Gozo would be welcome. According to most people I spoke with, the situation on Gozo is considered much worse than on the island of Malta. Men on Gozo are said to treat their family as their possession. In May 1998, the month of my visit, several cases of abuse and violence were brought to court in Gozo. The fact that women and children were willing to involve the authorities in cases of violence in the family was said to be a new development.

<sup>27</sup> Information supplied by the social workers of the units, 6 May 1998, Blata l-Bajda. See the information leaflets of the Social Welfare Development Program.

recommendation. The National Ombudsman has no authority to investigate complaints about lawyers in private practice, the judiciary or proceedings pending before a court, nor any criminal investigation by the police. All other activities of the police can be investigated, such as the way a victim or complainant was treated. In order to make a complaint to the National Ombudsman, citizens can simply send a letter in which they describe the wrong, by whom it has been committed and its effects. Finally, they should include a possible solution to remedy the wrongful action.<sup>28</sup>

## **4 SOURCES OF LAW**

### **4.1 General Sources of Law**

The most important sources of law are the Constitution and the Laws of Malta, which is one Code, subdivided into different Chapters (Cap. x), each representing a separate Code or Act.

The Constitution of 1964 is inspired by Constitutions of other former colonies, such as India and Nigeria, and by the European Convention of Human Rights. Chapter Eight of the Constitution contains provisions relating to the judiciary, and establishes the superior and inferior courts (s. 95- 101A Const.). The Maltese legal system has always had Codes. In spite of British rule, the Statutory law maintained its relevance and case law is a source of law, but not of the same order as in other common law systems. The courts do, almost routinely and as a matter of course, quote previous judgments of the same court or of superior courts in authoritative support of statements about the law. Previous court decisions as a matter of law are not binding on the courts, although it is very rare that previous decisions are disturbed. Whether or not English case law is quoted, depends on the subject matter or the competence of the particular court. Thus, English case law is very commonly quoted in the courts of criminal jurisdiction, in public law cases and therefore by the Constitutional Court or by the civil courts when taking cognizance of matters of public law. On the other hand, in private law English law is rarely quoted. Legal doctrine is not a source of law, but has persuasive force (see § 1).

### **4.2 Sources of Criminal Law and Procedure**

The most important source of criminal law and procedure is Chapter 9 (Cap. 9) of the Laws of Malta (1854). It contains both the substantive and procedural rules of criminal proceedings.<sup>29</sup> Other sources of law worth mentioning are, for instance, the Code of Police laws (Cap. 10), the Probation of Offenders Act (Cap. 152), the Inferior Courts (Re-designation) Act (Cap. 340), the Judicial Proceedings Act (Cap. 189) concerning the use of the English language, and the Children and Young Persons Act (Cap. 285). The latter Act contains *inter alia* care orders for juvenile delinquents.

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<sup>28</sup> See the government's official website: <http://www.magnet.mt/info/state/ombudsmn.htm>

<sup>29</sup> Because of the absence of separated Codes, the relevant provisions of Chapter 9 of the Laws of Malta (the Code of Criminal Law and Procedure) will be noted as follows: (s. x). Other Chapters are quoted according to their respective numbers.

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

Within the Maltese justice system, there are no specific Acts, nor guidelines or directives concerning victims. There is no Legal Aid Act but the Laws of Malta contain some provision enabling both defendants and victims to get free legal aid in civil proceedings (s. 119-125, Cap. 12). The only problem is that in the case of civil proceedings the income limit is extremely low. In practice, however, the rules are applied somewhat less strictly. The victim is not entitled to legal aid in criminal proceedings.

With respect to State Compensation, the Cabinet (1987) has decided to approve *ex gratia* payments to certain restricted categories of victims who suffered bodily harm resulting from

- (a) the breakdown of law and order;
- (b) police officers, being in breach of law, who cause wilful harm;
- (c) members of the security forces in the courts of their duties, as result of criminal offences.

The quantum of damages is determined on the basis of advice given by the Attorney General's office.

Recently, a commission has been set up to work on a draft of an Act on Domestic Violence, and another commission will be set up to evaluate how to facilitate giving evidence in court (see §§ 8.2 and 8.3).

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

The roles and the position of the victim in the criminal justice system are to a great extent influenced by the court before which the case is pending. Only in the magistrate's court, can the victim who reported a crime act as an injured party. In the criminal court, however, the victim can play no other role than that of a witness for the prosecution (see Scenery).

### 5.1 Reporting the Offence

According to the wording of the Laws of Malta, reporting the offence refers to the act whereby a public officer, who, in the enforcement of his duties, becomes aware of an offence that can be prosecuted *ex officio*, is bound to give notice to the competent authority. The term 'information' (*denunzja*) is used to refer to the act of an individual who spontaneously gives notice to the police of an offence which can be prosecuted *ex officio*. Citizens can lay an information with any officer of the police (s. 535). If a victim reports a crime, it is officially called a complaint. Accordingly, the term 'complainant' is, therefore, used to refer to a victim who reports a crime (and should be distinguished from the terminology used in § 5.2).

Pursuant to the law, every person who feels himself aggrieved by any offence and wants the offender punished may lay an information or file a complaint to any police officer, even by letter (s. 538). The difference between the information and the complaint is that an information may be laid by any person, but a complaint must be made by the person who has a direct interest in the punishment of the offender, or the wish to obtain redress at the hands of the court. The complaint may be made to any police officer. Complainants may be victims, their spouses or other family members or legal representatives (s. 542). The complainant holds a special position in the lower courts. He may act as an injured party and has, as such, several rights within the proceedings in the magistrate's court (see § 5.3).

Under Maltese law there is no general obligation imposed on private citizens to lay an information with the police. However, it may constitute an offence not to inform the police

of crimes against the state (s. 61).<sup>30</sup> It is also a contravention for a person who is present at any attempt against the life or property of another person to fail to report it to the police (s. 338-e). Likewise, certain special laws oblige certain persons or professions to lay information of crimes or the suspicion that an offence was committed. For instance, the Medical and Kindred Professions Ordinance (Cap. 51) obliges medical doctors to report crimes such as bodily harm, poisoning or violent death of which they have become aware in the practice of their profession. Social workers and other victim support workers are not obliged to report crimes which have come to their knowledge through their clients.

Crimes can be reported verbally or in writing. If it is reported verbally, it should be reduced to writing and signed by the informer to ensure its authenticity (s. 537). The police cannot act upon an anonymous information, except in the case of an offender caught red handed, or an ongoing offence (s. 535). The reporter of a crime, the person laying an information or the complainant, shall clearly state the facts and shall, as far as possible, furnish all such particulars as may be requisite to ascertain the offence, to establish its nature as well as to make the principals and the accomplices known (s. 536). Upon receipt of any information or complaint which require proceedings to be taken, the executive police shall inform the magistrate's court as soon as possible in order to receive the necessary directions for such proceedings (s. 540). If the police refuse to take action, the person who laid the information, or made the complaint, can submit an application to the magistrate's court and request it to order the police to take action. If, after hearing the evidence by the applicant and the Commissioner of Police, the court is satisfied that the information or complaint is *prima facie* justified, it notifies the Commissioner and order the police to take action (s. 541). In practice, this is referred to as 'challenging the police'. The police do not like being challenged in this way, so this is rarely used. (see § 7.1, B.5).

## 5.2 Complainant

For certain crimes, a complaint is necessary in order to start criminal proceedings. In these cases, the use of the term complaint equals the term normally used in this paragraph.

The police is not allowed to institute proceedings without a formal complaint of the victim or his representative in case of (a) carnal knowledge accompanied by violence; (b) abduction; (c) violent indecent assault, except in those cases where these crimes are committed with public violence, or are accompanied by any other offence affecting public order. In other words, if these crimes have occurred outside the home, in a public place, the offences can be prosecuted without a complaint (s. 544). There are some other crimes, and a number of contraventions, where proceedings may not be instituted in court without the complaint of the injured party, such as defamation and libel (s. 255 and 256, see § 5.4).

There are two main reasons why the legislature has introduced the prerequisite of the complaint. First, it does not want to perpetuate hatred among family members. Therefore, for certain minor offences against the person and some property crimes, the law makes criminal action dependant on the will of the victim. Second, in certain offences affecting the honour or reputation of a person or his family, it is felt that criminal proceedings may increase the damages suffered by giving publicity to the crime and to the private life of the

<sup>30</sup>

Sir Anthony J. Mamo, *Notes on criminal procedure*, (date unknown), as revised by senior lecturer and judge V.A. de Gaetano, Chapter 3, pp. 12-13.

victim and/or his family.<sup>31</sup>

The complaint can be made verbally or in writing, but it should, except in cases which allow no delay, be put in writing and have a signature (s. 539). The victim who acted as a complainant but regrets this later on can still stop the criminal proceedings. The institution and continuance of criminal action are fully dependant on the will of the complainant up to the verdict. Until that final moment, the complainant can waive the complaint and stop the proceedings (s. 545). The accused, however, may object to the waiver and insist the proceedings will continue. If the waiver is made after the opening of the trial and it appears to the court that the complaint was frivolous or vexatious, or made with the object of extorting money or making any other gain, the court may direct that the proceedings are instituted against the complainant for calumnious accusation or false evidence (s. 545).<sup>32</sup> The complainant has the right to act as an injured party (see § 5.3) before the court of magistrates.

### 5.3 Injured Party

Under current Maltese law, the civil claimant within criminal proceedings is unknown. The only way in which a victim can seek redress for sustained injuries and damages is through the civil courts. The criminal justice system is understood as the concern of the state and puts an emphasis on the relation between the state and defendant. As a result the position of the victim is marginal to non-existent. The victim is usually just a reporter of the crime and a witness for the prosecution (see § 5.5), without having the right to pursue his need for compensation and present his claim for damages to the court.

Nonetheless, in proceedings before the magistrate's court, the victim in his capacity of complainant can act as an injured party, a role which is similar to that of the civil claimant. According to s. 410 (3), the injured party has the right to engage an advocate or legal procurator to assist him. The advocate or legal procurator may examine and cross-examine witnesses, produce evidence or make, in support of the charge, any other submission which the court may consider admissible. However, the injured party does not have the right to claim damages. Therefore, the injured party is not a real equivalent of the civil claimant, even though in many ways the rights of the injured party are similar to the role of a civil claimant in other jurisdictions.

### 5.4 Private Prosecutor

In the typical accusatorial system, the right of instituting and carrying on the criminal action is vested in every private citizen. However, in practice, the great majority of prosecutions are instigated and carried out by the police, and to a lesser degree by the Attorney General's office. In the Maltese criminal justice system, the criminal action is essentially public, and private prosecutions are rare. It is only in cases within the jurisdiction of the magistrate's

<sup>31</sup> Original Mamo Notes on Criminal Procedure, p. 18-19. The Mamo Notes, distributed to students by Prof. Mamo of the (then) Royal University of Malta during the late forties or early fifties, were never officially published, but they are still used by legal practitioners and even quoted by the courts. For instance in Appeal nr. 138/95D, *The Police (Sharon Tanti vs. Thomas Wiffen)*. Some parts of the Notes on Criminal Procedure have been revised by senior lecturer and judge De Gaetano. Some parts of the Notes on Criminal Law have been revised by senior lecturer De Camilleri (Deputy Attorney General).

<sup>32</sup> Revised Mamo Notes, Chapter 3, p. 21.

court that the proceedings can be carried out by private persons employing their own counsel, and this only in respect of those offences which, according to the law, cannot be prosecuted except on the complaint of the injured party (s. 373).

Private prosecution, therefore, is performed only by the complainant (the term as used in § 5.2). If a complaint is the *conditio sine qua non* of prosecution, the responsibility for it lies with the injured party (or his representative, s. 373). The complainant and the defendant are then summoned to appear in person before the court (s. 374-f). The court may however, if it is dealing with a contravention, exempt the parties from appearing in person and allow a representative to appear (s. 374-b). The complainant and the defendant can both be assisted by an advocate or legal procurator (374-a).

### 5.5 Witness

The general rule common to criminal and civil law is that every person of sound mind is admissible as a witness,<sup>33</sup> unless there are objections to his competency (s. 629). Even though all witnesses have to take an oath, they can be of any age; even a very young person can be a witness as long as the court is convinced that he understands that it is wrong to give false testimony (s. 630). The fact that the witness is the same person who laid the information, or filed the complaint is not grounds to object to his competence as a witness. Nor can objections be made on the grounds that he is related or connected with these parties or with the accused (s. 633). The court, however, may decide that the witness may be excused from giving evidence against a family member. This is up to the discretion of the court (*Reg. vs Aquilina*, 1953).

The police inspector who handles the case is usually also the prosecuting officer in the magistrate's court. Therefore, the victim knows the police officer and the police officer can explain the necessity of his testimony in court. The police have no obligation to inform the victim of what it entails to be a witness and that he will be cross-examined by the defence, but many police officers will talk about this. This is especially true of the police prosecutors of the victim support unit, who handle the sexual crimes and cases of domestic violence and talk with their witnesses to reassure them.<sup>34</sup> Also, the prosecutors of the Attorney General's office may see the victim-witness before the trial, although it is not possible to speak each one. In very serious cases, the victim will often be asked to come to the Attorney General's office, where the prosecutor will explain the proceedings and try to reassure the witness. The primary objective of this meeting is not to assess the credibility of the victim-witness, but to reassure the witness and prepare him for what he should expect when the witness takes the stand. The prosecuting authorities are not allowed to instruct the witness on what to testify in court but they may inform the witness on the kind of questions that the prosecution or the defence is likely to ask. Most prosecutors from the Attorney General's office, however,

<sup>33</sup> According to legal practitioners, it can sometimes be very hard to find witnesses – other than the victim – who are willing to testify in court. This is due to the unwritten rule of 'omerta'; everybody wants to keep good relations with everyone involved. Another factor may be that giving evidence in court can be rather time-consuming and a financial loss to the self-employed. A case in point involves a recent hold-up, where the public was more willing to speak to the journalists than to the police. Officially, the witnesses did not want to be involved. Eventually, the police had to convince the journalists to tell them the facts in order to get the perpetrator.

<sup>34</sup> Information supplied by inspector Mrs. S. Tanti of the victim support unit, 14 May 1998.

prefer to avoid this kind of contact with witnesses in order not to give occasion for the defence to later suggest some form of improper conduct by the prosecution.<sup>35</sup> (see § 8.2).

## 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 obliged by law or directive to inform victims. However, the police force has established a victim support unit (see § 3.6). According to internal protocols, the police should call in the victim support unit when dealing with victims of violent and sexual crime and in cases of domestic violence. The unit provides legal and practical information to victims, and cooperates with other services. Certain types of information may be given to victims. In practice, social services and welfare programmes (such as the domestic violence and child protection unit, see § 3.6) are well-known by the police and they may inform victims of these services. However, this depends largely on the attitude of the individual police officer handling the case. But even when the police are willing to inform victims of services which provide assistance, not every victim is eligible for help. Therefore, the police usually try to involve the family or neighbours in supporting the victim. Family ties are still very strong and support from members of the family are more easily organized than official help.<sup>36</sup>

For legal advice, the police will usually advise a victim to contact a lawyer. If a victim is considering presenting a civil claim for damages, he will be told that compensation is dealt with in the civil courts (see § 7) and that he is obliged to have a lawyer to initiate civil proceedings. The police will also tell him to prepare a list of the damages and present it to the court as part of the evidence. If goods have been found or confiscated, the procedure on how possessions can be returned is explained to the victims.<sup>37</sup> No state compensation scheme for victims of violent crime has been set up, although state compensation exists for certain victims of public disorder (see § 4.3).

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<sup>35</sup> Information supplied by Dr. Camilleri, Deputy Attorney General, 12 May 1998.

<sup>36</sup> Inspector Muscat remembers a case in which fire destroyed the house of an old lady without any relatives. She tried to arrange help and housing through the official channels. This proved to be very difficult and too slow a process. The only thing that could be done to give the victim some new clothes and a roof over her head was to involve the neighbours.

<sup>37</sup> If the goods are needed as proof during the trial, the victim has to file a request after the trial or ask the court orally to return the goods.

In March and April 1998, a survey was carried out on behalf of the CMRU to assess public perceptions of the police services.<sup>38</sup> Pursuant to this survey of the general Maltese population, the vast majority of the respondents were satisfied (61%) to very satisfied (19%) with the Maltese police. They mentioned that the police were helpful (83%); 73% and 72% respectively considered the police to be well mannered and friendly, and 79% said that the police were prepared to listen. And the vast majority of them considered the police to be efficient (70%), well educated (78%) and good at their job (76%).<sup>39</sup> The survey showed that people with a higher level of education tend to be less satisfied with the police than those with lower levels of education. Also, women have a significantly higher opinion of the police than men and are more positive regarding their efficiency.<sup>40</sup> The high scores in public satisfaction surprised even the police, although they expected to do well in the survey.

This favourable outcome notwithstanding, the survey also revealed criticism of the police. Of the respondents, 17% were not so satisfied and 3% not at all satisfied.<sup>41</sup> The respondents could indicate more than one reason for dissatisfaction.<sup>42</sup> The reasons can be grouped into two categories: attitude and behaviour of the police. Concerning the attitude of the police, the following reasons for dissatisfaction were given: the police were unhelpful (27%), threatening (17.1%), arrogant (36%), or rude (25.8%). Others indicated police behaviour as a source of dissatisfaction: the police did not listen to them or believe them (26.9%), did not keep them informed (6.2%) or did not respond immediately (19%). Finally, 36.3% of the respondents were dissatisfied with the follow-up.<sup>43</sup> It is interesting to note here that only 6.2% claimed to be dissatisfied for not being kept informed by the police. This is a small percentage, in view of the fact that the police have no formal or legal obligation to keep victims informed. The fact that so few people complain can perhaps best be explained by local realities, such as the fact that the Maltese do not yet seem to expect to be given basic information on their rights and opportunities. They do, however, wish to be informed of what has happened in their case. Dissatisfaction with the police for not being kept informed are most likely related to the fact that the police did not tell them whether a suspects was apprehended.

Apart from the criticism of the respondents, social services are also critical of the police, especially the domestic violence unit. According to the social workers, it is quite common in small villages for the police to minimize the incidents and try to reconcile the couple. Moreover, they claim that many police stations are not victim-friendly. The victims who want to report a crime are not given any privacy. This is an additional burden for victims in such a small community. Often they have to report while others are queuing behind them. Also, police women are often not available late at night.<sup>44</sup>

<sup>38</sup> Survey of the General Population, Malta Police Force modernisation programme, May 1998. The survey is based on face-to-face interviews by trained interviewers with one thousand people. Respondents were selected on the basis of a quota representative of the age and gender of the Maltese population aged 18 and over (pp. 2 and 5 of the Survey).

<sup>39</sup> Survey of the General Population (1998), p. 9.

<sup>40</sup> Survey of the General Population (1998), p. 10.

<sup>41</sup> Survey of the General Population (1998), p. 7.

<sup>42</sup> The reasons are indicated as first and second answers. For instance, 14% indicated as a first reason for dissatisfaction that the police were threatening and 3.1% as a second reason.

<sup>43</sup> Survey of the general population (1998), p. 28.

<sup>44</sup> Seminar on Secondary Victimization, 15 May 1998. The seminar was organized by the domestic violence and child protection unit, on the occasion of my visit, to demand more attention for the position of victims within criminal proceedings. The seminar was well attended



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

According to the police commissioner, no official procedure has been developed regarding information on the outcome of the police investigation. However, victims usually are informed by the police if a suspect has been apprehended. And victims can contact the police at any time during the investigation to ask for information. The victim is always told the police officer's name and telephone number to facilitate contact between the police and the reporter of crime. This is very important to the victim, especially in a community like Malta where it is quite easy to contact the authorities and obtain information concerning the case. The victim does not need the file number to get basic information on developments in their case, or to find out the results the police investigation.<sup>45</sup>

The 1998 survey shows that only 6.2% of the respondents complained about not being informed by the police (see A.2). But the survey fails to indicate what kind of information these victims would have liked to receive. From a legal perspective, it is quite possible that the police are not to blame for not keeping victims informed. Due to the principle of secrecy, the police are not at liberty to provide victims with detailed information about an ongoing investigation.

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

The final decision concerning prosecution may be taken either by the police or by the Attorney General with respect to offences liable to a punishment not exceeding six months' imprisonment. The decision to prosecute usually is decision taken by the police. However, they have to prosecute if there is a *prima facie* case.<sup>46</sup> There is one exception to this rule: if the case can only be prosecuted after a complainant by the victim, the latter has the right to waive the complaint thereby stopping the prosecution. If the case is prosecuted by the police, the victim is notified because he is required to give evidence in court. Usually, the victim is informed by means of the summons, which may be served a long time after the decision to prosecute.

The police have no duty to inform victims about the decision not to prosecute. In offences liable to punishment between six months and four years' imprisonment, the preliminary inquiry may be waived if the Attorney General so directs, and the person charged does not object. In such circumstances, the case is dealt with by the court of magistrates as a court of criminal judicature. The final decision concerning prosecution in inquiry proceedings is taken by the Attorney General. The court of magistrates is the first to take a decision on whether the person is charged for a trial on indictment. If it, however, discharges the accused, the Attorney General may still order the arrest of that person if a judge agrees with the Attorney General. Conversely, if the magistrate's court does commit the person charged to stand trial on indictment, the Attorney General is still free to issue a *nolle prosequi* if he is of that opinion.

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by members of the police, the victim unit, the Attorney General's office, judges and magistrates, as well as by others interested in this topic.

<sup>45</sup> Information supplied by Police Commissioner Grech, Assistant Police Commissioner Rizzo and inspector Muscat, Police HQ, Floriana, 5 May 1998.

<sup>46</sup> A case is considered *prima facie*, if the police gathered sufficient evidence against the accused to start criminal proceedings.

The victim's lawyer is notified of the final decision on prosecution taken by the magistrate's court, but only in the sense that he has the right to be present when this decision is announced in public; if he is present, he receives notice. If the victim has no lawyer to represent him, and not many victims do, he may not know the decision unless he takes the trouble to ask the police prosecuting officer or makes enquiries with the court registry.<sup>47</sup> In practice, it is very rare for victims without a lawyer to be present at the hearing to learn the decision. If the crime is prosecuted by the Attorney General's office, the victim has to contact the office to find out the final decision concerning prosecution, positive or negative. The Attorney General's office does not take the initiative to notify the victim. Again, the summons to appear as a witness will serve the purpose of relaying the information about the decision to prosecute.<sup>48</sup>

*(D. 9) The victim should be informed of:*

- the date and the place of a hearing;*
- 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.*

As a rule the victim has to appear in court and give evidence. As a witness, the victim has to be summoned and is thus informed of the date and place of the criminal proceedings. However, he is not automatically informed of the outcome of the case.

Before the magistrate's court, the victim, as an injured party, has a formal status (s. 410, see § 5.3) and has the right to be informed of the date and place of any hearing, as well as of the outcome of the case.<sup>49</sup>

Before the criminal court and the court of criminal appeal, the victim has no formal status. His only right and duty is to act as a witness for the prosecution and to give evidence during the trial. As a witness, he will be summoned to appear in court. The summon contains the date and place of the trial. He is, however, not informed of the outcome of the case.

Information about the victim's opportunities to obtain restitution or compensation is not provided. This is not considered a matter of criminal law or procedure and the victim cannot make an application to receive damages from the offender (see § 7). If the victim wants to obtain restitution or compensation, he has to consult a lawyer and file a civil suit for damages in civil court. There is only one exception to this rule: the victim, personally or through his lawyer, may prevail upon the prosecuting officer to persuade the court to award compensation in combination with a probation order or suspended sentence in appropriate cases. Clearly, this option is not open in the majority of cases.<sup>50</sup>

<sup>47</sup> Information supplied by Mr. De Gaetano, judge of the criminal court and senior lecturer of the criminal law department of the Malta University, when correcting this chapter.

<sup>48</sup> Information supplied by Dr. Camilleri, Deputy Attorney General, 12 May 1998.

<sup>49</sup> The victim has to pay for his own lawyer. No legal aid is available.

<sup>50</sup> Information supplied by Dr. S. Camilleri.

## 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.*

A statement on the losses and injuries suffered by the victim is, as a rule, included in the police report. The damages are considered a part of the evidence that the crime has been committed. The amount of the material losses is written down in the report. This is relevant to the punishment of the defendant, and subsequently to the competence of the court. For instance, theft can be aggravated by the amount, the value of the things stolen, and is subsequently threatened by a more severe punishment (s. 261). In the police report, the value will be established according to the statement of the victim because usually victims do not have all the receipts to prove it. The material losses are evaluated and examined in court and can be contested by the defence counsel. The question of compensation, however, is not settled within criminal proceedings (see § 7).<sup>51</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.*

The court is informed of the injuries and losses of the victim as part of the evidence. As stated before, the victim has a certain status before the lower courts, i.e., the court of magistrates, as their rules of procedure are influenced by the continental tradition, contrary to the proceedings in the superior courts. In proceedings before the court of magistrates, the victim may, therefore, as an injured party, produce evidence, as related to his material losses and injuries. The court, however, has limited means of compensating victims (see § 7.2).

The question of compensation or restitution made by the offender or any genuine effort to pay for damages is, however, dealt with at the sentencing stage. The courts are increasingly willing to use sentencing policies as an inducement to indemnify victims. To avoid a more severe punishment, the defence counsel informs the court of any compensation or restitution made by the offender to the victim, or of any intention of the offender to do so.

## 7 THE VICTIM AND COMPENSATION

In criminal proceedings, compensation plays a very marginal role both in theory and in practice. Apart from compensation attached to a suspended sentence, a probation order or a (conditional) discharge, compensation is dealt with in the civil courts. But even there, moral damages are an exception, the rule being that only actual damages – *damnum emergens* and *lucrum cessans* – can be recovered. The exceptions refer to libel, breach of promise to marry, and illegal arrest. Unlike other common law countries, the compensation order does not exist. Likewise, no legal ways exist to make the offender compensate the victim prior

<sup>51</sup> Information supplied by Police Commissioner Grech, Assistant Police Commissioner Rizzo and inspector Muscat, 5 May 1998.

to the criminal trial. Mediation programmes are not yet available, although there are some initiatives to create such programmes. In practice, there are a limited number of cases in which the offender agrees to pay compensation prior to the trial. However, even the payment of full compensation to the victim during the pre-trial stages will not lead to a waiver of prosecution. This is due to the legality principle. Consequently, there is no real incentive for the offender to compensate the victim, other than the court practice that he will get a more lenient sentence if he pays or offers to pay compensation to the victim (see § 6.2, D. 12.). Hence, it is most likely that victims will actually get some compensation from the offender at the sentencing stage, after he has been found guilty by the court or jury. During the sentencing, the defence counsel may encourage the offender to compensate the victim.

### 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*

Concerning the decision whether to prosecute or not, a distinction should be made regarding crimes prosecuted by the police and those by the Attorney General's office. If the police are the prosecuting authority, the inquiry, i.e., committal proceedings, takes place. At the end of the inquiry the court has to decide, on a *prima facie* basis, whether there is sufficient ground for an indictment to be filed. If it is of the opinion that there are sufficient grounds, it will send the record of the case to the Attorney General. At this point the Attorney General, strictly speaking, is engaged in the case. It is then up to him to decide (1) whether to file an indictment before the criminal court (trial by jury), (2) whether there even is a case for trial; and if not a *nolle prosequi* is issued (which is a rare occurrence), or (3) whether, if the offence is liable to punishment not exceeding ten years' imprisonment, to send the case back to the court of magistrates to be tried there, provided that the accused agrees to be tried before the lower court. In practice, most cases end up this way. If the court of magistrates as a court of criminal inquiry is of the opinion that there are insufficient grounds for an indictment to be filed, it will discharge (not acquit) the accused. A person discharged can be prosecuted again, if new evidence is discovered. Moreover, the Attorney General may not agree with the discharge, and may think that there are sufficient grounds to indict. In that case the Attorney General, if he obtains the concurrence of a judge not ordinarily sitting in the criminal court or in the court of appeal, may issue a warrant for the re-arrest of the person discharged, and the proceedings continue against him. The bottom line is that even in the most serious cases, e.g. homicide, the first decision is to arraign the court (court of magistrates as a court of criminal inquiry) is technically taken by the police, not by the Attorney General. In practice, the police consult the Attorney General before arraigning but they are not obliged to do so. The Attorney General has only moral, not legal, authority over the police and over the proceedings at this stage.<sup>52</sup>

If the case is prosecuted by the Attorney General's office, the legal file is already at the disposal of the Attorney General, and the same safeguards apply. He takes the decision on

<sup>52</sup> Information supplied by Dr. S. Camilleri, Deputy Attorney General and Mr. V. De Gaetano, judge at the superior court. Dr. Camilleri and Mr. De Gaetano are also senior lecturers in Criminal Law and Procedure at Malta University.

prosecution. As a result of this practice, there is little to no margin of discretion for the prosecuting authorities not to prosecute if there is a *prima facie* case.

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

Offences which are tried within the jurisdiction of the court of magistrates as a court of criminal judicature (see § 3.3), are prosecuted by the police *ex officio*, except where the law states that proceedings cannot be instituted except on the complaint of the injured party (s. 430). In the latter case, the prosecutor is the victim acting as an injured party (see § 5.3). In practice, however, even in the case of private prosecution, that is, with the injured party or his advocate conducting prosecution, the police often take over. If, as often happens, neither the complainant nor the accused raise any objections before the magistrate, the court will allow the police to prosecute. In the case of offences which are within the jurisdiction of the criminal court (punishment exceeds six months' imprisonment, see § 3.3), even if the complaint of the injured party is required to set the action in motion, the prosecution is always conducted by the executive police. In this event, the case is brought before the court of magistrates as a court of criminal inquiry.

In addition, with respect to cases prosecuted by the police before the court of magistrates and cases triable before the criminal court, the victim has the right to challenge the decision not to initiate criminal action against the suspect. The victim can go to a magistrate and ask him to review the case and weigh the evidence.

In practice this virtually never happens in cases prosecuted by the police for they, as a rule, start prosecution if there is any evidence, however minor. The police do not like the idea of being challenged and being reprimanded by a magistrate (see § 5.1).<sup>53</sup> Finally, it is possible to institute private proceedings regarding certain crimes, such as defamation, insults and libel cases (see § 5.4).

## 7.2 The Court and Compensation

Section 3 of the Preliminaries to Cap. 9 of the Laws of Malta provides that:

1. Every offence gives rise to a criminal action and a civil action.
2. The criminal action is prosecuted before the courts of criminal jurisdiction, and the punishment of the offender is thereby demanded.
3. The civil action is prosecuted before the courts of civil jurisdiction, and compensation for the damage caused by the offence is thereby demanded.<sup>7</sup>

Consequently, compensation is completely separated from the criminal proceedings, although recently some minor changes in this rule have been introduced (see § 7.2, D13). Criminal action does not take precedence over civil action (s. 6). However, the victim's lawyer usually prefers to wait for the outcome of the criminal action before commencing civil litigation, because from the criminal proceedings he will know more or less what evidence is available for the civil action. There is criticism in the literature about this. According to Caruana, the fact that civil action has to be pursued before a different court, with its own rules and procedures may cause several problems. It may be years before a civil suit can be presented and even longer before the victim is actually awarded compensation for the damages inflicted

<sup>53</sup> Information supplied by Dr. S. Camilleri, Deputy Attorney General and senior lecturer at Malta University, 12 May 1998.

upon him. The backlogs and delays are much worse than in criminal proceedings because there are motions, hearings, depositions and appeals which are frequently used as tactical instruments to cause delays. Meanwhile, all expenses must be borne by the victim himself. First if he wants a lawyer during the criminal process in the magistrate's court, and later as the litigant in civil proceedings. In the civil court, the litigation costs can be quite high since he must be represented by counsel. In practice, therefore, civil lawsuits are relatively uncommon because most victims conclude that the benefits are not worth the (financial) risks. Furthermore, the independence of the two proceedings means that the entire case has to be tried all over again. This can be quite hard on some victims.<sup>54</sup>

Due to the separation of the civil and criminal action, compensation plays but a marginal role in criminal proceedings (see D.13). Prior to the criminal process, there are no judicial or official extrajudicial ways to make the offender pay damages to the victim. The payment of compensation to the victim prior to or during the trial also implies that the accused admits guilt. The situation must be beyond salvage before the defence counsel will advise his client to pay up. The defence would rather advise his client to offer compensation after he is found guilty, i.e., during the sentencing hearing, in order to get a more lenient sentence (see § 6.1, B.5).

*(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 law does not allow the court to order compensation by the offender to the victim. The legislature has not yet removed the general legal impediment which prevents the criminal court from ordering compensation of its own accord, or awarding civil damages upon the request of the victim. Nevertheless, some improvement has been made in recent years. The legislature has introduced the opportunity to attach compensation as a condition to the suspended sentence, the probation order or a conditional discharge (see D. 13.).

In general, the victim has to pursue his claim for compensation for damages caused by a criminal offence in civil court (s. 6). Civil and criminal action may be initiated at the same time or at different times. In civil proceedings arising from a criminal offence, the hearing of the case will take its course *ex integro* and independently of the criminal process. The parties may agree, however, that reference will be made to the evidence collected before the criminal court.<sup>55</sup> A judgement of the civil court discharging the defendant from liability for civil damages does not prevent initiating public action. Conversely, the acquittal of the accused by the criminal court does not prevent continuing the civil action for compensation. The verdict of the criminal court shall be deemed to be pronounced without prejudice to the right to institute civil action (s. 26). Apart from the financial condition accompanying the suspended sentence, the probation order or the conditional discharge, victims cannot obtain moral damages in criminal or civil court.<sup>56</sup>

<sup>54</sup> E. Caruana, *Compensation and restitution to victims of crime*, thesis, University of Malta, 1989, pp. 63-66.

<sup>55</sup> Law reports, vol. VIII, p. 322.

<sup>56</sup> Information supplied by inspector S. Tanti of the victim support unit, and by Dr. Agius, criminal lawyer.

*(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 legislature has not provided for compensation to be a penal sanction, nor a substitute for one. The court can award a very small indemnity to the victim in addition to a penal sanction for only three cases (traffic violations: ss. 51, 69, 82 Code of Police Laws).<sup>57</sup> However, the courts never apply these sections because of the trifling amount mentioned in the law as a maximum indemnity.

*(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 possibility of a probation order, a conditional or even an unconditional discharge coupled with an order for payment of damages or compensation has been available to the courts since 1941. Only recently was the maximum amount that the court could order was raised to LM 500 (EUR 1218). Previously, the maximum was LM 200 (EUR 488).<sup>58</sup> The probation order, and the order for conditional or absolute discharge,<sup>59</sup> may be made in respect of any offence which does not carry a punishment exceeding ten years imprisonment. The court, on making a probation order or an order for discharge, may order the offender to pay such damages for injury or compensation for the loss as the court may think reasonable provided that it does not exceed the maximum of LM 500 (s. 11 Probation of Offenders Act, Cap. 152). If the claim for damages exceeds this amount, the victim may seek redress in civil court for the rest of the damages. The order to pay compensation is without prejudice to the court's power to award costs (s. 380 and 533).<sup>60</sup>

Furthermore, the legislature has introduced the suspended sentence together with the option of attaching financial conditions to these measures, such as damages for injury or compensation for losses. The suspended sentence is applicable when a court awards a sentence not exceeding two years (s. 28A). It is immaterial what the maximum punishment of the offence

<sup>57</sup> These sections deal with traffic violations. The magistrate court may not only sentence the offender to the appropriate punishment, but may also order him, or the owner of the vehicle, to pay damages to the victim to the amount of 'not exceeding two or five liri' (depending on the violation). This is nowadays merely a symbolic sum. According to judge De Gaetano, in all his years at the bar, as a prosecutor and on the bench, he has never come across a case in which these sections were applied. The reason for this court practice is quite simple, nobody will be interested in a so low an indemnity. He feels these provisions might have made some sense at the turn of century but are useless today, unless the legislature decides to raise the amount the court may award to the victim by way of compensation of expenses. (Personal communication concerning these sections, letter of 9 June 1998).

<sup>58</sup> Information supplied by Mr. De Gaetano, judge at the superior courts and senior lecturer in Criminal Law and Procedure at Malta University.

<sup>59</sup> An absolute or conditional discharge may be ordered when the court is of the opinion that it is inexpedient to inflict punishment (s. 9-1, Cap. 152). A probation order, on the other hand, is made when the court is of the opinion that it is expedient to give such an order in stead of sentencing the person convicted (s. 5-1, Cap. 152). A suspended sentence is deemed to be a sentence awarding punishment (s. 28A – 5, Cap. 9).

<sup>60</sup> Revised Mamo Notes, chapter 3: *The criminal action*, p. 4.

is; if the court decides not to award a punishment not exceeding two years' imprisonment it may suspend its enforcement for an operational period of not more than four years. If, during the operational period the person in question does not commit an offence punishable with imprisonment, the suspended sentence of imprisonment will never take effect. If, however, he commits such an offence, he must, after he is found guilty of this further offence, also serve the sentence that was originally suspended. When making an order for a suspended sentence, the court may include a direction obliging the offender to make restitution to the injured party of anything stolen or knowingly received by unlawful gain to the detriment of the victim. In addition, the court may order the offender to pay compensation for any such loss, or for any damages or other injury or harm caused to the victim by or through the offence. Moral damages, however, do not come into the picture at all. Any order for a suspended sentence may include both a direction to make restitution and, in default, to pay compensation (s. 28 H). The court is not bound by a legal maximum.<sup>61</sup> If the direction of the court is not followed, the victim should make an application to the court upon which the court may either extend the period of time in which the payment has to be made, or activate the sentence (s. 28H-(4) and (5) and s. 29).

Today, the suspended sentence and probation order are widely applied by the courts. However, there have been relatively few cases in which an order for compensation or restitution has been made together with the suspended sentence.<sup>62</sup> One of the reasons is that there are only four probation officers on the islands (1998). It is understandable that judges and magistrates take this into account before deciding on a suspended sentence or a probation order (see § 3.5). In practice, the defence counsel may try to get the public prosecutor or the court to make a deal in chambers. He will then offer a guilty plea in return for a suspended sentence or a probation order with the condition to pay compensation to the victim. Most judges object to such practices and will not allow it. Compensation offered before the trial does not lead to a waiver, but does influence the sentence. Nowadays, the prosecuting authorities occasionally make a submission to the court to mitigate the sentence, if the offender has compensated the victim. But usually, the defence will bring the matter up. Also, the court, in its sentencing decision, increasingly makes mention of the offender's willingness to pay compensation.<sup>63</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.*

As said above (§ 7.2), compensation is essentially a civil matter which means that the law does not mention any rule regarding the priority of compensation, and also that the victim himself is responsible for the enforcement of compensation granted to him by the court. The

<sup>61</sup> Appeal nr. 317/93, Police v. Duncan.

<sup>62</sup> Information supplied by judge De Gaetano and Dr. S. Camilleri, Deputy Attorney General, Valletta. According to Mr. De Gaetano, a more effective use could be made of the payment of compensation combined with the suspended sentence if a little bit more attention would be given to this option by the police prosecuting officers and the court.

<sup>63</sup> Information supplied by judge De Gaetano, 9 May 1998, and Dr. Camilleri, Deputy Attorney General, 12 May 1998.



only assistance available is from his lawyer and the bailiff, whom the victim will have to pay for their services. In those cases in which the offender has been sentenced by the criminal court to serve time in prison, in theory, a problem could arise. Pursuant to the law, 'the persons sentenced to detention shall be detained at their own expense in the prison [...], according to the regulations which may be made by the Minister responsible for Justice [...], but they shall not be compelled to work' (s. 12-1). If a detainee has no means of his own to maintain himself, he shall be maintained by the government; but in such cases he may be forced to work (s. 12-2). In practice, however, the prison authorities do not enforce this rule.

Concerning compensation ordered as part of the probation order or discharge, probation officers may encourage the offenders to pay the money to the victim. However, if the victim does not receive the amount awarded to him by the court, it is up to him to make an application to the court of criminal or civil jurisdiction to take action. However, if compensation was granted as a condition of a suspended sentence, there usually is no supervision attached to it. If the offender does not pay, the victim has to take the case back to court. The court can choose between two options: revoke the suspension or allow the offender some time to pay compensation. The court fixes a time limit of no longer than six months, within which the offender has to pay. If the offender fails to do so in the time allowed, the victim must file his application to the court within three months from the expiration date of the time limit (s. 28H-6). In practice, the problem is that the victim has to react within a certain time. If the victim forgets to notify the court in time, it cannot undertake any action. And most victims are not informed of this requirement and thus fail to take legal action within the designated period of time. If this period lapses, or if the offender fails to pay, the victim can only turn to civil court to try to claim compensation.

## 8 TREATMENT AND PROTECTION

### 8.1 Victim-Awareness Training

#### *Training of the Judiciary*

In order to qualify for the bench, a magistrate must have at least seven years of practice, and twelve years are needed to qualify for appointment as a judge (s. 100-2 respectively s. 96-2 Const.). As a result, all judges have worked either as lawyers or as public prosecutors.<sup>64</sup> Magistrates and judges are not trained in victim-related topics.

#### *Training of Members of the Attorney General's office*

The qualification requirements for the Attorney General's office and its members are fixed in public calls for applications to fill vacant posts with the office. They may vary from one application to the other. The minimum qualification is certainly an LL.D. degree and a warrant from the President to practice as advocate in Malta. The legal posts at the Attorney General's office are the following: junior legal officer, legal officer, counsel, senior counsel, assistant to the Attorney General, deputy Attorney General, and finally Attorney General. At present, for an applicant to qualify for the post of counsel, he must have practised for 8 years as a lawyer. Members of the Attorney General's office are not given victim-awareness training.

<sup>64</sup> In 1998, there were 15 magistrates on the island of Malta and one on Gozo. There are approximately the same number of judges at the superior courts.

### *Training of the Police*

At the police academy, officially referred to by the name of Academy for Criminal Justice, training is provided for cadets, both of the rank of constables and officers, and to incumbent personnel since 1978. Training of the latter group consists of in-service courses. The system of recruitment of policemen and women was established in 1978. The lower rank policemen are given six months' training after which an exam has to be passed. The basic training course of constables is divided into socio-cultural studies; human studies (e.g. police ethics); law studies with an emphasis on human rights, criminal law and court proceedings; police work and general duties; skills and physical education.

The higher ranking police officers can be selected from within and outside of the force. Outsiders have to be university graduates. The officers' training consists of one year at the university, where they study *inter alia* law, psychology and sociology, followed by one semester at the police academy. At the academy Maltese and foreign lecturers are invited to speak on various subjects. Cadets usually spend one month abroad, for instance in the United Kingdom, where they can follow special seminars on e.g. questioning and community service. At the police academy, the training of officer cadets consists of law studies (criminal law and procedure, evidence, human rights, juvenile and family law and criminology); crime investigation with special attention to sexual offences and interrogation techniques; forensic science; enforcement operations (crime prevention and community relations, amongst other things); general police duties; management (ethics, behavioural science, sociology and victim support).

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

During the police basic training programmes, no special attention is given to the treatment of victims. However, recently a number of incidental programmes have been initiated to train policemen how to deal with victims. Social workers of the Blata l-Bajda domestic violence unit are giving lectures to the police on how to treat victims of violence in the family in an understanding and constructive manner. By May 1998, about 50% of all the members of the police would have been attending the lectures. In July 1997, two British police officers gave lectures to the Maltese police on police victim policy. These lectures had a great impact, according to the aforementioned domestic violence unit and the Good Shepard Sisters of the shelter for battered women in Balzan. According to legal practitioners, the lower rank personnel lack proper training for the job. The main reason for this is that the police force is based on the concept that all the important duties are performed by police inspectors. However, the first policemen on the spot after an offence has been reported are the police constables and sergeants, who clearly lack training in how to deal with victims.

Contrary to the basic courses for the lower personnel, during the training of higher ranking officers some attention is focussed on the position of victims in criminal proceedings and their treatment. In 1997, the subject Victim Support was taught by an inspector of the police victim support unit (28 – 31 July 1997).<sup>65</sup>

The in-service training for policemen who are going to work in the (small) victim support unit which handles sexual offences, prostitution, domestic violence and child abuse or neglect cases, deals with how to treat this particular group of victims. The unit is considered the

<sup>65</sup> The police inspector in question, Mrs. S. Tanti, claims that she never gave any further lectures. Information supplied on 14 July 1998, Floriana.

specialist group within the police and consists of four female police officers and one male CID officer. According to regulations, policemen and officers have to refer eligible victims to the unit for questioning and assistance. All the cases that are solved by the unit are also prosecuted by them. As a rule, a social worker is present during questioning of the victims (see § 8.2). However, in practice there are still instances in which the police do not involve social workers. For instance, in several cases of child abuse, no joint interviewing by the police and social workers was carried out. The children were interviewed by the police alone, without the presence of a social worker. As a result, the child was forced to speak again about the traumatizing events to the social workers from the child protection services unit. However, the cooperation between social workers and the police is steadily improving.<sup>66</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.*

At the police level, victims are questioned when they report the crime or file a complaint with the request to prosecute (see §§ 5.1 and 5.2). According to the police, the questioning takes place in private in one of the offices at the station unless the report is made at the scene of the crime.<sup>67</sup> However, according to social workers and other victim support workers it is not uncommon that the victim has to tell his story in the hallway at the general desk, where usually quite a few people are waiting and listening in.<sup>68</sup> Victims are usually questioned once, but if additional evidence is required the victim is called again to the police station. In cases of violent crime, the police will see the victim at home or at the hospital. Children are, as a rule, questioned by the police in the presence of a family member or guardian. This is standard police practice and not comprised in a law or regulation. There are no police officers who specialize in questioning children.

During the pre-trial questioning, the victim does not see the suspect, unless he consents to it.<sup>69</sup> If the Attorney General's office is handling the prosecution, it may happen that the prosecutor will see the witness before the trial, however this is not the rule (see § 5.5). The members of the Attorney General's office do not receive training in questioning victims before or during the trial.

In court, the magistrate or judge has the role of an impartial arbiter who has to ensure the proper administration of justice. As such, he has the power to stop irrelevant, repetitive or misleading questions. Questions by the defence counsel concerning the character of the victim-witness can be ruled inadmissible, unless the prosecutor has introduced the character

<sup>66</sup> Seminar on secondary victimization, 15 May 1998.

<sup>67</sup> Information supplied by Police Commissioner Grech, Assistant Commissioner Rizzo, and inspector Muscat, Floriana, Police Head quarters, 5 May 1998.

<sup>68</sup> Information supplied by social workers and lawyers of the domestic violence unit in Blata l-Bajda.

<sup>69</sup> Information supplied by Police Commissioner Grech, Assistant Commissioner Rizzo, and inspector Muscat, Floriana, Police Head quarters, 5 May 1998.

of the witness in his line of prosecution. In Malta, some judges are surprisingly active<sup>70</sup> given the common law tradition of non-interference. It is not uncommon that judges interfere during the cross-examination, and generally harsh questioning of the victim-witness is not appreciated. Nonetheless, the general rule of common law systems still largely applies in the sense that most judges will interfere as little as possible to retain their impartiality. Another difference with English court practice is that in Maltese court history, rarely, if ever, has a rape victim been subjected to several days of examination.

According to the law, there is no difference between child-witnesses, other vulnerable victims and 'ordinary' witnesses who have to testify in court. Just like adult witnesses, they are sometimes subjected to hostile questioning. However, some judges have taken the initiative to assist the child-witness during the examination. These judges try to protect him, for instance, by not making him take the stand but letting the child sit next to them. Furthermore, some judges do not allow direct questioning by the defence; the judge himself asks the questions.<sup>71</sup> Unfortunately, this is not standard procedure despite the fact that at the appellate level this line of action by the bench has never been attacked or otherwise declared improper. Nor are there any guidelines or standards which allow children to be assisted by a parent or a guardian during the questioning or cross-examination.<sup>72</sup> It is, therefore, of the upmost importance that the child-witness is familiarised with the surroundings of the court and that he be told what is expected of him to both improve the quality of his testimony and reduce his anxiety and stress. Some judges will see the child before in chambers to put him at ease.<sup>73</sup> However, no child-interviewing studios, or witness-to-court programmes have been set up. Nor is there any other way to facilitate the testimony of children in court, such as hearing him without the accused being present in the court room, or through a closed circuit television-link.

In practice, in order to prove emotional abuse or violent episodes within the family, children are often called to give evidence in court. For instance, in domestic violence or abuse cases, the child may be called to testify in front of his father, without the supporting presence of the mother because she is also a witness, and often also without his social worker. According to the domestic violence unit and the child protection services unit, their requests to talk to the child and prepare him for the trial are generally turned down because this might influence him. Furthermore, the social workers are not always allowed to be in court to support the child during testimony. They are much opposed to the fact that children have to give evidence in the presence of the accused and would welcome national procedures. Moreover, they recommend the introduction of questioning by means of video-linkage or

<sup>70</sup> For instance, I witnessed that judge of the superior courts De Gaetano is a rather active judge, very much involved with every thing that happens in his court room. According to his (former) colleagues this may be explained by his prosecution background.

<sup>71</sup> Information supplied by Mr. De Gaetano, judge of the criminal court and senior lecturer in Criminal Law and Procedure at Malta University, 9 May 1998.

<sup>72</sup> Seminar on Secondary Victimization, 15 May 1998.

<sup>73</sup> Information supplied by Mr. De Gaetano, judge of the criminal court and senior lecturer at Malta University, 9 May 1998. Judge De Gaetano added that in his experience in a jury trial, the jurors will believe the child, no matter what. Given this, the defence counsel will not easily subject the child to non-sensitive or harsh questions. Nevertheless, most children break down during questioning in court and cannot give evidence, which is one more reason to introduce protective measures.

closed circuit television.<sup>74</sup>

Given the fact that many children are required to give evidence against abusive or violent family member, for instance their father, it would be advisable for the legislature to introduce these procedures and protective measure to prevent vulnerable children from experiencing such examinations in the future. It is advisable that such protective rules are extended to include other groups of vulnerable victims, such as persons with learning disabilities and victims of sexual crimes. Perhaps this can be achieved through the Committee established in June 1998 to study manners to facilitate testifying in court and how to prevent secondary victimization as much as possible. Video recorded interviews and closed circuit television questioning of vulnerable victims and witness support programmes will be studied.

Another problem that has to be tackled by the Committee is the long waiting times in court for witnesses. It is common for witnesses to have to wait several hours before giving testimony and being questioned. It also occurs that, after waiting a long time in the hallway (together with the others, such as the accused, his friends and family), they are told to come back the next day because the trial has been delayed, or the proceedings have taken longer than expected. It frequently happens that victims have to come back twice to court before they can give evidence. Not surprisingly, many victims do not want to come to court anymore. However, if they do not appear, they can be fined. Clearly, something has to be done to facilitate the questioning in court. Today, the police complain about the problems they have finding witnesses. They prefer to pretend they did not see anything, or have forgotten vital information. This situation is detrimental to the functioning of the criminal justice system. However, the authorities are unsure how to reform an adversarial system in which evidence has to be orally presented to the court (and jury), the duration of the examinations, and the number of cross-examinations can be difficult to predict.

### 8.3 Protecting the Victim

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

In order to protect the victim from publicity which may unduly affect his private life, trials can be held *in camera*. Criminal law provides for all court sittings to be held behind closed doors if the court thinks that conducting proceedings in open court may be offensive to modesty or cause scandal (s. 531). If sittings are held *in camera*, no one may publish any reports of the trial proceedings. Any publication is considered a contempt of court, and sanctioned as such. The court of magistrates as a court of criminal inquiry can order the proceedings to be conducted behind closed doors, if the ends of justice would be prejudiced by an inquiry in open court. According to the wording of the law, the court has a wide margin of discretion. During a trial *in camera*, all persons and participants taking part in the inquiry are bound

<sup>74</sup> Seminar on Secondary Victimization, 15 May 1998. The social workers further recommend that the time between the cross-examination and the first time the child has to give evidence be shortened. The fact that they have to come back to court to recount their experiences long after the incident is very traumatic to small children.

not to disclose the proceedings, under penalty of a maximum of two years' imprisonment, or a fine not exceeding 20,000 Maltese Liri (EUR 48,736, s. 409-2). However, if the evidence given by the witness could have been given in open court without prejudice to modesty or causing scandal, he will be rebuked by the court.

In practice, however, the courts tend to be more lenient. They also allow a trial behind closed doors when a witness requests this, for instance, because he does not want his wife or family to know that he was involved, or because he was a police informer.<sup>75</sup> Furthermore, trials concerning sexual crimes and/or involving child-witnesses are held (partly) behind closed doors, although there have been some exceptions.<sup>76</sup> According to legal practitioners, a trial in camera is the only protection available to victims.

If a trial is held in camera, the press<sup>77</sup> is not allowed in the courtroom. The court can also order the media not to make anything public concerning the trial. In all other cases, the court can only recommend that the media leave the courtroom or that they not quote names in their coverage or publications. The court cannot order journalists to leave the court. Only in the juvenile court, is the press not allowed access and no information about the trials can be made public.<sup>78</sup> Nevertheless, practice shows that conducting proceedings *in camera* does not prevent press coverage of the trial. Some cases tried in camera have received full press coverage. The articles in the press included enough detailed information for anyone in the vicinity of the victim and the offender to allow their identification.<sup>79</sup> Especially, if a case is tried by jury, it will be discussed at length in all the newspapers and other media. The coverage usually consists of an assessment of the proceedings and the actions taken by the Attorney General and the defence lawyers. The full identity (name and surname) of all parties and persons involved are mentioned and are accompanied by clear pictures, even of the alleged offender(s). Also pictures of victims are quite common in the press, although they are usually printed with the consent of the victims.<sup>80</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.*

In Malta, there is said to be little organized crimes, so the courts rarely deal with it. However, whenever protection of victims of any crime is needed, the only measure that can be taken is to offer police protection before and after the trial. Obviously, this can be rather problematic in practice and can only be offered for a limited period of time.

<sup>75</sup> Information supplied by Mr. De Gaetano, judge at the superior court and senior lecturer at the University of Malta.

<sup>76</sup> Seminar on Secondary Victimization, 15 May 1998.

<sup>77</sup> There are a surprising number of newspapers on Malta: 2 weekly and 4 daily newspapers, 6 Sunday newspapers and 1 business newspaper.

<sup>78</sup> Information supplied by the Director of the Police Academy and Inspector Muscat, St. Elmo, 5 May 1998.

<sup>79</sup> Seminar on Secondary Victimization, 15 May 1998.

<sup>80</sup> Most people interviewed are convinced that the media normally asks the victim or his family for permission to publish photographs because the editors fear libel. Families are frequently asked to provide pictures of the victim.

## 9 CONCLUSIONS

It is surprising that a jurisdiction, which is highly influenced by English common law, and recently shows an increasing interest in the Scottish system, has not taken note of any of the victim-oriented reforms evident in those criminal justice systems. Recommendation (85) 11 is barely known and generally poorly implemented. In Malta, the only steps taken to improve the position of victims in criminal law and procedure are the creation of a victim unit at the police, however small in size, the possibility for the courts to impose the payment of compensation as a condition for a suspended sentence, and the protection of victims.

Victims are generally deprived of information unless they contact the authorities themselves. If Malta were not so small, and the authorities so well known, victims would not be able to find out about relevant decisions in their case.

Concerning compensation, the Maltese jurisdiction's performance is particularly substandard and represents worst practice. The courts cannot order compensation by the offender to the victim because legal impediments and technical restrictions prevent this from being generally realized. For example, neither the criminal courts, nor the civil courts can order the payment of compensation for moral damages.

The criminal justice authorities are not trained to deal with victims. As a result, there is little awareness of how victims, and in particular children and other vulnerable groups, should be questioned in order to reduce the risk of secondary victimization. Also, there is hardly any knowledge of what kind of facilities may be created to make questioning a less traumatic experience for vulnerable victims. Protective measures are largely lacking, apart from the option of holding a trial *in camera*, and prohibiting the publication of trial proceedings by the media.

Summarizing, the victim's interests are inadequately safeguarded by the criminal justice system. The legislature should abolish the limitations which prevent the courts from ordering offenders to pay compensation for both moral and material damages to all victims whose case is tried before the courts of criminal jurisdiction. It should introduce either the English compensation order model or the continental adhesion model. The legislature should take additional steps to protect the victim against publicity which unduly affects his private life or dignity. Such measures are particularly relevant in a small country like Malta. The protection of the victim against intimidation or retaliation by the offender should also be upgraded. It is furthermore advisable that the government, in cooperation with the criminal justice authorities, set up training programmes focussing on the needs and interests of victims of crime. Finally, it is of the utmost importance that services and facilities for victims are set up. Particularly urgent facilities are, for instance, a child interviewing studio, a rape suite, reception desks at the courts, a witness-to-court programme, and short circuit television links at the courts in Malta and Gozo.

# Supplements

## ABBREVIATIONS:

Cap.	-	Chapter of the Laws of Malta
CID	-	Criminal Investigations Department (police)
CMRU	-	Community and Media Relations Unit
Const.	-	Constitution
LM	-	Liri Maltese

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# Chapter 17

## The Netherlands

### SCENERY

The Netherlands is bordered by the North Sea, Belgium and Germany. It is a surprisingly flat country; only in the southeastern province of Limburg can some small hills be detected. Most of its land has been reclaimed from the sea over the centuries, and the drained polders are protected by dykes such as the famous IJsselmeer-dam (Afsluitdijk, 1933). A well-known expression is that God created the earth, but the Dutch created the Netherlands. Today, approximately half of the country lies below sea level. This is of course not without its risks. One of the country's worst disasters hit in 1953 when a high spring tide coupled with a severe storm breached the dykes in the province of Zeeland, drowning 1835 people. To ensure that the tragedy would never be repeated, the Delta project was launched involving a network of dams, dykes and a remarkable 3.2 kilometre storm surge barrier which is only lowered in rough weather conditions.

The Netherlands' history is closely linked with Belgium and Luxemburg. Today, these nations are still closely bound but now in an economic union (Benelux). Until the 17<sup>th</sup> century, the three were known as the 'Low Countries.' In the 16<sup>th</sup> century, the region's northern provinces, inhabited by recent converts to Protestantism, united to fight the Catholic Spanish rulers. The revolt of the Netherlands was led by Prince William of Orange. After 80 years of conflict, Holland and its allied provinces expelled the Spaniards in 1648. Since then, Holland became synonymous with the independent country that emerged. The influence of that period is not only noticeable by the name both foreigners and the Dutch use to refer to that small country by the North Sea, but also by the fact that the descendants of William of Orange still constitute the monarchy of the Netherlands.<sup>1</sup>

When foreigners think of Holland, they immediately get visions of Dutchmen in funny traditional clothes walking on wooden shoes amidst thousands of flowers, in particular tulips against a scenery of windmills. What a disappointment a visit to the Netherlands must be. Except for some exceptionally tourist-prone areas, and in certain small rural areas, nobody dresses in the traditional costume any more, nor walks on wooden shoes. Also the windmills, which once dotted the landscape and towered high above the flat lands, have become a rare sight.

In general, the Dutch believe that the continuous battle against the waters – the sea, the river delta's and the swamps – has helped to shape their being. They commonly see

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<sup>1</sup> Lonely Planet: the Netherlands (<http://www.lonelyplanet.com/dest/eur/net.htm#facts>), pp. 2 and 3. For more information see the same website.

themselves as industrious, inventive, and problem-solving nation. Also, the Dutch generally congratulate themselves with the idea that they have a long democratic tradition, and have long achieved equality among the sexes. Finally, they generally think of themselves as a tolerant people, with liberal and progressive ideas. The Dutch are proud of their welfare state that takes care of the less fortunate members of society. The welfare state is paid for by a progressive system of taxation: the rich fall in the 60% revenue tariff whereas the tax rate for the lower and middle class is much less. Also, they consider themselves very tolerant towards foreigners and refer to their society by the honorary title of a multi-cultural community. Other, more recent examples of progressive, liberal ideas are, for instance, the decriminalization of the use of soft drugs, which is combined with an elaborate assistance programme for hard-drug users, and the right to wed for homosexuals. The same ideas are visible in criminal law and procedure, in the sense that traditionally prison sentences and the quota of prisoners are relatively low compared to other European jurisdictions.

Concerning the position of victims in Dutch society and the criminal justice system, the role of the feminist movement is especially significant. Since the beginning of the century, the feminist movement has been relatively strong, and has had a considerable influence on national politics. After World War II, the feminist movement was among the first to demand attention for the position of victims in the criminal justice system, in particular that of victims of sexual crimes. Feminists set up shelters for battered or abused women and children and called the legislature's attention to their deplorable situation. Furthermore, its input has contributed greatly to the awareness that victims of crime are often seriously affected by their experience. Before the outcry and indignation of the feminist movement, the criminal justice authorities had often been callously indifferent to the victim's emotional suffering. The treatment of victims by the authorities clearly lacked empathy. The attention among medical doctors for the needs of battered and abused children also contributed to a more favourable climate for victims of crime. In 1970, the Association against the child abuse (*Vereniging tegen Kindermishandeling*) was founded. It promoted the creation of offices of medical doctors who could be consulted confidentially by victims or concerned third parties. These medical doctors often play a key role in domestic violence situations and cases of probable incest and child abuse.

Finally, Dutch society as a whole started to pay attention to the needs of victims of war in the 70's. The recognition of the emotional and psychological trauma of these victims by the legislature has played a vital role in the struggle for victim's rights. Another crucial factor in these developments was the hijacking of passenger trains in Wijster and De Punt by young Molluccans and the taking of hostages in a school in Bovensmilde. By these actions in 1975 and 1977, the Molluccans demanded attention for their struggle for an independent Republic of the South Molluccan Islands. Dutch society was shocked by these violent actions and as a result there was a lot of attention for the victims. Psychiatric knowledge of the effects of a hostage situation on the victims increased and the assistance to this type of victims improved dramatically. The Foundation of Institutes of Psycho Trauma (*Stichting Instituut voor Psychotrauma*) was set up to provide structural assistance and support for such victims. The Institutes soon afterwards expanded their activities to the counselling of victims of violent crime in general.<sup>2</sup> In 1979, a national platform for victim services was set up (see further § 3.6).

<sup>2</sup> J.A. Huisintveld, *Basistraining Slachtofferhulp, introductie voor de vrijwilliger van het Bureau Slachtofferhulp*, Slachtofferhulp Nederland, Utrecht, 1996, pp. 11-13.

## PART I: THE DUTCH CRIMINAL JUSTICE SYSTEM

### 1 INTRODUCTION

The Kingdom of the Netherlands comprises the Netherlands, the Dutch Antilles and Aruba; the former is situated in Europe and the latter two are islands in the Caribbean. In accordance with the Charter of the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*), the separate parts of the Kingdom have their own powers of legislation.<sup>3</sup> However, with respect to certain areas of law, such as civil law and criminal law and procedure, the different parts strive for unity of law. For that reason, the decisions of the court are enforceable throughout the Kingdom (ss. 3, 39 and 40 Charter). Nevertheless, the law and criminal procedure of the Dutch Antilles and Aruba, as well as the implementation of Recommendation (85)11 in these overseas parts of the Netherlands will remain outside the scope of this chapter.

### 2 GENERAL REMARKS AND BASIC PRINCIPLES

Two historical events played a fundamental role in shaping Dutch criminal law and procedure: the French period in the Netherlands (1795-1813),<sup>4</sup> which ended with Napoleon's annexation of the Netherlands during the years 1810-1813, and the establishment of the unified Dutch state in 1814.<sup>5</sup> The French Penal Code, Code of Criminal Procedure, and the Act on the organization of the judiciary were introduced in the Netherlands on the first of March 1811. This has had a great impact on the Dutch criminal justice system. According to the French system, the prosecution of criminal offences was centralized and ample instructions were given to the prosecuting authorities.<sup>6</sup> After the French occupation, French legislation remained in force and it took quite some time to replace it by legislation of Dutch origin. The Dutch Act on the Organization of the Judiciary (AOJ, *Wet op de Rechterlijke Organisatie*) dates from 1827<sup>7</sup> and the first Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) dates from 1838<sup>8</sup>. The Penal Code (*Wetboek van Strafrecht*) remained in force even longer (1886). The new Dutch statutes were mainly based on the French Codes.<sup>9</sup> However, some relevant differences can be distinguished among which the position of the victim in criminal procedural law.

Compared to the original French Codes, the role of the victim in the Dutch criminal

<sup>3</sup> A.H.J. Swart, *The Netherlands*, in: C. van den Wyngaert (ed), *Criminal procedure systems in the European community*, Butterworths, London, 1993, p. 279.

<sup>4</sup> P. Gerbenzon, N.E. Algra, *Voortgang des rechten*, 1975, pp.172 et seq.

<sup>5</sup> See A.H.J. Swart, *The Netherlands*, in: C. van den Wyngaert (ed), *Criminal procedure systems in the European community*, Butterworths, London, 1993, pp. 279-280.

<sup>6</sup> P. Gerbenzon, N.E. Algra, *Voortgang des rechten*, 1975, p. 190.

<sup>7</sup> Staatsblad. 1827, nr. 20.

<sup>8</sup> Staatsblad. 1838. nr. 12.

<sup>9</sup> De Bosch Kemper, *Wetboek van Strafvordering*, part I, Amsterdam, 1838, p. CXLII-CXLVI,  
For more information on the Dutch criminal justice system, see the English publication of P.J.P. Tak, *The Dutch criminal justice system; organization and operation*, Den Haag, WODC, 1999; and A.H.J. Swart (1993).

proceedings became a significantly less important one. In the Netherlands, the right of the victim to institute criminal proceedings (*la citation directe, constitution de partie civile devant le juge d'instruction*, see Chapter 8) was abolished. The legislature considered private prosecution and the interference of the victim to be a threat to the impartiality of the prosecution. It follows that the right to prosecute was assigned exclusively to the public prosecutor (s. 2 CCP of 1838). The victim was only given a limited right<sup>10</sup> to seek compensation within criminal law and procedure by joining the criminal case as a civil claimant (s. 231 CCP 1838). Section 3 of the 1838 Code of Criminal Procedure states the principal rule regarding the position of the victim within criminal law and procedure: 'Except in cases regulated by law, compensation of damages caused by any criminal offence can only be obtained through a separate civil procedure.' (*tr. MB*). This principle is influenced by both the strict interpretation of the *jurisdictio criminalis* – criminal court judges cannot pass sentences in private law cases – and the legislature's fear that the question of compensation may distract the court's attention from administering criminal justice. Thereupon, the legislature and legal practitioners formed a conception of the victim's claim for compensation as having a subsidiary position within criminal proceedings. Recently, the ancillary character of the victim's claim for damages was reaffirmed by the legislature in regard of the 1995 Victim Act Terwee<sup>11</sup> (*Wet Terwee*, see also § 7).<sup>12</sup>

## 2.1 Basic Principles

As in most other jurisdictions, the Dutch judiciary should attempt to discover the material truth in an independent manner. In determining the facts, the judiciary is not bound to accept the versions of the public prosecutor or the defence counsel. It follows that plea-bargaining does not exist. However, the prosecuting authorities and the defence counsel may arrive at certain agreements (*transacties*, conditional waivers) to avoid prosecution. Usually, the public prosecutor offers not to prosecute if the accused agrees to pay a fine or compensation to the victim. This practice is closely linked to the fact that the prosecution service not only has a monopoly on prosecution (the *ex-officio*-principle), but is also allowed a certain freedom to use it. In other words, criminal proceedings are governed by the expediency principle (*opportuniteitsbeginsel*, see also § 7.1, B.5). This principle plays a very significant role in daily practice. The prosecution service frequently uses its right to waive prosecution conditionally or unconditionally even in cases which would have led to a conviction in court. Each year between 15 and 20% of all felonies (up to six years imprisonment) are not prosecuted (*sepot, transactie*). Concerning misdemeanours, the percentage is even much higher because here

<sup>10</sup> The civil claimant could only join the proceedings if the demand for compensation did not exceed Fl.150,- and if he had not filed a claim with the civil courts. (s. 231 PC 1838).

<sup>11</sup> The preparatory Committee of this Act, which was accompanied by a guideline, was instructed to develop new legislation within the existing framework of criminal law and procedure. The Committee, the Act as well as the guideline are commonly known under the name Terwee, after its chair Mrs. Terwee-van Hilten.

<sup>12</sup> Victim Act Terwee of 1 April 1995/ *Wet Terwee, Wet tot aanvulling van het Wetboek van Strafrecht, het Wetboek van Strafvordering, de Wet voorlopige regeling schadefonds geweldsmisdrijven en andere wetten met voorzieningen ten behoeve van slachtoffers van misdrijven*, (Act to complement the Penal Code, the Code of Criminal Procedure, the Act on the State fund for victims of violent crime and other acts containing provisions for the benefit of victims). The accompanying Guideline Terwee (*Richtlijn slachtofferzorg bij het landelijk in werking treden van de wet Terwee*) were decreed by the Procurators-General on 22 March 1995 (see § 4.3.2).

the prosecution service may always decide to waive the right to prosecute.<sup>13</sup>

During the trial stage, three main principles govern the proceedings. Firstly, the principle of immediacy (s. 297 CCP). This is the principle of direct testimony, which obliges witnesses to appear in court. However, over the years the attention has shifted from the trial proceedings to the pre-trial investigation which became most crucial to the gathering of evidence. This means that the trial proceedings are often limited to a discussion of the contents of the legal files compiled beforehand (see §§ 5.5 and 8.2). Secondly, the principle of orality requires that the trial proceedings are oral. However, this principle is influenced by the practice of basing the trial primarily on facts contained in the legal file. Finally, the principle of publicity dictates that trials should be open to the public. This principle is subject to exceptions as stipulated in art. 6 of the European Convention of Human Rights (see § 8.2).<sup>14</sup>

### 3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

#### 3.1 Investigating Authorities

In spite of recent reorganizations, the structure of the Dutch investigative authorities remains complicated. According to the 1993 Police Act (PA, *Politiewet*) as revised in 1997,<sup>15</sup> the police are divided into three main forces: the regional police force (*Regio Politiekorps*), the state police force (*Korps Landelijke Politiediensten*) and the Royal Constabulary (*Koninklijke Marechaussee*). The tasks of the 25 regional police forces are to maintain order and to render assistance to persons in need (s. 2 PA). The final responsibility for the regional police rests with the mayors of the main municipalities concerning public order and assistance to citizens (s. 12 PA) and with the public prosecutor regarding judicial activities (s. 13 PA). Victims who report a crime usually come into contact with the regional police. The state police force – for which the Minister of Justice is responsible (ss. 4 and 38 PA) – is assigned with specific police services, like collecting and analysing data for the regional police and other bodies involved in criminal investigations. The Royal Constabulary performs the duties of the military police – for instance, protecting the royal family and guarding the airports – and assists the other two police forces (s. 6 PA). The Ministers of Justice, the Interior and Defence are responsible for the Royal Constabulary (s. 9 Police Act). Next to the three main forces, there are also special investigation services charged with the investigation of special categories of criminal offences, like the Tax Crimes Investigations Unit (*FIOD*) and the Economic Crimes Unit (*ECD*).<sup>16</sup>

The relationship between the police and the prosecuting authorities deserves further attention. It is traditionally based on the authority of the prosecution service in the fields of investigation and prosecution. With regard to victims, the police and the prosecution service have established a close working relationship which is governed not only by statutes but also by guidelines, some of which contain specific duties for both the police and prosecution service. In each legal district a network has been created to facilitate the implementation of the 1995

<sup>13</sup> A.H.J. Swart (1993), p. 294.

<sup>14</sup> A.H.J. Swart (1993), pp. 294, 297-299. For other principles concerning criminal procedure see pp. 292-299.

<sup>15</sup> Police Act of 9 December 1993, *Staatsblad (Stb.)*: Statute book 724, amended by law on 4 December 1997, *Stb.* 580.

<sup>16</sup> A.H.J. Swart (1993), p. 286.

Victim Act Terwee (see § 4.3.1) and accompanying Guideline (see § 4.3.2). In the Terwee network (see § 3.7), as it is commonly referred to, not only the police and prosecution service participate but also other authorities which undertake activities concerning victims, such as victim support schemes, legal aid services, alternative sanction centres for juvenile delinquents, probation services etc.

### 3.2 Prosecuting Authorities

The Act on the Judiciary (AOJ, *Wet op de Rechterlijke Organisatie*), as revised in 1994 and 1999, refers to the judiciary in the broadest sense, comprising both the prosecution service, examining magistrates and members of the bench. All members of the judiciary are trained in the same manner (see § 8.1) but have different roles and organizational structures. The prosecution service (*Openbaar Ministerie*) is a hierarchically organized body, according to the ideas of the Napoleonic code. At the top of the hierarchy is the Minister of Justice, followed by the Procurators General (*College van Procureurs-Generaal*), the chief public prosecutors (*hoofd officieren van justitie*), and finally the public prosecutors (*officiëren van justitie*).<sup>17</sup> Another legacy of the Napoleonic code is the idea that the prosecution service is an indivisible unity. Individual members act in name of their function only, so they may act on behalf of their fellow prosecutors at any time. The prosecution service conducts criminal investigations (s. 148 CCP), it has the exclusive right to prosecute (ss. 167, 242 CCP), and it has the competence to execute decisions taken by the courts (s. 553 CCP). It follows from the second task that private prosecution is unknown. The monopoly on prosecution does not imply, however, that the prosecution service is obliged to prosecute every offence brought to its notice because the legislature has adopted the expediency principle (*opportuniteits beginsel* – see §§ 2.1, 7.1).

Prosecution is commenced either by an indictment by the public prosecutor or a request by the public prosecutor to an examining judge in the district court to conduct a judicial investigation or to detain a suspect on remand.<sup>18</sup> Due to the monopoly on prosecution, in combination with the expediency principle and the power to supervise the police, the prosecution service has become the key element within the criminal justice system.

Concerning victims of crime, the prosecution service has been given certain specific duties both in the pre-trial and trial stages. These obligations are primarily mentioned in the Code of Criminal Procedure and in the different Victim Guidelines (see § 4.3.2). In 1987, concerning the Vaillant Guideline, several supporting measures were taken to facilitate actual implementation. Within each district, the prosecution service appointed a public prosecutor as a coordinator responsible for the implementation of the Guideline (*slachtoffer officier*). The main duties of the coordinator are to send and answer letters to victims, and to arrange the meetings of the public prosecutors with victims of serious crime. At the same time, these coordinators function as liaison officers between the prosecution service and third parties, such as the local victim support schemes. In 1995, it was decided that in addition to the coordinating officer, special staff members and administrative personnel should be appointed to provide victims with information as stipulated in the Guideline Terwee (see § 4.3.2). Recently, the prosecution services have hired additional personnel to check the statements

<sup>17</sup> The Procurators General at the Supreme Court (*Procureurs Generaal bij de Hoge Raad*) are not included in the hierarchy because one of their tasks is the prosecution of offences committed by those in public office.

<sup>18</sup> M. Sheridan, J. Cameron, *EC legal systems, an introductory guide*, Butterworths, London, 1992, Netherlands-p. 25.

on the victim's losses and injuries. Furthermore, several legal districts have appointed a mediator to arrange claim settlements between victims and offenders. The negative side of this approach is that victim support has mainly become the task of the persons specially assigned with victim-oriented duties. In practice, therefore, the statutory requirement that every individual public prosecutor should take the victim's interests into consideration has not yet been fully met.<sup>19</sup> Finally, the prosecution services in the 19 legal districts have all set up general reception services for victims (*slachtofferlokketten*) where victims and witnesses may go to obtain information about the criminal proceedings or their case.

### 3.3 Judiciary

The organization of the judiciary in criminal matters is influenced by the dichotomy of criminal proceedings in the pre-trial and the trial stage, and the distinction between the two categories of crimes: felonies (*misdriften*) and misdemeanours (*overtredingen*). The pre-trial stages consists of the police investigation, and if necessary, of the preliminary judicial investigation performed by the examining magistrate (*rechter-commissaris*). The preliminary judicial investigation (*gerechtelijk vooronderzoek*) – which takes only place in serious or complicated criminal cases – starts with a request by the public prosecutor to the examining magistrate to open the judicial investigation (s. 181 CCP). The purpose of the preliminary judicial investigation is to clarify the case to the extent that the public prosecutor will be able to take the decision whether or not to prosecute, and also to exercise judicial control over coercive measures. The examining magistrate must collect the evidence necessary to find the objective truth. He may also take decisions about the investigation as a whole. He has in fact two functions: that of an investigating officer in charge of the police as he hears and questions suspects, witnesses and experts, and that of a judge whenever he decides on the application of coercive measures. The pre-trial stage has a moderate inquisitorial character: the accused may be subjected to coercive means, but he has the right to challenge their application.<sup>20</sup> At the end of the preliminary investigation, the public prosecutor may decide to prosecute and to summon the accused. This marks the transition from the pre-trial to the trial stage.

The trial stage can be characterized as accusatorial.<sup>21</sup> During the trial stage, members of the judiciary work as members of the bench in one of the different courts. Usually, the less experienced judges work at the lower courts, and over the years they may be promoted to the courts of appeal, for instance. The competence of the different courts is mainly based on the distinction between felonies and misdemeanours. Felonies are tried in first instance by the nineteen district courts (*rechtbanken*) which are composed of three judges. In the Netherlands, no trial by jury exists. Misdemeanours are in first instance brought before one of the 62 subdistrict courts (*kantongerecht*). In a subdistrict court, justice is done by a single judge. Most crimes are brought before the special single judge (*politierechter*) on the condition that the case is easy to prove and the penalty will not exceed six months' imprisonment (s. 369 CCP).

Appeals against decisions by the subdistrict court are lodged with the district court. Appeals against decisions of the district court are lodged with one of the five courts of appeal. In last resort, the defendant can appeal to the Supreme Court of the Netherlands (*Hoge Raad*) which

<sup>19</sup> H.Geveke, M. Verberk, *De organisatie van slachtofferzorg, resultaten van een onderzoek naar de uitvoering en werking van de wet en richtlijn Terwee*, Ministerie van Justitie, August 1996, pp. 43-44.

<sup>20</sup> G.J.M. Corstens, *Het Nederlandse strafprocesrecht*, Gouda Quint, Arnhem, 1995, p. 7.

<sup>21</sup> G.J. M. Corstens (1995), p. 7.

is at the top of the judicial organization. An appeal to the Supreme Court is limited to questions of law, and the actual decisions of the lower judge are accepted as final and established findings. (For training of the judiciary, see § 8.1)

### 3.3.1 Criminal Proceedings

Dutch trials are largely based on the legal file made during the pre-trial stage. It is customary for the court to refer to the written evidence included in the file.<sup>22</sup> If none of the parties involved in the proceedings wish to add anything to the files, or to hear (additional) witnesses, the trial proceedings will be based mainly on the evidence included in the legal file. Until 1986, it was rare for witnesses to have to testify in court (see § 8.2).<sup>23</sup> Nowadays, however, witnesses are increasingly heard in court. Nevertheless, trial proceedings are generally brief compared to legal systems which strictly adhere to the principles of orality and immediacy.

The trial commences with the question of the court to the defendant regarding his personal particulars, after which he will be informed of his right to remain silent. Then the public prosecutor will read the indictment. After presenting the case, the court questions the accused and may hear witnesses and/or experts. The court proceedings are, however, not oral in the sense that every piece of evidence has to be voiced to the court (see § 5.5). Subsequently, the public prosecutor will hold his closing speech which culminates in his demand to impose a certain penalty, measure or non-punitive order. Thereupon, the defence is given the opportunity to react. After replication and rejoinder, the accused has the right to speak the last word.<sup>24</sup> Whenever the victim has joined the proceedings, he is allowed to clarify his claim for compensation to the court each time the public prosecutor has addressed the court (s. 336 CCP). Finally, it is important to remark that the trial proceedings do not consist of a bipartite process. The question of guilt and the imposition of the sentence are dealt with during the same trial procedure and by the same judges.<sup>25</sup>

### 3.4 Enforcement Authorities

As a rule, the victim is responsible for the enforcement of his claim for compensation awarded by the court (see § 7.3), although the probation services may lend a helping hand (see § 3.5). The only real exception to this rule, however, regards the compensation measure (see § 7.2), as introduced by the Act Terwee. The legislature has stipulated that the national debt collection agency (*Justitieel Incasso Bureau*) is responsible for the enforcement of compensation measures (see § 7.3).

### 3.5 Probation Services

The probation service (*reclassering*) plays an important role in the criminal justice system. The

<sup>22</sup> It is customary for the court to use the following expression: '*Uit de stukken blijkt dat...*' ('The legal file demonstrates that.....').

<sup>23</sup> The explanation for this practice can be found in the *de auditu* case law of the Supreme Court, see § 8.2.

<sup>24</sup> M. Sheridan, J. Cameron (1992), Netherlands-p. 26.

<sup>25</sup> The exception to this rule is the criminal financial investigation procedure (*strafrechtelijk financieel onderzoek in kader Plukze-wetgeving*). For additional information on specific court practice see M. L. Komter, *Dilemmas in the courtroom: a study of trials of violent crime in the Netherlands*, Mahwah, Erlbaum, 1998.



probation service consists of a number of private organizations which have joined the Dutch federation of probation services (*Nederlands federatie van reclasseringsinstellingen*). The federation is funded by the Ministry of Justice.

The probation service has an informatory and assisting task. It most resembles a social service which plays a very active part in criminal affairs. The probation service provides assistance to suspects, accused persons, and inmates. But it also provides information to the courts on the suspect's or accused's personal and social background. This information is usually gathered at the request of the court or the defence counsel.<sup>26</sup> Furthermore, the probation service enforces alternative sanctions.

The involvement of the probation services with victims is relatively small and varies a great deal among the legal districts. In some districts, the probation service has appointed a contact person within the scope of the 1995 Victim Act Terwee, who should try to facilitate the enforcement of the victim's claims for compensation. In other districts, the only victim-oriented activity of probation officers is to address the issue of payments to victims with their clients.<sup>27</sup> In practice, probation officers may ask a client whether he is willing to compensate the victim, how they would like to do this (e.g., payment of a sum of money, restitution of goods, or an apology), and whether this can be realized in practice. Only if all these matters are discussed with the accused/offender, is the victim contacted. Apart from trying to settle the victim's claim, probation officers may also try to mediate between offender and victim. Mediation can be done directly, if all participants are willing to meet, or indirectly through the probation officer, either in person or by letter. The victim is always told that he may ask a volunteer from Victim Support (see § 3.6) to assist or represent him during the mediation process. The probation service only tries to reach an agreement between the offender and the victim. It does not assume responsibility for enforcement. If the offender does not pay (regularly), the probation officer will point this out to him. He will not force the client to pay, but will end the agreement and inform the victim. Whether other persons have to be informed as well depends on the agreements that have been made, for instance, with the public prosecutor or the prison service.<sup>28</sup>

### 3.6 Victim Services

In the Netherlands, one nationwide victim support service exists (Victim Support the Netherlands, *Slachtofferhulp Nederland*). It provides support to all victims of crime. In addition, tourist victim support services have been set up in Amsterdam (Amsterdam Tourist Assistance Service) and other tourist-prone parts of the country.

#### *Victim Support the Netherlands*

Victim assistance schemes began to surface as grass-roots local services in the late 1960s.<sup>29</sup>

<sup>26</sup> See A.H.J. Swart (1993), p. 289.

<sup>27</sup> H. Geveke, M. Verberk (1996), p. 45.

<sup>28</sup> A. de Beer, 'Schadebemiddeling, Terwee en de reclassering', *Proces*, 1995, nr. 11/12, pp. 199-202.

<sup>29</sup> The first initiatives were developed by the private social service *Humanitas* and the foundation 'Commiseration with victims of crime' (*Medeleven met gedupeerden ten gevolge van misdrijven*). *Humanitas*, which previously worked mainly with offenders, started mediation projects. Ten years later, *Humanitas* published a blueprint for victim support centres. In 1979, the different victim support schemes and projects decided to establish a national service: the National Victim Support Platform (*Landelijk Overleg Slachtofferhulp*).

In 1980, three victim support projects were granted funding by the Ministry of Justice. In 1985, the National Victim Support Organization (*Landelijke Organisatie Slachtofferhulp: LOS*) was set up.<sup>30</sup> In addition, a Victim Support Fund (*Fonds Slachtofferhulp*)<sup>31</sup> was set up to help finance the local victim support centres (*Buro's Slachtofferhulp*). In 1996, it was decided that these three main branches should be referred to by the same name: Victim Support the Netherlands (*Slachtofferhulp Nederland*).<sup>32</sup> Today, the three main sources of funding for Victim Support the Netherlands are in addition to the Victim Support Fund, the central and the local governments. The Ministry of Justice finances the national office, the local councils pay for the local schemes, i.e. the costs regarding the provision of assistance and the office, and the Victim Support Fund pays for most of the costs regarding the volunteers.<sup>33</sup> In 1998, the budget of Victim Support the Netherlands amounted to 15.3 million guilders (EUR 6.9 million).<sup>34</sup> In the year 2000, the budget will amount to 17 million guilders (EUR 7.71 million).

Victim Support operates nationwide and covers the entire territory. Since 1994, there have been 75 local victim support centres which are spread quite evenly throughout the country.<sup>35</sup> The local victim support schemes offer moral and practical support, e.g., by accompanying victims to hearings; information and legal advice; practical assistance, e.g. concerning compensation from the offender both during the criminal proceedings and by means of mediation or pre-trial claim settlement, or from the State Fund for Victims of Violent Crime (1975, see § 4.3.1); indirect assistance by referring victims to other services, such as social services or mental health services.<sup>36</sup> Victim Support has three basic principles. First of all, the services provided are free of charge, and available to every victim. The centres are therefore widely spread and easily accessible. There are no waiting lists and the assistance offered is short-term. Complicated cases are referred to professional agencies.<sup>37</sup> A second

<sup>30</sup> The National Organization is an umbrella organization which has the following tasks: to work for the national organization, e.g. to carry out the joint registration and edit the newsletter for its members and volunteers; to organize local and regional schemes, to support local initiatives, to supply information, advice and training to the local schemes and third parties; to raise funds, to distribute the financial means among the members and to evaluate the different organization models; to be a central point of contact regarding victim issues for the government, ministries and to give publicity to the aims of victim support.

<sup>31</sup> The Victim Support Fund was established in 1989 by the ANWB (Dutch traffic association), the National Fund for Traffic Safety and the LOS. Its aim is fund raising on behalf of victim support and the local victim support schemes. It is not the same fund as the State Fund for victims of violent crime, which was established in 1975 by the Dutch government.

<sup>32</sup> National Victim Support Organization (*Slachtofferhulp Nederland*), Maliesingel 38, 3581 BK Utrecht. Phone: 0031 (0)30 2340116; fax: 0031 (0)30 2317655; e-mail: lbs@slachtofferhulp.nl

<sup>33</sup> J.A. Huisintveld (1996), pp. 11-14. And J.M. Wemmers, *Victims in the criminal justice system*, WODC, Kugler Publications, Amsterdam, 1996, pp. 35-39.

<sup>34</sup> Annual Report 1997 of Victim Support the Netherlands, *Slachtofferhulp Nederland, jaarverslag 1997*, pp. 53, 71. Exchange rate: 1 guilder is 0.4537 Euro.

<sup>35</sup> For efficiency reasons, Victim Support the Netherlands has recently divided the national territory into 25 victim support regions which correspond with the new police regions (Police Act, 1993). But the actual number of centres will remain the same.

<sup>36</sup> J.A. Huisintveld (1996), pp. 14-17.

<sup>37</sup> In 1995, 38% of the victims was referred to a specialized professional agency. Especially victims of sexual crime need professional help, 60% of this group is referred. Source: Annual Report 1995 of Victim Support the Netherlands, *Slachtofferhulp Nederland, jaarverslag 1995*, p. 20.

basic principle is that volunteers do the actual work, supported by paid staff members.<sup>38</sup> Every day, over 1500 volunteers provide information, emotional support, practical and legal advice to victims, assisted by more than 200 professionals.<sup>39</sup> Victim Support as an organization attracts many volunteers: most centres have waiting lists for volunteers and the turnover has decreased over the years. An important factor in this success is the attention given to the coaching and training of volunteers. The volunteers are thoroughly selected and trained. The basic training course is provided by the coordinators of the different services according to the manual published by Victim Support the Netherlands. After this course, volunteers may enrol in additional and/or specialized training.<sup>40</sup> Next to these courses, most centres have set up their own projects in cooperation with the local network partners. A third basic principle, which is of particular interest, is the pro-active approach to victims.<sup>41</sup> This means that the volunteer will make the first contact with the victim. This pro-active policy is made possible because of the close cooperation between Victim Support and the police. The police are required to ask the victim if he would like to be assisted by Victim Support (see § 6.1, A.2). At regular intervals, the police send Victim Support a list of persons who opted into the referral system. Thereupon, a volunteer of Victim Support will contact the indicated victims. With respect to serious crime, the police will phone victim support in order to provide assistance to the victim at very short notice. It is important to underscore that victims do not have to report the crime to the police to be eligible for victim support. In practice, however, about 75% of Victim Support's clients are referred by the police.<sup>42</sup> This is both due to the fact that since the introduction of the Victim Guidelines, the police have been required to inform victims about the services provided by the local victim support scheme, and to the efforts of the local victim support centres.

The initial contact between the volunteer and the victim is usually established by telephone (68%) but the volunteer may also contact the victim in person (24%) or by letter (8%). Almost all victims (96%) characterize the way in which they were contacted as pleasant. The majority of the victims were contacted within five days after the crime. Most victims are very glad

<sup>38</sup> Assistance is provided both to victims of crime and victims of traffic accidents, who are part of the target group since 1987.

<sup>39</sup> The National Victim Support Organization, *Victim Support in the Netherlands* (publication in English), July 1997, p. 2.

<sup>40</sup> The additional training consists of various subjects, such as the Act and Guideline Terwee. If volunteers would like to receive further training, they may take the *victim support* course at a specialized educational institute. It consists of five modules: *threats and fear, loss and mourning, communication and conflict settlement, intercultural communication*, and finally *victim support after sexual offences*.

<sup>41</sup> The reasoning behind the active approach is that most victims become a victim unexpectedly. This may be a sudden and often shocking experience which may lead to a temporary incapacity to handle even the least difficult affairs. Moreover, a significant number of victims do not easily ask for help. The majority of victims underestimate the emotional, physical, social, legal and practical consequences. Only after a some time do they start to realize that they do have problems. By then, they are too ashamed to ask for assistance or they have problems concretizing their questions and problems. If after a few days, a volunteer contacts them, they are often relieved to be able to talk to someone, and if they initially decline assistance, it is still easier to contact the local victim support scheme. After all, the first step was already made by the volunteers who tell them that they may contact them at any time, if they so wish.

<sup>42</sup> The National Victim Support Organization(1997), p. 4. About 20% contact the local victim scheme on their own accord and the remaining victims are referred by social agencies and other partners in the Terwee network.

to speak to a volunteer from Victim Support. Approximately 61% of the victims accept the offer of Victim Support to help, and 34.8% of these victims have more than one contact with Victim Support. Only 30.9% of the victims contacted indicate that no assistance is needed. The Victim Satisfaction Survey – carried out by independent researchers at the request of Victim Support – shows that victims who decline the assistance offered do appreciate the fact that a volunteer contacts them and shows an interest in their case.<sup>43</sup> During the first contact, the victim may indicate that he would like to come to the centre or that he would appreciate a visit at home.<sup>44</sup> The number of victims assisted is rising every year. This is caused by two main factors: a better cooperation with the police and nationwide publicity.<sup>45</sup> In 1987, assistance was provided to 5,500 victims. Three years later this number had already risen to 25,000 victims, and 1991 to 50,000. From 1991 to 1996, the number of victims approached and/or assisted by Victim Support doubled again to 114,500.<sup>46</sup> In 1996, 61,112 victims were given assistance.<sup>47</sup> This number had risen to 86,563 victims in 1997, 11,300 of whom were victims of serious violent crimes and 6,300 of whom were victims of sexual offences. For 60% of the victims assisted by Victim Support, several contacts were necessary. On average, victims of sexual offences have 6 consecutive contacts with volunteers; for other crimes, the average is 2.5 contacts.<sup>48</sup> Despite the sharp increase in clients, the services provided remain of good quality. The Victim Satisfaction Survey indicates that victims were generally pleased with the support offered. About 75% of the victims indicated that they were very satisfied with the moral and practical support, information and advice they received. On average, victim support was given a mark of 7.7 on a scale of 1 to 10 (with 10 as the perfect mark).<sup>49</sup> The 1998 study also indicates that 75% of the victims are (very) satisfied with the way they were treated by Victim Support volunteers; 76% were (very) satisfied with the information provided to them.<sup>50</sup>

### *Tourists*

For tourists who have become victims of crime in the Netherlands, the victim services for tourists are very important. We will here describe the functioning of the Amsterdam Tourist Assistance Service (ATAS).<sup>51</sup> It was set up by the municipality of Amsterdam, the local centre

<sup>43</sup> P. Verheggen, H. Keip, *Buro's slachtofferhulp. Een kwantitatief tevredenheidsonderzoek onder ex-clienten in opdracht van de vereniging Landelijke Organisatie Slachtofferhulp*, Motivaction, Amsterdam, 1995, pp. 36-38.

<sup>44</sup> J.A. Huisintveld (1996), pp. 17-18.

<sup>45</sup> Today Victim Support is very well known among the Dutch population. Victim Support participates in television programmes (mainly news and discussion programmes). In 1997, Victim Support also contacted the press to give statements following particular news items. Finally, the local centres organize activities e.g. they publish informative articles in local newspapers, visit schools or give presentations. See Annual report Victim Support 1997, pp. 31-34.

<sup>46</sup> The National Victim Support Organization (1997), p. 3.

<sup>47</sup> The other victims were offered assistance but declined the offer. Today, only the victims that were actually assisted are registered. Previously, all victims who came into contact with Victim Support were registered as well and accounted for in the statistics.

<sup>48</sup> Annual Report Victim Support 1997, pp. 12-16.

<sup>49</sup> P. Verheggen, H. Keip (1995), pp. 38-39.

<sup>50</sup> B&A Groep, *Slachtofferzorg in Nederland. Eindrapportage*, Den Haag, February 1998, p. 54.

<sup>51</sup> ATAS, Nieuwezijds Voorburgwal 114-118, Amsterdam. Phone: +31 (0)20-625 32 46, fax. +31 (0)20-625 33 59.

of Victim Support the Netherlands, and the Amsterdam Tourist Association in 1991. It is funded by the city of Amsterdam and the Ministry of Justice. The aim of ATAS is to provide assistance and support to foreign tourists who have become victims of crime in the national capital. The specific needs of tourists who have been victimized justifies the creation of a separate victim support service in the most tourist-prone area of the Netherlands. First of all, the target group has specific needs. Tourists are not victimized in familiar surroundings, often do not speak the language, and feel helpless where they would know what to do at home. The often very practical assistance, therefore, demands special organizational and language skills, as well as contacts with other partners within the tourist industry to offer tailored support. For instance, if tourists have been robbed, they may need help obtaining new travel or identity documents, obtaining a hotel room at reduced rates, arranging a postponement of paying the bills, getting cash pending bank-transfers, being referred to different services unknown to tourists, etc. As a separate victim service, ATAS is also better equipped to provide services outside office hours during the high tourist season.<sup>52</sup>

ATAS only operates within the city limits of Amsterdam and cooperates closely with the local police. The only condition for obtaining help from ATAS volunteers is that the tourist reports the crime to the police. In practice, victims are usually referred to ATAS by the police. Apart from the police, ATAS has good contacts with a network of private enterprises and agencies that are important to victims, such as hotels, consulates, tour operators, transport companies (i.e., ferries and airlines), banks, and social services. Private enterprises also contribute to the funding of ATAS. The total budget in 1997 amounted to about 500,000 guilders (EUR 226,891), more than half of which comes from private funding.<sup>53</sup> In the first six months ATAS was operating (May-December 1991), the services already assisted 637 tourists from 57 different countries or origin. The efforts of ATAS volunteers and the agreements made between ATAS and the participants in the network have turned it into an indispensable service for tourists. Today, 10% of all tourist who report a crime to the police are referred to ATAS and are in a real need of help. In 1997, 1,127 victims were referred by the police.<sup>54</sup> Tourists are very appreciative of the assistance offered. They often say that without the support and help from the volunteers their holiday would have been ruined. Moreover, the free assistance restored their confidence in Dutch society and prevented them from having negative feelings about the Netherlands and Amsterdam. ATAS, therefore, not only helps victimized tourists but is also essential to the Dutch tourist industry.<sup>55</sup> The participants in the ATAS network are equally positive about the assistance provided.

### 3.7 The Terwee Network Partners

With the purpose of improving the position of victims in criminal proceedings (see §§ 2, 4.3), the 1995 Victim Act Terwee introduced the phenomenon of networking into the justice system. The purpose of establishing such a network is to divide the victim-oriented tasks between the various authorities and services according to their specialization. In addition,

<sup>52</sup> J. Slot, *Rapportage Evaluatie Atas*, Amsterdam, November 1991, pp. 13-15. This study was conducted on request of the Ministry of Justice and the city of Amsterdam.

<sup>53</sup> Annual report ATAS 1997, *Jaarverslag 1997*, Amsterdam, p. 10.

<sup>54</sup> Annual report ATAS (1997), p. 4.

<sup>55</sup> J.J. van Wijngaarden c.s., *Amsterdam Tourist Assistance Service. Rapportage onderzoek naar de effectiviteit van ATAS*, Study performed by the Department of Criminology of the Free University Amsterdam, pp. 6-18. See also J. Slot (1991), pp. 5-12.

it is hoped that it will be possible in this way to settle the victim's claim for compensation at the earliest possible stage. Within a local network, *inter alia* the police, the prosecution service, the probation service, Victim Support, *Halt* (a sort of probation service for juvenile offenders carrying out alternative sanctions like community service), the child protection service (*Raad voor de Kinderbescherming*) and the legal advice centre (*Buro voor Rechtshulp*) cooperate closely. To facilitate the functioning of the network, steering committees have been created in all legal districts to formulate shared objectives and to measure implementation and progress. These steering committees differ in composition and in the frequency with which they meet. For instance, in Utrecht five representatives meet, while in Middelburg eighteen representatives assemble. Next to the steering committees, which are supposed to deal with policy issues, working groups have been established to concentrate on practical, executive matters. Within the steering groups policy choices, projects, and procedures have been developed, and the victim-oriented tasks are distributed among the partners. The allocation of tasks varies greatly from district to district.<sup>56</sup>

In practice, carrying out victim-oriented tasks poses serious difficulties to most services, mainly because the implementation of the new duties involves a significant additional workload. According to research on the functioning of the Terwee Network, many services did not yet have the required manpower for optimum implementation of the Guideline Terwee in 1996. Nevertheless, the study clearly showed that the collaboration and coordination of services and assistance provided to victims had already improved, even after only one year of national implementation.<sup>57</sup> This conclusion was confirmed by another study carried out in 1996. However, some critical remarks were made. The goals set (usually 80% of the victims should be satisfied about information, 65% about treatment, and in 10% of the cases the claim for compensation should be met) were not properly monitored or measured (see § 6.2). The data provided by the network partners were incomplete and could not be compared nationally. In general, establishing agreements among the partners was not the problem. Problems were linked to actual implementation of the allocated tasks. As a result, the attention of the partners was usually focused on one aspect of the goals set, i.e., providing information. Unsurprisingly, the latter improved most significantly in the police and prosecution services. Regarding the other tasks, less progress was made, although the initiative to appoint specialized mediators at the prosecution service has been quite successful.<sup>58</sup> Researchers have made several recommendations to improve the functioning of the Terwee Network. First, the network partners should point out the advantages of the implementation of the Victim Act and Guidelines Terwee to its members and show the relevant social and crime prevention effects. Second, they ought to give publicity to positive results and draw attention to successful initiatives. Third, achievements in the area of victim support should be made visible and be a permanent part of planning and control cycles and job evaluations. Finally, each partner should appoint persons to ensure structural, long-term attention for victim-oriented tasks.<sup>59</sup>

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<sup>56</sup> H.Geveke, M. Verberk (1996), pp. 1-15. The study focuses on the organization of victim support after the implementation of the Act Terwee and took place in the period November 1995 until February 1996.

<sup>57</sup> H.Geveke, M. Verberk (1996), pp. 13-15.

<sup>58</sup> B&A Groep (1996), pp. 104-108, 112-113.

<sup>59</sup> H.Geveke, M. Verberk (1996), pp. 46-47.

### 3.8 The National Ombudsman

The National Ombudsman has proven to be very relevant to the position of victims of crime within criminal proceedings.<sup>60</sup> Victims may complain to the National Ombudsman on the condition that the authority involved has been notified about the grievance. If the victim was not contacted within six weeks or if he is not satisfied with the response, he may write to the National Ombudsman. The National Ombudsman cannot alter the decision taken but he may recommend changes to the authorities. In practice, his recommendations carry a lot of weight. To illustrate the importance of the work of the National Ombudsman, let us give an example. After many complaints by victims who were unable to act as civil claimants because they were not duly informed or notified by the authorities, the Ombudsman recommended change in his annual report. Today, the Minister of Justice grants these victims a (small) amount of money in compensation. (For other examples see § 5.1, § 7.2, D.10).<sup>61</sup>

## 4 SOURCES OF LAW

### 4.1 General Sources of Law

The main source of law is the Constitution of 1815 (*Grondwet*, see § 4.2). In addition to the Constitution, the various Statutes, e.g., the Penal Code, the Code of Criminal Procedure, the Police Act, and the Act on the Organization of the Judiciary, are primary sources of law. Other sources of law are legal doctrine and case law. Case law, in particular of the Supreme Court (*Hoge Raad*), is very important in this respect. The Supreme Court's most important task is to determine the correct interpretation of the law and to decide whether the lower courts have complied with it. However, the Supreme Court has increasingly become an important creator of new procedural law. For instance, its case law with respect to the use of statements of anonymous witnesses has opened ways the legislature had not yet created (see §§ 8.2 and 8.3). The Supreme Court has allowed, within certain limits, to hear such witnesses during the pre-trial stage and to use the anonymous verbatim report of their testimony in court.<sup>62</sup>

### 4.2 Sources of Criminal Law and Procedure

The Constitution, in the revised version of 1987,<sup>63</sup> contains three chapters especially relevant to criminal proceedings. Its first chapter concerns fundamental rights (*grondrechten*), the fifth and sixth refers to legislation and the administration of justice, respectively. The fundamental rights mentioned in the Constitution correspond more or less with the provisions of the European Convention of Human Rights and the International Covenant on Civil and Political Rights, although in some cases the Dutch Constitution guarantees a more far-

<sup>60</sup> Act on the National Ombudsman, *Wet Nationale National Ombudsman*, 4 February 1981, Stb. 35.

<sup>61</sup> H.G.M. Hilken, *Memo slachtofferhulp 1995*, Kluwer, Deventer, 1995, pp. 220-221. In 1995, the sum amounted to 180 guilders (EUR 100). In 1996, this sum was slightly higher.

<sup>62</sup> See A.H.J. Swart (1993), pp. 283-286.

<sup>63</sup> *Grondwet voor het Koninkrijk der Nederlanden* van 24 August 1815, as revised by law of 3 June 1987, Stb. 270 en 271.

reaching protection than the international conventions. The two principal sources of criminal law in the Netherlands are the Penal Code of 1886<sup>64</sup> and the Code of Criminal Procedure of 1926.<sup>65</sup> The treatment of victims by the prosecution service and the police are laid down in Guidelines, published in the Gazette (*Staatscourant*, see § 4.3.2).

Concerning victim-oriented enactments and guidelines, the 1995 Victim Act Terwee will be discussed first and compared with the previously existing situation. The Act on Legal Aid and the State Fund for Victims of Violent crime will also be discussed, as well as the functioning of the Fund. After this, the contents of the different Victim Guidelines will be described. Here, a subdivision is made regarding the duties of the police and the prosecution service with respect to victims. The Guidelines themselves reflect this subdivision and specify the various obligations in the same manner.

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

#### 4.3.1 Victim-Oriented Acts

The Penal Code and the Code of Criminal Procedure contains several victim-oriented provisions. These provisions are as a rule the result of specific enactments which are incorporated into these Codes, such as the Victim Act Terwee (see § 4.3.1), or in one of these Codes, e.g., the Witness Protection Act (see § 8.3).

##### *The Victim Act Terwee*

Since the implementation of the current Code of Criminal Procedure in 1926, the provisions for victims within criminal proceedings have remained basically unchanged until the implementation of the Victim Act Terwee (*Wet Terwee*) in 1995. The Victim Act Terwee is incorporated in the Code of Criminal Procedure. It now comprises two titles which exclusively concern the position of the civil claimant (*benadeelde partij*). Moreover, the Penal Code and some other statutes, for instance the Act on the State Fund for victims of violent crime (*Schadefonds Geweldsmisdrijven*, see below) have been revised. As a direct result of the Victim Act Terwee, the opportunities for victims to obtain compensation within criminal proceedings have been significantly improved by introducing a compensation measure comparable to the English compensation order (see § 7.2, D.11 for a detailed discussion); it was introduced in addition to the traditional adhesion procedure for the civil claimant (see § 7.2, D.10).

What is truly remarkable about the Victim Act Terwee, however, is that the legislature took extraordinary measures to evaluate the effects of the Act, and the novelties it introduced, in order to make sure that not only the law in the books but also the law in action would change. It was decided to put the Act into effect in two of the nation's 19 legal districts ('s Hertogenbosch and Dordrecht) on an experimental basis for two years, from April 1993 until 1995. During this period, several studies were carried out to gain knowledge of the actual implementation of the law. As Groenhuijsen has justly remarked, there are two sides to the gradual implementation of a law aimed at improving the standing of victims

<sup>64</sup> Penal Code of 1886, laid down on 3 March 1881; *Wetboek van Strafrecht, vastgesteld bij de Wet van 3 maart 1881, Staatsblad 1881 nr. 35.*

<sup>65</sup> Code of Criminal Procedure of 1926, laid down on 15 January 1921; *Wetboek van Straffoordering vastgesteld bij de Wet van 15 januari 1921, Staatsblad 1921 nr. 14.*



within criminal justice systems. On the one hand, it makes sense to be very careful in not raising expectations for victims that could possibly not be met later on. On the other hand, it can be frustrating for victims to be denied rights which are already effective in a neighbouring judicial district. This is a dilemma for which there is no easy way out.<sup>66</sup> The fact remains that it is commendable to try and gain knowledge about possible drawbacks or bottlenecks of a legal reform. Furthermore, it is fair to say that the legislature has shown remarkable consciousness of the fact that it takes more than legal reforms to effectively alter an existing practice.<sup>67</sup> However, it turned out to be quite difficult to draw lessons in do's and don'ts from the experience in the pilots. When things went wrong, it was not easy to attribute problems to a single cause. The studies, however excellently executed, could not be and were not immediately used to learn by trial and error. Only after the nation-wide implementation were the outcomes of the studies taken gradually more to heart and were solutions found to remedy some of the actual shortcomings. What we can learn from this experience is that more time is needed to analyse data, isolate causes for general problems, and come up with adjustments.

Before 1995, the Dutch legal system contained a number of options open to victims to obtain compensation (see § 7.2). Besides the possibility to request compensation through the civil courts, a lengthy and costly procedure for victims,<sup>68</sup> provisions existed for victims to claim compensation from offenders within criminal proceedings. Victims of crime could file a claim for damages during the trial, and the judge could impose compensation as a special condition to a (partially) suspended sentence. The civil claim within criminal proceedings was subject to several conditions in order to be allowed in court. The claim could not exceed the amount of 1500 guilders (EUR 680) for felonies and 600 guilders (EUR 272) for misdemeanours.<sup>69</sup> If the losses exceeded these sums, the remaining damages could be collected through civil court proceedings. Furthermore, the victim claiming compensation had to be present during the trial. Once the claim was awarded by the court, it was completely up to the victim to ensure the collection of the money.<sup>70</sup> Especially the last two limitations were a recognized source of secondary victimization. Contrary to the civil claim for compensation, the imposition of compensation as a special condition was not restricted to a maximum value. The problem with this way of obtaining damages was, however, that victims were not able to ask the public prosecutor to demand the court to impose such a conditional sentence. Consequently, victims relied completely on the goodwill of public prosecutors and judges.

The 1995 Victim Act Terwee, which refers to Recommendation (85) 11 in its Explana-

<sup>66</sup> M.S. Groenhuijsen, 'The development of victimology and its impact on criminal justice policy in the Netherlands', in: E. Fattah, T. Peters (eds.), *Support for crime victims in a comparative perspective*, Leuven University Press, 1998, p. 46.

<sup>67</sup> M.S. Groenhuijsen (1998), p. 48. Despite all good intentions of the legislature and the many studies that were carried out, the Victim Act Terwee was implemented nation wide without carefully considering how to prevent the bottlenecks or solve the difficulties that were disclosed by researchers.

<sup>68</sup> In practice, civil court proceedings are not feasible regarding losses that amount to less than about 2000 guilders (907 EUR).

<sup>69</sup> Act of 10 October 1978, Stb. 1978, 528.

<sup>70</sup> J.M. Wemmers, M.I. Zeilstra, 'Victim policy and restitution in the Netherlands', in: G. Kaiser c.s., *Victims and criminal justice, legal protection, restitution and support*, Criminological research reports by the Max Planck Institute for foreign and international penal law, vol. 51, Freiburg i.Br., 1991, pp. 411-413.

tory Memorandum is enacted for the sole purpose of improving the position of the victim in Dutch criminal proceedings. First, it abolished the quantitative limits of 1500 (EUR 681) and 600 guilders (EUR 272) and replaced them by a qualitative criterion: the claim for compensation should be clear and simple, in the sense that no experts or witnesses are necessary to clarify or support the claim. However, the claim remains ancillary to the criminal proceedings. Because of the new criterion, both the victim and the court are given the right to divide the claim into two parts: a simple and a complicated part, for instance regarding injuries. The simple claim can be handled in the criminal court, while the victim may take the complicated part to the civil court. In addition, the victim is given a choice concerning the manner in which he wishes to join the criminal proceedings as a civil claimant. He may present a civil claim for compensation during the preliminary stages or during the trial stage up to the closing speech of the public prosecutor (s. 51a, 51b CCP). However, this does not mean that the victim needs to be present in court. He may avoid a confrontation with the accused. In that case, the public prosecutor will present his claim for civil damages. Second, the compensation measure (*schadevergoedingsmaatregel*) was introduced (s. 36f PC) alongside the civil claim for compensation to enhance the likelihood of the victim receiving compensation.<sup>71</sup> It is a financial punishment, but contrary to fines, the compensation measure benefits the victim. Another advantage is that the state is responsible for executing the compensation measure. The amount of money awarded to the victim by means of the compensation measure, however, is still determined by criteria of civil law. It is possible for the court both to award the claim for damages to the civil claimant and to order a compensation measure (for a more elaborate discussion see § 7.2, D.11).<sup>72</sup> A third novelty of the Victim Act Terwee regards the payment of a certain sum of money to a fund or service which promotes the interests of victims, if the victim does not wish to receive compensation or has remained unknown. This may be imposed as a special condition (*bijzondere voorwaarde*) to a suspended sentence (s. 14c PC). The funds that may profit from this special condition include the State Fund for Victims of Violent Crime (*Schadefonds geweldsmisdrijven*), Victim Support the Netherlands, or the National Office against Racism (*Nationaal bureau racismebestrijding*). Finally, the 1995 Victim Act Terwee contains a number of obligations regarding information and compensation for the prosecuting authorities. They should inform the civil claimant about the date and place of the trial (s. 51f CCP), and notify him of the decision whether to prosecute or not (ss. 167 and 51f CCP) (see § 6.1, D.9 and B.6). They should also ask the court to impose the compensation measure (see § 7). The public prosecutor (or the court) may also return seized goods to the victim (ss. 118, 353 CCP).<sup>73</sup> If the goods are not returned to the victim, he may complain to the court (s. 552a-1 CCP).

<sup>71</sup> J.J.M. van Dijk, 'Strafrechtshervormingen ten behoeve van het slachtoffer in internationaal perspectief', in: *Justitiële verkenningen* 1988, WODC., pp. 13-14. See also J. Shapland et al, *Victims in the criminal justice system*, Gower, Aldershot (Cambridge studies in Criminology, 53), 1985.

<sup>72</sup> Explanatory Memorandum see § 4.3.4, pp. 9-10.

<sup>73</sup> In practice, the problem for victims, however, is that the law stipulates that these goods should be returned to the person who had the goods at the time of seizure. This may be the defendant or a third person. Therefore, the return of property to the victim is not an automatic right. Only if the prosecution service 'has reason to believe that the seized goods are not the exclusive property of the suspect, the necessary investigations will be performed and it informs the interested parties of their rights under 552 CCP' (s. 552ca CCP, *tr. MB*). This reason to believe that the victim is the rightful owner is usually only instigated by actions of the victim himself.

In conclusion, the Victim Act Terwee leaves the victim a free choice regarding the manner in which he wishes to obtain compensation. He may act as a civil claimant, ask the court to impose a compensation measure (through the public prosecutor), or present his claim in civil court. However, a civil claim for compensation that has been denied by the criminal court may no longer be presented in civil court. This possibility is barred by the dictum *electa una via, non datur ad alteram*. On the other hand, if the criminal court considers itself not competent to deal with the claim, the victim may present his claim in civil court (see § 5.3). In addition, a victim of violent crime may request compensation from the State Fund for Violent Crime (see § 4.3.3).

#### *Legal Aid*

The Act on Legal Aid (ALA)<sup>74</sup> is most relevant to victims with limited resources (s. 12 ALA). Persons with a monthly income of less than f 3060,- (EUR 1388) are entitled to subsidized legal aid (s. 34 ALA). Persons seeking 'free' legal aid always have to pay at least f 30,- (EUR 13.6) up to a maximum of f 840,- (EUR 381). Legal aid is provided by lawyers working at legal aid centres and other legal practitioners, e.g., lawyers, bailiffs, notaries, with whom the Ministry of Justice has established legal aid agreements (s 13 ALA). The Committee on Legal Aid will establish the minimum and maximum amount of cases of subsidized legal aid a lawyer has to provide (s. 14 ALA). Lawyers working at the legal aid centres will either personally assist persons with limited financial capacity or refer them to other lawyers (*toevoeging*, s. 24 ALA). The victim who wishes to receive subsidized legal aid should ask a statement of financial incapacity from the mayor of his place of residence, which is provided free of charge (s. 25-1 ALA). The legal aid centre may make inquiries regarding the financial position of the applicant, for instance with the Ministry of Finance or social services (s. 25-2 ALA).

#### *State Compensation*

Already in 1974, the Act on the State Fund for Victims of Violent Crime (ASF, *Wet voorlopige regeling Schadefonds Geweldsmisdrijven*) was promulgated. This Act as well as the Regulation that governs the working of the Fund (Regulation on State Fund (RSF) *Besluit Schadefonds Geweldsmisdrijven*) have recently been changed due to the Victim Act Terwee.<sup>75</sup> Today, the following persons can make applications to the Committee managing the Fund:<sup>76</sup> a) everyone who has suffered serious material or moral losses and injuries due to an intentional violent crime committed on Dutch territory; b) everyone who lives in one of the member states of the European Union who suffered serious material or moral losses and injuries due to an intentional violent crime committed aboard of a Dutch vessel or air plane outside the national territory; and c) surviving relatives of the persons mentioned under a) and b) (s. 3 ASF). Applications to the Fund should be submitted within three years from the date the crime was committed.<sup>77</sup> Concerning surviving relatives, the three-year period starts from

<sup>74</sup> Act on Legal Aid, *Wet op de rechtsbijstand*, 23 December 1993, Stb. 775, as revised on 24 December 1997, Stb. 791.

<sup>75</sup> Stb. 1994, 504 (*Besluit Schadefonds*) and 587 (*Wet Schadefonds*).

<sup>76</sup> Schadefonds Geweldsmisdrijven, Prins Clauslaan 60 Den Haag, tel: +31 (0)70-381 39 90, fax: +31 (0)70 33 13. Applications (an example is found in the leaflet on State Compensation) should be sent to the Committee of the State Fund *Commissie Schadefonds Geweldsmisdrijven*, Postbus (P.O. Box) 20302, 2500 EH Den Haag.

<sup>77</sup> Before the reform, the time span was only six months.

the victim's day of death. If necessary, supplementary applications can be made at a later date regarding claims presented on time (s. 7 ASF). The State Fund Committee decides on the admissibility of the applicant's claim for compensation (s. 8 ASF) and can hear experts and witnesses (s. 9 ASF). The Committee may also decide to pay sums on a provisional basis (s. 13 ASF). If the application is declared inadmissible or if the payments are considered to be unfair by the applicant, he may lodge an appeal with the Court of Appeal in The Hague, which should give a reasoned decision (ss. 14-19 ASF). The appeal should be lodged within six weeks after the Committees' decision on the claim for state compensation.

Payments to victims of violent crime by the State Fund and other costs are at the expense of the Ministry of Justice (s. 2 ASF). The amount of compensation paid by the State to the victim is determined according to principles of reasonableness and fairness (*ex aequo et bono*, s. 4 ASF). The Regulation of the State Fund, however, stipulates that payments to the victim or his surviving relatives of material losses (including injuries and costs caused by the victim's death) cannot exceed the maximum of f50,000 (EUR 22,689) and regarding other damages (including moral damages) the maximum set amounts to f20,000 (EUR 9,076, s. 2 RSF).<sup>78</sup> The Fund will not cover claims which can be recovered through civil proceedings or which are already covered otherwise (i.e., by the offender or insurance companies). If this appears to be problematic, or if enforcement of compensation only seems possible at great expense, the Fund may, nonetheless, decide to award state compensation to the applicant. The State Fund subrogates in the rights of the victim against the offender or other third parties after payments to the victim (s. 6 ASF).

In practice, after the victim or his surviving relatives contact the State Fund, and they are sent an information form (*inlichtingenformulier*). If the victim is legally represented, the form is sent to his lawyer, who is the contact person between the Fund and the applicant. After the applicant has filled out the form and sent it to the State Fund, the secretariat of the Fund will check the application and may request additional information. The secretariat advises the Committee and inform the victim hereof. If the secretariat believes that the application does not fulfill the requirements, the applicant may still ask the opinion of the Committee. The secretariat keeps the applicant informed of all relevant developments in his case. The time that is needed by the Committee to take a decision depends on the number of experts that have to be consulted as well as on the number of applications that are submitted to the State Fund. The Committee may, however, at the request of the applicant, award the victim a provisional sum. If the claim for compensation is granted, it may take some weeks before the Ministry of Justice will transfer the sum to the applicant's bank account.<sup>79</sup>

The State Fund increasingly functions as a safety-net concerning the question of compensation for victims of intentional violent crime. In addition, victims consider being compensated by the State Fund an official acknowledgement of their plight. The number

<sup>78</sup> Before the revision, the maximum amounts payable to the victim were respectively 25,000 and 10,000 guilders. For a detailed description of the payable sums for different damages and losses, see the Ministry of Justice's publication *Schadefonds Geweldsmisdrijven*, February 1998, pp. 18-25, 54-69 which contains an overview of what is the normal sum for specific physical injuries, and particular moral damages. For instance, for rape, the moral damages amount to 7,500 guilders (cat. 5) and in very serious cases 15,000 guilders (cat. 7). For instance, for a broken arm the Fund will award 2,500 guilders (cat. 2), and for the loss of an eye 10,000 guilders (cat. 6).

<sup>79</sup> Ministry of Justice (1998), pp. 23-37.

of applications has steadily increased from 156 in 1980<sup>80</sup> to 1500 in 1990, and 2368 in 1995.<sup>81</sup> According to the most recent data, the number of applications has risen to 3749 in 1998, which represents an increase of 28% compared to the previous year (1997: 2921). In 1998, the Committee awarded state compensation in 1819 cases, and refused it in 484 cases. Out of the latter group of applicants, 146 victims asked for a review from the The Hague Court of Appeal (an increase of 6.3% compared to 1997). In total, the Committee awarded f 2,399,107,- (EUR 1,088,607) for material damages, and f 6,712,475,- (EUR 3,045,988) for moral damages in 1998. The average awarded sum amounted to f 5000,- (EUR 2269). The average time the Committee needed to decide on a claim for state compensation was 9.8 months in the year 1998. This is quite an improvement compared to the previous year when the Committee needed 12 months to deal with a claim for compensation.<sup>82</sup>

A final that victim-oriented enactment that is worth mentioning is the Witness Protection Act which is incorporated into the Code of Criminal Proceedings (ss. 226a – 226f CCP). This Act allows, among other things, that the examining magistrate veils the identity from the victim-witness from the offender (see § 8.3, G.16 for a detailed discussion).

#### 4.3.2 Victim Guidelines

In the Netherlands, the treatment of victims by the police and criminal justice authorities is regulated by guidelines.<sup>83</sup> Most guidelines are issued by the Procurators-General. Sometimes, the guidelines accompany enactments, such as the Guideline Terwee.<sup>84</sup> The guidelines contain rules which are not only binding for the criminal justice authorities (internally binding), but citizens may appeal to them to safeguard their rights (externally binding).<sup>85</sup> The external effect of victim guidelines can also be derived from the fact that they are

<sup>80</sup> In the years 1976-1979, the total number of applicants was 1098. See the Annual Report of 1980 which includes data over the period 1976-1979, issued by *het Paleis van Justitie Den Haag*, 1981, p. 4.

<sup>81</sup> The number of appeals against decisions of the Committee remained stable at about 5.5%. Ministry of Justice, *Notitie slachtofferbeleid*, Den Haag, 1997.

<sup>82</sup> Ministry of Justice, *Schadefonds Geweldsmisdrijven Jaarverslag 1998*, Den Haag, 1998, pp. 11-14.

<sup>83</sup> Concerning the relevance of victim guidelines, see also A.S. Penders, 'Guidelines for police and prosecutors: an interest of victims, a matter of justice', in: *Guidelines for victim support in Europe. Report of the first European Conference of Victim Support Workers in Eerbeek*, Utrecht, 1989, pp. 75-78. M.S. Groenhuijsen, *Police performance for victims of crime. Some experiments in the Netherlands*, paper presented in Valencia at the first (unofficial) European Forum for Victim Services meeting in 1989.

<sup>84</sup> The Guideline Terwee was published on the 22<sup>nd</sup> of March 1995. On 27 July 1999, the Guideline Terwee is replaced by the Directive Victim Assistance (*Aanwijzing Slachtofferzorg*) of the Procurators-General, Staatscourant 27.07.99, no. 141. The content remained largely unchanged. We have chosen to retain the name 'Guideline Terwee' for two main reasons: the Guideline Terwee was still in force at the time the study was carried out and, more importantly, this reference best expresses its close relation with the 1995 Victim Act Terwee.

<sup>85</sup> J.H. van Krefeld, *Beleidsregels in het recht*, Den Haag, 1983, p. 257; C. Bangma, M.E. Bröring, *De juridische relevantie van de slachtoffercirculaires voor het optreden van politie en Openbaar Ministerie, Delict en Delinquent*, 1990, nr. 5, p. 416.

officially published in the Gazette (*Staatscourant*).<sup>86</sup> In 1990, the Supreme Court recognised published guidelines as sources of law.<sup>87</sup> Decisive in this respect, however, is the content of the guideline itself. If the provisions in the guideline directly affect the position of citizens, they have an external binding effect.<sup>88</sup> As a result of the external effect of the guidelines, victims may appeal to them to support their claim. This appeal is based upon the general principles of confidence and equality<sup>89</sup> (*vertrouwens- en gelijkheidsbegin-selen*).<sup>90</sup> The judicial authorities, however, have the power to deviate from the guidelines if this is indicated by the interests involved.<sup>91</sup> This is why guidelines are also referred to as pseudo-legislation.<sup>92</sup> Judicial control of the authorities' adherence to the victim guidelines is limited to the judicial review procedure (s.12 CCP, see § 7.1, B.7).<sup>93</sup>

#### *Victim Guidelines and the Investigative Authorities*

The first guideline for both police officers and public prosecutors regarding the treatment of victims was issued by the Ministers of Justice and the Interior and was published in the Gazette in 1986.<sup>94</sup> The 1986 Guideline is commonly known as the De Beaufort Guideline after the chief public prosecutor who chaired the preparatory committee. The De Beaufort Guideline<sup>95</sup> concerns the treatment of victims of sexual crimes and includes a very practical code of conduct. The De Beaufort Guideline stipulates that:

- every police force must have a vice squad (*afdeling zedenzaken*)<sup>96</sup> which is adequately

<sup>86</sup> H.D. van Wijk, W. Konijnenbelt, *Hoofdstukken van administratief recht*, Lemma, Utrecht, 1994, p. 274-275; C. Bangma, E.M. Bröring, *De juridische relevantie van de slachtoffercirculaires voor het optreden van politie en Openbaar Ministerie*, DD, 1990, vol. 20, nr. 5, p. p. 416.

<sup>87</sup> The Supreme Court on the 19 of June 1990, *Nederlandse Jurisprudentie*, 1991, nr. 119. Guidelines have been recognized by the Supreme Court as law according to s. 99 AOJ.

<sup>88</sup> C. Bangma, E.M. Bröring (1990), p. 416.

<sup>89</sup> The principle of confidence implies that citizens may expect to be treated by an administrative body according to the course of action followed in other cases. The principle of equality expresses the rule that equal cases will be treated in an equal manner and that unequal cases will be treated unequally in so far as they differ from each other.

<sup>90</sup> H.D. van Wijk, W. Konijnenbelt, *Hoofdstukken van administratief recht*, Lemma, Utrecht, 1994, pp. 361-369.

<sup>91</sup> C. Bangma, E.M. Bröring (1990), p. 417.

<sup>92</sup> A.H.J. Swart (1993), pp. 281-286.

<sup>93</sup> C. Bangma, E.M. Bröring (1990), p. 419.

<sup>94</sup> Guideline of the Ministers of Justice and the Interior of 16 January 1986 regarding victims of sexual acts of violence; *Circulaire van de Ministers of Justitie en van Binnenlandse Zaken, 16 januari 1986, aan politie en Openbaar Ministerie inzake conclusies en aanbevelingen voor de bejegening van slachtoffers van seksuele misdrijven*, *Staatscourant* 1986, 33.

<sup>95</sup> In October 1999, the De Beaufort Guidelines was replaced by the Directive of the Procurators General of 1 October 1999 on the Treatment of Victims of Sexual Offences. The content has basically remained the same. We maintain reference to the De Beaufort Guideline because, at the time of the research, it was still in force.

<sup>96</sup> Due to the reorganization of the police the vice squads were abolished in 1994, except for the region of Amsterdam where the police refused to abolish its vice squad. The idea behind the discontinuance of the vice squads was that every police officer should be able to handle these cases and assist victims of sexual crimes. The Amsterdam police, however, feared the fading of the internationally highly praised expertise in the field of the treatment of victims of sexual crimes. Unfortunately, the Amsterdam police were proven right. The vice squads will probably soon be reinstated now that practice has shown that dealing with sexual crimes requires expertise. See Ministry of Justice report on child abuse and sexual violence against children,

trained to assist victims of sexual crimes. Specialized female officers should be appointed to improve the treatment and examination of female victims of sexual offenses;

- during the investigation, the case is handled by the same officer, and the anonymity of the victim should be safeguarded;
- investigations on the premises and the questioning of victims must be performed by plain-clothes policemen;
- during the examination and hearings, victims may be accompanied by a confidant. If the victim does not wish to be (re)examined, this decision will be respected as much as possible;
- if a rape victim is not prepared to give evidence, the police should investigate the offence as being a sexual assault case;
- the results of the medical examination are only included in the file with the explicit permission of the victim;
- no personal information about the victim is given to the press (see § 8.3).
- each victim is given extensive information about her/his rights, the criminal procedure, victim support services, and is provided with adequate support. If necessary a support service will be contacted by the officer in charge (see § 6).

The vice squads were known to comply with these rules<sup>97</sup> and the importance of the Guideline was generally acknowledged by individual police officers working in the vice squads. The De Beaufort Guideline was accompanied by a Guideline of the Procurators General<sup>98</sup> concerning victims of serious violent crimes.<sup>99</sup> With regard to these victims, the police were instructed:

- to treat victims with consideration and respect and to register thoroughly the report of the crimes (see § 8.1);
- to inform victims about the proceedings following the report and to notify them of relevant developments in their case; to inform them about the opportunities to obtain compensation, to take down their wishes, and to establish a claim-settlement between offender and victim if possible (see § 6.1, § 7.1);
- to make an official record containing all relevant information about the victim and the dealings of the police and finally to give a complete statement in the report of the losses suffered by victims (see § 6.2).

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*Bestrijding van seksueel misbruik en seksueel geweld tegen kinderen*, of 19 July 1999 – see further § 8.2. Also, the 1999 Directive of the Procurators General, replacing the De Beaufort Guideline, stipulates that every local police force should have specially trained officers to deal with these victims (the police should at least follow the courses sexual offences (*zedenzaken module*), sexual (deviant) behaviour (*cursus seksueel (afwijkend) gedrag*), and finally dealing with sexual violence (*cursus omgaan met seksueel geweld*), see § 8.1.

<sup>97</sup> However, no systematic evaluation of the implementation of the guideline has been performed.  
<sup>98</sup> Guideline of the Procurators General of 16 January 1986 regarding a new victim policy for the treatment of victims of crime; *Circulaire van de procureurs-generaal, Nieuw beleid voor het omgaan met slachtoffers van misdrijven*, *Staatscourant* 1986, nr. 33.

<sup>99</sup> Serious violent crimes include sexual offences (ss. 242-249 CCP); murder and manslaughter (ss. 287-289; 307-308 CCP); maltreatment (ss. 300-303 CCP) and violent theft (s. 312 CCP).

The 1987 Guideline Vaillant extended this victim policy to victims of all serious offences. It was issued by the Procurators-General and published in the Gazette.<sup>100</sup> In April 1995, the Guideline Terwee<sup>101</sup> accompanying the Victim Act Terwee was published.<sup>102</sup> This guideline again extends the authorities' victim policy and includes all victims, irrespective of the seriousness of the crime they suffered. It greatly resembles the Guideline Vaillant and can be considered a 'refresher' guideline. This was necessary because the Guideline Vaillant was not much known among police officers and public prosecutors. The Guideline Terwee was launched together with the Victim Act Terwee, which received a great deal of media attention. As a result, the Guideline Terwee can no longer be ignored by the authorities. Besides extending victim policy to all victims of crime, it formulates victim-oriented activities as basic tasks of the criminal justice authorities. The six basic police duties bare great resemblance to the guidelines of Recommendation (85) 11. The police must:

- take down the victim's report accurately, and refer victims to social or victim services (see A. 2);
- provide the victim with general information about the criminal proceedings and his opportunities for compensation, and ask him if he wishes to claim compensation from the offender and/or to be notified of relevant decisions, finally, give the victim a leaflet on Victim Support (see A. 2);
- make an accurate and complete statement of the victim's injuries and losses, include information about any payments by the offender or attempts to mediate between victim and offender, and/or items of proof to substantiate the victim's claim and need for compensation (see A. 4);
- gather information about the victim's injuries and losses, the suspect's willingness to pay compensation and his financial capacity (see A. 4);
- try to settle the claim for compensation, in cooperation with the prosecution service. If no claim settlement can be arranged, this should be noted in the legal file. The file must contain reasons why the attempt failed (see D. 12);
- notify the victim about his case, if he so wishes (see A. 3).

The basic police tasks reveal that much more emphasis is given to pre-trial claim settlements (see § 6.2, D.12). In addition, the 1995 Guideline introduces networking to safeguard and

<sup>100</sup> The 1987 guideline is named after the chairman of its preparatory committee, Mr F.A. Vaillant, a chief public prosecutor. Guideline of the Procurators General of 1 April 1987 regarding the extension of victim policy, *Richlijnen aan politie en Openbaar Ministerie ten aanzien van uitbreiding slachtofferbeleid, circulaire van de procureurs-generaal bij de gerechtshoven aan de hoofdofficieren van justitie, Staatscourant 1987, nr. 64.*

<sup>101</sup> The 1995 Act and Guideline are referred to as the Act and Guideline Terwee after the chair of its preparatory Committee Mrs Terwee-Van Hilten, vice-president of one of the district courts. This Committee – *the Committee on legal provisions for victims in the criminal justice process* – was formed by the Minister of Justice in 1985 and instructed to develop new legislation. In 1999, the Guideline Terwee is replaced by the Directive Victim Assistance (*Aanwijzing Slachtofferzorg*) of the Procurators General of 27 July 1999, Gazette 1999, no. 141. The content of the Guideline Terwee has largely remained unchanged, though it is simplified. We have chosen to retain the name Guideline Terwee for two main reasons: the Guideline Terwee was still in force at the time the study was carried out and, more importantly, this reference best expresses its close relation with the 1995 Victim Act Terwee.

<sup>102</sup> Gazette 1995, no. 65.



promote actual implementation. The police should gear its victim-related activities to those of other partners in the criminal justice system (see § 3.7).

It is also important to mention that two Guidelines were published on the provision of information by the criminal justice authorities to the media in 1990 and 1992 (see § 8.3)

*Victim Guidelines and the Prosecuting Authorities*

The treatment of victims by the prosecuting authorities is governed by the same guidelines as those discussed in the previous paragraph. The 1986 De Beaufort Guideline obliges public prosecutors:

- to send a letter to victims of sexual offences to inquire after their wish to be kept informed of the proceedings and/or to be financially compensated, and to ask them whether they would appreciate an interview with the public prosecutor;
- to inform victims; to express sympathy to the victims and/or their relatives if the police reports serious injury or heavy loss;
- to bear the victim's interests in mind regarding all relevant decisions in a case.

This last duty is particularly important in relation with the expediency principle and the prosecution service's discretionary powers.

The guideline Vaillant (1987) extends the reach of the previous guideline to victims of felonies, including the duty to have a personal hearing with victims of serious crime prior to the trial.<sup>103</sup> It contains the same basic ideas about the duties of public prosecutors towards victims of crime. However, some additional duties were formulated. The most important one is that the public prosecutor functions as a backup for the police regarding information and compensation. In practice, this means that the victim is sent a standardized victim letter (*slachtofferbrief*) in which the victim is asked to reply if he wants to be notified or compensated by the offender.

The 1995 Terwee Guideline generally repeats the duties for the prosecution service as mentioned in the previous guidelines. It contains 16 basic duties which again resemble the content of Recommendation (85) 11, but often set the standard even higher. Public prosecutors should:

- 1 - inform the victim of the arrest of a suspect and provide him with the number of the legal file (see A. 3);
- 2 - invite the victim of serious crime into his office previous to a hearing;
- 3 - act as a backup for the police, i.e. if the police statement is incomplete they should contact the victim to find out whether he wishes to be notified about relevant developments in his case and/or to be compensated by the offender, or to meet them face-to-face prior to any hearing (see A. 2, B.5);
- 4 - notify the victim of relevant developments, if so wished (see A. 3, B. 6, D. 9);
- 5 - take the victim's interests into consideration concerning the decision to prosecute or not (see B. 5);
- 6 - attempt to settle the claim for compensation prior to the trial. If the offender agrees to pay compensation, he should take this into consideration when deciding whether to prosecute (see B. 5);

<sup>103</sup>

According to the legislature, it is recommended that the public prosecutor contacts the victim or his relatives by virtue of his office, particularly with respect to felonies which inflicted serious bodily harm or were fatal to the victim, or shocked public opinion.

- 7 - notify the victim if the case is not suitable for claim settlement prior to the trial, or to inform the victim why the attempt to settle the claim has failed;
- 8 - check the police statement concerning the victim's injuries and losses, as well as the offender's willingness to pay compensation to the victim (see A. 4, D. 12);
- 9 - inform the victim why the case is not prosecuted, and of his right to have the decision reviewed by the court (see B. 6, B. 7);
- 10 - send the victim the adhesion form, inform him of the date and place of the trial if he decides to prosecute (see D. 9);
- 11 - inform the victim of the date and place of a postponed hearing (see D.9);
- 12 - ask the court to impose the compensation measure instead of awarding the civil claim for compensation;
- 13 - ask the court to order the offender to pay a sum to victim services, if the victim does not wish to receive compensation;
- 14 - allow the civil claimant to inspect the legal file;
- 15 - take the victim's interests into consideration with regard to the summoning of the accused, if he wishes to join the proceedings as a civil claimant or to inspect the files;
- 16 - take the victim's interests into consideration when lodging an appeal against the court's verdict.

The basic duties show certain slight modifications from the previous Guidelines. For instance, the victim letter has been replaced by a victim form (*slachtoffer-formulier*), which should contain statements on the victim's wishes regarding information and compensation, the damages and losses suffered, the nature and the value of the damages. The willingness and ability of the offender to compensate the victim should also be included in the form, as well as the actions taken by the police or public prosecutor to arrange a claim settlement. In addition, the Guideline Terwee stresses the responsibility of the prosecution service to notify the victim as soon as a suspect has become known or if the police have sent the case to the prosecutor's office. Finally, the public prosecutor is made responsible for the registration and actual implementation of the victim's wishes concerning information and compensation.

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

### 5.1 Reporting the Offence

Everyone who has knowledge about the occurrence of a crime may report the crime to the authorities (s. 161 CCP). This right is not limited to the victim of crime. With regard to certain crimes, such as murder, rape, and holding persons hostage, Dutch criminal procedure contains the general obligation to report these offences to the police (s. 160 CCP).<sup>104</sup> Criminal procedural law regulates the manner in which the report should be made (s. 163 CCP). If the formal rules are not fully observed, it does not have any negative consequences, but making a false report is a punishable act. Basically, the rules stipulate that crimes must be reported to the police, either orally or in writing.

The police must always take down the report. If they refuse to write it down, the

<sup>104</sup> G.J.M. Corstens (1995), pp. 72-74.

reporter of crime may complain to the Police Committee (see § 8.1) or the public prosecutor. If the police still refuse, the reporter may lodge a complaint with the court of appeal on the ground of the refusal to start criminal investigation in accordance with section 12 CCP (see § 7.2, B.7). Alternatively, he may complain to the National Ombudsman (see § 3.8). The National Ombudsman has repeatedly underlined the obligation to take down the report (*ontwangsverplichting*).

According to the Police Monitor, a standardized public survey, about 80 to 90% of the population states to be willing to report crimes to the police. However, after materialization of the hypothesis, only half of the population actually reports a crime to the police. Repeat victims are even less likely to report again.<sup>105</sup> The Police Monitor shows that 20% of victims who have reported a crime to the police are unwilling to report again in the future. Whether this is due to the fact that they were not treated according to their wishes or because the case was not prosecuted is not clear.<sup>106</sup> Most probably, they are under the impression that the police (and the other criminal justice authorities) are unable to undertake effective action, given the last reason mentioned for not-reporting a crime and the general levels of satisfaction with the treatment by the police (see § 8.1).

## 5.2 Complainant

According to the law, a complaint is a report with the request to prosecute (s. 164 CCP) that is filed by the direct victim or his legal representative (ss. 64, 65 PC). The victim can only act as a complainant regarding a restricted number of complainant offences (*klachtdelicten*). Complainant offences are characterized by the fact that they can only be prosecuted after the victim has laid down a complaint. The legislature recognizes, through the complainant procedure, that the victim may have a legitimate private interest in avoiding public action. There are two types of complainant offences: absolute and relative complainant offences. The first category concerns certain sexual offences, e.g., sexual relations with a minor, crimes against honour, and elopement. The second type concerns crimes which only become complainant offences if a (official) relationship between the offender and the victim exists. These crimes are usually property offences amongst relatives (ss. 316, 319, 324, 338, 353 PC), e.g., theft and extortion between husband and wife, or vandalism against possessions of relations.

<sup>105</sup> Reporting behaviour of citizens is important to the police. First of all, the proportion between reported and non-reported crimes enhances the knowledge of the actual numbers of crime committed. The report-rates are also crucial to the functioning of the criminal justice system as a whole. Reports are the starting point for investigation and prosecution. Furthermore, the dark number is a strong indicator of the population's perception of the police. If the reasons of non-reporting are known, the police may develop strategies to influence reporting behaviour of victims. The Police Monitor indicates that victims report to the police because they want the police to find the perpetrator. To many victims their sense of duty is a strong incentive, as well as the prevention of future crimes. In addition, pragmatic reasons play a role such as the return of stolen property, obtaining help after violent crimes, and obtaining documented proof as required by insurance companies. Victims do not report an offence if they believe that the police will not be able to do anything about it. Or, if they feel the case is too unimportant to bother the police with. Finally, victims do not report the crime if they can work things out with the offender.

<sup>106</sup> A. van den Berg, J. Geerlof, J. Meijer, 'Vooraf bepaalt het doen van aangifte', *Algemeen Politieblad*, 1991, nr. 8, pp. 5-8.

Every public prosecutor and assistant public prosecutor (*hulpofficier* – a high-ranking police officer)<sup>107</sup> is competent to receive complaints (s. 165 CCP). The complaint can be lodged up to three months after the offence (s. 66 PC). Furthermore, the complainant has the right to withdraw the complaint during eight days after the moment of filing it (s. 67 PC). Although the complaint is the *condition sine qua non* of prosecution, the public prosecutor is under no obligation to prosecute. Due to the expediency principle, the public prosecutor may decide to waive the case based on policy considerations (see §§ 2.1, 7.1).<sup>108</sup>

### 5.3 Civil Claimant or Compensation Measure Beneficiary

#### *Civil Claimant*

Traditionally, the victim has the right to present a claim for compensation caused by an offence during the criminal trial. The claim itself is a civil claim for compensation and is governed by rules of private law. However, it can be presented in criminal court and in juvenile courts<sup>109</sup> by means of the adhesion procedure. This means that as a civil claimant, the victim joins the criminal proceedings. He is then referred to in legal terms as an 'injured party' (*benadeelde partij*). A victim has to meet certain conditions in order to be allowed to act as a civil claimant. He should have suffered direct injury or loss (material or moral) as a result of a punishable act. Relatives of deceased victims (*nabestaanden*) may also become civil claimants (s. 51a CCP), but other successors in the rights of the victim (*rechtsopvolgers*) cannot. According to the legislature, this is indicated by the accessory nature of the claim and the prerequisite of direct cause and effect.<sup>110</sup>

Since 1995, the victim or his surviving relatives may initiate an action as civil claimants during the pre-trial or the trial stages (s. 51b-1 CCP). They assume the role of civil claimant by filling out an adhesion form (*voegingsformulier*) with the prosecution service, which states the contents and legal grounds of his claim (s. 51b-1 CCP). The new opportunity to present a claim prior to the trial is important to victims who want to avoid the confrontation with the accused in the court room (see § 4.3.1). If, on the other hand, the victim wants to present his civil claim during the trial, he may do so verbally or in written form, i.e., by means of the adhesion form, until the moment of the public prosecutor's closing arguments (ss. 51b-2, 311 CCP). As a civil claimant, he may claim compensation for material and moral damages. If the claim for compensation contains complicated parts, such as the extent of his injuries and their financial effects, the victim (and the court, see § 7.2, D.10) may divide his claim for damages into two separate parts: a complicated and a simple part (s. 51a CCP). The easily established losses and injuries can be dealt with in the criminal process. The claim for compensation of the more complicated losses may then be presented in civil court (see §§ 4.3.1, 7.2).

Besides the right to claim compensation, the civil claimant has several procedural rights. During the preliminary stage, he may inspect the legal file (*processtukken*) and obtain photocopies. However, the civil claimant needs the permission of the public prosecutor, who may

<sup>107</sup> Assistant public prosecutors are specially indicated police officers (ss. 154, 158, 159 CCP).

<sup>108</sup> G.J.M. Corstens (1995), pp. 74-77.

<sup>109</sup> Explanatory Memorandum Act Terwee; *Memorie van Toelichting Wet Terwee, Tweede Kamer, vergaderjaar 1989-1990, 21 345, nr. 3, p. 30.*

<sup>110</sup> A more practical reason mentioned in the Explanatory Memorandum is the fact that most successors in the rights of the victim are in fact insurance companies. See Explanatory Memorandum Act Terwee (1989-1990), p. 12.

refuse the access to the file to protect an ongoing investigation, the rights of the defendants, or because of ponderous arguments of general interest (s. 51d CCP). Against a refusal, the victim may lodge an appeal with the Minister of Justice, within fourteen days. If he is still denied access, he may appeal to the Council of State (*Raad van State*). Furthermore, the civil claimant has the right to have a lawyer or to be legally represented (s. 51e CCP), and he has the right to be notified of the decision to prosecute (s. 51f CCP, see § 6.1, B.6). During the trial, the civil claimant has the right to legal assistance (see § 4.3.1), to have an interpreter (s. 334-2 CCP) if he does not speak Dutch, to question witnesses and experts concerning the claim for compensation (s. 334-3 CCP); and to clarify his claim for compensation (s. 334-4 CCP). The last right may be used each time the public prosecutor has spoken. He may also leave the clarification of his claim for compensation to the public prosecutor (s. 334-4 CCP). The civil claimant cannot independently bring his own witnesses and/or experts, but he may ask the public prosecutor to summon certain witnesses and experts on his behalf (s. 334-1 CCP).

The civil claim for compensation is only admissible if the accused is found guilty and a penal sanction or measure is imposed,<sup>111</sup> and if it is proven that the victim has suffered losses that are directly caused by the crime (s. 361-2 CCP). Civil claims for compensation are thus inadmissible if the defendant is cleared of the charge (*vrijspraak*), acquitted on a point of law, or on the ground of an exemption (*ontslag van alle rechtsvervolgning*, s. 361-2 CCP). Procedures by default (*verstek*) have no effect on the admissibility of the victim's claim for compensation (ss. 51a jo 51f CCP). The legislature felt that the choice of the defendant not to attend the proceedings should not lead to the consequence of inadmissibility of the claim of the civil claimant.<sup>112</sup> Furthermore, the criminal court can declare the claim, or part of it, inadmissible if it is too complicated (s. 361-3 CCP). The easily proven part can still be dealt with by the court. The court then informs the civil claimant of his right to present the remaining part of his claim in civil court.<sup>113</sup> The verdict contains the court's reasoning regarding the civil claim for compensation (s. 361-4 CCP). The court decides simultaneously on the criminal case, the civil claim for compensation, and the legal costs of the civil claimant (ss. 335, 361-1 CCP). The Supreme Court shows an accommodating attitude towards the civil claimant. In 1985, it confirmed the decision of the court of appeal to order the offender to pay the legal costs, even if the full claim for compensation was not awarded. The reasoning of the Supreme Court was based on the idea that the claim of the civil claimant had 'in essence been sustained'.<sup>114</sup>

If the victim acted as a civil claimant in first instance and the claim for compensation was awarded by the court, he automatically joins the proceedings in appeal (*van rechtswege voortdurend appel*, s. 421-1 CCP). If his claim for compensation was not (fully) granted by the court in first instance, the victim may join the appeal under the same conditions as in first instance (s. 421-3 CCP). He may, however, not present his claim for compensation for the first time in appeal. If the public prosecutor did not lodge an appeal against the court's decision, the civil claimant may appeal that part of the sentence which concerns his

<sup>111</sup> See § 7.2, D. 11 and § 3.3.1, footnote Van Kalmthout c.s. (1992), pp. 667-672.

<sup>112</sup> Explanatory Memorandum Act Terwee (1898-1990), p. 30.

<sup>113</sup> This right of the court is closely linked to the similar right of the civil claimant to present the complicated part before a civil court and to claim the remaining sum in criminal court.

<sup>114</sup> Supreme Court, 10 September 1985, *Nederlandse Jurisprudentie* 1986, p. 199.

immediate interests: the claim for compensation.<sup>115</sup> It follows that the victim cannot appeal the acquittal of the accused.

It is important to note that s. 421 CCP makes a subtle difference between a claim that was awarded (*toegeewezen*), not awarded (*niet toegeewezen*) and dismissed (*afgeewezen*) by the court. If the claim is neither awarded nor dismissed, the civil claimant retains the right to go to civil court regarding that part of the compensation which was not granted by the criminal court. Concerning a dismissed claim, these rights no longer exist. It is advisable, therefore, that the court indicates in its reasoning which parts of the claim are awarded, not awarded, or dismissed. Furthermore, the court of appeal must know on which grounds the decision has been taken. Finally, it is important to mention that, since the rules of the civil procedure govern the victim's claim in appeal (s. 421-4 CCP), no appeal may be lodged if the claim amounts to less than 2500 guilders (EUR 1135).

#### *Compensation Measure Beneficiary*

The victim may also be a compensation measure beneficiary. The compensation measure is a special type of penal sanction which resembles the English compensation order (see §§ 4.3.1, 7.2, D.11). As a compensation measure beneficiary, the victim obtains compensation for his material and moral losses and benefits at the same time from enforcement of the sanction by the state, through the national debt collection agency. However, legal practice created a complicating factor for the victim who wishes not to act as a civil claimant but as a compensation measure beneficiary. The criminal justice authorities ask all victims, who want to obtain compensation from the offender, to fill out an adhesion form, irrespective if they wish to become civil claimants or compensation measure beneficiaries. Until 1992, the victim then depended on the public prosecutor to ask the court to award civil damages to the victim, or to impose a compensation measure. However, on 12 January 1999, the Supreme Court ruled that, if an adhesion form was filled out, the criminal courts must decide on the civil claim for compensation and cannot impose a compensation measure (see further § 7.2, D.11 under the heading 'the compensation measure'). The effects of this recent ruling on the opportunities for the victim to act as a compensation measure beneficiary are uncertain, particularly if the standard use of the adhesion form is not abandoned.

### **5.4 Private Prosecutor**

Private prosecution is not allowed under Dutch law.

### **5.5 Witness**

The victim who has reported a crime to the police may be summoned to court as a witness for the prosecution. However, given the fact that he may already testify during the pre-trial stage before the police or the examining magistrate, it is unlikely that he will have to be heard again in court (see § 8.2). The victim's pre-trial statement is as a rule joined in writing to the file and used as evidence in court. However, if he is summoned as a witness, he must appear in person and take an oath or pledge to speak the truth. Failure to comply with any of these requirements constitutes a criminal offence, unless the law declares otherwise. During the trial, the witness will be questioned by the court, after which the public prosecutor and the defence will have the opportunity to ask questions (see § 3.3.1). Cross-examina-

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<sup>115</sup> Explanatory Memorandum Act Terwee (1989-1990), p. 13.

tion is unknown. The legislature felt that it would not contribute to truth-finding but only lead to an unnecessary hardening of the examination of witnesses.<sup>116</sup>

Anyone who has knowledge of a crime being committed or who may shed some light on the facts is qualified to be a witness. Since 1926, furthermore, Dutch case law has allowed for indirect witnesses to give evidence, i.e., persons who have indirect knowledge about the crime through hearsay (*testimonium de auditu*) may act as a witness. The same judgment also allows the court to attach more value to a *testimonium de auditu* given before the police or the examining magistrate than to the testimony of another witness given in court if the court holds the opinion that the *de auditu* testimony is more trustworthy than the direct testimony.<sup>117</sup> Already in 1938, the Supreme Court allowed anonymous hearsay testimony.<sup>118</sup> Today, the practice of the anonymous witness has been substantially modified by the decisions of the European Court of Human Rights in, *inter alia*, the Unterpertinger<sup>119</sup> and Kostovsky case.<sup>120</sup> (see further § 8.3, F.16).

Certain witnesses may rightfully refuse to testify or to answer certain questions. Witnesses who may be exempted from the duty to testify are the accused's next of kin and persons who will expose themselves or their relatives to prosecution (ss. 217, 219 CCP). The right to exemption equally applies to fellow suspects. Moreover, the legislature recognizes the exemption of witnesses who are bound by professional secrecy towards their clients (s. 218 CCP), such as medical doctors, psychologists, probation officers, and priests.<sup>121</sup> Recently, the courts have also recognized the right of social workers and victim support volunteers not to give evidence.<sup>122</sup>

## PART II:

### THE IMPLEMENTATION OF RECOMMENDATION (85) 11

## 6 THE VICTIM AND INFORMATION

### 6.1 Informing the Victim

The Victim Act and Guideline Terwee require numerous flows of information to and from the victim (see §§ 4.3.1, 4.3.2). This involves an entirely new way of dealing with victims of crime. In practice, implementation of new tasks is sometimes hindered by the reorganizations of the police force (1996) and the prosecution service (ongoing). The activities related to the provision or the gathering of information are also in danger of being neglected due

<sup>116</sup> G.J.M. Corstens (1995), p. 539.

<sup>117</sup> G.J.M. Corstens (1995), pp. 615-619.

<sup>118</sup> Supreme Court, 17 January 1938, *NJ* 1938, p. 709.

<sup>119</sup> *Unterpertinger v. the Netherlands*, ECHR, 24 November 1986.

<sup>120</sup> *Kostovsky v. the Netherlands*, ECHR, 20 November 1989.

<sup>121</sup> G.J.M. Corstens (1995), pp. 123-133.

<sup>122</sup> District court of Middelburg, 27 June 1996, with extended the exemption for probation officers (Supreme Court 20 June 1986, *NJ* 1986, 322) to include volunteers of victim services. See also district court Groningen, *NJ* 1993, 252.

to additional workload for the police and prosecution service. The extra work consists partly of time spent with direct victim-related activities and partly of the adaptation of the procedures, working methods, and registration in computerized systems (see § 6.2). Nevertheless, researchers are confident that the additional workload will decrease once the new duties have been integrated into the daily routine.<sup>123</sup>

(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 has been stressed since the 1987. The Guidelines Vaillant and Terwee are in accordance with the above guideline A.2 (see § 4.3.2). The Dutch guidelines go even further than Recommendation (85) 11. The 1995 Guideline requires for instance that the police refer victims to Victim Support, if he so wishes. In practice, the police inform victims orally about the different items mentioned in guideline A.2. In addition, the police hand over leaflets. The police have different leaflets at their disposal to be able to give extra information about the subjects the victim wants to know more about, for instance, the State Compensation Fund, legal aid, compensation, and Victim Support.<sup>124</sup> Or, the police may give the victim of a specific type of crime a leaflet written especially for that group, e.g. the leaflet for victims of sexual offences.<sup>125</sup> In addition, several police districts have developed flowcharts (*structuurschema*) to facilitate the basic explanation of the criminal proceedings and possible developments after the report. This is not only beneficial to the victim, but also helps the police officer to provide a simple and schematic account.

Most police districts have recently (1996-1998) built in compulsory procedures into the computer systems. This obliges the police to take down all the victim's wishes when taking down the report. The police should, *inter alia*, include answers to the questions regarding the victim's wish concerning compensation, referral to Victim Support for moral, practical, and legal advice, and his wish to be kept informed of relevant developments. Concerning the duty to refer victims to Victim Support, the manner in which the victim is asked about his wishes regarding assistance seems to be crucial. A 1996 study reveals that the way this question is formulated strongly influences the victim's response. For instance, in the police districts where the police ask the victim 'Would you like help?', the positive response rate is very low. In other districts, where the victim is asked 'Would you object if we give your name and telephone number to Victim Support?', the number of referrals went up in a very significant manner.<sup>126</sup>

The formal implementation of guideline A.2 is, therefore, fully met. In practice, the provision of information also seems to be adequately organized. Detailed data about the progress in actual implementation of the different victim guidelines over the years are therefore the more interesting.

In 1990, research was done on the adherence by the police to the Guidelines De

<sup>123</sup> H. Geveke, M. Verberk (1996), p. 43.

<sup>124</sup> In Dutch, the leaflets are entitled: *Schadefonds Geweldsmisdrijven, U wilt rechtsbijstand, Slachtofferhulp en schadevergoeding, Slachtofferhulp, u hebt er recht op*. The last two leaflets are available in Dutch, French, German, English, Chinese, Arabic, Spanish, Malay, and Turkish. Also, leaflets issued by Victim Support are available, e.g., *Coping with the aftermath of crime*.

<sup>125</sup> These brochures are entitled in Dutch: *De schok te boven komen*, and *Seksueel geweld: wat kunt u verwachten van hulpverlening, politie en justitie*. The latter was issued by the Ministry of Justice in 1997.

<sup>126</sup> H. Geveke, M. Verberk (1996), p. 33.



Beaufort and Vaillant. At that time, information on the victim's wishes to receive information and compensation was included in the victim form in 34% of the cases. In 73% of the cases in which a form was included in the file, it contained no indication of an expressed wish to receive information or compensation. In the vast majority of cases, no direct link between the expressed wishes of victims and the information included in the file could be established.<sup>127</sup> Other critical studies<sup>128</sup> demonstrated that, several years after the introduction of the Guidelines, the actual behaviour of police officers had not changed significantly.<sup>129</sup> Leenders even found that a considerable number of local police forces were unaware of the bare existence of these guidelines.<sup>130</sup> This ignorance can further be illustrated by the fact that, with the introduction of the Guideline Terwee, the criminal justice authorities reacted as if the duties were completely new.<sup>131</sup> From this point of view, the introduction of the Act and Guideline Terwee is a new effort to realize older objectives. This time, the legislature had the opportunity to prevent earlier mistakes.

In 1993, it recognized the need for an experimental stage to gather data (as well as for adequate funding)<sup>132</sup> if the Victim Act and Guideline Terwee were to become a success. Therefore, the Act and Guideline Terwee was first introduced in two pilot districts, Dordrecht and 's-Hertogenbosch, for a two-year period. The phased introduction would allow the legislature to evaluate the effects and bottlenecks of the new rules. The implementation study regarding the Guideline Terwee in the pilot districts was published in 1994. The study showed that, after the introduction of the Guideline Terwee, victims were more often

<sup>127</sup> T. van Hecke, J. Wemmers, M. Junger, *Slachtofferzorg bij het openbaar ministerie, verslag van een verkennend onderzoek bij een groot parket in het westen des lands*, Den Haag, WODC, 1990, pp. 15-24.

<sup>128</sup> C.H.D. Steinmetz c.s., 'De slachtoffercirculaires: enkele suggesties voor nieuw beleid op basis van een onderzoek van de circulaires', *DD* 1987, pp.19-40; H.G. van Andel, *Evaluatie van de slachtoffercirculaire Vaillant II. Een eerste indruk*, WODC, Den Haag, 1987; S. Leenders, *Zolang de klant maar geen koning is*, Police Academy Apeldoorn (*afstudeeronderzoek*), 1990.

<sup>129</sup> The situation was not much different at the level of the prosecution service, as was shown by the researchers T. van Hecke, J. Wemmers, M. Junger (1990).

<sup>130</sup> S. Leenders (1990).

<sup>131</sup> Seminars on the Victim Act Terwee: *Studiedag Wet Terwee*, Breda, 1 November 1994, and *Studiedag Wel en Wee van Wet Terwee. Het slachtoffer binnen het stafproces*, Vrije Universiteit Amsterdam, 15 December 1995.

<sup>132</sup> One of the reasons why the implementation of the Guideline Vaillant failed to become a success was the lack of adequate resources. It takes a lot of money to train police officers and public prosecutors, to hire personnel to carry out new duties. According to Groenhuijsen, the lesson to be drawn is that one cannot conceivably expect a major change in behavioural patterns of a complex organization like the police or prosecution services if one is not prepared to supply these actors with resources enabling them to perform additional duties. M.S. Groenhuijsen (1998), p. 47. As a result of the previous experience, the legislature realized that the pilot projects and the nation-wide introduction of the Act and Guideline Terwee should be adequately funded. Nevertheless, when it was calculated that the national introduction would require 33 million guilders (EUR 14 million), the government opted out and invented ingenious arguments to cut back on funding. It decided on a gradual increase of money, because, most likely, not all victims would be making use of the new opportunities from day one. The government failed to see that victims were bound to be disappointed and the criminal justice authorities had to have a slow start due to lack of resources. Such effects may not be reversible or at least have a longer lasting effect than some would expect. M.S. Groenhuijsen, 'Victims' rights in the criminal justice system: a call for a more comprehensive implementation theory', in: J.J.M. van Dijk c.s. (eds.), *Caring for crime victims*, Criminal Justice Press, Monsey, NY, 1999, pp. 101-102.

informed, and the frequency of information included in the police files had risen from 27% to 72%.<sup>133</sup> In addition, victims were more often informed of victim support services (assistance, practical and legal help): in the pilots, 55% of the victims were informed after implementation, against 38% before implementation. In the control districts, where the Guideline Vaillant still applied, the percentages were 32% and 26%, respectively.<sup>134</sup> It is interesting to see that even in the control districts Terwee effects could be noted. Victims were more frequently asked whether they wished to be notified of future developments in their case: 51% after and 33% before Terwee. In the control districts, 39% of the victims were asked whether they would like to opt-in.<sup>135</sup> The provision of general information about the proceedings following the report also improved significantly (in the pilots from 41% to 61%, and in the control districts from 49% to 55%).<sup>136</sup> The duty to inform victims of the possibilities of obtaining compensation was the least successful. No significant changes were found after the implementation of Terwee.<sup>137</sup> This is not very surprising because compensation is considered by most policemen as a difficult subject because of its legal nature. They do not feel very confident discussing it. Handing over a leaflet in which the subject is addressed is much preferred to specifically explaining the ins and outs of the legal options to receive compensation.<sup>138</sup>

These data reveal that much has been achieved, but still not all is well. After the evaluations of the Victim Act and Guideline in the pilots, they were introduced nationwide without giving much thought to the lessons that could be learned from the implementation study. This is not only most regrettable, but it is a missed opportunity. Moreover, after the 1994 study, no data have been gathered in a manner comparable to the data collected in the pilots, even though several studies have been carried out since. As a result, no genuine comparison can be made between the 1993-1994 and 1995-1999 periods.

With respect to the duty to refer victims to Victim Support, a 1995 public survey reveals that 27% of the victims who report a crime to the police are referred to victim services.<sup>139</sup> Most probably, the number of referrals has increased over the last four years, due to the Terwee Network (§ 3.7), but no hard data are available.

In conclusion, the Victim Act and Guideline have greatly improved the position of victims, though improvements can and should still be made. Therefore, the Ministry of Justice has set target numbers regarding the different types of information the police should provide to the victim. According to the target, 80% of the victims should be satisfied with the provision of general information as mentioned in the Guidelines Terwee and A.2. The target figures of the Terwee network partners are even higher and range between 80 and 95%. However, no accurate data are available to answer the question whether these targets are in fact being met.<sup>140</sup> The 1998 study, however, includes a victim survey in which victims

<sup>133</sup> J. Wemmers c.s., *Evaluatie Terwee, slachtofferonderzoek wet en richtlijn Terwee. Eindrapport*, Den Haag, WODC, 1994, pp. 39-40.

<sup>134</sup> J. Wemmers c.s. (1994), p. 27.

<sup>135</sup> J. Wemmers c.s. (1994), p. 29.

<sup>136</sup> J. Wemmers c.s. (1994), p. 28.

<sup>137</sup> In the pilot-districts victims were informed about compensation in 37% of the cases after and in 31% of the cases before Terwee, in the control groups the figures were 36% after and 39% before implementing the law. See J. Wemmers c.s. (1994), p. 29.

<sup>138</sup> This phenomenon is not strictly Dutch: it was witnessed in all member states studied.

<sup>139</sup> *Politie-monitor 1995* (Police Survey 1995), *Landelijke rapportage Politie-monitor Bevolking*, 1995. In 1993, 21% of the victims was referred by the police to victim services.

<sup>140</sup> B&A Groep (1998), pp. 49-50.

were asked about their satisfaction with the provision of information by the police. The percentages of (very) satisfied victims ranged from 58% to 91% in the different legal districts, with an average of 82.3%. Only 4.7% of the victims (in average) were (very) dissatisfied.<sup>141</sup> The 1997 Survey on the functioning of the police (*Politie monitor 1997*) confirms the low percentage of victims who are dissatisfied with the provision of information (3.1%).<sup>142</sup> These percentages indicate that, although the set targets are not fully met in each legal district, the growing attention for the provision of information in combination with the efforts of the authorities and the Terwee network partners has a definitive positive impact on the actual implementation.

Among the efforts of the criminal justice authorities and Terwee network partners to achieve success, the introduction coercive procedures built into the automated system of taking down reports are crucial. For future improvements, however, other or additional incentives are needed. According to the 1996 implementation study, the 25 regional police forces tried to facilitate implementation by appointing one or more project managers. Practice, however, seems to indicate that the implementation of the basic duties requires other inducements since it is greatly influenced by police culture and police mentality.<sup>143</sup> Victim-related duties are still not seen as a basic task by each individual police officer. It is advisable, therefore, to improve the image of victim-related activities by measuring their effects, publishing the results, and introducing competitive elements. It is also of the utmost importance that new duties are appreciated and valued in the same way as other police duties by the police organization (see further § 8).<sup>144</sup>

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

The Guideline Terwee states that the police must ask victims whether they wish to be notified about developments in their cases. If the answer is affirmative, the victim has opted-in to the notification system and is informed of all relevant developments, such as the outcome of the police investigation. The legislature, however, made certain distinctions based on the seriousness of the crime. With regard to misdemeanours, the police are only obliged to inform victims of the progress in, and outcome of, their case if the offender is already known at the time of reporting the crime. If the offender is unknown, the police tell the victim that no criminal investigations will normally be undertaken to avoid unrealistic expectations, but it does not affect the obligation to inform victims (see A.2). Concerning serious crime, the police inform victims of relevant developments, e.g., the outcome of the police investigation. In any event, the police notify victims of serious crime if a suspect has been identified. In the remaining category of offences, police officers indicate what activities are probably undertaken and keep the opted-in victims informed. Not only the police are obliged to notify victims who expressed the wish to be informed. As soon as the file is sent to the prosecution service, it should take over the notification duties. In conclusion, more than full formal implementation of guideline A.3 has been realized.

Concerning practice, the 1994 implementation study indicates that initially, after the

<sup>141</sup> B&A Groep (1998), p. 121.

<sup>142</sup> B&A Groep (1998), p. 122.

<sup>143</sup> H.Geveke, M. Verberk (1996), p. 43. The study focuses on the organization of victim support after the implementation of the Act Terwee and took place in the period November 1995 until February 1996.

<sup>144</sup> H.Geveke, M. Verberk (1996), p. 46.

introduction of the Guideline Terwee in the pilot districts, no significant improvements could be detected in the provision of information to opted-in victims on relevant developments in a case. The vast majority of the victims (about 80%) indicated the wish to be kept informed about their case, but only 35% of them were notified.<sup>145</sup> By 1998, however, the functioning of the information and notification system seems to have been improved dramatically. The 1998 study shows that 85.3% of the victims were satisfied to very satisfied about the information provided by the police, and 71.1% about the provision of information by the prosecution service. Only 4.7% and 11.7% of the victims were dissatisfied with the information provided by the police and the prosecution service, respectively.<sup>146</sup> The discontent of victims was mainly caused by the lack of information on the outcome of the police investigation or the final decision concerning prosecution.<sup>147</sup> Not only do these figures suggest a genuine and significant improvement but they also indicate that current problems lie mostly with the actual implementation by the prosecution service rather than the police. This is confirmed by the 1997 study (*Politiemonitor 1997*): only 22.6% of the victims were not informed of the outcome of the investigation and further developments in their case.<sup>148</sup> Notwithstanding the low percentage of victims who were not notified, the 1998 study criticizes the current state of affairs. Researchers feel that the notification system is still underdeveloped and in urgent need of upgrading. It is still not standard practice for the police to contact victims to notify them of, for instance, the outcome of the investigation.<sup>149</sup> In fact, if one allows the victim to opt in to an information and notification system, the authorities should do their utmost to keep their promise and meet the expectations.

In addition, victims may also contact the authorities on their own accord. In practice, this may occasionally be difficult due to the inadequate information flow within the police force (see the problems described in § 6.2, A.4). It occurs that, if the victim is unable to contact the police officer in charge of the case,<sup>150</sup> the provision of information deteriorates.<sup>151</sup> His colleagues, who should then provide the required information, may not be able to find the correct answers in the file or the computerized system. Or, it may happen that a victim who contacts the police at different moments gets as many answers as the number of police officers he talked to, which indicates a lack of coordination.<sup>152</sup> To facilitate proceedings for victims who contact the authorities, the Ministry of Justice proposed to create service desks in each legal district. The victim can contact the service desk (by telephone or in person) and obtain all the requested information about his case.<sup>153</sup> Some legal districts already operate such services (see B.6). Summarizing, Dutch standards and practice offer a more than adequate safeguard for victims who wish to obtain information on the outcome of the police investigation.

<sup>145</sup> J. Wemmers c.s. (1994), p. 32.

<sup>146</sup> B&A Groep (1998) p. 121.

<sup>147</sup> B&A Groep, (1998), p. 53.

<sup>148</sup> B&A Groep (1998), p. 122.

<sup>149</sup> B&A Groep (1998), p. 47.

<sup>150</sup> This may either be caused by the flexible working hours (24 hour service), policemen working on the beat, etc.

<sup>151</sup> B&A Groep (1998), p. 47.

<sup>152</sup> Information supplied by staff members of Victim Support Tilburg, 1995. Corroborated by other persons who informed me on the basis of personal experience.

<sup>153</sup> Ministry of Justice, Action Plan (*Plan van aanpak verdere implementatie slachtofferzorg*), February 1999.

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

The 1995 Act Terwee obliges the prosecution service to notify the victim of the final decision to prosecute (ss. 51f-1, 167 CCP) or a waiver (s. 51f CCP). Concerning the decision not to prosecute, the public prosecutor should not only notify the victim in writing but also mention the underlying reasoning (s. 51f-3 CCP).

With regard to implementation of the Act, studies indicate that three years after its nationwide implementation significant improvements are made. In 1994, only 29% of the victims were informed of the final decision concerning prosecution; 47% of the victims ignored the final decision, and the remaining number of victims assumed the case was still under consideration.<sup>154</sup> The 1998 study, however, claims that victims are much more frequently informed of the final decision to prosecute in all legal districts, but fails to give exact data. The improvements are mainly due to the fact that the offices of the public prosecutors have hired specialized victim employees (*slachtoffermedewerkers*) who are responsible for sending the standardized letters. Differences between the performance in the different legal districts seem to be closely related to the number of these employees.

In addition, several districts<sup>155</sup> have set up a service desk for the provision of information to victims (see A.3), or a centralized registration and information monitoring system (see § 6.2).<sup>156</sup> The main advantage of the service desk is that all information passes through it. This facilitates the collection of information by the police, Terwee network partners and victims. At the same time, the information collected by these services and systems can be used for progress assessments within the Terwee networks.<sup>157</sup> A possible disadvantage of these initiatives may be that the provision of information to victims is taken away from individual public prosecutors, who may get the idea that everything is taken care of by specialized employees or services. However, their cooperation is essential to the proper functioning of the notification system: without feeding information to the victim employees or services, they cannot inform victims of relevant developments in their cases. The legal districts recognize this negative side-effect, and combat this by constantly reminding individuals of the importance of passing on information to the specialized staff members.<sup>158</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 prosecution service should inform victims as soon as possible of the date and place of the trial (s. 51f CCP). If the trial is suspended, the victim must be informed of the new date

<sup>154</sup> J. Wemmers c.s. (1994), p. 47.

<sup>155</sup> Procurator General Steenhuis announced that a service desk will be set up in every legal district (8 March 2000), *NRC* of 9 March 2000.

<sup>156</sup> In 1999, the Ministry of Justice wishes to realize a service desk in all legal districts. See Ministry of Justice, Action Plan, 1999. On 8 March 2000, Procurator General Steenhuis stated that soon every legal district will have a service desk where victims can go to for information.

<sup>157</sup> It could also be used in job-evaluations, but this is not done yet.

<sup>158</sup> B&A Groep (1998), pp. 47-48.

and place of the hearing. In practice, the main problem is that if the public prosecutor knows a case will be postponed, this knowledge is not always shared with the victim. If the case is postponed by the court at the beginning of the trial, the authorities cannot prevent victims from coming to the court in vain, but if the postponement is known in advance, the victim should be duly notified.<sup>159</sup>

Concerning the victim's opportunities of obtaining compensation, legal assistance, and advice, both the police and the prosecution service have the duty to make sure that the victim is informed (see § 4.3.2 and § 6.1, A.2).

Finally, the prosecution service should notify the victim of the outcome of the case. No exact data are available on its realization in practice. If the victim has assumed the role of civil claimant, the court's registry sends a copy of the court's sentence free of charge (s. 554 CCP). The law stresses that the clerk of the court should send the copy on his own initiative. In practice, this system functions very well. It would, therefore, be advisable to extent this duty of the court's registry to all victims who opted into the notification system.

## 6.2 Information About the Victim

With the introduction of the 1995 Victim Act and Guideline, an information and notification system was set up to enable the authorities to register the victim's wishes in regard of information and compensation, and to subsequently provide the opted-in victim with the required information. As discussed in § 6.1, the police have to provide the victim with general information and ask him about his wishes regarding information about developments in his case. The fact that the victim opts into the information system or wishes to receive compensation should be written down in the legal file by means of a police statement or through the victim form (*slachtofferformulier*). The 1996 study on victim assistance by the police and prosecution service indicates that, initially, after the nationwide implementation of the Victim Act and Guideline relevant information was frequently not included in the file, or the information included was not complete. After a year and a half, however, police performance on this point improved significantly. The victim forms are included much more frequently. This is also due to the fact that police executives and public prosecutors insist on it. In most legal districts, files that do not include such information are sent back to the police.<sup>160</sup> The information system regarding compensation not only consists of informing the public prosecutor of the victim's wish to claim compensation within the criminal proceedings, but also of any payments or restitution prior to trial.

The operation of the opt-in system requires computerization. The police and prosecution service already used automated systems, the information and notification system is integrated herein. Furthermore, the Ministry of Justice wishes to monitor and improve the quality of the information system. To this end, automation experts have established a nationwide monitoring programme to stimulate process control and to improve quality. First, targets should be formulated and action plans should be adopted and implemented. Second, data should be gathered and fed into the data system. Third, data should be

<sup>159</sup> Information supplied by Mr. W. Valkenburg, associate professor and depute judge (*plaatsvervangend rechter*) at the criminal court in Breda, and Mr. J. Simmelink, associate professor and depute judge at the criminal court in Dordrecht and the court of appeal in Den Bosch, 16 July 1999. However, it seems foremost a problem of the lower courts, which are burdened with many more cases than the courts of appeal.

<sup>160</sup> H. Geveke, M. Verberk (1996), p. 33.

checked against the targets. In this manner, the authorities gain better insight into actual achievements.<sup>161</sup> The monitoring programme focuses on the number of victims, the number of victims who should be informed, the provision of information both on the level of the police and the prosecution service. Other data included in the system are how many claims for damages are settled prior to the trial, presented and/or awarded in court, and how many compensation measure are imposed. By means of these data, bottlenecks and trends (in number and time) can be identified and analysed. At the end of 1995, the monitoring system was introduced in every legal district as a means to manage and improve the quality of the victim related activities.<sup>162</sup> In 1998, however, it became clear that the monitoring system falls short of expectations. It appears to be very difficult for the authorities, and in particular the prosecution services and the courts, to systematically feed data into the monitoring system in a manner that allows comparison between the different legal districts. The limited conformity of concepts and relevant indicators constitutes a bottleneck, in spite of the detailed manual of the Ministry of Justice.<sup>163</sup> A special committee has been created to assess the difficulties and to improve the data gathering and the input in the database. In 1999, the committee introduced an improved monitoring system. Simultaneously, training programmes will become operational to teach those responsible how to gather data and feed those into the database.<sup>164</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.*

According to the Guideline Terwee, one of the basic police tasks is to give a clear and accurate statement of the victim's injuries and losses. The police should not only assess the nature and extent of the damages as stipulated in guideline A.4, but also take down the victim's wish to receive compensation from the offender in the legal file. Finally, the police should assess the suspect's willingness to pay compensation (see D.12). All three different types of data should be included in the police records. The prosecution service should act as a safety-net to actual implementation and check the completeness of police statements. Recently, the prosecution service has appointed personnel to carry out this obligation.

Regarding injuries of the victim, medical reports are not always included or adhered to the legal file. There are two reasons for this. First, compulsory medical insurance covers the straightforward medical expenses caused by the victim's injuries. Therefore, only the standard amount of excess (approx. f 250 (EUR 113)) is claimed from the offender. A medical report is not needed for this. Second, medical reports on injuries having possible long-term effects that are still unclear are not always considered necessary during criminal proceedings. The reason for this is that most criminal judges will not deal with complicated claims because the law allows them to declare this part of the claim inadmissible and refer it to civil court (see § 4.3). However, not all judges deal with the victim's losses and injuries

<sup>161</sup> Ministry of Justice, project Terwee, Manual on Monitoring-methods, *Meetmethode slachtofferzorg, handleiding voor een meetmethode ten behoeve van het beheersen van het proces slachtofferzorg in netwerkverband voor politie en Justitie*, Den Haag, September 1995, pp. 4-8.

<sup>162</sup> For a detailed description of the monitoring process, see the annexes to the manual of the Ministry of Justice, *Meetmethode slachtofferzorg*, Den Haag, September 1995, pp. 17-25, and M.S. Groenhuijsen (1999), pp. 102-104.

<sup>163</sup> B&A Groep (1998), pp. 87-92.

<sup>164</sup> Ministry of Justice, Action plan, 1999.

in this way. Not including medical reports may thus harm chances of obtaining a court decision regarding such expenses.<sup>165</sup>

Concerning the statement on losses and injuries, the 1994 implementation study shows that the police frequently ignore the extent of the losses and their monetary value at that time. The statements are, therefore, far from complete or accurate. This is partly due to the fact that the police depend heavily on the cooperation of victims. Victims are asked to fill out an adhesion form (*voegingsformulier*, previously called the victim form: *slachtofferformulier*) on which they should indicate the losses, demonstrated by items of proof. Filling out the form turned out to be quite problematic for a great number of victims.<sup>166</sup> Therefore, from the year 1995 on, legal aid services and Victim Support are involved in assisting the victim with filling in the form. They help the victim with adding the correct items of proof and calculating the amount of compensation the victim should claim. This has been a highly successful development that has improved the quality of the filled out forms presented to the court. However, not all difficulties have been solved (see D. 12).<sup>167</sup>

Finally, victims or their legal representatives who wish to inspect the police records regarding the statement on the losses and injuries or to have access to filled out victim forms may be confronted with some practical problems. Difficulties are mainly caused by the fact that the number under which the report is registered (*nummer van aangifte*) is not always the same as the number of the legal file (*proces-verbaalnummer of dossiernummer*). The legal file gets a number only if it is ready to be sent to the prosecution service. Each individual police

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<sup>165</sup> Information supplied by lawyers working at the SRK Legal Protection Office (*SRK rechtsbijstand*), 19 July 1999. They furthermore remarked that if they send their clients' medical file to the court in a closed envelope with 'medical confidentiality' stamped on it, some judges were unwilling to open the envelope and consider the victim's medical file. These judges claimed to be unauthorized to open the envelope, but more probable they were unwilling to look into the matter on this pretext. This practice is a clear example of the sometimes very unwilling attitude of certain judges to deal with compensation within criminal proceedings (see § 7). Today, lawyers working at *SRK* have decided no longer to send the medical file to the court in this manner, even though this may harm the privacy of their clients.

<sup>166</sup> The adhesion form consists of 4 pages. On the first page, the victim should give (1) his personalia (2) and/or of his legal representative), (3) the date and place of the crime and the consequences of the crime for the victim. The second page allows the victim to (4) fill in his damages, injuries, and costs, after which he should indicate what items of proof demonstrate the extent of the losses (item of proof nr. X). The victim should also indicate (5) what costs have already been compensated and by whom, or claimed elsewhere (insurance company). Then they should deduct the total under (5) from the total of costs under (4). On the third page the victim and/or his legal representative should sign the form. The fourth page contains instructions for filling in the form and an explanation of the legal terms. Under the instructions ad (4) it is mentioned that the victim should include items of proof for his losses, and examples are given: old bills for stolen or damaged goods, repair bills for damaged property, bills for new goods to replace stolen/damaged ones, and proof of the amount of excess money by means of a copy of the insurance policy. The instructions have been rewritten over the years and seem to be very adequate and clear; even the instructions regarding the items of proof are written in non-legal language and illustrated by clear examples. Nevertheless, practice shows that adding evidence for losses remains a problem for most victims.

<sup>167</sup> For further improvement, the Minister of Justice announced that the introduction of the Victim Impact Statement is being studied. The Victim Impact Statement will be a statement written by the victim of the (emotional) impact of an offence and will be added to the legal file (9 March 2000).



officer has access to the computer system in which all numbers are available, and will thus be able to provide the number of the legal file on the basis of the registration number of the report. However, if victims are unaware of the different numbers, it may take a long time before information is obtained. This may frustrate the victim's opportunity to present a well-prepared claim for compensation during the criminal proceedings. Another problem is that the adhesion forms do not always reach the public prosecutor in time. Legal practitioners generally advise to check, before the trial, whether the public prosecutor has received the form. It sometimes happens that the forms get lost in the piles of paper work at the prosecutor's office.<sup>168</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, and any compensation or restitution made by the offender or any genuine effort to that end.*

Before discussing the implementation of the above guideline, it is important to note that the Guideline Terwee obliges the police to include in the police report the victim's wish and need to receive compensation. In 1994, the number of police reports containing the wish of victims regarding compensation had risen substantially from 3% to 44% after the implementation of the Guideline Terwee in the pilot districts.<sup>169</sup> Since then, this upward trend has continued, mainly due to the built-in checks in the automated system used to take down the reports (see § 6.1, A.2). However, exact data on the achieved progress are not available. In practice, the relevant information concerning the losses and injuries of the victim are provided to the court by means of the statement included in the police report and the victim form (see A.4), for which the public prosecutor has final responsibility. If the statement or the form is still inaccurate, the court may ask the public prosecutor, the civil claimant or his lawyer to enlighten him on this subject, but the court is seldom willing to look into the victim's claim seriously if the adhesion form contains too little information or items of proof. However, with the current practice that victims receive assistance from Victim Support or legal aid centres, the quality of the filled-in adhesion forms has much improved (see A.4). Nevertheless, one problem remains. The office of the public prosecutor (*parket*) is often far too late sending the victim form. It is not uncommon if it is sent only two days before the trial.<sup>170</sup> This leaves the victim little time to go to Victim Support or a legal advice centre and get assistance to properly fill it out. The reason why the adhesion form is not given to the victim at the time of reporting, but later on during the proceedings, is that the authorities do not want to give false hope to victims whose case will not go to court, either because of technical or policy waivers.

Similar to the obligation to include information on the victim's wish to be paid compensation, the police should also include information about the suspect's financial capacity and willingness to pay compensation. The 1994 implementation study shows that the police include relevant information about the capacity to pay compensation in only 18% of the

<sup>168</sup> Information supplied by lawyers working at the SRK Legal Protection Office (*SRK rechtsbijstand*), 19 July 1999. See the SRK memo *Standard procedures on how to obtain information contained in legal files and police records*.

<sup>169</sup> J. Wemmers c.s. (1994), pp. 38-39.

<sup>170</sup> Information supplied by lawyers working at the SRK Legal Protection Office, 19 July 1999.

cases (against 2% before the Act Terwee).<sup>171</sup> With respect to the defendant's willingness to pay, the police mentioned it in 48% of the cases (against 8% before the Act Terwee).<sup>172</sup> And although these are significant improvements compared to the situation prior to the Guideline Terwee, it is still unsatisfactory. This is the more regrettable because this information is essential to the court to be able to determine whether the nonpayment of compensation or the unwillingness of the offender to compensate the victim is in fact caused by an incapacity to pay. Only regarding serious crimes which are prosecuted even after a payment of compensation prior to the trial, will the court be duly informed. This information may reach the court through the legal file or through the defence counsel.

It is a common defence strategy to stimulate the offender to pay compensation to the victim or to show his willingness to do so to the court. The defence counsel will therefore inform the court of any payments made by the offender, or his willingness to do so. The payment of compensation or a genuine effort to that end is, as a rule, beneficial to the offender. Not only is it a reason to waive prosecution in the pre-trial stage, it is also considered to be a mitigating factor by the courts (see § 7.1, B.5). There is, however, one problem. Defence lawyers cannot always persuade their clients to compensate the victim because they cannot tell them the exact percentage of sentence reduction after any payments to the victim. This is an autonomous decision of the court.<sup>173</sup>

## 7 THE VICTIM AND COMPENSATION

### 7.1 The Expediency Principle and Compensation

The expediency principle encompasses the technical and the policy waiver. On the one hand, the public prosecutor may decide not to instigate prosecution because of lack of (sufficient) evidence. It is also possible that the right to prosecute no longer exists due to the statute of limitation (*verjaring*). This aspect of the expediency principle is called the technical waiver, which is by nature unconditional.<sup>174</sup> On the other hand, the public prosecutor may decide not to prosecute for policy considerations.<sup>175</sup> The legal basis of the policy waiver can be found in the sections 67 and 242 CCP, stating that prosecution may be renounced on

<sup>171</sup> J. Wemmers c.s. (1994), pp. 34-37.

<sup>172</sup> J. Wemmers c.s. (1994), p. 37.

<sup>173</sup> Today, there is discussion about the introduction of sentencing guidelines for the prosecution service (the Dutch public prosecutors demand the court to impose a certain penalty; the court is not bound by the demand, but it should motivate a more severe sanction). It might be advisable to include guidelines for the effects of (partially) compensating the victim (reduction in %).

<sup>174</sup> In 1990, the technical waiver was applied in approximately 15% of all felonies. The percentage varied between 11% and 20%. Attempts are being made within the prosecution service to reduce this percentage to a maximum of 5% in 1994. This goal has not been achieved: in 1994 the technical waiver was applied in 6-15% of all felonies. Source: Report of the Committee Donner; *rapport Commissie Openbaar Ministerie (Commissie Donner), Het functioneren van het Openbaar Ministerie binnen de rechtshandhaving*, 1994, p. 31.

<sup>175</sup> The percentage of policy waivers in 1990 was 3% in Assen and 35% in Haarlem, the national average was 16%. Attempts were made to reduce this percentage. In 1992 and 1993, the number of police waivers went down to 12% and 7%, respectively. By 1994, most offices reached the goal of 5%. See Report Committee Donner (1994), p. 31.

grounds of general interest. The policy waiver may be granted unconditionally or conditionally (*onvoorwaardelijk of voorwaardelijk sepot*). Usually, one of the conditions is that the defendant will not re-offend within a specific period of time. One of the other conditions which may be attached to the waiver is the payment of compensation to the victim. If the offender does not meet the conditions imposed, the public prosecutor has the right to reopen the criminal proceedings.<sup>176</sup> The public prosecutor may dismiss a case after the preliminary judicial investigation or the detention on remand of the defendant (ss. 244-1, 245-1 CCP).

Besides the waiver, another very common way of dealing with crime is the out-of-court settlement or 'transaction' (*transactie*),<sup>177</sup> whereby the accused voluntarily fulfills one or more of the conditions laid down by the prosecution service in return for the decision not to prosecute.<sup>178</sup> The public prosecutor may refrain from prosecution up to the moment the trial starts. The transaction is regulated by law (ss. 74-74c PC j. 578 CCP) and is formally excluded for crimes carrying a penalty exceeding six years' imprisonment. This restriction has no real meaning in practice because crimes carrying a sentence heavier than six years are rarely, if ever, considered for a (conditional) dismissal. The conditions which may be attached to a transaction are exclusively listed in article 74-2 PC.<sup>179</sup> Among the conditions, the first – payment of a sum of money to the state – and the last – the payment of complete or partial compensation to the victim of the damages caused by the punishable act – are the most relevant here. The public prosecutor may decide to impose one or more of the listed conditions. If the defendant fulfills the conditions, the right to institute criminal proceedings expires (s. 74-1 PC, see § 7.2).

(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 Guideline Terwee obliges the public prosecutor to take the interests of the victim into account with respect to the decision whether to prosecute. If the public prosecutor decides to start public action, the legislature explicitly obliges him to notify the victim and send a victim form. In addition, he should verify the information provided by the police in the reports regarding compensation and the victim's wish to be notified of relevant developments in his case. If the public prosecutor decides not to prosecute, he must also inform the victim (see § 4.3.2). Furthermore, the police and/or the prosecution service must try to arrange compensation prior to the trial. The public prosecutor should inform the victim why mediation has failed, or notify him if his case is not considered suitable for claim settlement (see § 4.3.2). If a settlement is realized, prosecution is usually waived, unless the offence carries a penalty of more than six years' imprisonment. In reality, trying to arrange compensation for victims in the pre-trial stages is complicated and depends on many

<sup>176</sup> A.M. van Kalmthout, P.J.P. Tak (1992), pp. 682-686.

<sup>177</sup> In 1990, 23% of all felonies ended with a transaction between the public prosecutor and the offender. This percentage varied from 14% in Amsterdam to 37% in Roermond. The prosecution service has the aim to offer a transaction in at least 33% of all felonies. In 1992 this objective was realized. See Report Committee Donner (1994), p. 32.

<sup>178</sup> G.J.M. Corstens (1995), pp. 461-464; A.M. van Kalmthout, P.J.P. Tak (1992), pp. 686-691.

<sup>179</sup> Payment of a sum of money to the state; renunciation of seized goods; surrendering of goods liable to confiscation or payment to the state of the estimated value of the goods; payment to the state of the estimated profit gained from the penal offence; and the payment of complete or partial compensation to the victim of the damages caused by the punishable act.

variables. This can be deduced from three experiments which took place in the late 1980s. The experimental projects were started to stimulate pre-trial claim settlements and to increase the understanding of the underlying processes. In the town of Leiden, a project was carried out by the municipal police<sup>180</sup> (now the regional police force), and in Alkmaar by the state police.<sup>181</sup> At the level of the prosecuting authorities,<sup>182</sup> an experiment took place in Middelburg. The three experiments show that pre-trial claim settlements are more likely to succeed when the following three basic conditions are met: specialized mediators perform

<sup>180</sup> In the experiment carried out in Leiden (1987), the municipal police were only allowed to mediate in simple cases of theft, assault and destruction of property, and no juvenile offenders were to participate in the project. The last condition was introduced so as not to interfere with the local alternative sanction project for minors (*Halt*, see § 3.7). Furthermore, the police could dismiss the case on the condition that it concerned a first offender, the damages amounted to less than 500 guilders (EUR 227), and the victim had actually been compensated. If the claim for damages involved an amount between 500 and 1500 guilders, they were allowed to offer an out-of-court settlement (*transactie*) on the condition to compensate the victim. The hiring of a part-time mediator proved to be very successful. Out of 118 cases, in which he tried to arrange a claim settlement, 72 cases (61%) were completed successfully and compensation was paid to the victim. In 10 out of 72 cases only a partial compensation was paid. Cases in which victims demanded compensation below 500 guilders were more successful (63%) than those involving higher sums (55%). At a later stage, the local victim support centre, located within the police department of Leiden, was assigned to mediate between victim and offender, instead of the police force. See M.I. Zeilstra, H.G. van Andel, *Evaluatie van het schadebemiddelings-project bij de Leidse politie*, WODC, Den Haag, 1989.

<sup>181</sup> The success of the experiment in Leiden stands in great contrast to the outcome of the project in Alkmaar. The conditions under which the state police had to arrange compensation differs a lot from the project in Leiden and are largely responsible for the lower success rate. In Alkmaar, offenders had to admit guilt, and the damage had to exceed 500 guilders (EUR 227). No specialized functionary was employed to coordinate the activities. In 38 cases, the police tried to settle the claim for damages. The attempt succeeded in 10 cases (26%). M.I. Zeilstra, H.G. van Andel, *Informatieverschaffing en schadebemiddeling door de politie. Evaluatie-onderzoek van een experiment bij slachtoffers van misdrijven in Alkmaar en Eindhoven*, WODC, Den Haag, 1990. See also T. van Hecke; J. Wemmers, *Schadebemiddelingsproject Middelburg*, WODC, Den Haag, 1992, pp. 95-96.

<sup>182</sup> In the experiment in Middelburg (1989), a full-time mediator was responsible for the arrangement of pre-trial compensation at the level of the prosecution service. If a case was considered suitable for claim settlement, it was handed over by the public prosecutor to the mediator. The latter would include the mediation results in the legal file to inform the public prosecutor handling the case. The criteria for claim settlement in Middelburg were very broad: it should concern a frequently encountered punishable act, and the victim should have suffered material loss. The mediator handled 241 cases; in 42% of the cases the negotiations led to the payment of damages. If the offender agreed to the condition to settle the claim, the large majority of them (84%) really compensated the victim. Usually the offender paid the sum agreed upon. Evaluation of the experiment, however, showed that only 54% of the cases suitable for claim settlement were handed over to the mediator. The high percentage of cases in which the prosecution service did not attempt to settle the claim indicates that the experiment was not carried out according to plan. Apparently, the prosecution service established new and informal standards along the way. Pursuant to the unofficial criteria claim-settlement was considered to be especially suitable for juvenile first offenders and for cases in which the damages did not exceed 500 guilders (EUR 227). These informal criteria seem to correspond with the successful criteria of the Leiden experiment. T. van Hecke, J. Wemmers (1992), pp. 1-8; 97-98.

the negotiations between victims and offenders; the mediator has the authority to take the decision not to prosecute; and finally, the total damages are limited (approximately 300 EUR).

In 1994, the implementation study Terwee shows that, about five years later, claim settlement by the police was attempted in 12% of the cases (in the other districts: 7%).<sup>183</sup> A striking phenomenon in the pilots is that when the police made an attempt to settle the claim, only in 50% of the cases was the victim's wish to receive compensation stated in the records. An even stranger situation arose in four cases in which the police tried to settle the claim against the explicit wish of the victim not to receive any compensation from the perpetrator.<sup>184</sup> These are clear indications of inadequate police procedures regarding claim settlement despite the lessons that could have been learned from the experiments.

At the level of the prosecution service, only a small number of victims were aware of any attempt to recover damages from the offender (17% after, and 14% before implementation of Terwee). The number of victims who really received compensation is minimal: in only three cases had a partial compensation been accomplished by the prosecution service.<sup>185</sup>

In 1998, 35% of the police officers often try to settle the claim for compensation, 61% occasionally, and the remaining 4 % never try to mediate. Sufficient data are lacking to make definite conclusions. However, the researchers have the impression that the accomplishments of the police leave a lot to be desired. Trying to settle the claim is still not standard procedure in suitable cases. The exceptions to this rule are the few legal districts where a police mediation centre has been set up, which seems to function adequately.<sup>186</sup> At the prosecutor's offices, mediation is centralized in 12 of the 19 legal districts. In the seven districts without a specialized centre, the clerks of the prosecutor's office assume responsibility for mediation. Most legal districts have set themselves the target of settling the victim's claim for compensation in 10% of the cases in which the victim wants to be compensated by the offender. Data are available per legal district but they do not allow nation-wide comparison. In general, about half of the attempts to mediate is successful (6% of all cases).<sup>187</sup> No data are available to establish in how many of the cases that are not prosecuted, the matter of compensation has been settled or duly considered. To enhance knowledge of the consequences of discretionary decisions for the question of compensation, it is advisable that data are collected and analysed. However, it is to be feared that only in a small minority of the dismissed cases is compensating the victim considered. The most common condition to a waiver is the payment of a fine instead of compensation (see § 7.1: transaction).

(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 persons directly affected by crime have extensive rights to ask for a (judicial) review of the decision not to prosecute. They do not, however, have the right to instigate a private prosecution (see § 5.4). Directly affected persons are victims and his surviving relatives. A

<sup>183</sup> J. Wemmers c.s. (1994), pp. 32-33.

<sup>184</sup> J. Wemmers c.s. (1994), p. 37.

<sup>185</sup> J. Wemmers c.s. (1994), pp. 45-46.

<sup>186</sup> B&A Groep (1998), pp. 59-64.

<sup>187</sup> B&A Groep (1998), pp. 65-71.

complaint of an association like the National Office against Racism (*Nationaal Bureau Racismebestrijding*) may also be admissible. They may all file a complaint based on s. 12 CCP (*artikel 12 procedure*) with the court of appeal, if they do not agree with a waiver or an out-of-court settlement. The right to legal review does not exist for an out-of-court settlement of a misdemeanour (*transactie van overtredingen*). The right to judicial review is thus limited in scope. Furthermore, a complaint lodged with the court of appeal is inadmissible if the case has not yet been presented to the prosecution service, if the complainant is not directly affected, or if the complaint was not filed within three months after the decision had been taken.<sup>188</sup>

The purpose of judicial review is to redress the negative consequences of the expediency principle and the state's monopoly of prosecution (see § 3.2). The legislature also felt that the possibility to exercise this right would force the public prosecutor to bear the interests of the victim in mind (see § 7.1, B.7). The legal provisions, with respect to the complaint based on s. 12 CCP, have been expanded and improved by the 1984 Act.<sup>189</sup> Applications for a judicial review should be filed in writing with the court of appeal of the district where the disputed decision was taken. It has to include a complete and accurate description of the criminal offence, the facts and circumstances of the case. Upon reception of the complaint, the full judicial review will start. The court of appeal invites the Procurator-General to explain the position of the prosecution service. This account may already be sufficient reason for the court to order prosecution. If this is not the case, the complainant is heard (s. 12d CCP). Thereafter, the 'suspect' is summoned to appear before the court if the latter considers ordering prosecution. He has the right to remain silent. The parties have the right to be represented by a lawyer or any other person during the procedure in the judge's chamber. The parties have the right to inspect the legal file. The civil claimant may even inspect the legal file, before he decides to ask for a judicial review (s. 51d CCP). However, the president of the court may decide to limit the parties' access to the file. He may do this by virtue of his office, at the request of the Procurator General in order to protect the privacy of the persons involved, or on grounds of public interest. If the court of appeal finds the complaint justified, it overrules the public prosecutor's decision and orders to instigate prosecution. Since 1984, it may in addition order the public prosecutor to undertake specific activities related to the prosecution, e.g., to start a judicial investigation, or summon the defendant to court. If after the order new facts become known to the public prosecutor which might lead to a dismissal, he has to ask permission from the court before dismissing the case. The court of appeal may decide to let the expediency principle prevail over the interests of the victim (s. 12i CCP). The legislature had to create this provision to avoid frustration of a correctly applied expediency principle.

A special Dutch feature of criminal procedure is when defendants are frequently suspected of having committed several punishable acts, the public prosecutor may opt to charge them with only some of the crimes, for efficiency reasons. Offences that are not included in the indictment are joined to the legal file *ad informandum* (to inform the court). The joined cases do not lead to separate guilty verdicts but are taken into account by the court in the sense that they may influence the quantum of the sentence (*voeging ad informandum*, see § 7.2, D.10). Victims of *ad informandum* cases cannot act as civil claimants. Therefore, the public prosecutor must inform them of the right to ask for a judicial review by the court of appeal of the decision to join their case *ad informandum* to the legal file (s.

<sup>188</sup> G.J.M. Corstens (1995), p. 77.

<sup>189</sup> Act of 8 November 1984, *Stb.* 551.

12 CCP). Furthermore, the victim has the right to lodge a complaint with the prosecution service, if the police do not undertake any investigations. In the complaint, the victim should mention when and where he reported the offence, include a description of the specifics regarding the crime and indicate the reasons why he wants it to be prosecuted. The public prosecutor will then review the decision taken by the police. Victims may also file a complaint with the National Ombudsman (see § 3.8).

## 7.2 The Court and Compensation

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

In Dutch criminal proceedings, the court has always been able to award compensation to the victim who joined the criminal proceedings as a civil claimant and presented a civil claim for damages. Since 1917, moreover, the opportunity exists to order compensation as a condition to a (partially) suspended sentence (see § 4.3 and § 7.2, D.13). The 1995 Victim Act Terwee added the compensation measure (*schadevergoedingsmaatregel*), which resembles the English compensation order (36f PC, for a detailed description see D.11). It also introduced the opportunity to order the offender to pay a certain sum to a victim-related service.

The legislature offers the court a free choice between the legal options to grant compensation, as expressed in the Memorandum in reply to the Upper Chamber of the Dutch Parliament:

In principle, it is conceivable that the court awards part of the civil claim for damages and grants the remaining part as a compensation measure. It is also imaginable that the payment of the claim for damages of the civil claimant will be awarded as a special condition to be fulfilled within a certain period of time, which has already been done in legal practice. This proposal of law gives the court the choice between the different punishments. Its purpose is to provide judges with a wider range of alternatives to compensate losses. (*tr. MB*)<sup>190</sup>

The legislature considered the introduction of the novelties alongside the traditional means to compensate the victim necessary as a result of different studies which showed that the adhesion model and the possibility to impose compensation as a condition to a sentence failed to offer victims a genuine opportunity to receive compensation from the offender. For instance, a 1988 study demonstrated that victims suffered losses and injuries in 82% of the criminal cases. In 30% of these cases, the amount of the loss exceeded 1500 guilders (EUR 681) and in 44% of the cases the damages were assessed at less than 500 guilders (EUR 227).<sup>191</sup> In 14% of the cases, the victims explicitly expressed the wish to join the proceedings, but only very few victims (4.2%) actually assumed the role of civil claimants. Even fewer victims (3.3%) were actually granted compensation by the courts.<sup>192</sup> A total of less than 7%

<sup>190</sup> Memorandum in reply to the Upper Chamber of Dutch Parliament, *Memorie van Antwoord I*, 21 345, nr 36, p. 3.

<sup>191</sup> M. Junger, T. van Hecke (1988), pp. 54-55.

<sup>192</sup> M. Junger, T. van Hecke (1988), pp. 77-78.

of the victims received compensation within criminal proceedings.<sup>193</sup> During the criminal proceedings, the court imposed a (partially) suspended sentence in 8% of the cases, but only in 3.2% of the cases on the condition to pay compensation to the civil claimant. Furthermore, the compensation awarded amounted to a relatively small sum (less than EUR 227) in 60% of these cases.<sup>194</sup> Clearly, the traditional ways of compensating victims did not live up to expectation.

The primary aim of the 1995 Victim Act Terwee, therefore, was to improve the position of victims during the criminal proceedings and to facilitate their claim for compensation (see § 4.3 for a detailed description). It improved the adhesion model, for it should be possible for more than 4% of the victims to act as civil claimants. Limitations as to the amount of damages admissible in criminal court were abolished. The possibility to present a claim during the pre-trial stage was introduced. The legislature, however, assumed that complicated claims would frustrate the expeditiousness of the criminal trial. Therefore, it decided to allow the claim to be divided into a simple and a complicated part. The latter part could be transferred to the civil court to avoid delays. In addition, something should be done about the low collection rates and the complicated procedures of presenting a claim for compensation in court. The introduction of the compensation measure was considered a good instrument to achieve this (see D.11).

In practice, the difficulties caused by the adhesion model were not as easily solved by legislation and guidelines. Victims still had great difficulty to claim compensation in spite of the victim form.<sup>195</sup> Apart from the fact that sometimes the form is sent far too late to the victim by the prosecutor's office (see § 6.2, D.12), another difficulty is that victims may decide to join the proceedings during the trial until the moment the public prosecutor holds his closing speech (ss. 51b, 311 CCP). However, this gives the public prosecutor too little time to consider the victim's claim and the completeness of the form. In fact, the presented forms are often incomplete and lack the required proof to substantiate the claim. This raises problems for both the public prosecutor who has to present the victim's claim, and the court.<sup>196</sup>

New difficulties also emerged as a result of the Victim Act Terwee. The possibility for the court to refer complicated claims to civil court turned out to be a major pitfall. It allows the court an easy escape route if it does not wish to deal with the matter of compensation. Furthermore, established court practice may frustrate the victim's right to claim compensation. First of all, criminal courts generally apply the rules of private law that govern the question of compensation in too strict a manner. Already in 1891, the court of appeal ruled that if the civil claimant has no items of proof to substantiate his claim, this should not automatically lead to a dismissal of the claim. The court should estimate the losses and

<sup>193</sup> M. Junger, T. van Hecke (1988), p. 86.

<sup>194</sup> M. Junger, T. van Hecke (1988), p. 72.

<sup>195</sup> In practice, the police ask every victim whether he would like to become a civil claimant and give him an information sheet (*informatie vel*), explaining the procedures, and a brochure. The police, however, do not give him the victim form (*slachtofferformulier*) -previously called the adhesion form (*voegingsformulier*)- because at that stage it is still unsure whether the case will be prosecuted and hence whether the victim has the opportunity to claim compensation. The prosecution service should subsequently send him an adhesion-form to facilitate and structure the claim for compensation.

<sup>196</sup> If, on the other hand, the victim form had been joined to the file before the proceedings, this does not guarantee success, either.



injuries and award compensation *ex bono et aequo*.<sup>197</sup> A decade later, this interpretation was accepted by the Supreme Court.<sup>198</sup> Today, however, the criminal courts still do not estimate the losses and injuries of the victim by these standards and continue to demand items of proof that must demonstrate the exact amount of the losses.<sup>199</sup> According to the 1998 study, the courts still refuse to take civil claims for compensation into account if not all losses are proven beyond doubt by receipts. Another difficulty discovered by the researchers is that judges of criminal courts and lawyers (claim to) lack knowledge of private law necessary to determine the amount of compensation due to the victim. The practice regarding the *voeging ad informandum* also frustrates the victim's right to claim compensation (see § 6.2, B.7).<sup>200</sup> The legislature, however, did not thoroughly address this matter in the Victim Act Terwee. It only stated that the public prosecutor should consider the victim's interest while joining files *ad informandum*. This is clearly an inefficient approach, as has been confirmed by the National Ombudsman. He handled several complaints of victims about these proceedings and recommended that the Minister of Justice revises the law at this point.<sup>201</sup> The 1998 study reveals that judges have fundamental objections to the adhesion procedure. On the one hand, judges claim that the rights of the defendant may be threatened because he may feel pressured to accept the losses and injuries of the victim out of fear of antagonizing the court. On the other hand, they are afraid that during a criminal trial not enough attention can be given to the question of compensation.<sup>202</sup>

Concerning the compensation measure, the principal impediments are that judges object to the measure in principle and do not have faith in its enforcement by the state. Judges disapprove of the interest charges and fines for non-payment, as well as of the custodial sentence for non-payment which does not relieve the obligation to pay compensation (see D.11).

With respect to the conditionally suspended sentence, the main limitation is caused by the opinion of judges that it is a superfluous instrument (see D.13).<sup>203</sup>

Today, of the above-mentioned problems the legislature only seriously addressed the practical difficulties with the victim form. The form was recently modified and simplified. Furthermore, Victim Support and the legal aid centres were given additional funding to assist the victim with filling in the form (see § 6.1, A.2). The restrictions and limitations caused by the opportunity to consider (part of) the claim as too complicated to handle in criminal proceedings and refer the entire claim to civil court, as well as the practice of the *ad informandum* cases are not yet adequately dealt with. Neither are the judiciary's objections to the compensation measure and the conditionally suspended sentence duly addressed. This inactivity on the part of the authorities prevents the realization of the compensation measure and the conditionally suspended sentence as genuine instruments to compensate the victim for his losses and injuries.

<sup>197</sup> Court of appeal Amsterdam, 29 September 1891.

<sup>198</sup> Supreme Court, 27 April 1903, and 18 November 1935.

<sup>199</sup> See M.E.I Brien, I.M. Koopmans, 'Voeging en schadevergoedingsmaatregel in de praktijk: het slachtoffer blijft slachtoffer', *NJB*, 1998, nr. 30, pp. 1347-1348.

<sup>200</sup> H. Geveke, M. Verberk (1996), p. 44.

<sup>201</sup> See the Annual Report of the National Ombudsman, 1995, p. 196 and Acts of the Dutch Lower Chamber of Parliament, TK 24 635, nrs. 1-2.

<sup>202</sup> B&A Groep (1998), pp. 79-81.

<sup>203</sup> B&A Groep (1998), pp. 81-84.

(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.*

Traditionally, legislation provides that compensation may be awarded in addition to a penal sanction by means of the adhesion procedure. The victim joins the criminal proceedings as civil claimant and presents his claim for compensation. As a rule, the claim for compensation is awarded in addition to a penal sanction or a fine. Since 1917, the court may decide to impose the obligation to pay compensation as a condition to a suspended sentence (see D.10, D.13). Since 1995, legislation furthermore provided the courts with the opportunity to impose a compensation measure (see D.10). The compensation measure is a unique penal sanction in Europe, which resembles the compensation order and, together with the adhesion procedure constitutes the Dutch hybrid compensation model. Its nature will be described here.

#### *The compensation measure*

The literal translation of the Dutch term *schadevergoedingsmaatregel* as compensation measure reveals on the one hand that it concerns a special type of penal sanction, i.e. a punitive measure, and on the other that it differs from the compensation order as used in common law jurisdictions. The main advantage of the compensation measure compared with the civil claim for compensation is the enforcement of the victim's claim by the state, which also means that all costs connected with enforcement are at the expense of the state (36a PC). Dutch criminal law is typified as a dualistic sanction system.<sup>204</sup> Under Dutch criminal law, penal sanctions and punitive measures are similar in the sense that they can only be imposed if the court finds the offender guilty of a punishable crime (s. 351 CCP). However, there are also significant differences which can be derived from the following quotation of the Explanatory Memorandum of the Victim Act Terwee:<sup>205</sup>

Punitive measures do not intend to inflict suffering to the offender like a penal sanction but are primarily aimed at restoring the legitimate situation. The payment of compensation does not add suffering to the defendant because the offender is already obliged to pay compensation according to civil law. Moreover, compensation in the form of punitive measures is advantageous because measures do not have to be related to the seriousness of the offence, the level of guilt of the defendant, and his financial capacity, contrary to punishments. As a result, only the injuries and losses suffered by the victim are conclusive to the amount of compensation awarded by the court. (*tr. MB*)<sup>206</sup>

Furthermore, compensation as a measure has the advantage that it can be imposed together with other penal sanctions and punitive measures, such as placement in a psychiatric ward or the confiscation of unlawfully acquired profits.

The introduction of the compensation measure into Dutch criminal procedure was inspired by the success of the English compensation order. To a certain extent, the compensation measure and its application are similar to the order. They are both sanctions which are imposed by the criminal court and enforced by the state. However, six significant

<sup>204</sup> D. van der Landen, *Strafen maatregel*, Gouda Quint, Arnhem, 1992, p. 495.

<sup>205</sup> Academics like Groenhuijsen and Langemeijer, and the preparatory Committee of the Act Terwee have argued that the compensation measure should be qualified as a penalty as it serves the same purposes as other punishments (see § 7.2, D 13).

<sup>206</sup> Explanatory Memorandum Act Terwee (1989-1990), pp. 5-6.

differences exist: 1) the compensation measure is not intended to inflict punishment because the obligation to pay compensation to the victim already exists by reason of civil law. It simply wishes to restore the situation as it existed before the crime was committed; 2) the custodial sentence for non-payment of the compensation measure does not relieve the offender from paying compensation; 3) the compensation measure is governed by rules of private law, just like the compensation awarded to the civil claimant within the adhesion-model; 4) the Dutch criminal courts are not obliged to explain why a compensation measure is not imposed. Nor do the courts need to consider the financial capacity of the offender; 5) the legislature did not wish to copy the English principle that the court should give priority to compensation measures over fines. The legislature felt that this would be incompatible with the basic assumption that the court should be able to choose freely whatever kind of punishment it feels is appropriate in the case, within the limits given by law. Instead, the legislature recommended that the prosecution service should give priority to the compensation measure when formulating its demands.<sup>207</sup>

These differences show that, although the compensation order was the main inspiration to create the compensation measure, it is not an exact copy. Though the compensation measure has its private law nature in common with the civil claim for damages, it differs from it by the way the compensation measure is enforced. Due to the specific characteristics of the compensation measure, it acquires a curious equivocal nature which constitutes its Achilles heel. The mixed criminal and private law nature constitutes a fundamental disadvantage of the compensation measure because it has become too similar to the adhesion procedure. The criminal justice authorities consider the only difference to be the enforcement by the state. This has led to general confusion on how to deal with the compensation measure. In one of the pilot districts ('s Hertogenbosch) an interesting has been created which is known as the '*Bossche model*'. This model has gained ground ever since as a result of presumed logic and best intentions. The first mistake that led to this model, was to demand that at all times the victim should fill out the victim form, even if he wanted the court to impose the compensation measure. The court now argues that because the form is joined to the legal file, it should decide on the presented claim under the adhesion procedure, and thus award or dismiss the civil claim for compensation.<sup>208</sup> But at the same time, it does not want to deprive the victim of the advantage of enforcement by the state of the compensation measure. The pragmatic solution for all problems is to award the civil claim for damages and at the same time to impose a compensation measure for the exact same amount. In the verdict a clause is incorporated saying that payment of compensation to the civil claimant frees the offender from paying the compensation measure, and vice versa. It was argued that this not only allows the victim to profit from enforcement by the state but also gives him the major advantage of being able to execute the civil claim for compensation himself. Furthermore, the court states that by this legal construction the important disadvantage of pardoning (*gratieverlening*) for the obligation to pay compensation

<sup>207</sup> Explanatory Memorandum Act Terwee, pp. 18-19. Contrary to the United Kingdom, where the priority is integrated into the Criminal Justice Act (s. 76), the Dutch obligation for the prosecution service has not been integrated into an enactment, nor is it included in any guideline.

<sup>208</sup> This argument was later accepted and taken over by the Supreme Court in its decision of 12 January 1999, *NJ* nr. 246.

as a measure was overcome in this manner.<sup>209</sup> However legally sound this reasoning may be, this disadvantage is nothing more than a mere theoretical problem with little or no practical impact. To date, no offender has been pardoned from the obligation to pay the compensation measure. This reality, combined with the fact that the vast majority of victims have great difficulty collecting money from the offender and is not able to see the advantage of the right to enforce the claim themselves against the offender, leaves little solid ground for the practice described. Furthermore, the court's interpretation of the law seems contrary to the opinion of the legislature who stated that the court is free to choose between the legal opportunities regarding compensation, and may even award part of the civil claim under the adhesion procedure and impose a compensation measure for the remaining sum. Nothing has been said, however, about combining the two and turning it into one possibility. The mere fact that a victim form is filled out does not imply that the court no longer can impose a compensation measure.<sup>210</sup> Recently, however, this has changed due to the decision of the Supreme Court of 12 January 1999. The Supreme Court's ruling is formally correct because it interprets the victim's action of filling out the form as an expression of the wish to act as a civil claimant. But it disregards the legal practice that every victim who wants to claim compensation in criminal proceedings is given this form to fill out. The victim is not told that this will prevent the court to impose the compensation measure. The legislature never intended this, it wished to enable the court to impose the compensation measure on its own accord, even without request of the victim or the public prosecutor. Unfortunately, this rarely, if ever, happens. As a result, the *Bossche model* is now widely used by criminal judges. Since the 1999 ruling of the Supreme Court, if a victim form is filled out, the courts cannot disregard it and impose a compensation measure without deciding on the claim for compensation. The hybrid compensation model – the adhesion procedure alongside the compensation measure – has now turned into a model which is not only hybrid but truly androgynous.

The odd mixture of both the adhesion procedure and the compensation measure does not seem to be very serious at first glance. The victim seems to be given the best of both worlds. However, it frustrates the intentions of the legislature to offer the victim an easy way of obtaining compensation whereby the victim, originally, did not have to present a formal claim for compensation or fill out a form. Today's legal practice, in fact, 'sabotages' the implementation of the compensation measures as intended by the legislature, who introduced it because the adhesion procedure did not work (see D.10). The courts still fail many victims by a too strict application of formal rules. The fusion of the compensation measure and the adhesion procedure prevents the former to become as successful as the compensation order. The *Bossche model* risks to drag the compensation measure down to the unsatisfactory achievements of the adhesion model. All this is not to say, however, that the blame should be put on the courts. The confusion is firstly caused by the legislature who failed to opt for the introduction of compensation in the form of a true penal sanction: the compensation order.<sup>211</sup>

<sup>209</sup> J.C.A.M. Claassens, B.A. Stoker-Klein, 'Het slachtoffer in het strafproces', *Trema*, 1995, nr. 6, p. 169.

<sup>210</sup> Explanatory Memorandum to the Victim Act Terwee, responding to questions of the Upper Chamber (1989-1990), 21345, nr. 36, p. 3.

<sup>211</sup> The introduction of the English compensation order in the Dutch criminal justice system has been advocated by Prof. M.S. Groenhuijsen in his 1985 doctorate thesis. He was also a member of the preparatory committee of the Act Terwee, however, his idea failed to be accepted.

The introduction of the compensation measure offers a classic example of the errors that can be made if one jurisdiction tries to copy a successful solution from another jurisdiction but fails to analyse the factors that contribute or even determine its success. The main reason for the success of the English compensation order is that it is a penal sanction. The court is not bound by civil law rules of evidence, and none of the negative attitudes of criminal judges regarding the application of civil law in a criminal trial are evident (see § 7.2, D.10). Another reason for its success is, apart from the fact that it has priority over fines, is that the court must indicate in its verdict why it has not imposed a compensation order. Like in England and Wales, Dutch courts impose the compensation measure of their own accord but the Dutch courts always wait for the victim to present his claim. The obligation to mention why it has not considered to impose the compensation measure could remedy this practice, as it has done in England and Wales. Although it must be said that the risk of including a standard reasoning is substantial, given traditional Dutch court practice. Nonetheless, it would force the court to give the compensation measure a moment's thought. Also, the Dutch legislature's dogmatic reasoning regarding the custodial sentence for non-payment backfires. The fact that a custodial sentence does not relieve the offender from paying compensation (because it is an obligation under private law) causes many judges not to impose a compensation measure. They feel it is unjust to punish the offender who cannot pay in this way (see § 7.3, E.14). This is the more so, because, concerning the compensation measure, the risk of a custodial sentence is much greater because it is not linked to the offender's financial capacity, unlike the compensation order. This reduces the chances of enforcement, and, at the same time, enhances the risk of a custodial sentence for non-payment having to be ordered. The fact that the court is allowed to fix in its verdict the number of days that the offender will have to spend in prison if he does not pay, did not take away the principled objections of many judges, as is shown by the 1998 study (see § 7.3).<sup>212</sup>

*(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.*

During the trial stage, the court may first of all attach the payment of compensation to the victim as a condition to a (partially) suspended sentence (ss. 14c and 14a PC, see § 4.3.1). The probation order as such does not exist, but with the suspended sentence the offender is always placed under the control of the probation service. This is due to the fact that the Dutch suspended sentence is really a hybrid form of the French *sursis* and the Anglo-Saxon probation order (see Chapters 9 and 7). The suspended sentence is always subject to the general condition that the convicted person does not commit another offence before the end of his probation period (s. 14c PC). In addition to this general condition, other more special conditions may be attached, such as compensation. The court fixes the length of the probationary period in its verdict, which is usually less than two years. Only if the payment of compensation is imposed as a condition, may the period be extended to three years.<sup>213</sup> There is no limit to the amount of money that may be granted to the victim by the court. The court may also make compensation payable to victim services or associations instead of to the victim (see § 4.3.1). Additionally, the court may order compensation by means

<sup>212</sup> B&A Groep (1998), pp. 82-83.

<sup>213</sup> A.M. van Kalmthout, P.J.P. Tak (1992), pp. 691-693.

other than money (s. 6:103 Civil Code and s. 14c CCP). It may impose conditions relating to the offender's behaviour which may offer redress to the victim, like an injunction forbidding the offender to appear in a certain area.<sup>214</sup> If the offender does not fulfill the conditions, the judge will revoke the postponement of enforcement and recommend the enforcement of the suspended sentence. In practice, the suspended sentence is very frequently used by the criminal courts. On average, 50% or more of the tried cases resulted in a (partially) suspended sentence every year. The overwhelming majority of cases are related to property crime, traffic offences, and violent crimes.<sup>215</sup> However, the possibility to attach the payment of compensation as a condition to the suspended sentence seems to be infrequently used. No statistical data are available as to the exact number of times it is imposed. As a result, researchers have interviewed judges to get an indication of practice. According to the interviewees, they rarely use this opportunity because they consider it a superfluous instrument after the introduction of the Victim Act Terwee.<sup>216</sup>

It is important to note that in Dutch criminal procedural law and policies, the question of compensation is given great importance. During the pre-trial stage, the police may waive prosecution (*politie sepot*) or settle the case out of court (*politie transactie*) in certain simple cases. However, the condition is almost invariably the payment of a fine (s. 74c-2 PC), even though compensation can be attached as a condition to the waiver. A better option is therefore mediation by the police if the offender is known, the victim has suffered losses and wishes to be compensated by the offender (see § 7.1, B.5). The police may either refer the case to a *Halt* centre (see § 3.7) or other Terwee network partners, or the police may try direct mediation. Mediation is usually tried regarding losses not exceeding f 1500 (EUR 680). In most legal districts, the Terwee networks have set themselves the target to settle the victim's claim in 10% of the cases. However, nowhere is this target being met (see § 7.1, B.5 and § 7.2, D.10).<sup>217</sup> If the case is not suitable for claim settlement, the case is referred to the prosecution service.

Similarly, the public prosecutor may attach financial conditions to the award of a pre-trial transaction (*bijzondere voorwaarde bij transactie*, s. 74-1 PC, § 7.1). The first four conditions mentioned in the law regard payments to the state,<sup>218</sup> and only the fifth mentions the payment of compensation to the victim (s. 74-2e PC). Although this does not necessarily reflect the priority given to compensation by the public prosecutor, the sequence in conditions will not enhance its use either. He may also attach the payment of compensation to the victim to a conditional dismissal (*voorwaardelijk sepot*, ss. 242, 244 CCP, see § 7.1, B.5). A lack of data does not permit an extensive analysis of the importance given to the payment of compensation by the offender to the victim.<sup>219</sup>

<sup>214</sup> J.C.A.M. Claassens, B.A. Stoker-Klein (1995), p. 274.

<sup>215</sup> See A.M. van Kalmthout, P.J.P. Tak (1992), p. 692.

<sup>216</sup> Judges are not familiar with the opportunity to impose the condition of paying a sum of money to a service or association working for victims, it is, therefore, hardly ever used. B&A Groep (1998), p. 84.

<sup>217</sup> B&A Groep (1998), pp. 58-64.

<sup>218</sup> S. 74-2PC: payment of a fine; s. 74-2b PC: renounce confiscated goods; s. 74-2c PC payment to the state of the estimated value of confiscated goods; 74-2d PC: payment to the state of a sum that is at least equal to the estimated profit gained from the crime.

<sup>219</sup> B&A Groep (1998), pp. 68-70.

### 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 collection of money depends upon the manner in which it has been awarded to the victim by the court, as a compensation measure, as a condition to a suspended sentence, or as a civil claim for compensation.<sup>220</sup>

The state is responsible for the enforcement of the compensation measure. During the first year and a half, public prosecutors enforced the measure. Since September 1996, the national debt collection agency (*centraal justitieel incasso bureau*) executes the compensation measure on behalf of the victim. As a result, it is enforced in the same way as fines. However, the compensation measure does not take priority over other financial sanctions (see § 7.2, D.11). The offender may pay in installments, or the prosecution service may allow a stay in the enforcement of the measure (s. 561-3 CCP). In any event, financial sanctions should be paid within 27 months after the verdict (s. 561-4 CCP). If the perpetrator fails to comply with the court's order in a satisfactory manner, the public prosecutor has the power to seize goods of the offender (*executoriaal beslag*). The public prosecutor may even take the unwilling offender into custody for non-payment of the measure. However, the detention does not free the offender from the obligation to pay compensation to the victim (s. 36f-6 PC, see D.11).<sup>221</sup>

Regarding the conditionally suspended sentence (ss. 14a j. 14c PC), the prosecution service is responsible for enforcement.<sup>222</sup> If the offender does not pay the imposed amount of money attached as a condition, the suspension will be revoked. The victim, however, will be left with nothing because compensation as a condition cannot be collected if the original sentence is executed (ss 14c j. 14g PC).

Victims who joined the criminal proceedings to bring an action as a civil claimants, and were awarded compensation, have to execute the sentence without the assistance of the authorities. If the offender does not voluntarily pay the compensation awarded by the court to the victim, the victim must send the offender an injunction (*sommatiebrief*). In last resort, he may have to send in the bailiffs in order to collect the money. Before a writ is served, the victim must weigh the pros and cons since enforcement may constitute a financial as well as an emotional burden. The costs of sending in the bailiff will have to be paid by the victim if the offender cannot pay. It is therefore prudent to look into the financial capacity of the offender beforehand. The victim may also ask the bailiff to check the offender's payment records or by calling in a firm specialized in this sort of information. The costs charged by these firms vary between 50 and 70 guilders (EUR 22,6 and 31,8). the formal implementation of guideline E.14 falls thus short on two points. The compensation measure has no

<sup>220</sup> In addition, three extra-judicial ways exist: civil mediation (*dading*), the State Compensation Fund, and insurance companies. The State Fund is usually crucial to the payment of compensation to victims of violent crime (see § 4.4). The insurance companies are important to most victims who have suffered material damages. The insurance rate is relatively high in the Netherlands. The vast majority of households have medical and dental insurance, liability insurance (obligatory for vehicles), fire insurance, home insurance, and property insurance.

<sup>221</sup> Explanatory Memorandum Act Terwee (1989-1990), p. 17.

<sup>222</sup> Explanatory Memorandum Guideline Terwee, pp. 9-10.

priority over other financial sanctions, and the victim receives too little assistance with the collection of the money from the offender.

Concerning actual implementation, research (1998) shows that the enforcement of the compensation measure differs greatly among the 19 legal districts. Not all prosecutor's offices are diligent in sending enforceable cases to the national debt collection agency. The four major legal districts (Amsterdam, Rotterdam, Den Haag, and Utrecht) perform very poorly in this respect. Furthermore, the great discrepancy of the requests to the courts to impose a compensation measure and the actual number of cases in which the measure was imposed is influenced by its enforcement, amongst other things. As said above, the enforcement was initially in the hands of the prosecution service, which did not perform adequately. A stigma, however, has stuck to the compensation measure even since the enforcement was done by the debt collection agency. Judges are generally unaware of the improved collection by the debt collection agency that effectively executed more than 50% of the compensation measures within its first year, and has been even more successful at later stages. Many judges indicated another reason not to impose the compensation order: since it cannot be related to the financial capacity of the offender, they consider it unjust to impose the measure when they know beforehand that the offender cannot pay (within 27 months) and will be taken into custody, but still has to pay. Judges specifically object to the fact that custody does not relieve the obligation to pay, as is the case with fines. Certain judges, furthermore, object to the fact that during the enforcement stage the amount of money the offender should pay may increase with interest and costs (fines for non-payment). Besides, judges realize that the compensation measure is usually combined with a prison sentence. Enforcing the compensation measure on a prisoner is rather difficult. In multiple-offender cases, offenders are severally liable (*hoofdelijk aansprakelijk*) to pay the compensation measure: if one offender pays, the others go shot-free unless the former persuades the latter to pay their share. This greatly frustrates the willingness of offenders to pay the compensation measure and hinders enforcement.<sup>223</sup>

The enforcement of compensation attached to the suspended sentences is much easier. The only problem is that it is not often used (see § 7.2, D.13)

For obvious reasons, the enforcement of the civil claim for compensation by the individual victim causes the most frequent and biggest problems. The legislature expected to solve these problems by introducing the compensation measure. In part, this intention has been realized by the fact that the courts simultaneously award compensation to the civil claimant and impose the compensation measure for exactly the same amount (see § 7.2, D.11). The victim is then told to wait with enforcement to allow the national debt collection agency to enforce the measure. If this turns out to be unsuccessful, the victim may try it himself. Most probably, this will never happen because a realistic victim will know that he stands little to no chance of succeeding where the state failed. At present, the legislature is discussing the possibility to allow the debt collection agency to enforce the civil claim of the victim as well.<sup>224</sup> This, however, will require some changes because the debt collection agency can only act on the explicit orders of the prosecution service. However, the Swedish example shows that solutions can be found to solve these technical problems. Ironically, if the debt collection agency would be empowered to enforce compensation awarded under the adhesion model, the compensation measure, as it is used today, would become utterly superfluous.

<sup>223</sup> B&A Groep (1998), pp. 81-83.

<sup>224</sup> B&A Groep (1998), p. 81.



## 8 TREATMENT AND PROTECTION

### 8.1 Victim-Awareness Training

#### *The judiciary*

All members of the judiciary (both judges and public prosecutors, except for 'outsiders', see below) are trained in the same manner during six years (*Raio-opleiding*). This training dates from 1956. Members of the judiciary receive four years of legal training, which consists *inter alia* of a 16-month practical training period at the district court (including 6 months training at the criminal chamber of the court) and a 10 months training at the office of the public prosecutor, after which the trainee chooses a future career as a public prosecutor or a judge. The remaining two years will be spent on a practical training outside the judiciary. For instance by working with a law firm, within the police, or at the Ministry of Justice. Besides, persons who work as jurists, for instance as university lecturers or lawyers, may become (substitute) judges or join the prosecution service. These persons, referred to as 'outsiders', may have to be trained as well for two or three years depending on their experience and expertise. In addition to the six-year training period, practising magistrates should attend on the job-training given by a specialized national training centre (*Stichting Studiecentrum Rechtspleging*). Public prosecutors have to enrol in courses on how to deal with victims (*cursussen slachtofferomgang*). This course is unique in Europe and is intended to prevent of secondary victimization.<sup>225</sup>

#### *The police*

In 1994, the Advisory Committee for the Police recommended new training programmes to enhance knowledge of victim-related duties of the police force.<sup>226</sup> Today, police schools and academies recognize that training of the police is essential since they are the first to come into contact with victims of crime. Besides, training may be a way of promoting changes in police culture and working methods. Early on, it was realized that real change can only be brought about if both recruits and incumbent personnel are trained, and if police management create the conditions necessary for a proper treatment of victims. The conditions within police stations to deal with victims have been greatly improved over the last years. Here, the influence of the Terwee network partners (see § 3.7) has been, and still is, significant. Moreover, they have contributed to the feeling that victim-related duties are important.

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

Current training programmes are firstly based on three police ranks: police constables, police officers, and police executives. For the first two categories, the police schools are responsible for the training (*herziene primaire opleidingen*). The police executives attend the

<sup>225</sup> See SSR, *Introductie Pakket Raio linging 1999 II*, 1999: p. verdiepingstage slachtofferzorg, point 11. See also M.S. Groenhuijsen (1993), p. 5.

<sup>226</sup> Adviescommissie politie en slachtofferzorg, 'De menselijke zorg voor slachtoffers: politiewerk bij uitstek, Tweede tussenrapportage', in: Eindrapport adviescommissie politie en slachtofferzorg, *Slachtofferzorg als kwalitatief hoogwaardig onderdeel van de integrale veiligheidszorg*, Den Haag, Leeuwarden, 1994, pp. 28-30.

police academy. The police schools train recruits on how to treat victims in a constructive manner during the basic police course (*recherche basis cursus*). The attention for the treatment and the position of victims has been integrated into almost all subjects taught. This is very important because it shows police officers from the beginning that the treatment of victims is not restricted to the moment of reporting but is something that should be constantly remembered.<sup>227</sup> In addition, the training programme for all new recruits includes the course Victim Assistance and emphasizes the basic duties as contained in the Victim Guidelines (Terwee, Vaillant, De Beaufort). The curriculum at the police academies also integrates victim assistance in the different courses and also contains the course Victim Orientated Activities. Training programmes for the royal constabulary are more or less the same as the programmes for the ordinary police force.<sup>228</sup>

Incumbent police officers who perform routine activities regarding the treatment of victims are given courses for specific duties. Training for police officers working with victims is tailored the function concerned.<sup>229</sup> For instance police officers working with children and victims of sexual offences are given specific, and extensive training.<sup>230</sup> Even receptionists and desk-clerks are trained during the course Victim Assistance by the Police (40 hrs. of self-study and 3.5 days of training in small groups of 15 persons). The courses Victim Act Terwee Instructor I and II (*Kerninstructeur Wet Terwee I, II*) are given to police officers who give in-service training to colleagues. The course takes two days and can be followed by eight persons per group.<sup>231</sup>

The in-service training programme is very important for the realization of police duties on the work floor. This type of training already existed prior to the Victim Act and Guidelines Terwee.<sup>232</sup> Evaluation of the experiments showed that police officers appreciate the extra training, especially the courses on how to deal with the emotions of victims and workshops on structuring their face-to-face conversations with victims. Nevertheless, the training cannot give a standard prescription of how to treat an individual victim. Dealing

<sup>227</sup> For instance, in the course Activities at the Station and on the Streets (160 hours), the daily activities of police officers are taught. The point of departure of this course is respect for human rights, dealing with stress and emotions, questioning techniques and victim assistance. The Legal Protection course (160 hrs) teaches police officers how to take down a report and to treat victims according to international standards. Victim assistance is also dealt with during the courses Common Crimes (160 hrs), Violence Control (160 hrs), Conflict Resolution (160 hrs), and Crimes against Personal Integrity (160 hrs). In the last course the police are trained how to deal with victims, surviving relatives, and other persons involved. See Landelijk Selectie en Opleidingsinstituut Politie, *Basisopleiding voor de agent*, Amersfoort, 1994, pp. 21-27, 34-36.

<sup>228</sup> Adviescommissie politie en slachtofferzorg (1994), pp. 28-30.

<sup>229</sup> Adviescommissie politie en slachtofferzorg (1994), pp. 28-30.

<sup>230</sup> Police officers working with victims of sexual crimes should, at least, follow the courses sexual offences (*zedenzaken module*), sexual (deviant) behaviour (*cursus seksueel (afwijkend) gedrag*), and finally dealing with sexual violence (*cursus omgaan met seksueel geweld*).

<sup>231</sup> Information provided by the National Institute for the Selection and Training of the Police (*Landelijk Selectie en Opleidingsinstituut Politie*).

<sup>232</sup> In the police districts of Alkmaar and Eindhoven, for instance, the police experimented with training regarding house calls of victims. In Utrecht, during the period 1985-1989, an on-the-job training programme called Treatment of Victims and Civil Claimants was set up. The programme consisted of a training on how to treat victims during and after the reporting of a crime, including visiting victims of serious crime at home. See A.W.M. Eijken, D.D. van Oostzee, *Slachtofferzorg en criminaliteitspreventie, werkwijze en effecten bij slachtofferzorg en preventieve voorlichting door politiefunctionarissen*, Ministerie van Justitie, 1991, pp. 12-14.

with victims requires a great amount of sensitivity and flexibility of police officers. The approach has to be adapted every time to the feelings, emotions, and knowledge of the victim concerned. The training give the police something to hold on to in difficult situations. The on-the-job training programmes have proven to be effective. A real change in attitude of the police officers could be noticed. However, such changes in attitude and mentality demand considerable effort and commitment of the police force.<sup>233</sup> Old habits can easily be reinstated if the relevance of victim-oriented activities and a respectful treatment of victims are not incessantly emphasized by police management and high-ranking officers. In spite of the fact that the attitude of police officers is favourable to a sympathetic and constructive treatment of victims, they are more easily persuaded to act accordingly if the crime has been particularly serious. Concerning common and less serious offences, the police may fail to see the importance of being supportive. Furthermore, the attitudes of police management and public prosecutors towards victim-related activities of the police are crucial to those police officers who find it hard to integrate the new basic police tasks in their daily routine and standard working methods.

In practice, the police treat victims with more consideration, whether this is due to the improved training or as a result of the implementation of the Act and Guideline Terwee is not clear. It is, however, undeniable that issuing the Guideline Terwee together with the Act has helped putting victim assistance on the agenda (see § 6.1, A.2). Four years after the nationwide implementation of the Victim Act and Guideline Terwee, 82.1% of the victims are satisfied to very satisfied with their treatment by the police.<sup>234</sup> This very high percentage of satisfied victims is not surprising if one considers the efforts of the police forces and academies to improve the treatment of victims.<sup>235</sup> Nevertheless, there is always room for improvement. According to the 1996 study on victim assistance by the criminal justice authorities, the treatment of victims by the police may be further improved by four practical measures. The police should attempt to avoid long waiting periods. Staying in the waiting room should be made more enjoyable by paying more attention to the looks of the place. Brochures and leaflets should be put on display in the waiting room. And it was advised to pay more attention to the privacy of victims when reporting the crime.<sup>236</sup>

<sup>233</sup> See A.W.M. Eijken, D.D. van Oostzee (1991), p. 16.

<sup>234</sup> B&A Groep (1998), p. 121. Regarding the treatment by the prosecuting authorities, the percentage is much lower: 61.1% of the victims were (very) satisfied with the way they were treated (ibid: p. 121).

<sup>235</sup> It is important to note that all police districts have created the possibility for citizens to complain about the treatment by the police, and/or any activities or omissions of the police. Since May 1995, complaints can be sent to the mayor, or can be presented to the police orally or by telephone. Following the reception of the complaint, the police and the unsatisfied citizen sit down together and discuss the problem. If the problem cannot be solved, the complaint should be written down and the problem will be investigated by a specially assigned police officer. Within six weeks, a decision should be taken by the mayor, who may seek the advice of an independent committee. See leaflet 'Dissatisfied or satisfied with the police?' (*Klachten of juist tevreden over de politie?*), which was sent to all households nationwide in 1995. For a more detailed analysis see M.P. Verberk, *Klagen bij de politie*, B&A Groep, Den Haag, 1998; and M.A. Hanrath, *Klagen staat vrij: de afhandeling van klachten bij de politie*, Publicatiereeks van de vakgroep criminologie VU Amsterdam, nr. 6, 1997.

<sup>236</sup> H.Geveke, M. Verberk (1996), pp. 47-48.

## 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 hearing and questioning of the victim in the role of witness in his case (see § 2.1 and § 5.5) will usually take place by the police and examining magistrates during the pre-trial stages. During the questioning, the victim may be accompanied by a trusted person.<sup>237</sup> The police are especially trained to question victims. The examining magistrates are not trained on a mandatory basis. They can, however, follow training courses on a voluntary basis. According to Van der Ley, victims who are questioned by examining magistrates more often perceived the hearing as fair, if compared to victims questioned in court. They were also more satisfied with the way they were treated during the questioning. But differences are not statistically significant.<sup>238</sup>

The criminal justice authorities are aware of the detrimental effect of questioning victims without consideration of their personal situation and feelings, and of the adverse effect of having to give testimony over and over again. Therefore, the criminal justice system tries not to subject the victim to repetitive questioning. The number of interviews and hearings of the victim can be limited since statements taken in the pre-trial stage can be used as evidence in court. The victim reports the crime to the police and gives a statement which may be used as evidence in court, without the requirement of oral explanations in court. Only in the more serious cases will the victim be questioned again by the examining magistrate, if the necessity arises. Witnesses are thus not called to testify in court, unless special circumstances make their presence necessary. Since 1986, however, decisions of the European Court of Human Rights<sup>239</sup> have forced the courts to somewhat change their practice and allow the defence counsel more opportunities to question witnesses (see § 5.5).

If witnesses are required to testify in court, they are first of all questioned by the members of the court and subsequently by the public prosecutor and the defence counsel. This does not mean, however, that cross examination exists in Dutch criminal proceedings (see § 3.3.1), nor that the victim will be confronted with the accused or subjected to hostile questioning. The court may decide to hear the victim-witness without the presence of the accused but in the presence of his counsel. In this way, the rights of the defence are safeguarded (s. 292 CCP). In practice, the accused is asked to leave the courtroom or to sit among the public. If the accused has left the room, the court will inform him on his return of what the witness has testified on his return, after which he may react to the statement. If necessary, the court may call the witness again. Furthermore, the court may disallow

<sup>237</sup> Concerning victims of sexual crimes this right is laid down in the 1999 Directive on the Treatment of Victims of Sexual Offences (§ 2), replacing the 1986 Guideline De Beaufort.

<sup>238</sup> Information supplied by J. Van der Leij, who is in the final stages of his doctorate thesis, *Getuigen voor de strafrechter (provisional title)*, University of Leiden/NSCR. See also J.B.J. van der Leij, M. Malsch, J.F. Nijboer, *De ontwikkeling van vraagregels voor de begeleiding van getraumatiseerde getuigen tijdens verhoorsituaties in strafrechtelijke context*, NSCR, Leiden, 1997.

<sup>239</sup> *Unterpertinger v. the Netherlands*, ECHR, 20 November 1986; *Kostovsky v. the Netherlands*, ECHR, 20 November 1989; *Baegen v. the Netherlands*, ECHR 27 October 1995; *Finkersieper v. the Netherlands*, ECHR, 14 March 1996; and *Doorson v. the Netherlands*, ECHR, 26 March 1996.

certain questions (s. 288 CCP). The courts quite easily intervene to protect the witness but, in general, defence counsels do not ask questions that are harmful or degrading. The courts do not particularly appreciate such defence strategies, therefore such questions are not in the interest of their client.<sup>240</sup>

The general practice of examining witnesses during the preliminary stages is beneficial for victims in the sense that they are not subjected to repeated questioning. On the other hand, victims may feel neglected, ignored<sup>241</sup> or not acknowledged as an important participant in criminal trials since his pre-trial statement – which may be very emotional and show their distress – will usually be written down in a concise form as legally relevant testimony. This is the more taunting because the victim cannot illustrate his declaration if he is not allowed to testify or is not present in court. However, even if the victim is present in court and is one of the few who are summoned to give evidence in court, he may only answer the questions put to him by the judges, the public prosecutor, or the defence counsel, and cannot speak his mind.<sup>242</sup>

Given the prevailing court practice of not hearing victims in court, the criminal justice authorities have traditionally tried to find ways of limiting the number of hearings without diminishing the reliability of the evidence procured. This is achieved by training the police in taking down reports in a manner that prevents the need for further questioning. With respect to child victims,<sup>243</sup> this goal is achieved by audio-visual registration of the interviews. Since 1990, the hearing of children in studios has been registered on videotape, as a rule.<sup>244</sup> According to the internal circular of the Amsterdam police force on Interview Studios (*Richtlijnen Interviewruimtes*),<sup>245</sup> and the almost identical national Protocol on Studio Examinations (*Protocol Studioverhoren*),<sup>246</sup> the public prosecutor should give his permission to hear a child in a studio during the pre-trial stage.<sup>247</sup> If the suspect is someone with authority over the child (parents, teachers etc.), the questioning will take place during the preliminary judicial investigation.<sup>248</sup> In quite a few police stations, such studios have been installed to record the conversation between the young victim and the specially trained police officer. In former days, a psychologist did the questioning. However, practice showed that, although the psychologists were very good at questioning and addressing a child, they were not trained to ask the right questions to gather evidence. As a result, it was decided to train experienced police officers in child psychology. The police interviewer should know how to ask open-ended questions and not to repeat questions: small children want to please adults, so they tend to change their answers because they think that the first answer was

<sup>240</sup> C.J. van Bavel, R.P.G.L.M. Verbunt, 'Slachtoffer/getuige in zedenzaken en verhoor ter zitting', *NJB*, 1990, nr. 36, pp. 1402-1403.

<sup>241</sup> M.S. Groenhuijsen (1993), pp. 5-6.

<sup>242</sup> See H. Slotboom, 'Veilig in de armen van de Staat?', *Nemesis*, 1994, nr. 3, pp. 67-69.

<sup>243</sup> In this respect a child is someone who has not yet reached 16 years of age.

<sup>244</sup> J. Oost, J. Jans, 'Kinderen horen met video wordt landelijk ingevoerd', *Algemeen Politieblad*, 1990, pp. 470-472.

<sup>245</sup> Internal guideline police force of Amsterdam, *Interne richtlijn politie Amsterdam*, June 1990.

<sup>246</sup> *Protocol studioverhoren*, October 1994.

<sup>247</sup> See M. Boelrijk, 'Kinderen als getuige', *Proces*, 1995, vol. 74, nr. 5, p. 146.

<sup>248</sup> The Supreme Court has decided in 1984 that an examination by the police in this stage is allowed, even though, the examining magistrate would normally perform the questioning. HR 22 November 1984, *NJ* 1984, nr. 805.

wrong.<sup>249</sup> The studio is designed in a child-friendly manner so as to make the child feel at ease. It is colourful, the furniture is downsized, drawings made by children are on display, and a lot of toys are available. The studio is divided into two parts, separated by a one-way screen or a screen of ordinary glass.<sup>250</sup> In principle, the persons sitting behind the screen are the defence lawyer,<sup>251</sup> another police officer, the examining magistrate<sup>252</sup> and experts such as a behavioural scientist.<sup>253</sup> They monitor the interview and may suggest additional questions to the interviewing officer, who will go to the other side of the screen to consult them at least once. Before the interview takes place, the child is fully informed about the proceedings. He is shown the video equipment and introduced to the persons behind the screen. Practice has shown that sincerity and candour give the best results.<sup>254</sup> Throughout the recording there is a timer to be seen on the screen. The time device offers the defence a control mechanism to check the tape's validity and to ensure that no cuts have been made to leave certain answers out.<sup>255</sup> If the interview leads to a conclusive statement and the defendant does not have well-founded objections to the line of questioning, there will be no need to hear the child again and the video may be used as evidence in court.<sup>256</sup>

In July 1999, the Minister of Justice published the report *Combatting Sexual Abuse of*

<sup>249</sup> See further S. Baxter, 'The suggestibility of child witnesses: a review', *Applied Cognitive Psychology*, 1990, nr. 4, pp. 393-407; J.C.J. Bonarius, 'Het horen van kinderen als getuige bij incest: het verschoningsrecht', *NJB*, 1994, nr. 34, pp. 1167-1171; H.R. Dent, G.M. Stephenson, 'An experimental study of the effectiveness of different techniques of questioning child witnesses', *British Journal of Social and Clinical Psychology*, 1979, nr. 18, pp. 41-51; R.A. Gardner, 'Leading stimuli, leading gestures and leading questions', *Issues in Child Abuse Accusation*, 1992, nr.4, pp. 144-155.

<sup>250</sup> The Amsterdam police force used to a two-way screen. The one-way screen seemed to frighten or distract many children who wanted to know what happened behind it. Today the children can see the persons on the other side. In other parts of the country, for instance in Eindhoven a one-way screen is used.

<sup>251</sup> According to the Guidelines concerning the Interview studio, the defence counsel may see the video-tape. In practice, however, he is invited to the hearing to allow him to suggest questions. This practice is caused by case-law of the European Court for Human Rights. Police officers do not wish to see that the evidence gathered during the hearing of a child will be declared inadmissible because the defence counsel did not have the opportunity to put questions to the witness.

<sup>252</sup> The presence of the examining magistrate is indicated if the hearing takes place during the pre-trial judicial investigative stage. See M. Boelrijk (1995), p. 146.

<sup>253</sup> J.C.J. Bonarius (1994), p. 1168.

<sup>254</sup> Much to the surprise of the interviewers, once the persons behind the screen are known to the child, he does not pay them much attention or question their presence, not even if a normal glass (two way) screen is used.

<sup>255</sup> Information supplied by Mrs. K. Dekens of the National Institute of Selection and Training of the Police and Police Academy Zutphen, department of behavioural sciences, Amsterdam 22 August 1997, and by police officers of the Amsterdam-Amstelland regional police force during a visit to child-friendly facilities and videotaping rooms, 22 August 1997. See also, for instance, paragraph 3F of the Guideline on Audiovisual Recording of the police district 's Hertogenbosch.

<sup>256</sup> M.S. Groenhuijsen (1993), p. 12-13. For more detailed information about the child as a witness, see K.M.K. Dekens, J. van der Steen, *Het kind als getuige: theorie en praktijk van het verhoor*, Vuga, Den Haag, 1997.

and Sexual Violence Against Children.<sup>257</sup> According to this report, one in three girls and one in thirty boys are sexually abused prior to the age of 16. An important aspect of the proposed legal reform, following the report, is that the vice squads will be set up again, after they have been abolished during the police reorganization in 1994 (see § 4.3.2). The abolishing of the vice squads has always been opposed by the police forces.<sup>258</sup> In the Minister's report it is stated that two officers should always be present during the examination and that the interview should be recorded on tape. In difficult situations, an expert in behavioural sciences should be consulted. The subsequent Directive on the Treatment of Victims of Sexual Offences of October 1999 stipulates that expertise of the police officers handling these cases is essential. Police officers who are not trained to work with this group of victims should immediately refer victims of sexual crimes to a specialist within the police.<sup>259</sup>

In practice, specific procedures and practices are already in operation to protect the victim of sexual crime and other vulnerable victims (see § 8.3). Such additional procedures are necessary because in these cases the pre-trial statement of the victim will frequently be challenged by the accused. However, this is not to say that in all these cases the victim will be questioned in court. The victim may have been questioned already by the examining magistrate. If the latter then considers the testimony of the victim reliable and trustworthy, and the defence counsel has had the opportunity to put questions to the victim-witness, it is rare for the defence to ask the public prosecutor to call the victim to the stand.<sup>260</sup> In the event that the defence has requested to examine the witness in court, the public prosecutor may decline to summon him if the accused cannot be said to be harmed in his defence by not- summoning the witness. The defence lawyer will be informed by a letter containing the reasons for the refusal (s. 263-4 CCP), after which the defence lawyer may request the court to summon the victim. Again, the court may refuse. According to case law, the most common reasons for refusal are that (a) the court considers the questions the defence wishes to put to the victim irrelevant; (b) the questions have already been put to the victim by the examining magistrate; or (c) the victim cannot attend the trial for certain special reasons. In addition, the case law of the European Court of Human Rights is very relevant here.<sup>261</sup> In the *Poitrimol* case,<sup>262</sup> the Court already accepted in general phrasing that the interests of victims can be taken into consideration. Concerning the right to question victims during the trial, the case of *Baegen v. the Netherlands* is of critical importance.<sup>263</sup> The European

<sup>257</sup> Ministerie van Justitie, *Bestrijding van seksueel misbruik en seksueel geweld tegen kinderen*, Den Haag, 19 July 1999.

<sup>258</sup> In 1994, the legislature held the opinion that every police officer should be able to deal with sexual violence (generalization was preferred to specialization). The police forces always stated that this would inevitably lead to the vanishing of expertise and specific knowledge. For that reason the Amsterdam police force always refused to do away with its vice squad. Five years later, the chiefs of police were proven right (see § 4.3.4.1).

<sup>259</sup> *Aanwijzing bejegening slachtoffers zedendelicten*, Directive of the Procurators-General, October 1999, published on the 10<sup>th</sup> of September 1999. The Directive replaces the Guideline De Beaufort.

<sup>260</sup> C.J. van Bavel, R.P.G.L.M. Verbunt (1990), p. 1400.

<sup>261</sup> See for instance M.S. Groenhuijsen, 'Mensenrechten van slachtoffers van delicten en verdachten in het strafproces', in: C.H. Brants c.s. (eds.), *Er is meer*, Gouda Quint, Deventer, 1996, pp. 171-173.

<sup>262</sup> ECHR 23 November 1994, *Poitrimol v. France*.

<sup>263</sup> ECHR 27 October 1995. The case was removed from the cause list. The report of the Commission therefore serves as guiding principle.

Committee held 'that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protection the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence'(par. 77).<sup>264</sup> This opinion was repeated in the *Finkensieper* case<sup>265</sup> and in the 1995 incest case.<sup>266</sup> In the latter case, the applicants complained about the fact that the victim-witnesses were not heard in appeal, in the presence of the applicants during a public hearing, and were not ordered by the court to answer detailed questions about the rape. The Committee, however, declared the complaints inadmissible. The victims were previously heard by the defence counsel. Moreover, the questioning of one of the victim-witnesses had to be stopped repeatedly because of the emotional state of the victim. In such circumstances it is acceptable that the court did not oblige them to answer all questions of the defence. The fact that the trial was held behind closed doors and in the absence of the applicants was not considered a violation of the Convention. The applicants and their counsel were allowed to follow the questioning through a live television circuit, after which they could suggest additional questions. This procedure safeguarded an adequate and effective exercise of the rights of the defence.

<sup>264</sup> 'The Committee has regard to the special features of criminal proceedings concerning rape and other sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the victim's private life. Therefore, the Committee accepts that in criminal proceedings concerning sexual abuse certain measure may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.'(Comm. Rep. 20. 10.94, paragraph 77).

<sup>265</sup> *Finkensieper v. the Netherlands*, ECHR 14 March 1996. This case concerned sexual abuse by the Dutch medical doctor Finkensieper in the setting of a psychiatric hospital. The victim-witnesses were four (former) patients of Finkensieper, who claimed not to be able to testify in the presence of the accused. The complaint was filed with the European Committee in 1992 and was declared admissible on 30 November 1994. The Committee repeated its point of view in the *Baegen* case in par. 66 of its report in the *Finkersieper* case. In the par. 60- 63, the Committee held that regarding the three victim-witnesses whose identity was known to the applicant and who were heard by the examining magistrate in the presence of the applicant's lawyer, who had the opportunity to question them, the criminal courts refusal to hear them again in appeal was not unreasonable or arbitrary. Regarding witness C., the situation was different. She had not been heard in this manner. The Committee held that 'it would have been preferable to hear her in person, however, taking into account the sensitive nature of the case and the problems C. apparently experienced, that the assessment of the court of appeal cannot be regarded as arbitrary or unreasonable. Furthermore, the applicant [...] knew C.'s identity and had the opportunity to comment on her statements in the course of the proceedings against him' (par. 67). The Committee concluded that, in the particular circumstances of the case, the applicant was not deprived of a fair trial within the meaning of Article 6 of the Convention.

<sup>266</sup> A., R., J., R. and W. Kremers, E.Hols, complaint nrs. 25205/94, 25207/94, 25208/94 and 25206/94. Complaints declared inadmissible by the European Committee on 19 October 1995.



### 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.*

Prior to the trial, the provision of information by police and prosecution service to the media is a delicate matter and is prone to a clash of interests between the interest of investigation or prosecution, the right to information of the public, and the right to privacy of victims and their families. Therefore, the information and public relations policies are governed by the Act on the Publicity of Administration (*Wet Openbaarheid van Bestuur*, May 1980),<sup>267</sup> the 1990 Guideline on the Relation between the Investigating and Prosecuting Authorities and the Media,<sup>268</sup> as well as the 1992 Guideline on the Provision of Information by the Police and Prosecution service to the Media about criminal cases.<sup>269</sup>

The 1990 Media Guideline holds the prosecution service responsible for public relations policies, even if the police actually give the information to the media. Information can only be given to the media through the official spokespersons of the police and prosecution service. It formulates a general code of conduct which prevents revealing the identity of victims, relatives of the deceased victim, witnesses, and persons who have reported the offence, unless their identity is already known to the public. The 1992 Media Guideline on the provision of information to the media in criminal cases stipulates again that information can only be provided by the official spokespersons. If spokespersons of the police give information to the media about criminal cases, this is done under the authority of the prosecution service. The police and prosecution service should make arrangements that allow consultations about the provision of information. Prior to the provision of information to the media, the interests of informing the public and the privacy of suspects, accused persons, victims, and witnesses should be weighed against each other. The balancing of interests should be done following certain criteria. The general idea is that authorities should be reticent with offering information to the media on individual cases. Normally, only information should be provided upon request by the media (passive approach). Only if a crime has caused great social unrest, the authorities may adopt a pro-active approach to

<sup>267</sup> Surprisingly, the Guideline on the Provision of Information to the Public by the Police and Prosecution Service of 26 May 1986 does not contain any relevant rules in this respect; *Circulaire aan de procureurs-generaal van de gerechtshoven, vastgesteld door de Minister van Justitie inzake informatieverstrekking door politie en Openbaar Ministerie*, Stcrt. 1986, 108.

<sup>268</sup> Guideline of the Procurators General of 16 August 1990 on the provision of information to the media by the police and the prosecution service and its public relations policies, *Richlijnen, vastgesteld door de procureurs-generaal bij de gerechtshoven inzake informatieverstrekking en voorlichting door politie en openbaar ministerie aan de media over strafzaken*, Stcrt. 1990, 161. See also the Guideline of the Ministry of Justice to the Procurators General and Chief Public Prosecutors on the provision of information by the criminal justice authorities of 27 May 1992, *WOB-circulaire Informatie verstrekking door politie en Openbaar Ministerie*, Stcrt. 1992, 111.

<sup>269</sup> Guideline concerning the provision of information by the criminal justice authorities to the media about criminal cases, 6 May 1992, *Richtlijn betreffende informatieverstrekking door politie en Openbaar Ministerie aan de media in en over strafzaken*, Staatscrt. 1992, 86.

inform the public. However, information may never be provided about persons involved in a criminal case, nor may information be made public regarding their nationality, ethnic origin, or sexual preference. The identity of victims, witnesses, or surviving relatives cannot be made public. Their personalia cannot be mentioned, nor any other particular that would enable their identification.<sup>270</sup>

During the trial, the presence and conduct of the press and other media in the court room is subject to the court's approval and control. The court may take all necessary measures to protect the privacy of the parties and persons involved in the case (s. 273 CCP), or to avoid hindrance to the trial proceedings caused by the presence of reporters, photographers or camera crews (s. 124 CCP).<sup>271</sup> At present, television cameras are rarely allowed in the court room. However, there is an ongoing discussion in academic writings and public debate about the pros and cons of the presence of the media in the courtroom.<sup>272</sup> In practice, the Dutch media very rarely reveal the identity of the accused or the victim. To date, only their initials are published. Never do any drawings, pictures, or TV registrations show the faces of persons involved in the trial proceedings, except for the judge, the public prosecutor, and the defence counsel. The accused and the victim are only depicted from behind, or a bar is placed over their faces. Even the tabloids and reality-tv programmes abide by these rules of conduct.

Concerning the option to hold the trial *in camera*, s. 121 of the Constitution allows exceptions to the principle of publicity. Trials can be held *in camera* if the legislature has stipulated proceedings behind closed doors -for instance in juvenile court-, or if the court rules that there are well-founded reasons to have the proceedings partly or entirely behind closed doors (s. 20 AOJ). The court may decide to hold the trial *in camera* in the interest of public morals, public order, or fair criminal proceedings, and finally if the court wants to protect the privacy of the suspect, minors, or other persons involved in the case (s. 269 CCP). All persons and parties involved in the trial proceedings may ask the court to hold the trial *in camera*. This request, however, cannot be done *in camera*; it must be done in public because there should be some degree of public control over the proceedings. If the trial is partly held behind closed doors at, for instance, the request of the witness, the trial hearing will usually continue in public after the hearing of the witness. Also, the court may decide to remove persons removed from the courtroom who hinder the trial proceedings, for instance, if the accused or other persons of the public threaten the personal safety or (mental) health of the victim. If the accused is not present during the questioning of the victim-witness, he can either follow it through a live television link and suggest additional questions, or he is informed of the statement and is given the chance to react and suggest additional questions.

Furthermore, the victim can be granted anonymity to protect him from undue publicity or intimidation (see F. 16). For the anonymous witness, the Doorson case<sup>273</sup> is very relevant:

'It is true that Article 6 does not explicitly require the interests of witnesses in

<sup>270</sup> Guideline on the provision of information by the criminal justice authorities to the media about criminal cases, 6 May 1992, §§ 4, 5 and 6.

<sup>271</sup> G.J.M. Corstens (1995), pp. 516-520.

<sup>272</sup> R. Pagano, *Recht op TV*, Arnhem, Gouda Quint, 1992; U. van de Pol, *Openbaar terecht: een onderzoek van het openbaarheidsbeginsel in de strafrechtspiegeling*, Arnhem, Gouda Quint, 1986; Y. Heslinga, 'Camera's in de rechtszaal zijn riskant', *NRC*, 31 May 1997; U. van de Pol, 'Rechtbank kan televisie niet langer weren', *NRC*, 16 May 1997.

<sup>273</sup> EHRM 26 March 1996. This case concerned anonymous witnesses Y.15 and Y.16.

general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security in person may be at stake [...] Against such backgrounds, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify. As the Amsterdam Court of Appeal made clear, its decision not to disclose the identity of Y.15 and Y.16 to the defence was inspired by the need, as assessed by it, to obtain evidence from them while at the same time protecting them against the possibility of reprisals by the applicant. This is certainly a relevant reason to allow them anonymity [...] In the instant case the anonymous witnesses were questioned at the appeal stage in the presence of counsel by an investigation judge who was aware of their identity [...] Counsel was not only present, but he was put in a position to ask the witnesses whatever questions he considered to be in interests of the defence except in so far as they might lead to the disclosure of their identity, and these questions were all answered [...] the Court considers, on balance, that the Amsterdam Court of Appeal was entitled to consider that the interests of the applicant were in this respect outweighed by the need to ensure the safety of the witnesses [...] Finally, [...] it is sufficiently clear that the national court did not base its findings of guilt solely or to a decisive extent on the evidence of Y.15 and Y.16.' (par. 70-76)

In practice, as the Doorson, Baegen and Finkensieper cases (see F.16) illustrate that judges are generally aware of the risks of secondary victimization and protect the victim-witness as much as they can. If a victim of a serious crime has well-founded reasons to want to avoid contact with the perpetrator while he is giving testimony, whether or not *in camera*, the court may order the accused to leave the courtroom and only allow the defence counsel to question the witness. Though the defence counsel may ask questions to the witness, the court controls the line of questioning and can disallow certain questions. At the end of the questioning, the court tells the defence to confer with his client to see if the accused would like to suggest certain questions. This practical procedure safeguards the rights of the accused as well as those of the victim.

Finally, one aspect of daily practice has to be addressed, i.e., the stay in the court's waiting rooms. This may cause serious difficulties for victim(witnesses). Normally, persons involved in criminal proceedings are waiting in the same hallway or waiting room. This practice may be unacceptable when serious crime is involved. To avoid intimidation and emotional harm to victims or witnesses, the courts should create separate waiting rooms for victims and accused persons. Several courts have already created such facilities.

*(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.*

With respect to the protection of victims who fear intimidation or retaliation because they have to give evidence, it is important to stress that the victim is seldom required to testify in the courtroom. Moreover, the public prosecutor and the court may refuse to summon the witnesses who are requested in court by the accused (see § 8.2 and F.15). Furthermore, legislation as well as case law comprise several instruments to protect witnesses (see §§ 5.5 and 8.2).

The first way to protect the victim from intimidation or retaliation is to allow him to

report the crime anonymously or to elect domicile at the police station where he reports the crime. The purpose of this option is to prevent the accused from learning the victim's address from the file. No data are available to assess how often reports are made anonymously. Moreover, the names of victims and witnesses can be veiled from the suspect. The accused may be granted access to the legal file but the names and addresses can be made illegible to protect the privacy of the persons involved. According to the Minister of Justice the interests of the accused to know who reported the crime and who produced evidence against him may not be enough to outweigh the interest of the protection of their privacy.<sup>274</sup> No data are available on the actual implementation of this opportunity.

Secondly, witnesses may testify anonymously (see § 5.5 and F.15). Case law played an important role with respect to the protection of the identity of witnesses. It allowed anonymous witnesses to make their entrance in the 1980s. Since then, the criminal justice system has been increasingly confronted with witnesses who feel threatened and do not wish to give evidence in court, or to reveal their identity. These witnesses may be victims but also, for example, undercover police officers. They all have in common that they are not willing to give evidence during the pre-trial stages in the ordinary manner because suspects have the right to see the file and can learn the personal details of the witnesses from the legal file or because they may be compelled to testify in person during the trial. However, already in 1989, the European Court of Human Rights restricted the use of anonymous witnesses (the *Kostovski* case). Hereafter, a law reform was introduced in 1993. In April 1997, however, the European Court again restricted the use of anonymous witnesses (the *Oirschot* case) by sanctioning the use of anonymous statements by police officers. It decided that the accused had been violated in his right to have a fair trial, particularly since the conviction was based almost entirely on the evidence given by anonymous witnesses.

According to the Witness Protection Act (*Wet Getuigenbescherming*, ss. 226a – 226f CCP), the examining magistrate may order to veil the identity of the witness from the defence counsel and the accused if (a) the witness justifiably fears for his life, health or security, and/or if his family life or socio-economic status is at risk, and (b) the witness has declared that he refuses to testify because of threats (s. 266a-1 CCP). It is not allowed, however, that the identity of the anonymous witness is also veiled from the examining magistrate.<sup>275</sup> The examining magistrate's decision should be given in writing and should contain his reasoning. The accused and the witness may lodge an appeal against the decision (within 14 days) with the court of appeal, which tries the appeal as a court sitting in chambers (s. 226b CCP). If the witness has been granted to right to remain anonymous (s. 266c CCP), the examining magistrate may decide to deny the defence counsel the right to be present during the hearing (s. 266d-1 CCP). However, it is given a nameless transcript of the hearing and the opportunity to suggest questions in writing before the hearing (s. 266d-2 CCP). The examining magistrate examines the reliability of the witness and accounts for his opinion in writing (s. 266e CCP). The examining magistrate has furthermore the authority to strike personal details from the records (s. 266f CCP). This practice was allowed by the European Court of Human Rights in the case *Doorson v. the Netherlands* (par. 70). The Court stated that the right of the defence to a fair trial may discord with the interests of witnesses whose 'life,

<sup>274</sup> This statement of the Minister of Justice (October 16, 1996) was made with regard to a case in which a person was accused of rape and placed under arrest. The accused was released because there was no conclusive evidence and he requested to know the names of the reporter of the crime, the witnesses, and fellow suspects.

<sup>275</sup> Decision of the ECHR in the *Kostovski* case.

liberty or security of person may be at stake, as may interests coming generally within the ambit of Art. 8 of the Convention.' 'Contracting states should organise their criminal proceedings in way that those interests are not unjustifiably imperiled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are counterbalanced by those of witnesses [...] called upon to testify.' Furthermore, the evidence may not be based 'solely or to a decisive extent' on the anonymous testimony.<sup>276</sup> This criterion is more explicit than the Dutch criterion of s. 344a CCP and of the Supreme Court in its decision of 8 September 1998.<sup>277</sup>

The decision of the examining magistrate to recognize the witness as a threatened witness whose identity should be concealed is thus critical (*bevel bedreigde getuige*, s. 226a CCP). Once this decision is taken, the witness no longer needs to be concerned that this status will be taken from him during the criminal proceedings.<sup>278</sup> As a threatened witness, the examining magistrate hears the witness in the absence of the defence counsel and the public prosecutor (s. 226d CCP). The examining magistrate may also decide not to include the pre-trial witness statements in the legal file to protect the identity of the witness. According to Buruma, the defence counsel, and its defence strategy, is thus 'at the mercy' of the examining magistrate, and, in appeal, of the decision of the court of appeal sitting in chambers (s. 226b CCP). Only if the court trying the case holds the opinion that, due to exceptional circumstances, the use of the anonymous statement is contrary to Article 6 ECHR, it may decide that it will not take the anonymous statement into consideration.<sup>279</sup>

In addition to veiling the threatened witness' identity, the examining magistrate may decide to disallow certain questions, for example, questions regarding the identity of the witness if there is reason to believe that the witness will suffer hindrance either in his personal life or professionally (s. 190-2 CCP). This provision has been created to protect those witnesses who do not fall within the category of the threatened witness, but to whom testifying will cause serious anxieties and nuisances.

Apart from witnesses, also certain groups of victims may be in need of protection from intimidation or retaliation. Women who need protection from their (ex) partners can ask the court to impose an injunction not to frequent certain areas. In practice, however, such injunctions are not foolproof. Domestic violence and violence against women are serious problems in the Netherlands. According to the Report on Economic Costs of Domestic Violence against Women (1997), it is estimated that annually 211,000 women suffer from violence by their (ex) partners. The police have to undertake action 21,000 times annually regarding domestic violence and about 25,000 women have to seek medical treatment because of injuries inflicted by their (ex) partners.<sup>280</sup> A national survey indicated that about 45% of the Dutch have suffered from domestic violence. Domestic violence was defined to

<sup>276</sup> ECHR, 26 March 1996.

<sup>277</sup> The Supreme Court's criterion is that the facts contained in the indictment are proven by other items of proof. See Y. Buruma, 'De bedreigde getuige ter terechtzitting', *AA*, vol. 48, nr. 9, 1999, p. 665.

<sup>278</sup> See Supreme Court, 20 April 1999 and Supreme Court, 30 June 1998. See also J.G. Postma, *Behandeling door de raadkamer*, doctorate thesis University of Groningen, 1999, p. 156.

<sup>279</sup> Y. Buruma (1999), pp. 664-665.

<sup>280</sup> Stichting Vrouwenopvang, *Economische kosten van thuisgeweld tegen vrouwen*, 1997. The numbers are estimations of the researchers because exact numbers are not available. This is partly due to the fact that women do not always report domestic violence and the police do not always enter withdrawn reports in police statistics. See also the Report of the Ministry of Justice on Domestic Violence, *Huiselijk geweld*, Den Haag, October 1997.

include verbal, physical and sexual abuse within an relationship. In 27% of the households, domestic violence occurs on a weekly basis, and 11% of the victims suffer long-term medical consequences.<sup>281</sup> Faced with the reality that injunctions do not work satisfactorily, an experiment was set up in the legal district of Rotterdam. The aim of the experiment is to offer better protection to women who suffer from violence from their (ex) partners. Women are given a portable alarm (the Aware-system) which they wear around their necks. The system is comparable to portable alarms used in homes for the elderly to alert nurses. The alarm is directly connected to the nearest police station to allow the police to swiftly react to alarm calls. Women who want to use the Aware-system have to meet certain requirements. They must suffer from stalking or be threatened by their (ex) partners, and live separately from the abuser. The court must have ordered the offender not to frequent the street the victim lives in (*straatverbod*), and the victim must report the crime after having used the alarm.<sup>282</sup> Members of Parliament tried to pass a law on stalking in December 1997. The Bill introduces s. 301a CCP and penalizes the repeatedly interference in the personal life of others with the intent of forcing the other (not) to undertake certain activities, to tolerate certain behaviour, or simply to frighten the other.

Regarding the protection of sexually abused children, a Bill was introduced following the 1999 report *Combatting Sexual Abuse of and Sexual Violence Against Children* (see § 8.2) stating that, in serious cases, the courts should order the offender to move house, away from the neighbourhood of the child victim. According to the Minister of Justice, the court can already give such an order on the basis of existing legislation.

It is often asserted that, after conviction, the offender will be imprisoned for some years but the victim's anxieties continue during and particularly after his conviction and detention. Quite a few offenders harass, intimidate, and even brutalize their former victims from behind the prison walls, but this is of course much easier after their release. Therefore, the notification of any decision regarding the offender's detention may be important to these victims. In public and academic debates, the question has frequently come up whether victims should have the right to know about the intention of the authorities to grant the offender any period of leave, or to allow early release. According to Groenhuijsen, the fact that victims are not notified constitutes a serious shortcoming of the present system which should be remedied urgently.<sup>283</sup> In July 1999, the legislature is seriously considering the introduction of legal provisions similar to those applied in England and Wales (see Chapter 7).<sup>284</sup>

<sup>281</sup> Bureau Intomart (Oktober 1997), survey by order of the Ministry of Justice among 1000 households.

<sup>282</sup> In the United States of America and Canada, the Aware-system has been proven very successful and significantly improves the chances that the offender is caught in the act, and can thus more easily be tried and convicted. See *Stichting vrouwenopvang* (1997) and the *NRC*, 17 June 1997.

<sup>283</sup> M.S. Groenhuijsen (1998), p. 51.

<sup>284</sup> In 9 March 2000, it was announced that the prosecution service recognizes the right of victims of sexual offences to be informed about the (early) release of an offender and about any leaves of absence from the prison facility (*tussentijdse verloven*). The prosecution service will, furthermore, notify the local police.

## 9 CONCLUSIONS

In the Netherlands, the legislature and the criminal justice authorities, with the assistance of criminal justice partners, such as Victim Support, have been quite active to improve the position of victims of crime in the criminal justice system. One of the landmark achievements was the introduction of the Victim Act and Guideline Terwee. The Act Terwee provides for several new procedural rights for victims as well as for the introduction of the compensation measure, a variation on the common law compensation order. The introduction of the compensation measure is a daring innovation for a jurisdiction traditionally adhering to the *partie civile* model. The Guideline Terwee accompanying the Act is designed to ensure a better treatment of victims by the criminal justice authorities during both the pre-trial and trial stages.

The way in which the Act and Guideline were introduced in the Netherlands, first on an experimental basis in two legal districts as a pilot project and two years later on a nationwide scale, was an innovative approach. The aim was to use the experience gained in the two districts to shape the implementation of the Act and Guideline Terwee throughout the nation. Therefore, evaluation studies were carried out and steering groups (Terwee networks) were set up on the level of the legal districts. The phased introduction was both a venturesome and justified undertaking. Venturesome because it had never been done before, and justified by the legislative rule that one should never raise expectations that cannot be fulfilled, nor introduce legal reforms that cannot be implemented or upheld. The clever setup did not, however, yield all the benefits that were expected.<sup>285</sup> Learning by trial and error was less easily achieved than had been anticipated by the legislature. What is worse, however, is that the nation-wide implementation was not fully prepared. This is most clearly demonstrated by the enforcement of the compensation measure. In the pilot districts, this was done by the prosecution service. But it obviously lacked the expertise as well as the manpower to execute all measures on behalf of the victim after the experimental phase. Yet, it took one and a half years before serious steps were undertaken to assign the enforcement of compensation measures to the national debt collection agency. These kinds of initial mistakes should not be taken lightly because a bad start can have grave and lasting effects on the viability of legal reforms.<sup>286</sup> Today, members of the judiciary still claim that they have no confidence in enforcement of the measure.

Nevertheless, the most recent developments show that many of the difficulties faced by victims can be overcome by a thorough evaluation of causes and effects and by careful planning. The initiative to create networks composed of representatives of, *inter alia*, the police, prosecution service, Victim Support, probation services, and legal aid centres proved to be a crucial instrument to improve the actual implementation of legal reforms and victim-oriented measures. The Terwee network partners do not only contribute to success by signalling problems and seeking remedies, but are also essential to upgrading the performance of each of the criminal justice partners. The value of enhancing victimological awareness among members of the criminal justice authorities through their representatives in the steering groups should not be underestimated.

The Victim Act and Guideline have also greatly contributed to the formal and actual implementation of Recommendation (85) 11. On the whole, the achievements regarding information, compensation, treatment, and protection of victims of crime rank among the

<sup>285</sup> M.S. Groenhuijsen (1999), p. 99.

<sup>286</sup> M.S. Groenhuijsen (1999), p. 100.

highest in Europe. The provision of information to victims is taken very seriously and justly so. The police have built in compulsory procedures into their computer systems for recording reports of crime. This facilitates the duty of the police to take down the wishes of victims for information, notification, and compensation. And even though not every victim is given the information he is entitled to, as is shown by research, both the achievements and the progress made are considerable. Referral by the police to Victim Support is also done in a systematic manner. The improvements in the field of information in their turn have a positive influence on the realization of the right to claim compensation from the defendant. The automatic referral to and the assistance offered by Victim Support and legal aid centres with filling in the adhesion forms and giving accurate statements on the victim's losses and injuries is an example of best practice. It enables victims to present a claim that is thoroughly prepared and thus allows the court to decide on the claim during the criminal process. At the level of the courts and prosecution services, the creation of service desks to inform victims is a noteworthy initiative. As far as the treatment and protection of victims is concerned, the obligatory and extensive training of police and public prosecutors on victim-related subjects is essential to safeguard the interests of victims. The victim-awareness training of public prosecutors is even unique in Europe. Training enhances victimological knowledge, which is crucial to the manner of questioning and the protection of victims from unwanted publicity, intimidation or retaliation. As a rule, questioning is done in a manner that gives due consideration to the victim's personal situation and dignity. Concerning vulnerable victims, the questioning of children in specially designed interviewing studios combined with audio-visual registration, as well as the possibility of other victims to be heard in the absence of the defendant are examples of best practice. It is important to remark that the functioning of the criminal justice system is also helpful in this respect. Victims do not as a rule have to testify in court after having been questioned during the pre-trial stage. Regarding protection from publicity, again local realities generally prevent that the victim's identity is revealed. However, the Media Guidelines that forbid the criminal justice authorities to reveal the identity of victims, witnesses, or surviving relatives are important steps forward. Protection against intimidation is secured via the right to report or testify anonymously or through the possibility to remove the victim's name and address from the legal file. The examining magistrate may also order to veil the identity of the victim. For women who fear their (ex) partners, the Aware system experiment which provides these women with a portable alarm that is directly connected to the nearest police station may prove excellent protection.

Summarizing, the legal reforms of recent years have been of principal importance to victims of crime, even though they were themselves of modest dimensions. The reforms have created the framework necessary to recognize victims of crime as individuals with their own legal rights and interests. More importantly, however, the conditions have been created to make allowance for victims' interests in the course of a criminal process. Most reforms and victim-oriented measures represent best practice in a comparative perspective. However, this is not to say that no further enhancement is needed. For instance, the monitoring system which has been set up is a potentially excellent tool to measure implementation. To date, however, it is still functioning inadequately. The authorities, therefore, need to secure that data are fed into the system in a comprehensive and standard manner that allows nationwide assessment of actual implementation concerning victim-related reforms and practical measures.



# Supplements

## ABBREVIATIONS:

AA	-	Ars Aequi (journal)
ALA	-	Act on Legal Aid ( <i>Wet op de Rechtsbijstand</i> )
AOJ	-	Act on the Organization of the Judiciary ( <i>Wet op de Rechterlijke Organisatie</i> )
ASF	-	Act on the State Fund for Victims of Violent Crime
CCP	-	Code of Criminal Procedure ( <i>Wetboek van Strafvordering</i> )
DD	-	Delikt en Delinkwent (journal)
ECHR	-	European Court of Human Rights
HR	-	Supreme Court ( <i>Hoge Raad</i> )
NJ	-	Nederlandse Jurisprudentie (journal containing case law of the Supreme Court)
NJB	-	Nederlands Juristenblad (journal)
NRC	-	Nieuwe Rotterdamse Courant (newspaper)
PA	-	Police Act ( <i>Politiewet</i> )
PC	-	Penal Code ( <i>Wetboek van Strafrecht</i> )
R&R	-	Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie (journal)
RSF	-	Regulation on the State Fund for Victims of Violent Crime ( <i>Besluit Schadefonds Geweldsmisdrijven</i> )
Stb.	-	Staatsblad (Statutebook)
Stcrt.	-	Staatscourant (Gazette)
TvCr	-	Tijdschrift voor Criminologie (journal)
Tr. MB	-	Translation by Marion Brien
WODC	-	Wetenschappelijk Onderzoeks- en Documentatie Centrum (Ministry of Justice)

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