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## **THE UNFINISHED TRIANGLE:**

**THE CRIMINAL JUSTICE SYSTEM, THE VICTIM, AND THE OFFENDER**

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**A COMPARATIVE REVIEW OF VICTIM TREATMENT IN SOME CRIMINAL JUSTICE SYSTEMS**

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**THE UNFINISHED TRIANGLE: THE CRIMINAL JUSTICE SYSTEM,  
THE VICTIM, AND THE OFFENDER**

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**A COMPARATIVE REVIEW OF VICTIM TREATMENT IN SOME CRIMINAL JUSTICE SYSTEMS**

Judges, as well as other criminal justice professionals, are most conscious of the public reactions from victims and victim support groups concerning the treatment victims receive within the criminal justice system. The public cry of victims has been an expression of alienation, even outrage, at their treatment by this system: a system beset by demands for increased services, but constantly threatened with reduced financial support. Perhaps a legal system so under siege that a change in the treatment of victims threatens not to be a high priority.

It is axiomatic that victims play crucial roles in any criminal justice system as complainants and witnesses, and thus they deserve to have their concerns and proposals for changes within the system openly and fully considered. In Canada some progress has already been made and it may be useful to compare our progress in victim treatment with that of other jurisdictions. How have

others dealt with victims' demands for better treatment and for greater participation in a manner consistent with the other obligations and demands of a democratic criminal justice system?\*

What should be the extent and nature of victim participation in the criminal justice system of Canada? Should victims be given standing to participate in any stage of the proceedings? If so, should they be granted legal aid, if entitled? What protections should be afforded to victims who participate in the legal process? Are certain witnesses deserving of special protection? Who should bear the financial burden of the victim's losses? To what extent should the victim be involved in initiating criminal action, in plea bargaining, bail hearings, the trial process, in sentencing and in correctional and release decisions? These are just some of the areas that are now the subject of often controversial discussion. In seeking to improve the system, the challenge is always to ensure that such changes can be accomplished without adversely affecting the constitutional guarantees and procedural safeguards of the accused: can we do justice to the victim without derogating from the accused's right to a fair trial?

This paper explores some aspects of these issues in Canadian law and compares them with corresponding practices of other democratic countries: The United States, England, Germany, Sweden, and Japan. The review of these jurisdictions is not exhaustive and is intended only to give an overview of the various responses to the demand for a reconsideration of the treatment of the victim in the criminal justice system. We must initially acknowledge that any serious reconsideration may test assumptions we currently hold about the nature and purpose of the criminal justice process. Such a reconsideration is beyond the purview of this paper. Its purpose is to review some of the Canadian reaction to the victims' movement, compare it with that of some other countries, and suggest some future direction for victim treatment which might improve the effectiveness and public perception of the administration of criminal justice. The paper will not

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\* Because of time limitations, this paper will not deal with the special legislation for youth offenders in Canada, *The Young Offenders Act*, R.S.C. 1985, and its provisions for special treatment for offenders aged 12 to 18 years;

make recommendations for change in the treatment of victims, only attempt to suggest how consideration for change could take place.

## **BACKGROUND**

Although in many pre-medieval criminal systems the victim was substantially involved in judicial decision making and restitution, the growth of central feudal power and the central state reduced the victim's role. Throughout most of the nineteenth and twentieth centuries, the major role of the victim in Canada's criminal justice system has been as an informant and a witness. Although the rights of the accused have been greatly enhanced over the centuries, traditionally neither our courts nor society viewed victims as entitled to special "legal" rights. Indeed, in the common law adversarial systems, the presumption of innocence usually prevents the party injured by the criminal action from being referred to as a "victim" until a verdict had been entered. Police and the prosecutors have relied upon victims' complaints and identifications to lay most<sup>1</sup> criminal charges, and on their evidence as witnesses to the event to obtain convictions. But as crime was considered principally an offense against the state, the injury to the victim was an incidental matter and its redress was not truly part of the criminal process. Consequently, until recently, the unrecognized within the justice system, except to a limited extent in the sentencing process.

In the past two or three decades an unprecedented international movement has been dedicated to improving the plight of victims of crime. This developing interest in the needs and rights of victims was initiated by different sources with varying agendas. However, one central theme that has united supporters of victims' rights has been the demand for empowerment and

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<sup>1</sup> Some "victimless crimes", such as drug offenses, do not rely on victim cooperation.

For example, women's organizations established shelters for battered women; community organizations promoted children's rights; police agencies began to provide victims with more services; and courts have become more sensitive to victims' needs -- this last change is reflected by the protection that courts have begun to grant victims,

participation in the criminal justice system. This movement has been highlighted by the General Assembly of the United Nations adoption of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985<sup>3</sup>. Subsequently, the Economic and Social Council adopted two resolutions for the implementation of the Declaration through national and international actions.<sup>4</sup> Resolution 1989/57 in part called upon Member States to ensure that victims are kept informed of their rights and opportunities with respect to redress from the offender, and of the progress of the relevant criminal proceedings. The Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders adopted a resolution in 1990 entitled *Protection of the Human Rights of Victims of Crime and Abuse of Power*, recommending that states consider the provisions of the *Declaration* in framing their national legislation, ensure the availability of public and social support services for victims, and foster culturally appropriate programs for victim assistance, information and compensation.<sup>5</sup>

## I. DEVELOPMENTS IN CANADA

Since the early 1980's, Canada has been active on victim's issues. Following a Federal-Provincial task force in 1983<sup>6</sup>, Canada was one of the sponsors of the Declaration. Canada has also responded by introducing legislative, political and legal reform. In the Canadian federal system, the criminal law is enacted by the federal Parliament and applies throughout the country. In 1988, *An Act to amend the Criminal Code (Victims of Crime)*<sup>7</sup> was passed by Canada specifically to improve the lot of victims in the criminal law system. These *Code* amendments include

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<sup>3</sup> UN GA Res.40/34, 1985. See Appendix A

<sup>4</sup> ESOCOR Res. 1989/57 and 1990/22.

<sup>5</sup> As discussed in: Daniel Préfontaine and Vincent Cheng Yang, "The Reform of Criminal Procedure: From United Nations Policy to Canadian Law" (Paper presented to Beijing International Conference On the Reform of Criminal Procedure, November 14, 1994) at 29-32..

<sup>6</sup> Canadian Federal-Provincial Task Force *Justice for Victims of Crime: Report*, (Ottawa: Supply and Services Canada 1993). See also Appendix B: Federal and Provincial Ministers' statement.

<sup>7</sup> SC 1988, c. c-89. See also: Canada, Standing Committee on Justice and Solicitor General, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Canada: Queen's Printer, 1988).

provisions for the identification and prompt return of stolen property, protection of the identity of victims and witnesses of sexual offenses and extortion, the consideration of victim impact statements at the time of sentencing and the imposition of a victim fine surcharge, in addition to any other sentence imposed on the offender. The revenue raised by the victim fine surcharge is to be used to finance victim support and compensation programs.

In Canada, the enforcement of the law, the prosecution of criminal offenses and the administration of justice are matters generally within provincial jurisdiction and the provinces have authored most victim services legislation. Most provinces have enacted victim legislation which provides how victim services shall be funded and which includes a statement of purpose and principles relating to the fair treatment of victims of crime by criminal justice personnel.<sup>8</sup> Additionally, all provinces and territories operate criminal injuries compensation programs which provide limited financial compensation to victims of violent crime.<sup>9</sup> The compensable damages, eligibility criteria and limits of awards vary among jurisdictions and are set out in the governing provincial legislation.

#### **a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS**

Arguably, the most heralded change to the Canadian criminal justice system has been the introduction of victim impact statements. Victim Impact Statements (VIS) provide victims with a formal opportunity to inform the court, the public, and the accused of the actual effect that the crime has had on them. Before this legislation, most Canadian courts normally considered the effects of the offender's crime when sentencing, but this was only rarely based on a sentencing statement of the victim.<sup>10</sup> In the absence of "standing", victim impact statements are the most

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<sup>8</sup> See for example: British Columbia's *Victim's Rights and Services Act*, S.B.C. 1988, c. 64.

<sup>9</sup> See for example: Ontario, Ontario Criminal Injuries Compensation Board 1992-93, 22nd Annual Report (Toronto: Ministry of the Attorney General, 1993) or British Columbia, Criminal Injury Compensation Act of British Columbia, 21st Annual Report (Richmond, B.C.: Worker's Compensation Board, 1990).

<sup>10</sup> Howard C. Rubel, "Victim Participation in Sentencing Proceedings", in Ezzat A. Fattah ed., *Towards a Critical Victimology* (London: Macmillan Press Ltd., 1992) 238 at 253-254.

direct way of increasing victim involvement in the sentencing stage of the criminal justice process.

The perceived benefits<sup>11</sup> of victim impact statements vary, but can be summarized as follows<sup>12</sup>:

1. There is a reduction in the sense of powerlessness and estrangement that victims often feel.
2. Victims may be more willing to cooperate with the criminal justice system in the future by reducing their sense of alienation.
3. Some criminologists have suggested that the inclusion of victim impact statements may be beneficial to an offender's rehabilitation.
4. The victim is more likely to cooperate with and seek to improve the system if they feel they are part of the process.

Section 735 of the Canadian *Criminal Code* describes how a VIS is to be dealt with by the court.

A victim is permitted to submit a written VIS which describes the harm done to or loss suffered by the victim arising from the offense. Section 735(1.2)(a) stipulates that a copy must be provided to the prosecutor and the defendant. "Victim" is defined in s.735 (1.4) as:

(a) the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offense, and (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement, includes the spouse or any relative of that person, anyone who has in law or in fact the custody of that person or is responsible for the care or support of that person or any dependent of that person.

Until the recent 1995 amendments, the *Code* provided that the court "may consider" the VIS in order to determine the sentence to be imposed on the accused<sup>13</sup> and, although the a court was not *obliged* to consider the VIS, most sentencing judges did not ignore them. Recently, this summer (1995), the *Criminal Code* was amended to ensure that when a victim impact statement has been made, a court *must* consider it.<sup>14</sup>

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<sup>11</sup> The *actual* benefits of the VIS in Canada is difficult to assess as it has only begun to be used extensively.

<sup>12</sup> Edna Erez, "Victim Participation in Sentencing: and the Debate Goes On ..." (1994) 3(1/2) *International Review of Victimology* 17 at 18-19.

<sup>13</sup> The reception of a Victim Impact Statement does not disentitle the court from consideration of any other evidence concerning any victim of the offense for sentencing purposes. As the trial judge is normally the sentencing judge, he or she often relies on this evidence of the victim at trial as a basis of sentencing evidence.

<sup>14</sup> *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof* SC 1995, c. 22, s. 722(1).

Since *Criminal Code* s.735 allows the use of victim impact statements only at the time of sentencing, there is no *Code* requirement to consult victims if the charge is resolved prior to the trial. Often as a result of plea negotiations, the vast majority of criminal cases result in an initial plea of guilty or a change of plea prior to trial. Unless there is a suitable protocol requiring it, there rarely is consultation with the victim in such cases.<sup>15</sup> In 1987, the Canadian Sentencing Commission rejected the idea of victims becoming independent parties in plea negotiations. However, they recommended that prosecutors should be required to obtain a statement from victims that describes the effect that the crime had on him.<sup>16</sup>

Although any citizen can lay a private information against an accused, this rarely occurs in Canada, and the prosecuting authority may, without explanation to a court, stay any such proceedings. Another stage of the pre-trial proceedings is the preliminary inquiry. Its purpose is to determine if there is sufficient evidence to put the defendant on trial. In Canada, victims have no right to participate in these proceedings other than as witnesses. In other words, unlike the prosecutor or defense counsel, a victim cannot call or interrogate witnesses or challenge any evidence.<sup>17</sup>

Thus in Canada, other than through the use of victim impact statements at sentencing, victims have very little influence over the outcome of a trial. However, if an accused is sentenced to prison and a victim requests information about the offender, considerable information will be provided pursuant to the *Corrections and Conditional Release Act* proclaimed on November 1st,

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<sup>15</sup> *supra*, note 7 at 406 wherein the 1986 Report of the Canadian Sentencing Commission (*Sentencing reform: A Canadian approach* (Ottawa: Department of Justice Canada)) notes that about 90% of criminal cases result in pleas of guilty. In the U.S., about 90% of the criminal cases are disposed of through plea bargaining. See also: Ezzat A. Fattah, "The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: A Constructive Critique" in *supra*, note 12 at 416.

<sup>16</sup> *Ibid.*, at 416-417. The Commission recommended that the victim not be accorded independent status in plea bargaining as it would be inconsistent with the ultimate responsibility of the Attorneys General to prosecute, that it could precipitate an adversarial relationship between Crown counsel and victims, and that the influence of victims might be "more illusory than real".

<sup>17</sup> The procedural directions for a preliminary inquiry are contained in section 537 of the *Criminal Code*, are exhaustive, and do not include provisions for victim participation. See: *Doyle v. R.*, (1976), 35 C.R.N.S. 1, 29 C.C.C. (2d) 177 (S.C.C.)

1992.<sup>18</sup> By this Act the rights of victims have been formally recognized in Canadian correctional legislation for the first time. The Act provides a right to information and a voice in the parole process to victims through the submission of a statement to the Board. This information includes the date and length of sentence, dates of eligibility for parole and the probable date of the offenders release on mandatory supervision.

When an inmate applies for parole, a Parole Board, independent of the Correctional Service of Canada, reviews any information that will assist in assessing whether an offender's release may pose a risk to society. If a victim wishes to become involved in the parole process, she or he may submit a victim impact statement to the board, preferably in writing. The Board will consider any information a victim believes relevant, particularly regarding the victim's fears or other long-term effects the crime might have caused, such as physical impairment, financial problems or the need for counseling. Victims are encouraged to supply this information as soon as possible after sentencing. If required, a victim can obtain assistance preparing the victim impact statement.

Persons over 18 years of age are entitled to attend a parole hearing, but only as observers. Observers, including victims, are not allowed to participate in any way or be present while the Board members discuss their decision. Victims who wish to give information to the Board must write to the Board before the review. Although the Board welcomes observers, they may deny a request if an observer's presence is likely to disrupt the hearing. In considering whether to allow someone to observe the hearing, the Board is required to consider the views of the offender as well.

If a victim submits a VIS, the Board must reveal to the offender any information which will be considered by the Board. However, the *Corrections and Conditional Release Act* provides that information from victims will be kept confidential if the Board believes that revealing

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<sup>18</sup> S.C. 1992, c.20.

such information to an offender could jeopardize the victim's safety. If the prisoner is granted parole, victims are informed only if they request notification of this information. The rationale is that some victims may want to put the incident behind them and have no further knowledge of the offender or may be further traumatized by unwanted contact regarding the subject.<sup>19</sup> The *Act*, however, does not provide for any penalties if the above victim's rights are not granted nor are the proceedings voidable.

#### **b. PROTECTION OF VICTIMS**

Aside from victim participation, another question that has raised substantial controversy is the extent of procedural protection extended to the victim as witness during trial. In many instances, victims of crime have had no prior contact with the criminal justice system and find testifying as a witness a traumatic and confusing experience. In addition to the difficulties experienced by most witnesses, victims have additional stresses. Although most victims experience enormous trauma in testifying about the violation of their person and privacy, victims of crime, particularly victims of sexual assault, have the greatest difficulty in participating in the criminal process as witnesses. Needless to say, child victims and victims of sexual assault tend to be the most vulnerable of witnesses, the most likely to be re-victimized by the criminal justice system.

In recent years, considerable attention has been given to the special needs of child victims of sexual offenses. In Canada, the *Criminal Code* affords protection for such witnesses. Section 486(1) states that when the presiding judge is of the opinion that it is in "the interests of public morals, maintenance of order or the proper administration of justice", she or he may exclude the public from the courtroom for "all or any part of the proceedings". Although this section restricts the right to an open and public trial guaranteed by s. 11(d) of the *Canadian Charter of*

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<sup>19</sup> Canada. Victims: Questions & Answers About Corrections and Conditional Release, (Canada: National Parole Board, 1993) at 13-19.

*Rights and Freedoms*,<sup>20</sup> our courts have held that s.486(1) is saved under *Charter* s.1 in that it "is justified in a free and democratic society".<sup>21</sup> Mere embarrassment at having to reveal personal sexual details is insufficient to invoke the section, it must be shown that the administration of justice is threatened because the capacity of the witness to testify significantly affected.<sup>22</sup> When determining whether to exclude the public from the courtroom under 486(1), "proper administration of justice" includes ensuring that the interests of witnesses under 14 years of age are safeguarded when the accused is charged with any violent crime or a crime of sexual assault. If a witness is under the age of 14, s. 486(1.2) permits the judge to allow a "support person" of the witness' choice to be present and close to the witness while testifying. Additionally, when the accused is charged with a sexual offense, a court may allow a victim under 18 years of age to testify outside the courtroom or behind a screen so the victim will not have to see the accused.<sup>23</sup> The judge must first be satisfied that the "exclusion is necessary to obtain a full and candid account of the acts complained of from the victim". A victim may only testify outside the courtroom where arrangements can be made, by means of closed-circuit television or otherwise, for the accused, the judge and the jury to watch the testimony of the child. Children can testify in Canada providing they promise to tell the truth and have the ability to communicate their evidence. The Supreme Court of Canada has held in *R v. Khan*<sup>24</sup> that children as young as three years of age may now testify in court if they can answer "a simple form of questions".

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<sup>20</sup> *Canadian Charter of Rights and Freedoms*, 1982, s.11(d) states that: "any person charged with an offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

<sup>21</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (1993), 143 N.B.R. (2d) 174 (Q.B.), affd. 91 C.C.C. (3d) 560 (C.A.), on appeal to Supreme Court of Canada. At 564, the court held that failure to exclude the public when details of the sexual act were disclosed would likely result in "further victimization of the victims, by permitting details of the offenses to be published and the possible identification of the victims, notwithstanding the s. 486(3) non-identification order."

<sup>22</sup> *R. v. Vandavelde* (1994), 89 C.C.C. (3d) 161 (Sask. C.A.). See also: R.E. Salhany, *Canadian Criminal Procedure*, 6th ed. (Aurora: Canada Law Book Inc., 1994-) at 6-109.

<sup>23</sup> Section 486(2.1). See *R.v.R. (M.E.)* (1989), 71 C.R. (3d) 113, 49 C.C.C. (3d) 475 (N.S.C.A.) wherein the court held that the right of the accused to be present at his trial is not absolute and it was not an improper exercise of discretion for the trial judge to permit the child complainant in a sexual assault case to testify from outside the courtroom on video camera.

<sup>24</sup> [1990] 2 S.C.R. 53, 59 C.C.C. (3d) 92 (S.C.C.).

Sub-sections 486(3) and (4) of the *Code* deal with publication bans with respect to the testimony a victim gives in a sexual offense or extortion proceeding. The ban prohibits publication or broadcast of the identity of the victim or witness, as well as any information that would disclose that identity. If a victim, witness or prosecutor applies for the ban, it is mandatory that the judge grant the order. Failure to comply with a non-publication order is a summary conviction offense under s.486(5). Additionally, s.486(4) imposes a *duty* on the presiding judge to inform the victim or any witness under 18, at the first reasonable opportunity, of their right to apply for an order.

The absolute nature of the publication ban under s.486(3) has attracted constitutional scrutiny under the *Canadian Charter of Rights and Freedoms*. In *R. v. Cdn. Newspapers Co.*<sup>25</sup> the Supreme Court of Canada held that the subsection does not infringe the accused's right to a public hearing under s.11(d) of the *Charter*<sup>26</sup> as the mandatory ban on publication does not prevent the public or the press from attending the trial proceedings but only restricts publication of facts disclosing the complainant's identity.

Section 276 of the *Code* generally excludes evidence of sexual activity of the victim in sexually related offenses where it is tendered to support an inference the victim is more likely to have consented or to challenge the victim's credibility. The section also provides for certain exceptions where the judge determines such evidence is particularly relevant or has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". At the hearing to determine if such evidence is admissible, the victim is not compellable and the public and the jury are excluded (s.276.2). As well, publication of evidence is banned unless the judge orders otherwise (s. 276.3).

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<sup>25</sup> (1988), 65 C.R. (3d) 50, 43 C.C.C. (3d) (24 sub nom. *Cdn. Newspapers Co. v. Canada (A.G.)*) 43 C.C.C.(3d) 24 (S.C.C.).

<sup>26</sup> *Supra*, note 20.

Finally, section 139(3) of the *Criminal Code* makes it an offense to "pervert or defeat the course of justice" in a judicial proceeding by persuading or trying to persuade prospective witnesses not to give evidence. This section further proscribes against any attempt to obstruct the course of justice, even if unsuccessful, and would include, for example, attempts to dissuade a victim from giving evidence by threats or bribes.

In addition to the procedural protections in Canadian criminal law, the Royal Canadian Mounted Police administer a modern and effective witness protection plan. It is suggested that the advances in procedural protections in Canada is evidence that it is possible to facilitate victim participation in a manner consistent with basic criminal justice principals.

### **c. RECOVERY OF VICTIM'S LOSSES**

Supporters of victims' rights have been urging reform with respect to compensation for the pain and suffering and any financial losses victims suffer as a result of crime.

All provinces and territories have enacted legislation to provide compensation to victims of violent crime.<sup>27</sup> These victim compensation schemes operate independently from the criminal process. Through programs administered by a compensation board, compensation is provided where a person is injured or killed as a result of the commission of certain criminal offenses. The provincial enactments vary somewhat, but generally compensate for the following expenses:

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<sup>27</sup>See:

- Alta: *Criminal Injuries Compensation Act*, R.S.A. 1980, c. C-33.
- BC: *Criminal Injuries Compensation Act*, R.S.B.C. 1979 c. C.83.
- Man: *Criminal Injuries Compensation Act*, R.S.M. 1979, c. C305.
- NB: *Compensation for Victims of Crime Act*, R.S.N.B. 1973, c. C-14.
- Nfld: *Criminal Injuries Compensation Act*, R.S.N. 1970 c. 68.
- NWT: *Criminal Injuries Compensation Act*, R.S.N.W.T. c. C-23.
- NS: *Compensation for Victims of Crime Act*, R.S.N.S. 1989 c. 83.
- Ont: *Compensation for Victims of Crime Act*, R.S.O. 1990 c. C.24.
- PEI: *Victims of Crime Act*, R.S.P.E.I. 1988 c. V-3.1.
- Que: *Crime Victims Compensation Act*, R.S.Q. 1977, c.1-6.
- Sask: *Victims of Crime Act*, S.S. 1992, c. V-6.01.
- YT: *Compensation for Victims of Crime Act*, R.S.Y. 1986, c. 10.1.

For a comprehensive analysis of criminal injuries compensation schemes see: P. Burns, *Criminal Injuries Compensation* 2nd ed (Toronto: Butterworths, 1992).

medical aid, funerals, special damages, rehabilitation and counseling services, wage loss, loss of support for dependents. Most compensate for pain and suffering. Generally recovery is not available for stolen money or loss or damage to property, legal fees, injuries to accused persons found "guilty", and injuries resulting from motor vehicle accidents. Some provinces also cover the maintenance of a child born as a result of a sexual assault.<sup>28</sup> Compensation schemes do not normally include an award for loss of amenities or expectation of life.

Federally, s. 725 of the *Criminal Code* authorizes a compensation order as part of the sentence for loss of or damage to property suffered by a victim as a result of the commission of an offense. A compensation order is a convenient, expeditious way to address the property loss of a victims of crime and does not bar any civil actions that a victim may have.<sup>29</sup> A s.725 compensation order may be imposed on the accused in addition to any other punishments.<sup>30</sup> However, there is presently no provision in the *Code* for compensation for bodily or other injuries suffered by victims.<sup>31</sup>

In 1985 Parliament passed sweeping amendments to the *Code* which revoked s.725 as described above and provided for "restitution" orders which allowed the criminal court to require the offender to pay the pecuniary damages of the victim "including loss of income or support, incurred as a result of the bodily injury, where the amount is readily ascertainable." *As of the date of this paper, these amendments and the other sections discussed below have not been proclaimed into law.*

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<sup>28</sup> See, for example, British Columbia's *Criminal Injury Compensation Act*, R.S.B.C. 1979, c. C. 83, s. 7.

<sup>29</sup> *London Life Insurance Co. v. Zavitz* (1992), 12 C.R. (4th) 267 (B.C.C.A.).

<sup>30</sup> Where the offender's imprisonment is required, it cannot be avoided or replaced by a compensation order. Where a compensation order is a particularly apt form of sanction, however, it can and should be used either to replace or reduce what would otherwise be a fit sentence of imprisonment in all of the circumstances. Its deterrent and denunciatory effects must be considered when measuring the other components of the sentence imposed: *R v. Hoyt* (1992), 77 C.C.C. (3d) 289 (B.C.C.A.).

<sup>31</sup> A compensation order applies only to property and there is no jurisdiction to order restitution for the costs of a sexual assault victim's counseling: *R. v Lapointe* (1986) 50 Sask. R.107 (C.A.)

Further to s.727.1 of these amendments, the court can also order the restitution be paid from moneys found on the offender at arrest, if ownership of the funds is not disputed by others. Unless the offender acknowledges the capacity to pay the restitution, the court is authorized by s.727 to hold a hearing to determine the offender's ability to pay and the terms of any order made pursuant to s.725. Section 727.2 provides that the court *may* give notice of the restitution hearing to "interested parties"--presumably victims, the offender and the prosecutor. Under these amendments, victims do not have an independent right to bring an application for restitution. If an order of restitution is not complied with, s.726 allows a victim to enter it as a judgment against the offender in the same manner as if it were a judgment rendered against the offender in civil proceedings. The Supreme Court of Canada has ruled that the existing compensation *Code* provisions are *intra vires* federal sentencing jurisdiction and do not improperly invade provincial constitutional jurisdiction over property and civil rights.<sup>32</sup>

On July 19th, 1995, certain *Code* amendments relating to restitution received Royal Assent but also *still have to be proclaimed as law*. It is presumed proclamation has of both the 1985 and 1995 restitution amendments have been delayed because the Federal Government and the provinces cannot agree on appropriate funding for the proposals. These latest amendments change the section number to 738 and, among other changes, provides that the court "may" make a restitution order, whereas the previous amendment (s. 725) provided that the court "shall" make a restitution order "if it is applicable and appropriate in the circumstances".<sup>33</sup>

## **II THE UNITED STATES**

In the United States, criminal law is constitutionally a matter of state jurisdiction. Generally, it can be said that all states are working to improve the quality of victim rights by changing the criminal process, giving special protection to children and sexual assault victims, and estab-

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<sup>32</sup> *R. v. Zelensky* (1978), 2 C.R. (3d) 107, 41 C.C.C. (2d) 97 (S.C.C.).

lishing victim services.<sup>34</sup> In response to social and political pressures several states have enacted victims' bills of rights,<sup>35</sup> strengthening the victims' role in the plea bargaining process, the sentencing process and at parole hearings. Other common provisions require that victims be notified of crucial developments in the case and be protected against intimidation and retaliation. Finally, about a quarter of the states require training in victims issues for judges, prosecutors and police officers.<sup>36</sup>

As in Canada, in much of the United States the most apparent barrier standing between victims and the exercise of their "rights" is the fact that most victims' legislation and published rights are frequently not enforceable nor is there a penalty if they are not granted.<sup>37</sup> Often, the legislation clearly states that no cause of action can be brought against the state or any employee of the state if a right granted by a victim assistance act has been infringed or denied. However, certain American states have enacted constitutional amendments that deal with victim's rights, specifying rights to dignity, respect, sensitivity, restitution, compensation and the opportunity to influence sentencing and be informed and present in the criminal process.<sup>38</sup> By elevating statutory rights to constitutional status, these amendments have been one of the most significant American advancements in the area of victims' rights.

#### **a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS**

Today almost all states allow victim impact statements at the time of sentencing, and thirty-several states allow a victim to offer a statement of opinion (oral or written) about the ap-

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<sup>33</sup> S.C. 1995, c. 22.

<sup>34</sup> Robert Elias, *Victims Still: The Political Manipulation of Crime Victims* (San Francisco: Sage Publications, 1993).

<sup>35</sup> California, Florida, Michigan and Rhode Island are considered to have the most progressive bills of rights.

<sup>36</sup> *Supra*, note 34 at 29.

<sup>37</sup> *Ibid*, at 31.

<sup>38</sup> The states that have made constitutional amendments include Alaska, Alabama Arizona, California, Colorado, Florida, Idaho, Illinois, Kansas, Maryland, Michigan, Mississippi, Missouri, New Jersey, New Mexico, Ohio, Rhode Island, Texas, Utah, Washington and Wisconsin. A number of other states are in the process of victims rights amendments.

propriateness of the sentence.<sup>39</sup> In the United States victims have been granted a much more active role in the plea bargaining process than is the Canadian experience.<sup>40</sup> About a quarter of the states allow victims to consult with the prosecutor and address the court during the plea bargaining process.<sup>41</sup> In Nebraska, prosecutors are required to consult with victims concerning negotiations if the victim is available,<sup>42</sup> and California prohibits the defense from plea bargaining *at all* in any case in which it is alleged that a firearm was personally used by the accused, or in any offense of impaired driving.<sup>43</sup> However, it appears that no state gives victims the power to veto a plea bargain.<sup>44</sup>

Similarly, most states have also enacted laws which allow victims to present an impact statement to parole boards. Although some states require that victims submit written statements, about thirty states allow victims to present oral statements to the board.<sup>45</sup> Most states' laws indicate the board is to receive impact information but do not direct or require the parole authorities to consider it.<sup>46</sup> Even when the laws indicates that the board is to "consider" impact information, they lack specific guidance on the weight the board should give to such statements.<sup>47</sup> Arizona and Oklahoma allow a victim to reverse a parole board decision if the victim was not give an opportunity to have input in the process.<sup>48</sup> In Arizona the law entitles victims "to seek to set aside

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<sup>39</sup> *Supra*, note 34 at 93.

<sup>40</sup> In *United States v. Salerno*, 481 U.S. 739 (1987), the U.S. Supreme Court ruled that if a criminal defendant posed a specific realistic threat to the safety of a victim, it was within the court's discretion to preclude a plea bargain between the accused and the prosecutor.

<sup>41</sup> *Supra*, note 34 at 92. See also: Davya B. Gewurz and Maria A. Mercurio, "The Victims' Bill of Rights: Are Victims All Dressed Up With No Place to Go?" (1992) 8 *St. John's Journal of Legal Commentary* 251 at 259: States which allow victims to speak during plea bargaining include Indiana, Minnesota, Nebraska, Rhode Island, South Carolina, and West Virginia.

<sup>42</sup> Gewurz and Mercurio, *ibid*, at 260.

<sup>43</sup> Cal. Penal Code §.1192.7(a).

<sup>44</sup> Susan Gegan and Nicholas Rodriguez, "Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?"(1992) 8 *St. John's Journal of Legal Commentary* 225 at 231.

<sup>45</sup> Frances Bernat, William Parsonage and Jacqueline Helfgott, "Victim Impact Laws and the Parole Process in the United States: Balancing Victim and Inmate Rights and Interests" (1994) 3(1/2) *International Review of Victimology* 121 at 126.

<sup>46</sup> *Ibid*, at 131.

<sup>47</sup> *Id*.

<sup>48</sup> *Id*.

the post-conviction release until the victim is afforded the opportunity to be present or heard".<sup>49</sup> The Oklahoma statute provides that if the victim has requested notification about his or her rights in the parole process and the parole board fails to notify a victim (who has requested notification), the board's decision is voidable.<sup>50</sup>

## **b. PROTECTION OF VICTIMS**

At the federal level, in 1982 President Reagan formed a *President's Task Force on Victims of Crime*<sup>51</sup> which proposed legislation to meet the needs of victims. Additionally, The *Report* proposed a significant federal constitutional amendment that "[t]he victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."

Under the guidance of the Task Force, the Federal government has moved to enhance victims' rights by passing legislation such as the *Federal Victim and Witness Protection Act of 1982* and the *Victims of Crime Act of 1984*. The *Federal Victim Witness and Protection Act* criminalized threats or retaliation against victims, thereby attempting to provide some protection to victims from harassment and intimidation. This *Act* also required that restitution be awarded to victims of federal crimes, a provision that was extensively challenged in the courts until those provisions were held to be constitutional by the US Supreme Court.<sup>52</sup>

As of 1993, almost all states also protect against victim and witness intimidation and retaliation by toughening criminal penalties and allowing for "protective orders".<sup>53</sup> About half of the states restrict the publication of victims' names and addresses in sexual assault cases. Again,

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<sup>49</sup> *Id.*, at 131-132.

<sup>50</sup> *Id.*, at 131.

<sup>51</sup> United States, President's Task Force on Victims of Crime: Final Report II (Washington, D.C: U.S. Government Printing Office, 1982).

<sup>52</sup> In *Hughey v. United States*, 495 U.S. 411 (1990). See also Maxine D. Kersh, "Victim Compensation Schemes in the U.S. and Australia", (1994) 24 *California Western International Law Journal* at 345

<sup>53</sup> *Supra*, note 34 at 29.

about half of the states protect the identity of child victims; however some states oppose such privacy protection on the basis that it restricts freedom of the press and access to public records.

Most states have also provided other protections for child victims. Several states have children's bills of rights that require a guardian to inform the court of the child's capabilities and the likely impact of the trial on the child, advise when to use videotapes and when to help with emotional problems, and generally support the child at court proceedings.<sup>54</sup> All but nine states permit children to testify through a videotaped statement, either alone (unsworn interrogatory) or under oath and cross-examination (deposition), or by live testimony through closed-circuit television.<sup>55</sup> Additionally, more than half the states have extended the statute of limitations for child offenses.

**c. RECOVERY OF VICTIM'S LOSSES**

In the U.S. victims may receive financial assistance from the state victims' compensation programs and from restitution orders. In 1986, the President's Task Force on Crime reported that 29 states mandated restitution as a part of sentencing.<sup>56</sup> In jurisdictions where restitution orders are common, courts exercise a considerable amount of discretion in determining the size of the awards.<sup>57</sup> These American courts have significant experience which may be useful to Canadian courts if the restitution amendments are proclaimed in Canada, and a review of the procedure, costs and effectiveness of the U.S. restitution experience may assist in resolving whatever inhibits the proclamation scheme.

American states also have publicly funded compensation programs. California became the first state to adopt a victim compensation program in 1965 and, today, practically every state

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<sup>54</sup> *Ibid*, at 30.

<sup>55</sup> *Ibid*, at 29.

<sup>56</sup> United States of America. Office of Justice Programs, U.S. Department of Justice, *President's Task Force on Victims of Crime*, (Washington: U.S. Department of Justice, 1986) at ii-iii..

<sup>57</sup> *Supra*, note 41, Gewurtz and Mercurio at 255.

maintains some form of victim compensation scheme.<sup>58</sup> Many of these programs require a claimant to meet certain eligibility requirements, for example, in most states, to obtain an award claimants must demonstrate financial need.<sup>59</sup> Additionally, most compensation programs do not comprehensively redress the damage that victims sustain because many of them exclude recovery for pain and suffering.<sup>60</sup> However, there are many American victims' service agencies, aided by such non-government organizations as the National Organization for Victims' Assistance (NOVA), which support victims by attempting to ensure that they receive sufficient community support to assist them to cope with their pain and suffering.<sup>61</sup>

### III. ENGLAND AND WALES

In the United Kingdom, for historical reasons, the criminal justice system of England and Wales is separate from those of Scotland and Northern Ireland. This paper will discuss only the distinct criminal system of Wales and England, an area which encompasses 90 per cent of the population of the United Kingdom. The Home Office is the center of the criminal justice system: it prepares the legislation that give a constitutional framework to the system, directs vast funds into the system, administers the probation, police and prison services, and is responsible for most matters affecting the control of crime.<sup>62</sup> In discussing the treatment of victims in European countries, the considerable role of The Council of Europe should be noted.<sup>63</sup>

Throughout the 1970's and 1980's, various changes were implemented in England to improve the position of victims. In the 1970's, thousands of volunteers united to provide local

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<sup>58</sup> *Ibid*, at 255-256.

<sup>59</sup> *Id.*

<sup>60</sup> See, eg., Neb. Rev. Stat. § 81-1815-17 (Supp.92) (compensation available for actual injury or death but not for pain and suffering); Mass. Gen. Laws Ann. Ch.258A § 1 (West 1992) (same); N.C. Gen. Stat. s. 15 B-1-25 (1990).

<sup>61</sup> National Organization for Victims' Assistance, *Victims' Rights and Services, A Legislative Directory* (Washington: National Organization for Victims' Assistance, 1988/89) at 8.

<sup>62</sup> Paul Rock, *Helping Victims of Crime: The Home Office and the Rise of Victim Support in England and Wales* (New York: Oxford University Press, 1990) at 7.

<sup>63</sup> See Aglaia Tsitsoura, "Criminal Justice Responses to Victimization" (1985) 10 *Victimology: An International Journal* 574

victim support schemes. These schemes make contact with victims of crime and offer comfort and practical advice. In 1979, the Home Office made its first grant (£1.5 million), and since then has continued to provide increasing support. There are currently over 350 victim support schemes covering all of England and Wales, whose services are coordinated and supported by the Home Office.

In 1990, the Home Office published the *Victim's Charter: A Statement of the Rights of Victims of Crime*.<sup>64</sup> In Part II, the *Charter* sets out some guiding principles declaring: "...in considering the public interest no one should overlook or disregard the interests and wishes of the victim"; "it is essential that every possible step is taken to minimize the upset and even hardship which may be caused"; and "victims should always be treated fairly and without adverse discrimination".<sup>65</sup> The *Victim's Charter* emphasizes that the additional traumatic effect of participating in the justice system should be minimized as much as possible. The *Charter* is a policy statement, outlining general government victim policy; it does not have legislative authority and thus is not enforceable and provides no remedies.

#### **a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS**

In England and Wales the right of victims to present their views and concerns during the criminal justice process is more restricted than the role victims typically exercise in North America. In England and Wales, in theory, victims have the legal right to privately commence a prosecution,<sup>66</sup> but it appears that this right is considerably restricted both in law and in practice. However, if a private prosecution is commenced, the Director of Public Prosecutions may take over any case and, with the leave of the court, offer no further evidence against the accused.<sup>67</sup>

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<sup>64</sup> United Kingdom. Home Office *Victim's Charter: A Statement of the Rights of Victims of Crime* (London: Home Office, 1990).

<sup>65</sup> *Ibid.*, at p. 8

<sup>66</sup> Matti Joutsen, "Victim Participation in Proceedings and Sentencing in Europe" (1994) 3(1/2) *International Review of Victimology* 57 at 60.

<sup>67</sup> *Ibid.*

Notwithstanding such limitations, though, there is still some prosecution by other than the prosecutor, particularly by such bodies as British Rail and the postal service who may prosecute for certain offenses. Although prosecution by private citizens is rare, there is the exception of shoplifting cases where many prosecutions are brought by shopkeepers.<sup>68</sup> Apart from this limited independent right to prosecute, it appears that victims in England do not have a *right* to participate in any stages of the proceedings, even through such means as victim impact statements.

**b. PROTECTION OF VICTIMS**

One area of victim involvement where significant changes have occurred in the last few years has been with regard to the protection that victims have been afforded in court. In 1988, the Home office produced a leaflet called "Witness in Court" which explains court procedure in a simplified manner and explains to victims what they may expect when testifying in court. As well, the *Criminal Justice Act 1988* contains broad provisions to ensure the anonymity of rape victims. The victim's identity is safeguarded from the moment of allegation, whether or not any proceedings follow, and this protection extends indefinitely.<sup>69</sup>

The Government has also introduced special protections relating to the evidence of children.. They are now allowed to testify outside the courtroom via live television links in cases involving violent, cruel or sex offenses; and a child's sworn statement no longer has to be corroborated by other evidence.

**c. RECOVERY OF VICTIM'S LOSSES**

In England and Wales, the courts are increasingly granting compensation orders. In 1982, the *Criminal Justice Act* provided that if a court wished to impose a fine and a compensation order, and the offender lacked the means to pay both, the court could issue the compensation order

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<sup>68</sup> *Id.*

<sup>69</sup> *Supra*, note 65 at 5.

only. In 1988 the law was amended to require a court to give written reasons if it failed to grant a compensation order.<sup>70</sup> Such an order is a penal sanction, enforced by the state, as distinguished from a civil order which must be enforced by the successful party.<sup>71</sup> The court may imprison an offender who fails to pay compensation as ordered, unless it is satisfied there is a reasonable explanation for the failure to pay.<sup>72</sup>

A Criminal Injuries Compensation Board is funded for England, Wales and Scotland for personal injury directly suffered as a result of a crime of violence or in an attempt to stop a crime. Compensation is assessed on the basis of "common law" damages, with a lower limit of £1000 after deduction of other benefits received.<sup>73</sup>

#### **IV SWEDEN AND GERMANY**

There are a number of similarities in the manner a victim may be involved in criminal justice systems in continental Europe. As the northern European countries of Sweden and Germany appear to be somewhat similar in this regard, this paper will attempt to summarize some of the more interesting aspects of their treatment of victims.

##### **a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS**

The Swedish Code of Civil Procedural (Rättegångsbalken or RB) grants the victim the right to present civil claims as part of the criminal proceedings and it is the duty of the prosecutor to advance these claims (22:2 RB)<sup>74</sup>. However, if a civil claim may adversely affect the criminal proceeding, the court has the jurisdiction to direct that the claim be tried separately as a civil

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<sup>70</sup> Home Office *The Criminal Justice System in England and Wales* London, Home Office 1995 at p. 28

<sup>71</sup> Note that in Canada, if an order of restitution is not complied with, s.726 of the *Criminal Code* states that a victim can enforce it, but only by entering a judgment against the offender as if it were a judgment rendered against the offender in civil proceedings.

<sup>72</sup> *Supra*, note 60 at p. 18

<sup>73</sup> Criminal Injuries Compensation Board: Thirtieth Report (Accounts for year ended 31 March 1994) (London: HMSO: 1994).

<sup>74</sup> Bo Svensson, *Criminal Justice Systems in Europe: Sweden* (Stockholm, Sweden: National Council for Crime Prevention, 1995) at 39.

cases(22:5 RB).<sup>75</sup> The victim is to be informed in the pre-trial stage of his or her right to have the prosecutor present the civil claim. In Germany, in a proceeding know as *ashionsprozees*, the victim may also present his or her civil claim as part of the penal process. A somewhat similar right exists in France, Belgium, Italy and Spain where the legal systems are based on the Roman law. By adjoining their civil claim to the criminal proceedings, victims are thus able to have their concerns directly reflected in the criminal justice process.

Sweden and Germany, as well as a number of other European countries such as Poland, (the former) Czechoslovakia, the Netherlands and Austria, allow the victim a prosecutorial role as a joint or *subsidiary* prosecutor.<sup>76</sup> As joint prosecutor, the victim does not control the prosecution of the case, but has access to information on the prosecution case, can suggest questions to be put to witnesses, and generally can take a more active role in the prosecution of the offender. In both Sweden and Germany if the public prosecutor refuses to bring charges against a suspect, a victim may have the *secondary* right to prosecute.<sup>77</sup> If the prosecutor decides not to prosecute in Sweden, a victim can appeal this decision to a senior prosecutor and the Attorney General. However, a Swede who prosecutes independently runs the risk of paying the defendant's costs in the event of an acquittal. A Swedish victim can also appeal against sentence if the prosecutor doesn't appeal, but again runs the risk of costs. (31:11 RB).

Victims in Germany rarely elect to proceed as a *secondary* prosecutor, that is to commence a private prosecution.<sup>78</sup> However, this is not as attractive to the victim as the joint or *subsidiary* prosecutor role. which carries the right to participate jointly with the prosecutor, alone or with counsel, and is thus more frequently used because it permits victims to express their views and concerns to the court while leaving the main prosecutorial burden to the prosecutor.

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<sup>75</sup> Ibid.

<sup>76</sup> R.I. Mawby and S. Walklate, *Critical Victimology: International Perspectives* (London: Sage Publications, 1994) at 133.

<sup>77</sup> In Germany this is known as "Privatklage": See: *Ibid*.

## PROTECTION OF VICTIMS

In Germany, the *Protection of Victims Act (Opferschutzgesetz)* which became law in 1987, considerably improved the procedural protection of victims of crime and was substantially consistent with the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

The Legal Affairs Committee of the German Federal Parliament (*Bundestag*) stated the objective of the legislation was the protection of victims:

"Particularly the victims of serious crime, e.g. rape victims or the victims of any other offense against sexual determination, are in need of a protected power of participation. Furthermore, they should get better protection, like other participants in the proceedings as well, of their personal sphere against damage emanating from the proceedings themselves. Also, the victim's chances of getting compensation for his material damage should be improved ...".<sup>79</sup>

The *Protection of Victims Act* provided for considerable improvements in the treatment of victims in Germany.<sup>80</sup> It provided that victims are to be fully informed of their rights and their role in the justice system, including the right to be informed of the outcome of all court proceedings. As well, the right of victims to be involved in the prosecution as ancillary or joint prosecutor was extended to more categories of serious offenses and those who could not afford counsel for this purpose were granted access to legal counsel.

A victim's right to act as a joint or ancillary prosecutor was expanded by the *Act* and included such serious offenses as rape, grave bodily harm, and attempted homicide. When such victims elect to act as joint prosecutors, they may act through counsel and may have access to legal aid services if qualified. As well, victims as witnesses may have counsel act for them when they give testimony. Legal aid is also available for victims who proceed by way of *adhesion*, that is where the civil claim is joined with the criminal trial.

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<sup>78</sup> *Supra*, note 71.

<sup>79</sup> Eberhard Siegismund, Federal Ministry of Justice, "Victim Protection in Criminal Proceedings", *Prevention of Crime and Treatment of Defendants*, at p.53.(Presented to the Ninth United Nations Congress in Cairo, Egypt, 1995)

The German *Protection of Victims Act* further restricts cross-examination of victims as witness in matters of a "personal nature" and child victims of sexual assault may only be questioned by the presiding judge. In appropriate circumstances, the public, even the offender, may be removed from the courtroom during the testimony of a child sexual assault victim, if the court deems it necessary for the child's welfare.

The *Protection of Victims Act* also allow victims to change their names and general identity if they are in fear of intimidation or retaliation from the offender as a result of giving testimony. In addition to these attempts to conform with the U.N. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the German government has undertaken to continuously review other possible changes to improve the legal status of victims of crime

In Sweden, controversy over the treatment of victims and witnesses has centered on victims of sexual offenses. Since the 1980's, victims of sexual assaults have been provided with an advocate or "support person" charged with looking after the victim's interests throughout the trial. Such assistants are appointed by the court as soon as the pre-trial investigation commences.<sup>81</sup>

In Sweden, public counsel are also appointed in the pre-trial stages for victims of crimes against life, health or liberty and peace, if the committed offense carries a minimum punishment of imprisonment.<sup>82</sup> Counsel protect the victim's rights, gives him or her support and has the right to be present whenever the victim is being interrogated. In addition to the public victim's counsel, the victim may also have a support person present during any interrogations.

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<sup>80</sup> *Ibid*, at 53-54.

<sup>81</sup> *Supra*, note 77 at 132.

<sup>82</sup> Public counsel is also available if the committed crime is robbery or attempt, preparation, conspiracy or complicity to robbery.

### **c. RECOVERY OF VICTIM'S LOSSES**

In both Sweden and Germany victims may obtain compensation from the state damages occasioned by certain criminal offenses. In Germany, the law concerning compensation for victims of violent offenses (Opferentschadigungsgesetz or OEG) came into force in 1976. Under this Act, a person who has suffered injury or damage as a result of a deliberate, illegal assault may obtain compensation for the physical and economic consequences of such an assault.<sup>83</sup>

Compensation in Sweden is given for damage and harm caused by crimes against persons. However, compensation for crimes against property is awarded only when the crime in question has been committed by escaped prisoners "and similar persons".<sup>84</sup> The general civil principles of damages are applied when compensation is determined. Thus, if the offender has paid damages or the victim has received compensation from his or her insurance, that amount is deducted from the compensation. Furthermore, the compensation is limited to certain maximum amounts.

As of July 1994, Sweden has also instituted a Victim Support Fund. A defendant who is sentenced for a crime which carries the minimum punishment of imprisonment shall always be ordered to pay, in his sentence, a fee of SEK 300 (\$60 CAN) toward the fund. The revenue obtained from these fees is used to promote activities beneficial to victims of crime (Law 1994:419 on Victim Support Fund).<sup>85</sup>

## **V. JAPAN**

In its recent report to the UN<sup>86</sup>, Japan has acknowledged that victims rights have not been appropriately respected but that efforts are being made to improve the situation and Japan has declared it is dedicated to improving the status of victims. The National Research Institute of

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<sup>83</sup> Helmut Kury, Michael Kaiser and Raymond Teske, Jr., "The Position of the Victim in Criminal Procedure -- Results of a German Study" (1994) 3(1/2) *International Review of Victimology* at 69-70.

<sup>84</sup> *Supra*, note 74.

<sup>85</sup> *Ibid*, at 40.

Police Science, National Police Agency, is carrying out research on victims and their needs. The report states that the research discloses that "victims of heinous offenses and their bereaved families felt discontent, fell into self-hatred and a sense of emptiness arising from fear, anger, and confusion, and felt isolated from society"<sup>87</sup>: An expression of discontent not unlike that heard in other cultures and criminal justice systems.

**a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS**

In Japan, the state has a monopoly on prosecution and victims do not have the right to prosecute. The prosecution service has considerable independence and has broad prosecutorial discretion. When there is a decision not to prosecute, dissatisfied victims may question this decision by application to a prosecution review commission "under which the propriety of the disposition of non-prosecution may be subject to people's review".<sup>88</sup> If the "Committee for the Inquest of Prosecution" decides that a prosecution should be instituted, the Chief of the District Prosecutor's Office takes into consideration the determination made by the Committee, and may institute prosecution. If the decision is still not to prosecute, for some serious offenses, the victim may file an application to commit the case to court for trial. If the judge determines the matter should proceed, it can select a lawyer to act as the public prosecutor. The U.N. report also states that " In a hearing of the victim, efforts are made not only to ascertain the facts, but also to grasp thoroughly the extent of suffering, if any, and to make the utmost effort to reflect them in criminal justice proceedings and assure their participation in judicial proceedings".<sup>89</sup>

The report indicates police try to be sensitive to victims concerns in sexual assault cases by using female officers where appropriate and take steps to expedite resolution of the complaint.

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<sup>86</sup> The Ninth United Nations Congress of the Prevention of Crime and the Treatment of Offenders Cairo Egypt, *Less Crime, More Justice: Security For All* (National Statement, Japan: 1995) UN Doc.: A/Conf.169/G/Japan at 45-47.

<sup>87</sup> *Ibid* at 45.

<sup>88</sup> *Ibid* at 33 wherein it is noted that in 1992 " out of 70,000 non prosecution decisions, 1,344 were appealed to the commission of which 51 were deemed 'inappropriate'"

It is also reported that police also make efforts to promptly return articles involved in offenses and inform the victims of the progress of the investigation and brief them about the judicial proceedings.<sup>90</sup>

**b. PROTECTION OF VICTIMS**

Intimidation of witnesses is a criminal offense under the Japanese Penal Code, and if there are reasonable grounds to suspect the accused will harm or threaten witnesses or victims, the accused may be refused bail. If witnesses are harmed or killed as a result of their involvement in an investigation or prosecution, the state will pay for medical and other expenses.<sup>91</sup>

Furthermore, to prevent victims of organized crime (*Boryokudan*) from retaliation by an offender, a variety of protective measures are taken which includes arranging personal guards and patrolling the victim's residential area.

**c. RECOVERY OF VICTIMS' LOSSES**

In Japan there is no adhesion process, and victims must use the civil courts to claim damages. However, when a prosecutor exercises the discretion to prosecute or not, an important consideration is whether the victim has already been paid for his losses. It is more likely that a prosecutor will decide not to prosecute when the victim has already been compensated.

As many victims or their surviving families cannot obtain compensation from the offender due to his or her lack of resources, the state has a "Crime Victims Benefit Payments System." This system is supplemented by a Crime Victims Relief Fund which in turn is funded by a wide range of people. Scholarships are offered to surviving children of crime victims and psychiatrists provide counseling to victims who suffer emotional distress.

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<sup>89</sup> *Ibid*, at 46.

<sup>90</sup> *Ibid*, at 33 wherein it is noted that in 1992 out of 70,000 non-prosecution decisions, 1,344 were appealed to the commission of which 51 were deemed "inappropriate."

<sup>91</sup> *Ibid*, at 47.

## CONCLUSION:

The criminal justice system must recognize that the victims' rights movement is more than an emotional demand for vengeance. It is instead an insistence that the victim has a right to have knowledge of and participate in the formal criminal proceedings and to be protected during the process. It is a cry for empowerment and "fairness" - a demand from victims and the public that "justice be done" from their perspective.. The challenge of this evolving era of improving treatment of the victims in the criminal justice system is "to do justice" to the victim while protecting the public interest right of assuring a fair trial to the accused. Canada has made progress in responding to this challenge. Sometimes the progress, although well-intentioned, has been incomplete and only marginally effective. To more usefully respond to victims' issues, those who are most aware of the importance of fundamental principles in the criminal law, the governments, the bar, the judiciary and legal and criminology academics, must positively respond to complaints about the system. Any significant re-assessment of victim treatment should focus on the following:

- ◆ Are victims adequately informed of their rights and their role in the criminal justice system? Some provinces and federal agencies have leaflets to provide victims; could this not be a national process with supplements to accommodate provincial distinctions? Note that some jurisdictions distribute these at the time a complaint is filed. This document could also indicate the source of further information, such as that relating to trial events and advice on the support services available.
- ◆ Should victims have allocution rights (the right to speak) or have standing at any stage of the criminal process? As this paper indicates, many common-law and European jurisdictions allow victims such status during some parts of the process; during the trial as witnesses, during sentencing, and during the correctional phase.

- ◆ Should the victim have restitution and compensation rights? This subject would require an assessment of the adequacy of the compensation statutes. Also, when will the restitution amendments of the *Criminal Code* be proclaimed and how should the courts implement them?

This is obviously not an exhaustive discussion list; assessment would also include witness protection, both physical and procedural, and access to advice and support. As well, one of the most important aspects of any re-assessment would be a consideration of how victims needs/rights should or could be made effective. Critics in all jurisdictions complain that most ‘statements of rights’ and supportive legislation do not provide remedies for victims if their rights are violated.<sup>92</sup> The Canadian criminal justice system could also take steps to implement the U.N. General Assembly resolution recommending that training programs aimed at the dissemination of rights of victims should be part of the curricula of law faculties, criminology institutes, police training and judicial education programs

In my opinion, criminal justice professionals should and can meet victim issues with a positive attitude, sensitive to the need for public support of the justice system and conscious of the importance of not compromising fundamental principals. It is time for a thorough re-assessment of the treatment of the victim in Canada’s criminal justice system, followed by the careful development of effective policy by all the players: including the judiciary and victims’ support groups.<sup>93</sup>

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<sup>92</sup> See, for example, *Supra*, note 41, Gewurtz and Mercurio at p. 227

<sup>93</sup> I am grateful to Tania Cogan for her research assistance, Mark Yamamoto for his attention to detail, and all my associates at The International Center for Criminal Law Reform and Criminal Justice Policy for their support and encouragement.

## APPENDIX A

### Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

#### A. *Victims of Crime*

1. “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term “victim” also includes, where appropriate, the immediate family or dependents of the direct victim persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

#### *Access to justice and fair treatment*

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

### *Restitution*

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

### *Compensation*

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including

in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

#### *Assistance*

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social services and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

#### ***B. Victims of abuse of power***

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies of such acts.

## **APPENDIX B**

In recognition of the United Nations Declaration of Basic Principles of Justice for Victims of Crime, in March, 1988, The Canadian federal and provincial governments endorsed a joint Statement of Basic Principles of Justice of Victims of Crime to guide Canadian society in promoting access to justice, fair treatment and provision of assistance for victims of crime. The Statement reflects the United Nation Declaration of Basic Principles of Justice for Victims of Crime which Canada co-sponsored in 1985.

Federal and Provincial Ministers Responsible for Criminal Justice agree that the following principles should guide Canadian society in promoting access to justice, fair treatment and provision of assistance for victims of crime.

1. Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.
2. Victims should receive, through formal and informal procedures, prompt fair redress for the harm which they have suffered.
3. Information regarding remedies and the mechanisms to obtain them should be made available to victims.
4. Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.
5. Where appropriate, the views and concerns of victims should be ascertained and assistance provided throughout the criminal process.
6. Where the personal interests of the victim are affected, the views or concerns of the victim should be brought to the attention of the court, where appropriate and consistent with criminal law and procedure.
7. Measures should be taken when necessary to ensure the safety of victims and their families and to protect them from intimidation and retaliation.
8. Enhanced training should be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines developed, where appropriate, for this purpose.
9. Victims should be informed of the availability of health and social services and other relevant assistance so that they might continue to receive the necessary medical, psychological and social assistance through existing programs and services.
10. Victims should report the crime and cooperate with law enforcement authorities.