Kaiser/Kury/Albrecht

Victims and Criminal Justice

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Victims and Criminal Justice

Legal Protection, Restitution and Support

Edited by

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with the assistance of

H. Arnold

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Preface

The present volumes in relation to empirical victimology, attempt to present an overall view of the state of international research as it stands. The victim of crime has been considered in many countries, from various perspectives. We are concerned in this way, with questions as to the assessment of crime, recording the effects of crime upon the victim, and most of all with the improvement of the victim's position within the criminal proceedings and criminal law itself. Victimology has in the meantime developed to become an area of research which has many facets to it. This has led within a short period of time since the rediscovery of the victim, to a multitude of results within this area of research.

The publication of this collection of articles takes place upon the occasion of the VIIth International Symposium on Victimology in Rio de Janeiro/Brazil 1991. It has not been difficult for us to undertake this task, given that study of the victim of crime can be regarded as having an established tradition at the Max Planck Institute for Foreign and International Criminal Law in Freiburg. In addition, the study of the victim represents the main focus of a research program at the Institute at present. The first entirely German victim study after the merging of the two German States, has emerged as a result.

The present volumes present an impressive picture of the immense variation of questions with which victimological research is concerned today. At the same time, however, a number of gaps in relation to former research, are appearing. As a result, victimological questions, which have been derived from what is considered to be a misuse of power, have been researched to a limited extent. The same applies to the field concerning the expectations and needs of the victim. The present collection of articles, at any rate, draws attention to the fact that not only the criminological discipline which is concerned with victimologically relevant studies, but also other disciplines such as psychology and sociology, are taking up such victimological questions.

The articles are divided into three main groups. Volume I contains reports in summary and also articles, which deal with victim surveys in particular. Volume II contains studies in relation to the fields of legal protection, restitution and victim support. Volume III combines particular victim groups and questions in relation to the victim. This division can naturally be regarded as a simple categorization of the themes dealt with.

The overall view which the first volume contributes to victimological research, relates in particular to European countries such as Spain, Switzerland, Austria, Greece and the Federal Republic of Germany. In addition, the USSR, Israel and Japan are represented, and likewise the Black African States, the latter being in a summarized form. Articles in relation to victim surveys have been presented in the second chapter of the first volume. The magnitude of the research in this area is particularly noticeable.

The second volume contains essentially articles relating to the question of compensation and offender-victim-settlement and likewise victim protection. The main emphasis of the research can be seen quite clearly in this area. This emphasis most of all reflects the criminal political dynamic as is expressed in many model projects and law reforms. It concerns therefore the implementation and evaluation of projects and laws.

The third volume deals with articles relating to the area of business and victimization, a field which likewise, has been little researched. The volume is also concerned with minorities, a theme which has only been recently discovered, just as for example old people as victims of crime. Further chapters deal with children and juveniles as victims, and questions which are related to violence against women, two complex themes which have been quite rightly emphasized within victimology. Finally, the third volumes contains articles relating to victims of violent crimes and abuse of power.

We wish to thank at this point, the academics from all over the world, who are represented by their articles in these volumes. Mrs. Scott L.L.B. has contributed to the translation of many articles and the preparation of others. Without her conscientious work, it would not have been possible to cope with the problems which arose due to the publication of such an extensive amount of work in English. Our thanks also to Mrs. cand.phil. Eva Tov who organized and coordinated the publication, Mrs. cand.phil. Daniela Kirstein and Mr. cand.phil. Joachim Obergfell-Fuchs, who were involved to a considerable extent in the organization of these volumes, and who carried out proof reading of many articles.

Mrs. Beate Lickert and Mrs. Martina Hog prepared the documents for printing with great efficiency and conscientiousness. Our thanks in particular to both of them.

Finally, we wish to thank the publisher "Computersatz & Druckservice Barth" for the exemplary technical production and the immense patience.

Freiburg, July 1991

G. Kaiser
H. Kury
H.-J. Albrecht

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Legal Protection, Restitution and Support

International Comparative Victim Surveys

A Comparative Victimization Study in the United States and the Federal Republic of Germany: A Description of the Principal Results

*Raymond H.C. **Teske, Jr.**, Harald R. **Arnold***

Contents

1. Introduction

This chapter presents descriptive findings resulting from a comparative study designed to measure the impact of crime on the residents of the state of Baden-Württemberg (Federal Republic of Germany) and the state of Texas (United States). The study represents the first pre-designed victimization survey carried out by researchers in both countries for the explicit purpose of comparison.[1] The data presented here are essentially descriptive and empirical in nature. More indepth analyses of data focusing on specific topics have been carried out and are published elsewhere.[2] The intent of this chapter is, primarily, to provide the first English-language presentation of almost all of the comparable data collected in the two surveys.[3] In order to facilitate the readability and comprehension of the results, to the extent

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1 Support for this project was provided by several sources. Professor *Teske* was supported during one year in the Federal Republic of Germany (1980 to 1981) by a stipendium from the Alexander von Humboldt-Stiftung. During this time he was also supported by a developmental leave (sabbatical) from Sam Houston State University (Huntsville, Texas, USA). Subsequent work on the project by Professor *Teske* has been supported by grants from the Alexander von Humboldt-Stiftung, Sam Houston State University, and the Max Planck Society. The Max Planck Society has provided financial and logistical support for the collection and analysis of the data. Mr. *Arnold's* work on the project has been supported by the Max Planck Institute for Foreign and International Criminal Law.

2 See, e.g. *Teske & Arnold* 1987, *Arnold & Teske* 1988, *Arnold* 1991.

3 For this reason, no major effort is made in the following to report on the state of the theory in the research field concerned. With regard to comparative victim surveys see, for example, *Sveri* 1982, recently *van Dijk et al.* 1990 and the secondary analysis by *Block* 1990. With further references and remarks, see *Arnold* 1990.

feasible, the findings are presented in the form of tables, accompanied by commentary.[4]

The specific purpose of the study was the acquisition and comparison of cross-national data regarding several salient criminal justice issues. Of primary interest were: (1) crime victimization rates; (2) reporting of crime to the police; (3) knowledge of other victims of crime; (4) fear of crime; and, (5) public opinion regarding selected issues such as the death penalty.[5]

Comparison of the methodological procedures were also of primary interest; however, they are not the focus of this chapter and, therefore, are reviewed only briefly. More detailed publications regarding the methodology are available.[6] Briefly stated, between 1977 and 1983 the senior author was director of the Survey Research Program at Sam Houston State University where he designed and supervised a substantial number of surveys, including an annual survey known as the Texas Crime Poll. The 1980 Texas Crime Poll questionnaire served as the model, or guide, for the German-language survey. Working together with the advice of other members of the Max Planck Institute the researchers constructed a German-language questionnaire which complimented the Texas English-language questionnaire. During this process, several changes, additions, and deletions were made. Subsequently, upon returning to the Criminal Justice Center, at Sam Hous-

4 The reader should be aware that, at the same time, a parallel survey has been carried out in Hungary by Dr. *László Korinek* (from the University in Pecs) which replicated most of the items in the questionnaires used in Texas and Baden-Württemberg. The results of Dr. *Korinek's* survey are reported in a book titled Rejtett bünözés 1988. See also *Arnold 1986, Arnold & Korinek 1985, Arnold et al.* 1988 and *Arnold & Korinek* (this volume) with comparative results including Hungarian data. Replication studies have been carried out in Switzerland; see *Schwarzenegger* and *Stadler-Griesemer* (both in this volume). In addition, a special study on foreign minorities has been done using the same design and methodology (see *Pitsela*, this volume).

5 It should be noted that additional issues and more indepth inquiry regarding some of the questions were included in the questionnaires. In total, the questionnaires contained some 400 variables. This chapter addresses most of the central issues. Information regarding other data contained in the surveys can be obtained from the authors as well as the methodological approach chosen. See also the overview in *Arnold* 1986 und *Arnold et al.* 1988.

6 See, for example, the publication Texas Crime Poll: 1982 by *Raymond Teske*, Jr., *Michael Hazlett*, and *Mary Parker* 1983. See, especially, pages 25 to 30 which contain a complete overview of the development of the research process and followup research regarding non-respondents. In addition to the 1982 survey, six Texas Crime Polls had been carried out previously, as well as five similar surveys on special topics. For a methodological analysis of the German survey see *Arnold* 1987.

ton State University, the senior author prepared and carried out another survey which reflected these changes. It is the results of this survey that are presented in this paper.

2. Method

Samples and Response Rates

The survey in **Baden-Württemberg** was carried out during the fall of 1981. The sample was obtained through a two-stage cluster procedure using names and addresses from the Regional Data Centers (Regionales Rechenzentrum).[7] Analysis of the socio-demographic characteristics of individuals included in the sample indicated that they were congruent with the parameters of the population of Baden-Württemberg.

A sample of 3,830 residents was selected. Prior to mailing the questionnaire, each person in the sample was sent a postcard which explained the purpose of the survey. Subsequently, each person was sent a packet by first-class mail which contained a letter explaining the purpose of the survey, a copy of the questionnaire, and a stamped, return addressed envelope. At the end of three weeks and, subsequently, six weeks, all non-respondents were sent a follow-up postcard requesting that they complete and return the questionnaire. The distribution of the returns is presented in Appendix A.

A total of 2,252 individuals returned completed, useable questionnaires. This represented a return rate of 58.8%. A total of 320 individuals were not available to participate in the survey because they had moved, were not at the address listed, or were deceased. These accounted for 199 members of

7 There are six Regional Data Centers and two larger cities with their own centers, Stuttgart and Mannheim. All residents in the Federal Republic of Germany, including foreigners, are required by law to register with the responsible local administration, that is, the Municipal Registration Office (Einwohnermeldeamt) or, in small communities, the Bürgermeisteramt. The local administration may or may not elect to use the services of a Regional Data Center for keeping their registration records computerized. A review of the statistics indicated that 91% of the Baden-Württemberg residents were contained in the data files and 86% of the 1,111 Gemeinden made use of the Regional Data Center services. Careful examination led to the conclusion that there was no apparent bias in the distribution of the population in the data files; therefore, the sample consisted of a systematic random probability sample drawn from the data files.

our sample. An additional 121 were too ill, too old, or indicated that they had language problems. If the 320 are subtracted from the original sample this means that 3,510 were actually available to participate in the survey, providing for an adjusted return rate of 64.2%. Analysis of the characteristics of the respondents indicated that, in general, they were representative of the original sample.

The sampling procedure in **Texas** was somewhat different. For several years prior to 1982 survey samples had been obtained by selecting a systematic random probability sample from the list of licensed drivers in the state of Texas. More than 90% of Texas residents eighteen years of age and older hold a valid drivers license and the samples are generally representative of the population parameters.

A sample of 2,000 Texas residents was selected and the data were collected during the early part of 1982, beginning in January. A postcard was mailed explaining the purpose of the survey, followed several days later by a packet, mailed first-class, containing (1) a letter, (2) the questionnaire, and (3) a stamped, return-addressed envelope. Non-respondents were sent a postcard at the end of two weeks, another packet containing a questionnaire and return envelope at the end of three weeks, and a final reminder postcard at the end of five weeks.[8]

A total of 1,442 completed, useable questionnaires were returned. This represented a return rate of 72.1%. In addition, 87 questionnaires were returned because individuals had moved and they could not be forwarded and two because the person was deceased. If these 89 were subtracted from the original 2,000, this would leave a potential sample of 1,911 and an adjusted return rate of 75.5%.[9]

The distribution of returns is presented in Appendix B. In general, the socio-demographic characteristics were congruent with those of the total sample. For a comparison of both samples with regard to the weekly response rates see Figure 1.

8 Although the research procedures used in the Texas Crime Polls were developed independently, beginning in 1977, they are very similar to the procedures developed by *Dillman* 1978.

9 More detailed analysis of the research procedure, including information on return rates is presented in the publication Texas Crime Poll 1982 (*Teske et al.* 1983).

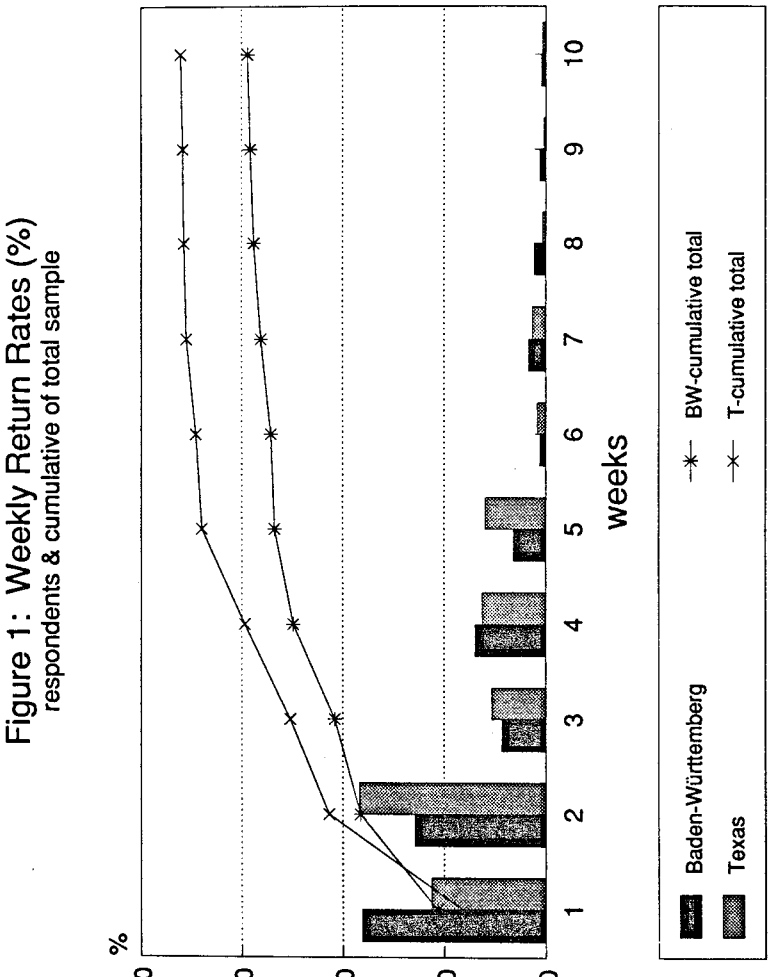

Figure 1: Weekly Return Rates (%)
respondents & cumulative of total sample

Main Characteristics of the Respondents

Community size can be a salient factor regarding victimization rates, as well as public attitudes. (Data regarding the distribution of respondents according to community size is presented in Appendix C.) Nine categories were listed in the Texas survey and seven in the Baden-Württemberg survey. Overall, the differences in the constructed categories are similar; nevertheless, slightly different categories were used in the questionnaires in order to reflect both official and more commonly used categories in the respective countries.

It is particularly noteworthy for the purposes of this study that, whereas only 15% of the respondents in Baden-Württemberg lived in a community of 100,000 or more residents, 44% of the Texas respondents lived in a community of 100,000 or more residents. Examination of Appendix C reveals that, in general, respondents to the Baden-Württemberg survey lived in communities of relatively smaller size compared to respondents to the Texas survey.[10] Nevertheless, in both instances the respondents approximated the demographic distributions of both the respective samples and the total populations.

Concerning gender, 50% of the respondents in Baden-Württemberg were males and 50% were females. In Texas, 54% of the respondents were male and 46% were females.

The average age of a respondent in Baden-Württemberg was 44 and the median age was 42. In Texas, the average age was 42 and the median age was 39. In both surveys, the intent was to include only individuals 18 years of age or older.

10 In contrast to this, one has to take into consideration another aspect to urbanization, namely that Baden-Württemberg is much more populated than Texas. The density, i.e. the population per square mile of land area, is 54.3 for Texas compared to 671.6 for Baden-Württemberg which equals a ratio of 1:12.4 (in km^2 the figures are 21.0 and 259.3 respectively).

3. Results

3.1 Crime Victim Experiences

Personal Victimization: Prevalence and Incidence Rates

Since technical terms regarding specific types of crime can convey significantly different meanings, even to residents of the same country, much less cross-nationally, it was necessary to construct statements defining specific types of events in order to gather comparable information regarding crime experiences.[11] For example, if a respondent were asked if he had been the victim of "robbery" during the previous year, the respondent may give an affirmative answer, even though the actual event consisted of someone breaking into the respondent's house or, perhaps, theft of the respondent's bicycle.[12] Therefore, in this specific instance, respondents were asked: "During the past year ..., did anyone take something from you by force or threat of force?" Subsequent questions ascertained the type of force and which type of weapons, if any, were used.

Respondents to both surveys were asked about nine specific crime categories. In addition, respondents were asked to list any other crimes of which they might have been a victim. In the Texas survey, the word "serious" was used in the latter question and could affect the comparability of this question. At the same time, experience by the senior author has indicated that the general trend is toward a very limited number of responses to this question. The Texas survey also included the category "fraud," that is, "... did anyone obtain money or property belonging to you by false (illegal) pretense?" For heuristic purposes, data regarding fraud are reported in this chapter in instances where they do not significantly diminish the comparability of the data.[13]

Table 1 presents the number of respondents who were victims of each of the crime categories at least once during the previous year. In the Texas

11 See, for example, *Teske & Arnold* 1982.

12 *Block & Block* 1984 have noted that the National Crime Survey uses a similar procedure.

13 To be able to compare to other negative life events, the Baden-Württemberg survey contained a series of questions regarding victimization as a result of traffic accidents. See *Arnold* 1986, 1024, *Arnold et al.* 1988, p. 916.

survey, this referred to the year 1981, as the survey procedure began in January of 1982. In the Baden-Württemberg survey, which started in the fall of 1981, this referred to "the previous 12 months."

Table 1: Summary of Crime Experiences

	Texas (N = 1,442)		Baden-Württemberg (N = 2,252)	
	Number	Percent	Number	Percent
Burglary (of home)	180	13	37	2
Motor vehicle theft	69	5	51	2
Other theft	180	12	178	8
Robbery	11	1	8	*
Assault with weapon	20	1	19	1
Assault with body	69	5	37	2
Rape or attempted rape	12[a]	1	6a	*
Arson or attempted arson	14	1	4	*
Vandalism and malicious mischief	201	14	210	9
Fraud	40	3	N/A	N/A
Other crimes listed	16	1	25	1

* Less than 0.5%.

[a] Respondents to the question regarding rape in the Texas survey included 8 females and 4 males. Respondents to the Baden-Württemberg survey included 7 females and 1 male. Since these were, in fact crimes, they are retained in this table as part of the total overview of crime incidents.

Note: In Texas, a total of 1,124 crime incidents were recorded by 525 (36.4%) of the 1,442 respondents. In Baden-Württemberg, a total of 887 crime incidents were recorded by 447 (19.8%) of the 2,252 respondents.

The data in Table 1 refer only to respondents who had been the victim of a particular crime category at least once (prevalence rates), and does not reflect multiple victimization. Overall, respondents to the Texas survey were significantly more likely to have been a victim of each type of crime than were respondents to the Baden-Württemberg survey. It is particularly noteworthy that the percentage of respondents who were victims of a burglary (of a home) was more than six times greater in Texas than in Baden-Württemberg.

This is particularly noteworthy since there is some evidence in the literature that burglary of a home, as well as knowledge of a victim of burglary of a home, is a significant factor affecting fear of crime.[14]

The two crime categories which were most similar with respect to the percentage of victims were other theft (Texas = 12%; Baden-Württemberg = 8%) and vandalism/malicious mischief (Texas = 14%; Baden-Württemberg = 9%). (The assault with a weapon category appears to be similar with 1% each; however, this is due to rounding of the percentages. More detailed analysis indicated that the Texas data equals 1.39% and Baden-Württemberg equals 0.74%, or about one-half compared to the Texas data.)

It is noteworthy that, with the exception of burglary of a home, the relative distribution, based on ranked percentages, are the same in both surveys, that is, in order from the type of crime victimization experienced most often to the crime category experienced least often.

Whereas the data in Table 1 represent respondents who had been the victim of a particular crime at least once during the previous year (incidence rates), Table 2 reports the total number of victimizations experienced during the previous year. In order to facilitate direct comparison, rates per 1,000 have been calculated based on the respective sample sizes.[15] Again, a very significant difference can be observed regarding burglary of a home, with a rate of 207 per 1,000 in the Texas survey and only 27 per 1,000 in the Baden-Württemberg survey.

The only crime category with a similar rate is vandalism/malicious mischief, with rates of 139 (Texas) and 129 (Baden-Württemberg) per 1,000. This does suggest that victims of this particular crime were more likely to have experienced multiple victimization in Baden-Württemberg than in Texas.

14 See, for example, *Maguire* 1980 and *Lurigio* 1987. See, also, tables 6 and 7 of this chapter which evidence the strong concern regarding burglary victimization and the steps taken to protect homes.

15 The rate per 1,000 is based on the total number of victimizations reported by the respondents using the total number of respondents as the base population (including those who did not respond to the question).

Table 2: Total Number of Crime Incidents Recorded for the Previous Year

	Texas (N = 1,442)		Baden-Württemberg (N = 2,252)	
	Number	Rate per 1,000	Number	Rate per 1,000
Burglary (of home)	298	207	48	21
Motor vehicle theft	69	48	63	25
Other theft	283	196	296	116
Robbery	13	9	9	4
Assault with weapon	32	22	33	13
Assault with body	109	76	69	27
Rape or attempted rape	8[a]	6	6a	3
Arson or attempted arson	15	10	6	3
Vandalism and malicious mischief	201	139	329	129
Fraud	(80)	(55)	N/A	N/A
Other crimes	20	14	28b	12
TOTAL	1,128	727[c]	887	394

[a] A total of 12 respondents to the Texas survey indicated that they had been the victim of rape. Four of these were males and are included in the "other crime" category. In the Baden-Württemberg survey, 7 respondents indicated that they had been the victim of rape. One of these respondents was a male and is included in the "other crime" category.

[b] Includes several cases of fraud which were written in by the respondents.

[c] Based on 1,048 crimes, excluding 80 fraud incidents.

Note: If the 80 incidents of fraud are subtracted from the Texas data, then a total of 1,048 crime incidents were recorded by the 1,442 respondents, including those who did not respond to one or more of the questions regarding victimization. This means, then, that there were 727 crime incidents for every 1,000 respondents. In comparison, the 2,252 respondents in Baden-Württemberg, including those that did not respond to the crime victimization question, recorded a total of 887 crime incidents. This means, then, that there were 394 crime incidents for every 1,000 respondents.

Overall, with fraud excluded, the Texas respondents experienced 727 victimizations per 1,000 respondents, compared to 394 victimizations per 1,000 respondents in Baden-Württemberg, with a ratio of 1.85 to 1. It is especially noteworthy that, if one calculates a similar ratio based on equivalent crimes used as Index Crimes by the Federal Bureau of Investigation's Uniform Crime Reporting Program, the ratio is 1.90:1.[16]

16 See *Teske & Arnold* 1987, p. 41 regarding a similar finding.

Reporting of Crime

Information regarding the reporting of crime incidents is presented in Table 3. As noted previously, respondents were asked to record the total number of crime victimizations which they had experienced. Subsequently, they were also asked to indicate the total number of incidents reported to the police. With the exception of arson, a greater proportion of the crimes recorded in the Texas survey were reported to the police than in the Baden-Württemberg survey. It is particularly noteworthy that the Texas respondents were approximately twice as likely to have reported crimes of robbery and assault than were the Baden-Württemberg respondents. Overall, respondents to the Texas survey reported 53% of the crime victimizations, respondents to the Baden-Württemberg survey reported only 40% of all victimizations.

Based on these data, the ratio between the likelihood of a crime being reported, that is, in Texas or Baden-Württemberg was 1.33:1 (53/40). If vandalism/malicious mischief is removed, the ratio is 1.36:1. Another way to examine this relationship is to calculate the reporting rate in Baden-Württemberg as a percentage of the Texas reporting rate. The results are 75% and 74% respectively.The significance of this is that if, in fact, the reporting rate in Baden-Württemberg is only three-fourths the reporting rate in Texas, then the comparatively lower crime rate in Baden-Württemberg (and the Federal Republic of Germany as a whole), based on official statistics, may, in part, be due to a lower propensity to report crimes to the police.[17]

Vicarious Victimization: Knowledge of Crime Victims

Respondents were also asked if they knew someone who had been the victim of each of the crime categories during the previous year. Fraud was included in Texas and in both surveys the crime of murder was added.

17 The seriousness of a victimization event (within each offence category) and its possible influence upon the reporting of the crime has not been taken into further consideration here. This would have been possible, in principle, because data on crime seriousness, for example the injury suffered in the case of a violent crime or monetary loss in the case of a property crime, have been gathered as well as reasons for the non-reporting of a crime, asked for. The result of this more detailed analysis could somewhat change the overall result and its interpretation.

Table 3: REPORTING OF CRIME INCIDENTS DURING THE PREVIOUS YEAR

	TEXAS			BADEN-WÜRTTEMBERG		
	Total Number Experienced[a]	Number Reported[b]	Percent Reported	Total Number Experienced[a]	Number Reported[b]	Percent Reported
Burglary of home	305	214	70	52	34	65
Vehicle theft[c]	69	60	87	64	51	80
Other theft	282	134	48	260	99	38
Robbery	14	10	71	9	3	33
Assault with weapon	32	17	53	29	8	28
Assault with body	112	30	27	71	11	15
Rape or attempted rape[d]	12	5	42	8	3	38
Arson or attempted arson	15	8	53	6	5	83
Vandalism or malicious mischief	351	153	44	327	117	36
TOTAL	1,192	631	53	826	331	40

[a]In some instances respondents reported that they had been a victim during the previous year, but failed to indicate how many times; therefore, in calculating the total number of victimizations, these respondents were scored as 1. The maximum number of victimization events coded in each category was 8 in Texas and 7 in Baden-Württemberg.

[b]It is possible that a respondent recorded being a victim of crime, but failed to answer the question regarding reporting, therefore, the data reported in this table include only instances actually recorded by the respondents.

[c]Due to the way that the Texas data were coded, it is likely that there were two or three cases not recorded in the total. There were however, at least 69 cases.

[d]Includes several males who considered themselves to be victims of rape.

Table 4: Knowledge of Crime Victims during Previous Year[a]

	Texas		Baden-Württemberg	
	Number	Percent	Number	Percent
Burglary (of home)	787	55	389	17
Motor vehicle theft	392	27	263	12
Other theft	510	35	517	13
Robbery	169	12	101	5
Assault with weapon	191	13	96	4
Assault with body	207	14	178	8
Rape or attempted rape	135	9	55	2
Arson or attempted arson	59	4	49	2
Vandalism and malicious mischief	346	24	321	14
Fraud	82	6	N/A	N/A
Murder	137	10	29	1

a The data indicate the number of respondents who knew at least one victim of the specific type of crime. For example, a respondent may have known several individuals who were the victim of robbery; however, this would be scored only once since respondents were not asked how many victims of robbery they knew.

The information presented in Table 4 indicates the number of respondents who knew at least one victim of a particular type of crime. In both surveys, the respondents were most likely to know someone who had been the victim of burglary of a home, with 55% in Texas and 17% in Baden-Württemberg. Perhaps the most noteworthy difference is with respect to murder. Almost one out of every 10 (9.5%) of the Texas respondents personally knew someone who was murdered during the previous year, compared to only about one percent (1.3%) of the Baden-Württemberg respondents.[18]

In summary, respondents in Texas were much more likely than respondents to the Baden-Württemberg survey to have been a victim of a crime,

18 The reader should also be aware that murder (Mord) and manslaughter (Totschlag) technically include attempted murder and attempted manslaughter. It is presumed that the context of the question made it clear that the question referred to instances in which the victim had died.

including each of the crime categories, during both the previous year and during their lifetime.[19] If the total number of crimes experienced during the previous year are converted to ratios, with the exception of vandalism/malicious mischief, Texas respondents reported a significantly greater number of crimes per 1,000 respondents. When a victimization did occur, respondents in Baden-Württemberg were much less likely to report it to the police than were respondents in Texas. Finally, Texas respondents were much more likely to know a victim of a crime during the previous year, especially victims of burglary of a home and murder.

3.2 Fear of Crime

Eight questions were included in both surveys in order to compare respondent's concerns about crime.[20] Four of the questions addressed respondent's fear under certain circumstances, one addressed concerns about being a victim of crime, one focused on safety measures taken to protect the respondent's home, and two addressed the respondent's perception of the crime problem in their respective communities.

The concept fear of crime has received a significant amount of attention in the victimological literature. It has been proposed that fear of crime affects the quality of life in that it may inhibit certain pleasurable activities.[21] Morever, fear of crime may result in an increased level of anxiety which, in itself, affects the quality of life.[22]

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19 Victimization data in its lifetime perspective are not reported here; see *Teske* et al. 1983 for Texas and *Arnold* 1986 with some comparative data. Less than one third of the Texas respondents have been classified as non-victims in their lifetime compared to more than one half of the survey respondents in Baden-Württemberg.

20 The Texas survey included several additional questions regarding, for example, fear of walking at night with a friend, or of a young child walking alone at night; see *Teske et al.* 1988. Both the Texas and Baden-Württemberg surveys included questions regarding how often respondents locked their doors and the Baden-Württemberg survey contained some more questions regarding perceptions of the crime problem in the neighborhood and in the Federal Republic of Germany. In addition, cognitive and emotional aspects of perceived victimization risk were measured in the German study, see recently *Arnold* 1991 with a comparative analysis.

21 See, for example, *Hartnagel* 1979; *Yin* 1980; *Lurigio et al.*, 1990, p. 7.

22 Among the writers who have addressed the connection between fear of crime and anxiety are, for example, *Sundeen & Mathieu* 1976, p. 55; and *Garofalo* 1981, p. 840. See also *Arnold* 1984.

Operationalization of the concept has also received significant attention.[23] Despite the fact that different approaches to the operationalization of fear of crime have been undertaken, the initial procedure, introduced as part of the National Crime Survey in 1972, has been the most consistently used and continues to be the fundamental method employed for this purpose. Specifically, survey respondents have been asked: "How safe would you feel being out in your neighborhood at night?" A Likert-type response set is then used: "very safe, somewhat safe, somewhat unsafe, and very unsafe." Occasionally, researchers have dichotomized the four possible responses, thereby developing two categories: (1) very unsafe and (2) the remaining three categories combined.[24]

The issue has been raised as to whether this one question does, in fact, measure "fear of crime." The developers of the National Crime Survey initially made the assumption that, since the question is asked in the context of a victimization survey, respondents would understand the meaning of the question. They also did not define "neighborhood," thereby allowing the respondent to conceptualize the meaning within the context of the survey.

The two primary questions used in the comparative survey were introduced in the initial Texas Crime Poll in 1977 and were included in the surveys through 1982.[25] The questions are quite similar to the question used by the National Crime Survey, although they were developed independently. One of the questions asked: "Is there any area within one mile of your home where you would be afraid to walk alone at night?" The response choices are, simply, "yes" or "no." The second question asks: "Would you be afraid to walk alone within one block of your home at night?" The same choices are provided, that is, "yes" or "no." It should be noted that, for the questionnaire used in Baden-Württemberg, one kilometer was substituted for one mile, and 100 meters was substituted for one block.

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23 For an overview of the efforts by researchers to operationalize the concept fear of crime, see *Teske and Hazlett* 1985. With reference to the problems caused by the differences in approaches see *Arnold* 1991.

24 See, for example, *Skogan & Maxfield* 1981, p. 75; *Garofalo* 1979, p. 85 et seq. Others have used questions which presented a dichotomized response choice of yes or no (*Clemente & Kleiman* 1977; *Braungart et al.* 1980).

25 *Teske & Powell* 1979.

Compared to the question used in the National Crime Survey, these two questions are more specific. "Neighbor," a somewhat broad concept, is replaced by two very specific areas. Also, the choices for the answers are dichotomized.

Although an initial assumption was made in 1977 that respondents would understand the context of the questions, that is, fear concerning crime, this was only an assumption. However, in 1982, if respondents answered "yes" to the question about fear of walking alone within one block of their home at night, they were asked to explain why. The results indicated that the respondents were definitely answering the question affirmatively due to fear of crime.[26] In addition to this empirical finding, the questions certainly meet the requirements for face validity. The context includes alone and at night, that is, circumstances under which an individual would feel most vulnerable to criminal assault.[27]

Concerning the first question, that is, fear of walking alone within one mile (one kilometer) of the respondent's home at night, 58% of the respondents to the Texas survey indicated that they would be afraid and 44% of the Baden-Württemberg respondents indicated that they would be afraid (see Table 5).

Affirmative responses to the second question, that is, fear of walking alone within one block (100 meters) of one's home at night, were 23% in Texas and 17% in Baden-Württemberg (see Table 5).[28]

A third question, not previously used in the Texas surveys, was introduced for this comparative survey. Respondents were asked: "Is there any place in your community where you would be afraid to walk alone during the daytime?" The responses were again dichotomized. Affirmative responses were 23% in Texas, but only 8% in Baden-Württemberg.

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26 Six questions in the Texas survey were used to develop a six item fear of crime scale. See *Teske & Hazlett* 1988.

27 See recently *Warr* 1990 with a similar interpretation based on an analysis of *Goffman's* writings.

28 The authors have published two articles which contain theoretical and methodological presentations regarding the development and comparative statistical models for explaining and predicting the dependent variable fear of crime. See *Teske & Arnold* 1987 and *Arnold* et al. 1988. See also recently *Arnold* 1991.

Table 5: Fear of Crime

	Texas		Baden-Württemberg	
	Number	Percent	Number	Percent
Fear of walking alone at night: within one mile (one kilometer)[a]				
Yes	829	58	986	44
No	592	41	1,237	55
No response	21	1	29	1
TOTAL	1,442	100	2,252	100
Fear of walking alone at night within one block (100 meters)[b]				
Yes	328	23	385	17
No	1,095	76	1,839	82
No response	19	1	28	1
TOTAL	1,442	100	2,252	100
Fear of walking alone during daytime[c]				
Yes	338	23	182	8
No	1,084	75	2,044	91
No response	20	1	26	1
TOTAL	1,442	100	2,252	100
Fear of being alone at night[d]				
Always	44	3	23	1
Most of the time	48	3	44	2
Sometimes	558	39	635	28
Never	777	54	1,522	68
No response	15	1	28	1
TOTAL	1,442	100	2,252	100

[a]Question: Is there any area within one mile of your home where you would be afraid to walk alone at night?

[b]Question: Would you be afraid to walk alone within one block of your home at night?

[c]Question: Is there any place in your community where you are afraid to walk alone during daytime?

[d]Question: Are you afraid to be in your home alone at night?

Note: The questionnaire for the Baden-Württemberg survey used "one kilometer" in place of "one mile" and "100 meters" in place of "one block".

Based on the results of these three questions, there is a significant difference between residents of Texas and residents of Baden-Württemberg with respect to fear of crime. Texans are certainly more afraid to be out alone at night and, apparently, are much more likely to perceive of certain parts of their community as too dangerous to walk alone.

Another question, designed specifically for the comparative surveys, sought to tap a different aspect of fear of crime, that is, fear even within one's own home. Respondents were asked: "Are you afraid to be in your home alone at night?" A range of four choices was provided: (1) always; (2) most of the time; (3) sometimes; and (4) never. The responses suggest that the choices could have been dichotomized (see Table 5). Slightly more than one-half (59%) of the respondents to the Texas survey answered "never," whereas more than two-thirds (68%) of the respondents to the Baden-Württenberg survey answered "never."

Victimization Expectation

Although questions about walking alone at night have been the primary method of measuring fear of crime, other methods of operationalization have been tried.[29] One method, introduced in the 1977 Texas Crime Poll, was to ask respondents about their fear of being a victim. This question, then, was included in the comparative survey and asked: "Do you feel that you may be the victim of any of the following crimes within the next year?" Respondents were then presented with a list of possible crimes (see Table 6).

It should be noted that these responses are not based exclusively on objective, empirical information. Nor are respondents asked to state a probability of the event occurring. Rather, the subjective responses to this question provide a relative perception for both comparative and longitudinal analysis.[30]

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29 See, for an early example, *Furstenberg* 1971.

30 The 1982 Texas Crime Poll publication contains a six year longitudinal comparison of responses to this question, as well as others; see *Teske* et al. 1983. A significant, consistent pattern was observed with respect to the category 'burglary'. In 1977, 30% of the respondents felt that they may be the victim of burglary during the next year. (The question specifically referred to home or business.) This increased steadily until 1982 when 41% of the respondents indicated they felt that they may be the victim of a burglary. It is also noteworthy that the percentage of respondents who had installed door bolts in their homes steadily increased from 31% in 1977 to 43% in 1982.

Table 6: Fear of being a Victim

	Texas (N = 1,442)		Baden-Württemberg (N = 2,252)	
	Number	Percent	Number	Percent
Total number of respondents who feel they may be the victim of a crime during the next year	828	57	817	36
Rape	91	6	101	5
Robbery	291	20	140	6
Assault with body	106	7	244	11
Assault with weapon	129	9	143	6
Burglary	595	41	336	15
Theft	452	31	367	16
Vehicle theft	321	22	458	20
Fraud	68	5	NA	NA
Vandalism	520	36	508	23
Other	9	1	46	2

Question: Do you feel that you may be the victim of any of the following crimes within the next year? If so, please check which ones.

Overall, 57% of the Texas respondents selected at least one crime of which they felt they may be a victim during the next year, whereas only 36% of the Baden-Württemberg respondents selected at least one crime. The 57% in Texas included some who selected fraud. Respondents selecting only fraud accounted for less than 1% of the total. The most frequently selected crime in Texas was burglary, with 41%. Only 15% of the Baden-Württemberg respondents felt that they may be a victim of burglary during the next year, although this still represented a relatively substantial proportion of the respondents. Baden-Württemberg respondents selected vandalism as the crime they felt they were most likely to experience, with 23% selecting this crime. More than one-third (36%) of the Texas respondents selected this crime. The distribution of responses to other crimes listed, in Texas, was: theft(31%); vehicle theft (22%); assault with weapon (9%); assault with body (7%); rape (6%); and fraud (5%). Approximately 19% of the Texas respondents listed some other type of crime. In Baden-Württemberg, in addition to vandalism (23%) and burglary (15%), the responses, in order,

were: vehicle theft (20%); theft (16%); assault with body (11%); assault with weapon (6%); robbery (6%); and rape (5%). Approximately 2% of the Baden-Württemberg respondents listed some other type of crime.

For comparative purposes, several findings are worth noting. First, a greater proportion of the Baden-Württemberg respondents (11%) than Texas respondents (7%) indicated that they felt they may be the victim of assault with body. If responses concerning both types of assault are combined, that is, assault with body and assault with weapon, the responses are about the same with 16% in Texas and 17% in Baden-Württemberg.

The responses were also rather similar with respect to motor vehicle theft (Texas, 22%; Baden-Württemberg, 20%) and rape (Texas 6%; Baden-Württemberg, 5%. With reference to women only: 12% of the female respondents in the Texas survey and 9% of the female respondents in the Baden-Württemberg survey indicated that they felt they may be the victim of rape during the next year.)

Precautionary Behavior: Security Devices

Another dimension regarding concern about crime can be acquired by asking about actions which persons have taken to protect their home (see Table 7). This, then, addresses empirical, factual information regarding behavior. Specifically, respondents were asked: "Which, if any, of the following devices have you placed in your home for reasons of security?"

In both surveys, the most common step taken for security was "door bolts," with 43% in Texas and 20% in Baden-Württemberg. Other than this category, less than 10% of the Baden-Württemberg respondents had placed any of the other devices in their home for security. In addition to door bolts, the most common steps taken were extra door locks (9%), window guards (7%), guard dogs (7%), and outside security lights (7%).

An issue which is frequently noted when comparing the United States with European countries, especially the Federal Republic of Germany, is the availability of guns. The question asked here did not inquire as to whether or not the respondent has a gun in his home, but whether the gun was acquired for the home for the purpose of security. (The proportion of respondents who actually have a gun in the home in reported below.) Texas respondents (38%) were more than 12 times as likely as Baden-Württemberg respondents (3%) to have a gun in the home for the purpose of security.

With respect to Texas, in addition to door bolts and guns, the other major steps taken were extra door locks (34%), outside security lights (33%), window guards (17%) and guard dogs (16%).

Table 7: DEVICES PLACED IN THE HOME FOR SECURITY

	Texas (N=1,442)		*Baden-Württemberg* (N=2,252)	
	Number	Percent	Number	Percent
Total number of respondents who have placed some type of device in their home for reasons of security	1,153	80	874	39
Specific types of devices placed in the home:				
Burglary alarms	76	5	25	1
Door bolts	625	43	439	20
Extra door locks	484	34	201	9
Window guards	242	17	164	7
Guns	551	38	75	3
Police department I.D. stickers[1]	135	9	12	1
Guard dogs	228	16	165	7
Outside security lights	481	33	160	7
Other	55	4	2	*

*Less than 0.5%.

Question: Which, if any, of the following devices have you placed in your home for easons of security?

Note: The questionnaire for the Baden-Würtemberg survey used "Private Security Protection" in place of "Police Department I.D. stickers."

In general, the Texas respondents were significantly more likely to have installed one or more of these devices in their home. It should also be noted, as indicated previously, that Texas respondents were much more likely to have been the victim of a burglary, to know the victim of a burglary, and to feel that they may be the victim of a burglary during the next year.

Concern about Crime: The Community Crime Problem

The remaining two questions which addressed respondent's concerns about crime asked for a subjective assessment of the crime problem in the respondent's community during the past three years and during the next three years. Specifically, respondents were asked: "Over the past three years, do you feel the crime problem in your community is: (1) getting better; (2) about the same; or (3) getting worse?" Essentially the same question was asked regarding the crime problem during the next three years.

Almost two-thirds (61%) of the Texas respondents felt that the crime problem had become worse, whereas only about one-third (31%) of the Baden-Württemberg respondents felt this way (see Table 8). On the other hand only 5% in both surveys felt that the crime problem was getting better.

Regarding the next three years, about one-half of the Texas respondents thought that the crime problem would become worse, whereas only about one-third (35%) of the Baden-Württemberg respondents thought it would become worse. (See Table 8). It is noteworthy that approximately one-third of the Baden-Württemberg respondents indicated both that the crime problem had become worse and would become worse. Texas respondents followed a somewhat different pattern, with only 51% indicating that the crime problem would become worse, whereas 61% said that it had already become worse. A plausible, though unsubstantiated, explanation is that some of the Texas respondents think that the crime problem in their community could not be any worse than it has already become.

Table 8: Assessment of the Crime Problem

State of the crime problem[a]				
	Texas		Baden-Württemberg	
	Number	Percent	Number	Percent
Getting better	71	5	104	5
About the same	33	33	1,387	62
Getting worse	874	61	702	31
No response	17	1	59	2
TOTAL	1,442	100	2,252	100
Future crime problem[b]				
	Texas		Baden-Württemberg	
	Number	Percent	Number	Percent
Get better	101	7	83	4
Stay about the same	575	40	1,313	58
Become worse	740	51	781	35
No response	26	2	75	3
TOTAL	1,442	100	2,252	100

[a]Question: Over the past three years, do you feel the crime problem in your community is:

[b]Question: During the next three years, do you feel that the crime problem in your community will:

In summary, the results, in general, indicate that residents of Texas are more fearful and concerned about crime as a potential threat to their personal security than are residents of Baden-Württemberg. In Texas there is more concern about walking alone at night, both near one's home and within some distance. There is good reason to propose that this is due to fear of crime. Morever, only a small percentage of the residents of Baden-Württemberg (8%) seem to feel that there is some place in their community where they would be afraid to walk alone during the daytime, compared to almost one-fourth (23%) of the Texas residents. Although the difference is not as dramatic, Baden-Württemberg residents indicate less fear of being home alone at night than do Texas residents.

Concern about being the victim of a crime during the next year presents mixed results. On the one hand, belief about the possibility of being the victim of burglary of a home or robbery is much stronger on the part of Texas residents. On the other hand, the proportion who believe that they will be the victim of an assault is very similar, albeit, relatively low. Overall, Texas residents (57%) are more likely to believe that they will be the victim of some type of crime than are residents of Baden-Württemberg (36%).

It is noteworthy that the respondents to both surveys seem to discriminate with respect to their concerns and belief. Certain crimes are given more weight than others.[31]

Devices placed in the home specifically for the purposes of security provide another dimension for assessing concern about crime. Overall, Texas residents are significantly more likely to take steps related to security. The extensive use of extra door locks, door bolts, and window guards, as well as outside security lights and guard dogs, is congruent with the differences previously noted regarding concern about and fear of being the victim of burglary. This is particularly not surprising when the findings regarding the large proportion of Texas residents who have been victims of burglary, as well as having known a victim of burglary, is taken into account.

Regarding the crime problem, per se, Texas residents were twice as likely to think that the crime problem in their community had become worse during the previous three years and the majority thought that it would become worse during the next three years. In comparison, a majority of the Baden-Württemberg residents thought that the crime problem in their community had stayed about the same during the previous three years and would remain about the same during the next three years.

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31 In a comparative perspective also referring to Hungarian data, see *Arnold* 1986, *Arnold et al.* 1988 and *Arnold & Korinek* (this volume) with some interesting results on the relationship of victimization experience, fear of crime and victimization expectations (i.e., feeling that one may become the victim of a crime in the next year).

3.3 Selected Criminal Justice Issues

Capital Punishment

This section of the chapter presents the results regarding several questions which acquired opinions to selected criminal justice issues. The first issue addressed focuses on the availability of the death penalty as a possible punishment. A key point to note regards the term "availability," rather than "use." Specifically, respondents were asked: "Are you in favor of the death penalty being available for any of the following crimes?" Respondents were presented with seven specific categories and could write in other crimes (see Table 9).[32]

In order to determine if the respondents were not in favor of the death penalty for any crime, since only some crimes were listed, the questionnaire contained a response category by which the respondent could indicate that he or she did not favor the death penalty being available for any crime.

Overall, 86% of the Texas respondents and 59% of the Baden-Württemberg respondents supported the death penalty being available as a punishment for at least one type of crime. In both surveys, the crime selected most frequently was murder, with 84% in the Texas survey and 52% in the Baden-Württemberg survey favoring the death penalty being available for this crime. Both sets of respondents evidenced relatively strong support for kidnapping (Texas, 33%; Baden-Württemberg, 28%) and terrorism (Texas, 45%; Baden-Württemberg, 31%). Texas respondents also indicated strong support for rape (46%) and treason (31%), and more than 10% were in favor of the death penalty being available for armed robbery (17%) and arson (12%). Less than 10% of the Baden-Württemberg respondents favored the death penalty being available for rape (9%), treason (6%), armed robbery (5%), or arson (2%).

32 A significant number of respondents wrote in "terrorism" in the initial Texas Crime Polls; therefore, this category was added in 1980. "Kidnapping" was added in 1978 after a significant number of respondents wrote this under "other." "Child sexual abuse" is frequently written in the "other" category. This was included in the 1980 and 1981 Texas Crime Polls with 56% and 52%, respectively, selecting this category. It was deleted from the 1982 survey in order not to affect comparison with the Baden-Württemberg survey.

Table 9: CAPITAL PUNISHMENT

	Texas (N=1,442)		*Baden-Württemberg* (N=2,252)	
	Number	Percent	Number	Percent
Total number of respondents in favor of the death penalty for at least one crime category	1,243	86	1,329	59
Murder	1,273	84	1,170	52
Rape	657	46	270	9
Treason	443	31	145	6
Armed Robbery	242	17	116	5
Arson	777	12	36	2
Kidnapping	477	33	622	28
Terrorism	654	45	698	31
Other	60	4	149	6
Not in favor of the death penalty for any crime	186	13	909	40
No response	13	1	14	1

Question: Are you in favor of the death penalty being available for any of the following crimes?

Prison Functions: The Purpose of Sanctions

The issue of the importance of different functions served by prisons was addressed by listing four principal functions and asking the respondents how important the function should be for their respective prison systems (see Table 10).

Table 10: The Importance of Different Prison Functions

	Texas		Baden-Württemberg	
	Number	**Percent**	**Number**	**Percent**
Rehabilitation				
very important	1,145	79	1,999	89
somewhat important	263	18	213	9
not important	23	2	22	1
no response	11	1	18	1
Punishment				
very important	1,150	80	1,396	62
somewhat important	251	17	650	29
not important	27	2	101	4
no response	14	1	105	5
Deterrence[a]				
very important	1,201	83	1,514	67
somewhat important	182	13	476	21
not important	38	3	178	8
no response	21	1	84	4
Incapacitation[b]				
very important	818	61	784	35
somewhat important	389	29	822	37
not important	94	7	501	22
no response	40	3	145	6

[a]To serve as an example to keep people from committing crimes.

[b]Isolation from society. (Note: incapacitation was not included in the 1982 Texas survey; therefore, results from a 1980 survey are used in this Table. The sample size was 1,341.

Questions: Prisons may serve a number of different functions. How important should each of the following be for Texas (German) prisons?

Respondents were provided with three response choices: very important; somewhat important; and, not important. Some differences in philosophy can be readily observed, especially if attention is given to the category "very important." Baden-Württemberg respondents attached more importance to rehabilitation than did Texas respondents, although more than three-fourths of the respondents to both surveys rated it as very important (89% and 79% respectively). A more distinct difference is noticeable with respect to punishment and deterrence. Texas respondents (80%) were much more likely to perceive punishment as a very important function of prisons than were Baden-Württemberg respondents (62%). The same findings held with respect to deterrence (83% and 67% respectively).

The greatest difference in opinions was with respect to the issue of incapacitation.[33] Almost two-thirds (61%) of the Texas respondents rated incapacitation as a very important function, whereas approximately one-third (35%) of the Baden-Württemberg respondents indicated very important.

Regarding the first three functions noted, even though there were differences in the selection of "very important" when assessing a prison function, when combined with the proportion selecting "somewhat important" the total percentages were about the same. This did not hold true for incapacitation. A total of 22% of the Baden-Württemberg respondents indicated that incapacitation is not important as a prison function, whereas only 7% of the Texas respondents indicated that it is not important.

Criminal Justice System: Evaluation of the Police, the Courts and the Prison

Respondents were also asked to rate the job being done by the police in their community (see Table 11).

33 It should be noted yet again that colloquial terms for the more legal terms deterrence (i.e., to serve as an example to keep people from committing crimes) and incapacitation (i.e., keeping criminals away from society) were used in the respective surveys.

Table 11: Effectiveness of Local Police Department

	Texas		Baden-Württemberg	
	Number	Percent	Number	Percent
Excellent	127	9	54	2
Good	612	42	839	37
Fair	506	35	996	44
Poor	167	12	312	14
No Response	30	2	51	3
TOTAL	1,442	100	2,252	100

Question: How would you rate the job being done by the police department in your community?

Only a relatively small percentage of the respondents to both surveys rated the police as "poor" (Texas, 12%; Baden-Württemberg, 14%). At the same time, the Baden-Württemberg (44%) respondents were most likely to rate their local police as "fair," whereas Texas respondents (42%) tended to rate the police as "good." Overall, there does not appear to be a major difference in how the respondents to the two surveys rated their local police.

A question focusing on perceptions of the criminal courts was included. Although the responses would, most certainly, be based on subjective, rather than objective, positions, nevertheless, responses to a question of this nature can still provide a comparison of the relative degree of confidence in the respective court systems.

Respondents to the Baden-Württemberg (46%) survey were more than twice as likely as Texas respondents (19%) to indicate that the courts are doing a "good job" when dealing with convicted criminals (See Table 12).

Table 12: The Courts and Convicted Criminals

	Texas		Baden-Württemberg	
	Number	Percent	Number	Percent
Doing a good job	270	19	1,035	46
Too easy	1,109	77	1,033	46
Too harsh	17	1	71	3
No response	46	3	113	5
TOTAL	1,442	100	2,252	100

Question: In general, when dealing with convicted criminals, do you feel courts are:

More than three-fourths (77%) of the Texas respondents thought that the courts are too easy, whereas less than one-half of the Baden-Württemberg respondents (46%) believed that their courts are too easy.

Respondents were also asked their subjective opinions regarding court rulings and the police, that is, if they thought that rulings by the courts in the area of law enforcement had hindered the police in their efforts to control crime (See Table 13).

Table 13: Court Rulings and the Police

	Texas		Baden-Württemberg	
	Number	Percent	Number	Percent
Have severely hindered police in their efforts to control crime	549	38	285	13
Have somewhat hindered police in their efforts to control crime	622	43	1,026	46
Have not hindered the police in their efforts to control crime	227	16	796	35
No Response	44	3	145	6
TOTAL	1,442	100	2,252	100

Question: Do you think that rulings by courts in the area of law enforcement:

More than one-third (38%) of the Texas respondents said that the courts have "severely hindered" the police and 43% said that the court rulings have "somewhat hindered" the police. Although only 13% of the Baden-Württemberg respondents thought that the courts had "severely hindered" the police, almost one-half (46%) thought that the courts had "somewhat hindered" the police. Approximately one-third (35%) of the Baden-Württemberg respondents indicated that they thought the courts had not hindered the police, whereas only 16% of the Texas respondents agreed with this position.

Gun Ownership and Registration of Guns

The final two issues discussed in this chapter regard ownership and registration of guns. Neither Texas nor Baden-Württemberg has a central

registry with records to indicate the exact number of firearms which are legally possessed; therefore, these findings are particularly relevant for estimating the proportion of the people that possess firearms.[34]

Respondents to both surveys were asked if they kept a gun in their home and, if so, what was the main purpose for having the gun.[35] In the Texas survey, 67% of the respondents indicated that they had a gun in their home, compared to only 12% of the Baden-Württemberg respondents (see Table 14).

Table 14: Reason for Keeping Guns

	Texas (N = 1,442)		Baden-Württemberg (N = 2,252)	
	Number	Percent	Number	Percent
Sporting purposes	224	16	133	6
Protection	191	13	97	4
Both sporting purposes and protection	540	37	N/A	N/A
Hunting	N/A	N/A	30	1
Firearm collection	N/A	N/A	64	3
Other	13	1	25	1
No gun in home	414	29	1,935	86
No Response	60	4	34	2

Question: If you have a gun in your home, do you keep it mainly for:

34 Texas has no mandatory firearm registration program. At the time of the survey gun dealers were required to keep a record of guns sold and persons to whom they were sold. Permission to purchase and own a firearm in the Federal Republic of Germany is granted to individuals upon application to the local Bürgermeister (mayor). There are no central registries of owners of firearms except at the Bürgermeister's office. And, it should be remembered that there are 1,111 communities (Gemeinden) in Baden-Württemberg.

35 In the Texas survey, "sporting purposes" would be understood as including hunting. It is presumed that anyone who had guns in their homes merely for the purpose of a collection would probably cite this under "other". In the Federal Republic of Germany individuals are much more likely to belong to a specific shooting club, independent of being a hunter. Therefore, the Baden-Württemberg survey made a distinction between sporting purposes, hunting, and collecting. See *Hinze* 1981, p. 43 with reference to § 32 WaffG.

It should be noted that the response choices provided were not exactly the same; however, they elicited similar information. In the Texas survey, the most common reason for keeping a gun was a combination of "sporting purposes and protection" (37%). An additional 13% said that they kept a gun strictly for protection and 16% said only for sporting purposes. In addition, 13% listed some other reason. One-half of the Texans, then, listed protection as one of the reasons for keeping a gun in the home.

In comparison, only 4% of the Baden-Württemberg respondents said that they keep a gun for protection and 6% said for sporting purposes.[36] Hunting was listed by only 1% and firearm collection by an additional 3%. Also, 1% listed other reasons.

The question regarding gun registration asked: "If you favor gun registration, which types of guns do you think should be registered?" It is important to note that the respondents could select one or more than one type of gun. Also, a response choice was included which allowed the respondent to indicate a position that no guns should be registered (see Table 15).

Table 15: Gun Registration

	Texas (N = 1,442)		Baden-Württemberg (N = 2,52)	
	Number	Percent	Number	Percent
All guns	659	46	1,984	88
Rifles	48	3	92	4
Shotguns	41	3	46	2
Handguns	372	26	778	5
Other	27	2	11	1
No guns should be registered	363	25	96	4
No response	67	4	45	2

Question: If you favor gun registration, which types of guns do you think should be registered?

36 In addition to these two questions regarding firearms, the Texas survey included thirteen questions regarding measures to control handguns. Nine of these questions were subsequently used to develop a handgun control scale. See *Teske & Hazlett* 1985.

Whereas only 46% of the Texas respondents thought that all guns should be registered, 88% of the Baden-Württemberg respondents indicated that all guns should be registered. In addition, approximately one-fourth (26%) of the Texas respondents indicated that they thought handguns should be registered and a small percentage said that rifles (3%), shotguns (3%) and some other types of guns (2%) should be registered. At the same time, 25% thought that no guns should be registered.

Among the Baden-Württemberg respondents, only 4% thought that no guns should be registered. In addition, a small percentage selected handguns (5%), rifles (4%), shotguns (2%), and other types (1%) not listed.

A concise summary of the preceding section is difficult since it concerns a variety of topics. Nevertheless, it seems possible to draw several basic conclusions. The Texas respondents were significantly more likely to favor having the death penalty for a number of crimes, especially murder. At the same time, a majority of the Baden-Württemberg respondents also believed that the death penalty should be available for murder. In the case of certain types of murder, under strictly defined circumstances, the death penalty is available as a punishment in Texas. Since 1948, the death penalty has not been available in the Federal Republic of Germany for any crime. It is noteworthy that more than one-fourth of the respondents in both Texas and Baden-Württemberg favored having the death penalty available as a punishment for kidnapping and terrorism.

Both Texas and Baden-Württemberg respondents appeared to see rehabilitation as a very important function for prisons, although Baden-Württemberg respondents were somewhat stronger in this regard. Texas respondents attached significantly more importance to punishment and deterrence. The major difference was with respect to incapacitation, with Texas respondents attaching much stronger significance to incapacitation as a prison function.

Responses to the question regarding the respective police departments indicated only minimal difference in opinions. Overall, respondents to both surveys gave the police in their communities a favorable rating.

There was, however, a significant difference when it came to the courts and how they deal with convicted criminals. The Texas respondents felt very strongly that the courts are too easy, whereas the Baden-Württemberg respondents were about evenly divided on whether the courts were too easy or "doing a good job." Texas respondents were also somewhat more likely to indicate that they thought the courts had hindered the police in their efforts to control crime, although the majority of the Baden-Württemberg respondents agreed with this position.

The issue of guns revealed a significant difference with respect to both questions. Whereas more than two-thirds of the Texas respondents had a gun in their home, only 14% of the Baden-Württemberg respondents had a gun in their home. An even greater difference is to be found with respect to gun registration. One-fourth of the Texas respondents indicated that no guns should be registered; however, almost nine out of ten Baden-Württemberg residents believed that all guns should be registered.

4. Summary and Conclusions

The results of the study presented in this chapter are significant not only with respect to the basic comparative findings, but also for the methodological implications. Both surveys used the post as a means of collecting the survey data and in both instances the return rates were significantly high; more than 59% in the Federal Republic of Germany and 72% in the United States. Moreover, the sociodemographic characteristics of the samples closely approximated the populations. Therefore, the procedure appears to be quite acceptable for comparative research requiring samples from diverse populations spread over large geographic areas.

Several general conclusions can be drawn based on the results of this study.

First, Texas residents are significantly more likely than Baden-Württemberg residents to report having been the victim of a crime during the previous twelve months. More than one-third (36%) of the Texas respondents and one-fifth (20%) of the Baden-Württemberg respondents reported that they had been the victim of at least one crime. Burglary victimizations presented the greatest difference with 13% in Texas and only 2% in Baden-Württemberg.

At the same time, Texas residents are also more likely to report victimizations to the police. The only exception was arson or attempted arson.

In addition to the fact that they are more likely to have been the victim of a crime, respondents to the Texas survey were also much more likely to have known someone who was a victim of a crime during the previous twelve months.

The second general conclusion that can be drawn from the data is that Texas residents are much more fearful and concerned about crime than are Baden-Württemberg residents. Texans are more afraid to walk alone at night, are much more likely to believe that they may be the victim of a crime

during the next year, and are more likely to take actions to secure their home against crime. In addition, respondents to the Texas survey were almost twice as likely as respondents to the Baden-Württemberg survey to state that they believe that the crime problem in their community had become worse during the previous three years and were much more likely to state that it would become worse during the next three years.

Overall, the results of the respective surveys with regard to victimization and its consequences, e.g., fear of crime, are in accordance with what is already known from the official data, i.e., the police statistics.

A third general conclusion that may be drawn is that Texas residents are more likely to support having the death penalty available as a punishment for murder and certain other crimes. It is especially noteworthy, in addition to the crime of murder, that the respondents to the Texas survey were much more likely to favor having the death penalty available for the crimes of rape, treason, armed robbery, and arson. At the same time, it is also noteworthy that, other than murder, the two crimes about which respondents to both surveys were in similar agreement, that is, they supported having the death penalty available as a punishment, were kidnapping and terrorism.

Texans were also slightly more likely to stress punishment and deterrence as important functions for prisons, compared to rehabilitation, although the overall difference in attitudes toward the function of prisons was not very large.

Respondents to the Texas survey gave a slightly more positive rating to their local police than did the respondents to the Baden-Württemberg survey. Regarding the courts, more than three-fourths (77%) of the Texas respondents indicated that they believe the courts are too easy when dealing with convicted criminals, whereas less than one-half (46%) of the Baden-Württemberg respondents indicated that their courts are too easy. Texas respondents were also much more likely (38%) than Baden-Württemberg respondents (13%) to indicate that court rulings have severely hindered the police in their efforts to control crime.

A fourth general conclusion that might be drawn, then, is that residents of Baden-Württemberg have greater confidence in the way that their court system is functioning.

A fifth conclusion that can be drawn from the data is that residents of Baden-Württemberg are much less likely to have a gun in their home. Eighty-six percent in Baden-Württemberg indicated that they do not have a gun in their home whereas only twenty-nine percent in Texas indicated that they do not have a gun in their home. Finally, with respect to gun registra-

tion, only four percent of the Baden-Württemberg respondents indicated that no guns should be registered, whereas only one-fourth (25%) of the Texas respondents indicated that no guns should be registered.

5. References

Arnold, H. (1984). Verbrechensfurcht und/oder Furcht vor Viktimisierung - Folgen von Viktimisierung? In: H.-J. Albrecht & U. Sieber (Eds.), Zwanzig Jahre Südwestdeutsche Kriminologische Kolloquien (pp. 185-236). Freiburg: Eigenverlag des Max-Planck-Instituts für ausländisches und internationales Strafrecht.

Arnold, H. (1986). Kriminelle Viktimisierung und ihre Korrelate. Zeitschrift für die gesamte Strafrechtswissenschaft, 98, 1014-1058.

Arnold, H. (1987). Victim Surveys mittels postalischer Befragung. Erfahrungen zur Methode anhand einer international vergleichenden Opferbefragung. Vortrag anläßlich der Konferenz zur schriftlichen und telefonischen Befragung. ZUMA. Mannheim, 29.4.

Arnold, H. (1990). Commentary [on International Comparative Research in Criminology: The 1989 Telephone Survey]. In. G. Kaiser & H.-J. Albrecht (Eds.), Crime and Criminal Policy in Europe. Proceedings of the II. Europoean Colloquium (pp. 143-164). Freiburg: Eigenverlag des Max-Planck-Instituts für ausländisches und internationales Strafrecht.

Arnold, H. (1991). Fear of Crime and its Relationship to Directly and Indirectly Experienced Victimization: A Binational Comparison of Models. In: K. Sessar & H.-J. Kerner (Eds.), Developments in Crime and Crime Control Research (pp. 87-125). New York.

Arnold, & Teske, R. (1988). Factors related to Fear of Crime: A Comparison between the Federal Republic of Germany and the United States. In: G. Kaiser & I. Geissler (Eds.), Crime, Victimization and Criminal Justice (pp. 355-384). Freiburg: Eigenverlag des Max-Planck-Instituts für ausländisches und internationales Strafrecht.

Arnold, H.R., Teske, R., & Korinek, L. (1988). Viktimisierung, Verbrechensfurcht und Einstellungen zur Sozialkontrolle in West und Ost. Ergebnisse vergleichender Opferbefragungen in der Bundesrepublik Deutschland, den Vereinigten Staaten und Ungarn. In: H. Kury &

H.-J. Albrecht (Eds.), Kriminologische Forschung in den 80er Jahren (pp. 909-942). Freiburg: Eigenverlag des Max-Planck-Instituts für ausländisches und internationales Strafrecht.

Block, R. (1990). A Cross-National Comparison of Victims of Crime: Victim Surveys of Eleven Countries: Preliminary Results. Loyola University of Chicago.

Block, C.B., & Block, R.L. (1984). Crime definition, crime measurement, and victim surveys: Journal of Social Issues, 40, 137-159.

Braungart, M.M., Braungart, R.G., & Hoyer, W.J. (1980). Age, sex, and social factors in fear of crime: Sociological Focus, 13, 55-66.

Clemente, F., & Kleiman, M.B. (1977). Fear of crime in the United States: A multivariate analysis. Social Forces, 56, 519-531.

Dillman, D.A. (1978). Mail and telephone surveys: The total design method. New York.

van Dijk, J.J.M., Mayhew, P., & Killias, M. (1990). Experience of Crime across the World. Deventer.

Furstenberg, F.F.Jr. (1971). Public reaction to crime in the streets. American Scholar, 40, 601-610.

Garofalo, J. (1979). Victimization and the fear of crime. Journal of Research in Crime and Delinquency, 16, 80-97.

Garofalo, J. (1981). The fear of crime: Causes and consequences. Journal of Criminal Law and Criminology, 72, 839-857.

Hartnagel, T.F. (1979). The perceptions and fear of crime: Implications for neighborhood cohesion, social activity, and community affect. Social Forces, 58, 176-193.

Hinze, R. (1981). Waffengesetz. 3. Aufl. Wiesbaden.

Korinek, L. (1988). Rejtett bünözés. Budapest.

Lurigio, A.J. (1987). Are all victims alike? The adverse, generalized, and differential impact of crime. Crime and Delinquency, 33, 452-467.

Lurigio, A.J., Skogan, W.G., & Davis, R.C. (1990). Victims of crime: Problems, policies, and programs. Newbury Park.

Maguire, M. (1980). The impact of burglary upon victims. British Journal of Criminology, 20, 261-275.

Skogan, W.G., & Maxfield, M.G. (1981). Coping with crime: Individual and Neigghborhood Reactions. Beverly Hills.

Sundeen, R., & Mathieu, J. (1976). The urban elderly: environments of fear. In: J. Goldsmith & S. Goldsmith (Eds.), Crime and the elderly: Challenge and response (p. 55 et seq.). Lexington, Mass.

Sveri, K. (1982). Comparative Analyse of Crime by Means of Victim Surveys in the Scandinavian Experience. In: H.-J. Schneider (Ed.), The Victim in International Perspective (pp. 209-219). Berlin.

Teske, R., & Arnold, H.R. (1982). Comparison of the criminal statistics of the United States and the Federal Republic of Germany. Journal of Criminal Justice, 10, 19-34.

Teske, R., & Arnold, H.R. (1987). A comparative analysis of factors related to fear of crime in the United States and the Federal Republic of Germany. International Journal of Comparative and Applied Criminal Justice, 11, 33-45.

Teske, R., & Hazlett, M.H. (1985). A scale for the measurement of attitudes toward handgun control. Journal of Criminal Justice, 13, 71-79.

Teske, R., & Hazlett, M.H. (1988). A scale for the measurement of fear of crime. American Journal of Criminal Justice XII, 274-292.

Teske, R., Hazlett, M.H., Parker, M.L. (1983). Texas Crime Poll: 1982 Survey. Huntsville.

Teske, R., & Powell, N. (1979). Texas Crime Poll: Fall. 1977 Survey. Huntsville.

Warr, M. (1990). Dangerous Situations: Social Context and Fear of Criminal Victimization. Social Forces, 68, 891-907.

Yin, P. (1980). Fear of Crime among the Elderly: Some Issues and Suggestions. Social Problems, 27, 492-504.

Yin, P. (1985). Victimization and the Aged. Springfield.

6. Appendices

Appendix A Weekly survey returns: Baden-Württemberg

week of return	weekly total	percent of respon-dents	cumulative percent of respon-dents	percent of total sample	cumulative percent of total sample
1	816	36.23	36.23	21.30	21.30
2	581	25.80	62.03	15.17	36.47
3	195	8.66	70.69	5.09	41.56
4	314	13.94	84.63	8.19	49.75
5	145	6.44	91.07	3.78	53.53
6	26	1.16	92.23	.69	54.22
7	76	3.37	95.60	1.98	56.20
8	52	2.31	97.91	1.36	57.56
9	26	1.16	99.07	.69	58.25
10	21	.93	100.00	.55	58.80
Total	2,252	100.00	100.00	58.80	58.80

Appendix B Weekly survey returns: Texas Survey

week of return	weekly total	percent of respon-dents	cumulative percent of respon-dents	percent of total sample	cumulative percent of total sample
1	325	22.54	22.54	16.25	16.25
2	529	36.69	59.23	26.45	42.70
3	153	10.61	69.84	7.65	50.35
4	180	12.48	82.32	9.00	59.35
5	171	11.86	94.18	8.55	67.90
6	24	1.66	95.84	1.95	71.05
7	39	2.71	98.55	1.95	71.05
8	8	.55	99.10	.40	71.45
9	5	.35	99.45	.25	71.70
10	8	.55	100.00	.40	72.10
Total	1,442	100.00	100.00	72.10	72.10

Appendix C Size of the Community Where Respondents live

Texas				Baden-Württemberg		
	Number	Percent			Number	Percent
Rural	220	15		Less than 3,000	434	19
Less than 2,500	82	6		3,001 to 5,000	298	13
2,501 to 10,000	140	10		5,001 to 10,000	312	14
10,001 to 25,000	132	9		10,001 to 20,000	284	13
25,001 to 50,000	105	7		20,001 to 50,000	364	16
50,001 to 100,000	131	9		50,001 to 100,000	189	8
100,001 to 250,000	140	10		Over 100,000	343	15
250,001 to 500,000	121	8		No Response	28	1
Over 500,000	370	26				
No Response	1	*		Total	2,252	99
Total	1,442	100				

* Less than 0.5%.

Crime and Victimization in East and West

Results of the First Comparative Victimological Study of the Former German Democratic Republic and Federal Republic of Germany

Helmut Kury[*]

Contents

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* My special thanks to the colleagues of the victimological working group within the criminological research group in the Max Planck Institute for Foreign and International Criminal Law in Freiburg, *D. Kirstein* (cand.phil), *J. Obergfell-Fuchs* (cand. phil.), Dipl-Psych. *H. Richter* and *M. Würger* (Pedagogue).

3. Discussion of Results
4. Summary
5. Tables and Figures
6. References

1. Introduction

Since the (re-)discovery of the victim of crime and the establishment of victimology as a science or rather partly a criminology discipline, which deals with the victim and his or her interests, the study of victims has been regarded as a well established component of empirical criminological-victimological research. It must be noted, that empirical victim surveys, already have an extensive history. *Wolf* (1976) reported for example that the City Parliament of Aarhus/Denmark realized a first victim study to be carried out in the community in 1730 namely over 260 years ago. Former methodology, also corresponds to present procedures: entire households were questioned whether they had been a victim of a property crime within the past three years. In this way, one hopes, in view of the lack of official criminal statistics, for a reliable assessment of property crime in the society (see also *Schwind et al.* 1989). More recently, a survey was carried out in Japan in 1951 regarding the attitudes of the population towards the police, in which questions were raised about victimization and crime reporting to the police (see *Reuband* 1979).

Since the beginning of the 1970s, victim surveys have been carried out worldwide, particularly in the so-called western countries, after the victimological questions had already stimulated increasing interest in previous years (see *Kaiser* 1979; *Kiefl & Lamnek* 1986). Modern victim surveys had already begun in the middle of the 1960s, particularly in the USA, under the supervision of the President's Commission on Law Enforcement and Administration of Justice. A very comprehensive study has already been carried out in 1965, by the National Opinion Research Center. A random sample of 10,000 households were questioned which kind of offences had been committed in previous years, against the members of the particular household (see summarizing *Ennis* 1967). Since the first Congress of the World Society of Victimology, the corresponding research results had been presented and discussed here (see for instance *Schneider* 1982; *Miyazawa & Ohya* 1986). In the interim period, many countries in the world, presented their research studies about victimization. In the USA, constant victimological investigations had in the meantime (since 1972), produced large research results, which strongly influenced the contents and methods used in comparable studies in other countries (see for example *Hindelang* 1982; *Block & Block* 1984; *Gottfredson* 1984; 1986). Wide discussion regarding the possibilities, advantages and limits of victim surveys arose (see for

example *Sparks* 1981; *Skogan* 1982; *Waller* 1982; *Kaiser* 1986; *Lurigo et al.* 1990; *Skogan et al.* 1990; *Sveri* 1991). The often broad victim studies had, for their part, strong repercussions upon the further development and the significance of victimology as a whole (see *Jung* 1985, p. 519).

In the meantime, more European countries presented large scale victim surveys (see summary of increasing victim research in Europe *Maguire & Shapland* 1990; *Helsinki Institute for Crime Prevention and Control* 1989; *Kaiser* 1986). In this way, more extensive victim surveys were and are being carried out, for instance in the Netherlands (see *van Dijk* 1991), Great Britain (see *Mayhew* 1991), Finland (see *Siren & Heiskanen* 1985; *Aromaa & Siren* 1991; *Bondeson* 1991), Switzerland (see *Killias* 1989; the regionally limited Swiss victim studies by *Schwarzenegger* 1989; *Stadler-Griesemer* 1991), the Federal Repulic of Germany (see recently *Teske & Arnold* 1982; *Arnold* 1986; *Schwind et al.* 1975; *Schwind* 1991), and in the meantime also, third-world-countries (see articles in in these 3 volumes). In 1989, a first international victim survey was carried out by an international research group under the directorship of the Netherland's Ministery of Justice. This was carried out in a total of 17 European countries and also for instance in the USA, Canada, Japan, Australia and Indonesia (see *van Dijk et al.* 1990; *Mayhew* 1990, the article by *Kury* in this volume). This study, also took place, as a matter of interest, in one of the so-called East block countries, namely Poland, although for financial reasons, it was merely effected in the capital city Warsaw. This both is, interesting and remarkable because it allows, to compare the crime data between the so-called socialist-and-capitalist-orientated countries. The data from this study have not yet been exhaustively evalutated, although the relatively high victim rate in Warsaw and correspondingly high degree of fear of crimes which the inhabitants of the Polish capital city hold, has already been made clear. In relation to the eleven crimes studied, Warsaw has the highest average victim rate, in comparison with the large cities with over 100,000 inhabitants, from the other countries such as the USA, Canada, Australia or Western Europe. The high risk of victimization for theft of personal property, pickpocketing and car theft, is striking (see *van Dijk et al.* 1990, p. 43 et seq.). At the same time, the population of Warsaw is very dissatisfied, in comparison to other countries, with treatment by the police, especially in relation to the contacts related with the reporting of a crime (see in relation to victimology in Poland and the socialist countries, *Böhm et al.* 1985; *Arnold & Korinek* 1985; *Holyst* 1985; *Bienkowska* 1991; see in relation to the problems of comparative empirical criminological research *Albrecht* 1989).

Victim surveys were carried out in the Federal Republic of Germany in the 1970s and 80s, in particular by the Max Planck Institute for foreign and

international criminal law in Freiburg. A large scale international comparative victim study, in which the federal state Baden-Württemberg in the south of the Federal Republic of Germay, Texas in the USA and Baranya in Hungary were included, was carried out (see *Arnold* 1986; *Teske & Arnold* 1991). Interestingly, comparative data from an Eastern block country were collected. This presented extensive information regarding crime in Eastern Europe. *Schwind et al.* (1975; 1989; *Schwind* 1991) carried out a victim survey which included a replication study in Bochum. *Pitsela* (1986) presented the results of a victim study of a Greek minority in a German city. *Plate et al.* (1985) and likewise *Sessar et al.* (see *Boers & Sessar* 1991) presented studies of particularly regional limited samples. These results are of no lesser interest, although they do not allow generalization. The present most extensive and comprehensive list of international (empirical) victimological research will take place with about 100 articles from all over the world, at the Max Planck Institute in Freiburg, with these three volumes with regard to the VII. International Symposium in respect of victimology of the World Society of Victimology in August 1991 in Rio de Janeiro, Brazil. In view of this impressive wealth of international victimological research, the important status of victim research in criminology, will become clear (see for instance *Kaiser, Kury & Albrecht* 1988). In cooperation with the Max Planck Institute for criminal law in Freiburg, further victim studies, complementary to the worldwide victim survey of 1989, were and are still being carried out in Greece and Egypt.

Not only for the Western European countries, in particular the Federal Republic of Germany, but also for not European industrial nations, the question of the development of crime in the communist countries - especially the European - has always been of great interest. How is the rate of crime and structure of crime in the Eastern block countries illustrated, in comparison with the Western block countries? To what extent are the official and publicated data valid or falsified? - These were questions which could not be answered by Western nor Eastern criminologists (see *Bienkowska* 1991a). It is only in the last few years, that larger comparative studies, using the same research methods, has been made possible. The progressive opening up of the Eastern block countries in the last few years, has allowed more opportunity for comparative criminological and victimological research, to be moved into focus.

The opening of the borders and unification of both German countries - a process which was set in motion at the end of the 1980s - presented an extraordinary opportunity, to compare the former German Democratic Republic as a socialistic-communistic state and the former Federal Republic of Germany as a democratic-capitalistic orientated country. In order to estab-

lish the distinctions between the two German countries and in particular the process of re-orientation in the former GDR, it was important to carry out empirical social scientific research as soon as possible after the borders had been opened. It is not surprising, that in the meantime, several research organizations and scientists, have begun empirical social scientific and criminological research (see *Kerner et al.* 1990; *Allerbeck et al.* 1991; *Ewald* 1991).

The first comparative victimological study between the old and new German federal states, was taken up by the criminological research group of the Max Planck Institute for foreign and international criminal law in Freiburg, in cooperation with the criminalistic-criminological research group of the German Federal Bureau of Investigation ("Bundeskriminalamt") in Wiesbaden. As a result of this successful comparative criminological research, and as a continuation of this first victim survey between the old and new federal states, in June 1991 the first German-German criminological international colloquium planned by the Max Planck Institute in cooperation with the university of Jena, was carried out at the university of Jena, in which particular questions of victimological research and most of all, the victim survey mentioned here, were presented and discussed. In conclusion a more detailed continuation of the comparative empirical-victimological study between the old and new federal states, has been focused upon (see *Kaiser et al.* 1991).

The following text should illustrate and discuss a number of significant results from the first German-German victim survey. Only selected results can be presented here owing to limited space. These results are limited to the following areas:

1. Description of the sample and methodology of the study
2. results in relation to the number of crime and assessment of the development of crime, comparison with official (police) registered crimes,
3. results in relation to reporting behavior patterns,
4. satisfaction with the police,
5. results in the area of fear of crime and
6. illegal drugs and alcohol.

2. The first German-German Victimological-Criminological Study

2.1 Sample and Methodology

In order to secure comparability of results with the international world-wide victim survey (see *van Dijk et al.* 1990), we chose to use to a large extent, the form of questionnaire developed in the latter survey. This was merely supplemented to correspond with the situation in the former GDR. We were advised and supported by the criminologists at the university of Jena*.

The questionnaire is formulated as follows: After a few preliminary questions in relation to the size of the family, particularly the number of the members of over 14 years, who counted as being valid for the purposes of the survey, a number of questions follow in relation to the ownership of motorvehicles, motorbikes, bikes and so on. Particular questions then follow in respect of the 11 types of offences. The target person is asked whether he or she (respectively the household in some offences) has been a victim during the last five years in one of these 11 type of offences. If the answer is affirmative, the respondent must clarify the year in which this took place and the number of victimization. The 11 offence types deal with the following crimes or crime groups:

1. theft of cars,
2. theft from cars,
3. vandalism to cars,
4. theft of motorcycles, scooters, motorbike etc.,
5. theft of bicycles,

offences in the area of cars and bicycles

6. burglary (breaking and entering house without permission and theft or attempted theft of property),
7. unsuccessful attempt at burglary (attempted burglary),

* Our thanks in this connection to Prof.Dr. *Kräupl* and also Dr. *Ludwig* from the Criminological-Criminalistic Institute of the University of Jena.

8. robbery (theft or attempted theft using violence or threat of violence),
9. theft,
10. sexual incidents (including sexual harassment),
11. assault or threat (to an extent that the victim had actual fear, at home or outside).

In addition to these offences, questions as to where the offence occured, whether or not it was reported and if not why not, the extent of the damage suffered, whether the offender had a weapon in cases of attack upon a person and who the offender was, the circumstances of the offense (use of violence and so on) were also asked. Furthermore - as it is normal with victim surveys - additional information was asked in order to obtain information regarding fear of crime. The work of the police also had to be assessed. The instrument also contained questions relating to the assessment of victim help organizations and also attitudes towards criminal punishment. Questions relating to personal circumstances, like living conditions, education, occupation, income, age, size of community, nationality etc. were also included within the questionnaire.

The methodical implementation of the questionnaire, was discussed by the staff members of the ZUMA ("Zentrum für Umfragen, Methoden und Analysen"; center for surveys, methods and analyses) in Mannheim (South Germany). Collection of the data was carried out by an experienced commercial public opinion research institute in the second half of 1990. Wheras in the international victim survey carried out at the beginning of 1989, collection of the data took place to a great extent by means of telephone interviews (see *van Dijk et al.* 1990; the article by *Kury* in this volume), this was not possible in the study proposed here, due to the limited extent of access to telephones in the new federal states (the former GDR). We decided therefore, in spite of the considerable financial costs, to carry out personal interviews (face to face). 5,000 random selected people, in the new federal states and a further 2,000 people in the old federal states (a total of 7,000 people) all from 14 years upwards, should be questioned. The sample of people chosen, formed a random sample in the new federal states, from the "Gemeindedatei" (community data; 7,563 communities/regions, as at 31.12.1989), allocated at levels according to districts and largeness of municipalities. A random walk procedure was used at the around 800 sample points. The "Stimmbezirksdatei" (voting register) for the local parliamentary vote of 1987, formed the basis of selection of the old federal states.

The extent to which the persons questioned neglected to or refused to answer the questionnaires is of particular importance for the validity of the

survey data. Table 1 gives a detailed overall view (see also the article by *Kury* in this volume). Of the gross sample of N = 7,500 in the new federal states (NFS) (old German states:OFS: N = 3,360) 799 (10.7 %) constituted the neutral failure rate (OFS: N = 470; 13.9 %). Such a sample failure, means that it has no relationship to the theme of the research and therefore do not falsify the results of the study (streets which could not be found, houses unhabited, no target person within the particular group and so on). The possible distortion of results due to systematic refusals, is of more significance. These amount in the NFS, to 25.1 % (N = 1,681) (OFS: 29.8 %; N = 860) of the cleared sample taking part N = 6,701 (OFS: N = 2,890). Direct refusal to participate in the study only ocurred in the NFS in N = 838 cases (12.5 %) (OFS: N = 439; 15.2 %), where in N = 390 (5.8 %) cases (OFS: N = 205; 7.1 %) the household refused to give any information and in N = 448 (6.7 %) cases (OFS: N = 234; 8.1 %) the selected target person in the household refused to give an interview. Of the final number of N = 5.020 (OFS: N = 2,030) of interviews carried out, N = 21 (0.3 %) (OFS: N = 3; 0.1 %) could not be evaluated because of the deficiencies, so that finally N = 4,999 (OFS: N = 2,027) interviews could be assessed, which were the baisis for the results presented in the following article.

The number of people replying to the questionnaires in the NFS, is 75.6 % - somewhat higher than the rate in the old federal states 70.1 %. This could be attributable to the lack of interest in the survey, by those in the old federal states, where surveys of the population regarding various themes, are carried out somewhat more frequently than in the former GDR. The press sometimes reports about studies of varying forms, partly very critically, so that the population may have a distanced attitude toward participation in such opinion polls. People are to some extent warned against taking part in such population surveys, in the general public itself. The reliability of the data obtained from such studies is often questioned and the opinion of the research itself placed in doubt. In addition, many data protection considerations arise, which to a large extent brings the OFS into controversial discussion, in particular in connection with the last census, and also may cause more reservation in relation to cooperation with such surveys (see *Jehle* 1987).

Tables 2 and 3 give an overall view of the age and sex distribution in relation to both sample areas (NFS, OFS). There is a significant distinction ($p < .01$) in relation to the age structure, between the NFS and OFS. In contrast to the OFS, the age groups in the NFS of 14 to 17 years, 45 to 59 years and 60 to 64 years are more strongly represented. The age groups of the 25 to 44 years-olds and over 65 years-olds are more strongly represented,

in contrast in the OFS. To what extent the particular age structure is representative of the population as a whole, in both parts of the country, must be checked by comparing our data with the population structure itself. This has not been possible up to now, due to time limitations. There was no statistically significant difference between the NFS and the OFS in so far as sex distribution is concerned ($p = .56$).

As a whole, we can accept, that possible distortions due to sample missings are limited and that the established results are valid and evidential. In comparison to other victim surveys, our study achieved a relatively high utilization rate (see article by *Kury* in this volume).

2.2 Number of Crime and Assessment of the Development of Crime Rate

Whereas no fewer than 32.6 % of the respondents in the OFS during the five years period (1986-1990) had at least on one occasion been the victim of one of the recoded 11 offences, the figure was 28.2 % in the NFS namely 4.4 % less. This means that the victimization rate in the NFS at the end of 1990 with reference to the last 5 years of which around 4 years are allocated to the former GDR period, in total is significantly lower than in the OFS (see table 4, figure 1). This difference is very significant ($p < .01$).

A detailed consideration of the 11 offence categories, shows that the victimization rate in the NFS in relation to all offences, is lower than in the OFS, with the exception of theft of motorcycles (NFS: 7.3 %; OFS: 6.3 %), theft of bicycles (14.9 %; 14.3 %) and attempted burglary (2.2 %; 1.7 %) (see table 5, figure 2). The differences are relatively small and should not be over-interpreted. One cause for these distinctions, could lie in the more limited security against theft in the Eastern federal states, in relation to motorcycles and bicycles, and also in the bad security of houses against burglary. In the Western German states, motorcycles and bicycles are becoming increasingly better secured with locks, due to the high rate of theft, and equally so, houses are better secured than in the NFS. The structure of offences in both parts of the country, is very similar. The three most frequently reported offences, are theft of bicycles, damage to cars and theft from cars.

A very significant distinction ($p < .01$) between the two parts of the country, can be seen in relation to the number of victimization per victim (see table 6, figure 3). Whereas in the NFS, those victims who are victimized merely on one occasion, are more strongly represented. The groups of victims who were victimized on two, three or more occasions are more

frequently in the OFS. This means that the proportion of multiple victims in the OFS, is significantly higher than in the NFS. Table 7 shows that the number of victimizations per victim, according to expectation, depends upon the form of offences committed. The number of victimizations per victim in a particular offense category in the NFS, amounts in relation to theft of motorcycles and robbery to 1.1 and in relation to theft from cars and damage to cars 1.6 and in relation to violent assaults, even 1.7. The structure is similar in the OFS, where the average victimization rate in relation to violent assaults, is 1.9 in relation to the particular victims. This means that those people (N = 84) who were victims of an violent attack in the last 5 years, were on average victimized almost twice. The victims of this offence category, have the highest probability of mulitple victimization. This suggests peculiarities regarding these circles of people. Differentiated evaluations of these data, can lead to further clarification.

An evaluation with regard to multiple victimizations in relation to both parts of the country, divided according to sex, indicates no distinction for men in relation to the NFS and OFS, although the distinction in relation to women, is statistically very significant (men: $p = .07$; women: $p < .01$; see table 8). The tendency in relation to men, is that multiple victimizations (three times and more) takes place more often in the OFS than in the NFS and this can be statistically verified in relation to women. In the OFS, there are proportionally more women who have been the victim of a crime on two or more occasions than in the NFS. The reasons for these differences can be clarified by further statistical evaluations and we can assume personality related victim characteristics in relation to these mulitple victims.

In the mass media in united Germany and also in academic publications (see for instance *Ulbrich* 1991; in relation to organized crime *Guth* 1991; in relation to attacks against financial institutions *Skoda* 1991; *Steinke* 1991), a more or less increasing rise in crime in the NFS, since the opening of the borders, has been reported. Almost dramatic and fearfully high crime statistics were presented, which are due to the lack of valid data materials, constituted on more or less speculative statistics. We questioned the persons interviewed as to whether the victimization reported by them, occured in the 4 years before the opening of the borders or within the year between the opening of the borders (9.11.1989) and the study (September 1990) (see table 9, figure 4). The figures showed for the time before the opening of the borders of the former GDR, a lower proportion of victims than in the former FRG, with the exception of the offences of bicycle theft, burglary, attempted burglary and violent assault. In relation to the other 7 offences, there was a proportionately greater change in the NFS in the period after the opening of

the borders, in comparison with the OFS. These results already point to an increase of crime in the NFS after the opening of the borders, in comparison to the development in the same period in the NFS.

This picture is confirmed in the assessment of the development of crime as a whole, by the citizens questioned in the NFS (table 10, figure 5). In assessing the development of crime before the opening of the borders, 53 % (N = 2,325) are of the opinion that the crime rate has remained the same and 32.7 % (N = 1,653) believe that it has already increased. For the period after the opening of the borders, the picture is quite clearly reversed: only 22.8 % (N = 1,035) are of the opinion that crime has remained the same, whereas 71.1 % (N = 3,220) approximately three quarters are of the opinion that the crime rate has risen. The distinctions are statistically very significant ($p < .01$). Nevertheless 7.5 % (N = 327) are of the opinion that there was no crime in the former GDR (NFS) in the period before the opening of the borders and 5.4 % (N = 244) are of this opinion in relation to the period after the opening of the borders. These results may reflect that some of those questioned who were influenced by the former SED ideology, and believe that in a socialist-communistic state, criminal behavior if at all, is only a transitional phenomenon, namely a relict from capitalistic times and that -" what is not allowed to be, cannot be".

To the question as to the future development of crime, 86.8 % (N = 3,988) citizens in the NFS expect a sharper rise in time in their part of the country, than in the OFS. Here, 40.5 % (N = 691) are of the opinion that crime will remain the same (NFS 10.3 % N = 475) and 53.7 % (N = 918) are representative of the opinion (clearly less than in the NFS) that the crime rate will rise (table 11, figure 6). The results established here are also statistically highly significant ($p < .01$).

Victim surveys also have the aspect of being surveys of unreported crime (darkfield-studies) namely they can record information about the actual victimization experienced in contrast to the reported crimes. In order to be able to estimate the extent of this area of unreported crime, which concerns the old federal states, a comparison is required of the crimes recorded by us by means of the victim studies, with the data from the Criminal Statistics of the Police ("Polizeiliche Kriminalstatistik":PKS). The definition of the 11 offences recorded by us namely the categories of offences, were taken because of the comparability from the questionnaire of the International Telephone Survey (see above). This questionnaire was applied by an international study, so that the offence definitions satisfied the requirements of an international investigation. This limited a comparison of the data obtained by us with the information from the police statistics (PKS), to the extent that the offence categories in the questionnaire and in the PKS, are defined

differently to some extent (see table 12). This shows one disadvantage of the use of the telephone survey questionnaire, which can be adjusted from the advantage of direct comparability of our victim survey data with the international data.

A comparison of our questionnaire data with official crime data, is even more difficult, if not impossible, such as the data published in the former GDR (see for instance *Statistisches Amt der DDR* 1990). Since the union of the two German states, a number of scientific publications have appeared, which have questioned the value of official crime data as published in the former GDR criminal statistics (see *von der Heide* 1990; *von der Heide & Lautsch* 1991; *Baier & Borning* 1991). For this reason, the comparison with official police statistics is limited to the old federal states.

2.3 Patterns of Reporting Behavior

The number of official (police) registered crimes, depends considerably upon the victims reporting the crime to the police. Reporting behavior is the most important determining factor in relation to the extent, structure and development of registered and thereby socially evident crime (*Heinz* 1985, p. 28) at least in so far as the classical property crimes are concerned, which make up three quarters of the entire crimes committed. It is only in the last few years, that reporting behavior and the reporter him- or herself, have gained significance in relation to social control and crime (see for instance *Villmow* 1977; *Reuband* 1981; *van Dijk* 1982; *Skogan* 1984). The victim can be said to be the "gate-keeper" of the criminal legal system (*Hindelang & Gottfredson* 1976, p. 58) and is therefore an important factor in the establishment of the relationship between reported and unreported crime (see *Kaiser* 1985). The data from our research, clearly shows that citizens of the NFS report crimes to the police to a lesser extent, than in the OFS (see table 13, figure 7). An exception are the offences of vehicle theft, theft in general and violent assault. The rate of reporting in these areas is higher in the NFS. There is a surprisingly large discrepancy in the reporting rate in relation to both parts of the country, concerning theft from the cars (NFS: 45.7 %; OFS: 86.5 %), damage to cars (33 %; 54.6 %), burglary (69.5 %; 84 %) and robbery (41.4 %; 70.6 %). Although these are, in so far as robbery and burglary are concerned with relatively severe crimes, a comparatively high number of NFS citizens, do not report the crime to the police. Insurance related conditions may certainly have some influence upon the rate of reporting. This may also however depend to a great extent upon trust into the police and the prosecution organs and upon confidence in their work.

2.4 Satisfaction with the Police

The citizens of the NFS are clearly less satisfied with the police than those in the OFS, both in the time before and also after the opening of the borders (table 14, figures 8 and 9). It is noteworthy, that the extent of satisfaction with the work of the police in the NFS for the period after 9. November 1989, has fallen. Before the opening of the borders 31.1 % of those questioned were very satisfied or satisfied with the police in the NFS, this figure dropped nearly to 25.3 % for the period after the opening of the borders. During the same period after the "change of events" ("Wende"), 16.7 % assess the work of the police as being fairly bad or very bad. In comparison, 52 % of the OFS citizens are very satisfied or at least satisfied with the work of the police and only 3.8 % assess the police work as fairly bad or very bad. Whereas the view of the police in the general public, is relatively good in the OFS, it is relatively bad in the NFS and has become worse since the opening of the borders.

2.5 Fear of Crime

The area of "fear of crime" constitutes an important component of victimological research (see *President's Commission on Law Enforcement and Administration of Justice* 1967; *Kerner* 1978; 1980; *Skogan* 1986; 1987; *Arnold* 1991). The importance of recording fear of crime namely the feelings of the population of being threatened, is justified from a criminal political point of view, in that extensive evidence of fear of crime can lead to self and private justice. The danger exists, that the (potential) victim of crime takes his own protection into his own hands, because he or she no longer trusts into the protection of the state which he/she desires (see *Schwind et al.* 1989, p. 282).

The discussion of fear of crime and recording this fear, is very controversial: There are large variety of definitions and terminological uncertainties (*Arnold* 1984, p. 187). This makes a comparison of the results obtained, very difficult. Various studies have established for example a higher extent of fear of crime in relation to women, older people, city inhabitants and member of the lower classes (see for instance *Stephan* 1976; *Braithwaite et al.* 1982; *Maxfield* 1984; *van Dijk* 1978; summary in *Schneider* 1987, pp. 767ff).

Kirchhoff et al. (1980) emphasize the dependence of fear of crime upon the strength of invasion of the offender within the personal sphere of the victim (see also *Baril* 1980). *Förster* and *Schenk* (1984) emphasize a connection between the information of the victim about the facts of crime

commission as well as about the offender and the anxiety caused by crimes: victims who are more informed, develop less diffuse and irrational, emotional fear of crime in comparison to those who are uninformed. The results however contradict the relationship between individual victim experiences and fear of crime (see *Villmow* 1979; *Sheley & Ashkins* 1981; summary in *Arnold* 1984).

Information in relation to fear of crime, was merely indirectly obtained in our study (see also the research by *van Dijk et al.* 1990, pp. 77ff). The aspect of the assessment of safety in the vicinity of the home can however be referred to here. Due to the established and much discussed more or less sharp increase in crime in the NFS, it was to be expected, that safety within the vicinity of the home, would be assessed to be less effective than in the OFS. This could be confirmed by our study (see table 15, figure 10). Of the inhabitants of the NFS 17.3 % (N = 859) estimate that the vicinity of their homes are fairly or very unsafe, in comparison with merely 13.0 % (N = 263) of the inhabitants of the OFS.

Assessment of safety within the vicinity of the home by victims of crime, obviously relates to the number of victimizations which have taken place: victims of multiple victimizations regard the vicinity of their home as being more unsafe than victims who have "only" been victimized on one occasion. This statistically significant relationship, applies both to the old and also to the new federal states (NFS: $p < .01$; OFS: $p < .05$) (see table 16).

According to expectation, this assessment of safety within the vicinity of the home (fear of crime) depends further upon the status of the victim. Those who have been the victims of serious offences, in particular against the person, regard safety within the vicinity of the home as being more limited, than those who have been victims of property or means of conveyance offences. This can be shown more clearly in relation to the NFS citizens, but is also the tendency of the OFS citizens (see table 17).

2.6 Illegal Drugs and Alcohol

The fact that there is a large discussion in the mass media in relation to the (supposed) sharp increase in illegal drug handling and use in the NFS, introduced a number of items to the questionnaire within this area. According to expectation, the personal acquaintance of NFS citizens with drug abusers, is (still) more limited than in the OFS (see table 18, figure 11). Of the respondents in the NFS, 2.4 % (N = 120) know one or more people who have experiences with drugs, in comparison to 16.1 % (N = 327) in the OFS. The distinctions between the NFS and OFS are statistically significant

($p < .01$). 2 % (N = 100) of the inhabitants of the NFS, in comparison with 7.7 % (N = 155) of those in the OFS, have personally seen narcotic transactions. The distinctions in these figures between both parts of the country, are also statistically highly significant ($p < .01$). Obtaining narcotics is estimated by 43.1 % (N = 2,147) of the inhabitants of the NFS, in comparison with 17.3 % (N = 351) of those in the OFS, as rather difficult (see table 19, figure 12). The distinctions between the NFS and OFS are also significant here ($p < .01$).

Since the drug problems in the NFS are estimated to be lower than in the OFS, alcohol seems to play a more significant role in relation to crime committment in the NFS in comparison to the OFS - at least according to the assessment of those questioned (see table 20, figure 13). Of the NFS citizens, 85.7 % (N = 3,838), in comparison to 75.3 % (N = 1,305) of those in the OFS are of the opinion that alcohol plays a very significant role in relation to the commission of crime (see also *Kury* 1979). These results are also highly significant ($p < .01$).

3. Discussion of Results

In conclusion, the results reported from the first large scale comparative victim survey between the old (former FRG) and new (former GDR) federal states, should be discussed and partially supplemented with additional considerations.

The union of the two former German states is "a historical, unique and notable event". It concerns the self-dissolution of a state and its economic and social order and the processes of democratisation, the introduction of free enterprise, the creation of entirely new institutions, changes in political culture and public opinion, sudden, induced changes in values, adaption of behavior to these changes and also the hurried and deep-rooted re-organisation of an entire society" (*Allerbeck et al.* 1991, p. 6). It is not therefore surprising that social scientists are making increasing use of this unique chance to pursue the research and record social changes and restructuring processes offered by this example. The "Deutsche Forschungsgemeinschaft" (DFG; German research society) as a logical consequence of this, set up a program focused upon "social and political change in relation to the integration of the GDR society" (*Allerbeck et al.* 1991). Particular historical, sociological, psychological and social scientific questions and points of research have been focused upon by this program, with particular reference to criminological aspects.

Preparation was begun at the Max Planck Institute for criminal law in Freiburg, which has for many years been concerned with victimological research, and since 1988 has built up its victim research area to a considerable extent, at the beginning of 1990, for carrying out a large scale victim study in both former German states, in cooperation with the criminalistic-criminological research group from the "Bundeskriminalamt" (BKA; German Federal Bureau of Investigation). We are concerned here with the first comparative victim study between the old and new federal states. In the meantime, other criminological research proups have begun preparations for carrying out criminological studies in the new federal states (NFS) (see *Kerner et al.* 1990). The research in the Max Planck Institute was planned and carried out, following upon the worldwide victim survey (see *van Dijk et al.* 1990) and in particular concerning the questionnaire. This allows the possibility of comparing the data obtained. Due to the relatively large samples of persons questioned in the NFS (N = 4,999) and OFS (N = 2,027) the results obtained in relation to the victim situation, will be evidential. This is particularly true, because the percentage of answers received is comparatively high in the NFS (74.6 %) and in the OFS (70.1 %). We can speak therefore of representativeness of the data. Even in comparison with other victim studies, which carried out personal interviews, the percentage of answers obtained by us is very good (see article by *Kury* in this volume).

In relation to the categories of the 11 offences, recorded by us, of which 5 relate to crimes concerning vehicle and bicycle theft, the rate of victims is lower in the former GDR, with the exception of theft of motorcycles, bicycle theft and attempted burglary. In relation to bicycle and motorcycle theft, this difference can be attributed to the more limited security against theft in the Eastern federal states. Bicycle theft and motorcycle theft is also a frequently committed offence in the Western federal states and this brought about in the last few years, better and more efficient locks for such means of transport, which protected the owners against loss. Information campaigns by the criminal police ("Die Kriminalpolizei rät"; "the criminal police recommendations") also contributed for example to this increase in security. Due to the poor type construction, burglaries in the former GDR are considerably easier to effect, than in the West, where security locks have become standard equipment for entrance doors. This position is for example responsible to a considerable extent for the sharp increase in the rate of bank robberies in the NFS (see *Skoda* 1991). The number of crime in the new federal states is around 4.4 % lower than in the old federal in relation to all 11 offence types.

The dramatic increase in crime in the former GDR, often reported in the mass media, could have been confirmed by our inquiry to the extent that in

the majority of offences recorded by us during the period after the opening of the borders, there were an increasing number of victimization in the NFS compared with the OFS. These facts already point to the actual sharp increase of crime in the East of the country than in the West. In addition, the citizens of the former GDR, assume a considerably sharper increase of crime in the period after the opening of the borders than during the period before the opening of the borders than the citizens of the former FRG for the same period of time. Almost three quarters of the respondents in the NFS (71.1 %) are of the view that crime has risen since the opening of the borders. More citizens in the NFS expect an increase in the future rate of crime than the inhabitants of the OFS (86.8 %; 53.7 % respectively). Without doubt, the sensationalism of reporting plays in particular in relation to the Western states, an important role in relation to this assessment. In any case, our victim data clearly show an increase in crime in the NFS after the opening of the borders.

The number of officially registered crimes depends considerably upon the reporting behavior of the population. This readiness to report "underlies the social change and can never be regarded as constant. It contributes to the increase and decrease in the development of crime" (*Kaiser* 1988, p. 347). Reporting behavior is undoubtedly, influenced by attitudes towards the police force and confidence in the criminal prosecution organs. The low reporting rate in the NFS, established in our studies, in relation to the majority of the offences dealt with, is influenced by distinctions in the various insurance-related provisions. There was a higher reporting rate in the OFS in relation to theft from vehicles, damage to vehicles, burglary and robbery. This relates to offences, which are usually covered by insurance. In order to enforce an insurance claim, in most cases, a report to the police and appropriate confirmation of this is required.

On the other hand, the citizens of the former GDR are clearly less satisfied with their police than those in the former FRG. This could lead to differences in the rate of reporting. Every third citizen of the GDR (31.1 %), assumed for the period before the opening of the borders that the work of the police was very good or good. For the period after 9. November 1989, these impressions were represented to merely every fourth citizen (25.3 %). No fewer than 16.7 % estimate for this period the work of the police to be fairly bad or very bad. This may relate to the fact that because of the political changes, the police were very unsure and their work was less efficient during this period of great uncertainty and concern. In addition, a political incrimination of the police apparatus of the former GDR, in particular the key positions in the police force, has more clearly come to light and could be more openly discussed. *Zinycz* and *Hahn* (1991, p. 189) point for example

to the fact that the "criminal police work... in the past... was most of all politically motivated and directed. The relationship of the citizens in the former GDR to the police, was and is not free from pressures." (p. 190). In the OFS in contrast, there is relatively high satisfaction amongst the population with the police. More than the half (52.0 %) assess the work of the police to be good or very good. Merely 3.8 % assess the police work to be fairly bad or very bad.

Due to the subjectively felt increase in the number of crimes by the NFS citizens, an increase in the fear of crime can be expected. The fact that subsequent to the study of *van Dijk et al.* (1990), the area of fear of crime, which appears as a very complex issue (see *Arnold* 1984), can only be indirectly investigated in our study, means that only a few statements in this respect can be made. More inhabitants of the NFS (17.3 %) estimate the vicinity of their home to be fairly unsafe or very unsafe in comparison to those in the OFS (13.0 %). Particularly in the NFS, a clear connection between the status of the victim and feelings of safety within the vicinity of the home can be seen. The more severe the victimization, respectively the stronger the offender's invasion in the private spheres of the victim, namely direct (physical) injury or damage, the more unsafety of the vicinity of the home is assessed and fear of crime is is accordingly higher. 77.0 % of victims of means of conveyance regard the vicinity of the home as being very safe or fairly safe. In relation to victims of property offences this figure is merely 68.7 % and in relation to victims of offenses against a person, 62.5 %. In the OFS, the distinctions appear less evident. These results correspond with the results of other victim studies (see above).

A "wave of narcotics" is again and again reported in the press, as spreading into the new federal states. Our results show that the citizens of the NFS at least until now, had less contact with illegal drugs namely direct observation, in comparison with the OFS. Alcohol is estimated to be more influential as a cause of the commission of crime, in the NFS. 85.7 % are of the view that alcohol plays a very large or a large role in relation to the occurence of crime. In the Western states, the number of those questioned in this respect corresponded merely to 75.3 %. More high-proof alcohol was consumed in the former GDR than in the former FRG. According to *Müller* (1991, p. 48) alcohol "can be said to be drug number one in this area with complete justification".

The comparative victim study carried out by us, introduced a magnitude of interesting results, which allows insight into the structure of crime and processes of victimization. Only a number of aspects can be addressed here and a limited insight into the extensive results given. Other research works within the area of the Eastern block states, could on the one hand be

confirmed and supplemented, and on the other hand interesting distinctions could be produced. For example *Kurleto* and *Blachut* (1977) established in their study into unreported theft of private property in 1976 in Krakau (Poland) that no fewer than 25.2 % of the persons questioned, confirmed having been a victim of theft within the last three years before the period of the inquiry. We can compare this with our inquiry in the NFS, where "merely" 5.1 % of the persons questioned confirmed having been the victim of a theft within the last 5 years (OFS: 7.1 %). This illustrates a very high victim rate in Poland. *Wojtycka* (1979) established in his study of office workers from all parts of Poland, in relation to a study of theft, that 47.7 % had been victims of theft at least on one occasion since they were 17. These results point to a much higher rate of theft in Poland in comparison for example to the Federal Republic of Germany (see summary in *Arnold & Korinek* 1985). The international Victim Survey confirmed this result: In this survey, Warsaw in comparison to cities with over 100,000 inhabitants from other countries, including the USA, Canada, Australia and Western Europe, had the highest victim rate for 1988 (13.4 %). The same applies to pickpocketing (13.0 %). (Western Europe: theft = 5.8 %; pickpocketing = 3.3 %) (see *van Dijk et al.* 1990, p. 44).

The presented victim studies, between the old and new federal states - the first of its form - introduced many interesting results of which only a few can be illustrated here. The fact that there are many radical changes and developments in progress in the new federal states, suggests that comparable inquiries and studies should be carried out at regular intervals in order to gain more insight into the relationship between social conditions and the development of criminal behavior and the dealing with such behavior. Empirical criminology has a unique chance to further its knowledge as a direct result from the "natural experiment" of the unity of the two German states.

4. Summary

In the 70ies the victims of crime were rediscovered worldwide. As part of the increasing number of victimological research in numerous countries more victim surveys were carried out. A first worldwide victim survey was directed by the Dutch Ministry of Justice in 17 States. Amongst others, data was collected from Warsaw, too. At an earlier date, victim studies had already been carried out in Poland. Their results are on the whole identical with those of corresponding western studies. In the FRG, especially the MPI for Criminal Law in Freiburg had already carried out victim studies, since

the 70ies. In the early 80ies, an international comparative study with Texas/USA as a western State and Hungary as a socialist State was carried out.

The unification of the two German States and particularly the increasing approach of the Eastern Block to the western industrial nations have helped to move corresponding comparative criminological-victimological studies into the centre of interest. The unification of the former GDR with the FRG offered the chance to record the effect of political changes upon crime development by means of comparative victim research. At an early stage, the MPI together with the German Federal Bureau of Investigation (BKA) in Wiesbaden decided to carry out a first large victim survey in the two parts of Germany. In order to guarantee comparability with the worldwide victim survey, the method of collecting data in the latter was mainly adopted. In the second half of 1990, in the former GDR, N = 4,999 and in the former FRG N = 2,027 randomly chosen persons above the age of 14 were interviewed by a commercial poll institute. The response rate was relatively high: 74.6 % in the new federal states (NFS) and 70.1 % in the old federal states (OFS). Information was asked as to 11 types of offences: 1. theft of cars, 2. theft from cars, 3. vandalism to cars, 4. theft of motorcycles, 5. theft of bicycles, 6. burglary, 7. attempted burglary, 8. robbery, 9. theft of personal property, 10. sexual assault and 11. assault or threatening.

First results are reported as to frequency of crime and assessment of crime development, reporting behavior, satisfaction with the police, fear of crime and illegal drugs and alcohol. Victimization rates are 4.4 % lower in the NFS compared to the OFS. With regard to the single offences, the victimization rate is higher in the former GDR for theft of motorcycles, theft of bicycles and attempted burglary. The citizens of the NFS suppose that the crime rate will rise significantly after the opening of the border. In the NFS, crimes are less frequently reported than in the OFS. In the NFS, satisfaction with the police was much lower, before the opening of the border as well as afterwards. In the NFS fear of crime is slightly higher than in the OFS. Victims of (serious) crimes were recorded obviously to be more anxious than those of less serious crimes or non-victims. Illegal drugs (still) play a more minor role than in the OFS, however the significance of alcohol in the commission of crime is estimated to be more important in the NFS than in the OFS. Finally, the results are discussed within the background of international research results.

5. Tables and Diagrams

Table 1: Response Rates (Comparison NFS/OFS)

Composition of the sample	NFS		OFS	
	N	%	N	%
Gross sample	7500	*100,0*	3360	*100,0*
non-relevant missings including:	799	*10,7*	470	*13,9*
address not found	27	*0,4*	54	*1,6*
dwellings uninhabited	-	-	61	*1,8*
no target person in household	5	*0,1*	84	*2,5*
not treated sample-points or singular addresses	719	*9,6*	223	*6,6*
other reasons for missings	48	*0,6*	48	*1,4*
adjusted sample	6701	*100,0*	2890	*100,0*
relevant missings including:	1681	*25,1*	860	*29,8*
nobody at home	335	*5,0*	182	*6,3*
target person in spite of several trials not met	215	*3,2*	122	*4,2*
target person ill	173	*2,6*	53	*1,9*
household refuses	390	*5,8*	205	*7,1*
target realized but respondent not available during fieldwork	120	*1,8*	64	*2,2*
target person refuses	448	*6,7*	234	*8,1*
realized interviews	5020	*74,9*	2030	*70,2*
not useable interviews	21	*0,3*	3	*0,1*
completed interviews	4999	*74,6*	2027	*70,1*

Apart from non-relevant missings, the basis of calculation always refers to the adjusted sample.

OFS/NFS = old/new federal states

Table 2: Age

(Comparison NFS/OFS)

Age	NFS		OFS	
	N	%	N	%
14 - 17 years	209	*4,2*	52	*2,6*
18 - 24 years	459	*9,2*	195	*9,6*
25 - 44 years	1968	*39,4*	832	*41,0*
45 - 59 years	1239	*24,8*	465	*22,9*
60 - 64 years	361	*7,2*	135	*6,7*
65 years and older	763	*15,3*	348	*17,2*
Total	4999	*100,0*	2027	*100,0*
Significance	Chi^2 = 17,43	df = 5	p < .01 **	

OFS/NFS = old/new federal states

Table 3: Gender

(Comparison NFS/OFS)

		Gender			
	Total	male		female	
	N	N	%	N	%
NFS	4999	2356	*47,1*	2643	*52,9*
OFS	2027	971	*47,9*	1056	*52,1*
Significance	Chi^2 = 0,35	df = 1	p = .56 n.s.		

OFS/NFS = old/new federal states

Table 4: Victimization in comparison NFS - OFS

	Total		Non-Victims		Victims	
	N	%	N	%	N	%
NFS	4999	*100*	3591	*71,8*	1408	*28,2*
OFS	2027	*100*	1366	*67,4*	661	*32,6*
Significance	Chi^2 = 13,71		df = 1	p < .01 **		

OFS/NFS = old/new federal states

Table 5: Victimization in each kind of offence 1986-1990 (NFS/OFS)

Offence		Victimization no		Victimization yes	
		N	%	N	%
Theft of cars[1]	NFS	3179	99,6	13	0,4
	OFS	1551	98,8	19	1,2
Theft from cars[1]	NFS	2949	92,4	243	7,6
	OFS	1402	89,6	163	10,4
Vandalism to cars[1]	NFS	2871	89,9	321	10,1
	OFS	1346	85,5	229	14,5
Theft of motorcycles[1]	NFS	1200	92,7	95	7,3
	OFS	194	93,7	13	6,3
Theft of bicycles[1]	NFS	3149	85,1	551	14,9
	OFS	1220	85,7	204	14,3
Burglary	NFS	4894	97,9	105	2,1
	OFS	1977	97,5	50	2,5
attempted burglary	NFS	4889	97,8	110	2,2
	OFS	1993	98,3	34	1,7
Robbery	NFS	4962	99,3	37	0,7
	OFS	1993	98,3	34	1,7
Theft of personal property	NFS	4744	94,9	255	5,1
	OFS	1883	92,9	144	7,1
Sexual incidents*	NFS	2588	97,9	55	2,1
	OFS	1014	96,0	42	4,0
Assaults/ threats	NFS	4838	96,8	161	3,2
	OFS	1943	95,9	84	4,1

[1]only households which owns vehicles

*only women

OFS/NFS = old/new federal states

Multiple responses over all kind of offences are possible, but for each kind of offence only one victimization is taken into account.

Table 6: Multiple victimization per victim (Comparison NFS/OFS)

Number of victimization	NFS		OFS	
	N	%	N	%
1 time	1012	*71,9*	422	*63,8*
2 times	286	*20,3*	154	*23,3*
3 times and more	110	*7,8*	85	*12,9*
Significance	$Chi^2 = 18,23$		df = 2	p < .01 **

Table 7: Victimization for each kind of offence (NFS/OFS)

Offence	N F S			O F S		
	Victims	number of incidents	number of victimization per victim*****	Victims	number of incidents	number of victimization per victim *****
Theft of cars	13	15	1,2	19	18*	1,0
Theft from cars	253	398	1,6	168	232	1,4
Vandalism to cars	321	513	1,6	229	348****	1,5
Theft of motorcycles	95	107	1,1	13	14	1,1
Theft of bicycles	551	733	1,3	204	256*	1,3
Burglary	105	129**	1,2	50	58	1,2
attempted burglary	110	133**	1,2	34	45	1,3
Robbery	37	42	1,1	34	40**	1,2
Theft of personal property	255	338	1,3	144	183**	1,3
Sex. incidents[1]	55	72	1,3	42	64*	1,5
Assault/threats	161	273*	1,7	84	159	1,9

[1] only women

* missing values of 1 victim
** missing values of 2 victims
*** missing values of 3 victims
**** missing values of 4 victims
***** In the case of missing values we assumed that the victim was victimized one time.

Multiple responses over all kind of offences are possible. Therefore the sum of victims is more than there are victims actually.

Table 8: Multiple victimization separated by gender (NFS/OFS)

male								
			Number of victimization					
	Total		1 time		2 times		3 times and more	
	N	%	N	%	N	%	N	%
NFS	706	*100,0*	497	*70,4*	149	*21,1*	60	*8,5*
OFS	332	*100,0*	218	*65,7*	71	*21,4*	43	*12,9*
Significance	$Chi^2 = 5.26$		df = 2		p = .07 n.s.			

female								
			Number of victimization					
	Total		1 time		2 times		3 times and more	
	N	%	N	%	N	%	N	%
NFS	702	*100,0*	515	*73,4*	137	*19,5*	50	*7,1*
OFS	329	*100,0*	204	*62,0*	83	*25,2*	42	*12,7*
Significance	$Chi^2 = 15.56$		df = 2		p < .01 **			

Table 9: Number of victims in each kind of offence before (Time I) and after (Time II) the 9. November 1989 (NFS/OFS)

Offence	NFS						OFS					
	Total		Time I		Time II		Total		Time I		Time II	
	N	%	N	%	N	%	N	%	N	%	N	%
Theft of cars	13	100	8	61,5	5	38,5	19	100	13	68,4	6	31,6
Theft from cars	253	100	172	68,0	81	32,0	168	100	120	71,4	48	28,6
Vandalism to cars	321	100	181	56,4	140	43,7	229	100	136	59,4	93	40,6
Theft of motorcycles	95	100	65	68,4	30	31,6	13	100	9	69,2	4	30,8
Theft of bicycles	551	100	401	72,8	150	27,3	204	100	132	64,7	72	35,3
Burglary	105	100	78	74,3	27	25,8	50	100	34	68,0	16	32,0
attempted burglary	110	100	70	63,6	40	36,3	34	100	21	61,8	13	38,2
Robbery	37	100	21	56,8	16	43,2	34	100	25	73,5	9	26,5
Theft of personal property	255	100	146	57,3	109	42,7	144	100	98	68,1	46	32,0
Sex. incidents	55	100	36	65,5	19	34,5	42	100	29	69,0	13	31,0
Assaults/threats	161	100	98	60,9	63	39,2	84	100	45	53,6	39	46,4

Time I = January 1986 - 9. November 1989
Time II = 9. November 1989 - September 1990

Table 10: Criminality in the new federal states before and after the 9. November 1989
Estimation from respondents of the NFS

	before 9.Nov. 1989		after 9.Nov. 1989	
	N	%	N	%
remained the same	2325	*53,0*	1035	*22,8*
increased	1653	*37,7*	3220	*71,1*
decreased	79	*1,8*	32	*0,7*
there is no criminality	327	*7,5*	244	*5,4*
Total	4384	*100,0*	4541	*100,0*
Significance	Chi^2 = 3194.25		df = 9	p < .01 **

Table 11: Criminality in future
Estimation of criminality since the beginning of the fieldwork (September 1990)

	NFS		OFS	
	N	%	N	%
will remain the same	475	*10,3*	691	*40,5*
will increase	3988	*86,8*	918	*53,7*
will decrease	62	*1,3*	45	*2,6*
there is no criminality	68	*1,5*	54	*3,2*
Total	4593	*100,0*	1708	*100,0*
Significance	Chi^2 = 815.43		df = 3	p < .01 **

Table 12: Incidents of offences 1986-1989 in the old federal states. Comparison of the "Criminal Statistics of the Police" ("Polizeiliche Kriminalstatistik": PKS) with our study

Offence	Number of offences				Proportion PKS to our study
	PKS (1986 -1989)		our study (1986 - 9. Nov. 1989)		
	Total	in relation to 100000 persons	Total	in relation to 100000 persons	
Theft of cars*	208633	340	12	592	1 : 1,7
Theft from cars*	2873672	4683	173	8535	1 : 1,8
Vandalism to cars*	689881	1124	237	11692	1 : 10,4
Theft of motorcycles*	165286	269	10	493	1 : 1,8
Theft of bicycles*	1337591	2180	179	8830	1 : 4,1
Burglary**	805492	1313	69	3404	1 : 2,6
Robbery**	70961	116	31	1529	1 : 13,2
Theft of personal property*	627479	1023	132	6512	1 : 6,4
Sexual incidents*,2,3	24394	83	48[2]	2368	1 : 28,5
Assaults/threats*	732191	1193	108	5328	1 : 4,5

[1] Sources: *Polizeiliche Kriminalstatistik 1986* (1987). Wiesbaden: Bundeskriminalamt.
Polizeiliche Kriminalstatistik 1987 (1988). Wiesbaden: Bundeskriminalamt.
Polizeiliche Kriminalstatistik 1988 (1989). Wiesbaden: Bundeskriminalamt.
Polizeiliche Kriminalstatistik 1989 (1990). Wiesbaden: Bundeskriminalamt.

[2] including sexual harassment

[3] only women

* excluding attempts

** including attempts

Basis of calculation PKS : N = 61.364.000
♀: N = 29.501.000

Basis of calculation our study: N = 2027
♀: N = 1056

Table 12: Comparison of offence categories Survey - Criminal Statistics of the Police (PKS)

Survey	Criminal Statistics
Theft of cars	-Theft of cars including unauthorized use (without attempts)
Theft from cars	-Theft in/from cars -Theft at cars (without attempts)
Vandalism to cars	-Damage of property on cars (without attempts)
Theft of motorcycles	-Theft of motorcycles (without attempts)
Theft of bicycles	-Theft of bicycles (without attempts)
Burglary	-Theft in/from housing spaces (including attempts)
Robbery/attempted robbery	-Robbery of drivers -Robbery after drinking -Robbery of handbags -other robberies on streets, ways or places -Robbery for getting narcotics -Robberies in dwellings (including attempts)
Theft of personal property	-Theft from restaurants, canteens, hotels and boarding-houses -Theft from lofts, cellars and laundries -Pickpocketing (without attempts)
Sexual incidents	-Offences against sexual self-determination with using force or utilization of a condition of dependence (without attempts)
Assaults/threats	-dangerous and grievous bodily injury as well as poisoning -Maltreatment of charges without maltreatment of children -intentional minor bodily injury (without attempts)

Table 13: Reporting to the police (NFS/OFS)

Offence	NFS						OFS					
	Total		reporting to the police				Total		reporting to the police			
			yes		no				yes		no	
	N	%	N	%	N	%	N	%	N	%	N	%
Theft of cars	13	*100*	13	*100,0*	-	-	19	*100*	18	*94,4*	1	*5,3*
Theft from cars	243	*100*	111	*45,7*	132	*54,3*	163	*100*	141	*86,5*	22	*13,5*
Vandalism to cars	321	*100*	106	*33,0*	215	*67,0*	229	*100*	125	*54,6*	104	*45,4*
Theft of motorcycles	95	*100*	81	*85,3*	14	*14,7*	13	*100*	12	*92,3*	1	*7,7*
Theft of bicycles	551	*100*	406	*73,7*	145	*26,3*	204	*100*	163	*79,9*	41	*20,1*
Burglary	105	*100*	73	*69,5*	32	*30,5*	50	*100*	42	*84,0*	8	*16,0*
Robbery	37	*100*	19	*51,4*	18	*48,6*	34	*100*	24	*70,6*	10	*29,4*
Theft of personal property	255	*100*	131	*51,4*	124	*48,6*	144	*100*	67	*46,5*	77	*53,5*
Sex. incidents	55	*100*	9	*16,4*	46	*83,6*	42	*100*	8	*19,0*	34	*81,0*
Assaults/threats	161	*100*	47	*29,2*	114	*70,8*	84	*100*	21	*25,0*	63	*75,0*

Table 14: Satisfaction with the police referring to repression of criminality (NFS/OFS)

satisfaction with the police	NBL before 9. November 1989		NBL after 9. November 1989		OFS	
	N	%	N	%	N	%
very well	200	*4,1*	136	*2,8*	149	*7,7*
well	1309	*27,0*	1078	*22,5*	859	*44,3*
quite well	1464	*30,2*	1422	*29,6*	615	*31,8*
not so well	1257	*25,9*	1361	*28,4*	241	*12,4*
quite bad	398	*8,2*	531	*11,1*	48	*2,5*
very bad	225	*4,6*	269	*5,6*	25	*1,3*
Total	4853	*100,0*	4797	*100,0*	1937	*100,0*

Table 15: Estimation of the security of the home area (NFS/OFS)

	NFS		OFS	
	N	%	N	%
very secure	587	*11,8*	281	*13,9*
quite secure	3533	*71,0*	1480	*73,1*
quite insecure	775	*15,6*	242	*12,0*
very insecure	84	*1,7*	21	*1,0*
Total	4979	*100,0*	2024	*100,0*
Significance	$Chi^2 = 22.99$		df = 3	p < .01 **

Table 16: Estimation of the security of the home area in relation to the number of victimization (NFS/OFS)

Number of victimization	NFS										OFS									
	Total		very secure		quite secure		quite insecure		very insecure		Total		very secure		quite secure		quite insecure		very insecure	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1 time	1007	*100*	73	*7,2*	705	*70,0*	208	*20,7*	21	*2,1*	421	*100*	52	*12,4*	293	*69,6*	72	*17,1*	4	*1,0*
2 times	284	*100*	17	*6,0*	176	*62,0*	80	*28,2*	11	*3,9*	154	*100*	9	*5,8*	99	*64,3*	41	*26,6*	5	*3,2*
3 times and more	109	*100*	2	*1,8*	68	*62,4*	37	*33,9*	2	*1,8*	85	*100*	8	*9,4*	53	*62,4*	21	*15,7*	3	*3,5*
Significance	$Chi^2 = 21.53$ df = 6 p < .01 **										$Chi^2 = 16.32$ df = 6 p < .05 *									

Table 17: Estimation of the security of the home area from victims of offence groups of different seriousness (NFS/OFS)

	NFS										OFS									
	Total		very secure		quite secure		quite insecure		very insecure		Total		very secure		quite secure		quite insecure		very insecure	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
Means of conveyance crimes[1]	1026	*100*	72	*7,0*	718	*70,0*	216	*21,1*	20	*1,9*	485	*100*	52	*10,7*	332	*68,5*	93	*19,2*	8	*1,6*
Property crimes[2]	428	*100*	22	*5,1*	272	*63,6*	122	*28,5*	12	*2,8*	214	*100*	20	*9,3*	139	*65,0*	49	*22,9*	6	*2,8*
Crimes against the person[3]	232	*100*	11	*4,7*	134	*57,8*	76	*32,8*	11	*4,7*	141	*100*	12	*8,5*	92	*65,2*	34	*24,1*	3	*2,1*

Its possible that persons are in more than one offence group.

[1] including theft of cars, theft from cars, vandalism to cars, theft of bicycles, theft of motorcycles
[2] including burglary, attempted burglary, theft of personal property
[3] including robbery, sexual incidents, assaults/threats

Table 18: Acquaintance of persons experienced in drugs (NFS/OFS)

	NFS		OFS	
	N	%	N	%
knowing 1 person	64	*1,3*	112	*5,5*
knowing several persons	56	*1,1*	215	*10,6*
not personal, only from hearing	224	*4,5*	270	*13,4*
neither nor	4640	*93,1*	1423	*70,4*
Total	4984	*100,0*	2020	*100,0*
Significance	Chi^2 = 686.14	df = 3	p < .01 **	

Personal observation of drug activities (NFS/OFS)				
	NFS		OFS	
	N	%	N	%
yes	100	*2,0*	155	*7,7*
no	4848	*98,0*	1863	*92,3*
Total	4948	*100,0*	2018	*100,0*
Significance	Chi^2 = 130.2	df = 1	p < 01 **	

Table 19: Estimation of the difficulty to get drugs (NFS/OFS)

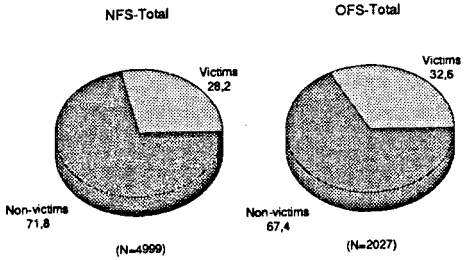
	NFS		OFS	
	N	%	N	%
quite easy	526	*10,6*	685	*33,9*
quite difficult	2147	*43,1*	351	*17,3*
don't know	2307	*46,3*	986	*48,8*
Total	4980	*100,0*	2022	*100,0*
Significance	Chi^2 = 732.30	df = 1	p < .01 **	

Table 20: Criminality and the role of alcohol (NFS/OFS)

	NFS		OFS	
	N	%	N	%
very important	1410	*31,5*	397	*22,9*
important	2428	*54,2*	908	*52,4*
little	545	*12,2*	366	*21,1*
very little	99	*2,2*	61	*3,5*
Total	4482	*100,0*	1732	*100,0*
Significance	$Chi^2 = 108.98$	df = 3		p < .01 **

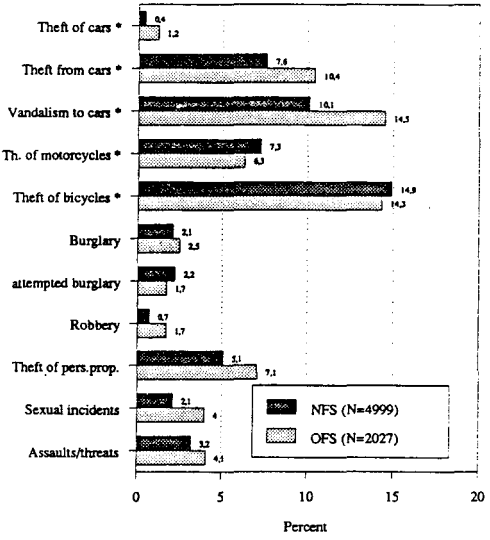
Figure 1: Victimization in Comparison NFS / OFS

Responses to at least one offence



in Percent

Figure 2: Victimization in each kind of offence 1986 -1990 Comparison NFS / OFS



sexual incidents only refers to women
* Those statements only refer to households which possess such vehicles

Figure 3: Multiple victimization per victim

Comparison NFS / OFS

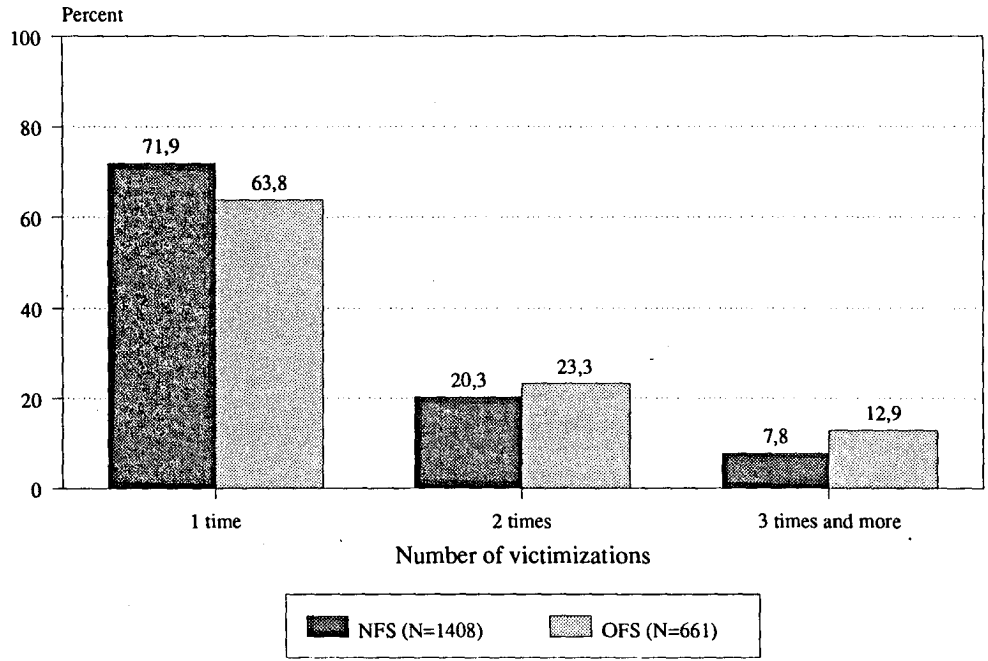


Figure 4: Number of victims NFS / OFS

in each kind of offence before (Time I) and after (Time II) the 9. November 1989

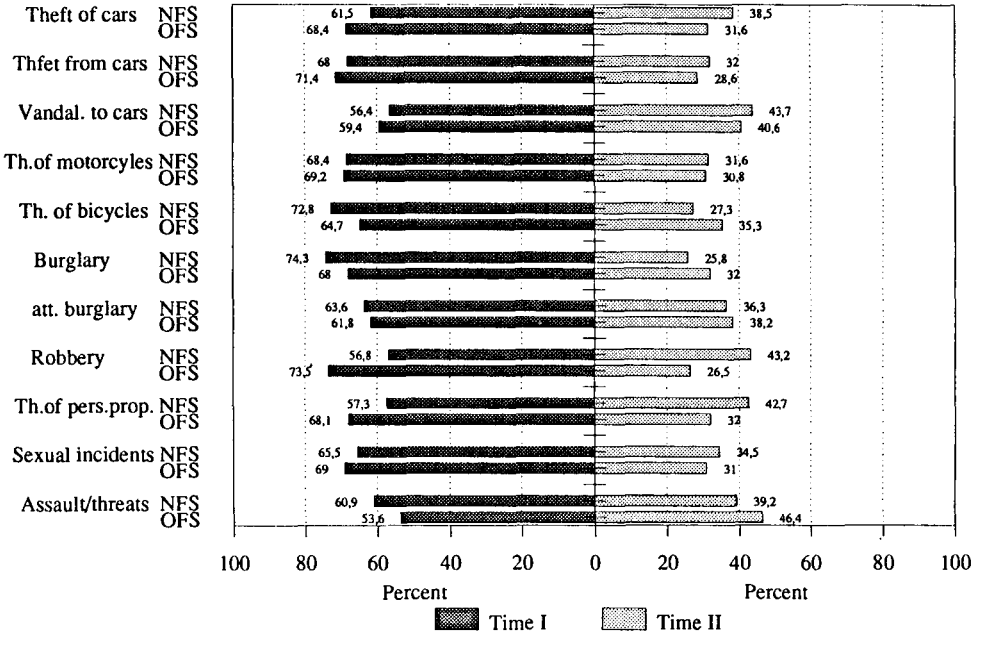
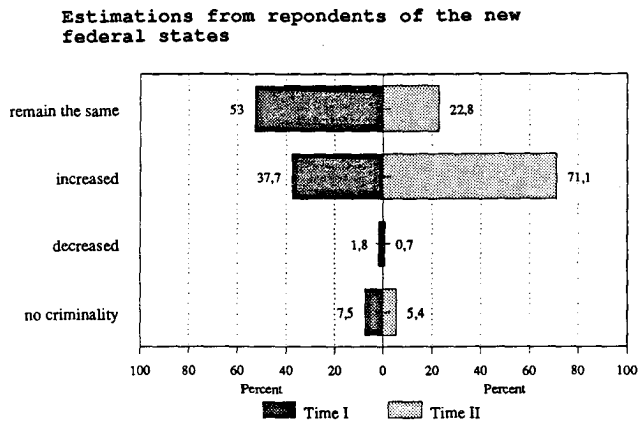
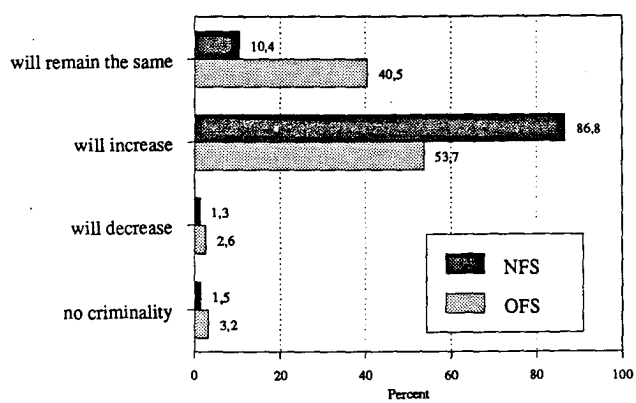


Figure 5: Criminality in the new federal states before and after the 9. Nov. 1989



Time I : N=4884 Time II : N=4541
Time I : January 86 - 9.November 89
Time II: 9.November 89 - September 90

Figure 6: Criminality in future - Estimation of Criminality since the beginnig of the fieldwork (September 90) Comparison NFS /OFS



new federal states N=4593
old federal states N=1708

Figure 7: Reporting to the police
Comparison NFS /OFS

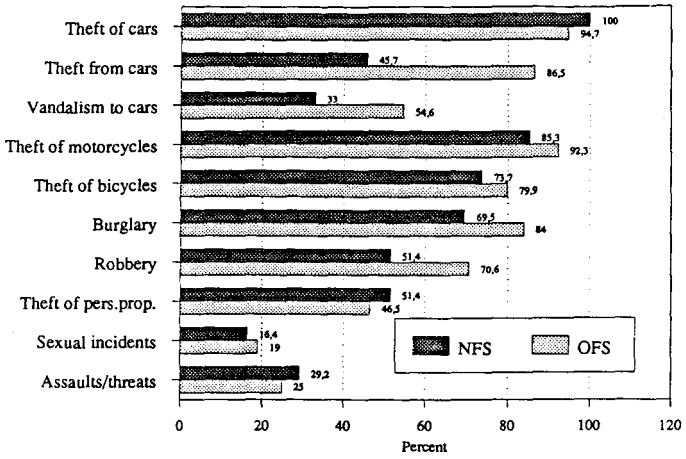
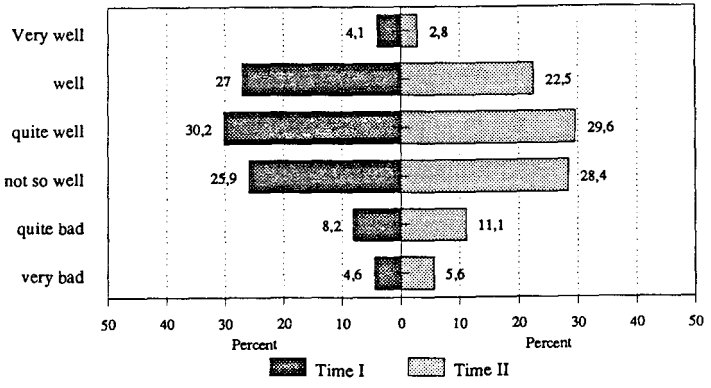
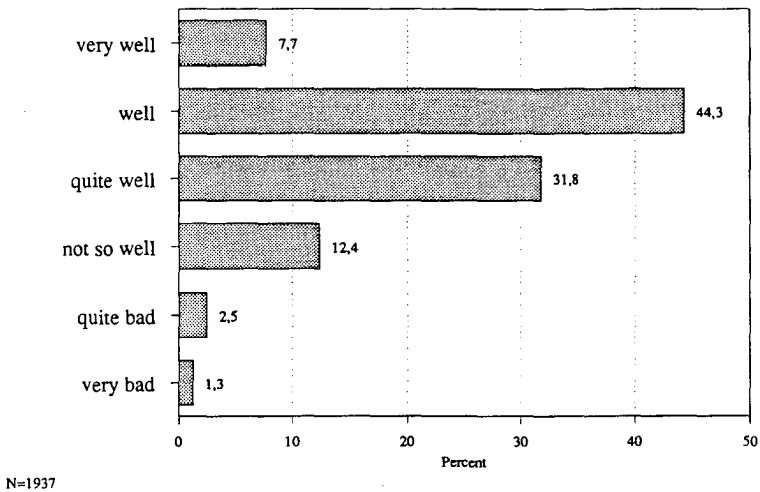


Figure 8: Satisfaction with the police
in the new federal states -
before (Time I) and after
(Time II) the 9. November 1989



Time I : N=4853 Time II : N=4797
Time I : January 86 - 9.November 1989
Time II: 9.November 1989-September 1990

Figure 9: Satisfaction with the police
old federal states



N=1937

Figure 10: Estimation of the security
of the home area
Comparison NFS /OFS

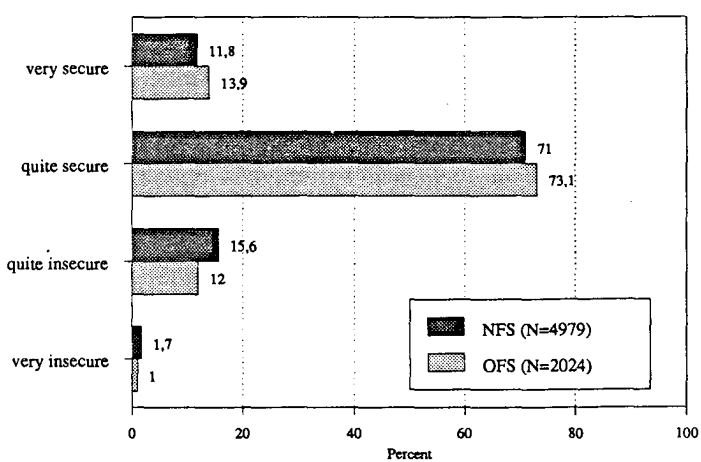
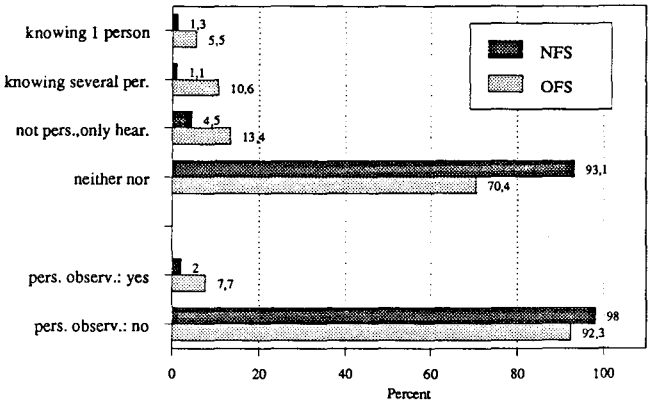


Figure 11: Acquaintance of persons experienced in drugs Comparison NFS /OFS



Presentation of two different variables v291 and v292

Figure 12: Estimations of the difficulty to get drugs Comparison NFS /OFS

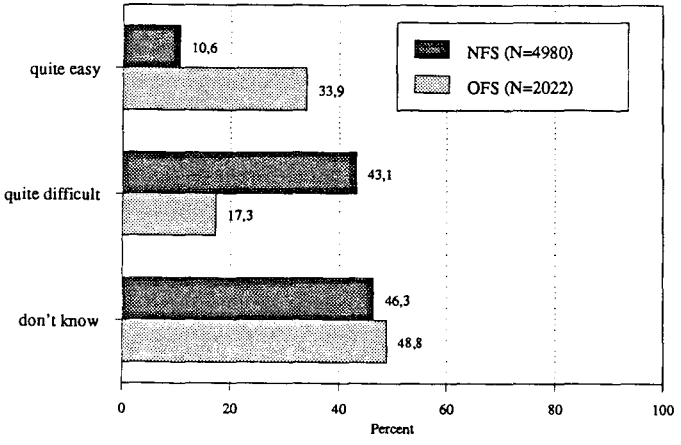
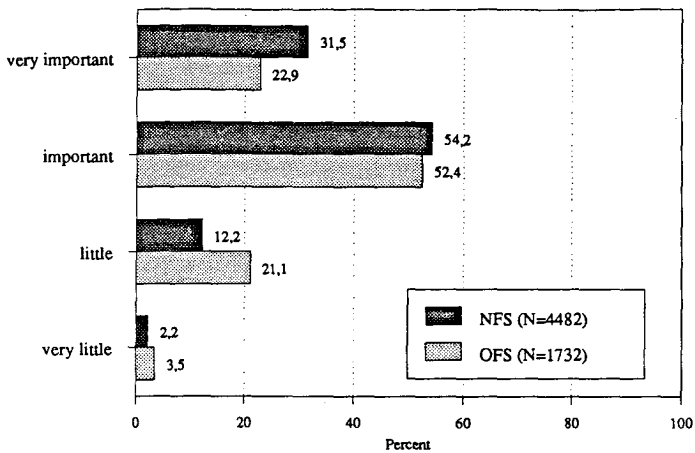


Figure 13: Criminality and the role of alcohol Comparison NFS /OFS



6. References

Albrecht, H.-J. (1989). Comparative research in crime and delinquency - The role and relevance of national penal codes and criminal justice systems. In: M.W. Klein (Ed.), Cross-national research in self-reported crime and delinquency (pp. 227-248). Dordrecht.

Allerbeck, K., Esser, H., Mayer, K.U., Scheuch, E.K., & Tack, W.H. (1991). Sozialer und politischer Wandel im Zuge der Integration der DDR-Gesellschaft. Antrag an den Senat der Deutschen Forschungsgemeinschaft auf Einrichtung eines Schwerpunktprogramms. Bonn, unveröff.

Arnold, H. (1984). Viktimisierung und Verbrechensfurcht. Verbrechensangst und/oder Furcht vor Viktimisierung - Folgen von Viktimisierung? In: H.-J. Albrecht & U. Sieber (Eds.), Zwanzig Jahre Südwestdeutsche Kriminologische Kolloquien (pp. 185-238). Freiburg: Eigenverlag Max- Planck-Institut für ausländisches und internationales Strafrecht.

Arnold, H. (1986). Kriminelle Viktimisierung und ihre Korrelate. Ergebnisse international vergleichender Opferbefragungen. Zeitschrift für die gesamte Strafrechtswissenschaft, 98, 1014-1058.

Arnold, H. (1990). Commentary. In: G. Kaiser & H.-J. Albrecht (Eds.), Crime and criminal policy in Europe. Proceedings of the II. European Colloquium (pp. 143-164). Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Arnold, H. (1991). Fear of crime and its relationship to directly and indirectly experienced victimization: A binational comparison of models. In: K. Sessar & H.-J. Kerner (Eds.), Developments in crime and crime control research (pp. 87-125). New York, Berlin.

Arnold, H., & Korinek, L. (1985). Kriminalitätsbelastung in der Bundesrepublik Deutschland und Ungarn: Ergebnisse einer international vergleichenden Opferbefragung. In: A. Böhm, H. Eckert, M.W. Feuerhelm, F. Hamburger & G. Sander (Eds.), Kriminologie in sozialistischen Ländern (pp. 65-136). Bochum: Studienverlag Dr. Norbert Brockmeyer.

Aromaa, K., & Siren, R. (1991, in print). Recent applications of national victimization surveys in Finland. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victims and criminal justice. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Baier, U., & Borning, A. (1991). Mysterium DDR-Kriminalstatistik. Verwirrspiele mit der Kriminalstatistik der ehemaligen DDR. Kriminalistik, 45, 273-278.

Baril, M. (1980). Ils n'ont plus la liberté: Réactions à la victimisation et ses conséquences. Criminologie, 13, 94-103.

Bienkowska, E. (1991a). Crime in eastern Europe. In: F. Heidensohn & M. Farrell (Eds.), Crime in Europe (pp. 43-54). London, New York.

Bienkowska, E. (1991, in print). Law and practice: Two faces of reality victim in the Polish criminal justice system. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.). Victims and criminal justice. Freiburg. Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Block, B., & Block, C. (1984). Crime definition, crime measurement, and victim surveys. Journal of Social Issues, 40, 137-160.

Böhm, A., Eckert, H., Feuerhelm, M.W., Hamburger, F., & Sander, G. (Eds.) (1985). Kriminologie in sozialistischen Ländern. Bochum: Studienverlag Dr. Norbert Brockmeyer.

Boers, K., & Sessar, K. (1991). Do people really want punishment? On the relationship between acceptance of restitution, needs for punishment, and fear of crime. In: K. Sessar & H.-J. Kerner (Eds.), Developments in crime and crime control research. New York: Springer.

Bondeson, U. (1991, in print). Surveys of victimization in the Scandinavian countries. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victims and criminal justice. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Braithwaite, J., Biles, D., & Whitrod, R. (1982). Verbrechensfurcht in Australien. In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 171-181). Berlin: de Gruyter.

Dijk, J.J.M. van (1978). Public attitudes toward crime in the Netherlands. Victimology, 3, 265-273.

Dijk, J.J.M. van (1982). Die Bereitschaft des Opfers zur Anzeige: eine Funktion der Strafverfolgungspolitik. In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 331-338). Berlin: de Gruyter.

Dijk, J.J.M. van (1991, in print). On the uses of local, national and international crime surveys. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victims and criminal justice. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Dijk, J.J.M. van, Mayhew, P., & Killias, M. (1990). Experiences of crime across the world. Key findings from the 1989 international crime survey. Deventer, Boston: Kluwer.

Ennis, P.H. (1967). Crime victims and the police. Trans-Action, 36-44.

Ewald, U. (1991). Sozialer Wandel und kriminologische Forschung auf dem Gebiet der ehemaligen DDR. Das Forschungsprogramm der Projektgruppe "Kriminologie". Berlin, unpublished manuscript.

Förster, M., & Schenk, J. (1984). Der Einfluß massenmedialer Verbrechensdarstellungen auf Verbrechensfurcht und Einstellung zu Straftätern. Monatsschrift für Kriminologie und Strafrechtsreform, 67, 90-104.

Freiburg, A. (1985). Jugendkriminalität in der DDR - Erscheinung, Erklärung, Bekämpfung. In: A. Böhm, H. Eckert, W. Feuerhelm, F. Hamburger & G. Sander (Eds.), Kriminologie in sozialistischen Ländern (pp. 137-164). Bochum: Studienverlag Dr. Norbert Brockmeyer.

Gottfredson, M. (1984). Victims of crime: The dimensions of risk. London: HMSO.

Gottfredson, M. (1986). Substantive contributions of victimization surveys. Crime and Justice, 6, 251-287.

Guth, R. (1991). Situation verändert - allseitig und tiefgründig. Erste Anzeichen organisierter Kriminalität in Thüringen. Kriminalistik, 45, 125-126.

Heide, F. von der (1990). Zur Entwicklung der festgestellten Kriminalität im 1. Halbjahr 1990. Der Schöffe, 8, 221-223.

Heide, F. von der, & Lautsch, E. (1991). Entwicklung der Straftaten und der Aufklärungsquote in der DDR von 1985 bis 1989. Neue Justiz, 45, 11-15.

Heidensohn, F., & M. Farrell (Eds.), Crime in Europe. London, New York.

Heinz, W. (1985). Anzeigeverhalten der Bevölkerung. In: G. Kaiser, H.-J. Kerner, F. Sack & H. Schellhoss (Eds.), Kleines Kriminologisches Wörterbuch (pp. 27-32). Heidelberg.

Helsinki Institute for Crime Prevention and Control (Ed.) (1989). Changing victim policy: The United Nations victim declaration and recent developments in Europe. Helsinki.

Hindelang, M.J. (1982). Opferbefragungen in Theorie und Forschung - Eine Einführung in das "National Crime Survey Program". In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 115-131). Berlin, New York: de Gruyter.

Hindelang, M.J., & Gottfredson, M.R. (1976). The victim's decision not to invoke the criminal justice process. In: W.F. McDonald (Ed.), Criminal justice and the victim (pp. 57-77). Vol.VI. Newbury Park.

Holyst, B. (1985). Der Stand der Kriminologie in Polen. In: A. Böhm, H. Eckert, W. Feuerhelm, F. Hamburger & G. Sander (Eds.), Kriminologie in sozialistischen Ländern (pp. 4-35). Bochum: Studienverlag Dr. Norbert Brockmeyer.

Jehle, J.-M. (Ed.) (1987). Datenzugang und Datenschutz in der kriminologischen Forschung. Wiesbaden: Kriminologische Zentralstelle.

Jung, H. (1985). Viktimologie. In: G. Kaiser, H.-J. Kerner, F. Sack & H. Schellhoss (Eds.), Kleines Kriminologisches Wörterbuch (pp. 518-525). Heidelberg.

Kaiser, G. (1979). Viktimologie an der Schwelle der 80er Jahre - ein kritisches Resumee. In: G.F. Kirchhoff & K. Sessar (Eds.), Das Verbrechensopfer (pp. 481-496). Bochum: Studienverlag Dr. Norbert Brockmeyer.

Kaiser, G. (1985). Die Rolle des Opfers als Initiator der Verbrechenskontrolle. In: H. Janssen & H.-J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 25-44). Bonn: Schriftenreihe Deutsche Bewährungshilfe.

Kaiser, G. (1986). Victim surveys - stocktaking, needs, and prospects: A German view. In: K. Miyazawa & M. Ohya (Eds.), Victimology in comparative perspective (pp. 133-143). Tokyo: Seibundo.

Kaiser, G. (1988). Kriminologie. Ein Lehrbuch. Heidelberg.

Kaiser, G., Kury, H., & Albrecht, H.-J. (Eds.) (1988). Kriminologische Forschung in den 80er Jahren. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Kaiser, G., Kury, H., Kräupl, G., & Ludwig, H. (1991). Gesellschaftliche Umwälzung von Lebensverhältnissen, deviantes Verhalten und Kriminalität - ein Vergleich kommunaler Gemeinwesen aus den neuen und alten Bundesländern. Freiburg, unpublished manuscript.

Kerner, H.-J. (1978). Fear of crime and attitudes towards crime. Annales Internationales de Criminologie, 17, 83-99.

Kerner, H.-J. (1980). Kriminalitätseinschätzung und innere Sicherheit. Eine Untersuchung über die Beurteilung der Sicherheitslage und über das Sicherheitsgefühl in der Bundesrepublik Deutschland mit vergleichenden Betrachtungen zur Situation im Ausland. Wiesbaden.

Kerner, H.-J., Sessar, K., & Boers, K. (1990). Sozialer Umbruch und Kriminalitätsentwicklung in der DDR mit Blick auf die Auswirkungen auf Deutschland als Ganzes. Unveröff. Antrag an die Deutsche Forschungsgemeinschaft. Tübingen.

Kiefl, W., & S. Lamnek (1986). Soziologie des Opfers. Theorie, Methode und Empirie der Viktimologie. München.

Killias, M. (1989). Les suisses face au crime. Collection Criminologie, Vol.5. Grüsch: Rüegger.

Kirchhoff, C., Kirchhoff, G.F., & Dussich, J.P.J. (1980). Viktimologie. Eine Einführung in Probleme einer jungen Disziplin und deren Bedeutung für Sozialarbeit. Bewährungshilfe, 27, 1-16.

Kurleto, E., & Blachut, J. (1977). 'Ciemna liczba' kradziezy miena prywatnego ("Dark figure" concerning thefts of private property). Studia Kryminologiczne, Kryminalistyczne i Penitencjarne, 6, 85-109.

Kury, H. (1979). Sozialstatistik der Zugänge im Jugendvollzug Baden-Württemberg. Freiburg, hektographiertes Manuskript.

Kury, H. (1988). The situation of criminology in the Federal Republic of Germany. In: The Institute of Comparative Law in Japan (Ed.), Conflict and integration: comparative law in the world today (pp. 455-492). Tokyo.

Lurigio, A.J., Skogan, W.G., & Davis, R.C. (Eds.) (1990). Victims of crime. Problems, policies, and programs. Newbury Park.

Maguire, M., & Shapland, J. (1990). The 'Victims Movement' in Europe. In: A.J. Lurigio, W.G. Skogan & R.C. Davis (Eds.), Victims of crime. Problems, policies, and programs (pp. 205-225). Newbury Park.

Maxfield, M.G. (1984). Fear of crime in England and Wales. London.

Mayhew, P. (1990). International comparative research in criminology: The 1989 Telephone Survey. In: G. Kaiser & H.-J. Albrecht (Eds.), Crime and criminal policy in Europe. Proceedings of the II. European Colloquium (pp. 111-141). Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Mayhew, P. (1991, in print). The British Crime Survey: The first ten years. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victims and criminal justice. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Miyazawa, K., & Ohya, M. (Eds.) (1986). Victimology in comparative perspective. Tokyo: Seibundo.

Müller, R. (1991). Drogenkriminalität. Ein Überblick über einige aktuelle Aspekte ihrer Entwicklung und Vorbeugung. Kriminalistik, 45, 47-49.

Pitsela, A. (1986). Straffälligkeit und Viktimisierung ausländischer Minderheiten in der Bundesrepublik Deutschland - Dargestellt am Beispiel der griechischen Bevölkerungsgruppe. Freiburg.

Plate, M., Schwinges, U., & Weiss, R. (1985). Strukturen der Kriminalität in Solingen. Eine Untersuchung zu Zusammenhängen zwischen baulichen und sozialen Maßnahmen und dem Kriminalitätsaufkommen. Wiesbaden.

President's Commission on Law Enforcement and Administration of Justice (Ed.) (1967). The challenge of crime in a free society. Washington, D.C.

Reuband, K.-H. (1979). Viktimisierung und Anzeigebereitschaft in Japan. Monatsschrift für Kriminologie und Strafrechtsreform, 62, 1-9.

Reuband, K.-H. (1981). Determinanten der Anzeigebereitschaft unter Opfern von Eigentumskriminalität. Monatsschrift für Kriminologie und Strafrechtsreform, 64, 213-223.

Schneider, H.J. (Ed.) (1982). Das Verbrechensopfer in der Strafrechtspflege. Berlin, New York: de Gruyter.

Schneider, H.J. (1987). Kriminologie. Berlin, New York.

Schwarzenegger, C. (1989). Zürcher Opferbefragung: Fragestellung, Vorgehen und Resultate. Kriminologisches Bulletin, 15, 5-28.

Schwind, H.-D. (1991, in print). Fear of crime in Germany: A report about three population surveys: 1975/1986/1989. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victims and criminal justice. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Schwind, H.-D., Ahlborn, W., & Weiss, R. (1989). Dunkelfeldforschung in Bochum 1986/87 - Eine Replikationsstudie -. Wiesbaden: BKA Forschungsreihe.

Schwind, H.-D, Ahlborn, W., Eger, H.-J,. Jany, U., Pudel, U., & Weiß, R. (1975). Dunkelfeldforschung in Göttingen 1973/74. Eine Opferbefragung zur Aufhellung des Dunkelfeldes und zur Erforschung der Bestimmungsgründe für die Unterlassung von Strafanzeigen. Wiesbaden: BKA-Forschungsreihe.

Shapland, J. (1991). Criminology in Europe. In: F. Heidensohn & M. Farrell (Eds.), Crime in Europe (pp. 14-23). London, New York.

Sheley, J.F., & Ashkins, C.D. (1981). Crime, crime news, and crime views. Public Opinion Quarterly, 45, 492-506.

Siren, R., & Heiskanen, N. (1985). Victimization to violence. Results from a 1980 national survey. Helsinki.

Skoda, H. (1991). Raubüberfälle auf Banken. Geldinstitute zwischen Rostock und Suhl. Kriminalistik, 45, 44-46.

Skogan, W.G. (1982). Issues in the measurement of victimization. Washington D.C.

Skogan, W.G. (1984). Reporting crimes to the police: The status of world research. Journal of Research in Crime and Delinquency, 113-137.

Skogan, W.G. (1986). Fear of crime and neighborhood change. In: A.J. Reiss Jr. (Ed.), Communities and crime. Chicago.

Skogan, W.G. (1987). The impact of victimization on fear. Crime and Delinquency, 135-154.

Skogan, W.G., Lurigio, A.J., & Davis, R.C. (1990). Criminal victimization. In: A.J. Lurigio, W.G. Skogan & R.C. Davis (Eds.), Victims of crime. Problems, policies, and programs (pp. 7-22). Newbury Park.

Sparks, R.F. (1981). Surveys of victimization - An optimistic assessment. In: M. Tonry & N. Morris (Eds.), Crime and justice: An annual review of research, Vol.3 (pp. 1-60). Chicago: University of Chicago Press.

Stadler-Griesemer, H. (1991, in print). Canton Uri in 1984. Questioning of victims of crime. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victims and criminal justice. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Statistisches Amt der DDR (Ed.) (1990). Statistisches Jahrbuch der DDR. Berlin.

Steinke, W. (1991). Kriminalitätsentwicklung. Kriminalistik, 45, 200.

Stephan, E. (1976). Die Stuttgarter Opferbefragung. Wiesbaden: BKA-Forschungsreihe.

Sveri, K. (1991, in print). Victim surveys and police statistics. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victims and criminal justice. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Teske, R.H.C., & Arnold, H. (1982). Comparative investigation of criminal victimization in the United States and the Federal Republic of Germany. In: Criminological Research Unit (Eds.), Research in criminal justice (pp. 63-83). Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Teske, R.H.C., & Arnold, H. (1991, in print). Victim experiences and related factors based on comparative surveys in the FRG and the USA. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victims and criminal justice. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Ulbrich, W. (1991). Tatorteinsätze und Spurenaufkommen mit steigender Kriminalität gewachsen. Über kriminalistische Sachverständigentätigkeit und kriminaltechnische Arbeit im ehemaligen Bezirk Halle, Bundesland Sachsen-Anhalt. Kriminalistik 45, 198-200.

Villmow, B. (1977). Schwereeinschätzung von Delikten. Zum gegenwärtigen Stand der internatinalen Forschung. In: Bundeskriminalamt (Ed.), Straftatenklassifizierung und -gewichtung sowie ihre praktische Anwendung (pp. 64-83). Wiesbaden.

Villmow, B. (1979). Die Einstellung des Opfers zu Tat und Täter. In: G.F. Kirchhoff & K. Sessar (Eds.), Das Verbrechensopfer (pp. 199-218). Bochum: Studienverlag Dr. Norbert Brockmeyer.

Waller, I. (1982). Opferbefragungen als Handlungsanweisungen: Mahnungen zur Vorsicht und einige Vorschläge. In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 132-159). Berlin, New York: de Gruyter.

Wojtycka, M. (1979). Czynniki powstrzymujace obywateli od zgloszenia o popelnieniu kradziezy na ich szkode (Factors restraining the citizens from reporting the fact of robbery to their detriment). Studia Kryminologiczne, Kryminalistyczne i Penitencjarne, 10, 309-323.

Wolf, P. (1976). Victimization research and means other than crime statistics to provide data on criminality. In: Council of Europe (Ed.), Means of improving information on crime (pp. 51-72). Strasbourg.

Zacher, F. (1991). Kriminalität ein Kunstgriff? Tendenzen von Angriffen auf Kunst- und Kulturgut in den fünf neuen Bundesländern. Kriminalistik, 45, 265-267.

Zinycz, J., & Hahn, G. (1991). Zum bisherigen und zum neuen Polizeiselbstverständnis in Ostdeutschland. Gedanken über eine Einführungsfortbildung an der PFA Münster. Kriminalistik, 45, 189-190.

Victimization, Attitudes towards Crime and Related Issues: Comparative Research Results from Hungary

Harald ***Arnold,*** *László* ***Korinek***

Contents

1. Introduction

As a starting point as well as a background for interpreting the results reported below, one has to take into account that Hungary has experienced a tremendous change within its economic, social and political system during the last decade. Hungary has played a significant role among the (former) socialist countries in its development towards a western democratic type of societal system (*Halmai* 1990; *Kiss* 1990; *Majoras* 1990). The process of change, still going on in eastern European countries, has had its significant impact on the Hungarian public opinion (*Bokor* 1991).

This development resulted in the renaming of Hungary as a (democratic) republic and the corresponding changes with regard to its constitution and the system of government as well as in democratic elections taking place in the year 1990.

As *Bard* (1990a, p. 310) has stated recently, referring to that short period of change, transformation and peaceful revolution in Hungarian history, when the old power and authority has already vanished, but the new one has not been established meanwhile, that the sciences have played a particular role as never before. This assessment and evaluation holds true for the legal sciences and to a somewhat minor degree for criminology and victimology too (see *Bard* 1990b).

To look back somewhat, we may be reminded that Hungary has been among those socialist countries which has published official statistics about crime and criminality, that is, police data as well as judicial and prison statistics, rather detailed in the past (*Balázs* 1980; 1985; *Kubiak* 1985; 1986; 1987). At least for the present, this means: "In Hungary, data about criminal statistics is accessible in full to everyone" (*Vigh* 1987, p. 17; see also *van den Berg* 1987 with further references).

To give another example: it is not surprising that Hungary has been the first socialist country to transfer crime data to the *Interpol* to be published in its International Crime Statistics (*Interpol* 1984; see *Arnold & Korinek* 1985 with further references; recently with regard to the United Nations Crime Survey, including Hungarian data, see *Pease & Hukkila* 1990).

In addition, pioneering work has been achieved within the area of research into hidden delinquency which at the same time has been the first large scale victim survey carried out in a socialist country as well as an international

comparative project (*Korinek* 1988).[1] Some main results of this project will be reported below. More detailed results have been published elsewhere (*Arnold & Korinek* 1985; *Arnold* 1986; *Arnold, Teske & Korinek* 1988).

Other research followed, joint projects as well as replication studies, both with an international comparative perspective (*Sajó* 1987; *Vigh & Tauber* 1988/1989; *Korinek* 1990). The authors will report on such an example too. It goes without saying, that this article does not cover all of the victim-related research carried out in Hungary but it is representative of the progress taking place in Hungarian criminological as well as victimological research.[2]

Although this research refers to Hungary, some of the results may be significant and correct for other countries in Eastern Europe (cf. *van den Berg* 1987; *Bienkowska* 1990; *Kube & Koch* 1990).

2. The International Comparative Victimization Survey

2.1 Method

At the beginning of the 1980s, a replication study parallel to a pre-designed comparative victimization survey carried out (in the state of Baden-Württemberg) in Germany and (in the state of Texas) in the United States (see *Teske & Arnold*, this volume) had been conducted in the city of Pécs and in the surrounding county of Baranya, south of Hungary. The same design and methodology including the research instruments have been used as in the German and the US studies to yield a comparable data set (*Teske & Arnold* 1982). In particular and in detail namely, firstly, that a

1 Smaller local victim surveys in a socialist country have been previously carried out in Poland (see references in *Arnold & Korinek* 1985), recently a local one in Warsaw (*van Dijk et al.* 1990). *Joutsen* (1989) refers to one in the Soviet Union and also recently even researchers in the Republic of China joined the international community of survey users in the social sciences in carrying out a victim survey themselselves (*Chang* 1990).

2 See e.g., *Toth* 1985, *Sajó* 1987; *Kerezsi* 1988; *Vág* 1991; in general, see also the articles in the Research Reviews (on Hungarian Social Sciences granted by the Government) 'The Complex Analysis of Deviant Behavior on Hungary' (Project No. 4) edited by I. Münich and B. Kolozsi (1989 et seq.); cf. *Szábóne* 1982 for an overview on the development of the criminal sciences in the socialist countries at the beginning of the 1980s.

representative systematic random sample of the target population has been drawn, secondly, that data collection has been done by means of a mail survey (*Arnold & Korinek* 1985; *Arnold et al.* 1988).

Used less in the sicial sciences than interviewing, the mail survey approach has its advantages not only with regard to costs but especially with regard to standardization which is a crucial fact in international comparative research. In addition, the difficult task to be solved by respondents of victimization surveys with regard to memory and recall, that is retrieving retrospective data with sometimes minor significance, seems to be favourable in the case of the mail survey method (*Arnold* 1990).

In the Hungarian study, a total of 3,600 addresses have been selected yielding a final sample of 2,448 respondents. The response rate of 68.0 % in Baranya, taking into account that no reminder could have been used in this survey, has been noteworthy also in comparison to the parallel studies in Germany (58.8 %) and the United States (72.1 %). The sample sizes of both latter surveys have been N=3,830 and N=2,000, respectively.

The research instrument, i.e. the questionnaire, included 9 common offence categories, referring to property and violent crimes such as burglary, theft, assault etc. as well as an open response category, to mention other victimizations. In addition, fear of crime and criminal justice related issues have been other focal points besides direct and indirect victimization.

2.2 Results

Victimization Rates

One of the major research results has been that total victimization rates, i.e. the prevalence rates, for the reference period (1981) were about the same in the Hungarian as in the German sample: 23 % and 20 % of the respondents respectively have been classified as victims of one of the offences asked about. This was an unexpected result because the previous analysis based on available official crime statistics suggested a ratio of roughly between 1:5 and 1:2 depending on the source of information, whether it was police or judicial statistics, thereby showing the German society to be the one more burdened by crime (more detailed *Arnold & Korinek* 1985).

In general, this significant result has been confirmed by more detailed analysis within specific offence categories (see Table 1). With the exception of vandalism and arson, the Hungarian sample produced higher prevalence as well as incidence rates than the German one for most types of offences. In addition, the prevalence rate in the German study was somewhat higher

with regard to assault with a weapon. Although the figures for some of the offence categories are too small to be reliable, the overall picture shows surprisingly an equivalent picture, at least with regard to extent and frequency of victimization, i.e. the quantitative aspects of the crime burden described (see *Sajó* 1989 with reference to a victimization survey in Budapest).

Table 1: Victims in the reference period according to offences (1981)

	Baranya/Hungary	Baden-Württemberg/ FRG
burglary	3.1%	1.5%
motor vehicle theft	3.2%	1.8%
other theft	11.9%	7.2%
robbery	0.5%	0.3%
assault with weapon	0.5%	0.8%
assault with body	2.9%	1.6%
rape*	1.4%	0.6%
arson	0.0%	0.2%
vandalism	7.8%	8.9%
other offences	1.3%	1.1%
total**	23.1%	20.2%

* women only
** multiple responses

Seriousness and Reporting of Victimizations

Further analysis suggested that differences to some degree may exist with regard to the significance of the single victimizations reported, i.e. the seriousness of the events suffered by the victims. For example, for property related offences, such as theft and vandalism, it could be shown, that the amount of financial loss suffered is smaller in Hungary than in Germany. The assumption that more trivial victimization events were reported in the Hungarian survey is supported in additon, by the analysis of reasons for non-reporting a crime. In total, 56 % of the Hungarians mentioned the insignificance of the damage or injury suffered as the major reason for

non-reporting compared to 32 % in Germany where this reason has been the second important one mentioned according to frequency. On the contrary, the results were different with regard to the evaluation of the effectiveness of the respective prosecution authorities, namely the success rate in detecting crimes. In Germany, 44 % alleged the low expection with regard to a successful detection of the crime as the major reason for non-reporting the victimization event, compared to 13 % in Hungary. In total, Hungarian respondents did not report 76 % of the victimizations mentioned to the police, whereas the non-reporting rate was somewhat lower in Germany (58 %).

Victimization in Lifelong Perspective

An interesting result came up when analyzing the victim rate, i.e. the prevalence rate, in a lifetime perspective. In total, 46 % in the German sample compared to 41 % in the Hungarian have been a victim of a crime during their lifetime up to the time of the survey. This shift towards a higher burden of crime victimization in a lifelong perspective in the German sample increased in magnitude when a differentiation with regard to reference period was made (see Table 2).

Table 2: Victims of crime according to different reference periods

	Baranya/ Hungary	Baden-Württemberg/ FRG
Victims in 1981 only (first time ever)	12.7%	7.4%
Victims in 1981 and previously	10.4%	12.8%
Victims only previous to 1981	18.0%	25.6%
Total victims in 1981	23.1%	20.2%
Total victims previous to 1981	28.4%	38.6%
Total victims during lifetime	41.1%	45.8%

When asked as to victimizations prior to the one year reference period, i.e. the year previous to the time of the execution of the survey, the proportion of victims in the Hungarian sample totalled 28 %, whereas the corresponding German group totalled 39 % of the sample. Further, an even

more differentiated classification supports the result through its divergence as to size of the groups of former victims. Those respondents who had been victimized exclusively previous to the reference period constituted 18 % in Hungary and 26 % in Germany. Put in another way: Whereas the victim rates for 1981, irrespective of previous victimizations, were 23% and 20%, those victimized in the reference period for the first time in their life constitute 13 % and 7 % in Hungary and Germany, respectively (*Arnold & Korinek* 1985).

Victimization Rates and Crime Development

The results in Baranya/Hungary with regard to victimizations could be seen as an indication of an increasing crime rate prior to the time of the survey, a result which was later supported by the official statistics of the years following the survey. Such an early supposition was confirmed especially with regard to (non-violent and violent) property offences, such as theft, burglary or robbery which, at least as regards to Hungarian standards, increased significantly through the 1980s up to now, so that criminal prosecution authorities as well as politicians have likewise been alarmed. To quote *Vigh* (1987, p. 157): "...a significant rise in crime began in the early 1980's". Already previously, also *Vigh* (1984, p. 219) made reference to the "increase in crime, deterioration of public security, fear of crime" in Hungary. To sketch the crime development in this period according to official statistics: from 1979 to 1989, the crime rate, i.e., the number of crimes per 100,000 inhabitants, increased from 1,171 to 2,129 which equals 82%. At the same time the proportion of crimes (vs. misdemeanours) increased from 28% to 40% and the clearance rate decreased from 74% to 50%. In this view, the victim survey has had the potential of a criminal policy relevant (social indicator) function without any doubt.[3]

A tremendous rise in crime at the beginning of the 1990s has been noted recently by Hungarian officials who reported an increase in criminal offences of 47% (crimes 68% and misdemeanours 34%) compared to the

3 Further, partly different, also partly contradictory descriptions and assessments from inside and outside Hungary of the development of crime and criminal justice-related issues in Hungary through the 1980s are indicated in the reference list (see e.g., *Csalay & Sziki*, 1989; *Déri* 1988; *Gödöny* 1981; *Gönczöl* 1984; *Györgi & Lammich* 1888; *Kiraly* 1985; *Lammich & Nagy* 1985; *Nagy* 1990; *Rósza* 1986; *Sajó* 1987; *Toth* 1985; *Vag* 1991; with regard to a developmental overview see especially *Vigh* 1983; 1984; 1985; 1987; recently also *Racz* 1990; *Kube & Koch* 1990; *Lammich* 1990); with a focus on drug-related crime see *Lévai* 1990.

Table 3: Fear of and concern about crime - different indicators

	Baranya/ Hungary	Baden-Württemberg/ FRG
Fear of walking alone at night within one kilometer from home - yes	43.3%	44.4%
Fear of walking alone at night within 100 meters of home - yes	22.6%	17.3%
Fear of walking alone during daytime at a certain place in the community - yes	8.4%	8.2%
Fear of being alone at night in home - (at least sometimes)	45.4%	31.6%
thereof: always	7.0%	1.0%
most of the time	4.2%	2.0%
sometimes	34.2%	28.5%
Safety of residential area: not safe	3.4%	3.7%
less safe	8.4%	5.7%
moderate safe	36.5%	25.2%
rather safe	34.2%	55.8%
very safe	17.5%	9.5%
Community crime problem - past 3 years: better	14,7%	4.7%
about the same	58.6%	63.3%
worse	26.7%	32.0%
National crime problem - past 3 years: better	11.1%	2.4%
about the same	32.0%	16.1%
worse	57.0%	81.5%
Community crime problem - future 3 years: better	25.9%	3.8%
about the same	58.3%	60.3%
worse	15.8%	35.9%
National crime problem - future 3 years: better	29.3%	3.0%
about the same	39.5%	17.6%
worse	31.1%	79.3%

previous year (*Magyar Nemzet*, 29.12.1990, quoted in *Recht in Ost und West* 1991, 35, p.83). More or less similar developments in this period of transition and change are reported for other (former or actual socialist) countries in eastern Europe (*van den Berg* 1987; *Bienkowska* 1991; *Kube & Koch* 1990), even for the Soviet Union (*Ivanov* 1991).

Fear of Crime and Related Issues

Another important research topic of the study has been fear of, and concern about, crime as consequences of victimization and crime. To mention but one major result: Whereas a common measure of fear of crime, namely, being afraid to walk alone at night in one's neighborhood, showed a similar picture in both countries corresponding to the victimization rates, results based on alternative fear indicators as well as those measures indicating worry and concern about crime differed to some extent (see Table 3).

For example, asked about their victimization expectations, i.e., asking the respondents if they felt that they might become a victim of crime within the next year, a result emerged which showed a picture more favourable to the Hungarian situation compared to the German (see Table 4).

Table 4: Victimization expectations during the next 12 months according to offences (1981)

	Baden-Württemberg/ FRG	Baranya/Hungary
burglary	15.3%	5.8%
motor vehicle theft	20.8%	6.9%
other theft	16.8%	12.6%
robbery	6.4%	1.6%
assault with weapon	6.5%	0.9%
assault with body	11.1%	5.1%
rape	5.2%	2.9%
vandalism	23.2%	7.6%
other offences	2.1%	0.2%
total*	37.2%	25.4%

* multiple responses

In total, i.e. averaged over all offence categories, a only quarter of the Hungarian sample (25 %) as opposed to more than a third in the German (37 %) are plagued with victimization expectations with regard to various offences. (This result would be less surprising according to a prognosis based only on the official data mentioned.) Detailed analysis differentiating according to offence type supported the overall result. It is supposed, that this result points to the considerable burden caused by crime through indirect victimization within the German society. This interpretation was based on assumptions with regard to effects of vicarious victimization, especially media influences and knowledge of crime victims. A basic assessment with regard to this result has been, that the Hungarians' perception of the threat of real crime based on the comparison of recent victimization rates and expected victimizations was somewhat closer in accordance with reality than those of the German respondents (compare Table 4 and Table 1 with regard to the totals as well as the single offences). More precisely, this holds true for the cognitive aspect of the fear of crime complex whereas there is less difference with regard to the emotional aspect, indicated by common fear of crime indicators (see again Table 3; cf. *Arnold* 1986; *Arnold, Teske & Korinek* 1988).

Attitudes towards Criminal Justice Issues

A third focus of the research was attitudes of the public, for example, towards the criminal justice system, i.e., the police, the courts and the prisons respectively (see Table 5).

Table 5: Evaluation of the criminal justice system - Proportion of respondents giving positive judgement

	Baden-Württemberg/ FRG	Baranya/Hungary
local police	40.6%	28.8%
courts	48.4%	42.4%
prisons	16.2%	18.9%

To summarize a few of results: respondents of both nations were in agreement as to their critical view of the effectiveness of the prison system in rehabilitating offenders, the Germans being even somewhat more scepti-

cal. There was a greater distinction in the evaluation in the respective samples with regard to the police and the courts. In contrast to the prisons, the work of the courts was evaluated more favourably. The result was even more favourable among the Germans. The ratings for the job done by the police in the community is somewhat in between, i.e. above those for the prisons and below those for the courts, but diverging in the respective nations, Hungarians being more sceptical. The latter may be another reason why the reporting rate in Hungary, as already mentioned above, is lower compared to Germany (*Arnold* 1986; *Arnold, Teske & Korinek* 1988).

The critical attitude of Hungarians towards their police is not simply an expression of (relatively) lower punitiveness compared to the Germans. It can be supposed that it is more a traditionally and historically developed criticism of the holder and machinery of power and their immediate executive bodies in this society.

Other crime policy-related items included in the questionnaire, e.g. on capital punishment, probation/parole etc., suggest a cautious and guarded interpretation with regard to punitiveness in the respective nations. For example, the issue of the importance of different functions served by prisons, which were also indicators of the purposes of sanctions supported by the respondents, vividly showed that the results as to punitiveness are somewhat manifold (see Table 6).

Respondents in both nations attached the most importance to rehabilitation as a main prison function. The other, more repressive and punitive aspects (of the purposes of sanctions) were mentioned as being important too, although to a lesser extent. The two samples correspond as to the rated prison functions most closely with regard to punishment and differed to a greater extent in relation to incapacitation, i.e. isolating criminals from society, and, secondly, deterrence, i.e. to serve as an example to keep people from committing crimes. No easy conclusion can be reached with regard to punitiveness in the respective nations from this data. On the one hand, Hungarians regard punishment and deterrence as less important than Germans, i.e. are less punitive in this perspective, and on the other hand they support incapacitation rather strongly and are also comparatively less in favour of rehabilitation. Although Germans may be as punitive as Hungarians, the latter seem to be more sceptical with regard to the influence that may be put by the criminal justice system upon the actual and potential offender.

Tab.6: Importance of different prison functions

	Baranya/ Hungary	Baden-Württemberg/ FRG
Rehabilitation		
very important	81.9%	89.5%
somewhat important	16.9%	9.5%
not important	1.2%	1.0%
Punishment		
very important	61.9%	65.0%
somewhat important	34.9%	30.3%
not important	3.3%	4.7%
Deterrence[1]		
very important	59.3%	69.8%
somehat important	30.6%	22.0%
not important	10.1%	8.2%
Incapacitation[2]		
very important	55.9%	37.2%
somewhat important	29.0%	39.0%
not important	15.0%	23.8%

[1]To serve as an example to keep people from committing crimes

[2]Keeping criminals away from the society

3. Attitudes towards Restitution in Comparison

3.1 Method

A second survey conducted by the Hungarian author as a partial replication of study carried out in Hamburg/FRG in 1984 therefore had a comparative perspective, too (*Sessar* et al. 1986). The comparative aspect of this study focused on the public attitude towards restitution and their willingness to replace criminal proceedings and punishment by private conflict resolution (with or without the assistance of a mediator). The concepts of compensation, restitution or victim-offender reconciliation are rather new issues under discussion in the Hungarian scientific community, i.e. the legal experts, even less well known among the public (*Sajó* 1987). In addition to this new topic, data on victimization and feelings of safety as well as various attitudinal aspects related to crime and criminal justice have been gathered again.

Three different samples have been drawn in the area of Pécs. First, a systematic random sample of the general population has been drawn at the local registration office for residents. The size of this sample was N = 1,700. A second sample was drawn from a frame won of officially known and registered victims of crime, i.e. citizens who as victims have reported an offence during the previous year. The size of this group was N = 500. And a third group added was a sample of law students, the size of which was N = 100. As in the earlier study reported above, data collection was done again by means of a mail survey. The response rates in this new study have been to some extent less satisfactory than before, although not lower than in the respective German study (*Korinek* 1990). In Hamburg, the sample size was N = 4,400 and the adjusted return rate 44 % (*Sessar* et al. 1986). In detail, the response rates for the Pécs studies have been 54 %, 38 % and 53 %, respectively. Interestingly, the sample of known victims had the lowest response rate.

3.2. Results

Punitiveness: Acceptance of Reconciliation vs. Preference of Punishment

One focus of the study was the acceptance of restitution or reconciliation in addition to or instead of a punishment, as has been already mentioned. With the intention of measuring this acceptance, the survey instrument included descriptions of 14 hypothetical offences with a varying degree of seriousness and a corresponding response category which proposed 5 possible forms of reaction to the crimes. These alternatives formed a scale which had an ascending degree of punitiveness or, put in another way, a scale of descending acceptance of restitution or reconciliation. The options to be chosen with regard to punishment or restitution as possible responses or reactions to the criminal situations described in the questionnaire, were as follows:

A. Private agreement of victim and offender on restitution or reconciliation (help of a mediator possible)

B. Victim-offender agreement on restitution/reconciliation mediated by an officially appointed person

C. Victim-offender agreement on restitution initiated by the criminal justice system and supervised by an official

D. Punishiment to be mitigated or dispensed with after provision of restitution

E. Punishment without consideration of restitution being provided

As a general result, the respondents in Pécs seemed to be more punitive than those in Hamburg. Averaged over all 14 cases (crime situations), more than half (55 %) in Pécs preferred a penal sanction, i.e. punishment, compared to less than half in Hamburg (40 %), where the majority accepted restitution instead of punishment (see Table 7). As can be shown, the difference is largest for the harshest reaction. Overall, 36 % of the Hungarian respondents preferred the offender to be punished, even if he provided restitution for the victim. In addition, in their view, the punishment should not be reduced or dispensed with. In the German sample only 21 %, on average, preferred this reaction. Differentiated according to the specific crime cases, the discrepancy and divergence is even greater in favour of a demand for harsher punishment in the Hungarian sample (*Korinek* 1990; *Boers & Sessar* 1991).

Table 7: Attitudes towards restitution versus punishment (averaged on 14 cases)

	agreement on restitution			punishment		Total
	private only[1]	with help of a mediator[2]	initiated and supervised by the criminal justice system[3]	with consideration of restitution[4]	without consideration of restitution[5]	
Hamburg/FRG	22.8%	19.2%	17.5%	19.2%	21.3%	100.0%
Pécs/Hungary	16.4%	14.9%	13.4%	19.1%	36.2%	100.0%

Response categories:

[1] Private agreement of victim and offender on restitution or reconciliation (help of a mediator possible)
[2] Victim-offender agreement on restitution or reconciliation mediated by an officially appointed person
[3] Victim-offender agreement on restitution initiated by the criminal justice system and supervised by an official
[4] Punishment to be mitigated or dispensed with after provision of restitution
[5] Punishment without consideration of restitution being provided

Another result to be mentioned, was that personal victimization experience was of relatively minor significance with regard to punitiveness in Pécs as well as in Hamburg. Victims as opposed to the general population, especially non-victims, showed hardly any distinction in their acceptance of restitution (see also *Sajó* 1987 with comparable results.) Over all cases, the responses of both groups, victims and non-victims, were rather similar.

To report a final result with regard to the punitiveness in the attitudes of the Hungarian public: Respondents were asked as to their general attitudes towards crime and crimnality, to choose among 5 alternatives the one which came closest to their own attitude. The following result emerged: 46 % of the respondents favoured "punishment with greater harshness" and another 16 % "punishment even if" there was no specific or general deterrent effect, i.e. "crime will not be reduced" through sanctioning. A more moderate view which supported "tolerance towards a strict societal control by the responsible authorities of the criminal justice body" was taken up by 12 % of the sample. Further 23 % of the respondents favoured "reasonable rehabilitation of offenders" and 4 % decided upon an "acceptance of crime as a drawback to societal development".

Criminal Victimization

Although not a major issue, the measurement of the prevalence of victimization in the sample was of interest again in this survey, e.g. with regard to punitiveness as has been mentioned above. Asked about the most severe victimization ever suffered, 57 % reported having been a victim of crime before. Victimizations most often reported were in the category of theft (17 % - not including burglary) and vandalism (14 %), a large part of both were related to cars and bicycles. Damaging a car or bicycle was the single offence most often named (12 %), followed by simple theft (9 %) and burglary (5 %). Crimes of violence, such as assault and attacks (8 %) or theft with force and robbery (2 %) as well as sexual crimes, such as rape and sexual molestation (2 %) were reported to a lesser extent. White-collar crimes (5 %) and other offences (2 %) made up the rest (see also for the victimization rates in Budapest *Sajó* 1989).

Reporting of Crime Victimization

With regard to reporting of these victimizations, 55 % of the victims did not notify the police, 38 % of the victims reported the offence and another 7 % were reported by someone else. Within offence categories, the non-reporting rate differed considerably between a robbery (14 %) and burglary (19 %) on one side, and "indecent assault (touching)" (100 %) on the other

side. The rates of non-reporting for some of the other offences were as follows: completed or attempted rape, 43 % and 60 % respectively, simple assault and assault with a weapon 57 % and 37 % respectively, simple theft and bicycle theft 56 % and 41 % respectively, vandalism and damaging of a car or bicycle 65 % and 72 % respectively.

Fear of Crime and Related Issues

Finally, data on feelings of insecurity and the perceived likelihood of victimization have been gathered as a necessary and significant complementary part of the victimization data have been, too. Respondents had to evaluate safety in the streets nowadays compared to the past. The majority (44 %) did not recognize any difference between the past and the present, while another large group (39 %) regarded the past as being safer than today, in contrast to about a sixth (17 %) who assessed the past as less safe than today. Accordingly, three quarters (75 %) of the respondents felt rather or very secure after dark (46 % and 28 %, respectively), a quarter felt somewhat or very insecure (18 % and 8 %, respectively).

Asked about the perceived likelihood of becoming a victim in the neighborhood, "less likely" was the response most often named, in the case of robbery (59 %), theft (53 %), assault (50 %), threat (43 %) and sexual molestation (43 %) and "unlikely" for rape (73 %) and murder (68 %). To mention for comparative: The most frequent response category chosen in regard to traffic accidents was "less likely" (54 %).

Vicarious Victimization

Knowledge of victims of crime, because of its significance in relation to fear of crime, was another issue in the survey. The respondents had to answer a question about victims of crimes among their acquaintances. The majority reported knowing a victim of theft (46 %) and a surprising high number (43 %) named a victim of sexual molestation among the acquaintances. The figures were lower (and respectively equal) for robbery, assault and traffic accidents (18 % each) as well as rape and murder (3 % each).

As a final (statistical) test showed that there is quite a significant relationship between the perceived likelihood of becoming a victim and knowing a victim of crime which yields notable correlation (association) coefficients with regard to threat (of violence), sexual molestations, and theft (.41, .38, .38, respectively), pointing to the relevance of vicarious victimization for the genesis of fear of crime. The relationship (according to Pearson's

Contingency Coefficient) was weakest for murder (.12) and somewhat in between for robbery and assault (.28, each) as well as rape and traffic accidents (.24, each; all values highly significant; $p < .001$; $df = 3$).

4. Summary

It was the intention of this article to report on some of the results of two surveys which were carried out in Hungary in the last decade focusing on victim-related issues, one of which was the first large-scale victim survey in a (former) socialist country.

The empirical data presented has been a selection but representative of the whole. Large parts of the empirical data presented have been comparative in nature.

To name but a few significant results: The victimization rate in Hungary was higher than expected according to national as well as international views. The extent of unreported crime seemed to be considerable especially with regard to minor offences. This result was in contrast to expectations of representatives and advocates of the former socialist ideology, although it was supported largely by the crime development in the years following the survey. According to our data, the victimizations in the Hungarian sample have been to some degree less serious in nature as are the consequences of these crimes, speaking in terms of fear of crime. The burden of crime in the Hungary was therefore expected to be somewhat lower compared to other western European countries, although signs of alarm and indicators of a critical development could be detected.

With regard to their criminal justice related attitudes, the Hungarians seem to be rather punitive and oriented toward traditional values. But the rapid change currently going on in this society in transition, will have its influence and impact, as further research will have to prove. To finish with a last example which has a victimological implication itself: At the end of 1990, the Hungarian constitutional court declared capital punishment to be unconstitutional and repealed the corresponding provisions in the Hungarian penal code (MK Nr. 107/1990; *Magyar Nemzet*, 25.10.1990, quoted in *Recht in Ost und West* 1991, 35, p. 20 et seq).

5. References

Arnold, H. (1986). Kriminelle Viktimisierung und ihre Korrelate. Zeitschrift für die gesamte Strafrechtswissenschaft, 98, 1014-1058.

Arnold, H. (1990). Commentary: (International comparative research in criminology: The 1989 Telephone Survey). In: G. Kaiser & H.-J. Albrecht (Eds.), Crime and criminal policy in Europe (pp. 143-164). Freiburg: Max Planck Institute.

Arnold, H., & Korinek, L. (1985). Kriminalitätsbelastung in der Bundesrepublik Deutschland und Ungarn. In: A. Böhm et al. (Eds.), Kriminologie in sozialistischen Ländern (pp. 65-136). Bochum: Brockmeyer.

Arnold, H., Teske, R., & Korinek, L. (1988). Viktimisierung, Verbrechensfurcht und Einstellungen zur Sozialkontrolle in West und Ost. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Kriminologische Forschung in den 80er Jahren. Projektberichte aus der Bundesrepublik Deutschland (pp. 909-942). Freiburg: Max-Planck Institut.

Balázs, J. (1980). Vereinheitlichung der Kriminalstatistik in Ungarn. Acta Universitatis Szegediensis-Acta Juridica et Politica, 27, 83-93.

Balázs, J. (1985). Anfänge der Kriminalstatistik in Ungarn. Acta Universitatis Szegediensis-Acta Juridica et Politica, 33, 57-70.

Bard, K. (1990a). Ein Jahr danach. In: A. Eser & G. Kaiser (Eds.), Sanktionensystem, Stellung des Beschuldigten. Strafvollzug. Deutsch-ungarisches Kolloquium über Strafrecht und Kriminologie (pp. 303-310). Freiburg: Max-Planck Institut.

Bard, K. (1990b). Ungarn: Neuer Kurs. Neue Kriminalpolitik, 1, 12-13.

Berg, G.P. van den (1987). Judicial statistics in a period of glasnost. Review of Socialist Law, 13, 299-311.

Boers, K., & Sessar, K. (1991). Do people really want punishment? On the relationsip between acceptance of restitution, needs for punishment and fear of crime. In: K. Sessar & H.-J. Kerner (Eds.), Developments in crime and crime control research. German studies on victims, offenders, and the public (pp. 126-149). Berlin: Springer.

Bokor, A. (1991). Die öffentliche Meinung im Zuge des Systemwandels in Ungarn. Journal für Sozialforschung 31, 51-87.

Bienkowska, E. (1991). Crime in Eastern Europe. In: F. Heidensohn & M. Farrell (Eds.), Crime in Europe (pp. 43-54). London: Routledge.

Chang, Y. (1990). Research on fear of crime in China. Police Studies 13, 125-127.

Csalay, A., & Sziki, L. (1989). The development of robbery in Budapest. Kriminologiai es Kriminalisztikai Tanulmanyok, 26, 293-322. [Im Hungarian]

Dijk, J.J.M. van, Mayhew, P., & Killias, M. (1990). Experiences of crime across the World. Key findings from the 1989 International Crime Survey. Deventer: Kluwer.

Déri, P. (1988). Die Kriminalitätslage in Ungarn und deren voraussichtliche Entwicklung bis zum Jahr 2000. Archiv für Kriminologie, 182, 107-118.

Gödöny, J. (1981). New tendencies in the criminality against property. Acta Juridica Academiae Scientiarum Hungariae, 23, 303-327.

Gönczöl, K. (1984). Hungarian public policy in relation to its criminal justice system. Annales Universitatis Scientiarum Budapestinensis-Sectio Juridica, 26, 17-38.

Györgi, K., & Lammich, S. (1988). Entwicklung des Strafrechts, der Kriminalisierung und der Strafpraxis in Ungarn seit dem Inkrafttreten des StGB von 1978. Zeitschrift für die gesamte Strafrechtswissenschaft 100.

Halmai, G. (1990). Von der gelebten Verfassung bis zur Verfassungsstaatlichkeit in Ungarn. Osteuropa-Recht, 36, 1-12.

Interpol (1984). International Crime Statistics 1979-1980. Saint Cloud: International Criminal Police Organisation, General Secretariat.

Ivanov, L. (1991). Charakteristik der Kriminalitätstendenzen in der Sowjetunion 1961-1989. Montasschrift für Kriminologie und Strafrechtsreform, 74, 182-191.

Joutsen, M. (1989). Research on victims and criminal policy in Europe. In: R. Hood (Ed.), Crime and criminal policy in Europe (pp. 50-83). Oxford: Centre of Criminological Research.

Kaltenbach, J. (1990). Die Entwicklung der kommunalen Selbstverwaltung in Ungarn. Jahrbuch für Ostrecht, 31, 77-93.

Kerezsi, K. (1988). Introduction to the victimological explanation of delinquency committed against children and juveniles. Kriminologiai es Kriminalisztikai Tanulmanyak 25, 175-207. [In Hungarian]

Kiraly, T. (1985). Opening speech. In: J. Vigh (Ed.), Proceedings of the international conference on social defense and crime prevention (pp. 9-16). Visegrad, May 15-17, 1984. Budapest.

Kiss, L. (1990). Einige Fragen zur Rechtsstaatlichkeit in der Gesetzgebung in Ungarn. Osteuropa-Recht, 36, 12-22.

Korinek, L. (1985). Research on hidden criminality in Hungary. In: J. Vigh (Ed.), Proceedings of the international conference on social defense and crime prevention (pp. 171-174). Visegrad, May 15-17, 1984. Budapest.

Korinek, L. (1988). Research on hidden delinquency. Budapest: KJK. [In Hungarian]

Korinek, L. (1990). Die Akzeptanz der Idee der Schadenwiedergutmachung in der Bevölkerung der Bundesrepublik Deutschland und Ungarns. In: In: A. Eser & G. Kaiser (Eds.), Sanktionensystem, Stellung des Beschuldigten. Strafvollzug. Deutsch-ungarisches Kolloquium über Strafrecht und Kriminologie (pp. 107-121). Freiburg: Max-Planck Institut.

Kovacsics, K.N. (1984). An attempt at the international comparison of criminality and recidivism. Annales Universitatis Scientiarum Budapestinensis-Sectio Juridica, 26, 89-107.

Kube, E., & Koch, K.-F. (1990). Die Kriminalitätslandschaft in Ost und West im Zeichen des politischen Zusammenbruchs in Osteuropa. WGO-Monatshefte für Osteuropäisches Recht, 32, 124-142. [Or: Der Kriminalist, 22, 346-350]

Kubiak, J.R. (1985). Das Problem der Publizität von Informationen über die Kriminalität in den sozialistischen Staaten Europas. Osteuropa-Recht, 32, 45-57.

Kubiak, J.P. (1986). Die Publizität von Kriminalstatistiken in den sozialisatischen Staaten. Recht in Ost und West, 32, 169-175.

Kubiak, J.R. (1987). Internal and external factors influencing the operation of criminal justice systems in socialist European countries. Review of Socialist Law, 13, 5-57.

Interpol (1984). International Crime Statistics 1979-1980. Saint Cloud: International Criminal Police Organisation, General Secretariat.

Lammich, S. (1990). Aktuelle Entwicklungstendenzen des Strafrechts, der Strafpraxis und der Kriminalität in Ungarn. Bewährungshilfe, 37, 357-372.

Lammich, S., & Nagy, F. (1985). Kriminalitätsentwicklung und Strafpraxis in Ungarn nach dem Inkrafttreten des StGB von 1978. Monatsschrift für Kriminologie und Strafrechtsreform 66, 176-186.

Lévai, J. (1990). Drogenproblem und Drogenkriminalität in Ungarn. Monatsschrift für Kriminologie und Strafrechtsreform 73, 90-104.

Majoras, F. (1990). Ungarns neue Verfassungsordnung: Die Genese einer neuen demokratischen Republik nach westlichen Maßstäben. Osteuropa-Recht, 36, 86-99 (part 1) and 161-174 (part 2).

Nagy, F. (1990). Sanktions- und Strafvollzugspraxis der Bundesrepublik Deutschland und in Ungarn im Vergleich. In: A. Eser & G. Kaiser (Eds.), Sanktionensystem, Stellung des Beschuldigten. Strafvollzug. Deutsch-ungarisches Kolloquium über Strafrecht und Kriminologie (pp. 263-281). Freiburg: Max-Planck Institut. [Or: Acta Universitatis Szegediensis-Acta Juridica et Politica, 39, 163-176]

Patera, A. (1980). Some ideas on comparison of international statistical data on criminality and crime repeaters. Kriminologiai es Kriminalisztikai Tanulmanyok, 17, 331-373. [In Hungarian]

Pease, K., & Hukkila, K. (1990). Criminal justice systems in Europe and North America. Helsinki: HEUNI.

Racz, G. (1990). Kriminalpolitik und Lage der Kriminalität in Ungarn. Goltdammer's Archiv für Strafrecht, 53, 49-54.

Rósza, J. (1986). Violent crime in the last quarter century. Kriminologiai es Kriminalisztikai Tanulmanyok, 23, 229-286. [In Hungarian]

Sajó, A. (1987). Legal consciousness in Hungary: Some findings and remarks. Acta Juridica Academiae Scientiarum Hungaricae, 29, 249-253.

Sajó, A. (1989). Hungarian victims' reactions to crime. In: I. Münnich & B. Kolozsi (Eds.). The complex analysis of deviant behaviour in Hungary (pp. 97-101. Research Review on Hungarian Social Sciences Granted by the Government. '89/1. Budapest.

Sessar, K., Beurskens, A., & Boers, K. (1986). Wiedergutmachung als Konfliktregelungsparadigma? Kriminologisches Journal, 18, 86-104.

Szábóne, T.N. (1982). The development of criminal sciences in certain socialist countries (Soviet Union, Bulgarian People's Republic, Czechoslovakian Socialist Republic, German Democratic Republic, Hungarian People's Republic). Annales Universitatis Scientiarum Budapestinensis-Sectio Juridica, 24, 265-288.

Teske, R.H.C., & Arnold, H.R. (1982). A comparative investigation of criminal victimization in the United States and the Federal Republic of Germany. In: Criminological Research Unit (Ed.), Research in criminal justice (pp. 63-83). Freiburg: Max-Planck Institute.

Toth, T. (1985). Victimological possibilities of the prevention of criminal offenses. In: J. Vigh (Ed.), Proceedings of the International Conference on Social Defense and Crime Prevention (pp. 375-383). Visegrad, May 15-17, 1984. Budapest.

Vág, A. (1991). Interaction between the police and victims during the years of transition. In: I. Münnich & B. Kolozsi (Eds.). Studies in deviant behavior in Hungary (Research Review '91/1) (pp. 167-179). Budapest.

Vigh, J. (1983). The task of criminology and the public policy. Annales Universitatis Scientiarum Budapestinensis-Sectio Juridica, 25, 255-268.

Vigh, J. (1984). The task of social defence and criminal policy. Annales Universitatis Scientiarum Budapestinensis-Sectio Juridica, 26, 217-224.

Vigh, J. (1985). Crime prevention and realities. Annales Universitatis Scientiarum Budapestinensis-Sectio Juridica, 27, 273-287.

Vigh, J. (1987). Thoughts about the essence of socialist criminology. Annales Universitatis Scientiarum Budapestinensis-Sectio Juridica, 29, 151-173.

Vigh, J., & Tauber, I. (1988/89). Juvenile delinquency in Hamburg and Budapest. A comparative criminological study. Annales Universitatis Scientiarum Budapestinensis-Sectio Juridica, 30, 91-109.

Walter, M., & Fischer, W. (1988). Strukturen registrierter Jugendkriminalität und Formen ihrer Bewältigung in Budapest und Hamburg. Monatsschrift für Kriminologie und Strafrechtsreform, 71, 228-245.

Victimization and Incidence of Delinquency

- An International Comparison -

Results of a Survey of Law Students in the Federal Republic of Germany, Austria and Switzerland

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Contents

1. Survey

The study presented here records the victimization and incidence of delinquency of law students in the Federal Republic of Germany (Münster), Austria (Graz) and Switzerland (Zürich). Offender and victim questionnaires were combined in order to analyze the connections between the incidence of delinquency and both criminal and non-criminal victim situations which could be interpreted in the sense of the lifestyle concept (for details see *Gottfredson* 1981). With respect to criminally relevant victimization, we also recorded the reporting practices and the motives for reporting and non-reporting (see *van Dijk, Mayhew & Killias* 1990). Official registration and sanctioning of offender behavior were recorded, in order to be able to assess the extent of unreported crime.

We started from the hypothesis that delinquent behavior and victim situations are widely distributed amongst law students in the field of petty crime and that a high percentage of law students have been both victim and also offender within the course of the twelve month period covered by the survey (see the earlier research carried out in the Federal Republic of Germany by *Stephan* 1976; *Villmow & Stephan* 1983). If one can assume that minor offenses are ubiquitous, it appears that the official registration is rather the exception to the rule. It was assumed that a comparison of the three countries examined would yield no noteworthy distinctions in view of the homogenous sample groups (law students in their first few semesters of study at the university).

International comparative victim studies have been carried out in Germany since the mid 70's - admittedly with greater and/or more representative population samples (see *Stephan* 1976; *Teske & Arnold* 1982; *Arnold & Korinek* 1985; *Arnold* 1986; *Arnold & Teske* 1988; *Arnold, Teske & Korinek* 1988; *Arnold* 1991). We had only modest expectations of the study, as it includes only variables directly related to the incidence of delinquency and victimization. This limited approach is due to the fact that the origin of the project goes back to lectures held by the authors teaching at universities in the various countries in the winter term 1990/91.

2. Methods, Sample and Period of Research

A written survey was chosen as the research tool; the research was carried out in November/December 1990 as part of first semester lectures on

criminology and criminal law. The samples are therefore particularly homogenous. The students were almost all 19 or 20 years old. The number of students questioned totalled 273 (FRG) students in Münster, 485 students in Graz (Austria) and 171 students in Zürich (Switzerland). The number of students who refused to take part could not be established precisely. The figures were, however, minimal in the FRG and in Austria. The data from Switzerland, where two thirds of the students questioned did not return the questionnaire, can be assessed differently. It is to be assumed that current discussions on data protection in Switzerland contributed to the number of students who refused to take part. The results from Zürich should hence be interpreted with a certain caution. Some of the statements or representations in this paper are therefore restricted to data from Münster and Graz.

The proportion of women in the three samples examined is relatively similar, constituting 52.8 % in Münster, 49.5 % in Graz and 55.6 % in Zürich.

Regarding the **victim survey**, the **questionnaire** included the following ten offenses: 1. theft, 2. burglary, 3. damage to property, 4. fraud and similar offenses, 5. threat of physical violence or coercion, 6. minor physical injury, 7. serious physical injury (resulting in medical treatment), 8. robbery, attempted robbery, 9. sexual harassment and 10. sexual coercion, (attempted) rape. The students were also asked to indicate the frequency of victimization within the last twelve months with respect to all offenses. The following ten offenses were recorded in relation to the **incidence of delinquency**: 1. theft (with a differentiation as concerns shoplifting); 2. fraud or similar offenses; 3. travelling without a ticket; 4. property damage; 5. drunken driving (1.3 *pro mille* in the FRG); 6. threat of physical violence or coercion; 7. intentional physical injury; 8. robbery, extortion; 9. sexual harassment and 10. sexual coercion, (attempted) rape. The first seven offenses were examined with respect to frequency. The respondents, moreover, were asked generally whether they have ever committed one of these offenses (not only in the last 12 months).

3. Findings on Victimization and Rate of Delinquency - an Overview

3.1 Overall Rate

Focussing on the **victimization data** first, we note that there is a surprising difference between the three countries when comparing the results within the international framework. No less than 56.0 % of students in Münster had been a victim of at least one of the ten offenses under

examination within the last 12 months. The percentage in Zürich (42.1 %) was clearly lower and the percentage of students victimized in Graz (28.5 %) was only half that in Münster. These differences remain even when differentiating according to sex. 62.8 % of the male students in Münster had been victimized, 44.7 % in Zürich and only 32.5 % in Graz. The corresponding figures for women were a bit lower and amounted to respectively 50.0 %, 40.0 % and 23.8 % (see diagram 1).

The three countries also exhibit surprisingly clear differences as concerns the **incidence of delinquency**, with, however, a reversed tendency in comparison with the victimization data. The Graz students are affected most (total percentage 64.2 %), the Münster students least (49.8 %), (Zürich: 60.2 %, see diagram 2). When comparing all offenses in Graz with Münster, however, we note that the increased rate of delinquency may be attributed exclusively to the offense of travelling without a ticket. Leaving out of account this "everyman's" offense, which can only be prosecuted in Austria if a person has actually been deceived (i.e., as a rule it is not punishable),the crime rates in Münster and Graz become practically identical (29.3 %:30.7 %, see diagram 2). This similarity persists when differentiating the data according to sex (men: 42.6 %:40.6 %; women: 17.4 %:20.5 %).

The data on the self-reported delinquency rate correspond with the increased victimization rate of male students. 49.5 % of German students, 60.2 % of Swiss and 64.2 % of Austrian students admitted having committed at least one of the ten offenses covered by the questionnaire. The male groups examined exhibited a higher rate of crime in Münster and Zürich (56.6 % and 65.8 % respectively) than the female groups (43.1 % and 55.8 %, respectively), whereas, on the whole, no differences were established for the Austrian sample as concerns the delinquency rate of men and women (64.3 %:64.0 %, see diagram 2).

Leaving the offense of travelling without a ticket out of consideration, however, we note that, as expected, there are clear differences, i.e., an increased delinquency rate of male students, with male students in Münster being twice as highly affected (42.6 %) as opposed to female students (17.4 %). There are also considerable differences in Austria (40.6 %:20.5 %).

3.2 City-Country-Differentials

In the study reported here the students in Münster and Graz could be differentiated according to regional background relative to the period sur-

veyed. The city-country-differential confirmed the results of earlier studies based on official statistics and on research on unreported crime, according to which there is a higher crime rate in larger cities (more than 100,000 inhabitants) as opposed to medium-size towns (20,000 - 100,000 inhabitants) and small towns (up to 20,000 inhabitants). The city-country-differential in the FRG, namely a decline of 62.3 % to up to 47.1 % was particularly noticeable, whereas the differences in Austria are not as obvious, namely 32.0 % and 24.3 % (see diagram 3).

The city-country-differential was also confirmed for students from Münster and Graz with regard to the crime rate. Those students who had lived in a community with up to 20,000 inhabitants, exhibited the lowest crime rate (45.1 % in Münster; 48.6 % in Graz). However, the increase in the crime rate in larger communities remains relatively small and there are no striking differences with respect to communities with more than both 20,000 and 100,000 inhabitants (see diagram 4). Leaving travelling without a ticket out of consideration once again, the increased rate in larger communities and cities remains the same (the students concerned were resident in Münster and Graz). Whereas the offense of travelling without a ticket appears to be relatively independent of the size of the community, the expected city-country-differential applies to the "classical" crimes (if not particularly obvious, significant in any event, see diagram 4).

4. Rates of Victimization in Relation to Specific Offenses

Differentiating the data on victimization according to the nature of the offense we notice that the increased rate in Münster results mainly from property offenses, whereas the Swiss students were slightly more affected by violent crimes on the whole, namely, physical injury, robbery and/or sexual offenses (11.7 % as opposed to 8.8 % in Münster and 6.4 % in Graz). Taking all property offenses together, the victimization rate was highest in Münster (45.1 %), followed by Zürich (35.7 %) and Graz (24.5 %). Other types of victimization in connection with traffic accidents or other accidents (e.g., at home or while participating in sport) are also of interest. In the FRG, once again, there is a clearly higher rate of victimization (19.0 %) in relation to traffic accidents and even (28.2 %) in relation to other accidents in comparison with Austria (16.5 % and 22.0 % respectively) and most of all Switzerland (10.1 % and 13.9 % respectively, see diagram 5). In Münster, in contrast to Graz and Zürich, not only are the risks of becoming a victim of a crime clearly higher, but so also is the general risk to life with respect to accidents. Differentiating the students in Münster and Graz according to

sex we obtain the following picture: Throughout, the rate of property offenses committed by men as opposed to women on the one hand, and that of students in Münster as opposed to students in Graz on the other hand, is clearly higher (see diagram 6). The same applies to the offenses of threat of physical violence and coercion (where the Graz students appeared not to be particularly affected). There are some exceptions in relation to violent offenses and accidents outside the criminal context. Women in Münster and Graz appear to be equally affected by violent offenses on the whole (6.9 %7.5 %), whereas the differences exhibited by male students (with an increased rate in Münster, namely, 10.9 %:4.9 %) remain unchanged. There are but few noticeable differences between men and women in Münster with respect to traffic accidents (22.7 %:18.4 %). In addition, the male students hardly differ from the population in Graz in respect of such offenses (22.7 %:21.0 %). The same applies to female students in relation to other accidents (23.0 %:21.2 %, see diagram 6). The habits (for example involvement in traffic, sports activities etc.) appear to be similar in this area, both from city to city and in relation to sex, a fact which results in similar victimization rates.

Diagram 7 shows a further differentiation according to offenses, namely property offenses and threat/coercion. A comparison of the three countries reveals interesting regional peculiarities. The Swiss students (26.3 %) proved to have the highest risk of victimization as concerns theft (Münster: 22.7 % and Graz merely 11.3 %). In contrast, there is a particularly high risk in Münster (28.2 %) in comparison to Graz (15.9 %) and Zürich (12.9 %) of becoming victim of a property offense. As expected, the risk of falling prey to the crime of burglary is considerably lower. 10 of the Münster students (= 3.7 %), 8 of the Zürich students (= 4.7 %) and only 3 students in Graz (= 0.6 %) stated that they had been a victim of one of those crimes within the last twelve months. The rate of victimization is similarly low in relation to fraud or similar offenses (Münster 3.3 %, Graz 1.6 %, Zürich 0.6 %), whereas there is a very much higher rate of crime in relation to threat of physical violence and coercion in Münster (18.3 %) as opposed to Graz (3.1 %) and Zürich (1.2 %), (see diagram 7).

The differentiation according to sex with respect to property offenses, as shown in diagram 8, reveals a particular peculiarity for Graz in so far as the figures relating to men and women who had been the victim of a theft are evenly distributed with 11.1 %:11.3 % (the same tendency applies fraud in Münster and Graz, the absolute number of cases, however, being verly low), whereas men are clearly affected more often than women throughout.

Considering victimization in connection with violent crimes (see diagram 9) we can say, albeit with general reservations, that we are here

dealing with very rare events, which, as expected due to the size of the samples studied, scarcely allow a quantitative comparison. This applies particularly to the few isolated cases of victimization involving physical injury, robbery or serious sexual offenses (attempted or completed rape). We notice that the students in Münster tend to be subject to minor physical injuries (4.8 %) more often than those in Graz (3.5 %) and Zürich (1.8 %), whereas the order seems to be reversed with respect to sexual harassment, namely 5.8 % in Zürich, 3.5 % in Graz and only 2.9 % in Münster. Because of the small number of cases reported,, an interpretation of these figures is somewhat problematic, as the data from Zürich are possibly distorted on account of the high number of refusals to participate in the survey. In this connection, the high rate of sexual harassment is all the more astounding, as we can assume this offense to be overrepresented among those who did not participate.

Differentiating the rates of victimization pertaining to violent crimes according to sex allows scarcely any interpretation either, because of the small absolute figures. It is clear, however, that in Münster, where the victimization rate concerning minor physical injuries was significantly higher, the victims of such offences were almost exclusively male, whereas the reverse appears to apply to sexual harassment of female students (in Münster and Graz) who, as expected, were particularly affected (see diagram 10).

5. Reporting Practices and the Victims' Motives

It is an established finding of victimological research that above all in the domain of petty offenses only a small proportion of offenses observed is actually reported to the authorities (see *Reuband* 1981, p. 213 et seq.; summary in *Kaiser* 1985, p. 25 et seq.; 1988, 483 et seq.). This also applies to the sample researched in Münster and Graz. Only 37.1 % and 42.3 % respectively of students who had had something stolen from them had reported the crime (see diagram 11). The same applies to victimization involving property damage and fraud, of which only a fraction (28.6 %:32.4 %; and 33.3 %: no cases in Graz, respectively) was brought to the attention of the prosecuting authorities. Victims of the few cases of burglary reacted quite differently: 8 of the 10 victims in Münster and all 3 in Graz reported the crime. As the sample contained only isolated reports of serious violent crimes (physical injury and robbery), hardly any interpretation is possible in this respect.

Next we examined the reasons for reporting or non-reporting crimes. 59 victims in Münster and 61 in Graz had made a report. Focusing first on the

main grounds for reporting (those declared to be most important) we notice that the students in Münster and Graz correspond clearly in their emphasis on insurance requirements as the decisive factor. 54.2 % of students in Münster and 59.0 % in Graz admitted having reported a crime in order to be able to receive benefits from private property insurances (see diagram 12). 13.6 % and 14.8 % respectively of victims reported that other compensation benefits had taken priority. A general request for help from the police was also fairly significant in individual cases (5.2 % and 9.8 % respectively). In only 18.6 % of cases in Münster and 11.5 % of the reports in Graz, was priority given to securing the punishment or prosecution of the offender. This result corresponds with recent studies conducted in (the former) West Germany, according to which the interest in obtaining compensation played an important role particularly in relation to property offenses, whereas the tendency towards punishment appears to be quite limited (see for example *Sessar et al.* 1986; *Voß* 1989; *Boers & Sessar* 1991). Considering the reasons for reporting in relation to the number of entries as depicted in diagram 13 (without regard to import and including the respective multiple entries) this picture holds true. Almost three quarters of all reports (71.2 % and 73.8 % respectively) involve also insurance requirements and more than one third of reports (35.6 % and 39.3 % in Graz) involve other compensatory interests. However, requests for help from the police play at least a secondary role in every third case (33.9 % and 29.5 % respectively). Interest in the offender being punished proves to be a significant factor along with others in no less than 59.3 % of cases in Mümster and 45.9 % of cases in Graz. One cannot completely negate a certain desire on the part of the victim to see punishment meted out, even if this appears to be mostly secondary to compensation from private property insurance companies or the offender.

The tendencies not to file a complaint, as observed in earlier research into victimization, were also confirmed in our study. In this respect too, the wide congruence between students in Münster and Graz is striking. 86 students in Münster and 79 in Graz refrained from filing a complaint. As expected (and in accordance with earlier research carried out, see for example *Rosellen* 1980; *Arnold* 1986; *Voß* 1989; summary in *Kaiser* 1988, p. 483 et seq.) the analysis of the primary reasons for not reporting a crime proved the insignificance of the damage suffered to be dominant (54.6 % in Münster, 51.9 % in Graz, see diagram 14). The perception that the chance of success of such a report is limited, also seems to be of importance (29.1 % in Münster, 22.8 % in Graz as most important motive). Consideration for the offender (e.g., where social relationships exist) as a reason for not reporting the crime was only occasionally of significance in Münster (3.5 %)

and slightly more so in Graz (17.7 %), whereas fear of police questioning was very rarely a decisive factor for refraining from making a report (Münster 5.8 % and Graz 2.5 %).

Focusing on the reasons for not reporting a crime (independent of their import) in relation to the number of entries, the dominance both of the victims' lack of confidence concerning a successful outcome and of the insignificance of the damage suffered becomes quite clear. Such motives were cited in more than one half to two thirds of cases (see diagram 15), whereas consideration for the offender or fear of the police questioning played a subordinate role.

On the whole, the findings in relation to frequency of reporting and motivation already established in previous victimology research (see for example *Pudel* 1978, p. 205 et seq.; *Rosellen* 1980; *Heinz* 1985, p. 27 et seq.; *Engelhard* 1990, p. 404 et seq.; summary in *Kaiser* 1988, p. 485 et seq.) were confirmed by both the German and Austrian samples.

6. Incidence of Crime in Relation to Specific Offenses

The generally high incidence of crime in Münster (49.8 %), Zürich (60.2 %) and even Graz (64.2) can be relativized if one considers the individual offenses. More than three quarters of these offenses observed within the last 12 months fall into the category of travelling without a ticket. No less than 32.2 % of students in Münster, 49.4 % in Zürich and 53.2 % in Graz admitted having travelled without a ticket in the last year. Drunken driving also appears to be fairly widespread. Every 10th student in Münster (9.9 %) and almost every 4th student in Zürich and Graz (24.7 % and 22.5 % respectively) admitted having driven under the influence of alcohol at least once. It must be noted that this behavior is not necessarily punishable in Graz, as drunken driving which does not cause any bodily injury is merely prosecuted as an administrative infringement. The students in Münster were asked to make a self-assessment concerning driving with a blood alcohol concentration of more than 1.3 *pro mille* (the criminally relevant limit as per § 316 German Penal Code). The mere regulatory offense of driving with a blood alcohol level of more than 0.8 *pro mille* was hence expressly left out of consideration. The rates in Graz and Zürich were more than twice as high, possibly as a result of the varying legal positions. It is also conceivable that the social condemnation of drunken driving is lower in Austria because of its being classified merely as an administrative offense (from 0.8 promille upward), thus leading to an increased readiness to practice and admit such behavior.

A comparison with the survey carried out in the early 70s by *Schwind* and *Eger*, where 290 law students in Göttingen were questioned, seems of interest. No less than 60.7 % admitted having driven in a drunken state (see *Schwind & Eger* 1973). There is clearly less tolerance of such behavior today than 20 years ago. The Göttingen questionnaire also reveals a higher rate at the beginning of the 70ies as concerns other comparable offenses in comparison with the research reported here. 19.3 % more students admitted then having committed shoplifting, 12.4 % other thefts. The overall theft rate in the study reported here was 11.4 % in Münster, with the rate of shoplifting amounting to a mere 2.6 %. The theft rate in Zürich and in Graz was even lower (5.3 and 5.4 % respectively), with the percentage of shoplifting relative to theft on the whole constituting more than 80 % of the property offenses admitted. In contrast, in Münster, more than 80 % theft cases concerned cases other than shoplifting. Theft of bicycles is possibly of particular importance. Münster is the city in the Federal Republic of Germany, with the highest "bicycle density".

The students in Münster (in comparison to Zürich and Graz) consistently achieve the highest crime rate in relation to property offenses, fraud and others (threat of physical violence and coercion), (see diagram 16).

Violent crimes against persons hardly allow any interpretation on account of the small number of cases reported in the questionnaire. Offenses involving physical injury reached the only rate worth mentioning with a percentage in Münster (4.0 %) which clearly exceeds that in Zürich (0.6 %) and Graz (1.0 %). The percentage of property offenses, sexual harassment or sexual coercion, and rape is somewhat under 0.5 % throughout. This was to be expected both on account of the size of the sample examined and the readiness to confess. Taking the offenses involving violence as a whole we notice that the rate among West German students as against students in Austria is clearly higher (based on offenses involving bodily injury), namely 5.1 %:1.6 % (see diagram 17).

The same applies to offenses committed at any time in the past, i.e., not merely within the preceding 12 months. The figures for the total incidence of crime in Münster (70.3 %) and Graz (72.8 %) are clearly similar. This tendency also applies to the offense of travelling without a ticket (53.8 %:61.4 %), whereas Austrian students are overrepresented with respect to drunken driving (24.9 %:10.6 %) as opposed to property offenses where they are underrepresented (20.4 %:40.7 %, see diagram 17). The German students are also more affected by threat of physical violence and coercion (7.0 %:1.0 %) and offenses involving violence against the person (8.1 %:2.5 %).

Differentiating the frequency of crimes committed by German students according to sex we obtain the following picture (see diagram 18):

With the exception of travelling without a ticket (31.8 %:32.6 %), crimes are more frequently committed by male persons throughout, in particular offenses involving theft (17.8 %:5.6 % with the exception of shoplifting:

3.1 %:2.1 %) and drunken driving (18.6 %:2.1 %). As expected, of the 11 offenses of physical injury reported, 10 related to male students (for comparative results of a poll of students in Gießen, see *Kreuzer et al.* 1990, p. 12 et seq.).

The astonishingly equal distribution of the crime rate of male and female Austrian students which strikes one the first glance (see diagram 2) is based exclusively on the particularly high proportion of female students having travelled without a ticket (56.9 % as opposed to "only" 49.6 % of male students). The higher rate of delinquency which is to be expected of male students with respect to all other offenses, is also clearly visible in Graz (see diagram 19).

In a further step in our analysis we evaluated the **number of different offenses** committed within the past twelve months. Only those students who had committed offenses in different fields (e.g., property offenses or damage to property etc. in addition to travelling without a ticket) were counted as multiple offenders. As expected, the greater proportion of students who had admitted having committed an offense proved to have been delinquent in one category of offenses only (33.0 % in Münster, 42.5 % in Graz). Two different offenses were recorded in Münster by 9.9 % of students and in Graz by 15.3 %, whereas the commission of three or more different offenses (in both test samples) was admitted by only a small minority of 6.6 % in Münster and 5.4 % in Graz (see diagram 20). This general decrease in crime rate with respect to two or more offenses also remains visible when differentiating the data according to sex (see diagram 21 and 22). Multiple offenders amongst female students are, however, even more underrepresented (no case of three or more offenses in Münster, 2.5 % in Graz).

In order to establish the frequency of offenses committed, we recorded the number of delicts committed for each individual delict category. The following interesting finding was established in relation to students in Münster and Graz. Multiple/recurrent offenders can be found most of all in the field of travelling without a ticket and drunken driving (see diagram 23). Of the delinquent students in Münster and Graz two thirds and more than one half, respectively, had stolen a ride at least three times (between 50 and 100 times in individual cases) in the last twelve months. 4-5 of the 10 students in Münster or Graz, who admitted to driving under the influence of liquor on at least one occasion, committed three or more such offenses (see diagram 23). In contrast, a comparison of single and repeated commission of crimes in the fields of property offenses, damage of property and violent crimes against the person reveals a linear decrease.

7. Official Registration of Offenders and Imposition of Penalties

If one can regard the **commission of crime** by law students as being quite **"normal"**, the **official registration** and penalization remain an exception - as established by earlier research into undetected crime (see for example *Amelang* 1971, p. 89 et seq.; *Schwind & Eger* 1973, p. 151 et seq.; *Treiber* 1973, p. 97 et seq.; *Kirchhoff* 1975; *Kreuzer* 1975, p. 229 et seq.; *Schwind et al.* 1975; *Reuband* 1983, p. 199 et seq.; *Villmow & Stephan* 1983, p. 239 et seq.; *Schwind* 1988, p. 943 et seq.; summary in *Kaiser* 1988, p. 356 et seq.; *Schwind* 1990, p. 13 et seq.). This also applies to the research reported here, where only 12 students in Münster and Graz stated that they had been reported to the police for one of the offenses committed.

In **Münster** this concerned 3 cases of shoplifting, 4 cases of damaged property, one case of fraud (travelling without a ticket), one case of drunken driving, and 3 cases of intentional physical injury. A conviction resulted only in a third of cases - in two of the three cases of shoplifting, in one case of drunken driving and in one of the three cases of intentional physical injury. One of the two remaining cases of intentional physical injury was discontinued on the ground of insignificance (§ 153 et seq. StPO, Code of Criminal Procedure), the other for lack of evidence (pursuant to § 170.2 StPO). Failure to proceed on the grounds of insignificance seems to be the normal case as concerns damage to property (all four cases), no charge being preferred on this ground either in the only case of fraud. One of the three cases of shoplifting registered was also discontinued for this reason. The only case of travelling without a ticket uncovered did not proceed to court either (possibly because of the payment of an increased fare of 40 marks).

The 12 cases of registered crime involving Austrian students, were distributed as follows: three cases of theft, two cases of shoplifting, two drunken driving offenses (possibly involving negligent physical injury, as the act itself would otherwise not constitute any criminally relevant behavior), and one case each each of travelling without a ticket, threat of physical violence or coercion, and physical injury. Unfortunately, statements regarding the further course of the procedure were only made in six of the cases. In three cases (one case of theft, one case of shoplifting and one case of physical injury) the proceedings were discontinued "for lack of criminal

nature" (§ 42 öStGB), and another case involving travelling without a ticket, for lack of evidence. Only one of the cases of shoplifting and one of the two cases of drunken driving resulted in a conviction.

On the whole, we can see that there is an extremely low rate of people who have been previously convicted - both in the German and also in the Austrian sample. However, the fact that the questionnaire was carried out anonymously and that no questions were asked as to the nature of penalties imposed in cases where a conviction resulted, practically rules out greater distortions.

8. Comment Upon the Problem of Undetected Crime in the Light of Data Relating to Victimization and Incidence of Crime

Considering the **proportion of unreported crime** on the basis of our **data on victimization** we established that in Münster for every case of theft reported to the authorities there would be 4.1 unreported cases. The proportion in respect of burglary is 1:1.6 and in relation to property damage and fraud 1:4.9 and 3.7 respectively. Cases of acts of coercion very rarely reached the attention of the prosecuting authorities (see diagram 24) - the proportion of reported versus unreported cases corresponding to 1:41.5. With respect to violent crimes we can at best only make statements about physical injury, as the estimated proportions of unreported cases of both minor physical injury (1:4.5) and serious physical injury (1:4.0) are comparable with the figures established for property offenses. Only one of the three victimizations involving robbery (one of the two victims stated that he or she had been robbed twice within the last twelve months) had been reported to the police (1:2.0). As no reported case of sexual harassment was registered with the police, the proportion of unregistered cases cannot be estimated.

In part, the proportions of unregistered cases established for the students in Graz deviate considerably, particularly in relation to acts of coercion ("only" 1:7.6) and minor physical injuries (1:14.3). In general, however, the proportion of unregistered crime is similar to that in Münster, with a higher rate in relation to minor property offenses in comparison with burglary or offenses of violence (see diagram 24). The particularly high rate of unregistered cases of sexual harassment is striking (1:30.0). A certain caution,

however, is advisable with respect to this figure - equally so in relation to threat of physical violence in Münster (1:41,5). Moreover, differing assessments of such situations possibly play an important role.

Taking the data on **self-reported delinquency** as a measure, an immense field of unregistered crime emerges, in particular as concerns petty property offenses, travelling without a ticket and drunken driving. The risk of being caught stealing a ride appears to be extremely low both in Münster and Graz (with a proportion of no less than 1:746 and 1:2.829 respectively of registered cases of travelling without a ticket to undetected cases). The estimated proportions of undetected crimes in diagram 25 (see 7. above) ought not to be overinterpreted, in view of the fact that such crimes are registered only rarely and largely by chance (see 7. above). The results, however, confirm the particularly high proportion of unreported petty property offenses as established in earlier studies involving larger samples, whereas perpetrators of violent crimes (in this respect we can only make statements about crimes involving bodily injuries) are occasionally registered. The data produced by the current study also underline the **"random character"** of punishment under **criminal law**. Moreover, even when we proceed with the utmost caution, the limited possibilities for wider application of penal measures also become clear. If the incidence of unreported crime were to be dramatically reduced, the criminal prosecution system would very quickly reach the limits of its capacity (see *Popitz* 1968). From a preventive viewpoint, steps towards reducing the opportunity of committing crime seem more appropriate (e.g., replacement of automatic validation of tickets in streetcars by constant personal control) or even better (from the criminal-political perspective) a **decriminalization of travelling without a ticket** and of **petty property offenses** (restriction to civil forms of control).

9. Connections Between Victimization and Incidence of Crime - Consideration in Relation to Concepts of Lifestyle

A poll of 14 to 25-year-old young people, carried out in a small town in Southern Germany at the beginning of the 1970s, revealed that combined offender and victim questionnaires produce a high percentage of affected persons in both areas (see *Villmow & Stephan* 1983, p. 192 et seq. with further references). The survey showed that 70.4 % of all offenders had also been victimized in the same period of twelve months. 54 % of all victims described themselves as also being offenders. 26.6 % of the total sample were affected with respect to both fields. Surprisingly, young people from the upper social classes were recorded as being both offenders and victims

to a particularly high degree (*Villmow & Stephan* 1983, p. 195). Comparable findings with respect to the fact that a differentiation between social role as offender or victim depends exclusively on the particular situation involved, had already been established in earlier American research (see *Newman* 1975; *Feyerherm* 1977; summarized in *Villmow & Stephan* 1983, p. 204).

The research reported here established a proportion of 34.4 % in Münster and 22.1 % in Graz of persons who had been both offenders and victims within the last twelve months. Only a little over a quarter of the students questioned were neither offender nor victim within the said period. Differences between Münster and Graz appeared in relation to those who were only offenders or only victims. Whereas no less than 42.3 % of those questioned in Graz, admitted crimes without reporting any victimization, the percentage in Münster (15.4 %) is clearly lower. The proportion of victims in Münster (21.6 %) is therefore three times as high as the proportion in Graz (6.4 %, see diagram 26). In other words, two thirds of the students recorded as offenders in Münster also indicate having been victimized, whereas this applies only to around a third of offenders established among students in Graz. From the victim perspective, 3 out of 4 victims in Graz were also recorded as being offenders, whereas the corresponding figure for Münster was 3 out of 5.

Diagram 27 includes a further differentiation in that it omits the offense of travelling without a ticket which can be considered a commonplace offense at least for the Graz students, and almost appears to have fallen into the area of socially acceptable behavior (see 6. above). When this form of petty offense is left out of account, the proportion of students who have been neither offender nor victim increases to 36.3 % in Münster and 53.8 % in Graz. The number of those who were only victims but not offenders totals 34.4 % and 15.5 % respectively. Even then, the proportion of those affected in the area of crime and victimization still amounts to 21.6 % in Münster and 13.0 % in Graz. A further differentiation was therefore made in relation to sex. As expected, above all male students had been both offenders **and** victims, Münster being clearly more affected (31.0 %) than Graz (16.4 %). The figures in relation to female students are somewhat lower, namely 13.2 % and 9.2 % respectively, with but little difference between Germany and Austria (for details see diagram 28).

The relationships between the so-called **recurrent offenders** and **victims** were also analyzed as a further aspect of the research. Students who stated that they had committed at least three crimes within the last twelve months (in either one or more categories, leaving out of account the offense of travelling without a ticket) were characterized as recurrent offenders. On the whole, this concerned 40 cases in Münster (14.7 %) and 65 in Graz

(13.4 %). Students who had been victimized at least twice, including victims of traffic accidents, were labelled "recurrent victims" with the number of cases recorded totalling 102 (37.4 %) in Münster and 85 (17.5 %) in Graz. 67.5 % (N = 27) of the 40 recurrent offenders in Münster had also been victimized more than once, whereas "only" 26.5 % (27 out of 102) recurrent victims emerge as recurrent offenders. A similar relationship was revealed in Graz, i.e., 38.5 % of recurrent offenders (25 out of 65) and 29.4 % of recurrent victims (25 out of 85). Differences in relation to sex could not be established. However, the absolute numbers of cases involving female recurrent offenders (Münster: N = 9; Graz: N = 13) were too small to reveal any conceivable connections that are significant statistically.

On the whole, we notice that offender and victim experiences of a small proportion of students in Münster and Graz are closely linked. The greater the involvement in the area of crime, the greater the possibility of becoming a victim of a crime. On the other hand, the higher the number of victimizations experienced, the higher the possibility that the person concerned will turn offender (an event that was recorded extremely rarely, though). The correlation coefficient between at least one offense admitted and the frequency of victimization experienced amounts to 0.26 in Münster and 0.22 in Graz.

These findings might be interpreted in the sense of the so-called concept of lifestyle, which, however, was developed primarily with respect to victimization but also to criminal behaviour (see *Hindelang, Gottfredson & Garofalo* 1978; *Gottfredson* 1981, p. 714 et seq.; see also *Schneider* 1987, p. 762; *Kaiser* 1990, p. 27 et seq.; *Walters* 1990). It seems that a small group of students are intensively involved in the commission of crimes and that the feature of being victim or offender is probably accidental. Moreover, their involvement is often situation-related (see in summary *Villmow & Stephan* 1983, p. 192 et seq.). It cannot be overlooked, however, that most experiences of crime occur in the area of petty offenses and that therefore the data on hand allow no statements about delinquent lifestyles - all the more so as further, more differentiated data on the respondents' social and legal biographies are lacking - this, indeed, was not the objective of the research, which was instigated in order to carry out a pilot study into the rate of victimization and incidence of crime, as a comparative international study.

10. Summary and Conclusions

The research relates to a specific part of the population (law students) and is therefore not representative of the rate of victimization and incidence of crime in general. The aim of the research was to point out similarities and differences between students from Germany, Austria and Switzerland.

It was astounding to find that the students in Münster were more frequently victimized than those in Zürich and in particular those in Graz, whilst the incidence of crime, in contrast, affects considerably more Austrian and Swiss than German students. This difference is based admittedly, to a great extent, upon the offense of travelling without a ticket, which was committed by around a third of students in Münster and one half of those in Graz and Zürich, within the last twelve months at least on one occasion and in many cases on more than one occasion. With the exception of this offense (not prosecutable in Austria as a rule), the increased incidence of crime involving male as opposed to female students and equally a city-country-differential were confirmed. In the area of crime reporting and victim motivation for reporting a crime, the reduced tendency to report minor property offenses also measured up to our expectations. Reports were made predominantly with a view to a later insurance claim or in order to achieve other compensation benefits, whereas prosecution/punishment of the offender in relation to property offenses played either no role at all or a very subordinate one. The main reasons for refraining from making a report were related to the insignificance of the damage suffered and the limited chance of success expected from a report.

With respect to the incidence of crime, drunken driving played an important role, in addition to travelling without a ticket. The Swiss and Austrian students (in each case a quarter) in contrast to the Münster students (every 10th) appeared to be considerably more involved in these crimes, possibly on account of the varying definitions of "drunken driving". Within the student environment it seems to be normal to have been delinquent in some form or another (most of all in relation to travelling without a ticket, drunken driving or petty theft). On the other hand, the repeated commission of offenses remains the exception and serious violent offenses are extremely rarely committed or rather cited. Official recording and sanctioning remain an absolute exception, with the result that there is an extensive area of unreported crime, particularly in the categories of petty property offenses, travelling without a ticket and drunken driving. The high percentage of

students who have been both offender and victim is particularly noteworthy. Two thirds of the students identified as offenders in Münster (34.4 % of the entire sample) were also victims. In Graz, this figure totalled one third (22.1 % of the group researched). The results could be interpreted, to some extent, in the sense of the concept of lifestyle; namely, that, depending on the situation, a small group of students (frequently) moving in a social environment in which a relatively high risk exists, may become offenders or victims.

11. Diagrams

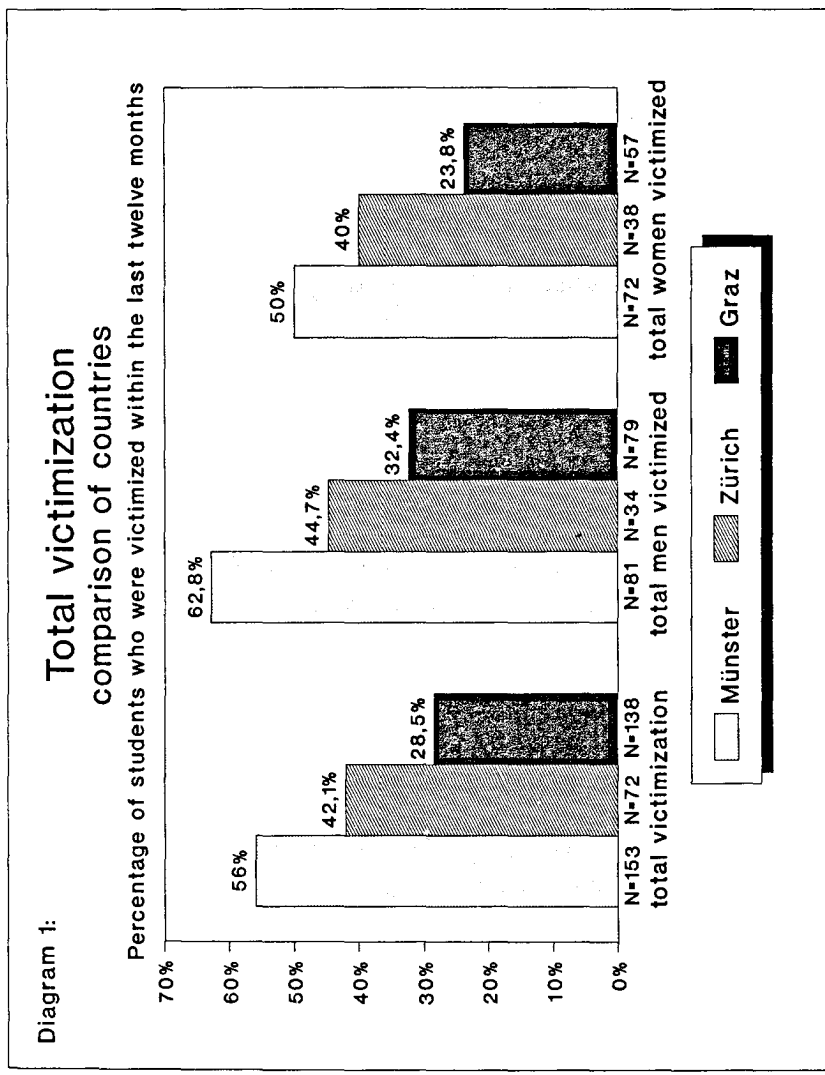
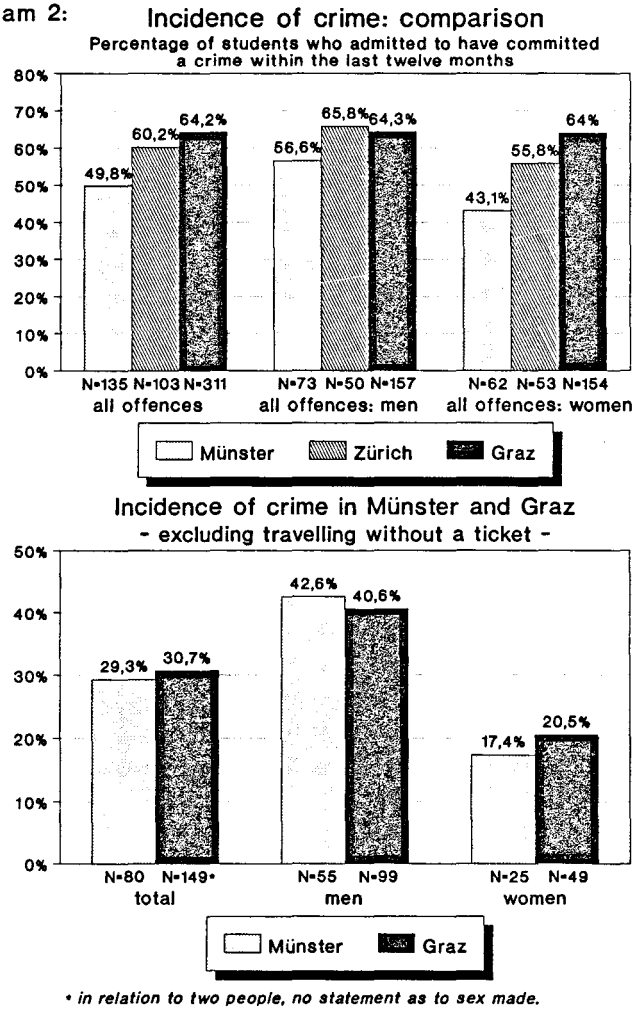


Diagram 1:
Total victimization
comparison of countries
Percentage of students who were victimized within the last twelve months
70%
60%
50%
40%
30%
20%
10%
0%
56%
42,1%
28,5%
62,8%
44,7%
32,4%
50%
40%
23,8%
N=153 N=72 N=138 N=81 N=34 N=79 N=72 N=38 N=57
total victimization total men victimized total women victimized
Münster
Zürich
Graz

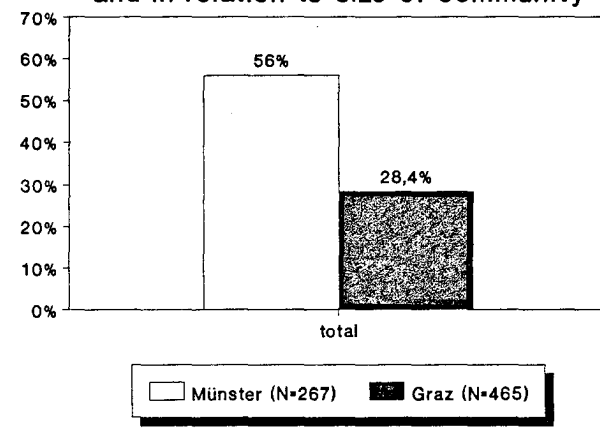
Diagram 2:



** in relation to two people, no statement as to sex made.*

Diagram 3:

The total rate of victimization of law students and in relation to size of community



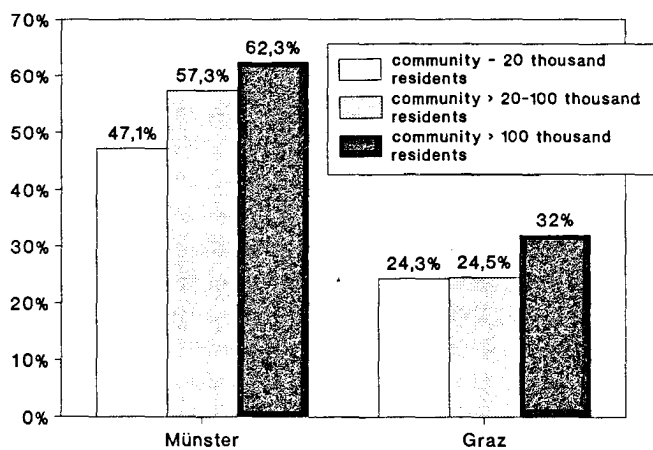
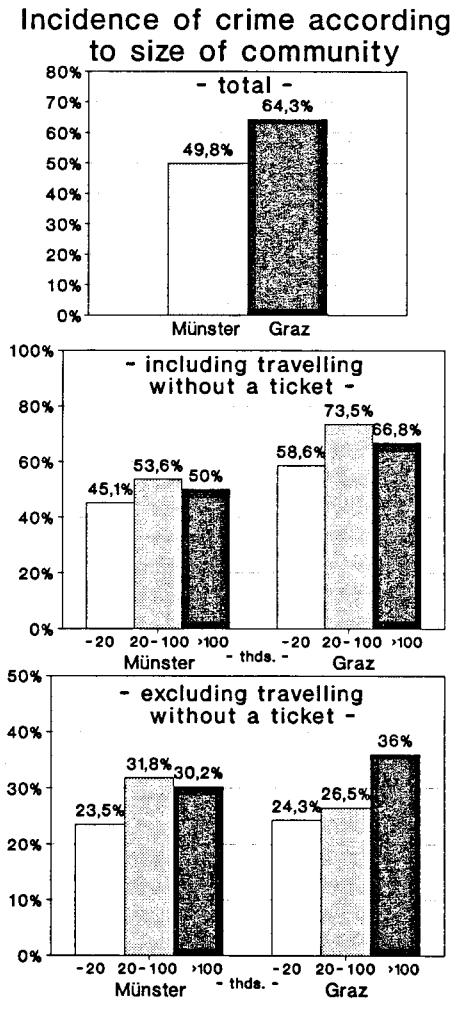


Diagram 4:


Incidence of crime according to size of community
- total -
80%
70%
60%
50%
40%
30%
20%
10%
0%
49,8%
64,3%
Münster
Graz
- including travelling without a ticket -
100%
80%
60%
40%
20%
0%
45,1%
53,6%
50%
58,6%
73,5%
66,8%
-20
20-100
>100
Münster
- thds. -
Graz
- excluding travelling without a ticket -
50%
40%
30%
20%
10%
0%
23,5%
31,8%
30,2%
24,3%
26,5%
36%
Münster
Graz

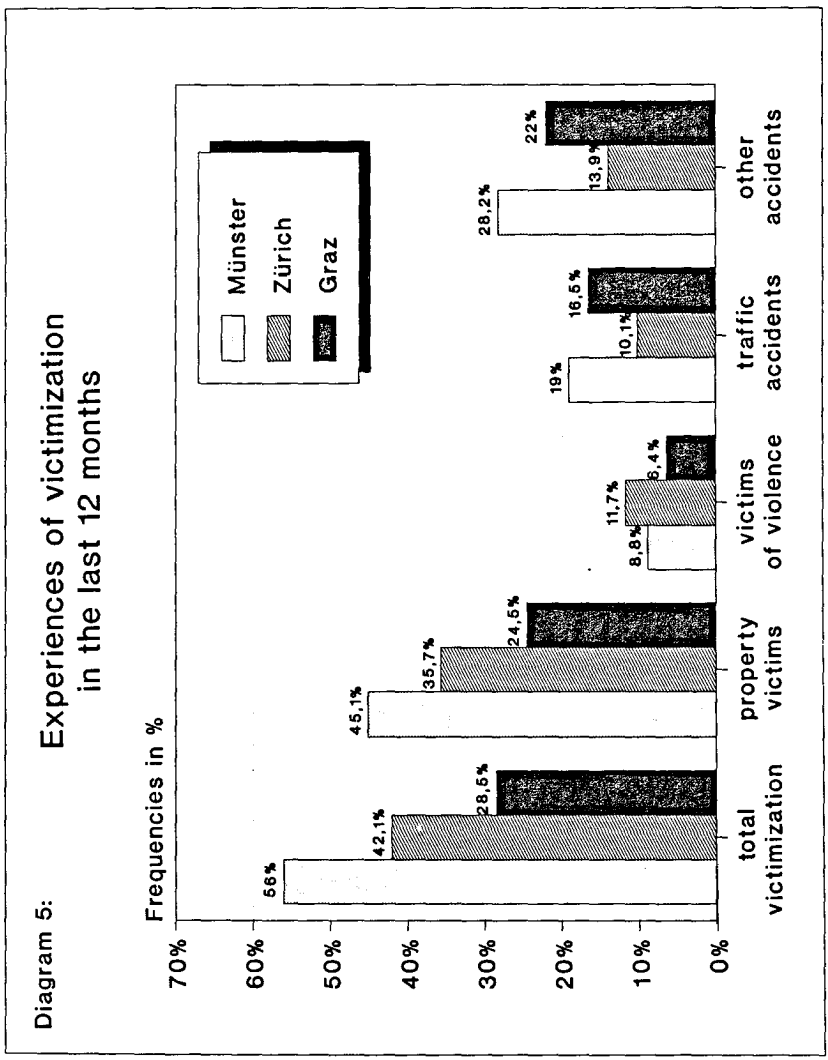


Diagram 5:
Experiences of victimization
in the last 12 months
Frequencies in %
Münster
Zürich
Graz
70%
60%
50%
40%
30%
20%
10%
0%
56%
42,1%
28,6%
45,1%
35,7%
24,6%
8,8%
11,7%
8,4%
19%
10,1%
16,6%
28,2%
13,9%
22%
total victimization
property victims
victims of violence
traffic accidents
other accidents

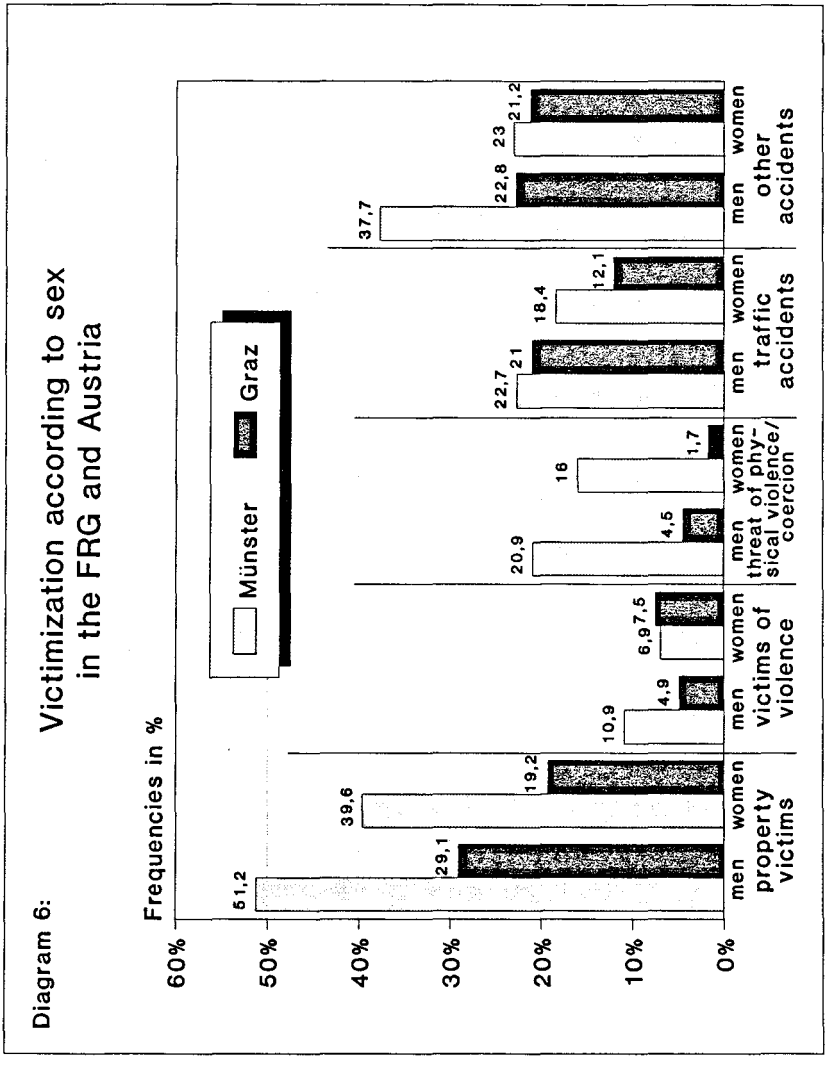


Diagram 6:
Victimization according to sex in the FRG and Austria
Frequencies in %
Münster
Graz
60%
50%
40%
30%
20%
10%
0%
51,2
39,6
29,1
19,2
10,9
4,9
6,9
7,5
20,9
4,5
16
1,7
22,7
21
18,4
12,1
37,7
22,8
23
21,2
men women
property victims
men women
victims of violence
men women
threat of physical violence/ coercion
men women
traffic accidents
men women
other accidents

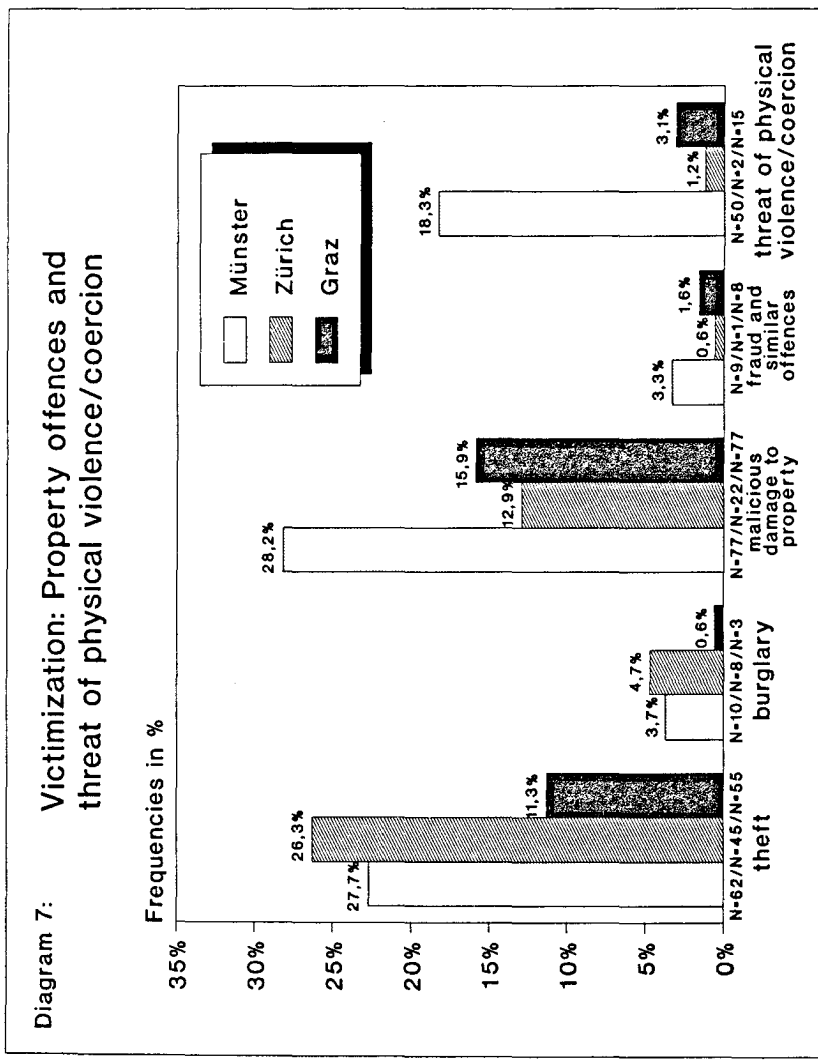


Diagram 7:
Victimization: Property offences and threat of physical violence/coercion
Frequencies in %
35%
30%
25%
20%
15%
10%
5%
0%
Münster
Zürich
Graz
27,7%
26,3%
11,3%
3,7%
4,7%
0,6%
28,2%
12,9%
15,9%
3,3%
0,6%
1,6%
18,3%
1,2%
3,1%
N=62/N=45/N=55
theft
N=10/N=8/N=3
burglary
N=77/N=22/N=77
malicious damage to property
N=9/N=1/N=8
fraud and similar offences
N=50/N=2/N=15
threat of physical violence/coercion

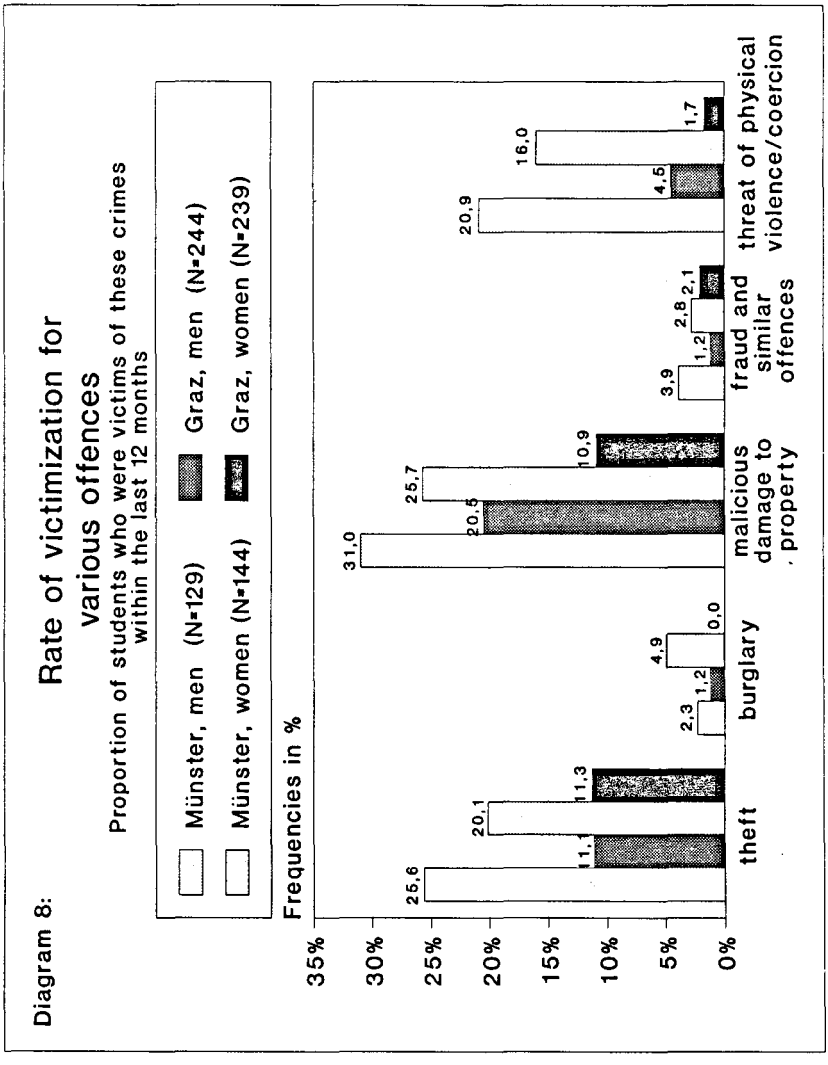


Diagram 8:
Rate of victimization for various offences
Proportion of students who were victims of these crimes within the last 12 months
Münster, men (N=129)
Münster, women (N=144)
Graz, men (N=244)
Graz, women (N=239)
Frequencies in %
35%
30%
25%
20%
15%
10%
5%
0%
25,6
20,1
11,1
11,3
2,3
1,2
4,9
0,0
31,0
25,7
20,5
10,9
3,9
1,2
2,8
2,1
20,9
16,0
4,5
1,7
theft
burglary
malicious damage to property
fraud and similar offences
threat of physical violence/coercion

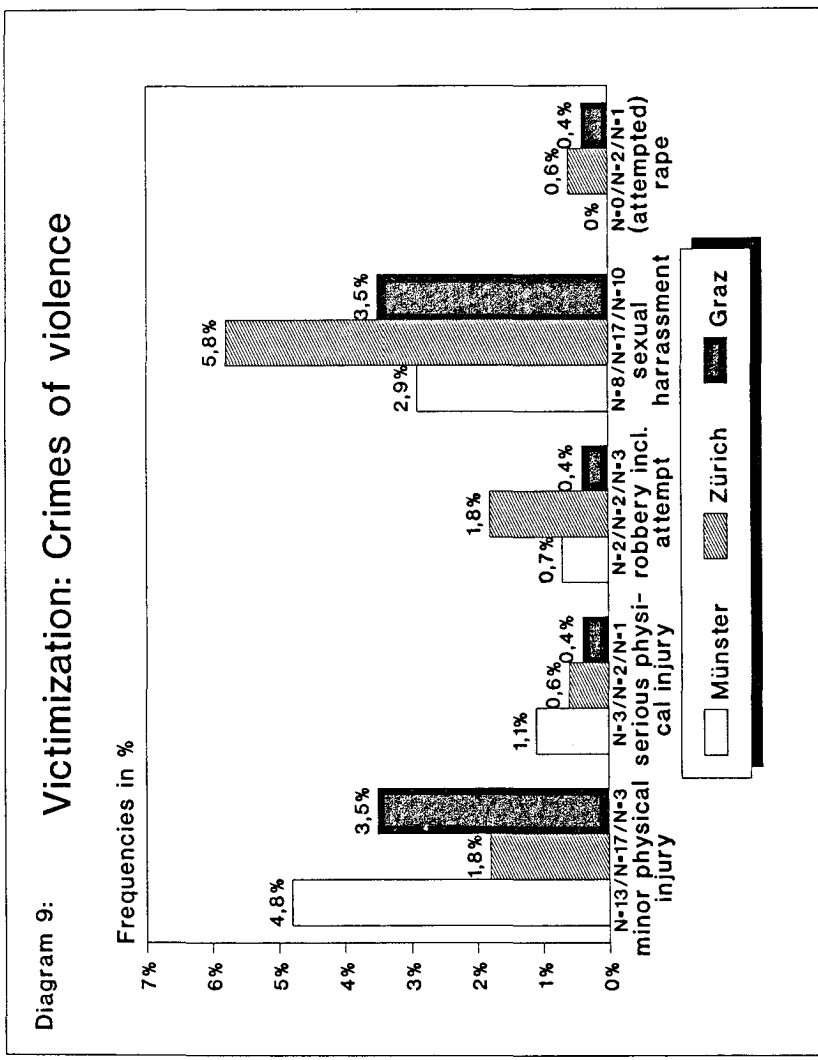


Diagram 9:
Victimization: Crimes of violence
Frequencies in %
7%
6%
5%
4%
3%
2%
1%
0%
4,8%
1,8%
3,5%
1,1%
0,6%
0,4%
0,7%
1,8%
0,4%
5,8%
2,9%
3,5%
0%
0,6%
0,4%
N=13/N=17/N=3
minor physical injury
N=3/N=2/N=1
serious physical injury
N=2/N=2/N=3
robbery incl. attempt
N=8/N=17/N=10
sexual harrassment
N=0/N=2/N=1
(attempted) rape
Münster
Zürich
Graz

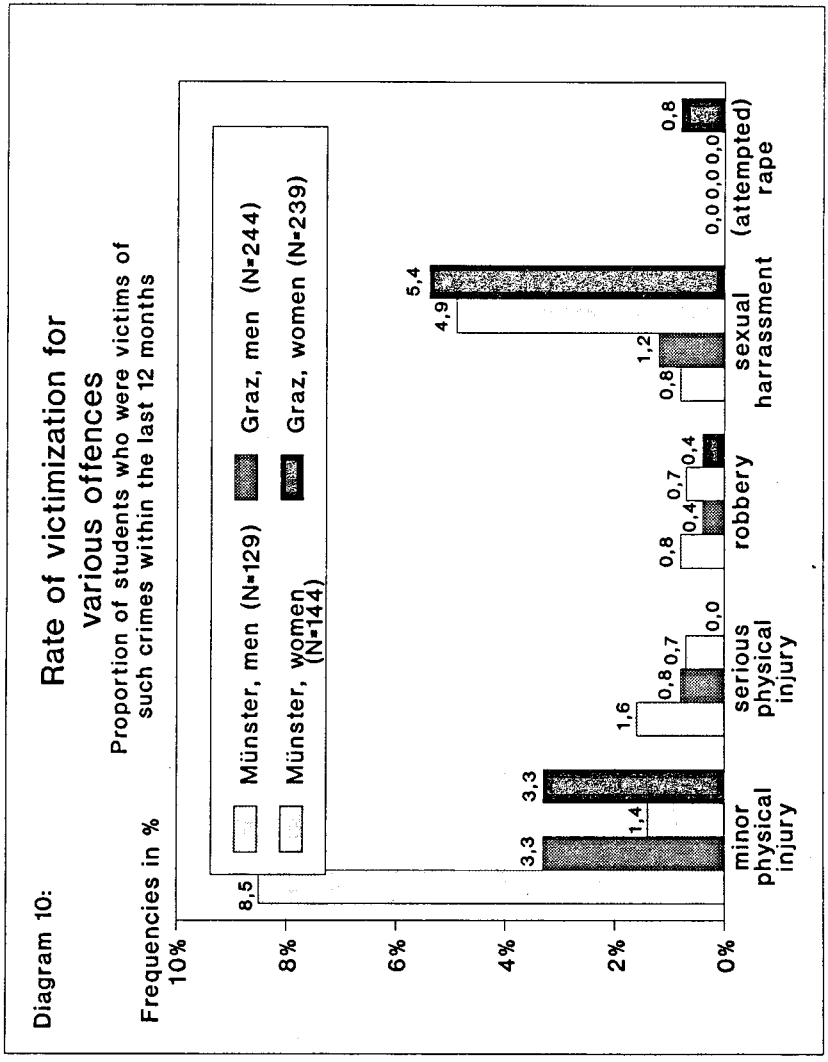
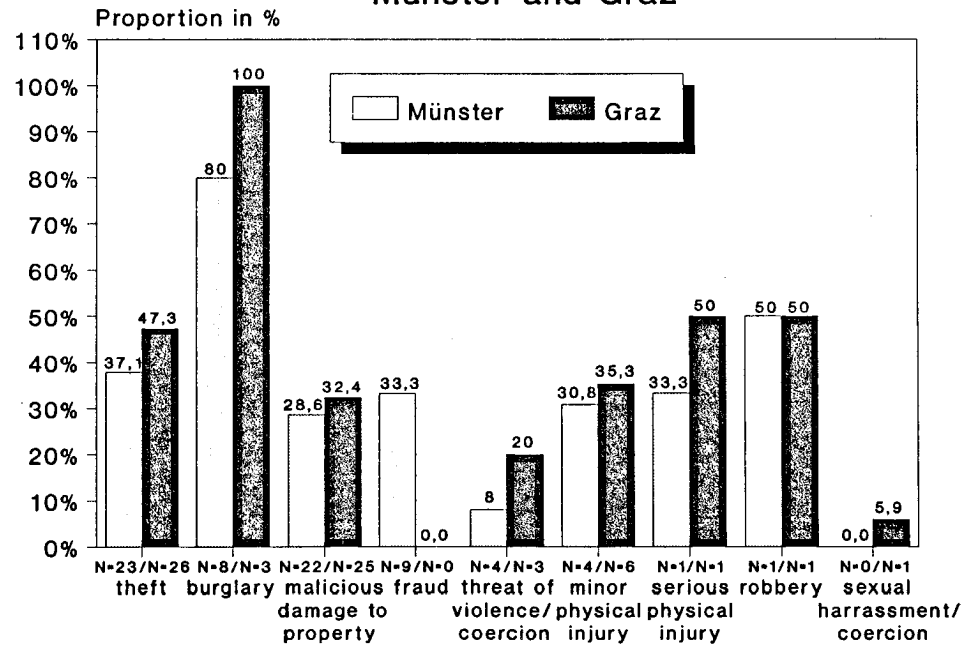


Diagram 10:
Rate of victimization for various offences
Proportion of students who were victims of such crimes within the last 12 months
Frequencies in %
10%
8%
6%
4%
2%
0%
Münster, men (N=129)
Münster, women (N=144)
Graz, men (N=244)
Graz, women (N=239)
8,5
3,3
1,4
3,3
3,3
1,6
0,8
0,7
0,0
0,8
0,4
0,7
0,4
0,8
1,2
5,4
4,9
0,8
0,0 0,0 0,0 0,0
minor physical injury
serious physical injury
robbery
sexual harrassment
(attempted) rape

Diagram 11:

Rate of victims reporting in relation to victimization of law students in Münster and Graz



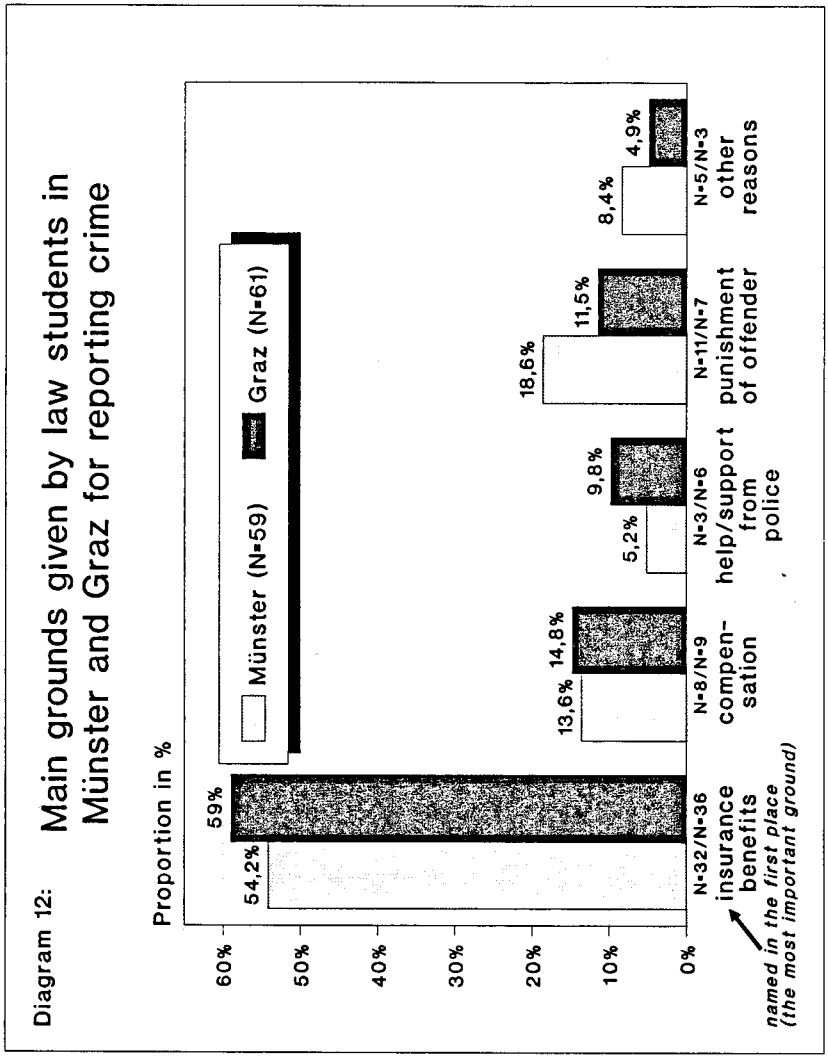


Diagram 12:
Main grounds given by law students in Münster and Graz for reporting crime
Proportion in %
Münster (N=59)
Graz (N=61)
60%
50%
40%
30%
20%
10%
0%
54,2%
59%
13,6%
14,8%
5,2%
9,8%
18,6%
11,5%
8,4%
4,9%
N=32/N=36
insurance benefits
N=8/N=9
compen-sation
N=3/N=6
help/support from police
N=11/N=7
punishment of offender
N=5/N=3
other reasons
named in the first place (the most important ground)

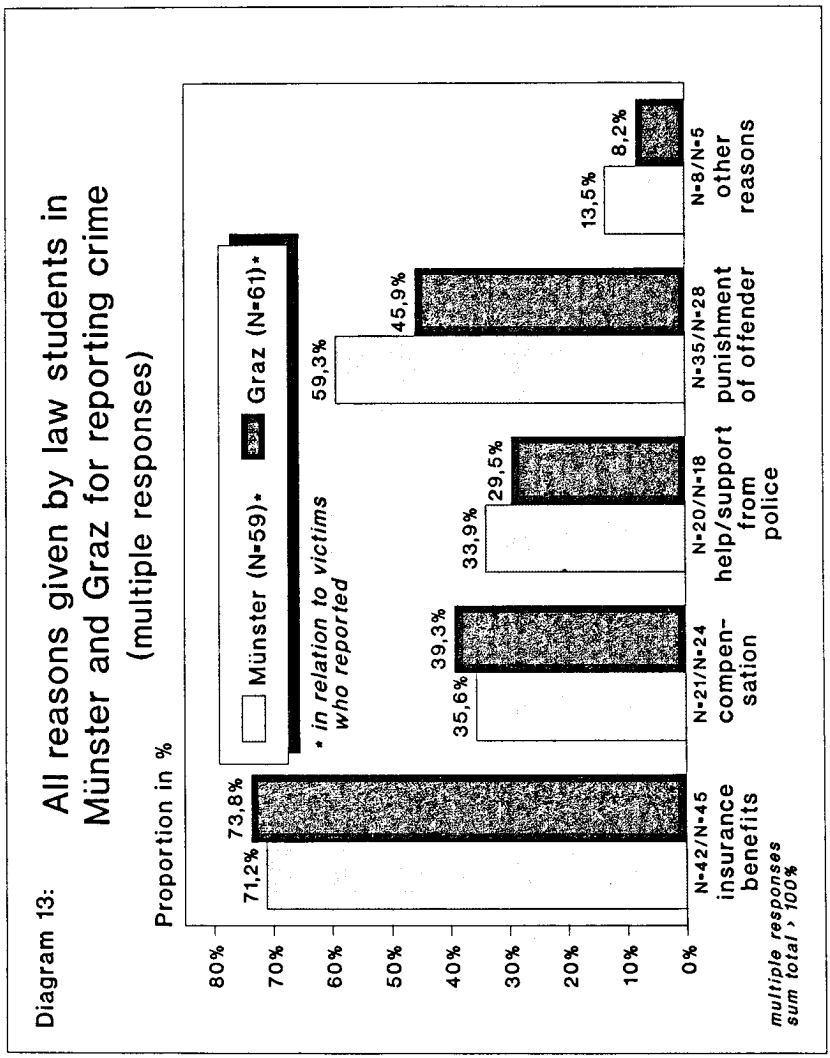
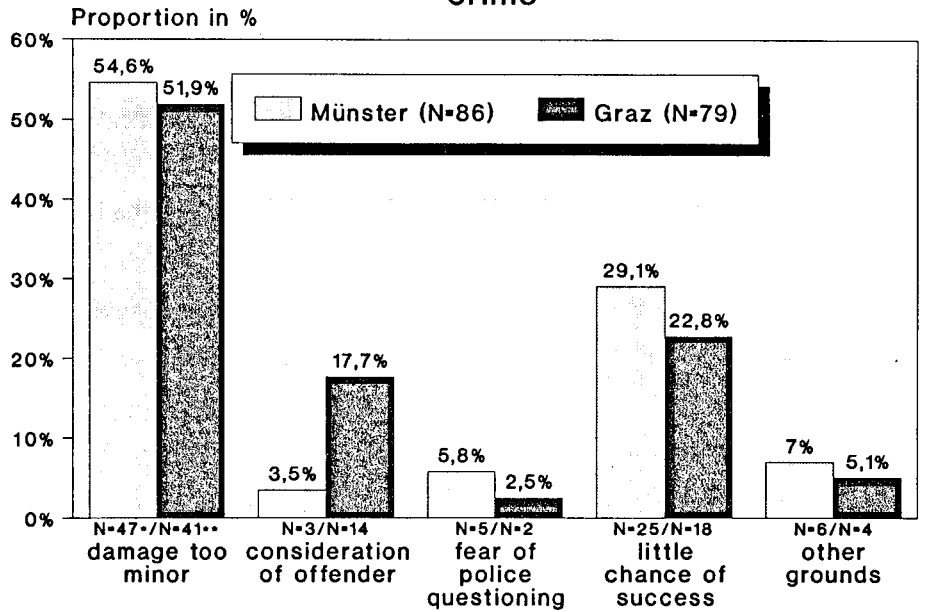


Diagram 13:
All reasons given by law students in Münster and Graz for reporting crime
(multiple responses)
Proportion in %
Münster (N=59)*
Graz (N=61)*
* in relation to victims who reported
80%
70%
60%
50%
40%
30%
20%
10%
0%
71,2%
73,8%
35,6%
39,3%
33,9%
29,5%
59,3%
45,9%
13,5%
8,2%
N=42/N=45
insurance benefits
N=21/N=24
compen-sation
N=20/N=18
help/support from police
N=35/N=28
punishment of offender
N=8/N=5
other reasons
multiple responses
sum total > 100%

Diagram 14:

Main grounds given by law students in Münster and Graz, for not reporting crime



* other grounds of equal importance, named in 29 cases (12 x little chance of success)
** other cases of equal importance mentioned in 16 cases (11 x little chance of success)

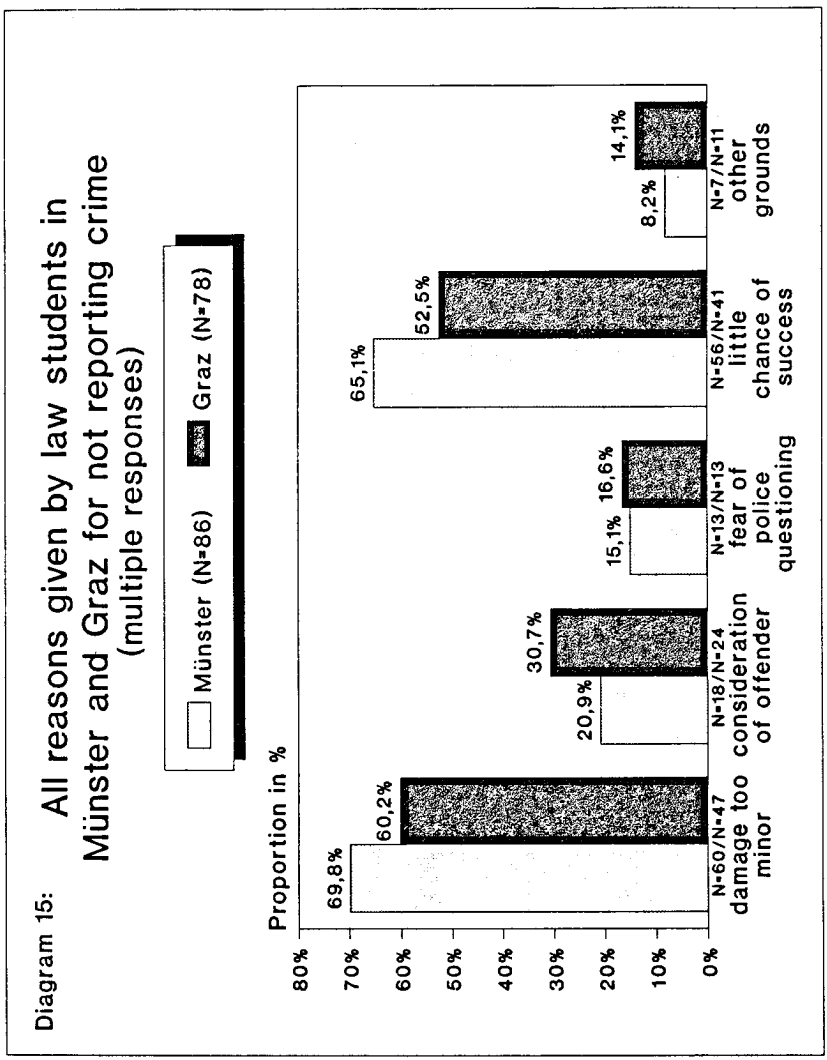
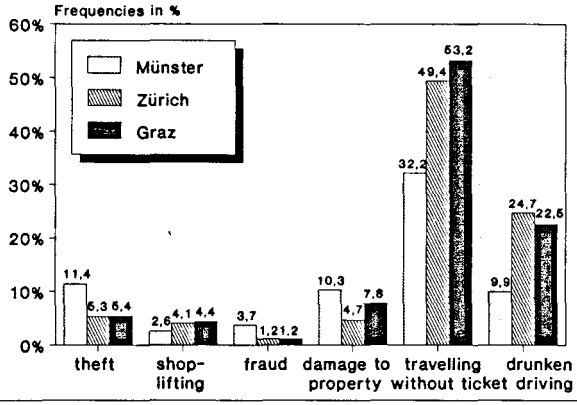


Diagram 15:
All reasons given by law students in Münster and Graz for not reporting crime (multiple responses)
Münster (N=86)
Graz (N=78)
Proportion in %
80%
70%
60%
50%
40%
30%
20%
10%
0%
69,8%
60,2%
20,9%
30,7%
15,1%
16,6%
65,1%
52,5%
8,2%
14,1%
N=60/N=47
damage too minor
N=18/N=24
consideration of offender
N=13/N=13
fear of police questioning
N=56/N=41
little chance of success
N=7/N=11
other grounds

Diagram 16:

Incidence of crime in relation to various offences

Theft, fraud, damage to property, travelling without ticket, drunken driving



Offences involving violence, sexual offences, threat of physical violence and extortion

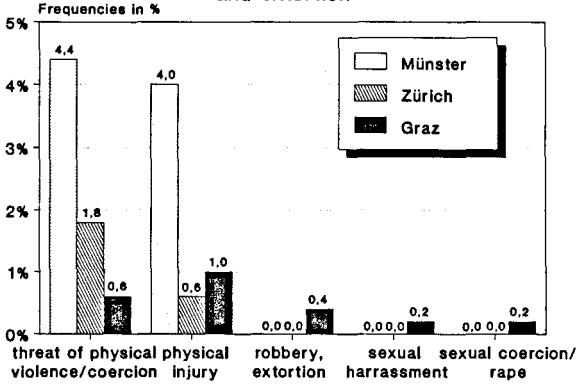
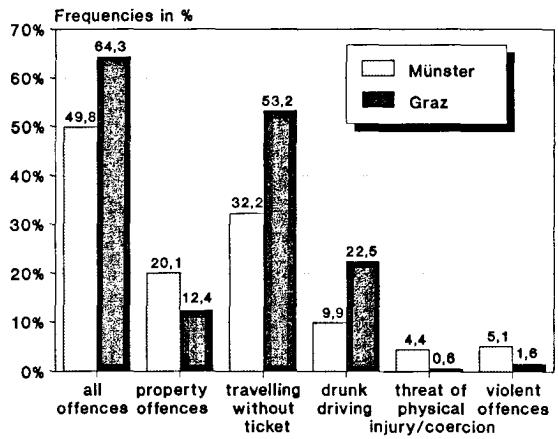


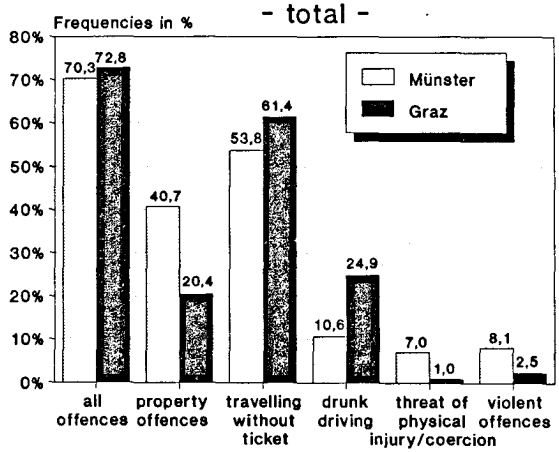
Diagram 17:

Incidence of crime in relation to particular offences

- within the last 12 months -



- total -



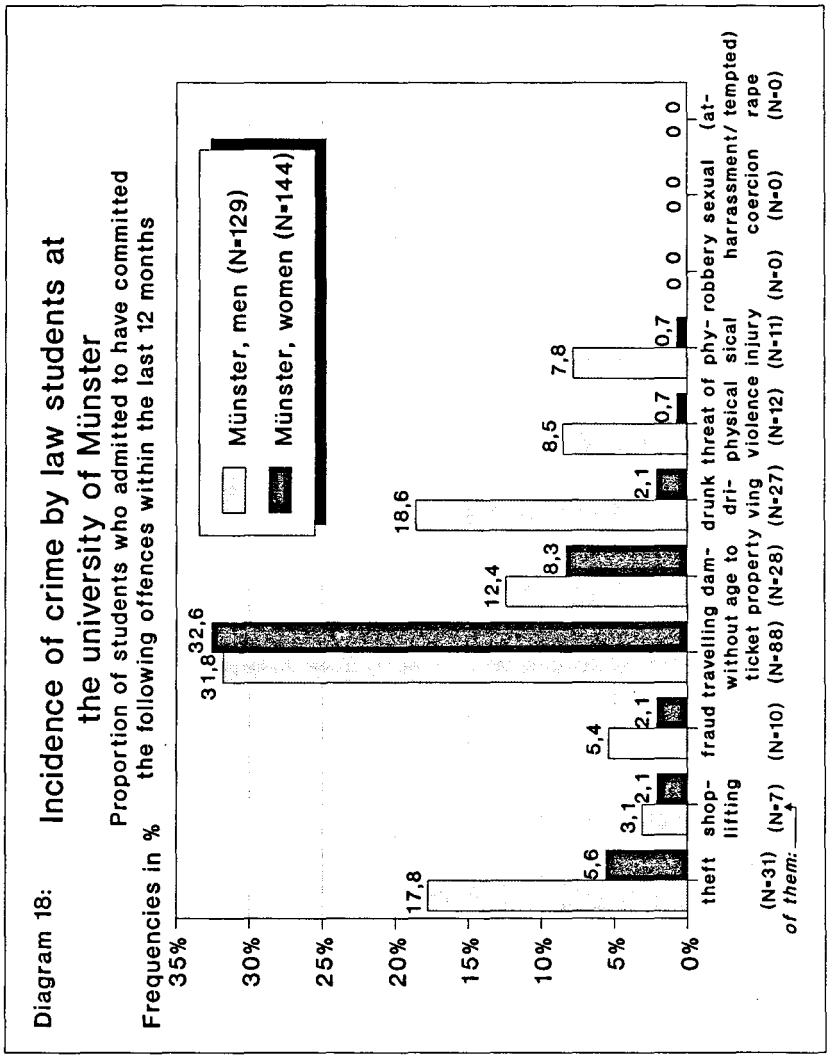


Diagram 18: Incidence of crime by law students at the university of Münster
Proportion of students who admitted to have committed the following offences within the last 12 months
Frequencies in %
Münster, men (N=129)
Münster, women (N=144)
35%
30%
25%
20%
15%
10%
5%
0%
17,8
5,6
3,1
2,1
5,4
2,1
31,8
32,6
18,6
12,4
8,3
2,1
0,7
8,5
7,8
0,7
0 0 0 0 0
theft
shop-lifting
fraud travelling without ticket
damage to property
drunk driving
threat of physical violence
robbery
sexual harrassment
(attempted) rape
(N=31) (N=7) (N=10) (N=88) (N=28) (N=27) (N=12) (N=11) (N=0) (N=0) (N=0)
of them:

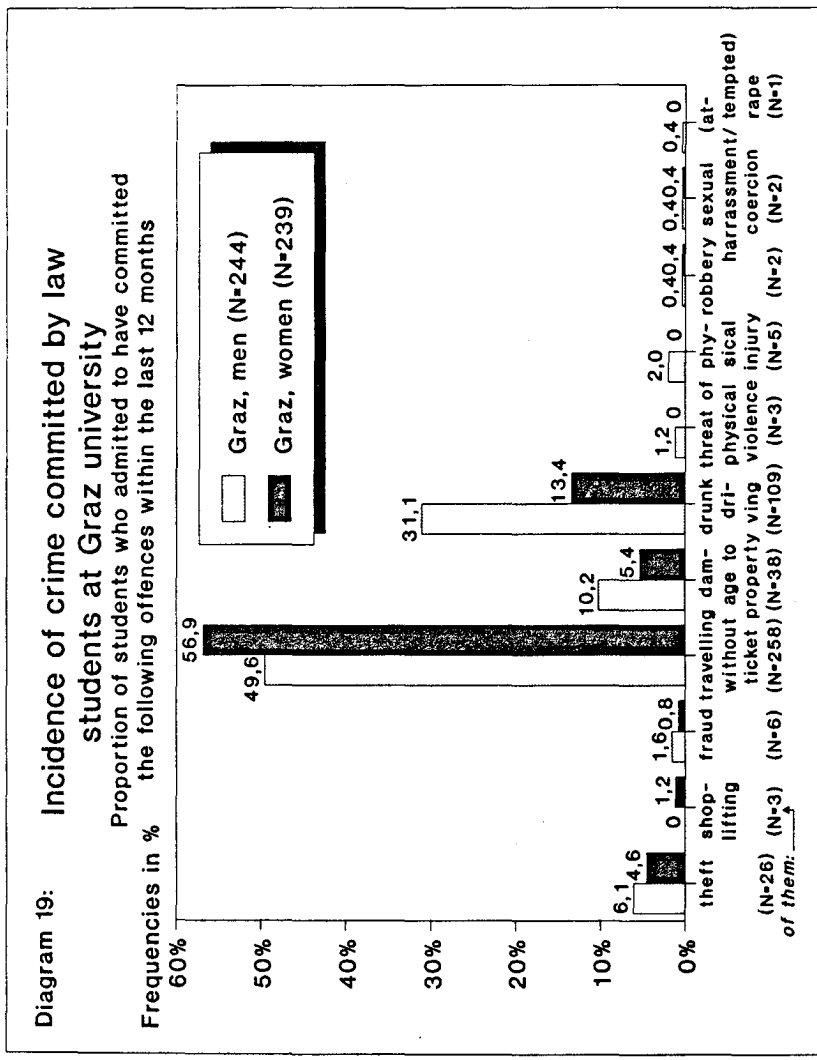


Diagram 19:
Incidence of crime committed by law students at Graz university
Proportion of students who admitted to have committed the following offences within the last 12 months
Frequencies in %
Graz, men (N=244)
Graz, women (N=239)
60%
50%
40%
30%
20%
10%
0%
6,1
4,6
0
1,2
1,6
0,8
49,6
56,9
10,2
5,4
31,1
13,4
1,2
0
2,0
0
0,4
0,4
0,4
0,4
0
theft of shop-lifting (N=26)
fraud (N=3)
travelling without ticket (N=6)
dam- age to pro- perty (N=258)
drunk dri- ving (N=38)
threat of physical violence (N=109)
phy- sical injury (N=3)
robbery (N=5)
sexual harrassment (N=2)
(at- tempted) coercion (N=2)
rape (N=1)
of them:

Diagram 20:

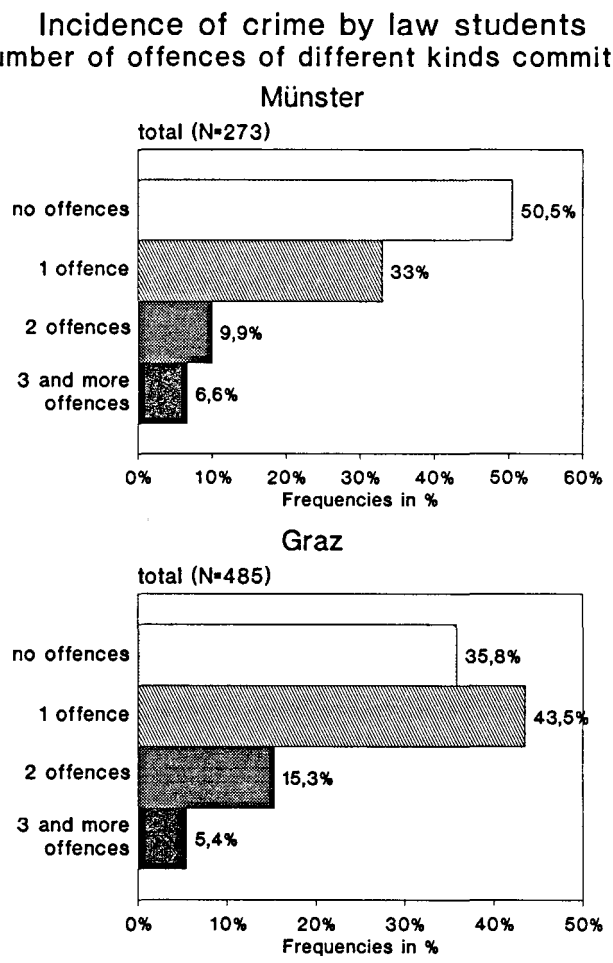
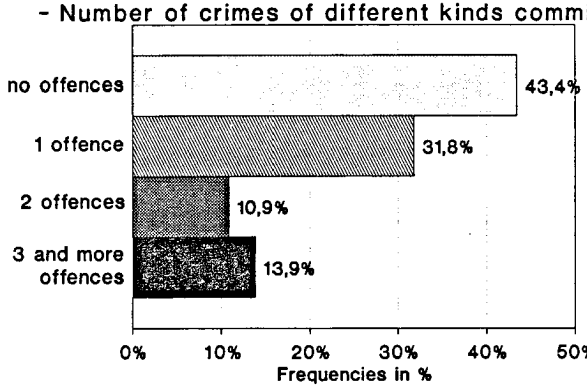

Incidence of crime by law students
- Number of offences of different kinds committed -
Münster
total (N=273)
no offences
1 offence
2 offences
3 and more offences
50,5%
33%
9,9%
6,6%
0%
10%
20%
30%
40%
50%
60%
Frequencies in %
Graz
total (N=485)
no offences
1 offence
2 offences
3 and more offences
35,8%
43,5%
15,3%
5,4%
0%
10%
20%
30%
40%
50%
Frequencies in %

Diagram 21:

Incidence of crime by law students in Münster

Men (N=129)

- Number of crimes of different kinds committed -



Women (N=144)

- Number of crimes of different kinds committed -

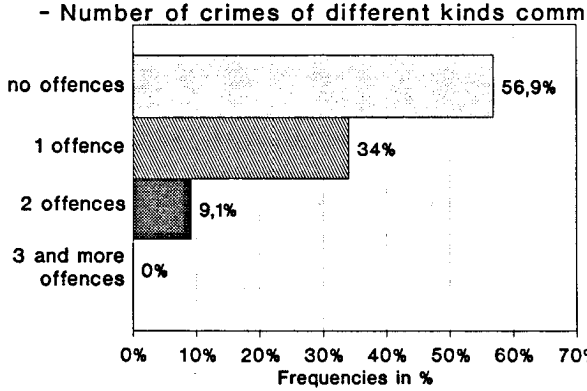
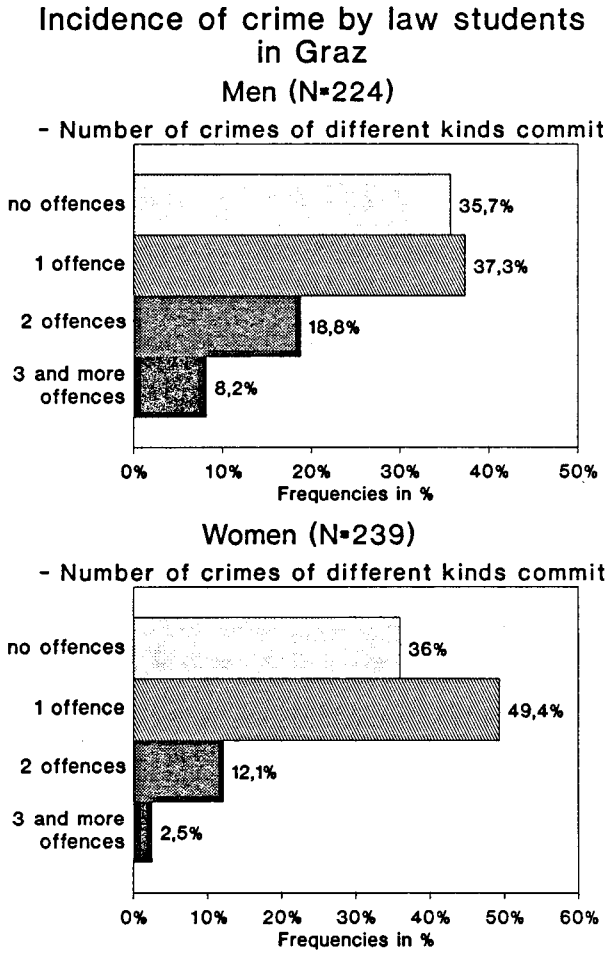


Diagram 22:


Incidence of crime by law students in Graz
Men (N=224)
- Number of crimes of different kinds committed -
no offences
1 offence
2 offences
3 and more offences
35,7%
37,3%
18,8%
8,2%
0%
10%
20%
30%
40%
50%
Frequencies in %
Women (N=239)
- Number of crimes of different kinds committed -
no offences
1 offence
2 offences
3 and more offences
36%
49,4%
12,1%
2,5%
0%
10%
20%
30%
40%
50%
60%
Frequencies in %

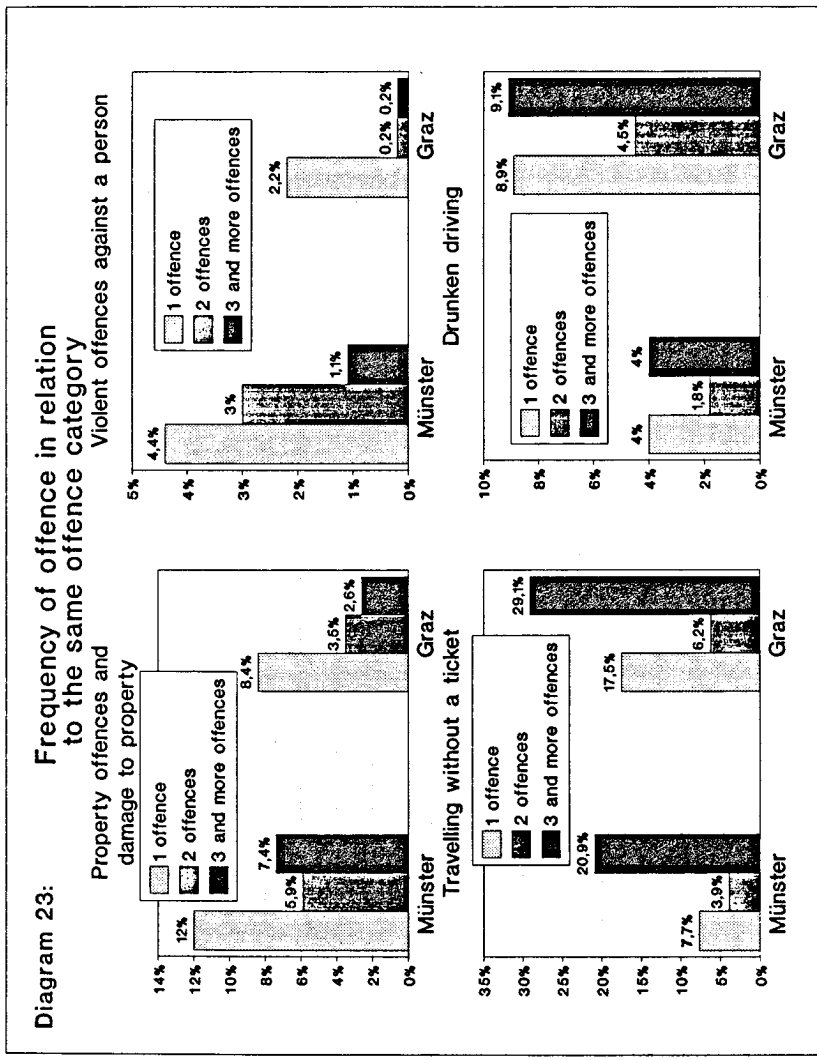


Diagram 23:
Frequency of offence in relation to the same offence category
Property offences and damage to property
Violent offences against a person
Travelling without a ticket
Drunken driving
1 offence
2 offences
3 and more offences
Münster
Graz
12%
5,9%
7,4%
8,4%
3,6%
2,6%
4,4%
3%
1,1%
2,2%
0,2%
0,2%
20,9%
7,7%
3,9%
17,5%
6,2%
29,1%
4%
1,8%
4%
8,9%
4%
4,5%
9,1%

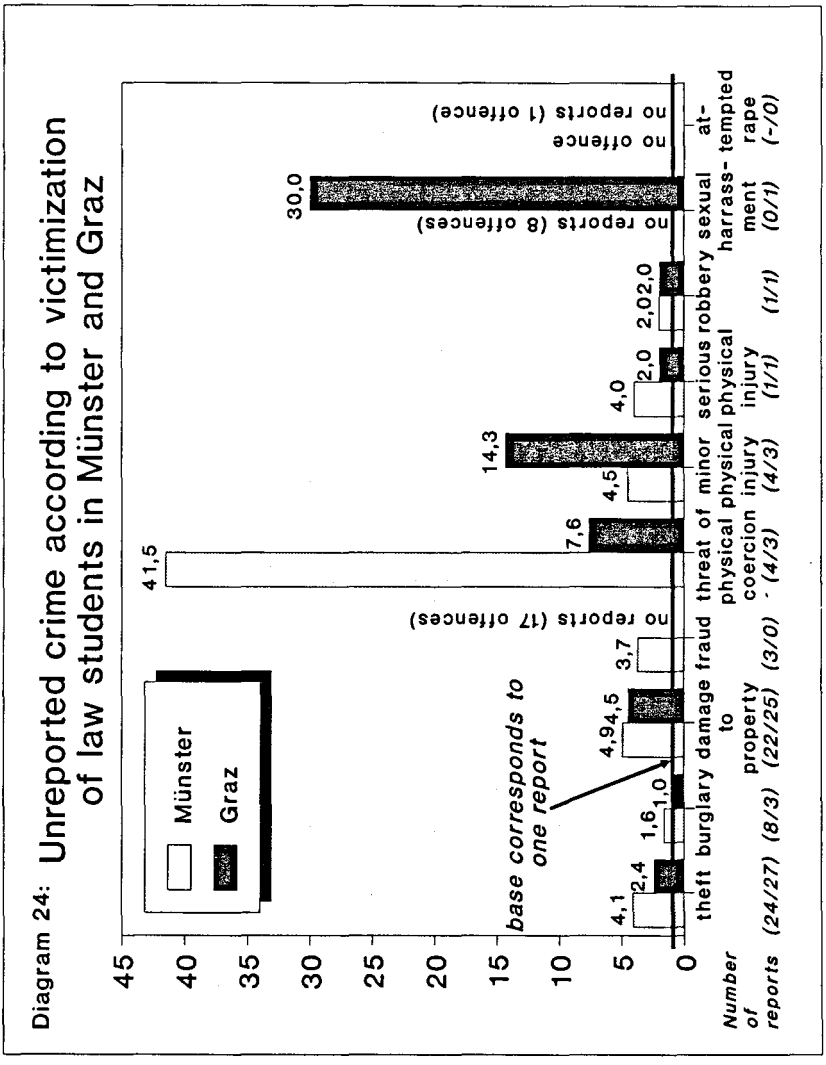


Diagram 24: Unreported crime according to victimization of law students in Münster and Graz
Münster
Graz
45
40
35
30
25
20
15
10
5
0
4,1
2,4
1,6
1,0
4,9
4,5
3,7
41,5
7,6
14,3
4,5
4,0
2,0
2,0
30,0
base corresponds to one report
no reports (17 offences)
no reports (8 offences)
no offence
no reports (1 offence)
theft
burglary
damage to property
fraud
threat of physical coercion
minor physical injury
serious physical injury
robbery
sexual harrassment
attempted rape
Number of reports
(24/27)
(8/3)
(22/25)
(3/0)
(4/3)
(4/3)
(1/1)
(1/1)
(0/1)
(-/0)

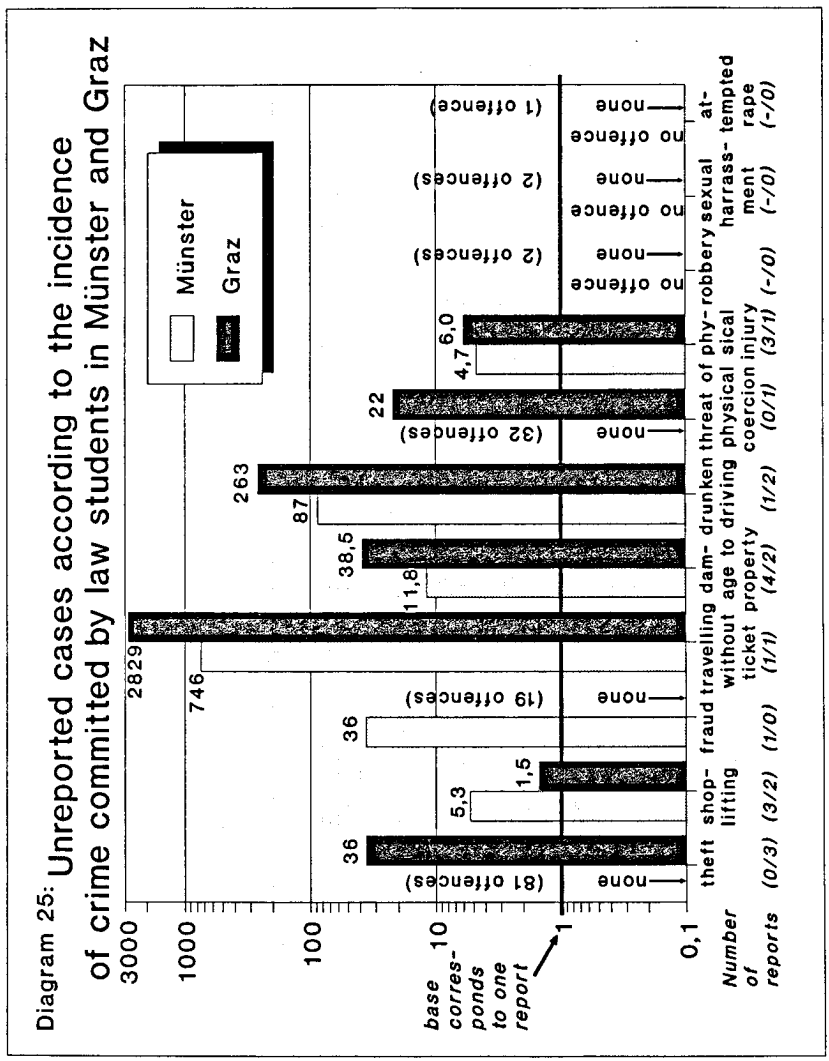


Diagram 25: Unreported cases according to the incidence of crime committed by law students in Münster and Graz
Münster
Graz
base corresponds to one report
Number of reports (0/3) (3/2) (1/0) (1/1) (4/2) (1/2) (0/1) (3/1) (-/0) (-/0) (-/0)
theft shop-lifting
fraud travelling without ticket
dam- age to property
drunken driving
threat of physical coercion
phy- sical injury
robbery
sexual harrass- ment
at- tempted rape
3000
1000
100
10
1
0,1
2829
746
36
36
5,3
1,5
(81 offences)
(19 offences)
none
263
87
38,5
11,8
22
4,7
6,0
(32 offences)
(2 offences)
(2 offences)
(1 offence)
no offence

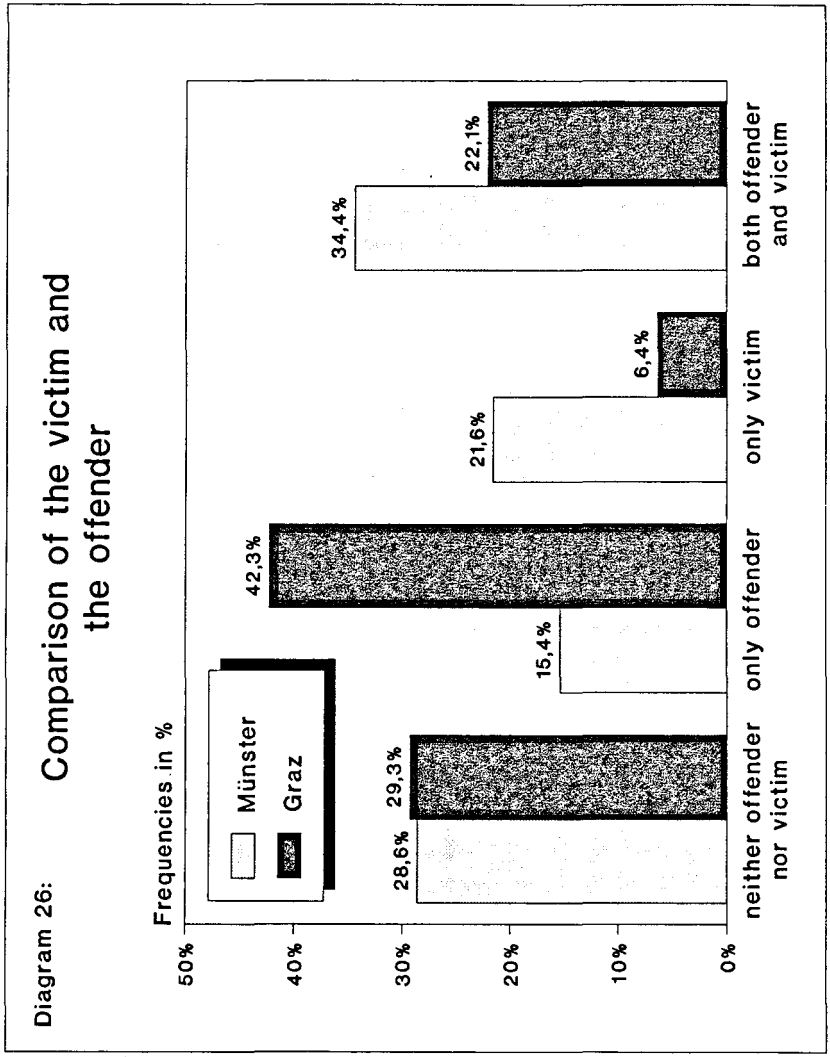


Diagram 26:
Comparison of the victim and the offender
Frequencies in %
Münster
Graz
50%
40%
30%
20%
10%
0%
28,6%
29,3%
15,4%
42,3%
21,6%
6,4%
34,4%
22,1%
neither offender nor victim
only offender
only victim
both offender and victim

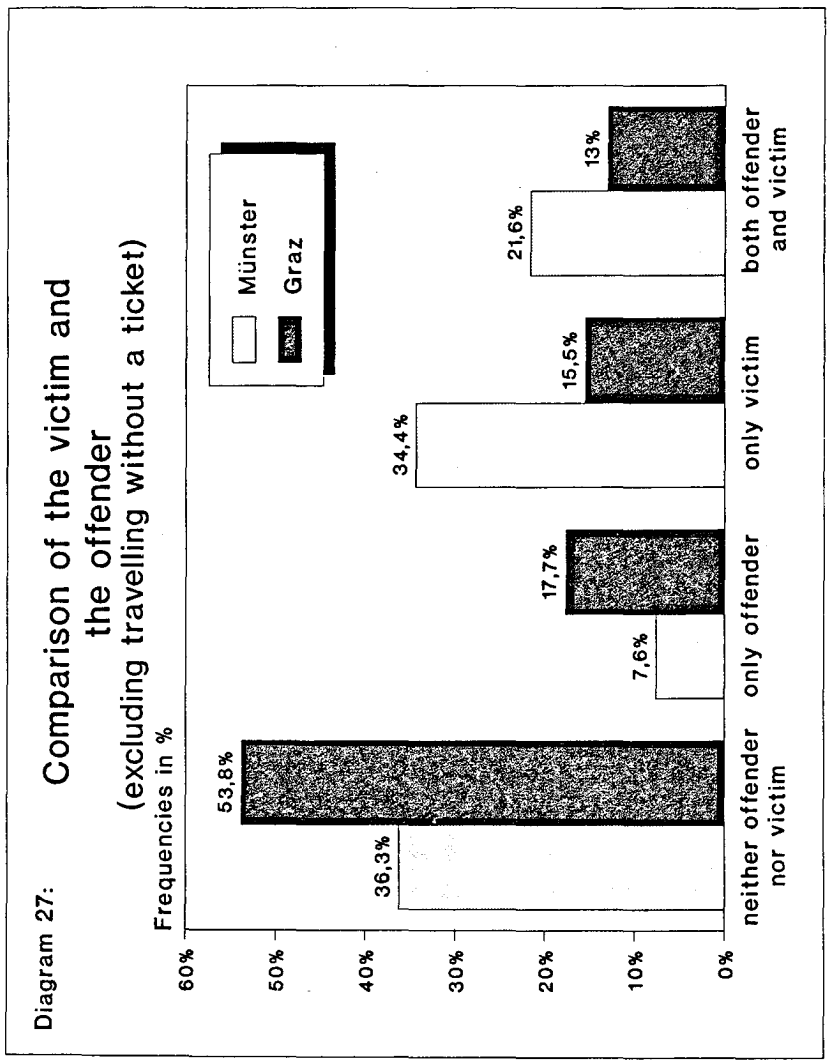


Diagram 27:
Comparison of the victim and the offender
(excluding travelling without a ticket)
Frequencies in %
Münster
Graz
60%
50%
40%
30%
20%
10%
0%
53,8%
36,3%
17,7%
7,6%
34,4%
15,5%
21,6%
13%
neither offender nor victim
only offender
only victim
both offender and victim

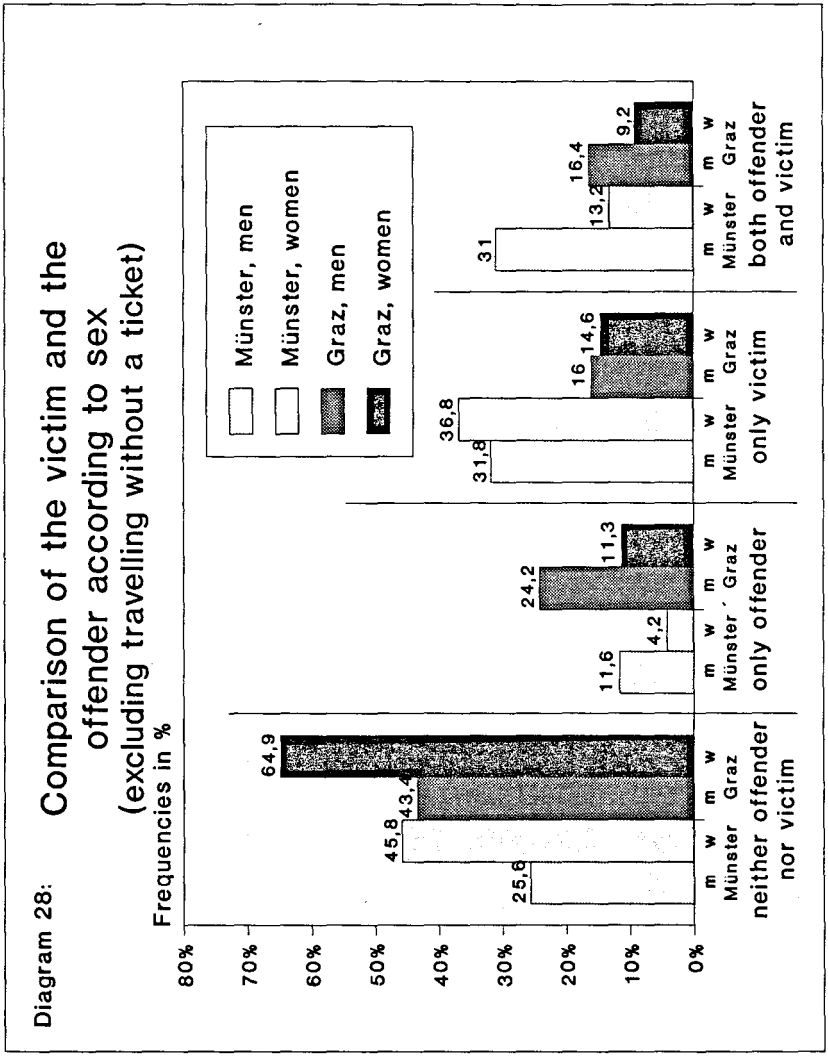


Diagram 28:
Comparison of the victim and the offender according to sex (excluding travelling without a ticket)
Frequencies in %
80%
70%
60%
50%
40%
30%
20%
10%
0%
Münster, men
Münster, women
Graz, men
Graz, women
25,6
45,8
43,4
64,9
11,6
4,2
24,2
11,3
31,8
36,8
16
14,6
31
13,2
16,4
9,2
m w m w
Münster Graz
neither offender nor victim
m w m w
Münster Graz
only offender
m w m w
Münster Graz
only victim
m w m w
Münster Graz
both offender and victim

12. References

Amelang, M. (1971). Untersuchungen zur selbstberichteten Delinquenz. MschKrim, 54, 98-105.

Arnold, H. (1984). Verbrechensfurcht und/oder Furcht vor Viktimisierung - Folgen von Viktimisierung? In: H.-J. Albrecht & U. Sieber (Eds.), Zwanzig Jahre Südwestdeutsche Kriminologische Kolloquien (pp. 185-236). Freiburg: Eigenverlag Max-Planck-Institut für Strafrecht.

Arnold, H. (1986). Kriminelle Viktimisierung und ihre Korrelate. Ergebnisse international vergleichender Opferbefragungen. ZStW, 98, 1014-1058.

Arnold, H. (1991). Fear of crime and its relationship to directly and indirectly experienced victimization: A binational comparison of models. In: K. Sessar & H.-J. Kerner H.-J. (Eds.), Developments in crime and crime control research: German studies on victims, offenders and the public (pp. 87-125). New York 1991.

Arnold, H., & Korinek, C. (1985). Kriminalitätsbelastung in der Bundesrepublik Deutschland und Ungarn. Ergebnisse einer international vergleichenden Opferbefragung. In: H. Böhm et al. (Eds.), Kriminologie in sozialistischen Ländern (pp. 65-136). Bochum.

Arnold, H., & Teske, R.H.C. (1988). Factors related to fear of crime. A comparison between the Federal Republic of Germany and the United States. In: G. Kaiser & I. Geissler (Eds.), Crime, victimization and criminal justice. Freiburg.

Arnold, A., Teske, R., & Korinek, L. (1988). Viktimisierung, Verbrechensfurcht und Einstellungen zur Sozialkontrolle in West und Ost. Ergebnisse vergleichender Opferbefragungen in der Bundesrepublik Deutschland, den Vereinigten Staaten und Ungarn. In: G. Kaiser et al. (Eds.), Kriminologische Forschung in den 80er Jahren (pp. 909-942). Freiburg.

Bock, A. (1974). Why notify the police. The victims decision to notify the police of an assault. Criminology, ll, 555-569.

Boers, K., & Sessar, K. (1991). Do people really want punishment? On the relationship between acceptance of restitution, needs for punishment and fear of crime. In: H.-J. Kerner & K. Sessar (Eds.), Developments in crime and crime control research. German studies on victims, offenders and the public. New York.

van Dijk, J.J.M., Mayhew, P., & Killias, M. (1990). Experience of crime across the world. Deventer.

Engelhard, M. (1990). Viktimisierung und Anzeigebereitschaft. Der Kriminalist, 22, 404-409.

Feyerherm, W. (1977). The interrelationship of various indicators of crime. Phil. Diss. New York.

Gottfredson, M.R. (1981). On the Etiology of Criminal Victimization. Journal of Criminology, 72, 714-726.

Hanak, G. (1984). Kriminelle Situationen. Zur Ethnographie der Anzeigeerstattung. KrimJ, 16, 161-180.

Heinz, W. (1985). Anzeigeverhalten der Bevölkerung. In: G. Kaiser, H.-J. Kerner, F. Sack & H. Schellhoss (Eds.), Kleines Kriminologisches Wörterbuch (pp. 27-32). 2. Ed. Heidelberg.

Hindelang, M.J., Gottfredson, M., & Garofalo, J. (1978). Victims of personal crime: An empirical foundation for a theory of personal victimization. Cambridge, MA.

Kaiser, G. (1985). Die Rolle des Opfers als Initiator der Verbrechenskontrolle. In: H. Janssen & H.-J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 25-43). Bonn.

Kaiser, G. (1988). Kriminologie. Ein Lehrbuch. 2. Ed. Heidelberg.

Kaiser, G. (1990). "Lebensstil". Entwicklung und kriminologische Bedeutung eines Konzepts. In: H.-J. Kerner & G. Kaiser (Eds.), Kriminalität, Persönlichkeit, Lebensgeschichte und Verhalten. Festschrift für H. Göppinger (pp. 27-40). Berlin et al.

Kirchhoff, G.F. (1975). Selbstberichtete Delinquenz: Eine empirische Untersuchung. Göttingen.

Kreuzer, A. (1975). Schülerbefragungen zur Delinquenz. Recht der Jugend und des Bildungswesens, 23, 229-244.

Kreuzer, A., Hürlimann, M., Krämer, K., & Schneider, H. (1990). Gießener Delinquenzbefragungen. Deliquenz bei jungen Frauen und Männern nach Befunden bei Studienanfängern im WS 1988/89. Spiegel der Forschung (Justus-Liebig-Universität Gießen), 7, 11-15.

Newmann, J. (1975). The offender as the victim. In: J. Drapkin & E. Viano (Eds.), Victimology: A new focus. VIII, crimes, victims and justice (pp. 113-120). Lexington/Mass.

Popitz, H. (1968). Über die Präventivwirkung des Nichtwissens. Dunkelziffer, Norm und Strafe. Tübingen.

Pudel, V. (1978). Motivanalyse des Anzeigeverhaltens. In: H. Schwind & W. Ahlborn (Eds.), Empirische Kriminalgeographie. BKA-Forschungsreihe (pp. 205-210). Wiesbaden.

Reuband, K.H. (1981). Determinanten der Anzeigebereitschaft unter Opfern von Eigentumskriminalität. MschrKrim, 64, 213-223.

Reuband, K.-H. (1983). Dunkelfeld, Deliktstrukturen und Täterbild. Zum Verhältnis von registrierter und nicht registrierter Kriminalität. In: H.-J. Kerner, H. Kury & K. Sessar (Eds.), Deutsche Forschungen zur Kriminalitätsentstehung und -kontrolle (pp. 199-234.). Köln et al.

Rosellen, R. (1980). Private Verbrechenskontrolle. Eine empirische Untersuchung zur Anzeigeerstattung. In: Forschungsgruppe Kriminologie (Eds.), Empirische Kriminologie (pp. 93-112). Freiburg.

Schneider, H.-J. (1987). Kriminologie. Berlin, New York.

Schwind, H.-D. (1988). Dunkelfeldforschung in Bochum 1975 und 1986 - Die erste deutsche Replikationsstudie. In: G. Kaiser et al. (Eds.), Kriminologische Forschung in den 80er Jahren (pp. 943-959). Freiburg.

Schwind, H.-D. (1990). Kriminologie. eine praxisorientierte Einführung mit Beispielen. 3. Ed. Heidelberg.

Schwind, H.-D. et al. (1975). Dunkelfeldforschung in Göttingen 1973/74. Wiesbaden.

Schwind, H.-D., & Eger, H.-J. (1973). Untersuchungen zur Dunkelziffer: Nichtentdeckte Straftaten von Göttinger Jurastudenten. MschrKrim, 56, 151-170.

Sessar, K., Beurskens, A., & Boers, K. (1986). Wiedergutmachung als Konfliktregelungsparadigma? KrimJ, 18, 86-104.

Stadler, K. (1987). Kriminalität im Kanton Uri. Eine Opferbefragung. Diss.jur. Entlebuch.

Stephan, E. (1976). Die Suttgarter Opferbefragung. Eine kriminologisch-viktimologische Analyse zur Erforschung des Dunkelfeldes unter besonderer Berücksichtigung der Einstellung der Bevölkerung zur Kriminalität. Wiesbaden.

Teske, R., & Arnold, H. (1982). A comparative investigation of criminal victimization in the United States and the Federal Republic of Germany. In: Criminological Research Unit (Ed.), Research in criminal justice (pp. 63-83). Freiburg.

Treiber, H. (1973). Entlastungseffekte des Dunkelfeldes. Anmerkungen zu einer Dunkelfeldbefragung. KrimJ, 5, 97-115.

Villmow, B., & Stephan, E. (1983). Jugendkriminalität in einer Gemeinde. Eine Analyse erfragter Delinquenz und Viktimisierung sowie amtlicher Registrierung. Freiburg 1983.

Voß, M. (1989). Anzeigebereitschaft, Verfahrenserwartungen und die Bereitschaft von Geschädigten zur informellen Konfliktregelung. Erste Ergebnisse einer Opferbefragung. MschrKrim, 72, 34-51.

Walters, G.D. (1990). The criminal lifestyle. Patterns of serious criminal conduct. London, New Delhi.

4. Punishment, Restitution and Reconciliation

Victim Compensation in some Western Countries*

Bernhard Villmow

Contents

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1. Introduction

Numerous articles have already discussed the development, structure and justifications of state funded victim compensation programs. The main purpose of this paper, however, is to provide an overview of their functioning and the effects the regulations possibly have on the victims of crime. As *Carrow* states, "the evaluation of victim compensation programs can facilitate the effective administration of programs, help to improve program services to crime victims, enhance the formulation of appropriate policies and procedures... and promote the development of more effective and efficient programs in the future" (1980, p. 173). Statistics from various countries, for example, showed that only a minority of victims have benefitted from these schemes. Evaluation studies tried to discover the reasons for this unsatisfactory situation. Up to now, there are only a few concrete and comprehensive empirical studies of ongoing programs. So, this report can only summarize some results of research from Great Britain, Canada and the USA. However, these give an interesting picture of the different schemes and the present situation of victim compensation.

Some findings of a German study will be added. But because this research only has the character of a pilot study, the results concerning German victim compensation are preliminary and restricted.

2. Aims and Scope of the Schemes

The aims of the different programs are not always clear. Often there is a mixture of expectations and rationales and legislative philosophies. Sometimes it has been noted that they are even contradictory or too vague to be of any real value for use in program evaluations (*Carrow* 1980, p. 174).

Generally many different underlying philosophies or justifications are discussed, for example the strict liability theory, the government negligence theory, the equal protection theory, the humanitarian theory, the social obligation theory and the social welfare theory (see *Elias* 1983a; *Burns* 1983; *Kirchhoff* 1983/84).

Most of the schemes are clearly directed at the so called "innocent victims". There is a special image of the victim as an innocent party,

sometimes brutally subjected to a deliberate, sudden and unprovoked assault by the offender (*Joutsen* 1987, p. 267). the problems combined with this stereotype will be presented in the following parts of the paper.

Despite their common concerns and partly similar backgrounds the programs represent a process that varies somewhat from country to country.

But a summarizing overview shows that compensable offences are limited almost entirely to violent crimes and that compensable losses are almost exclusively limited to medical costs. Property losses are virtually never compensable. Compensation for pain and suffering is provided only in some countries. The use of minimum loss criteria has been criticized by many contributors, who point out that the threshold limitation poses problems to the poor victim, to whom the statutory minimum may be a significant sum. In addition, estimations showed that the program costs would not be substantially increased by elimination of minimum loss criteria (*Carrow* 1980, p. 19).

Attempting to reduce "unjust" attainment of benefits, some programs have excluded victims related to the offender and victims who contributed to their own injury. Many critics have stated that the first condition often denies compensation to deserving and needy individuals (female spouses and children) and in Great Britain, for example, such victims have been included in the scheme since 1979 (*Burns* 1983, p. 107; *Miers* 1983, p. 207). The second restriction too has been discussed widely in the victimological field. The difficulty of ascertaining the existence of victim reponsibility and assessing its extent has been noted and it is argued that the questionable stereotype of the "innocent victim" quite obviously plays an important role (*Burns* 1983, p. 106).

In sum, one can state that virtually all schemes contain a series of restrictive eligibility requirements. As a result of these and other limitations on benefits, a majority of crime victims is not covered by the programs.

It may be added to this that some statutory reasons for denying benefits are to be regarded as overly vague, for example, when the British scheme draws attention to the conduct of the victim, including conduct before and after the event, and his or her character and way of life. Another example is the Federal Republic of Germany rule that denies compensation entirely if in the light of the victim's own conduct, it would appear injust to grant the award. It is unclear which attitudes and moral principles held by the officials in the compensation process influence their decisions. Obviously, certain victims or specific forms of behaviour of victims are not accepted and various programs differentiate in this context between "innocent" and "guilty" victims. Developing special stereotypes, for example, may lead to

broad interpretations given to statutory grounds for denying applications. So the scope of the schemes may be considerably limited in a second way , namely by exercise of discretion by members of the boards. It would, therefore, appear that *Joutsen* is right when he states: "The schemes are clearly to the benefit of the ideal, innocent victim, but they will not benefit those victims who, in the opinion of the decision-making tribunal, were to an appreciable degree responsible for their victimization. In some countries, moreover, the restrictions operate to the disadvantage of those whose lifestyle is regarded with severe disfavour" (1987, pp. 267-278).

3. Evaluation of the Compensation Programs

The importance of systematic planning studies and program evaluations has been increasingly recognized as essential to the sucess, continuation and improvement of projects in this field. Up to now there have been relatively few attempts to evaluate state victim compensation programs (*Carrow* 1980, p. 173; *Baril et al.* 1984, p.1). In his overview *Elias* comes to the conclusion that "the existing studies purporting to evaluate compensation programs are inadequate because they are either too small or incomplete, or fail to question victims or simply fail to live up to what their titles promise" (1983b, p. 217).

Elias attempted to fill that gap by contrasting the New York and New Jersey compensation plans, comparing a control group of victims having no contact with their state's compensation scheme to an experimental group that had applied. Telephone interviews were completed for 98 non-claimants and 85 claimants in Brooklyn, and for 80 non-claimants and 79 claimants in Newark. A further data source included interviews with board members and investigators from each compensation board.

A similar comprehensive research was done in Britain by *Shapland et al.* between 1979 and 1982. They studied the experiences, attitudes and difficulties of 276 victims of violent crime (physical assault, sexual assault and robbery) as their cases passed through the criminal justice system, including applications for compensation to the various compensation agencies. In a longitudinal study the victims were interviewed several times over a period of up to three years. Additionally, police officers, prosecution solicitors, justices' clerks, other court staff and compensation agency personnel were questioned as well as police and compensation agency files of the cases and newspaper reports examined (*Shapland et al.* 1985, pp. 4-9).

In Canada *Baril at al.* studied the effectiveness of the Quebec crime victims compensation scheme in 1981/82. The main objective was to give a description of the claimants, the program and the operation of the scheme, and to assess the program's impact on beneficiaries (*Baril et al.* 1984, p. 1). They analyzed 1251 files (applications in 1979/80) concernig characteristics of victims, circumstances of crime, legal proceedings, personal consequences of victimization and applicant-program relationship. In a second step, 43 victims were interviewed to obtain more information on victimization as an experience, on the needs of victims and their level of satisfaction with the compensation program (*Baril et al.* 1984, pp. 6-10).

Simultaneously, but without any knowledge of the other studies, we began our research concerning the application of the German victim compensation act in Hamburg. There were similar research questions concerning the situation of the victims, their decision to apply for compensation, the experiences with the administration, and the outcome of the compensation case, and we tried to find out which criteria influenced the decisionmaking process. In our opinion there is no comprehensive theoretical framework that covers all questions to be studied. So we proceeded from a relatively rough filter/selection approach, which includes very different aspects.

Analysis on the level of the legal program reveals that injuries below a certain degree of seriousness are not covered by the system which primarily provides for rehabilitation and for securing the victim's livelihood (see also *Kirchhoff* 1983/84, p. 23).

On the administrative level, you may find various factors that exclude certain groups of victims. Many agencies lack interest in passing on information about the act. Arguments range from strategies to avoid higher work loads (*Weintraud* 1980, p. 92) to problems for the responsible administration in cases of high financial demands (*Vaughn & Hofrichter* 1980, p. 38), to the notion that the victim compensation scheme is only "symbolic legislation", which would mean that application of the act is of secondary importance (*Elias* 1983b, p. 214; *Miers* 1983, p. 211). In addition, administrators may harbor some notion of the "ideal type" of victim worthy of compensation, who therefore, will be benefitted. In contrast, claimants who are injured in similar situations, but who do not meet the stereotype of "innocent victim", are denied benefits either due to lack of sufficient evidence or due to "unworthiness". In analyzing the exercise of discretion we tried to include concepts of the so-called labeling approach in our search for an explanation (*Miers* 1980, p. 3; *Miers* 1990, p. 226). We had to investigate which groups of the non-stereotypical compensable victims were often said to have contributed to their injuries, were regarded as tardy in making an application, and offered no explanation or who appeared reluctant to cooperate with

the police. *Mies* has noted that "those who fall within this class are characterized by their advertised willing participation in risk situations, their similarity in socioeconomic terms to offenders and their participation in activities which are perceived by the schemes' administrators as constituting unacceptable departures from conventional standards of behaviour, that is, those standards subscribed to by innocent victims" (1980, p.14).

On the third level, finally. on the part of the victims, it is imaginable that they intentionally refrain from claiming compensation because they intentionally refrain from claiming compensation because they feel stigmatized by societal reaction and wish to avoid an "official recognition" as victims. In this context, it is assumed that many victims suffer disadvantages in the course of "secondary victimization" caused by the reaction of persons in their social environment as well as by interactions with the criminal justice system (*Kirchhoff & Kirchhoff* 1979, p. 279). It may also be relevant that victims of violent crime often belong to social classes and groups that generally find it difficult to deal with administrative agencies (see *Mayntz* 1985, pp. 241-245; *Hoffmann-Riem* 1980).

Furthermore, financial benefits alone might not satisfy the primary needs of this group of victims. In a study on problems faced by victims, *Knudten* and *Knudten* found that 57% complained of psychological and emotional difficulties, 25% of family problems and 12 % of difficulties with friends (1979, p. 461; see also *Shapland* 1984, p. 142). Thus it becomes clear why more and more organisations offering support to victims have been founded over the past few years, trying to tackle the most immediate problems directly with the victim, that is emotional help, counseling and information etc. (*Weigend* 1981; *Williams* 1983).

Obviously, the three levels described above and their various aspects and factors are not independent of each other. Therefore the study combined analysis of 403 compensation-agency files with interviews of 96 victims who decided to apply for compensation and 51 victims who did not apply. In addition, the compensation administration personnel of Hamburg and Bremen were questioned to contrast their attitudes toward and experiences of the act with those of the victims.

4. Findings of the Studies

In the following part of the paper, only an overview can be given about some main results of the studies primarily concerning the situation of the

victims and the compensation process. Some investigations, for example, those of *Elias* and *Shapland et al.*, have covered in detail more topics which, however, cannot be discussed in this report.

4.1 Registered Number of Violent Crimes and Number of Applications

American research already has shown that only a small proportion of all victims of ciolent crimes, mostly less than 10%, apply for compensation (*Vaughn & Hofrichter* 1980, p. 30). The application ratios cited by *Carrow* (1980, p. 102) for some other American states are even lower (2-7%) and in the New York/New Jersey study less than 1% of all violent crime victims filed a claim (*Elias* 1984, p. 110). The numbers found by *Baril et al.* for Montreal are similar ones (1984, p. 15). Of course, the ratio depends on the definition of "violent crime", and in Germany, for example, there is considerable dispute about the range of the term (see *Villmow & Plemper* 1984, p. 73-74). However, numerous other factors affect the outcome in terms of the number of applications. The structure of crime, the structure of the population, public information, and awareness of the act, are only some of those aspects. Further, many applicable criminal provisions are constructed in such a way that violent offences in the true sense can be recognized as having been committed where a threat with a specific act of violence occurred. Many violent acts registered in the police statistics may be carried out without any bodily injury being suffered and respective consequences (see *Baril et al.* 1984, p. 16). If one considers, therefore, only serious violent crimes such as homicide and aggravated assaults etc., one will get higher application ratios as cited above. In the Netherlands, calculations indicate that approximately 20% of all potentially eligible crime victims do file a claim (*van Dijk* 1984, p. 4), in Germany the percentages vary between 8 and 20% in the individual states (*Villmow & Plemper* 1989, pp. 80-81; new British figures are presented by *Newburn* 1989, pp. 12-13).

4.2 Characteristics of Applicants, Kinds of Crimes and Effects of the Offences

Numerous studies showed that social factors influence the risk of being victimized (*Elias* 1986, p. 59-65). To account for this, the lifestyle/exposure model has been developed (*Hindelang* 1982, pp. 156-163). Of course, there may be differences between the general group of victims of violent crimes and the special group of applicants because of certain selection processes.

Examination of the applicants' social background, however, serves an additional function because it can be assumed that those factors play an important role when the boards have to decide about worthiness or unworthiness of the claimants. In the American study, most victims were between ages 15 and 45 (74%), two thirds were male, and 46% were married. The results indicated that socio-economic status was not very high: 42% of the victims were unemployed and nearly the same percentage received welfare payments (*Elias* 1983 a, pp. 69-71). The results of the Canadian study of *Baril et al.* correspond the American ones. About 60% of the applicants were between the ages of 14 and 45, nearly two third were men, but only 36% married. Two out of five victims were unemployed at the time of the crime that resulted in their applying compensation (1984, pp. 25-29).

In the British study the victims in assault and robbery cases were primarily men (75%). The age group 18 to 22 years contained one third of all victims. Most of the sample were single, and the rate of unemployment corresponds to that of Conventry and Northampton. So, *Shapland et al.* came to the conclusion: "According to victimization studies, the picture of the typical victim in our study is the correct one" (1985, p. 12; recent *Home Office* research found similar results, see *Newburn* 1989, pp. 8-9).

The research done in Hamburg again showed that 75% of the claimants were male and approximately two thirds stated that they were unmarried, divorced or separated. Nearly 80% belonged to the age groups between 14 and 49. For one third of the sample there was no information about characteristics influencing socio-economic status. Taking profession as a criterion of economic well-being, for the other part of the sample the following picture emerges: 40% had a low social status, 54% belonged to the middle class and 5% to the upper class. It is, however, difficult to compare these data with the results found in the other studies because in Hamburg foreign workers were excluded whereas in the American study 57% of the victims were members of ethnic minorities (*Elias* 1983 a, p. 70), and the British study, too, covered non-white victims.

An interesting result in the American study and the German research was that no significant difference could be found in the social background of claimants and non-claimants. It seems that those factors are not a major determinant when deciding about claiming compensation (*Elias* 1983a, p. 79; *Villmow & Plemper* 1989, p. 97).

Examination of the victim-offender relationship is of special interest because some statutes consider indigible victims having a past or present relationship with the offender (see *Carrow* 1980, pp. 41-43; *Joutsen* 1987, pp. 263-364; *Newburn* 1989, pp. 10-11). the results of the studies correspond

very well. In the British research, 61% of the victims were assaulted by offenders unknown to them. The known perpetrators were primarily relatives or friends, followed by business associates and neighbours (*Shapland et al.* 1985, pp. 10-11). The Quebec study also showed that 61,5% of assailants were strangers to the victims; the other offenders were friends or acquaintances or were related to the victims (*Baril et al.* 1984, p. 43). *Elias* found that little over one half of the perpetrators were strangers, one third were acquaintances and one in five cases could be definded as close relationship (1983 a, p. 87). The remarkable point, however, was the difference in the pattern of relationships between claimants and non-claimants. Intimate relationships, which can be the basis of refusing an award, were reported by 29% of the non-claimant group whereas the claimants showed 5%. *Elias* assumed that potential claimants disqualified themselves by not applying after having notices the restriction in the official program brochures (1983 a, pp. 88-89). For the German study, which found the same tendencies concerning the (relationship) differences in relationships between claimants and non-claimants this explanation cannot be used directly. Neither do the regulations explicitly cite this ground for denying benefits, nor do the brochures of the government nor do those of the boards. Therefore, the victim-offender relationship probably is not a very prominent factor for German victims' decision to apply or not to apply.

Another similar finding can be shown when the effects of the offences are studied. Only 4% of the New York/New Jersey victims experienced no injury, one in five indicated minor harm, 58% received medical assistance, and 16% were hospitalized. *Elias* emphasized that there are no significant differences between the individual samples (1983a, p. 86). His tables, however, show tendencies for non-claimants to have bigger quotas in the groups without injuries or minor harm and a smaller percentage of victims who required medical assistance or were hospitalized (see *Elias* 1983a, p. 268, Table B. 2).Those differences between claimants and non-claimants in physical effects of the offences were also reported by the German victims. Claimants tended to have more serious forms of injuries and were more often reported sick. Possibly future studies with bigger samples will find those aspects worthy of being examined again.

4.3 Applying for Compensation

Besides the different levels of physical, social and psychological effects (see *Shapland et al.* 1985, pp. 87-108), various other causes can influence the decision to apply for compensation. Often lack of information is seen as a main reason (*Newburn* 1989, p. 30). In the British study, a majority of

victims had not heard of any means of obtaining compensation, only 39% had heard of the state provisions (*Shapland et al.* 1985, p. 124). The American victms seem to be better informed, almost one half of the non-claimants in the NewYork/New Jersey study said they had information about the programs (*Elias* 1983 a, p. 111). Striking results, however, have been found in a Dutch national crime survey. Of the general public less than 3% knew that a compensation fund existed, and of the victims of violent crimes only 14% had heard of the scheme's existence (*van Dijk* 1984, p. 5).

Many of the Hamburg victims also lacked adequate information about the compensation system. Four out of ten non-claimants knew that in certain situations financial help by the state could be claimed. Yet the analysis also showed that the regulations are important for health insurers and administrators. There are cases in which the insurance companies are reimbursed by the state (Article 19 Bundesversorgungsgesetz, see *Kirchhoff* 1983/84, pp.29-30). So, not surprisingly the examination of the files in Hamburg suggested that only 11% of the claimants initiated the procedure for compensation on their own. The great majority of the claims were filed by request of agencies of the state medical insurance system, which was the first time many victims were informed about the provisions.

4.4 The Processing of Applications

The psychological success of the compensation program is influenced, among other things, by the length of the process. British data show a mean period of time of approximately nine months, varying from four months to two years (*Shapland et al.* 1985, p. 175; *Newburn* 1989, p. 8). The vast majority of *Elias'* claimants were dissatisfied with the length of their cases, as almost one-half of the cases lasted between 12 and 18 months, followed by 37 % lasting between 18 and 24 months and 12 % lasting more than two years (1983a, p. 184). In contrast, lawyers in Quebec made nine out of ten decisions within a year of receiving the applications (*Baril et al.* 1984, p. 85).

The reasons for the long delays in some countries (in Hamburg the applications on average took nearly one year) seem to be manifold. In many cases applicants filled in forms insufficiently or incorrectly. Therefore, the boards had to request for additional information. Furthermore, most administrators wait for files of enquiries from other institutions like the police, and hospitals etc., or want to consider the outcome of the trial. Another important factor which contributes to many delays - for example in German application cases - is the necessity to get additional medical expert evidence when the medical situation is unclear. Those special inquiries in Hamburg

(concerning also reduced earning capacities) sometimes took 12 and more months until the final report was submitted (for the different factors, see also *Shapland et al.* 1985, pp. 157-158).

Baril et al. point to the fact that rejections in general took longer than awards because they probably were considered longer to ensure that the victim was being treated fairly (1984, p. 86). This is not confirmed by the German data. If a statutory requirement was lacking or could not be proved, applications were refused in the majority of cases within approximately six months. Awards on average took longer as well as the special group of denials being justified with the victim's causing the injury or with the victim's behavior. It can be assumed that in connection with the awards the often necessary medical statements played an important role, whereas in refusals the outcome of the trial had been awaited to be sure that the facts in the decision were correct.

4.5 The Compensation Decision

The results of the studies show a very different structure: In England and Quebec most of the applications resulted in some award being made (83%/75%), whereas in New York/New Jersey and Hamburg only small groups of the claimants got positive decisions (38%/18%). There are, of course, many reasons that influence these results. The British compensation program, for example, in contrast to the other ones covers payment for pain and suffering. Therefore, many victims with minor injuries can receive benefits. At the time of Shapland's study the general minmum limit of loss and harm covered was £150, so the sums of money awarded range from £154 to £3000, with a mean of £611 (*Shapland et al.* 1985, pp. 150, 163). The German scheme, however, is not designed to compensate minor victimizations (see *Jung* 1979, p. 389; *Kirchhoff* 1983/84, p. 29). Therefore, if many applicants with minor injuries try to get awards, the rate of denials must be high (see also *Weintraud* 1980, p. 165). It should be mentioned that at least in Hamburg between 1976 and 1986 the structure of decisions has changed in favour of the victims. The quota of positive decisions doubled to nearly 40%, although there was no significant change in the structure of serious violent crime. Yet it is unclear whether this development depends on better victim information, a better selection by health insurance organisations or a more liberal application of the compensation regulations. Data concerning the years 1987 until 1989 again showed a negative tendency, when only one third of the applications resulted in benefits.

Concerning the high rate of awards in Quebec, the Canadian data indicate that this structure is not unusual. *Hastings* found a slight decrease in the

percentage of applications refused between 1975 and 1976 (16%), 1976 and 1977 (14%) and 1977 and 1978 (12%), even though overall applications were increasing during this period (1983, p. 48). In contrast to this, the American average award rate is lower, approximately 60%. There is wide variation in the rate of benefits made by the various programs, ranging between 24% in Texas and 99% in the Virgin Islands (*McGillis & Smith* 1983, p. 103.).

Although there is only one legal basis for victim compensation in all individual states, in Germany, too, the statistical data show notable differences with respect to the number of awards granted (*Villmow & Plemper* 1989, pp. 78-90). For the American situation, *MGillis & Smith* try to give an explanation: "... the public may be inadequately informed of the program eligibility and benefit policies, resulting in a large number of inappropriate applications. In other cases, a program's strict adherance to reporting and application time period requirements may result in increased denial rates. The program's approach to handling cases with evidence of contributory misconduct may also significantly affect the denial and award rates. In addition, those programs with strict financial-need criteria my deny a larger number of claims than others" (1983, p. 103).

4.6 Reasons for Rejecting Applications

Benefits must be denied when statutory requirements are lacking or cannot be proved. Furthermore, in most programs there are restrictions on the behavior of the victim (for example, responsibility for the injury or when it would be unfair to grant compensation for other reasons, or when non-cooperation with the authorities is observed). For all groups it can be assumed that the stereotypes of the "innocent" and "unworthy" victim are relevant in the decision-making process.

For the first category, lack of evidence that an offence was committed or an application not meeting statutory requirements, the analysis shows that administration officers fear fraudulent claims. Yet most of the studies did not investigate if in the staff's opinion special groups of victims were often suspected of false or exaggerated claims. *Shapland et al.* noted the feeling among those administering the scheme that everything an applicant says should be checked (1985, p. 171). They also described "extra enquiries", but there are no findings on the type of victim who runs into more problems than other applicants when trying to evidence his or her victimisation.

In the German study, too, no clear-cut results could be found. There were, however, tendencies that victims aged 60 years or older are more often seen

as worthy of belief (see also *Geis* 1976, p. 254; *Newburn* 1989, p. 15). These victims were seldom under the influence of alcohol, the offenders were more often unknown, the victimisation places were more likely to be in public and seemed to be less disreputable, and the times of victimisation seldomly were after midnight. This impression that older victims, therefore, are given more "credit" was confirmed by the interviews with the board officials. Obviously, those victims belong to the group of "innocent, worthy" victims.

On the other hand, there is a very unclear picture concerning the characteristics of the so called "problematic" victim. It seemed to us that the aspect "having been drunk" reduced the chances to be seen as worthy of belief. For other factors like being a member of the "milieu" etc., the study could not show that this really influenced the decision. However, more detailed research is necessary (see also *Shapland et al.* 1985, p. 162).

For the second group of ground for denials (contribution to the victims injury, inequity because of the claimant's conduct, non-cooperation etc.), often described as specific eligibility criteria to limit compensation to deserving victims, the studies give some examples concerning the difficult problems (see also *Carrow* 1980, pp. 44-48). In three cases cited by *Shapland et al.* (1985, pp. 161-162), the victims were not seen as "innocent victims". Yet the criteria set out are far from being clear. So the decisions are very different. The data showed one victim being denied an award because of previous convictions, whereas five other claimants obtained benefits even though they had convictions (*Shapland et al.* 1985, p. 161). Similar problems are connected with the issue of provocation or victim responsibility for the offence. In six cases, for example, the researchers came to the conclusion that the victim was the first to use violence, and in seven that he was abusive to the offender. Yet only in two cases benefits were denied or reduced for this reason (*Shapland et al.* 1985, p. 161). Summarizing the findings, the authors state: "The amount of provocation necessary to produce a reduced award or no award at all seems like the extent of previous bad character, to be a matter of judgement" (1985, p. 162). They agree that it is important to examine how the board builds up the picture of the "innocent victim" and which information is used to decide wether a certain claimant fits into this category or does not (for new results see *Newburn* 1989, pp. 17-20). In this context, it has been assumed that the subjective moral values of the members of the board influence the compensation policy. Thus an analysis of the board's decisions on victims of sexual offences not surprisingly found that the regulations are used to carry through predominant values of the middle class and to interdict deviating behavior (*Weintraud* 1980, pp. 147-151).

Not only in Britain, but also in other countries such attitudes can be recognized. *McGillis* and *Smith* cite an American program adminstrator stating that he did not believe that victims involved in assault situations are innocent. In his opinion they involve themselves in "occasions of crime" and so are responsible for their injuries, at least to 10% through poor judgement (1983, p. 71). In another program they found an administrator who had developed for his own use a set of guidelines of percentages of reduction corresponding to levels of provocation. Yet he refused to hand over a copy because of the highly arbitrary nature of the criteria (*McGillis & Smith* 1983, p. 72). The German research, too, found a different and sometimes very broad interpretation given to statutory grounds for denying application. The frequency of denials based on such ground varies widely by state and, therefore, it seems to be of importance where one is involved in a criminal act and applies for compensation (*Villmow & Plemper* 1989, pp. 78-90). The data concerning decisions in Hamburg show a relatively positive development that also can be found in connection with the discussed reasons of denial. Analysis of the files (1978-1980) indicated that only 8% of applications were denied because the victim was held co-responsible or uncooperative etc.. Up to the year 1986 this percentage was reduced to 5% on an average. Of course, this does not mean that those decisions altogether were unproblematic. There were, in fact, cases with moralizing arguments making individual victims to "undeserving victims". Yet the examination did not show concrete indications for strategies to stigmatize certain marginal groups of society, for example, members of the "St.-Pauli-scene" ("Reeperbahn"), homosexuals or prostitutes etc.. The results of the interviews with board officials confirmed this assessment. The board members were considerably aware of those problems because, when reviewing some board decisions, the local Sozialgericht (welfare court) had emphasized that not all victims involved in the subculture were unworthy victims. It may be added to this the fact that critical analyses of the regulations (see *Baumann* 1980; *Stolleis* 1981) in line with restrictive decisions of the Federal Supreme Welfare Court showed the necessity of reviewing the board's criteria. Obviously, in Hamburg at that time the staff became more careful about the reasons for denying benefits. Yet the statistical data now show that there is (1987-1989) a new development that again should be observed carefully (see the table).

5. Concluding Remarks

Analysis of the application of some compensation programs showed very diverse results. Therefore, one can understand that the judgements are not

corresponding. Concerning the main official goals of compensation schemes - repaying a substantial proportion of victims of violent crime, improving attitudes and cooperation among people towards criminal justice, victim compensation, and government - American and Dutch evaluation research comes to the conclusion that the programs generally are a failure (see *van Dijk* 1984, p. 13; *Elias* 1984, pp. 111-113). Many respondents were dissatisfied with delays, inconveniences, poor information, inability to participate and the restrictive eligibility requirements. Especially applicants whose claims have been rejected express negative attitudes and their willingness to cooperate in future is minimal. Thus, claimants often were more discontented than non-claimants (*Elias* 1984, p. 111).

Yet British victims, too, expressed reservations although they had a high rate of applications resulting in an award. Only 50% of those interviewed were satisfied or very satisfied, whereas 41% felt dissatisfied or very dissatisfied (*Shapland et al.* 1985, p. 164). Similar ambivalent reactions can be found when Canadian applicants comment on their experiences (*Baril et al.* 1984, pp. 122-136).

Of course, compensation programs have provided valuable aid to thousands of victims. German data, for example, show that overall about 210 millions DM have been paid out by the end of the year 1988 (for British figures see *Newburn* 1989, p. 1). It is, however, in most countries only a minority which benefits from the existing schemes. Therefore critics which scholars claim that victim compensation in its present form is "only a symbolic policy that served to justify strengthening of police forces, provided political advantages to supporters, facilitated social control of the population and yet substantially failed in providing most victims with assistence" (*Elias* 1983b, p. 213; see also *Miers* 1983). Even if not every aspect of this negative statement can be totally accepted, it seems obvious that necessary improvements in victim compensation should be made, otherwise characterizations like those of *van Dijk* will be found again: "It gives too little, too late to too few of the crime victims" (1984, p. 81).

Table: Structure of Compensation Decisions in Hamburg 1981-1989

Year	Claims processed	Claims granted	Claims denied because of lack of statutory requirements, lack of evidence etc.	Claims denied because of co-responsibility of the victim; unfairness; non-cooperation etc.	Other decisions, e.g. withdrawal of application etc.
1981	499	156 = 31.3%	277 = 55.5%	3 = 0.6%	63 = 12.6%
1982	574	228 = 39.7%	284 = 49.5%	24 = 4.2%	38 = 6.6%
1983	513	206 = 40.2%	217 = 42.3%	27 = 5.3%	63 = 12.3%
1984	429	148 = 34.5%	209 = 48.7%	18 = 4.2%	54 = 12.3%
1985	388	154 = 39,7%	164 = 42.3%	18 = 4.6%	52 = 13.4%
1986	368	141 = 38.3%	161 = 43.8%	19 = 5.2%	47 = 12.8%
1987	393	129 = 32.8%	162 = 41.2%	39 = 9.9%	63 = 16.0%
1988	420	126 = 30.9%	203 = 48.3%	48 = 11.4%	43 = 10.2%
1989	373	104 = 27.9%	183 = 49.1%	32 = 8.6%	54 = 14.5%

6. References

Baril, M., Laflamme-Cusson, S., & Beauchemin, S. (1984). Crime victims compensation. An assessment of the Quebec JVAC Program. Department of Justice of Canada. Crime victims working paper No. 12. Ottawa.

Baumann, J. (1980). Zurechnungskriterien beim Opferentschädigungsgesetz. Die Sozialgerichtsbarkeit, 27 (6), 221-227.

Burns, P. (1983). A comparative overview of the criminal injuries compensation schemes. Victimology 8 (3-4), 102-110.

Carrow, D. (1980). Crime victim compensation. Program model. U.S. Department of Justice. Washington: National Institute of Justice.

van Dijk, J. (1984). Compensation by the state or by the offender: the victim's perspective. Paper presented at the conference on victim's restitution and compensation in the criminal justice system at Cambridge on 13-16 August.

van Dijk, J. (1984). State assistance to the victim of crime in securing compensation: alternative models and the expectations of the victim, pp. 80-84. In: Helsinki Institute for Crime Prevention and Control (Ed.), Towards a victim policy in Europe. Helsinki.

Elias, R. (1983a). Victims of the system: crime victims and compensation in American politics and criminal justice. New Brunswick. London: Transaction Books.

Elias, R. (1983b). The symbolic politics of victim compensation. Victimology 8 (1-2), 213-224.

Elias, R. (1984). Alienating the victim: compensation and victim attitudes. Journal of Social Issues 40 (1), 103-116.

Elias, R. (1986). The politics of victimization. Victims, victimology, and human rights. New York, Oxford: Oxford University Press.

Geis, G. (1976). Crime victims and victim compensation programs. In: W.F. McDonald (Ed.), Criminal justice and the victims (pp. 237-256). Beverly Hills: Sage.

Hastings, R. (1983). A theoretical assessment of criminal injuries compensation in Canada. Policy, programmes and evaluation. Department of Justice of Canada. Crime victims working paper No.6. Ottawa.

Hindelang, M.J. (1982). Victimization surveying: theory and research. In: H.J. Schneider (Ed.). The victim in international perspective (pp. 151-165). Berlin, New York: de Gruyter.

Hoffmann-Riem, W. (1980). Bürgernahe Verwaltung? Analysen über das Verhältnis von Bürger und Verwaltung. Neuwied, Darmstadt: Luchterhand.

Joutsen, M. (1987). The role of the victim of crime in European criminal justice systems. A crossnational study of the role of the victim. Helsinki: Helsinki Institute for Crime Prevention and Control.

Jung, H. (1979). Entschädigung des Opfers. In: G.F. Kirchhoff & K. Sessar (Eds.), Das Verbrechensopfer (pp. 379-395). Bochum: Brockmeyer.

Kirchhoff, G.F. (1983/84). The German victim compensation act. Victimology Newsletter 3 (1), 17-36.

Kirchhoff, G.F., & Kirchhoff, C. (1979). Untersuchungen im Dunkelfeld sexueller Viktimisation. In: G.F. Kirchhoff & K. Sessar (Eds.), Das Verbrechensopfer (pp. 275-299). Bochum: Brockmeyer.

Knudten, R.D., & Knudten, M.S. (1979). Opfer- und Zeugenprogramme in den Vereinigten Staaten. In: G.F. Kirchhoff and K. Sessar (Eds.), Das Verbrechensopfer (pp. 459-478). Bochum: Brockmeyer.

Mayntz, R. (1985). Soziologie der öffentlichen Verwaltung. Heidelberg: C.F. Müller.

McGillis, D., & Smith, P. (1983). Compensating victims of crime: An analysis of American programs. U.S. Department of Justice. Washington: National Institute of Justice.

Miers, D. (1980). Victim compensation as a labelling process. Victimology 5 (1), 3-16.

Miers, D. (1983). Compensation and conceptions of victims of crime. Victimology 8 (1-2), 204-212.

Miers, D. (1990). Positivist victimology: A critique - part 2: Critical victimology. International Review of Victimology, 1, 219-230.

Newburn, T. (1989). The settlement of claims at the criminal injuries compensation board. Home office research study No.112. London: Her Majesty's Stationery Office.

Shapland, J. (1984). Victims, the criminal justice system and compensation. British Journal of Criminology, 24 (2), 131-149.

Shapland, J., Willmore, J., & Duff, P. (1985). Victims in the criminal justice system. Aldershot: Gower.

Stolleis, M. (1981). Entschädigung für Opfer von Gewalttaten - erste Konkretisierungen durch die Rechtsprechung. In: W. Gitter, W. Thieme & H. Zacher (Eds.), Festschrift für G. Wannagat (pp. 579-598). Köln: Heymanns.

Vaughn, J., & Hofrichter, R. (1980). Programme visibility in state victim compensation programmes. Victimology 5 (1), 30-41.

Villmow, B., & Plemper, B. (1984). Opfer und Opferentschädigung: einige statistische Daten und Probleme. Monatsschrift für Kriminologie und Strafrechtform 67 (2), 73-85.

Villmow, B., & Plemper, B. (1989). Praxis der Opferentschädigung. Hamburger Entscheidungen und Erfahrungen von Opfern von Gewaltdelikten. Pfaffenweiler.

Weigend, T. (1981). Assisting the victim. A report on efforts to strenghten the position of the victim in the American system of criminal justice. Freiburg: Max-Planck-Institut.

Weintraud, U. (1980). Staatliche Entschädigung für Opfer von Gewalttaten in Großbritanien und der Bundesrepublik Deutschland. Baden-Baden: Nomos Verlagsgesellschaft.

Williams, K. (1983). Community resources for victims of crime. Home Office, Research and Planning Unit Paper 14. London.

Compensation as a Criminal Penalty?

Heinz Müller-Dietz

Contents

1. The Renaissance of The Idea of Compensation in Criminal Law

The criminal political development in recent times is subject to imminent radical changes. Admittedly the variety of different tendencies cannot in any way be reduced to a common denomenator. Questions which are more practice-orientated, point towards the improvement of criminal preventive initiatives - in particular in forms of new crime such as for instance environmental crime and organized crime (see *Kaiser & H.-J. Albrecht* 1990). In this way, interest is in the end aimed at working out new, more effective penalties. In the theoretical and at the same time practical spheres, on the one hand neo-classical reprisal and deterrence tendencies, and on the other hand the shift towards alternative patterns of response stand out; the latter amount to nothing more than alternatives to imprisonment and are aimed at social or private ways of solving conflicts and therefore move into a criminal law penalty position, or should do so (see *Killias* in: *Kaiser & H.-J. Albrecht* 1990, p. 249 et seq.). Both the efforts aimed at making the criminal law a more efficient or sharper instrument of crime control and the tendency to turn away from the criminal law towards replacing it with other legal or social means with which to satisfy society, should be considered (see *Bianchi* 1988; *Maelicke & Ortner* 1988; *Koch* 1988).

When the spectrum of such national and international trends is widely divided, two characteristics stand out in particular ways: one of them is the development of criminal politics which is clearly victim-orientated. The other is guided more generally towards giving more consideration to the possibility of social or private reconciliation which should replace penalties either completely or partially.

1.1 The Change of the Paradigm in Crime Policy

Until the 1970s, criminal political development in the Federal Republic of Germany was guided by signs of orientation towards the offender. Legislation politics and academic discussion were characteristic of this movement which to a great extent placed the offender at the center point of its efforts. Both criminal law reform (1975), and the law in respect of sentencing (Strafvollzugsgesetz 1977; Prison Act) placed considerable emphasis upon the goal of social integration (misleading: rehabilitation) of the criminal.

The emphasis which was placed on this aim of special crime prevention was gradually diminished because of practical experience of difficulties insofar as treatment of offenders within prisons was concerned as well as criminological evaluation studies. The "crisis of imprisonment" (*Jescheck*) has contributed to the fact that an increasing number of non-custodial penalties are being preferred, and in addition led to the fact that more emphasis is being placed on the victim in the field of criminal political thought and perspective. In the meantime - and what concerns crime policy - the victim of crime has stepped into the shoes of the offender. This does not naturally mean that the offender has no further role to play in practice and theory. The scales are now more decisively weighted towards the victim insofar as discussion and assessment of goals are concerned (see for example *Riess* 1984; *Janssen & Kerner* 1986; *Schünemann* 1986; *Neumann* 1987; *Schneider* 1989). This change of paradigm is not only due to disillusionment in view of the possibilities of rehabilitating the offender but is also an expression of insight into the neglect of the specific interests of the victim in criminal law and criminal procedure.

1.2 Private Interests in Reconciliation versus the so-called State Right to Punishment

In the course of the monopolization of the punitive power by and in the State, which is the result of a long history of legal development, the State interest in criminal prosecution and execution of sentence has increasingly emerged. Accordingly, the interests in those involved in the criminal act and of those affected by the act, of offender and victim, have been driven back. The so-called State claim or right to punishment and its realization stand at the center point of criminal political aims. Beyond this right or claim, victim and offender's interests in reconciliation and pacification find little or no outlet in the criminal law and criminal procedure. This refers in criminal law for instance to the fact that the condition imposing compensation (§ 56b II Nr. 1 StGB; Strafgesetzbuch; Penal Code) merely plays a minor role and the so-called adhesive procedure to criminal proceedings (Adhäsionsverfahren) which makes it possible for the injured party to make a claim for compensation for damages caused by the criminal act, scarcely happens in practice (§ 403 StPO; Strafprozeßordnung; Code of Criminal Procedure).

As the emphasis upon the victim as become stronger, at the same time awareness has increased of the fact that the neglect of private or social interests can interfere with or restrict the general function of the law to provide for reconciliation and pacification. This gave the criminal political trend which was directed towards consideration of such interests within the

framework of the criminal law, increasing impetus. In this way, concepts of offender-victim-reconciliation must be developed and practically tested (see *Grave* 1988; *Marks & Rössner* 1989) and more weight should be attached to concepts of compensation for damages caused by the crime (see *Schöch* 1987; *Frehsee* 1987; *Frühauf* 1988; *Weigend* 1989; *Eser, Kaiser & Madlener* 1990).

2. Subject Matter of the Study

2.1 History of the Study

The study set out can be viewed within this criminal political background (*Müller-Dietz* 1988). It emerged from considerations and results which arose from research commissioned by the Federal Ministry of Justice. The working group to which *Hubert Beste, Gabriele Dolde, Rainer-Dieter Hering, Heike Jung, Paul Wetterich* and the author belonged, was entrusted in 1985 by the Federal Ministry of Justice, with the task of investigating "problems of compensation caused by the criminal, in particular in terms of substantive-criminal and criminal-procedural legal aspects, including practice-related experience" (*Bundesministerium der Justiz* 1988, p. 9). In the course of its discussions, it worked on the situation of compensation for damages in the FRG and also the relevant status of international discussion, it dealt with structural and typological considerations about the possible organization of compensation from a criminal law point of view and voiced recommendations in respect of future criminal laws (*Bundesministerium der Justiz* 1988, p. 47). The final report was submitted in 1988. Basic considerations are dealt with and developed by the author below, in view of the discussion which has taken place since then, mostly with reference to a substantive law approach.

2.2 The Approach relating to Substantive Criminal Law

As past experience and observation have shown, compensation for damages can find its way in various ways and in varied forms into the criminal justice system. It can - for instance as a private model for solving conflicts - replace punishment itself. It can also take the form of an independent criminal legal response, which at least in some areas replaces conventional penalties such as pecuniary penalties/fines and imprisonment. The first cases are concerned to a certain degree with social conflicts insofar as they are "restored to private ownership" and which should bear in mind the interests

and needs of those directly involved in the crime and of those affected namely of offender and victim. The basis of this is the abolitionistic perspective of driving back the state right to punishment in favor of settlement of conflicts by using extrajudicial or non-penal means (see *Feltes* in: *Janssen & Kerner* 1986, p. 407 et seq.; *Rössner* 1989, p. 7 et seq.).

Insofar as compensation for damages is integrated into the substantive criminal law as a particular form of response, it serves most of all to satisfy the material interests of the victim in respect of a settlement within the structure of the criminal procedure. In this way, many goals can be strived for. The victim of the crime can be spared having to enforce his civil law claim for compensation according to German law, by instigating a (second) separate civil court process, particularly since the adhesive procedure - as indicated - is practically minimous. This takes account of the element of victim satisfaction - merely because of direct consideration of the victim's interests by the criminal law. However setting up compensation as an independent criminal law response, raises the question of its compatibility with the aims and purposes of the criminal law system and system of penalties (*Roxin* 1987, p. 37 et seq.; *Hirsch* 1990; *Müller-Dietz* in: *Eser, Kaiser & Madlener* 1990, p. 355 et seq.). The question is therefore under discussion as to whether such a standpoint, without a theoretical break, can be integrated into the criminal legal system, or would lead to a new direction in crime policy. This is indicated by the fundamental dimension of a substantive penal concept.

2.3 Delimitation from other Crime Policy-related Concepts

Considerations of substantive criminal concepts naturally do not exclude consideration of other crime policy-related concepts. In the entire spectrum of real possibilities, alternatives to compensation for damages could prove to be an exceptional form of criminal response and has even been worthy of preferential treatment. A comprehensive analysis first of all of the entire problem area, will be able to assess whether or not this is actually the case, for instance as envisaged at the time by the Max Planck Institute for Foreign and International Criminal Law, Freiburg i.Br. (MPI) (see *Roxin* in: *Eser, Kaiser & Madlener* 1990, p. 367 et seq.).

It is however necessary, independent of what has just been said, to differentiate between the substantive criminal law approach and those concepts which realize compensation as a possibility or alternative means of conflict settlement or of diversion strategies (see *Voss & Pfeiffer* in: *Müller & Otto* 1986, p. 79 et seq.; *Blau* 1987; *Frehsee* 1987, p. 202 et seq.) or strive towards an improvement of the legal position of the injured party in

the procedure (*Riess* 1987). In the former case, the goal of pushing criminal law into the background was envisaged. In the latter case, it is concerned in the end with transferring more weight to the position of the injured parties - witnesses in the process. This was to some extent visualized by the German Victim Protection Act of 1968 (§ 406d et seq. StPO).

2.4 Various Criminal Law Concepts

The various criminal law concepts which plan, or permit the consideration of compensation for damages in procedural ways or by the imposition of legal penalties, can be divided to a considerable extent, into three initial stages: One can distinguish between procedural, enforcement and substantive legal solutions depending on the area of the law and the institutions concerned with so-called penal social control. The practical handling of such solutions is distributed between the department of public prosecution, courts and prison (*Bundesministerium der Justiz* 1988; *Müller-Dietz* 1988).

2.4.1 Solutions relating to Procedural Law

Solutions at a procedural law level are considered according to German law in two ways: One is namely that compensation for damages can lead to the end, in the form of suspension or discontinuance, of the criminal procedure. On the other hand, it can become an additional procedural matter on the application of the injured party, alongside the pursuit of the state's right to punishment.

The facilities in particular for compensation imposed as a condition according to § 153a StPO, are of particular importance in the stopping of the court procedure. After that, the department of public prosecution can, with the agreement of the appropriate court and the person charged, temporarily refraim from legal antion and impose upon him, the task of "making an effort towards bringing about compensation for damages caused by the act". This facility is suitable "where there is merely a small degree of guilt, in order to avoid public interest in criminal prosecution". The court can also, with the agreement of the department of public prosecution and the person charged, stop the procedure temporarily after the institution of the action, provided the same requirements are met. If the person charged or the accused complies with the condition, the criminal act can "no longer be prosecuted as a criminal offence" (§ 153a I 4, II 2 StPO). Admittedly, in practice, this possibility has been made use of only seldom, according to former empirical research; it appears - alongside the problem of lack of

ability on the part of the person charged/accused - that the view that the supervision of payments of compensation often takes up more time than the control of other monetary conditions (see *Frehsee* 1987, p. 268 et seq.).

The second procedural law possibility consists in making use of the so-called adhesive procedure (§ 403 StPO). The injured party can, according to this procedure, make a claim against the defender for pecuniary damages caused by the act. Many reasons have been put forward as to why this procedure has remained practically meaningless within the German criminal process. The criminal court judge therefore shys away from the additional investigation and time involved in detailed assessment of the claim in many cases. As he has to adapt himself in this way to civil law rules, the use of which he is not familiar with because of his activities as a criminal law judge, he retreats to the rules within his authority and refrains from making such a decision "if the application for discharge of the case is not suitable in the criminal procedure" (§ 405 StPO, see *Frehsee* 1987, p. 184 et seq.).

A third possibility which until now has not been realized, is illustrated by the restitution procedure recommended by *Schöch* (1989). This should be able to be practised with the consent of the confessing offender, in order to be able to bring about a compensation agreement between victim and offender. If such an agreement comes about, the so-called restitution judge should be able, depending upon the facts and circumstances, either to disregard punishment entirely or alternatively mitigate punishment.

In any event, the procedural approaches up until now, which are aimed at compensation, prove to be problematic (*Müller-Dietz* 1988, p. 967). It is still undecided as to whether concepts can be developed which will help the idea of compensation to make a procedural break-through.

2.4.2 Solutions relating to Enforcement

Approaches relating to legal enforcement have developed more significance within the framework of pecuniary penalties in particular. They also play a role, although a secondary role within the penal system (see *Wulf* 1985; cf. also *Brenzikofer* in: *Marks & Rössner* 1989, p. 379 et seq.).

There is also the possibility of having the pecuniary penalty due to the State, declared payable to the injured party, under particular conditions. It is also possible to allow the claim for compensation for damages to take priority over the pecuniary penalty in cases of concurring claims (see *Frehsee* 1987, p. 212 et seq.). Both solutions have in common the fact that the fiscal interests of the State are placed second to those of the injured party.

The German law has until now, to some extent, followed such paths which have already been followed in other countries (e.g. in Switzerland; see *Schulz* in: *Eser, Kaiser & Madlener* 1990, p. 219 et seq.). In this sense, the authority of the law enforcement authorities to allow realization of payment of pecuniary penalties "if the compensation for damage caused by the criminal act of those convicted would be considerably endangered, without approval (§ 459a I 2 StPO)", can be understood. According to more extensive but up to now practically unrealized suggestions, either the conditional remission - of a part - of the pecuniary penalty should be introduced in respect of a case of compensation or at least positive significance should be attributed to compensation by refraining from enforcement of pecuniary penalties (§ 459d StPO), or imprisonment in default of payment of fine (§ 459f StPO) (*Müller-Dietz* 1988, p. 967). Regulations which irrespective of their concrete conceptualization would establish the priority of compensation would come in useful for the injured parties in particular in view of the disadvantageous income and property levels of those debtors subject to pecuniary penalties.

Approaches which are directed towards compensation during imprisonment, are therefore only of limited importance. As experience shows, negative effects accumulate: Many prisoners have to cope with a high extent of debts (see *Freytag* 1989, p. 10 et seq.). The highest financial burdens cannot be reduced during the period of incarceration. In contrast, these burdens increase because of the comparatively limited remuneration (see §§ 43, 200 StVollzG; Strafvollzugsgesetz; Prison Act). There is therefore only room for compensation during imprisonment in a small number of suitable cases, in view of the present legal position and practice. It is therefore most likely be realized on the basis of programs which provide for settlement of debts (see *Freytag* 1989, p. 42 et seq.).

2.4.3 Solutions Relating to Substantive Law

Substantive legal principles in respect of compensation are of most significance in the area of legal consequences. Compensation by the offender can accordingly have an effect on whether or not, and how a punishment is imposed. Three concepts can to a considerable extent be distinguished from each other in this respect (see *Müller-Dietz* 1988, p. 968 et seq.):

The first possibility exists in that the actual efforts towards or achievements of compensation, or the corresponding formal obligations of the offender - for instance in relation to property offences - can be recognized

as a ground for repealing sentence. Austrian law provides for such an example (§ 167 öStGB; Austrian Penal Code; see *Hoepfel, Krainz* in: *Eser, Kaiser & Madlener* 1990, p. 171 et seq., 197 et seq.).

According to a further concept realized in German law (§ 46 II StGB), compensation allows a claim for mitigation to be made, which influences the determination of the penalty in relation to the offender. Afterwards, the criminal judge must take into account, in establishing the degree of punishment, the behavior of the offender after the act and in particular his efforts "to compensate for damages" and likewise "to reach a settlement with the injured party" (see *Frehsee* 1987, p. 201 et seq.).

A third substantive law variant is to look into the establishment of compensation as a non-independent or independent criminal penalty. The non-independent form has been realized in German criminal law. Accordingly, the court can require those convicted to "compensate for the damage caused by the criminal act according to ability" (§ 57a III 1 StGB), where there is suspension of a determinate prison sentence on probation (§ 56 StGB) and also in cases where there is suspension of the rest of a determinate prison sentence (§ 57 III 1 StGB) or lifelong imprisonment (§ 57a III 2 StGB). In all of these cases, the compensation is tied up with the principle of punishment, namely imprisonment, and is therefore dependent on this. Admittedly, the compensation has only little practical significance in the form of probation conditions (see *Frehsee* 1987, p. 264 et seq.). It is similar to compensation in the form of a condition attached to the suspension of a prosecution (see 2.4.1).

The German legislature has not been able to make up its mind as to creation of compensation as an independent legal response. Until now, merely the first suggestions and ideas have been set out in relation to crime policy - alongside many practical projects relating to offender-victim-settlement (see *Marks & Rössner* 1989 and, see *Bundesministerium der Justiz* 1988, p. 47; *Schöch* in: *Eser, Kaiser & Madlener* 1990, p. 73 et seq.), the chances of realization of which must be regarded as undecided. Some foreign laws have however already undertaken first steps in this direction. A characteristic example is the compensation order in Great Britain (see *Jung* in: *Eser, Kaiser & Madlener* 1990, p. 93 et seq.). Admittedly international discussion in this field of all others, is isolated. This is becoming apparent from the multitude of theoretical and empirical questions which have been drawn around the relationship of the criminal law and civil law, punishment and compensation, state interests and private interests in respect of settlement (see *H.-J. Albrecht, Müller-Dietz* in: *Eser, Kaiser & Madlener* 1990, p. 43 et seq., 355 et seq.).

3. Compensation in the General Context of Legal Approaches

Two aspects appear in this connection both of which have had a lasting and particularly significant effect upon the development of German law: Firstly, the compensation/settlement of a property/pecuniary damage is traditionally understood in the first instance, as a task for the civil law. Accordingly, the criminal law - in its substantive content and also in its procedural content - attributes only comparatively marginal weight to compensation.

3.1 The Traditional Starting Point: Compensation and Punishment

The comparison and distinction between criminal law and civil law, punishment and compensation, is the result of a long history of legal development, which is closely tied to monopolization of the punitive power in the state, and the extension of the state demand for punishment. At the same time, this process has increasingly led to abstraction of those people involved directly in the criminal act, namely the victim and the offender, and to removing the formalized handling of the social conflict which is constituted by the criminal act, namely the criminal procedure, from the concrete world of life itself. The elaboration of various forms of wrong involving injury or damage, corresponds with the line of development, to which the significant theoretical attention was devoted in the 19th century (see *E.A. Wolff* in: *Hassemer* 1987, p. 137 et seq.). According to this, of the various individual legal consequences, merely compensation and punishment correspond to civilian and punishable wrong and compensation appears more as an object and task for the civil law than the criminal law. This applies in spite of some overlapping substance, for instance the function of legal redress for (civil law) damages for pain and suffering.

A number of criminal theoretical concepts were developed in the 19th century. These concepts saw compensation in a complete sense, as settlement on the one hand of material and on the other hand of psychical and social damage (in relation to the victim and the other citizens not affected by the criminal act). However, these concepts which were partly labelled restitution and reimbursement theories and partly as recovery or (legal) redress theories, were unable to succeed in further discussion (see *Müller-Dietz* 1983; *Frehsee* 1987, p. 50 et seq.).

3.2 The Neglect of Interests in Settlement, in Criminal Law and Practice

The other side of the study of the development of the law with its counter arguments of compensation and punishment, form the neglect of the personal relationships, interests and needs of victim and offender. Accordingly, it is no longer a question of eliminating - in whatever way and with whatever results - the social conflict between the parties involved in the crime and the parties affected by the crime. This is rather a task which is incumbant upon the state. The interests of the victim and offender in reaching a settlement and pacification are therefore not thematized primarily in the criminal proceedings, but the criminal procedure is aimed in the first instance at satisfying the interest of the state in making the claim to punishment (see *Frehsee* 1987, p. 890 et seq.; *Rössner* in Marks & Rössner 1989, p. 7 et seq.).

Characteristic of this in particular, is the distribution of power and opportunity within the German criminal (law) procedure to bring influence to bear upon the course and results of the legal proceedings. The authoritative decision-maker in the criminal procedure, is represented by the criminal law institutions of authority which are in control, alongside the police and most of all the department of prosecution and civil court. Central procedural rules such as the principle of mandatory prosecution (Legalitätsprinzip) and the principle of official investigation by the public prosecutor (Grundsatz der Amtsermittlung) also contribute to this. For this reason, the opportunities for the victim and offender to shape or influence the procedure are particularly limited. Both parties to the proceedings are confined to safeguarding the specific rights of the accused and witnesses (determined by the rule of law).

This also applies - to the same extent - in respect of the enforcement of settlement and compensation interests of the victims in the criminal procedure. In this respect, it is open to the injured party, alongside the considerably obsolete legal institution of the adhesive procedure (§§ 403 et seq. StPO) already mentioned, to make use of the possibilities of an accessory prosecution (Nebenklage; §§ 394 et seq. StPO) and a private prosecution (Privatklage; §§ 374 et seq. StPO). He can bring no influence to bear upon a condition directing suspension/discontinuance of the proceedings, himself (summarized in *Rieß* 1987, see 2.4.1).

The doctrine of the so-called state right/claim to criminal punishment or sanction, has finally had a negative effect upon the satisfaction of private interests in the criminal procedure. The state accordingly appears in the criminal process - as it were, acting on behalf of the legal community - as

the "rightful party". The state alone can achieve payment of the pecuniary penalty/fine from the criminal or the intrusion upon a person's freedom - in cases where imprisonment is imposed. The injured party himself can only assert his claim to compensation in the criminal procedure - as explained - under more difficult circumstances. However, the offender is then primarily indebted to the state in respect of fulfillment of his duties. A direction to suspend or discontinue proceedings in a case of compensation, is an example of this (see *Müller-Dietz* 1988, p. 971).

4. Compensation as a "Third Path" in the Criminal Law?

The neglect of elementary victim and settlement interests in the traditional criminal process, has given further impetus to considerations focussing upon the development of compensation as an independent penalty or response in the area of criminal law. Such ideas come to mind particularly, if compensation is not merely seen as a means to compensate for the (property) damages caused by the crime, but if it is seen as an opportunity towards settlement or disposal of criminal legal conflicts. The models or projects of victim-offender reconciliation frequently stress this pacifying effect (see *Marks & Rössner* 1989).

In the meantime, past experience and discussion has shown that compensation cannot be further integrated into the spectrum of the system of penalties, owing to its particular nature. This applies in particular in view of the separation of and differentiation between punishment and compensation, and also in view of the fact that the criminal law has traditionally had difficulty in accepting the idea of compensation into its repertoire of legal consequences. If and so long as compensation for damages is understood primarily as a task for the civil law and in this way therefore a civil concept (see 3.1), the significance and character of a "classical" criminal penalty cannot be attributed to the concept of compensation. Such considerations have therefore lead to the suggestion that compensation should be formed as a "third path" alongside punishment in its narrower sense, and the measures for prevention of crime and reformation of the offender (*Roxin* 1987, p. 52; *Schöch* in: *Eser, Kaiser & Madlener* 1990, p. 73 et seq.).

The realization of such a suggestion throws up an entirely new set of questions which have already been taken up for some time in past discussion, but never conclusively settled (see *Bundesministerium für Justiz* 1988, p. 34 et seq.; *Müller-Dietz* 1988, p. 972 et seq.; *H.-J. Albrecht, Schöch* in: *Eser, Kaiser & Madlener* 1990, p. 43 et seq., 73 et seq.). Such questions are partly legally theoretical and partly empirical in nature. On the one hand, we are concerned with setting a target, and justification of compensation as

an independent criminal response. In this respect, the relationship to the recognized criminal goal and to the traditional criminal legal penalties, requires clarification. From an empirical point of view, the question now arises as to the area of application and implementation of such a response, which in any event is new to German law. The difficulties which are tied up with integration of compensation into the system of criminal law consequences, have caused in addition, writers of the accordingly alternative designs, to develop a restitution model which is based on the willing efforts of the offender, which foresees dispensation with punishment in respect of a case where there is full compensation for damages - where there is clear establishment of guilt - and therefore no court conviction for such an outcome (*Schöch* in: *Eser, Kaiser & Madlener* 1990, p. 89 et seq.).

4.1 Setting Targets

Thoughts and ideas up until now (see esp. 1.), show that compensation can pursue quite differing goals. It can bear in mind purposes of abolition and diversion, victim's interests in settlement and the pacification requirements of the parties involved in the crime and those affected. Positive effects upon the victim and the offender, the legal community and the so-called authorities of penal control, can also be effected.

This is evident in cases of victim-offender-reconciliation or in cases where compensation is the outcome, both of which help to avoid a criminal procedure form the outset. The fact that such combined settlements or solutions are coming up again and again in practice, is well known (for example *Hanak* in: *Müller & Otto* 1986, p. 177 et seq.). Until now, merely an insufficiently researched dark area in respect of solutions to private and social conflicts, has existed. The preference for proceeding in such a way is obvious: It saves both the victim and the offender who are involved in the criminal court procedure, psychical-social burdens and disadvantegeous legal consequences. The injured party must not in cases of extra-judicial settlement, enlist the help of the court to satisfy his interest in settlement and he is most of all spared the subsequent civil court process to enable enforcement of his claim. The position of his interest lies in that he can thus reach his goal in a much shorter and easier way. The negative legal and social effects of a conviction fall upon the offender. The Ministry of Justice also profits from this joint disposal of the conflict, because in this way, the court procedure is avoided.

These grounds which have admittedly been presented in an ideal-typical form, point decisively in favor of the practical possibilities of an extra-judicial victim-offender reconciliation, with or without consultation or media-

tion being encouraged (see *Schreckling & Pieplow* 1989; *Marks & Rössner* 1989; *Arbeitsgruppe TOA-Standards* 1989; *Schreckling* 1990). In contrast, a court judgement in favor of compensation - in so far as the introduction of such a response can be considered - points to a solution which is a second choice. At any rate, it takes the interests of the victim and offender more strongly into account than the traditional criminal penalty (just as for example pecuniary penalty/fine or suspension of sentence in favor of probation) which it would replace.

Such a criminal legal response would move the real interests of the victim in settlement into the focal point of the court decision, and in this way push the right of the state to punishment into the background, this being in any event of abstract and symbolical significance and therefore something which is difficult to comprehend and understand from the point of view of the juridical layman. The offender would in this way clearly be more aware of what he had caused as a result of his criminal act than if the "classical" penal sanction was imposed. Frequently he believes that he has "paid for" his crime by means of the pecuniary penalty or completion of his prison term, without recognizing the injury or damage which he has caused to the victim. The court cooperation or the confirmation of the duty to compensate, can contribute at the same time to strengthening the general awareness of "norms" and "values" which are directed towards recognition of and respect for the right and property of others (see *Frehsee* 1987, p. 87 et seq.; *Roxin* 1987, p. 47 et seq.). The point of such a response would therefore be to work towards eliminating every disturbance which the offender has caused by his crime in relation to the victim and also the legal community. In this way, it would be a function of social pacification, which is understood in many ways as the comprehensive task of the criminal law. The point of view of bringing relief to the judiciary in that a subsequent civil court procedure would be avoided, would therefore lose weight (*Müller-Dietz* 1988, p. 973).

4.2 Difficulties of Legitimation

4.2.1 Aspects in Penal Theory

The ideas of settlement and restitution have played a considerable role in the historical development of penal theories (see 3.1). This shows that the idea of compensation is in no way and certainly must not be foreign to the criminal law. In the meantime, the concepts aimed at restitution or settlement of damages caused by an act of crime, by means of criminal punishment, were unable to succeed. The differentiation and refinement of the legal system has led to the fact that varying functions have been added to the

various legal outcomes, namely compensation and punishment. Accordingly, criminal theoretical aspects of retribution and - general preventive - deterrence, which can only be strongly associated with aims of compensation, have for a long time taken priority.

It only appears to have been possible to justify compensation in penal theory, in the course of a new departure in crime policy. This has happened - at least up to now - in two different ways. One concept deals with connecting compensation for damages to the recognized aims of punishment (of today). A further concept would prefer it to be identified as a new penal objective - namely in the further development of the criminal legal system.

The first principle can therefore be easily justified because it can be linked to the prevailing justifications and aims of the criminal law and of criminal penalties. 'Positive general prevention/deterrence', the so-called 'prevention by integration' and 'positive specific prevention/deterrence', the rehabilitation of the offender, are taken into account as such purposes. The 'positive general prevention/deterrence' is aimed at training the citizen to comply with the laws and at maintenance and strengthening general awareness of the law. The function of compensation is however in agreement with this (see *Roxin* 1987, p. 47 et seq.). The settlement between a victim and the offender can in this sense point to a means by which the relationship between the two parties which has been destroyed because of the crime, can be improved and social peace restored. The socially constructive efforts of the offender can help to strengthen the priority of standards and in this way the social and individual awareness of the law. It can work against the neutral tendencies of the offender and remind him of his social responsibility. The legal community can be convinced that the state is looking after the objects of legal protection and interests of the victim" (*Müller-Dietz* 1988, p. 974).

The second concept is based on a new departure in the historical development of criminal law, which considers the thoughts of offender-victim reconciliation, of "settlement and discharge of conflict in the interests of the victim, of society and of the offender" to be of prime importance. It is true that also a connection is made here with the penal objectives outlined, positive general and specific prevention/deterrence, in that it is referred to the effect of learning, trust and pacification of a criminal law practice which is aimed at social settlement (*Rössner* 1989, p. 36). However the accent is place quite clearly on the function of the socially constructive processing of the crime and in this way, the "principle of responsibility" is set against the "principle of counter-attack" which belongs to the criminal law of retaliation and deterrence (*Rössner* 1989, p. 19).

The realization of such a concept would require an extensive structural change to the criminal law and criminal law attitudes as they stand today, because it is not recognizable which penal function could be attributed to compensation, beyond the purposes of integration and special prevention (see *Roxin* 1987, p. 46 et seq.; *Müller-Dietz* in: *Eser, Kaiser & Madlener* 1990, p. 361 et seq.). The criminal law would in this way be brought closer to the civil law which in fact promotes the settlement of private interests to a considerable extent and seeks in this way to adjust the social relationships to a stable and satisfactory level. The last words have not been spoken in respect of the internal justification and necessity for such a change of "paradigm" (see *Frehsee* 1987, p. 145 et seq.; *Beste* 1987, p. 324 et seq.).

If compensation is successfully integrated into the criminal law program, with its specific targets, the specific penal character of the court response is in no way evident. Additional arguments are required to establish compatability within the system. Such arguments may be reflected in the fact that the obligation undertaken by the offender to effect compensation within the criminal proceedings, may already imply or mean burden comparable to a criminal sanction. This assumption is based not least upon the fact that in such cases precisely such a criminal legal decision-making authority is at work (*Frehsee* 1987, p. 365). On the other hand, we can refer to the possibility of registering the compensation in the Federal Central Register, which would attribute to this response, a function which distinguishes it from civil law compensation (*Federal Ministry of Justice* 1988, p. 41).

4.2.2 Question of "Social Acceptance"

In connection with the integration-preventive concepts favored today, which are aimed most of all at the functions of confirmation of norms and stabilization of general awareness of the law, the question arises as to the social attitudes towards the criminal law and criminal punishment. Such assessment and evaluations in the empirical research of "positive general prevention" therefore play, not by accident, a fairly extensive role (see *Schumann* 1989; *Schöch* 1990). How compensation in relation to "classical" criminal penalties is judged by society, is also of importance in this context. New studies - for instance the Hamburger survey by *Sessar et al.* - appear to point to the fact that punitive tendencies, as it has always be assumed, are not so evident. "Compensation as a replacement for punishment, is equally accepted as being in itself a punishment" (*Sessar, Beurskens & Boers* 1986, p. 88). Admittedly, the findings point to clear discrepancies in the assessment or evaluation by the general public and judiciary. Whereas the general population is predominantly positively pre-disposed towards the

principle of compensation, the judiciary on the other hand can be seen to hold a reserved attitude towards it (*Sessar* in: *Marks & Rössner* 1989, p. 42 et seq.).

These results could speak for the fact that integration of compensation into the criminal law, introduces more of a problem of implementation than a problem of social acceptance. Such a criminal political step would therefore have a realistic social chance. Other questions however remain open and which on the one hand concern the ability to generalize the findings mentioned, and on the other hand concern the legal theoretical problem of which consequences are to be drawn from the attitudes of the general public to this spectrum of possible legal consequences or responses to crime. Both aspects require further clarification (*Müller-Dietz* 1988, p. 976).

4.3 Problems of Application and Implementation

Many questions are arising in the area of the application and the practical realization of compensation as a criminal law response. They indicate the complexity and difficulty of such a plan. It is therefore about problems of the concept of damages, form of damages, the possibilities of reparation- in the view of particular cases or groups of offences -, the willingness of victim and of offender to work together, the (economic) capacity of the offender, the possibility of substitution of compensation by means of other contributions of efforts or by means of forms a symbolical settlement and of acceptances by the judiciary itself. The individual aspects have been more closely worked on elsewhere (see for example *Frehsee* 1987, p. 155 et seq.; *Bundesministerium der Justiz* 1988, p. 47 et seq.; *Roxin, Hirsch* in: *Eser, Kaiser & Madlener* 1990, p. 371 et seq., 380 et seq.). These can merely be referred to here in a fragmentary and cursory way.

Past discussion points to the difficulties already arising in establishing the area in which compensation can be meaningfully and adequately applied. First of all, the crimes which involve material and non-material damages must be considered, the extent of which can be evaluated and established or at least fixed in the normal proceedings for the taking of evidence. The principles of the law of compensation relating to the civil law would be considered for reasons of substantive law, as measures for defining the foundation and extent of obligations to pay or to perform. This would in any case help to avoid unfair treatment of various groups of "offence creditors or obligants" (*Müller-Dietz* 1988, p. 977). Offenders with low incomes would also have to be able to participate in every form of response. This could however only happen if a suitable substitute was presented - for example, charitable non-profit-making work (community service) would be

such a possibility, having in fact taken over in many ways the role of a contribution which has some monetary value (*Bundesministerium der Justiz* 1988, p. 41). Another matter which is open to question is as to whether and to what extent forms of symbolical compensation can be developed and practised. These forms should however be added judicially, to the constitutional grounds already in existence and finally to the standard catalogue of legal consequences.

It is a widely known view, that compensation as a criminal law response, requires the readiness of the victim to cooperate. However, a minimum of willingness to cooperate on the part of the offender also appears to be necessary if the failure of such efforts towards reconciliation are not to become an automatic result. The problems attached to any solution which makes compensation an integral part of the criminal law system of legal outcomes, can clearly be understood. It is therefore possible that such concepts with their current requirements, are not merely bordering on criminal theoretical legitimization, but also on the limits of practical realizability. The fundamental structural changes of the criminal law mentioned (see 4.2.1) or the models of extra-judicial reconciliation already tested in many cases, refer in fact to alternative solutions.

5. Compensation as a "Concept with Limited Scope"

The obstacles sketched out, which stand in the way of realizing the criminal law response of "compensation", have caused the working party working on it at that time (see 2.1) to speak of a "concept of limited scope" (*Bundesministerium der Justiz* 1988, p. 34 et seq.). The difficulties appear to be numerous and too complex to be able to be regarded within such a theory, as an all embracing solution to the penalty and the legitimation problems of todays criminal law (*Bundesministerium der Justiz* 1988; *Müller-Dietz* 1988, p. 979). Discussion in the meantime, has allowed reservations to emerge somewhat more clearly. It has also shown what may be called, a wish to reconcile the dogmatical, consistent solutions with practical ones. Discussion has also brought the fact to realization that what is decisively important, is to reach a clear target which should be pursued by means of the concept of compensation (see most of all *Eser, Kaiser & Madlener* 1990). The extent to which science and practice introduce a readiness for innovation in crime policy in the future should also be important from the point of view of its further development.

6. Summary

The article which follows up the studies of the *Arbeitsgruppe TOA-Standards* (1988), of which the author formed part, made various observations on the matter of setting up compensation as a criminal legal response. Authoritative approaches relating to integration of compensation into the criminal law as a whole, are being discussed and placed at the forefront of such discussion. The suggestion of adding compensation as a "third path" (option) in the system of criminal law penalties, is being more specifically substantiated. It appears that this can be regarded at most as a "concept of limited scope" which leaves a number of questions unanswered.

7. References

Arbeitsgruppe TOA-Standards in der Deutschen Bewährungshilfe (1989). Täter, Opfer und Vermittler. Vom Umfang mit Problemen der Fallarbeit beim Täter-Opfer-Ausgleich. Bonn: Deutsche Bewährungshilfe e.V.

Beste, H. (1987). Probleme der Schadenswiedergutmachung im Zuge viktimisierter Kriminalpolitik. Monatsschrift für Kriminologie und Strafrechtsreform, 70, 336-352.

Beste, H. (1990). Strafrechtliche Sozialkontrolle auf der Suche nach Alternativen: Außerjuristische Konfliktregelung in Perspektive. In: Deutsche Bewährungshilfe e.V. (Ed.), Die 13. Bundestagung (pp. 407-421). Bonn: Forum.

Bianchi, H. (1988). Alternativen zur Strafjustiz. Biblische Gerechtigkeit. Freistätten. Täter-Opfer-Ausgleich. München, Mainz: Kaiser, Grünewald.

Blau, G. (1987). Diversion und Strafrecht. Jura, 9, 25-34.

Bundesministerium der Justiz (Ed.). (1988). Schadenswiedergutmachung im Kriminalrecht. Untersuchung des Fachausschusses I "Strafrecht und Strafvollzug" des Bundesverbandes der Straffälligenhilfe e.V. Abschlußbericht. Bonn: Forum.

Der Senator für Justiz und Verfassung der Freien Hansestadt Bremen (Ed.) (1990), Täter-Opfer-Ausgleich und Opferhilfe im Land Bremen. Bremen: Steintor.

Eser, A. (1989). Zur Renaissance des Opfers im Strafverfahren. In: G. Dornseifer et al. (Eds.), Gedächtnisschrift für Armin Kaufmann (pp. 723-747). Köln: Heymanns.

Eser, A. et al. (Eds.). (1989). Wiedergutmachung im Strafrecht einschließlich Rechtsstellung und Entschädigung des Verletzten im Strafverfahren. Rechtsvergleichendes Seminar. Freiburg i. Br.: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Eser, A. Kaiser, G., & Madlener, K. (Eds.) (1990). Neue Wege der Wiedergutmachung im Strafrecht. Internationales strafrechtlich-kriminologisches Kolloquium in Freiburg i. Br. Freiburg i. Br.: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Frehsee, D. (1987). Schadenswiedergutmachung als Instrument strafrechtlicher Sozialkontrolle. Ein kriminalpolitischer Beitrag zur Suche nach alternativen Sanktionsformen. Berlin: Duncker & Humblot.

Freytag, H. (1989). Entschuldungsprogramme für Straffällige. Eine kriminologisch-empirische Untersuchung unter besonderer Berücksichtigung des hessischen "Resozialisierungsfonds". Bonn: Forum.

Frühauf, L. (1988). Wiedergutmachung zwischen Täter und Opfer. Eine neue Alternative in der strafrechtlichen Sanktionspraxis. Gelsenkirchen: Mannhold.

Grave, R. (1988). Täter-Opfer-Ausgleich. Theoretischer Bezugsrahmen und Umsetzungsmöglichkeiten in der sozialen Arbeit. Bonn: Forum.

Hassemer, W. (Ed.) (1987). Strafrechtspolitik. Bedingungen der Strafrechtsreform. Frankfurt a.M. et al.: Lang.

Hirsch, H.-J. (1989). Zur Stellung des Verletzten im Straf- und Strafverfahrensrecht. In: G. Dornseifer et al. (Eds.), Gedächtnisschrift für Armin Kaufmann (pp. 699-721). Köln: Heymanns.

Hirsch, H.-J. (1990). Wiedergutmachung des Schadens im Rahmen des materiellen Strafrechts. Zeitschrift für die gesamte Strafrechtswissenschaft, 102, 534-562.

Janssen, H., & Kerner, H.-J. (Eds.). (1986). Verbrechensopfer. Sozialarbeit und Justiz: Das Opfer im Spannungsfeld der Handlungs- und Interessenkonflikte. 2nd ed. Bonn: Eigenverlag der Deutschen Bewährungshilfe e.V.

Kaiser, G., & Albrecht H.-J. (Eds.) (1990). Crime and Criminal Policy in Europe. Proceedings of the II. European Colloquium. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Kawamura, G., & Schreckling, J. (1990). Täter-Opfer-Ausgleich als professionelle soziale Intervention. In: Deutsche Bewährungshilfe e.V. (Ed.), Die 13. Bundestagung (pp. 445-455). Bonn: Forum.

Kerner, H.-J., Marks, E., Rössner, D., & Schreckling, J. (1990). Täter-Opfer-Ausgleich im Jugendstrafrecht. Bewährungshilfe, 37, 169-176.

Koch, H. (1988). Jenseits der Strafe. Überlegungen zur Kriminaltitäsbewältigung. Tübingen: Mohr.

Kühne, H.-H. (Ed.). (1988). Opferrechte im Strafprozeß. Ein europäischer Vergleich. Kehl, Straßburg, Arlington: Engel.

Kuhn, A. (1990). Der andere Umgang mit strafrechtlich relevanten Konflikten und Konfliktregelung und Täter-Opfer-Ausgleich versus Strafrecht. In: Deutsche Bewährungshilfe e.V. (Ed.), Die 13. Bundestagung (pp. 457-476). Bonn: Forum.

Kuhn, A., Rudolph, M., Wandrey, M., & Will, H.-D. (1989). "Tat-Sachen" als Konflikt. Täter-Opfer-Ausgleich in der Jugendstrafrechtspflege. Forschungsbericht zum Modellprojekt "Handschlag". Bonn: Forum.

Luther, H., & Pfeil, H. (1990). Zur Stellung und zu den Rechten des Geschädigten im Strafvefahren. Neue Justiz, 44, 31-34.

Maelicke, B., & Ortner, H. (Eds.). (1988). Alternative Kriminalpolitik. Zukunftsperspektiven eines anderen Umgangs mit Kriminalität. Weinheim, Basel: Beltz.

Marks, E., & Rössner, D. (Eds.). (1989). Täter-Opfer-Ausgleich. Vom zwischenmenschlichen Weg zur Wiederherstellung des Rechtsfriedens. Bonn: Forum.

Müller-Dietz, H. (1983). Vom intellektuellen Verbrechensschaden - Eine nicht nur historische Reminiszenz. Goltdammer's Archiv für Strafrecht, 130, 481-496.

Müller-Dietz, H. (1988). Schadenswiedergutmachung - ein kriminalrechtliches Konzept? In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Kriminologische Forschung in den 80er Jahren. Projektberichte aus der Bundesrepublik Deutschland (pp. 961-982). Freiburg i.Br.: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Müller, S., & Otto, H.-U. (Eds.). (1986). Damit Erziehung nicht zur Strafe wird: Sozialarbeit als Konfliktschlichtung. Bielefeld: Böllert.

Neumann, U. (1987). Die Stellung des Opfers im Strafrecht. In: W. Hassemer (Ed.), Strafrechtspolitik. Bedingungen der Strafrechtsreform (pp. 225-253). Frankfurt a.M.: Lang.

Rieß, P. (1984). Die Rechtsstellung des Verletzten im Strafverfahren: Gutachten C zum 55. Deutschen Juristentag. München: Beck.

Rieß, P. (1987). Der Strafprozeß und der Verletzte - eine Zwischenbilanz. Jura, 9, 281-291.

Roxin, C. (1987). Die Wiedergutmachung im System der Strafzwecke. In: H. Schöch (Ed.), Wiedergutmachung und Strafrecht (pp. 37-55). München: Flink.

Roxin, C. (1988). Die Stellung des Opfers im Strafsystem. Recht und Politik, 24, 69-76.

Rössner, D. (1989). Wiedergutmachung statt Übelvergelten. In: E. Marks & D. Rössner (Eds.), Täter-Opfer-Ausgleich (pp. 7-41). Bonn: Forum.

Rössner, D. (1990). Täter-Opfer-Ausgleich und Kriminalitätsverhütung. In: Ch. Frank & G. Harrer (Eds.), Der Sachverständige im Strafrecht. Kriminalitätsverhütung (pp. 164-174). Berlin et al.: Springer.

Schädler, W. (1990). Den Geschädigten nicht nochmals schädigen. Anforderungen an den Täter-Opfer-Ausgleich aus der Sicht der Opferhilfe. Zeitschrift für Rechtspolitik, 23, 150-154.

Schneider, H.-J. (1989). Die Rechtsstellung des Verbrechensopfers im Strafrecht und im Strafverfahren - Neuere Entwicklungen in der Kriminalpolitik der Vereinigten Staaten, der Bundesrepublik Deutschland, des Europarates und der Vereinten Nationen. Jura 11, 72-81.

Schöch, H. (Ed.) (1987). Wiedergutmachung und Strafrecht. Symposium aus Anlaß des 80. Geburtstages von Friedrich Schaffstein. München: Fink.

Schöch, H. (1989). Staatliches Restitutionsverfahren und außerjustitielle Konfliktregelung. In: H. Jung (Ed.), Alternativen zur Strafjustiz und die Garantie individueller Rechte der Betroffenen (pp. 125-135). Bonn: Forum.

Schöch, H. (1990). Zur Wirksamkeit der Generalprävention. Forensia-Jahrbuch, vol. 1, 95-111.

Schreckling, J. (1990). Täter-Opfer-Ausgleich nach Jugendstraftaten in Köln - Bericht über Aufbau, Verlauf und Ergebnisse des Modellprojekts "Waage"-. Bonn: Bundesministerium der Justiz.

Schreckling, J., & Pieplow, L. (1989). Täter-Opfer-Ausgleich: Eine Zwischenbilanz nach zwei Jahren Fallpraxis beim Modellprojekt "Die Waage". Zeitschrift für Rechtspolitik, 22, 10-15.

Schünemann, B. (1986). Zur Stellung des Opfers im System der Strafrechtspflege. Neue Zeitschrift für Strafrecht, 6, 193-200, 439-443.

Schumann, F. (1989). Positive Generalprävention. Ergebnisse und Chancen der Forschung. Heidelberg: C.F. Müller.

Seelmann, K. (1989). Paradoxien der Opferorientierung im Strafrecht. Juristenzeitung, 44, 670-676.

Sessar, K., Beurskens, A., & Boers, K. (1986). Wiedergutmachtung als Konfliktregelungsparadigma? Kriminologisches Journal, 18, 86-104.

Trenczek, Th. (1990). Victim-Offender-Reconciliation/Mediation: Täter-Opfer-Ausgleich in den Vereinigten Staaten. In: Deutsche Bewährungshilfe e.V. (Ed.), Die 13. Bundestagung (pp. 423-443). Bonn: Forum.

Voß, M. (1989). Anzeigemotive, Verfahrenserwartungen und die Bereitschaft von Geschädigten zur informellen Konfliktregelung. Erste Ergebnisse einer Opferbefragung. Monatsschrift für Kriminologie und Strafrechtsreform, 72, 34-51.

Weigend, Th. (1989). Deliktsopfer und Strafverfahren. Berlin: Duncker & Humblot.

Will, M.R. (Ed.). (1990). Schadensersatz im Strafverfahren. Rechtsvergleichendes Symposium zum Adhäsionsprozeß. Kehl, Straßburg, Arlington: Engel.

Wolff, E.A. (1987). Die Abgrenzung von Kriminalunrecht zu anderen Unrechtsreformen. In: W. Hassemer (Ed.), Strafrechtspolitik. Bedingungen der Strafrechtsreform (pp. 137-224). Frankfurt a.M.: Lang.

Wulf, R. (1985). Opferbezogene Vollzugsgestaltung - Grundzüge eines Behandlungsansatzes. Zeitschrift für Strafvollzug und Straffälligenhilfe, 34, 67-77.

Compensation and Sanctioning - The Court Assistance as Aid to the Resolution of Conflicts

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Contents

1. Introduction: Framework and General Aims of the Tübingen Court Assistance Project

Compensation in the form of settlement of conflict namely settlement between offender and victim, became a criminal political concept of prime importance at the end of the second millenium. Focus upon the victim, growing social interest in poetic justice and reconciliation (see memorandum by the Evangelical German Church 1990; *Zehr* 1990; *Wright* 1982), the imperfect profile of traditional criminal law (*Kaiser* 1988, p. 900 et seq.) and the re-evaluation of freedom and humanisation of power as outlined constitutionally, have stimulated discussion of a corresponding fundamental reform of the criminal law. Ideas within the framework of crime policy include many areas, namely the abolition of the criminal law in favour of settlement of conflicts which is exclusively a private matter (*Christie* 1982, p. 92 et seq.; *Plack* 1974, p. 326 et seq.), creation of a separate channel within the criminal law system (*Frehsee* 1986, p. 119; *Rössner* 1990, p. 164 et seq.; *Roxin* 1987, p. 37 et seq.; *Schöch* 1990, p. 73 et seq.) and advocating more extensive practical application within the framework of the existing sanctions such as discontinuance of proceedings and suspension of sentencing supported by critics of the idea in general (*Hirsch* 1990, p. 550 et seq.). In spite of fundamental criticism which regards compensation as a foreign body within the criminal legal system and as the sole task of the criminal law (*Hirsch* 1990, p. 551 et seq.), complete exclusion of compensation from movements towards criminal reform in Germany, has never been discussed anywhere.

Whether or not compensation is being propagated as a strategy for bringing about peaceful resolution of a conflict without use of the criminal law and state control, or as a simple alternative to a punishment which is retaliatory in effect within the system of criminal social control, the consequences of the legal responses are in any case diametrically opposed to the classical understanding of punishment. The frequently claimed state right to punishment is thrown into disarray, if the offender and victim are able to define the legal consequences and are finally called upon themselves to restore law and order after the offence has been committed. At least the mechanism of retaliation which until now has dominated the criminal law, will have been broken through: "An evil deed calls for an evil response" and the state is then called upon to produce this relationship in the criminal law (*Coing* 1985, p. 248; *Rössner* 1989, p. 7 et seq.).

It is therefore clear that the idea of compensation is confronted with widely established public opinion and professional criminal legal views. It's power of enforcement, both speedy and far-reaching, is just as astounding. It depends most certainly in this situation upon how the idea is put into practice. Most of all, the danger exists that the possibilities and boundaries of criminal political concepts are taken up without criticism and practical trial. One wants to avoid a verdict of momentary euphoria being attached to compensation in a few years. The effects of compensation in practice must therefore be analyzed critically.

Although widely documented experience of very positive results were presented in juvenile criminal law in Germany since the model projects had begun in 1984 in Braunschweig, Reutlingen and Cologne (*Kuhn* 1989; *Marks & Rössner* 1989; *Schreckling* 1990; for summary and good overall view see *Schöch & Bannenberg* in this volume), corresponding results have until now been lacking in the general criminal law. The research proposals in respect of the Tübingen Court Assistance Project reported here, attempts to close these gaps. The projects belongs, as a singular concept in general criminal law, to the compensation models of early days. The plan had already been formulated in the years 1983/84, and the work was begun in 1984.

The project can be regarded as a compensation model within the framework of criminal social control. Admittedly, this does not mean that the idea of settlement of conflict is limited contentswise in this way. The central starting point can be regarded as being § 153a StPO (Strafprozeßordnung; code of criminal procedure), which introduced compensation as an alternative solution of prime importance to formal sanctions in 1975. The provisions were set out in such a way that compensation is not effected by the judiciary as a coercive condition, but rather it is achieved between offender and victim with the participation of the court assistance preliminary to the court proceedings. The work of the court assistance is aimed, alongside these efforts towards dismissal of the proceedings, also at giving impetus to compensation as a probationary condition and in relation to the extent of punishment imposed according to § 46 Abs. 2 StGB (Strafgesetzbuch; penal code). The legitimization of the court assistance in relation to work concerning settlement of conflict, is safeguarded by law. The court assistance is, according to § 160 Abs. 2 S. 2 StPO, called upon to place the judicial decision relating to the legal consequences of the crime, on a reliable social data basis. Settlement of the conflict is understandably part of this social dimension of the crime.

The court assistance set up by the criminal prosecution service, receives cases from the processing prosecutor where compensation is to be effected.

The offender must have confessed and the victim must be prepared to cooperate. The court assistant acts as a "conflict assistant" in individual consultations or a general discussion. Forms of reconciliation such as mutual recognition, apology and the symbolic achievement (of this reconciliation) is important, over and above achievement of material reconciliation. The element of bringing about peace, which the social work is geared towards, takes priority over the more precise civil legal development of the case.

2. Issues and Methods of the Study

The statistical evaluation of the Tübingen Court Assistance Project is based on 183 cases in which compensation was strived for. These were carried out by the Tübingen prosecutors court assistance between May 1984 and December 1989, within the sphere of the other ordinary work of the court assistance and everyday circumstances.

The cases were received by the court assistant upon the referral of the prosecutors and not upon their own decision. Because of the experimental character of the work, the case referrals depended strictly upon the personal attitude of the particular prosecutor concerned. Only some of the Tübingen prosecutors cooperated with the court assistance in relation to efforts towards compensation. The uncontrolled selection of cases which therefore arose, must be accepted in view of the pilot function of the project. The data was recorded by the court assistant in a standardized questionnaire. In order to draw conclusions regarding the attitude of the judiciary towards compensation, a questionnaire was carried out of 6 prosecutors.

Finally, an evaluation of the individual cases was carried out as part of the course of the study, in order to demonstrate the effects and their relationship to everyday cases of compensation.

3. Selected Results of the Tübingen Court Assistance Project

3.1 The Offences

The compensation cases extend over a wide spectrum of crimes, which cannot be characterized by formal criteria. The distribution is spread amongst the entire area of classical offences. Nevertheless, certain strong characteristics arose in relation to this distribution, relating to the frequency

of the offence and interpersonal relation to the form of the offence. The order in relation to the spread of offences, can be formulated as follows: Physical injury (32%), theft (16%), fraud (15%), damage to property (7%), insult/defamation (5%).

Three out of four offences related to material damages. In relation to the others, or alongside the others, the attempts at achieving compensation, had to be focussed in addition upon non-material consequences of the crime such as hurt feelings, insult/defamation and breach of trust. The extent of damage amounted in the majority of cases to between 100 DM and 500 DM.

3.2 Offender and Victim and their Relationship

In relation to offenders, basic social data with regard to sex and age structure, are not different from those suspects in police criminal statistics (namely three quarters of offenders were men and age was focussed within the 21 to 40 age group). There were no peculiarities in relation to the number of foreigners, namely 18%.

Social data in relation to the offender, gave no indication at all of any circumstances owing to personal advantage. Those questioned stemmed on the whole from the lower half of the social strata and the number of unemployed (11%) as opposed to the rate of unemployment locally (3.5%) and the number of workers (48%) was relatively high. Allocation of cases to the victim-offender-reconciliation project was affected officially according to factual and not personal criteria.

This picture has been rounded off because of the high percentage of previously convicted offenders (40%). It can be concluded from the fact that although eight people had indicated more than six previous convictions, that compensation is regarded as a sensible and reasonable way of dealing with career offenders.

It is noticeable in relation to victims, that the proportion of women (36%) was less than that of men although the crime in relation to these women could more frequently have qualified as an offence where a personal victim-offender relationship was of significance.

According to the aims of conflict settlement set out, natural persons, according to expectation, were most frequently (83%) the victims of the crimes. The remaining related to the state, community and firms. Social data in relation to the victims, shows that they are socially more privileged than the offenders. The offender-victim-relationship also mirrors the obvious selection criteria used by the prosecutors, namely that a clear conflict exists

between the offender and victim of the crime. The overall results show that over a half (57%) of all offender-victim-relationships, already existed before the crime itself. In many of these cases - most of all those where there is a partner involved - up to 20% - or relationship between relatives - considerable tension existed, which had resulted from serious conflicts which had not been resolved. The potential for conflict which emerges for the court assistance, proved to be explosive and demanded extensive action being taken within the social work sphere, over and above treatment of the case as a criminal legal matter. The court assistant could frequently no longer confine the conflict to the crime. The possibility of resolving the conflict gives rise to the prosecutors referring such cases to the project.

3.3 Reasons for Criminal Law Settlement of the Conflict

The activities of the criminal prosecution authorities was based, in relation to the project cases - as usual - predominantly upon the initiative of the victim (84%).

The project confirmed the high level of acceptance of compensation within the criminal proceedings, once again. Over 90% of offenders and victims were prepared to take part in an attempt at settling the dispute. As a rule, the offenders' and victims' expression of readiness to participate merely followed readily upon information about the work of the project.

The grounds for willingness to take part in a settlement within the criminal law and interest in compensation, stem both on the part of the offender and also the victim, from a large number of motives. Almost all functions attributed to compensation in criminal political discussion, can be found here.

The offenders cite quite sincerely, the improvement of their position within the criminal proceedings in the first place (85%). In addition they cite their interest in a very speedy resolution of the conflict (83%) and understanding for the victim (59%) the former being almost as frequently cited as the first.

Victims gave priority to their wish towards obtaining satisfaction (74%). This extends from simply "having peace at last", to more comprehensive peaceful resolution of the conflict in particular in relation to physical injury, insult/defamation or coercion. A larger number of victims indicated that they had been impressed by the offender's willingness to settle the dispute and did not want to refuse these moves towards compensation. Personal redress by means of compensation determined the victim's willingness to cooperate in almost half of the cases. A number of victims regarded their own

behaviour as jointly responsible for the crime. It was also shown in a number of cases, that "clearing up" of the situation was the most important aspect in a conflict which had lasted for some time.

There were various reasons why the need for punishment did not take priority in relation to a few offenders (8%) and victims (8%), who refused to participate in compensation. The conflict orientated background played a role. In this way, both, offender and victims no longer wished to come into contact with each other again. Compensation was considered in a number of cases, to be pointless.

3.4 Settlement of the Conflict

After the cases had been transferred, the court assistant first of all clarified as to whether or not the offender and victim were prepared to reach a settlement. The first contact was made either by telephone or personally according to the particular situation. The first initiation of contact between victim and offender was handled flexibly. This was not relevant in any way in relation to the success of the settlement.

Mediation with a view to a compensation agreement took place in two out of three cases without direct contact between offender and victim. The court assistant performed the mediation itself. In 14% of cases a mediation consultation was carried out accompanied by the court helper. This could bring about more satisfaction for both the offender and victim. This consultation was carried out by offender and victim alone in the remaining cases (20%), upon the suggestion of the court assistant but without his or her presence. There is a distinct contrast here to the offender-victim-settlement models in juvenile criminal law, where the direct consultation between the parties, takes priority.

A more successful conclusion was reached in four out of five cases as a result of these efforts towards compensation. Only 19% of cases had to be given up to the prosecutors, having failed. Compensation was attributed success if offender and victim expressed themselves to be satisfied with the compensation agreement concluded and the agreement was implemented in full. Failure of efforts towards compensation could frequently be attributed to both offender and victim. As a rule, these efforts failed because the attempts towards reaching a compensation agreement, were made prematurely. Those parties who were prepared to participate in reconciliation, were in most cases successful.

Compensation agreements were concluded verbally in 85% of cases and put to paper in just under 15%. Three quarters of the cases which had been

successfully concluded, included more or less non-material achievement of reconciliation of a symbolical character, e.g. work carried out for the victim, presents and apologies in many forms. Full compensation was effected in 35% of cases and only part compensation in 18%.

The greater majority of victims considered offender-victim-settlement to be a sufficient criminal response. More than three quarters of victims indicated that no further sanctions were necessary. Only 5% were of a different opinion. The majority of victims indicated that there was often a general improvement in the relationship between offender and victim after compensation had been achieved. Deterioration of the offender-victim-relationship was established even in unsuccessful cases.

3.5 The Influence of Compensation upon the Criminal Proceedings

The criminal proceedings were dismissed by the public prosecutor in 78% of cases, after compensation had been achieved. Another pre-condition was imposed in relation to half of the cases which were dismissed - mainly a pecuniary penalty to be paid to an institution for public benefit. An application for a summary award of punishment or charge was made in 5 (13%) of cases which had been successfully concluded with compensation provisions being made. Due to the complexity of the way in which punishment is assessed and imposed and in particular the lack of comparison between individual factors of particular prosecutors in relation to imposition of sanctions, we can only assume but make no precise statements to the effect that compensation has a mitigating effect upon the assessment of punishment to be imposed. Moreover, it can be established if one considers the cases which have failed, that these cases are three times less likely to have been dismissed without further consequences following.

We can assume that the application of compensation is dependent in the first instance, upon the personal attitude of the prosecutor towards questions of punishment and compensation. The open legal position at present, produces considerable uncertainty and unfairness in practice.

3.6 The Attitude of Prosecutors towards Compensation

A survey of six prosecutors attempted to establish a basis for the central question as to what attitudes the judiciary has towards compensation within the framework of the practice models.

The basic position of all prosecutors questioned presents a fairly positive picture. Compensation was regarded as a constructive option in relation to processing crimes, particularly in cases where there is basic personal conflict involved. Offender-victim-settlement is particularly well-suited to the task of pacification. The information obtained from the prosecutors indicated concrete effects in relation to insight into justice and emphasis of norms.

Crimes within the sphere of middle-range crimes such as theft/burglary, physical injuries, damage to property and others prove to be particularly suitable. The form of offence was classified as being of secondary importance as opposed to the existence of a personal relationship between the parties. The criterion which brought about non-qualification, were in particular insidious crimes, offenders previously convicted for the same offence or very high sums of damages. The question of the suitability of offenders who had been previously convicted, was discussed controversionally.

All prosecutors believed that compensation, regarded quantitatively, is neglected too much. They all supported settlement of conflicts being transferred to a particular institution, for example court assistance or private organizations.

The majoritiy of prosecutors called for legal provisions governing this area. The purpose cited was avoiding unnecessary charges and bringing about mitigation of sentences. The opinion was unanimous however, that compensation will maintain its position of subsidiary importance within the criminal law, without legal provisons and safeguards.

3.7 An Example: A Case of Compensation

The quality of compensation as an event which is procedural in character and which has many interactions, cannot be established statistically. This reality can only be clarified in the analysis of an individual case. For this reason, one non-spectacular every-day case from the court assistance practice should be outlined:

> B who has been accused of physical injury, is 35 years old and is employed as a civil servant. His nine year old son was injured by another youth who lived in the neighbourhood, when playing football in the street. B, who was angry and wanted to clarify exactly what happened, questioned the other youth, who behaved pigheadedly and in a provocating way to the extent that B was so irritated that he hit him quite forcefully with his hand. The child suffered injuries from the strike, which resulted in him having to stay in hospital for three days. The youth's parents raised a criminal charge because of the physical injury. The responsible prosecutor considered the case immediately to be one

which was particularly suitable for compensation, in that the matter was threatening to escalate to a long-term conflict between neighbours. It was therefore transferred with the appropriate request, to the court assistant. The assistant first thought to consult B and his wife. B was immediately prepared to meet up with the youth's parents and to explain the accident and apologize. He was interested in maintaining a good neighbourly relationship and it would have been very unpleasant for him if he had to keep out of his neighbour's way in future. He knew that his behaviour had not been right. He had lost his self-control. After this consultation with B, the court assistant went to the youth's parents. They were still very outraged about the affair. They felt that it would have been better if B had immediately apologized after the offence had been committed. On the other hand, they expressed themselves to be interested in maintaining a good neighbourly relationship for the future. They no longer felt any feelings of revenge, and most of all did not want B to be criminally convicted or indeed be disadvantaged in his job. In addition, their son had suffered no consequent damage and it was not intended to claim for compensation for pain and suffering. Admittedly, the matter was not to be allowed to go by without B having some form of reminder to consider. The fear was that the youth's parents would otherwise quickly instigate other proceedings, having withdrawn the original charge without satisfactory consequences following upon it.

After the first contact took place, a general consultation took place with all parties concerned. This succeeded in processing the conflict to the satisfaction of the parties concerned. Finally, the paradoxical situation which arose was that the victim and his parents did not want to accept any money for pain and suffering and merely desired be "to settle his guilt". B suggested that he could make an appropriate contribution to an organization for physically handicapped children. The final solution was found by the prosecutor, namely the preliminary proceedings were discontinued according to § 153a StPO and a condition was imposed upon the accused party upon his own suggestion of having to pay a contribution of 750 Marks to an organization for the handicapped. Inquiries made by the court assistance after some time had passed, indicated that the neighbourly relationship had been resumed and was continuing undisturbed.

The special quality of compensation as a form of criminal legal response, can clearly be seen: Constructive processing of the offence and conflict itself and a positive approach towards a peaceful future relationship after the event. The complex but effective elements of compensation within the criminal law, emerge clearly with hindsight: the youth and his parents received some form of redress in which B took responsibility upon himself for the offence. Their real interest in maintaining a neighbourly relationship and conforming their role as victims in the general public, was considered

and borne in mind by the settlement of the conflict and admission of guilt made by the offender. The voluntary and symbolical efforts made towards compensation or reconciliation was proved outwardly.

4. Summary and Evaluation of Study Results

Compensation has been fundamentally accepted by both the victims of crime and the judiciary as a criminal legal method by means of which law and order is restored in every-day crime. The majority of victims and likewise the prosecutors are in agreement and are satisfied with resolution of the conflict which is aimed at achieving peace between the parties.

The high level of willingness amongst the victims and offenders to participate in this form of settlement and the correspondingly high success rate of these efforts towards compensation, are understandable given the general level of acceptance (see representative results in *Sessar* 1989, 42ff.).

The crimes in the compensation projects consist of the usual mixture of every-day crime - concentrated in the area of physical injuries and damaged property and being of middle-range severity. The suitability of compensation is not really related to the particular offence concerned, but rather each situation must be individually assessed. The offenders who participate in compensation represent those involved in "normal" every-day crimes.

Clarifying the particular circumstances of the conflict and likewise help towards working out what has happened and reaching a compensation agreement, demands time and the competence of those trained with social work skills. This can be found in the general criminal law in the court assistance. Admittedly, compensation is used less by adult than by juvenile offenders. The central aspect is not the educational element of the settlement consultation but rather coping with and managing the consequences of the crime in a rational way. This can be affected quickly, routinely and satisfactorily by the court assistance, for example in cases of property offences.

The victims regard their interests within the compensation proceedings as being well represented with the help of the court assistance. The hope most of all in relation to crimes within the context of conflicts which have existed for a long time or have been intensive, is to have the opportunity of being able to live in harmony once again with the adversary.

The high level of satisfaction which the victim feels, is an indication that his or her expectations have been fulfilled.

The high level of ideal compensation and resolution of conflicts, is expressed in the form of reconciliation achievements. The most ideal mo-

ment may be regarded as decisive for the need for punishment which no longer exists after successful compensation is effected. The elements of conflict settlement which are both constructive and positive in relation to the victim and offender, emerge particularly clearly.

The tendency of compensation lies in favour of a reduction of the criminal legal response. After compensation has been effected, more criminal proceedings are dismissed and there are clear signs of mitigation of penalties.

Admittedly, it cannot be overlooked that the application of compensation in the first instance is dependent upon the personal attitude of the prosecutor towards the questions of compensation and punishment. The applicable provisions do not contain any fixed or compulsary guidance. Inspite of the fundamental will of the public prosecutors, great uncertainty and reservation exists in relation to the practical application of compensation.

Summing up, the need for compensation in the general criminal law by victim, offender, judiciary and society, is unmistakable. The analysis of results is of great importance in pursuing the question as to how compensation can be more strongly established than it has been in the criminal law system of legal consequences until now. The principal questions, for example the special function of the criminal law, the aims of punishment and most of all the relationship to the civil law, require - as has already been illustrated - openness in criminal political thinking. These important aspects shall be outlined in more detail in the final chapter.

5. The Criminal Political Perspective: Compensation as a Task of and for the Criminal Law

The natural core of the criminal law is conventionally regarded in the social ethical condemnation of violation of the law and the accompanying punishment, as having a penal character (*Jescheck* 1988, p. 58). The nature and task of today's criminal law has not, with this characterization, been conclusively defined. The criminal law is no longer content with penal sanctions. The discontinuance of the criminal proceedings based upon the principle of tolerance, belongs, like the safety-orientated formation of measures for the prevention of crime and reformation of offenders, to its global concept such as punishment in the traditional sense. The criminal law with its all-embracing task of control of behaviour which is classified as crime, and punishment itself, are not identical. The range of criminal legal consequences extends far beyond punishment and embraces a denial of formal responses as well as imprisonment as a response to dangerous offenders.

Clearly state control within the area of behaviour which is defined as offensive by law, remains the common denominator of all of these criminal legal sanctions. The central task of the criminal law is not the imposition of punishment which is penal in character, but rather control which is an appropriate reaction to the offence. Conflicts which result in crimes, should be kept under surveillance in the interests of the victim and society in general.

There are three "paths" (options) in relation to this control: no action in the form of discontinuing the proceedings, imposition of punishment appropriate to the guilt of the offender and measures for the prevention of crime and reformation of offenders.

It is obvious that compensation, as a voluntary recognition of norms or standards and as a constructive approach to settlement following an offence, belongs in its form and purpose, somewhere between the dismissal of the proceedings which is without consequence, and punishment. Punishment cannot only be applied in cases of civil crimes but also in the case where compensation achieves or partly achieves law and order between offender and victim. If one considers a non-reaction within the criminal legal system of control as a whole, as a "base-line", compensation is the first "path" (option) in relation to criminal-legal consequences, if tolerance is ruled out. The voluntary assumption of responsibility and with it, recognition of norms/standards and satisfaction of the victim's interest, takes priority in this way, over the parallel aim of punishment. Compensation, considered in this way, is becoming a primary "path" (option) in relation to legal consequences, to the point where it fulfills the task of the criminal law in a similar way to state punishment or imprisonment. The constitutional subsidiary obligation is in this way an important support in favour of compensation.

Empirical results have shown that compensation is deemed to be of importance to both offender and victim in relation to dealing with injustice as a criminal law matter. We are not concerned with civil legal possibilities in what is to a great extent a concern with avoiding materially orientated damage, but rather with restoration of law and order in society in an all-embracing sense. The ideal moment in offender-victim settlement which as emerged from research, is aimed at dealing with and coping with damage arising from the crime which is intellectual, and in this way can be added to the list of specific criminal legal tasks.

Each case indicates the independent element of compensation within a global context. The clear distinction between civil and criminal law, does not present an obstacle to the actual corresponding effects.

Today's criminal law accommodates under its umbrella of control, behaviour which is socially damaging. The aim is to restore law and order after the crime has been committed. There are four other subsidiary aims which are focused upon in particular areas according to the offence and the situation, and which are classified to a great extent according to the principle of subordination:

a) Tolerance with the possibility of a non-reaction to the extent that law and order can be restored without some form of conviction or sentencing in cases of juvenile offences,

b) peaceful settlement of conflicts orientated towards the victim, by means of compensation, if deliberate assumption of responsibility by the offender, sufficiently fulfills the victims' interests in obtaining redress, and the interests of the general public as a whole in the enforcement of standards, and this assumption of responsibility is achieved in a socially constructive way.

c) Atonement for guilt and preventive influence by means of penalties, if tolerance or victim-offender settlement is not sufficient to restore law and order after the crime has been committed,

d) by means of preventative social defence using measures for the prevention of crime and reformation of offenders, in order that a particular state of threat may be borne in mind.

Non-intervention, compensation, punishment and imprisonment do not admittedly exist isolated under the common umbrella of criminal-legal social control, which has the aim of restoring law and order, but rather they must "work together". Alongside typical crimes which can only be dealt with by a specific response, there is a lot of overlapping where the tasks of the criminal law cannot be fulfilled by one nor another response. The question then arises - as it has done before - as to a combination of means. This must be found in accordance with the emphasis of the particular area of the task in the individual case.

The empirical results show that compensation is tied up in particular with concepts of prevention. This is connected to the fact that if one pursues these thoughts to conclusion, they point to all-embracing pacification as the ultimate goal (*Roxin* 1987, p. 48). Compensation can certainly assume aims which are deterrent and preventative. The fact that it extends however beyond this, by reason of its constructive and interpersonal elements, can be attributed to its independent aim of intervention with regard to settlement and establishing a peaceful solution. As a consequence, it can be seen that the criminal law has to deal with a crime both constructively and with a

view to achieving a peaceful solution. Only then, can further questions be raised as to whether it can in addition have a preventive or repressive effect upon the offender. The accent placed upon the offence in the criminal law, is significantly supported by this (*Frehsee* 1986, p. 119).

Integration of compensation into the criminal law as an independent but primary "path" (option), strenghtens a number of important principles of humane criminal politics in a desirable way. First and foremost, the extension of the subsidiary principle can be seen. A willful compensation in relation to injustice committed, alongside recognition of norms and an assumption of responsibility, can be regarded as less intensive intervention compared with penalties which are imposed by the judiciary themselves. Compensation in the form of a personal and deliberate act by the offender, secures the principle of autonomy - admittedly within the framework of criminal legal controls - within the criminal law as well. The necessary force of the criminal law namely the sharp subdivision of offender and victim according to the facts of the case, does not exclude the fact that the offender's deliberate attempts to avoid the consequences of the crime, must be considered. The introduction of strong incentives for "the return to the law" are part of effective legal protection and most of all victim protection. The principle of responsibility has become more established because active treatment of the offender in order to distance him from the crime is called for and not, as is the case in relation to punishment, evasion of any individual responsibility for the offence. Due to the accent upon the offence the victim's interest has been focused upon in the criminal law. This corresponds with the actual situation because the criminal report is frequently effected in order to obtain help on the one hand by calling in the police to intervene in a conflict, and on the other hand restitution for the damages suffered.

Reception of compensation within the system of criminal legal consequences, requires clear legal provision both in substantive law and also in procedural law. As a primary option, compensation requires to be established in clear and simple terms. What must be understood by compensation, must be defined precisely from its constitutional aspect. The sphere of application in which compensation suffices as the sole response, must be established and also where compensation should in addition have an effect. This question cannot be dealt with further here. It should be sufficient to establish an urgent need for action in relation to the development of compensation within the criminal law, as a direct result of the empirical results and confrontation of the results with criminal political principles. The concrete constitutional safeguarding of compensation and the duty to help in relation to resolution of conflicts, based on the principle of social justice,

present an immense challenge to present-day criminal politics. At this point, it should be mentioned that within the circle of German, Austrian and Swiss criminal law academics, the challenge has been accepted and has resulted in a corresponding draft bill in relation to compensation, being presented for discussion in 1992. The essential features of this draft can be found in the article by *Schöch & Bannenberg* (in this volume) and referred to here in conclusion.

6. References

Christie, N. (1982). Limits to Pain. Oslo: Universitetsforlaget.

Coing, H. (1985). Grundzüge der Rechtsphilosophie (4th ed.). Berlin, New York: de Gruyter.

Denkschrift der Evangelischen Kirche Deutschlands (1990). Strafe: Tor zur Versöhnung. Gütersloh: Mohn.

Frehsee, D. (1987). Schadenswiedergutmachung als Instrument strafrechtlicher Sozialkontrolle. Berlin: Duncker & Humblot.

Hirsch, H.J. (1990). Wiedergutmachung des Schadens im Rahmen des materiellen Strafrechts. Zeitschrift für die gesamte Strafrechtswissenschaft, 102, 534-551.

Jescheck, H.-H. (1988). Lehrbuch des Strafrechts. Allgemeiner Teil. Berlin: Duncker & Humblot.

Kaiser, G. (1988). Kriminologie. Heidelberg: C.F. Müller.

Kuhn, A. (1989). "Tat-Sachen" als Konflikt. Täter-Opfer-Ausgleich in der Jugendstrafrechtspflege. Bonn: Forum-Verlag.

Marks, E., & Rössner, D. (Eds.) (1989). Täter-Opfer-Ausgleich. Vom zwischenmenschlichen Weg zur Wiederherstellung des Rechtsfriedesn. Bonn: Forum-Verlag.

Müller-Dietz, H. (1983). Vom intellektuellen Verbrechens-Schaden. Golddammer's Archiv, 481-496.

Plack, A. (1974). Plädoyer für die Abschaffung des Strafrechts. München: List.

Rössner, D., & Wulf, R. (1984). Opferbezogene Strafrechtspflege. Bonn: Forum-Verlag.

Rössner, D. (1989). Wiedergutmachung statt Übelvergelten. In: E. Marks & D. Rössner (Eds.), Täter-Opfer-Ausgleich (pp. 7-41). Bonn: Forum-Verlag.

Rössner, D. (1990). Täter-Opfer-Ausgleich und Kriminalitätsverhütung. In: C. Frank & G. Harrer (Eds.), Der Sachverständige im Strafrecht - Kriminalitätsverhütung (pp. 164-174). Berlin et al.: Springer-Verlag.

Roxin, C. (1987). Die Wiedergutmachung im System der Strafzwecke. In: H. Schöch (Ed.), Wiedergutmachung und Strafrecht (pp. 37-55). Göttingen: Fink.

Schöch, H. (1990). Vorläufige Ergebnisse der Diskussion zu einem Alternativ-Entwurf Wiedergutmachung (HE-WGM). In: A. Eser, G. Kaiser & K. Madlener (Eds.), Neue Wege der Wiedergutmachung im Strafrecht. Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Schreckling, J. (1990). Täter-Opfer-Ausgleich nach Jugendstraftaten in Köln. Bonn: Der Bundesminister der Justiz.

Sessar, K., Beurskens, A., & Boers, K. (1986). Wiedergutmachung als Konfliktregelungsparadigma? Kriminologisches Journal, 18, 86-104.

Wright, M. (1982). Making good: Prisons, punishment and beyond. London: Burnett Books.

Zehr, H. (1990). Changing lenser. Scottdale: Herald Press.

Evaluation of the Practice of Compensation within recent Victim-related Crime Policy in France

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Contents

1. Introduction

1.1 Formulation of the Problem in Connection with the Development of Crime Policy in France

After the Second World War, crime policy in Europe had been strongly characterized by humanistic ideas. The focal point of crime policy was the reintegration of the offender into society (offender-orientated). This orientation contributed partly to improvement of the prison system and to the conditions of prisoners, without giving any attention to the problem of the victim. In the last few years, the improvement of the legal rights of the victim, has become a concern of new innovations in crime policy. These efforts have brought about considerable changes in the legislature in order to improve compensation for the victim. Amongst other important legal reforms in respect of victim compensation, is the Reform Act of 6.7.1990. The rights of the victim of violence and other crimes, have been extended by the new provisions relating to the right of a victim to claim compensation. These new changes constitute a unique development. The new provisons of the law, are regarded as a development of particular victim-orientated crime policy in France. The new provisions in respect of victim compensation in France, which are quite distinct in their application in comparison with other European countries, can be briefly illustrated. When creating this new law, the legislature aimed at resolving or avoiding the problems which had arisen from the former Act of 1983. In addition, the usual requirements for such a claim, in particular in relation to the nationality of a victim, were abolished and through compensation was provided for all damages suffered by victims of violent crimes. The entire problematic area relating to the victim has been deeply influenced by this Act which came into force on 1.1.1991.

Innovations relating to victim-related criminal politics should be empirically researched and regard paid to implementation of the changes in criminal law practice.

In the first instance, the practice of compensation for damages within in the criminal justice system, must be examined. Concepts of compensation for damages constitute both new aspects and also important perspectives in relation to satisfying the interests of the offender and victim simultanously.

Compensation can be regarded as a compromise between victim-related and offender-related criminal politics. An evalutation of practice therefore appears to be necessary as a starting point.

This research relates principally to a implementation of legal provisions in respect of compensation for damages in the criminal justice system, from the point of view of the criminal prosecution service (in accordance with the principle of discretionary prosecution: Art. 40 French Criminal Procedure Act), imposition of penalties within the framework of the probation service (Art. 469-2 and 469-3 French Criminal Procedure Act, which provides that compensation is a condition of suspension of sentence or repeal of sentence) and in relation to sentencing. A new Act was passed on 6th July 1989, which introduced suspension of sentence with probation as a condition (Art. 469-4 French Criminal Procedure Act). Conditions imposing compensation for damages is considered first of all within the framework of probation. The practice of discontinuing the criminal procedings within the scope of the principle of discretionary prosecution, which allows the prosecutor to exercise more discretion, is of particular interest. The object of the study planned, is to analyze the significance and role of compensation in the light of discontinuance of the proceedings. Compensation operates informally in this area in that the discontinuance of the criminal proceedings by the criminal prosecutor, does not have to be justified. The same applies for the mitigation of sentence within the framework of the practice of imposing penalties.

There are however claims that the judges rarely make use of the appropriate provisions. The following questions arise:

- What practical significance and role has compensation achieved?
- Why are the compensation conditions seldom imposed by the judges?
- How strongly is compensation accepted by the lawyers?

Compensation lies within an area of conflict between the offender-orientated crime policy which previously controlled academic thinking, and the new victim-related crime policy. The fact that offender-related crime policy, which has a general preventive (deterrent) aim, means that the claim to punishment stands at the forefront of crime policy, whereas the reintegration of the offender and compensation for the victim play a secondary role in relation to the extent of punishment imposed upon the offender. The question as to whether compensation for the victim and the corresponding reparation by the offender can be reconciled with each other taking account

of the interests of the society as a whole, must remain open to question, so long as judges make little use of this alternative to conventional alternatives in practice.

The opportunity for greater use of compensation in criminal law practice, should be analyzed by questioning criminal law judges, prosecutors and probation workers regarding their attitude towards the concept.

The second focal point of empirical research, is the "action civile", which the victim has first recourse to in practice as a legal instrument. The question arises as to what extent this action is worthwhile in the framework of victim compensation. By means of the new provisions which improve the legal position of the victim (especially the Act of 8.7.1983) the fact that the protection formerly afforded to the victim, was not sufficient, has been emphazised. Implementation of victim rights within the proceedings (for example the right to receive information and right to compensation) are examined. This deals with the comparison between the aims of the new crime policy and effecting these goals in the criminal proceedings. The offender's solvency or ability to pay, being a requirement for effective compensation of the victim, is investigated, in relation to the fulfillment of any such condition imposed.

1.2 Victim-related Innovations in Crime Policy in France - An Overall View

1.2.1 The Situation until 1982

Until 1982, there was no victim related policy in France. The reasons lie partly within the French criminal justice system. The victim, as in other Romanistic legal systems, plays an important part in the criminal proceedings. In contrast to German law where the principle of legality dominates, the principle of discretionary prosecution applies in France (Art. 40 French Criminal Procedure Act). According to this principle, the criminal prosecution lies within the discretion of the public prosecutor's office. The victim can, by means of the so-called "action civile", raise an official complaint (Art. 1 French Criminal Procedure Act) even if contrary to the wishes of the public prosecutor's office. The "action civile" has two functions: on the one hand, it is an action claiming compensation, and on the other hand, it initiates public criminal action. It can be established, that the second function, is the exception in practice (with exception in the area of white-collar crime).

Until then, only isolated laws were passed in relation to this area. The following innovations, which are particularly significant in relation to the research planned, are worthy of mentioning.

- The so-called "contrôle judiciaire" as a non-custodial alternative to pre-trial detention, was introduced by the Act of 17th July 1970. The "contrôle judiciaire" contains certain conditions, which are similar to supervision of conduct in German criminal law. It is only used however in the preliminary proceedings in France. One of the conditions which can be imposed by the investigating magistrate, consists of the possibility of establishing a particular amount of bail in favour of the victim (Art. 142 1 - French Criminal Procedure Act).
- The Act of 11th July 1975, extended the responsibility of the French criminal courts, to crimes, which have been committed abroad, against French subjects (Art. 689-1 French Criminal Procedure Act). The same law introduces two new articles (469-2 and 469-3 French Criminal Procedure Act) into the criminal law procedure. According to Art. 469-2, the court can dispense with punishment, if compensation is effected for the damages caused. The court can, according to Art. 469-3, postpone the imposition of punishment, if the offender is in a position to compensate for the damage in this way. These two provisions, play an important role in France, as legal conditions concerning compensation.
- A law was passed in 1977, in relation to compensation for victims of crimes by unknown or insolvent offenders (Act of 3rd January 1977). The conditions for compensation, were so narrowly restricted in this law, that it was in practice rarely ever made use of. With particular regard to the inadequate legal position, the legislator reformed the law relating to improvement of the legal status of and compensation for victims of crime. A new law was passed on July 1983.
- The claim of the victim to 10 % of the salary of the offender, as part of his or her compensation payment, is provided for by the following regulations (order of 28th March 1978: Art. D 113, and order of 6th March 1982: Art. 325 French Criminal Procedure Act).

The practical significance of this law, was limited, in so far as victim-orientated crime policy in concerned, in a global sense.

In June 1982, a report by Prof. *Milliez*, was presented, setting out the situation of the victim in criminal matters. This report brought attention to the disadavantaged position of the victim. The report aroused the particular interest of the Minister of Justice *Badinter*. Due to the limited possibilities

existing for material compensation, and the satisfaction of the immaterial needs of the victim, new alternatives for improving the situation, were looked for. Due to the fact that the legal provisions alone, could resolve the social problems of the victim satisfactorily, victim help organizations were created by the appropriate institutions at a local level (within the framework of decentralization 1981). Over 120 associations have been founded in the last few years.

1.2.2 Priorities of New Victim-related Crime Policy

Crime policy on the one hand, is strongly affected by the consequences of decentralization, upon the development of victim help organizations, and on the other hand by the victim movement, which has lead to the new Victim Protection Act.

Victim-help organizations

The victim-help organizations dealt with a total of 30,000 victims in 1987. These organizations arose in the course of decentralization, which lead to a new distribution of political authorities, namely in favour of local government bodies and municipalities. Many social and public-related decisions are now taken at a local level. The citizens themselves often participate in this area. The tasks of the victim-help organizations are not only directed towards legal but also social and psychological claims. These two aspects of new crime policy are therefore taken account of and supported to a considerable extent by the Ministery of Justice. The many tasks of the victim-help organizations can be summarized as follows:

- informing the victim
- legal assistance, psychological help and material support for the victim
- confrontation between offender and victim
- compensation
- avoidance of recidivism on the part of the offender

The focal point of crime policy lies particularly in the new practice approach of the victim-help offices, in the area of mediation. This means developing extra-judicial settlement of conflict, in order to assert or argue the victim's case for compensation. Compensation should in this respect, play an important role by means of the offender him- or herself.

Victim protection and compensation with reference to the Act of 8th July 1983

The Act of 8th July 1983, was passed in order to improve the legal position of the victim (facilitation of criminal proceedings for obtaining effective compensation).

The fact that the "action civile" is regarded as a conventional and important method for obtaining victim compensation, meant that the preconditions of the "action civile" were simplified in the 1980ies by the Act of 8th July 1983, and the victim compensation provisions were improved.

The legal innovations were introduced in two different sections.

The regulations relating to the criminal proceedings themselves, are referred to in the first section. They allow facilitation of the formalities of the "action civile" and extend the responsability of the criminal judge. The following new provisions are important:

- The public action, is raised by the public prosecutor. The victim can also, instigate a claim by registered letter, unless his claim for compensation (as a result of offence or violation of the law) exceeds 30,000 FF.
- Inspite of the acquittal of the accused party, the criminal judge can call for indemnification in his judgement, according to civil legal provisions (Art. 470-1 French Criminal Procedure Act). Before 1983, the criminal court could not make any decision regarding a compensation claim by the injured party, if the accused was acquitted. According to Art. 1384 French Civil Code, the victim retained the possibility of raising a civil law action. With the opening of the new form of proceedings, the decision regarding compensation was delayed. This lead to considerable financial strain for the injured parties.
- The civil law courts are responsible for taking action in summary proceedings and safeguarding proceedings, even if the criminal courts are dealing with the principal claim itself (Art. 5-1 French Criminal Procedure Act). These actions are all-embracing, for example concerning expert opinions, distraint attachment of property, advance payments...).
- He/she must in cases where the victim raises a public action, in principle, deposit the established sum to cover procedural costs. If the financial means are insufficient, the investigating magistrate can disregard the requirement of a deposit. In the other cases, the extent of

the sum deposited must be established both in respect of procedural costs and also in relation to the financial means of the victim (Art. 88 French Criminal Procedure Act).

- Within the context of the so-called "contrôle judiciaire", the catalogue of conditions was extended. The accused party can be prohibited from carrying a weapon, or conditions can be imposed upon him in order to secure material safety and to safeguard the later claims to be made by the victim.
- In the criminal proceedings, the participation of the injurer of the accused party (Art. 385-1, 388 French Criminal Procedure Act) is allowed (or the "partie civile").

The second section of the statute deals with the conditions of the French Penal Code.

- The fraudulent causation of insolvency on the part of the debtor, is introduced as providing new evidence of a crime. A debtor is threatened with imprisonment from 6 months to 3 years according to Art. 404-1 French Penal Code, or a with a pecuniary penalty of 6,000 to 120,000 FF, if he before or after a court decision, brings about his own insolvency or has endeavoured to do so, in order to avoid a pecuniary penalty or compensation order being enforced against him by the criminal courts.

The latest legal provisions passed on 9th July 1990, can be regarded as the "crowning" of victim-related crime policy. The legislature has abolished the customary conditions which presuppose a claim, in particular with regard to the nationality of the offender, and compensation for damages for all victims of violent crimes, is provided for. The new article 706 par. 3 of the French Criminal Procedure Act runs as follows:

"Every person who has suffered damage as a result of a deliberate or unintentional crime, which complies with the definition as such, can claim full compensation for damages." As a result, the extent of compensation is no longer limited to 400,000 FF and all damages suffered are included (physical, psychological, financial etc.).

The new victim-related crime policy in France, introduces many new aspects, which can be seen both in the practice of victim-help organizations and also in the practice of the courts themselves.

1.3 Compensation - Legal Conditions

1.3.1 The Role of Compensation in Sentencing

The extent of damage suffered and also the behaviour of the victim (for example his pardon...) and the efforts of the offender towards compensation for the damage suffered, are taken into account by the criminal judge in the trial, when the measure of sentence is being considered.

According to the new Art. 467-1 French Criminal Procedure Act, voluntary compensation for damages by the offender before the trial, is taken into account as a ground for mitigation of sentence. However, this condition in practice should play an important role. The frequency and extent of application of this option is very difficult to assess, in that the criminal judge does not have to justify a sentence which is mitigated.

The concept of compensation was introduced in legal proposals in 1983, as follows: in relation to assessing the extent of punishment, the circumstances of the offence, personality and motives of the offender, and his behaviour after the offence was committed, are taken into account by the court.

1.3.2 Compensation as a Requirement for Reversal of a Sentence (Act of 11th July 1975)

The legal provisions contained in Art. 469-2 and 469-3 French Criminal Procedure Act, already mentioned, contained very interesting new regulations. These legal rights are not often, it appears, put into practice. However, the project in St. Etienne effected on the initiative of two judges, is interesting to note. The following status in the proceedings, must be recognized: in relation to the initial hearing after establishment of guilt, the court establishes the extent of the damages for the purposes of compensation. The court then imposes the appropriate punishment. If the offender complies with the condition of compensation, the court can reverse the sentence imposed, which corresponds to probation or work which is of benefit to the general public. The period between the two hearings cannot extend beyond a year (Art. 469-3 par. 4 French Criminal Procedure Act). The offender is allocated a probation helper, who ensures that the compensation agreement is complied with by the offender. The extent and form of material compensation, are established according to the interest of the victim and the financial means of the offender. After five years practical experience in St. Etienne, it can be shown, that this project has resulted to a great extent in a reduction of sentences imposed, and has made effective compensation for the victim of crime, possible.

On 6.7.1989, the legislature introduced the possibility of compensation, under the name of suspension of sentence with probation condition attached (Art. 469-4 French Criminal Procedure Act).

It is however astounding, that this legal opportunity plays a very minor role in practice in other courts. The question therefore arises in empirical research, as to the extent of opposition in view of the frequency of its use. This must be researched.

1.3.3 Compensation within the Context of Probation

The court can suspend sentence in favour of probation and impose corresponding conditions. Two kinds of conditions are to be noted: general and special conditions. As special conditions, the criminal judge (or also the judge who is responsible for the execution of the sentence) according to Art. 739 French Criminal Procedure Act can impose compensation upon the offender in the form of financial compensation conditions which must be complied with in favour of the victim (R 58-5 French Criminal Procedure Act). The same applies to those on work furlaugh if the prison sentence does not amount to more than 6 months (D 536-5 French Criminal Procedure Act). The question however arises, as to what extent the application of these principles in practice, has actually put compensation as a concept into effect.

1.3.4 Compensation and Imprisonment

The legislature introduced new forms of compensation into the criminal justice system, taking account of the interests of the victim. The victim therefore has a claim to 10 % of the salary of the prisoner as contribution towards compensation due (Art. D 113 c French Criminal Procedure Act). According to an order of 26th March 1982, the prosecutor is instructed to make notification of the extent of compensation due, to the head of the prison.

The relaxation of the imprisonment provisons, in the sense of a non-confinement facility (for example conditional release) can be made dependent upon compensation being effected (Art. D 536-5 French Criminal Procedure Act).

The question of implementation of compensation also arises within the framework of the prison. The fact that work of the prisoner, is a requirement for compensation, should be expanded by empirical research into the conditions relating to the structure of imprisonment. In addition, the non-confinement facility, appears to play an important role in relation to compen-

sation, if the prisoner is employed and can earn money. The empirical research should therefore research the relevance of the legal opportunities available in practice.

2. Methods

The evaluation of compensation in practice and its acceptance by those participating at various levels in the criminal proceedings, is researched as the first step. Compensation has found its way into the criminal justice system and probationary service.

In relation to victim compensation, the planned empirical analysis is limited to the effects of the "action civile", which remains as a conventional legal instrument in France. That means that no evaluation of a state victim compensation program is being made.

The research consists of two parts: on the one hand in relation to the practice of compensation, and on the other hand in relation to the "action civile".

2.1 In Relation to the Practice of Compensation

Introductory notes

Due to the small number of French judges and prosecutors - a total of 6,000 - and the centralized court system, research by means of questionnaires at a national level, appeared to be a sensible way of proceeding. Account was taken of the peculiarities of the French legal system, in choosing the parties to be questioned. As the public prosecutors play an important role in victim-related crime policy due to the principle of discretionary prosecution, a questionnaire was drafted to take account of this problem.

The second important figure is the judge (Juge de l'application des peines) to whom the task of execution of sentence and imprisonment is attributed. More detailed research in relation to the role of this judge was of particular interest in relation to compensation, most of all in the relaxation of execution of sentence with the imposition of conditions of compensation.

The execution of the compensation conditions involves the probationary service. This means that this organization untertakes the execution of these conditions under the control of the judge responsible for the execution of sentence (supervision, care and assistance).

In order to be able to evaluate the practice of compensation, the written survey of the probationary service regarding their methodical approach and manner of dealing with these provisions, was undispensable.

The research carried out, was effected as follows:

Three different standardized questionnaires were used as means of acquiring data, namely for the judge responsible for the execution of the sentence, prosecutors and probationary helpers. A pre-trial run took place in Strasbourg and on this basis, the questionnaires were formulated with the help of judges from the regional court in Strasbourg. The questionnaires consists mostly of closed questions (a total of around 60 questions per questionnaire). The open questions are in general qualitatively analyzed.

In order to guarantee a representative sample, taking account of the specific French court system, a total of 181 regional courts (Tribunal de Grande Instance) were included. As a result, in September 1990, the 181 questionnaires were sent to the prosecutors, the judges responsible for the execution of the sentence and probationary helpers. The fact that the procedural practice is the same in every court, meant that only one questionnaire was sent to a representative of the individual occupational groups within a court (mentioned above).

The questions are divided into four groups. The survey constitutes both a quantitative and also qualitative investigation.

- The **first** group of questions:
  - General questions regarding the attitudes of the parties questioned towards victim-orientated crime policy. This complex of questions was equivalent to the comparative law research. (Germany: *Kaiser/Hertle* and Austria: *Krainz*).

- The **second** group of questions:
  - General questions regarding the attitudes towards and acceptance of concepts of compensation by the various institutions concerned (public prosecutors, judges responsible for the execution of sentence, probationary helpers). It is particularly interesting to analyze the

views of these people regarding the value and likely success of victim-related crime policy in comparison with the traditional offender-orientated crime policy which has dominated until recently.

Within the course of the research, general questions arise in relation to attitudes towards compensation:

- in relation to cooperation with the criminal justice system (allocation of a case, influence upon the outcome of proceedings),
- in relation to attitudes towards compensation and the practice of mediation at a pre-court level, in the area of minor offence (in connection with problems of the training of the so-called "mediator", of the necessity for legal supervision and the choice of cases which are regarded as suitable for extra-judicial conflict settlement), and
- in relation to more far-reaching reform alternatives, for example compensation as an independent option within the context of the so-called "contrôle judiciaire" and the opportunity for a later discontinuance of the criminal proceedings, if the offender has compensated the victim before the trial, or compensation as a requirement for discontinuance of proceedings in accordance with the German model juvenile criminal law, or compensation as an independent/sole penalty (with particular reference to alternative to short prison sentence or extention of the existing legal possibilities, see Art. 469-2, 469-3 and 469-4 French Criminal Procedure Act)...

- The **third** group of questions:
  - In order to be able to record the individual work load in practice in relation to compensation, general questions regarding the activities of the parties questioned, were set.
  - The number of people convicted, for whom each professional group-member is responsible.
  - How many of them must comply with compensation conditions?

In order to be able to evaluate the individual practice of the sentencing judges, questions were set as to methodical approach and manner of dealing with each case (e.g., in connection with the cooperation with probationary service and the victim).

- The form of conditions to be complied with by the offender.
- Compensation is imposed in relation to which offences?
- Which criteria are definitive in making this decision?
- Form and extent of compensation conditions imposed.

- The **fourth** group of questions:
  - In relation to implementation of compensation conditions, the following questions were put:
  - Adherence by offender to agreed conditions.
  - What was experienced in relation to the offender/victim's willingness to participate in mediation?
  - In relation to the results of an offender/victim confrontation: what is the extent of agreement reached?
  - What role does the judge responsible for the execution of sentence play? How wide is the individual scope for his/her discretion?
  - What role does the probationary helper play (supervision, control, care and assistance?)
  - What difficulties are the judges and probationary helpers confronted with in relation to compensation? (strain of work load...)

2.2 In Relation to Compensation in the Context of the "action civile"

In order to be able to evalute the efficiency of the action civile, an evaluation of files as instruments of inquiry can only be considered in the regional court. The probationary helper plays a central role in the practical implementation of compensation provisions. It therefore appears sensible, in cases where compensation conditions are imposed, to include the probationary services as a further step in the sequence of events.

In the analysis of files, the following details were established:

- The length of the criminal proceedings (up until compensation imposed)
- the level of compensation conditions imposed
- the difficulties of the victim in the criminal proceedings (procedural costs, information...)
- the functioning of the "action civile" and the implementation of the reforms introduced by the statute of 8th July 1983, in court practice.
- How many victims have received full compensation.
- Why have victims received either no compensation or merely partial compensation?

3. Summary

In summary it must be observed that the new victim-orientated crime policy in France contains various different aspects. The most important aspects which are being tested in practice at present are mediation, reconciliation and compensation. Two tendencies should be reconciled in this way, namely satisfaction of the interests and claims of the victims, and on the other hand the social rehabilitation of the offender. The experiments in relation to reconciliation by the offender present a promising solution to the conflict in this respect. Since the introduction of victim-orientated crime policy ten years experience have ensured in the practical application of these laws, repeatedly reviewed, relating to improvement of the victim's status in the criminal law. With this on-going empirical research, the question should be evaluated as to the area in which the victim-orientated crime policy particularly established in France, has been enforced in practice and to what extent the victim's interests have been satisfied.

4. References

Abel, R. (1981). Règlement informel et formel des conflits. Analyse d'une alternative. Sociologie du travail.

Akermann, R., & Dulong, R. (1984). L'aide aux victimes. Premières évaluations. Paris: MSH.

Albernhe, R. (1974). Procédure pénale et victimologie. Annales de l'université des sciences de Toulouse, XXII, 167.

Ancel, M. (1978). La défense sociale nouvelle devant le problème de la victime. Revue de Sciences Criminelles, 179.

Badinter, R. (1984). Préface. Guide des droits des victimes. Ministère de la Justice: Gallimard.

Baril, M. (1981). Assistance aux victimes et justice pénale. Déviance et Société, V, 277.

Bernard de Celis, J. (1981). L'expérience du service d'accueil des témoins et victimes du tribunal de Paris. Revue de Sciences Criminelles, 695.

Bernard de Celis, J. (1983). Police et victimisation: réflexions autour d'une main-courante. Archives de politique criminelle, 6, 147.

Bolard, G. (1981). De la déception à l'espoir: la conciliation. In: Mélanges Hébraud Pierre. Toulouse: Université des Sciences sociales.

Bonafé-Schmitt, J.P. (1987). Les justices du quotidien, les modes formels et informels de règlement des petits litiges. In: Journées d'étude sur les pratiques de médiation. Lyon: GLYSI Université LYON II.

Bonafé-Schmitt, J.P. (1987). La part et le rôle joué par les modes informels de règlement des litiges dans le développement d'un pluralisme judiciaire. Droit et Société, 6, 263.

Broquere, F. (1987). Le conciliateur, une nouvelle juridiction. Bulletin du Bâtonnier. Nîmes.

Charmes, C. (1979). La victime et la justice. Promovere, 19.

Commission d'études et de propositions de l'aide aux victimes présidée par le Professuer Milliez. Ministère de la Justice, Juin 1982, doc.Ron.

Couvrat, P. (1990). La loi du 6 juillet 1990 relative aux victimes d'infractions. Actualité Législative, 17, 1143.

Couvrat, P. (1983). La protection des victimes d'infractions. Essai d'un bilan. Revue de Sciences Criminelles, 594.

Delmas Marty, M. (1984). Des victimes, repères pour une approche comparative. Revue de Sciences Criminelles, 216.

Desdevises, MC. (1985). Les associations d'aide aux victimes. Revue de Sciences Criminelles, 541.

Dupre, J.F. (1977). La transaction en matière pénale. Litec.

Estoup, P. (1986). Etude et pratique de la conciliation. Dalloz, Chronique, 161.

Fattah, E. (1981). La victimologie entre les critiques épistémologiques et les attaques idéologiques. Déviance et Société, V, 71.

Fattah, E. (1980). Victimologie: tendances récentes. Criminologie, 28.

Fauard, J., & Guth, J.M. (1990). La marche vers l'uniformisation?: La quatrième réforme du droit à indemnisation des victimes d'infractions. La Semaine Juridique, I, 37.

Fauchere, J. (1986). Sanction et réparation dans le travail d'intérêt général (une recherche empirique en région parisienne). Centre de recherche de politique criminelle, Institut de droit comparé de l'Université de Paris II.

Fortunet, F. (1984). La conciliation: sanction acceptée. Archives de Politique Criminelle, 7, 118.

Franco, M.J. (1988). La variante de médiation. Mémoire de DEA de droit pénal et politique criminelle. Université de droit de Montpellier.

Gewaltig, S. (1990). Die Action civile im französischen Strafverfahren. Europäische Hochschulschriften. Frankfurt: Peter Lang.

Ghanam, M. (1984). La victime du système. Thèse Université de Pau.

d'Hauteville, A. (1991). L'esprit de la loi du 6 juillet 1990 relative aux victimes d'infractions. Revue Science Criminelle, 1, 151.

Hellbrunn, L., & Hincker, M. (1985). Peut-on aider les victimes? Strasbourg: ACCORD, Ed. ERES.

Kleinkotz, Z. (1981). Compte rendu du colloque à Pau du 6-9 juillet 1981 sur le règlement des litiges en dehors des tribunaux. Revue Internationale de Droit Comparé, 4, 1036.

Körtz, H., & Ottenhof, R. (1983). Les conciliateurs, la conciliation. Economica.

Larguier, J. (1978). Le domaine de la dispense de peine. Revue de Sciences Criminelles, 617.

Larzerges, C. (1988). La mise en oeuvre par un C.C.P.D. de l'idée participation des citoyens à la politique criminelle: l'exemple de Montpellier. Revue de Sciences Criminelles, 150.

Larzerges, C. (1988). Pour une politique criminelle participative. In: La politique criminelle, P.U.F. Collection Que said-je? No.2356.

De Liege, M.P. (1986). Victimes, victimologie, la situation française. Revue de Sciences Criminelles, 757.

Lombard, F. (1984). Les différents systèmes d'indemnisation des victimes d'actes délinquants et leurs enjeux. Revue de Sciences Criminelles, 277.

Lombard, F. (1984). Les systèmes d'indemnisation des victimes d'actes de violence. Paris: CESDIP.

Mérigeau, M. (1990). Überblick über die neuen Wege einer opferbezogenen Kriminalpolitik in Frankreich. In: A. Eser, G. Kaiser & K. Madlener (Eds.), Neue Wege der Wiedergutmachung im Strafrecht (p. 325). Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht.

Mérigeau, M. (1991). Neues Opferentschädigungsrecht in Frankreich. Neue Kriminalpolitik, 1, 12.

Normandeau, A. (1981). Les droits et liberté des victimes. Déviance et Société, 1981, V, 283.

Normandeau, A. (1983). Pour une charte des droits des victimes d'actes criminels. Revue de Sciences Criminelles, 1983, 209.

Parizeau, J. (1980). Le dédommagement des victimes. Criminologie spécial, Regards sur la victime, 37.

Pradel, J. (1983). Un nouveau stade dans la protection des victimes d'infractions. Commentaire de la loi no.83608 du 8 juillet 1983. Dalloz: Chronique, 241.

Rapport du Comité européen pour les problèmes criminels sur le dédommagement des victimes d'infractions pénales. In: Dédommagement des victimes d'infractions pénales, Conseil de l'Europe 1978.

Rapport sur l'étude de la jurisprudence des commissions d'indemnisation des victimes d'infractions pénales, Ministère de la Justice, Conseil de la recherche, Mai 1988.

Rapport sur la décriminalisation, Conseil de l'Europe, CEPC, Strasbourg 1980.

Rico, J.M. (1968). L'indemnisation des victimes d'actes criminels. Etude comparative, Acta Criminologia, 261.

Servidio-Delabre, E. (1985). La médiation aux Etats-Unis. Archives de Politique Criminelle, 192.

Servidio-Delabre, E. (1986). La médiation à Chicago. Revue de Science Criminelle, 199.

Stanciu, V.V. (1985). Les droits de la victime. Paris: P.U.F.

Szabo, D. (1981). La victimologie et la politique criminelle. Revue Internationale de Criminologie et de Police Technique, 343.

Tailhades, E. La modernisation de la justice. Rapport au Premier Ministre, Paris. Documentation française.

Touzard, M. (1977). La médiation et la résolution des conflits. Etude psychosociologique, Préf. D. Anzieu. Paris: P.U.F.

Trioux, M. (1985). La médiation pénale. Paris: Ministère de la Justice (unpublished manuscript).

Verin, J. (1983). La médiation à San Francisco, à New York et à Kitchener. Revue de Sciences Criminelles, 292.

Verin, J. (1980). La victime et le système pénal. Revue de Sciences Criminelles, 763.

Verin, J. (1982). Règlement extra judiciaire des lititges. Revue de Sciences Criminelles, 172.

Verin, J. (1983). La médiation à San Francisco, à New York et à Kitchener. Revue de Sciences Criminelles, 292.

Verin, J. (1984). Un exemple de conciliation non étatique: la médiation anglo-saxonne. Archives de Politique Criminelle, 7, 13.

Verin, J. (1983). Une politique criminelle fondée sur la victimologie et sur l'intérêt des victimes. Revue de Sciences Criminelles, 895.

Zauberman, R., & Robert, P. (1984). Les victimes. In: B. Aubusson, P. Lascoumes & R. Zauberman (Eds.), Le pénal en première ligne ou en dernier ressort. Paris: Cesdip.

Zauberman, R. (1982). Grandes enquêtes en recherches pénales et difficultés de réalisatio: réflexions complémentaires à propos des enquêtes de victimisation. Déviance et Société, VI, 281.

Problems Relating to Compensation for Victims in Spain

Alfonso Serrano Gómez

Contents

1. Introduction

In Spain, there is almost total neglect, not only with regard to "victims" but as to criminology as a whole. There is no research, and institutes founded in the various law schools lack the budgetary allocations. Save in very few cases, permanent professors devote themselves to theoretical teaching, without undertaking studies on realities in the world of delinquency and its consequences. In recent years, the major concern of political parties lies in attracting votes in elections so as to attain power, regardless of the procedure. For this reason, the knowledge and study of criminality is something secondary; only terrorism is of interest, precisely owing to its importance in the field of politics.

There are no public statistics in Spain regarding the police. It is difficult to obtain data both on crimes and victims. It is necessary to appeal to the willingness of police officials to secure partial statistics. On the other hand, it should be noted that there is a disparity of data as regards those of the police and of the judiciary; also, the meagre interest these latter evince from the criminological standpoint.

The above makes clear the serious difficulties existing in Spain in order to ascertain more or less approximate data, not only in so far as criminality in general is concerned, but with respect to victims of crime, because there is an overall distrust on the part of the citizenry concerning the effectiveness of the justice administration in general, i.e., police and judges. The number of victims of crimes who no longer report to the above mentioned authorities grows continually, as possibilities diminish for recovering their losses owed to crime, or to secure any type of indemnity for economic, physical or moral damages sustained by reason of the criminal action [1].

Political change initiated in 1975 at the termination of the previous authoritarian regime, to give way to a democratic process, has not yet been consolidated; the situation has not improved. There is no great interest in problems posed by national crime,[2] despite the extraordinarily increased

1 See *Serrano Gómez, A.* (1986). El costo del delito y sus víctimas en España. Madrid, pp. 111 et seq.

2 See *Serrano Gómez, A.* (1987). Cambiamento político e cambiamento della política criminale, en Trattato di Criminología, Medicina Criminológica e

number of crimes.[3] Thus, it is not easy to know the victims of a crime and, consequently, damages sustained. Nevertheless, this means they are practically defenseless in so far as the crime, the delinquent, and government interest in assuaging damages sustained are concerned. It is for this reason that I shall dwell on problems experienced as to the rights of victims in Spain. While certain works on victimology have been published in this country, they fail to address such problems.

2. Impediments in Police Research and in the Judicial System

As it is the case with criminality in other countries, theft makes up a higher percentage of crime in Spain. Approximately two of every three offences belong to this type. These violations involve delinquents with no means for indemnifying the victim; thus, because there is no government compensation system, the latter is totally defenseless.

As for crimes against property, the majority involve theft or larceny. Almost in no case the offender is able to compensate the victim, since he lacks the financial means and it is for this reason that he committed the misdemeanor of this type. Spanish courts have been declaring such persons insolvent, i.e., 95 % of persons involved in theft or larceny lack the means for compensating the victim.

The police recover only a small portion of what the author of the crime has obtained. By judicial decision, this will later go to the victim. According to confidential police data, the percentage recovered in crimes related to theft in 1989 was: theft, 6.3 %, larceny, 6.2 %, objects removed from the interior of vehicles, 2.3 %, bank fraud, 27 %, fraud in general, 11 %, fraud by means of bank cheques, 3.5 %.

Psichiatria Forense, a cura di Franco Ferracuti (vol. IV.), pp. 53 et seq.

3 Evolution of delinquency in Spain during the Decade 1980-1989, and according to data on page 89, Report of the Attorney General of the Supreme Court, 1990, offers statistics on proceedings instituted in prior proceedings. The numbers of such proceedings initiated in the previous years were: 718,212 (1980), 698,353 (1981), 733,242 (1982), 922,731 (1983), 1,082,135 (1984), 1,142,106 (1985), 1,236,909 (1986), 1,338,309 (1987), 1,423,617 (1988) and 1,522,340 (1989). Of these figures, 937,319 relate to theft, 131,821 to negligence and crimes related to motor vehicle traffic.

What little is recovered from the crime, as well as the delinquent's lack of financial means, represents a serious limitation to the victim's right to compensation. There is no possibility and, as already noted, there is no government indemnity system for the victim, although he may be entirely ruined. There is no compensation system as it is the case in other countries;[4] we have one example in the Cuban Penal Code of 1987.[5] While the Spanish Penal Code very exhaustively regulates civil liability derived from criminal conduct, especially in its Articles 19 and following,[6] and 101 and following,[7] the reality is that it is extremely difficult for the victim to be compensated, at least in so far as robbery and other property damages are concerned. The criminal court judge must resolve concerning indemnity to the victim or person who has suffered damages owing to the crime. While in the matter of punishment the courts are more or less effective, their diligence as regards indemnity to victims is weak. Thus, they very frequently receive no compensation or do so too late, even and including, at times when deaths or injuries are involved. The Spanish Justice Administration almost forgets to see that the victims receive the indemnity the judges themselves establish in their sentences. This is recognized by the government itself through its Attorney General, stressing the ineffectiveness of the justice administration.[8]

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4 See *Madlener, K.* (1989). La reparación del daño sufrido por la victima y el derecho penal. In: Estudios de Derecho Penal y Criminologia (pp. 9 et seq.).

5 The Cuban compensation fund is as entity responsible for implementing civil liability to pay for material damages and indemnity for damages to victims of a crime. Art.71)

6 Art. 19 of the Spanish Civil Code provides that "any person criminally liable for a crime or fault is civilly liable as well".

7 In its Articles 101 to 111, the Spanish Penal Code deals with civil liability and procedural costs - rights and indemnities occurring in judicial actions. According to Article 101, civil liability covers: "restoration; reparation". Remaining articles deal with establishing what must be understood as such items, as well as the course for making such items effective between offenders, accomplices or accessories to the crime.

8 On page 78 of the 1989 Annual Report of the Attorney General of the Supreme Court, it is stated: "Protecting the victim of the crime is not exhausted by the penal sanction of the delinquent, but it must be ascertained that reparations are made with regard to all effects of the crime. Save exceptions, exercising civil and penal action must, in its criminal procedure, be sufficiently effective in order that it may not become a mere bureaucratic and senseless display. Thus, they need immediately following the crime, to initiate and substantiate the so-called liability items, and to urgently adopt cautionary economic-social protection measures for the victim, without awaiting the content of the accusation and, often, without the civil liability

In the face of deficiencies in the Spanish Justice Administration in the matter of compensation for victims or persons who sustain damages owing to a crime, it is frequent for the victim to arrive at an agreement with the offender himself, although it is generally made with insurance companies when the victimization results from traffic accidents. They renounce rights to which they are legally entitled in order to ensure compensation, almost always markedly less than that which the judge would stipulate in the sentence. The victim's right to waive compensation is provided in the Spanish Penal Code.[9] Unfortunately, when this procedure is followed, insurance companies have the legal means for delaying payment, simply appealing the sentence to the Superior Court. In the face of this serious difficulty, Spanish justice seeks to prevent the victim from experiencing an extended delay in order to receive compensation, compelling insurance firms to deliver a prior sum to victims of crimes.

It has been stated above that in crimes against property, which represent more than two-thirds of Spanish criminality, it is rare indeed for the author of the crime to have the financial means for compensating the victim. In so far as theft and larceny are concerned, for example, in 95 % of cases the courts declared the offender insolvent; on the other hand, little over 6 % of property obtained by the delinquent is recovered.

If we add to the above that in Spain, given a distrust of justice, the inconvenience and expenses required to follow penal proceedings or to be a witness, causes many not to report that they have been victims of a crime. It can be estimated that somewhat more than one half of thefts are not reported. Larceny can be estimated to be reported in one out of every five cases, when the amount involved is truly high. For if there are included cases of slight damages, as a whole only one out of every 50 or 60 cases is reported. The foregoing makes it clear that victims of crimes against

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having been concluded, once sentence is passed. The guarantees may diminish or disappear as soon as the prisoner observes the adverse content regarding the manner in which the proceedings are handled. In the formation of so-called civil liability items, the parties and the victim should be allowed greater intervention, with the former's impulse, and a more in-depth investigation of the guilty party's property should be sought with assistance from specialized judicial police teams and close cooperation from entities such as treasury departments, city halls, etc. Only thus would the "items" often cease to be mere proceedings, without ulterior investigations to detect the "arrival at better fortunes".

9 Paragraph 2, Article 25 of the Spanish Penal Code provides: "In so far as the interest of the condoning party and civil liability, becomes extinguished by his express renunciation".

property are compensated in less than 1 % of cases, so that their protection with respect to the crime as to its compensation is practically nil. This is further confirmed if it is considered that police effectiveness concerning known crimes against property resulted in the solution of only 15% of cases during 1989.[10]

This without overlooking the fact that on not a few occasions, the courts fail to sentence a presumed delinquent whom the police considers guilty. Under the Spanish legal system, problems encountered by the victim in order to obtain compensation for other crimes present the same serious difficulties, although he is in a better position when the offender enjoys a better financial status than do property offenders, as it is the case with certain swindlers, delinquents in the area of offences against sexual freedom, offences against life or physical integrity of persons, etc.

3. Legal Impediments

The Spanish Penal Code attenuates criminal liability based on the circumstance of **spontaneous reconsideration.** In its Article 9.9, the aforesaid code provides that an extenuating circumstance is that: "The guilty party having proceeded, prior to initiation of judicial proceedings and owing to spontaneous remorse, to repair or diminish the effects of the crime, and to offer the offended party satisfaction or to confess his violation to the authorities". The contents of this article establish a number of impediments for the victim to obtain restoration from the crime's author, for a) it requires reparation prior to the opening of judicial proceedings, i.e., prior to the judge's intervention when he is informed about the crime; b) it is necessary to fully compensate for the crime. Although some sentences of the Spanish courts require partial reparation, others compel to be total, which the guilty party is sometimes unable to do, since the latter questions the effectiveness of extenuating circumstances and, considering that he fails to benefit from only partially indemnifying the victim, makes no indemnity at all.[11] It

10 Concerning other crimes known to the police during 1991, the percentage of those resolved was: Crimes against sexual freedom (62%), crimes against persons (65%), crimes against the justice administration (82%), falseness (85%), crimes against freedom and safety (66%).

11 In some cases, as occurs in fraud through overdraft as provided in Art. 563 b) of the Spanish Penal Code, the parties usually agree, even moments before the trial is held, on total or partial restoration of damages of the victim caused by the offender. If they arrive at an agreement, the complainant party's

would be necessary to amplify this extenuating circumstance with a reduced sentence which, at times, a) could even include short detention, freedom under proof or fine; b) extend the time limit beyond the instant at which the judge is informed of the crime, and may even be at any time prior to holding the trial; and c) compensation may be total or partial, which the judge and courts would bear in mind for purposes of mitigating sentences.

3.1 Privileged Status of the Government in Certain Crimes

The Spanish Penal Code provides certain cases wherein the government experiencing damages owing to a crime, it applies a special extenuating system, including exemption from criminal liability, in order to secure recovery of damages occasioned it by the crime. Under "misappropriation of public funds by officials", the sentence can include deprivation of freedom for twelve years and one day, to twenty years, if the "public official should remove, or consent that others remove, public funds or securities in his charge or at his disposal by reason of his duties", when the amount exceeds 2,500,000 pesetas (25,000 dollars)[12] (Art. 394 of the Penal Code). Accordingly Article 396 provides sentences in case the official should "apply for his own use or that of others, the funds or securities in his charge".

However, the penalty remains at special disqualification or suspension, where pertinent, if the amounts are returned within the ten days following initiating the indictment (Art. 396, par. 2).

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attorney withdraws the accusation at the time of the trial, and judges usually absolve the author of the crime. Procedurally, this is improper, but it is a manner of recognizing that the victim has been compensated, for otherwise he would with difficulty obtain even a part of the damages occasioned by the offender.

In the matter of non-payment of bank cheques, the Spanish Penal Code provides a more reasonable system for compensating victims. This is offered in establishing that "whomsoever writes a cheque and pays its amount within a period of five days, relieves the writer of the cheque from penal liability."

12 According to Article 394, the penalty is: one month and one day to six months in prison, if the sum removed does not exceed 30,000 pesetas (300 dollars); 2) six months and one day to six years imprisonment if the amount should exceed 30,000 pesetas but be not more than 500,000 (5,000 dollars); 3) six years and one day to twelve years should it exceed 500,000 pesetas but does not exceed 2,500,000 (25,000 dollars). Twelve years and one day to twenty years of imprisonment if the amount removed should exceed 2,500,000 pesetas. Further, in all cases the penalty of absolute inability to fill public positions and public office, etc.

The Government also situates itself in a privileged position with respect to the victim of a crime in other cases of misappropriation, such as that provided in paragraph one, Article 395 of the Penal Code, where a penalty consisting of a fine for "one half the worth of the funds or securities removed, and may not be less than 100,000 pesetas" (1,000 dollars).[13] In these cases the penalty is limited to public reprimand[14] "if the guilty official returns the funds or securities prior to trial, or through his actions reimbursement is secured".

From the foregoing it is concluded that the government contemplates privileged extenuation with respect to the author of the crime when itself becomes the injured party - victim by extension - of events. As against the extenuating circumstance of spontaneous remorse under Article 9 noted above, Articles 395 and 396 extend to a procedural stage much later than that of initiating the **juridical proceeding** such as **within the ten days of initiating proceedings** (Art. 396), or is prolonged even much further, as under reimbursement prior to trial (Art. 395). Doubtless, if this was possible within extenuating circumstance 9, Article 9 of the Penal Code, the victim could be restored in many more cases than is currently the case.

3.2 Other Impediments

As indicated above there are difficulties experienced by the victim of a crime in obtaining reparation when it is incumbent upon an insurance company to implement the same. A situation observed quite frequently in the case of penal infringements committed with a motor vehicle, resulting in deaths or injuries. The situation is worsened in the Spanish system owing to the quasi impunity with which many insurance companies operate. After attracting a substantial number of clients and collecting the premium, they declare for insolvency. Thus, in cases where by judicial decision they must compensate their victims for crimes caused by their insured persons, they do not do so, since their capital and property, for the most part non-existent almost, pass to a higher body[15] which, after liquidating the properties,

13 Article 395 of the Spanish Penal Code castigates the "Public official who, owing to inexcusable abandonment or negligence should provide occasion for another person to remove public funds or securities noted under 2, 3 and 4 of the preceding article, see preceding note.

14 Article 89 of the Penal Code provides that "A person sentenced to public reprimand shall receive the same personally and at an open door hearing of the court".

15 There is a Liquidating Commission for Insurance Companies, covered by

assumes responsibility for indemnifying the victims. This entity is unable to grant much - in no case the sum to which the victim is entitled - and in the majority of cases, the latter receives only a small portion after several years of administrative red tape and legal expenses which frequently exceed what they receive. The impunity with which many firms act resulted in that by January 1991, one hundred and fifty-one insurance companies were in liquidation. In Spain there are numerous legal impediments that hamper or delay victims of a crime from being compensated, or they collect nothing or only a portion. It frequently takes several years to achieve this and can sometimes be up to six or seven years.

4. Compensation to Victims of Terrorism

As indicated above, the Spanish government expressly undertakes to indemnify this type of victims, and to such end has passed a number of resolutions. Current legislation is contained in **Royal Decree 1311, October 28, 1988, govern the reimbursement to victims of armed gangs and terrorist elements.**[16] This legal provision includes five articles; the first of them deals with the **concept and range of indemnification,** where provision is made as to persons entitled to the same - those sustaining physical injuries as a consequence of crimes by armed gangs or terrorist elements. Not included here are damages which may be sustained by the authors of the events, i.e. the offenders.[17] as a consequence of handling arms or explosives, or occasioned to them by agents of the authority or third parties, in repelling the criminal action.

Royal Decree 10/1984, Law 46 of December 27, 1985, as well as Royal Decrees 2020 of August 22, 1986 and 2226 dated September 12, 1986, and March 30, 1988. The funds of this Liquidating Commission are extremely insufficient with respect to victims to be indemnified.

16 The Decree cancels another of January 24, 1986, dealing with the same subject. Currently, a new Royal Decree is under preparation improving indemnifications.

17 Article 1.1 provides: "The government shall indemnify for physical injuries caused to persons unrelated to the crime as a consequence, or on occasion of criminal activities conducted by armed gangs or terrorist elements, to the extent and in conditions established in the present Royal Decree".

Article 2 deals with persons entitled to indemnity, is quite extensive, since it includes persons who shall have sustained injuries,[18] spouses or children of victims, when as a consequence of a terrorist action a person shall have become deceased.[19] In case there are no descendents, indemnity accrues to the victim's parents, brothers, sisters or other relatives.[20]

Article 3 of the aforesaid Royal Decree dated October 28, 1988, deals with **criteria for determining the amount of indemnity;** these vary depending on whether injuries shall have resulted in non-invaliding labour disability,[21] or inability to work.[22] In order to determine what should be understood as invaliding or non-invaliding injuries, the decree refers to

18 Article 2 provides that persons entitled to indemnity shall be: "1) in case of injuries, the person or persons who shall have sustained them".

19 According to Art. 2.2, in the event of death, entitlement to indemnity accrues to: "a) The spouse not legally separated, children of the victim, regardless of relationship, who are minors or, if of age, are legally disabled or clearly unable to procure their substenance, and the surviving progenitor, if there is one, of any child of the deceased shall be entitled to indemnity, provided that same are in his/her custody. When the spouse, offspring of the deceased and surviving progenitor of one of these concur in certain cases, indemnity shall be shared by halves. One half shall accrue to the spouse not legally separated, the other is to be distributed equally among the children of the victim with particiption of their respective surviving progenitor; i.e., whether or not a spouse of the deceased, 50% of the amount accrues to each of the children".

20 Article 2.2: "b) In the absence of the above persons, or in case they do not meet the requisites noted, the parents of the victim. c) In the absence of persons enunciated in preceding items, brothers and sisters of the victim, provided that they live with and depend upon him/her financially and have insufficient means of subsistence. Exceptionally, and in the event of death of progenitors and a child of theirs in common, other children in common surviving, these latter with respect to their brothers/sisters without the need of custody and financial dependence concurring as provided in preceding paragraph.

21 According to Art. 3.1. of the Decree, indemnification shall be established following to criteria noted here: "a) Should a situation of transitory labour disability occur, permanent non-invaliding injuries or both, indemnity to be received shall be that established for such purposes in norms current at all times in the Social Security System".

22 Article 3.1. stipulates: "b) In case invaliding injuries are sustained, the amount of indemnity shall relate to the minimum interprofessional wage and shall depend upon degree of disability according to the following scale: partial permanent disability - thirty months wages; total permanent disability - fifty months wages; absolute permanent disability - seventy-eight months wages. Major disability - ninety-three months wages. c) In the event of death, indemnity shall be one hundred and seven months wages at the current minimum interprofessional wage".

Social Security Legislation.[23] Minimum interprofessional wages are those in force at the moment injuries are sustained or death occurs.[24] On the other hand, the decree provides for cases in which indemnities are increased.[25] The period for initiating claims is one year beginning with the event or when the victim is cured of the injuries.[26] Administrative action to secure indemnification is effected via urgency proceedings.

This type of victims, i.e. those suffering the consequences of terrorist attacks in Spain, are the only ones whose indemnity is assured; indeed, proceedings are conducted via urgency channels. However, the Spanish government is not so diligent when it is incumbent upon it to indemnify victims resulting from the intervention of its officials. In crimes committed by persons dependent upon the state in the exercise of their duties, government power resorts to every legal procedure and recourse before the authorities and courts in order to delay indemnifying the victims, even when the administration is sentenced in the first instance to make such an indemnity.

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23 Article 3.2. provides: "The consideration of injuries as disabling or non-disabling shall be determined on the basis of criteria stipulated by Social Security Legislation in the matter".
Social Security Decree 2065, May 30, 1974 as amended, Art. 135.3: "There shall be understood to be partial permanent disability for the customary profession, that which, not being total, causes the worker to reduce by not less than 33% his normal performance in the said profession, without preventing him from conducting fundamental duties thereof". Art. 135.4: "There shall be understood as permanent total disability for the customary profession, that which incapacitates the worker from performing all or the fundamental duties of such profession, provided that he can devote himself to others different therefrom". Art. 135.5: "There shall be understood as absolute permanent disability for all work that which completely incapacitates the worker for any profession or skill". Art. 135.6: "There shall be understood as disability the worker's condition for purposes of absolute permanent disability and which, as a consequence of anatomical or functional losses, he/she needs the assistance of another person to perform the more essential activities of life, such as dressing, moving, eating or analogous".

24 The minimum interprofessional wage in Spain in January 1991, is 53,250 pesetas monthly, equivalent to 532 dollars. The daily wage is 1,775 pesetas, equivalent to 18 dollars. This is for persons over 18 years of age.

25 According to Art. 3, Royal Decree 1311, October 28, 1988: "3. To indemnity provided under b) and c) in the first item of the present article, shall be added the sum of twenty months payment of the minimum interprofessional wage for each minor child or disabled adult. 4. Amounts resulting from applying above rules may be increased up to 30%, bearing in mind the personal, family and professional circumstances of the victim". It is reminded that a minimum monthly wage is equivalent to 53,250 pesetas (532 dollars).

26 Article 5.2. Royal Decree dated October 28, 1988.

All too frequently in these cases, it can take the victim four or five years, even more, to secure indemnity for injuries sustained in a crime. On occasion, indemnity is not claimed owing to distrust of the result, slowness and expenses sometimes necessary to initiate the claim.

From the foregoing remarks it is concluded that according to Spanish administration indemnity to victims of terrorism covers only cases of death or injury, but does not extend to any other type of damage.[27] Indeed, many are the effects of terrorism where indemnity is not possible, since it involves fear and insecurity among certain social groups in particular, such as the police, the military, and justice administration officials, the effects of which cannot be evaluated, nor are they indemnified. Although there is extra pay for the police and other officials working in areas more deeply affected by terrorism, e.g., the Basque country. Also attorneys and judges responsible for accusing and judging terrorist crimes,[28] since some have been the object of attacks and in one case, an attorney was assassinated.

To return to victims of terrorism when death or injury are not involved, it is estimated that the terrorist organization ETA[29] has obtained some six thousand million pesetas (about 60 million dollars) through kidnappings,[30] aside from other sums.[31] In none of these cases the victims have been indemnified.[32]

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27 Art. 1.3. Royal Decree of October 28, 1988: "Beyond the protection established in this Royal Decree are any other damages sustained by persons, things or property, indemnification of which, where pertinent, will be governed by applicable norms".

28 Besides a financial complement, police working in this zone shall be granted special periodic leave, designated psychological recovery. In sum, it can be estimated that this involves compensation for possible victims of terrorist attacks. Attorneys and judges hearing terrorists, receive compensation in the sum of 50,000 pesetas monthly (500 dollars).

29 Euzkadi ta Azkatasuna (Homeland and Liberty), Basque nationalist group.

30 Over the twenty years of ETA's existence, the number of persons kidnapped amounts to some forty.

31 Through the "Revolutionary Tax", ETA has obtained some ten thousand million pesetas (one hundred million dollars). No victim has been indemnified.

32 The effects of victimization affect the entire Basque Country in particular, not overlooking its effects nationwide. The Basque Country has been one of the wealthiest zones in Spain. It went from being the recipient of persons from other provinces, to many abandoning it. The economy has taken a heavy downturn. In 1960, Guipúzcoa held second place insofar as per capita income among Spanish provinces; it is now in fourteenth place. The unemployment rate in 1973 was 1%, and by 1986 had reached 24%. In the period 1982-1983

While the major terrorist activity is carried out by the ETA group, there are other organisations.[33] Terrorist acts are not only performed against persons,[34] but also against firms, causing substantial damages.[35] Considering the frequency of terrorist acts in Spain as well as the importance and number of deaths, injuries and damages, there is special legislation in the matter of insurance for compensating victims or damaged persons.[36]

alone, forty-six thousand jobs were lost.

33 Other organizations conducting terrorist activities in Spain: GRAPO, Terra Lliure, Galizia-Ceibe, and Extreme Right.

34 Besides individual executions, as of 1982 the terrorist organization ETA has frequently used car bombs in its attacks; from that date to December 1990, it has utilized this procedure twenty-four times, resulting in eighty-four mortal victims in all. The gravest actions occurred June 19, 1987, with twenty-one deaths in a supermarket, and on December 11 of the same year, with eleven deaths.

35 Between 1986 and 1989 the terrorist group ETA carried out more than 500 terrorist acts against firms, causing damages approximating seven thousand million pesetas (70 million dollars).

36 Royal Decree 2022, August 29, 1986 approved Regulations covering "extraordinary risks for persons and property"; it covers cases in which indemnity is granted to persons and goods that are insured, including "actions derived from terrorism" (Art. 1°.b).

Compensation, Restitution, *Sanción pecuniaria* and other Ways and Means of Awarding Damages to the Victims of Crime through the Courts*

Kurt Madlener

Contents:

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* I am indebted to Mr. Brian *Duffett*, barrister, for his comments on the English terminology used in this article.

1. Introduction

If we go back to the origin of criminal law, we see that the victim and his family occupy a central position: it is the victim and his family who have the right to request revenge or penitence. However, over the centuries, with the evolution of the State and the organization of State prosecution the role of the victim has changed: from his central position the victim has been shifted to a marginal one.

France, Italy and Spain make it possible for the victim to intervene in the criminal process through a so-called "adhesive" or "adjunct" procedure, which is nothing else but a civil claims procedure adhered to the criminal procedure. This adhesive procedure is widely used in these countries, but it seems that its results are not very encouraging.

In a number of legal systems there is indeed no lack of regulations which provide for compensation or at least are supposed to do so, but they rarely function. It is therefore not sufficient to theorize on new ways and means of compensation if the practical problems of implementation are neglected.

The overall picture is bleak, and this obliges us to rethink the whole question. There is agreement that something has to be done for the victim, that "forgotten party" of the criminal process.[1] But it is obviously difficult to arrange for something which works. This is shown clearly through the negative experiences in Germany and elsewhere.

It has also to be kept in mind that legislative changes which benefit the victim might be detrimental to the social reintegration of the offender. This complicates tremendously any possibility of a satisfactory solution, and it constitutes the real challenge before us. A number of proposals have been designed to use compensation to the victim of crime in various ways as an instrument of criminal policy. However, up until now, it has seemed difficult to reconcile the two basic interests confronted in this respect: alleviating the

1 In Mexico it is thought that the victim is a nobody (*nadie*) in the criminal process, because according to Art. 141 *Código Federal de Procedimientos Penales* the victim is not a party in the criminal procedure (*no es parte en el proceso penal*). This opinion is debatable, though; compare Carlos *Franco Sodi*, El procedimiento penal mexicano, 4th edition, Mexiko 1957, p. 108.

damage suffered by the victim and helping the offender to get reintegrated into society.

The object of this paper is to review some of the ways which are supposed to offer to the victim of crime compensation for the damage suffered. As a matter of fact not all of the ways and means designed in various legislations over the last 200 years have been successful. The most important reason for this failure seems to be that as yet no efficient harmonization of the contradictory interests of victim and offender has been achieved. We should like to try to determine what kind of reform could better the situation of the victim, who all too often does not get anything out of the criminal process, but never forgetting that we also want to reintegrate the offender into society. This is the real crux of the problem.

2. Basic Problems

It certainly will not be possible to treat or even only to mention in this paper all of the points under discussion, a discussion which was already going on 100 years ago and even before. Many more questions could be raised, for instance the possibility of making greater use of arbitration and other techniques of settling criminal cases even before the criminal process starts. The following are only some of the basic problems:[2]

2 For more points under discussion see Albin *Eser*, Günther *Kaiser*, and Kurt *Madlener* (Eds.), Neue Wege der Wiedergutmachung im Strafrecht, Freiburg i. Br. 1990. This volume contains the reports submitted to a symposium on "New ways for compensation of damage in penal law", which was held in 1989 at the Max Planck Institute for Foreign and International Criminal Law in Freiburg i. Br. upon my suggestion. On the basis of the results of this symposium a research project is being prepared in the Max Planck Institute of Foreign and International Criminal Law; see the short outline by Barbara *Huber*, Punishment and Compensation - A Comparative Research Project at the Max Planck Institute of Foreign and International Criminal Law (this volume, pp. 357-361). For a critical view of the discussion see Hans Joachim *Hirsch*, Wiedergutmachung des Schadens im Rahmen des materiellen Strafrechts, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 102 (1990), pp. 534 et seq.

2.1 Is Compensation for the Damage caused by Crime an Objective of the Criminal Process?

An important point is whether compensation to the victim of crime can be regarded as an objective of the penal process. The main question is the one concerning the relationship between compensation to the victim of crime and (other) objectives of the penal system. It is especially important to clarify whether compensation of the damage which the private citizen has suffered is to take precedence over other objectives of the penal system, and if so, in which way and in which cases. A decision on this point is especially important when the judge imposes on the offender various financial obligations like court costs, fines and compensation to the victim. Which of these obligations should take precedence over others if the offender's financial means are insufficient to satisfy all of them?

In this context another problem is whether peace-making between the offender and the victim has to be recognized as one of the objectives of the penal system, and what consequences perhaps follow therefrom. If peace-making is to be considered, then we shall also have to think over the possibilities of substitute compensation if financial payments are unfeasible because the offender is poor.

2.2 What Kind of Compensation Should be Afforded and to Whom?

Financial compensation for the damage caused by crime is mostly very limited because offenders tend to be poor. It therefore has to be examined whether apart from payment of money also moral compensation could be employed and whether work could be imposed where an economic contribution cannot otherwise be expected from the offender. Since at least in the penal system, as far as adults are concerned, work by the offender directly for the benefit of the victim can hardly be considered, it has to be asked whether community service could be used and whether the result of such work could be applied for the benefit of the aggrieved person or in what other way he could get compensation for his private damage in this case.

Another important question is how to deal with the case in which the victim is not willing to cooperate, for instance because he declines to accept compensation. The victim might take this attitude because, for instance under German law, the criminal court judge, when granting parole and imposing (as is sometimes, but not often done) compensation of the victim as a condition of parole, requires the offender only to make as much

compensation as he can (*nach Kräften*).[3] In cases where the damage is huge and the ability of the offender to compensate small, the partial compensation offered may seem a mockery to the victim. There are similar difficulties when the victim is unknown or when the offence committed is one of those which are victimless (for instance a traffic violation which does not result in damage to anybody). If compensation is partly or totally a substitute for a penal sanction or if it is in some other respect a prerequisite for a benefit which could be granted to the offender, it would be unjust if the offender lost this benefit in those cases for reasons which are not necessarily within his responsiblity.

2.3 Which Courts Will Award Compensation?

The very practical question of the competent court[4] raises a basic problem, namely the separation of the disciplines of private and criminal law and accordingly of civil claims courts and criminal law courts in many countries. Of course a number of difficulties arise if the same historical event, the offence, is on the one hand dealt with by a court dealing with the private law question of compensation, and by a criminal court, dealing only with the question of guilt and punishment.[5]

The separation of the disciplines of private law and criminal law has not been carried through everywhere as strictly as in Germany, though. In France, for instance, even nowadays criminal law is part of private law.[6]

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3 § 56 b par. 2 no. 1 German Penal Code (*StGB*). For an English translation of this code see Gerold *Harfst* and Otto A. *Schmidt*, German Criminal Law, vol. I: The Criminal Code, The Narcotics Law, Würzburg 1989.

4 On the various models of court competence for adjudication of criminal and private law consequences of an offence see Vinicio *Geri*, Manuale della responsabilità penale e civile da illecito, della prescrizione e del danno, Milano 1968, pp. 121 et seq.

5 This subject has also already been extensively discussed by the Italian positivists in connection with compensation for damage caused by crime. Enrico *Ferri* was quite outspoken on that subject: "Per noi parificare l'obbligo del delinquente a riparare i danni recati col suo delitto all'obbligo derivante dall'inadempimento di un contratto, è semplicemente immorale." (Sociologia criminale, 3rd ed., Torino 1892, p. 701).

6 The legal encyclopedia Pandectes Françaises edited by *Rivière* in 1892 put it this way: "Le droit civil comprend essentiellement le droit civil, la procédure civile, le droit commercial, et accessoirement le droit criminel, qui est la sanction et la garantie des règles du droit civil; on l'oppose au droit public..." (vol. III, p. 668, no. 456). About 70 years later this has not much changed as can be seen in the Nouveau Répertoire de Droit Dalloz, edited in

This seems to be the main reason why less attention has been paid to criminal law in France than in other continental countries. It is a matter of fact, though, that the law governing civil claims and criminal law is sharply differentiated in most Continental law countries.

But civil claims courts and criminal jurisdictions are not everywhere strictly separated, not even on the European continent. For instance in Spain private law questions and criminal law questions have traditionally been decided by the same court, the *Juzgado de Primera Instancia y de Instrucción*. This has only recently been changed by a law passed in 1988.[7] On the basis of this important reform most criminal matters are now to be decided at first instance by the *Juzgados de lo Penal* where there is a single judge sitting, imposing sentences of up to six years. A tendency to specialize either in private law matters or in criminal law matters is obvious in Continental Europe. But the Spanish *Juez de lo Penal* still decides not only on guilt and punishment, but also on compensation whenever he has a trial.

If one considers, though, that mixing criminal and civil matters in the so-called adhesive procedure of countries like France, Italy and Spain has not really solved the problem of compensation, it is doubtful whether the unification of highly specialized disciplines which have to deal with quite different aspects of human interests is useful.

2.4 How Will Compensation be Enforced?

Another extremely practical problem is the question how the compensation which has been fixed in the criminal process can be enforced. If compensation is defined by private law, then it might be enforced just like any other private obligation. This way has been chosen by the legislator for instance in the German adhesive process.[8] But it may seem inadequate and unjust to ask the victim of an offence to try private enforcement which

1963 in 2nd edition by Emmanuel *Vergé* and Roger *de Ségogne*: "Le droit pénal fait, par sa nature, partie du droit public. Mais il a été rattaché traditionellement au droit privé, parce que beaucoup de ses dispositions sont destinées à sanctionner les rapports juridiques privés; d'autre part, la procédure pénale a été pendant longtemps étudiée en même temps que la procédure civile" (vol. 2, p. 252, no. 12).

7 *Ley Orgánica* no. 7/1988 of December 28, 1988 (Aranzadi no. 2065).

8 Art. 406 b Criminal Procedure Code (*StPO*). For an English translation of this code see: Gerold *Harfst* and Otto A. *Schmidt*, German Criminal Law, vol II: The Code of Criminal Procedure, The Youth Court Law, Würzburg 1989.

implies a risk of cost and which gives to the debtor quite a few possibilities of defence. On the other hand, if enforcement of the compensation to the victim of crime is done by means of the extensive powers conferred by criminal procedure (in some cases using as a means of coercion even substitute imprisonment or coercive imprisonment), the question arises whether this does not lead to unfair treatment of other creditors of the offender. At any rate it also has to be taken into account that private law embodies protective regulations for social reasons (for instance income limits for enforcement), which cannot be neglected by the criminal system.

2.5 How Important is it that it is the Offender Who Affords Compensation?

The ongoing repetition of the *leitmotiv* "peace-making between offender and victim" leads to the erroneous view that there is always, or at least mostly, a confrontation between offender and victim when the question of compensation arises. This, however, is part of the "romantic conceptions"[9] which are quite typical of the discussion about the problem of compensation for damage to the victim of crime.

As a matter of fact, the claim for compensation is in many countries transferred, to a large extent, to private or state insurances or to some other institution which pays damages to the aggrieved person and tries to recover from the offender. This is the case in the great majority of offences based on negligence because the risks involved are to a large extent covered by voluntary insurances (for instance landlord's insurance) and compulsory insurances (for instance motor vehicle insurance).[10]

This is also true for a considerable amount of damages resulting from intentional offences. As far as personal injury is concerned, the claim for compensation is transferred to private insurances, especially private health insurance, but also to the social security system. If exceptionally there is no insurance, the poor have a claim for welfare payments (*Sozialhilfe*) against the state, in Germany as well as in many other countries, and the institutions

9 Hans Joachim *Hirsch*, Zur Stellung des Verletzten im Straf- und Strafverfahrensrecht, in: Gedächtnisschrift für Armin Kaufmann, Köln 1989, pp. 699 et seq.

10 In Germany about 40 % of the convictions of adults (and young adults treated as adults) concern traffic offences: in 1989 of a total of 608,548 convictions 238,243 were for traffic offences; *Statistisches Bundesamt*, Fachserie 10: Rechtspflege, Reihe 3: Strafverfolgung, Stuttgart 1991, p. 42.

which grant it try to recover from the offender. Often wage payments by the employer continue if the employee has suffered from an offence and is therefore unable to work. In these cases it is practically the employer who compensates the damage, at least in part. As far as damage to property is concerned, in many cases there are insurances against theft, fire, and so on, which are mostly voluntary insurances, very much employed in insurance-conscious countries. In all these cases the third party, the insurance or other third party, which compensates partly or totally the damage suffered by the victim of crime, may recover from the offender.

The consequence is that the offender is no longer confronted with his victim, but with a third party, mostly a huge corporation. This greatly limits of course the possibility of using compensation as an instrument of re-establishing peace between the offender and the victim: they have nothing to do with each other in these most frequent cases.

2.6 Can Compensation be an Effective Tool of Decriminalization?

Although very often the whole of the damage or at least part thereof will be covered by insurances, there are of course some cases in which damages have to be compensated by the offender directly to the victim. When the offences are not of a very serious nature, that is to say if they do not inherently make it impossible to replace the penal sanction with compensation, then there is a chance to decriminalize using compensation as a substitute for punishment. It has to be taken into account, however, that these offenders are mostly not well off financially so that only replace compensation, especially community work, might play a role in substitution for a penal sanction.

In the German system, where more than 80 % of all penal sanctions are fines,[11] compensation as a penalty substitute might perhaps cover some of these cases. A stumbling-block could be, though, that in the German system sursis cannot be granted for fines. The possibilitiy of decriminalization by compensation in this field should certainly lead to a reconsideration of the problem of criminal policy for relatively small offences.

11 In 1989 of a total of 608,548 persons convicted, 503,356 were sentenced to a fine and 104,890 to imprisonment (these figures do not include juvenile offenders and young adults treated as juveniles); *Statistisches Bundesamt*, loc. cit. (note 10).

2.7 What Comes First - Compensation of the Damage or Resocialization of the Offender?

This really is the *crux* of the matter, the relation between resocialization of the offender and compensation to the victim. On the one hand, the obligation to compensate for damage done may have a resocializing effect on the offender since it shows him clearly the negative consequences of the offence and puts the responsibility for compensation on him. This may be especially favourable when the offender accepts responsibility to a certain extent voluntarily or at least on the basis of his own decision. From there stems the question whether only voluntary compensation can be considered as pertinent in the penal system or whether compensation can also be meaningful when forced upon the offender.

On the other hand, the financial burden following from the obligation to compensate for the damage done may make resocialization of the offender more difficult. It seems that one of the reasons for the reluctance of German judges and prosecutors to impose the condition of compensation pursuant to § 153a Criminal Procedure Code (*StPO*) and §§ 56b, 57 par. 3 Penal Code (*StGB*) on the offender is to be found here. One also has to take into account when comparing legal systems that compensation as an instrument of education cannot be employed in all societies in the same way when the offender is an adult. Whether there will be anything left of the idea of education through compensation in the law of the formerly socialist countries remains to be seen.[12]

The problem of making compensation for the victim and resocialization of the offender compatible, is at any rate the decisive point.

3. Historical-Comparative Aspects

The evolution of the problem of compensation to the victim of crime has been quite different in different countries. This makes it interesting to study this evolution on a comparative basis.

12 On this idea see Zbigniew *Doda*, Neue Wege der Wiedergutmachung im polnischen Strafrecht, and Norbert *Lembeck*, Zu Fragen der Wiedergutmachung im Strafrecht der DDR, in: *Eser/Kaiser/Madlener*, op. cit. (note 2 above).

At the beginning revenge was the reaction to an offence. Then compensation and restitution become a substitute for revenge. The point of departure is what we could call the restitution principle: after an offence has been committed, the victim or his familiy gets compensation for the damage suffered. Under this system, which German legal history calls the *Kompositionensystem*, the amount paid or the asset (for instance cattle) handed over to the victim or his family become the legal consequence of the penal wrong and settles the matter, thereby restoring peace in the community.

The principle of restitution was supplemented by the principle of retribution to the extent that State organization got stronger and provided penal sanctions. Already in the times of the Merovingian and Franconian Kings crime and punishment are more and more regarded as public law notions, a viewpoint nowadays generally accepted as the result of an evolution lasting several centuries.[13]

The fact that the public law notion of crime and punishment has prevailed makes us sometimes forget that in criminal law for many centuries the principle of restitution and the principle of retribution coexisted. We can observe this in many legal systems.

An example is the Spanish law of the *Siete Partidas*, the important legislation of King Alfonso X called "the Wise" (*Alfonso el Sabio*), enacted in the 13th century. The *Septima Partida*, the seventh part of this statute, deals with crime, penal sanctions and compensation. Besides the obligation of restitution there is for instance in case of theft the obligation to pay multiple damages, double or even more, according to the circumstances of the offence and the kind of participation, as a penal sanction.[14] This statutory achievement of *Alfonso the Wise* was applicable as subsidiary law in many places in Spain and in Latin America as recently as during the 19th century.

But, on the whole, the organization of State prosecution has led to the legal position of the victim becoming weaker. However, a reaction to this evolution already got under way more than 200 years ago. In several

13 Eberhard *Schmidt*, Einführung in die Geschichte der deutschen Strafrechtspflege, 2nd ed., Göttingen 1951, pp. 23 et seq. (39).

14 *VIIa Partida, Titulo XIV* "De los furtos", law XVIII and passim. Similar regulations can be found in Germanic law; see Heinrich *Brunner*, Deutsche Rechtsgeschichte, 2nd ed., Berlin 1928, reprint 1958, pp. 832 et seq. On the *Siete Partidas* see Benito *Gutiérrez Fernández*, Exámen histórico del derecho penal, Madrid 1866, pp. 163 et seq.; Luis *Jiménez de Asúa*, Tratado de Derecho Penal, vol. I, 3rd ed., Buenos Aires 1964, no. 203 - 207.

countries we can observe that reformers and legislators became anxious to design new ways for the protection of the victim. In the Italian legislation of the 18th century considerable attention was indeed being paid to the victim. The State even took care of the compensation the victim had to receive. Since the offender often is unable or unwilling to afford compensation, the State organizes a public fund which is supported by fines and from which the victim can be compensated.[15]

Efforts to ensure compensation to the victim can also be found in the early 19th century in Brazilian draft legislation. The influence of Jeremy *Bentham* was most important in this respect.[16]

In more recent times, starting in the second half of the 19th century, it is the Italian *Scuola Positiva* which stresses the importance of compensation to the victim in the criminal law process. The main proponents of the *Scuola Positiva*, *Garofalo* and *Ferri*, were not very successful in getting their teachings on compensation for the victim into Italian law. However, the *Scuola Positiva* had a long-lasting influence in Latin America. Even in penal codes enacted in the last few years this influence can be perceived. There are indeed examples in Latin American legislation which show the influence of the *Scuola Positiva* to an astonishing degree up until the present day.[17]

In the 19th and the 20th centuries, however, we observe very different tendencies of evolution. In Germany the victim has been removed from his central position in criminal procedure to a marginal one. The role of the victim is now only that of a witness, and as such he traditionally has obligations, but scarcely any rights. As far as compensation is concerned the Criminal Procedure Code of 1877 hardly offers to the victim any possibility of recovering damages in the criminal process, but obliges him to institute civil proceedings, which means that in many cases he has to pay

15 The Penal Code of the Toscana, the *Codice Leopoldino* of 1786, named after *Leopoldo the Wise*, provided such a fund in Art. XLVI (the text of this code is reproduced in: Carlo *Paterniti*, Note al Codice Criminale Toscano del 1786, Padua 1985). This fund and a similar one to be found in Art. 35 of the *Codice per lo Regno delle Due Sicilie* of 1819 were recommended by *Bonneville de Marsangy* as outstanding models of legislation in this field (De l'amélioration de la loi criminelle, Paris 1864, vol. II, pp. 310 et seq.).

16 *Bentham's* influence in Brazil was long-lasting; see Galdino *Siqueira*, Direito Penal Brazileiro, vol. I. Parte General, 2nd ed., Rio de Janeiro 1932, p. 717. On the Brazilian legislation of the early 19th century see Kurt *Madlener* and Silma Marlice *Madlener*, The Past and Present State of Victims' Compensation in Brazilian Law and the Need for Reform (this volume, pp. 305-355).

17 For more on this see below 5.

court fees in order to be able to pursue the matter. The result of this type of procedure, which started its evolution in the 19th century, is that the offender stands at the centre of interest in modern German law. This is being accentuated by the fact that resocialization of the offender is becoming more and more important.

In the period after the Second World War human rights in criminal procedure got particular attention as a consequence of the UN Declaration of 1948 and of a number of international conventions. But these human rights are first and foremost the human rights of the offender and of the accused.

In Germany the victim has indeed been extremely marginalised in criminal procedure. Interest in the victim in criminal law is a belated phenomenon, judging from the growing flood of publications only during the last few years. The German legislator has recently made some efforts to ensure compensation of the victim. This was done especially by putting compensation as a condition prior to the granting of certain benefits like suspended sentence, parole and so on.[18]

However, these efforts have not been very successful. The statistics clearly show that the prosecution authorities and the courts do not very often employ these instruments designed by the legislator. Other conditions which can be imposed upon the offender to get these benefits are used to a much greater extent. The requirement to pay compensation is indeed very rarely imposed. This would not be particularly bothersome if the tendency were towards an increase in the use of these conditions. However, the fact is that this tendency is decreasing instead. The result is that the legislative initiatives in Germany in this respect have not been successful.[19]

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18 See § 56 b par. 2 no. 1, 57 par. 3 *StGB*. The prosecution or the court may also in certain cases shelve the proceedings if the offender compensates the damage suffered by the victim wholly or partially: see § 153 a par. 1 no. 1 *StPO*.

19 See Peter *Rieß*, Statistische Beiträge zur Wirklichkeit des Strafverfahrens, in: Rainer *Hamm* (Ed.), Festschrift für Werner Sarstedt zum 70. Geburtstag, Berlin 1981, pp. 253 et seq. (317); Wolfgang *Heinz*, Strafrechtsreform und Sanktionsentwicklung Auswirkungen der sanktionsrechtlichen Regelungen des 1. und 2. StRG 1969 sowie des EGStGB 1974 auf die Sanktionspraxis, ZStW 94 (1982), pp. 632 - 668 (644 et seq.), Hans-Jörg *Albrecht*, Legalbewährung bei zu Geldstrafe und zu Freiheitsstrafe Verurteilten, Freiburg i. Br. 1982, pp. 167 et seq.; Peter *Rieß*, Entwicklung und Bedeutung der Einstellungen nach § 153a *StPO*, ZRP 1983, pp. 93 - 99; Edwin *Kube*, Systematische Kriminalprävention. Ein strategisches Konzept mit praktischen Beispielen, 2nd ed., Wiesbaden 1987, pp. 128 et seq.; Detlev *Frehsee*, Schadenswiedergutmachung als Instrument strafrechtlicher Sozialkontrolle, Berlin 1987, pp. 305 et seq.

This evolution has not in all countries led to such a strong erosion of the legal position of the victim in criminal procedure as in Germany. The classical countries of the so-called adhesive procedure, Italy, Spain, France, Greece, and also the Scandinavian States, have never accepted the marginalization of the victim in the same manner. The question is, though, whether their legislation gives real advantages to the victim in need of compensation, or if they only pay lip service.[20]

4. Compensation as a Means of Obtaining Exemption from Punishment - A Chance for Decriminalization?

If we try to analyze what the role of compensation to the victim of crime could be in the criminal process, we think not only of the benefit to the victim, but also of the possibility of replacing penal sanctions partly or totally by compensation. Proposals to this effect have been made during the last few years by several German authors.[21] The idea is, however, not at all new: already the Italian positivists, the proponents of the *Scuola Positiva*, tried more than 100 years ago to integrate compensation to the victim of crime into the penal system in such a way that it would to a certain extent be a substitute for a penal sanction (... *costituire un vero succedaneo della pena*).[22]

4.1 Compensation Instead of Punishment in a Particular Cultural Setting: The Black African Tradition

When we look for societies which prefer compensation to punishment, Black Africa is a case in point. There are more than 40 Black African countries, and therefore the variety of solutions is impressive.[23]

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20 For more on this see below 6.2.

21 See Detlev *Frehsee* (note 19), p. 119; Claus *Roxin*, Die Wiedergutmachung im System der Strafzwecke, in: Heinz *Schöch* (Ed.), Wiedergutmachung und Strafrecht, München 1987, pp. 37 - 55, and Claus *Roxin*, Die Stellung des Opfers im Strafsystem, Recht und Politik 1988, pp. 69 - 76.

22 *R. Garofalo*, Riparazione alle vittime del delitto, Torino 1887, pp. 42 and passim. *Enrico Ferri*, op. cit. (supra note 5), p. 696: "Il risarcimento del danno sofferto dalle vittime del delitto puó essere considerato ... come sanzione da sostituirsi alle pena carceraria nei piccoli delitti commessi da delinquenti occasionali."

23 A particular aspect of victimization is treated by Kwame *Frimpong* in his

What is interesting is the different spirit which governs the matter in these civilisations when compared with Western countries. Compensation is certainly much more important to the Black African than punishment of the offender. An assistant of mine has put that spirit in a little story which she invented after extensively reading and talking to Black African colleagues:

Imagine a bicycle is stolen. The owner is a student, who is disgusted since he has to use his bicycle every day to go to the university and follow the classes. He and his friends investigate the matter. Who could have stolen the bicycle? An old lady who lives in the same street and spends most of her time watching what is going on in the street saw the thief and can give a description. The thief indeed also lives in the neigbourhood. The student and his friends go there and question him about the matter. After some discussion he admits having stolen the bicycle and returns it to the poor student. In the evening the student and his friends, happy about the outcome of the affair, organize a party, to which the whole neighbourhood is invited - even the thief and his family. With this the matter is settled.[24]

This example illustrates a concept of law and justice deeply rooted in Black African tradition. Restitution or compensation is the decisive matter, and through it peace can be restored in the community. Punishment, on the other hand, is unimportant: nothing positive comes out of it.

Of course it would be an illusion to try transferring such models of compensation and peacemaking to the anonymous society of modern industrialized States. But it clearly shows the importance of compensation in Black Africa, which we also found when we did an investigation on the Administration of Criminal Justice in Cameroon.[25] Indeed, what matters to the aggrieved person is not that the offender must go to prison, but that his damage must be compensated. And it is obvious that in the Black African tradition peacemaking is above all the objective of the customary system of law.

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article Victimising the Accused and the State Through Incarceration - The Experience of Botswana (vol. 52 of this collection, pp. 733 - 745). See also Sekou Goureissy *Condé*, Selected Questions in Relation to Victimological Research in French Black Africa (vol. 50 of this collection, pp. 207 - 217).

24 Christine *Sottong*, Schwarzafrikanische Rechte - Modelle der Wiedergutmachung, in: *Eser/Kaiser/Madlener*, op. cit. (supra note 2), p. 419.

25 See Peter *Bringer*, Entwicklung und aktuelle Probleme der Strafrechtspflege in Kamerun, Yearbook of African Law, vol. 1 (1980), pp. 25 et seq. (48). See also: Hans-Heinrich *Jescheck*/Kurt *Madlener* (Eds.), Strafrechtspflege in Kamerun, Part 1: Peter *Bringer*, Stellung und Aufgabe des Richters in Kamerun, Baden-Baden 1981, pp. 237 et seq.

4.2 Western Models

Compensation of the victim by the offender is nowadays a mitigating circumstance practically everywhere.[26] This leads, however, only to a reduction of punishment. A number of countries have gone much further.

One such country is Austria with its regulation of "active repentance". The interesting thing about this Austrian institution is that it has existed for a very long time and that it is indeed applied in everyday court practice. Since several papers have been published recently on this subject,[27] I shall not dwell on this matter here. It has to be pointed out, however, that there are similar regulations to be found in other legal systems, for instance in Greek law.

The first Greek Penal Code dates from 1834. It was published at the time in Athens in both official languages of the Greek Kingdom, that is to say in German and in Greek. In the seventh chapter of this code Art. 114 determined the principle of "active repentance". According to this article, an offence which, by definition, was completed by the occurrence of a certain result was not punishable if the offender voluntarily made compensation for the damage he had caused before he was contacted by the authority in any way with respect to this offence.

The Special Part of the code defined in which cases the principle embodied in Art. 114 would be applied. Art. 378 determined, for instance, that in case of theft the offence would not be punishable, and that there would indeed be no investigation of the case, if the thief made full compensation or restitution for what he had taken, so that neither for the aggrieved person nor for a third party would any damage remain as a consequence of the offence. The settlement of the matter by full compensation would exempt the offender from investigation and punishment only if the thief had made

26 See for instance Art. 9 no. 9 Spanish Penal Code, § 46 par. 2 *StGB*, § 34 no. 14, 15 Austrian Penal Code. When there is no express provision to this effect (see e.g. the Peruvian Penal Code of 1991, Book I, Title I, Chapter III), one may presume, though, that the courts take victim's compensation into account within their discretion in sentencing.

27 See articles by Frank *Höpfel*, Die strafbefreiende tätige Reue und verwandte Einrichtungen des österreichischen Rechts, and Klaus *Krainz*, Zur praktischen Bedeutung der Wiedergutmachung in Österreich, in: *Eser/Kaiser/Madlener*, op.cit. (supra note 2), pp. 171 - 196 and 197 - 217. See also Klaus *Krainz*, The Position of Injured Parties in the Austrian Criminal Procedure, First Results of an Empirical Investigation (this volume, pp. 629-668).

the compensation before the police or a judicial authority had dealt with the case. It would not apply either, if the compensation or restitution was only partial, but in those cases the penalty would be mitigated.

This principle also applied in the Penal Code of 1834 in the case of fraud, embezzlement, and so on. The way this institution of "active repentance" is designed as well as its legislative history show that there are close relations with the Austrian regulation. It has to be kept in mind that the King of Greece, Otto the First, was the son of the King of Bavaria and that his advisors were to a large extent from Southern Germany.[28]

The present Penal Code of Greece, i. e. the Code of 1951, has kept this institution without material modification in Art. 379, which refers to theft and embezzlement. In this code, too, the principle is extended to other offences, for instance fraud, unauthorized use of a motor vehicle, breach of trust, receiving stolen goods and so on.[29]

There are similar regulations in other legal systems. Portuguese law, for instance, enables exemption from punishment under Art. 301 par. 2 *Código Penal* if the stolen chattel has been restored or damages paid before criminal proceedings have been initiated. However, this is so only if the stolen goods are of little value (*de pequeno valor*); if not, the penalty is only reduced. Although this principle is extended, just as in Greece and Austria, to a number of other offences like fraud, breach of trust and receiving stolen goods,[30] it is less far-reaching than the Greek and the Austrian regulation because its application lies at the discretion of the judge and it can only be applied in petty matters.

28 As to the influence of the Bavarian Penal Code of 1813 and the Bavarian drafts of 1822, 1827 and 1831 on this first Penal Code of the Kingdom of Greece, which was drawn up by Georg Ludwig *von Maurer*, see Telemachos G. *Philippides*, Der Einfluß der deutschen Strafrechtswissenschaft in Griechenland, ZStW 70 (1958), pp. 291 - 313 (295 et seq.). These Bavarian drafts have been published in reprint by Werner *Schmidt* (Ed.), Frankfurt 1988, in three volumes.

29 Art. 384, 393, 395, 402, 404 par.6, 405 par.2 Greek Penal Code of 1951.

30 Art. 313 no. 2, 315 no. 3, 319 no. 2, 330 Portuguese Penal Code.

Brazilian criminal law also provides that with respect to certain offences there is to be no punishment if the offender makes compensation for the damage.[31] One of these cases is to be found in Art. 143 *Código Penal*, which exempts the offender from punishment (*isento de pena*) in a case of slander (*calumnia* or *difamação*) if he retracts his assertions before he is convicted. Another case is to be found in the articles of the Penal Code concerning embezzlement by civil servants. Pursuant to Art. 312 no. 3 *Código Penal* the criminal liability of the civil servant who has participated by negligence in the embezzlement of public assets (*peculado culposo*)[32] extinguishes (*extingue a punibilidade*) if he makes compensation for the damage. This has to occur before a final court decision has been handed down (*sentença irrecorrível*). If the compensation is made after the court decision, then the punishment is diminished to the extent of one half of the sentence imposed upon the offender.

The 1984 draft for a new Special Part of the Brazilian *Código Penal* does retain these rules without material changes.[33] By statute and by a leading decision (*súmula*) of the Supreme Court of Brazil the application of the idea underlying these rules has even been extended to tax and customs offences, although the legislator later on restricted this extension.[34]

Another example of exemption from punishment in many legal systems is to be found in legal provisions stating that the drawing of bad checks will not be punished if the check is paid within a certain period of time after presentation.[35] This, however, is a subject which depends very much on the legal construction of the nature of a check.

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31 See on this Kurt *Madlener*, A reparacão do dano como medida de política criminal na Parte Especial do Código Penal, in: *Grupo Brasileiro da AIDP* (Ed.), Libro-homenagem a Heleno Cláudio Fragoso (in press), and on victim's compensation in Brazilian law in general *Madlener/Madlener*, op.cit. (note 16).

32 As to the various forms in which this offence can be committed see Paulo José *da Costa* Jr., Comentários ao Código Penal, Parte Especial, vol. 3, São Paulo 1989.

33 Art. 148 and 322 no. 3 *Anteprojeto do Código Penal, Parte Especial*, Brasília 1984.

34 Art. 18 *Decreto-lei* no. 157 of February 2, 1967; Coleção das Leis, Atos Legislativos do Poder Executivo, 1967, vol. 1, pp. 177 et seq. (180). Federal Supreme Court *súmula* no. 560, in: José *Nunes Ferreira*, Súmulas do Supremo Tribunal, 2nd ed., São Paulo 1980, pp. 319 et seq. See *Madlener/Madlener*, op.cit. (note 16).

35 For an example see Art. 563bis b Spanish Penal Code (5 days). Under Brazilian law the punishment provided in Art. 171 par. 2 no. VI *Código*

It is interesting to note that rules allowing for the substitution of criminal sanctions by compensation generally only apply to certain types of offences. This is the case, as we have seen, in Brazil, Greece and Portugal, and also in Austria.[36]

5. The Integration of Compensation into the System of Criminal Sanctions: The *Scuola Positiva* and Latin America

The *Scuola Positiva*, starting in the last century, has given fresh impetus to a new look at the problem of the victim in criminal procedure and his compensation. In the *sistema razionale di penalità* proposed by *Garofalo*, compensation (*riparazione del danno*) is classified as an independent penal sanction along with the death penalty, imprisonment, and so on. This compensation takes two forms in *Garofalo's* system : on the one hand it can be a fine (*multa*), which goes to the State, and on the other hand it is compensation (*indennità*), which goes to the victim. Instead of a payment of money (*pagamento di una somma* or *rilascio di parte del salario*), there can also be performance of labor (*lavoro coatto senza carcerazione*).[37] However, compensation of the victim should not only cover the damage done: according to *Garofalo* it should be *larga e superiore al danno ricevuto*.[38]

Penal no longer applies if the check is paid before the accusation has been presented to the court; this results from Federal Supreme Court *súmula* no. 554 (*Nunes Ferreira*, op.cit., note 34 supra, pp. 314 et seq.). See also the Italian draft of October 5, 1987 (L'Indice Penale 1988, pp. 106 et seq., now Statute no.386 of December 15, 1990: *Nuova disciplina sanzionatoria degli assegni bancari* (Art. 8).

36 See Kurt *Madlener*, Die Wiedergutmachung im Spiegel der Rechtsvergleichung, in: *Eser/Kaiser/Madlener*, op.cit. (supra note 2), pp. 9 - 42 (35 et seq.).

37 See the schematic description of *Garofalo's* system in Ferri, op.cit. (supra note 5), pp. 682, 683.

38 *R. Garofalo*, Criminologia, 2nd ed., Torino 1891, pp. 457 et seq., 493.

Ferri, too, considered the obligation of the offender to compensate for the damage done as an obligation *essenzialmente e sempre di diritto pubblico*[39] and as a sanction which, irrespective of whether it took the form of a fine or of compensation, was to be considered part of the penal sanction system.

The Italian penal code of 1930 did not accept this idea. The *Codice penale* contains, in Art. 185 to 198, regulations on compensation for damage caused by crime. These regulations, however, are to be found under the title "Delle sanzioni civili". In the second title "Delle pene" (Art. 17 and following) of the First Book, the General Part of the *Codice penale*, compensation for damage is not mentioned.

This does not mean that the ideas of Italian positivism were of no avail. They have certainly profoundly influenced the criminal law and criminal procedure of Latin America up to our time,[40] and they have in many places been implemented by the legislator, even in a very stringent form, for instance in Mexican law. This legislative model of positivism is quite interesting for the discussion on the integration of compensation to the victim of crime into criminal procedure: According to Mexican law compensation is not only in the public interest, but it is a matter of ordre public[41] and it has the character of a penal sanction.[42]

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39 See the explanation to the preliminary draft of 1921 of the *Commissione Reale per la Riforma delle Legge Penali*, whose president was *Ferri* (*Garofalo* was also a member of the commission); *Ministerio della Giustizia*, Relazione sul Progetto Preliminare di Codice Penale Italiano, Libro I/Denkschrift und Vorentwurf zu einem italienischen Strafgesetzbuch, I. Buch, Rom 1921, pp. 126, 324. See also Fernand *Collin*, Enrico Ferri et l'Avant-projet de Code pénal italien de 1921, Bruxelles 1925, p. 175.

40 This influence started rapidly with translations, for instance *Garofalo's* book Indemnización a las víctimas del delito, translated by *P. Dorado Montero* (Madrid, without indication of the year of publication) and his book Criminologia, translated by Julio *de Mattos* (São Paulo 1893).

41 "La reparación no es sólo de interés público, sino de orden público" (Francisco *González de la Vega*, El Código Penal Comentado, 8th ed., Mexico 1987, p. 118).

42 The ideas of positivism influenced the Mexican Federal Penal Code of 1929, which was replaced in 1931 by a new code that is still in force. According to *Franco Sodi*, though, the author of the first Mexican Federal Penal Code, of 1871, Antonio *Martínez de Castro*, Minister of Justice of President *Juárez*, already considered compensation to be penal in character (op.cit. supra note 1, pp. 40, 41).

Art. 29 par. 1 of the Mexican Federal Criminal Code of 1931 (*Código penal para el Distrito Federal, CPDF*) reads as follows:

"La sanción pecuniaria comprende la multa y la reparación del daño."

The legislator employs here the notion of "financial sanction", which comprises two subnotions, namely the fine and compensation for damage, and both of these subnotions are placed on the same level.

Art. 34 CPDF characterizes the legal nature of compensation unequivocally:

"La reparación tiene el carácter de pena pública y se exigirá de oficio por el Ministerio Público".

The compensation of the damage caused by crime consequently has the character of a penal sanction. It is, however, not a private penal sanction. The legislator expressly determines that compensation is a public penalty (*pena pública*). As such the State prosecutor requests its imposition on the accused, which is, by the way, in accordance with the teaching of the *Scuola Positiva.*[43]

From this concept of compensation as a State penal sanction there follow very specific consequences. One is that the offender and the accused cannot make a settlement of the claim for compensation. Since compensation is a State penal sanction, the offender and the victim cannot dispose of this claim.[44] The victim cannot renounce his claim to compensation either. If he does not want to accept compensation, then according to Art. 35 par. 3 *CPDF* it will be paid to the Treasury. The enforcement of compensation is effected in accordance with Art. 37 *CPDF* just as if it were a fine.

This concept of compensation as a public penalty enables us to explain without contradicting basic principles of criminal law that according to Art. 30 no. III *CPDF* public servants (*servidores públicos*) have to pay double damages when they commit an offence in their official capacity

43 *Ferri*, op.cit. (supra note 5), p. 700. In the Italian *Codice de Procedura Penale* of 1930 (Art. 105) and of 1988 (Art. 77 par.4) this is the exception. The Spanish prosecution authority (the *fiscal*), on the other hand, is like his Mexican colleague under an obligation to apply for compensation to the victim (Art. 108 *Ley de enjuiciamento criminal*). The Italian *Codice de Procedura Penale* of 1865 solved the problem in a technically different way: the judge had to decide on compensation *ancorché non si fosse costituito parte civile* (Art. 569).

44 *González de la Vega,* op.cit. (supra note 41), p. 119.

against the State:[45] Compensation is a penal sanction and it can therefore be fixed above the amount of damage done. Multiple damages in criminal matters are anyway not contrary to the Spanish-Mexican legal tradition: as we have seen (supra 3.), there have been precedents for the imposition of multiple damages as a sanction in the *Siete Partidas*, the Spanish statute of the 13th century, which was in force in Mexico even after independence in the 19th century as subsidiary legislation.[46]

It is also remarkable, as far as the Mexican concept is concerned, that fine and compensation are initially on the same level as subnotions of the "financial sanction". But when the fine or compensation have to be enforced, compensation to the victim takes precedence. This is, by the way, also the rule in other Latin American countries, in Brazil for instance already since 1830.[47] It is also the case in Spanish law under Art. 111 *CP*. The possibility of granting instalments for the payment of the fine if the payment of compensation to the victim was otherwise endangered, which has existed for a few years now in § 459a par. 1 sentence 2 German Criminal Procedure Code, looks rather paltry compared with the modes of regulation under Ibero-American statutes.

The positivist concept of fine and compensation is not considered outdated in Mexico. Even the most recent Mexican penal codes follow this concept, for instance those of the States Guerrero (Art. 34 and following), Sinaloa (Art. 41) and Zacatecas (Art. 25 ff.), all dating from the year 1986, the *Código de Defensa Social* of the State Yucatán (Art. 33) and the *Código Penal* of the State of Querétaro (Art. 27), both of 1987.

45 This also applies to participants in the offence (Art. 212 par. 2 *CPDF*).

46 On the importance of the *Partidas* in Mexico see Juan N. *Rodríguez de San Miguel*, Pandectas hispano-mexicanas, vol. I, Mexico 1980, pp. 17 et seq.

47 Art. 30 *Código Criminal do Império do Brasil*. The text of this famous code is reproduced in: José Henrique *Pierangelli*, Códigos Penais do Brasil, Evolução Histórica. Bauru (São Paulo) 1980, pp. 165-265.

There have been some critics of this concept,[48] but their view has not prevailed up to now.

The positivist tradition is indeed very lively throughout Latin America. Art. 53 of the 1981 draft for a new General Part of the Brazilian Penal Code provided for a *multa reparatória* in favour of the aggrieved person. It should be fixed in day-fines (*dias-multa*). The maximum number of such day-fines corresponded to the one fixed for the fine (*multa penitenciária*), namely 360 day-fines (Art. 49 of the draft). The number of day-fines to be imposed should be the result of the sum to be fixed by the judge for each day-fine and the damage proven in the criminal proceedings. This proposition, which had been elaborated by a commission of eminent Brazilian lawyers (among others René *Ariel Dotti*, Rogério *Lauria Tucci*, Miguel *Reale Júnior*), was, however, not accepted by the legislator when the new General Part of the Penal Code was enacted in 1984.[49]

We also find positivist ideas in the *Código penal tipo para Latinoamérica*, which was elaborated during the postwar period by penal lawyers from many Latin American countries. The Model Penal Code determines, in Art. 93 sentence 2, that the obligation to compensate is part of the *ordre public*..

Any discussion on the integration of compensation to the victim into the criminal law system should take into account these legislative designs elaborated in Latin America on the basis of Italian Positivism.

48 See for instance Niceto *Alcalà-Zamora y Castillo* (Derecho procesal mexicano, vol. II, 2nd ed., Mexico 1985, p. 542) who considers classification of compensation as a penal sanction to be an error. The only author whom he cites in favour of this is a Spaniard, *Silva Melero*, and he himself is also of Spanish origin, in exile since the Spanish Civil War. Criticism of Mexican authors refers rather to details of the regulation, not to the principle; see for instance *Franco Sodi*, op. cit. (supra note 1), pp. 40, 41.

49 On this draft and on the new General Part see *Madlener/Madlener*, op.cit. (note 16).

6. The Award of Compensation in Criminal Procedure: The So-Called Adhesive Procedure

6.1 Dead-Letter Law: The Case of Germany

The first penal code for all of Germany, the *Constitutio Criminalis Carolina* of 1532, had some articles on compensation of the victim. A consequence of this was that it became customary to claim compensation in criminal procedure. On the basis of this court practice the adhesive procedure of the German common law originated. *Mittermaier* defined it as a kind of procedure "by which the person who suffered damage through a criminal offence participates in the criminal proceedings initiated because of this offence in order to present his civil claims".[50]

This procedure was to be found in the codifications of the various German states until the middle of the 19th century. Thereafter it was progressively abolished. At the time when a uniform criminal procedure for the German Empire was prepared, only the criminal procedure laws of Baden, Braunschweig, Hamburg, Lübeck, Sachsen and Thüringen had stuck to the adhesive procedure.[51]

The 1872 project for a German criminal procedure code had a section entitled "On the adhesion of the offender as civil claimant" (§§ 322 - 336). According to § 332 the decision on the civil claims presented in the criminal process should be taken without participation of the lay judges and only by the professional judges. Furthermore, the combination of the criminal matter with the civil claim ended when the matter went up for appeal. An appeal against the decision concerning compensation should be governed exclusively by civil procedure law (§§ 333, 334): it was a purely civil matter.

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50 *C.J.A. Mittermaier*, Das Deutsche Strafverfahren in der Fortbildung durch Gerichts-Gebrauch und Landes-Gesetzbücher und in genauer Vergleichung mit den englischen und französischen Strafverfahren, vol. II, 4th ed., Heidelberg 1846, p. 682.

51 Peter *Hill*, Die Geltendmachung des Schadensersatzanspruchs im Strafverfahren, Freiburger Dissertation bei Eduard Kern, Frankfurt 1935, p. 3.

The Imperial Criminal Procedure Code of February 1, 1877,[52] however, did not follow this model: with the advent of this code the adhesive procedure disappeared.

According to the Imperial Criminal Procedure Code (*StPO*), the victim could, however, act as a "secondary prosecutor" (Nebenkläger) or as a "private prosecutor" (Privatkläger) pursuant to §§ 444 - 446 *StPO*, and make an application to have a kind of compensatory fine (*Buße*) imposed on the offender. If this motion was granted and the award had to be enforced, then this was done pursuant to § 495 *StPO* in application of the civil procedure regulation. The *Buße*, as a matter of fact, was held to be "a purely private law compensation",[53] the part of the procedure dedicated to awarding it as a kind of adhesive procedure.[54] However, it was only possible in the case of a few types of offences (for instance insults) to request the award of a *Buße*.

Only when the Second World War made the administration of justice very difficult, did the "Third Regulation for the Simplification of the Administration of Criminal Justice" of May 21, 1943[55] admit generally that the aggrieved person would be compensated in the course of criminal proceedings. This was done by the inclusion of a third section with the title "Compensation of Aggrieved Persons" in the Fifth Book of the Criminal Procedure Code. The possibility of awarding *Buße* was also dealt with in this section.[56]

In the postwar period a number of statutory enactments cleared the law of Nazi reminiscences and unified the law after the three western occupation zones (American, British and French) were merged. The "Law on the Restablishment of Legal Unity in the Field of Court Organization, Administration of Civil Justice, Criminal Procedure and Court Costs" of September 12, 1950 retained the section "Compensation of Aggrieved Persons" of the Criminal Procedure Code.[57] The very extensive Introductory Law to the Penal Code of March 2, 1974 struck out § 406d on the award of *Buße*.

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52 Reichsgesetzblatt 1877, pp. 253 - 346.

53 Ernst Heinrich *Rosenfeld*, Der Reichs-Strafprozeß, Berlin 1912, p. 308.

54 Heinrich *Gerland*, Der deutsche Strafprozeß, Mannheim 1927, p. 458.

55 Reichsgesetzblatt 1943 I, pp. 342 - 345. See Heinrich *Henkel*, Das deutsche Strafverfahren, Hamburg 1943, pp. 482 et seq.

56 Art. 406 d *StPO*.

57 Bundesgesetzblatt 1949/1950, pp. 455 et seq. (498, 499).

Apart from that, however, the section "Compensation of the Aggrieved Persons" remained practically unchanged.[58]

The fact is then that for centuries in Germany the adhesive procedure was current practice; it was abolished by the Imperial Criminal Procedure Code of 1877 for somewhat more than half a century, and then it was again written into the law nearly 50 years ago. However, the re-establishment by the legislator has been of no avail: in the day-to-day practice of the courts it is hardly ever used.

The reasons for this abstinence seem to be partly of a psychological nature. There is obviously resistance on the part of those who have to deal with the procedure, that is to say the judges, of whom the majority are exclusively criminal court judges, the prosecutors, who in Germany generally have nothing to do with private law, and also the practising attorneys.

As far as judges and prosecutors are concerned, a not very favourable regulation on the distribution of the workload within the courts and prosecution offices might be of some importance, too. As a matter of fact, the caseload of a judge or a prosecutor will not be alleviated because, apart from decisions on guilt and penal sanctions, he also handles problems of compensation. Accordingly, he is not very eager to get into these questions that might be quite complicated and bothersome to decide. For practising attorneys there might also be a very practical point: the attorney's fees, which are fixed by statute, do not take much account of the fact that within a penal procedure the question of private compensation is also decided.[59]

Another point might be that the section in the Criminal Procedure Code was written into the code by virtue of an order of the Nazi Government during the war, although the adhesive procedure certainly cannot be regarded as being part of the Nazi ideology. The net result at any rate, is that the adhesive procedure is hardly ever used.

It must also be said that the adhesive procedure presents a number of immanent difficulties because, according to its structure, the same historical event, the offence, has to be analyzed within the criminal process on the one hand according to principles of criminal law and criminal procedure, and on the other hand also according to the rules of private law and civil procedure, which to a large extent are quite different. It is therefore doubtful whether overcoming psychological and other resistance to the adhesive procedure

58 Bundesgesetzblatt I 1974, pp. 469 et seq. (513).

59 Art. 31 and 89 *Bundesrechtsanwaltsgebührenordnung.*

would lead to a successful practice of this procedure.[60] As a matter of fact, it does not seem in those countries where adhesive procedure has been an uninterrupted practice for centuries, for instance in France, Italy and Spain, that compensation is really obtained through it.[61]

6.2 Legal Title of the Platonic Kind: The Mediterranean Tradition

As stated before, the victim has never been marginalized to the same extent in, for instance, Spanish law as has been the case in German law. According to Art. 108 *Ley de Enjuiciamento criminal (LECRIM)* of 1882 (still in force), the prosecutor is under an obligation to request compensation for the victim *ex officio*. To present to the court an indictment means to request damages as well. This is so according to Art. 112 *LECRIM* even when there is no express statement to this effect in the accusation presented to the court by the prosecution attorney. In this way the legislator wants to ensure that in every criminal trial a decision on the compensation of the victim will be taken if there is reason to do so.

The presentation of the criminal accusation to the criminal court blocks, according to Art. 114 *LECRIM*, any civil procedure on the matter of compensation.[62] As long as the criminal matter has not been decided, a civil proceeding on the claim of compensation cannot be initiated, and if it has been initiated before the criminal matter, it has to be suspended. It is therefore important for the victim's claim to be presented in the criminal process. Otherwise he might have to wait for many years until he gets an opportunity to present his claim to a civil claims court, and the proceedings before that court might again last for years until he finally gets payment of compensation (or not).

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60 The opinions on this are divided in Germany. See Kurt *Madlener*, Die Wiedergutmachung im Spiegel der Rechtsvergleichung, in: *Eser/Kaiser/Madlener,* op.cit. (supra note 2), p. 21, note 38.

61 See footnote 65.

62 Art. 114 par. 1 *LECRIM*: "Promovido juicio criminal en averiguación de un delito o falta, no podrá seguirse pleito sobre el mismo hecho; ...". See also Art. 44 *Ley Orgánica del Poder Judicial* of 1985; "El orden jurisdiccional penal es siempre preferente ...". Art. 149 German Civil Procedure Code gives the civil claims court judge only the possibility of suspending the proceedings if he deems this to be expedient. The same holds true for Brazilian law; see Art. 64 *Código de Processo Penal.*

Another aspect of the Spanish adhesive procedure, which can also be found in the adhesive procedure regulations of other countries, is very problematic. If in the pretrial procedure of the investigating judge (*sumario*) there is reason for suspicion (*indicios de criminalidad*), then the investigating judge will already order, at this stage of the procedure, the seizure of assets under civil law *ex officio*. This seizure is to secure the financial claims (*responsabilidades pecunarias*) against the offender in case he is convicted. They are, according to Art. 111 *CP*, the claims of victim compensation, which are regulated in Art. 101 *CP*, and also the court costs and the fine. To secure these claims the judge requests a deposit (*fianza*). If this deposit is not made at the latest one day after the order by the judge (Art. 597 *LECRIM*), then seizure of assets will be carried out pursuant to Art. 589 *LECRIM*. The deposit or the seizure must at least cover one third of the probable financial claims against the accused. According to Art. 610 *LECRIM*, even part of the salary of the prosecuted person can be seized.

It follows from this that the opening of a judicial investigation (*procesamiento*) is extremely important, since it has a number of very negative consequences for the prosecuted person. He is still considered innocent, and he might even be free, but part or all of his assets are blocked. This might cause him quite a number of difficulties for his business, for his family, but also when he tries to retain a defence lawyer who requests advance payment of fees.

The adhesive procedure is rather complicated. More than 30 articles of the criminal procedure law, namely Art. 589 to 621 *LECRIM*, deal with it.[63] Part of the complexity is that there are not only seizures against the accused, but also against third parties, because in quite a few criminal cases a third party is liable for the damage for some private law reason.[64]

Similar regulations are to be found in all legal systems where there is an adhesive procedure. In Italy the State has, according to Art. 189 *Codice penale*, a legal (i. e. compulsory) mortgage on the assets of the accused in order to secure the claims of the aggrieved person (as requested by *Ferri*), fines, court costs and so on.

63 The new Model Criminal Procedure Code for Latin America also devotes more than 20 articles to "La reparación privada"; *Ministerio de Justicia* (Ed.), Códigos Procesal Civil y Procesal Penal, Modelos para Iberoamérica, Madrid 1990, pp. 286 et seq., 400, 403.

64 See Vicente *Gimeno Sendra et al.*, Derecho procesal, vol. II, Proceso penal, 3d ed., Valencia 1989, pp. 181 et seq. (Víctor *Moreno Catena*) and pp. 398 et seq. (Valentín *Cortés Domínguez*).

It has to be asked whether this very complicated adhesive procedure, which we find in one or another form in many legal systems, leads in practice to satisfactory compensation for the damage suffered by the victim of crime. Unfortunately, there are only very few empirical investigations on the efficiency of the procedure. It seems it generally speaking gives the aggrieved person, in a very simple and cheap way, a legal title against the offender. But whether the victim really gets compensation, is an open question. If we have to believe what the practising attorneys tell us in these countries and if we consider those few investigations done on the matter to be representative, then not much emerges from these procedures for the victim, except the legal title.[65] He does not often really seem to get compensation paid.

This result, namely that the adhesive procedure usually only gives the aggrieved person a more or less worthless legal title, is not new: *Garofalo* already talked about the *platonica azione di dani ed interessi.*[66] *Ferri* was no less outspoken when he referred to the *platonica dichirazione di condanna generica ai danni ed alle spese, contenuta pro forma in ogni sentenza.*[67]

65 Figures given on France by Renée *Zaubermann* (see Kurt *Madlener*, op.cit. supra note 60, p. 26, note 49) and on Spain by Antonio *Beristain et al.* (Estudio criminológico de sentencias en materia penal, Datos de las sentencias dictadas en San Sebastián en 1975, Juzgados de Instrucción y Audiencia Provincial, Madrid 1983, pp. 63, 94 - 96, 117 - 119) and by Pedro *Larranaya Mugica* (La indemnización en las víctimas del delito, un estudio basado en las sentencias dictadas en la Audiencia Provincial de Guipuzcoa durante el año 1986, in: Eguzkilore 1988, 139 - 224) are disappointing. See also Alfonso *Serrano Gómez*, Problems Relating to Compensation for Victims in Spain (this volume, pp. 255-267) and Martine *Mérigeau*, Überblick über die neuen Wege einer opferbezogenen Kriminalpolitik in Frankreich, in: *Eser/Kaiser/Madlener*, op.cit. (supra note 2), pp. 325 - 342, and Evaluation of Compensation for Damages Within Recent Victim-Related Criminal Politics in France (this volume, pp. 237-254).

66 Riparazione alle vittime del delitto, Torino 1887, p. 10.

67 Op.cit. (supra note 5), p. 699.

Indeed the current practice in Italy is that if there is an adhesive procedure, only a decision on the principle of compensation will be given by the criminal court, but not on the amount to be paid. As a consequence, this adhesive procedure makes it easier for the victim to present his claim in the civil claims court, but it does not make it superfluous to initiate that second proceeding.

Very recently, though, on the basis of legislation supplementing the *Codice di procedura penale (CPP)* of 1930, which has been included in the new Criminal Procedure Code of 1988, the criminal court judge is able to grant what is called *provisionale*, a provisional award of the claim that will be ultimately and definitively fixed by the civil court judge.[68] In practice, this is particularly used in cases of traffic accidents, and it is only this new legislation which has led to a certain, but still modest, importance for the adhesive procedure. The victim still has to go to a civil claims court after the termination of the criminal process if he wants full compensation and is not satisfied with the *provisionale.*

The new *Codice di procedura penale* of 1988 regulates, in its Art. 74 to 88, the adhesive procedure in detail, just as was the case in the *CPP* of 1930. However, there is a tendency in the new code to have the private claims of the victim decided by the civil judge. The legislator tries to obtain this result by making the procedure swifter.[69]

If we look at the legislation embodying the adhesive procedure and indeed dealing with the claims of the victim within criminal procedure, we have to admit that the effectiveness of this procedure is at least doubtful.

7. An Idea of the 18th Century, Still Up To Date: Compensation Funds

There is another evolution which also has its roots in Italy. I am referring to State funds for compensation to victims of crime. Such funds have been set up in many countries over the past decades in order to ensure payment of compensation to the victim if the offender is unable to pay, or if at least there is no possibility of enforcing his obligation to pay. In general, these

68 Art. 489 par. 2, 489bis *CPP* of 1930; Art. 539, 540 *CPP* of 1988, in force since October 24, 1989.

69 Ennio *Amodio*, Das Modell des Anklageprozesses im neuen italienischen Strafverfahrensgesetz, ZStW 102 (1990), pp. 171 et seq. (192).

victim funds pay only in case of certain offences being committed (generally crimes of violence),[70] and they pay out of State funds. In these cases there is accordingly no compensation by the offender, but by the State.

For a long time there have, however, been other State funds designed under the influence of Italian positivism and older Italian models, dating from the 18th century, which are quite different.

One such fund is the *Caja de resarcimientos of Cuba*. This fund is to be distinguished from other victim funds. It does not simply substitute the defaulting payment of the offender with its own payment, at least not in general: it is the task of the fund to recover the money from the offender and to pay it to the victim.

The fund was introduced into Cuban law by the *Código de defensa social* (*CDS*), the Code of Social Defense of 1936 (Art. 121 to 126). It seems that the idea was taken from the *Scuola Positiva*, but the positivists could draw on precedents in older Italian penal codes. Already the Penal Code of the Toscana, the *Codice Leopoldino* of 1786, named after *Leopoldo the Wise*, defined the setting-up of a fund for compensation in Art. XLVI. The famous French penalist of the 19th century *Bonneville de Marsangy*[71] recommended this fund of the *Codice Leopoldino* and also a similar fund to be found in Art. 35 of the *Codice per lo Regno delle Due Sicilie* of 1819 which was called *Cassa delle amende*. And of course these legal achievements of 18th century Italy were in accordance with the theories of *Bentham*.

The *Caja de resarcimientos* of the Cuban *Código de defensa social* does not only intervene if the offender is bankrupt or if the offence is one of those aimed against life and limb. It is a State agency which always has to pay compensation if a penal sentence has imposed such a payment. Its role is, so to speak, that of a middleman between the offender and the victim. The *Caja* pays the victim on the basis of the sentence passed on the offender and in favour of the victim. Consequently, the victim does not have to go to the trouble of trying to get something from the offender. On the other hand, the *Caja* recovers the amount paid from the offender.

For this purpose the *Caja* could, according to Art. 123, 125 *CDS*, request compensation for the victim in its own name and it could enforce the sentence against the offender. If it was not possible to get payment from

70 For examples see Ulrike *Weintraud*, Staatliche Entschädigung für Opfer von Gewalttaten in Großbritannien und der Bundesrepublik Deutschland, Baden-Baden 1980.

71 De l'améloriation de la loi criminelle, Paris 1864, vol. II, pp. 310 et seq.

him, then according to Art. 125 par. E *CDS* he had to be brought into an establishment (*establecimiento, taller o reclusorio criminal de labor*) where he had to work to satisfy his obligation to the *Caja* from what he earned for this work. If that was not possible, the court could order substitute imprisonment (*prisión subsidiaria*, Art. 125 par. F *CDS*). This substitute imprisonment was not to last more than 6 months.[72]

The *Caja* is to be financed, or at least it was financed when it was created, *inter alia* through fines and through the proceeds of seized assets,[73] furthermore through a number of other payments, especially the compensation payments of the offenders, to the extent that they were being paid, and naturally also through subsidies by the Treasury.

The *Código de Defensa Social* was even, after the Cuban Revolution of 1959, on the statute-book until 1978. Then it was replaced by the first Penal Code of the Cuban Revolution. This penal code retained the *Caja* in Art. 72 to 75 *Código Penal* (CP).

The changes made by the legislator are, compared with the *Código de Defensa Social* of 1936, in no way revolutionary. There is no longer any article permitting the offender to be sent to an establishment to work if he fails to pay. *Prisión subsidiaria* is, according to Art. 22 par. 3 *CP*, only admissible when he refuses to perform acts which have been imposed upon him in order to make good non-material damage (this probably refers to presenting an excuse, to retract and so on). The article permits a minimum duration of three, and a maximum duration of six months, of *prisión subsidiaria.* Imprisonment in these cases has the character of a coercive measure. This becomes clear from the fact that the offender is set free as soon as he fulfils his obligations. If he does not pay the sums which he is obliged to pay to the *Caja*, there can only be seizure of his income (*sueldo, salario o cualquier otro ingreso económico*) under Art. 73 par. 5 *CP*.

In the meantime, this first Penal Code of the Cuban Revolution has been replaced by a new *Código Penal*, which was enacted in 1987 and which entered into force in 1988.[74] This new Penal Code has kept the *Caja de*

72 Art. 125 F *CDS* is something of a surprise, because *Ferri* thought that those unable to pay (*gli insolvibili*) should only have an obligation to work; op. cit. (supra note 5), p. 701.

73 This was already provided for in Art. XLVI of the *Codice Leopoldino* of 1786 and Art. 35 of the *Codice per lo Regno delle Due Sicilie* of 1819. In Germany this idea was advanced *de lege ferenda* by Albin *Eser* (Die strafrechtlichen Sanktionen gegen das Eigentum, Tübingen 1969, pp. 116 - 118, 381).

Resarcimientos. Compensation to the victim and the *Caja* are dealt with in Art. 70 and 71 of the new Penal Code, with some modifications when compared with the earlier legislation. By virtue of Art. 73 par. 3 *CP*, in case of nonpayment of the compensation, any asset (*toda clase de bienes y derechos*) is subject to seizure to the extent that this is possible under civil procedure law. The new code also admits *prisión subsidiaria*, which again is only conceived as coercive imprisonment: the court can order the *prisión subsidiaria* according to Art. 70 par. 2 *CP* only if the offender refuses to execute an action which has been imposed upon him for the compensation of non-material damage.

Cuban authorities insist that the *Caja* functions quite well in practice. The only noticeable difficulty which is mentioned consists in the fact that corporations can also claim compensation from the *Caja*, and according to Art. 71 par. 1 *CP* even those who have not suffered damage directly, but only indirectly, through the offence (e.g. those who have paid damages and now request payment on the claims that have been transferred to them because of their payments). The opinion is that this possibility for corporations to recover from the *Caja* is superfluous because corporations are generally speaking in a position to present their claims directly. It also seems that this possibility for corporations to claim damages from the *Caja* leads to an important financial drain on the *Caja*.

Another change to be observed in the new Penal Code is that fines are no longer used for the financing of the *Caja*, as was the case according to Art. 73 par. 2b *CP* of 1978. It is an open question whether this modification makes financing of the *Caja* considerably more difficult or not.

Similar *Cajas* have been created in the legal systems of other Latin American countries, for instance in Bolivia[75] and Peru.[76] However, they intervene only in case the offender is unable to pay, and usually they only pay for damage suffered as a consequence of some specific offences. An institution with an all-encompassing competence for the benefit of the victim like the *Caja de resarcimientos* of Cuban law does not seem to exist anywhere else. It is regrettable that there has not yet been any empirical study on the functioning of the Cuban *Caja de resarcimientos*. It would

74 Gaceta Oficial de La República de Cuba, special edition of December 30, 1987.

75 Art. 94 Bolivian Penal Code of 1973: *Caja de Reparaciones.*

76 Art. 47, 77, 403, 404 Peruvian Penal Code of 1924: *Caja de indemnización a las víctimas del delito.* The Penal Code of 1991 does not keep this institution; see no. 3 of the *Disposiciones finales y transitorias.*

certainly be highly interesting to study this institution, which has been functioning now for more than half a century, in order to examine whether it could be adapted to other legal systems.

8. Conclusions

There are indeed a number of interesting ideas on how a better chance for compensation of the victim could be obtained. However, it has to be taken into account that for law reform what is needed are not brilliant theories, but practical concepts which work. Here are the difficulties which have to be overcome. There are many theoretical concepts which work badly or not at all. We have seen above that the so-called adhesive procedure is one of them. In many countries it helps the victim get a title against the offender, but hardly ever can the victim's claim be enforced. The reason for this is mainly that there is nothing for the offender to offer.

It also has to be taken into account that, in industrialized nations at least, and even to a certain extent in so-called Third World countries, the rules on compensation by the offender are not the most important thing for the victim. Social security and private insurances take care of the damage many victims suffer. The net result is that in most cases damage caused by negligence will not be compensated for by the offender, but by an insurance, and even in the case of many intentional offences at least partial compensation is granted by insurances or other institutions.

It is probably only a relatively small number of cases where compensation could be used as an instrument of criminal policy. Possibly these are the same cases which the *Scuola Positiva* considered when it requested compensation as *sanzione da sostituirsi alla pena carceraria nei piccoli delitti commessi da delinquenti occasionali.*[77] At present we should, however, rather consider the substitution of fines, which in many countries, especially in Germany, largely displaced imprisonment formerly applied in the case of petty criminality. A possibility would be to suspend fines, to grant parole to offenders sentenced to pay a fine, if compensation is paid to the victim. It is indeed necessary to reconsider the relationship between the fine and compensation, at least in those countries which - as Germany[78] - do not yet

77 *Ferri*, op. cit. (supra note 5), p. 696.

78 See § 459a *StPO*.

give really preference to victim's compensation over the payment of the fine to the Treasury.

Ferri already saw the difficulty which lies in the fact that the offender often does not have any assets, and he therefore suggested a *sostituire al risarcimento pecuniario l'obbligo del lavoro a favore del dannegiato, individuo o società.*[79] Problems which we encounter in relation to compensation for the victim of crime are therefore long-standing and well-known questions. Very interesting solutions have been designed since the 18th century. A number of these solutions, applied in various legal systems like the 18th century Italian legislation, the 19th century Austrian and Greek legislation, the 20th century Cuban legislation, are interesting enough to warrant further study.

One thing has to be made clear, though: any effort to introduce a comprehensive concept of criminal policy in this field has to be preceded by a decision as to what the objective of such criminal policy is to be. On the one hand, there is the victim who in many cases is in a pathetic situation since nobody cares about the damage he has suffered. On the other hand, there is the offender who has to be reintegrated into society. If we put compensation of the victim first, then the reintegration of the offender might suffer. A financial burden which is too heavy for him might even lead to recidivism. On the other hand, if only very small compensation is given to the victim who has suffered important damage, this might seem to heap ridicule upon the helpless victim. It does not seem easy to reconcile these contradictory interests.

The solution might be found in an institution similar to the Cuban *Caja de resarcimientos*, which, according to the Cubans, has been operating successfully since 1936. Of course this solution costs money, i. e. the taxpayer's money. But it would be worthwhile investigating this solution thoroughly: full compensation to the victim by a State institution, compensation within the limits of his ability by the offender, who pays the money to the State institution. Since there are already institutions in a number of States, which take care of certain cases of compensation to the victim, a cautious extension of this system, taking into account of course the limits facing the public purse, could be a workable solution to the problem. The financing of this fund should not be too difficult if the proceeds from fines and the sale of seized goods are used, among other sources.

79 Op. cit. (supra note 5), p. 697.

The Past and Present State of Victim's Compensation in Brazilian Law and the Need for Reform*

Kurt Madlener and Silma Marlice Madlener

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1. Introduction

Brazilian legislators and lawyers have constantly given thought to the plight of the victims of crime. Many bills of reform and statutes are evidence of this attitude.

At an early stage in the course of Brazilian legal history a number of ideas were put forward which even today would be useful if implemented. The objectives of this article are, therefore, to review the history of victim's compensation in Brazilian law, in order to show what these ideas are, and to suggest which reforms should be undertaken in the light of Brazilian legal history to obtain a more effective system of victim's compensation.

In the history of Brazilian penal law some periods have been particularly remarkable. Such has been the case with the first decades of the Empire and the famous Penal Code of 1830, which was in many respects progressive for its time. In the 20th century, during the 1920's and the 1930's, numerous ideas for reform were advanced, and then again in the 1980's. To these periods, therefore, particular attention will be paid.

It is not possible, though, to treat the topic of victim's compensation in Brazilian law exhaustively in an article, with its severe limitations of space. It has, indeed, many aspects: Victim's compensation is dealt with in the General Part *(Parte Geral)* of the various penal codes of Brazil, but also in the Special Part *(Parte Especial)*, where a number of specific crimes contain special rules in respect of the damage caused by the offender.

On the other hand, it is not sufficient to study only the substantive law of victim's compensation: How the victim can effectively obtain compensation is determined by procedural law. The various Brazilian statutes of criminal procedure must therefore also be considered.

Finally, an effort must be made to ensure that the victim can recover compensation, even if the offender has no assets to be attached and is serving a prison term. For this reason penitentiary law is also relevant.

Although this article can only give a survey, it cannot touch on all the aspects of victim's compensation. Whereas the relevant rules in the Special Part of the Penal Code of 1940 are dealt with briefly, the historical evolution and the need for reform in that area have to be omitted.[1] The same holds true for the special rules applicable to juveniles and victim's compensation in substantive and procedural military law.

The law of victim's compensation in Brazil is at present federal law. This has not always been the case. The Constitution of 1891[2] authorised the states and the Federal District to enact their own procedural laws. It would have been interesting to study the state laws of the period to see whether they followed the federal model as e.g. the Mexican states mostly do, or whether the diversity of statutes brought about new and original ideas. But this, too, was not possible to research within the framework of an article.

An overview of law and literature on victim's compensation indicates that the grit of the problem is that of implementation. Unfortunately empirical studies on the problem do not seem to exist, or at least they are not available. This is a field where criminological research is sorely needed. Since the Constitution of 1988 permits (supplementary) state legislation on procedural matters[3], and since a number of drafts to reform the law have been submitted on the federal level, such research would be very useful to develop a realistic approach to the problem of victim's compensation.

2. From Discovery to Independence (1500 - 1822)

The era of modern Brazilian law starts with the discovery of Brazil by the Portuguese on April 22, 1500. Amongst the native Indians responsibility for damage was a collective rather than an individual one, but this customary law of the Indian natives did not influence the evolution of modern Brazilian legislation at all.[4]

1 On the project to reform the Special Part see Kurt *Madlener*, A reparação do dano como medida de política criminal na Parte Especial do Código Penal Brasileiro, in: *Grupo Brasileiro da AIDP* (Ed.), Livro-homenagem a Heleno Cláudio Fragoso, Rio de Janeiro 1991 (in press).

2 Art. 34 no. 23 *Constituição da República dos Estados Unidos do Brasil.*

3 Art. 24 no. XI *Constituição da República Federativa do Brasil* (compare Art. 22 no. I).

4 José Henrique *Pierangelli* Códigos Penais do Brasil, Evolução Histórica, Bauru (São Paulo) 1980, p. 6.

When the Portuguese arrived in Brazil, their law were the *Ordenações Afonsinas* of 1446. Shortly after the discovery of Brazil, the Portuguese King *Dom Manuel "O Venturoso"* ordered new legislation to be drawn up, and this was published in 1521. As a result the *Ordenações Afonsinas* were practically never applied in Brazil, while the *Ordenações Manuelinas* were at some stage at least applied in some parts of Brazil.

The most important Portuguese legislation, however, were the *Ordenações Filipinas*, sometimes referred to as *Código Filipino*, which were drawn up on the basis of the former legislation by order of King Philip II of Spain who at the same time was King of Portugal under the name of Philip I. They were published in 1603 by King Philip II of Portugal (King Philip III of Spain), and revalidated by King John IV in 1643[5]. Some parts of it were in force in Brazil until well into the 20th century.[6]

In Book V of the *Ordenações Filipinas*, criminal law was regulated.[7] In various parts of this Book victim's compensation is dealt with. Title LXXXVI, for instance, refers to damage caused by fire.

Title LXXXVI, no. 1, of the *Ordenações Filipinas* established a special procedure which could be called *Sumaríssimo* (summary proceedings), applicable to cases where a fire had destroyed trees, wineyards etc. According to this procedure, the place of damage had to be visited by the judges and experts who had sworn that they would estimate the damage caused by the fire objectively. The victim or victims, i.e. the people who had suffered the damage, must also be present. The estimation of the damage is certified by a public notary (*Tabelião Público*) and signed by the experts, to enable the victim or victims to get compensation by seizing the goods of the culprit.

The judges had to start and complete the investigation in the case of damage caused by fire within 15 days, and if they did not do so, they were obliged to pay 2,000 *Réis*. Half of this considerable amount of money had to be paid to the prisoners (*Captivos*), and the other half to those who accused them (Title LXXXVI, no. 2).

Since Portuguese law permitted slavery (it was abolished in Brazil only in 1888), there were also special provisions for the damage done by the

5 *Pierangelli*, op.cit. (note 4), pp. 6/7.

6 Milton *Duarte Segurado*, O Direito no Brasil, São Paulo 1973, pp. 35, 69.

7 This part of the *Ordenações Filipinas*, also known as the *liber terribilis* (Nélson *Hungria*, Comentários ao Código Penal, Vol. I/1, 2nd ed., Rio de Janeiro 1953, p. 37) is reproduced in: *Pierangelli*, op.cit. (note 4), pp. 17 - 163.

criminal act of a slave. If, for instance, the slave had caused a fire, he received corporal punishment in public. As far as the damage was concerned, the slave's master could either pay the damage or have the slave sold, in which case the proceeds of the sale would go to compensate the damage (Title LXXXVI, no. 5, par.1).

Another interesting case of compensation for damages in the *Ordenações Filipinas* is to be found in title CXVIII. It refers to those who accuse or start criminal proceedings against somebody, but do not prove their accusation. The same court which absolves the person who has been criminally prosecuted, orders that he who has instigated the criminal prosecution will have to pay the costs and also the damages which the accused has suffered.[8] If it could be proven that the proceedings had been initiated maliciously, an order for double or triple the amount of the costs could be awarded and a penalty imposed on the culprit.

Similarly if the accused was absolved of a crime, his accuser was obliged to pay double the amount of costs and all the damages which the accused had suffered by virtue of the accusation (Title CXXX, no. 1, par. 5).

As a general rule, if the offender had given bail (*fiança*) it had to be applied primarily for the compensation of the damage, costs and other expenses of the aggrieved person (Title CXXXI). In certain cases seizure of the assets of the offender was allowed, and these assets could be used to compensate the victim's family for damages suffered.[9]

The *Código Filipino* established guidelines in Title CXXXVI under the heading "*Que os Julgadores não appliquem as penas a seu arbítrio*", for the determination of penalties by the judges to prevent arbitrary punishment. However, the Title allowed discretionary sanctions to be imposed by the judge on the offender for the compensation of the victim's damage where the victim did not make a specific request.[10]

As far as compensation in penitentiary law is concerned, it is interesting to note that already the *Código Filipino* provided that the wages of prisoners would be applied for victim's compensation.[11]

8 *Duarte Segurado,* op.cit. (note 6), pp. 204, no. 118.

9 See Title CXXVII, especially no. 2.

10 Title CXXXVI, no. 2, par. 3.

11 Title CXXXIX, especially no. 7.

3. The Empire (1822 - 1889)

On September 7, 1822 *Dom Pedro I do Brasil* (later Dom Pedro IV de Portugal), born in 1798 in Lisbon as a son of the Portuguese King *Dom João VI*, proclaimed independence from Portugal and established Brazil as Constitutional Empire. In a typically Brazilian manner independence was achieved without any bloodshed.

With independence an autonomous legal system for Brazil evolved. However, since it was impossible to design a new legal system overnight, statutes applicable on April 25, 1821 remained in force pursuant to a Statute of October 20, 1823.[12]

Prior to the undertaking of comprehensive reforms, piecemeal reforms of an urgent nature were made by statute, some of which provided compensation for illegal actions.[13] Substantial reforms of criminal law and procedure took place through the enactment of comprehensive codes in 1830 and 1832. Only a few years later, in 1841/42, criminal procedure was reformed, drastically modifying the system of victim's compensation.

3.1 Compensation for Victim's Damages in Criminal Law

3.1.1 Vasconcellos' Bill

The first bill for a criminal code of the Empire was presented by a congressman named Bernardo *Pereira de Vasconcellos* in 1827.[14]

12 Collecção das Leis do Império do Brasil de 1823, Rio de Janeiro 1887, part 1, pp. 7 et seq.

13 For instance a Statute of 15 October 1827 regulated the criminal responsibility of ministers and secretaries of state. Abuse of power *(abuso de poder)* which caused prejudice, obliged them to pay damages to the State or, as the case may be, to the citizen. As a penalty the culprit had to leave the capital (*a Corte*) for 1 to 3 years, and in any event he was not allowed to return without having compensated the damage caused (Art. 3, par. 1). The Statute is reproduced in: José Henrique *Pierangelli*, Processo Penal, Evolução Histórica e Fontes Legislativas, Bauru (S.P.) 1983, pp. 348 - 355.

14 Thomaz *Alves Júnior*, Annotações Theóricas e Práticas ao Código Criminal. Rio de Janeiro 1864, vol. I, p. 18.

Art. 47 of the bill provided for the damage, suffered by the victim through crime, to be paid out of public funds if the criminal did not have the financial means to pay it or if the offence had been one of negligence. For this purpose a special public fund had to be established in each city's administration. All the fines and other sums of money granted by law for compensation of damages had to be paid into this fund. This public "treasury" had to be equipped for reasons of security with three keys: One key had to be with the justice of peace, another key with the local priest and the third key with the depositary.[15]

Of course it was not the first time that the idea of a public treasury for victims' compensation had been proposed. As a matter of fact, already in the Italian legislation of the 18th century, references to such public treasuries are to be found. But it is interesting to note that *Vasconcellos* took up this idea. Many years after him two famous Italians, *Garofalo* and *Ferri*, made a similar proposition.[16]

A second bill was submitted in the same year by José *Clemente Pereira*. On the basis of these two bills the statute was drafted. The influence of Jeremy *Bentham's* theories was obvious.[17] Unfortunately, not all the ideas of *Vasconcellos* on victims' compensation were included. The legislator neither provided a special fund nor employed the fines for the compensation of damages caused by crime as suggested by *Vasconcellos*. It is regrettable that this type of public treasury was not instituted in Brazil.[18]

3.1.2 The Famous Imperial Penal Code of 1830

Although the *Código Criminal* of 1830 (CCRIM) did not include these most important ideas of *Vasconcellos* concerning compensation of damages to the victim of crime, it was indeed an outstanding codification, well advanced if compared with others of the 19th and even the 20th century. It was, for example, the first code to adopt a system of day-fines (Art. 55

15 *Alves Júnior,* op.cit. (note 14), pp. 464/465.

16 See Kurt *Madlener*, Compensation, Restitution, Sanción pecuniaria and other Ways and Means of Awarding Damages to the Victims of Crime through the Courts (this volume, pp. 269 et seq.), chapter 7.

17 *Alves Júnior*, op.cit. (note 14), pp. 45 et seq.

18 At present the Brazilian Constitution of 1988 orders in Art. 245 that the state shall in certain circumstances pay damages to the victim of crime. However, the Brazilian parliament has not yet passed a statute implementing this constitutional provision. On victim's compensation funds in present-day Brazilian legislation see below 8.1.

CCRIM). In fact, the Brazilian Code of 1830 was used as a model for many penal codes of the 19th century, for instance the Spanish Penal Code of 1848.[19]

The legislator attributed great importance to the damage suffered by the victim, as is evidenced by the fact that the amount to be imposed as fine depended in many cases directly upon the value of the damage. In a number of articles in the Special Part of the Code the fine constituted a percentage of the value of the damage (e.g. Art. 129 par. 8 CCRIM: 5 to 20 %).

The compensation of damage was regulated in Part I, Title I, Chapter IV (Art. 21 - 32) of the code under the heading "Da satisfação". Art. 21 CCRIM stated the obligation of the offender to compensate the victim's damage, and compensation had to be "as fully as possible"; in case of doubt the decision had to be in favour of the victim.[20]

Art. 30 CCRIM gave preference to the victim's claim for compensation if the offender had to pay damages to the victim as well as fines to the state. This indicates how much the Brazilian legislator valued the legitimate interest of the victim to receive compensation. In many other jurisdictions it took a century or more until similar rules were enacted, and even today some do not give the same absolute preference to victim's compensation against the Treasury's interest in recovering fines.[21]

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19 Already four years after its publication in Brazil a French translation of the code was published: Code Criminel de l'Empire du Brésil, traduit par M. Victor *Foucher* et précédé d'observations comparatives avec le Code Pénal Français, Paris 1834. Some European penalists (e.g. Karl Josef Anton *Mittermaier*) even learned Portuguese in order to be able to get familiar with the code; *Duarte Segurado*, op.cit. (note 6), p. 358.

20 "A satisfação será sempre a mais completa que fôr possível, sendo no caso de dúvida a favor do offendido" (Art. 22 par. 1 CCRIM). The Imperial Decree for the Consolidation of Civil Law of 1858 (Consolidação das Leis Civis de 22 de novembro de 1858, 3d ed., Rio de Janeiro 1876, pp. 485, 486) restated in Art. 798 that every delinquent was obliged to pay the damage which he had caused by crime, and provided in Art. 800 that if there was doubt as to the amount of damage to be awarded to the victim, the victim would receive the benefit of the doubt. The principle contained in Art. 22 CCRIM, decision in favour of the victim in the case of doubt, was therefore reaffirmed. This principle, of course, is absolutely contrary to the normal legal position in civil matters where any person who claims to have suffered damages must prove the damage, and if there remains any doubt in the mind of the judge, this will be to his disadvantage.

21 Compare § 459a German Criminal Procedure Code, as amended in 1986, which gives a very weak preference to victim's compensation.

In this context it is also noteworthy that Art. 27 and 30 CCRIM provided the possibility to mortgage assets of the offender in order to secure full compensation of the victim's damages. Many years later, *Ferri* and *Garofalo* advanced this idea as part of the regulation of victim's compensation within the framework of positivism.[22]

Since slavery continued to exist after independence, Art. 28 par. 1 CCRIM incorporated the rule of the *Ordenações Filipinas* on master's liability for the damage caused by his slave. Similar to the position in the *Ordenações Filipinas* (see supra 2) the liability was limited to the commercial value of the slave.

The compensation of damage caused by crime was considered by the code of 1830 as an institution of public law. This followed from Art. 32 CCRIM, which stipulated that if the delinquent did not have the financial means to pay the damage within eight days, he will be sentenced to prison to work for the necessary time to earn the money to pay the damage.[23] This, of course, gave the victim a very forceful argument for the recovery of the damage. He did not have to rely on a costly and cumbersome civil procedure to obtain payment, but had the powerful instruments of the criminal justice system on his side to enforce payment by the offender. Interesting enough this was something the Italian Positivists also suggested half a century later.[24]

In principle, the order for compensation was imposed during sentencing in the criminal procedure. However, already with the Statute of September 22, 1829[25], an accused who had fled and who for that reason could not be tried, could pursuant to Art. 2 of that Statute be sued in the civil claims court to pay damages. Now this was regulated in Art. 31 CCRIM, which stated that there could not be any order for the compensation of damage before the conviction of the delinquent by a criminal court, except in certain cases, for instance if the accused was absent (par. 1) or had died (par. 2) or if the victim preferred to apply for compensation in the civil claims court (par. 3).

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22 See Art. 93 of the *Progetto Preliminare di Codice Penale Italiano per i Delitti (Libro I)*, which was drawn up by a commission with *Ferri* as president and *Garofalo* as one of the members.

23 Roberto *Lyra,* Introdução ao Direito Criminal, Rio de Janeiro 1946, p. 89, no. 6. Compare Art. 226 CPCRIM, below 3.2.1.

24 See *R. Garofalo,* Criminologia, Rome 1885, pp. 312 - 319.

25 Lei de 22 de setembro de 1829, Colleção das Leis do Império do Brazil de 1829, Actos do Poder Legislativo, p. 10.

law of the *Ordenações Filipinas* continued in force even after Brazil became a Republic on November 15, 1889, until 1917. It was only then that book IV of the *Ordenações Filipinas* ceased to be applicable;[26] the *Código Civil Brasileiro* went into force on January 1, 1917.[27]

3.2 Compensation for Victim's Damages in Criminal Procedure

3.2.1 The Criminal Procedure Code for Courts of First Instance of 1832

The *Código do Processo Criminal de Primeira Instância* of 1832 (CPCRIM)[28] provided in accordance with the Penal Code that, as a rule, victim's compensation must be awarded in the criminal process.[29] Accordingly Art. 79 par. 2 CPCRIM ordered that the relevant damage must already be indicated in the accusation or complaint *(queixa)*.

The Code also provided that if bail was granted to the accused, the amount of damage caused by the offence must be determined by two experts and included in the amount of bail requested from him (Art. 109 CPCRIM). This guaranteed from the outset that the victim would obtain compensation.

Among the questions the presiding judge had to submit to the Court of Appeal *(Junta de Paz)* were whether the accused had to pay compensation, and to what extent (Art. 225 par. 4, 5 CPCRIM). If the convicted person did not provide security for the damage nor paid the compensation, he had to go to prison (Art. 226 CPCRIM).[30]

In jury trials, the President of the Court had to ask the *Jury de Sentença* for a decision on compensation (Art. 269 par. 5 CPCRIM).

3.2.2 The Criminal Procedure Reform of 1841/1842

After Emperor *Dom Pedro I* renounced the throne in 1831, his son *Dom Pedro II* succeeded him in 1841 at the tender age of fifteen. In 1841/42 the

26 *Duarte Segurado,* op.cit. (note 6), pp. 35 and 69. See Art. 1.807 Código Civil.

27 Art. 1.806 Código Civil.

28 Lei de 29 novembro de 1832. The Statute is reproduced in: *Pierangelli,* op.cit. (note 13), pp. 215 - 245.

29 See above 3.1.2.

30 This procedural provision is the counterpart of the substantive provision contained in Art. 32 CCRIM; see above 3.1.2.

reform of the Criminal Procedure Code for Courts of First Instance took place by means of Statute no. 261 of December 3, 1841 and Regulation no. 120 of January 31, 1842.

Statute no. 261 brought about a drastic change as far as the procedure for compensation of damage was concerned. Until then compensation for crime-related damage was in principle awarded in the criminal process (with some exceptions provided in Art. 31 CCRIM), but Art. 68 now determined that compensation of damage must be recovered by civil action. Art. 31 CCRIM and Art. 269 par. 5 CPCRIM were revoked.

However, the change thus brought about was tempered: Once the criminal court had found that the offence had been committed and identified the perpetrator, this decision could not be questioned in the civil claims court. Consequently what remained to be decided by the civil claims court was the question whether the offender had caused the damage, and if answered in the affirmative, then the question of quantum.[31]

Statute no. 261 also dealt in Art. 44, 45 with the use of bail money for compensation. These articles did not alter Art. 109 CPCRIM (see above 3.2.1), but rather indicated when and how bail money would be applied to compensate the victim. Art. 44 stated that if the offender convicted in final form ran away, the proceeds of the assets given as bail went to the city treasury, but only after the amount of victim's compensation and legal costs had been deducted. Similarly, if the convict was unable to pay victim's compensation and legal costs, part of the bail money was applicable for this purpose (Art. 45).

Regulation no. 120 of January 31, 1842,[32] which implemented Statute no. 261, also embodied the aforesaid rules as far as victim's compensation was concerned. It stated that in the case of bail forfeiture after conviction, the money would go to the city treasury. However, the amount of damages to the victim and the legal costs must first be deducted (Art. 315, 316

31 Art. 68 Lei no. 261 de 3 de dezembro de 1841. The Statute is reproduced in: *Pierangelli,* 1983, op.cit. (note 13), pp. 249 - 261. The Consolidation of Civil Laws of 1858 confirmed this division of competence between the criminal and the civil claims courts; see Art. 799 Consolidação das Leis Civis aprovada pelo Decreto Imperial de 22 novembro 1858, 3d ed., Rio de Janeiro 1876, pp. 485 and 486.

32 Regulamento no. 120 de 31 de janeiro de 1842. The Regulation is reproduced in: *Pierangelli,* op.cit. (note 13), pp. 265 - 319.

Regulation no. 120). Even if the offender did not forfeit his bail, part of it would be used for compensation of the victim and legal costs if he was convicted and unable to pay (Art. 317 Regulation no. 120).

4. The First (1889 - 1930) and Second (1930 - 1937) Republic

4.1 Compensation for Victim's Damages in Criminal Law

4.1.1 The Penal Code of 1890

On November 15, 1889, the imperial period ended and the Republic was proclaimed. One year later, on October 11, 1890, the first penal code of the Republic was published.[33]

This code, in contrast to the code of 1830, did not have any separate title on the compensation of damage caused by crime. The question was dealt with in Book I, Title V *"Das penas e seus effeitos, da sua applicação e modo de execução"*. As one of the consequences of conviction Art. 69 letter b CP 1890 stated the obligation to compensate damage. Art. 70 CP 1890, the last Article in Title V, added that the obligation to indemnify the damage had to be regulated according to civil law *(será regulada segundo o direito civil)*. Accordingly the division between the decision on criminal liability (by the criminal court) and on victim's compensation (by the civil claims court), initiated during the reform of the criminal procedure in 1841/1842, continued.

Again, as with the Penal Code of 1830, the legislator referred several times in the Penal Code of 1890 to damage as a yardstick for fixing fines. For a number of crimes the fines were indeed fixed as a percentage (5 % to 20 %) of the damage caused by such crime. These crimes were to be found, *inter alia*, in the chapters dealing with fire and other crimes of general danger (Art. 136 et seq. CP 1890), crimes against the safety of transport and communication (Art. 149 et seq. CP 1890), crimes against public property, (*peculato*; Art. 221 et seq. CP 1890), damage (Art. 326 - 329 CP 1890), theft (Art. 330 par. 1 CP 1890), and fraud (Art. 338, no. 11 CP 1890).

33 *Decreto n. 847 de 11 de Outubro de 1890*, reproduced in: *Pierangelli*, op. cit. (note 4), pp. 269 - 318.

4.1.2 The Consolidation of Criminal Laws of 1932

The Penal Code of 1890 was not considered to be satisfactory, and already in 1893 a new bill was presented.[34] Neither this nor other attempts in the first quarter of the century succeeded to substitute the Code. During the following 40 years after the enactment of the Penal Code of 1890 the legislator frequently had to intervene, and enacted a number of reforms modifying the code by special laws not integrated with the Code. Finally there were more than 90 statutes, decrees and regulations outside the Penal Code dealing with criminal matters, and the need to consolidate was felt.

The Government followed the recommendation of the *Sub-Commissão legislativa do Código Penal,* presided by Virgílio de *Sá Pereira,* and published by Decree no. 22.213 of December 14, 1932[35] a book by Justice Vicente *Piragibe,* in which he had consolidated the penal laws of Brazil by integrating them with the Penal Code of 1890 without altering the substance.[36]

4.1.3 The Bill of Sá Pereira

Since the need for a new penal code was felt in any event, the Government entrusted Virgílio *de Sá Pereira,* a high ranking judge, to prepare a bill which was published in the *Diário Oficial* in 1928. It was thereafter revised by a commission, and the final version was published by the *Imprensa Nacional.*[37] In 1935 it was submitted to the Parliament *(Câmara dos Deputados),* which approved it. It was still pending approval in the Senate (*Senado Federal*) when the *putsch* of 1937 took place. With this the legislative history of the bill ended: It was never enacted.

Although the draft of *Sá Pereira* failed as such, it is worthwhile to study its solution for the problem of victim's compensation: Many of the provisions of this draft reappeared in the following one, that of *Alcântara Machado,*[38] and a number of them were finally included in legislation.

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34 *Pierangelli,* op. cit. (note 4), p. 10.

35 Coleção das Leis da República dos Estados Unidos do Brasil de 1932, vol. V (1933), pp. 371/2

36 Vicente *Piragibe,* Consolidação das Leis Penaes, Approvada e adoptada pelo Decr. n. 22.213 de 14 de Dezembro de 1932, Rio de Janeiro 1933.

37 Virgílio *de Sá Pereira* / Evaristo *de Moraes* / Mário *Bulhões Pedreira,* Comissão Legislativa, Projeto do Código Criminal, Rio de Janeiro 1933.

38 See below 5.1.1.

Art. 32 of the bill stated that material or moral damage caused by crime had to be compensated. As for the method of compensation, the draft followed the existing law: The conviction of the offender was the basis of victim's compensation (Art. 37), but the amount of compensation had to be fixed by the civil claims court pursuant to the Civil Code (Art. 38).

When determining the penalty, the judge had to take into account, among other things, the material or moral damage caused by the crime *(ao dano causado, material ou moral;* Art. 100 no. V), but the draft also provided an incentive to the offender to compensate this damage. Pursuant to Art. 101 no. XIII it was a mitigating circumstance if the offender had compensated the material or moral damage caused or if he had tried to do so insofar as it was within his power to do so *(na medida de suas posses)*. The presence of a mitigating circumstance allowed the judge to impose a lesser or other type of punishment. For instance, he could impose a fine instead of imprisonment of up to 6 months (Art. 102 no. V).[39] On the other hand it was an aggravating circumstance if the offender did not compensate the damage although he was in a position to do so (Art. 104 no. V).

An incentive to compensate the damage was also provided in connection with *sursis* (suspended sentence). If the parolee did not compensate the damage or did not prove that he had tried to do so to the extent that it was possible for him, the *sursis* had to be revoked (Art. 123).

Similarly conditional release *(livramento condicional;* Art. 126 - 135) could be granted only if the prisoner had compensated the damage or at least showed that he had tried to do so to the extent that it was possible for him (Art. 131). However, these provisions using suspended sentence and conditional release as an incentive for compensation were not new. In this respect *Sá Pereira* more or less repeated what was already part of the law since 1924.[40] The same was true for rehabilitation *(rehabilitação;* Art. 145 - 149), which consisted in *Sá Pereira's* draft in the lifting of the prohibition to exercise certain civil rights, professional activities and so on.

39 This reminds one of the efforts of the German legislator to eliminate prison terms of less than six months as far as possible (§ 14 StGB as amended by the *Erste Gesetz zur Reform des Strafrechts* of June 25, 1969, now § 47 StGB).

40 Art. 1, 2 par. 2 Decreto n. 16.588 de 6 de setembro de 1924 (*condemnação condicional*); Art. 1, 10 Decreto n. 16.665 de 6 de novembro de 1924 (*livramento condicional*); Collecção das Leis da República dos Estados Unidos do Brasil de 1924, vol. III, Atos do Poder Executivo, pp. 159 - 160 and 392 - 397.

One way in which the draft tried to help the victim to recover compensation, was to allow the use of the proceeds of crime for that purpose. Art. 95 provided that if the offender had received payment or a gift in order to commit the crime, these had to be seized, and while this seizure was in principle for the benefit of the state or the Union, the judge was free to use it for victim's compensation.

Also in order to give the victim the possibility to recover damages, Art. 73 provided that one third of the prisoner's remuneration for work could be paid to the victim or his heirs by order of the judge.

4.2 Compensation for Victim's Damages in Criminal Procedure

4.2.1 Regionalization of Procedural Law and the Attempt to Institute again a Uniform Criminal Procedure Code for all of Brazil

As far as criminal procedure was concerned, victim's compensation as provided for by the federal statutes of 1832 and 1841/42 (see above 3.2) did not change. However, there were certain regional differences. The Federal Constitution of 1891 provided implicitly that the states of the Union could legislate on procedural matters.[41] Some states therefore enacted their own statutes. The state of Rio Grande do Sul, for example, in its Code of Penal Procedure, stated that the damage could either be claimed by way of a criminal action or by way of a civil action.[42]

With the Federal Constitution of 1934 the competence to legislate on procedural law was again reserved to the Federation.[43] Accordingly a uniform system of procedural law had again to be provided for all of Brazil. A bill for a federal criminal procedure code was swiftly drawn up by a commission of two justices and a professor of criminal law and presented in 1935 by Vicente *Ráo*, Minister of Justice, to the President of the Republic. However, as a consequence of the *putsch* of Getúlio *Vargas* in 1937 and the coming into force of a new constitution, the bill of Vicente *Ráo* was dropped.[44]

41 Art. 34 no. 23 of the *Constituição da República dos Estados Unidos do Brasil de 1891.*

42 Antonio *Bento de Faria,* Annotações theórico-práticas ao Código Penal do Brazil, 3d ed., Rio de Janeiro 1919, vol. I, p. 196.

43 Art. 5 no. XIX letter a of the *Constituição da República dos Estados Unidos do Brasil de 1934.*

44 José Frederico *Marques*, Elementos de Direito Processual Penal, 2nd ed., Rio de Janeiro 1965, vol. I, p. 104. The *Exposição de Motivos* of Minister of

4.3 Compensation for Victim's Damages in the Penitentiary Law

Already in 1933 a commission of three distinguished lawyers, Cândido *Mendes de Almeida*, José Gabriel *de Lemos Britto* and Heitor *Pereira Carrilho*, drew up an *Anteprojeto de Código Penitenciáro da República.*[45] This draft was submitted to Parliament in 1935,[46] but due to the proclamation of the "New State" *(Estado Novo)* it has never been enacted, as was the case with the bills for a Penal Code by Virgílio *de Sá Pereira* and for a Criminal Procedure Code by Vicente *Ráo*.

In its 854 articles the draft dealt extensively with the compensation of damage caused by crime. It provided that matters relating to the payment of compensation were under the jurisdiction of the authorities entrusted with the execution of penal sanctions (Art. 8). An especially important role was assigend to the *Conselhos Penitenciários* (Art. 1, 42 et seq., 643 et seq., 666).

The payment which a prisoner were to receive for work done in prison was to be used in part for the compensation of the damage he had caused (Art. 541, 594 no. 6, 600). However, compensation of damage was not a necessary prerequisite for obtaining conditional release [47] As far as rehabilitation, the lifting of the prohibition to exercise certain civil rights, professional activities and so on, was concerned (*reabilitação*, Art. 794 et seq.), however, compensation of damage was a necessary condition (*condição imprescindível*), although it was considered sufficient if the offender showed that he had made an effort to compensate the victim as far as it was possible for him (*na medida das suas posses*; Art. 797 par. 2).

Taking all this together it is clear that the three authors of the draft were very much concerned with the victim. On the other hand they cared obviously for the reintegration of the offender so that in case of conditional release and rehabilitation compensation of damage did not have precedence.

Justice Vicente *Ráo* to his bill has been reproduced in: Archivo Judiciário XXXVI (1935), pp. 21-28.

45 On the legislative history see Armida *Bergamini Miotto*, Curso de Direito Penitenciário, vol. 1, São Paulo 1975, pp. 109 et seq.

46 The bill is reproduced in *Senado Federal* (Ed.), Execução Penal, Lei no. 7.210, de 11 - 7 - 84, Brasilia 1985, pp. 175 - 287.

47 *Suspensão condicional da execução da pena*, Art. 655 et seq., especially Art. 660, 661, 666; see also Art. 674 par. 2. *Livramento condicional*, Art. 696 et seq., especially Art. 727.

5. The Third Republic (*Estado Novo*)

5.1 Compensation for Victim's Damages in Criminal Law

5.1.1 The Draft of Alcântara Machado

After the *putsch* of 1937 and the creation of the so-called *Estado Novo,* the Minister of Justice Francisco *Campos* entrusted *Alcântara Machado,* professor of law in São Paulo, with the task to draw up a new draft. This draft was already published in the following year.[48]

Alcântara Machado insisted that the bill which had been pending in Congress at the time of the *putsch* had so many short-comings that he had to draw up an entirely new draft.[49] However, as far as victim's compensation is concerned, the provisions in his draft and *Sá Pereira's* are often quite similar.

Just as *Sá Pereira, Alcântara Machado* did not deviate from the principle, introduced by the reform of the Criminal Procedure in 1841/42 and confirmed by the Consolidation of Civil Laws in 1858, that the claim for damages had to be awarded by the civil claims court on the basis of the conviction obtained in the criminal court.[50] *Alcântara Machado*'s draft did not define failure to compensate as an aggravating circumstance, but used mitigating circumstances as an incentive to avoid or diminish the damage or compensate it. However, compensation was to be taken into account only if it was done spontaneously and fully *(espontânea e integralmente;* Art. 50 no. V).

Alcântara Machado's draft also provided that the prisoner's remuneration for work would be used partially for victim's compensation, although not in exactly the same proportion as suggested by *Sá Pereira* (Art. 34 par. 2 no. II, par. 3).

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48 *Alcântara Machado,* Ante-projeto da Parte Geral do Código Criminal Brasileiro, São Paulo 1938.

49 Op. cit., pp. I et seq.

50 Op. cit., pp. XXII et seq.; Art. 56 no. IV, V, parágrafo único, of the draft.

The new draft also took the compensation of damage into account with the suspension of sentence (Art. 40 par. 3 no. III), conditional release (Art. 41 no. III) and rehabilitation (Art. 71 no. II letter a).[51] In all these cases the wording is somewhat different, but the substance is more or less the same.

Alcântara Machado was also in favour of instituting a special treasury for the compensation of damage caused by crime. He referred to the Italian Reform Commission of the 1920's, presided by Enrico *Ferri*, which had taken up an idea to be found already in the penal code of the Toscana (*Codice Leopoldino* of 1786)[52] and the penal code of the Two Sicilies (*Codice per lo Regno delle Due Sicilie* of 1819). The idea of *Alcântara Machado* was to organize this fund according to the characteristics embodied in the Peruvian fund for compensation of victims.[53] It was to be financed by the sale of objects seized from the criminal, part of the convicts' salaries, fines and bail.[54]

The draft was revised by a commission, of which Nélson *Hungria* and Roberto *Lyra* were members, and served as the basis for the Penal Code of 1940.[55]

5.1.2 The Penal Code of 1940

On January 1st, 1942, the new *Código Penal* (CP 1940)[56] came into force. It had not been enacted in the form of a statute by Parliament, but decreed by President Getúlio *Vargas*, who at the time ruled Brazil as a dictator. While the General Part of the Penal Code of 1940 has been substituted with another in 1984, the original Special Part is still on the statute-book, although with many alterations due to various amendments.

51 It has to be noted that the institution of rehabilitation is somewhat different in this draft when compared with *Sá Pereira's*; see Art. 70.

52 This code is reproduced in: Carlos *Paterniti*, Note al Codice Criminale Toscano del 1786, Padua 1985.

53 See Art. 47, 77, 403, 404 Peruvian Penal Code of 1924.

54 *Alcântara Machado,* loc. cit., p. XXIII.

55 According to Lopo *Alegria* (Assim foi Roberto Lyra, Rio de Janeiro 1984, pp. 132/3) *Lyra* was the only member of the Commission with a positivist tendency.

56 *Decreto-Lei n. 2.848 de 7 de dezembro de 1940.*

5.1.2.1 The General Part (Parte Geral)

In the General Part, which today is only of historical interest, Art. 48 no. IV b provided a mitigating circumstance for the offender that has spontaneously, efficiently and soon after committing the crime (*por sua espontânea vontade e com eficiência, logo após o crime*) took the necessary steps to avoid or reduce the possibility of damage or has compensated the damage before the hearing of the case by the judge.

The problem of compensation of damage was dealt with under the heading "Das penas" (Title V) in Chapter VI "On the consequences of conviction" ("Dos efeitos da condenação"). Art. 74, the only article in this chapter, stated in no. I (similar to Art. 69 CP 1890) that a conviction implied an obligation to compensate the damage caused by crime.

Art. 74 no. II CP 1940 provided for the seizure of instruments and proceeds of crime for the benefit of the Union (*em favor da União*), but that the rights of the victim and of *bona fide* third parties would be preserved. Art. 122, *parágrafo único*, of the Criminal Procedure Code added that the proceeds of the seized assets sold by public auction will go to the National Treasury only after deducting the amount of compensation for damages which the victim can claim.[57] In other words, pursuant to Art. 74 no. II CP 1940 the seizure of instruments and proceeds of crime had to serve in the first place the interest of the victim in obtaining compensation.

Since 1924 Brazilian law provides that conditional release can be granted to a convicted person who had already served a certain part of the prison sentence.[58] Among the conditions to obtain conditional release was that the convict must have fulfilled the obligations which resulted from his criminal act, in other words compensated for the damage and paid the legal costs (*as custas do processo*), unless it was proven that he had no financial means to do so. The judge could also grant periodical payment over a specified period of time, taking into account the economical and professional situation of the ex-convict.

The CP 1940 changed the conditions somewhat as far as payments by the convict were concerned. Pursuant to Art. 60 no. III CP 1940 only the payment of the prisoner's *obrigações civis*, that is to say victim's compensation, had to be taken into account. This implied that the payment of legal costs was no longer a condition for release. Even though this change was

57 See below 5.2.2.

58 *Decreto n. 16.665 de 6 de Novembro de 1924* (see above note 40).

favorable to the convict, the Penal Code of 1940 did not provide for the possibility that the prisoner could first be released and then compensate the damage, as was provided in the legislation of 1924. At any rate conditional release was granted to a convict who had not compensated the damage only if *insolvência* had been proven.

Statute no. 6.416 of May 24, 1977 modified the position slightly. It stated that conditional release could be granted if the damage was compensated or, if not, there was "an impossibility to do so".[59]

If the amount of damage to be compensated had not yet been determined, failure to compensate did not prevent conditional release from being granted.[60] The reason for this was because the impossibility to pay the damage in this case was not caused by the convicted person.

The Code also provided in Art. 108 for the extinction of criminal responsability (*extinção da punibilidade*) in certain cases, some of which were relevant to the compensation of damage.

One of these provisions referred to the crime of *peculato culposo* (embezzlement of public funds through negligence of a civil servant; Art. 312 par. 3 CP 1940). If the offender compensated the damage, he was absolved from criminal responsibility pursuant to Art. 108 no. IX CP 1940.

Another provision was to be found in Art. 108 no. VIII CP 1940. If the offender, after having committed a sexual crime defined in Chapters I, II and III of title VI of the Special Part, married the victim, he was no longer punishable. This was later extended: even if it was not the offender but another person who married the victim, the criminal responsibility of the offender was terminated. This was however only the position if the crime had been committed without violence or serious threat (*violência ou grave ameaça*) and if the victim did not request, within 60 days from the celebration of the marriage, that the prosecution be continued.[61] In a way this was compensation of damage by a third party for the benefit of the offender.

59 Art. 60 no. III as amended by Statute no. 6.416 of May 24, 1977.

60 Tribunal de Justiça de Santa Catarina, September 14, 1978, Revista dos Tribunais 522 (1979), p. 412.

61 Art. 108 no. IX as amended by Statute no. 6.416 of May 24, 1977. After the amendment the reference to the *peculato culposo* was to be found in Art. 108 no. X.

5.1.2.2 The Special Part (Parte Especial)

The Special Part of the CP 1940, still on the statute-book, in a number of articles provides an incentive for the offender to compensate the damage he caused. This incentive consists in the extinction of criminal responsibility. In other cases, however, the amount of damage, irrespective of compensation, is taken into account to reduce the penalty.

5.1.2.2.a Reduction of Penalty

In some articles, the CP 1940 allows a reduction in punishment if the damage is little. Presumably this benefit could also be given to the offender who reduces the damage so that it becomes little.

Article 155 par. 2 CP 1940 provides for a reduction in punishment in the case of theft where the accused is a first offender and the stolen goods are of little value. In this case the punishment can be reduced by one to two thirds, or imprisonment can be substituted by fine.

For embezzlement (*apropriação indébita*; Art. 168, 169 CP 1940; appropriation of goods transferred by the owner to the possession of the offender who thereafter keeps them as if they were his own property),[62] the code provides for the same reduction in punishment as for theft (Art. 170 CP 1940).

Art. 155 par. 2 CP 1940 is also applicable to the case of fraud (*estelionato*) pursuant to Art. 171 par. 1 CP 1940. In the case of fraud there are judicial decisions to the effect that an agreement between the offender and the victim does not prevent criminal proceedings, even if the offender surrender his gain to the police or repays the victim after the criminal act.[63]

5.1.2.2.b Extinction of Criminal Responsibility upon Compensation

There are several provisions in the Special Part of the CP 1940, which provide for the extinction of criminal responsability upon compensation. Such is the case with Art. 143 CP 1940, which prevents the punishment of the offender if he retracts libel or slander uttered by him. In this case, the offender is exempted from penalty (*isento de pena*).

62 See on this crime Sebastião *da Silva Pinto,* O aspecto subjetivo do delito de apropriação indébita, Revista de Jurisprudência do Tribunal de Justiça do Estado de São Paulo (RTJESP) 88 (1984), pp. 25 - 31.

63 Edgard *de Moura Bittencourt,* Vítima, São Paulo 1970, p. 172.

Another example is to be found in Art. 312 par. 3 CP 1940. This article provides for the extinction of penalty when a civil servant, who has through negligence contributed to the embezzlement of public funds (*peculato culposo*), has compensated for the damage before final sentence was passed on him. If the compensation has been given after final sentencing, the penalty imposed by that sentence is reduced by one half.

Apart from these instances provided for by the legislator, the courts have created other examples of extinction of criminal responsibility for certain crimes. One of them is the passing of bad checks (Art. 171 par. 2 no. VI CP 1940). *Súmula* no. 554 of the Federal Supreme Court[64] contains the rule that paying the check after the accusation for having passed the bad check has already been registered in court, does not hinder criminal prosecution. From this it can be deduced that if the amount is paid *before* the offence is denounced, criminal responsibility will be extinguished.

Another example is provided by tax law. If the offender has committed an offence by not paying taxes, his criminal responsibility in many cases comes to an end if he pays the taxes.[65] This principle has been confirmed and extended by Statute no. 8.317 of December 27, 1990.[66] This Statute defines a number of criminal offences under tax law, and provides in Art. 14 that certain crimes will not be punished if the tax or the social security contribution is paid before the criminal acts are denounced.

The Federal Supreme Court had extended the extinction of criminal responsibility in tax matters to smuggling by *Súmula* no. 560. This decision was superseded by the legislator through Statute no. 6.910 of May 27, 1981.[67] By virtue of this Statute, the payment of custom duties, even if done before the start of criminal proceedings, does no longer do away with criminal responsibility.[68]

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64 Raul José *Cortes Marques*, Súmulas do Supremo Tribunal Federal, 2nd ed., São Paulo 1984, p. 21.

65 Celso *Delmanto*, Código Penal Anotado, 5th ed. São Paulo 1984, pp. 119, 120

66 Suplemento do Boletim da Associação dos Advogados de São Paulo, no. 1.673 (1991), pp. 1 et seq.

67 Coleção das Leis de 1981, vol. III, p. 34. See also *Decreto-lei* no. 1650 of December 19, 1978; Coleção das Leis de 1978, vol. VII (1979), p. 36. Roberto *Rosas*, Direito Sumular, 2nd ed. São Paulo 1981, p. 303.

68 Damásio *Evangelista de Jesus*, Código Penal Anotado, São Paulo 1989, p. 806.

5.2 Compensation for Victim's Damages in Criminal Procedure

5.2.1 The Draft for a new Criminal Procedure Code

Since a Federal Criminal Procedure Code was necessary in order to create a uniform system of procedural law in all of Brazil, as visualized by the Constitution, a new commission was appointed to draft one. Among its members were famous criminal law professors like Nélson *Hungria* and Roberto *Lyra*. A draft code, drawn up by the commission, was presented by the Minister of Justice Francisco *Campos* to the President of the Republic Getúlio *Vargas* on September 8, 1941.

In the explanation given by the Minister of Justice to the bill[69] it was stated that the separation between criminal and civil procedure was to be maintained and the "ambiguous institution" of the "partie civil" in criminal procedure rejected (*Exposição de Motivos*, VI). The Minister also made it clear that the obligation to compensate for the damage caused by the offence was not of penal character (*não é uma conseqüência de caráter penal*). Here the bill clearly deviated from the teaching of the Italian *Scuola Positiva*.[70]

The Minister insisted furthermore that the bill tried to avoid that the right to compensation would be a mere illusion (*se torne ilusório*), and to this end provided efficient measures like seizure and legal (i.e. compulsory) mortgage (*hipoteca legal*) on assets of the offender or the person responsible for the damage. These measures should already be imposed before the start of judicial proceedings. If the victim is a poor person, the prosecuting authority should intervene in his favour. To this extent the critics should loose the force of their argument, namely that, in the national legal system the compensation for damage caused by crime was no more than an empty or platonic promise of the law.

5.2.2 The Criminal Procedure Code of 1941

The *Código de Processo Penal* (CPP) was decreed in 1941 by the President of the Republic Getúlio *Vargas* who at the time ruled as a dictator.[71] There have been several initiatives to substitute this code, but until now none of the various efforts has been successful.

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69 The *Exposição de Motivos* is reproduced in: *Pierangelli*, op. cit (note 13), pp. 533 - 543.

70 See on this Kurt *Madlener*, op.cit. (note 16), chapter 5.

71 *Decreto-Lei* n. 3.689 of October 3, 1941, reproduced in: Pierangelli, op. cit. (note 13), pp. 547 - 638.

The Federal Constitution of 1988 establishes in Art. 22 no. I that the Union has the exclusive competence to legislate on procedural law ("direito processual"). Art. 24 no. XI, however, provides concurrent competence to legislate on "procedures in procedural law" ("procedimentos em matéria processual") for the Union, the states and the Federal District. This means that general procedural provisions created by the Union can be supplemented, according to Art. 24 par. 2 of the Constitution, by the states (and the Federal District). It seems, however, that up to date the states and the Federal District have not used this possibility of (supplementary) regional legislation afforded by the Constitution of 1988. Therefore, the present criminal procedure law of Brazil is sstill to be found in the Criminal Procedure Code of 1941, which is a federal law.

The CPP in a number of articles tries to ensure efficient victim's compensation. Lengthy procedures are provided which permit a lien on assets of the offender so that he cannot dispose of them nor can third parties seize them to the victim's disadvantage. Bail, too, is used to secure the victim's claim for compensation.

5.2.2.1 The Action for Civil Claims in Criminal Procedure

In Art. 63 to 68 CPP, under the heading "Da ação civil", the code determines how the victim's claim for compensation can be presented.

The victim may, if he so chooses, present his claim for compensation to the civil claims court. If, however, a criminal proceeding is under way, the civil claims court may suspend the civil proceedings (Art. 64 CPP).[72]

Normally, the victim will have to wait until the criminal court has adjudicated upon the case. If the offender is convicted, one of the consequences of conviction is pursuant to Art. 74 no. I CP 1940 (now Art. 91 no. I *Parte General* 1984; see below 7.1.3) the obligation by the offender to compensate the damage caused by his offence. The victim can now request the civil claims court to provide for the execution of the criminal court's decision pursuant to Art 63 CPP. This means that the judge has the power to establish the amount of compensation, in general assisted by experts, and to order the offender to pay. If he does not pay, the judge can order a public auction of the offender's assets.

72 The German law contains the same rule (§ 149 Civil Procedure Code), whereas under Spanish law the criminal proceedings have precedence (Art. 114 par. 1 *Ley de enjuiciamento criminal* (LECRIM) and Art. 44 *Ley Orgánica del Poder Judicial.*

If the victim is poor *(for pobre)*, Art. 68 CPP provides that the prosecuting authority will start these proceedings for him, but only upon his request. This seems to be a rather inadequate regulation, because in many cases the victim will not know that this possibility exists. It would be better if the law would direct the prosecuting authority to act on its own initiative, *ex officio*, if the person is poor.[73]

After conviction, the power of decision on goods under seizure and mortgage is transferred to the civil claims court (Art. 143 CPP).

Under certain conditions a foreign judicial decision in a criminal matter can be certified in Brazil in order to oblige the convicted person to compensate for damages, to restitute and to produce other civil law consequences (Art. 787 et seq. CPP). In other words, the foreign criminal decision would not have any effect in Brazil as far as the penal sanction is concerned, but to the extent that the foreign decision provides for compensation of damage, restitution of things etc., it can be enforced to the fullest possible effect in Brazil after it has been certified by the Federal Supreme Court.

5.2.2.2 Provisional Measures in Respect of the Assets of the Offender

The code provides a number of possibilities to secure assets of the offender before conviction, so that in the case of non-payment of the compensation those assets can be used for the benefit of the victim. Such measures also ensure payment of legal costs and fines. However, Art. 140 CPP states that the compensation of damage has preference.

5.2.2.2.a Legal (i.e. Compulsory) Mortgage (hipoteca legal)

A mortgage can be registered upon any of the real estate of the person under investigation at any time of the investigation or the criminal process if it is clear that the crime has been committed, and if there are sufficient indications that the person under investigation is the perpetrator (Art. 134 CPP).[74]

Art. 135 CPP determines in detail the procedure to be followed in such a case: the victim has to make a petition to the court indicating the damage

73 It is interesting to compare this position with the Spanish law, where according to Art. 108 LECRIM the public prosecutor always has to ask for damages in any criminal proceeding where there is an offended person who has suffered damage, poor or not.

74 Compare Art. 189 Italian Penal Code.

suffered and the value of the real estate he wants to be mortgaged. If the victim is poor or if he requests it, the prosecuting authority *(Ministério Público)* will make the petition on his behalf (Art. 142 CPP). The judge then orders an estimation of the damage and of the value of the real estate to be made, determines the amount of damage suffered and the value of the real estate on the basis of these estimations, and accordingly orders the registration of a mortgage which covers the damage suffered. If the person under investigation offers to deposit a sufficient amount in money or in public debentures, the judge can refrain from ordering the registration of the mortgage. The determination by the criminal judge of the amount of damage suffered by the victim is only provisional. The final determination will be made after conviction by the civil judge (Art. 135 par. 5 CPP).

Since the registration of the mortgage takes some time, Art. 136 CPP also creates the possibility to have the real estate seized. However, the seizure (*arresto*) will lose its effect if the victim does not present a petition for the registration of a mortgage within 15 days.

5.2.2.2.b Seizure (arresto) of Movable Things

Only in cases where the person under investigation does not have real estate or the available real estate is insufficient, can movable things be seized (Art. 137 CPP). Although legally this seems to be the exception, it might be that this is in reality the more frequent option. In general, though, there might not be many cases of seizures at all since most offenders are poor.

As with the case of the *hipoteca legal*, the *Ministério Público* has to petition for the order of seizure if the victim is poor or requests that this be done on his behalf (Art. 142 CPP).

5.2.2.3 Seizure (seqüestro) of Assets obtained with the Proceeds of Crime

The Criminal Procedure Code deals extensively with the problem of seizure and confiscation of the proceeds from crime.[75] Art. 125 CPP determines that real estate obtained by the suspect with the proceeds of the crime can be seized even if it has been transferred to third parties. This implies that even real estate which is the property of a third party can be

75 Only in the last few years some decisive steps have been taken in this respect on the international level: see especially the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, drawn up by the Council of Europe in 1990 (European Treaty Series No. 141).

seized. The seizure is ordered by the judge, on his own initiative, or upon request by the prosecuting authority *(Ministério Público)*, the police or the victim (Art. 127 CPP).

The real estate can be seized even before a request for judicial proceedings has been presented by the prosecuting authority or by the victim (Art. 127 CPP). In other words, the seizure can be ordered even though there is only a police investigation under way. Once the seizure has been made, the judge will order that it be registered in the real estate register *(registro de imóveis)* according to Art. 128 CPP.

In order to carry out the seizure, full proof of the fact that the real estate was acquired by the offender with the proceeds of the offence is not necessary. Art. 126 CPP provides that "very strong indications" *(indícios veementes)* are sufficient.

Of course the person under investigation or the third party owner of the real estate can appeal against the order of seizure (Art. 129, 130 CPP). Art. 130 no. II CPP gives the third party the possibility to attack the seizure on the grounds that the real estate was acquired for consideration in a *bona fide* commercial transaction *(a título oneroso... de boa fé)*. However, it is interesting to note that pursuant to Art. 130 *parágrafo único* no decision can be taken on such an appeal *(embargos)* before the relevant criminal proceedings have been concluded. [76]

The possibility thus exists that an accused who is the owner of real estate seized, will not have the full property rights over the real estate for years although it can be proven that the property was not acquired with proceeds of crime. Similarly, a third party who received his title to real estate from the accused might not have the full enjoyment of his property for years, although he can prove that he acquired the real estate in a *bona fide* commercial transaction. A solution for the third party is provided in Art. 131 no. II CPP: He can deposit a sum of money *(caução)* in order to get the seizure lifted. However, it might not be easy for him to obtain the necessary money, and it is inevitable that he will lose a considerable amount of interest on this money if it is judicially deposited. This "hidden" damage transforms the *bona fide* third party practically into another victim of the crime (or of the code of criminal procedure). Obviously the damage suffered

76 See on this Romeu *Pires de Campos Barros*, Processo Penal Cautelar, Rio de Janeiro 1982, p. 422.

by the *bona fide* third party does not result in any benefit to the victim of the crime. The solution given here by the code therefore does not seem to be particularly adequate or fair.

If the criminal court ultimately acquits the offender or absolves him from punishment, then the seizure will be lifted according to Art. 131 no. III CPP. Otherwise the matter will be transferred to the civil judge for decision after the criminal procedure has been concluded.

Art. 132 CPP extends the scope of this option, to seize real estate obtained with proceeds from crime, to movable assets.

Art. 122 CPP states that 90 days after conviction the judge orders the sale by public auction of the instruments and proceeds of crime. From the revenue of this public sale payment will be made to the victim, and pursuant to Art 133 *parágrafo único* only the remainder will be paid to the national treasury.[77]

5.2.2.4 Bail (fiança)

Bail is also used to secure victim's compensation. Art. 322 CPP determines that bail can be granted in certain cases. Art. 336 CPP provides that the money or assets given as bail will be used for the payment of the damage, of the legal costs and for the fine in the event of the offender being convicted. Of course this was not an innovation: already in 1832 Art. 109 CPCRIM provided that if bail was granted, the amount of damage caused by the offence must be included in the amount of bail requested from the offender.

6. The Fourth Republic (1945 - 1964)

6.1 The Draft for a Criminal Procedure Code of *Hélio Tornaghi*

During the short-lived presidency of Jânio *da Silva Quadros*, comprehensive reforms were initiated.[78] An ante-projeto for the criminal procedure code was drawn up by Hélio *Tornaghi* and published in 1963.[79] He

77 Compare Art. 91 no. II letters a and b of the General Part 1984; see below 7.1.3.

78 Pierangelli, op.cit. (note 13), p. 169

79 Hélio *Tornaghi*, Anteprojeto de Código de Processo Penal, Rio de Janeiro 1963.

distinguished in Art. 365 of his *ante-projeto* between three kinds of compensation for damage. *Ressarcimento* was defined as compensation for material damage caused by crime, *reparação* as compensation for moral damage caused by crime and *indenização* as compensation for damage caused by an illegal act. It seems that *Tornaghi* had studied German law, and his intention was to reproduce the three notions of *Schadensersatz, Schmerzensgeld* and *Buße.*[80]

Art. 367 of the *ante-projeto* more or less copied Art. 66 CPP (still in force). It is to the effect that if the accused is absolved in the criminal proceeddings, the claim for compensation can notwithstanding be presented to the civil courts unless it has been decided unequivocally that there was no crime.

Art. 357 par. 3 required the redemption of punishment after conviction to be declared by judgement, possible only in cases of amnesty, retroactivity of a law which makes the act legal, marriage between the offender and the victim of a sexual crime, and compensation of damage resulting from *peculato culposo* (embezzlement caused by negligence of public servants).

After Jânio *Quadros* renounced his office as President of the Republic and his successor João *Goulart* was deposed, military rule started in 1964 and the draft was no longer discussed.

6.2 Compensation for Victim's Damages in Penitentiary Law

In 1957 the parliament enacted Statute no. 3.274[81] on the basis of a bill presented by Congressman *Carvalho Neto* in 1951.[82] This Statute contained general rules for the penitentiary system, but many provisions were vetoed by the President of the Republic, Juscelino *Kubitschek.* It is interesting to note that in Art. 1 no. XV it provided for social assistance (*assistência social*) not only to convicts and ex-convicts and their family, but also to victims. This assistance should start, pursuant to Art. 26 of the Statute, with the execution of the penal sanction in prison.

80 Hélio *Tornaghi*, Comentários ao Código de Processo Penal, vol. I, part II, Rio de Janeiro 1956, pp. 126 et seq.

81 *Lei n. 3.274 de 2 de outubro de 1957*, Coleção das Leis de 1957, vol. VII, pp. 29 - 32.

82 *Bergamini Miotto*, op.cit. (note 45), p. 113.

In 1957 an *Anteprojeto de Código Penitenciário* drawn up by a commission appointed by the Minister of Justice was presented by Oscar *Stevenson* to the Minister, but no action was taken on it.[83]

In *Stevenson's* draft Title IV was entitled "Reparação do Dano". It provided an efficient and swift procedure in Art. 75 - 88 for compensation of victim's damages, but only for victims who were not private persons or institutions (*ofendido não .. particular*, Art. 75; *instituição não particular*, Art. 76). Title XI "Assistência às Vítimas de Infrações Penais ou suas Famílias" determined that the legal department of the prison would have to help the victim get compensation (Art. 206). The department for social service of the prison, on the other hand, had to give moral assistance to the victim or his family "to avoid impulses of revenge" (*para evitar impulsos de vingança*; Art. 207).

Finally in 1963 an *Anteprojeto de Código das Execuções Penais* was presented by Roberto *Lyra*.[84] This distinguished member of the public prosecuting authority had been asked by the Minister of Justice to prepare an *Anteprojeto de Código Penitenciário*, but he accepted the invitation only on the condition that he could choose another title, *Código das Execuções Penais*.[85] Pursuant to the draft 10% of the salary the inmate received for working in the prison should be earmarked for the payment of the fine and another 10% for the compensation of the damage he had caused (Art. 152 no.1 and 2). After conditional release such deduction could amount to 25% of the salary in order to pay the court cost, cost of imprisonment, the fine and victim's compensation (Art. 184).

The invitation to prepare the draft had been extended to *Lyra* by the Minister of Justice João *Mangabeira* under President João *Goulart*.[86] After the Military deposed the President, the draft was dropped.

83 *Bergamini Miotto*, loc.cit. (note 45). The draft is reproduced in *Senado Federal* (Ed.), op.cit. (note 46), pp. 289 - 336.

84 The draft is reproduced in *Senado Federal* (Ed.), op.cit. (note 46), pp. 337 - 409.

85 *Bergamini Miotto*, op.cit. (note 45), p. 115.

86 *Alegria*, op.cit. (note 55), p. 135.

7. Reforms during the last Military Government Period (1964 - 1985)

7.1 Compensation for Victim's Damages in Criminal Law

7.1.1 The Penal Code of 1969

For the *Código Penal* of 1969 (CP 1969)[87] a draft was drawn up by Nélson *Hungria* and submitted in 1963. This draft was amply distributed to the faculties of law, the bar associations and other institutions. During a period of six months extending from September 1963 to February 1964 it was discussed in a series of conferences in the faculty of law of the *Universidade de São Paulo* with the participation of the *Instituto Latino Americano de Criminologia*. Thereafter a commission was formed to revise the draft, and from this commission came the bill which was converted into the Penal Code of 1969 by the Ministers of the Navy, the Army and the Air Force. It was supposed to come into force in August of 1970.

In the chapter referring to the consequences of conviction (Art. 91 no. I CP 1969) the obligation to compensate the damage is stated. In this respect the Penal Code of 1969 more or less repeated the wording of Art. 74 no. I CP 1940 and also Art. 69 letter b CP 1890, which had a slightly different wording.

The code provided, however, a new incentive for the offender to compensate the damage caused to the victim, and by the same token tried to reduce short prison terms: pursuant to Art. 46 detention of not more than six months could be substituted by fine if the delinquent was not a recidivist, was not dangerous or hardly so, if he had compensated the damage before the conviction, and if a fine would seem to be sufficient as a warning (*advertência*) to him.[88] In 1973 the legislator added that compensation prior

87 *Decreto n. 1004 de 21 de outubro de 1969*, Coleção das Leis da República Federativa do Brasil de 1969, vol. VII, Brasília 1970, pp. 583 - 686.

88 This reminds one of the efforts of the German legislator, also of the year 1969, to eliminate short prison terms (those of less than six months) as far as possible (§ 14 *StGB* as amended by the *Erste Gesetz zur Reform des Strafrechts* of June 25, 1969, now § 47 *StGB*).

to conviction would not be a condition if this was economically unfeasible for him (*salvo impossibilidade econômica*).[89]

The code also placed emphasis on compensation in the context of *sursis* and conditional release, but did not make any substantial innovation in this respect. Art. 71 CP 1969 provided the possibility of *sursis* for prison terms of up to two years, if the offender was not a recidivist, was not dangerous or hardly so, and had shown that he sincerely wanted to compensate the damage (*sincero desejo de reparação do dano*). In the *Exposição de Motivos* (no. 30) of the Minister of Justice Luis Antonio *da Gama e Silva* it is stated that whenever it is possible (*sempre que possível*), the compensation of damage, to be carried out within a specified period, is to be imposed as a condition of *sursis*. As a matter of fact, Art. 73 no. II CP 1969 provided for compulsory revocation of *sursis* if the parolee did not compensate the victim "without just cause" (*sem motivo justificado*).

As far as conditional release after serving a certain part of the prison term is concerned, the CP 1969 imposed victim's compensation as a prior condition "unless impossibility to do so" was present (*salvo impossibilidade de fazê-lo*; Art. 75 no. II CP 1969). It is not clear why the code did not follow the same technique as in the case of *sursis*, that is, to impose compensation as a condition, grant a period for compliance and revoke the concession of liberty if the condition has not been fulfilled. The *Exposição de Motivos* of the Minister of Justice *da Gama e Silva* (no. 31) does not give any explanation.

In its Special Part, the Penal Code of 1969 provided in Art. 165 par. 1 and 2 that a reduction of punishment applied not only if the stolen object was of little value, as Art. 155 par. 2 CP 1940 already did, but also in cases where the thief restituted the stolen goods to the owner or compensated for the damage that the owner had suffered before the criminal proceedings started. The CP 1969 offered the reduction of penalty, just like the CP 1940, only to first offenders, and extended it also to embezzlement (*apropriação indébita*, Art. 183 CP 1969) and to fraud (*estelionato*, Art. 184 par. 3 CP 1969).

89 Art. 46 CP 1969 as amended by Statute no. 6.016 of December 1973, Coleção das Leis da República Federativa do Brasil de 1973, vol VII, Brasília 1974, pp. 203 et seq. The text of the Penal Code of 1969 as amended is reproduced in: *Pierangelli*, op.cit. (note 4), pp. 579 - 674, together with the explanatory memorandums to the bills by the Minister of Justice Antonio *da Gama e Silva* (1969) and Alfredo *Buzaid* (1973).

The new code was hailed as a substantial improvement by such distinguished foreign penalists as Pietro *Nuvolone* of Italy,[90] but in Brazil there was very strong criticism against this code. The fact is that it never went into force, and in 1978 it was definitely revoked.[91]

7.1.2 The Penal Code Draft of 1981

In 1981 the then Minister of Justice Ibrahim *Abi-Ackel* published a provisional draft for a new General Part of the Penal Code.[92] This draft had been drawn up by a commission of seven distinguished Brazilian law professors: Francisco *de Assis Toledo* (president), Francisco *de Assis Serrano Neves*, Ricardo *Antunes Andreucci*, Miguel *Reale Júnior*, Hélio *Fonseca*, Rogério *Lauria Tucci* and René *Ariel Dotti.*

This draft provided for two kinds of fine. The so-called "penal fine" *(multa penitenciária)* was to be paid to the public treasury. It had to be fixed in "days-fine". The minimum would be ten "days-fine" and the maximum 300 (Art. 49). Thus the old Brazilian institution of the "days-fine" of the Imperial Penal Code of 1830 reappeared.

The other type of fine was the "reparatory (or compensatory) fine" *(multa reparatória)*, which the authors of the draft intended to use as an instrument of education of the criminal.[93] Art. 53 provided that the "reparatory fine" consisted of payment to the court, in favour of the victim or his heirs, of a sum of money calculated on the basis of the provisions of Art. 49, if material damage was caused by crime. The reference to Art. 49 implied that the compensation in the form of the compensatory fine should also be fixed according to the system of "days-fine", adapting it thereby to the financial position of the convicted person. Art. 54 par. 2 provided that in the enforcement of fines, the compensatory fine took preference over the penitentiary fine. In other words, Art. 54 determined that the interest of the victim in compensation prevailed over the interest of the State to receive additional revenue.

As far as *sursis* is concerned, the draft of 1981 differed in some respects from the CP 1969, but in wording rather than in substance. It also provided

90 See *Pierangelli*, op.cit. (note 4), p. 14.

91 *Lei n. 6.578 de 11 de outubro de 1978.* See Revista Forense 264 (1978), p. 481.

92 *Ministério da Justiça* (Ed.), Código Penal, Anteprojeto de Lei, Brasília 1981.

93 See Manoel Pedro *Pimentel*, O crime e a pena na atualidade, São Paulo 1983, p. 175.

that the parolee had to do community work during the sursis, except if compensation for the damage caused had been made (Art. 78 *parágrafo único*).

7.1.3 The New General Part of 1984

The bill for a new General Part of the Penal Code presented by President João *Figueiredo* to Congress on June 29, 1983 along with two other bills[94] differed from the 1981 draft. As far as victim's compensation is concerned, a most important (and regrettable) change is that the *multa reparatória* had been dropped.

In Art. 91 no. I the new General Part (*Parte Geral*, PG 1984)[95] maintains, as a consequence of the conviction, the obligation to compensate for the damage caused. In this respect it repeats the principles contained in Art. 91 no. I CP 1969 and Art. 74 no. I CP 1940 (Art. 69 letter b CP 1890 only differed slightly).

Similar to the previous codes,[96] Art. 91 no. II PG 1984 provides for the confiscation (*seqüestro*) of the instruments and proceeds of crime. The ultimate use of the money, eventually obtained through public auction of these assets, for victim's compensation, is the result of Art. 122, 133 CPP.[97]

With the new General Part new penalties are introduced, especially community work and weekend-restrictions *(penas restritivas de direitos;* Art. 43 et seq.). These new penalties are also used in the context of victim's compensation, as shall be seen below. In a number of articles, the *PG* 1984 also tries to motivate offenders to compensate victim's damage:

94 *Ministério de Justiça* (Ed.), Projetos de Reforma Penal: Código Penal, Parte Geral; Código de Processo Penal; Lei de Execução Penal, Brasília 1983.

95 Statute no. 7.209 of July 11, 1984; Coleção das Leis de 1984, vol. V, pp. 38 - 67.

96 Compare Art. 91 no. II CP 1969, Art. 74 no. II CP 1940.

97 See above 5.2.2.3.

7.1.3.1 Compensation as Mitigating Circumstance

As most penal codes, the Brazilian penal code also considers it to be a mitigating circumstance for the offender if he has compensated the damage he caused.[98] The PG 1984 does not change anything in this respect, but reproduces in Art. 65 no. III, letter b, what was already stated in Art. 58 no. III, letter b, CP 1969 and Art. 48 no. IV, letter b, CP 1940. Accordingly the offender obtains a mitigating circumstance if after committing the offence he either avoids damage, or reduces it, or compensates the victim before the judicial hearing starts *(antes do julgamento)*.

As a matter of fact, this recognition of mitigating circumstances is of great practical importance. In the day-to-day operation of the criminal justice system offenders often pay compensation as soon as the matter is being investigated by the police, or at least they pay before judicial hearings start. If they know that they obtain a better treatment by the criminal justice system, they are eager to pay whenever they are in a position to do so.

There is another article in the new General Part of the penal code which purports to stimulate the offender's disposition to compensate voluntarily in order to get a reduction of penalty. This is Art. 16, which deals with "repentance after committing crime" *(arrependimento posterior)*. It is applicable in the case of offences committed without violence or serious threat against the person, if the damage has been voluntarily compensated or the object taken voluntarily restituted prior to the denunciation (*denúncia*) or the lodging of a complaint (*queixa*) in court. In this case, the penalty will be reduced by one to two thirds of what would be imposed normally.

7.1.3.2 Compensation and Sursis (suspensão condicional da pena)

Art. 77 PG 1984 provides again that prison sentences of up to two years can be suspended (*sursis*). If the convicted person is over 70 years of age, then prison sentences of up to four years may be suspended (Art. 77 par. 2 PG 1984).

Normally, during the first year of the suspension of the prison sentence, the parolee has to do community work (*serviços à comunidade*; Art. 46 PG 1984) or suffer five hours of confinement in an institution (*casa de alber-*

98 See for a number of examples in various countries Kurt *Madlener*, La reparación del daño sufrido por la víctima y el derecho penal, in: Estudios de Derecho Penal y Criminología (libro-homenaje a José María *Rodríguez Devesa*), Madrid 1989, vol. II, pp. 9 - 32 (22/23).

gado ou outro estabelecimento adequado; Art. 48 PG 1984) every Saturday and Sunday pursuant to Art. 78 par.1 PG 1984. This is known as "simple sursis" (*sursis simples* or *comum*).

If, however, the offender has compensated the damage caused, and if other circumstances enumerated in Art. 59 PG 1984 are favourable, then the judge can impose more lenient conditions on the basis of Art. 78 par. 2 PG 1984. The compensation of damage is a prerequisite for the imposition of these more lenient conditions, except if the offender is not in a position to compensate (*salvo impossibilidade de fazê-lo*). This *sursis* with less rigorous conditions is called "special sursis" (*sursis especial*).

The *sursis* has to be revoked (*revogação obrigatória;* Art. 81 PG 1984) or can be revoked (*revogação facultativa;* Art. 81 par.1 PG 1984) if the conditions imposed are not fulfilled. The fact that non-compensation of the victim's damage without just motive (*sem motivo justificado*) is among those conditions which lead to compulsory revocation, clearly indicates the importance attributed to victim's compensation. The new General Part follows a previous provision in this respect, already found in Art. 59 no. II CP 1940 as amended by Statute no. 6.416 of May 24, 1977.[99]

7.1.3.3 Compensation and Conditional Release (livramento condicional)

Conditional release can now be granted pursuant to Art. 83 et seq. PG 1984 by the judge responsible for the execution of sentence, if the damage caused by the offence had been compensated or if there was an "effective impossibility to do so" (*salvo efetiva impossibilidade de fazê-lo*).

Since the law states that only an "effective impossibility" to compensate allows conditional release without prior compensation,[100] there is a court decision which holds that if the convicted person has assets, then the conditional release cannot be granted unless the damage has been compensated.[101] This, of course, does not constitute an equitable solution. In the case of the convicted prison inmate, the state requests from the inmate that he proves that he could not pay the damage. He, although restricted in his freedom, must prove his impossibility to pay, and that will very often be difficult. The net-result is that in many cases convicted persons who could

99 See *Pierangelli*, op.cit. (note 4), p. 459.

100 Art. 75 no. II CP 1969 did not request "effective impossibility", but only "impossibility".

101 Tribunal de Justiça do Estado de São Paulo, 3 de novembro de 1986; RJTJESP 104 (1987), pp. 411 - 413.

claim conditional release will not obtain it simply because they cannot prove that they are unable to pay the damage caused by crime. In these cases they remain in prison, which causes high costs for the state and does not improve the possibility of compensation to the victim. The situation in this respect is clearly unsatisfactory.

7.1.3.4 Compensation and Rehabilitation (reabilitação)

The institution of rehabilitation to a certain extent reduces the stigma and other negative consequences of a criminal conviction, especially by restricting information on conviction (Art. 93 PG 1984). Its object is to facilitate the resocialization of the offender.[102]

Among the conditions of rehabilitation in Art. 94 no. III PG 1984 (which repeats Art. 117 par. 1 letter c CP 1969 and Art. 119 par. 1 letter c CP 1940) are: that the damage caused by the offender has been compensated; or that his "absolute impossibility to do so" (*absoluta impossibilidade de o fazer*) has been proved; or that the victim has abandoned his claims; or that an undertaking to pay (*novação da dívida*) has been signed.

Although the phrase "absolute impossibility" seems to rule out any possibility to grant rehabilitation except if compensation has been done or its impossibility proven, the courts have stated that there should not be "a rigid formalism" when it has to be examined whether conditions of secondary importance for granting rehabilitation, such as the compensation for damage, have been fulfilled.[103] In another decision it has been said that compensation of damage as a condition for rehabilitation is of secondary importance, because "if brought to its utmost consequences, it would be difficult or even impossible" to grant rehabilitation.[104]

As a consequence of this judicial interpretation of Art. 94 par. III PG 1984 the convicted person who has already been released from prison and who has been living as a free man for a considerable period of time, does

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102 Paulo José *da Costa Júnior*, Comentários ao Código Penal, vol. I, São Paulo 1984, pp. 449 et seq.

103 Tribunal de Alçada Criminal de São Paulo, 23 de fevereiro de 1978, Revista dos Tribunais 511 (1978), p. 405. This decision was taken on the basis of Art. 119 par. 1 letter c CP 1940, but it is still valid since Art. 94 no. III PG 1984 is identical with the provision of the CP 1940.

104 Tribunal de Justiça do Estado de São Paulo, 10 de dezembro de 1984, Revista dos Tribunais 598 (1985), pp. 232-234. See also the following decisions of the same Court: 29 de outubro de 1984, RJTJESP 91 (1984), pp. 394/395, and 9 de abril de 1990, RJTJESP 125 (1990), pp. 471/472.

not have to offer much proof that he cannot repair the damage. This stands in stark contrast to what is requested from the prison inmate (see supra 7.1.3.3), and it seems that the distinction made between the two situations does not take the particular hardships of imprisonment into account.

7.2 Compensation for Victim's Damages in Criminal Procedure

7.2.1 The Draft for a new Criminal Procedure Code of Marques

An *Ante-Projeto* for a Criminal Procedure Code was presented by José Frederico *Marques* and published in 1970 by the Ministry of Justice, after having been revised by a commission composed of *Marques*, José Carlos *Moreira Alves*, Benjamin *Moraes Filho* and José *Salgado Martins*.

Marques, judge and professor of civil procedure in São Paulo, tried to streamline the determination of the amount of compensation to be paid so that compensation to the victim could be done more rapidly (see Art. 803 et seq.). However, according to his draft, a claim for compensation based on a criminal offence could not be presented to civil claims courts as long as the criminal procedure had not been concluded. In this respect the *ante-projeto* differed from the law on the statute-book, which allows a civil claim for compensation to be presented with complete independence from the criminal procedure, unless the criminal court has decided unequivocally that there was no offence (Art. 66 CPP).[105]

7.2.2 The Bill for a new Criminal Procedure Code of 1983

In this context of possible reforms the bill for a new code of criminal procedure of 1983 must also be mentioned.[106] It provides in Book V "Da reparação do dano causado pelo crime" (Art. 662 - 689) that the amount of compensation to be paid to the victim would in general be fixed in the criminal proceedings. Afterwards the file would be transmitted to the civil claims court only for the purpose of execution of the judgement (Art. 663).

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105 It seems, however, that this change was due only to oversight; see Egas Dirceu *Moniz de Aragão*, Da reparação do dano causado pelo crime, Arquivos do Ministério de Justiça, no. 116 (1970), pp. 209 et seq. (214).

106 This bill was published with two other bills; see note 94. Previously an *Anteprojeto de Código de Processo Penal* had been published by the Ministry of Justice (Brasília 1981).

President João *Figueiredo* presented the bill to Congress on June 29, 1983. To date, however, this *ante-projeto* has not been approved. In view of the fact that, with the return of Brazil to democracy, a new constitution has come into force in 1988, it is rather unlikely that it will be taken up again in its present form.

7.3 Compensation for Victim's Damages in Penitentiary Law

In 1984, together with the new General Part of the Penal Code, the *Lei de Execução Penal* was enacted. With this, a long history of *projetos* and *ante-projetos* came to a close.[107]

After the institution of military rule a provisional draft was drawn up by professor Benjamin *Moraes Filho* and reviewed by a commission of three, José Frederico *Marques*, José *Salgado Martins* and José Carlos *Moreira Alves*. This *Anteprojeto de Código das Execuções Penais* was submitted to the Minister of Justice Alfredo *Buzaid* in 1970.[108]

Even before the bill was to become law, an important reform was carried through by Statute no. 6.416 of May 24, 1977[109] determining how the remuneration for work of prison inmates should be applied. Pursuant to the Penal Code of 1940 as amended by this Statute the money is to be employed in the first place for the compensation of the damage caused by the crime to the extent that these damages have been fixed judicially, but not compensated by other means; in the second place to assist the family of the inmate according to his duty of maintenance under civil law; in the third place for pocketmoney of the prisoner; and finally, what remains must be deposited in a saving account and handed over to the inmate when he is released.[110]

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107 On the legislative history see Armida *Bergamini Miotto*, op.cit. (note 45).

108 Another *Anteprojeto de lei "que define as normas gerais de regime penitenciário"* was drawn up by a commission *(Grupo de Trabalho para a Reforma Penitenciária)* in 1975, but not published until several years later by its President: *A.B. Cotrim Neto*, Normas gerais de regime penitenciário, Um anteprojeto, sua explicação e um comentário, Revista de Informação Legislativa 20 (1983), pp. 233 - 276. The text of the draft and the *Exposição de motivos* are also reproduced in *Senado Federal*, op. cit. (note 46), pp. 461 - 501.

109 Coleção das Leis de 1977, vol. III, pp. 74 - 81.

110 Art. 30 par. 3 CP 1940 as amended. Similar provisions had already been included in the draft of *Sá Pereira* of 1928 (Art. 73) and the draft of *Alcântara Machado* of 1938 (Art. 34 par. 2) for a new penal code (see above 4.1.3 and 5.1.1).

The *Lei de Execução Penal* (LEP),[111] finally enacted in 1984 together with the new General Part of the Penal Code, provides in Art. 29 par. 1 that prison inmates will receive payment for work done. Among the purposes for which these payments are to be applied, the compensation of the judicially fixed damage is mentioned in the first place. Furthermore, the Statute states one of the duties of the prison inmate to be "compensation for the victim or his heirs" (*indenização à vitima ou aos seus sucessores*; Art. 39 no. VII LEP).

It is interesting to note that the idea of applying the wages of prisoners for victim's compensation can already be found in the *Código Filipino*, the Portuguese legislation applicable in Brazil during the colonial period.[112] In this respect the Penitentiary Code continues a long and standing tradition.

8. Developments in Victim's Compensation since Brazil's Return to Civil Rule

8.1 Consumer Protection and Related Laws

Statute no. 7.347 of July 24, 1985, modified by Statute no. 8.078 of September 11, 1990[113] creates a new way to compensate certain damages. It provides for a "public civil procedure" *(ação civil pública)* in the event of damages caused to the environment, the consumer, artistic, esthetic, historic, tourism and landscape treasures and other collective interests (*a qualquer outro interesse difuso ou coletivo,* Art. 1 no. IV). The interesting aspect is that Art. 13 provides for the establishment of a fund, administered by a federal council or by state councils, as the case may be, with the participation of the prosecuting authority and representatives of the community. Where the public civil proceedings result in judgement which orders payment in money, this sum goes to the respective federal or state fund, and the fund will then apply its available resources for the restitution of the damage *(à reconstituição dos bens lesados).*

111 Statute no. 7.210 of July 11, 1984; Coleção das Leis de 1984, vol. V, pp. 68 - 107.

112 See Title CXXXIX, especially no. 7.

113 The Statute, as amended, is reproduced in: *Governo do Estado de São Paulo* (Ed.), Secretaria do Consumidor, Código de Defesa do Consumidor e Legislação Correlata, São Paulo 1990.

The Consumer Protection Code of 1990 (*Código de Defesa do Consumidor*, CDC)[114] also provides that in certain cases damages are paid to the funds established by the above-mentioned Statute no. 7.347. Pursuant to Art. 81 et seq. CDC individual and collective proceedings for consumer damages are possible. In the case of collective proceedings, the damages must be paid to the aforementioned funds except for direct payment to individual victims, which takes precedence (Art. 99, 100 CDC). The funds also receive the administrative fines imposed under the Consumer Protection Code (Art. 57 CDC). Penal fines are not used for this purpose (see Art. 61 - 80 CDC). The fund then in turn compensates the consumer who has suffered damage.

Another Statute, no. 7.913 of December 7. 1989,[115] on the public civil action for compensation of damage caused in the investment market, could possibly give new impetus to victim's compensation. Art. 1 of the Statute provides that the prosecuting authority has to move, among other things, in order to obtain compensation of damage caused in certain fraudulent ways, on its own initiative or by request of the Investment Market Commission (*Comissão de Valores Mobiliários*). Compensation collected by these proceedings must be deposited, according to Art. 2 par. 1, in a judicially controlled account until the victim claims the part of the compensation which is his. If the victim does not claim his compensation within two years, this amount will go to the treasury of the Union. A better idea would be to create a general fund for the compensation of damage caused by crime with these unclaimed amounts.

8.2 Reform of the Special Part of the Penal Code

In 1987 the Minister of Justice Paulo *Brossard de Souza Pinto* published an *Anteprojeto de Código Penal (Parte Especial)*.[116] With this bill for a new Special Part of the Penal Code the process of reform that started in 1984 (enactment of the new General Part) should be completed. The bill has been drawn up by a commission of distinguished Brazilian lawyers: Francisco *de Assis Toledo,* Luiz Vicente *Cernicchiaro,* Miguel *Reale Júnior,*

114 The Code is reproduced in: *Governo do Estado de São Paulo* (Ed.), op.cit. (note 113), pp. 9 - 55.

115 The Statute is reproduced in: *Governo do Estado de São Paulo* (Ed.), op.cit. (note 113), pp. 81.

116 *Portaria n. 790 de 27 de outubro de 1987.*

René *Ariel Dotti,* Manoel Pedro *Pimentel,* Everardo *da Cunha Luna,* Jair Leonardo *Lopes,* Ricardo *Antunes Andreucci,* Sérgio Marcos *de Moraes Pitombo,* José Bonifácio *Diniz de Andrade.*

In Title II the bill takes up the provisions from the CP 1940 which provide for reduction of penalty in cases where the resulting damage is little.[117] It is not necessary to discuss how these and other provisions in this bill could be used to make victim's compensation more effective, since there is an article in press which deals with this topic.[118] In any event it is not probable that the bill of 1987 will be taken any further before the next Congressional elections.

8.3 The Constitution of 1988

The Constitution of 1988 provides in Art. 245 that the law will regulate the conditions under which the state will give assistance to heirs and dependents in need, of persons who have been victims of intentional crime. As far as can be ascertained, this article of the Constitution has not yet been implemented. This certainly should be done as soon as possible.

9. Conclusions

9.1 No Shortage of Excellent Ideas

If we look over the evolution of legal history of Brazil, it is obvious that the legislator at all times made efforts to guarantee compensation to the victim for the damage caused by crime. That can already be seen in the legislation of colonial Brazil, for instance in the case of damage done by fire. The legislator was not satisfied to order that compensation should be paid, but also provided a very quick procedure (*sumaríssimo*).

Another interesting point is that already in the bill for a penal code of congressman *Vasconcellos* in 1827, a public fund was envisaged which should pay compensation to the victim in certain cases.

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117 See Art. 165 (theft); Art. 176, 179 (embezzlement); Art. 180, 185 (fraud); etc. Compare also Art. 165 et seq. CP 1969.

118 See Kurt *Madlener,* op.cit. (note 1).

The first Brazilian penal code of 1830, influenced by Jeremy *Bentham*, was a very progressive piece of legislation. Compensation for the damage caused by crime was considered to be a matter of public law (*Direito Público*). This idea was to be taken up half a century later by the Italian positivists, and later on it was implemented in the Mexican criminal law.[119] This same code also instituted a system of day-fines, an idea which is today, more than 150 years later, considered most modern as far as fines are concerned.

It is interesting to note that the Criminal Procedure Code for Courts of First Instance of 1832 already determined in Art. 109 that bail should also be used in order to secure compensation for the victim of crime.

In 1924 the suspended sentence was instituted, and in this case, and also in the case of conditional release (already to be found in Art. 50 par. 2 CP 1890), compensation of victim's damage had to be taken into account when a decision on the granting of these benefits had to be taken.

An important advance was made in the draft penal code of *Sá Pereira* (1933), since it provided seizure of the proceeds of crime and permitted the judge to use all or part of it for the compensation of the victim (Art. 95 - 97 of the draft). This idea was incorporated in Art. 74 no. II letter b CP 1940 and Art. 125 et seq. (133 *parágrafo único*) CPP 1941.

The idea of *Vasconcellos*, more than 150 years ago, to establish a fund for the compensation of damage reappeared in the draft of *Alcântara Machado* (1938), who was inspired by the Peruvian model. This was, however, not included in the penal code of 1940. Only recently funds have been set up in the context of Consumer Protection and related legislation.

The draft of *Alcântara Machado* (Art. 71 no. II letter a) also provided that the convict would obtain the benefit of an order of rehabilitation only when he showed that he had compensated the damage done or that he was not able to compensate. This was incorporated into Art. 119 par. 1 letter c CP 1940 and later on in Art. 117 par. 1 letter c CP 1969, and is now to be found in Art. 94 no. III General Part of 1984.

The Penal Code of 1940 treated the question of compensation under the heading of "penal sanctions" (*Das penas*). This clearly shows a positivist influence. The seizure of instruments and proceeds of crime and the use thereof for the compensation of the victim, as mentioned above, was provided for in the Penal Code of 1940 and the Criminal Procedure Code

119 Compare article by Kurt *Madlener*, op.cit. (note 16), chapter 5.

of 1941.[120] The provision is now to be found in Art. 91 no. II letter b General Part of 1984. This was also an obvious improvement in comparison with other legal systems, for instance German criminal law.[121]

An interesting idea was embodied in the draft penal code of 1981, since two classes of fines were designed. One was the *multa penitenciária*, which should be paid to the State, the other, the *multa reparatória*, which should go to the victim for compensation. This is another clear reappearance of a positivist idea. However, this idea was not accepted and not included in the new General Part of the Penal Code, which was enacted in 1984.

9.2 The Problem of Implementation

While regulations in favour of the victim were never in short supply, the problem of implementation has not been very well tackled. *Siqueira* thought that either the compensation of the damage should be handled by the criminal judge on the basis of a petition by the prosecutor or *de ofício*, or otherwise it would simply be an illusion, as it had been until then, even for victims who were not without financial means.[122] It seems that this view is even valid today. As a matter of fact, the judge or the prosecutor should have an obligation to advise the victims, whether they have their own financial means or not, of their rights to ask for compensation for the damage suffered. In this respect the draft penitentiary code presented by Oscar *Stevenson* in 1957 is also interesting. It provided that if the victim was a private person, the judicial service of the prison administration would take care of the problem of compensation of the victim. This proposal was, however, not accepted by the legislator.

The problems are therefore essentially still the same for the victim: Most victims do not have information about what and how they can claim for compensation. Those who are under investigation because of a suspicion of having committed some offence often do not know what the benefits would be if they could show that they have compensated for the damage caused,

120 The idea can already be found in the Italian legislation of the 18th century. See Kurt *Madlener*, Neue Wege der Wiedergutmachung im Strafrecht, in: Albin *Eser* / Günther *Kaiser* / Kurt *Madlener* (Eds.), Neue Wege der Wiedergutmachung im Strafrecht, p. 33, note 75.

121 Compare § 74e, 74f German Penal Code. A reform proposal de *lege ferenda* was submitted in 1969 by Albin *Eser*, Die strafrechtlichen Sanktionen gegen das Eigentum, Tübingen 1969, pp. 116 - 118, 381.

122 Galdino *Siqueira*, Direito Penal Brazileiro, 2nd ed., Rio de Janeiro 1932, pp. 717 et seq.

and accordingly in many cases they do not compensate for such damage although they are in a position to do so and might have taken this decision with the relevant knowledge.

Of course compensation as an instrument of decriminalization, among others, could be very beneficial. In July 1990 there were in the State of São Paulo (about 30 million inhabitants) more than 650,000 criminal proceedings pending against adults and more than 100,000 against juveniles.[123] Obviously it would be highly desirable to relieve the administration of criminal justice of those cases which could be dealt with in another way.

In order to give information to people under investigation about the possibility of obtaining benefits in the criminal process by compensating the damage caused, the cooperation of police would be necessary so that cases could be settled at an early stage of the investigation. In addition the institution of special proceedings to settle petty offences could be useful. Furthermore it would be interesting to investigate the possibility of giving the offender some kind of formal warning only (*admoestação*) instead of imposing a penalty, if he has compensated the damage caused. In other words, the cases referred to above where the punishability disappears in the event of compensation for the damage caused should be extended.

It would also be practical to use another recent institution in this context, the special courts for small claims (*Juizados especiais de pequenas causas*).[124] These courts function without cost in first instance, and they apply a very simplified procedure. They can deal with matters not exceeding the value of 20 "minimum salaries", which at present corresponds to about 1,000 US$. They mostly reach settlements, and they are therefore very well equipped to deal with the damage caused by petty offences. In this respect it is necessary to inform the public that these courts can deal with such matters; but it would also be necessary to allow these courts to hear cases where a party is a prisoner or a public entity (*pessoa jurídica de direito público*), which is at present not possible due to Art. 8 of the Statute.

123 Álvaro *Lazzarini*, Instalação do Juizado de Pequenas Causas da Comarca de Jundiaí e do Juizado Informal de Conciliação do Foro Distrital de Várzea Paulista, RJTJESP, Vol.125 (1990), pp. 611 et seq. (612).

124 Statute no. 7.244 of November 7, 1984; Coleção das Leis de 1984, vol. VII, pp. 124 - 133.

It would also be useful if the informal arbitration courts set up locally *(Juizados informais de conciliação)*[125] could extend their acivity. As a matter of fact they are very popular, since Brazilians prefer to solve problems in an amicable manner.

9.3 Need for Reforms

It will be important that an offender, especially a first offender, in the judicial period of the proceedings, be informed what benefits can be derived before and after conviction by compensating the damage he has caused.

On the other hand the victim also needs information. Very often victims do not know that they can go to the civil claims court, especially to the informal small claims court, in order to obtain compensation for the damage they have suffered. In all cases where the victim is poor, the *Ministério Público* should see to it during the whole procedure, and especially when the judgement is being executed, that the interests of the victim are protected. It is not a satisfactory solution that the *Ministério Público* has to act only upon request of the poor party as Art. 68 CPP provides.

The proposal of *Alcântara Machado* in 1936, who thought that a "fines treasury" *(caixa)* should be established according to the Peruvian model, should also be remembered. Those funds or treasuries should be provided with the proceeds from the sale of things confiscated in the criminal process, with a part of the salaries of the convicted, with fines, bail which has been forfeited, compensations which have not been paid out because nobody claimed them and finally with voluntary contributions. To that can be added that the state should also provide additional funding to the extent that other sources of income are insufficient. The idea of *Alcântara Machado* was that the *caixa* would help the victim and his family when this was necessary, by paying part of the compensation and then recover it from the convicted, but he thought that it could also be used for compensation of victims of judicial errors, prisoners who were on parole, minors and other cases.

A most important point in favour of victims would be the institution of a victim's compensation fund. The best way to ensure that effective compensation would be paid, is not to leave it to the state treasury in general, but to establish a special fund. Armida *Bergamini Miotto* already propagated the idea in 1974 that the compensation of damage suffered by crime should

125 See for instance *Resolução n. 12 de 28 de agosto de 1985*; RJTJESP 112 (1988), p. 643.

a duty of the State or of the Community (*incumbência "pública"...do Estado ou da Comunidade*).[126] Her idea was that there should be a public or a private or a mixed entity which would as soon as feasible pay compensation to the victim or to his heirs, and then request payment from the offender. If the offender did not have the financial means to pay, monthly amounts should be subtracted from his salary to cover the amount of damages paid, in so far as he can financially afford it. This idea seems very interesting, and it should be studied again.[127]

We have seen that there had already been suggestions, similar to these above, made some time ago. By Statute no. 7.347 of 1985, modified by Statute no. 8.078 of 1990, a fund has been established which should compensate damage caused to the environment, to the consumer, to artistic treasures etc., practically to any "collective" interests. This fund should have a wider reach. It should be used as a general victim's compensation fund, and be financed by proceeds from bail, fines, seizures, etc. Financing would be easier, of course, if fines and other proceeds from seizures which at present go to the Union, was used for that fund. Regulations like the one of Statute no. 7.913 of 1989, which provides that certain payments deposited in favour of the victim will go to the National Treasury if the victim has not claimed those payments within two years, should be changed to the effect that they then become available for the compensation of other victims.

As things are what they are, special caution would have to be applied in the legal construction of the fund. What has to be prevented, is that money deposited in the special fund simply passes to other parts of the National Treasury. It should be remembered that in *Vasconcellos'* bill of 1827 three keys were necessary to get to the money: the key of the judge, the key of the priest, and the key of the depositary. The organization of such a fund should be done with the same kind of caution which *Vasconcellos* considered necessary in the last century: Things have not changed that much since then.

An idea which should be studied again, is the *multa reparatória*, which seems to be inspired by the *Scuola Positiva* (there are parallels in the Mexican legislation).[128] It was embodied in the *ante-projeto* for the *código*

126 Estudos de Vitimologia, O binômio Delinqüente-Vítima e os atuais problemas da vitimologia, Revista do Conselho Penitenciário Federal 1974, pp. 27 - 32 (pp. 31, 32)

127 A similarly organized fund functions since 1936 in Cuba. See *Madlener*, op.cit. (note 16), 7.

128 See *Madlener*, op.cit. (note 16), chapter 5.

penal in 1981, but was rejected by the Government. The bill presented by the Minister of Justice to the Parliament did not contain any provision dealing with the *multa reparatória*, and accordingly the new General Part of 1984 did not institute this type of compensatory fine.

Comparative law also might be able to contribute some ideas which could be investigated with the view of their implementation in Brazil. As far as the pretrial period is concerned, it might be interesting to study Art. 153a of the German Criminal Procedure Code, which permits the prosecution and the court to shelve certain proceedings if the offender compensates the damage. The provision of this German Statute has not been very successful in Germany,[129] but this does not mean that it could not be adapted to the Brazilian setting and be useful there. At any rate, in this or another way, one has to search for possibilities to reduce the overload of cases on the system of the administration of criminal justice in Brazil.

Another possibility would be to study the functioning of private organizations like the *Weißer Ring* in Germany or *Victim Services* in the USA, which in the case of the *Weißer Ring* has its own sources of income, partly also from judicial orders, and which pays compensation to victims of crime.

9.4 Prospects for the Future

Many "new" ideas of criminal law today have been known in Brazil a long time ago. We think of the day-fines, the victim compensation funds, the use of the proceeds of crime for the compensation of victims, etc. What is needed now is putting all these ideas together and implement them. The country has in general a good structure of courts, the administration of justice is for the better part fully computerized, the number of legal publications and their quality is impressive, and Brazilian lawyers for the past 200 years have been as well equipped by their legal training as other lawyers in any part of the world.

The need for reform is obvious, but also the possibilities of reform after the return of the country to democracy are excellent.[130] There is indeed a

129 See Kurt *Madlener*, Neue Wege der Wiedergutmachung im Strafrecht, in: *Eser/Kaiser/Madlener*, op.cit. (note 120), p. 33 (note 75).

130 On the human rights problems in Brazil after the return to democratic rule see Kurt *Madlener*, Menschenrechtsprobleme in Brasilien nach der Rückkehr zur Demokratie, and Horácio *Bernardes Neto*, Die Lage der Menschenrechte in Brasilien nach Rückkehr der Demokratie, in: *Deutsche Sektion der Internationalen Juristenkommission* (Ed.), Menschenrechtsprobleme in Lateinamerika, Heidelberg 1991, pp. 85 -116 and 125 - 131.

growing awareness that the Rule of Law requires Justice for all, and that this is the basis of any constitutional state. Implementing victim's compensation would therefore be an essential step for this country on its way to a society offering a fair deal to all its inhabitants.

Punishment and Compensation

- A Comparative Research Project at the Max Planck Institute for Foreign and International Criminal Law -

*Barbara **Huber***

Contents

1. Project Genesis

The Max-Planck-Institute of Foreign and International Criminal Law has been involved in victim related research since several years (*Kaiser* 1991). In connection with this research interest and in order to confront German scholars and practitioners with the state of development in other countries an international colloquium was held at the Institute early 1989 which brought together experts from twenty countries. They were asked to offer information as to the scope in which their national criminal justice systems take account of the victim's needs for restitution and/or compensation, what the state of discussion and practice was regarding offender-victim mediation schemes, what designs for reform are available. Since the German reform discussion on compensatory topics is very lively at present the foreign presentations were received with extreme interest and, though the material presented turned out to be surprisingly rich in ideas and solutions, a desire for a more structured and deeper research into the foreign models was formulated at the end of the colloquium.

Departing from the material collected at the conference (*Eser, Kaiser & Madlener* 1990) which proved that the problem of compensating victims for the damage inflicted upon him by the offender is a world wide one showing a broad spectre of ways to deal with the idea of compensation during the various stages of the criminal process and beyond, the legal research group at the Institute decided to embarque on a comparative project in order to follow up theoretical and practical approaches outside the German jurisdiction. It was felt that the conference papers as such could not form the basis for this research work as they were not sufficiently structured for our purposes and varied too much in content and depth.

2. Research Subject

The main subject of the project is the existence, function and significance of compensation/restitution in the framework of the criminal law and justice system. Extra-judicial models shall only be dealt with to the extent to which they have a direct impact on decisions taken on the level of police, state prosecutor or courts. However, we do not intend to cover the question of whether the offender-victim conflict should be excluded from the present

system of criminal justice; thus, the idea of abolition of the present system or the privatisation of conflicts will only be tackled marginally in order to describe the present discussion on compensation. As many models departed from impulses and activities in the juvenile system solutions found in this area shall be included in the surveys.

At the centre of the research into the models of compensation there are two questions, a theoretical and a practical one: the first relates to the fundamental relationship between punishment and compensation, thus leading to the problem of the state's legitimation to punish and the victim's position and significance in the criminal justice system. In order to answer these questions a discussion of the theories of punishment in the national systems will be inevitable, a task so far has never been undertaken by this Institute on such a broad and comparative level. The second one aims at a critical evaluation of the practical efficacy of the various foreign approaches.

3. Research Aim

The aim of the project is twofold: the immediate objective is a description of the possibilities in the framework of the criminal law and justice system which lead to the victim's compensation. Such a collection of models seems worthwhile under the view point of the actual worldwide interest in the topic, and it offers a chance for the discussion or challenge of theories of punishment, as well as for an evaluation of the efficacy of endeavors.

The national reports then will serve as a basis for the long-term objective which consist in

- a typifying and systimatizing analysis of the collected models due to their characteristics as a bonus model (gratification by criminal justice agencies of the deliberate compensation), a sanction model (imposition of compensation by court order) or a multiprocedure model (connection/interaction of criminal and civil procedures),
- a comparative evaluation under theoretical and penal policy view points.

4. Research Method

With regard to its twofold aims, this project will be undertaken in two phases. In a first step we are preparing the stocktaking of national models undertaken according to a common scheme. The national reporter will look at

- the theoretical foundations of the change of perspective from the offender to the victim,
- forms of compensation in the substantive criminal law, during the stages of the criminal process, under the authority of the courts (criminal and civil),
- forms of compensation during imprisonment, and
- legal practice and policy evaluation.

Regular meetings of those authors attached to the Institute or staying here as visiting scholars will accompany the research. Results from these discussions and experiences gathered during the reporting stage will influence the national contributions.

The second step will serve for typifying of the models and the comparative analysis of the aims and means of criminal law and its administration under factors like practicability, efficiency and justice.

We hope to receive 16 national reports thus rendering a reliable cross cultural basis. They will be written either by members of this Institute or by lawyers who are experts in their countries. Jurisdictions included are: Australia, Austria, Botswana etc., Finland/Sweden, France, Great Britain, Greece, Italy, Japan/Korea, Latin America, Netherlands, Poland, Spain/Portugal, UdSSR, USA, Turkey, Council of Europe.

5. Conclusions

This project of the legal group on punishment and compensation and the occupation of the criminological reasearch group on issues of victim and criminal procedure will thus be at the centre of the Instiutute's research activities during the coming period complementing one another most effec-

tively. It is a fortunate condition that both groups are in a position to collaborate closely together, to exchange results and experiences as well as to learn from each other. We do hope that the results of the common research will allow us to asses foreign solutions better and thus to support German reform efforts effectively.

6. References

Kaiser, G. (1991). Victim-related research at the Max Planck Institute. Points of departure, issues and problems. In: G. Kaiser, H. Kury & H-J. Albrecht (Eds.), Victims and criminal justice. Vol.50 (pp. 3-17). Freiburg: Eigenverlag Max-Planck-Institut.

Eser, A., Kaiser, G. & Madlener, K. (Eds.) (1990). Neue Wege der Wiedergutmachung im Strafrecht. Freiburg: Eigenverlag Max-Planck-Institut.

Restitution instead of Punishment

- Reorientation of Crime Prevention and

Criminal Justice in the Context of Development

Hans Joachim ***Schneider***

Contents

According to the classical school of criminology, which emerged around the middle of the eighteenth century, crime was the result of rational considerations on the part of the offender, who was considered to possess a free will. Thus the classical school supported penal sanctions oriented to the extent of the individual's culpability as a response to criminality. Opposed to this view were the positivist criminologists at the end of the nineteenth century, who regarded crime causation as determined by the offender's physical, mental and social characteristics. They held that the offender possessed no free will and required treatment to prevent him from recidivism. The ideas of both the classical and the positivist schools have left their impressions on our Criminal Code and our Code of Corrections. Rather than stressing personality disorders, the modern school of criminology, which emerged following the Second World War, emphasizes the role of interpersonal conflicts in crime causation. Crime originates in social processes involving the offender, the victim and society. It must be controlled in processes of social and interpersonal learning and interaction in which social groups such as the family, the school, the neighbourhood, and occupational and recreational groups are involved to the same extent as the criminal justice system is.

1. The Crisis of Criminal Policy

Modern explanations of crime causation, based predominantly on social learning theory and the theory of symbolic interaction, have prevailed in the international theoretical - criminological debates. This is because both the classical and positivist schools - due to their considering criminal offences to be individual isolated phenomena - were no longer able to provide adequate explanations for the mass criminality of the twentieth century. Furthermore, two major empirical findings of modern criminological research supported the socio-psychological criminological theories of crime causation:

- Numerous criminal victimization surveys (dark field studies)[1] have revealed that the dark field of undetected, unreported crime is quite extensive and that the crime victim is the "gate-keeper" of the criminal justice system. It is he or she who usually initiates criminal proceedings by reporting the crime. Police, prosecution and courts rely heavily

1 Cf. the survey in *Schneider, H.J.* (1987). Kriminologie (pp. 203-207). Berlin, New York.

on the victim's cooperation in controlling crime. At the same time it was also discovered that crime victims are often subject to renewed suffering as a consequence of the response to their victimization, and that victims are not at all satisfied with their position in criminal proceedings.[2]

- Research into recidivism in the North American,[3] Scandinavian[4] and English[5] correctional systems has come to the conclusion that the treatment of prisoners in correctional institutions does not prevent or exclude recidivism to a higher degree than mere custody does. This is the effect of a number of causes: Crime is the culmination of 15-20 years of misguided and defective socialization. Criminal attitudes will therefore not be unlearned overnight in the social isolation of a prison. In a penal institution, which has to be run on the principles of security and order, it is extremely difficult for correctional staff to create and maintain a social atmosphere that is not dominated by criminal models and values and in which lifestyle and behaivour in accordance with socially acceptable rules can be practised. Prisoners victimize each other socially, psychically, sexually and physically (through the use of violence). However, the main reason for the failure of the treatment practice in penal institutions so far is the fact that the correctional system has failed to involve crime victims and society in this treatment process.

2 Cf. e.g. *Shapland, J., Willmore, J., & Duff, P.* (1985). Victims in the criminal justice system. Aldershot, Hants-Brookfield, Vermont; Shapland, J. (1986). Victims and the criminal justice system. In: E.A. Fattah (Ed.), From crime policy to victim policy (pp. 210-217). Houndsmiths, Hampshire, London.

3 *Lipton, D., Martinson, R., & Wilks, J.* (1975). The effectiveness of correctional treatment. A survey of treatment evaluation studies. New York, Washington, London; *Martinson, R.* (1976). What works - questions and answers about prison reform. In: R. Martinson, T. Palmer & S. Adams (Eds.), Rehabilitation, recidivism, and research (pp. 7-39). Hackensack/N.J.

4 *Bishop, N.* (1975). Beware of treatment. In: E. Aspelin, N. Bishop, H. Thornstedt & P. Törnudd (Eds.), Some developments in nordic criminal policy and criminology (pp. 19-27). Stockholm; *P. Wolf* (1978). The effect of prison on criminality. In: J.C. Freeman (Ed.), Prisons past and future (pp. 93-104). London.

5 *McClintock, F.H.* (1978). The future of parole. In: J.C. Freeman (Ed.), Prisons past and future (pp. 123-130). London.

2. Crime in Social and Interpersonal Processes of Learning and Interaction

Every society has its own limits to socially acceptable behaviour, which have developed historically and which continue to evolve in social processes and in processes of penal legislation and its enforcement.[6] All forms of crime are related to a societal context.[7] As economic and social conditions change, so do extent and form of crime.[8] Industrialization, urbanization, and motorization bring about - among other things - changes in a population's lifestyle and its value and behaviour systems. Industrialization, urbanization, and motorization can lead to anomie, to the disintegration of values, social disorganization, the deterioration of the community and to the emergence of youth subcultures. The presence of both traditional and progressive value norms and behaviour patterns in a changing society can produce conflicts which must not be suppressed or resolved violently. Rather, the conflicting values must be socially integrated and coordinated. Such a peaceful process leading to renewed social cohesion, to value consensus and to the sharing of common societal norms (synnomie) requires a creative energy within a society which can be summoned with the aid of legally implemented conciliatory proceedings. In contrast to this the failure of a society to cope with conflicts results in value disintegration and a considerable increase in juvenile delinquency and adult crime. Unresolved value conflicts are apt to be transmitted to social groups, e.g. the family, leading to the dissolution of personal relationships. During the socialization process the child internalizes this value disintegration. This inadequate internalization cannot produce an intact, normatively conforming conscience in the personality of the child or adolescent.

The basis for the emergence of criminal acts in interpersonal learning and interaction processes are social learning processes, which, in turn, are a function of historically generated social structures and cultural value sys-

6 *Erikson, K.T.* (1966). Wayward puritans. A study in the sociology of deviance. New York, London, Sydney.

7 *Newman, G.* (1976). Comparative deviance. Perception and law in six cultures. New York, Oxford, Amsterdam.

8 *Brantingham, P., & Brantingham, P.* (1984). Patterns in crime. New York, London.

tems and can be influenced by penal legislation, its enforcement, and by the mass media. A felon learns not only criminal skills and attitudes, criminal justifications and values in criminal subcultures, but also his role as a perpetrator of crime; equally, the victim learns his role as a victim. Criminality is not inborn; it is essentially the result of defective socialization and upbringing. Juvenile delinquency emerges and rigidifies into adult criminality when children are not supervised and constrained sufficiently. Juvenile delinquents are unable to identify with their parents or teachers. Delinquent and criminal behaviour can be learned as such, but it can just as easily result from a failure to learn socially accepted behaviour. Most cases of juvenile delinquency are caused by inadequate supervision and poor child-rearing ability of parents and teachers, flaws which tend to recur in each generation. Juvenile delinquency and adult criminality are caused by the deterioration and dissolution of relationships which bind a person to the normative society and its particular socio-cultural groups. When such relationships decay there is an increase in delinquent and criminal subcultures in which criminal and delinquent behaviour patterns and value notions are learned, and in which the delinquent and criminal behaviour of individuals is vindicated and supported.

Juvenile delinquency and adult criminality also result from processes of symbolic interaction, from criminal careers. Individuals influence each other not only by reacting to each other's actions but also by interpreting and defining the actions and personal characteristics of their partners in interaction. Everybody commits petty delinquent or criminal acts at least once in his life. The criminal, however, is a person whose life and idenity are determined by the reality of crime. The orientation of his behaviour around crime is largely dependent on his experience of being arrested and of being labelled a criminal in criminal court proceedings. This experience is one of the most crucial steps in the process of developing a fixed pattern of criminal behaviour. It leads to the emergence of an autodynamic process, a self-fulfilling prophecy. Having been branded as a criminal, a person experiences steadily increasing social pressure pushing him towards increasing and more severe crime. Finally he develops a criminal self-image and a criminal self-esteem. Juveniles who have often been convicted for delinquency at an early age show a high rate of recidivism. Each arrest and conviction increases the likelihood of rearrest and reconviction.[9]

9 *Farrington, D.P.* (1979). Longitudinal research on crime and delinquency. In: N. Morris & M. Tonry (Eds.), Crime and justice, Vol. 1. (pp. 289-348). Chicago, London; *Farrington, D.P., Osborn, S.G., & West, D.J.* (1978). The persistence of labelling effects. British Journal of Criminology, 18, 277-284.

3. Punishment as a Deterrent and as an Educational Measure

The general population's attitude to crime influences penal legislation and its enforcement and vice-versa. Penal legislation and enforcement constitute the formal cultural definition of what is forbidden in a society, a definition which must be accepted by the people and which must be transmitted to the younger generation by means of the socialization process. Here, the immediate deterrent effect of penal legislation and its enforcement is less important than the indirect influence exerted on the population by a life-long socialization process, a process likewise oriented to penal law standards. Empirical criminological research has shown that the immediate deterrent effect of penal legislation and its enforcement cannot be rated as high as was originally assumed.[10] As a general rule successful citizens can easily be deterred because they have too much to lose and tend to be bound by their success to the social system in which they live. On the other hand, offenders are usually unsuccessful in their socially conform careers and therefore difficult to deter, since they have lost all hope and believe that by committing criminal offences they can only gain.

An individual's personality is the result of a process of social learning - a mental process of active, cognitive integration of past experiences. How parents and other important identification figures react to norm violations is crucial for the development of a sense of justice in the psyche of children and adolescents. Child-rearing that is characterized primarily by the use of punishment and power, and that employs harsh and frequent corporal punishment, produces at best a superficial, outward willingness to conform to the norms; it can also lead to aggressive modes of behaviour towards weaker persons. "Laissez-faire" methods of child rearing do not generate any sense of justice at all. For the development of an independent, internally controlled sense of justice the presence of an actively law-abiding model is important since it does not develop according to professed abstract norms

10 *Andenaes, J.* (1974). Punishment and deterrence. Ann Arbor; *Zimring, F.E., & Hawkins, G.* (1973). Deterrence. Chikago, London; *Gibbs, J.P.* (1975). Crime, punishment, and deterrence. New York, Oxford, Amsterdam; *Blumstein, A., Cohen, J., & Nagin, D.* (1978) (Eds.), Deterrence and incapacitation: Estimating the effects of criminal sanctions on crime rates. Washington D.C.

and rules. Parents or teachers who have established a relationship with their children or pupils on the basis of emotional warmth and acceptance should not fall back on their superiority and authority if a conflict arises. Instead of providing prefabricated conflict solutions, they ought to discuss seriously and sincerely with their children or pupils on an intellectual and emotional level. This requires teachers and parents to observe the following three points:

- Firstly, they must make clear to their children or pupils why it is neccesary to observe the norm that has been violated.
- Furthermore, they must point out to their children or pupils the extent of suffering and anguish experienced by the injured party, i.e. by the victim, as a result of the norm violation.
- Finally, parents and teachers must themselves observe those generally binding norms, and show their children or pupils that they can conduct and resolve their own conflicts among themselves openly and peacefully.

Individuals also learn open and peaceful conflict resolution by observing the behaviour of others. The social climate of those involved must be characterized by a mutual respect for each other. Undoubtedly, parents can also learn from their children's behaviour.

4. Formal and Informal Crime Control

A criminal offence does not come out of the blue, even if this sometimes appears to be the case. It is the product of centuries of cultural, as well as decades of interpersonal learning and interaction processes in which it is embedded. Therefore, whoever wishes to prevent juvenile delinquency and adult crime in future societies has to start in the family and at school. The family setting in which the socio-cultural birth of the individual takes place initiates the development of a socially conform or of a criminal career. As the modern family is marked by an increasing degree of loss of function, and many children do not receive adequate supervision and an appropriate upbringing within the family, schools must assume a greater role in teaching children peaceful modes of conflict resolution. In this case the only appropriate educational approach is one which provides the reasons for the existence of norms and sheds light on the victims' suffering. Such an educational approach requires intellectual and emotional discussions with the pupils, supervised by teachers with strong personalites and conducted in

much smaller classes than presently exist. Due to the increasing degree of family disfunctionality, the school is forced to assume the task of teaching familial psycho- and sociodynamics, and, above all, familial child-rearing practices.

Comparative criminological studies[11] have made clear the great importance of the informal social control exercised by families, schools, neighbours, professional and recreational groups in the prevention and control of crime. The ten nations with the lowest crime rate in the world, although including countries with distinctly different economic and social structures such as Japan, Switzerland, or Saudi Arabia, show three common characteristics:

- Community consciousness and the citizens' willingness to accept responsibility facilitate the peaceful regulation of conflicts in the community. Mutually accepted regulation of conflicts in turn produces value agreement and social cohesion.
- The decay of communities and the deterioration of social relationships are minimal. Youth subcultures and socially disorganized areas, for example in industrialized urban areas, have not developed. Social relationships within social groups and between social groups are more or less undamaged.
- The criminal justice system is well integrated into the community. The community is involved in defining and solving crime, and in charging, sentencing and punishing offenders. The community supports its criminal justice system; the criminal justice system seeks to be integrated into its community.

Many people assist the criminal justice system in an honorary capacity, for example as voluntary probation officers or as visitors in correctional institutions. Police officers live in the neighbourhood where they work, and try to be in touch with the citizens. By setting up police information and counselling bureaux in schools attempts are made to develop a trust relationship between the pupils and police officers.

11 *Clinard, M.B.* (1978). Cities with little crime. Cambridge, London, New York, Melbourne.; *Adler, F.* (1983). Nations not obsessed with crime. Littleton, Colorado.

5. Restitution as a Creative Social and Individual Achievement

Offender-oriented treatment in correctional institutions is increasingly losing the support of the general public. There can be no return to the ineffective and inhumane dungeons, no matter how hard "moral entrepreneurs" (*Howard S. Baker*) try to persuade people of their value. Such a regression would be a step backwards in social development and untenable in the long term. Rather, the entire criminal justice system must be adapted to the concept of restitution, which extends the offender-oriented treatment approach to encompass victims and society. Restitution must be seen as an interactional process between offender, victim and society which resolves criminal conflicts and creates harmony and peace between the parties involved. This does not simply involve a monetary payment and a few perfunctory apologetic remarks. Restitution is a creative process, a personal and social achievement, requiring a considerable psychical and social effort on the part of the offender towards confession and remorse and towards assuming responsibility for his offence to society and his victim. From this process - if it reaches a successful conclusion - the offender, the victim and society will emerge changed and matured as a result. The offender repents his action by facing up to its harmful consequences and by being forgiven by his victim; he is absolved without personal humiliation. He loses his criminal stigma and can take again his place in society as a member enjoying equal status. The victim receives - as far as possible - restitution. Having successfully made the personal effort of forgiveness he is able to overcome the psychical and social damages suffered as a result of the offence. His willingness to forgive the offender needs to be aroused. As a rule, the victim does not insist on revenge. It is, however, of vital importance to him that the court acknowledges his injury and the damage incurred and that the offender assumes reponsibility for his deed instead of resorting to rationalizations and excuses. The use of restitution, the solution of the criminal conflict and the reconciliation process involving the offender, the victim, and society create a sense of justice in society, something far more important for crime control than deterring the population in general with penal legislation and enforcement. Restitution calls for an alteration in the aims of the criminal justice system in its entirety. The police, district attorneys and courts no longer solely concentrate their activities around the offender. Probation officers and correctional staff no longer just help and give gui-

dance to offenders in their charge but also have to assume the role of mediator between offender, victim, and society. The concept of restitution thus demands not only an increased effort on the part of the offender, but also of the victim and of society, especially with regard to their social control function.

The victimological concept was just the first step in the right direction. It has led to the establishment of the fact that victims of crime are traumatized by the offence itself as well as by the reaction to their victimization; also, that they are therefore in need of help and support during the process of reaction to their victimization, and that their mental, social and physical injuries have to be treated. This concept is beginning to gain public recognition. The offender-victim reconciliation involving formal social control institutions is another important step towards an effective model of crime control. A crime victim does, by no means, wish to hinder the social rehabilitation of an offender. In fact, he can play a considerable part in the offender's rehabilitation and wants to do so. By being assigned a more active and positive role in the reaction to crime the victim can avoid, to some extent, becoming the object of further harm or being victimized again during and by this process. The principle of restitution is one to which offenders, victims and society can give their approval as it benefits all parties involved. In our German judicial system, however, legislation is unsatisfactory with regard to the possible use of restitution as a condition attached to the granting of probation and as a potential method of victim compensation within the criminal procedure. With the enactment of the first Victim Protection Act (Opferschutzgesetz) in 1986,[12] the federal legislator made an effort to activate and promote victim compensation in criminal procedure, an effort, though, which was inadequate and will not achieve the desired effect. Rather, restitution must be promoted to constitute an independent penal sanction, as was acknowledged by the U.S. legislation in the 1982 Victim and Witness Protection Act.[13] If a federal court in the United States does not make use of the opportunity of utilizing a reparatory sanction, the reason for its decision not to do so must be stated in the written judgement. Both the General Assembly of the United Nations[14] an d the Council of

12 Bundesgesetzblatt I, pp. 2496-2500.

13 Victim and Witness Protection Act; Public Law 97-291 of 12. October 1982 (97. Congress).

14 United Nations, General Assembly, Resolution of 29 November 1985, Document A/Res/40/34 (96th General Assembly).

Ministers of the Council of Europe[15] have fundamentally acknowledged the importance of restitution as a concern of criminal justice. Nevertheless, the crucial importance of restitution still remains to be fully appreciated by political institutions, society and also by the criminal justice system. First experiments employing restitution as a sanction in its own right in juvenile court proceedings in the United States have, as a result, led to a decline of recidivism rates.[16]

6. The Social Reintegration Model

Penal law constitutes only one aspect of social control. Criminal proceedings create a distance between those involved; a trial can have stigmatizing side effects for an offender if it is utilized too early. All the same, the criminal procedure retains its importance for constitutional reasons. It must, however, be closely connected with the informal social control exercised by social groups. That is why the social reintegration model is receiving such worldwide attention in criminal policy debates. This model attributes great importance to the "treatment of the offender at liberty", to his treatment in, by, and with the community, and to improving the quality of community interaction: The offender is encouraged to develop bonds with his family, with his neighbourhood and with his occupational and recreational groups. This is meant to involve community in the treatment process on a large scale. The people in the offender's immediate social sphere are to be kept aware of the problems concerning delinquency and crime. The social reintegration model supports "diversion" (circumvention of the criminal justice system), because, the more delinquents and criminals are entangled in the net of the criminal justice system, the more their delinquency and criminality will strengthen. "Diversion" involves the following responses of formal social control agencies (e.g. the police, the courts and correctional institutions):

- Delinquents and criminals are referred to informal social control, e.g. youth services run by honorary assistants working outside the criminal justice system.

15 *Council of Europe* (1985). The position of the victim in the framework of criminal law and procedure. Strasbourg.

16 *Schneider, A.L.* (1986). Restitution and recidivism rates of juvenile offenders: Results from four experimental studies. Criminology, 24, 533-552.

- Delinquents and criminals are subjected to less harsh official or semi-official sanctions within the criminal justice system, e.g. to correctional forms based upon the community.

7. Mediation and Arbitration Procedures

These procedures, first proposed by the Canadian Law Reform Commission[17] as a pre-trial diversionary measure preceding the formal proceedings, involve the offender and the victim meeting face to face and attempting to resolve their conflict between themselves in an informal procedure under the supervision and mediation of a judge and with the assistance of the public prosecutor, the defence lawyer and, in certain cases, an expert. This procedure can only be made use of if there is no doubt as to the guilt of the offender and if all parties involved have given their consent to it. This mediation and arbitration procedure, which concludes with a judgement which is binding for all parties, has been recommended as it strengthens the informal control by allowing the parties concerned to practise resolving conflicts between themselves with the help of the criminal justice system. The aim of such a procedure is, on the one hand, to settle the terms of restitution between the offender and the victim and to reach a binding agreement for all concerned; this, for example, has been proposed to resolve criminal conflicts between persons in close social proximity such as cases of abuse of wives and children. On the other hand, such a procedure also attempts to control the criminal conflict in the future by organizing social workers to monitor and look after the family, so that a formal conviction of the offender to a term of imprisonment can be avoided - a sanction that is hardly of any use to either the family or the victim, and which can even lead to further damage. The mediation and arbitration procedure can also be recommended for resolving criminal conflicts within the scope of petty, environmental and economic crime. When the mediation and arbitration procedure is successful the formal proceedings can be suspended.

17 *Law Reform Commission of Canada* (1975). Diversion. Ottawa.

8. Restitution in the Community

Occasionally, an offender is released on probation under the condition that he will make reparation. However, this option is not used sufficiently in either the juvenile or the adult criminal procedure. Furthermore, the reparation of material damages usually is the only matter of any concern. Where immaterial damages are concerned, a simple apology is usually considered as sufficient. This criminal law practice is inadequate. Victim surveys have shown that even in case of property offences, such as burglary or fraud, the crime victim suffers substantial immaterial damages, manifested in a fear of crime and a mistrust of the criminal justice system. For that reason treatment experiments, e.g. in Canada,[18] with offender-victim reconciliation projects are successfully carried out: Juvenile burglars on probation meet their victims under the supervision of probation officers acting as mediators with a great deal of sensitivity and psychological skill. By bringing the offender and the victim together, not just once but for a series of meetings, the offender comes to realize the full extent of the social, material and psychical damage caused by him. His victim is no longer an abstract person fading from his memory. He cannot rationalize his act any longer nor repress it. By getting to know his offender the victim "humanizes" his image of him. The juvenile offender is no longer an abstract "monster" for the victim, but a young individual with problems shared by many other young people. Rather than being excused, the offender must be prepared to take full responsibility for his offence and to compensate the material damages he inflicted.

9. Restitution in Correctional Institutions

The German Code of Corrections enacted in 1976 excludes the victim perspective almost completely. The belief was that the prisoner's socialization deficits can be remedied by subjecting them to offender oriented treatment. This was obviously done without realizing that the development

18 *Yantzi, M.D.* (1985). Das Täter-Opfer-Aussöhnungsprojekt in Kitchener (Ontario), Kanada. In: H. Janssen & H.-J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 329-343).

of a sense of justice on the part of the offender and the general population depends on the prisoner coming to terms with his crime intellectually and emotionally. It was even assumed, and it still is, that restitution for damage inflicted on the victim, would subject the offender to excessive stress and interfere with his rehabilitation, if not annullate these efforts. Interviews with prisoners both in Germany and abroad have repeatedly shown that prisoners know next to nothing about their victims and that they considered their crimes as expiated after their term of imprisonment. What memory of the crime they had, had faded during that time. They viewed any such recollections as an undesirable mental burden. Material and immaterial restitution was, and still is, considered to be a "double punishment". Those holding this point of view, including some members of the correctional staff, fail to comprehend that, however necessary the offender-oriented treatment may be, it alone is not sufficient to rehabilitate offenders. Acceptance of the fact that it is only offenders who are offered support within the correctional institution system will diminish in the general public. The aims of penal sanctions should therefore be defined anew as follows:

- The prisoner in a correctional institution should in no way be subjected to personal degradation under the guise of "culpability compensation" or "penitence", as he will only internalize such degradations; this in turn will weaken his already poor self-esteem and lead to the reinforcement of the criminal image he holds of himself. This merely results in the prisoner waiting to be released so that he can inflict further damage on society; his main ambition is reduced to only avoiding further arrests and convictions.
- The prisoner must be made to understand that although his criminal behaviour cannot be accepted socially, still he is not regarded as an inferior person and that he is expected in future to be able and prepared to realize normatively correct behaviour. Consequently, he must be encouraged and enabled to engage in socially adequate behaviour. His social status must be improved, his self-esteem strengthened and his role potential and inventary expanded. Not only must he be familiarized with normatively conforming behaviour patterns but also with normatively acceptable attitudes and roles.
- As far as the construction of a self-articulating sense of justice is concerned, such treatment can only be successful if the reasons for the necessity of abiding by the norms are made clear to the prisoner and if he makes an effort to consider his offence and the victimization of his victim honestly and self-critically. Acknowledging that by committing his offence he has inflicted harm on his victim, the prisoner

learns to cognitively process and emotionally digest the offender-victim conflict. His personal responsibility is not "stolen" from him.[19] Rather, he faces up to his social obligations, thus relieving himself of his guilt. The prisoner's sensitization to the damages he has inflicted on the victim must not, however, be misinterpreted as a return to a retaliatory form of penal sanctioning. The former has nothing in common with repetitive, personally degrading accusations of guilt directed at an inmate. Rather, it constitutes a necessary expansion, advancement and supplementation of the concept of treatment.

Adapting the corrections system to a democratic mode of treatment, which is binding on our democratic society as a whole, places exceptional psychological and social demands on all persons concerned, i.e. offenders, victims, society, and, last but not least, the correctional staff. Even though the respective efforts will not always be crowned with success, these aims must be persistently and uncompromisingly pursued none the less. Based on the obligation of corrections to motivate the prisoner, the aim of treatment is to convert the prisoner's attitude from one of reluctance to one of willingness regarding victim restitution. Possible meetings between offenders and victims must be planned as carefully and meticulously as possible. The victim's special situation, namely his emotional stress, must be taken into account. A face-to-face encounter between the victim and the offender is a highly delicate emotional experience for both. Extreme care must be exercised in this situation. The open correctional institution Saxerriet-Salez in Switzerland has been running an offender-victim restitution program for years.[20] Not always necessary, however, for successful offender-victim restitution are face-to-face encounters between both parties. In order for prisoners to be able to affect material reparation, the long-term aim must be to pay them adequate wages for their work, allowing them to organize their debts and make restitution payments in full. Moreover, not always is full material restitution absolutely indispensable. Often the victim's only concern is that the prisoner demonstrates his good will. The immaterial reconciliation between offender and victim is more important and at the same time more difficult. Not every crime victim is prepared to engage in discussions or is capable of talking to the offender. In this case symbolic restitution in form of symbolic reconciliation is acceptable and can

19 *Christie, N.* (1977). Conflicts as property. British Journal of Criminology, 17, 1-15.

20 *Brenzikofer, P.* (1982). Bemühungen um Opfer von Verbrechen in der Schweiz. In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 367-373). Berlin, New York.

be achieved, for example, by having prisoners not meet their own victims, but by letting them become acquainted with crime and its consequences from the angle of victims in prisoner discussion groups attended by crime victims willing to converse. By engaging in victim-oriented role plays within the framework of social training, offenders could also develop a lasting sensitivity for the concerns of crime victims. A victim-oriented correctional system is not just any variant of the penal approach, it is a crucial progress in the treatment concept, which must be tested with care and imagination in correctional institutions. This progress in the treatment concept will be instrumental in promoting the acceptance of the penal system in the general public.

10. Community Involvement in Corrections

The public image of corrections in Western Europe and North America does not correspond to prison reality. In no way does it do justice to the efforts of political authorities towards improving the correctional system, nor does it take into account the positive results achieved in these institutions every day. Prisons are constantly referred to as the "slammer", "joint" or "can" in a pejorative manner and claims are made that they are too lenient and comfortable on the one hand and too antiquated and conservative on the other. Those few prisoners who use their weekend leave to escape and to commit other spectacular crimes make the headlines, thereby determining to a large extent the public image of the penal system as "penal hotels". Western European and North American governments, the correctional systems themselves and even criminologists have, for many years, foregone on the opportunity of providing the public directly with precise information about the real causes of crime and the reality of the correctional system, and of gaining public support for **their** style of corrections. The only industrialized nation comparable with Germany in terms of its economic and social structure, but with considerably less crime, is Japan, where crime control is not only left in the hands of specialists and experts (the criminal justice system) but is also accepted as a community task. The Japanese are much better informed about their correctional system and they take a more active part in **their** criminal justice system. This means that within the Japanese correctional system there are honorary prison visitors who have voluntarily assumed an important control function. Rather than seeing prisoners as "victims of society", and thereby hindering their socialization they appreciate the fact that during an inmate's term of imprisonment he is unable to create his own circle of socially conforming friends outside the institution. Therefore, they form a network of social contacts on his behalf so that after

his release these people will be in a position to support him and help him acquire normatively acceptable behaviour. Honorary assistants fulfill an important task in the correctional system. Accordingly, their work warrants our full support. Publicity must aim at attracting honorary assistants for the correctional system, because they bolster a community's faith in this system.

11. Corrections as a Continuing Process of Development

The education and training of our population in the Federal Republic of Germany is a matter of central importance for our society, as our high standard of living and our high quality of life depend on this high standard of education and training. For this reason, not only the education and training of prisoners, but also that of the correctional staff must be fostered constantly. The prison situation is an educational and training process for the staff as well as for the inmates. The training of correctional staff must not be considered as an isolated phenomenon separated from the daily routine of the correctional institution. If a medium-grade civil servant, for example, after absolving his training in a correctional academy cannot apply this in the correctional institution he comes to work in because the practice in this institution follows the principle that "we do everything the way we used to", then his training was a waste of time and the correction process will not develop further. The opportunity of prospective smaller prison populations in the Federal Republic must, therefore, be used to constantly improve the training of **all** correctional staff. The educational style which is obliging for a democratic society, requires the correctional staff to be constantly in physical and intellectual rapport with the prisoners, so that they learn how to resolve conflicts peacefully and develop an internally motivated sense of justice. Such intensive contact requires extreme mental energy, which has to be recharged by having further interpersonal contact. Therefore, prison staff require not only constant and careful training and education but also interpersonal contact, otherwise they will suffer from psychical exhaustion. Especially medium-grade correctional personnel should act as "role models" for prisoners by being actively involved in their adult education. Therefore they will have to decide straight after school that they wish to work as adult trainers in prisons. For this sort of work one has to be highly motivated, and many young people have just the commitment needed for this profession. Following thorough training at tertiary level they should be given the chance to engage in educational work.

12. The Correctional Institution as a Modern Service Organization

Only the best suited and most professionally trained persons in our society are capable of assuming the highly demanding task of educating adult felons. Adult education in correctional institutions is a service requiring the highest qualifications and a desire to engage in personal contact. The correctional system must employ the latest research findings from the fields of organizational psychology and sociology. Prison staff and inmates must be able to identify with the goals of the penal system. Only when the staff themselves are motivated and interested they can motivate and interest the prisoners. In order to prevent the formation of a prison subculture with criminal value notions and behaviour patterns, and to prevent prisonization, i.e. prisoners adopting these norms and patterns, an organizational atmosphere must be created in which creativity, initiative and originality at the place of work can develop. All those involved must be sufficiently informed about events and decisions within the organization. Prison staff and prisoners must see their own tasks and those of the others as being constructive and useful. A good working environment depends on communal decision-making and the feeling that problems can be solved, that one can achieve something valuable through one's work and that one is respected. A satisfied worker is proud of what he has achieved. Prison staff and inmates must not feel helpless and isolated. To reach the aim of correctional institutions must be a challenge for them, and by accepting this challenge they can develop and mature personally. The feeling of being productive and of making progress must be awakened and promoted in the prison staff and inmates, so that they achieve the aims of corrections and can successfully resolve arising conflicts. Rehabilitation can be enhanced considerably by humanizing the organizational processes and by encouraging people to develop self-initiative. An organizational environment in which individual talents and, at the same time, a network of social relationships can develop will contribute significantly to dissolving the negative public image of correctional institutions and to making job prospects in penal institutions more attractive for potential junior staff.

Compensation in the Context of Sanctioning and Victim's Interest

- Results of Court Practices' and Victim Survey -

Dirk Hertle

Contents

1. Introduction

The research which is reported in the following, is part of a project relating to research of the administration of justice carried out by the Max Planck Institute for Foreign and International Criminal Law in Freiburg in 1989. It is concerned with the implementation and evaluation of the potential use of compensation in prevailing German criminal and criminal procedural law. It is linked to some extent to questions which arise from the awareness of problems which are relevant to victim interests and which have become more focussed upon in the past years.

When we raise the question of compensation within the existing system of penalties, we realize that we are not dealing exclusively with "interest in and claims for legal redress" and even less so with "settlement" of primary conflicts between offender and victim. Criminal procedure is in fact not intended for the latter purpose in any event.[1] Compensation within the criminal proceedings pursues the goal of a kind of mediation between offender and victim within the criminal law system of legal responses, and raises the question in view of endeavours towards reform of this option being a quasi penal, independent or dependent response. Seen in this way, restorative criminal politics opens up a far-reaching perspective of legal redress which extends beyond thoughts of civil law compensation, and which naturally includes the financial replacement of losses suffered by the crime. This at the same time allows enough room for a form of reconciliation and settlement of interests. To this extent, compensation for damages raises the question of further development of judicial criminal law considerations and also a new direction for criminal law. Such an understanding and understood role for compensation for damages within current criminal and criminal procedural law is far from realization. Before far reaching reform concepts can actually be set in motion, the requirements, roles and meaning of compensation for damages within the existing system of legal responses, must be more closely examined and brought to light.

The aim of the research was to clarify empirically, what status compensation has within the framework of the present system of penalties, and where the main problems of application of the corresponding forms of

1 *Weigend* 1989, p. 218.

compensation arise. It is important to take account of the fact that the sufficiently well-known but minor role of the injured party within the criminal procedure has just as little significance as compensation has within the criminal prosecution system. This applies both to the standardization of forms of compensation and the application of these methods by those administering criminal justice.

Consideration of the victim's interests in the use of compensation formed the focal point: Investigation and identification of the victim's needs and assertion of those needs within the system of penal social control, was the second most central question.

The research was so set out, that the needs of the victim in the criminal proceedings stood at the forefront. The special criminal legal perspective of the offender was not however ignored.

The following areas were investigated individually, in the research into the judiciary:

- Implementation and evaluation of conditions of compensation imposed;
- significance and status of compensation within the criminal law system of responses;
- reasons for conditions imposing compensation;
- influence of judicial decision-making with regard to compensation;

Within the area of victim research, the following issues were of interest:

- Investigation, identification and characterization of the needs of victims;
- aspects of secondary victimization;
- significance and existence of desire for punishment;
- investigation into motivation with regard to factors influencing willingness to mediate (for instance degree of victimization, existence of victim-offender-relationship).

Increasing consideration of the interests of the victim which is emerging in academic debate, is expressed in the many forms of reform proposals in support of compensation and to some extent offender-victim-mediation.[2] The need for further research into these areas arises from the diverse range of ideas regarding new endeavours in crime policy. The motives for these

approaches are varied both in national and international discussion. It is not always the pressing victim-related concepts which are contained within the proposals. Protection for the victim of crime was not the authoritative factor initially.[3] For many, the creation of an area within which the victim and offender could react, was the focal point of academic discussion. Against this, the protagonists who preached the failure of the rehabilitation concept, advocated the victim's "right to redress" as the end of "offender-orientated developments" within the criminal law.[4] In fact, hidden behind the demand for more victim protection and the call for "law and order" from time to time, was a demand for more severe punishment of the offender.[5] The statements of female lawyers can be suggested as one example.[6] At any rate, the common aim is to end the role of the victim which until now has been a minor one, in relation to finding a solution to potential conflicts. The various approaches arising, which seek to reach a solution to the problem, stem entirely from antagonistic legal political concepts: victim friendly demands geared towards the victim's "interest in seeking legal redress", on the one hand and a solution which seeks to balance the interests of the primary conflicts which form the basis of the crime, by abolitionistic strategies[7] on the other hand, illustrating perhaps new conflicts of opinion most clearly.

The following research does not suggest an ideologically formulated set of ideas. By endeavouring to examine the requirements for reconciliation within the criminal proceedings, it adapts to the characteristics of criminal judicial conflict processing, without starting out with "wishful thinking" in other directions.

2. Information on the State of Research

An overall view of the research, shows that it is concerned with empirical questions and also with compensation as an instrument of penal social control.[8] The principal characteristic of most research can be found pri-

2 *Kaiser* 1988, p. 993.
3 *Müller* 1982, p. 2.
4 See *Seebode* 1986, p. 179.
5 See summary by *van Dijk* 1985, pp. 4 et seq.
6 For many, *Selig* 1988, p. 498.
7 *Christie* 1977, p. 7.
8 *Frehsee* 1987.

marily in the areas of research into motives for reporting crimes, attitudes towards punishment, interests in reaching a settlement, and the effectiveness of informal conflict regulation.

The most important of past results can be summarized as follows:

Interests in achieving civil law settlement (compensation) and likewise the desire for help effected by criminal prosecution are the predominant motives for reporting crime (*Rosellen* 1983, p. 811; *Hanak* 1982, pp. 125 et seq.).

The Bielefeld study by *Voß* is concerned with the willingness of victims to participate in possible informal settlement of conflict. Around half of the victims questioned declared that they were ready to participate in mediation involving the victim, where dealing with incidents in which damage was caused by an anonymous offender and their consequences were given priority rather than the settlement of interpersonal primary conflicts. According to this research, around 30% of those questioned were interested in punitive measures, which they sought to satisfy by means of reporting the crime.[9] The research by *Sessar* points to a high acceptance of forms of mediation, and a retreat of interests in obtaining punishment held by the population.[10]

For a long time, empirical research focussed to a lesser extent upon the area of compensation and criminal justice. The work of *Frehsee* (file analysis) was set around the examination of qualitative operational and formative conditions of compensation imposed by the courts, whereby the justification for and legitimization of the imposition of these conditions were considered first and foremost. Compensation cases are accordingly not simply categorised as being equally suitable.[11] Cases involving compensation often concern juvenile offenders. The question therefore of the particular earnings of the juvenile offender is of primary importance in the imposition of the main conditions by the courts.[12] The work carried out by *Knoll* (1978) also deals with the problem of compensation and the juvenile offender. Interviews (admittedly only 10) which were carried out, established that there was a tendency for overlapping civil law compensation claims, to lead to a restraint in the imposition of the appropriate conditions.[13]

9 *Voß* 1989, pp. 44 et seq.

10 *Sessar* 1985, p. 1155.

11 *Frehsee* 1987, p. 320.

12 *Frehsee* 1987, p. 319.

Within the framework of *Sessar's* research (1989), questions of compensation and informal settlement of conflict, were put to members of the criminal justice system. Those questioned expressed themselves to be somewhat reserved towards these proposals and were more frequently inclined towards penalties being imposed.[14]

Conclusions: In the area of victim research, we are faced with an enormous amount of material in which there is nevertheless a number of gaps which should be closed. Most victim research work has been aimed at answering the question as to whether and at what stage injured parties are prepared to take part in the informal resolution of primary and secondary conflicts, and therefore consider a solution which is outwith the criminal procedure itself. It is still open to the question as to with what expectations the victims who are confronted with the criminal proceedings, enter this proceedings, and also what expectations they have regarding compensation. There is no "informal settlement of conflict" for most victims. Their hopes and expectations regarding their own interests must however be examined.

The area of research on the administration of justice can be said to be unresearched to some extent. This also applies to both the role and significance and compensation within the system of criminal law penalties and also to the reasons for the reserved application of compensation.

3. Methods

3.1 Theoretical Presumptions

3.1.1 Research on the Administration of Justice

According to the doctrine of the state right to punishment, the state is obliged to enforce the appropriate legal consequences and rules in order to protect the rights of individuals and the public in general against the threat of criminal law in justice in proceedings which are judicially controlled. The criminal process as a specific form of resolution of conflict by third party intervention may perhaps supply the basis of the decision in this respect. Those participating in the proceedings themselves have specially allocated and fixed positions, which allow very little scope for movement for the

13 *Knoll* 1978, p. 166.

14 *Sessar* 1989, p. 53.

particular person holding the position at any one time. The structure of the proceedings however allocates a position to the judge the conceptualization of which is characterized by the principle of the search for the substantive truth.[15] His procedural law powers are not however an arbitrary matter and are determined by the rules and regulations which relate to the procedure. These norms however create an asymmetry in relation to the judge which must not be overlooked. Effecting the State right to punishment with the aid of proceedings which are focussed upon the judge as the central point, allows little room for rules aimed at settling conflicts which may conflict with this system. Balancing the victims' interests and proper regard to these interests is of course also important within the context of achieving the creation and maintenance of law and order. Assertion of these interests is however limited to the structure of the proceedings, the position of those participating and the dominance of the judges's position. This suggests therefore the following proposition: The level of recompense achieved by individual settlement and compensation, by the assertion of a criminal law claim, is overshadowed within the criminal procedural form of resolution of conflict, in favour of the level of penalty aimed at satisfying the demands of the general public.

The dominance of the judge within the peculiar institutional structure of the proceedings, is directly attributable to the particular personality of the judge. The more the person administering justice works towards removing factors which hinder communication, the more the proceedings become human-related. This contributes not merely to the fact that those participating may feel more open to "the judiciary" and "the law", but also that the proceedings themselves create a medium for settlement and dispute with the opponent. If the judge's behaviour therefore allows more participation by the parties concerned, this would allow more room for expression of the desires, interests and expectations relating to the particular situation. The artificial but not original division of punishment and compensation is therefore broken down to a level which can be socially communicated and not merely understood within a formal court environment. This leads to the following proposition: The participation of parties involved, namely assertion of the interests of the victim, is attributed more meaningful status by criminal lawyers, by encouraging more communication within the court procedure.

This should be seen as a practical problem of implementation or operation of the special compensation rules, and should not be seen as hindering the

15 *Wassermann* 1988, Einl. II, Rdnr.1.

concrete use of such provisions. Such problems of implementation cannot naturally be concealed in their entirety. The acceptance of compensation provisions and their use, does not depend merely on attitudes, but rather upon their feasability in individual cases. It can be formulated as follows: The implementation of compensation provisions is dependent not only on the acceptance of the concept by criminal lawyers, but also upon more detailed, definable considerations of practicality of the rules.

The following basic assumption can be formulated from the considerations already set forth: It is supposed that the grounds behind the feasibility (supervision and control of orders given, work load, civil legal investigation of facts) in preference to the legal political concept of compensation within the criminal procedure, results in a reserved attitude on the part of judges and prosecutors towards the various forms of compensation.

3.1.2 Victim Study

Due to the varied influences, for instance of victimization upon processing of the offence acts of compensation and their results, theoretical grounds justifying assessment of victim-offender-reconciliation and compensation as a success, cannot be derived from an implementation theory which has merely been summarily derived itself. It would be wrong to add existing findings for instance from victim research to this and to seek to draw theoretical conclusions from this.[16] This also applies to the knowledge obtained from the victim research set out. The practical translation of these results, is effected therefore by means of a so-called filter selection concept, where descriptive data is recorded, and explanations tried and tested.[17]

3.2 Data Collection

3.2.1 Research on Administration of Justice

A survey was carried out of judges and prosecutors. Predominantly standardized questionnaires were devised for this. The aim of the research was both to question the facts - namely the practice of compensation - and also opinions - for instance the assessment of the effects of reserve in the use of such provisions. Accordingly, the questionnaire contained both questions as to fact and opinion.

16 *Albrecht* 1990, p. 72.

17 *Blankenburg* 1975, pp. 19, 20.

In order to achieve uniformity of answers and therefore to be able to obtain comparability in these answers, and to ensure to some extent that the answers were reliable, only well-defined questions were used. The survey was carried out as a universal inquiry in the area of the higher regional court (Oberlandesgericht) in Karlsruhe. The number of judges, both female and male, and likewise prosecutors practising in the area of criminal cases within the district of the Karlsruhe higher regional court at the time of the investigation, amounted in total to 460. The judges practising at the higher regional court in Karlsruhe and likewise the prosecutors belonging to the chief public prosecutor in Karlsruhe are not included within this figure. 192 questionnaires were sent out, of which 185 were completed. This accords with a return rate of 40%.

The questionnaires were sent out by mail at the beginning of October 1989 and at the end of November, further notices were sent out, in which the criminal lawyers were asked to cooperate once again. Questionnaires were returned up until the turn of the year.

3.2.2 Victim Research

A total of 42 court proceedings involving individual parties who had been injured or suffered loss or damage, were attended during a period of four weeks in 1989. The proceedings were observed and followed closely with the help of a questionnaire which had already been prepared in advance. This observation was carried out by co-workers who had been well-trained by psychologists and sociologists before. At the end of observing the procedure the injured parties were asked as to whether they would be prepared to take part in an interview. The interviews were carried out by those who had watched the court proceedings and who had already had experience of this. 35 of the 42 parties questioned, indicated that they were prepared to take part in an interview, and this accords with a rate of participation of 83%.

It must be noted, that the victim research has an explorative function. The fact that such a combination, namely "observation of proceedings" and an interview had not been carried out before in respect of this complex theme, means that the first impressions and assessment from practice itself, is important.

4. Results of Research

4.1 Judge and Prosecutor Survey

4.1.1 The Range of Judicial Attitudes towards Compensation

We are concerned in the first instance, with the basic question as to the meaning and role of compensation within the entire structure of the criminal law system of responses.

72% of those questioned, answered negatively to the statement that interest in achieving compensation could not be fitted into the existing criminal procedure. This was voiced by only 28% (N= 184). Restoring these interests within the criminal proceedings was supported by the administrators of justice, if only to a minimum extent. The terminological categorization of compensation corresponds to this. The specific legal details of compensation, can be allocated quite clearly both to the criminal law and civil law (see Figure 1). These findings point to the fact that according to the view of the judges and prosecutors questioned, compensation and mediation in the general sense and in principle, does not need to present a conflict in relation to the system of penalties and to the underlying demand for punishment. This applies to compensation within the criminal law/civil law and equally the interests in achieving compensation characterized within the criminal proceedings. This can be seen, especially in the basic motives which place compensation within the system of responses: The parties questioned answered predominantly in the affirmative (73%), when they were asked as to whether compensation proved to be an acceptable basis for legal certainty and justice (see Figure 2).

A clearer picture emerges in relation to the question as to what extent compensation is suitable, for strengthening that the confidence in the legal system, "because the citizen experiences that the injured parties uphold their own rights": More than 85% of members of the criminal justice system, expressed themselves to be in agreement with this. The reasons for judges and prosecutors refusing to make such a statement, was attributed to the compensation achieved by the offender who was guilty in any event. Discharge of guilt in this way, does not appear sufficient to give society the necessary feeling of trust in the legal system. To deduce from that, that compensation is badly suited to being a means of creating confidence in the

legal system in fact would be a false conclusion. The fact that compensation lacks an independent penal character, was also pointed out as being an important factor. The liability for damages which arises beyond the question of punishment as a result of injury or damage caused, lacks quite clearly, the further aspect of sanctioning which differentiates compensation from what was exclusively a civil law approach to indemnification in the sense of restoring the former state of affairs. That however the state right to punish suffers to some extent with the imposition of compensation was only expressed to a lesser extent (4.5%).

Those who regard confidence in the legal system as being disturbed by the concept of compensation are also of the view which is quite significant that only a few people in the population understand compensation to be an appropriate response to punishable behaviour. Those who recognize increased confidence in the legal system brought about by compensation, assessed in contrast (65%) that most people in the population give more recognition to compensation as a suitable response ($chi^2 = 11.707$; $df = 2$; $p = .003$; see Figure 3).

If, as according to the judges and prosecutors questioned, fundamental compatibility of (substantive) criminal law and compensatory settlement exists, it must still be asked as to what extent compensation can fulfill criminal law objectives in particular. Preventing the offender from committing future crimes, namely a special preventive (rehabilitative) effect upon delinquents, it is also one of the aims of punishment. The question was asked as to whether compensation is an effective means of pointing out to the offender that he has committed a wrong, distinction being made between juvenile/young adult and adult delinquents. The answer was affirmative in relation to both adult and juvenile offenders, the latter to a much greater extent. The educational character of compensation in relation to juveniles is noted particularly by judges and prosecutors. According to the opinions of the respondents, the effects of compensation are more rehabilitative than deterrent (rehabilitation by compensation 72%; deterrence by compensation 38%).

Agreement with criminal objectives and confirmation of rehabilitative effects does not mean that according to the views of judges and prosecutors, compensation is to be attributed a punitive character. The emphasis in relation to compensation is regarded by the members of the justice system as being satisfaction of the victim on the whole (61%, N = 112) and also reconciliation (54%, N = 100). Classifications such as characterization as a penalty imposed "to show a lesson" or a part of a penalty which has an independent punitive character, are only expressed occasionally. It has become clear due to the wide-spread agreement of criminal lawyers in

relation to interests in regulations within the criminal proceedings and at least partial fulfillment of punitive objectives, that compensation recognized as helping to bring about satisfaction on the part of the victim, does not have to mean that there is incompatibility in relation to punishment and settlement. The fact that the overwhelming majority of members of the criminal justice system make all questions of the feasability of compensation within the criminal procedure, problematic, corresponds with this (78%, N = 145). Basic questions regarding the compatibility of the criminal law and compensation are raised by about 58% of respondents (N = 109). In view of the clear results in favour of compatibility, details of which are not given here, the problems which are regarded as being fundamental are more concerned with questions of compensation as a substitute for punishment.

4.1.2 Reasons for Non-Application of Forms of Compensation

4.1.2.1 Descriptive Statistical Data Analysis

The practicability in relation to the use and basis of compensation are in fact merely general questions which do not resolve the problems themselves. The attitudes established above do not provide an answer to the question as to what reasons exist for wide-spread reservation in the use of forms of compensation. The judges and prosecutors questioned were therefore presented with a list containing 19 answers which sought to discover the spectrum of possible reasons as to why compensation should not be applied. The reasons were taken in part from opinions derived from literature and partly stemmed from conversations with practitioners and problems which were expressed.

Each reason introduced was evaluated as follows 1 (unimportant), 2 (less important), 3 (important) until 4 (very important) (see Figure 4).

This analysis produced many findings of varied significance. It is noticeable that the reasons mentioned in relation to the fundamental questions concerning compensation can be found in an area which is regarded as less important. This corresponds with the importance of the reasons shown before in relation to feasability and fundamentality. Practical questions however, present the main emphasis in the assessment. The questions related to civil law must be noted in particular and likewise unclear facts and circumstances (in relation to establishing the damage or injury suffered, contributory fault of a third party and questionable consequential damages) are also a matter for prime consideration. The strain feared, caused by examination of the questions arising in relation to compensation, is an expression of this uncertainty. Added to these difficulties in relation to the

law of evidence, is the concern about unreasonable delays in the proceedings. The liquidity which the offender often lacks is also a factor which must be given consideration in the offender's situation.

It is remarkable that according to criminal lawyers, some problems which have until now been regarded as important if not pressing, are now regarded as considerably less important. For example, the question of the fees of defence counsel scarcely plays any role in relation to a civil procedure which is dropped because of compensation, in daily practice.

It is more surprising however, that supervision of work performance is of lesser importance. It has already been expressed on many occasions that especially the difficulties suspected with regard to control of the fulfillment of work commitments means that judges and prosecutors refrain from imposition of compensation. This, in accordance with the opinion of criminal lawyers, is quite an important reason for hindering the use of compensation.

4.1.2.2 Correlational Findings

If we can now make a general statement as to where according to the members of the criminal justice system, the main difficulties concerning the application of forms of compensation, lie, the next step is to evaluate more closely where influence can be exerted upon judicial decision-making. We still do not know why the application of compensation fails in a particular case, although differing grounds illustrate notably different points of view. Finally, other circumstances may contribute to the decision not to impose compensation, adding to the main problems already mentioned. It would be conceivable however, that quite different motives have an effect upon the decision beyond the importance of specific reasons given and this may present a completely different picture. The basis of the following discussion is the attempt to distinguish between groups of judges and prosecutors who apply forms of compensation and those who exibit reserve in this respect. In differentiating between such groups, care was taken to ensure that the statements regarding use and non-use of compensation remained uninfluenced to a considerable extent by the difficulties expressed in general. In other words: What had to be avoided was a respondent expressing himself to be a non-user of forms of compensation because he regards himself as being confronted with the problems referred to in 4.1.2.1. After presenting a list of legal possibilities for the application of compensation, the question was asked as to whether compensation was actually carried out in all cases in which its use was possible in a practical sense. Restricted to cases where compensation is suitable, reasons for refraining from its imposition (beyond

known reasons) were to be filtered out. The respondents could reply to the questions cited as to whether compensation was effected very often, not at all, seldom, on the whole or almost always in the possible cases. If two groups are created showing judges and prosecutors who make less or more use of compensation, the relationship between these groups is 43.1% (N = 78) and 56.9% (N = 103). The fact that this grouping was possible indicates that there are further reasons for restrictive use of compensation other than those already mentioned. These two groups were compared with the following groups to be created:

Four proposals relating to the extention of compensation provisions in relation to a judgement, were presented to the respondents. The respondents were asked to respond to each individual proposal. The range extended from compensation as grounds for quashing a sentence in minor cases, the possibility of suspending a fine on probation on condition of compensation, deferment of a pecuniary penalty until fullfillment of compensation condition imposed and finally compensation as an independent criminal penalty. Two groups were created from the numbers either agreeing or rejecting the possibilities proposed. We can establish that there is a significant relationship between full acceptance of the proposals and the tendency towards the application of compensation in the existing law and likewise between rejection of reform proposals and the tendency towards non-application of compensation (chi^2 = 5.820; df = 1; p = .016, see Figure 5).

We can therefore say that there is a correlation between awareness of the need for reform and the influence of decision-making behavior. These group relations can be illustrated in the following way:

a) Statements critical of reform - Statements as to limited application

Both groups attribute a certain civil law related aspect to compensation (chi^2 = 6.682; df = 2; p = .035). There may also be a strong civil law related educational aspect: The judges and prosecutors who applied compensation were those who had been trained with emphasis upon the civil law (58%; chi^2 = 4.969; df = 1; p = .026; see Figure 6). The criminal lawyers who stemmed from civil law backgrounds viewed matters in relation to compensation in a civil law-oriented way. This may also have an effect in connection with the reform plans discussed.

The fact that reform critics significantly express a clearly negative attitude towards interests in achieving compensation, corresponds with this (chi^2 = 13.824; df = 2; p = .001; see Figure 7). The criminal law's loss of credibility by imposing payment of a fine upon the accused as is occasionally discussed, confirms this (chi^2 = 20.741; df = 3; p = .000; see Figure 8). Beyond these attitudes towards compensation within the criminal proceed-

ings, there are still objective questions in relation to the daily practice of criminal lawyers in relation to compensation which lead to the following conclusions:

The reform critics have indicated that the grounds which dominate in relation to the rare application of the applicable provisions, are the (lack of) clarity in relation to the facts and circumstances concerning questions of consequential damages, the contributory fault of a third party and also the difficulty with which the damage can be ascertained (T-test; p = .01). According to statements made, this correlates with the views of the judges and prosecutors who apply compensation less frequently, that ascertained damages (where civil law problems are therefore obsolete), diminishes doubts about the imposition of compensation conditions (T-test; p = .01).

b) Attitudes receptive towards reform - statement as to more frequent application

If we confront those in favour of reform and the corresponding judges and prosecutors who apply compensation, with the analysis referred to above, assessment of the role, importance and difficulties of compensation are entirely focussed upon modern intentions of compensation related to crime policy.

Judges and prosecutors who are in favour of reform proposals clearly favour the assertion of interests in achieving compensation within the criminal proceedings. The quick settlement of a quarrel by means of compensation is a positive factor which is highly significant (T-test, p = .001). The fact that the victim is not to be directed to civil proceedings if possible corresponds with the correlating views of the judges and prosecutors applying compensation, as being a positive factor of compensation. The conclusion that readiness to help the victim to satisfy his/her needs is more important than awareness of problems in relation to the civil law related question of the compensation decision, stems from the fact that compensation is neither attributed civil law related aspects nor objective questions of everyday practice (such as ascertaining damages, contributory guilt, etc. are mentioned).

Judges in favour of reform do not neglect the offender perspective in relation to compensation: Compensation is generally attributed as having a special preventive effect (T-test; p = .01). One positive factor of compensation which conflicts with doubts regarding its application, is the opportunity which the offender has to recognize the wrong-doing of his actions by fullfilling compensation requirements (p = .001).

The view that the legal provisions regarding compensation are too narrow is given as an important reason for the reserve with which the criminal justice system applies compensation ($p = .01$). These reasons also relate to the range of the provisions but not the varied objective problems however, which arise in everyday legal practice. There are good grounds for saying that there is a wide area of unexploited potential for reception of the modern means of conflict resolution.

4.2 Victim Study

The victim survey carried out by means of observation of the proceedings and subsequent interviews, was predominantly explorative in its function. The aim was less that of presenting a precise quantitative and representative assessment of the position but rather an investigation of varying impressions held by and of the victims arising from practice itself.

The analysis of the questionnaires was on the whole statistically descriptive.

a) Characterization of offence

About a half of the cases observed involved assault including a number of sexual offences (total 23 cases). The remaining cases concerned property offences, offences against honour and also those affecting personal liberty.

b) The victim within the criminal proceedings

Amongst motives for reporting a crime, the function of the criminal proceedings in "showing the offender a lesson" and the expectation that protection can be obtained from the offender by means of the criminal proceedings, occupies first place. This is understandable given that just under a half of victims questioned regarding the questions of their direct feelings about the offence, pointed to fear/danger and anger. Feelings towards the offender are formulated accordingly: the so-called feelings of frustration clearly predominate. Having been asked about their interest in punishment at that time, in the trial, the majority expressed a desire for high to very high penalties being imposed. The time which had elapsed since the crime had been committed and which amounted to a year or more, often had no influence upon the desire for punishment: The respondents were asked to make a note of their feelings directly after the offence. Punishment of the offender (43%) clearly dominated, followed by coping with one's own crisis (26%) and the wish for compensation (17%; see Figure 9).

c) Compensation within the criminal proceedings

Compensation by the offender was offered or had already been effected in only 3 of the 42 cases. Insurance had, however, already been paid in 6 cases. Seven victims were aware of compensation within the criminal proceedings. In almost three quarters of the cases compensation was neither considered nor mentioned, although observation of the proceedings showed that there were facts and circumstances which would allow for compensation in more than 50% of cases. If we assume that insurance payments had been made to victims and compensation effected by the offender in some cases, there still remains around 35% of victims who were not compensated in any way. If one also considers the range of motives in relation to compensation within the applicable criminal law, disappointments are almost inevitable. The vast majority of victims exhibit material interests, followed by an obvious interest in accelerating the proceedings: material satisfaction was related in 55% of responses to compensation and in 45% of responses to acceleration of the proceedings. The fact that there is support for compensation because it is a "reasonable punishment" or because it allows the offender to understand his wrong-doing was voiced by only 16 (10%) victims. 31 victims out of 35 were in favour of compensation and merely 4 rejected it. It is worthy of note that the desire for reconciliation or settlement, well-known in other studies, is less predominant here (see Figure 10).

d) Settlement outwith the criminal proceedings?

The vast majority declared themselves to be prepared to participate in informal settlement meetings (20 out of 33). The significant relationship between readiness to participate in settlement meetings and the desire for more information about the proceedings is remarkable ($chi^2 = 4.89$; $df = 1$; $p = .027$; see Figure 11). Willingness to participate in discussions with the offender, clearly correlates with the wish for greater procedural law involvement.

Assessments obtained from observation of the proceedings present the following picture in relation to readiness to participate in a settlement meeting: The desire for punishment of the offender and feelings of frustration concerning the offender naturally prevailed in the cases of victims who rejected any such meeting. Support for such meetings clearly diminishes where there are feelings of despair in relation to a victim-offender-relationship which has failed and also in general where the victim and offender are acquainted. Quite clearly in such cases, the possibility of a settlement is not attributed any positive outcome. The fact that the victims who had a personal relationship with the offender indicated that they wanted to ensure that by initiating the criminal proceedings, the offender would be effectively given

a "lesson" and reminded of what he had done or alternatively the relationship which was full of conflicts would be finished, corresponds with this. Readiness to participate in such settlement arrangements cannot be interpreted as meaning that a harmonious reconciliation should be achieved with it. According to tendency victims prepared to take part in reconciliation meetings were namely those who had (not yet) been compensated materially although they still wish. In contrast amongst victims who were less willing to attempt a reconciliation were in particular those who had already been compensated (insurance and such things).

5. Summary

There is a distinct relationship between the willingness of parties to actually apply compensation and the reform-oriented view focussed on the instrumental concern that compensation can be used on the one hand as a means of allowing sufficient consideration of victim needs and on the other hand has a special preventive (rehabilitative) effect on the offender. Consideration of legitimate victim needs is important on the part of the judges and prosecutors who apply compensation. There is in addition strong emphasis upon instrumental concerns in relation to the offender and victim perspective.

On the other hand, basic attitudes which are more civil law-orientated influence the opinions of both laws against reform and the judges and prosecutors who make less use of compensation. There is clearly more support for standard responses, to the detriment of the assertion of interests in achieving compensation within the criminal proceedings. Compensation is only considered if objective (ascertained damages, clear facts and circumstances) criteria allow this.

The basic assumption originally made can be regarded in general as having been substantiated: It is questions of feasability which have an adverse influence on a decision to impose compensation. Our theoretical presumption is correct, namely that the judges' personality and attitude have a considerable influence upon the importance of problems arising in relation to the application of compensation. Interest in effecting instrumental concerns can cover difficulties arising in daily practice. The differentiated views set out, present a picture of the "criminal lawyer who is receptive towards reform" and who makes use of compensation despite known difficulties and who is confronted with a certain motivation regarding the offender and victim perspective of compensation and settlement.

Victims associate material interests predominantly with compensation. This does not exclude interests in proceeding by informal means of settlement and the victim does not always have confidence in an award of compensation by the criminal judge. The extent of injury suffered as a result of the offence admittedly exerts considerable influence upon the victim's willingness to take part in such informal reconciliation meetings. The victims appear to be at least somewhat sceptical towards measures which are aimed at aiding the victim and helping him/her to cope with the psychological effects.

Compensation within the criminal proceedings will determine objectives of penal policy in the long run. The specific perspectives of both the victim and also the offender must be considered when approaching the question of reforms which are more orientated towards "victim-related" criminal justice.

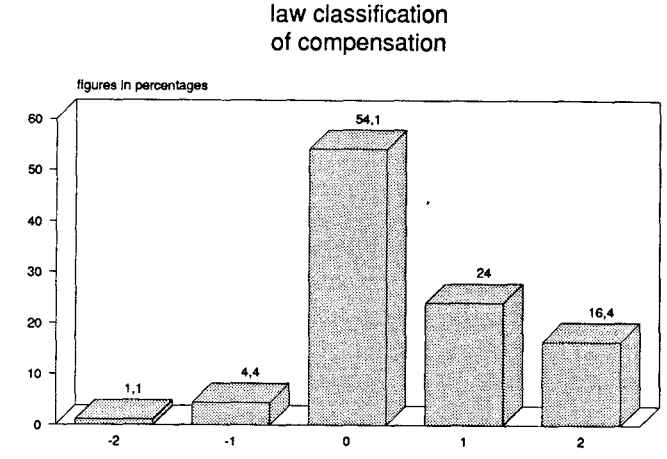
Penal policy strategies are admittedly dependent upon social acceptance of the system of criminal law administration of justice in relation of realization of these strategies. Even if the question of open-mindedness towards compensation conditions within the criminal justice system can no longer be answered on such negative terms as has been assumed until now, the members of the criminal justice system should be encouraged to take more initiatives to compensate for damages and effect a settlement. It must be said of the efforts towards reform, that the decision-makers must be made more responsible normatively and institutionally in relation to consideration of a solution to the practical problems.

Compensation can at least contribute to effecting what is a sensible solution to the conflict, beyond detailed consideration of the conflict arising from the crime.[18] Even if the conflict which is inherent within the crime committed, cannot be completely resolved by the criminal law, the chance always exists that reconciliation and compensation can achieve more satisfaction for the parties within the criminal proceedings.

18 Weigend 1989, p. 343.

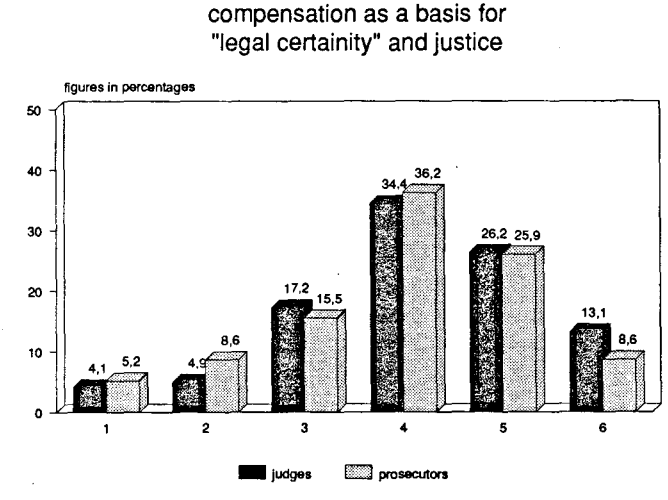
6. Figures

Figure 1:



Rating: -2 (criminal law)
0 (both)
2 (civil law)

Figure 2:



Rating: 1 (rejection) - 6 (agreement)

Figure 3:

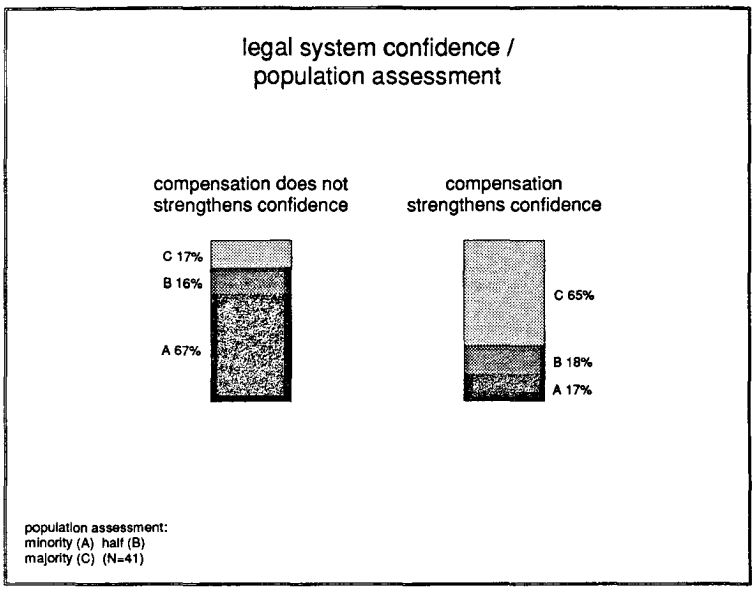


Figure 4:

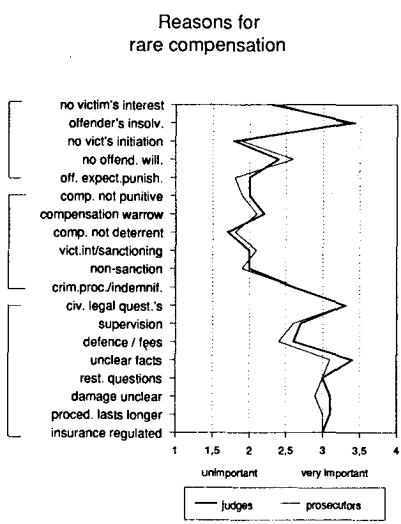
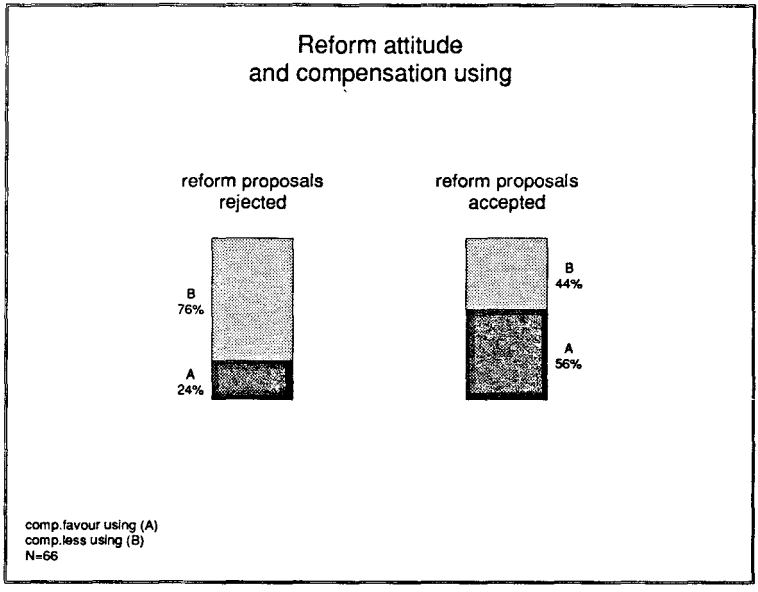


Figure 5:



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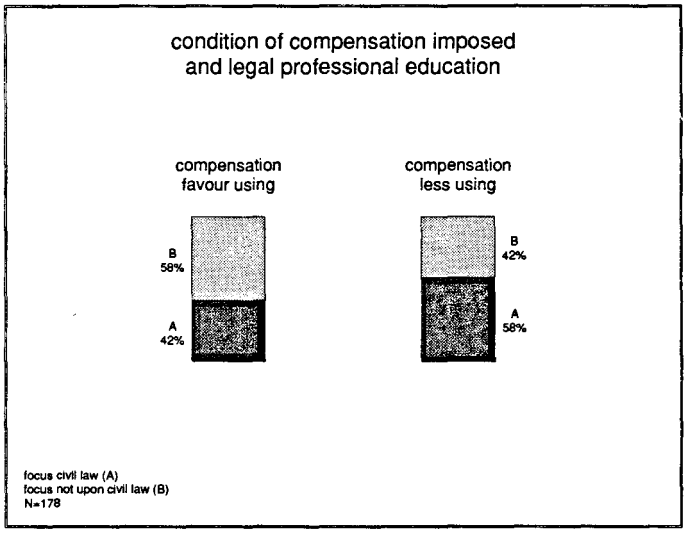


Figure 7:

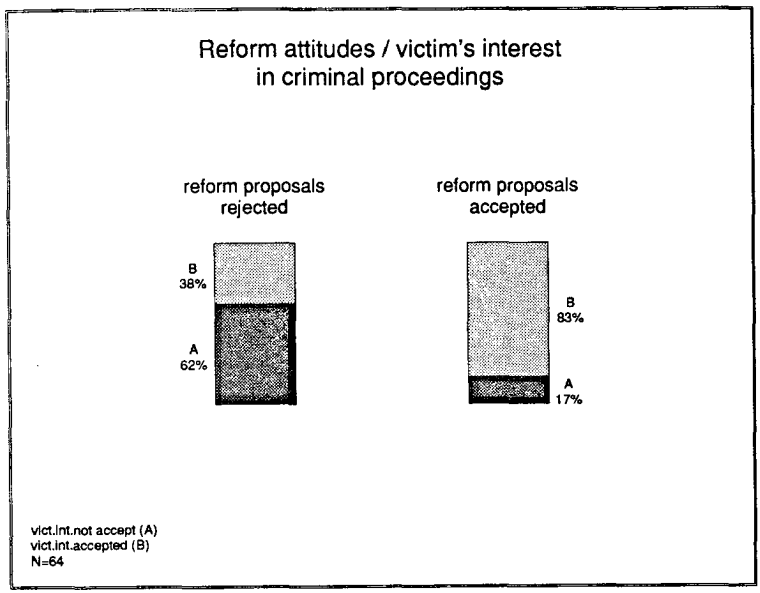
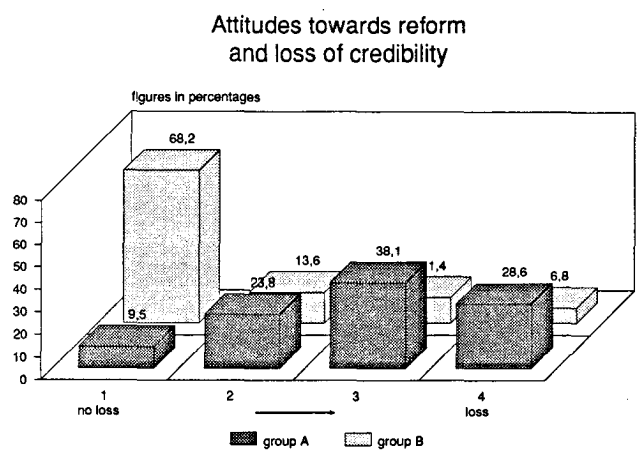


Figure 8:



rejection (group A)
agreement (group B)
N=65

Figure 9:

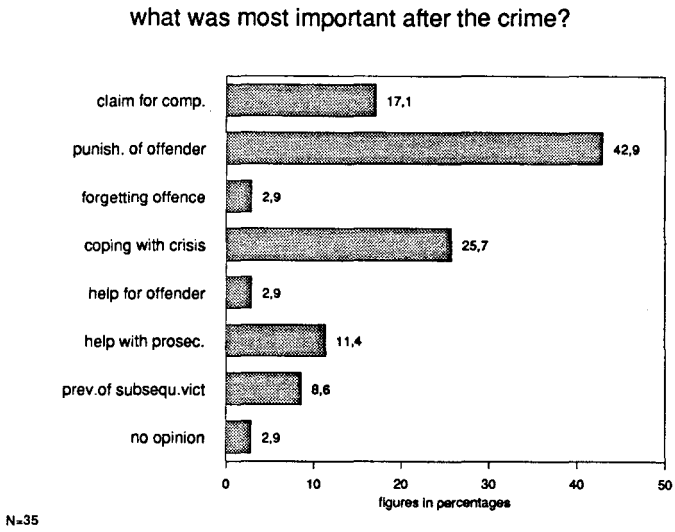


Figure 10:

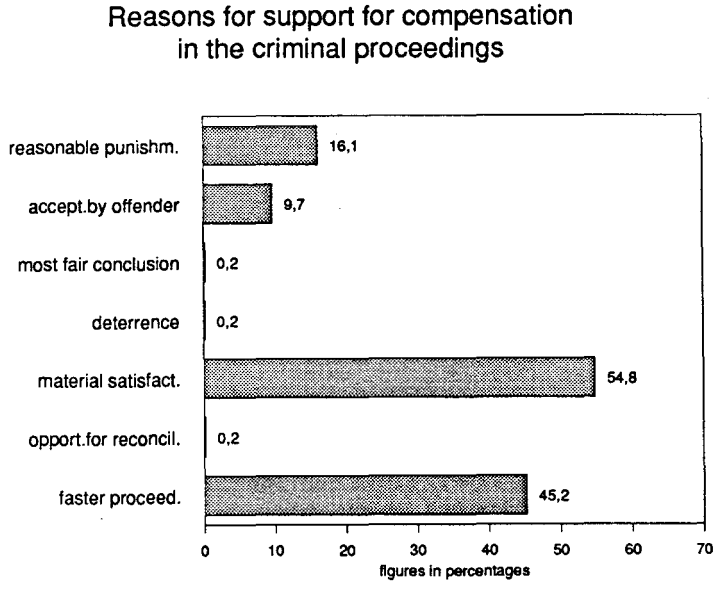
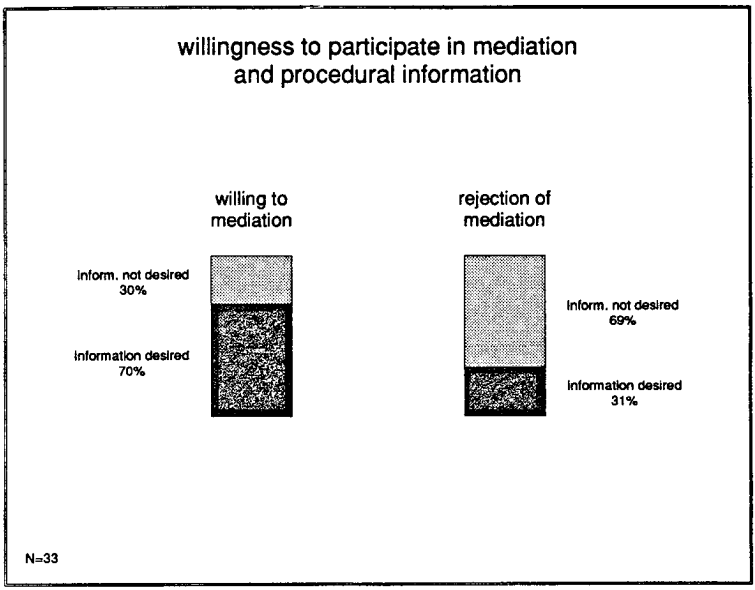


Figure 11:



7. References

Albrecht, H.J. (1990). Kriminologische Perspektiven der Wiedergutmachung. In: A. Eser, G. Kaiser & K. Madlener (Eds.), Neue Wege der Wiedergutmachung im Strafrecht (pp. 43 et seq.). Internationales Kolloquium in Freiburg i.Br.

Blankenburg, E. (1975). Die Gewinnung von Theorien und ihre Überprüfung - zwei Methodologien? In: E. Blankenburg (Ed.), Empirische Rechtssoziologie (pp. 7-21). München.

Bundesministerium der Justiz (Ed). (1988). Schadenswiedergutmachung im Kriminalrecht. Bonn.

Brunner, R. (1986). Jugendgerichtsgesetz. Kommentar. Berlin.

Christie, N. (1977). Conflicts as property. British Journal of Criminology, 17, 1-15.

Frehsee, D. (1987). Schadenswiedergutmachung als Instrument strafrechtlicher Sozialkontrolle. Berlin.

Hanak, G. (1982). Alltagskriminalität und ihre Verarbeitung durch die Strafjustiz. Kriminalsoziologische Bibliographie, 9, (36/37), 117-135.

Kaiser, G. (1988). Kriminologie. Ein Lehrbuch. 2nd Ed. Heidelberg.

Knoll, C. (1978). Empirische Untersuchungen zur jugendrichterlichen Sanktionsauswahl. Heidelberg.

Maher, Docherty, McLean, & Campbell (1988). Compensation orders in the Scottish criminal courts. Scottish Office Edinburgh (Ed.).

Müller, G.O.W. (1982). Plädoyer für eine eigenständige Viktimologie innerhalb einer eigenständigen Kriminologie. In: H.-J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege. Psychologische, kriminologische, strafrechtliche und strafverfahrensrechtliche Aspekte (p. 1 et seq.). Berlin.

Rieß, P. (1984). Die Rechtsstellung des Verletzten im Strafverfahren. Gutachten C für den 55. Deutschen Juristentag. In: Verhandlungen des 55. Deutschen Juristentages. Hamburg, Vol.1, München.

Rosellen, R. (1983). Soziale Kontrolle durch Anzeigeerstattung: Eine empirische Untersuchung zu den situativen Bedingungen, Motiven und Zielen privater Strafanzeigen. In: H.-J. Kerner, H. Kury & K. Sessar (Eds.), Deutsche Forschungen zur Kriminalitätsentstehung und Kriminalitätskontrolle (pp. 798-822). Vol.6/2. Köln.

Seebode, M. (1986). Opfer der Straftat - Stiefkind der Strafrechtspflege. Bemerkungen zur Stellung des Verletzten im Strafrecht de lege lata et ferenda. In: W.T. Haesler (Ed.), Viktimologie (pp. 177-203). Grüsch.

Selig, F. (1988). Opferschutzgesetz - Verbesserung für Geschädigte im Sexualstrafverfahren? Der Strafverteidiger, 8, 498-500.

Sessar, K. (1985). Über das Opfer. In: T. Vogler (Ed.), Festschrift für Hans-Heinrich Jescheck (pp. 1137-1155).

Sessar, K. (1989). Strafbedürfnis und Konfliktregelung - Zur Akzeptanz der Wiedergutmachung im und statt Strafrecht. In: E. Marks & D. Rössner (Eds.), Täter-Opfer-Ausgleich (pp. 42 et seq.). Bonn.

van Dijk, J.J.M. (1985). Viktimologie in Theorie und Praxis. In: H. Janssen & H.-J. Kerner (Eds.), Sozialarbeit und Justiz (p. 84 et seq.).

Voß, M. (1989). Anzeigemotive, Verfahrenserwartungen und die Bereitschaft von Geschädigten zur informellen Konfliktregelung. Monatsschrift für Kriminologie und Strafrechtsreform, 72, (1), 34-51.

Wassermann, R. (1988). In: R. Wassermann (Ed.), Alternativkommentar zur Strafprozeßordung (pp. 1-93), Einl. II, Rn.1. Vol.1. Frankfurt.

Weigend, Th. (1989). Deliktsopfer und Strafverfahren. Freiburg.

Victim Policy and Restitution in The Netherlands

Jo-Anne M. Wemmers and Marielle I. Zeilstra

Contents

1. Introduction

During the last ten years, there has been a growing of interest in the position of the victim of crime. This phenomenon has been world wide as the *U.N. Declaration of Basic Principles of justice for Victims of Crime and Abuse of Power* (1985) illustrates. This international trend also affected the Netherlands. With it, there was increasing concern not only for the emotional plight of the victim of crime but also for the financial losses incurred by his/her victimization. One of the first studies to illuminate the financial problems which victims of crime are often left with, was conducted by Smale in the late 70's. *Smale* found that as much as 80% of the vicitims of serious property and violent crimes remain with financial losses as a result of their victimization (1977). When less serious property and violent crimes are included, only 7% of all victims receive compensation from the offender or from the insurance, prior to the trial and considering all of the possibilities for compensation, between 52% and 70% of the victims, are left with material damages (*Junger & Van Hecke* 1988). Focusing on common property crimes, it is estimated that in over 2,000,000 offenses per year, the victim(s) remains with damages as a result of the crime (*Mulder* 1989).

Increasing evidence for the material losses which the victims of crime are often left with, has spurred the Ministry of Justice into taking measures to increase the incidence of restitution by offenders. In the following, dutch government policy on restitution and the present possibilities for victims wishing to obtain compensation will be discussed. Experimental projects with restitution are also presented. Finally, we will present future plans regarding restitution as a legal sanction.

2. Dutch Policy for the Victims of Crime

The first efforts of the dutch government were to improve the position of the victims of violent and or sexual crimes. In 1987 the durch government extended their policy to include all victims of crime (*Staatscourant* 1987). The policy was based on a number of recommendations made earlier by a governmental committee for judicial policy and victims (*Vaillant* 1985). The task of the committee had been to evaluate the present practices of the offices of the public prosecutors and the police forces with respect to the

position of the victims of crime. The committee chose to give police and public prosecutors a number of duties which would serve to improve the position of the victim while remaining within the present legal framework.

The main recommendations of the committee concerning restitution are:

1. If it appears the the victim's damages could be compensated by the offender, then the police should inform the victim of the possibilities for obtaining restitution within the criminal procedure as well as the possibilities within the civil courts.
2. The police may mediate a settlement between the victim and offender.
3. The police can give the victim the name and address of the offender so that he/she can arrange a settlement with the offender him/herself.
4. The police should include information about the damages suffered by the victim in their case report as well as whether the victim wishes restitution and if a settlement was reached by the police.
5. Once the police report enters the office of the public prosecutor and the case includes one or more victims who have informed the police that they wish restitution, the public prosecutor is requested to bear in mind the victims' wishes when handling the case.

In short, both police and public prosecutors are to try and obtain compensation for the material losses suffered by the victim as a result of the crime. The focus here however, is restitution outside of the criminal trial. The possibility does exist within the present legal system, for victims to be appointed restitution within the context of the criminal trial.

3. Present Possibilities for Restitution and Compensation

Besides the possibility to request compensation through the civil courts, provisions exist in the Netherlands for victims to claim damages from offenders within the criminal law. Presently, there are two possibilities within criminal law for victims to receive restitution by way of the criminal judge: firstly, the victim can file a civil suit for damages within the criminal trial; secondly the judge may impose restitution as a special condition with a (partially) suspended sentence. Acting as a civil party within the criminal trial is however, subject to a number of limitations:

1) a civil suit within the criminal trial cannot exceed the sum of f 1500 (approx. $ 750) (for misdemeanours the limit is f 600,--).
2) when damages exceed these maximum values, remaining damages cannot be requested through civil court once the victim has acted as a civil party in the criminal trial.
3) the value of the damages should be readily proven.
4) the particular offence for which the compensation is requested, must be included in the summons.
5) the victim requesting compensation in this manner must be present at the trial in order for the judge to grant it to him.
6) once granted compensation by the court, it is completely up to the victim to make sure that he gets his money.

The second option, namely imposing compensation of the victim as a special condition with a (partially) suspended sentence, ist not restricted by these limitations making it a more appealing option for victims. There is no limit on the amount of compensation that can be ordered and when the offender does not pay, he is threatened with the suspended sentence. Unlike a civil suit within a criminal trial however, victims cannot request the the public prosecutor demand such a sentence on the offender.

Civil law allows victims to challenge offenders before the civil courts for any damages they may have suffered as a result of their victimization however, civil procedures take a lot of time and money.

Outside of the courtroom, police and public prosecutors can also arrange a settlement between victims and offenders. Informal mediation by police is possible. When the offender has paid restitution, this information should be included in the case report where the public prosecutor handling the case can take this fact into consideration. Public prosecutors can also mediate restitution outside of the criminal trial. By offering the offender a conditional dismissal or transaction on the condition that he reimburse the victim, public prosecutors may provide victims with restitution.

Furthermore, there are some funds in the Netherlands providing state compensation for particular groups of victims. One such fund is 'The Damage Fund for Violent Crimes'. Again, there are a number of drawbacks related to this fund. To begin with, only victims of serious violent crimes with severe bodily injuries can file a claim and individuals who received injuries because they tried to intervene a crime, are not entitled to compensation. A study under the dutch population found that 60% believe the requirement of severe bodily injury to be too strict and 90% think the fund

should be expanded to include those who are injured while trying to help (*Cozijn* 1988). Perhaps the most important finding of this study is that although the fund has been in operation since 1976, the public is generally unaware of its existence (*Cozijn* 1988).

At first glance there appear to be several possibilities for victims to receive compensation and the guidelines have shone new light on their existence. In practice, however, very few victims receive compensation from the offender. Research shows for example, that in only 7% of the cases (with victims) in which a criminal trial is held, compensation is appointed to the victim by way of a civil suit within the criminal trial or as a special condition with a (partially) suspended sentence (*Junger & Van Hecke* 1988). Most police forces and prosecutors, regard the victim as a person with in the first place, emotional problems. His/her financial losses are usally overlooked, despite explicit instructions and intentions to do the contrary (*Groenhuijsen* 1988). These findings suggest that although the guidelines have given police and public prosecutors well defined duties concerning victims, victims are still often eft with financial losses as a result of their victimization.

3.1 The System

With the introduction of the guidelines for police and prosecutors, it was necessary to design an information system in which the wishes of victims could be registered. The guidelines request that police include information about the wishes of the victim in their case report. Once the report reaches the office of the public prosecutor, victims who wish restitution are sent a (standard) letter in which they are notified that their case is with the public prosecutor and are asked if they wish to be kept informed of the developments in their case and if they are interested in restitution. Victims wanting restitution must then send a letter back to the public prosecutor. Their request then enters the administration of the public prosecutor.

In this system police form a crucial function. When ist is not apparent from the police report that the victim wishes restitution, the victim will usually not be sent a letter by the staff of the public prosecutor concerning his/her wish for restitution. Hence the victim's wish for restitution will not be registered and the public prosecutor will not be aware of the victim's material losses and wish for compensation.

Some research has been done concerning the extent to which police adhere to the guidelines. One of the authors was involved in a study in which the victim information system of one regional office of the public prosecutor was examined. The study was conducted one year after the system was in

operation; at this time it had been two years since the guidelines for victims of crime were introduced. In this particular jurisdication, police had agreed to include a letter for the victim in their case reports and the personnel of the public prosecutor would subsequently mail the incoming letters to the victims. Analysis of 102 case reports entering the office of the public prosecutor form local police units and in which victims were involved, revealed that a standard letter for the victim(s) was included in 35% of the cases.

From this information it is however, not possible to determine the number of victims who were denied the right to information. The guidelines require that only those victims who have expressed an interest in information and/or restitution be sent a standard letter from the office of the public prosecutor. Unfortunately, it was usually impossible to derive from the reports whether the victims wished information or not: this occured in only 6 cases. Of these 6 victims, 3 reports included a letter and 3 did not. In fact, in 73% of the cases which included a standard letter for the victim(s), there was no indication in the report that the victim desired information or restitution (*Van Hecke et al.* 1990).

Although these results are confined to one office and in no way give a national picture of the situation, similar findings have been reported in other jurisdictions (*Groenhuijsen* 1988). The information system is not yet operating optimally and many victims may still be missing out on an opportunity to request restitution.

3.2 Victims Requesting Restitution

Those victims who are contacted are however given the opportunity to submit their requestes to the public prosecutor. Of those victims who receive a letter from the public prosecutor, between 20 and 30% reply (see *Van Andel* 1987 and *Van Hecke et al.* 1990). Why victims do not respond to the letter from the public prosecutor is largely unknown. One possible reason is that victims do not understand the judicial procedure and what they can ask of or expect from the public prosecutor (*Van Andel* 1987).

The recent automation of the administrative system used for victim notification in the offices of the public prosecutor provides a summary of the number of requests registered throughout the Netherlands. Data are available for the first four months in which the computerized system (introduced 1-1-1990) operated. In this period, some 4,000 requests form victims were registered by the offices of the public prosecutor. Their

requests concerned information in 58% of the cases and 42% requested restitution. Per year this would mean some 3,000 victims informing public prosecutors that they would like restitution from the offender(s).

The guidelines request that public prosecutors bear in mind the wishes of the victim when handling a case. In the recently mentioned study by *Van Hecke, Wemmers* and *Junger* (1990), public prosecutors were asked if the introduction of the guidelines had changed their behaviour. Specifically we asked if they now more often included victims as a civil party in the trial and if they more often requested conditional sentences with the payment of restitution as the condition. The majority of the public prosecutors who were interviewed claim that neither of these forms of restitution is used more often than prior to introduction of the guidelines.

Other studies also indicate that restitution within the criminal trial is not common. Research shows for example, that in only 7% of the cases (with victims) in which a criminal trial is held, compensation is appointed to the victim by way of a civil suit within the criminal trial or as a special condition with a (partially) suspended sentence (*Junger & Van Hecke* 1988). Similarly, restitution together with a conditional dismissal or transaction does not occur often (*Kommer et al.* 1986). On this background, it is not surprising that, when all of the possiblities for compensation are considered, between 52% and 70% of the victims are left with material damages (*Junger & Van Hecke* 1988).

This does not however mean that restitution is not feasible in many of the cases which come before police and public prosecutors. In the following the findings of experimental projects with restitution by offenders are discussed.

4. Experimental Projects Using Restitution

Efforts haven been made to stimulate restitution and increase our understanding of the process through experimental projects. Two experiments involve mediation by police and one involves the office of the public prosecutor. In the following these experiments and their findings will be discussed.

4.1 Municipal Police

In 1987 *Zeilstra* and *Van Andel* began an experiment with mediation by police. This project took place with the municipal police force of the city

of Leiden. The duration of the experimental period was one year, after which the project was continued and is presently operating within the same police department's victim assistance project. The general idea behind the experiment was to provide victims with actual supprot through relieving them of any material losses resulting from the offence. At the same time, the offender would be confronted with the negative consequences of his act.

Police fulfil an active mediating role while the victim and offender are never directly confronted with one and other. Only simple cases of theft, destruction of property and assault are included in the project, more serious offenses are not considered for mediation. Also, the project does not place a maximum or minimum value on the amount of damages which are eligible for negotiation and partial compensation is permitted provided the victim gives his consent. Only adult offenders are permitted to particitpate in projcect as not to interfere with the municipality's local project with alternative sanctions for minors.

An important point characteristic of the project is the introduction of the police dismissal. When the total damages are less than f 500, the offender is a first-offender and payment is successful, police have the authority to dismiss the case. This means that they do not sehnd the case through to the office of the public prosecutor and instead, simply make a not of it. In similar cases with damages ranging between f 500 and f 1500, police can offer the offender a transaction with restitution. Transactions involve the paying of a sum to police whereby the case is again not sent to the prosecutor. The ability to offer offenders dismissal of the case gives police a strong position in negotiating selltlements with offenders. In accordance with the restrictions for dismissal and transactions, only first-offenders are included in the project.

Finally, although the original plan in Leiden was that police would conduct all mediation, it soon become obvious that this task required too much work from police to be carried out beside their usual duties. This led to only a small number of cases in which restitution was attempted and the succes of the experiment was threatened. To remedy the situation, a part-time position was created within the police unit. A new employee was recruited for 20 hours a week to carry out negotiations between victims and offenders and basically run the project.

The results of this project show that a settlement of damages can be arranged in many cases. In 118 cases (with a known offender) the police tried to arrange compensation for the victim. This resulted in 72 successful settlements (i.e. 61% of all cases wher compensation was attempted). Looking at the success rate for the three different types of offenses included

in the study, settlement was most successful in cases of theft (77%), followed by cases involving the destruction of property (58%) and cases involving assault (44%). Furthermore, cases with damages under f 500 were more successful than cases above f 500; 63% and 55% respectively (*Zeilstra & Van Andel* 1989).

4.2 State Police

The high success rate found in the Leiden experiment stand in contrast with the findings from an experiment with state police and restitution (*Zeistra & Van Andel* 1990). This second experiment followed a different design and subsequently provides new information regarding the conditions under which restitution will be most successful.

The experiment lasted 10 months and four groups of the state police in the district of Alkmaar participated in it.

The procedure followed by police in reaching settlements between victims and offenders was as follows:

Only offenders who have confessed their guilt to police can be approached regarding the payment of compensation to the victim. Severe recidivists are not included in the experiment and in questionable cases the public prosecutor should first be consulted. If restitution appears to be manageable (financially) and the offender is prepared to compensate the damages, the police approach the victim and inform him of their findings. If the victim agrees to restitution and he has demonstrable losses of **at least** f 500, police will attempt to reach a settlement between both parties. It should be mentioned that although police are engaging in a form of mediation, all contact occurs through the police and the victim and offender never meet.

The police aid in determining the amount of compensation the offender will pay the victim, if this will occur all at once or in instalments and the amount of the instalments. Within 5 months however, payment should be completed. Once both parties have voluntarily agreed on the settlement, police send both the victim and the offender a written confirmation of the agreement. Payments pass through the police: the offender deposits the money in a bank account belonging to the police an the police subsequently forward this money to the victim's account.

In total 42 cases were considered by the police for settlement of damages during the experimental peridod. In 4 cases the victim's losses were covered by insurance whereby he had no claim against the offender. Thus, 38 cases

remained in which police tried to arrange the damages (90%). This resulted in 10 successful settlements between victim and offender (i.e. 26% of all cases where a settlement of damage is undertaken). Restitution was unsuccessful in 28 cases (74%).

Contrasting the results of the two experiments, it appears that restitution by police is more likely to be successful when:

- police are able to offer the offender a dismissal or transaction in return for paying compensation to the victim
- the offender has no prior convictions
- in cases of property crime
- when the total damages to be paid do not exceed F. 500,-- ($ 250,--).
- when responsibility for arranging settlements between victims and offenders is specific to one person.

4.3 The Public Prosecutor

The above experiments with restitution took place at the level of the police. The ministerial guidelines state that public prosecutors should also actively consider compensation of the victim. At the present time, one of the authors in involved in an experiment with restitution at the level of the public prosecutor. The experiment is still in operation and consequently it is not possible to provide results at this time. However the unique design of the project legitimizes a short description of the project.

In this experiment a full-time "mediator" is employed by the prosecution to arrange settlements between victims and offenders. When the prosecutor has a case which he thinks suitable for mediation, he hands it to the mediator. There are few restraints on the types of cases that can be included in the project the offence may not be too serious and should fall under the general category of petty crime. The project is restricted to financial restitution and the reimboursement of material damages. As in the above experiments in restitution by police, the victims and offenders are not directly confronted with one another and all communication passes through the mediator. A report is made in each case, regardless of the outcome, and this is included in the case file. Hence, the public prosecutor handling the case is kept informed of whether a settlement was attempted and what the outcome was.

Unfortunately the results of the experiment are not yet complete however, the first impression is positive and the project has been extended for another year.

4.4 Victim Attidudes

Restitution ist not only feasible, it appears to have a positive influence on victims. A survey was conducted among the victims who participated in the project carried out in a municipal police station (*Zeilstra et al.* 1989). 50 victims were included in the survey which was conducted by telephone. Victims attitudes towards the criminal justice system, police, restitution and punishment were included in the survey.

Generally speaking, the reactions of the victims are positive. Approximately 90% of the victims are pleased with the way their first contact with police went. Receiving compensation does however, appear to influence victims' evaluation of their first contact with police: victims who actually received compensation from the offender are significantly more satisfied about their first police contact than victims who have not received compensation (92% and 63% respectively). Receiving compensation also correlates with a higher evaluation of police behaviour in general. Victims who have received compensation gave a high police evaluation mor often than victims who have not received compensation (48% versus 24%). Finally, victim compensation is related to judgements about the offenders punishment. Surprisingly, only 78% of the victims find that the offender has to be punished. Victims' views regarding the appropriate punishment of the offender depends on the received compensation. Victims who have received compensation from the offender, find significantly mor often than victims who have not recived compensation, that punishing the offender is not necessary, (88% and 68% respectively).

5. The Future

Knowing that restitution is feasible and that victims are generally in favour of it, is important information for futur victim policy in the Netherlands. Already the Ministry of Justice has taken steps towards expanding the possibilities for victims to receive restitution. In 1986 a committee was established with the task to consider how the present possibilities for victims to receive restitution as a civil party within the criminal trial could be improved and to deliberate the expansion of available sanctions to include the payment of damages by the offender. A report of their findings was

published in 1988 and in it recommendations are made to release present constraints on the inclusion of victims as a civil party within the criminal trial and to introduce restitution as a penal sanction (*Terwee* 1988).

The most important proposals concerning the civil party are:

1) removal of the quantative limits on the value of damages that can be obtained ba a civil party within the ciminal trial.
2) introducing qualitative restrictions on the nature of the damages that can be obtained within the criminal trial, in order to insure that the focus of the trial will remain on the criminal offense.
3) victims are no longer required to be present at the trial.
4) remaining damages which are not claimed in the criminal trial will be allowed to be pursued in the civil courts.

The committee also suggests the introduction of restitution as a penal sanction. The proposed sanction will work much like a fine and will be subject to the same restrictions (i.e. cannot exceed the maximum fine available for the particular offence and cannot be less than five guilders). The public prosecutor is responsible for monitoring the payment of restitution and when the offender fails to pay, may apply incarceration.

The recommendations of the Committee Terwee will be incorporated in dutch law. One important change however, is that restitution will not be a sanction but a legal measure. The argument is that restitution is the offenders duty and hence does not form a sanction in the proper sense of the word. As a measure, restitution can be improved by itself or together with a traditional sanction such as a fine or community service. The new law is presently in preparation and should be introduced in 1991 (*Ministry of Justice* 1990).

6. Summary and Suggestions

There is a growing awareness that the victims of crime are often left with material damages resulting from their victimization. The dutch government has responded to this problem with the introduction of victim policy in which police and public prosecutors are requested to pay closer attention to any damages suffered by the victim and, if possible to arrange restitution

for the victim. Furthermore, thera are plans to expand the possibilities for victims to obtain restitution through the criminal trial and to introduce the payment of restitution as a legal measure.

However, the communication between victims and public prosecutors regarding the victim's wish for restitution is presently problematic and these problems will continue to interfere with the victim's right to restitution after the new legislation is passed. Police form an important link in the system, and they often fail to include information regarding the damages suffered by the victim and his/her wish for restitution in their case reports. Consequently, many victims are not invited to make their wishes known to the public prosecutor handling their case. Not knowing that the victim has damages which he/she would like to see reimbursed, restitution is not considered by the public prosecutor. Furthermore, when its known that the victim wants restitution, public prosecutors sometimes fail to take this into consideration when handling a case.

Nevertheless, experimental projects with restitution suggest that restitution is both a positive and realistic solution to the financial losses incurred upon victims of crime. Offenders seem both able and willing to reimburse victims. Furthermore, receiving compensation has a positive influence on victims' judgement of the police and the criminal justice system. With further research into to optimal organisation of restitution programs, dutch victims may no longer be left with material losses resulting from their victimization.

7. References

Andel, H.G. van (1987). Evaluatie van de slachtoffercirculaire Vaillant II: een eerste indruk. Den Haag: Wetenschappelijk Onderzoek en Documentatie Centrum.

Cozijn, C. (1988). Schadevergoeding door het schadefonds of door de dader: het oordeel van het slachtoffer (nr. 88). Den Haag: Wetenschappelijk Onderzoek en Documentatie Centrum.

Groenhuijsen, M. (1988). Police performance for victims of crime, some experiments in the Netherlands (blz. 1-10). Tilburg: Katholieke Universiteit Brabant.

Hecke, T van, & Wemmers, J.M., & Junger, M. (1990). Slachtofferzorg bij het openbaar ministerie: Verslag van een verkennend oderzoek bij een groot parket in het westen des lands (K10). Den Haag: Wetenschappelijk Onderzoek en Documentatie Centrum.

Junger, M., & van Hecke, T. (1988). Schadevergoeding binnen het strafrecht; dades en slachtoffers van misdrijven (nr. 82). Den Haag: Wetenschappelijk Onderzoek en Documentatie Centrum.

Kommer, M.M. et al. (1986). De transactie in misdrijfzaken (nr. 68). Den Haag: Wetenschappelijk Onderzoek en Documentatie Centrum.

Ministerie van Justitie (1990). Recht in Beweging. Den Haag: SDU.

Mulder, R.P. (1989). Wie helpt het slachtoffer? Publieke en particuliere voorzieningen voor slachtoffers van misdrijven (Cahier nr. 70). Rijswijk: Sociaal en Cultereel Planbureau.

Smale, G. (1977). Slachtoffers van ernstige vermogens- en geweldsmisdrijven (deel 1). Groningen: Kriminologisch Institut.

Staatscourant (1986). Richtlijnen voor Openbaar Ministerie en Politie: Nieuw beleid voor het omgaan met slachtoffers van misdrijven (nr. 33, feb. 1985). Den Haag.

Staatscourant (1987). Richtlijnen aan ploititie en Openbaar Ministerie ten aanzien van uitbreiding slachtofferbeleid (nr. 64, apr. 1987). Den Haag.

Terwee Commissie wettelijke voorzienigen slachtoffers in het strafproces (1988). Wettelijk voorzieningen slachtoffers in het strafproces: Rapport van de Commissie wettelijke voorzieningen slachtoffers in het strafproces. 's-Gravenhage: SDU uitgeverij.

United Nations (1985). Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (DPI/895-August 1986-10M). Department of Public Information.

Vaillant Werkgroep Justitieel Beleid en Slachtoffer (1985). Eindrapport van de werkgroep Justitieel Beleid an Slachtoffer.

Zeilstra, M.I., & van Andel, H.G. (1990). Informatieverschaffing en schadebemiddeling door de politie bij slachtoffers van misdrijven: evaluatie-onderzoek van een experiment bij de politie in Alkmaar en Eidnhoven (nr. 101). Den Haag: Wetenschappelijk Onderzoek en Documentatie Centrum.

Zeilstra, M.I., & van Andel, H.G. (1989). Evaluatie van het schadebemiddelingsproject bij de Leidse politie. Den Haag: Wetenschappelijk Onderzoek en Documentatie Centrum.

Recent Developments on Restitution and Victim-Offender Reconciliation in the USA and Canada: An Assessment

Elmar Weitekamp

1. Introduction

In the complex structure of today's criminal justice system there are growing signs of concern and consideration for the party who suffers most from criminal activity: the victim. Nearly twenty years ago *Stephen Schafer* (1970a) concluded in his study on restitution and compensation to victims of crime that, "If one looks at the legal systems of different countries, one seeks in vain a country where a victim of crime enjoys a certain expectation of full restitution for his injury" (p. 117). Yet, historically, that was not always the case. Quite unlike the laws found in today's societies, the laws of more primitive communities contained monetary evaluations for most offenses as compensation to the victim, not as punishment of the criminal (*Childres* 1964; *Fry* 1951; *Laster* 1970; *Schafer* 1970a; *Tallack* 1900). As primitive societies became more stable, they became more property-oriented, and restitution and victim compensation became more developed.

A major change occurred in the ninth century under the Frankish Empire where restitution was replaced by a fine, assessed against offenders by a tribunal, which went to the state rather than to the victim (*Gillin* 1935, p. 198). This change marked the beginning of the state's monopoly on criminal punishment; and by the end of the twelfth century the erosion of restitution was complete (*Schafer* 1970a, p. 8). Despite this erosion and the diminished role of the victim, the concept of restitution has remained alive well through the centuries.

Despite the increasing interest in reforming the offender, which was matched by decreasing care for the victim, some legal philosophers and reformers reiterated the importance of restitution and compensation over and over. Among them were Sir Thomas Moore in the seventeenth century and James Wilson at the end of the eighteenth century. They were followed by Cesare Beccaria, Raffaelo Garofalo, Jeremy Bentham, Enrico Ferri, Bonneville de Marsangry, Adolphe Prins and William Tallack, to name but a few.

Between 1878 and 1900 legal reformers discussed various forms of restitution and compensation at prison and penal congresses throughout Europe. At the International Prison Congress in Paris in 1895, the members agreed on a favorable resolution for restitution and compensation and recommended that further study of this topic continue until the next meeting in Brussels in 1900, at which time they failed to agree on a specific

reparation proposal and, according to *Geis* (1977), "effectively managed to bury the subject of victim compensation as a significant agenda topic at international penological gatherings from thence to the present time" (p. 160). Similar argues *Thorvaldson* (1987) in his evaluation about the efforts to reintroduce restitution for victims of crimes in the 1970s and 1980s in that chances were not used and that, once again, the big loosers will be the victims of crime.

Margery Fry (1951) and *Stephen Schafer* (1970a, b, 1974, 1975a, b) were most responsible for the revival of restitution and compensation in the current context. *Fry*, a British reformer, felt that victims were being ignored by the criminal justice process and proposed a formal use of restitution. *Schafer*, who saw restitution as a auxiliary tool for punishment, offered the same proposal.

After considerable difficulty with implementing restitution into the criminal justice process, Fry cooled her advocacy stance in favor of compensation. She realized that restitution could not reach all victims equally and suggested an approach combined with offender restitution whenever possible and state compensation wherever needed (*Geis* 1977, p. 151). Her efforts ultimately led to the creation of state victim compensation programs in the early 1960s in New Zealand and Britain, which served as models for many other countries.

Victim compensation programs today are, in general, state-run programs for victims of violent crimes; and, despite critics of such programs - most notably *Mueller* (1955, 1959, 1965) - the proponents have succeeded in establishing these programs within various scopes and limitaions in the various jurisdictions of the United States and in countries around the world (e.g., *Childres* 1964; *Fry* 1951; *Lamborn* 1975, 1976, 1979; *Schafer* 1970a, b, 1974, 1975a, b; *Wolfgang* 1965, 1970).

2. Restitution: Recent Rationale, Purpose, and Issues

The commonly accepted definition of restitution is payment to victims of crime by an offender to cover losses incurred from the crime. Payment can take the form of money and/or services to the victim or the state. According to *Black's* Law Dictionary (1968), restitution is an "Act of restoring; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification" (p. 1477).

In their literature review on restitution, *Hudson, Galaway,* and *Novack* (1980) found that 85% of the 336 articles, books, and reports they identified had been published since 1970. They further pointed out that the literature prior to 1970 focused mainly on the role of restitution in criminal law and theory, whereas since 1970 the literature has dealt more often with program development, implementation of restitution programs, and research on these programs.

There are several reasons for the rediscovery of restitution as a penal sanction: The first reason was the rediscovery of the victim in the criminal justice system. *Viano* (1978), amongst others, pointed out that restitution has the potential for integrating the victim more fully into the criminal justice system. However, *Galaway* (1977c, p. 82) noted that promoting restitution as a program to help crime victims is popular but questionable. No doubt the victim, in the case where an offender is apprehended and convicted for the crime, can benefit from recompense for the losses suffered; but, as *Edelhertz* (1977) noted, in its historical connotation restitution was designed to benefit the offender and his kin group to avoid more severe sanctions by the victim's kin group.

A second purpose of restitution is to provide less severe and more humane sanctions for the offender. As *Tallack* (1900, p. 7) claimed: "For injuries both to person and property, it enacted restitution, or reparation, in some form, as the chief, and often the whole, element of punishment. And this was wiser in principle, more reformatory in its influence, more deterrent in its tendency, and more economic to the community, than the modern practice, of so often substituting an unremunerative or very costly imprisonment for the ancient mode of treatment." Restitution in its current context is considered to be a viable alternative to incarceration. Not only does the offender in particular benefit from this approach, but society benefits in general. As *Berrini* (1921, p. 42) wrote, "The State spends enormous sums of intensive breeding of dangerousness and criminality of offenders: and thereafter restores to society offenders more fearful than before". Furthermore , the family of an offender, who may actually be innocent, does not suffer from the imprisonment; and the offender, in order to make his/her restitution payments, has to work, which means that taxes will be paid or community service will be delivered, which is beneficial to society but would not be the case if we imprison the offender. Especially today, as correctional administrators struggle with the dilemmas of overcrowded prisons and record incarceration rates, restitutions seems to be a viable way to ease some of today's correctional system problems in the United States. Just to illustrate the dilemma of the correctional crisis in the United States: the prison population increased according to the *U.S. Department of Justice*

(1989a) between 1980 and 1988 by 90.2% and the *American Civil Liberties Union Foundation* (1987) reported that as by March of 1987 48 of the 50 correctional departments of the States were under federal court orders to improve the situation of the prison systems.

Third, a conceptually distinct purpose for restitution is the rehabilitation of the offender. As *Cohen* (1942), *Del Vecchio* (1975), *Eglash* (1958a, b, 1959), *Galaway* and *Hudson* (1975a, b), *Mowrer* (1978), *Newton* (1976a, b), *Schafer* (1970a, b, 1974, 1975a, b), *Spencer* (1975), and *Tallack* (1900) pointed out, restitution might be more rehabilitative than other correctional measures because it is related rationally to the amount of damages done and might be perceived as more just by the offender. Furthermore, the offender is an active participant in the treatment program: i.e., the program puts the burden almost totally on him and much less on society. In addition, it provides the offender with a concrete way to express guilt; and the stigma for the offender who makes restitution is far less than for the offender who is sent to prison.

Christie (1978), who considered conflicts as property, argued that criminal conflicts have become others people's conflicts, primarily the property of lawyers, a process in which the victim is a nonperson in a Kafka play and goes away more frightened than ever before and in even greater need of an explanation of criminals as nonhumans. He advocated, instead, some sort of neighborhood court where the offender would be confronted by his/her victim and neighborhood, since the offender usually wants distance between him/herself and the victim, the neighborhood, and other participants in the conflict.

In *Christie's* concept, the offender would have to take responsibility for his action through some process of mediation with the victim and/or the neighborhood, thus constituting a major part of the concept of rehabilitation. As restitution becomes one of the major program innovations to rise from the ashes of the correction/rehabilitation/treatment area of the past, it offers a healthier environment for treatment without loosing the goals of the approach.

Fourth, restitution also offers a fairly easy-to-administer sanction for the criminal justice system. Restitution programs can be administered at the pre-trial stage in the prosecutor's office and community correctional facilities and as part of probation and parole sentences. *Galaway* (1977a, b) suggested it as part of diversion; and *Cohen* (1942) thought the right place for restitution was the probation department. Regardless of which form one prefers, we know that there are many established organizations in the criminal justice system where restitution programs could be added easily.

Their main goal would be a reduction of either (1) offenders who would not have processed through the complicated and expensive court system or (2) incarcerated offenders who are the most costly for society.

Finally, the last advantage of restitution programs is that society at large would benefit from a more humane approach that would lead to a reduced need for vengeance and retribution. If society sees that the offender takes an active step to undo the harm he has done and that the victim is involved in the criminal justice process, people might develop different attitudes towards offenders. In a way this condition refers to *Christie's* ideal society in which conflicts would be handled by victim-oriented and lay-oriented courts.

These five poosibilities are not mutually exclusive and may not be complete. Those possibilities are, in practice, defined more definitely by specific restitution programs. Over the past fifteen years we have experienced a booming business in the creation and operation of these programs.

3. Restitution Programs in the 1980s

While restitution and victim offender reconciliation sounds very promising in theory, it is plagued by shortcomings in practice: First, despite a tremendous amount of legislative decision with regard to the implementation of restitution and victim offender reconciliation programs, they are applied in a very unsystematic manner at the discretion and initiative of criminal justice administrators who support such programs at very different levels. According to *Waller* (1990) Legislation in the USA and Canada created over the past fifteen years over 2,000 new laws and procedures to improve the situation of victims of crimes and and to implement various forms of restitution and victim offender reconciliation programs. Unfortunately these laws and procedures were passed in a very unsystematic manner, leading to quite different applications depending on the jurisdiction one looks at. Furthermore, according to *Hudson* and *Galaway* (1989) and *Shapiro* (1990), these laws and procedures are mostly applicable at the discretion of the police, the prosecutors office and the courts and not mandatory, thus leading to confusion.

Second, almost all restitution and victim offender reconciliation programs use restitution or mediation only for property offenses and/or first-time offenders. There is no reason why these programs are restricted to this clientele; and one looks in vain to find a theoretical explanation. We were

unable to find in the restitution literature evidence suggesting such limitations, although in the more practice-oriented literature of the 1970s and 1980s these limitations are taken for granted without a reasonable explanation.

Third, having found such a limitation, we are not surprised that restitution and mediation as an alternative to incarceration, although heavily advocated by proponents, is nearly nonexsistent. *Hudson* and *Chesney* (1978) found that restitution is commonly added to probation and parole requirements and, as *Austin* and *Krisberg* (1982) found, expands rather than reduces control over the offender. *Harlands* (1981a, b) reviews of community service statutes revealed that community service is not intended as an alternative to incarceration, although it is claimed as such in the literature.

Fourth, *Hudson* and *Galaway* (1980) reported that restitution programs in Pima County, Arizona, British Columbia, and Minnesota admit only a disproportionately small number of minorities, indicating that programs indeed select very carefully whom they admit into their programs. To no one's surprise, those who are admitted constitute the lowest risk group of offenders; and it is possible that the chosen offender would, in the absence of a restitution or mediation program, just be fined and/or placed on probation. If that were the case, restitution would be an additional burden to the offender.

Fifth, the majority of restitution programs are applied to juveniles more often than to adult offenders. Again, juveniles probably constitute a lower risk group for which the criminal justice officials might be more willing to use this penal sanction. With the exception of the Philadelphia study by *Weitekamp* (1989) we were unable to find a study where restitution or mediation was applied to a group of people who represented a common sample of offenders in a metropolitan area. Quite contrary, participants in restitution and mediation programs seem to be white, middle-class individuals who have committed only property crimes and are often first-time offenders; in many of these cases, the victims are companies.

Sixth, as *Weitekamp* (1989) found there exists evidence that the goal of restitution and mediation proponents, to reintroduce these forms on a grand scale into the criminal justice system, failed. Furthermore, the creation of official restitution and mediation programs might have led to the reduction of restitution orders typically used by judges as part of a probation sentence. According to *Sutherland* and *Cressey* (1960, p. 429) 33% of all the sentences in 1957 in California, that is before the rediscovery of restitution and mediation in the 1970s, contained a restitution order. *Weitekamp* (1989) found in his Philadelphia study a rate of 28.6%. Again, in his study there

was not an official restitution or mediation program implemented and the restitution orders were imposed on the initiative of a single judge. On the other hand reported *Hudson* and *Chesney* (1978, p. 134) far lower rates for various jurisdictions in Minnesota at a time where restitution and mediation programs were at the peak of their popularity. A reason for this discrepancy might be that judges who used restitution orders more often became more cautious because of the increased public attention restitution and mediation received in the 1970s and 1980s. Further clarifications for this discrepancy are needed.

Seventh, another important aspect would be whether restitution and mediation in their various forms have reduced the recidivism rate. *Hudson* and *Chesney* (1978), in a study in Minnesota, reported that 6% of the experimental group (released from prison to a restitution center), versus 24% of the control group (served their prison sentence and were released on parole), were returned to prison because they were convicted of a new crime. However, only 10% of the control group were returned because of technical violations, whereas 40% of the experimental group were returned. In general, 46% of the experimentals versus 34% of the controls were returned to prison, indicating that the experimentals were under much tighter control and that this control was responsible for their higher recidivism rate.

Finally, a major problem of restitution and mediation programs is the planning, implementation and evaluation of such programs. According to *Hudson* and *Galaway* (1989) and *Shapiro* (1990) restitution and mediation programs are often planned and implemented in a very unsystematic manner. In addition these programs are implementated with no concrete goals and are often combined with other criminal justice and welfare programs, thus making evaluations of the effects of restitution and mediation programs impossible. Furthermore, net-widening effects are almost never considered. In order to improve the quality of restitution and mediation programs major changes in the planning and the evaluation of the effects of these programs seem to be unavoidable and necessary.

4. Recent Legislative Developments in the USA and Canada

A variety of standard setting bodies have recommended the use of restitution and mediation in the justice system of Canada and the United States. For example, the *American Bar Association* (1970) approved that restitution has precedence over a fine. The *Annual Chief Justice Earl Warren Conference on Advocacy* (1975), the *U.S. National Advisory Commission on Criminal Justice Standards and Goals* (1973), and the *Law*

Reform Commission of Canada (1974) proposed to use restitution as an alternative to incarceration. More recent legislative developments who recommended and supported the use of restitution are based on the *U.S. Presidential Task Force on Victims of Crime* (1983), the *Canadian Council on Social Development* (1981), the *Canadian Association for the Prevention of Crime* (1982), and the *Canadian Federal-Provincial Task Force on Justice for Victims of Crime* (1983).

The Congress of the U.S.A. passed in 1982 the Victim and Witness Protection Act and in 1984 the Victims of Crime Assistance Act, both calling for compulsory consideration of restitution. The *National Organization for Victim Assistance* reported in 1987 that all fifty states in the U.S. have laws who allow the use of restitution in order to make redress to the victim. In addition is the use of restitution a part of the sentence in 26 states mandatory and in cases where a judge does not impose a restitution order he/she has to give a written explanation why a restitution order was not imposed.

In Canada passed the parliament in 1984 Bill C-19 which gave restitution as a sentencing tool priority over all other sanctions and allowed the use of restitution in cases of violent crimes. In addition passed the Canadian parliament in 1988 Bill C-89 which focussed exclusively on victims of crimes and entailed a whole battery of sections dealing with the use of restitution and mediation. We are unable to discuss the details of these sections here, but they look overall like a major improvement with regard to the use of restitution and victim offender reconciliation, as well as the rights of victims of crime. Unfortunately found *Robinson* (1990) in her evaluation of the effects of Bill C-89 that the new law had almost no effect in practice. The reason for not using restitution and mediation more often is that the new laws created all these options as a possibility and they were not mandatory. It seems therefore that the police, prosecutors, and judges did not pick up the options the laws created and the losers at the end are, once again, the victims of crime.

A tremendous step further went the *Standing Committee on Justice and Solicitor General* in their report and recommendations to the House of Commons in August 1988. The members of the Committee were, according to *Waller* (1990), quite conservative and their recommendation about the role of victims of crimes and the use of restitution and mediation within and outside the Canadian Criminal Code was in general perceived as a big surprise. The committee did not only make very explicit and detailed recommendations about the role of the victim and the use of restitution and mediation, but it recommended them to be mandatory. If these recommen-

dations would be adopted by the Canadian House of Commons, Canada would definitely become one of the leading nations with regard to victims rights and could achieve a more restitutive justice system.

Contrary to Canada, where legislative decisions are made on a national level, legislative efforts in the USA are mainly made on the state or county level. Therefore lacks the USA a unified policy regarding restitution and mediation and the 2,000 new laws and procedures passed over the past fifteen years can be explained by this fact. For example, in a report on restitution to the Governor and the Legislative of New York in 1988, the Committee recommended 48 improvements. An evaluation of that report reveals that the legislation and administration of restitution and mediation in the State of New York is on all levels tormented by little and often tedious problems, thus leading to confusion and ineffectiveness.

To summarize the legislative developments in the USA and Canada shows that recent developments do have problems. In Canada where Bill C-89 was supposed to create a unified crime victim policy and an increased use of restitution and mediation this was not achieved because the new sections of the law were not made mandatory. The Standing Committee on Justice and Solicitor General clearly acknowledged this fact and it has to be seen whether the House of Commons will adopt the far reaching recommendations of the Committee. On the other hand, as the developments in the State of New York - developments in other states and counties of the USA are very similar - show, that they work from the bottom to the top. If a problem occurs in the practical application of restitution and mediation programs, attempts are started to solve them on the legislative level. This procedure appears to be too time consuming and uneconomically. A unified State or Federal policy seems to be more effective and less time consuming. Such an approach, on the other hand, bears the risk that smaller problems will be implemented permanently in the system and the correction of them would be difficult if not impossible.

5. Can Restitution and Mediation Programs serve as an Alternative to Incarceration?

Despite the fact that one of the major arguments of restitution and mediation proponents in the 1970s was that this approach allows a reduction in prison sentences and can serve as an alternative to incarceration, results of such programs show that it seems to be impossible. Although the theoretical groundwork of restitution and victim offender reconciliation

stresses this aspect heavily, evaluations of current programs indicate that restitution and mediation orders can lead to an increase of incarceration rates. The national surveys on victim offender reconciliation programs (*Daniels* 1988; *Gehm* 1990; *Coates* 1990, and *Umbreit* 1986) and on community service programs (*Harland* 1981a, b) clearly show that these programs do not serve as an alternative to incarceration because they serve an offender population charged with minor offenses. *Coates* (1990), however, mentioned the program of the Genese County Sheriff's Department in New York which started to work with violent offenders and their victims. Unfortunately no results are available yet, but this development seems to indicate a trend. While in the 1970s the criminal justice systems enthusiastically planned and implemented restitution and victim offender reconciliation programs led the results of these evaluations led in the early 1980s to disenchantment among restitution proponents. By the end of the 1980s, however, there seems to be the trend to extent restitution and victim offender reconciliation programs to more problematic offender populations and, in general, it seems that criminal justice officials are willing to take a higher risk.

The reason why recent restitution and victim offender reconciliation programs failed to be alternatives to incarceration is caused by the selection criteria for these programs. These selection criteria were developed by criminal justice officials and, once again, there exists no theoretical basis for the limited use of restitution and victim offender reconciliation programs. The average offender, being assigned to a restitution or victim offender reconciliation program, is typically white, belongs to the middle class, is a first time offender, and committed a property offense. Therefore, it seems to be logical that with such an clientele, which does not represent the typical Canadian or American criminal, one cannot speak about restitution and mediation programs as alternatives to incarceration.

In this context one has to ask why current restitution and mediation programs, although praised as alternatives to incarceration, fail to be such an alternative. So far results from program evaluations indicate that this failure results from the implementation process and bureaucratism. *Weitekamp's* (1989) study showed that a single judge, using exsisting facilities of the criminal justice system, was able to use restitution as an alternative to incarceration for serious violent offenders on a large scale. The analysis showed that there was almost no difference between the incarceration and the probation/restitution group, whereas there were substantial differences between them and the probation only group. The judge did not use any selection criteria and the comparatively low recidivism rate of the probation/restitution group indicates that restitution and mediation can

successfully be used as an alternative to incarceration and can be applied to offenders with an extensive criminal history. In addition belonged the majority of the offenders to a minority group, came from a large, metropolitan area, and about half of the offenses committed were serious, violent offenses such as homicide, rape, robbery, and aggravated assault. On the other hand showed the results of carefully planned and implemented restitution and victim offender reconciliation programs that they used very strict selection criteria, thus avoiding to be an alternative to incarceration. In addition increased rather then reduced restitution and mediation programs the high recidivism rates of these programs the prison population through the high rate of technical probation/parole violations.

Evidence shows so far that restitution and victim offender reconciliation programs failed to be an alternative to incarceration. The sound theoretical basis and the practicability of the concept, as shown by our ancestors, failed to have an impact on the implementation of restitution and victim offender reconciliation programs in the 1970s and 1980s. The causes for this failure can be seen in the application of strict selection criteria, the bureaucratism, and the cautious approach criminal justice officials take in the planning of such programs. On the other hand the brave, unbureaucratic, and unconventional use of restitution, as shown by the Philadelphia judge, shows, that restitution can serve as an alternative to incarceration for serious, violent offenders.

6. Do Restitution and Mediation Programs lead to wider, stronger, and different Nets of Social Control?

Austin and *Krisberg* (1982, p. 377) pointed out that the restitution programs have created:

"1. Wider Nets, in the sense that reforms have increased the proportion of persons whose behavior is regulated and controlled by the state.

2. Stronger Nets, in that reforms have augmented the state's capacity to control citizens through an intensification of its powers of intervention.

3. Different Nets, through the transfer of jurisdictional authority from one agency to another, or the creation of new control systems."

It seems to be clear that restitution and mediation programs do increase the nets of social and state control. Only restitution models, such as proposed

by *Del Vecchio, Barnett,* and *Christie,* could reduce such control, but they seem at this point and time to be unrealistic. The critique, that these programs increase control by the state (e.g. *Austin & Krisberg* 1982), seems to be nonsense since this kind of sanctioning always increases the obligations of the offender. A restitution or victim offender reconciliation order always means that the offender is obliged to fulfill some services. The control of this fulfillment leads then necessarily to a wider, stronger, and/or different control by the state. Therefore seems to be the right question, whether this additional burden for the offender is justified? *Weitekamp* (1989) concluded in his study that this additional burden is justified since the advantages of restitution and victim offender reconciliation programs for the society at large far outnumber the disadvantages the offender might suffer from a restitution or victim offender reconciliation order.

The absence of restitution and victim offender reconciliation programs would mean that the victim of a crime would again be excluded from the criminal procedures. We do not deny that restitution orders constitute an additional burden for the offender, but the alternative would be to neglect the victim of a crime. This form of sanctioning, despite being an additional burden for the offender, can also lead to advantages for the offender. The offender might not be sentenced to a prison term or his prison term might be shortened.

A conceptually distinct purpose for restitution and victim offender reconciliation is the rehabilitation of the offender. As *Cohen* (1942), *Del Vecchio* (1975), *Eglash* (1958a, b, 1959), *Galaway* and *Hudson* (1975a, b), *Mowrer* (1978), *Newton* (1976a, b), *Schafer* (1970a, b, 1974, 1975a, b), *Spencer* (1975) and *Tallack* (1900) pointed out, restitution might be more rehabilitative than other correctional measures because it is related rationally to the amount of damages done and might be perceived as more just by the offender. Furthermore, the offender is an active participant in the treatment program; i.e., the program puts the burden almost totally on him and less on society. In addition, it provides the offender with a concrete way to express guilt; and the stigma for the offender who makes restitution is far less than that for an offender who is sent to prison. Finally, leads the use of restitution as a penal sanction to higher degrees of satisfaction among the victims of crimes and in the case of victim offender reconciliation programs it may lead to atonement between the offender and the victim (*Daniels* 1988), thus leading to a better and more content society.

On the other hand restitution programs can indeed lead to stronger control by the state and, as *Hudson* and *Chesney* (1978) showed, to increased prison sentences. They compared a group of offenders who were released to a restitution center after a three month period of incarceration with a group

of offenders who served their term in prison. While 24% of the incarceration group were recidivistic and had to return to prison, only 6% of the restitution group were reincarcerated. However, an additional 40% of the restitution group returned to prison, because of technical violations, compared to 10% of the incarceration group. These results show that parole was revoked for 40% of the restitution compared to the incarceration group. Unfortunately reported *Hudson* und *Chesney* (1978) not which technical violation was responsible for the revocation of parole. It is quite normal that apart from the restitution order additional orders are imposed as a condition of parole. This could be to participate in a vocational training program, to learn to read and write, to participate in a alcohol/drug treatment program, etc.. Therefore one cannot conclude from *Hudson* and *Chesney's* results that the restitution order was responsible for the high failure rate. In addition, the offenders of the restitution group were required to live for the first six months after their release from prison in a restitution center. Since parole for the restitution group was revoked in 50% of the cases within the first six months, one can assume that the tight supervision and control of the parole conditions and the restrictive living circumstances were responsible for the high failure rate and not restitution alone.

Contrary to the results from *Hudson* and *Chesney* found *Weitekamp* (1989) that his restitution group, compared to the incarceration and probation only group in his sample, had the highest revocation rate within the first two years (51%) and in 45.6% was the reason a technical violation. For the probation group were the numbers 30.8% and 20.4% respectively. However, if one compares the total probation time the picture looks quite different. 61.2% of the restitution group finished their probation time successfully, meaning they were not reincarcerated, compared to 57.3% of the probation only group. Further analysis revealed that in the case of the restitution group the main reason for the probation revocation was failure to fulfill the restitution order. In these cases resentenced the judge usually the offenders to another probation term. As the final results show, it seems to take some time for the offenders to realize that they have to fulfill the restitution order and some of them have to be reminded more than once.

One can conclude from the results available that restitution and victim offender reconciliation programs do indeed lead to wider, stronger, and/or different nets of social control. But the question seems to be whether this is justifiable and reasonable or not. If one reacts as strict and swift for slight failures, as it was the case in Minnesota (*Hudson* and *Chesney* 1978), it seems to be questionable. The results of *Weitekamp* (1989) show that one has to be more patient with the offender and give him more time in order to get good results. In this case seems the additional burden to the offender

justifiable and the gain for him, the victim, and society at large seems to far outnumber the disadvantages caused by the wider, stronger and different nets of social control.

7. The Rehabilitative Effect of Restitution and Victim Offender Reconciliation Programs

As mentioned earlier, the proponents of restitution and mediation pointed out the rehabilitative effects of this approach. *Galaway* and *Hudson* (1974) identified five rehabilitative effects: first, that the restitution sanction is rationally and logically related to the damage done; second, that the sanction is clear and explicit, with the offender knowing at all times where he stands in relation to completing the goals; third, restitution requires the offender to be an active participant; fourth, provides a concrete way in which the offender can atone and make amends for his wrongdoing; fifth, the stigma an offender suffers usually from might be avoided by a more positive response from members of the community. *Eglash* (1958a, b, 1959, 1977) demanded already in the 1950s a kind of "creative restitution" which should include five elements: first, an active, effortful role on the part of the offender; second, this activity has socially constructive consequences; third, these consequences are related to the offense; fourth, the relationship between offense and restitution is reparative, restorative; fifth, the reparation may leave the situation better than before the offense was committed. *Eglash* preferred in his approach services rather than monetary payments towards the victim. His demands of the 1950s are refelected best in the victim offender reconciliation programs of the 1970s and 1980s. Even though the offender does usually not meet the victim in the case of a restitution order as part of a probation/parole sentence, almost all the rehabilitative elements and advantages can be applied to this situation as well.Only an active participation of the victim in the process of mediation is not possible as well as it is not possible that the reparation process may leave the situation better than before the offense was committed.

The active participation of the victim in the mediation process is, however, advocated unanimously. *Galaway* (1985) identified five critiques against the participation of victims in the mediation process: first, that the victim should not be able to secure private gain through the criminal process; second, that the involvement of the victim in a process focusing on reparation of the damage will distract from other goals of sentencing; third, that the victims are reluctant to participate; fourth, that the victims are vindictive;

fifth, that the victims will create an additional, unjustifiable burden on the criminal justice officials and that they will become a general nuisance to officials in the system.

The first two objections are general ones. If one prefers a dogmatic, penal approach they are indeed serious objections. On the other hand, if one prefers a restorative approach one can dismiss them easily.

If one wants to answer the question whether the victims are reluctant to participate in the process penal procedures one should evaluate existing victim offender reconciliation programs. Restitution orders as part of probation cannot answer this question adequately. As *Weitekamp* (1989) reported all of the victims in his study agreed with a probation sentence and the restitution order and preferred this sentence compared to a possible prison sentence. However, one has to interpret this result cautiously. The victims were only marginaly included in the criminal procedures and the decision of the judge. They were questioned about the damages suffered from and whether they agreed upon the restitutive sentence. The judge, however, was an absolute authority person, representing the state and having a lot of power. In this situation, combined with the prospect to get reimbursed for the damages suffered from, it seems to be no surprise that 100% of the victims agreed upon a restitutive sentence.

Umbreit (1986) reported in his national evaluation of victim offender reconciliation programs, in which he evaluated 32 programs, that about 60% of the victims agreed to have a meeting with the offender. He reported further on, that in a program in Valparaiso, Indiana in nine out of ten meetings a contract between the victim and the offender was reached. Similar results were obtain by *Coates* and *Gehm* (1988) in a study, in which 28% of the victims and 2% of the offenders refused to meet each other. In 95% of the meetings a contract was agreed upon and 90% of the contracts were fulfilled by the offenders within one year. *Gehm* (1990), on the other hand, found a lower participation rate in a program he evaluated. Of the 535 cases he evaluated, 53% of the victims refused to meet the offender. In 228 cases of the 250 meetings between offender and victim the participants agreed upon a contract and in 203 of the cases the offender fulfilled his obligation.

Even though a considerable number of victims refuses to meet the offender, some victims are willing to take an additional burden upon themselves in order to meet the offender. *Galaway* and *Hudson* (1975a) reported that of 44 victims at the Minnesota restitution center 31 were willing to make a long trip by car to the prison in order to meet the offender

for a mediation session and to negotiate a restitution agreement. In addition, constitutes the mediation in general an additional burden to the victims of crime.

The results indicate a participation rate of about 60% one has, once again, to interpret these results cautiously. All the evaluated programs admitted into the mediation process almost exclusively offenders who were first time offenders, and/or property offenders, were white, and mainly juveniles. The real test would be if victims of violent offenses would agree to participate in victim offender reconciliation programs. Since the emotional trauma for the victims are in cases of violent victimizations much more dramatic, one could expect a much lower participation rate. Unfortunately there exist no victim offender reconciliation programs who deal with these kinds of crimes and it has to be seen in which way would the inclusion of violent offenses be reflected in the participitation rates.

The fourth argument against the participation of the victim: that the victim is too vindictive, cannot be supported by available research results. *Heinz* and *Kerstetter* (1981) reported that the victims, when asked for statements about the sentence length for the offender, did in general not recommend the maximum penalty they could have asked for. *Hudson* and *Galaway* (1974), as well as *Henderson* and *Gitchhoff* (1981) found that the victims, being aware of the fact that their participation would lead to a shortening of the prison stay or even avoid one for the offender, were willing to participate in the mediation process. The most convincing result was obtained by *Coates* (1990), who found that 97% of the victims reported that they would do so if they would be victimized again. Similarly reported *Daniels* (1988) that 81% of the participants of a victim offender reconciliation program, of whom were already 33.3% vicitimized at the time of the questioning another time, supported the notion that restitution and mediation programs should be used as an alternative to incarceration.

The last objection: that the participation of the victims in the criminal procedure would be too burdensome for the criminal justice system can, again, not be supported available evidence. Existing restitution and mediation research shows that the costs of such programs are not unreasonable. Furthermore reported *Hudson, Galaway* and *Novack* (1980) that such programs can be implemented at all stages in the criminal justice system. In addition, showed *Weitekamp* (1989) that the judge in his study used the exsisting structure of the Phialdelphia probation department successfully for restitutive purposes without additional funds.

To sum it up, the five objections towards the participation of the victim in the criminal procedure can be rejected. It has to be seen, however, in

which way the results change when restitution and victim offender reconciliation programs will include in their programs more serious, violent offenders.

Another important aspect of the rehabilitative effect of restitution and victim offender reconciliation programs is in which way they lead to atonement and content among the offender, the victim, and the society at large. Once again, we have to concentrate our interest on the victim offender reconciliation programs, since they can evaluate these effects better than programs in which restition orders are added to probation/parole. A way to evaluate these effects for the latter is to evaluate the extent of which victims make use of victim impact statements. Victim impact statements were in the State of New York introduced in 1985 and *Poklemba* and *Abate* (1988) reported that in 1986 20,654 of 30,331 victims used this possibility to inform the court about their victimization and to have an impact on the criminal procedure. This response rate of 68% is quite encouraging and one can expect that this rate will grow since 1986 was the first year it was used in the State of New York. It has to be pointed out that in the case of victim impact statements the victim does not meet the offender, but he/she gives the court a written report, thus enable prosecutors and judges to evaluate the victimization in a better way and to use these informations to impose restitution orders. It has to be seen in which way other jurisdictions will use victim impact statements and what effects they will have on the criminal justice procedures in the future.

With regard to victim offender reconciliation programs reported *Coates* (1990) that 97% of the victims who participated in such programs in Indiana and Minnesota would participate again in such programs in the case of an additional victimization. The victims were in particular content with the fact that they could meet the offender, thus getting informations about their victimization and to learn about the hidden motives of the offender's action. *Umbreit* (1986) ranked the reason why victims participated in a mediation program: first ranked the wish to get reimbursed for the losses suffered from, followed by the wish to help the offender, followed by the thought to participate in a meaningful way in the criminal justice process, and finally followed by the idea to learn more about the hidden motives of the offenders action and to get rid of their own frustrations. In general agreed the participants of the mediation program in *Umbreits* study that the victim offender reconciliation program provided a more meaningful way to punish the offender compared to the traditional ways of punishment. The victims, who did not participate in the mediation process, ranked their reason for not participating as following: first, the burden placed on them by participation far outweighted the damage suffered from; second, to be too afraid to meet

the offender; third, to have reached already a restitution contract with the offender on a private basis; finally, too much time went by between the time of the commission of the crime and the proposed meeting with the offender.

While the victims in *Umbreit's* study did not feel pressured to participate in the mediation process, reported the majority of the offenders that they felt pressured. Of the offenders reported 83% that they were very pleased with the outcome of the mediation process while 59% of the victims felt that way. Of the victims reported an additional 30% that they were partially pleased with the outcome and 11% reported dissatisfaction. 97% of the victims reported that they would participate again in a mediation program.

Umbreit evaluated in his study the reasons why the victims and offenders felt satisfied and content with the mediation process and how atonement was reached. The victims reported that most important was the opportunity to meet the offender and to learn more about the hidden motives of the offenders action as well as to learn more about the social background of the offender. Second ranged the possibility to get reimbursed for the damages suffered from, followed by the opportunity that this procedure allows the offender to express his guilt and repentance, and, finally, the conscientiousness of the mediator who made a tremendous effort to reach an agreement.

The offenders on the other hand ranked highest the possibility to meet the victim and the willingness of the victims to listen to them. This was followed by the fact that they could avoid a short imprisonment period and in some cases to get no criminal record. At the end ranked that they had the option to negotiate a realistic time frame to make the restitution payments and to make things right. Of the victims, asked whether the sentences the offender received were adequate, reported 70% they were, wereas 24% of the victims thought the sentences were to low and 5% reported them to be too high.

Daniels (1988) compared a group of 21 persons who participated in a victim offender reconciliation program with 25 persons who went through the normal criminal justice procedure. Although the sample is quite small, the results are very informative. The mean age of the mediation participants was 41,4 years compared to 50,8 years for the non-participants. At the time of the questioning were already again victimized about 33% of both groups. 76.1% of the persons who participated in the victim offender reconciliation program reported that they were satisfied and content with the outcome while only 16.7% of the persons who went through the normal criminal justice procedure reported this. In addition reported 44.5% of the partici-

pants in the mediation program that the meeting with the offender enabled them to get a better understanding of their victimization whereas only 8.3% of the control group reported this effect.

However, one criteria of victim offender reconciliation programs, atonement, although heavily advocated by proponents of these programs, seems to be the missing case. We could not find concrete evidence that victim offender reconciliation programs lead to atonement between the victim and the offender and that the situation might be better after the crime than it was before. One can find once in a while described cases where this was the case but they seem to be the exception rather than the norm. The cases described by *Coates* and *Gehm* (1985), for example, give the impression that the victims were mainly interested in getting reimbursed for the losses suffered from and not to achieve atonement with the offenders. Further research seems to be necessary to find out more about this aspect of victim offender reconciliation programs.

It seems to be clear that the victim and the offender accomplish in victim offender reconciliation programs a higher degree of content and satisfaction compared to the traditional criminal justice procedures. Therefore one can conclude that this approach is more rehabilitative than traditional sanctioning. More content victims on the one hand, who understand the causes of their victimization better and know more about their victimizer, and more content offenders on the other hand, lead in the end to a more content society. But one has to caution here again, since victim offender reconciliation programs so far focus typically on juvenile offenders, first time offenders, and/or property offenders. The real test for these programs would be to include serious, violent offenders who belong to minority groups and come from large metropolitan areas.

8. Recidivism Rates for Offenders who Participated in Restitution and Victim Offender Reconciliation Programs

If one wants to find out about the recidivism rates for participants of victim offender reconciliation programs one looks almost in vain for such informations. Program evaluations seem to be very interested in the degree of content and satisfaction the victim and the offender achieve; are interested if victims get victimized again; and want to know whether the victims would participate in such programs again. On the other hand they are not interested at all whether the offenders, who participated in such programs, commit crimes again and what are the recidivism rates for such programs. This fact

seems to be a fatal flaw since the success of any intervention and treatment program is usually evaluated by the recidivism rate. Especially if one demands to extent these programs to more serious and violent offenders, e.g. *Umbreit* (1988), it seems to be necessary to base this on the success - here meaning a low recidivism rate - of existing programs.

On the other hand we do have some results with regard to recidivism for restitution programs as part of probation and parole. One of the best results was reported by *Challeen* and *Heinlein* (1978) for the Win-Onus program. Their evaluation after a four year period revealed that only 2.7% of the over 800 persons who participated in the programs committed another crime. Quite contrary reported *Hudson* and *Chesney* (1978) that 46% of the clients in the Minnesota restitution center were reincarcerated within a two years period, although a substantial number of the offenders was reincarcerated for technical parole violations. *Petersilia* (1987) reported for a community service program in New York that 50% of the clients recidivated within six months after their conviction. *Weitekamp* (1989) found that 24.5% of the restitution/probation group were reincarcerated during their probation time. Compared to this figure reported the *U.S. Department of Justice* (1989b) that within three years after release from a prison sentence 41.4% of these persons will be in prison again. Needless to say that the recidivism rate accomplished by the Philadelphia restitution group should be preferred, especially if one takes into consideration the current crisis of the American correctional crisis.

These results of these few restitution programs are slim but, nevertheless, encouraging. Future evaluations of restitution and victim offender reconciliation programs should focus on the recidivism aspect heavily since the "success" in this respect will be most important for the future of these programs. We do not deny that the degree of content and the satisfaction victims and offenders gain from these programs is important, but if these programs want to achieve to be considered as viable alternatives to incarceration and to traditional criminal procedures, as demanded by proponents of this approach, they have to pay attention to the recidivism rates.

9. Future Directions for Restitution and Victim Offender Reconciliation Programs

As mentioned earlier, concluded *Hudson* and *Galaway* (1989), as well as *Shapiro* (1990) in their evaluations of restitution and victim offender reconciliation programs and research that these programs are: poorly planned; no

goals are set; restitution orders are mixed with all kinds of other therapeutic needs and goals, thus making it impossible to measure the real restitutive effect of these programs; and, finally, not to take the creation of wider, stronger and different nets into account. In addition, we pointed out that the recidivism rate is almost completely ignored.

Our overview of recent developments on restitution and victim offender reconciliation programs in the USA and Canada is more confusing and brings up problems rather than clarifying them. Therefore we will try to show in which direction restitution and victim offender reconciliation programs could go and what needs to be done in order to do so. In addition, we will try to develop and show strategies how evaluation research of these programs can be improved.

First, one has to clarify which level in the criminal justice system is best for the implementation of restitution and victim offender reconciliation programs; what kind of clientele should they serve; if selection criteria are necessary; and what are the goals of these programs.

In order to decide which level within the criminal justice system is best for a program one has to consider the legal options. In Canada thought the legislation by passing Bill C-89 to create the legal prerequisites for a state wide restitutive approach whenever possible. However, as *Robinson* (1990) pointed out a first look at the effect of Bill C-89 revealed that prosecutors and judges did not use restitution and mediation more often since the sections of Bill C-89 were not mandatory. In addition showed the recommendations of the *Canadian Standing Committee on Justice and Solicitor General* (1988) that the restorative approach in the criminal procedures can be taken a big step further as it was done in Bill C-89. In the USA exists no federal legislation regulating the use of restitution and mediation, however, there exist thousands of laws and criminal procedures on the state or county level which allow restitutive sanctions on various levels in the criminal justice system. Therefore one can safely conclude that the legal prerequisites for restitution and victim offender reconciliation, even though not optimal and far away from the demands of *Christie, Del Vecchio,* and *Barnett,* are in place and sufficient for the time being in the USA and Canada.

If one evaluates the levels in the criminal justice system of the USA and Canada on which restitution and mediation can be applied one finds the first one at the prosecutors level. In programs, operating on this level, can restitution and mediation orders within the framework of plea bargaining be negotiated which lead to the dismissal of the case. In addition can the offender on this level be encouraged by the prosecutor to participate in a

restitution or victim offender reconciliation program which could be runned by the state, county or a private organization. A successful participation would, again, lead to the dismissal of the case.

Restitution or mediation orders can be made by the judge within the framework of a probation sentence. Although judges can incarcerate an offender and, in addition, can order that restitution has to be made, little is known whether offenders do make their restitution payment after they serve their jail or prison sentence. Finally, the offender can be released on parole and transferred to a restitution center, operated either by the state, county or a private organization, and after a successful stay be released into freedom.

If one wants to implement a restitution or mediation program, one has to decide which level would serve best the interest of the planned program and whether this program should be runned by the state, county or a private organization. The most important factor in this decision seems to be the clientele the program is supposed to serve. Restitution and mediation programs at the prosecutors level, which typically lead to the dismissal of a case should serve the group of less severe criminals. We think this group should enclose first time and property offenders, a clientele, which at the current state of restitution and mediation programs is almost exclusively benefitting from such programs. More serious offenders with an extensive criminal history and/or violent offenders should benefit from restitution and victim offender reconciliation programs within the framework of probation and in extreme cases within the framework of parole.

Once again, the currently in the USA and Canada applied selection criteria, used for the screening for eligible restitution and mediation candidates, are applied without any theoretical basis and they are responsible for the limited application of restitution and victim offender reconciliation. Because of these limitations one can consider the results of restitution and mediation programs at best as trivial and in general as disappointing. The results of *Weitekamp* (1989) indicate that a tremendous extention of eligible candidates for restitution and mediation programs should be possible.

If one considers the selection criteria used in the Minnesota restitution center, one finds that the eligible offenders had to be sentenced for a property offense, did not commit a violent offense within the past five years, and did not carry a weapon at the time of the commission of the last crime. As *Hudson* and *Chesney* (1978) reported was the recidivism rate for this group 46%. However, only 6% were reincarcerated because they committed and were sentenced for a new crime. 40% of the reincarcerated offenders were so called "in program failures", meaning they would not have been

reincarcerated if they would not have participated in the restitution program. These results show that the goal of restitution, namely to serve as an alternative to incarceration and/or to traditional criminal justice procedures, was turned upside down. We think that a clientele with a criminal history like the persons in the Minnesota program could be served best by restitution and mediation programs on the prosecutors level in a far less formal way and thus avoid the high rate of "in program failures".

If one compares the results of *Hudson* and *Chesney* (1978) and *Weitekamp* (1989) one of the major differences, among others, is that the clients in Philadelphia, even though having a high probation revocation rate because they did not make their restitution payments, got plenty of chances to do so without sending them to prison or jail. Time and patience seem to be the most decisive factors for the different results obtained in Minnesota and Philadelphia. In Minnesota was in 50% of the cases parole revoked within six months while in Philadelphia in 51% of the cases probation was revoked within two years. However, only 38.8% of the Philadelphia cases were reincarcerated within their total probation period. If one compares the clientele of Minnesota and Philadelphia the difference becomes even more evident. The Philadelphia clientele had an extensive criminal history (mean number of prior arrests = 3.72, mean number of prior convictions = 1.67, mean number of prior incarceration = 0.41) and were charged with serious, often violent crimes, came from a large metropolitan area and the vast majority of the offenders belonged to a minority group. Nevertheless accomplished this group a far lower recidivism rate as the Minnesota group. Therefore it seems to be legitimate to suggest that programs like the Minnesota one should be abandoned, since they serve a clientele which does not commit serious crimes, and the high "in program failure rate" shows that the traditional criminal procedures work even better than the restitution program in Minnesota. In which way restitution centers like the one in Minnesota could serve a different, more serious offender population cannot be said here and would be speculative.

Besides the above mentioned problems is restitution and victim offender reconciliation programs research plagued by methodological problems. Research on these programs reveals more problems rather than solving them. Besides evaluating vague formulated goals do researchers focus on superficial success criteria and neglect the important issues. One reasonable explanation for this might be the fact that in the USA and Canada funding agencies as well as politicians demand shortly after the implementation of restitution and mediation programs informations about the success of these programs. Unfortunately does this not allow to develop a elaborate evaluation design because this would take time, and time is something which

newly started programs do not have. The negative effect of this procedure is that these programs report success which is not justified since the informations about the success are at best superficial and typically misleading. This shortsightedness of the American and Canadian criminal justice officials leads to the above mentioned limitations and shortcomings of existing restitution and victim offender reconciliation programs.

One negative example for this shortsighted, success oriented approach is the Economic Crime Unit in Philadelphia (*Maiolino, O'Brian & Fitzpatrick* (1990): The unit was started in the prosecutors office of Philadelphia in 1974 and the goal was to use restitution as an alternative to incarceration for white collar crime and consumer and government fraud cases. Basically there are no objections against this, but if one looks at the offenses the prosecutors office is following, one finds that they almost exclusively prosecute welfare fraud cases. In addition to this limitation the success of this unit is measured by the amount of dollars of welfare fraud discovered and the amout retrieved by the city of Philadelphia. *Maiolino, O'Brian and Fitzpatrick* (1990) reported that since 1981 3,330 criminal complaints charging welfare fraud have been filed charging the theft of $ 19,863,306. They further reported that the city of Philadelphia, while having retrieved in the early 1980s $ 300,000 per year, is expecting to retrieve $ 1,650,000 in 1988. The authors celebrate these increases in the number of cases prosecuted and the increasing dollar value as great success and come to the conclusion that their approach makes the victim whole again and holds the offender accountable.

First, we think it is questionable whether this program can be considered as a restitution program in the true sense. It takes some elements of a restitutive approach, but *Maiolino, O'Brian* and *Fitzpatrick* do not report at all how they evaluate the financial capabilities of the offenders and all they seem to care about seems to be money, money for the city of Philadelphia. In addition, if one considers that persons on welfare are in very bad shape in the USA and that the commission of welfare fraud is almost a necessity to survive one can become cynical. One wonders whether the offenders who make the "restitution payments" commit other crimes in order to fulfill their obligations, but the criminal history and the recidivism rate is of no interest to *Maiolino, O'Brian* and *Fitzpatrick*. To base the "success" solely on the amount of money seems to be extraordinary shortsighted and misleading. The other side of the coin is that the program is among criminal justice officials and officials of the city of Philadelphia quite popular and they support the efforts and needs of the Economic Crime Unit as much as they can.

In order to improve future programs of restitution and victim offender reconciliation programs one should consider the following recommendations:

1. To reduce or abandon the rigid selection criteria if one is really interested to use restitution and mediation as a real alternative to the traditional criminal justice procedures and incarceration.
2. In order to determine the success of these programs one should control the recidivism rate of the participating offenders. To give the offenders time and to be patient with them seem to be decisive factors to run successful restitution and mediation programs.
3. It is important to control whether the offenders do make their restitution payments, but in order to evaluate the success of a program the noncommission of new crimes should be more important.
4. It would helpful to evaluate in cases where the victim and the offender have an ongoing relationship if through mediation atonement between the parties can be achieved.
5. In cases where besides the restitution or mediation order other orders are imposed should the evaluation try to determine which effect had the highest effect for the success or failure of the participant. Discriminant analysis and/or logistic regression models seem to be the appropriate tools to do so.
6. Experimental or quasi experimental studies seem to be necessary to determine whether restitution or mediation programs can be considered as real alternatives to incarceration.
7. If one insists that restitution and victim offender reconciliation programs have to be cost effective, one has to take the recidivism rates into account in order to determine whether these programs are cheaper as traditional procedures in the criminal justice system.

10. Conclusions

So far it seems that restitution and victim offender reconciliation programs in the USA and Canada have not achieved what proponents had hoped for. The 1970s and early 1980s were shaped by enthusiasm of restitution and mediation proponents and the implementation of such programs. However, in the 1980s disenchantement about the achievement set in because the theoretical soundness of restitution and mediation could not be trans-

ferred into practical programs. The end of the 1980s is characterized by the hope to turn the wheel around and to extent restitution and victim offender reconciliation programs to more problematic offender populations. It has to be seen if this development takes place and whether it will succeed.

The legislative developments in the USA and Canada with regard to restitution and victim offender reconciliation programs were manifold but, unfortunately, unsystematic. While Canada passed with Bill C-89 a unified law which promotes the use of restitution and mediation on a large scale, first results indicate that it failed since the procedures were not made mandatory and prosecutors and judges ignore the option this bill offers. In the USA passed legislation numerous laws and procedures to promote restitution and mediation on the state or local level, but in an unsystematic manner, thus leading to a great variety and confusion.

The results of restitution and mediation programs reveal that too rigid selection criteria were used to determine whether an offender was eligible to participate in these programs. Therefore is the typical offender, who participates in these programs, a first time offender, committed a property offense, belongs to the middle class, does not belong to a minority group, is often a juvenile, and does not come from a large, metropolitan area. Therefore it is no surprise that restitution and mediation programs, although praised to be an ideal alternative to incarceration, failed to be such an alternative. To make things worse, some existing restitution and mediation programs increased instead of decreased the prison population.

Furtheron were program evaluations poorly conducted and use superficial criteria to determine whether a program was a success or not. The most neglected aspect is the recidivism rate of offenders who participated in restitution and mediation programs.

To sum it up, the results of existing restitution and victim offender reconciliation programs in the USA and Canada failed to be a real alternative to traditional criminal procedures and incarceration. It has to be seen whether the wheel can be turned around. Otherwise the victim of a crime will be, once again, according to *Thorvaldson* (1987) the big loser.

11. References

American Bar Association (1970). Standards of sentencing alternatives and procedures. New York: American Bar Association.

American Civil Liberties Union Foundation (1987). Status report: The courts and prisons. The National Prison Project. Washington, DC: American Civil Liberties Union Foundation.

Annual Chief Justice Earl Warren Conference on Advocacy in the United States (1972). A program for prison reform. Cambridge: Heath.

Austin, J., & Krisberg, B. (1982). The unmet promise of alternatives to incarceration. Crime and Delinquency, 28, 374-409.

Barnett, R. (1980). The justice of restitution. American Journal of Jurisprudence, 25, 117-132.

Berrini, B. (1921). La justizia. Problemi hiudiziari italiani. N.p.

Black, H.C. (1968). Black's law dictionary. St. Paul: West Publishing.

Canadian Association for the Prevention of Crime (1982). Toward a new criminal law for Canada. Ottawa: Canadian Government Publishing Center.

Canadian Council on Social Development (1981). Rights and services of crime victims. Ottawa: Canadian Government Publishing Center.

Canadian Federal/Provincial Task Force on Justice for Victims of Crime (1983). Report. Ottawa: Canadian Government Publishing Center.

Challeen, D.A., & Heinlein, J.H. (1978). The Win-Onus Restitution Program. In: B. Galaway & J. Hudson (Eds.), Offender restitution in theory and action (pp. 151-160). Lexington: DC Heath and Company.

Childres, R. (1964). Compensation for criminally inflicted personal injury. New York University Law Review, 39, 444-471.

Christie, N. (1978). Conflicts as property. British Journal of Criminology, 17, 1-15.

Coates, R.B. (1990). Victim offender reconciliation programs in North America. In: B. Galaway & J. Hudson (Eds.), Criminal justice, restitution, and reconciliation (pp. 245-265). Mounsey: Criminal Justice Press.

Coates, R.B., & Gehm, J. (1985). Victim meets offender: An evaluation of victim offender reconciliation programs. Valparaiso: PACT Institute of Justice.

Coates, R.B., & Gehm, J. (1988). An empirical assessment. In: M. Wright & B. Galaway (Eds.), Mediation and criminal justice: Victims, offenders, and communities (pp. 253-265). London: Sage.

Cohen, I.E. (1942). The integration of restitution in the probation service. Journal of Criminal Law, Criminology, and Police Science, 33, 315-321.

Daniels, R.A. (1988). Making things right: An evaluation of a victim restitution program. Paper presented at the ASC Meeting. Chicago.

Del Vecchio, G. (1975). The problem of penal justice. In: J. Hudson & B. Galaway (Eds.), Considering the victim (pp. 85-101). Springfield: Charles C. Thomas.

Edelhertz, H. (1977). Legal and operational issues in the implementation of restitution within the Criminal Justice System. In: J. Hudson & B. Galaway (Eds.), Restitution in criminal justice (pp. 63-76). Lexington: DC Health Company.

Eglash, A. (1958a). Creative restitution: A broader meaning for an old term. Journal of Criminal Law, Criminology, and Police Science, 48, 619-622.

Eglash, A. (1958b). Creative restitution: Some suggestions for prison rehabilitation programs. American Journal of Corrections, 226-232.

Eglash, A. (1959). Creative restitution: Its roots in psychology, religion, and law. British Journal of Delinquency, 10, 114-119.

Eglash, A. (1977). Beyond Restitution: Creative Restitution. In: J. Hudson & B. Galaway (Eds.), Restitution in criminal justice (pp. 91-100). Lexington: DC Heath and Company.

Fry, M. (1951). Arms of the law. London: Victor Gollancz.

Galaway, B. (1977a). Is restitution practical? Federal Probation, 41, 3-8.

Galaway, B. (1977b). Restitution as an integrative punishment. In: R. Barnett & J. Hagel (Eds.), Assessing the criminal (pp. 331-348). Cambridge: Ballinger.

Galaway, B. (1977c). Toward the rational development of restitution programming. In: J. Hudson & B. Galaway (Eds.), Restitution in criminal justice (pp. 77-90). Lexington: DC Heath and Company.

Galaway, B. (1985). Victim-Participation in the penal corrective process. Victimology, 10, 617-630.

Galaway, B., & Hudson, J. (1974). Using restitution in the rehabilitation of offenders. International Social Work, 16, 44-50.

Galaway, B., & Hudson, J. (1975a). Issues in the correctional implementation of restitution to victims of crime. In: J. Hudson & B. Galaway (Eds.), Considering the victim (pp. 351-360). Springfield: Charles C. Thomas.

Galaway, B., & Hudson J. (1975b). Restitution and Rehabilitation: some central issues. In: J. Hudson & B. Galaway (Eds.), Considering the victim (pp. 255-264). Springfield: Charles C. Thomas.

Gehm, J. (1990). Mediated victim offender restitution agreements: An exploratory analysis of factors related to victim participation. In: B. Galaway & J. Hudson (Eds.), Criminal justice, restitution, and reconciliation (pp. 348-360). Mounsey: Criminal Justice Press.

Gehm, J., & Coates, R.B. (1986). The Indiana Community Corrections Act: Process, practice, and implications. Valparaiso: PACT Institute of Justice.

Geis, G. (1977). Restitution by criminal offenders: A summary and overview. In: J. Hudson & B. Galaway (Eds.), Restitution in criminal justice (pp. 147-164). Lexington: DC Heath Company.

Gillin, J.L. (1935). Criminology and penology. New York: Appleton-Century.

Hagan, J. (1983). Victims before the law: The organizational dominion of the criminal law. Toronto: Butterworths.

Harland, A.T. (1981a). Court-Ordered community service in criminal law: The continuing tyranny of benevolence. Buffalo Law Review, 29, 425-486.

Harland, A.T. (1981b). Restitution to victims of personal and household crimes. U.S. Department of Justice. Washington, DC: Government Printing Office.

Heinz, A., & Kerstetter, W.A. (1981). Pretrial settlement conference: Evaluation of a reform in plea bargaining. In: B. Galaway & J. Hudson (Eds.), Perspectives on crime victims (pp. 266-276). St. Louis: Mosby.

Henderson, J., & Gitchhoff, T. (1981). Victims' perceptions of alternatives to incarceration. Paper presented at the First World Congress on Victimology. Washington, DC.

Hudson, J., Chesney, S. (1978). Restitution program model. In: B. Galaway & J. Hudson (Eds.), Offender restitution in theory and action (pp. 131-148). Lexington: DC Heath Company.

Hudson, J., & Galaway, B. (1974). Undoing the wrong. Social Work, 19, 313-318.

Hudson, J., & Galaway, J. (1980). A review of the restitution and community-service sanctioning research. In: J. Hudson & B. Galaway (Eds.), Victims, offenders, and alternative sanctions (pp. 173-194). Lexington: DC Heath Company.

Hudson, J., & Galaway, B. (1989). Financial restitution: Toward an evaluable program model. Canadian Journal of Criminology, 31, 1-18.

Hudson, J., Galaway, B., & Novack, S. (1980). National assessment of adult restitution programs: Final report. Duluth: University of Minnesota, School of Social Development.

Lamborn, L.L. (1975). Toward a victim orientation in criminal theory. In: J. Hudson & B. Galaway (Eds.), Considering the victim (pp. 145-188). Springfield: Charles C. Thomas.

Lamborn, L.L. (1976). Crime victim compensation: Theory and practice in the second decade. Victimology, 1, 503-516.

Lamborn, L.L. (1979). Reparation for victims of crime: Developments and directions. Victimology, 4, 214-228.

Laster, R.E. (1970). Criminal restitution: A survey of its past history and an analysis of its present usefullness. University of Richmond Law Review, 5, 80-98.

Maiolino, F.W., O'Brian, J., & Fitzpatrick, J.J. (1990). Computer supported restitution programming in Philadelphia county probation and parole. In: B. Galaway & J. Hudson (Eds.), Criminal justice, restitution, and reconciliation. Mounsey: Criminal Justice Press.

Mowrer, O.H. (1978). Applications and limitations of restitution. In: B. Galaway & J. Hudson (Eds.), Offender restitution in theory and action (pp. 67-72). Lexington: DC Heath Company.

Mueller, G.O.W. (1955). Tort, crime and the primitive. Journal of Criminal Law, Criminology, and Police Science, 46, 303-332.

Mueller, G.O.W. (1959). Compensation for victims of criminal violence: A round table. Journal of Public Law, 8, 218-236.

Mueller, G.O.W. (1965). Compensation for victims of crime: Thought before action. Minnesota Law Review, 50, 213-221.

National Organization for Victim Assistance (1987). Victim rights and services: A legislative directory. Washington, DC: National Organization for Victim Assistance.

Newton, A. (1976a). Aid to the victim, part I. Compensation and restitution. Crime and Delinquency Literature, 8, 368-390.

Newton, A. (1976b). Alternatives to imprisonment: Day fines, community service orders, and restitution. Crime and Delinquency Literature, 8, 109-125.

Petersilia, J. (1987). Expanding options for criminal sentencing. Santa Barbara: The Rand Corporation.

Poklemba, J., & Abate, C. (1988). Restitution in New York State: Recommendations for improvement. A joint report to the Governor and the Legislature. Albany: Divison of Criminal Justice Services.

Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections (1988). Taking responsibility. Ottawa: Canadian Government Publishing Center.

Robinson, J. (1990). Bill C-89: An act to amend the Criminal Code. Paper presented at the VIIth Annual Course on Victims and the Criminal Justice System. Dubrovnic.

Schafer, S. (1968). The victim and his criminal. New York: Random House.

Schafer, S. (1970a). Compensation and restitution to victims of crime. Montclair: Patterson Smith.

Schafer, S. (1970b). Victim compensation and responsibility. Southern California Law Review, 43, 55-67.

Schafer, S. (1974). Compensation of victims of criminal offenses. Criminal Law Bulletin, 10, 605-636.

Schafer, S. (1975a). The proper role of a victim compensation system. Crime and Delinquency, 21, 45-49.

Schafer, S. (1975b). The restitutive concept of punishment. In: J. Hudson & B. Galaway (Eds.), Considering the victim (pp. 102-115). Springfield: Charles C. Thomas.

Shapiro, A. (1990). Is restitution legislation the chameleon of the victims' movement? In: B. Galaway & J. Hudson (Eds.), Criminal justice, restitution, and reconciliation. Mounsey: Criminal Justice Press.

Spencer, H. (1975). Prison ethics. In: J. Hudson & B. Galaway (Eds.), Considering the victim (pp. 71-84). Springfield: Charles C. Thomas.

Sutherland, E.H., & Cressey, D.R. (1960). Principles of criminology, 6th edition. Chicago: Lippincott.

Tallack, W. (1900). Reparation to the injured and the rights of victims of crime compensation. London: Wertheimer, Lea and Co.

Thorvaldson, S.A. (1987). The battle for restitution: Why victims are losing. Paper presented at the ASC Meeting. Montreal.

Umbreit, M.S. (1985). Crime and reconciliation: Creative options for victims and offenders. Nashville: Abingdon.

Umbreit, M.S. (1986). Victim offender mediation: A national survey. Federal Probation, 50, 53-56.

Umbreit, M.S. (1988). The meaning of fairness to victims in victim-offender mediation. Minneapolis: University of Minnesota.

U.S. Department of Justice (1989a). Prisoners in 1988. Washington, DC: Government Printing Office.

U.S. Department of Justice (1989b). Attorney General's survey of release procedures: Probation. Washington, DC: Government Printing Office.

U.S. National Advisory Commission on Criminal Justice Standards and Goals (1973). Corrections. Washington, DC: Government Printing Office.

U.S. Task Force on Victims of Crime (1983). Final report. Washington, DC: Government Printing Office.

Viano, E.C. (1978). Victims, offenders, and the criminal justice system. In: B. Galaway & J. Hudson (Eds.), Offender restitution in theory and action (pp. 91-100). Lexington: DC Heath Company.

Waller, I. (1990). Implementing the Victims Declaration of the United Nations. Paper presented at the VIIth International Course on Victims and the Criminal Justice System. Dubrovnik.

Weitekamp, E.G. (1989). Restitution: A new paradigm of criminal justice or a new way to widen the net of social control? Ann Arbor: University Microfilms.

Wolfgang, M.E. (1965). Victim compensation in crimes of personal violence. Minnesota Law Review, 50, 223-241.

Wolfgang, M.E. (1970). Social responsibility for violent behavior. Southern California Law Review, 43, 5-21.

Zehr, H., & Umbreit, M.S. (1982). Victim offender reconciliation: An incarceration substitute? Federal Probation, 46, 63-68.

Victim-Offender-Reconciliation in Germany - Stocktaking and Criminal-Political Consequences

Heinz Schöch, Britta Bannenberg

Contents

1. Introduction

1.1 Legal Foundations

The victim-offender-reconciliation (VOR; in German: Täter-Opfer-Ausgleich, TOA), can be said at the moment to be "an alternative to conventional criminal penalties which is full of hopes", (*Schreckling & Pieplow* 1990, p. 10). Victim-offender-reconciliation (also referred to as indemnification) is concerned with the reconcilatory settlement of the crime by means of voluntary settlement of the conflict by the victim and offender aside from the obvious compensation for material damage.

The international restitution movement has moved VOR in Germany, into the central point of criminal-political discussion. Abolitioners demand that conflicts should be referred once again by the criminal justice system to a private level (*Hanak* et al. 1989). However, the inherently criminal view associates VOR with various theoretical expectations (see *Roxin* 1987, p. 37 et seq.). Deterrent effects upon a particular offender is particularly concerned with the fact that the offender confronts the effects of his behaviour and is directed to talk with the victim as a person. This can achieve a norm-stabilizing inner concern. At the same time, indemnification is a socially constructive achievement which can be meaningfully experienced and which contributes to reconciliation (*Rössner* 1989, pp. 31, 35).

The analysis of German criminal law and the law of criminal procedure, shows that only a few rules can be found which make the imposition of compensation possible in a judgement, or along with dismissal of the criminal process, but such rules have scarcely any practical meaning (see e.g. *Schöch* 1987, p. 144; *Roxin* 1987, p. 38; *Frehsee* 1987, p.185, 261 et seq.; *Frühauf* 1988, pp. 77, 80).

In addition, there are a considerable number of model projects and smaller projects in which the VOR has been arranged at an earlier stage in the procedure, mostly with the aim of having the case dismissed after settlement has been effected, and, partly also with the aim of obtaining mitigation of sentence. The information about this is full of gaps, in that until now only interim reports have been available in respect of some of the more extensive and well-known experiments (see e.g. for Braunschweig *Viet* 1988; for Köln *Schreckling & Pieplow* 1990, *DBH* 1990; for Reutlingen/Tübingen *Kuhn & Rössner* 1987; for Munich/Landshut *Hartmann* 1988; for the Tübinger Court

Assistance Project *Rössner & Hering* 1988, see e.g. also the overview of *Marx & Rössner* 1989). Until now, final reports have only been available in respect of the "Handschlag-" (hand-shake)project in Reutlingen (*Kuhn* et al. 1989), in respect of the project "Waage" (balance) in Köln (*Schreckling* 1990a) and in respect of the Court Assistance Project in Tübingen (*Rössner* 1990).

The available research should contribute to removing this deficit of information and to producing essential and fundamental structures and experiences of diverse initiatives, from a general point of view. The five new "Bundesländer" (federal states) in East-Germany, could unfortunately not be considered, in that reliable information could not until now be obtained. In addition, merely some basic data can be communicated in this volume from the comprehensive investigation.

2. Method

An overall inquiry into all of the presently running VOR-projects was attempted with the help of a mail survey which was carried out in March 1990. The study concerned 93 departments of public prosecution in the old federal states, owing to the fact that the departments of criminal prosecution had proved to be central levels of authority in all projects carried out before. The information was virtually complete; some of the criminal prosecution departments did not reply themselves, but rather, it was dealt with by the chief public prosecutors or Ministry of Justice of the particular federal states affected. The extent of the information given was varied. The spectrum ranged from short negative answers to concrete and relevant references to the projects, with details of addresses and full information concerning the projects.

Personal interviews of those concerned in the projects which had been reported followed, and afterwards, an evaluation of individual cases by means of criminal records, juvenile court aid files or files of private organizations, with the help of a predominantly standardized investigation sheet. The case information had to be obtained "ex post" in contrast to the accompanying research concerning the larger experiments. The associated interference with the fullness of the information and its uniformity or standardization, was balanced, in that the most important events were structured fundamentally according to similar points of view.

3. Results

3.1 Victim-Offender-Reconciliation in the Criminal Law relating to Juvenile Offenders

The first victim-offender-reconciliation projects were promoted and supported as model projects in the criminal law relating to juvenile offenders, and provided with accompanying research. The first project arose in 1985 in Braunschweig following the trying-out of other measures over several years. The project "Handschlag" (hand-shake) in Reutlingen and Tübingen (1985), the Kölner "Waage"- (balance) (1986), and the "Ausgleich"- (reconciliation)project in Munich and Landshut (1987), followed.

In the meantime, several survey results could be said to convey the impression, that the actual number of victim-offender-reconciliation-projects is already immeasurable (cf. also *Schreckling* 1990b). Our more detailed inquiry however, indicated that merely a few youth welfare offices and private agencies have until now effected actual offender-victim-reconciliation. In addition to the four model projects, there are VOR-projects with at least one year's practice experience, in the following places: Aachen, Alfeld, Augsburg, Bielefeld, Bremen, Delmenhorst, Dortmund, Düsseldorf, Hamburg, Kiel, Lüneburg, Oldenburg und Stuttgart (more detailed data in the appendix, see tables). Additions to this list are possible in the course of 1990. In any case, from April 1990, there was a clear increase in statements of intent, expressing a wish to carry out victim-offender-reconciliation.

The VOR is carried out in Bremen by a victim assistance establishment, which in the main, offers general assistance to the victim and also to witnesses. The work extends from offers to discuss the matter and advice on the matter, to more long-term assistance by various experts (lawyers, psychologists, social workers). VOR was carried out in 1986-1988, predominantly with young adolescent offenders. These cases were allocated by the judiciary. After a short interruption, the Bremer Aid revised the concept and offered VOR also to adults and others, who could themselves register with the Bremer Aid.

There were no victim-offender-reconciliation-projects in Berlin, Hessen, Rheinland-Pfalz and in the Saarland until the end of investigations (Decem-

ber 1990). There are concrete plans above all, in Baden-Württemberg, Niedersachsen and Nordrhein-Westfalen, to carry out further VOR-projects. Schleswig-Holstein is even planning to introduce it throughout the province.

3.2 Victim-Offender-Reconciliation relating to the General Criminal Law

The first project in general criminal law began in 1984 in Tübingen, and was begun on the initiative of *Hering* (court assistant) and *Rössner* (at that time both judge and holding a university position). Four prototype projects began in 1985 in Nordrhein-Westfalen, Düsseldorf, Hagen, Köln and Bochum, after discussions in respect of a state-wide introduction. In the meantime, all, with the exception of the Düsseldorf project, have failed. In the middle of 1987, the Hamburger VOR-project also began, and the department of public prosecution Detmold, has led its own "VOR-files", since the beginning of 1989. The VOR-project in Nürnberg-Fürth, has processed cases since 1.1.1990. There are concrete plans in Hannover and Nordrhein-Westfalen, to introduce offender-victim-reconciliation.

An initial evaluation exists in respect of the Tübinger project (*Rössner* 1990). Further empirical results are not known. No file evaluation was possible in Nürnberg within the structure of the existing inquiry, because associated research supported by the Federal Ministry of Justice, has been provided for. The results of file evaluations in Düsseldorf, Hamburg and Detmold with a total of 155 allocated cases, are being compared with those from the Tübinger project, in respect of which there have been 183 cases in about five years.

3.3 Number of Victim-Offender-Reconciliation Cases

Details in respect of the extent of previous experience in the criminal law relating to juvenile offenders, are produced in the following table. The large case figures indicate the experiments during the associated research (200 up to 360), and in general the number of cases is clearly lower (around 20 up to 70). Altogether, there are already experiences derived from over 1,500 juvenile criminal law procedures, and around 400 general court procedures (see above 3.2).

3.4 Institutions and Organizations

All mediation relating to criminal law in general, has until now been carried by the court assistance. Private agencies, organizations providing aid

to those previously convicted or alternatively to victims, as well as two specially founded VOR-organizations (Köln, Lüneburg) have until now been more frequently represented in the juvenile criminal law than the juvenile court assistance. The foundation of the project was effected on the private initiative of highly motivated workers. Since 1987, a central establishment has been attempted in Hamburg by the Senate through the juvenile court assistance but without much success.

Most projects have arisen from experience with offender-orientated work. In this way, victim-offender-mediation is included within the tasks of the juvenile court assistance, or the organizations providing aid to those previously convicted, offer victim-offender-mediation. So-called "Brücke-Vereine" (registered organization working in the field of diversion) undertake alongside other care and guidance functions, victim-offender-mediation.

3.5 Mediator

The mediators do not bear any uniform description. The expressions "conflict-adviser" or "conflict arbitrator" have recently been frequently used; the expression "settlement adviser" appears more apt (according to *AE-WGM* (alternative proposals for compensation) see below 4.)).

Almost all mediators have professional training as social workers/social educationalists, partly as psychologists: in one instance, a female lawyer was successfully appointed.

All mediators work up to full time, although the extent of other work commitments is varied. Although some are concerned exclusively with victim-offender-mediation, others carry out court assistance work in respect of juvenile offenders, or work for an organization.

3.6 Financing

The financing is not a particular problem, if the VOR is undertaken jointly as a further task by the juvenile court assistance or by the court assistance. This is not self-evident in so far as positions are somewhat limited. The employees either split the work, or the colleague is allowed to be released for the purposes of the VOR. The experiments were provided with financial means for at most 3 to 4 years, whereas almost all of the private agencies, were referred to short-term financing due to ABM (Arbeitsbeschaffungsmaßnahme; job creation program; special steps taken by the employment

office in respect of creation of jobs, 1-2 years). These positions are rarely safeguarded in terms of normal budgeting, e.g. part-time job relating to social welfare work in Augsburg.

It remains to be seen as to whether the model projects fall into financial difficulties after support runs out. In any case, the financing presents a serious problem for the private agencies. The project in Alfeld, had to discontinue its mediation work, after two years, in September 1990, because the ABM-finance had run out and there were no further means available to provide a budget for the project. There are the same problems in Bremen, Oldenburg und Lüneburg.

3.7 Aims

Most projects strive for the dismissal of the criminal charge when settlement has been achieved, because the confrontation with the victim and the assumption of responsibility taken by the offender by means of compensation, should be sufficient as the only reaction to the offence. A VOR is prompted therefore in several projects, by the department of public prosecution in those cases where after successful mediation, diversion is secured by means of dismissal of the criminal charge, e.g. Bielefeld, Hamburg, Augsburg.

Most projects consider diversion and settlement of conflict as goals of equal importance. Allocation of the case at different stages of the court procedure, is varied; the departments of criminal prosecution predominantly allocate the cases in order that such dismissals of the charge in respect of successful settlements, occur more frequently in preliminary proceedings. This also applies to projects in general criminal law. In contrast, most cases in Köln are transferred after the indictment or main court proceedings; dismissals, in which VOR constitute the only response to the criminal act, predominate however here (*Schreckling* 1990a, p. 107).

Other projects strive towards a offender-victim-settlement in all cases allocated, because the settlement of the conflict per se is a goal worthy of striving for. A settlement can lead to dismissal of charge or mitigation of sentence. An attempt at settlement in a severe case, should not fail merely because the charge is raised. Therefore, whether an agreement can be achieved, stands at the forefront, e.g. for the Bremer aid group. How this settlement is regarded by the Ministry of Justice, is of lesser importance.

3.8 Selection of Appropriate Cases

The criteria for the selection of a case are considerably similar in so far as all projects are concerned:

- VOR requires a self-confessed offender, at least clearly established or investigated facts and circumstances of the case. In about 10% of cases, the lack of suitability in so far as cases involving adults are concerned, comes to light too late, for this reason.
- It must be about a personal victim or about an institution with victims which can be individualized.
- Offender and victim must be happy to take part in an attempted settlement.
- Trivial offences where the charge is dismissed in any event, without legal consequences, are excepted because the efforts towards a settlement would be too costly for all those taking part, and increasing the frequency with which penalties are imposed should be avoided.

It is rare to have formal "exclusions" in respect of offences, in a project. Traffic and sexual offences, in addition to serious crimes, are regarded as inappropriate for victim-offender-mediation merely in Delmenhorst; this is also true for serious crimes in Hamburg. There is often however a catalogue listing offences which are regarded as particularly suited to settlement; this catalogue refers to a wide spectrum of offences.

The department of public prosecution transfers most cases according to this criteria, to the project representative. Cases are also transferred by the juvenile court judge, however seldom after the main court procedure (otherwise in Köln). If it comes to trial, in suitable cases, the possibility of an offender-victim-settlement is commented upon and the trial is momentarily suspended or interrupted.

The juvenile court assistance primarily, in a few districts, checks the detailed report mandates with the indictments, for settlement suitability. The department of public prosecution is then asked for its agreement relation to attempting a victim-offender-mediation. The police also are involved in the choice of the case in a few communities in Lower Saxony (Braunschweig, Alfeld, Delmenhorst, Lüneburg). If the case appears suitable according to the short catalogue of criteria, the investigation records are sent to the public prosecutor and - on the basis of general agreement - to the project representative. The advantage lies in the saving of time between the commission of the crime and start of the contact between offender and victim.

3.9 Strategies for Implementation

Contact with the offender is taken up first, almost without exception. After information is briefly obtained about the VOR, an attempt to obtain agreement to advisory talks, is made. If the offender is not prepared to take part, the victim is no longer approached, in order to safe him further disappointment. If the offender is prepared to participate, an appointment is made with the victim. Only in Bremen and in so far as the court assistance is concerned in Düsseldorf, is the victim approached first and in this way his feelings and needs take priority. Arbitration talks in Düsseldorf, are carried out mostly at a place suitable to the wish of the victim. There must always be voluntary willingness or readiness by both parties to take part in arbitration talks or to take other steps. In general criminal law practice, a personal meeting is sometimes waived, and the settlement is brought about by means of the mediatory talks of the court assistance. The settlement agreement should be as comprehensive as possible and should combine both material and non-material indemnification.

3.10 Success of Projects

A settlement is seen to be successful when the victim and offender express themselves to be happy with the course of the settlement negotiations, when agreed benefits have been brought about and when the victim expresses no further wish for punishment.

76.2% of the 396 cases previously evaluated in the area of juvenile court cases (without model projects), could be successfully concluded. Almost the same result was achieved in the "Waage"- project in Köln (76.9%, cf i.e. *Schreckling* 1990, p. 87). The figure in Reutlingen is even higher, with 80.9% (*Kuhn* et al. 1989, p. 198). In so far as projects relating to criminal law in general are concerned, the Tübinger project with a success rate of 81%, shows the best result (*Rössner* 1990, p. 22, it contributes moreover 125 namely 66,4% of cases processed).

3.11 Structure of Offences

Assault cases are most prevalent in so far as the juvenile projects are concerned (40.5%). The same is true with regard to model projects in Reutlingen (46.5%) and Köln (31.6%). Assault also prevails in the general criminal law where 31.7% of the 309 cases refer to this offence category (in Tübingen 32.2%). Property damage in juvenile criminal law, follows with a figure of 17.4% and theft with a figure of 16.6%, and in the general

criminal law amount to 16%, theft 12% and defamation/insult 7%. A wide spectrum of offences (e.g. property damage, threats, coercion) then follows both in the juvenile and general criminal law areas.

The most severe offence concerned a case of mediation which arose because of attempted homicide by stabbing (Bremen). There were also cases of robbery, extortion and dangerous assault, in a few cases with medical treatment and leading to several weeks detention in hospital. On the whole, an extensive spectrum of offences can be seen, reflecting the selection criteria, with regard to personal conflicts between offender and victim. Serious offences are only rarely included within the mediation process.

3.12 Damages

Material damages occur in around a half of the cases. They are however in most cases not very high and rarely extend to over DM 1,000. On average, they amount to around DM 400.

Non-mmaterial compensatory achievements dominate in the area of compensation in the juvenile criminal law. If a reconciliation succeeds, a refusal to accept material compensation is very rare.

3.13 Victim Funds

Almost all projects in the area of juvenile criminal law have so-called victim funds which should make it possible for destitute offenders to compensate for material damage. In fact, they have to be called credit funds for compensation. The victim funds have as a rule, a capacity of DM 500 to DM 10,000 and are financed through donations and fines. A victim fund is managed in Hamburg by a specially set-up organization, which has a fund of DM 50,000 for juvenile offenders and of DM 27,000 for adults.

If material damage cannot be immediately be settled, the possibility exists of obtaining a loan from the victim fund. The agreed sum is paid out to the victim and the offender repays it to the fund at a low rate. It is also possible to "work the sum away". A ficticious hourly wage of for example DM 10 is set out, and the offender works the corresponding time in a charitable establishment. The money is paid out via the fund direct to the victim, either after the agreed hours have been completed or according to agreement. When such "work" is carried out, admittedly no money flows back into the fund. This is in most cases not a problem in so far as financing by means of fines is concerned, in that the total sum of the damage often lies between DM 100 and DM 300.

Very few cases per year are handled via the fund. Most projects regard the victim fund as however very important, because a settlement in individual cases, can fail because compensation has not been effected as a mediator from Oldenburg confirmed, where inspite of the appropriate efforts being made, no fund could be created.

There is a victim fund in Aachen, Alfeld (appoximately DM 7,000, no utilization of ressources), Augsburg, Bielefeld, Braunschweig, Bremen, Delmenhorst, Hamburg (DM 50,000/DM 27,000), Kiel, Köln (since 1990), Munich (approximately DM 10,000), Lüneburg, Reutlingen and Essen. There are no victim funds, except in Oldenburg, in Dortmund, Düsseldorf and Landshut, because the establishment has not been regarded as necessary up to now, and similarly, in so far as adult projects are concerned in Tübingen and Düsseldorf.

4. Consequences in Relation to Crime Policy

Inspite of the diverse initiatives in many places, the VOR plays a minor role in the practice of the judiciary as a whole. Even in the specially promoted model projects, the proportion of VOR-cases remains far below 1% of all criminal court cases (*Schreckling & Pieplow* 1990, p. 15 : 120 cases relating to approximately 4,000 juvenile delinquent court cases yearly in Köln). Alongside the undisputed practical and personal limitations of this new way of constructive management of criminal incidents (*Rössner* 1990, p. 2), it remains to say, that up to now, the personal attitude of the responsible prosecutor defines the choice almost exclusively and that it depends on chance whether an open-minded public prosecutor who supports the idea, meets a motivated juvenile court helper or is supported by the mediator of a private agency.

Without institutionalization of VOR within the criminal justice system which must embrace alongside the department of public prosecution and court assistance, also the police and the court itself, expansion can scarcely be expected and promising beginnings may die away. Appeals by outsiders or personal recommendations from an open-minded Ministry of Justice, are not sufficient. Clarification by the legislator is therefore essential.

Legal rules are also necessary in order to encourgage initiative being taken by the offender himself, and in order to ensure that the resulting risk is maintained at an acceptable level, in view of the uncertain outcome of the criminal process. Such rules can also contribute to the fact that injured

parties, having been advised either by a lawyer or by victim help organizations, themselves initiate this way which is often more effective in relation to compensation.

Until now, such suggestions were put to the legislature, in a global form or with a limited scope. This also applies, in the end, to the welcome attempt by the legislature, to embody the VOR legally in the 1. JGGÄndG (Juvenile Court Amendment Act) passed on 1 December 1990. Introduced by this Act was a direction to judges "to encourage juveniles to make an effort to achieve a settlement with the injured party" (§ 10 Abs.1, S.3 No.7 JGG). This will not be expected to achieve a greater extent of application in comparison with the judicial direction in respect of compensation and offender apology (§ 15 Abs. 1 Nr.1, 2 JGG). In this way, both alternatives cannot really function, because past experience has proved that merely voluntary constructive efforts towards dealing with the crime meet the requirements of the particular quality of the VOR, and not those efforts which are prescribed by ruling or direction. The diversion solution extends so far in the right direction in § 45 Abs.2 JGG (disregarding the prosecution after a successful VOR), however the classification as "educational steps" remains full of doubts. Such procedural authority to dismiss a case alone, does not develop the required legal impetus, and contributes very little to the uniformity with which the law is applied.

Fundamental reforms are therefore necessary, as are being prepared at the moment in the German-Austrian Swiss Working Group of Criminal Law Academics, and as such are expected to be published in 1992 as a AE-WGM (alternative proposals for compensation) (for earlier proposals outlined and for the present circle of AE-professors *Schöch* 1990, p. 74 et seq.). Their essential features can be summarized roughly as follows:

- The AE-WGM will contain a criminal law and criminal procedural part.
- In the criminal law part, a "third path" (option) should be created in relation to the "legal consequences of the criminal act", alongside penalties and regulations regarding reformation of delinquents. This third option is thought of as conceptual and even as the key answer to the system of criminal law penalties.
- In so far as compensation extends to the restoration of law and order, it should replace the penalty itself ("refraining from punishment"), and in so far as this is not the case (as a rule in such cases where imprisonment is imposed for over a year), it should mitigate the punishment.

- The personal offender-victim-settlement is at the center point of the reform approach. However, offenders who do not fall into the particular case groups, should not become worse off in principle (e.g. attempted crimes, cases where the victim is not prepared to consider settlement procedures, crimes against the public). Alongside primarily personal achievements by the offender, compensation related to society (symbolical) must also be recognized (e.g. community work or monetary payments to charitable establishments).
- The voluntary achievements of the offender in relation to compensation which have actually been brought about, up to the commencement of the main court procedure, should effect an obligatory mitigation of punishment or punishment substitution and afterwards as a rule, merely facultative mitigation of punishment, comes into question.
- The criminal procedural part should not open up primary procedural decisions with regard to penalties, but rather should serve to safeguard the patterns which have already been put into practice, and the implementation of the third substantive law option.
- The private initiative in respect of a VOR should be encouraged, by explaining to those people charged, and the injured parties at an early stage, about the possibilities of compensation, and likewise, it should be encouraged by discontinuance of the court procedure, with the possibility of bringing in court assistants, arbitration boards or other settlement advisory bodies. Successful compensation means that prosecution by the department of public prosecution, is disregarded.
- A judicial compensation procedure headed by a judge and in particular circumstances with the help of a judicial proposal for settlement should be able to take place on application or officially, in the interlocutary proceedings, i.e. after the indictment and opening up of the main court proceedings resulting in an agreement on VOR. If VOR achievements are immediately effected or within a short period, in the case of full compensation, the procedure is dismissed, and if compensation is considerable, a mandatory mitigation of penalties is confirmed by the court.

5. Summary

In the second half of the 80s, there were initiatives taken in many places in Germany, towards encouraging the establishment of the VOR, apart from the well-known model projects (Braunschweig, Köln, Reutlingen/Tübingen,

München/Landshut). These projects took place predominantly in the criminal law area of juvenile delinquency and in fact there is already considerable experience with VOR in the general criminal law. Admittedly, reality does not always match up to official claims or survey results although up until the end of 1990, around 2,000 VOR-cases had successfully been put into practice.

In these selected cases, VOR has been readily accepted, and leads quite often to a lasting improvement in the relationship between offender and victim. The failure rate lies between approximately 20 up to 25%. The Ministry of Justice has up until now, acted somewhat reservedly; case allocations require a particular relationship of trust or confidence between the lawyer or judge and the project official and mediator. There are no grounds for a "net-widening-effect" in the sense of including processes which have been suspended without legal consequences. Delinquency is concentrated in the area of a physical injury with partly serious consequences, property damage, theft (partly also house breaking and theft). The breadth of the area of application of the model projects as a whole, shows that the potential of suitable cases has not yet been exhausted.

Legal provisions are (in spite of smaller amendmends in 1. JGGÄndG 1990) still insufficient, and contributes little to the promotion and standardization of VOR practice. Suitable criminal and criminal procedural proposals can be found in draft, put forward by a German-Austrian-Swiss Group of Criminal Law Academics and this will be published in 1982.

6. Appendix

Table 1: Illustration of Offender-Victim-Settlement Projects in the Criminal Law Area of Juvenile Delinquency

State	City	Project	Foundation	Agencies	Number of cases
Baden-Württemberg	Reutlingen/ Tübingen*	"Handschlag"	1.4.1985	e.V.	204 (86-88)
	Stuttgart	VOR	1.1.1990	JGH[2]	?
Bayern	München/ Landshut*	"Ausgleich"	1.1.1987	Brücke[3]	197 (87-88)
	Augsburg	VOR	1987	JGH/ DW	152 (87-90)
Bremen	Bremen	VOR	1986	e.V.	31 (86-90)
Hamburg	Hamburg-Wandsbek	VOR	1988	JGH	27 (88-90)

Note: Continuation and footnotes next page.

Table 1 (continued)					
State	**City**	**Project**	**Foundation**	**Agencies**	**Number of cases**
Niedersachsen	Braunschweig*	VOR	1985	JGH	220 (86-88)
	Alfeld	VOR	1.9.1988	e.V.	29 (88-90)
	Delmenhorst	VOR	1.4.1989	JHG	66 (89-90)
	Lüneburg**	"Handschlag"	1987	e.V.	?
	Oldenburg***	VOR	1989	e.V.	56 (89)
Nordrhein-Westfalen	Köln*	"Waage"	1986	e.V.	354 (86-8)
	Düsseldorf	VOR	1987	AWO[5]	39 (87-90)
	Aachen***	VOR	1989	JGH	20 (89-90)
	Dortmund	VOR	1988	Brücke	?
	Bielefeld**	VOR	1986	JGH	?
Schleswig-Holstein	Kiel****	VOR		Brücke	?

* First model project with its own evaluation research

** Evaluation research planned, results probably 1991 (Lüneburg) and 1992/93 (Bielefeld)

*** No analysis of files by author; results of the research report of the project

**** File analysis not permitted

Table 2: Offender-Victim-Settlement in the General Criminal Law

State	City	Project	Foundation	Agencies	Number of cases
Baden-Württemberg	Tübingen*	VOR	1984	GH[6]	183 (84-89)
Bayern	Nürnberg**	VOR	1.1.1990	GH	?
Hamburg	Hamburg	VOR	1988	GH	44 (88-90)
Nordrhein-Westfalen	Düsseldorf	VOR	1987	GH	54 (87-90)
	Detmold	VOR	1989	GH	28 (89-90)

* Model project with evaluation research

** Evaluation research supported by BMJ, results probably 1992

*** Cases suitable for settlement

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1 Registered organization

2 Juvenile Court Assistance

3 Die Brücke (registered organization)

4 Diakonisches Werk (Social Welfare Work)

5 Arbeiterwohlfahrt, Jugendberatungsstelle (Workers' Welfare Association, Juvenile Advisory Bureau)

6 Court Assistance

7. References

DBH, Deutsche Bewährungshilfe (Ed.) (1990). Die Waage Köln. DBH Materialien Nr.1. Bonn: Eigenverlag.

Eser, A., Kaiser, G. & Madlener, K. (1990). Neue Wege der Wiedergutmachung im Strafrecht. Freiburg i.Br.: Eigenverlag des Max-Planck-Instituts für ausländisches und internationales Strafrecht.

Frehsee, D. (1987). Schadenswiedergutmachung als Instrument strafrechtlicher Sozialkontrolle. Berlin: Duncker & Humblot.

Frühauf, L. (1988). Wiedergutmachung zwischen Täter und Opfer eine neue Alternative in der strafrechtlichen Sanktionspraxis. Gelsenkirchen: Mannhold.

Hanak, G., Stehr, J. & Steinert, H. (1989). Ärgernisse und Lebenskatastrophen. Über den alltäglichen Umgang mit Kriminalität. Bielefeld: AJZ-Verlag.

Hartmann, A. Täter-Opfer-Ausgleich. Modellprojekte München und Landshut. Jahresberichte 1987, 1988. Unveröffentlicht. Erscheint demnächst (1991).

Heinz, W. (1990). Jugendstrafrechtspflege im Spiegel der Statistiken. Monatsschrift für Kriminologie und Strafrechtsreform, 73, 210-226.

Kuhn, A. & Rössner, D. (1987). Konstruktive Tatverarbeitung im Jugendstrafrecht: "Handschlag" statt Urteil. Zeitschrift für Rechtspolitik, 20, 267-270.

Kuhn, A., Rudolph, M., Wandrey, M. & Will, H.-D. (1989). "Tat-Sachen" als Konflikt. Täter-Opfer-Ausgleich in der Jugendstrafrechtspflege. Forschungsbericht zum Modellprojekt "Handschlag", Bonn: Forum.

Marks, E. & Rössner, D. (1989). Täter-Opfer-Ausgleich. Vom zwischenmenschlichen Weg zur Wiederherstellung des Rechtsfriedens. Bonn: Forum.

Pfeiffer, H. (1990). Täter-Opfer-Ausgleich - Möglichkeiten und Grenzen der Konfliktschlichtung aus der Sicht der Praxis. Erfahrungen im Modellprojekt Täter-Opfer-Ausgleich in Braunschweig. In: Der Sena-

tor für Justiz und Verfassung der Freien Hansestadt Bremen (Ed.). Täter-Opfer-Ausgleich und Opferhilfe im Land Bremen (pp. 49-61). Bremen: Steintor.

Rössner, D. (1989). Wiedergutmachen statt Übelvergelten - (Straf-)theoretische Begründung und Eingrenzung der kriminalpolitischen Idee. In: E. Marks & D. Rössner (Eds.), Täter-Opfer-Ausgleich. Vom zwischenmenschlichen Weg Wiederherstellung des Rechtsfriedens (pp. 7-42). Bonn: Forum.

Rössner, D. (1990). Wiedergutmachung als Aufgabe der Strafrechtspflege. Auswertung des Tübinger Gerichtshilfeprojekts und kriminalpolitische Folgerungen. Ein Gutachten. Göttingen (demnächst Bonn: Eigenverlag Bundesministerium der Justiz).

Rössner, D. & Hering, R.D. (1988). Täter-Opfer-Ausgleich im Allgemeinen Strafrecht. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Kriminologische Forschung in den 80er Jahren. Projektberichte aus der Bundesrepublik Deutschland (pp. 1043-1054). Freiburg i.Br.: Eigenverlag des Max-Planck-Instituts.

Roxin, C. (1987). Die Wiedergutmachung im System der Strafzwecke. In: H. Schöch (Ed.), Wiedergutmachung im Strafrecht (pp. 37-55). München: Wilhelm Fink Verlag.

Roxin, C. (1990). Neue Wege der Wiedergutmachung im Strafrecht. In: A. Eser, G.Kaiser & K.Madlener, K. (Eds.), Neue Wege der Wiedergutmachung im Strafrecht. (pp. 367-375) Freiburg i.Br.: Eigenverlag des Max-Planck-Instituts für ausländisches und internationales Strafrecht.

Schöch, H. (1987). Täter-Opfer-AusgleichAusgleich im Jugendstrafrecht. In: H. Schöch (Ed.), Wiedergutmachung im Strafrecht (pp. 143-158). München: Wilhelm Fink Verlag.

Schöch, H. (1990). Vorläufige Ergebnisse der Diskussionen zu einem Alternativ-Entwurf Wiedergutmachung (AE-WGM) im Arbeitskreis deutscher, österreichischer und schweizerischer Strafrechtslehrer. In: A. Eser, G. Kaiser & K. Madlener (Eds.), Neue Wege der Wiedergutmachung im Strafrecht. (pp. 73-82) Freiburg i.Br.: Eigenverlag des Max-Planck-Instituts für ausländisches und internationales Strafrecht.

Schreckling, J. (1990a). Täter-Opfer-Ausgleich nach Jugendstraftaten in Köln. Bericht über Aufbau, Verlauf und Ergebnisse des Modellprojekts "Die Waage", Köln, Bonn: Eigenverlag Bundesministerium der Justiz.

Schreckling, J. (1990b). Aktueller Stand der Ausgleichspraxis in der Bundesrepublik. DBH-Umfrage - vorgestelt auf der 5. Fachkonferenz "Täter-Opfer-Ausgleich" in Bonn vom 1.10-3.10.1990.

Schreckling, H. & Pieplow, L. (1990). Täter-Opfer-Ausgleich: Eine Zwischenbilanz nach zwei Jahren Fallpraxis beim Modellprojekt "Die Waage". Zeitschrift für Rechtspolitik, 22, 10-15.

Viet, F. (1988). Der "Täter-Opfer-Ausgleich" als eine Aufgabe der Jugendgerichtshilfe. Fünf Jahre Erfahrungen aus Braunschweig. Zentralblatt für Jugendrecht, 75, 17-22.

Implementation and Acceptance of Victim/Offender Mediation Programs in the Federal Republic of Germany: A Survey of Criminal Justice Institutions

Hans-Jürgen Kerner, Erich Marks, Jürgen Schreckling

Contents

1. Introductory Remarks

The term "victim/offender mediation" refers to all programs which endeavour to achieve a settlement of the conflicts, problems and strain situations existing between offenders and their victims. This is done with the assistance of a "mediator" who has individual talks with the parties concerned and who encourages and directs meetings between the offender and the victim, where the offense and the consequences thereof are being talked over and a possible compensation is being discussed. Beyond the actual damage compensation and conflict settlement, these mediation programs aim at emphasizing the victim's position within the penal prosecution, at making the offender realize to a fuller extent his violation of an existing norm, at avoiding or mitigating formal punishment and at sparing victim and offender further civil law procedures with regards to damage and or pain compensation.

The term "victim/offender mediation" is not a literal translation of the German term "Täter-Opfer-Ausgleich" (TOA; victim/offender conflict settlement, victim/offender compensation agreement). We think, however, that this term which is much-used in Great Britain (see *Marshall & Merry* 1990), better fits the German efforts and projects of conflict settlement than the term "victim/offender reconciliation" used in the United States for certain model programs (see for ex. *Coates* 1990). The term "reconciliation" tends to evoke rather high expectations as to the actual results of the mediation efforts, expectations which, as a rule, cannot be fully met. The German projects aim at a satisfactory mutual agreement rather than at a complete reconciliation between the two parties concerned.

1.1 Victim/Offender Mediation - a New Strategy?

The idea of restitution is not an alien or new one to the German criminal jurisprudence and to penal legislation. Even before the important reforms took place between the sixties and the eighties, the criminal law included provisions for the crime victims - or the "injured" according to the Code of Criminal Procedure - to assert their rights and needs within the criminal procedure. Furthermore, the criminal courts have always been entitled to impose some sort of restitution or to mitigate punishment if such a compensation had already taken place.

After the coming into force of the most recent reform laws, the present situation can be described in short as follows:

Within the general penal procedure (in the case of adults or those young adults between the age of 18 and 21 to whom the general penal law applies) the public prosecutor has the possibility in the case of minor offenses, according to section 153a Code of Criminal Procedure, to refrain at the preliminary proceedings provisionally from an official accusation and to impose some sort of restitution instead. If this measure is considered to be adequate, a "public interest" in a further penal prosecution no longer exists. The charge will finally be dismissed after the imposed measure has duly been effected. The public prosecutor may also accept restitution offers from the offender himself or from the defense attorney. In the case of certain offenses requiring an application for prosecution (for instance in the case of physical injury with intent, section 223, Code of Criminal Procedure), the prosecutor is nevertheless entitled to take action of his own accord if there exists a justified public interest in the penal prosecution, even if the victim has not applied for prosecution or has withdrawn the application.

In private prosecution cases (which sometimes overlap with the "application offenses"), the victim is entitled to bring himself the case either immediately before a local court or to do so later on if the public prosecutor negates any public interest in a penal prosecution and refers the victim to the private prosecution procedure (Privatklageweg). In such cases, the Code of Criminal Procedure, section 380, provides for reconciliation procedures. The competent authorities of the German Bundesländer dispose of different possibilities to handle such cases. Best known is the institution of the arbitrator (Schiedsmann) who tries to arrange a satisfactory conflict settlement. The victim with damage claims relating to the civil law but linked with a criminal prosecution has the possibility to recur to the so-called adhesion procedure. Under certain conditions, the victim may also act as additional private prosecutor in an official criminal procedure and he can do this even before the formal accusation and before the trial process.

A genuine victim/offender mediation can hardly be conceived in the case of a formal criminal procedure but there exists, nevertheless, the possibility of some sort of damage compensation. With regards to the final sentencing decision the Criminal Code expressly stipulates, according to section 46, sub-clause 2, that the court has to consider - inter alia - all mitigating factors in favour of the offender, especially his behaviour after the committment of the offense and his efforts to compensate the damage and to come to an agreement with the injured. In the case of a suspension of sentence on probation, the court may impose on the offender, besides other measures, the obligation to do his best to compensate the damage caused by the

committed offense. In this context, the law explicitly provides for the possibility that the court may also accept restitution schemes proposed by the offender himself (Criminal Code, section 56b).

Compared to the general criminal law, the criminal law relating to young offenders (Jugendstrafrecht) has always been more open to the idea of compensation and conflict settlement. According to section 45, Juvenile Court Act, the public prosecutor may, within the "informal educational proceeding" (formloses Erziehungsverfahren), refrain from any penal prosecution and ask the Juvenile Court Judge to impose some sort of restitution and conflict settlement arrangements instead, or to take into account all compensation efforts that have already been made. Nowadays, the public prosecutor in juvenile courts may even initiate either of his own accord or with the assistance of a mediation service a suitable restitution in order to be able to drop the case. Has the charge already been filed, then the Juvenile Court Judge may nevertheless take similar action according the section 47 Juvenile Court Act. If an official court hearing takes place, the judge can award as sole punishment that the juvenile makes his apologies to the injured and compensates the damage to the best of his abilities. Probation orders may also include the condition of adequate restitution and conflict settlement arrangements.

However, these alternative ways of settlement played, in the original version, but a minor part in the actual practice of criminal law. As a rule, only 1 to 2% of all decisions of the public prosecutors to withdraw a charge during the preliminary proceedings were conditioned on restitution arrangements. The same percentage applied to the sanctions imposed by the criminal courts. The possibilties of (simple) restitution arrangements and of a (more complex) conflict settlement were also frequently ignored by the social services linked with the criminal justice system, i.e. the court aid service (Gerichtshilfe), the probation service and the after-care services.

What's new on the victim/offender mediation programs that's not the idea of restitution as such. But now, increased efforts are made to implement restitution more effectively in the criminal justice practice and to offer to victims and offenders possibilities of a real conflict settlement which goes beyond a mere material damage compensation. Furthermore, these reconciliatory efforts shall be given priority over the state's right to punish.

1.2. Victim/Offender Mediation as Practiced in the Federal Republic of Germany: Development in the Eighties

Until as late as the end of the seventies, restitution was but a side issue in the Federal Republic of Germany, even in victimology which began to establish itself in the FRG at about that time: the first German reader on victimology included but one paper dealing with the possibility of restitution by the offender (see *Schneider* in Kirchhoff & Sessar 1979). Even though experiences made with such programs abroad, especially in the U.S., were gradually being discussed (see *Kirchhoff* et.al. 1980, *Sessar* 1980), this did not lead up at first to any concrete plans as to possible changes of the German practice.

Since the beginning of the eighties, strategies of conflict settlement, of compensation and mediation, played an increasing part in the penal and criminological debate and in criminal policy. The most important reasons for this new development were the following:

- Doubts increased as to the efficiency of punishment in general and prison sentences in particular.
- Conflict settlement was increasingly seen as a major task of the criminal justice system; the repressive aspects of the criminal law became less important.
- The victim was given more attention; victim assistance services were being established.
- A great number of ambulant social services and educational programs, especially for young offenders, were created.

As the traditional punitive sanctions were questioned and critized, victim/offender mediation programs were increasingly considered to be very promising alternative reactions of State and society to a large percentage of (youth) criminality. Intensive and very thorough theoretical discussion ensued as to the possibilities of "restitution instead of punishment" (*Frehsee* 1982). Restitution models and experiences of other countries were being studied with the view to develop appropriate concepts for the German criminal justice system (see anthology of *Kerner & Janssen* 1985).

The development of "the first generation" of mediation models in the Federal Republic of Germany between 1984 and 1986 is a good example for a criminal policy rooted in practice:

In close cooperation between practitionners (judges, public prosecutors and/or social workers) and expert scholars local initiatives for the realization

of mediation projects were being founded. In these efforts, the German Probation and Parole Association (Deutsche Bewährungshilfe - DBH) and the German Association of Juvenile Courts and Juvenile Court Aid (Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen - DVJJ) played the role of catalysts: they stipulated the founding of working groups, they organized discussion platforms (see for instance *DVJJ* 1984) at expert meetings and they encouraged developing mediation projects. In 1984, a working group of the German Probation and Parole Association composed of lawyers, criminologists and social workers who started the discussion in 1982, published "Guiding principles and suggestions for action" towards a "victim-oriented" criminal justice practice (*Rössner & Wulf* 1984).

Based on these preliminary efforts, it was possible to secure the financial means (for staff, nonpersonal costs and the accompannying scientific research) for the realization of the first four mediation models for young offenders in 1985/86. In the meantime, one court aid service gained first experiences with adult offenders as well. The projects were supported by all parties of the German Federal Government as well as by some of the "Länder". Investigations made in the years 1986 through 1988 showed that the mediation efforts were mostly limited to the model programs and to some other projects in different parts of the Federal Republic of Germany (*Bundesministerium der Justiz* 1988, *Dünkel & Rössner* 1989, *Schreckling* 1989).

This first trial stage was terminated with a symposium organized in spring 1989 by the Federal Ministry of Justice in cooperation with the German Probation and Parol Association. So far, the results of the projects were quite promising (*Bundesministerium der Justiz* 1991). The Federal Minister of Justice, Mr. *Engelhard*, pointed out that "the victim/offender mediation was susceptible to change and further develop the criminal justice system just as decisively as this had been done when the German Probation Service was established in the fifties or when the idea of (re)education was being introduced into the Juvenile penal law system in the twenties."

Thus it cannot surprise that in summer 1989 the (already existing) ministerial bill for the First Amending Law of the Juvenile Court Act was supplemented by provisions for a victim/offender mediation: mediation was explicitly mentioned as a (possible) reaction within the above mentioned informal educational procedure (sections 47/47 Juvenile Court Act) and as an educational measure imposed by the Juvenile Court Judge (section 10 Juvenile Court Act). Victim/offender mediation would thus have to be seen as part of the regular judicial obligations once the amendments would come into force in December 1990. It became therefore increasingly important to work towards a broad implementation and acceptance of the mediation idea

in the juvenile penal practice. To begin with, it was necessary to investigate to what extent victim/offender mediation was already being practiced, which agencies and institutions were actually working in this field or were planning to engage themselves in this direction.

The investigation results described below must be seen in view of their possible interst for the victims. It has to be asked whether the different models encourage a satisfying restitution and a true settlement of the conflict and help to avoid a further victimization. The risk of a repeated victimization might be given if an institution works from an offender assistance point of view rather than offering a truly "neutral" mediation. Victim assistance services in the Federal Republic of Germany and elsewhere fear that in such case the victim is but a tool for the resocialization of the offender (*Eppenstein* 1991, *Schädler* 1991, *Reeves* 1989).

1.3 Investigations as to the Acceptance of Victim/Offender Mediation in the Federal Republic of Germany.

The criterion of "acceptance" is of much more importance with regard to victim/offender mediation than with regard to any other (penal) reactions to crime: whereas in the case of a prison sentence the acceptance of this sentence by the offender doesn't much count for, a victim/offender mediation can hardly be successful if the offender doesn't see any sense in such efforts, and even less so without the explicit consent of the victim who can hardly be forced to agree to such restitution and mediation efforts. Consequently, all mediation projects were centred around the question whether the victims would be willing to cooperate. The results of the German investigations as to the acceptance of victim/offender mediation programs by the victims are in short as follows.

In the German model programs approximately 81 to 92% of the victims agreed to cooperate (see *Bilsky & Pfeiffer* 1990, *Hartmann* 1991, *Kuhn et al.* 1989, *Schreckling* 1990). Considering the doubts of so many practitionners whether the victims would be willing to cooperate at all, this percentage is remarkably high, notwithstanding the fact that the percentage of victims willing to cooperate was slightly lower than the percentage of cooperating offenders. In interviews the victims stated their reasons for their willingness to cooperate: when informing against the offender they did not predominantly wish to see him punished, but were mainly interested in an adequate compensation and restitution. However, the wish for punishment did nevertheless exist, especially in the case of more serious offenses and when severe damage had been caused (*Schädler & Baurmann*, as well as *Voß* in this volume).

An investigation was carried out by the mediation project in München/Landshut in order to determine the most decisive factors for the willingness to cooperate in mediation programs. The results were as follows:

- no correlation existed between the demographic characteristics of the victims and their willingness to cooperate;
- neither did it matter whether the offender and the victims were of the same nationality.
- Victims who had not made a demand for prosecution, who had only suffered material damage or were but slightly physically injured were more willing to cooperate than other crime victims.
- Victims and offenders who did not know each other before the perpetration of the offense were also more willing to cooperate than those who were acquainted with each other.

In this context it must be mentioned that the "analysed rate of consent never fell short of 70%"(*Hartmann* 1991). This relativizes somewhat the results of the victim interviews of *Voß* according to which 42% of the victims who were acquainted with the offender before the perpetration of the offense agreed to cooperate (compared to 63% of those to whom the offender was unknown) (*Voß* 1989 and in this volume). The different percentages of acceptance might partly be due to the fact that in the Munich mediation project the victims could truly decide to cooperate in the program whereas this offer was but a fictive one in the case of the victims interviewed by *Voß*.

Regarding the factors which are decisive for a the consent to mediation, we do not dispose of much information resulting from direct interviews with the parties concerned. According to mediators and to explorative interviews with victims they mainly wish for compensation. However, there are also cases where the wish to get to know the offender dominates or - in the case of young offenders - the wish to contribute to the (re)education of the latter (*Hartmann* 1991, *Schreckling* 1990).

A major criterion for a successful mediation is the retrospective rating by the victim: should victims frequently be of the opinion that the mediation had been of little help or even prejudicial to them, then the whole approach would have to be questioned.

The results obtained so far can only be seen as trends: in the Federal Republic of Germany as well as abroad, only a very limited number of studies have been carried out in this respect, mainly with rather small samples. Also it must be said that unsuccessful mediation cases are not

sufficiently represented in such studies. Moreover, victims and offenders who deliberately broke up mediation hardly ever consent to a follow-up interview.

However, notwithstanding these reservations it can be said that victims and offenders mostly feel positive about "their" mediation and the results obtained. In follow-up interviews carried out by the "Waage" project in Cologne the victims rated the mediation as follows:

- 64.5% of the victims were "predominantly" or "completely" satisfied with the agreed compensation;
- 79.1% were "predominantly" or "completely" satisfied with the mediation assistance offered by the "Waage" project and
- 61.1% of them would "most probably" or "quite definitely" be willing to cooperate again in such a project. (Only 13.9% would "never again" or "probably never again" cooperate) (*Kondziela* 1991, pp. 218 ff.).

The victims expressed dissatisfaction if the offender hadn't shown much discernment during the mediation process or if they had got the impression that the mediator took the offender's side (*Hartmann* 1991). It must be said, however, that only 13.9% of the victims interviewed by the "Waage" project, Cologne, felt that the mediator merely acted in the interest of the offender. Nevertheless, these interviews clearly show that it is all-important for the victims whether they consider the mediator as being truly "neutral" or as acting in the interest of the offender.

Very little is known so far as to how victims rate the victim/offender mediation within the context of penal prosecution. The victims interviewed by the Munich mediation project considered mediation as a good alternative to penal prosecution (*Hartmann* 1991). The Cologne project confirms these results only up to a certain degree: 27.8% of the victims voted for mediation as a diversion from penal prosecution whereas 37.5% felt that the mediation should be part of the penal prosecution. Of the remaining sample 9.7% were in favour of "penal prosecution only", 2.8% "neither wished for mediation nor for penal prosecution" and 22.2% "held no opinion/made no statement" (*Kondziela* 1991, p.220). What's remarkable is the fact, that according to the Cologne victims investigation the general practice of sanctioning in the Federal Republic of Germany is judged less favourably by the victims than the sanctions imposed to "their" offender. The sanctions inflicted on the latter are considered as being "more just" than the general penal practice in the Federal Republic of Germany: 52.8% of the victims were of the opinion

that the German penal practice was "much" or "a bit" too lenient. But only 27.8% shared this view as far as "their" offender was being concerned (*Kondziela* 1991, pp. 216 f., p. 220).

All-important for the further implementation of victim/offender mediation is its acceptance not only by victims and offenders but also by the institutions and agencies of the criminal justice system. The hitherto rather insufficient legal and organizational provisions might well have been one of the reasons why the practice of mediation and conflict settlement up to now has been practically non-existent within the general penal prosecution in the Federal Republic of Germany but more subjective factors seem to be just as important: If those who decide which cases should be referred to a mediation project and those acting as mediators between victims and offenders, as well as the competent judicial authorities cannot see much point in such programs, they will hardly ever make use of this possibility.

Promoters and mediators of victim/offender mediation programs unanimously report that initially only a minority of judges and/or public prosecutors actively take up the idea of mediation. The majority are, as a rule, rather sceptical about it or have a wait-and-see attitude. Public prosecutors seem to be more sceptical than judges. According to promoters and mediators, other social services are either "interested" in the mediation idea or "indifferent". They take a sceptical view only if there exists a professional jealousy between the mediation service and other social services as might be the case for instance between private organizations and youth welfare offices. Sceptical attitudes are mainly based on the following reasons:

- doubts whether there really exist enough suitable cases;
- doubts whether the victims are really willing to cooperate;
- problems with data protection;
- fears that the victim/offender mediation might complicate or prolong the (penal) proceedings (see *Schreckling* 1990).

These and several other arguments are mixed together and weigh differently as they are no doubt influenced by the good or bad relations and conditions of cooperation existing between the agencies concerned. Thus it is not surprising that in this climate of scepticism and precaution the first projects developed neither very quickly nor "automatically". A very methodical development of the projects and much persuasion was needed. However, the model projects have proved that sceptical attitudes can thus be overcome. Now, after two to three years of practice, victim/offender mediation is accepted and approved of by all cooperating partners of the criminal justice system and the social services (see also *Bilsky* 1990).

There remains the question whether the victim/offender mediation is accepted and implemented not only in places where there exist model projects but also elsewhere.

2. Method

By means of a survey (hereinafter referred to as DBH investigation) basis information should be gained regarding mediation services and projects in the Federal Republic of Germany. Judicial authorities and youth welfare offices as well as private organizations of victim assistance (Opferhilfe) and offender assistance (Straffälligenhilfe) were interviewed in order to assess

- to what extent victim/offender mediation programs were implemented in the criminal justice system and
- whether the criminal justice institutions considered mediation to be a good policy.

In view of the large number of criminal justice institutions and due to the rather limited financial budget for the investigation, it was necessary to decide beforehand on what level the investigation was to be carried out. Should the persons actually engaged in the penal prosecution or working in the field of victim or offender assistance be interviewed, i.e. public prosecutors, local court judges, social workers of the juvenile court aid services etc.? Should the "middle level" be contacted, i.e. the presidents of the local courts, the heads of the respective judicial departments and social services, the directors of public prosecution departments and the executive secretaries of private welfare associations etc.? Or should the investigation be carried out on the "upper level", including the Higher Appelate Courts, the Attorneys General, the welfare departments of the "Länder", the central organizations of private welfare associations and even the competent ministries?

It was decided to investigate on the "middle level", i.e. to address the criminal justice institutions who actually have to decide with regards to victim/offender mediation: the local courts, the district and regional courts, prosecutors' offices, the competent authorities of probation services, court aid services and youth welfare departments as well as the competent authorities of private victim or offender assistance services. Notwithstanding the fact that this is a rather rough classification it seemed nevertheless be fitting to choose these institutions as they influence to a great extent how directives and instructions from superior authorities are being put into practice and whether actions initiated by a judge, a public prosecutor or a social worker are being supported or not.

In order to get as accurate and complete an idea as possible of the implementation and acceptance of victim/offender mediation, it was decided to carry out the investigation nationwide. This meant that it had to be done by mail, by means of standardized questionnaires. Draft questionnaires were developed and discussed in a pre-test with representives of the target groups. After the feed-back two questionnaires were developed. With the exception of the "remarks" section, both were standardized. An abridged version was destined for the courts and the public prosecution offices. Basically, this questionnaire consisted of three questions:

- Do you approve of victim/offender mediation in your area of jurisdicition?
- Is victim/offender mediation actually being practiced or projected in your district? In the affirmative - by which service?
- Is your office (directly or indirectly) engaged in victim/offender mediation projects?

The second, more complex questionnaire was addressed to the social services linked or cooperating with the penal justice institutions. Besides the above mentioned questions it inquired after the actual practice of victim/offender mediation (or respective plans regarding such projects). What services were engaged in mediation projects? Did the "mediators" work full-time in mediation or did their work include other tasks as well, for instance in the field of offender aid?

The questionnaires were addressed to the presidents of the courts and public prosecution offices and to the heads of the other institutions. In order not to lose too much time, the DBH did not apply for support to the Ministries of Justice of the "Länder". Letters of recommendation were however obtained from the "Deutsche Städtetag" (German Cities Assembly) and from the "Kreis- und Gemeindetag" (district council). As the investigation was to be carried out in spring/early summer 1990, the districts of the former German Democratic Republic could not be included.

The effective analysis of investigations carried out by mail depends to a large degree on the number of questionnaires that are completed and returned. As a rule, the percentage of questionnaires returned is well below 50%. The mailing list of the DBH investigation comprised 2,500 institutions. Thus at least some hundreds of questionnaires could be expected to be returned. A statistical analysis would therefore be possible. However, the more questionnaires are being returned, the better are the possibilities for a more differentiated analysis. With 300 questionnaires being returned, it

would, for instance, hardly make sense to classify according to the 93 regional court districts but such a classification would be most appropriate should 1,000 quesitonaires be returned.

But even if a rather large number of questionnaires are being completed it must still be verfied whether they are truly representative for the target group as a whole: are the different "Länder" adequately represented, the various regional court districts, the urban as well as the rural areas? Due to the limited staff potential and the restricted financial means, and also because of the great diversity of institutions included in the investigation, such a verification could only be made with a proportionate sample on a very limited scale. In this context it should also be kept in mind that the different rates of participation might as well be indicators of the different degree of interest in victim/offender mediation as such.

As the investigation was carried out in spring 1990, only institutions in the "old" Länder were contacted. The questionnaires were mailed to 603 local courts (including 52 sub-offices), to 93 district and regional courts, to 318 agencies of the German probation service, and to 76 agencies of the court aid service. The questionnaires were also mailed to approx. 800 private organizations; an exact number cannot be given as the questionnaires were partly distributed by parent organizations. It might well be that institutions which were not included in the mailing list might have been relevant as well. The DBH aimed at contacting all local, district and regional courts, all public prosecution offices, youth welfare departments and private organizations of offender and victim assistance. This goal could not be reached to the full. However, with 2,500 institutions included in the mailing list, the missing institutions could hardly be of consequence for the statistical analysis of the data.

A total of 1,300 questionnaires were completed and after clearing the data a remaining set of 1,251 institutions were processed by means of SPSS-PC software. The percentage of completed questionnaires has been satisfying throughout the target group, in some parts it was even surprisingly high. Participation was as follows: Public prosecution offices = 82.1%, youth welfare offices = 63.4%, district and regional courts = 54.8%, court aid services = 52.6%, probation services = 50.6%, local courts 42.6%. The public prosecutions offices are clearly over-represented in the investigation whereas the local courts are somewhat under-represented. For a further analysis of the data, a breakdown according to the different types of institutions seemed therefore to be appropriate.

A comparison of the different "Länder" and their population density with regards to the percentage of completed questionnaires didn't reveal any

significant difference. This analysis, however, doesn't take into account that the number of criminal justice institutions doesn't necessarily increase parallel to the population growth. City states and the "Länder" with a predominantly urban structure will undoubtedly have a higher population figure within their regional and local court districts (or within the competency of a youth welfare office) than rural areas.

Our limited means only permitted a further breakdown according to the judicial authorities. It became apparent that the proportion of questionnaires from this sample largely corresponded to the proportion of the judicial population of the different "Länder". The percentage of completed questionnaires did therefore not differ much either: With the exception of Berlin (completed questionnaires = 16.7%), the percentage of questionnaires returned by the different "Länder" largely corresponded to the mean percentage calculated for the Federal Republic of Germany: with the exception of Hamburg and Saarland (62.5%), the difference to the federal mean of 48.8% did not amount to more than 1 to 4%.

Even though not all aspects with regard to the question of representativeness could be verified, we think that the results of the DBH-investigation can nevertheless be regarded as being truly representative for the (former) Republic of Germany.

3. Results

3.1 Implementation of victim/offender mediation

The majority (i.e. 57.4%) of the institutions interviewed by the DBH stated that to their knowledge victim/offender mediation was neither practised nor projected within their jurisdiction. On the other hand, 532 institutions (i.e. 42.6%) reported to know of such activities. These figures indicate that the practice (or the planned practice) of victim/offender mediation is not limited to a few model projects in some areas even though regional differences clearly exist.

The question which and how many institutions are themselves actively engaged in victim/offender mediation or are planning such activities can be answered as follows: 18.2% of the interviewed institutions - mainly youth welfare offices - stated to be already practising victim/offender mediation, 5.7% reported to be engaged in the planning of such activities and 9% cooperate with victim/offender services.

According to these results, nearly one third of all interviewed institutions (i.e. 412 institutions) are directly or indirectly engaged in victim/offender mediation. It must, however, be doubted whether victim/offender mediation in its true sense is being practiced in all these cases. Even though it was made clear that victim/offender mediation implied restitution and conflict settlement it is nevertheless possible that institutions which are primarily engaged in restitution without offering the service of a mediator with the view to a settlement of the conflict also claimed to be practicing victim/offender mediation. Data obtained from the social services seem to confirm this: 42 out of the 248 social services who reported to be practicing or planning victim/offender mediation (probation services and court aid services, youth welfare offices and private organizations) stated that to them victim/offender mediation implied "predominantly restitution".

None the less it may justly be claimed that in spite of the quite considerable regional differences, victim/offender mediation is no longer the concern of but a few model projects and a small number of institutions.

Investigation data should not only be analysed on an internal level but be correlated to the population as a whole. This can only be done here as far as the judicial authorities are being concerned. The 791 judicial authorities (local courts, district and regional courts and public prosecution offices) contacted for the investigation were the basis for computing how many judicial authorities in the Federal Republic of Germany are concerned with victim/offender mediation. The results are as follows:

Almost one quarter (i.e. 22%) of the judicial authorities in the Federal Republic of Germany know of actually existing or projected victim/offender mediation activities within their jurisdiction. One out of six (i.e. 16.2%) stated to be actively engaged in victim/offender mediation (i.e. to practice it, to plan its implementation or to cooperate with mediation services).

In the following we take a closer look at social services who practice victim/offender mediation or plan to do so in the near future (i.e. youth welfare offices, probation services and court aid services, private organizations). For the drawing up of a list containing all mediation projects in the Federal Republic of Germany, the data of the DBH investigation were on the one hand reduced and on the other hand supplemented: only institutions who had stated to practice an "authentic" victim/offender mediation, i.e. restitution and conflict settlement, were put on the list. Institutions who merely assist in the regulation of damage claims and restitution arrangements are not included. The list was supplemented by data of some victim/offender mediation services who had not participated in the DBH investigation.

In total, the "list of mediation services in action" now comprises 224 institutions. Although these services are not equally spread over the Federal Republic of Germany, there exists at least one such service in more than 80% of all regional court districts. 156 of the above mentioned institutions stated that they actually practiced victim/offender mediation, the remaining 68 institutions where actively planning to do so. Victim/offender mediation is (as yet) mainly practiced (or projected) as far as juveniles are being concerned: 85.3% of the a.m. institutions practice victim/offender mediation with juvenile offenders or with young adults. Only 11.2% practice mediation with adult offenders and yet another 3.6% work with juveniles and adults.

Table 1 gives a survey on the social services who offer victim/offender mediation: Mediation is practiced to more than two thirds by youth welfare offices, the mediation activities of the social services within the judicial system amount to 10% and the activities of private organizations to 22%. There hardly exist any specially created mediation services. As a rule, mediation is done by (already existing) institutions with other main fields of activity. 208 of the institutions shown in table 1 are concerned with juveniles and/or offenders. Most victim/offender mediation services are thus structurally offender-oriented.

It was further investigated whether mediation is integrated in other tasks of the social workers or whether it is a partly specialized or an entirely specialized task:

- "Integrated" implies that the staff member acting as mediator is entrusted in the same case with tasks pertaining to the field of pre-sentencing reports, offender assistance or victim assistance;
- "Partly specialized" implies that in one case the staff member acts as mediator whereas in other cases he is entrusted with other tasks;
- "Entirely specialized" implies that the staff member has no other tasks than mediation.

The investigation showed that at present mediation is very seldom a specialized - or even partly specialized - task: 78.1% of the institutions stated that their staff members in a given case not only act as mediators but are simultaneously charged with other tasks. As these institutions, as already mentioned, are predominantly "offender-oriented", many of them combine victim/offender mediation activities with offender assistance.

For a further analysis of the obtained data, please refer to the detailed investigation reports (*Schreckling* 1991, *Schreckling* et al. 1991).

Table 1: Private organizations, youth welfare offices and social services within the judicial system who stated to practice victim/offender mediation or are actually planning such activities (Source: Questionnaires of the DBH investigation and further investigations. Updated 15.12.199O)

Type of Institution	Number of Offices	Percentage
Probation services	5	2.2
Judicial assistance services	17	7.6
Youth welfare offices	155	69.2
Private organizations:	47	21.0
- offender assistance	(17)	
- youth assistance		
- mediation services	(3)	
- victim assistance	(2)	
- others	(11)	
Total number of instiutions	224	100

3.2 Acceptance of Victim/Offender Mediation by Criminal Justice Institutions

"Do you approve of victim/offender mediation activities within your jurisdiction? To this question 75.6% (i.e. 946) of the interviewed institutions answered in the affirmative. Only 4.6% (i.e.57) answered in the negative whereas 15.3% (192) "held no opinion" and 4.5% (i.e. 56) made no statement.

Diagram 1 shows the differing opinions of the institutions working within the criminal justice system. Probation services, private organizations (not linked with the Red Cross or the Churches), youth welfare offices and court aid services very frequently approve of victim/offender mediation. Of the judicial authorities the public prosecution offices show the highest degree of acceptance.

In a further analysis we tried to determine whether and to what extent victim/offender mediation is dependent on the degree of information which the different institutions dispose of. To this means, two sub-groups were compared with each other:

- One group consisted of the 719 institutions who had stated that they did not know of any victim/offender mediation practiced (or projected) within their jurisdiction.
- The other group comprised the 120 institutions who knew of such a practice (or such projects) within their jurisdiction but who were themselves not actively engaged in mediation activities.

Quite deliberately we did not take into account the 412 institutions who had stated to either practice victim/offender mediation themselves (or were planning to do so) or else to cooperate with mediation services. Here a high degree of acceptance was to be expected anyhow.

Diagram 2 shows how many institutions of the above mentioned subgroups stated that they approved of victim/offender mediation. Of special interest are the most extreme results: only 17.6% of the public prosecution offices who did not know of any victim/offender mediation activities within their jurisdiction approved of the mediation idea whereas 75% of the public prosecution offices who knew of such a practice were in favour of victim/offender mediation. The probation services present quite a different picture: They support the idea of victim/offender mediation whether they know of such activities within their own competency or not. The difference in the opinions of the other institutions amounts to 30 - 40% which corresponds to the number of institutions to whom mediation activities are known resp. not known.

In the following the results of the judicial authorities participating in the DBH investigation are correlated to the population as a whole, i.e. to the total number of local courts, district and regional courts, and public prosecution offices to whom the questionnaires were addressed: 386 judicial authorities out of 791 completed the DBH questionnaires; 256 out of these 386 institutions approved of the implementation of victim/offender mediation within their jurisdiction. Thus we know that (at least) 32.4% of all judicial authorities in the Federal Republic of Germany support the idea of victim/offender mediation. It remains open whether the "silent majority" of those who did not complete the questionnaires (51.2% of the above mentioned judicial authorities) is either indifferent or sceptical to the idea of victim/offender mediation.

Considerable differences exist between the attitudes of the courts and the opinions of the public prosecution offices: 62.1% of the 95 public prosecution offices approved of victim/offender activities within their jurisdiction whereas only 38.7% of the 93 regional courts 38.7%, and 26.7% of the 603 local courts supported the mediation idea.

In a next step we correlated the 1,251 completed questionnaires to the 93 regional court districts of the former Republic of Germany. This further breakdown was possible due to the large number of institutions participating in the DBH investigation.

As to the question of the acceptance of victim/offender mediation, the regional court districts did not differ very much. With the exception of three districts (acceptance up to 40%), the rate of acceptance amounted to more than 60% in all regional and district courts (see diagram 3). However, the rate of acceptance is less homogenous if we look at the different institutions within the regional court districts. Within this paper, this breakdown can only be made as regards the judicial authorities (i.e. local courts, regional and district courts, and public prosecution offices).

As illustrated in diagram 4, the judicial authorities of the different regional court districts present themselves less homogenous than the (judicial) population as a whole. The difference is even more significant if the judicial authorities who did not return the questionnaires are also taken into consideration. Diagram 5 shows that a "qualified minority" of one third of all judicial authorities does (as yet) approve of victim/offender mediation. At the same time, the diagram demonstrates to what great extent the various regional districts differ in their opinion: on the one hand, we have 6 regional court districts with an acceptance rate exceeding 60%, on the other hand, there are 25 districts where less than 20% of all judicial authorities approve of the idea of victim/offender mediation.

For further data, please refer to the detailed investigation reports (*Schreckling* 1991, *Schreckling* et al. 1991).

4. Discussion

The results of the DBH investigation clearly show that victim/offender mediation is being accepted by a considerable number of the criminal justice institutions in the Federal Republic of Germany and that mediation practice is in no way limited to the well-known model programs. Yet, these positive results should not blind us to the many difficulties which still have to be overcome with regard to the firm establishment of victim/offender mediation in the penal practice.

The different rates of acceptance in the different regions and institutions prove once more that criminal justice is not applied quite homogenously in the entire Federal Republic of Germany. Even though an equal application of a new measure such as victim/offender mediation could not be expected

everywhere and keeping in mind that an absolutely equal homogenous penal practice is illusory, we should nevertheless make efforts towards a maximal equalizing of victim/offender mediation in the not too distant future.

Here we must also keep in mind the interests of the victims: for instance, it would hardly be justifiable if victims of physical injury in Bielefeld or Munich could apply to qualified mediation services for restitution and conflict settlement whereas victims living in Bückeburg or Erfurt would have to apply to a civil court for the assertion of their rights.

Problems relative to the implementation of victim/offender mediation: If we keep in mind that one third of the institutions listed in table 1 have but recently begun to practice mediation or are at present engaged in planning such activities, we can justly speak of a "boom" in victim/offender mediation activities. According to juvenile court judges and to representatives of private organizations, this has mainly been brought about by the amendment of the Juvenile Court Act wich now includes provisons for victim/offender mediation. Although the results of the investigation may be seen as a proof that the law amendment has been accepted by the practicionners, further data of the DBH investigation which cannot be presented here indicate that many institutions with a small or even very small case load practice victim/offender mediation rather peripherally to their other tasks. Many social services are simply not in the position to build up victim/offender mediation systematically. A qualified mediation requires a concept taking into account the respective local conditions and circumstances. Furthermore, a cooperation between the mediation service and the judges and public prosecution offices has to be established and - last but not least - the mediators should receive further training in case work and be able to evaluate each individual case. It may well be that the surprisingly rapid implementation of victim/offender mediation within the juvenile penal practice is somewhat detrimental to the quality of the offered mediation.

From the victims' point of view, mediation as practiced by some institutions gives cause to criticism: for instance, if mediation is an integrated part of the tasks of a "mediator" it risks to collide with the other tasks of the latter. The success of mediation efforts might thus be impaired. This applies especially to cases where the social worker not only acts as a (neutral) mediator but is also entrusted with the assistance and counseling, may be even the therapeutic treatment of one of the parties concerned. As most of the institutions are offender-oriented, its mostly the interests of the victims that are being neglected. In order to be able to cope with such situations, the mediators would have to have the same professional skills and experiences as family or group therapists dispose of. Guidelines and experiences from other fields of conflict settlement indicate that the person

attending to the interests of one of the conflicting parties should better not act simultaneously as a mediator between the two conflicting parties. We refer in this context to the practice in divorce cases. Also, marriage or family counselling is either done with both parties simultaneously or else the psychologists work as a team should the individual counseling develop into a group counselling.

Some remarks to the question of acceptance: The above reported three-quarters majority for the idea of mediation is, at first glance, quite impressive. It should, however, not be overrated as a large number of institutions participating in the investigation were aware of the fact that the DBH as the initiator of the investigation was also to a vast extent responsible for the development of the mediation idea as such. Moreover, the question relating to the "acceptance" of victim/offender mediation had to be formulated in rather an abstract way as investigations carried out by mail must be as concise as possible. As a rule, one aspect is covered by one question only. Even though it was asked whether victim/offender mediation existed within the different areas of jurisdiction, some rather important complimentary aspects had to be omissed, for instance the question whether victim/offender mediation should only be introduced as an informal measure (diversion) or whether it should also be practiced in the formal penal procedure. In more differentiating studies it should be investigated to what extent the acceptance of victim/offender mediation is dependent on certain conditions: for instance on the number of suitable cases, on its possible restriction to certain types of offenses or certain offender categories (first offenders, recidivists) or on the position within the penal.

More rewarding than an analysis of the general rates of acceptance is a breakdown of the data according to the different institutions. The different attitudes of the institutions who knew (resp. did not know) of mediation activities within their area of jurisdiction are of much interest in view of a further implementation of victim/offender mediation. According to the investigation data, probation services as a rule approve of victim/offender mediation efforts whether they know of such activities within their working district competency or not whereas public prosecution offices in particular who do not know of any such activities within their area of jurisdiction are rather sceptical about it. Undoubtedly, more information is needed here.

If correlated to the judicial population as a whole, the investigation data show that mediation is only known to one quarter of the above mentioned judicial authorities; only one agency out of six is directly or indirectly engaged in mediation. Furthermore, according to the DBH investigation

only one third of the judicial authorities approved of mediation, although the percentage of acceptance of the public prosecution offices (62%) is remarkly high.

Notwithstanding all empirism as to the development of victim/offender mediation, it must be stressed that the legal basis for its application in all those cases where the victim/offender constellation seems to be suitable has still to be improved. As far as adult offenders are concerned, the practice of victim/offender mediation in an early stage of the penal procedure in view of an informal settlement of the case is so far restricted to less serious or petty offenses (for amendment proposals see *Schöch* 1990). Neither are the possibilities offered by the amended Juvenile Court Act fully made use of. Only when restitution efforts and conflict settlement are given prioritiy to penal prosecution can victim/offender mediation be considered as being firmly established in the German criminal justice system. Based on positive experiences gained in Austria with their new Juvenile Court Act, adequate material-legal provisions for the German Juvenile Court Act are now being discussed (see *Kerner* et al. 1990, *Ostendorf* 1980, *Walter* 1991).

5. Diagrams

Diagram 1: **Acceptance of victim/offender mediation by institutions of the criminal justice system.**
(Rate of acceptance shown in % of the resp. sub-group; N = 1,251 institutions)

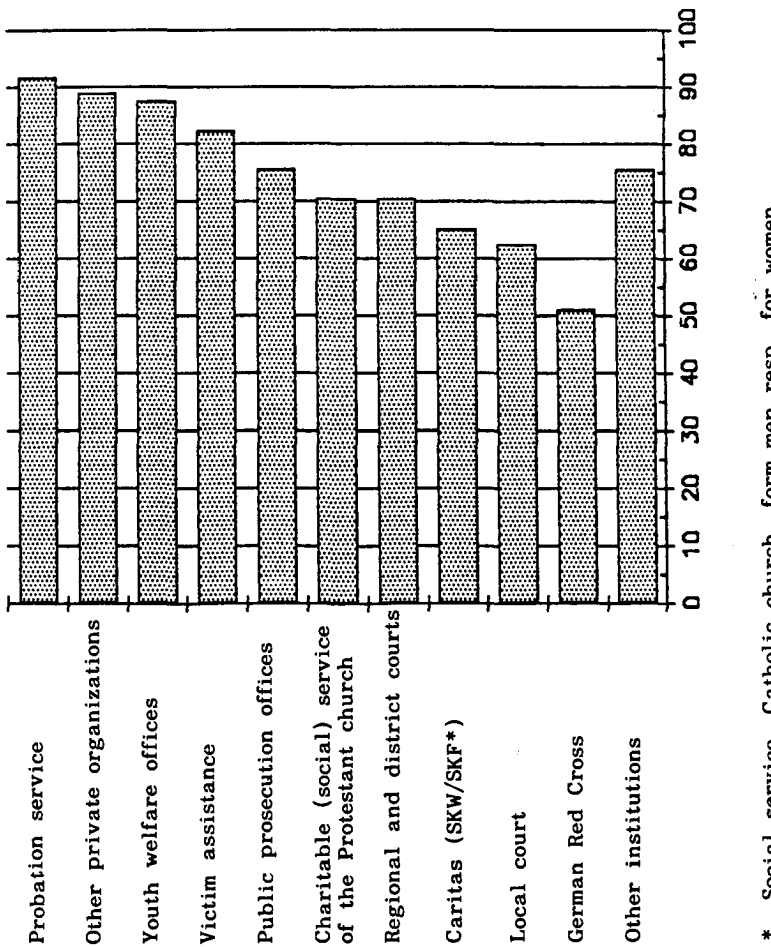


Diagram 2: **Acceptance of victim/offender mediation by institutions of the criminal justice system who knew resp. did not know of mediation activities within their area of jurisdiction.**
(Rate of acceptance shown in % of the resp. subgroups; N = 839 institutions, i.e. without the institutions who are themselves engaged in mediation local courts.

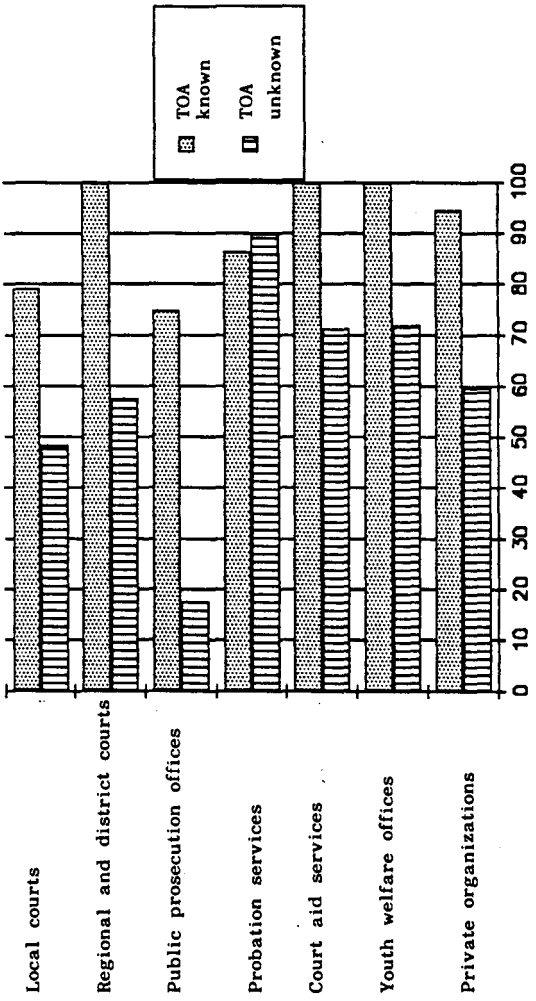


Diagram 3: **Acceptance of victim /offender mediation by institutions of the criminal justice system breakdown according to regional court districts. (Rate of acceptance shown in % of the institutions within the regional court districts of the former Republic of Germany who participated in the DBH investigation; N = 1,251 institutions)**

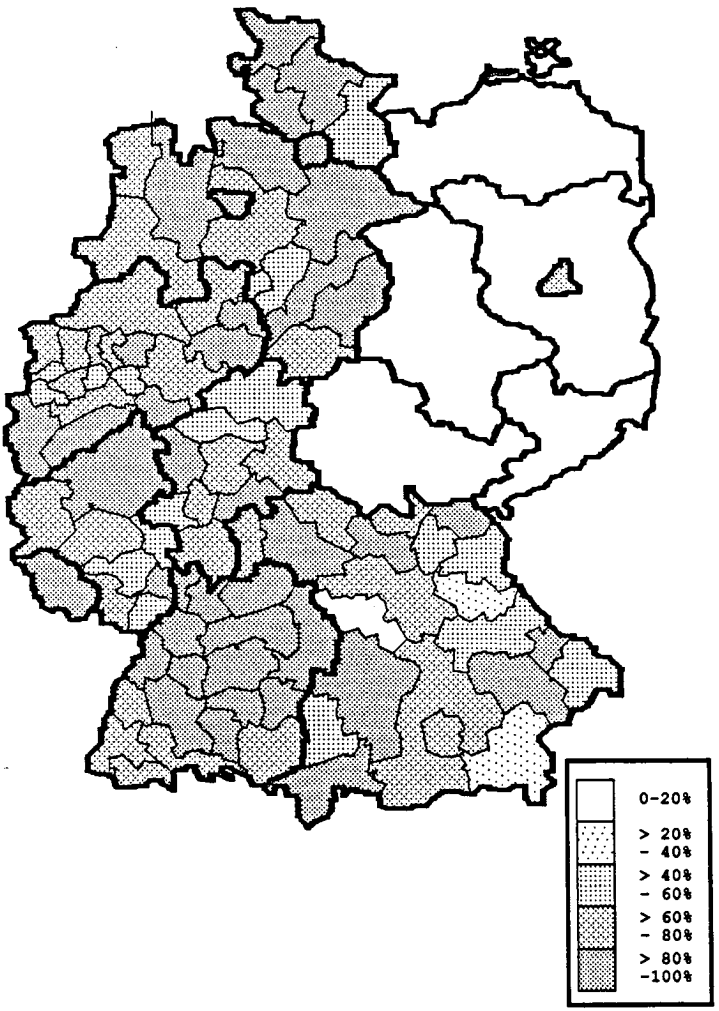


Diagram 4: **Acceptance of victim/offender mediation by local courts, district and regional courts, and public prosecution offices; breakdown according to regional court districts. (Rate of acceptance shown in % of the institutions of the regional court districts of the former Republic of Germany who participated in the DBH investigation; N = 386 judicial authorities.)**

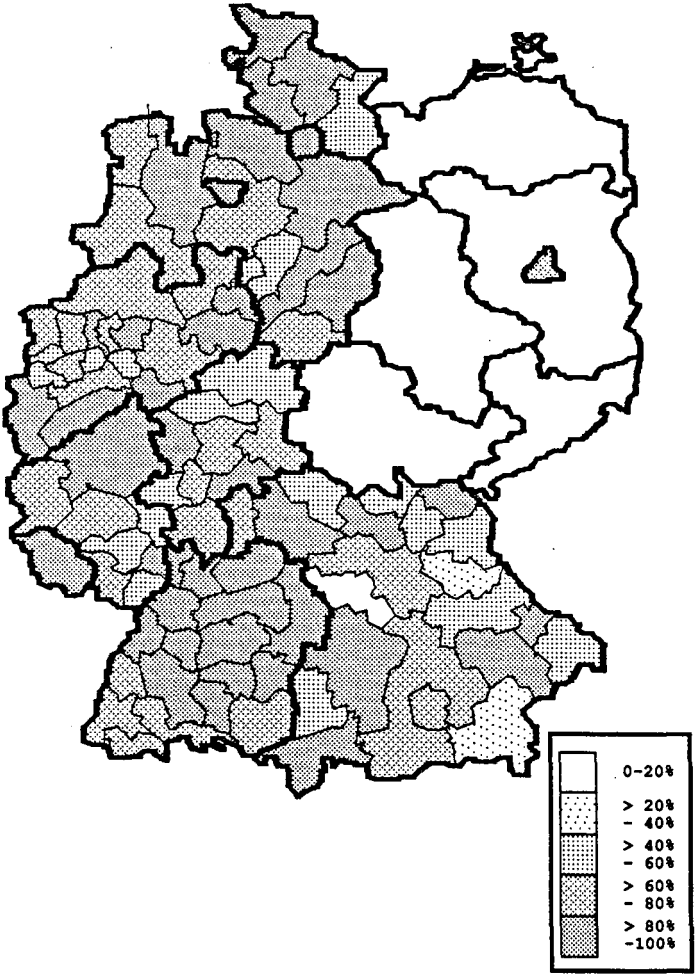
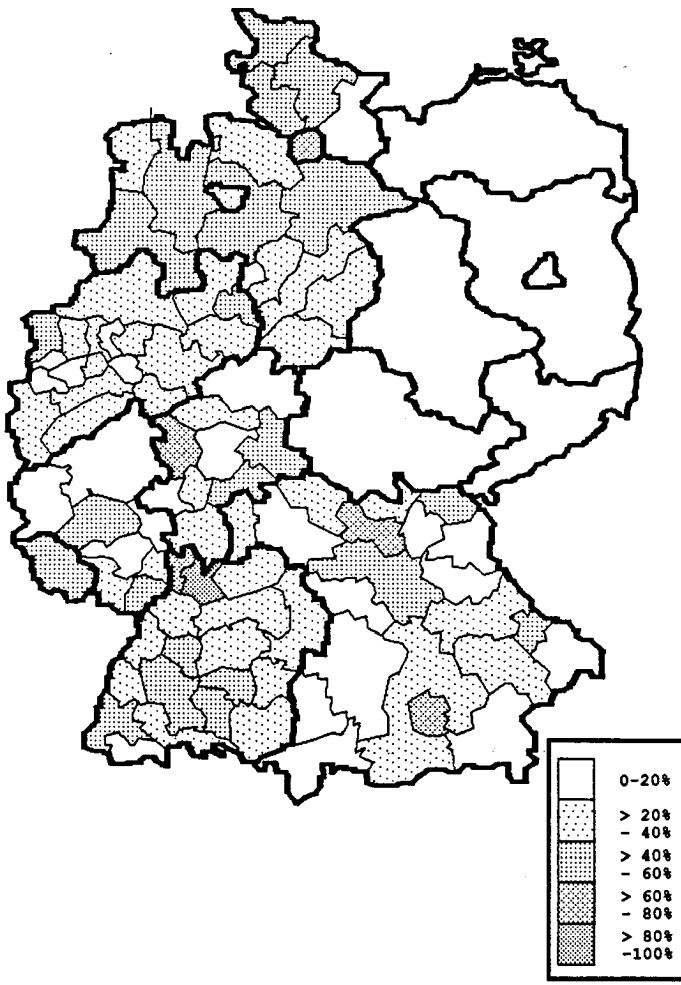


Diagram 5: **Acceptance of victim/offender mediation by local courts, regional and district courts, and public prosecution offices within the total judicial population; breakdown according to regional court districts.**
(Rate of acceptance shown in % of the a.m. judicial authorities in the regional court districts of the former Republic of Germany; N = 791 judicial authorities).



6. References

Bilsky, W. (1990). Extrajudical Mediation and Arbitration. Evaluation of German Victim-Offender-Reconciliation Programs. The International Journal of Conflict Management 1, 357-373.

Bilsky, W., & Pfeiffer, H. (1990). Praxis der Konfliktregulierung im Rahmen des Modellprojekts Täter-Opfer-Ausgleich in Braunschweig. In: DVJJ (Ed.), Mehrfach Auffällige, mehrfach Betroffene (pp. 505-519). Bonn: Forum Verlag Godesberg.

Bundesministerium für Justiz (Ed.) (1988). Schadenswiedergutmachung im Kriminalrecht. Bonn: Schriftenreihe "recht".

Bundesministerium für Justiz (Ed.) (1991). Täter-Opfer-Ausgleich - Zwischenbilanz und Perspektiven. Bonn: Schriftenreihe "recht" (forthcoming).

Coates, R.B. (1990). Victim-Offender Reconciliation Programs in North America: An Assessment. In: B. Galaway & J. Hudson (Eds.), Criminal Justice, Restitution, and Reconciliation (pp. 125-134). Monsey, NY: Criminal Justice Press.

DVJJ (Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen) (Ed.) 1984). Jugendgerichtsverfahren und Kriminalprävention. München: Schriftenreihe der DVJJ, Heft 13.

Dünkel, F., & Rössner, D. (1989). Law and Practice of Victim/Offender Agreements. In: M. Wright & B. Galaway (Eds.), Mediation and Criminal Justice (pp. 152-177). London: Sage.

Eppenstein, D. (1991). Täter-Opfer-Ausgleich - Zwischenbilanz und Perspektiven. In: Bundesministerium der Justiz (Ed.), Täter-Opfer-Ausgleich - Zwischenbilanz und Perspektiven. Bonn: Schriftenreihe "recht" (forthcoming).

Frehsee, D. (1982). Wiedergutmachung statt Strafe. Kriminologisches Journal. 126-136.

Hartmann, A. (1991). Die Akzeptanz des Täter-Opfer-Ausgleichs bei den betroffenen Tätern und Geschädigten. In: Bundesministerium der Justiz (Ed.), Täter-Opfer-Ausgleich - Zwischenbilanz und Perspektiven. Bonn: Schriftenreihe "recht" (forthcoming).

Kerner, H.-J., & Janssen, H. (Eds.) (1985). Verbrechensopfer, Sozialarbeit und Justiz. Bonn: Schriftenreihe der Deutschen Bewährungshilfe e.V., Neue Folge, Band 3.

Kerner, H.-J., Marks E., Rössner, D., & Schreckling, J. (1990). Täter-Opfer-Ausgleich im Jugendstrafrecht. Bewährungshilfe, 37, 169-176.

Kirchhoff, G.F., & Sessar, K. (Eds.). (1979). Das Verbrechensopfer. Bochum: Studienverlag Brockmeyer.

Kirchhoff, G.F., Kirchhoff, C., & Dussich, R. (1980). Viktiminologie - Eine Einführung in Probleme einer jungen Disziplin und in deren Bedeutung für Sozialarbeit. Bewährungshilfe, 27, 313-327.

Kondziela, A. (1991). Opferrechte im Jugendstrafverfahren. Frankfurt/M.: Lang.

Kuhn, A., Rudolph, M., Wandrey, M., & Will, H.-D. (1989). "Tat-Sachen" als Konflikt. Bonn: Forum Verlag Godesberg.

Marshall, T.F., & Merry, S. (1990). Crime and Accountability: Victim/Offender Mediation in Practice. London: HMSO.

Ostendorf, H. (1990). Ansatzpunkte für materiell-rechtliche Entkriminalisierungen von Verhaltensweisen junger Menschen. Vortrag auf dem "Symposium über Grundfragen des Jugendkriminalrechts und seiner Neuregelung", veranstaltet vom Bundesministerium der Justiz in Zusammenarbeit mit der Kriminologischen Forschungsstelle der Universität zu Köln, Oktober 1990 (Tagungsband in Vorbereitung).

Reeves, J. (1989). The Victim Support Perspective. In: M. Wright & B. Galaway (Eds.), Mediation and Criminal Justice (pp. 44-55). London: Sage.

Rössner, D., & Wulf, R. (1984). Opferbezogene Strafrechtspflege. Bonn: Beiheft zum Rundbrief Soziale Arbeit und Strafrecht der Deutschen Bewährungshilfe e.V., Nr. 3.

Schädler, W. (1991). Den Geschädigten nicht nochmals schädigen. Anforderungen an den Täter-Opfer-Ausgleich aus Sicht der Opferhilfe. In: Bundesminsiterium der Justiz (Ed.), täter-Opfer-Ausgleich - Zwischenbilanz und Perspektiven. Bonn: Schriftenreihe "recht" (forthcoming).

Schneider, H.-J. (1979). Opferschaden, Wiedergutmachung und Opferbehandlung. In: G.F. Kirchhoff & K. Sessar (Eds.), Das Verbrechensopfer (pp. 365-378). Bochum: Studienverlag Brockmeyer.

Schöch, H. (1990). Vorläufige Ergebnisse der Diskussionen zu einem Alternativ-Entwurf Wiedergutmachung (AE-WGM) im Arbeitskreis deutscher, österreichischer und schweizerischer Strafrechtslehrer. In: A. Eser, G. Kaiser & K. Madlener (Eds.), Neue Wege der Wiedergutmachung im Strafrecht (pp. 73-82). Freiburg: Beiträge aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Band S 18.

Schreckling, J. (1989). Täter-Opfer-Ausgleich bei Jugendstraftaten. Zur Lage der Projektarbeit und ihren Perspektiven in der Bundesrepublik Deutschland. In: Bundesministerium der Justiz (Ed.), Jugendstrafrechtsreform durch die Praxis (215-229). Bonn: Schriftenreihe "recht".

Schreckling, J. (1990). Täter-Opfer-Ausgleich nach Jugendstraftaten in Köln. Bonn: Schriftenreihe "recht" des Bundesministeriums der Justiz.

Schreckling, J. (1991). Bestandsaufnahme zur Praxis des Täter-Opfer-Ausgleichs in der Bundesrepublik Deutschland. In: J. Schreckling et al, Bestandsaufnahme zur Praxis des Täter-Opfer-Ausgleichs in der Bundesrepublik Deutschland (pp. 1-149). Bonn: Schriftenreihe "recht" des Bundesministeriums der Justiz.

Schreckling, J., Marks, E., & Franzen, W. (1991). Bericht über eine Rundfrage der Deutsche Bewährungshilfe e.V. bei Institutionen der Strafrechtspflege zur Akzeptanz und Vorbereitung des Täter-Opfer-Ausgleichs. In: J. Schreckling et al., Bestandsaufnahmen zur Praxis des Täter-Opfer-Ausgleichs in der Bundesrepublik Deutschland (pp. 150-194). Bonn: Schriftenreihe "recht" des Bundesministeriums der Justiz.

Sessar, K. (1980). Rolle und Behandlung des Opfers im Strafverfahren - Gegenwärtiger Stand und Überlegungen zur Reform. Bewährungshilfe, 27, 328-339.

Sessar, K. (1989). Strafbedürfnis und Konfliktregelung - Zur Akzeptanz der Wiedergutmachung im und statt Strafrecht. In: E. *Marks & D. Rössner* (Hrsg.): Täter-Opfer-Ausgleich (pp. 42-56). Bonn: Forum Verlag Godesberg.

Voß, M. (1989). Anzeigemotive, Verfahrenserwartungen und die Bereitschaft von Geschädigten zur informellen Konfliktregelung. Erste Ergebnisse einer Opferbefragung. Monatsschrift für Kriminologie, 72, 34-51.

Walter, M.: Theoretische Perspektiven des Täter-Opfer-Ausgleichs. In: Bundesministerium der Justiz (Ed.), Täter-Opfer-Ausgleich - Zwischenbilanz und Perspektiven. Bonn: Schriftenreihe "recht" (fortcoming).

New Forms of Conflict Management in Juvenile Law: A Comparative Evaluation of the Brunswick Victim-Offender-Reconciliation-Program

*Wolfgang **Bilsky**, Hartmut **Pfeiffer** and Thomas **Trenczek***

Contents

1. Abstract

This paper presents a comparative evaluation of the exploratory victim-offender-reconciliation program conducted in Brunswick. Evaluation concentrates on the influence of program organization and implementation on effectiveness of mediation. In the first part, results from four different research approaches in Brunswick are outlined. These approaches deal with the number of cases that are principally suited to mediation, the actual amount of mediation, the practicability of mediation, and the acceptance of mediation by victims and offenders. In the second part, findings of the Brunswick program are compared to those of two other German mediation programs - those conducted in Cologne and Reutlingen - as well as to some general mediation experiences from North-America. This overall evaluation suggests that mediation is an effective means of conflict management beyond petty offense. Furthermore, recommendations of the police proved helpful in selecting cases for mediation. However, a special training for mediators seems necessary to meet the demands of more complex conflicts to be encountered in mediation.

2. Introduction

Today, discussions in criminology and criminal policy focus to a great extent on two central issues: (1) on strengthening the position of the victim, and (2) on finding alternative reactions to crime that are, both, more promising than the 'rehabilitation paradigm' and clearly distinctive from the neo-classic 'law and order' approach.

Victim-offender-reconciliation is often considered to be one measure that meets both interests. It has been adopted by the 'diversion movement' in West Germany as a means to minimize negative aspects of formal proceedings and sanctions, especially in juvenile justice. One reason for this development is that criminal justice officials more and more agree that juvenile delinquency can generally be understood as a concurrent phenomenon of adolescence that normally disappears without intervening with formal measures. Furthermore, the opinion is widely held that formal punishment in general and imprisonment in particular are no adequate means to respond to criminal behavior and to reduce recidivism.

These trends in criminological reasoning partly characterize what has become known as the 'internal reform movement' of the judicial system. This movement started in the late seventies and aimed at the 'disarmament' of criminal law by reducing formal court proceedings as well as custodial measures and by implementing and testing new community oriented educational measures.

Implementation of these measures in general and victim-offender-reconciliation in particular could best be accomplished within the juvenile justice system because of the guiding **principle of education** (cf. *Kerner & Weitekamp* 1984) in the Juvenile Court Act: While traditional sanctions are likely to reinforce the offender's passiveness and indifference towards the victim and to foster techniques of neutralization (*Sykes & Matza* 1957), these new measures stress the interactive character of criminal behavior and aim at mutual perspective taking of the parties involved in the conflict. Face-to-face encounters of victims and offenders are regarded as a reasonable way to initiate perspective taking and social learning processes that are important with respect to the settlement of social conflicts and the acquisition of social competence.

In addition to diversionary and rehabilitative interests with regard to the offender, an altered view of **criminality** was important for the emerging idea of interactive reconcilitation, too. While the criminal justice system responded to delinquency primarily with offender oriented measures in the past, this approach is more and more criticized because it overemphasizes the 'reestablishment of the legal system' (Wiederherstellung der Rechtsordnung), thereby reducing the victim to a minor figure in the conflict. However, to a large part crime is not committed against the state, first and foremost it is a violation of the physical and emotional integrity of another person. This is true for personal crime (e.g., robbery and assault) as well as property offenses (e.g., theft and burglary; cf. *Maguire* 1980; *Waller* 1985). Strengthening the victim's position is also important in order to avoid secondary victimization which is likely to arrive when recasting social conflicts into categories of normative conflicts and criminal law. Besides the increase of protection and information rights, there is a call for encouraging active victim participation in response to crime (cf. *Rössner & Wulf* 1984). It is to *Christie* (1977) that we owe the revival of considering crime as an interactional process involving personal interests.

With effect from December 1st 1990 the German Juvenile Court Act was amended. In addition to the remaining right to order restitution (cf. *Trenczek* 1990) victim offender reconciliation was explicitly included in this law. It may now be used as a judicial educational direction (Erziehungsmaßregel) for juveniles and young adults. More important, however, efforts taken to

reconcile with the other party are now explicitly accepted as a satisfactory condition to either withdraw from prosecution or to dismiss a case (cf. Figures 1 and 2).

The position of *Christie* and other protagonists of reprivatizing victim-offender conflicts and strengthening the victim's position has only partly been converted into practice till today. However, it has influenced criminological reasoning in Germany in general, and, both, the amendment of the Juvenile Court Act and the conception of several exploratory projects on victim-offender-reconciliation. It is on these projects that we comment in the present report which is partly an update and extension of an earlier paper on German mediation programs (*Bilsky* 1990).

The first main section gives an outline of the eldest German mediation project, the Brunswick victim-offender-reconciliation program, including information about implementation and evaluation. Mediation was first practiced in Brunswick in 1982; it has become the main focus of a pilot project on victim-offender-reconciliation in 1985. The following section focuses primarily on comparing this program with two others that were conducted in Cologne (initiated in 1986) and Reutlingen (initiated in 1985). These three programs spearheaded a couple of similar mediation projects in West Germany. Finally, results are summarized and evaluated with respect to the further development of mediation in Germany. Before starting our overview, however, a short note on the use of two central terms, restitution and reconciliation, seems appropriate.

3. Restitution and Reconciliation

There exists quite a variety of victim-offender-programs in North America and in Germany. However, this variety can be split up into two major approaches, restitution and reconcilitation programs. **Restitution** programs can be found in nearly every jurisdiction in the United States (cf. *Warner & Burke* 1987). They occasionally use mediation techniques in order to determine the amount of restitution to be paid by the offender. Over and above that, negotiation in restitution programs is not significant with regard to the process of conflict resolution (*Trenczek* 1989). These programs primarily focus on the outcome, the concrete requirement being the offender's compensating for his misbehavior. Thus, restitution is best characterized as an offender oriented measure with educational and penal aims (*Galaway* 1987; *Schneider* 1985; *Trenczek* 1990) that pays only functional

attention to the victim. Consequently, restitution programs should not be labeled 'mediation' programs since they do not mediate the victim offender conflict; rather, they are involved in the negotiation of punishment.

In Germany the concept of restitution is considered insufficient because of its focusing merely on the outcome, and because neither the offender nor the victim are expected to actively participate in an interactive conflict solving process. In other words, this narrow approach disregards the fact that the criminal act is very often embedded in a complex conflict structure. Therefore, initiating and facilitating interactive conflict resolution is much more stressed in the German programs which could perhaps best be labeled **reconciliation** programs.

Reconciliation is often associated with a religious connotation and, therefore, sometimes criticized as an unrealistic goal of criminal policy. In fact, the first North-American Victim-Offender-Reconciliation Programs (VORPs) have strong historical and philosophical roots in the religious community, especially the Mennonite church (cf. *Gehm* 1986; *Peachey & Skeen* 1986; *Trenczek* 1989). However, reconciliation has actually got a broader, secular meaning, including conflict resolution and settlement as well as establishing or restoring equity and equality. Reconciliation implies a dynamic dimension that clearly goes beyond mere restitution. Thus, central ideas of reconciliation projects are the initiation and facilitation of controlled forms of conflict settlement and resolution which adequately reflect the interactive, conflict oriented perspective of crime and which are sensitive to both victims' and offenders' needs and problems. Since the term **Victim-Offender-Reconciliation-Program** and its acronym VORP are already well introduced in the English criminal justice terminology we use both interchangeably with the German **Täter-Opfer-Ausgleich** (TOA) to describe those projects that programmatically focus on interactive conflict resolution and face-to-face encounter.

4. Victim-Offender-Reconciliation in Brunswick

In this section we first give some information about how mediation has been implemented in Brunswick: Starting from the involvement of the police and the mediating role of the juvenile court assistance, we comment on some central preconditions as well as consequences of mediation before giving a summarizing overview of implementation. Next, we briefly list some criteria for selecting cases to be mediated. Then, a case dealt with in the Brunswick

TOA-program is sketched over to illustrate, both, how mediation may be realized, and possible effects of mediation. Finally, four different approaches to evaluate this program are outlined including some central results.

4.1 Implementation

4.1.1 Police

In Germany, because of the **principle of mandatory prosecution,** the police is obliged to investigate every case that is reported and to refer to the prosecutor all persons that are suspected of an offense. Although being better informed about every single offense than any other institution, police, however, are not allowed to mediate since investigation and prosecution are strictly separated in the German judicial system. To conform to these legal restrictions without losing first hand information at the same time, a special solution was developed and implemented in Brunswick in 1988 that has become a central feature of this mediation program: The police charged with investigation complete a special form stating whether the case under consideration is recommended for mediation or not. This recommendation is then sent to the prosecutor's office and to the juvenile court assistance simultaneously. Thus, prosecutors and juvenile court aides both receive information without delay and not filtered by any other intervening institution. Furthermore, they can contact and take initiatives with regard to mediation in the very beginning of the formal procedure (cf. *Pfeiffer* 1989).

4.1.2 Juvenile Court Assistance

The second feature that is characteristic of the Brunswick program is that mediation is realized by the juvenile court assistance. This institution is part of the judicial system in Germany and takes care of juveniles and young adults who came into conflict with the law. In contrast to the other German programs, the staff of this institution, consisting of about seven full- and part-time social workers, is not specialized on mediation but has to deal with a diversity of administrative and counseling activities that are primarily concerned with young offenders. Since these social workers are not especially trained in mediation they have to rely on their professional skills and experience.

4.1.3 Preconditions for Mediation

One characteristic of all German programs is that participation in mediation is voluntary. This means that both, victims and offenders, must be asked

whether they are willing to get involved in any reconciliatory effort. In order to avoid unnecessary irritation and additional stress on the part of the victim, the offender is contacted first in the Brunswick program. Only if the offender agrees to join in mediation the victim is asked whether s/he is interested in victim offender reconciliation as well. Refusing to participate should not have any negative consequences with respect to the outcome of the procedure. However, successful mediation is usually expected to positively affect the outcome of the (formal) proceedings. Therefore, the offender's freedom how to decide seems to be limited in practice.

4.1.4 Consequences

By and large, mediation is classified successful by the different reconciliation programs if the parties involved agree that the outcome of mediation meets their respective expectations, interests, and demands with respect to the solution of the underlying conflict. Consequences of successful mediation, however, may differ considerably from program to program. In Brunswick the prosecutor may either refrain from further prosecution on the initial stage of preliminary investigation or he may stick to a formal charge. In the latter case the juvenile court judge may dismiss the case during the interlocutory or during the main proceedings. If neither the prosecutor nor the judge decide to withdraw or dismiss the case, successful mediation is usually expected to result in mitigation of sentence. It should be added that the judge, too, may propose or initiate victim-offender-reconciliation at any stage of the proceedings. The other reconciliation programs partly deviate from this practice, which will, therefore, be discussed in our comparative analysis again.

4.1.5 Organizational Overview

The following figures give an overview of mediation as implemented in the Brunswick TOA-program: Figure 1 outlines the organizational arrangement of mediation, Figure 2 shows the sequential steps of prosecution. In addition, this second figure roughly indicates the different exits from the formal proceedings, namely during the preliminary investigation (i.e., the prosecutor refrains from prosecution) and during the interlocutory and main proceedings (i.e., the judge dismisses the case). Since stigmatizing effects can best be avoided if prosecution is abandoned at an early stage mediatory conflict management is normally initiated during the preliminary investigation in Brunswick. Given that mediation is successful the prosecutor can, thus, abstain from a formal charge (cf. Figure 2).

Figure 1

Organizational Implementation of Mediation in Brunswick

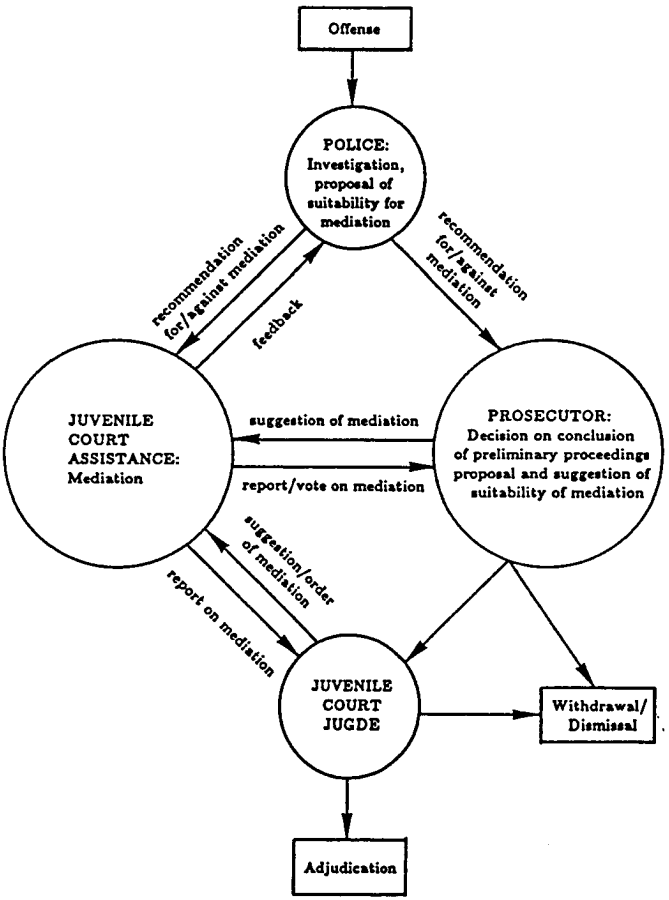
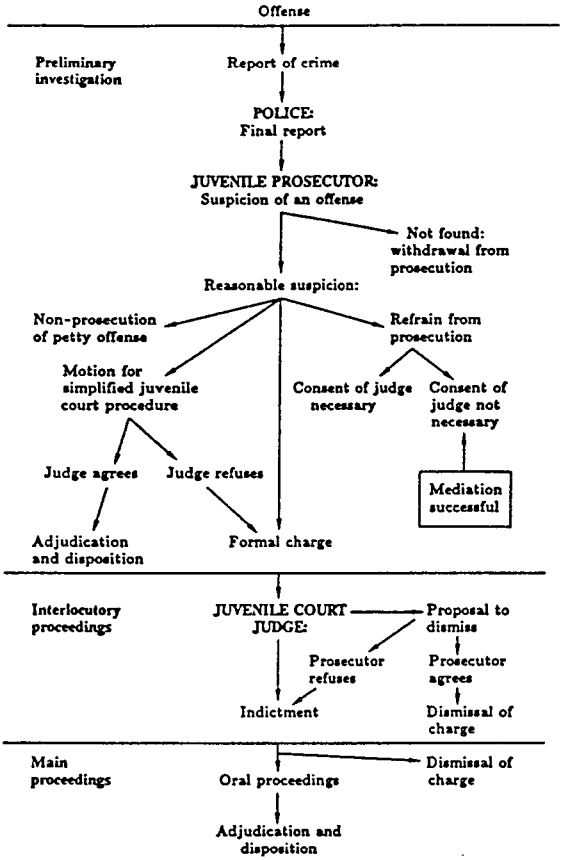


Figure 2

Sequential Steps of Prosecution and Placement of Mediation



4.2 Criteria

When setting up an intervention program criteria must be specified according to which the program input is to be selected; this holds for any kind of intervention, no matter whether medical, economical or social. Quite similarly only a smaller part of all delinquent acts that are reported to the police is also suited to mediation. Therefore, filters had to be defined that help the police decide whether or not to recommend a special case for the Brunswick reconciliation program. Since conflicts differ considerably in content these filters are confined to formal aspects, however.

Three limiting conditions have been specified to control the program input in Brunswick: (1) The victim must be a concrete person or a group of persons; anonymous victims and institutions are excluded. (2) The offender must have confessed the delinquent act; otherwise there must be at least sufficient evidence about facts and circumstances of the offense as well as liabilities. This takes into account that - although the offender does not deny the act - s/he often perceives the situation differently from the victim or the police. (3) Petty offenses that used to be withdrawn from prosecution in the past without further consequences should be excluded from mediation in order to avoid widening the net of social control.

Since there are no further principles beyond these formal criteria that exclude any special type of offense, the range of application of victim-offender-reconcilitation is rather wide. Delinquent acts that might be included in the program are assault, burglary, insult, robbery, sexual compulsion, and theft, for example (cf. Tables 3-5 for additional information).

4.3 Victim-Offender-Reconciliation: An Example

Describing a program only conceptually, without referring to any concrete example may leave the reader in the dark about its usefulness and practicability. Selectivity of examples does, on the other hand, easily result in a distorted picture of reality. This applies to the present report as well. Nevertheless, it might be instructive to get an idea of the complexity of cases that can be handled in a reconciliation program. We will, therefore, sketch out one case illustrating a face-to-face **encounter** of victim and offender in the presence of a third party (a juvenile court aide). This is the most common form of mediation in the Brunswick program. It seems to be most promising because mutual perspective taking as well as coping processes can be facilitated by the juvenile court aide who is supposed to guide the encounter and to support mediation (cf. *Viet* 1988, pp. 34-36, for this case).

A drunken young man had broken into an apartment by smashing a window at night. He was surprised by the tenant, a female student, who tried to gain control of the situation by offering him a beer and trying to get into conversation with him. She was not successful, however, and fled when the juvenile started to damage the furnishings. He left the apartment, too, but was caught by the police later. With regard to the victim, this event resulted in suffering from extreme nightmares and fears, as well as feelings of loss, due to material damages.

When asked whether she was willing to participate in mediation guided by a social worker, the student agreed to see the offender in the office of the juvenile court aide. During this encounter, the offender apologized convincingly for his behavior. He also spoke about his problem of alcoholism, which partly explained his misbehavior. The student on her part, talked about her problems of coping with her fears.

According to the mediator, this session resulted in a better mutual understanding of experiences, feelings, and problems associated with the offense. Both the victim and the offender asserted that this encounter had been helpful to them. While the student was able to overcome her fears, the juvenile felt relief about having apologized for his misbehavior in this face-to-face encounter. When they met later, both felt free and easy enough to start a conversation. Besides these positive emotional consequences of mediation, the juvenile also profited from mitigation of sentence because of the positive outcome of the mediation approach (instead of serving a jail term he was directed to pay compensation).

4.4 Evaluation

4.4.1 Research Questions and General Approach

Evaluation of the reconciliation program in Brunswick was set up to answer four questions that are of central interest with respect to the exploratory phase of mediation and the continuation of the program. These questions and the respective research approach chosen to answer them are briefly outlined before going into more detail.

The first question asks for the proportion of cases dealt with by the **juvenile prosecutors** in Brunswick that are suited to mediation. In other words, this question refers to the maximal **input** of cases into the program. To find a reliable answer to this question an analysis of court files was conducted based on the total input of cases in 1988.

The second question focuses on the actual amount of mediation as compared to the overall caseload of the **juvenile court assistance,** i.e., the **output** of mediation. Two research approaches were made to answer this second question. First, juvenile court aides were asked to continuously document their work throughout the exploratory phase of the mediation project. Documentation was accomplished with the help of a standardized questionnaire so as to collect information about all cases dealt with. In a second step court files of those cases were analyzed in which mediation had been successful according to the questionnaire study.

The third question concerns **practicability** of mediation. Answers to this question were of special interest because mediation was not to be restricted to the exploratory period only; instead, it was intended to become an integral part of the juvenile court aides' everyday activities in Brunswick. Therefore, a Delphi-study was conducted including police, juvenile court aides, prosecutors, and judges who were involved in mediation. These **experts'** evaluations of the mediation project were systematically analyzed in order to prepare for the post-project period.

The final question is directed towards the **acceptance** of the reconciliation program by those who were directly involved, i.e., **victims and offenders.** Thus, an exploratory interview study was conducted assessing the positive and negative mediation experiences of a limited number of victims and offenders.

The following summary highlights some central results of the aforementioned studies.

4.4.2 Method and Results

4.4.2.1 Input

This first study was carried out in order to get an idea of the maximal input of cases into the mediation program. Starting from all 3,356 **court files** dealt with in 1988 by the juvenile prosecutors in Brunswick, a random sample of files was drawn amounting to approximately 15% ($\underline{N}$ = 496) of the underlying population. Files were analyzed according to legal categories that are significant with respect to mediation, using a standardized multiple classification scheme (cf. *Bilsky* 1990; *Bilsky & Pfeiffer* 1990, for a preliminary analysis of this sample).

After excluding those categories which are not in the jurisdiction of the (local) juvenile court and, secondly, those which do not meet the program criteria, about 11 percent of cases remained that were basically suited to

mediation (cf. Table 1). Further analyses revealed, however, that in only about one quarter of the remaining cases conflicts were actually settled by mediation.

Table 1: Maximal Input of Cases into the Brunswick Mediation Program (Analysis of Court Files, 1988)

	N	%
Random sample of court files	496	100
Inappropriate categories		
Contravention of rules and regulations	43	8.7
Jurisdiction of other departments of prosecution/other courts	58	11.7
No criminal act (accident, etc.)	12	2.4
Offender older than 21	52	10.5
Offender younger than 14	42	8.5
Inappropriate cases		
Victim neither a person nor a group of persons	172	34.7
Offender not inclined to confess	64	12.9
Maximal input of cases into mediation program	53	10.7

Reasons for this rather low rate of mediation are manifold. However, some of them are more outstanding. Thus, some victims could not reasonably be expected to be confronted with their offenders again, petty offense was to be excluded from mediation, parties failed to come to an agreement, and one or both of the conflicting parties refused to participate in the reconciliation program. Nevertheless, there still seem to be resources for a more extensive use of mediation.

4.4.2.2 Output

Research on the output of the reconciliation program in Brunswick started with a comprehensive **questionnaire study** lasting from June 1986 to January 1989 (cf. *Pelster* 1990). During this time, juvenile court aides were asked to fill out questionnaires, one per offender, to assess their overall caseload and their mediation activities. Some general results of this study

are summarized in Table 2; when interpreting these data it is important to realize that the caseload of juvenile prosecutors and of juvenile court aides overlap only partly.

Table 2: Overall Caseload and Mediation Activities of Juvenile Court Assistance in Brunswick (cf. *Pelster* 1990)

	N (%)	July 87 - January 89 (19 months)	June 86 - January 89 (32 months)*
1	Caseload of juvenile court assistance	954 (100%)	1,474 (100%)
2	Cases basically suited to mediation	284 (29.8%)	502 (34.1%)**
3	Offenders asked to participate	118 (41.5%)	220 (43.8%)
4	Offenders that agreed to participate	99 (83.9%)	172 (78.2%)
5	Victims that rejected to participate	17 (17.2%)	32 (18.6%)
6	Mediations	70 (24.6%)	126 (25.1%)***

* Data collected with two partly differing instruments.
** Percentages based on data in the immediately preceeding row.
*** Percentages based on number of cases basically suited to mediation (row 2).

Data from this table show that about one third of all cases attended to by the juvenile court assistance is basically suited to mediation according to the above mentioned criteria. Again, there are several reasons why less than half of them enter into the formal mediation program (row 2 vs. 3), the most important being mentioned below.

First, there is quite a number of cases in which parties succeeded in settling the conflict **without** the help of an official mediator (100 cases of informal conflict settlement were recorded from June 1986 to January 1989). As might be expected, there is a remarkable difference between **informal** and **formal** conflict settlement with respect to the underlying conflict. While theft and larceny clearly exceed assault in the former case (50% vs. 25%, approximately) this order is reversed in formal mediation (25% vs. 30%, approximately). These figures may be taken as first evidence that conflicts

originating from financial loss and material damage may well be settled without professional help. In contrast, conflicts including physical and psychological harm are often more demanding with respect to professional expertise (see table 3 of the following study for additional information).

Second, there is another group of cases in which the offenders do not react to the invitation to contact the juvenile court assistance. Consequently, this group remains uninformed about the mediation program.

Third, several mediators reported to have refrained from intervention because of the individual, social, and situational characteristics of the respective case that seemed to prevent a successful solution. A special training in mediation might have helped to settle some or all of these cases, too.

Since data available to the juvenile court aides are incomplete with respect to several social and legal variables, the questionnaire study was supplemented by an analysis of **court files**. This analysis was restricted to those cases in which **successful settlement** of the conflict had been reported by the juvenile court assistance.

Table 3 informs about the distribution of the respective offenses, both, for formal and informal conflict settlement (despite the low frequencies, percentages are included in the following tables in order to facilitate comparisons). When comparing data from Tables 2 and 3, it should be noted that the number of cases reported deviate from each other because of different units of enumeration: While mediations were tallied in the questionnaire study, persons, i.e., victims and offenders, were the corresponding unit in analyzing court files.

In addition to the data in Table 3, three results of this analysis should be mentioned. First, about 50% of the offenses that were in the focus of formal conflict settlement can either be classified as offense against property, or as incorporeal offense (against personal freedom, health, integrity). In contrast, the respective figures for informal settlement are about 85% versus 15%. Second, the proportion of male and female victims identified in this analysis is about 60% versus 40% for both, formal and informal settlement. Finally and contrary to our expectation, conflicting parties that settled conflicts without the help of a mediator did not prove to know each other more frequently than those participating in formal mediation.

Table 3: Distribution of Offenses (Main Offense) for Victims and Offenders in Brunswick (July 87 - January 89): Successful Mediation

Offense	Mediation				Informal settlement			
	Offender		Victim		Offender		Victim	
	N	%	N	%	N	%	N	%
Assault	22	29.7	25	31.2	7	17.0	8	16.3
Damage to property	9	12.2	7	8.7	5	12.2	3	6.1
Fraud	1	1.4	1	1.2	-	-	-	-
Larceny	22	29.7	29	36.3	22	53.7	30	61.2
Robbery	1	1.4	1	1.2	-	-	-	-
Insult	4	5.4	5	6.3	-	-	-	-
Trespass	8	10.8	2	2.5	-	-	-	-
Traffic Offense	2	2.7	3	3.8	5	12.2	7	14.3
Others	5	6.7	7	8.8	2	4.9	1	1.2
N / %	74	100	80	100	41	100	49	100

4.4.2.3 Practicability

Practicability of the Brunswick mediation program was evaluated by means of a **Delphi-study** (cf. *Bilsky, Petzold & Netzig* 1990). The focus of this study was on problems arising when changing from exploratory practice of mediation to daily routine.

Considering past research (cf. *Linstone & Turoff* 1975), the principal use of Delphi-studies has been to make future projections and forecasts. According to *Moore* (1987), the Delphi technique "uses a series of questionnaires [in successive rounds of investigation] to aggregate the knowledge, judgments, or opinions of experts (who are usually anonymous) in order to address complex questions. Individual contributions are shared with the whole group by using the results from each questionnaire to construct the next questionnaire" (pp. 50-51). Instead of questionnaires, however, other modes of enquiry (e.g., interviews) may be used as well, depending on the problem to be solved.

The Delphi-study conducted in Brunswick consisted of three rounds. In the first round individual interviews were run with police, court aides, prosecutors, and judges who had participated in the program. Interviews

centered around the concept of reconciliation, the organizational context, the process as well as the effects and benefits of mediation. Results of this first round were summarized and communicated to all participants. The second Delphi-round was run by questionnaire. In this round participants were asked to evaluate several proposals based on the preceding interviews about how to practice mediation in the post-exploratory period. Again, all participants received a structured feedback of results. In the final round participants joined in a round-table discussion which focused on the question how to transfer findings from the preceding rounds into practice.

Results of this study primarily refer to the following problems: range of application, consequences of mediation, flow of information between and within different judicial authorities, and specialization of mediators. Those results which go beyond organizational details of local concern are briefly summarized (cf. *Bilsky* 1990, pp. 366-367):

1. There are no general limits of mediation with regard to severity of crime, type of interpersonal conflict, and recidivism. When considering the individual case, however, limitations may result from both, the fact that the victim may not be reasonably expected to participate in mediation and from the professional competence of the mediator. In this context, competence was primarily understood as the ability to adequately diagnose and react to the emotional involvement and distress of the conflicting parties and to manage tension and hostility arising during the encounter.

2. Successful mediation should either result in withdrawal from prosecution/dismissal of case or in mitigation of sentence. Unsuccessful mediation, however, should, in general, not affect sentencing because reasons for failure can be manifold and may often be attributed to the victim, or to the mediator as well.

3. Integration of the police into the organizational framework of mediation proved extremely helpful and was positively evaluated by all practitioners. Recommendations accelerated the procedure and augmented the portion of pre-trial withdrawals during the preliminary investigation. Furthermore, input to the program is less likely to be preselected by differential evaluations of the prosecutors.

4. The issue of whether or not mediators should be specialized in conflict management remained controversial, mostly because specialization would interfere with the present form of task organization in Brunswick. This topic is discussed again when comparing the different approaches to mediation in Germany.

On the whole, practitioners evaluated the idea of mediation positively. However, mediation is not conceived of as a cure-all with respect to the whole range of juvenile delinquency. Instead, it was judged as a promising approach with regard to the broad repertoire of interpersonal conflicts.

4.4.2.4 Acceptance

The last study for evaluating the reconciliation program in Brunswick was an **interview study** with victims and offenders who had participated in this program. The purpose of this exploratory study was to get some heuristically useful information about how mediation is perceived by those who were directly involved in the conflict to be settled. Because of the limited number of participants evidence cannot be considered representative of all participants in this program, however.

Eight victims and four offenders who were involved in mediation between January 1988 and 1989 were interviewed, using a semi-structured interview schedule. Interviews centered on the relationship between victim and offender, the history of the offense, motives to report to the police and to participate in mediation, concrete experiences with this reconciliation program, and the general evaluation of mediation as a measure of conflict settlement (*Rattay & Raczek* 1990). Despite the exploratory character of this study, some of the findings seem worth mentioning here (cf. *Bilsky* 1990, p. 367):

In general, mediation was positively evaluated by victims and offenders. This holds true even if their concrete experience with respect to process and outcome of mediation did not meet their expectation. Aspects of mediation that were valued by both parties are the reestablishment of social peace, avoiding a formal trial, and mutual understanding of behavioral motivation, for instance.

One reason for this positive evaluation obviously is that the direct interaction between the parties involved in the conflict allows an exchange that comes closer to the underlying problems than an official proceeding. Especially in those cases in which the offense (e.g., assault) is but the final step of a longer lasting dispute or quarrel (e.g., between neighbors) attribution of responsibility and ascription of the respective roles of an offender and a victim often seem to be somehow arbitrary. Although the background and the actual circumstances of a conflict should be considered in official proceedings as well, information used is normally highly selective on these occasions. While this is at least partly necessary in order to meet the requirements of the trial, these restrictions do not hold for mediation.

Beyond this shared evaluation, victims and offenders mentioned differential aspects, too. Thus, several offenders reported feelings of relief because of having got an opportunity to apologize for their misbehavior directly. Victims reported, among other things, that the successful settlement of the conflict was helpful in coping with their fear of crime.

Findings presented thus far can only roughly characterize the overall results of the evaluation studies carried out in Brunswick. Of course, there have been critical comments with respect to the idea of mediation in general and the mediation program in Brunswick in particular as well. However, since stock-taking of expectations and experiences during the exploratory period of mediation was positive on the whole, it is to be expected that mediation will become an effective means of settling conflicts in everyday practice, too.

5. Comparative Evaluation of Mediation Programs

While the last section focused on the Brunswick mediation project only, we now switch over to a short comparative analysis. As indicated in the introduction, there are two other programs, those of Cologne and Reutlingen, which have been trendsetting with respect to mediation in West Germany. It is to these projects that we relate information about the Brunswick program in this section. Furthermore, we will refer to the North American VORPs on several occasions. These programs have gained quite some experience since the initiation of the first VORPs in Kitchener, Canada (1974), and Elkhart, USA (1978). However, information about the actual procedure, outcome and benefits of all these programs is only partly available (cf. *Coates & Gehm* 1985; *Dittenhofer & Ericson* 1983; *Galaway* 1986; *Trenczek* 1989; *Umbreit* 1986).

The three German programs essentially concur with regard to formal criteria of case selection, the way of contacting offenders and victims, as well as procedure and forms of mediation (cf. *Dünkel & Rössner* 1987; *Trenczek* 1990, for additional information). As far as procedural aspects are considered, this also holds for the North American projects. Similarly, general program goals largely overlap. The German VORPs are mainly influenced by a conflict oriented conception of crime as well as the growing diversion movement. Therefore, they want to provide alternatives to formal and residential forms of social control by focusing on solving existing conflicts between victim and offender, making a formal procedure and further punitive sanctions unnecessary. This intention is in line with those American and Canadian reconciliation concepts that aim at the following

goals: humanize the criminal justice process, increase offender's personal accountability, provide meaningful roles and restitution for victims, help the offender to stay out of trouble, find alternatives to incarceration, ease the caseload of the judicial system, enhance community understanding of crime and criminal justice, and provide opportunities for reconciliation (cf. *Coates & Gehm* 1985; *Trenczek* 1990).

However, the German programs partly differ with regard to the intended judicial consequences of mediation (formal goals), the appraisal of successful mediation by prosecutors and judges, and program implementation. These differences exist both, among the German programs (cf. *Kuhn, Rudolph, Wandrey & Will* 1989; *Schreckling* 1990), and between German and North American programs (cf. *Trenczek* 1989).

5.1 Formal Goals and Appraisal of Successful Mediation

As outlined above, successful mediation in Brunswick is expected to result in either withdrawal from further proceedings or mitigation of sentence. As far as withdrawal results, practice largely overlaps with the idea of diversion, i.e., avoiding formal adjudication. However, mitigation of sentence is also accepted as a reasonable outcome if the prosecutor or judge is not willing to simply withdraw/dismiss a case, for instance, because of the severity of the offense.

This approach is mainly shared by the Cologne reconciliation project. The mediation project in Reutlingen, in contrast, definitively aims at the prosecutor's refraining from prosecution after the offender has fulfilled the obligations of the reconciliation (or restitution) agreement. Because of this explicit formal goal, mediation in this latter program can be regarded as an extrajudicial means of diversion; it is not conceived as an amplification of judicial reactions to delinquency but as an independent extrajudicial alternative.

However, one important parameter should be mentioned that has to be considered when comparing German projects in general: This is the amount of dismissals by the juvenile prosecutor, prior to and independent of mediation. This parameter might vary substantially and, thus, clearly influence formal mediation goals, input, and practice of the respective project.

A direct comparison of formal objectives with North America seems problematic, partly because of differences in the judicial system and program implementation in Canada and the United States. With regard to the appraisal of successful mediation, however, there is some evidence that, despite their benefits, positive outcomes are still far from being fully

appreciated by the justice system. In fact, in the US, there is generally no necessary link between participation in a reconciliatory attempt and either the following course of the procedure or the disposition by the court (*Trenczek* 1989). *Coates* and *Gehm* (1985) found out that offenders who participated in VORP were incarcerated as often as those from a comparison group. However, the average length of time served by VORP participants was considerably less than that of non VORP referrals. They were also more likely to serve time in local jails than in state institutions.

5.2 Program Implementation

Besides goals and appraisal, implementation is another feature that discriminates among mediation programs. There are three facets that should be distinguished in this context: financial and organizational integration of the mediating institution, input of cases, and specialization of mediators. We will comment on them separately.

5.2.1 Integration

To begin with Brunswick, the juvenile court assistance which serves as the mediating agency is an integral part of the youth welfare office; this, in turn, is a permanent institution of the local community. The court assistance is closely linked to the other judicial institutions and has a couple of different functions and responsibilities, apart from mediation. Because of these connections to other institutions the mediation program in Brunswick could fall back on a well established infrastructure of communication and information. Furthermore, a long-term perspective for mediation was in the realms of possibility since the juvenile court assistance is a permanent institution. This does not (yet) hold for the other programs in Cologne and Reutlingen.

These other programs are run by community based, private, non-profit organizations; this kind of organizations is partly handicapped by the legal restrictions regarding the access to personal data and court files that are essential for effective mediation. In order to conform to the Law on Protection against the Misuse of Personal Data, special arrangements had to be made in Cologne and Reutlingen, therefore, in order to link both organizations to the net of judicial information. In Reutlingen this was accomplished by officially delegating victim-offender-mediation from the juvenile court service to the private organization according to the Juvenile Welfare Act. In Cologne special permission was obtained from the president of the local court to transmit and make use of personal data.

As is the case in these latter programs, VORPs in Canada and the United States are primarily sponsored by community based, non-profit organizations. The budget of many US programs is quite low, often less than $30,000. The 'bigger' programs in Minneapolis, Valparaiso, and Elkhart have funds of about the same proportion as the German programs (about $80-100,000).

5.2.2 Input

The organizational restrictions of private, community based non-profit institutions as outlined above are not only unfavorable with respect to the transmission of information relevant to mediation, but also with regard to its preselection and filtering. This situation could only be improved by establishing a direct link to the gatekeeper of the judicial system, the police. Such a link exists in Brunswick, too.

Since the juvenile court assistance in Brunswick is kept informed by the police about all cases reported to the prosecutor, social workers are already able to propose a case for mediation during the preliminary investigation. This is true even if the police do not recommend the case for mediation and the prosecutor did not yet react to it. Thus, speed and completeness of information are the main advantages of the mediation program in Brunswick.

In Cologne and Reutlingen, however, information is filtered by prosecutors and judges. In Reutlingen, for instance, referrals are made by the prosecutors and by court services almost exclusively prior to the trial, in about one third to one half of the cases even prior to the filing of a charge. In Cologne organizational constraints with respect to the input into the program result in a lower pre-trial settlement; more than 50 percent of the cases are referred to mediation only after the main proceeding (cf. *Schreckling* 1990). Thus, mediation loses much of its extrajudicial potential and becomes merely an alternative judicial reaction to delinquency.

North American VORPs usually accept referrals at nearly every stage of the criminal proceedings. In the criminal justice system of the United States victim offender reconciliation is either performed in the wake of restitution provisions or it is initiated by the discretionary power of the (juvenile) court. Cases are usually referred to VORP because the court has decided that restitution should be determined by court services.

5.2.3 Spezialization and Professionalism

Despite the aforementioned advantages, implementing mediation in the juvenile court assistance has some significant shortcomings, too. Thus, the private organizations in Cologne and Reutlingen profit from the fact that their social workers are full-time mediators. Although they did not receive any special training in advance either, they are more likely to efficiently manage even complex social conflicts because of their professional routine and expertise.

Another aspect might be advantageous to the mediating institutions in Cologne and Reutlingen as well: both are definitively neutral with respect to their clients, i.e., victims and offenders. In contrast, the juvenile court aides in Brunswick work in an institution that is so defined as to take special care of young offenders likely to be formally charged. They might, thus, experience an intra-role conflict, resulting from deviating expectations of the conflicting parties: On the one hand, they have to attend to the interests and needs of the young offenders. On the other hand they are expected to look after the interest of the victims, too. Even if they were able to mediate social conflicts without being biased, victims might, nevertheless, suspect them not to behave impartially.

Last not least, juvenile court aides are involved in a diversity of tasks with respect to administration and social work. This may give rise to intra-role conflicts due to the court aides' professional interests and competences, as opposed to the request of the special case under consideration. Consequently, the amount of (successful) mediation does not only depend on the potential program input of social conflicts but also on professional skills and task preferences.

One basic difference between North American and German reconciliation programs is that the former mostly work with volunteer mediators. Besides the fact that costs are drastically reduced hereby, this form of organization corresponds with a philosophy quite common in North America: Accordingly, volunteers symbolize the responsibility of the community and increase the general acceptance of a program in the public. In these projects a small paid staff generally has to coordinate the program activities, to conduct volunteer training, monitor the fulfillment of the victim-offender agreement, and maintain the communication with the justice system.

5.3 Selected Results

The focus of the present discussion was primarily on the concept and organization of mediation. However, some aggregated data concerning the

output of German victim offender reconciliation programs might be instructive with respect to comparisons, too. Therefore, we include some selected descriptive results. Table 4 gives an overview of the distribution of offenders and offenses that **entered** the different mediation programs (program input).

Table 4: Distribution of Offenses (Main Offense) and Offenders in German Mediation Programs: Program Input

Offense		Brunswick July 87 - January 89	Cologne* May 86 - August 88	Reutlingen** June 85 - December 87
Assault		42.4	26.7	29.4
Damage to property		7.6	14.0	22.5
Fraud		0.8	5.7	4.9
Larceny		28.7	22.7	37.8
Robbery		4.1	11.8	4.9
Others		16.4	19.3	30.0
Offender	N	118	229	204 (multiple classification)
	%	100	100	

* cf. Schreckling 1990 (p. 50).
** cf. Kuhn et al. 1989 (pp. 150 and 218).

However, not all conflicts that were accepted for mediation could also be settled successfully. Furthermore, projects clearly differ with respect to the proportion of **successful mediation**; with regard to offenders, the following percentages are reported: Brunswick 63%, Cologne 77%, and Reutlingen 81%. Both, in Brunswick and in Cologne, attempts to settle conflicts associated with assault were more likely to fail than others; this is in line with our reasoning outlined above that settlement of personal crimes, as contrasted to property offenses, is more demanding with respect to third party's mediation competence. Table 5 gives an overview of the distribution of offenders and offenses for successful mediation in the latter projects (Reutlingen could not be included in this table because of the multiple classification of cases used).

Table 5: Distribution of Offenses (Main Offense) and Offenders in Brunswick and Cologne: Successful Mediation

Offense	Brunswick July 87 - January 89		Cologne* May 86 - August 88	
	N	%	N	%
Assault	22	29.7	39	22.1
Damage to property	9	12.2	26	14.8
Fraud	1	1.4	29	16.5
Larceny	22	29.7	45	25.6
Robbery	1	1.4	17	9.7
Others	19	25.7	12	6.8
Unknown	-	-	8	4.5
Offender	74	100	176	100

* cf. Schreckling 1990 (p. 96).

Since all three projects are concerned with juvenile delinquency we finally give an overview of the **age structure** of young offenders in Brunswick and Cologne, both for program input and successful mediation (cf. Table 6; for Reutlingen, these data are not available).

Table 6: Age Structure of Offenders in Brunswick and Cologne: Program Input versus Successful Mediation

Age	Brunswick* July 87 - January 89				Cologne** May 86 - August 88			
	Input		Successful		Input		Successful	
	N	%	N	%	N	%	N	%
Juveniles								
14	7	5.9	2	2.7	10	4.4	8	4.5
15	8	6.8	5	6.6	29	12.7	21	11.9
16	7	5.9	12	16.2	27	11.8	21	11.9
17	23	19.5	15	20.3	28	12.2	21	11.9
Young adults								
18	22	18.6	18	24.3	34	14.8	21	11.9
19	24	20.3	11	14.9	41	17.9	35	19.9
20	22	18.6	11	14.9	38	16.6	31	17.6

Table 6 (continued)

	Brunswick* July 87 - January 89				Cologne** May 86 - August 88			
Age	**Input**		**Successful**		**Input**		**Successful**	
	N	%	N	%	N	%	N	%
Adults 21 and older	2	1.7	-	-	21	9.2	16	9.1
Missing	3	2.5	-	-	1	0.4	2	1.1
Offenders	118	100	74	100	229	100	176	100

* Since data for input and successful mediation relate to different points of reference - offender's age when contacting the juvenile court assistance vs. age when committing the delinquent act - seemingly inconsistent results may occur.

** cf. Schreckling 1990 (personal communication, February 26, 1991).

The reconciliation program of Reutlingen clearly differs from those in Brunswick and Cologne with respect to the age structure of offenders. According to *Kuhn et al.* (1989, p. 153), the percentages of juveniles and young adults that enter into the program are about 71 and 29 percent, respectively.

6. Discussion

Knowledge about the possibilities and limitations of mediation within a criminal justice system (cf. *Trenczek* 1989, for a more detailed discussion) is far from complete. Nevertheless, evaluation of the projects to which we referred in this paper enables us to take stock provisionally. We do so by briefly summarizing past mediation experiences first, and specifying conditions favorable to effective mediation in a second step.

6.1 Past Experience

Data from the Delphi- and the interview study with victims and offenders both suggest that settlement of social conflicts by mediation is preferred to judicial conflict settlement by trial and sentence, in general. However, appreciation of the benefits of reconciliatory and restitutional efforts must

not conceal the fact that the range of application of mediation is of course limited. The input study of court files in Brunswick revealed that only a minor part of the total caseload of juvenile prosecutors is suited to this approach.

While no cure-all, however, mediation is an effective means of dealing with those cases embedded in an interactional context. Furthermore, it should be noted that cases suited for mediation clearly differ from petty offense. There are no classes of social conflict that are excluded categorically, for instance, because of the severity of the delinquent act. Instead, it is the interests of the conflicting parties that must be considered when deciding whether or not to initiate mediation. Last not least, mediation is by no means restricted to first-time offenders. Rather, the respective individual and social context of the case under consideration must be taken into account when deciding whether or not a case is suited to mediation.

The idea that a more extensive use of mediation might reduce the caseload of the judicial system is probably short-sighted and mainly wrong. In fact, the caseload of juvenile courts will be reduced efficiently in those cases only, in which mediation is used as an extrajudicial means of conflict settlement, i.e., as an instrument of diversion. However, this means but a shift of workload from one institution to another.

6.2 Preconditions for Efficient Mediation

Based on the mediation experience of the projects described, two conditions can be identified that are essential for efficient mediation, flow of information and know-how in conflict management.

Evaluation of the Brunswick program clearly demonstrated that an undelayed and unfiltered flow of information between the mediating and the judicial instances is a sine qua non of efficient mediation. In this context, integrating the police into the program proved extremely helpful in Brunswick, both, with respect to speed and completeness of transfer of information. To guarantee a maximum of transparency and effectiveness of conflict settlement, we, therefore, strongly recommend to implement a direct line of communication, right from the beginning of new victim-offender-reconciliation programs, that links the mediating institution to the police who are in charge of investigation.

The second condition concerns know-how in conflict analysis and settlement. As outlined above, there are no general restrictions with respect to the categories of social conflict that are suited to mediation. However, the Delphi-study has shown that practical limitations arise from lack of pro-

fessional experience and expertise in mediation. While middle-range conflicts usually do not pose any problems to the mediator, this does not apply to more demanding conflicts as sexual offense for instance.

Experiences from the North American VORPs largely conform to these findings. According to them, cases of severe crime and aftermath, like those handled by the VORP of the Genessee County Sheriff's Department in Batavia, New York (concerning robbery, attempted murder, negligent homicide, for instance), generally require a more intensive and subtle preparation for mediation than the numerous cases of minor juvenile delinquency dealt with by other programs. It is in cases of personal crime exceeding middle-range conflicts that carefully guided and monitored reconciliation can demonstrate the potential of mediation, as, for instance, in Batavia (New York), Madison and Beloit (Wisconsin). However, the dominance of the restitution approach in the United States which is primarily concerned with property offenses seems to prevent a more efficient use of the mediation approach.

Bisno (1988), in analyzing conflict variables, convincingly summarized the **complexity** of the task which a mediator has to face if he does not want to confine himself to simple everyday cases:

> Among the ways in which the issues at the root of conflicts vary are degree of generality or specificity, linkages with other issues, historic antecedents, and the rigidity of the positions expressing these issues. In addition, some issue struggles are seen by the adversaries as being accessible to 'rule-regulated' conflict management strategies (e.g., negotiation), while others may be defined in terms of total victory or defeat - or a continuing impasse. The substance of a conflict - that is, the issues - and the process of managing the conflict are interactive (p. 36).

6.3 Further Development of Mediation in Germany

Meanwhile, the mediation idea has widely spread in Germany. There is quite a number of new attempts to implement victim offender reconciliation programs in the judicial system by now. Based on the mediation experiences from Brunswick, Cologne, and Reutlingen, as well as some more recently implemented programs, the German Juvenile Court Association (DVJJ) and the German Probation Service (DBH) are about to develop and establish a curriculum for mediators. This curriculum is planned to go beyond standard curricula of social workers by meeting the special demands of mediation within the German justice system; its development will be guided by past experience in mediation.

This development is straightforward since mediation has left its exploratory phase in Germany, and because it has become obvious that goodwill and interest in mediation are necessary but not sufficient prerequisites for transferring a good idea into efficient practice. However, it should be noted, too, that mediation has not been restricted to the narrow scope of criminal justice and social work. There is an abundance of research findings concerning mediation and related fields, e.g., communication skills, professional helping behavior, mechanisms of power and dependency, and negotiation, to name but a few (cf., *Deutsch* 1973; *Fisher & Ury* 1981; *Lenrow* 1978; *Watzlawick, Beavin & Jackson* 1967). Protagonists of mediation and those involved in setting up curricula for enhancing skills in mediation must, therefore, be able to see beyond the end of their own nose and to take these findings into account. This will certainly help to avoid dead ends on the way to more professionalism in mediation, and to come up to the interests and expectations of all parties involved, - mediators, offenders, and victims.

7. References

Bilsky, W. (1990). Extrajudicial mediation and arbitration: Evaluation of German victim-offender-reconciliation programs. The International Journal of Conflict Management, 1 (4), 357-373.

Bilsky, W., Petzold, F., & Netzig, L. (1990). Täter-Opfer-Ausgleich in Braunschweig. Bestandsaufnahme und Perspektiven: Eine Delphi-Studie [Victim-Offender-Reconciliation in Brunswick. Stock-taking and perspectives: A Delphi-study]. (KFN Forschungsberichte). Hannover: Kriminologisches Forschungsinstitut Niedersachsen.

Bilsky, W., & Pfeiffer, H. (1990). Praxis der Konfliktregulierung im Rahmen des Modellprojekts Täter-Opfer-Ausgleich in Braunschweig [Applied conflict management in the Brunswick Victim-Offender-Reconciliation Program]. In: Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen (Ed.), Mehrfach Auffällige, mehrfach Betroffene (pp. 505-519). Bonn: Forum.

Bisno, H. (1988). Managing conflict. Newbury Park: Sage.

Christie, N. (1977). Conflicts as property. British Journal of Criminology, 17 (1), 1-15.

Coates, R., & Gehm, J. (1985). Victim meets offender. An evaluation of victim-offender reconciliation programs. Valparaiso: PACT Institute of Justice.

Deutsch, M. (1973). The resolution of conflict. New Haven: Yale University Press.

Dittenhofer, T., & Ericson, R. (1983). The victim offender reconciliation program: A message to correctional reformers. University of Toronto Law Journal, 33, 315-347.

Dünkel, F., & Rössner, D. (1987). Täter-Opfer-Ausgleich in der Bundesrepublik Deutschland, Österreich und der Schweiz [Victim-Offender-Reconciliation in the Federal Republic of Germany, Austria, and Switzerland]. Zeitschrift für die gesamte Strafrechtswissenschaft, 99, 845-872.

Fisher, R., & Ury, W. (1981). Getting to yes. Boston: Houghton Mifflin.

Galaway, B. (1986). Preliminary experiences of an urban victim offender reconciliation program. In: H.J. Kerner, B. Galaway & H. Janssen (Eds.), European and North-American juvenile justice systems (pp. 417-430). München: Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen, Eigenverlag.

Galaway, B. (1987). Restitution as innovation or unfilled promise. Unpublished paper prepared for the National Juvenile Restitution Conference, New Orleans.

Gehm, J. (1986). Victim offender reconciliation & mediation program directory. Valparaiso: PACT Institute of Justice.

Hughes, S.P., & Schneider, A.L. (1989). Victim-Offender Mediation: A survey of program characteristics and perceptions of effectiveness. Crime & Delinquency, 35, 217-233.

Kerner, H.J., & Weitekamp, E. (1984). The Federal Republic of Germany. In: M.W. Klein (Ed.), Western systems of juvenile justice (pp. 147-169). Beverly Hills: Sage.

Kuhn, A., Rudolph, M., Wandrey, M., & Will, H.D. (1989). "Tat-Sachen" als Konflikt ["Tat-Sachen" as conflict]. Bonn: Forum.

Lenrow, P. (1978). Dilemmas of professional helping: Continuities and discontinuities with folk helping roles. In: L. Wispé (Ed.), Altruism, sympathy, and helping (pp. 263-290). New York: Academic Press.

Linstone, H.A., & Turoff, M. (Eds). (1975). The delphi method. London: Addison-Wesley.

Maguire, M. (1980). The impact of burglary upon victims. British Journal of Criminology, 20, 261-275.

Moore, C.M. (1987). Group techniques for idea building. Newbury Park: Sage.

Peachey, D., & Skeen, C. (Eds.). (1986). Directory of Canadian dispute resolution programs. Kitchener, Ontario: Network for Community Justice and Conflict Resolution.

Pelster, C. (1990). Täter-Opfer-Ausgleich in Braunschweig. Ergebnisse der schriftlichen Befragung von Jugendgerichtshelfern [Victim-Offender-Reconciliation in Brunswick. Results of a questionnaire study with juvenile court aides]. (KFN Forschungsberichte). Hannover: Kriminologisches Forschungsinstitut Niedersachsen.

Pfeiffer, H. (1989). Einbeziehung der Polizei in das Modellprojekt Täter-Opfer-Ausgleich in Braunschweig [Integrating the police into the Brunswick Victim-Offender-Reconciliation Program]. In: E. Marks & D. Rössner (Eds.), Täter-Opfer-Ausgleich (pp. 65-76). Bonn: Forum.

Pruitt, D.G., & Kressel, K. (Eds.) (1985). The mediation of social conflict [Special Issue]. Journal of Social Issues, 41 (2).

Rattay, H., & Raczek, W. (1990). Täter-Opfer-Ausgleich in Braunschweig. Zur Akzeptanz des TOA durch die Beteiligten: Eine Interviewstudie [Victim-Offender-Reconciliation in Brunswick. Acceptance of TOA by the persons involved: An interview study]. (KFN Forschungsberichte). Hannover: Kriminologisches Forschungsinstitut Niedersachsen.

Rössner, D., & Wulf, R. (1984). Opferbezogene Strafrechtspflege [Revising criminal law with special focus on the victim]. Bonn: Deutsche Bewährungshilfe, Eigenverlag.

Schneider, P. (1985). Schadenswiedergutmachungsprogramme für jugendliche Straftäter in den USA. In: H. Janssen & H.J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 305-328). Bonn: Deutsche Bewährungshilfe, Eigenverlag.

Schreckling, J. (1990). Täter-Opfer-Ausgleich nach Jugendstraftaten in Köln [Juvenile delinquency and Victim-Offender-Reconciliation in Cologne] (recht). Bonn: Bundesministerium der Justiz.

Sykes, G.M., & Matza, D. (1957). Techniques of neutralization: A theory of delinquency. The American Journal of Sociology, 22, 664-670.

Trenczek, T. (1989, December). Towards a reprivatization of social control? An assessment of victim-offender-reconciliation. Paper presented at the V. International Conference of the Generalitat de Catalunya, Departament des Justicia, Barcelona.

Trenczek, T. (1990). Victim offender reconciliation in West Germany. In: B. Galaway & J. Hudson (Eds.), Criminal justice, restitution and reconciliation (pp. 199-232). New York: Criminal Justice Press.

Umbreit, M. (1986). The victim offender reconciliation program. In: H.J. Kerner, B. Galaway & H. Janssen (Eds.), European and North-American juvenile justice systems (pp. 403-416). München: Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen, Eigenverlag.

Viet, F. (1988). Bericht aus der Praxis der Jugendgerichtshilfe [Report on the practice of the juvenile court assistance]. In: Stadt Braunschweig (Ed.), Braunschweiger Hefte: Vol. 12. Täter-Opfer-Ausgleich in Braunschweig (pp. 18-69). Braunschweig: Stadt Braunschweig.

Waller, I. (1985). Die Auswirkungen von Straftaten auf deren Opfer [The impact of delinquent acts on victims]. In: H. Janssen & H.J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 45-80). Bonn: Deutsche Bewährungshilfe, Eigenverlag.

Warner, J., & Burke, V. (1987). National directory of juvenile restitution programs. Washington: OJJDP, US Department of Justice.

Watzlawick, P., Beavin, J.H., & Jackson, D.D. (1967). Pragmatics of human communication. A study of interactional patterns, pathologies, and paradoxes. New York: Norton.

5. Protecting the Victim and Strengthening the Victims' Position in the Criminal Procedure

The Status of the Victim in the Criminal Justice System According to the Victim Protection Act

Michael Kaiser

Contents

1. The Status of the Victims in the Criminal Law System

1.1 German Steps toward Reform seen in an International Context

The victim of crime stepped into the center of academic discussion in the 1980s.[1] Increasing progress has been made in victimology fields, since the first International Symposium of Victimology in Jerusalem in 1973. Since then, more academic organisations have been concerned with this very theme and the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" was passed by the United Nations on 29th November 1985. The basic principles for the improvement of the status of the victim within the criminal law and criminal proceedings was recommended to the Council of Europe, parallel to this. These principles were similar in contents to the United Nations declaration.[2]

Many legislators looked more and more to the party injured by crime, within this background. Many different approaches were established. The following three basic concepts can be distinguished:

On the one hand, the legislature thought to support the victim of crime in specific areas. This meant firstly for example, help in relation to medical care and coping psychologically with the consequences of the crime. Alongside these forms of help, practical help can be given in the form of removal of the material damage caused. This frequently takes the form of financial support. This pragmatic approach can be seen in the formation of "victim and witness assistance" progam in the United States, which has recently come to the forefront.[3]

In this area, many, frequently private, help organizations were founded, which afforded worthwhile help to victims of serious crimes. State help could also be provided in other areas, from the extensive social welfare system.

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1 See *Kaiser* 1988, pp. 4-16.

2 See *Joutsen* 1987, pp. 298-324.

3 See *U.S. Department of Justice* 1983, pp. 2.

A further approach seeks to provide financial compensation to victims. The frequently applied "action civile" in France, supports this form of compensation by the offender.[4] In Germany, the legislature tried to reintroduce the adhesive procedure (Adhäsionsverfahren), whereby a damage claim is linked with the criminal proceedings.[5] In order to structure these victim protection concepts as effectively and surely as possible in relation to financial compensation, state compensation was considered. The "Gesetz über die Entschädigung für Opfer von Gewalttaten" (Victim Compensation Act)[6] was passed in the Federal Republic of Germany in 1976. This is no longer included in the revised text of 1985. State victim compensation merely affects a limited peripheral area and is aimed at social welfare considerations. Only a few extreme cases are embraced by these provisions. They are to be found according to the concept of the German rules, outwith the criminal and criminal procedural right to individual social insurance. These provisions are little used.[7]

In order to support the victim of crime, the third focus is upon the extension of the legal status of the victim within the criminal proceedings. The German legislature directed their attention to this in the "Opferschutzgesetz" (Victim Protection Act) which was passed on 18.12.1986.[8] It came into force on 1.4.1987 and was praised by the legal politicians as being "a secular turn".[9] In practice, the reaction to the law was very reserved.[10] The innovations were met partly with disapproval by academics,[11] although as a whole, these innovations were positively assessed even if criticism and proposals for improvement were not spared. An end was temporarily put to

4 See article by *Mérigeau* (this volume).

5 See the later explanation.

6 BGBl. 1976 I, pp. 1181-1183; see *Jung* 1976, p. 478.

7 See *Villmow & Plemper* 1989, p. 43. The German government has rejected the frequently expressed criticism concerning the effectiveness and implementation of the Victim Compensation Act. See the answer given by the German government (25.9.1990) to the SPD party inquiry into the situation of the victim of crime in: BT-Drucks. 11/7969, pp. 2-5.

8 See *Rieß* 1984.

9 See *Rieß* 1987, p. 281.

10 See *Bertram* 1985, p. 322 (from judges' viewpoint); *Hammerstein* 1986, pp. 2 et seq. and *Thomas* 1985, pp. 431 et seq. (from the attorneys' viewpoint).

11 See *Schünemann* 1986, pp. 193 et seq.

reform discussion. The German legislature had in this way, clearly placed emphasis upon the status of the victims in the criminal proceedings, in so far as relating to the question of victim protection.

About three years after these reforms were introduced the time came for having a look at the temporary state of affairs. Firstly however, a few words regarding the contents of the Victim Protection Act.

1.2 The New Regulations of the Victim Protection Act

The legal status of the victims within the criminal proceedings was improved in three areas. Firstly, **protection** from interference by other parties participating, was extended. This area of protective provisions related to the rules for communication as to questioning (§ 68a StPO), removal of the accused (§ 247 StPO)[12] and exclusion of publicity (§ 171 GVG).[13] The victim merely plays a passive role in so far as these regulations are concerned. These regulations should guarantee a minimum of protection of the victim's person and personality.

Only negligible changes were produced, however on the whole. There already existed a similar legal position based on principles of court practice with regard to removal of the accused which has now been established in law. Only regarding to the exclusion of publicity, there is a significant change: the protection of the victim takes precedence over the principle of publicity.

New regulations were not enacted. The reform was limited to some extent reservedly and cautiously to the extension of the regulations which already existed.

The reforms in the area of a **person's right to obtain information and protection,** were more extensive. The provisions which make it possible for the victim to be informed about the position and course of the proceedings and likewise the provisions which ensure that the victim can actively use preventive rights for his/her protection, come within these new rules. The obligation was also for example introduced to allow the victim, on application, to be informed about the result of the trial (§ 406d StPO). The possibility was also created, for the victims to call for legal assistance in the criminal proceedings (§ 406f StPO). This possibility however, had already

12 Code of Criminal Procedure (Strafprozeßordnung).

13 Constitution of Courts Act (Gerichtsverfassungsgesetz); law governing court jurisdiction and organization.

been recognized in the administration of justice. The Victim Protection Act was therefore merely of declaratory significance. New rights were also introduced for injured parties who have been permitted as accessory private prosecutor in the prosecution (§ 406g StPO). This relates to a special group of injured parties, who are victims of particular crimes. The relevant crimes are listed in § 395 StPO.[14] Victims of these crimes, can exercise their rights as set out in § 406g StPO, without having to undertake an active role as accessory (private) prosecutor. This is in contrast to other injured parties. The considerable advantage which these victims therefore enjoy, is that they can assert the right to request for help to finance an attorney. The right to inspect records or files, was also provided for in the Act (§ 406e StPO). However, there was no change in the legal practice produced by the law, since the subject matter of the provisions had already been settled in administrative regulations.

The third area of change, affected the right of the victim to **participate actively** in the proceedings. New regulations were produced in relation to the "Nebenklage" (accessory prosecution) and the "Adhäsionsverfahren" (adhesive procedure). The accessory prosecution (§ 395 ff. StPO) brought about procedural status for particular injured parties, which is comparable to the public prosecutor. Before the Victim Protection Act was introduced, the circle of these priviledged victims was established by reference to the "Privatklage" (private prosecution) which to a considerable extent, covers merely insignificant offences. This was not aimed at making the accessory prosecution a way of satisfying the victims's right to participate. The jurisdiction therefore attempted with legal theoretical arguments, to create a balance amongst the interests concerned.[15] The reforms contained in the first instance, the list of particularly severe crimes, whose victims should be given preferential treatment particularly in the area of sexual offences. Many crimes set out in the catalogue of offences, stem however from the area of trivial crimes. The Victim Protection Act also introduces limitations upon the rights of the accessory (private) prosecutor. The possibility or legal remedy by the victim, was limited, to relieve the judges.

There were far reaching theoretical changes produced by the reforms in respect of the adhesive procedure. These regulations make it possible for the victim to enforce civil legal claims within the criminal proceedings. The reforms seek to increase the application of these rights in practice. The responsibility of the local court, where most criminal proceedings take place,

14 See below.

15 The conceptual approach was the so-called "competition doctrine".

was extended. All claims, independent of the extent of the claim can be asserted in this court. The local court judge no longer necessarily has to make a final decision in respect of the claim. The civil law dispute no longer has to be decided in every respect by the criminal law judge.

The legislature has also attempted to effect supporting measurements for improvements in these three areas affecting the status of the victims within the criminal proceedings. The central point was the extensive duty which the authorities have, to advise victims about their rights. Before the Victim Protection Act came into force, this duty existed merely in the adhesive procedure. The obligation now applies to practically all rights of the victims (§ 406h and § 406d Abs. 3 StPO).

2. Research Questions

The main significance of the Victim Protection Act in relation to the amelioration of the position of the victim, have already been pointed out. However, research which is concerned with the changes effected by this law, should be carried out. Great importance was attached to the question as to how these legal changes were accepted by those administering justice within the criminal proceedings and the attitudes towards the Victim Protection Act within criminal law practice.

Another important question concerned the fundamental attitudes of the lawyers participating in the procedure in relation to the status of the victims in the criminal proceedings. Whether or not the new legal positions are known to all affected parties, is of particular significance in relation to the implementation of the Act itself. The question as to which primary interests were pursued by the victims in the criminal proceedings, was also investigated, and how their personal situation was represented - mainly what practical problems were the victims confronted with. How frequently particular rights are observed and put into operation and what objective and subjective circumstances prevent or hinder exercise of these rights, must also be researched.

3. Implementation of the Study

3.1 Statistical Material

In order to obtain a hard core of data in relation to the frequency of the application of individual norms, the criminal prosecution statistics for

Baden-Württemberg and the "Zählkarten" (case enumeration forms) for the criminal proceedings of the courts from the years 1986-1989, were evaluated.

3.2 Observation of Criminal Trials and Interviews of Victims

In order to record the position and treatment of victims in the criminal proceedings and to learn about the problems and impressions of the parties involved in the trial and to establish what interests they have, the trials were observed and an interview of the victims carried out at the end of the proceedings. Two predominantly standardized questionnaires were developed. The survey was carried out in the autumn of 1989. During one month, all court proceedings involving individual victims, which took place before the "Amtsgericht" and "Landgericht" (local and regional court) in Freiburg/FRG respectively, were attended. 83% of the victims present, agreed to take part in an interview. 35 interviews were able to be carried out.

73 % of the cases were dealt with by the local court and 27 % by the regional court. Around a third concerned offences involving assault. Property offences represented a substantial number of cases (20 %) and similarly offences against the person. 69 % of those interviewed were male and 31% were female. Those interviewed were spread throughout various age groups. More than a quarter had been victims of crime before.

3.3 Survey of Lawyers Participating in Criminal Proceedings

The acceptance of regulations and the fundamental attitude towards the problems for the victims in this area, is particularly important in relation to the implementation of the Victim Protection Act in so far as we are concerned with those involved in putting the law into effect. In order to obtain insight into the practical problems of applying the law, the main emphasis of the research lay in the area of questioning judges, prosecutors and attorneys. The survey was carried out by means of two predominantly standardized questionnaires, one of which was specifically designed for judges and prosecutors and the other for lawyers. The questionnaires correspond with each other to a great extent in so far as contents are concerned. The survey of judges and prosecutors effected an overall inquiry in relation to the "Oberlandesgerichtsbezirk Karlsruhe" (higher regional court area of Karlsruhe/FRG). The rate of participation in relation to the judges, was 44.3 % and in relation to public prosecutors 33.1 %. 127 judges and 57 prosecutors took part in the survey.

252 attorneys who according to their own statements work most frequently in the criminal law area, were approached within the almost identical area. The participation rate was 59.7 %, i.e. 123 people.

Altogether, 307 jurists took part in the survey, of whom 88.6 % were male.

4. Results of the Study

4.1 Fundamental Attitudes of Lawyers Participating in the Criminal Proceedings, towards the Status of the Victims within the Criminal Justice System

The lawyers on being asked as to fundamental goals to be achieved by the criminal proceedings themselves had a predominantly traditional attitude towards the aim of the proceedings. The clearing up of suspicion and fight against crime took priority as being the most important aspect. The idea that the establishment of law and order is of particular importance, merely took fourth place according to the investigations carried out.

In order to obtain a first impression as to whether the attitudes of those questioned were more victim or more offender orientated, the question was asked as to whether the criminal proceedings should be limited to the dispute with the offender, or whether it should be used to resolve the victim-offender relationship. These fundamental attitudes towards the goals of the criminal proceedings, can be characterized as "minimalistic" or "maximalistic" attitudes towards the proceedings. 41.8 % were inclined towards the minimalistic goals of the proceedings, and 58.2 % to the maximalistic goals of the proceedings. Distinctions in relation to the occupations of those questioned, could be noted in relation to these evaluations. The lawyers proved to have the most victim-orientated attitude (64.2 %). The prosecutors had a slightly less favorable attitude towards victims (57.4 %). The figure was 52.8 % among the circle of judges. However, a differentiation must be made between judges in the juvenile courts who are clearly influenced by the offender-orientated juvenile law and the judges in the regional courts (Landesgerichte) who were more victim-orientated. The percentages were recorded as being 43.8 % and 58.6 % respectively. The judges in the local courts (Amtsgerichte) were on average victim-orientated (47.7 %).

Attitudes toward the distribution of power or authority between the victim and the accused in the criminal proceedings, were evaluated differently. This related specifically to the occupations of those questioned. Whereas the

judges felt that there was predominantly a balancing of the interests in the criminal proceedings, most lawyers spoke of the less favorable situation of the victims of crime. It was clear that the lawyers were often torn between supporting the victim or the accused - an occupation-related problem. As defenders of the accused they naturally tend towards legal provisions which are structured in favor of the accused parties. This attitude is regularly maintained at the expense of the extention of the rights of the victims (see Figure 1).[16]

Although almost a half of the prosecutors and judges regard there as being a distribution of authority in favor of the injured party, only a good 10 % believe that the rights of the victims are too limited. Over two thirds believe that these rights are sufficient. Future extention of these rights in favor of the victim is clearly not acceptable. The lawyers assess this question more consistently at first glance, and express themselves to be in favor of further extention of these rights (50 %), (see Figure 2).

Two reasons explain the inconsistant attitude of judges and prosecutors: firstly, it is possible that the view predominates that the criminal proceedings have nothing to do with balancing the status of the interests of the victim and accused, but rather that - according to the "minimalistic" attitude already explained - the accused party is of prior importance in the criminal proceedings and he is therefore provided with a predominance of rights. In this way, a balancing of the authority of both parties, is not desired within the criminal proceedings. Other parties questioned, rely openly on the position of strenght of the individual party, and believe that the inequality can be sufficiently balanced by the state administration of the proceedings. In view of this, maintenance of a balance of interests, is not necessary.

An extension of the legal rights of third parties like the victims, would result in restricting the position of the judiciary. The aspect of control by the victim, was emphasized within the course of the discussion regarding the extension of the rights of victims. This cannot be regarded as acceptable by the parties concerned. Changing the structure of the criminal proceedings is not worthy of consideration from this viewpoint.

The lawyers regard themselves to be in a completely different position. Their task is to grant rights and legal status, because these aspects secure participation and the possibility of being heard in the proceedings. "Opening up" the criminal procedure in the direction of a (two) party procedure,[17]

16 This conclusion is not necessarily the case, however. See details below.

17 In German Law, a conceptual differentiation with regard to litigations is

strenghtens their position. The majority of attorneys are dealing in their daily work mainly with civil proceedings, in which the principle of party disposition takes priority place. The great willingness to change the present structure of the criminal procedure, can therefore be understood. The possibility of victim representation opens up a new field of operation for attorneys, which until now has been almost completely out of reach, and which is attractive from the earning fees point of view. Inspite of this, it is astounding just how quickly the legal profession has disgarded the traditional view of being that of defender, and taken up this new task.

The research shows quite clearly that positions of interest which are specifically related to occupation, cover up other social biographical characteristics almost completely. There were scarcely any sex-or age-related differences. In summary, it can be said that judges and prosecutors tend towards a "minimalistic" approach, and that attorneys have a "maximalistic" attitude toward to rights of the victims.

4.2 State of Knowledge

It is particularly difficult to research the question as to how well known the regulations of the Victim Protection Act are to those involved and using the rules. From the outside, we cannot expect to find precise and clear statements. In order to attempt some form of approach to this problem, the jurists were questioned as to their familiarity with the regulations in the administration of justice. The result was, that over a half of the jurists were regarded as being unfamiliar with the Victim Protection Act. The attorneys regard this problem particularly pessimistically: Only 18.9 % those questioned, believe that the profession is more likely to be unfamiliar with the Act (see Figure 3). It is clear from an examination of the individual regulations of the Victim Protection Act that the protection regulations and rights of participation which have existed for some time, were estimated as being most likely to be well known. The rights to obtain information and protection were classified as being somewhat less known. The right to obtain information regarding the course of the proceedings (406d StPO) and the additional right of being able to institute an accessory prosecution according to § 406g StPO and the instructive duties are particularly less known to the parties concerned. To what extent conclusions can be drawn from the

made contrasting "Parteiprozeß" (party procedure) to "Anwaltsprozeß" (counsel procedure), the latter referring to cases where a counsel is necessary in court.

individual knowledge of the parties questioned, cannot however be conclusively assessed. However, it is clearly the case that legal practice has a lot of catching up to do.

35.5 % of victims taking part in the survey involving injured parties, indicated that they had known about the right to inspect court records. 22.6 % knew something about the right to obtain information regarding the course of the proceedings and 16.7 % indicated that they had been aware of the possibility of an "Adhäsionsverfahren" (adhesive procedure). The state of knowledge of the injured parties can be regarded as being somewhat limited. The duty to advise/instruct a party regarding his or her rights also appears to have little effect in practice.

Due to this lack of knowledge, in particular amongst the parties participating in the court proceedings, the practice of cautioning and instructing a party has to be investigated more closely. The survey of jurists should firstly provide information regarding the implementation of the regulations by the parties questioned. A total of 26.3 % judges and prosecutors indicated that they had never directed the victim to his or her rights. Only 8.8 % according to their own statements always observe this duty. 44 % indicated that they only gave information on request. The group of judges at the regional court were more frequently inclined to caution or instruct a party than in relation to other judges. However, the judges who practically never make any clarification to a victim regarding his or her rights (41 %) can be found amongst those judges. This definite polarisation can be explained by the fact that on the one hand such instruction is more likely to take place regarding severe offences, and on the other hand the late state of contact in particular in proceedings of second instance, is more likely to prevent the exercise of this duty. The limited amount of instruction given by prosecutors is very noticeable. Although they are in a position (in contrast to judges) to give important instructions and directions at an earlier stage, their tendency to give such information and clarification, appears fairly restricted. Assessing the figures in relation to sex, women instruct more frequently than men. 15.4 % indicated that they always did so. The corresponding figure in relation to men, was merely 7.9 %.

There were considerable differences in relation to the format of the instruction. Judges predominantly give oral instructions, whereas prosecutors more frequently make use of the written prescribed form of instructions at their disposal. Figure 4 describes the position in detail.

The survey of injured parties, indicated that 20 % of the parties questioned, according to their own statements, had been advised as to their rights. Although we assume that the duty to instruct exists as a general rule and

that every victim has a right to be so instructed, only a small percentage are in fact so advised. If we look at the circumstances more closely, the results turn out to be shocking: Instruction by the prosecutors or the court was not effected in a single case. The police were involved in instruction in only 5.7 % of cases. In one case an employee of a medical insurance company declared himself to be prepared to carry out proper instruction. In general, instruction of the rights of the injured party, was effected by a attorney, namely after the victim had himself been actively participating and had decided to seek legal advice, using his own financial ressources. The conclusion was therefore that the state obligation to caution and instruct a party, was only carried out in 5.7 % of cases. All injured parties who received such instruction were men. In view of the small number of those concerned, this cannot be regarded as being representative.

This small percentage of instruction which took place, did not alter in terms of the period of time considered. The number of injured parties instructed in relation to crimes arising between 1988-1990, did not change considerably. We cannot therefore deduce any positive effects of the Victim Protection Act.

The situation regarding instruction can as a whole been characterized as being somewhat lacking in its observance. The duty was observed, if at all, only in relation to serious offences and this was often because the injured party had gone to an attorney on his own initiative. Instruction by the police did not take place in any of the serious offences researched. No instruction was given in relation to property offences, although the opportunity of an adhesive procedure (Adhäsionsverfahren) would frequently have been considered. Inspite of belonging to the category of accessory prosecution (Nebenklage) offences, qualified instruction with regard to a party's rights, never took place in relation to cases of insult and cases of negligent physical injuries. According to the statements of jurists in relation to this question, the regulations are to a large extent ignored in practice.

It was indicated that the instruction of a party is often quite simply forgotten in the everyday routineness of court activities. This was given as the main reason for the lack of instruction. 81.6 % in total, regarded this reason as being particularly relevant. Over a half of judges (52 %) and prosecutors (60.3 %) indicated that they often had no opportunity to give such instruction. The view that it would already be too late to give an instruction, is also widespread (see Figure 5). Many complained about the additional time and effort involved. Three quarters of those questioned did regard it as being significant. With age, this viewpoint gained further weight.

The practical problems in relation to implementation of standards can be predominantly attributed to the everyday routine and overwork. Late contact with the victim is also often responsible for hindering proper instruction, namely the lack of a suitable opportunity to give such an instruction. It was clear from many comments made, that a lack of coordination between individual authorities is often the immediate cause for misunderstandings and instruction was often ignored because the party obliged to give such instruction assumed that someone else had undertaken this task or would do so.

There were significant differences, related to occupation, with regard to acceptance of the regulations relating to instruction. There were scarcely any attorneys who felt that the duty to instruct was superflous. This opinion was more widely spread amongst judges and in particularly amongst the prosecution service (see Figure 6). Judges and prosecutors were rarely interested in a further extension of the rules. Around 10 % were inclined towards the opinion that the rules had to be extended further.

Victims, on the other hand, are very interested in proper instruction as to their rights. Over a half of the parties questioned (57.1 %) would have been pleased to receive more information. There were admittedly other distinctions in relation to particular offences (see Figure 7).

The information points to the fact that there is a strong general interest in rights and events occuring in the criminal proceedings (80 %). However, only a small percentage (25.7 %) are satisfied with the information. There is a general lack of advice being given, spread over all groups of offences.

4.3 Responsibility for the Interests of the Victims

As there are no rules expressed as to who should take responsibility for protecting the interests of the victims, research should throw some light on this matter.

According to the opinions of jurists, lawyers should in the first instance, take up this task. All of the groups concerned expressed themselves to be in favour of this opinion. The courts, criminal prosecution service and the police were mentioned in further ranking order. (see Figure 8).

A similar result was produced by the victim survey regarding to the preference of the attorneys. 64.3 % of victims would have preferred to have received legal help. No one expected help from the court, since it is accepted as a neutral adjudicating body. The remainder of the state authorities were not viewed very favorably by the victims. Other areas of responsibilities are

obviously attributed to these positions. Basic disapproval of or lack of confidence in the judiciary, could not be established as being a reason for the lack responsibility attributed to these organs (see Figure 9).

4.4 The General Position of the Victims within the Criminal Proceedings

The victim survey and the observance of the proceedings, should allow insight to be obtained into the personal situation and feelings of the victims, in particular in relation to the victim's position in the trial itself. There were particular distinctions noted (as was to be expected), which were offence-related. The strain upon the victim was as a whole, fairly high (see Figure 10).

Those who were not happy with the instruction given, and would have wished for further information to have been given to them, regard the trial in a particularly negative way (60 %), although the severity of the offence was below average. On the other hand, the victims, who had legal support during the trial, had fewer problems. Only 33.3 % spoke of stress in the court proceedings, despite the above-average incidence of serious offences.

The main reason for strain and stress caused to victims, predominantly the proceedings were themselves (70.6 %). Confrontation with the offender caused somewhat less strain than anticipated (29.4 %).

Most injured parties regarded themselves as having been well treated during the proceedings (see Figure 11).

This result shows that the strain caused to the victims involved, is not caused by the parties participating in the process. Neither the confrontation with the offenders, nor treatment by jurists, is regarded as particularly negative. The main reason why victims have fear, is the uncertainty involved in the proceedings. This could be reduced if more explanation and information was given to the relevant parties. The victims were very interested in this possibility. Around three quarters would have liked to have had more information about the course of the proceedings.

According to the results, satisfaction with the running of the proceedings and the outcome itself, is fairly high. Only 18.8 % expressed themselves to be unsatisfied with the results, and 16.3 % unsatisfied with the running of the proceedings.

4.5 Procedural Rights according to the Victim Protection Act

The implementation of individual procedural rights according to the Victim Protection Act, was examined against this background. The summarized results confirm the schematic division into the three norm categories explained above.

4.5.1 Protection Regulations

The limitation of questioning according to § 68a StPO, removal of the accused according to § 247 StPO and the right to exclude publicity according to the § 171 GVG (Gerichtsverfassungsgesetz; Constitution of Courts Act) are not necessarily frequently implemented in the daily court routine. A question was objected to in 7.1 % of cases in the research carried out. Exclusion of the accused party from the proceedings, did not take place. Exclusion of publicity only took place in 4.8 % of cases.

The extent of knowledge of both jurists and victims in relation to these regulations is high in comparison with the other rules. This also relates to rights which have existed for some time, and which have merely been modified by the Victim Protection Act.

Acceptance of these regulations amongst jurists, is fairly high. The judges and prosecutors exhibit the most acceptance of the protection rules. Attorneys regard the provisions to be important. However, they regard other rights as having priority place. (See Figure 12). The protection regulations are regarded universally as necessary. Further extension of these rights is supported to a great extent. Hardly anyone assesses these rules as being a danger to the criminal process.

This fundamental agreement exists in respect of all age groups. At first glance, the sex-related differences are not surprising. Female attorneys regard the victim protection regulations more positively than their male collegues. It is however astonishing that the opposite appears to be the case in so far as female judges are concerned. They expressed themselves more negatively as a whole, in particular in comparison to the female attorneys. This may be connected to the expected behaviour of women in relation to this subject. Women are regarded more frequently as being more sentimental and emotional.[18] Judges are admittedly attributed an independent status. The social pressure from collegues and the general public is however very strong in relation to these aspects, so that an opposite reaction from female judges,

18 See *Adam, Albrecht & Pfeiffer* 1986, p. 104 and *Sessar* 1989, pp. 415-418.

can result. From this point of view, the position of attorneys is more independent. He/she is there to represent a party's interest and can and must take sides. Female judges are faced with the prejudice of "victim friendliness" and increased emotiveness and attempt to balance this by acting in an opposite manner. The necessity of behaving in this way, does not exist for female attorneys.

Inspite of the very high acceptance of the provisions, implementation of the protection regulations does cause some difficulties. Fear of procedural mistakes in particular, hinders the frequent use of these regulations. This fear is often widespread. Judges particularly in the regional court, are careful to avoid making mistakes. The age of the person involved, also plays a particular role. Fear of making a mistake in respect of the standards required, is greater in relation to younger and unexperienced jurists. This is less so in relation to their older collegues.

4.5.2 Rights to obtain Information and Protection

As has already been pointed out, the interests of the victims in obtaining more information, is very high. The frequency with which these regulations were put into effect, was however, low. As new rights introduced by the Victim Protection Act, the right to apply to participate in the course of the proceedings (§ 406d StPO) and the additional rights for victims to participate as accessory (private) prosecutor (§ 406g StPO), are practically never applied. Only one police official, according to the victim questionnaire, who had been the victim of an insult, made an application to participate in the course of the proceedings. According to the assessment of jurists, these new rights are to a considerable extent unknown, and in practice are as good as never observed.

The right to be able to apply for legal assistance (§ 406f StPO) and the right to inspect court files (§ 406e StPO) were already known before the Victim Protection Act. They are now regulated merely by a special law. Implementation of these rights had already been put into effect to some extent in practice. They are made use of regularly however, only within the course of an accessory prosecution. Apart from this particular situation, no noteworthy relevant practice can be recorded. These rights (without there being an accessory prosecution raised), were not made use of within the frame of the victim survey.

The limited acceptance by the judiciary may be reason for the lack of use of these rights. Judges and prosecutors regard the protection regulations as

being the most important part of victim protection. The right to receive information and protection are considered to be less important. The reverse is the case in so far attorneys are concerned.

There are practical problems of implementation of these rules. Financing of party participation can be seen most of all to be the main problem.

4.5.3 Rights to Participate

The interest of the victims in actively participating in the criminal proceedings proved to be quite high, according to the research carried out. 14.3 % took part actively in the accessory prosecution. A further 28.6 % would have liked to have taken part in the proceedings. The form of participation desired, extended from being allowed greater participation in the statement and summary of the facts, to the possibility of being allowed to ask questions and have a "final say" in the proceedings. (See Figure 13).

Active participation has a fundamentally positive effect upon the victims position, according to both the view of the victims themselves and as assessed by the jurists questioned. Many of the jurists were able to establish that there was increased satisfaction on the part of the victims participating.

Legal assistance provided for the injured parties in the proceedings, is regarded as necessary. The view that the victim cannot cope him-/herself in the proceedings without an attorney, is frequently expressed. On the other hand, there was less agreement with the view that this could also be the case even if a attorney is present. (See Figure 14).

Active participation in the proceedings, is deemed to have a positive effect on the victims position. The effect upon the proceedings themselves, is not however always positively assessed (see Figure 15).

It can be said that a large number of victims are interested in active participation. The majority of parties involved in the criminal proceedings believe however, that this cannot take place without an attorneys help. Such help from a solicitor frequently has a positive effect upon the victims position (see Figure 16).

The accessory prosecution and the adhesive procedure must be distinguished in relation to these rights of participation. The accessory prosecution offers the victim the possibility to take part in the proceedings as a "second prosecutor". The adhesive procedure makes it possible for civil legal compensation claims to be enforced within the criminal proceedings.

Just as the aims of these two procedures are different, so is acceptance by jurists participating in the trial and the frequency with which these procedures are made use of in court practice.

Wheras the accessory prosecution appears quite frequently in the regional court procedures, the adhesis proceedings (also as altered by the Victim Protection Act) are very unusual. Both forms of active participation are well known to jurists. This relates to the fact that these rights have existed for some time. The adhesive procedure is particularly well known to the victims.

The accessory prosecution is not regarded according to judges and prosecutors as being particularly popular. Inspite of the troubles caused to the parties involved, this procedure is well established in legal practice.

In contrast, the accessory prosecution is very popular with attorneys. This relates to the relatively high level of fees. Fees in respect of the adhesive procedure are evaluated in contrast, as being completely insufficient.

The accessory prosecution procedure has therefore been well accepted by the attorneys. Judges and prosecutors have in the meantime, become used to it (see Figure 17).

A large number of attorneys regard the adhesive procedure as being necessary. The level of acceptance of this procedure, is however not very high (see Figure 18). The jurists questioned expressed various fundamental and theoretical doubts relating to the adhesive procedure. The majority regard it as an "alien body" within criminal proceedings (see Figure 19). Around three quarters of those questioned, also agree with the thesis that most judges are overtaxed by this form of proceedings (see Figure 20).

The following aspects arise first and foremost as practical problems in relation to the accessory prosecution and also the adhesive procedure.

In the first instance, the procedures, according to the views of the jurists questioned, demand a lot of time and effort. The procedural delays arising in particular with regard to the adhesive procedure are evaluated as considerable. There are also problems according to the jurists, in relation to the financing of these forms of proceedings, by the victims. In particular, the attorneys refer to the fact that the majority of victims refrain from any active particitpation in the proceedings because the financial costs are too high (see Figure 21). This problem could not have been solved, despite reformation of the procedural costs.

There is a clear division in relation to the participation rights. The possibility of a accessory prosecution is made use of relatively often. In a good 10 % of cases in the "Amtsgericht" (local court) and in over a third

of possible cases in the "Landgerichte" (regional court), a subsequent accessory prosecution was initiated. In contrast, the adhesive procedure according to the reforms carried out by the Victim Protection Act, is scarcely ever used.

5. Conclusions

When confronted with the questions as to what the Victim Protection Act should and should not have achieved, we can see considerable deficits.

The first aim of ensuring that the regulations and changes are explained to the parties involved and that they are acquainted with these rules, must be regarded as having failed to some extent. The state of knowledge of the jurists, is not particularly extensive. Concrete ideas as to the finer details of the changes, are often lacking. One positive aspect of the Victim Protection Act however, is that at least the problems of "victim protection" has been brought to the attention of the parties involved. This applies particularly in relation to the area of victim protection in the narrow sense. This positive effect is to a great extent attributable to the accompanying legal political discussion. The Victim Protection Act must be credited as having some success and as having a symbolic function.

Knowledge of the regulations is particularly lacking in relation to the victims. We cannot expect the injured parties to have knowledge of the Act from the start. Instructing and informing those parties is absolutely necessary to ensure that all those concerned are aware of the position. The fact that the duty to instruct is not particularly well adhered to, and that it does not achieve the goals set of ensuring that the parties concerned are properly advised and informed, can be seen from the research set out. It can therefore be said that the positive success of the Act has been to a great extent impossible from the beginning.

With regard to the specific new regulations, only the area which is concerned with protection regulations, can be seen as having been successfully provided for. The judiciary see the actual significance of victim protection in the narrow sense so that these regulations are more widely accepted.

The aim of allowing the victim to assume the positon of a subject within the proceedings, and to allow him a full role to play within the proceedings, can be regarded quite differently. The starting point for allowing every victim a basic set of rights, could not really effect any changes in practice. The victims are rarely properly informed over the course of the proceedings.

The victim is therefore sadly lacking in information in this area. Although they are particularly interested in receiving information (namely formal information) this desire is not really satisfied. The considerate behaviour of parties involved in the proceedings, can be said to be responsible for the fact that great dissatisfaction does not arise in respect of the proceedings and the justice system in general. However, there is latent dissatisfaction on the part of the victims, which could easily become an important factor or problem.

The reform of the accessory prosecution has not caused many changes in practice. The Victim Protection Act had a clarification function in the first instance. The attempt of a renaissence of the adhesive procedure, has failed. Theoretical support for this procedure by the Victim Protection Act has been met understandably with disapproval by the jurists. This is due to the fact that the support of the interests of this particular group of people, was omitted, as being related measures.

The Victim Protection Act can therefore be regarded in general as being of limited success. Its general call for more sympathy towards the victim and therefore improvement of the prevailing attitudes towards the victim in procedure, could be said to be its greatest achievement. The Act could also be said to have qualified and given legal certainty to practice which had been carried out for some time. Concrete changes have however not been made.

Further efforts towards reform should be concentrated principally in taking steps towards making sure that more information is available. This applies both to jurists and also to the victims themselves. As long as this area is not improved to any considerable extent, further substantive improvements to the law, cannot be successful. First of all, the existing rights must be made use of. Further improvements to the victims position have to be tackled. However, this cannot be enforced over the heads of the jurists involved. In the case of further reforms, the needs and interests of this particular group of people, must be considered.

6. Figures

Figure 1: Assessment of distribution of power within the criminal proceedings (in percent)

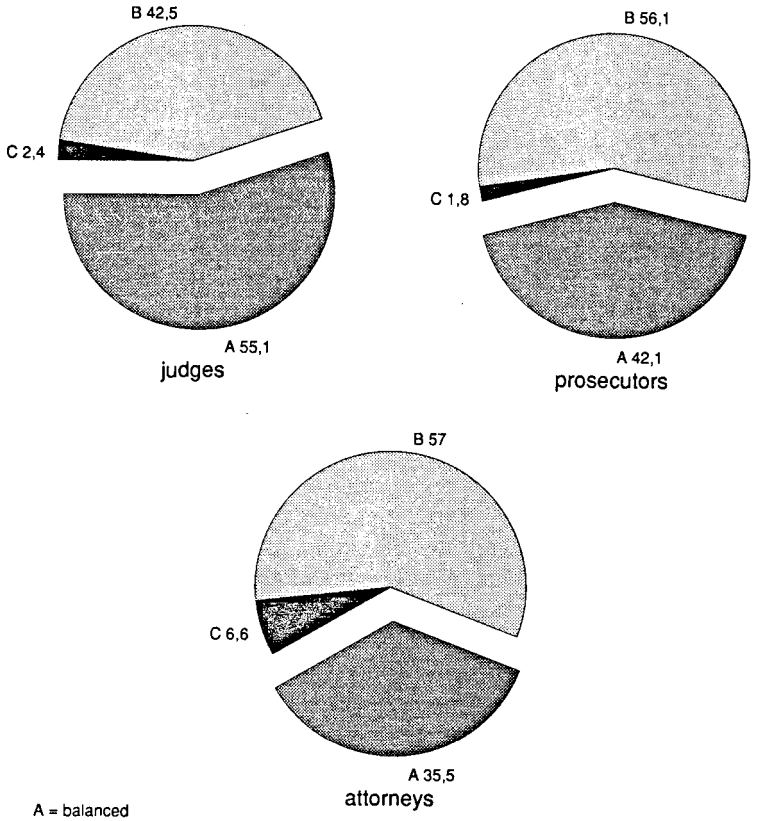
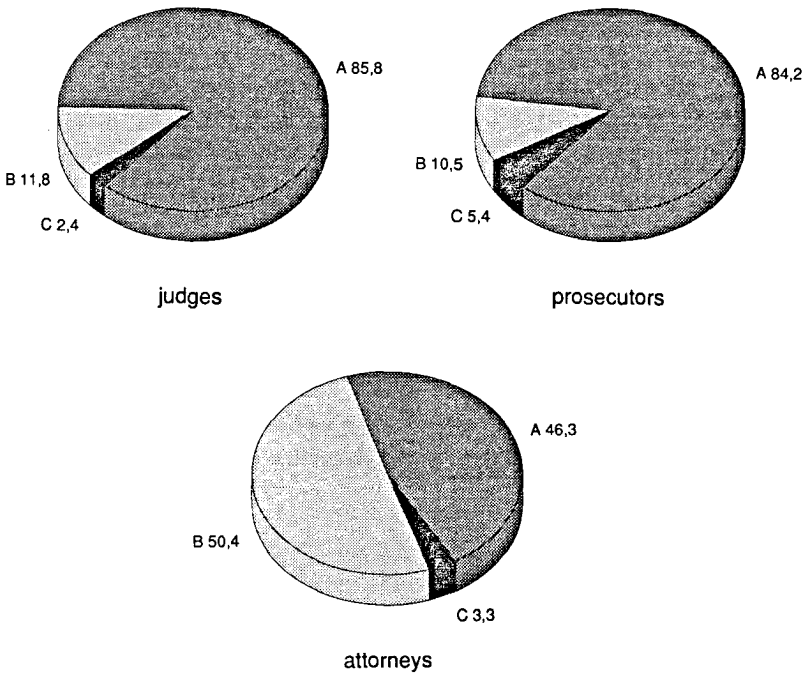
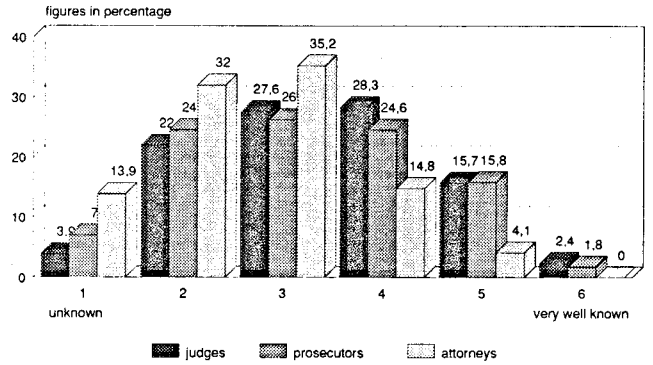


Figure 2: The position of the victims rights within the criminal proceedings (in percent)



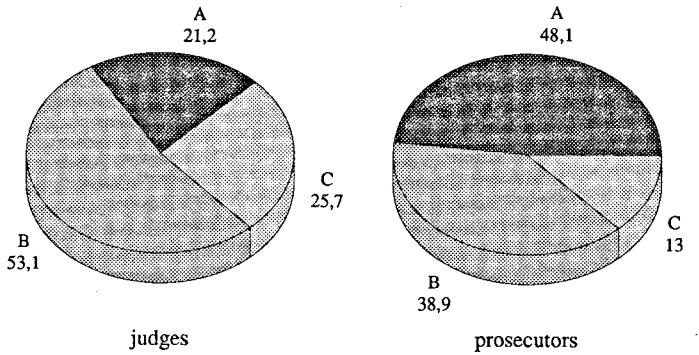
A = sufficient rights
B = insufficient rights
C = too many rights

Figure 3: Assessment of familiarity with the Victim Protection Act (in general)
- assessment of jurists -



judges: N=126
prosecutors: N=57
attorneys: N=123

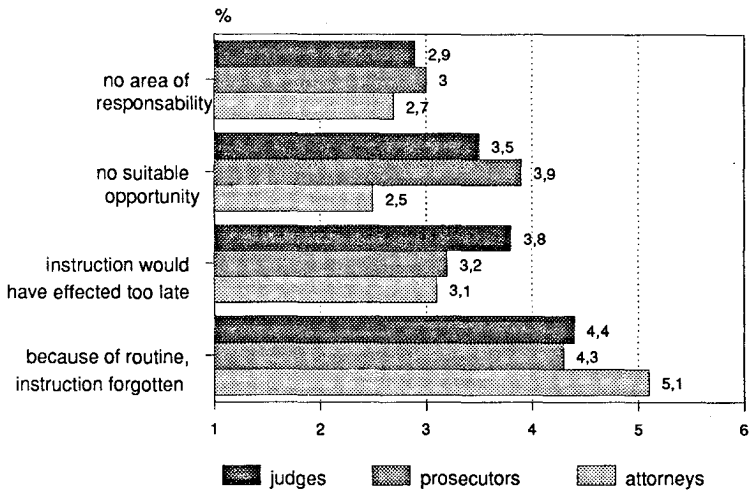
Figure 4: Form of instruction by judges/prosecutors
- according to their own statements - (in percent)



A = use of information sheet B = instr. given incidentally
C = instruction given in detail

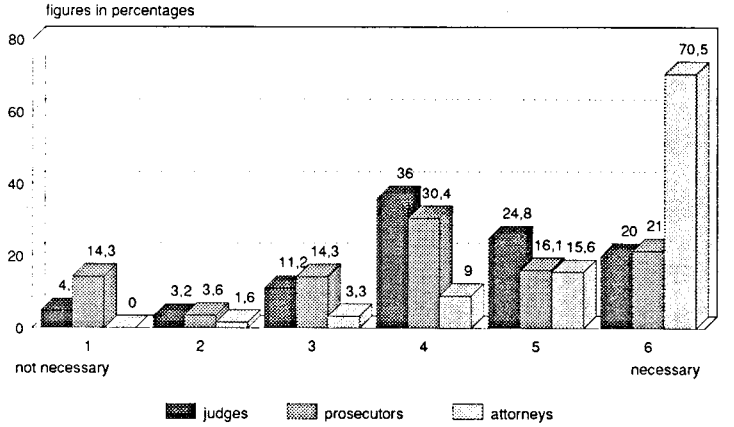
judges N=113
prosecutors N=54

Figure 5: Assessment of the reasons for lack of the duty to instruct



Rating:don't agree (1) - agree (6)

Figure 6: Assessment of necessity of duty to instruct



judges: N=125
prosecutors: N=56
attorneys: N=122

Figure 7: The interest of the victims in instruction

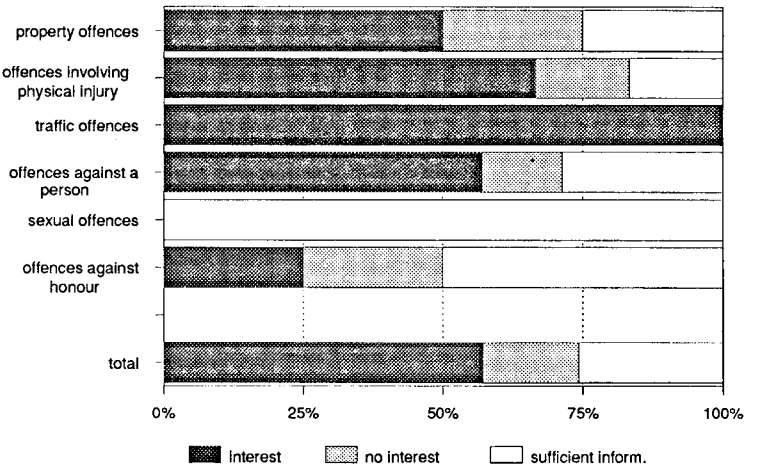
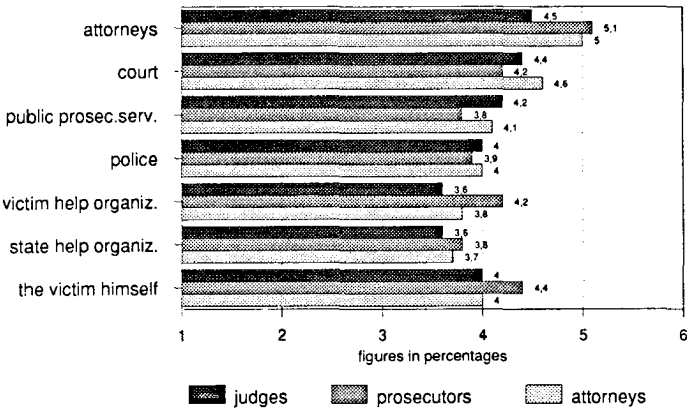
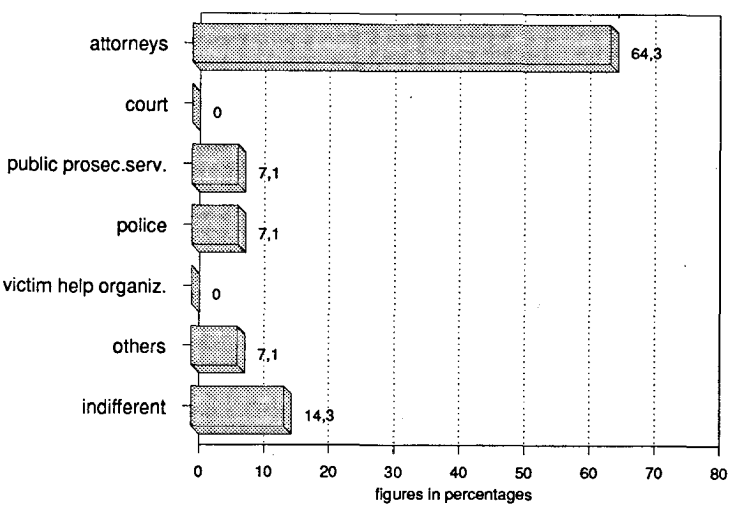


Figure 8: Responsibility for the interests of the victims (in general) - statements of jurists -



Rating: don't agree (1) - aggree (6)

Figure 9: Preference as to responsibility for victim interests - according to statements of the victims -



N=14

Figure 10: Feelings of the victims before - in - and after the trial

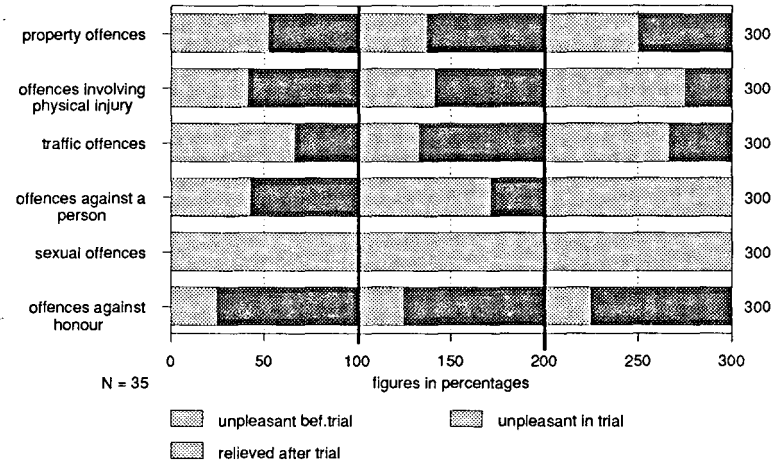


Figure 11: Consideration given to the victims in the trial - according to the statements of the victims involved -

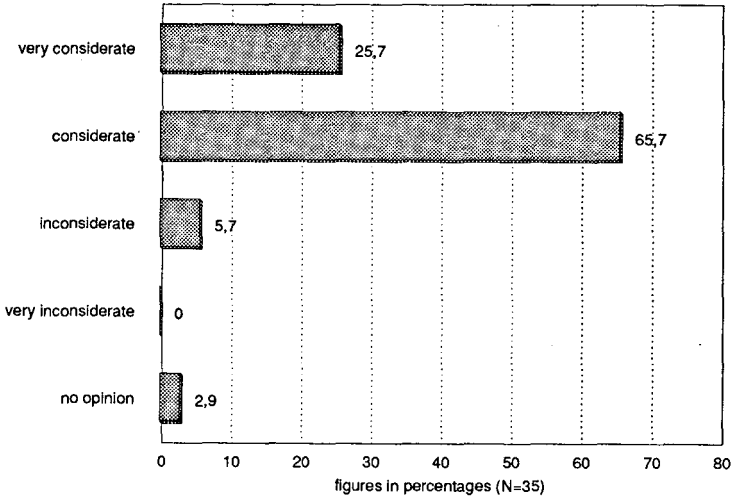
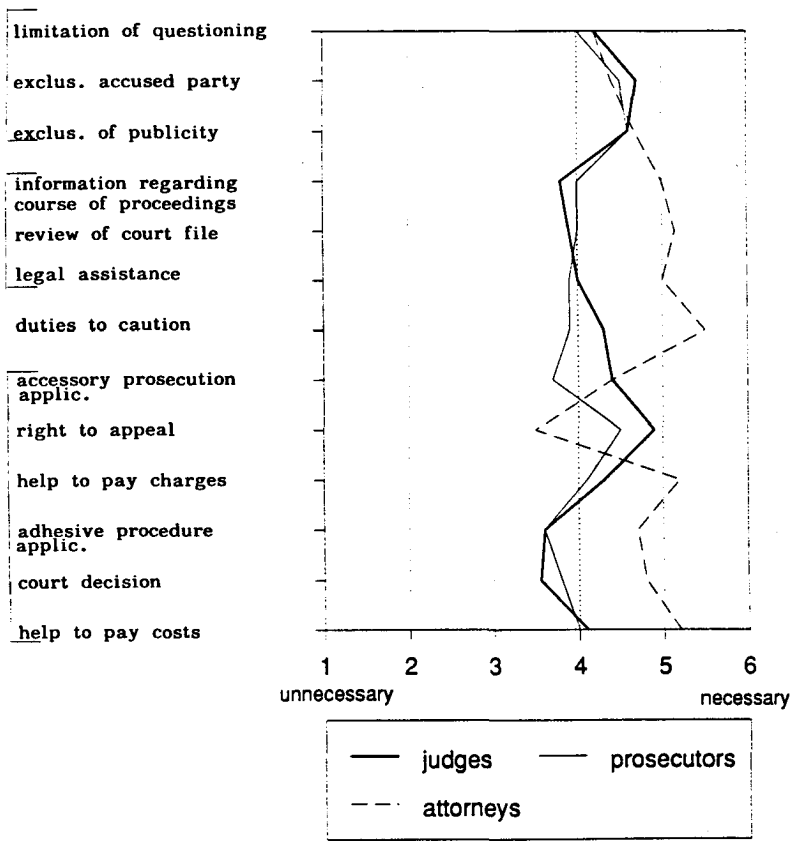
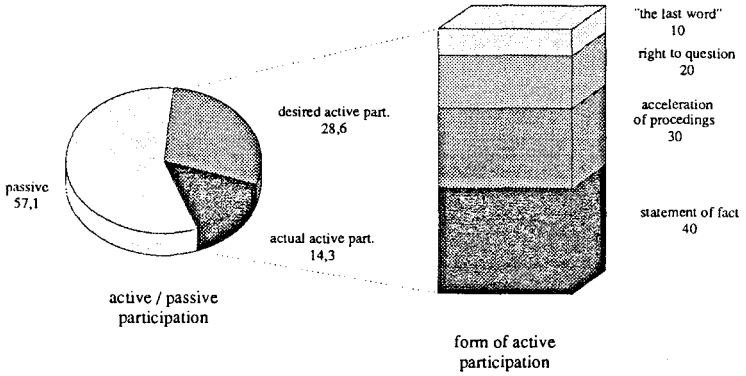


Figure 12: Assessment of need for regulations



judges: N=127
prosecutors: N=57
attorneys: N=123

Figure 13: Desire for active participation in criminal proceedings



figures in percentages
N=35

Figure 14: Effects of formal participation upon the victim position - according to assessment of jurists -

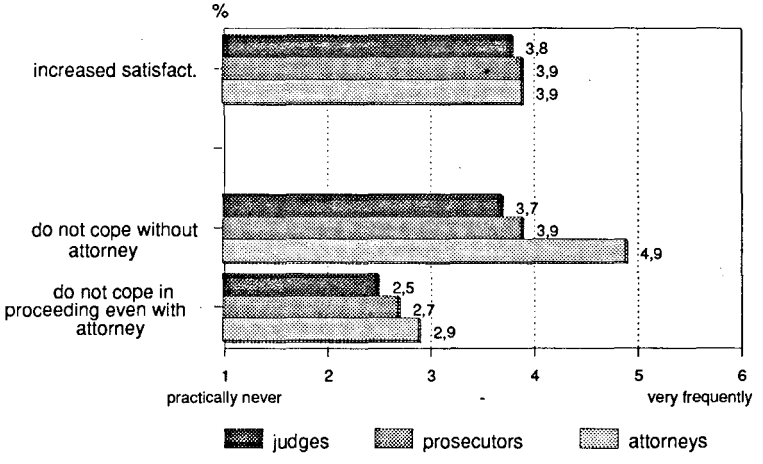


Figure 15: Effects of formal participation upon the proceedings - according to assessment of jurists -

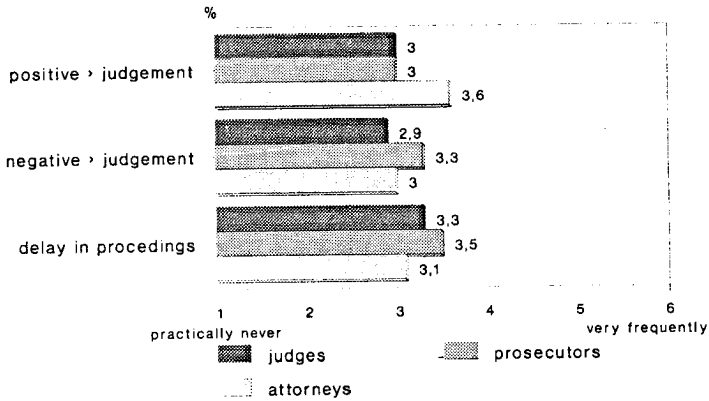
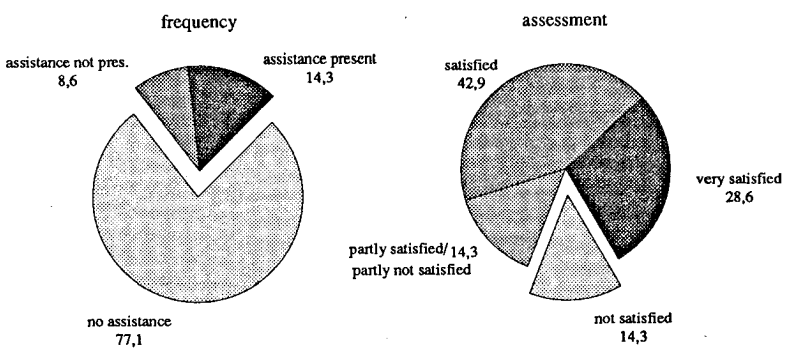
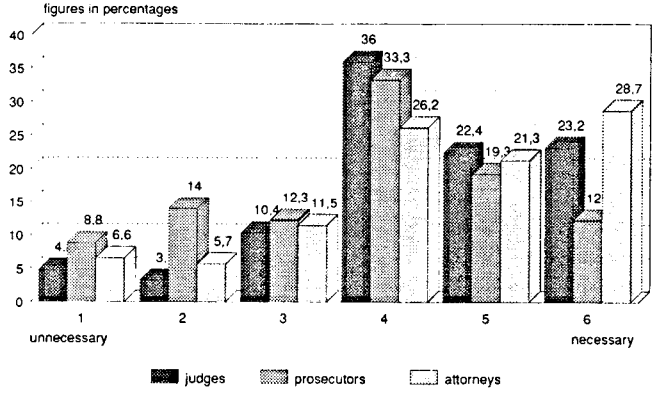


Figure 16: Frequency and assessment of legal assistance representative in accessory prosecution (in percent)



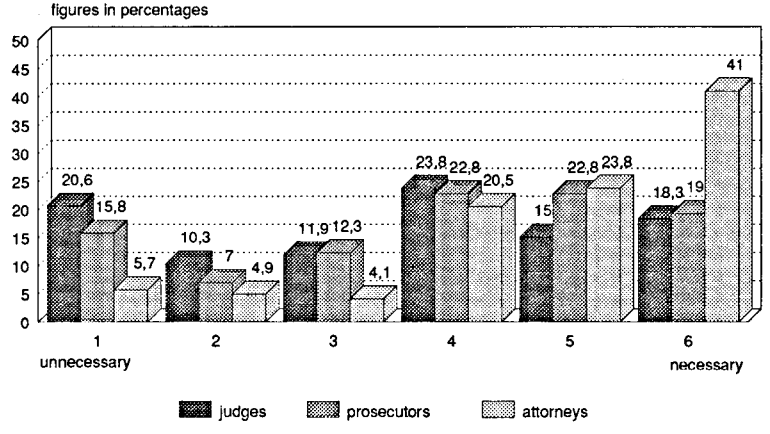
N=35

Figure 17: Assessment of necessity of regulations - need for accessory prosecution -



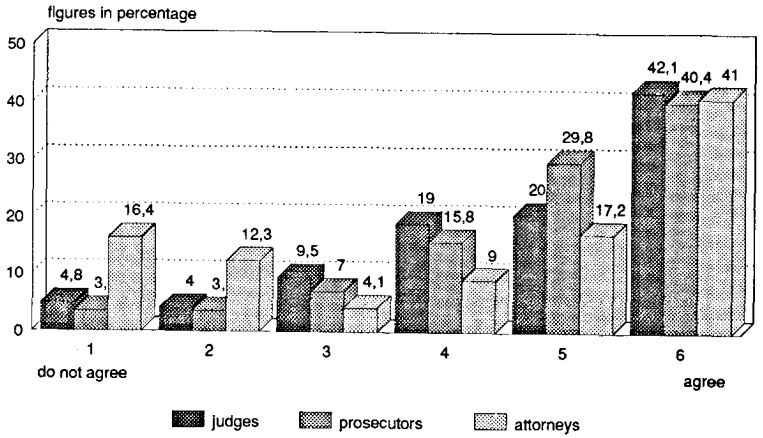
judges: N=125
prosecutors: N=57
attorneys: N=122

Figure 18: Assessment of necessity of regulations - possibility of judgement/part judgement in adhesive procedures-



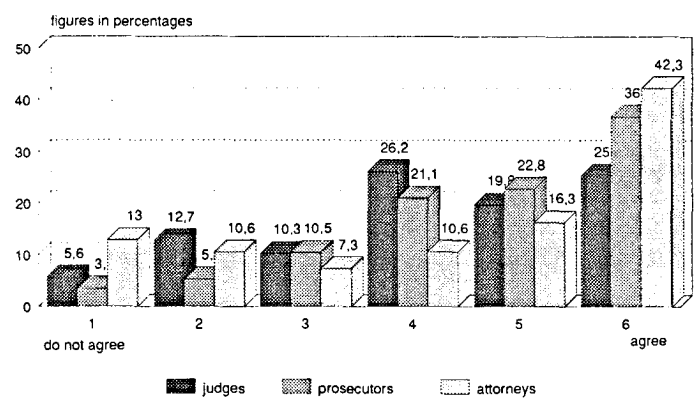
judges: N=126
prosecutors: N=57
attorneys: N=122

Figure 19: The adhesive procedure as a "foreign body" in the criminal proceedings
- attitude of jurists -



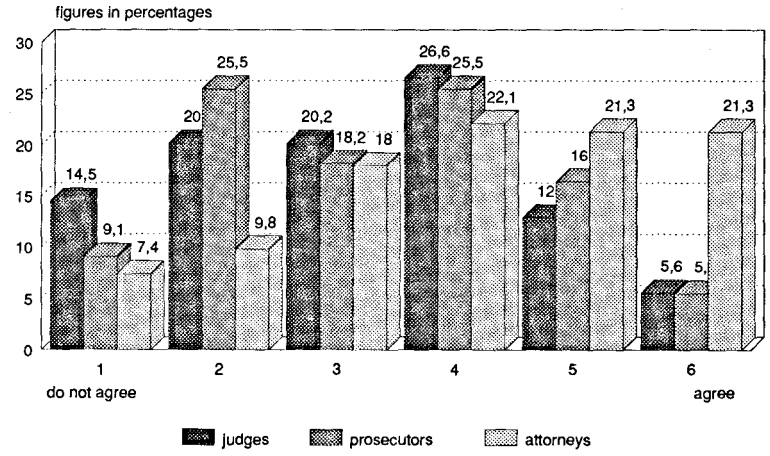
judges: N=126
prosecutors: N=57
attorneys: N=122

Figure 20: Overburdening of judges with the adhesive procedure
- attitude of jurists -



judges: N=126
prosecutors: N=57
attorneys: N=123

Figure 21: Finance problems for the victims
- adhesive procedure-



judges: N=124
prosecutors: N=55
attorneys: N=122

7. References

Adam, H., Albrecht, H.-J. & Pfeiffer, C. (1986). Jugendrichter und Jugendstaatsanwälte in der Bundesrepublik Deutschland. Freiburg.

Bertram, G. (1985). "Opferaktivierung" und Justizgewährung. Deutsche Richterzeitung 163, 322.

Hammerstein, G. (1986). Die Stellung des Verletzten im Strafverfahren. BRAK-Mitteilungen, 17, 2-6.

Joutsen, M. (1987). The Role of the Victim of Crime in European Criminal Justice Systems. Helsinki/Finland.

Jung, H. (1976). Gesetz über die Entschädigung für Opfer von Gewalttaten. Juristische Schulung, 16, 478-479.

Kaiser, G. (1988). Kriminologie. (2nd ed.). Heidelberg.

Rieß, P. (1984). Die Rechtsstellung des Verletzten im Strafverfahren. Gutachten C für den 55. Deutschen Juristentag. In: Ständige Deputation des Deutschen Juristentages (Ed.): Verhandlungen des 55. Deutschen Juristentages , Vol.I. (pp. C9-C136). München.

Rieß, P. (1987). Der Strafprozeß und der Verletzte - eine Zwischenbilanz. Jura, 9, 281-291.

Schünemann, B. (1986). Zur Stellung des Opfers im System der Strafrechtspflege. In: Neue Zeitschrift für Strafrecht, 193-200, 439-443.

Sessar, K. (1989). Die Frau vor den Toren der Jurisprudenz. In: W. Melnitzky, & O.F. Müller (Eds.), Strafrecht, Strafprozeßrecht und Kriminologie. Festschrift für Franz Pallin zum 80. Geburtstag (pp. 401-418). Wien/Austria.

Thomas, S. (1985). Der Diskussionsentwurf zur Verbesserung der Rechte des Verletzten im Strafverfahren - ein Stück Teilreform? Strafverteidiger, 5, 431-436.

U.S. Department of Justice (1983). Victim and Witness Assistance. Washington D.C./USA.

Villmow, B. & Plemper, B. (1989). Praxis der Opferentschädigung. Hamburger Entscheidungen und Erfahrungen von Opfern von Gewaltdelikten. Pfaffenweiler.

The Victim's Position within the Criminal Proceedings

- An Empirical Study -

Helmut Kury and Michael Kaiser

Contents

1. Introduction

Whereas the victim of crime has led a distinctly shadowed existence in academic discussion for a number of years, the position changed fundamentally in the 1970s and 1980s. This phenomenon is something which extends beyond national boundaries and is in fact an international development (see *Kaiser* 1979, pp. 481-484; 1988, p. 4-16). Although there has been a "victim movement" for the past 15 years in most European countries, it has only gained impetus in the last 5 years (*Maguire & Shapland* 1990, p. 205 et seq.).

The criminal law and in particular criminal law practice had to a great extent lost contact with the victim in the course of their development (see *Schmidt* 1971; *Rüping* 1981). "The history of criminal justice is almost synonymous with the decline of the victim's influence" (*Jung* 1981; 1986, p. 349; *Janssen & Kerner* 1985). The victims became the "forgotten persons" within the criminal legal system (*McDonald* 1976; *Erez* 1991). Until the early 70s, victims of crime were scarcely paid any attention. They were suddenly "'discovered', and afterwards it was unclear how their obvious neglect had so long gone without attention and remedy" (*Geis* 1990, p. 255).

In the meantime, science, legal politics and the legislature have accepted the victim. The victim has therefore become one of the most frequently dealt with topics in the last few years in German legal politics. Legal politicians speak partly of a mostly secular change, whereas practice is in many ways reserved and science is partly critical (*Ries*s 1987, p. 281 et seq.). Victimology has in the meantime become a frequently used catchphrase. It has been rightly pointed out that to speak of the victim because it is not only 'en vogue', but also 'à la mode', is in danger of giving merely superficial consideration to the issue (*Kerner* 1985, p. 497).

The reasons why the victim was rediscovered in criminology and criminal law can be seen in (see in particular *Erez* 1991):

1. the increasing problems of crime represented by frustration and disillusionment with the lack of efficiency of the criminal prosecution system, the fight against crime and offender rehabilitation (*Kury* 1986; *Maguire & Shapland* 1990, p. 206),
2. socio-political activities of particular victim groups, especially women who have drawn attention to violence in the family, sexual abuse and

abuse of children (*Geis* 1990, p. 253; *Kelly* 1990, p. 172). These groups were particularly active in the USA and acted partly aggressively towards the offenders' rights (*Maguire & Shapland* 1990, p. 206). This is understandable if one considers that interest in the research theme of "violence within the family" has risen sharply in the last few years. The research "...has revealed alarmingly high prevalence rates of the various forms of violence and victimization" (*van Hasselt et al.* 1988, p. 3; see also the articles in *van Hasselt et al.* 1988a; see also *Brownmiller* 1975; *Beinen* 1981; *Baurmann* 1983). The many catastrophic effects of violence within the family in particular in relation to children, is referred to in the many studies which have been carried out (see summary in *Browne & Finkelhor* 1986). In general, the extent of damage or injury caused to the victim depends on many factors, particularly and naturally upon the form and severity of the crime and also the variable of the personality of the victim him- or herself (see *Shapland* 1984; *Mayhew* 1985). There has been increasing discussion in the last few years in the Federal Republic of Germany about the conflict between offender rights and victim rights (see *Weißer Ring* 1990; *Böhm* 1990; *Schöch* 1990);

3. particular victim organizations have called for more protection and rights for the victim, especially the victim of crimes of violence;
4. empirical and clinical research has pointed out the psychological effects upon the victim alongside economic and physical effects.

Schüler-Springorum (1986, p. 100) established the thesis that the fact that the interests of the victim of crime have been reawakened, has resulted in an increasing fear of existence in itself which is worldwide and which gives everyone the feeling of becoming a possible victim of uncontrolled threats.

Work in the area of victimological research gained impetus worldwide after the First International Victimological Symposium in Jerusalem in 1973 (see *Kühne* 1988, p. 1). The "World Society of Victimology" was based upon the Third Victimological Symposium in 1979 in Münster/FRG, and this held international symposiums every three years.

Victimology has brought about a focus upon the victim in criminological research (see *Kirchhoff & Sessar* 1979; *Arnold et al.* 1988; *Kaiser* 1988). State compensation for the victim and victim protection were extended in many countries particularly by the passing of better legal provisions (see for European countries *Joutsen* 1987). In this way for example, the "law in respect of compensation of victims of violent crimes (Victim Compensation Act; VCA)" came into force, according to which those who "had suffered

damage to their health as a result of a deliberate attack against their person or another person or as a result of their legitimate defence... shall receive support on application, because of the economic consequences and damage to health..." (§ 1 OEG, Opferentschädigungsgesetz/Victim Compensation Act). Since this law has come into force, around 140 million DM has been spent on providing compensation for victims of crimes up until the end of 1986. This amount can be seen in perspective if one considers that 1,8 billion DM were spent in 1984 on the corrections (*Villmow* 1988, p. 81).

2. Necessity for Improvement of the Victim's Position within the Criminal Proceedings

Supplementary to this, the "First Law for the Improvement of the Position of the Victim within the Criminal Proceedings" (Victim Protection Act; VPA)" was passed in 1986 and came into force on April 1, 1987. The law related to extending the rights of victims within the criminal proceedings and in particular safeguarding the victim's protection from further damage caused by the criminal prosecution itself. The injured party already has an established, although admittedly predominantly insignificant position in most criminal procedure systems and this should have been altered and the victim's status extended within the course of this development. *Kühne* (1988) who along with others, carried out a European comparison of victim rights within the criminal procedure, came in summary to the following result, namely that consideration of these victim rights within the criminal proceedings "is in no way a new paradigma. The neo-latin procedures most of all have been aware for some time of things which have been raised as new claims in German discussion. Austrian and Swiss laws however also contain many of these demands for reform" (p. 12). *Joutsen* (1987) who compared the victim protection provisions of the United Nations with those of the Council of Europe, found many common points in both sets of provisions. The comparison of European countries which was carried out, pointed to the result that in most countries "the complainant retains only a minor role in the process. Only a few countries grant him extensive prosecutorial rights" (p. 219; see also *Joutsen & Shapland* 1989; *Tsitsoura* 1989; *Helsinki Institute for Crime Prevention and Control* 1989; *Council of Europe* 1985).

It has been pointed out correctly once again, that the victim who has played merely a fringe role as a witness in the prosecution of the offender at least until now, has been further detrimentally affected and in this way victimized in cases of serious crimes where correspondingly serious injury

has occurred. One speaks in this connection often about "tertiary victimization". This may play a significant role particulary in relation to victims of sexual crimes and predominantly in relation to children (see *Steffen* 1980; *Abel* 1988). The injury caused to the victims by the criminal proceedings themselves has been referred to more and more within the last 20 years. According to *Adler* (1975, p.214) the mechanisms which have been developed for dealing with crimes of rape within the criminal prosecution are just as cruel in themselves for the women as the original crime itself. "These mechanisms are a direct mirror image of traditional male dominance and supremacy which can be seen quite clearly within the entire system of criminal prosecution".

In the meantime, many publications have been presented in relation to the problems - also within the German spheres (see for instance *Blankenburg et al.* 1978; *Henry & Beyer* 1985; *Fehrmann et al.* 1986; *Steinhilper* 1986; *Steffen* 1987; 1988; 1989; 1991; *Greuel & Scholz* 1991; *Scholz & Greuel* 1991). "People concerned with the needs and interests of the victim might prefer to protect the victim against the justice system which tends to help itself by using the victim instead of helping the victim" (*Sessar* 1990, p. 44). The victim is most of all a supplier and means of proof within classical criminal proceedings (*Kirchhoff* 1988, p. 197). *Weigend* (1984, p. 764) characterizes the earlier legal position in the former Federal Republic of Germany quite accurately, to the effect that the victim of crime has been allocated sometimes more, sometimes less and sometimes no legal rights at all in relation to various stages of the criminal proceedings and in relation to various forms of crime. As soon as the preliminary proceedings have been introduced, the "dismantling" of the victim begins according to *Jung* (1981, p. 1157) and the victim has become a "disruptive factor" more and more. The "disruptive victim" was not only "forgotten" within the course of the history of the criminal procedure, but rather forced out quite actively. This explains the partly strong resistance against the reintroduction of increased victim rights within the criminal procedure, for instance suspension of the provisions of the Victim Protection Act (see *Kaiser, M.* in this volume).

It has been pointed out in this connection that there have been as good as no empirical studies, in particular in the Federal Republic of Germany, which have been evidential and which have contained the wishes and ideas of the victim in respect of his or her participation within the criminal proceedings. Information in this area would however be an important precondition of any change desired in the law, e.g. greater consideration of victim interests. Research in this area, however, has only begun in the Federal Republic of Germany (see e.g., *Baurmann & Schädler* 1990; *Baurmann* 1991). The State is accustomed in conventional criminal law to

formulating and recognizing the interests of the victim and administering them on his or her behalf (*Kirchhoff* 1988, p. 198). The extent to which these victim interests which have been defined by the State, correspond with the actual wishes and ideas of the victims themselves, has at least in the Federal Republic of Germany, scarcely been checked. "We do not know whether crime victims, as a group, actually desire changes in the administration of justice, and, if so, what changes they deem most urgent" (*Weigend* 1986, p. 162).

As a rule, three areas have been assumed, not without good reasons, to be important for the victim: 1. the beginning and introduction of the criminal proceedings, 2. protection of the victim against injury during the proceedings, 3. participation of the victim within the criminal court decisions (*Weigend* 1986, p. 162). The opinions of experts are already divided and do not necessarily agree with the opinions of the victims themselves. Victims are disappointed as to their treatment and role within the criminal proceedings, as is shown by studies, in particular from the USA. Opinions are, however, partly divided as to the factors responsible for this disappointment (*Knudten et al.* 1976; *Hagan* 1982; *Kelly* 1984; *Shapland et al.* 1985). Results show as a whole, that victims wish to participate actively in the criminal proceedings and wish to play a "subject role" instead of the former "object role" (*Hammer* 1989). It has rightly been pointed out from a psychological point of view, that "a criminal justice system that provides no opportunity for victims to participate in proceedings would foster greater feelings of helplessness and lack of control than one that offers the victim such rights" (*Kilpatrick & Otto* 1987, p. 19; see also *Wortman* 1983).

After a report has been made, the victim as a rule, comes up against a number of problems which continue up until the close of the criminal proceedings. It is therefore understandable that many victims, even those who have been seriously injured, refrain from the outset from making a report (*van Dijk* 1982; *Knudten & Knudten* 1979). The main reason for reporting or not reporting a crime is the expectation of the victim as to how he will be treated (see *Kilpatrick et al.* 1983; *Kidd & Chayet* 1984). It has been rightly pointed out that the victims, especially those of rape, have been badly treated by the police and that this is still the case to some extent. According to *Chelimsky* (1981, p. 86) the police often give the victims who are reporting a crime, the feeling that they are "responsible for the crime of which they are in fact victims". *Weis* (1982) found in his empirical research of women who had been raped, that the main reason for a victim not reporting a crime, alongside a sense of shame and fear of the crime becoming known, was fear of the reaction of important people in women's social network and consideration of the offender, in particular, also fears in

relation to the behaviour of the police, fears that they would not be believed and that the report would be useless. According to *Shapland et al.* (1985, p. 180 et seq.), many studies about the victim of various crimes, from various countries, have come up with similar results: "That victims are generally well satisfied with the police at the initial encounter and that any dissatisfaction is related primarily to an uncaring, routine or hostile attitude on the part of the police, to police refusal to take action and to general unthoughtfulness or disregard of the obvious victim needs".

In order to dismantle for instance, the fears of the victim in relation to the criminal proceedings, a preparatory course was developed and/or the victim was accompanied by trained people in the procedure (see e.g. *Driller* 1988; *Engel* 1988; *Davis et al.* 1984; *Young* 1990). *Friedman* (1982, p. 378) found that the victim wanted most of all a forum for airing, quarrels with the accused, financial compensation for expenses and loss of income, protection from the offender and return of property. *Heinz* and *Kerstetter* (1979) established that only around a third of victims actually wish to participate in the criminal proceedings (see also *Forer* 1980).

The interests of the victim in the offender being punished is officially accepted as being more limited than the interest in particular of criminal practitioners. For example *Sessar* (1990, pp. 14 et seq.) found in his study of victims in Hamburg, that 42% had pleaded for compensation as being a sufficient sanction in itself, a further 5% wanted to reject sanctions and 44% wanted punishment of the offender. The requirement for punishment was more clearly expressed by the judges and prosecutors who were questioned in the same study, in comparison to the views of the victims themselves. Greater punitiveness was established there, in particular in relation to men within the criminal justice system (see also *Sessar* 1989).

3. Prehistory in Relation to the German Victim Protection Act

The motive and purpose of the German Victim Protection Act were, most of all, better protection of the victims of serious crimes within the criminal proceedings and more effective material compensation. In these respects, the experts from the judiciary, legal profession and criminal law academic profession and also those representing the interests of women, were united. The legal theoretical starting point was the concept that the injured party should be allowed an independent position as a subject within the criminal proceedings. The main idea was the creation of a unified legal position for

all victims. The consequent shaping of the law has not however been effected by the legislature. General basic rights have been in the first instance, expressly granted to all victims. However distinctions specific to the offence have been made in individual areas.

The German Victim Protection Act must be viewed from another perspective. The long-term aim is restoring and securing law and order between the offender and victim (see *Roxin* 1989, p. 2 et seq.). The Victim Protection Act can only be regarded here as the first step. It is, as it were, an interim realization of an immediate objective. The Victim Protection Act was passed astoundingly quickly and without problems. This indicates that consensus existed regarding the defficient status of the victim within the criminal proceedings and also the urgent necessity for change. In addition, there was certainly general consensus amongst the population. After a number of important criminal trials, predominantly in the area of sexual delinquency, had been reported in the 1980s in the media, in a spectacular way, this strengthened existing sympathy with the "innocent victim". In 1979 the Third International Victimological Symposium took place in Münster/FRG and this drew more attention in the German Federal Republic, to the victims' perspective. The topic moved into the central point of discussion because of the 55th German Law Congress (Juristentag) in September 1984 (see *Riess* 1984). *Riess* (1984, pp. 22 et seq.) worked out four reasons which supported both victim participation "de lege lata" and also improvement of "de lege ferenda" and this was presented as a paper for discussion: 1. satisfaction of legal redress for the victim, 2. consideration of compensation interests, 3. the victim's interest in control of the proceedings and 4. protection and defence position along with rights of information. The Federal Ministry of Justice had already effected the decisions made by the German Law Congress in May 1985 in a discussion paper about the Victim Protection Act (see *Boers & Sessar* 1990; *Schünemann* 1986; *Jung* 1987).

4. The German Victim Protection Act

The Victim Protection Act attempts to protect victims from interference within the criminal proceedings, particularly against what may injure or damage their personal life. In addition, the victim should be allowed the necessary right to participate within the proceedings. The latter should be a starting point for changing the victim's position within the criminal procedure, from that of being a simple object in the procedure, to becoming an active subject within the procedure. In this connection, the aim is to improve the assertion of claims for compensation for material damage within the

criminal proceedings. The victims should, apart from that, be advised about their rights. These changes fundamentally affect all victims, and in particular, draw attention to the victims of serious crimes. In this way, the special position of the victim of a sexual crime, is placed in the forefront. Particular attention has been paid to respecting and consideration of existing legal powers of defence.

The Victim Protection Act introduced the following legal provisions in detail (see summary in *Kaiser* 1988, p. 491; *Kaiser, M.* 1991; see article by *Kaiser, M.* in this volume):

- improvement of protection of personal life of injured party and of relatives in relation to questions about personal life;
- possibility of removal of accused extended in relation to questioning of witnesses;
- possibility of excluding publicity extended;
- the injured party is allowed to participate on application at the beginning of court proceedings;
- right to inspect court files according to provisions of the Act;
- right by law to have assistance of counsel in criminal proceedings;
- the injured party is referred to his/her authority under the Victim Protection Act;
- extension of power of the so-called accessory prosecution by injured party (Nebenkläger);
- the requirements for asserting the claim for compensation within the adhesive procedure formulated more in the victim's favour;
- further clarification of provisions regarding court costs;
- account taken of efforts made by the offender in provision of redress for the victim, in relation to assessing punishment. Priority of victim's claim for compensation, over State's claim to pecuniary penalty (fine) and court costs.

It can be said in summary, that the Victim Protection Act provided more power for the victim. Other rights were extended. Indirect support is given to the victim by means of the duty of the authorities to advise the victim of his/her rights. The Victim Protection Act however confirms the fundamental division into two victim categories: The "normal victim" and the "victim who should be given particular protection". In the first instance, basic rights

were established for every victim, such as advising him/her of his right to inspect court files, the right to obtain assistance in court and the possibility of an adhesive procedure.

5. The State of Empirical Research in Relation to Victim Protection in the Federal Republic of Germany

Empirical studies in the FRG have concerned themselves in general with the behaviour of the victim. Knowledge from individual areas to which the Victim Protection Act relates, has not however been accumulated. The few empirical studies relate to the protection provisions of the Victim Protection Act and the accessory prosecution (Nebenklage) and adhesive procedure (Adhäsionsverfahren).

Schöch (1984) questioned 63 victims following upon their being questioned as witnesses in the trial itself. The results indicated an astoundingly high degree of contentment with the implementation of the provisions which applied then, in relation to protection to personal life. On the whole, the form of dismissal was criticized because of the impression which arose that the further presence of the victim in the trial was not desired. In addition, the questionnaire confirmed the impression that the injured parties did not know about the relevant provisions, to the extent that they could not fall back upon the experience of legal counsel and were merely referred to the court duty to provide proper care and supervision for the victim.

The legal institution which has been empirically researched most carefully, is the accessory prosecution. *Hüsing* (1982) assessed a sample of 569 files from procedures which qualified for accessory prosecution in 1980/81 in relation to the prosecution services of three regional court areas. The right to participate as an accessory prosecutor was explained in 33% of the criminal procedures in which an accessory prosecution was possible. The procedures related on the whole to negligent physical injury and homicide, in particular in relation to traffic offences. The probability of a subsequent accessory prosecution increases with the severity of the injury. The accessory prosecutor almost always made use of a solicitor, who made use of the right to inspect court files in 80% of cases. The accessory prosecutor or his representative were present in the trial in 97% of cases. A negative influence upon the proceedings could not be established and there was no obvious delay in the procedure caused. The accused's right to defend himself was

not interfered with. The accessory prosecution did however, have enormous financial consequences for the convicted party: The procedural cost rose by an average of 138%.

Schulz (1982) studied the Ministry of Justice statistics in relation to criminal matters for the years 1976-1979. He also analyzed in addition, 113 files of procedures in which an accessory prosecutor had lodged an appeal. He found that the accessory prosecution was not a "dead legal institute". The victims proved to have a keen interest in actively participating in the criminal prosecution. The strain put upon the court because of the accessory prosecution did not prove to be insignificant.

Kuhlmann (1982) came to the conclusion in 1979, that 90.5% of accessory prosecutions were concerned with traffic offences and 9.5% about other private prosecution offences. *Schöch* (1984) was concerned with the interests of the victim in pursuing an accessory prosecution. 42.9% of victim-witnesses declared that they would employ counsel in the event of an accessory prosecution being admitted, if they would have to pay the counsel themselves. If payment was made by the accused, the State or legal protection insurance, 53.6% would join the proceedings as accessory prosecutor. *Kühne* (1986) studied 1,500 files from the year 1982 of a regional court district. An accessory prosecution was possible in 45 of these cases and this was strived for on 15 occasions. The accessory prosecution would, in fact, prepare in particular for the enforcement of civil legal claims. Influence upon the outcome of the judgement or extent of punishment imposed could not be established.

In so far as the adhesive procedure is concerned, *Schmahl* (1980) discovered a great reserve with regard to its use. The reasons cited by the courts questioned, point particularly to the lack of knowledge of those participating in the proceedings, delays in the proceedings, lack of fees, incentive for practitioners, the debtors' inability to pay and the view that the object of compensation can be achieved by the imposition of conditions in this respect.

Schöch (1984) found that 80.6% of victims were of the opinion that compensation and claims for compensation for pain and suffering should be decided as much as possible within the criminal proceedings. The pecuniary damages were not covered by insurance or indemnification such as e.g. continuation of wage payments, in 60% of the cases studied. Compensation proved to have an influence upon the interest in punishment of the offender: 39.7% would not necessarily have placed importance upon punishment of the offender, if the accused had indemnified the offender.

The Federal Council requested in its comment upon the Draft Victim Protection Act in 1986, that the Federal Government should varify, after the changes to the adhesive procedure had come into force, the extent to which this had led to a greater use of the procedure. A report was presented in 1989 by the Federal Government with regard to the application of the adhesive procedure after the first Act had come into force in relation to the improvement of the victim's position within the criminal proceedings (*Kaiser, M.* 1991, pp. 133-134). The report was founded upon a study of regional court administration. An increase in the use of the adhesive procedure during the first 18 months after the Victim Protection Act had come into force, could not be established. The absolute figures were extraordinarily low. That means that the adhesive procedure still plays a minor role in practice.

It can be said as a whole, that the position of the victim of serious crime has been relatively well examined. However the position of the "normal victim" has been studied somewhat less. Although this victim as a whole does not have such deep-rooted problems, the victim must however be confronted with many difficulties and problems. Brief consideration was equally given to the legal categories in which the victims are often inevitably involved after the crime has been committed. The victim's role and his position within the criminal proceedings, especially in the trial, which must be regarded as an unforgettable experience after the offence has been committed, are often neglected. With particular reference to the sphere of the provisions of the Victim Protection Act, no empirical facts and figures have been presented regarding the legal reality which exists, since the changes have been brought about in this respect. The research described in the following text should help to close these gaps.

6. The Study

6.1 Aims of the Study

The project is concerned with verifying the question as to the extent to which the aims set by the legislator in relation to the passing of the Victim Protection Act, are being realized. To the extent that this is not the case, it is of interest to assess what factors appear to be responsible for such a limited success. The main question areas of the empirical study were:

- fundamental attitudes of the lawyers participating in the procedure towards the victim's position within the criminal proceedings;

- state of knowledge of those participating in the procedure with regard to the provisions of the Victim Protection Act and the responsibility for the victim's interests;
- the victim's interests and situation within the criminal proceedings;
- implementation of the provisions relating to the victim according to the Victim Protection Act (see *Kaiser, M.* 1991; *Kaiser, M.* in this volume).

6.2 Implementation of the Study

Analysis of the problem area required the use of various research methods. In order to obtain data regarding the frequency of the use of individual norms, the criminal prosecution statistics for the Federal State of Baden-Württemberg and the case enumeration forms (Zählkarten) for the criminal proceedings were evaluated. Within the regional court district of Freiburg during one month, all trials in which a victim participated, were recorded. A total of 86 trials were visited (participant observation). Observation of the procedure was carried out by 6 trained interviewers with the use of standardized observation schedules. There was no injured party as defined for the purpose of the study in 11 cases (12.8%). The appointment - because the accused did not appear - was cancelled in 25 cases (29.1%) and the victim was not present on 13 occasions (15.1%). In general there were 37 suitable appointments for the purpose of this study, in which 42 victims were present. 35 (83.3%) of the victims were prepared to participate in an interview. 12 (34.3%) of victims were victims of asault, 8 (22.9%) victims of property offences. 24 victims were male and 11 female. 12 were multiple victims.

In addition, a study of judges, prosecutors and counsel was carried out. A total of 287 judges, 156 at the district court (Amtsgericht), 131 at the regional court (Landgericht), were involved in criminal matters. There was a total of 172 criminal prosecutors. The participation rate in the self-administered survey amounted to 68 (43.6%) of judges at the district court, 59 (45.0%) of judges at the regional court. In general, 27 (44.3%) of judges completed the questionnaire. 57 (33.1%) of prosecutors took part in the study. In relation to counsel, only those people who dealt with criminal matters were selected for the study, on the basis of the list provided by the Bar Association. A total of 252 legal practitioners were approached. 41 were removed from the study at a later date due to the fact that they did not deal

with criminal matters in accordance with their own statements. A total therefore of 211 practitioners were questioned. Of those, 126 (59.7%) completed the questionnaire.

A total therefore of 670 jurists were questioned of whom 310 (46.3%) took part in the study. 307 questionnaires (45.8%) could be considered in a later assessment. The self-administered survey which followed a pretested standardized questionnaire form, took place between the end of 1989 and the middle of 1990.

7. Results of the Study

The differences between the individual groups studied were examined at a variable level in the first step of our study (see *Kaiser* 1991). In the second step of our assessment, we attempted to work out a coherent structure by means of a multivariate analysis.

7.1 Attitude of Jurists towards Position of Victim within the Criminal Proceedings

Asked as to the fundamental aims of the criminal procedure, traditional concepts with regard to the criminal procedure dominated in general in relation to the respondents. On a 6-point-scale (1 = unimportant; 6 = very important) the jurists cited the following as the most important objectives: clearing up suspicion of crime ($\bar{x}$ =5.3), fight against crime (5.3), investigation of the substantive truth (4.8), achieving law and order (4.8), preparation for sentencing (4.6), enforcement of substantive criminal law (4.4) and balance of interests between the State and the individual (3.3). With regard to the question as to whether the criminal procedure should be limited to the dispute with the offender or whether it should also serve to rectify the victim-offender-relationship, 52.8% of the judges questioned, 57.4% of the prosecutors and 64.2% of counsel proved to be victim-orientated. However the results arising from individual questions in relation to the victim protection provisions indicated a clear offender-orientation in so far as judges and prosecutors were concerned. Where there was offender-orientation, was most clear in relation to the jurists aged over 55 (55.2%) and the under 35 year olds (43.7%; 36 to 45 years old: 37.4%; 46 to 55 years old: 42.0%).

A factor analysis of the 7 variables in respect of the assessment of the objectives of the criminal procedure (Var. 002-Var. 008) brought out three factors (varimax-rotation; see table 3). The extent of the eigen-value (≥1.00)

and in particular the interpretability of the factor solution found serve as factor extraction criteria. The correlation matrix which forms the basis of this factor analysis is reproduced in table 2. Many significant or rather highly significant correlations between the individual variables can be seen.

Factor F1 shows the highest factor loadings in relation to the variable "investigation of substantive truth" (Var. 004), "clearing up suspicion of crime" (Var. 005) and "preparation for sentencing" (Var. 006). This relates to formal legal aspects of the criminal procedure which are strongly orientated towards the law, clarification of the crime and sentencing.

Factor F2 indicates the highest factor loadings in relation to the variables "balancing of interests between the State and individual" and "restoration of law and order". This relates to the more victim-orientated aspects of the criminal procedure, to their social political goals which expand the narrow legal framework.

Factor F3 has finally the highest factor loading in relation to the variables "fight against crime" and "enforcement of substantive criminal law". The more repressive aspects namely criminal political preventative considerations take priority here.

Whereas factors F1 and F3 reflect more traditional or rather anti-reform patterns, factor F2 contains views which show a readiness to accept reform and which regard the objectives of the criminal procedure as social political objectives in balancing the interests of the State and individual and restoring law and order.

The individual scores have been calculated for the respondents, for the three factors traced. Table 1 shows a comparison of these scores for judges and prosecutors on the one hand and counsel on the other hand (analysis variance). Whereas there are significant differences in relation to F1 and F2, the distinction between the two groups in F3 is very significant ($p < .00$). Judges and prosecutors clearly have stronger views, namely they regard the objective of the criminal procedure more clearly than counsel, as being the fight against crime and enforcement of substantive criminal law.

The current division of authority between the accused and the victim within the criminal procedure, has been evaluated in different ways according to the occupation of the respondent. Whereas the judiciary most of all, speak of a predominant balance of power (55.1%, prosecutors 43.1%), the figure in relation to counsel drops to around a third (35.5%). The latter regard there as being a clear shift of authority in favour of the accused (47.0%; prosecutors 56.1%; judges 42.5%).

Although more than a half of prosecutors (56.1%) and 42.5% of judges regard there as being a shift of authority in favour of the victim, merely one in every ten however (judges 11.8%; prosecutors 10.5%), are of the opinion that the extent of victim rights are too limited. Well over two thirds believe that these rights are sufficient. Any future extension of these rights would clearly be rejected. In contrast, half of the counsel members (50.5%) are of the opinion that the victim has an insufficient number of rights within the criminal proceedings. These differences are statistically very significant.

Supplementary verification of the mean differences of the attitude variables in relation to the victim within the criminal procedure, scarcely showed any statistically significant mean differences between judges and prosecutors. However, between each of these two groups and counsel members, there were many very significant mean deviations. Table 1 shows the results of a variance analysis between the two groups, judges and prosecutors on the one hand and counsel on the other hand. Counsel, in comparison to the group of judges and prosecutors, regard the objective of the criminal procedure as being less repressive (fight against crime, enforcement of substantive criminal law). They are more of the opinion that the victim has too few rights within the criminal procedure and should have more rights so that the victim can contribute positively to the final judgement. They are of the opinion that the victim cannot cope in the criminal proceedings with or without a solicitor and that the Victim Protection Act is little known. They believe that participation of the victim in the court proceedings would not lead to delay in the proceedings and that the new provisions of the Victim Protection Act are necessary and do not in fact,go too far. They are further of the opinion that jurists know too little about the new provisions and that the provisions have been accepted by judges and prosecutors merely to a limited extent. Further, they believe that victims are interested in these new provisions and that the victim is admittedly not aware of the new law and his own rights. Legal practitioners believe at the same time, more than judges and prosecutors, that academic discussion about the position of the injured party within the criminal proceedings is problematic and that the rights of the accused have not been sufficiently considered within the framework of the Victim Protection Act. It must be noted however, that the greater majority of counsel questioned were mostly defence counsel and therefore they regarded the rights of the accused as being more important. Finally, there was a significant difference in relation to both groups in so far as age was concerned: The group of judges and prosecutors were significantly older than the legal practitioners.

The study points to a victim orientation bias on the part of the counsel and a greater willingness to accept the new provisions of the Victim

Protection Act. Court practitioners are clearly prepared to allow the victim more rights and authority, whereas judges and prosecutors who are more keen to maintain the present status quo, are of the opinion that victims have too many rights already. This comparison does not however mean that there are also very progressive jurists amongst the judges and prosecutors, although it is obvious that they are on average clearly less in number than in relation to counsel.

Supplementary to the group comparison at a variable level, we carried out a comparison at factor level. A factor analysis was carried out with the individual variables and scores of factors F1-F3 (varimax-rotation). The proportion of the variance set forth for the individual factors and in particular their interpretability pointed to a 4-factor-solution. Table 4 shows the correlation matrix which forms the basis of the factor analysis and Table 5 shows the results of the factor analysis.

Factor FAC1 shows considerable factor loadings upon the variables Y1-Y6 (the individual provisions of the Victim Protection Act are little known on the part of the jurists and were accepted merely to a limited extent by judges and prosecutors and legal practitioners, the victims had no interest in these provisions and also were not aware of them). Variables 46 and 13 also showed a significant negative loading on this factor (the provisions of the Victim Protection Act are regarded as little known in the administration of justice and the division of authority within the criminal procedure between victim and accused, is regarded as having a bias in favour of the accused). The dominating aspects of these factors are the limited acceptance of the victim protection provisions by judges, prosecutors and legal practitioners and the limited knowledge of the provisions and lack of interest in the provisions by the victims.

FAC2 has significant factor loadings in the variables 014 (the victims should have more rights allocated to them in the future), X3 and X4 (the individual provisions are considered to be important and must be extended), 031 (victims who participate in the court proceedings over and above their role as a witness, contribute positively to the final judgements), 011 (victims have too few legal rights at their disposal within the legal proceedings) F2 (emphasis upon victim-orientated objectives of the criminal proceedings and balancing of interests and restoration of law and order), 010 (the criminal proceedings should most of all serve to resolve the victim-offender-relationship) and 036 (victims who participate in the legal proceedings over and above their role as a witness, are more satisfied). This factor combines both victim-orientated interests and attitudes together. A claim for improving the

victim's position within the criminal proceedings and to view the criminal proceedings also within the context of non-classical juristic-dogmatic objectives clearly emerges.

FAC3 has significant loadings in the variables 032-035 (victims who participate in the criminal proceedings over and above their role as a witness, make the final judgement more difficult, hold back the proceedings and do not cope either with or without a solicitor within the criminal proceedings), 048 (discussion about the victim's position within the criminal proceedings is problematic) and 012 (the accused's rights were taken too much account of in the Victim Protection Act). The factor contains clearly negative and disapproving attitudes towards extension of victim rights within the criminal proceedings. The victim is regarded most of all within the criminal proceedings, as an obstacle which makes the final judgement more difficult, holds up the course of proceedings and does not know his/her way about and cannot cope. At the same time, the accused's rights are considered as being too extensive. The attitude here, is clearly that the course of the proceedings should not be disturbed by either victim or offender rights which are too powerful. A conservatively formulated basic attitude in relation to the objectives of the criminal procedure, lies behind these findings.

In conclusion, FAC4 has significant factor loadings on variables X1 and X2 (implementation of the individual provisions of the Victim Protection Act lead to more expenditure and therefore delays in the proceedings), F1 (formal legal aspects of the criminal proceedings are regarded as taking priority place, investigation of the truth, clarification of suspicion of crime and determination of punishment) and F3 (repressive aspects of the criminal proceedings are emphasized, such as fight against crime and enforcement of criminal law). Although not the highest, variable 046 (.35) also had a relatively high loading on this factor; the provisions of the Victim Protection Act are regarded as well-known). The factor includes variables which describe a pattern of anti-victim attitudes, particularly due to economical grounds in relation to procedure. Importance is placed upon the classical objectives of the criminal procedure such as investigation into the truth and clarification of suspicion of crime. The victim is regarded as a trouble maker who causes increased costs and delays in the procedure.

The next step was to check in relation to these four factors, the extent to which distinctions could be found between the three groups (judges, prosecutors and counsel). It was also checked as to whether statistically significant differences between the sexes and age groups could be observed. Table 6 shows the results of the variance analysis.

Whilst no significant differences could be observed between judges and prosecutors, these two groups could be distinguised from the court practitioners in all four factors, to a significant extent ($p < .00$, see table 6). The court practitioners have a statistically significant, higher value in FAC1-FAC3 and a lower value in FAC4. Court practitioners, in comparison with judges and prosecutors, are more of the opinion that the victim protection provisions are very little known and that they are merely accepted to a limited extent. They are clearly more in support of victim-orientated interests than judges and prosecutors. However they regard the victim protection provisions as having disadvantages for the criminal proceedings, e.g. making the final judgement difficult, delays in the proceedings and too many demands upon the victim because of complicated procedural rules. At the same time they believe, although to a lesser extent, that the implementation of the individual provisions of the Victim Protection Act results in an economical disadvantage for the criminal proceedings. They regard the formal legal aspects of the criminal proceedings as having less priority and emphasize to a lesser extent, the repressive aspects such as fight against crime and enforcement of the criminal law. The fluctuating position of the court practitioners must be borne in mind, namely, on the one hand they support, an extension of victim rights more than judges and prosecutors and on the other hand however, they act as the defender of offender's rights.

The sex-related differences between the professional groups are less clear. There are no sex-related differences at a variable level in relation to court practitioners. There are however sex-related differences in relation to judges and prosecutors: women exhibit a bias in favour of the victim: 40.0% as opposed to 25.4% of men, are of the opinion that the victim still has too few rights. Further extension of the victim's rights however is rejected by just as many women as men.

On a factor level, there is a very significant sex-related difference in FAC1 ($p = .01$): women have a lower value. There is also greater acceptance by women of the victim protection provisions. They clearly have greater support for victim's interest within the provisions of the Victim Protection Act, compared with their male colleagues.

The influence of age upon the view that the victim has sufficient rights, shows that there is greater agreement with this viewpoint and this corresponds to increasing age in relation to judges and prosecutors. There is greater rejection of this viewpoint with increasing age in relation to counsel. Older judges and prosecutors adhere more strongly to the present provisions than their younger colleagues, whereas older court practitioners plead more strongly than their younger colleagues, for further extension of victim rights. On a factor level, there is a statistically significant difference ($p<.00$) in

FAC4: those questioned who were over 45 years old have a higher value than their younger colleagues. This confirms the result to the extent that older jurists with no distinction between judges, prosecutors and court practitioners, appear to show a pattern of anti-victim tendencies. They critisize the victim protection provisions particularly on the basis of economic grounds in relation to the proceedings. The victim is regarded as being a trouble maker in the proceedings more by older jurists than by younger.

7.1.1 Knowledge of the Victim Protection Provisions

In order to obtain knowledge about the awareness and familiarity with the Victim Protection Act and the individual provisions, the jurists questioned were asked to assess their own extent of knowledge of the Act in the administration of justice, namely in relation to their professional group. This indicated that the Victim Protection Act is regarded as relatively unknown in general by more than a half of jurists. Legal practitioners classify their own awareness particularly pessimistically: merely 18,9% believe that the Victim Protection Act is "quite well known" (judges: 46.4%; prosecutors: 42.2%). 13.9% of the legal practitioners believe that the Victim Protection Act is unknown to the lawyers concerned among the particular jurists (judges: 3.9%; prosecutors: 7.0%). These differences are very significant ($p<.00$). Distinction related to age could not be established in relation to these questions.

During the course of the victim surveys, 25.7% of victims indicated that they had been sufficiently informed about their rights. This subjective impression does not give us any clues as to the actual state of knowledge of the victim. Victims were therefore also asked as to their knowledge of the existence of individual rights. It was expected that at least a rudimentary knowledge of these rights would be known. The right to inspect court files was known to 40% of those questioned and the degree of awareness of victims of more serious crimes was higher than in respect of victims of other crimes. The right to apply for information regarding the outcome of the proceedings was only known by 25.7%. 20.6% of those questioned had heard something of the possibility of being able to make a claim for compensation in the criminal proceedings, for damage suffered.

The limited knowledge of the victims regarding their rights must be regarded with the background knowledge that 26.3% of judges and prosecutors indicated that the victim had never been referred to his rights. Only 8.8%, according to their own statements, always referred to these rights. 44.0% indicated that they merely gave information on a question being put

to them. It is noticeable that those few who caution the victim regularly about his or her rights could not be found predominantly amongst prosecutors, but rather amongst judges and in particular those judges at the regional court. There were considerable differences in the form of caution given. Judges work predominantly according to the principle of oral proceeding (Mündlichkeitsprinzip), whereas prosecutors more frequently make use of formal notes. The victim survey showed that 20.0% of victims, according to their own statements, were actually cautioned as to their rights. Admittedly, this caution was not carried out in any case by the prosecutor or court, but rather predominantly by a court practitioner and in a few cases by the police.

Jurists assess knowledge of the duty to caution within their own profession as fairly limited in comparison with the other rights contained in the Victim Protection Act. No less than 53.2% of court practitioners believe that the duty to caution is too little known (judges: 35.4%; rosecutors 22.0%). The main reason given by jurists for the disregard of the duty to caution is that it is quite simply forgotten in the everyday court routine (81.6% of respondents). More than a half of judges (52%) and prosecutors (60.3%) indicated that there was often no suitable opportunity to give the appropriate caution. The same opinion is shared however by only 29.2% of court practitioners. A considerable number of jurists questioned, regard there as being increased costs because of the caution. No fewer than 27.1% of judges in the district court regard these costs as considerable (judges in the land court: 15.1%; prosecutors: 19.3%). Accordingly, delays in proceedings arising from implementation of this duty to caution, are regarded as being quite considerable (judges: 12.6%; prosecutors: 12.5%; court practitioners: 5.7%).

Acceptance of the duty to caution was assessed in various ways by the jurists. 63.2% of judges believed that the provisions have simply not been accepted (prosecutors: 62.8%; counsel: 28.9%). Significant differences arose in relation to assessment of the necessity for norms. Scarcely any court practitioners believed that the duty to caution was superfluous (4.9%). This view was held by 28.4% of judges and 32.2% of prosecutors. Significant differences arose in relation to assessment of norms. 41.8% of court practitioners were of the opinion that the new provisions should go further and 9.4% of judges and 5.0% of prosecutors, clearly less, were of this opinion. The new provisions are estimated by 6.9% of judges and 14.3% of prosecutors, but merely 0.8% of court practitioners, as being too far reaching.

In general, acceptance of the provisions by judges and in particular prosecutors, can be regarded as being limited. Although there is merely limited use in practice and much reserve with regard to these provisions, it

is astonishing that the majority of this group do not wish do make any changes to these provisions however. There is only a limited tendency to have the existing rules changed, even if the rules are being rejected in so far as contents are concerned. The attitudes of court practitioners who have exhibited a great interest in this area, can be contrasted with these views. The substantial interest of the victim in obtaining information was also to be confirmed by the victim study. More than half of victims questioned (57.1%) would like to have had more information about their rights.

The question arises as to who should take on the task of helping the victim in some way, to the extent that endeavours have been made in this direction. The jurist study sought to obtain from the respondents an evaluation of who in their opinion or of which of a number of various institutions, should pay particular attention to the interests of the victim. In relation to assessment of this responsibility, court practitioners were cited in the first instance amongst all professional groups. This was followed by the court, prosecutors, police, victim help organizations, state victim help and the victim him- or herself.

The victim study indicated that in general, 22.9% of victims sought help, 87.5% of which took the form of a lawyer. 17.1% indicated that they would have had help if this had been available to them. This showed that actual representation of interests which extends beyond merely neutral and considerate regard for the victim, for instance such as can be expected from court, is suitable for the victim to a great extent. They desire that this interest should be directed toward their own concrete situation, namely partial advice which would at least be expected from a lawyer who could be made use of as their own representative. Clearly other tasks are allocated to the state bodies namely the courts. A lack of trust in relation to the judicial institutions or fundamental rejection of these institutions could not be established as a reason for the limited allocation of responsibility.

7.1.2 Victims' Interests and the Situation within the Criminal Proceedings

The victim survey made it clear, that in general almost a half (42.9%) of victims are interested in ensuring that the offender is punished after the crime has been committed. A quarter (25.7%), in contrast, placed coping with their own crisis in the forefront and a further 17.1% were primarily interested into compensation. There are however distinctions to be observed here which are offence-related. Interests in punishment took first place with regard to offences of coercion (71.4%) and in relation to offences of assault

(50.0%). Coping with the crisis was the most important aspect in relation to sexual offences and negligent physical injury offences. Claims for compensation were most important in relation to property offences (50.0%).

The jurists' study indicated that this group assessed the balance of interest similarly to some extent. There was an extremely false evaluation by jurists merely in relation to negligent physical injury offences: 76.9% believed that victims sought compensation in the first instance.

The victim study and observance of the proceedings should give insight into the personal situation and feelings of the victim after the crime, in particular in the trial situation which proved to be a relatively high psychological strain caused to the victim as a result of the trial. 48.6% had an unpleasant feeling before the trial. Victims of sexual offences were particularly strained psychologically.

Victims who were not satisfied with the position regarding cautioning and would have liked to have had more information, regarded the trial situation particularly negatively. Victims who had the support of a legal advisor or counsel in the trial, were less afraid. The proceedings themselves were cited predominantly as being a cause for stress and strain (70.6%). Confrontation with the offender was in contrast considered less stressful (29.4%). Female victims were more afraid of the trial (80.0%) than male victims (66.7%). Fear of confrontation with the offender increased proportionately with the period of time which had elapsed since the crime. Practical problems which the victims came across in relation to the trial were most frequently difficulties with appointments, particularly in relation to lenghty proceedings, and the general uncertainty of the criminal proceedings themselves.

With regard to treatment of the victim by those participating in the court procedure, 91.4% felt that they had been treated considerately or very considerately. In relation to satisfaction with the course and result of the trial, 56.3% were (very) satisfied with the trial result and 61.2% with the course of the proceedings. 68.6% of victims were very relieved after the trial that everything was at an end. If one considers the positive assessment of those participating in the criminal proceedings, one may say that the stress and strain and fears are to a great extent attributable in the first instance to the proceedings themselves and not to the parties participating. Most of all, victims wanted (more than half) to know more about the course of the proceedings (54.3%) and about their rights (57.2%).

The assessment by those participating in the proceedings, as to the victims' position within the proceedings themselves, was also recorded, supplementary to the jurist study, in particular what personal effects and advantages formal participation of the victim within the proceedings would

have. Considerably more than half (66.1%) of all jurists questioned indicated that the victim was more satisfied if he or she has participated formally in the trial. This assessment was not related to any noticeably professional, sex or age-related differences. This corresponds to a considerable extent with the results of the victim study. 59.5% of judges, 61.1% of prosecutors and 85.9% of court practitioners believed that the injured party could not cope in the proceedings without a solicitor. The differences between the two groups, judges and prosecutors as opposed to court practitioners, are very significant ($p<.00$). Even with a solicitor, victims can scarcely cope in the proceedings - according to the opinion of most of all the court practitioners themselves ($p<.05$).

7.1.3 Implementation of Provisions according to the Victim Protection Act

7.1.3.1 Protection Provisions

The protection provisions insofar as they are an instrument for protection against serious injury or interference being caused to the victim by others, are only relevant in everyday court proceedings, in exceptional situations. In general, the behaviour of those participating in the proceedings and the presence of others is hardly stressful for the victim and cannot give grounds for objection. It can be seen that victims are very satisfied in relation to this position. The most problematical relationship is most often the relationship between the victim and accused. In the victim study, victims in a total of 25% of trials expressed the opinion that they were afraid during the course of their contact with the accused. The extent of awareness or knowledge of the protection provisions (questions about dishonorable matters, removal of the accused, exclusion of publicity) is in comparison to other victim provisions, fairly extensive both in relation to jurists and also victims. We are speaking here predominantly of rights which have existed for a long time and which have merely been modified by the Victim Protection Act. Acceptance amongst jurists is predominantly very high. In spite of this, the standards appear to have caused a number of difficulties in relation to their implementation. The increasing costs and delays in the proceedings are merely relevant to a noticeable extent in relation to removal of the accused. Fear of making a mistake in the proceedings plays admittedly an important role. This fear is widespread amongst jurists.

7.1.3.2 Rights to obtain Information and of Protection

The victim study has shown that the desire to obtain more information and an explanation of one's rights is very widespread. 57.1% of all respondents would have liked to have known more about their rights. 54.3% of victims for example would have liked to have known how the proceedings turned out. In relation to the right to obtain information and protection, it must be noted that the right to apply for information regarding the conclusion of the proceedings and the additional rights available to the victim to proceed as an accessory prosecutor, were introduced by the Victim Protection Act as completely new rights which did not exist before. These new rights are clearly relatively unknown and are scarcely observed in practice. In contrast, the right to inspect files and to obtain legal assistance has been recognized for some time in practice. They merely obtained legal status by means of the Victim Protection Act. Their implementation has already clearly been put in practice.

Apart from the right to apply for information regarding the outcome of the proceedings, the existence of legal assistance, namely a lawyer or counsel is frequently necessary to ensure implementation of this right. Financing of this participation is regarded quite rightly as being one of the main problems of enforcement of the provision. The limited acceptance of the judicial institutions in relation to the provision may be a further but not insignificant obstacle in relation to implementation of the rule. The protection provisions are regarded as taking priority place in relation to victim protection, insofar as judges and prosecutors are concerned. The right to obtain information and protection are in contrast, regarded as being less important. The opposite is true of court practitioners. The protection provisions are in their eyes just as important, in the same way that judges and prosecutors regard the right to obtain information as being more important. The results obtained in relation to fundamental attitudes of those participating in the court proceedings towards the victim's position within those proceedings, are confirmed by means of the concrete assessment of individual norms.

7.1.3.3 Right to Participate in Trial Proceedings

The victim study showed that 14.3% of victims were interested in active participation in the trial and this was also documented by them by means of the accessory prosecution. In addition, 28.6% would have liked to have more influence upon the course of the proceedings without actually having done so. Active participation within the proceedings was expressed by the victims most of all in the following ways: the opportunity to present the

facts of the case from their individual viewpoint (40%), acceleration of the proceedings (30%), their own right to put forward questions (20%), opportunity of having a final say (10%). The jurist study shows that this group also speaks of a fundamental victim interest in active participation. The effects of formal participation by the victim upon the proceedings was assessed relatively uniformly. The respondents were of the view that it could have equally positive and negative effects upon the judgement. However, more reference was made to delays in the proceedings (see above).

A uniform assessment of the active right of participation of the accessory prosecution and adhesive procedure is only possible to a degree. Whereas the accessory prosecution is a completely normal occurrence in everyday court work in relation to proceedings before the regional court, the adhesive procedure is still very unusual. Both legal institutions are however very well known by jurists. In contrast, victims know very little in particular about the adhesive procedure. To the extent that the rights of active participation are in fact observed, according to the views of jurists, this results in substantial additional costs. There are also often considerable delays caused in the proceedings. These practical problems result in varying levels of acceptance of the procedure. The accessory prosecution can be characterized as being less popular in relation to judges and prosecutors. The adhesive procedure is regarded as a foreign body in the criminal proceedings by the majority of jurists. The evaluation of victim interests in relation to these rights is in stark contrast, very high. Whereas judges and prosecutors react somewhat reservedly in general towards victim rights, the victim's interest in relation to rights of active participation were ranked very highly. Court practitioners evaluated the interest in relation to all victim rights as being substantial.

8. Discussion of Results

The position of the victim within the German criminal proceedings should have been improved considerably by the Victim Protection Act. Our results show however, that this objective has not been achieved in many ways. The first more pragmatic objective introduced of making the provisions more well known to the parties concerned and clarifying the changes made, must already be regarded as having failed to a considerable extent. The state of knowledge in relation to jurists is not particularly good. We can probably accept that every jurist has heard something about the Victim Protection Act. However, concrete ideas of the actual changes which in part are only insignificant, frequently do not exist amongst the experts themselves. One

completely positive aspect of the Victim Protection Act is that the problem of victim protection has at least been brought to the attention of the parties concerned.

The lack of knowledge in relation to the Act is more prevalent amongst victims than jurists. A caution is an unrenounceable requirement in relation to informing the parties concerned. The fact that the duty to caution is not made proper use of and does not achieve the objective of providing information in any way, can be clearly illustrated by our study. Concrete success of the Act in relation to its contents, has been made impossible from the beginning and is impossible in many areas.

If one considers the individal areas of the new provisions in more detail, one may consider that merely the area which focuses on the protection provisions can be regarded as having been successfully regulated. The relevance in practice of these protection provisions is frequently limited to a small number of cases, in particular in relation to sexual offences and other relationship-related offences. This does not naturally mean that the provisions are of no relevance in relation to all other cases. These provisions are accepted and put into practice on a wider scale by the judiciary who regard these protection provisions as embodying the spirit of victim protection.

The opposition is otherwise in relation to the objective of allowing the injured party a position as a subject within the proceedings and including him as an equal participator within the proceedings. The starting point for the legislature of attributing basic rights to the victim in this area, could scarcely have effected any changes in court practice. The general rights to obtain information and protection which are also relevant here, such as informing the victim and the call for legal assistance, are scarcely ever observed and the right to obtain information is also not encouraged by the judiciary in any event. There also exists however a greater problem. The interest in obtaining formal information on the part of the victim, remains to a great extent unsatisfied. Judges and prosecutors still regard the victim predominantly in his or her role as witness, whereas the victim wants to be regarded as a party to the proceedings (*Rubel* 1986).

The "two class system of rights" which is available to the victim by means of the new provisions is not convincing. The additional rights allocated to victims in relation to secondary prosecutions, have not succeeded in any significant way. Scarcely anything has altered in practice in relation to the accessory prosecution which may be regarded as a participation right in this connection. The Victim Protection Act had in the first instance a clarification purpose in this aspect. The attempt to reawaken the adhesive procedure must also be regarded as having failed. In relation to the attitudes of the victims

questions towards sanctions being imposed on the offender, 42.9% primarily supported punishment of the offender after the crime (see above). *Sessar et al.* (1986; *Sessar* 1986) in contrast, found that there was extraordinary high acceptance of compensation by the respondents questioned by him. According to this study, victims are no more punitive than the general population (*Boers & Sessar* 1991; *Hough & Moxon* 1985). *Erez* and *Tontodonato* (1990) found that merely around a third of victims of serious crimes, desire imprisonment of the offender (see also *Smale & Spickenhauer* 1979). *Kosaki* (1984) discovered in his study of assault victims that a large proportion of victims supported help or counseling of the offender more than punishment. *Fujimoto* (1982) in contrast discovered that the Japanese population had relatively punitive attitudes: 45% of victims who had sufferend injuries, were in favour of more severe punishments than those pronounced by the court and 44% of the same victims believed that they could never forgive the offender's criminal behaviour. A study by *McDonald* (1982) proved that 46% of the victims of serious crimes, supported the most severe punishments for the offender. *Arnold* (1986) found that in the Federal Republic of Germany, a considerable number of respondents regarded the criminal law practice of the courts as being too mild. *Albrecht* (1990, p. 68) rightly points out that it is not clear in many studies as to what dimensions are recorded by such questions. In addition, victims are often asked at different stages after the victimization has occured and when they are trying to cope with the event. *Henderson* and *Gitchoff* (1981) point to the fact that there is another variable which intervenes: if victims achieve imprisonment as a punishment, they do so in many cases because they quite clearly know of no other alternative.

In general, the Victim Protection Act has remained, at least until now, of limited success. Its general appeal function towards more "victim-friendly" behaviour, alongside improvement of the prevailing mood in the proceedings in favour of the victim, may have been the greatest achievements of its efforts. For jurists, legal certainty could be said to have been improved in some areas in relation to the clarification of what has been practiced until now, without concrete changes arising as a result.

Improvement of present criminal practice in relation to achieving optimum victim protection should have been affected, in particular in relation to the explanation of the provisions of the Victim Protection Act. One must consider increasing the number of information brochures and meetings to provide more information for jurists who give practical advice to victims. What is important is improved information for the victim. Clear and simple information brochures should be prepared in particular, which are also accessable to the victim. The brochures should refrain from a formal-type

caution both insofar as contents are concerned and visually. Publications by various American institutions may be regarded as an example. Better organization of the cautioning of the victim is essential. The question as to whether or not the victim has already been referred to his rights could, for instance, be solved by the necessary note on the file and a regular check. The frequent misunderstandings between the authorities are unnecessary and a particularly annoying factor in this area of the law which causes difficulties for all participants.

The fundamental question regarding regulation of responsibility for the victim should be raised in this connection. Whether or not the victim should be allocated an established place in the official criminal justice apparatus such as may be possible for instance with the criminal prosecution service in accordance with the American model, appears admittedly to be doubtful. On the one hand, there are already too many differences in the theoretical approach of the justice systems. The obvious disinterest of many prosecutors in the victims' problems may be based upon this. It must be noted however, that what were obviously promising results were clearly achieved in a model project in Baden-Württemberg ("victim aid provided by the criminal prosecution department"). Such work could, for example, encourage the cooperation of the criminal prosecution department with victims of crime and their attitudes towards them. *Wulf* (1985, pp. 458 et seq.) regards the tasks of such work in relation to victim aid provided by the criminal prosecution department as being, in particular - advice or consultation in relation to victim aid - exchange of experiences with police stations regarding victim protection in the preliminary proceedings - cooperation with judges, extra comforts for the victims - contact with private and state victim help organizations - public relation work for the victim - back-up for this.

The establishment of a special department within the police would be conceivable. Victims have admittedly a limited tendency to turn to state institutions. According to both their opinion and those of jurists, the legal profession should become more involved in giving advice to victims. This task is widely accepted. The problem is actually the financing of this work. Particular problems in relation to finance are related to the right to obtain information and protection and more seriously the right to participate in the court proceedings. With reference to the former, it has already been established that it is often not possible for victim to assert their claims without legal help.

The instruction of legal assistance for the victim alone is not sufficient to improve the implementation of the Victim Protection Act however. Acceptance by the judicial authorities must be increased and this can be achieved on the whole by alleviating and improving the everyday situation for the

victim. Accumulating costs must be considered for the benefit of those charged with these costs. In this way, implementation of the victim provisions could, for instance, lead to alleviation of work in other areas. It is critisized however from many points of view, namley that including the victim within the criminal procedure neither causes delays nor more outlays (see e.g. *McDonald* 1982; *Hudson* 1984).

Finally, the crucial turning point of the inadequate implementation of the Act, lies in financing improvements in a wider sense. The view that the Victim Protection Act merely provides an additional burden for the judicial budgets of the states, which itself is not considerable, cannot be accepted in principle. The extent to which the victim rights are observed indicates more costs being involved for the judiciary and it is out of touch with reality to accept that the new provisons are welcome if they result in an additional burden for individuals. Actual improvement of the victim situation can be expected on the basis of the present regulations, in particular by means of increasing involvement of legal assistance for the victim. This applies most of all in relation to the fundamental change strived for, to allow the victim's position in the criminal proceedings to be that of an independent subject. Finance under these circumstances referred to and as *Weigend* has already expressly pointed out (1989, pp. 471-477), can be expected from the State. At least advisory talks and consultation with a legal advisor would be considered, financed appropriately by the public treasury. The present situation is however more than unsatisfactory. Improvement is tied up with considerable additional costs. *Villmow* (1986, p. 428) emphasizes quite rightly in this connection however: "Under no circumstances should fiscal restrictions be regarded as the paramount factor in the calculation of what is due to the victim of crime".

The legislature is then faced once again with the fundamental questions: Does "victim protection" merely mean minimum protection? This has admittedly already been secured by respect for the individual within the course of a fair process. Only minor improvements can then be made, which are possible with a minimal amount of effort and costs. Or does the legislature seriously mean to make the victim a subject within the criminal proceedings by making fundamental changes to the criminal procedure by allowing the victim to be included? In order to realize these concepts however, further steps are necessary. The fundamental readiness of those participating in the proceedings for a maximum solution, is in spite of many reservations, at least partly in existence. One must then depart from the thought that such an all-embracing improvement is available at no cost. Those who are responsible for implementation of these provisions must be supported to a considerable extent in performing these tasks.

Passing a law is merely the first step. If this law is not put into practice it becomes something which is idling and at most feigns progressive victim politics. Comparable problems arose in the last 20 years in the area of imprisonment where an acceptable Act was passed in the Federal Republic of Germany the implementation of which was not adequately supposed by practioners (see *Kury* 1986). The law was rightly seen as being a method which was not effective in changing present politics if it could not in fact be implemented in practice (*Elias* 1990, p. 238). "An idea can easily be altered, a norm cannot be altered from one day to the next. Application of the law is rich in its persistence and this is underestimated time and again by theorists" (*Horn* 1987, p. 174). According to *Vester* (1980, p. 456) changes in ways of thinking less than a lack of opportunity, present "more of enormous pressure upon traditions and taboos, upon doctrines and dogmas". It is a characteristic of the system and also of the criminal legal system to defend itself against the introduction of changes of its rules or organization. According to *Watzlawick* (1988, p. 125) the rigidity of the system increases with its disturbance by changes (see also *Kuhn* 1973). There are understandably good reasons for the persistence of the application of the law. Admittedly, it can prevent changes which are urgent at a particular time. Changes demand efforts being made towards this transition and new departures.

The fact that the victim, in particular of serious crimes, has a legitimate right to support and help, cannot be in doubt today. This help and support must express itself in a change to the role of the victim in criminal proceedings. It is rightly pointed out that it is important for compensation and also from a psychological point of view that the victim is taken seriously in the criminal proceedings and has the right to participate (*Erez* 1990). Participation of the victim in the criminal proceedings should not remain simple rhetoric (*Erez* 1990). *Maguire* and *Shapland* (1990, p. 219) regard there as being three possibilities for improving participation of the victim within the criminal legal system: 1. greater direction of police, criminal prosecution department and the court towards the needs of the victim. 2. creation of a different climate insofar as attitudes of those participating in the proceedings are concerned and 3. changes in the law. The latter alone is really not sufficient to derive "a victim policy" from a "crime policy" (*Fattah* 1986). Whether or not the present criminal legal system has absorbed victimological demands and can integrate them or whether or not the consequent victimological approach once it has been concluded, must inevitably lead to its dissolution, is disputed (see *Hillenkamp* 1986; *Waller* 1985; *Schneider* 1982). *Villmoare* and *Neto* (1987, p. 5) emphasize as follows: "Victims' rights cannot be grafted on to the existing system without generally remaining simply cosmetic, nor can they be made potent without

creating profound changes through the entire system". According to *Kerner* (1985, p. 500) setting up the victim as a subject in the criminal procedure has the consequence "of abolishing the modern criminal law itself". He accordingly believes that the future criminal law would have to place the conception of the law in the forefront and not the conception of punishment, which has until today kept the old basic thoughts of pain alive, in spite of some alleviation (1985, p. 516). What should be clear today is that the rigid structures which have built themselves around the criminal proceedings make effective action in relation to the needs of the victim and understanding of their problems, very difficult, if not completely impossible.

"Nor do they provide the care, hardwork and understanding that are likely to protect citizens, assist victims' recover or help victims feel that 'justice' includes them. It is time for action to care for crime victims" (*Waller* 1986, p. 318).

9. Tables*

Table 1: Comparison of Means (Analysis of Variances) between Judges/Prosecutors and Lawyers

Variable	Judges, Prosecutors			Lawyers			Analysis of Variances	
	N	M	s	N	M	s	F-Value	p
F1	181	14,5	2,7	122	14,6	2,5	1,15	.41
F2	182	8,2	2,3	122	7,3	2,2	1,09	.61
F3	183	9,9	1,6	122	8,9	2,1	1,61	.00
Var010	177	1,5	0,5	120	1,6	0,5	2,91	.09
Var011	184	1,9	0,4	123	1,5	0,6	53,09	.00
Var012	183	2,0	0,3	120	1,8	0,5	19,42	.00
Var013	184	1,6	0,5	121	1,5	0,6	0,55	.46
Var014	180	2,8	1,5	122	4,0	1,6	45,92	.00
Var031	181	3,0	1,4	121	3,6	1,3	13,19	.00
Var032	179	3,0	1,3	122	3,0	1,4	0,02	.89
Var033	180	3,4	1,4	122	3,1	1,5	2,06	.15
Var034	180	3,8	1,6	121	4,9	1,3	40,76	.00
Var035	181	2,6	1,2	121	2,9	1,3	3,96	.05
Var036	179	3,9	1,1	122	3,9	1,3	0,27	.60
Var046	184	3,3	1,2	122	2,6	1,0	27,70	.00
Var048	181	3,4	1,2	122	4,2	1,1	34,49	.00
Var322	184	1,1	0,3	123	1,1	0,3	0,13	.72
Var323	184	2,2	1,0	123	1,9	0,9	5,00	.03
Var324	184	3,3	1,2	123	3,2	1,0	1,42	.23
Var341	184	1,2	0,4	122	1,2	0,4	0,07	.79
X2'	184	30,9	8,7	123	26,5	7,8	20,57	.00
X3	184	55,7	12,1	123	65,1	9,3	53,24	.00
X4	184	47,0	7,8	123	59,9	9,0	177,21	.00
Y1	184	30,5	10,5	123	36,3	9,5	24,22	.00
Y2	184	31,2	10,8	123	35,6	9,1	13,95	.00
Y3	184	30,4	10,8	123	36,7	8,8	28,53	.00
Y4	184	28,3	10,5	123	28,6	8,2	0,07	.79
Y5	184	25,1	8,4	123	21,7	8,0	12,63	.00
Y6	184	42,9	9,5	123	47,6	8,7	19,24	.00

' Variable X1 was not computed for lawyers.

* For description of variables, see Appendix.

Table 2: Correlation Matrix of the Variables relating to the Criminal Procedure

Variable	Var002	Var003	Var004	Var005	Var006	Var007	Var008
Var002	1.00						
Var003	-.04	1.00					
Var004	.25**	.09	1.00				
Var005	.15**	.03	.49**	1.00			
Var006	.08	.16**	.22**	.35**	1.00		
Var007	.28**	.09	.19**	.17**	.37**	1.00	
Var008	.10	.25**	.10	.12*	.16**	.18**	1.00

Significance (2-tailed):

* $p < .05$
** $p < .01$

Table 3: Factor Analysis of the Variables relating to the Criminal Procedure

Variable	F1	F2	F3	Communality
Var002	.09	-.13	.83	.72
Var003	.06	.79	-.12	.64
Var004	.80	-.00	.14	.65
Var005	.87	.03	.04	.76
Var006	.50	.40	.22	.45
Var007	.17	.30	.71	.62
Var008	.02	.70	.18	.52
Eigenvalue	2.18	1.18	1.00	

Table 4: Correlation Matrix of essential Variables relating to the Victim Protection Act

	F1	F2	F3	Var 010	Var 011	Var 012	Var 013	Var 014	Var 031	Var 032	Var 033	Var 034	Var 035	Var 036	Var 046	Var 048	X1	X2	X3	X4	Y1	Y2	Y3	Y4	Y5	Y6
F1	1.0																									
F2	.19**	1.0																								
F3	.33**	.11	1.0																							
Var010	.03	.13*	-.08	1.0																						
Var011	-.04	-.04	.07	-.23**	1.0																					
Var012	.04	.01	.03	-.15**	.37**	1.0																				
Var013	.04	-.10	-.08	-.05	.39**	.10	1.0																			
Var014	.09	.09	-.12*	.26**	-.66**	-.26**	-.44**	1.0																		
Var031	.08	.17**	-.03	.08	-.33**	-.09	-.27**	.49**	1.0																	
Var032	-.09	-.01	-.01	-.09	.13*	-.07	.09	-.15*	-.34**	1.0																
Var033	-.10	-.02	-.05	-.12**	.21**	.08	.11	-.25**	-.32**	.69**	1.0															
Var034	-.01	-.01	-.16**	.02	-.17**	-.01	-.04	.18**	.06	.20**	.18**	1.0														
Var035	-.05	.01	-.10	.02	.06	-.03	-.09	.07	-.09	.39**	.32**	.33**	1.0													
Var036	.03	.10	-.06	.11	-.07	-.02	-.05	.15**	.29**	-.22**	-.23**	-.02	-.07	1.0												
Var046	.15*	.12*	.20**	-.07	.24**	.15*	.11	-.19**	-.04	-.03	.04	-.22**	-.14*	.01	1.0											
Var048	-.00	.00	-.14*	.05	-.14*	-.11	-.06	.16**	.03	.10	.11	.19**	.25**	-.07	-.04	1.0										
X1	-.03	.07	.04	-.09	.23**	.07	.08	-.24**	-.16*	.20**	.25**	-.13	.16*	.04	.11	.12	1.0									
X2	-.06	.05	.09	-.09	.29*	.14*	.05	-.32**	-.18**	.25**	.33**	-.11	.16**	-.15*	.14*	.05	.83**	1.0								
X3	.09	.14*	-.10	.20**	-.37**	-.17**	-.17**	.43**	.31**	-.16**	-.19**	.20**	-.08	.21**	-.04	.20**	-.21**	-.29**	1.0							
X4	.07	.04	-.15**	.22**	-.51**	-.28**	-.21**	.54**	.35**	-.15**	-.23**	.26**	-.02	.17**	-.21**	.21**	-.18**	-.30**	.73**	1.0						
Y1	-.11*	-.11	-.13*	.05	-.23**	-.15*	-.12*	.23**	.13*	.07	-.04	.28**	.18**	.02	-.32**	.03	-.03	-.03	.03	.23**	1.0					
Y2	-.12*	-.12*	-.10	-.04	-.14*	-.10	-.17**	.11	.05	.19**	.12*	.25**	.30**	-.03	-.28**	.11	.24**	.18**	-.10	.11	.64**	1.0				
Y3	-.08	-.12*	-.17**	-.00	-.22**	-.12*	-.21**	.24**	.12*	.14*	.06	.29**	.26**	.03	-.32**	.10	.16*	.10	.05	.23**	.58**	.86**	1.0			
Y4	-.10	-.07	-.04	-.04	-.02	-.06	-.11*	.02	-.07	.15**	.09	.14*	.25**	-.05	-.25**	-.01	.09	.09	-.18**	-.00	.50**	.67**	.62**	1.0		
Y5	-.08	-.10	.06	-.12*	.18**	.07	.07	-.18**	-.17**	.11	.12*	-.10	.06	-.10	-.08	-.17**	.13	.15*	-.41**	-.24**	.18**	.20**	.15**	.45**	1.0	
Y6	.00	-.17**	-.10	.06	-.15**	-.08	-.12*	.22**	.06	.03	-.03	.30**	.14*	.04	-.25**	.10	-.04	-.01	.23**	.33**	.40**	.33**	.39**	.25**	.06	1.0

Significance (2-tailed):

* $p < .05$
** $p < .01$

Table 5: Factor Analysis of essential Variables relating to the Victim Protection Act

Variable	FAC1	FAC2	FAC3	FAC4	Communality
F1	-.22	.15	-.16	.34	.21
F2	-.18	.47	.01	.37	.40
F3	-.14	-.06	-.24	.38	.22
Var010	-.06	.38	.09	-.15	.18
Var011	-.16	-.50	.24	.19	.37
Var012	-.11	-.16	.32	.01	.14
Var013	-.36	-.32	.15	-.03	.25
Var014	.22	.70	-.12	-.20	.59
Var031	.05	.54	-.31	.02	.39
Var032	.21	-.18	.68	.08	.55
Var033	.13	-.29	.70	.05	.59
Var034	.16	.23	.63	-.20	.52
Var035	.39	-.05	.66	-.06	.59
Var036	-.08	.39	-.15	.23	.23
Var046	-.42	-.05	-.07	.35	.31
Var048	-.17	.01	.40	.06	.19
X1	-.18	-.22	.23	.79	.75
X2	.26	-.16	.29	.75	.74
X3	-.27	.73	.07	-.04	.62
X4	.03	.72	-.06	-.03	.52
Y1	.74	.09	-.03	-.19	.59
Y2	.87	-.17	.12	.12	.82
Y3	.84	.02	.18	.08	.74
Y4	.84	-.05	.03	.00	.71
Y5	.59	-.24	-.06	-.00	.41
Y6	.58	.32	.18	-.06	.47
Eigenvalue	4.82	3.58	1.89	1.80	

Table 6: Comparison of Means (Analysis of Variances) of the Factors

Variable	Males			Females			Analysis of Variances	
	N	M	s	N	M	s	F-Value	p
FAC1	272	204,5	43,0	35	183,3	41,3	7,57	.01
FAC2	272	133,3	23,1	35	136,0	26,0	0,42	.52
FAC3	272	18,5	4,8	35	18,7	4,2	0,05	.82
FAC4	272	72,2	39,6	35	70,5	23,7	0,16	.69

Variable	Age up to 45 years			Age over 45 years			Analysis of Variances	
	N	M	s	N	M	s	F-Value	p
FAC1	223	202,4	42,5	84	201,3	45,4	0,04	.85
FAC2	223	134,7	24,1	84	130,6	21,4	1,88	.17
FAC3	223	18,6	4,7	84	18,2	4,8	0,39	.53
FAC4	223	69,1	21,9	84	79,6	24,6	13,05	.00

Variable	Judges, Prosecutors			Lawyers			Analysis of Variances	
	N	M	s	N	M	s	F-Value	p
FAC1	184	194,6	47,6	123	213,3	32,9	14,37	.00
FAC2	184	123,8	20,6	123	148,2	19,4	108,16	.00
FAC3	184	17,8	4,7	123	19,6	4,5	11,28	.00
FAC4	184	86,7	17,2	123	49,9	8,6	481,56	.00

10. References

Abel, M.H. (1988). Vergewaltigung. Stereotypen in der Rechtsprechung und empirische Befunde. Weinheim, Basel.

Adler, F. (1975). Sisters in crime. The rise of the New Female Criminal. New York et al.

Albrecht, H.-J. (1990). Kriminologische Perspektiven der Wiedergutmachung. Theoretische Ansätze und empirische Befunde. In: A. Eser & G. Kaiser (Eds.), Neue Wege der Wiedergutmachung (pp. 43-72). Freiburg: Eigenverlag Max-Planck Institut.

Arnold, H. (1986). Kriminelle Viktimisierung und ihre Korrelate. Zeitschrift für die gesamte Strafrechtswissenschaft, 98, 1014-1058.

Arnold, H., Teske, R.H.C., & Korinek, L. (1988). Viktimisierung, Verbrechensfurcht und Einstellungen zur Sozialkontrolle in West und Ost. Ergebnisse vergleichender Opferbefragungen in der Bundesrepublik Deutschland, den Vereinigten Staaten und Ungarn. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Kriminologische Forschung in den 80er Jahren (pp. 909-942). Freiburg: Eigenverlag MPI.

Baurmann, M.C. (1983). Sexualität, Gewalt und psychische Folgen. Eine Längsschnittuntersuchung bei Opfern sexueller Gewalt und sexueller Normverletzungen anhand von angezeigten Sexualkontakten. Wiesbaden.

Baurmann, M.C. (1991). Über die Bedürfnisse von Kriminalitätsopfern. Empirische Ergebnisse aus dem Forschungsschwerpunkt "Viktimologie" in der Kriminalistisch-Kriminologischen Forschungsgruppe im BKA. In: R. Egg (Ed.), Brennpunkte der Rechtspsychologie (pp. 11-38). Bonn.

Baurmann, M.C., & Schädler, W. (1990). Das Opfer nach der Straftat - seine Erwartungen und Perspektiven. Eine Befragung von Betroffenen zu Opferschutz und Opferunterstützung sowie ein Bericht über vergleichbare Untersuchungen. BKA-Forschungsreihe Vol.22. Wiesbaden.

Beinen, L. (1981). Rape III: National developments in rape reform legislation. Women's Law Reporter, 6, 170-189.

Blankenburg, E., Sessar, K., & Steffen, W. (1978). Die Staatsanwaltschaft im Prozeß strafrechtlicher Sozialkontrolle. Berlin.

Böhm, A. (1990). Straftaten während Vollzugslockerung und Hafturlaub - besondere Entschädigung für Opfer. In: Weisser Ring (Ed.), Risiko-Verteilung zwischen Bürger und Staat (pp. 22-29). Mainz.

Boers, K., & Sessar, K. (1991). Do people really want punishment? On the relationship between acceptance of restitution, needs for punishment, and fear of crime. In: K. Sessar & H.-J. Kerner (Eds.), Developments in crime and crime control research (pp. 126-149). New York et al.

Browne, A., & Finkelhor, D. (1986). Imput of child sexual abuse: A review of the research. Psychological Bulletin, 99, 66-77.

Brownmiller, S. (1975). Against our will: Men, women and rape. New York: Simon and Schuster.

Chelimsky, E. (1981). Serving victims: Agency incentives and individual needs. In: S. Salasin (Ed.), Evaluating victim services. Newbury Park et al.: Sage.

Council of Europe (1985). (Ed.). The position of the victim in the framework of criminal law and procedure. Strasbourg.

Davis, R.C., Rumeuther, F., & Connick, E. (1984). Expanding the victim's role in the criminal court dispositional process. Journal of Criminal Law and Criminology, 75, 491-507.

van Dijk, J.J.M. (1982). Die Bereitschaft des Opfers zur Anzeige: eine Funktion der Strafverfolgungspolitik. In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 331-338). Berlin, New York.

Driller, U. (1988). Praxisbericht über das "Präventionsprogramm Polizei/Sozialarbeiter" (PPS) in Hannover. In: Polizei-Führungsakademie (Ed.), Das Verbrechensopfer im Strafverfahren (pp. 255-268). Münster.

Elias, R. (1990). Which victim movement? The politics of victim policy. In: A.J. Lurigio, W.G. Skogan & R.C. Davis (Eds), Victims of crime. Problems, policies, and programs (pp. 226-250). Newbury Park: Sage.

Engel, K. (1988). Das Verbrechensopfer im Strafverfahren. In: Polizei-Führungsakademie (Ed.), Das Verbrechensopfer im Strafverfahren (pp. 247-254). Münster.

Erez, E. (1990). Victim participation in sentencing: Rhetoric and reality. Journal of Criminal Justice, 18, 19-31.

Erez, E. (1991). Victim participation in sentencing, sentence outcome and victim's welfare. In: G. Kaiser, H. Kury & H.-J. Albrecht (Eds.), Victimology across the world. Freiburg.

Erez, E., & Tontodonato, P. (1990). The effect of victim participation in sentencing on sentence outcome. Criminology, 28, 451-474.

Fattah, E.A. (1986) (Ed.). From crime policy to victim policy. London: Macmillan.

Fehrmann, H., Jakobs, K., Junker, R., & Warnke, C. (1986). Das Mißtrauen gegen vergewaltigte Frauen. Erfahrungen von Vergewaltigungsopfern mit Polizei und Justiz. Wiesbaden.

Forer, L. (1980). Criminals and victims. New York: Norton.

Foucault, M. (1979). Discipline and punish. New York: Vintage Books.

Friedman, L.N. (1982). Das Amt für Opferhilfe: eine vorläufige Übersicht. In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 374-381). Berlin, New York: De Gruyter.

Fujimoto, T. (1982). Die viktimologische Forschung in Japan. In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 90-114). Berlin, New York: De Gruyter.

Geis, G. (1990). Crime victims. Practices and prospects. In: A.J. Lurigio, W.G. Skogan & R.C. Davis (Eds.), Victims of crime. Problems, policies, and programs (pp. 251-268). Newbury Park: Sage.

Greuel, L., & Scholz, O.B. (1991). Einstellungsstrukturen bei der polizeilichen Vernehmung von vergewaltigten Frauen. In: R. Egg (Ed.), Brennpunkte der Rechtspsychologie (pp. 55-65). Bonn.

Hagan, J. (1982). Victims before the law: A study of victims' involvement in the criminal justice process. Journal of Criminal Law and Criminology, 73, 317-329.

Hammer, J.H. (1989). The effect of offender punishment on crime victim's recovering and perceived fairness (equity) and process control. (Ph.D. Diss.) Ann Arbor.

van Hasselt, V.B., Morrison, R.L., Bellack, A.S., & Hersen, M. (1988). Overview. In: V.B. van Hasselt, R.L. Morrison, A.S. Bellack & M. Hersen (Eds.), Handbook of family violence (pp. 3-8). New York, London: Plenum Press.

van Hasselt, V.B., Morrison, R.L., Bellack, A.S., & Hersen, M. (1988a). (Eds.), Handbook of family violence. New York, London: Plenum Press.

Heinz, A.M., & Kerstetter, W.A. (1979). Victim participation in plea bargaining: A field experiment. In: W.F. McDonald & J.A. Cramer (Eds.), Perspectives on plea bargaining. Lexington/Mass.: Heath.

Helsinki Institute for Crime Prevention and Control (1989). (Ed.). Changing victim policy: The United Nations victim declaration and recent developments in Europe. Helsinki.

Henderson, J., & Gitchoff, G.T. (1981). Using experts and victims in the sentencing process. Criminal Law Bulletin, 17, 226-233.

Henry, Chr., & Beyer, J. (1985). Blaming the Victim - Die "Schuldumkehr" in Vergewaltigungsprozessen. Monatsschrift für Kriminologie, 68, 340-347.

Hillenkamp, T. (1986). The influence of victim behaviour on the dogmatic judgement of the offence: Some remarks on the relationship between victimology and the dogmatics of penal law. In: K. Miyazawa & M. Ohya (Eds.), Victimology in comparative perspective (pp. 111-129). Tokyo: Seibundo Publishing.

Horn, E. (1987). Kriminalpolitische Tendenzen im Strafrecht der Bundesrepublik Deutschland. In: A. Eser & K. Cornils (Eds.), Neuere Tendenzen der Kriminalpolitik (pp. 147-159). Freiburg.

Hough, M., & Moxon, D. (1985). Dealing with offenders: Popular opinion and the views of victims - findings from the British Crime Survey. The Howard Journal of Criminal Justice, 24, 160-175.

Hudson, P.S. (1984). The crime victim and the criminal justice system: Time for a change. Pepperdine Law Review, 11, 23-62.

Hüsing, D. (1982). Die Rechtswirklichkeit der Nebenklage. Eine rechtstatsächliche Untersuchung an 569 nebenklagefähigen Strafverfahren (Diss.). Göttingen.

Janssen, H., & Kerner, H.-J. (1985) (Eds.). Verbrechensopfer, Sozialarbeit und Justiz. Das Opfer im Spannungsfeld der Handlungs- und Interessenkonflikte. Bonn-Bad Godesberg: Deutsche Bewährungshilfe.

Joutsen, M. (1987). The role of the victim of crime in European criminal justice systems. A crossnational study of the role of the victim. Helsinki: Helsinki Institute for Crime Prevention and Control, affiliated with the United Nations. Publication Series No.11.

Joutsen, M., & Shapland, J. (1989). Changing victim policy: The United Nations Victim Declaration and recent developments in Europe. In: Helsinki Institute for Crime Prevention and Control (Ed.), Changing victim policy: The United Nations Victim Declaration and recent developments in Europe (pp. 1-32). Helsinki.

Jung, H. (1981). Die Stellung des Verletzten im Strafprozeß. Zeitschrift für die gesamte Strafrechtswissenschaft, 93, 1147-1176.

Jung, H. (1986). The victim in the criminal justice system. In: K. Miyazawa & M. Ohya (Eds.), Victimology in comparative perspective (pp. 349-358). Tokyo: Seibundo Publishing.

Jung, H. (1987). Das Opferschutzgesetz. Juristische Schulung, 27, 157-160.

Kaiser, G. (1979). Viktimologie an der Schwelle der 80er Jahre - ein kritisches Resumee. In: G.F. Kirchhoff & K. Sessar (Eds.), Das Verbrechensopfer (pp. 481-496). Bochum.

Kaiser, G. (1988). Kriminologie. Ein Lehrbuch. Heidelberg.

Kaiser, M. (1991). Die Stellung des Verletzten im Strafverfahren - Implementation und Evaluation des "Opferschutzgesetzes". Freiburg.

Kelly, D.P. (1984). Delivering legal services to victims: An evaluation and prescription. Justice System Journal, 9, 62-85.

Kelly, D. (1990). Victim participation in the criminal justice system. In: A.J. Lurigio, W.G. Skogan & R.C. Davis (Eds.), Victims of crime. Problems, policies, and programs (pp. 172-187). Newbury Park, London, New Delhi: Sage.

Kerner, H.-J. (1985). Die Wiedereinsetzung des Opfers als Subjekt des (Straf-)rechts. In: H. Janssen & H.-J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 495-522). Bonn-Bad Godesberg.

Kidd, R.F. & Chayet, E.F. (1984). Why victims fail to report? The psychology of criminal victimization. Journal of Social Issues, 40, 39-50.

Kilpatrick, D.G., & Otto, K. (1987). Constitutionally guaranteed participation in criminal proceeding for victims: Potential effects on psychological functioning. The Wayne Law Review, 17-31.

Kilpatrick, D., Veronen, L., et al. (1983). The psychological impact of crime: A study of randomly surveyed crime victims. Washington, D.C.: National Institute of Justice.

Kirchhoff, G.F. (1988). Opferschutz und Opferunterstützung - historisch betrachtet und ein internationaler Vergleich. In: Polizei-Führungsakademie (Ed.), Das Verbrechensopfer im Strafverfahren (pp. 191-221). Münster.

Kirchhoff, G.F., & Sessar, K. (1979) (Eds.), Das Verbrechensopfer. Bochum: Brockmeyer.

Knudten, R.D., & Knudten, M.S. (1979). Opfer- und Zeugenprogramme in den Vereinigten Staaten: Notwendigkeiten, alternative Modelle und das Projekt "Turnaround". In: G.F. Kirchhoff & K. Sessar (Eds.), Das Verbrechensopfer (pp. 459-478). Bochum: Brockmeyer.

Knudten, R.D., Meade, A., Knudten, M., & Doerner, W. (1976). The victim in the administration of criminal justice: Problem and perceptions. In: W.F. McDonald (Ed.), Criminal justice and the victims (pp. 115-146). Beverly Hills/Ca.: Sage.

Kosaki, L.C. (1984). The "known" criminal: Non-stranger crime in the criminal court. (Dissertation). Ann Arbor, Michigan.

Kühne, H.H. (Ed.). (1988). Opferrechte im Strafprozeß. Ein europäischer Vergleich. Kehl et al.

Kuhlmann, G.-J. (1982). Die Nebenklage - eine Sinekure der Anwaltschaft. Deutsche Richterzeitung, 60, 311-312.

Kuhn, T.S. (1973). Die Struktur wissenschaftlicher Revolutionen. Frankfurt: Suhrkamp.

Kury, H. (1986). Die Behandlung Straffälliger. Teilband I: Inhaltliche und methodische Probleme der Behandlungsforschung. Berlin: Duncker & Humblot.

Kury, H. (1987). Die Behandlung Straffälliger. Teilband 2: Ergebnisse einer empirischen Untersuchung zum Behandlungserfolg bei jugendlichen und heranwachsenden Untersuchungshäftlingen. Berlin: Duncker & Humblot.

Maguire, M., & Shapland, J. (1990). The "victims movement" in Europe. In: A.J. Lurigio, W.G. Skogan & R.C. Davis (Eds.), Victims of crime. Problems, policies, and programs (pp. 205-225). Newbury Park et al.: Sage.

McDonald, W.F. (1976). Criminal Justice and the victim. An introduction. In: W.F. McDonald (Ed.), Criminal justice and the victim (pp. 17-55). Beverly Hills et al.

McDonald, W.F. (1982). The victim's role in the American administration of criminal justice: Some developments and findings. In: H.J. Schneider (Ed.), The victim in international perspectives (pp. 397-402). New York: De Gruyter.

Mayhew, P. (1985). The effects of crime: victims, the public and fear. In: Council of Europe (Ed.), Research on victimization. Strasbourg.

Riess, P. (1984). Gutachten. Verhandlungen des 55. Deutschen Juristentages. Hamburg. Vol.I, C8-C136. München.

Riess, P. (1987). Der Strafprozeß und der Verletzte - Eine Zwischenbilanz. Jura, 9, 281-291.

Roxin, C. (1989). Strafverfahrensrecht (2nd ed.). München.

Rubel, H.C. (1986). Victim participation in sentencing proceedings. Criminal Law Quarterly, 28, 226-250.

Rüping, H. (1981). Grundriß der Strafrechtsgeschichte. München.

Schafer, St. (1968). The victim and his criminal. A study in functional responsibility. New York: Random House.

Schmahl, H.L. (1980). Das Adhäsionsverfahren im dänischen Recht. Itzehoe.

Schmidt, E. (1965). Einführung in die Geschichte der deutschen Strafrechtspflege. Göttingen: Vandenhoeck & Ruprecht.

Schmidt, E. (1971). Einführung in die Geschichte der deutschen Strafrechtspflege. Göttingen.

Schneider, H.J. (1982). Der gegenwärtige Stand der Viktimologie in der Welt. In: H.J. Schneider (Ed.), Das Verbrechensopfer in der Strafrechtspflege (pp. 9-44). Berlin, New York: De Gruyter.

Schöch, H. (1984). Die Rechtsstellung des Verletzten im Strafverfahren. Neue Zeitschrift für Strafrecht, 4, 385-391.

Schöch, H. (1990). Staatshaftung für Schäden durch Gefangene bei Vollzugslockerungen. In: Weisser Ring (Ed.), Risiko-Verteilung zwischen Bürger und Staat (pp. 30-42). Mainz.

Scholz, O.B., & Greuel, L. (1991). Vergewaltigte Frauen als Zeuginnen und Opfer. In: W. Hommers (Ed.), Perspektiven der Rechtspsychologie (pp. 117-130). Göttingen et al.: Hogrefe.

Schüler-Springorum, H. (1986). Kriminologische Forschungsperspektiven aus juristisch-kriminologischer Sicht. In: H. Kury (Ed.), Entwicklungstendenzen kriminologischer Forschung (pp. 93-106). Köln et al.

Schünemann, B. (1986). Zur Stellung des Opfers im System der Strafrechtspflege. Neue Zeitschrift für Strafrecht, 6, 193-200, 439-443.

Schulz, J. (1982). Beiträge zur Nebenklage. Berlin.

Sessar, K. (1979). Prosecutorial discretion in Germany. In: W.F. McDonald (Ed.), The prosecutor (pp. 255-276). Beverly Hills, London: Sage.

Sessar, K. (1980). Rolle und Behandlung des Opfers im Strafverfahren. Gegenwärtiger Stand und Überlegungen zur Reform. Bewährungshilfe, 27, 328-339.

Sessar, K. (1986). Neue Wege der Kriminologie aus dem Strafrecht. In: H.-J. Hirsch, G. Kaiser & H. Marquardt (Eds.), Gedächtnisschrift für Hilde Kaufmann (pp. 373-391). Berlin, New York.

Sessar, K. (1989). Die Frau vor den Toren der Jurisprudenz. In: W. Melnitzky & O.F. Müller (Eds.), Strafrecht, Strafprozeßrecht und Kriminologie. Festschrift für Franz Pallin zum 80. Geburtstag (pp. 401-418). Wien.

Sessar, K. (1990). Tertiary victimization: A case of the politically abused crime victims. In: B. Galaway & J. Hudson (Eds.), Criminal justice, restitution, and reconciliation (pp. 37-45). Monsey, New York: Criminal Justice Press.

Sessar, K., & H.-J. Kerner (1991). (Eds.). Developments in crime and crime control research. German studies on victims, offenders, and the public. New York et al.

Sessar, K., Beurskens, A., & Boers, K. (1986). Wiedergutmachung als Konfliktregelungsparadigma? Kriminologisches Journal, 18, 86-104.

Shapland, J. (1984). Victims, the criminal justice system and compensation. British Journal of Criminology, 24, 131-149.

Shapland, J., Willmore, J., & Duff, P. (1985). Victims in the criminal justice system. Aldershot: Gower.

Smale, G.J.A., & Spickenheuer, H.L.P. (1979). Feelings of guilt and need for retaliation in victims of serious crimes against property and felons. Victimology, 4, 75-85.

Steffen, W. (1980). Reaktionen von Polizei und Justiz auf Frauen. In: D. Gipser & M. Stein-Hilbers (Eds.), Wenn Frauen aus der Rolle fallen. Weinheim, Basel.

Steffen, W. (1987). Gewalt von Männern gegenüber Frauen: Befunde und Vorschläge zum polizeilichen Umgang mit weiblichen Opfern von Gewalttaten. München.

Steffen, W. (1988). Gewalt gegen Frauen - Ergebnisse eines Forschungsprojekts. In: Polizei-Führungsakademie (Ed.), Das Verbrechensopfer im Strafverfahren (pp. 117-132). Münster.

Steffen, W. (1989). Sexuelle Gewalttaten an Frauen. Geschlechtsrollenstereotype und sekundäre Viktimisierungen im polizeilichen Ermittlungsverfahren. In: J.-M. Jehle et al. (Eds.), Strafrechtspraxis und Kriminologie. Festgabe für Hans Göppinger (pp. 265-283). Bonn.

Steffen, W. (1991). Zum Problem der sexuellen Gewalt an Frauen und Mädchen und des polizeilichen Umgangs mit ihren Opfern. In: R. Egg (Ed.), Brennpunkte der Rechtspsychologie (pp. 39-53). Bonn.

Steinhilper, U. (1986). Definitions- und Entscheidungsprozesse bei sexuell motivierten Gewalttaten. Konstanz.

Tsitsoura, A. (1989). Victims of crime - Council of Europe and United Nations Instruments. In: Helsinki Institute for Crime Prevention and Control (Ed.), Changing victim policy: The United Nations Victim Declaration and recent developments in Europe (pp. 197-206). Helsinki.

Vester, F. (1980). Neuland des Denkens. Stuttgart: Deutsche Verlagsanstalt.

Villmoare, E., & Neto, V.V. (1987). Victim appearances at sentencing under California's Victims' Bill of Rights. Washington, D.C.: National Institute of Justice.

Villmow, B. (1986). The application of the victim compensation act in the Federal Republic of Germany. In: K. Miyazawa & M. Ohya (Eds.), Victimology in comparative perspective (pp. 422-429). Tokyo: Seibundo Publishing.

Villmow, B. (1988). Die Praxis des Opferentschädigungsgesetzes. In: Polizei-Führungsakademie (Ed.), Das Verbrechensopfer im Strafverfahren (pp. 81-116). Münster.

Waller, I. (1985). Die Auswirkungen von Straftaten auf deren Opfer. In: H. Janssen & H.-J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 45-77). Bonn-Bad Godesberg.

Waller, I. (1986). Crime victims not to be orphans of social policy: Needs, services and reforms. In: K. Miyazawa & M. Ohya (Eds.), Victimology in comparative perspective (pp. 302-322). Tokyo: Seibundo Publishing.

Watzlawick, P. (1988). Münchhausens Zopf oder Psychotherapie und "Wirklichkeit". Bern et al.: Huber.

Weigend, Th. (1984). Viktimologische und kriminologische Überlegungen zur Stellung des Verletzten im Strafverfahren. Zeitschrift für die gesamte Strafrechtswissenschaft, 96, 761-793.

Weigend, Th. (1986). The role of the victim in the criminal process. In: K. Miyazawa & M. Ohya (Eds.), Victimology in comparative perspective (pp. 160-170). Tokyo: Seibundo Publishing.

Weigend, Th. (1989). Deliktsopfer und Strafverfahren. Berlin.

Weis, K. (1982). Die Vergewaltigung und ihre Opfer. Stuttgart: Enke.

Weisser Ring (1990). (Ed.). Risiko-Verteilung zwischen Bürger und Staat. Mainz.

Wortman, L.B. (1983). Coping with victimization: conclusions and implications for future research. Journal of Social Issues, 39, 195-221.

Wulf, R. (1985). Opferbezogene Strafverfolgung. Plädoyer für ein neues Verhältnis zwischen Staatsanwalt(schaft) und Verbrechensopfer(n) nach geltendem Recht -. In: H. Janssen & H.-J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 437-470). Bonn-Bad Godesberg.

Young, M.A. (1990). Victim assistance in the United States: The end of the beginning. International Review of Victimology, 1, 181-199.

11. Appendix

Description of the variables:

The essential function of the criminal procedure is:
(1 = unimportant; 6 = very important)

Var002 fight against crime
Var003 balancing of interests between the state and the individual
Var004 determination of material truth
Var005 clarification of suspicion
Var006 preparation for the award of punishment
Var007 enforcing of the substantive penal law
Var008 overall restoration of law and order

Var010 -The criminal procedure should restrict to the offender (=1)
-The criminal procedure should clarify the relationship between the offender and the victim (=2)

Var011 Rights of the injured (1 = few rights
2 = enough rights
3 = too many rights)

Var012 Consideration of the rights of the accused in the Victim Protection Act
(1 = too little considered
2 = fairly considered
3 = too much consideration)

Var013 Distribution of authority between the victim and the offender in the criminal procedure (1 = in favor of the accused
2 = balanced
3 = in favor of the victim)

Var014 More rights should be conceded to the injured party
(1 = agreement
2 = non-agreement)

Injured parties, who, apart from their role as witnesses, participate in the criminal procedure...
(1 = never; 6 = very often)

Var031 ...contribute positively to the judicial decision
Var032 ...complicate the judicial decision
Var033 ...delay the procedure
Var034 ...do not cope in procedure without a lawyer
Var035 ...do not cope in procedure even with a lawyer
Var036 ...are more satisfied with the course of the procedure

Var046 The Victim Protection Act is in practice
1 = unknwown
2 = well known

Var048 Questions about and the discussion of the victim's position in the criminal procedure is 1 = unproblematic
2 = very problematic

Var322 Sex (1 = male; 2 = female)

Var323 Age (in years)

Var324 Duration of professional life in the criminal justice system

Var341 Have you participated in the last few years in a further education course? (1 = yes; 2 = no)

X and Y are sum variables about all singular provisions of the Victim Protection Act.

X1 Does this provision mean additional expenditure?
(1 = not at all
6 = substantial)

X2	Does this provision mean a delay in the procedure? (1 = not at all 6 = substantial)
X3	Assessment of the provisions (1 = unnecessary; 6 = necessary)
X4	Assessment of the provisions (1 = it goes too far; 6 = it should be more far-reaching)
Y1	The provisions are unknown, even to jurists.
Y2	Acceptance of the provisions by judges is limited.
Y3	Acceptance of the provisions by prosecutors is limited.
Y4	Acceptance of the provisions by lawyers is limited.
Y5	The victim has no interest in these provisions.
Y6	The victim does not know about these provisions.
	(Y1 - Y6: 1 = not true; 6 = true)

The Position of Injured Parties in the Austrian Criminal Procedure - First Results of an Empirical Investigation

Klaus W. Krainz

Contents

1. Setting Goals and Methods

The Austrian court of criminal procedure provides for a multitude of rights available to the injured parties in cases where an act has been committed which is liable to punishment, and which on the one part involves active participation in the criminal procedure and enforcement of private legal claims, and on the other hand should protect the interests of the injured party in particular in personal and private spheres, and protect those injured from "secondary victimization" by means of the criminal procedure itself.

The aim of the research which has been carried out (and at present is being processed) is amongst other things, to check as to whether the legal possibilities mentioned, are workable, i.e. are being made use of by the injured party or rather are being paid attention by the other parties of the procedure. Further questions which have not been discussed in detail in this article have been: the actual aims of the injured party in the criminal procedure, the attitude of offender and victim to the alternative forms of response such as diversion etc.

The procedure investigated on the whole 630 cases at each one of the district and state courts at the seats of all four Austrian regional appeal courts, with the help of 21 law trainees released by the Federal Ministry of Justice for this purpose. These cases present an entire official collection of data in respect of all judicial headings of certain kinds of offences arising within a period of three months: deliberate offences of violence, negligent physical injuries, property offences, property offences involving violence, offences against morality and private prosecution offences. File/record evaluation, observation carried out during the main proceedings (MP) and interviews of (the most severe) injured parties and (first named) accused were used as methods of research. The questions or rather evaluation questionnaires were standardized and had been previously checked and tested, and the staff had been trained by the project leader. In order to reach objectivity in the investigations being carried out, two legal trainees regularly took part in the MP-observations - they were thus also in a position to request an interview of both the injured party and also the accused after the end of the main proceedings or rather when the injured party abandoned the hearing at an early stage.

As the file evaluation and observation of the main proceedings in the inquiry should have made it possible to carry out all four steps in the

investigation, hearings had to be ignored (of 26 proceedings) in which it was foreseeable from the beginning that they would be ajourned or end beyond the period of observation. Finally 624 criminal proceedings were able to be evaluated (six had to remain unobserved in that merely an evaluation of the files had taken place and the amount of data was incomplete).

Of these 624 proceedings, 128 contained all four steps in the inquiry, in 31 cases additional to the file evaluation and observation of the main proceedings, only one interview of an injured party took place, and in 38 cases only one interview of the accused party took place. In the majority of cases (427) only file evaluation and observation of the main proceedings was possible because both the injured party and the accused refused an interview. The reason for this was frequently the influence of the advocate concerned, mostly in cases where the accused and partly where the injured party was asked for an interview. In these cases, the advocate hindered his client from the interview with the justification that his client's participation was not of any significance, in spite of previous references to the research project by the presiding judge at the end of the main trial.

2. Empirical Results

The Austrian rules of criminal procedure envisage for an injured party a series of "active rights", i.e. possibilities to actively take part in the criminal procedure, the ascertainment of truth and also enforcement of civil legal claims, if the injured party follows the criminal procedure at least as a "private participant" (§ 47 StPO).[1] If the victim claims a private charge in respect of an offence (§ 46 StPO) or continues the procedure as a "subsidiary prosecutor" (§ 48 StPO) because the prosecutor has withdrawn from the prosection of the punishable offence, the legal position is the same (apart from the possibility of a right to appeal) as the one of the prosecutors (*Miklau* 1987).

Because of the fact that during the three months investigation, only a single case of a subsidiary prosecution appeared (= 0.2%) and only a few private prosecutions (22 = 3.5%) have been raised, I would like to concentrate in the following text on the situation of the "private participants" (PP), i.e. those parties injured as a result of a crime, who have endorsed the

1 StPO (Strafprozeßordung); (Austrian) Code of Criminal Procedure.

criminal procedure in order to pursue their civil legal (and also other) interests. The situation of a private prosecutor will be mentioned only where it appears significant from the point of view of making a comparison.

The empirical results illustrated in the following text, are limited to the perception of active rights on the part of the injured party/PP in the preliminary proceedings and the effectiveness of rights of protection in the main proceedings. File evaluation and observation of the main proceedings serve as foundations for the analysis.

2.1 Preliminary Proceedings

Two admittedly differing but also cross linked sides of the joining of the private participant should be described in the following text; these are on the one hand legal powers of the PP to participate actively in the criminal procedure, i.e. in particular in the finding of evidence by means of submissions, suggestions, evidence tendered a.s.o. and on the other hand protective or passive rights of the injured party.

2.1.1 Safeguarding of Active Rights

The series of active rights which are considered here, extend from the report of the offence itself, and the entry of a party as PP, to the rights of motion and participation.

2.1.1.1 Reporting Crime

The most important right at the beginning of the criminal prosecution which not only the injured party but also everyone must have at their disposal, is the possiblity of reporting a crime.

Our investigation confirms other empirical works (*Schwind* 1975; *Stephan* 1976; *Villmow & Stephan* 1983; *Kaiser* 1985; *Heinz* 1985; for Austria compare *Schima* 1981; *Hanak* 1984) which have shown that the predominant number of criminal procedures begin with a report by the victim of crime, and other people play a secondary role as reporters.

Of the 624 evaluated criminal procedures, in (509 = 81.6%) cases a private person appeared as the victim, other injured parties weres firms (74 = 11.9%), communal establishments (13 = 2.1%), insurance firms (4 = 0.6%), associations (1 = 0.2%), and others (23 = 3.7%). The crime was in 351 cases (= 56.3%) reported by the victim, family members (22 = 3.5%) or acquaintances/friends of the injured party (43 = 6.9%). Witnesses not involved (73 = 11.7%), the awareness of the authorities themselves

(70 = 11.2%), and hospitals/doctors (32 = 5.1%) were likewise initiators of the criminal procedure, self (14 = 2.2%) and anonymous/pseudonym reports (14 = 2.2%) were rather seldom.

Table 1: Reports by whom?
- According to Categories of Offence -

	I abs. %	II abs. %	III abs. %	IV abs. %	V abs. %	VI abs. %	Total abs. %
Victim	142 67.0	21 17.5	111 72.5	52 59.1	8 47.1	17 89.5	351 57.6
Family of the victim	4 1.9	3 2.5	4 2.6	5 5.7	6 35.3	-	22 3.6
Friends of the victim	9 4.3	3 2.5	17 11.1	3 3.4	-	1 5.3	33 5.4
Uninvolved witnesses	20 9.4	28 23.3	9 5.9	16 18.2	-	-	73 12.0
Awareness of the authorities themselv.	14 6.6	33 27.5	10 6.5	11 12.5	1 5.9	1 5.3	70 11.5
Hospital, doctor	17 8.0	15 12.5	-	-	-	-	32 5.3
Reported by the offender himself	2 0.9	10 8.3	1 0.7	-	1 5.9	-	14 2.3
Anonymous, pseudonym reports	4 1.9	7 5.8	1 0.7	1 1.1	1 5.9	-	14 2.3
N=	212	120	153	88	17	19	609

I: assault
II: negligent physical injuries
III: property offences
IV: property offences with violence
V: sexual offences
VI: private prosecution offences
cannot be established: 15

The highest number of reports to the police related to those, who were victims of property and violent offences (apart from private prosecution proceedings which the injured party himself set in motion) amounting to 70%; in cases of property offences involving violence just under 60% of reports are those by the victim and in the case of sexual offences only 47%. The proportion of reports by the victim in cases of negligent physical injuries, i.e. traffic accidents (17.5%), was noticably low. Uninvolved witnesses played a considerable role as reporters in such cases and this could explain the fact that merely in cases of traffic accidents where people are

injured, the injured parties or rather parties involved in the accident are frequently themselves not in a position to fetch the police and rescue parties. The "self-reports of the offender" were also significant, i.e. the guilty driver in the case of an accident. The high figure of cases within the awareness of the authorities, must be qualified (27.5%), as this must be attributed to the recording of the accident by the safety authorities and it is frequently not recognizable who has notified the authorities before. Witnesses not involved in the offence were important as reporters of the offence, most of all in relation to the property delicts where violence was also involved (18.2%), whilst family members in cases of sexual offences "call in the police" just as much as the victim him- or herself (35.3%).

In so far as deliberate offences of violence and negligent physical injuries are concerned, the reports regularly take place within three hours after the offence being committed. Property offences involving violence were reported in 60% of cases within three hours, and a further 32.5% of victims wait until up to two weeks after the offence. The cases of mere property offences were noticeable here: One third of reports followed within three hours, another third within the first six weeks and a further third still later.

The easy admittance of the criminal justice system by means of the institution of the police, already emphasized by *Hanak* (1990) can also be seen in this investigation. The reports were almost exclusively made to the security authorities (550 = 90.8%), the reporter scarcely ever reported to the department of public prosecution - (36 = 5.9%) - (Graz illustrates a peculiarity; for instance twice as many injured parties reported direct to the public prosecutor (11.3%), as in the other OLG[2] districts); the complaints directed to the local court (16 = 2.6%) or the examining magistrate (2 = 0.3%) have been exclusively applications for prosecution by private prosecutors.

2.1.1.2 Joining as Private Participant

Of the 509 injured private victims, a total of 199 (= 39.1%) had already declared their participation during the pre-trial procedure as a private participant (PP) (compare from the legal point of view *Probst* 1986; *Steininger* 1990).

When we consider single groups of offences, we can see a joining by the PP in this stage of criminal procedure in 60% of the cases, and most take place in cases of negligent physical injury, property offences and property offences where violence is involved. Parties injured as a result of offences

2 OLG (Oberlandesgericht); High Regional Court.

against morality (5.9%) or by deliberate violent offences are not eager to take an "active" part in the preliminary proceedings. We can consider here the weight of PP joinings in the individual court districts; for example in Vienna and Innsbruck the figure was around 37%, in Linz 31%, in Graz only 26% (this could amongst other things be attributed to the small number of cases arising from negligent physical injury in Graz).

Referring to all PP a number of 82 (= 41.2%) declared their intent of their following up the procedure immediately at the time of reporting, 95 (= 47.7%) during the preliminary proceedings and 22 (= 11.1%) during the intermediate proceedings. Clear differences are recognizable between the individual groups of offences. The joining as PP relating to property offences with or without violence and in cases involving deliberate violent offences happened regularly at the stage of reporting or at latest in the preliminary proceedings. In contrast, the victim of negligent physical injuries made the decision in favor of private participation most of all during the preliminary proceedings and partly in the intermediate proceedings. The evaluation according to the district courts involved, shows a clear trend in direction to Vienna and Graz, where PP join at the stage of the report or during the preliminary proceedings, whilst in Linz and Innsbruck (15 i.e. 18%) also private participations during the intermediate proceedings occur.

Of a total of 153 possible cases (82 cases "joinings immediately at the time of the report" and 274 magistrate court (BG) cases are not considered here) the injured party was informed - contrary to legal obligation - by the investigating judge only in 31 cases (= 20.3%) of the possibility of the PP joining, and questioned as to whether he wished to adjoin the procedure.

There is admittedly no connection between the representation of an advocate and the existence of a joining as PP shown from our data. However there is a question which arises in relation to further evaluation, as which injured parties make use of an advocate to safeguard their rights.

It must be established in general that firms join the criminal procedure as PP around 10% more frequently than private persons, and make use of legal assistance twice as much (7.1 : 16.2%). It must also be stated that these statistics relate exclusively to property offences.

2.1.1.3 Inspection of Files (§ 47 Sec. 2 No. 2 StPO)

There were no certain criteria to be found from the file investigations, in respect of the observation of the law relating to inspection of files by means of the participating party or his lawyer (factual activities of this kind cannot be established in the form of notes on the file) therefore only the statements

of the manager of the branch can be used in respect of this point. This indicates that the private participant makes use of his right to inspect files only in exceptional cases, whilst the representative of the private participant does this as a rule.

Table 2: Perception of Active Rights by Means of PP in the Preliminary Proceedings
- According to Category of Offence -

Motions, suggestions:	I abs. %	II abs. %	III abs. %	IV abs. %	V abs. %	Total abs. %
Questioning of accused	-	1 1.7	6 8.8	-	-	7 3.5
Questioning of witnesses	3 8.1	2 3.4	2 2.9	-	-	7 3.5
Hearing of evidence	-	-	3 4.4	-	-	3 1.5
Confiscation	-	-	1 1.5	-	-	1 0.5
Detention of accused	-	-	1 1.5	-	-	1 0.5
Appointment of experts	-	1 1.7	-	-	-	1 0.5
Examination	-	-	2 2.9	-	-	2 1.0
Summoning of other witnesses	2 5.4	1 1.7	2 2.9	1 2.9	-	10 5.0
Further investigations in the intermediate proceedings	-	-	-	2 5.7	-	2 1.0
Producing of evidence	5 13.5	2 3.4	11 16.2	6 17.1	1 100	25 12.6
N=	37	58	68	35	1	199

I: assaults
II: negligent physical injuries
III: property offences
IV: property offences with violence
V: sexual offences
VI: private prosecution offences
Multiple responses possible.

2.1.1.4 Producing One's Own Evidence

The simplest possiblity for the injured party owing to his proximity to the object of damage, to participate in the criminal procedure, is represented by the facility of supplying ones own evidence (§ 47 Sec. 2 No. 1 StPO).

Of 199 PP, only 27 however were prepared (= 13.6%) to contribute in this way to establishing the truth (see Table 2). At the most, the victim of a property offence (most of all fraud) or rather property offences where violence is involved showed themselves to be active. When checking the behavior of the injured parties in the various OLG districts, there proved to be a comparatively high degree of readyness of the victim (28%) to bring along his own evidence in Vienna, and to a lesser extent in Innsbruck (9.7%). However in Graz and Linz the injured parties were scarcely prepared to take an active part in this form (around 5%). Male victims appear for instance twice as active as female victims who generally behave more passively.

The picture indicated in respect of the PP, is also applicable to their advocates (representatives of private participants = PPR). Such representatives were most active concerning property offences and property offences involving violence. The rate was somewhat lower as far as private prosecutions are concerned. The PPR behave in various ways in the individual court districts: Whilst the activity of those representatives was just as high in Vienna, Innsbruck and Graz with 25% participation, the representatives in Linz appeared to be relatively passive (6.3%).

2.1.1.5 Motions for the Admission of Evidence

The PP has the right according to § 47 Sec. 2 StPO, to make a motion to take evidence, i.e. to prompt the investigating judge to collect particular evidence.

The results of research show (see Table 2) that the PP make use of this right very rarely. Motions for the examination of the accused or of witnesses (10 = 5%) were relatively frequent and applications to procede with particular takings of evidence, examinations or regressions practically never took place (only in two cases). The evaluation according to groups of cases proved that motions to take evidence were made most of all in clear property offences and offences resulting in private charges, and as a rule were brought by male injured parties. In contrast, the females were somewhat passive in this respect. Applications to carry out an inspection of the scene of the crime or also telephone surveyance, did not arise in our research.

It was noticeable from comparable consideration of the initiatives taken by the representatives of the private participant (=PPR), that they were not noticeably more active than the injured parties whom they were representing, and who were most of all most active in so far as property offences were concerned.

2.1.1.6 Rejection of a Judge

The injured party - like the accused or defendent - can challenge a judge who is biased in his opinion or keeper of the minutes, by means of an application because of lack of impartiality, or rather bring forward grounds for impartiality against a prosecution. There was not a single case of refusal averted by a victim in the 199 cases research, in which the injured parties had joined in as private participants in the criminal process. However the advocate representing the injured party asserted such a ground for rejection on four occasions (= 2%; see Table 2). The PP made use of this right to reject an expert because of impartiality only once (= 0.5%).

2.1.1.7 Participation in the Investigation Procedures

Private participants who continue a criminal procedure as a subsidiary prosecutor (SP), have the right (§ 97 Sec. 2 StPO) to take part in the investigation proceedings (for example investigating the scene of the crime, questioning of witnesses who probably could not be heard further in the main proceedings, searches) during the preliminary proceedings, and - as a requirement in the observation of this right - to be advised of these appointments. In contrast, private participants can merely take part in the questioning of people, who probably cannot be questioned in the main proceedings.

The evaluation of files showed that in total eleven investigations took place at the scene of the crime: Although the PP has no right to participate and only a single case of subsidiary prosecution was submitted, notifications went out to injured parties in two cases, and PPs took part in the investigation of the scene of the crime in five cases.

The PPR did not play an obviously large role in so far as these investigations at the scene of the crime were concerned. Only once in the eleven cases was notification sent to a PPR who did not in fact take part in the investigation of the scene of the crime. Evaluation of the groups of offences showed that such inspections of the scene of the crime take place most of all in the negligent physical injury cases and property offences where violence is involved. Such cases occurred in Linz and Innsbruck.

Notification was given to the PP/SP in five cases (= 12.3%) out of the total of 40 procedures in which a search was carried out. However no such notice was given to a PPR. Seven PPs (= 17.5%) and no PPR took part in the searches, although one subsidiary prosecution arose in our case material. The cases were also established in Innsbruck and Linz.

It was noticeable in seven cases from the files, that the witness would not testify in the main proceedings and therefore (in accordance with § 162 Sec. 3 StPO) an interrogation would have to take place by the investigating judge with the prosecution, defence, and PP being present. No parties to the process were notified of the appointments of the seven examinations and no participation took place (see Table 2).

The law entitling the PP to refuse a confrontation with the accused was never used in the 18 cases of this kind.

2.1.1.8 Further Motions

The PP has - as does the accused - the right to demand the summoning of further witnesses. This right was taken up in 10 cases (= 5%) of a total of 199 PP (see Table 2). According to the groups of offences shown, these cases were concerned with deliberate offences of violence (2 = 5.4%); property offences with violence (1 = 1.6%) and without violence (2 = 2.9%) and likewise negligent physical injuries (1 = 0.8%) were of less importance (relatively speaking). The most frequent cases of such "application for questioning of witnesses" can be found in the proceedings relating to the private charges. In only six cases were further witnesses proposed by the representatives of the private participants and these cases concerned mostly property offences.

Only 1% (= 2) of all private participants claimed their right to apply for further investigations in the intermediate proceedings, where the questioning of witnesses was proposed exclusively (see Table 2). PPRs used this right more often and applied for investigation of the site of the crime (3), appointment of experts (2) and questioning of witnesses and search (1). The applications by the PP and PPR named here, were allowed.

The PP has the right according to § 367 Sec. 2 StPO, to apply to the investigating judge, before the main proceedings, for the recovery of an item belonging to him, which has been confiscated by the court. Ten cases in total arose concerning seizure of items belonging to the injured parties. There was not a single case where the PP made a proposal to have the item belonging to him delivered or surrendered to him, although the item seized by the court was in possession of court yet.

2.1.2 *Safeguarding Rights of Protection*

The considerable number of legal rights attached to the protection of the injured party in the preliminary proceedings constitute various opportunities to repudiate a statement either in part or entirely.

2.1.2.1 *The Right of Relatives to Refuse to give Evidence*

According to § 152 StPO, relatives of the accused have the privilege of refusing to give evidence entirely, so that they are not forced because of an obligation to be truthful to testify against the (close connected) accused. The law provides a duty for the criminal procedural organs, to advise the family members about this right, and the failure by the legal authorities to caution accordingly, is threatened with absolute nullity of the evidence. However it is not the case in so far as the safety authority organs are concerned (§ 152 Sec. 3 in connection with § 281 Sec. 1 No. 2 StPO).

Table 3: Observation of Right to Refuse Evidence before the Safety Authorities
- According to Court Districts -

	Vienna abs. %	Linz abs. %	Innsbruck abs. %	Graz abs. %	Total abs. %
Advised by safety authorities	3 30.0	10 52.6	3 21.4	2 18.2	18 33.3
Refusal of statements	-	-	-	1 9.1	1 1.9
Expressedly given up	1 10.0	3 15.8	3 21.4	2 18.2	9 16.7
N=	10	19	14	11	54

There were 65 injured parties in our investigation, who were related to the accused (according to § 72 StGB).[3] Of the 54 injured parties interrogated by the safety authorities, the file showed in one third of the cases that the injured party had been advised (see Table 3); it was shown here that people most of all within the age group 20-30 years (83.3%) were not so advised

3 StGB (Strafgesetzbuch); (Austrian) Penal Code.

and that the failure affected injured males most of all (90% not cautioned, females 61.4%). An evaluation with regard to the occupation and nationality did not show significant differences.

The behavior patterns of the safety authorities with regard to this caution differed significantly, in particular OLG districts. Whilst Vienna for instance is somewhat average (30% instructions), in Innsbruck (21.4%) and Graz (18.2%) such cautions were clearly little used. A (relatively speaking) positive exception with regard to the observance of the legal rules concerning this caution is constituted by Linz, where just over 52.6% of injured parties were advised of their right to refuse to give evidence.

Table 4: Observation of Right to Refuse to give Evidence by the Investigating Judge
- According to Court Districts -

	Vienna abs. %	Linz abs. %	Innsbruck abs. %	Graz abs. %	Total abs. %
Advised by safety authorities	-	-	5 83.3	5 83.3	10 83.3
Refusal of statements	-	-	1 16.7	1 16.7	2 16.7
Expressly given up	-	-	4 66.7	2 33.3	8 66.7
N=	-	-	6	6	12

The investigating judges caution on the other hand in 83.3% of the cases (in 16.7% a ground for nullity because of the failure of caution would have been given in any case; see Table 4). We can distinguish here according to groups of offences. Accordingly, the right to refuse to give evidence was given by relatives of the injured party in relation to deliberate violent offences and those involving a sexual offence most of all.

The actual observation of this right proved to be a real exception. Only a single witness (= 1.9%) repudiated a statement before the safety authorites, before the investigating judge just over two (= 8.3% of such cases) and in the latter case, it concerned a victim of a premeditated offence of violence.

If an injured party does wish to testify inspite of his right to refuse, his express wish has to be noted in protocol (§ 152 Sec. 3 StPO).

Concerning the safety authorities (see Table 3) the practice of only rarely noting such express wishes in protocol, took place (in a maximum of 25% of cases for example Vienna 10%, Innsbruck 23%) in all districts.

Investigation judges who are threatened with the penalty of nullity due to this failure, protocolled such an express wish or renounciation of the right to refuse only in 48.3% of cases, despite this threat. This meant that in more than 40% of these cases, grounds for nullity could have been given. The practice in Graz was particularly noticeable where in three of four cases (=75%) a note in protocol was omitted (see Table 4).

2.1.2.2 The Right to Refuse to give Evidence according to § 153 Sec. 1 StPO

A witness has the right according to § 153 Sec. 1 StPO to refuse to give evidence as a witness or reply to individual questions, if by answering such questions he is in danger of disgrace, criminal legal prosecution or it may be directly and significantly detrimental to his property interests.

Only two (= 0.5%) of a total of 433 injured parties asked as witnesses, took advantage of this right. In one case "disgrace", which normally was given as a ground, and in the other case there was no obvious ground given. Both named injured parties did not give evidence.

2.1.2.3 The Right to refuse to give Evidence according to § 153 Sec. 2 StPO

"An injured party as a result of a punishable offence against their morality, can refuse to answer questions relating to circumstances from their intimate personal life and likewise details of the punishable offence whose description they regard as unacceptable" (§ 153 Sec. 2 StPO, from the legal point of view compare *Schedlberger* 1989):

Of the 15 injured parties considered here, two (= 13.3%) made use of this right in the preliminary proceedings. In one of the two cases, the investigating magistrate insisted inspite of this to a reply to the question in that this "appears important because of the particular significance of the statement".

2.2 Main Proceedings

Active, i.e. rights to participate, and passive, i.e. priviledges should also be distinguished in the trial process.

2.2.1 Safeguarding of Active Rights

The rights to make a motion are very similar to those described in the preliminary proceedings, and are amongst other things, supplemented by means of the application for a decision concerning civil law claims and likewise rights of appeal (§ 47 Sec. 1 StPO).

2.2.1.1 Joining as Private Participant

According to § 47a StPO introduced by the Criminal Law Amendment Act of 1987 for the reinforcement of existing obligation to caution and the duty in respect of care and supervision, all authorities active in the criminal procedure, are duty-bound to advise the injured parties about their rights in the criminal procedure "in so far as this appears to be necessary". Advice about the possibility of PP belongs first and foremost to this area, and the associated rights and opportunities attached to this, and also the fundamental question as to whether the injured party wishes to prosecute his private legal claims in the criminal procedure, as a joint party and/or actively take part in the procedure.

The observations made during the main trial procedure showed that - ignoring the cases of PP during the preliminary proceedings - for instance half of the injured parties were asked by the presiding judge at the beginning of their questioning of witnesses, but were in no event offered a caution about the associated rights and opportunities, and as to whether he/she wished to adjoin the procedure as PP (see Table 5). The question was put to 5% of victims at the beginning of the taking of evidence, and a quarter (23.5%), admittedly exclusively in cases of deliberate violent offences, were not asked at all.

On considering the individual court districts (see Table 6) we can see that the cautions and questions concerning PP were more frequently omitted in Vienna (26.2%), and Graz (19.6%) than in Innsbruck (12%) or Linz (8.3%).

In fact, 54% of the injured parties present in the trial, were private participants (only 11 injured parties who had joined the criminal procedure as PP, remained absent).

According to the offences set out, the rate of joinings as PP in these offences which resulted in damage to property (normally damages are easily estimated) was relatively high (70-75%), whilst the injured parties of a deliberate violent crime (34.8%) and victims of sexual offences practically never (7.1% = 1 case) appeared as private participants. In cases of victims of sexual offences, statistical assessments regarding their behavior as PP, must remain omitted in the following text, because of the small numbers.

The easier prosecution of property offences in the form of PP shows the assessment of the question as to whether the PP had calculated their claims exactly. On average 72.6% had stated their claims in such a way as could be precisely calculated. The proportion of property offences - as was to be expected - was particularly high (94.7%). The proportion of negligent physical injuries appears in contrast to be relatively low (49.3%) and this could be attributed to the damages arising from physical injury, compensation for pain and suffering a.s.o, which are difficult to estimate.

Table 5: Joining as Private Participant
- According to Category of Offence -

	I abs. %	II abs. %	III abs. %	IV abs. %	V abs. %	VI abs. %	Total abs. %
Only in preliminary proceedings	20 12.2	46 47.7	40 54.1	17 32.1	1 7.1	-	124 30.0
Of which: repetition in trial	9 5.5	8 8.2	10 13.5	7 13.2	1 7.1	-	35 8.5
Only in trial	37 22.6	21 21.6	17 23.0	19 35.9	-	-	94 22.8
Others	-	4 4.1	-	1 1.9	-	-	5 1.2
No joining as private participant	107 65.2	26 26.8	17 23.0	16 30.2	13 92.9	11 100	190 46.0
N=	164	97	74	53	14	11	413
Question about joining as PP	81 49.4	54 55.7	46 62.2	37 69.8	2 14.3	1 9.1	221 53.5

I: assaults
II: negligent physical injuries
III: property offences
IV: property offences with violence
V: sexual offences
VI: private prosecution offences

Vienna is below average with 62.7% of quantifiable claims; this could be attributed to the high number of traffic accidents and also the low proportion of decisions concerning the civil legal claims themselves.

It is also interesting to note as an additional matter, as to how and to what extent the PP had joined in.

More than half of the injured parties had quantified the damages themselves. This could be seen particularly in relation to cases of mere property offences (86%), offences to property where violence was involved (up to 65%) and also offences involving deliberate violence (43.9%). A PP for these reasons merely arose in cases of negligent physical injuries (in 67.6%) and also deliberate violent offences (in 56.1%) most of all. A PP at the level of damages already established by experts was the exception (2.2%). Here, it was shown that PPs represented by PPRs stated the damages either according their own ideas or merely as a matter of claiming their damage, whilst injured parties which were not represented, cited exclusively the total sum of the damages as estimated by themselves.

Table 6: Joining as Private Participant
- According to Court Districts -

	Vienna abs. %	Linz abs. %	Innsbruck abs. %	Graz abs. %	Total abs. %
Only in preliminary proceedings	29 28.1	39 36.1	32 32.0	24 23.5	124 30.0
Of which: repetition in trial	11 10.7	6 5.5	15 15.0	3 2.9	35 8.5
Only in trial	20 19.4	20 18.5	20 20.0	34 33.3	94 22.8
Others	2 1.9	1 0.9	1 1.0	1 1.0	5 1.2
No joining as private participant	52 50.5	48 44.4	47 47.0	43 42.2	190 46.0
N=	103	108	100	102	413
Question about joining as PP	47 45.6	60 55.6	56 56.0	58 56.9	221 53.5

The PPs who were not represented by agents, prosecuted their claims twice as frequently as those represented (37.5 : 62.5%).

The PP has the right to declare his private legal claims to a more detailed extent in the proceedings, and to justify to these claims (§ 365 Sec. 2 StPO).

Victims of property offences without violence (78.9%) and also those cases where violence was involved made use of this opportunity. This

occured to a lesser extent in cases where deliberate physical violence was involved (38.6%) and in cases of negligent physical injuries (19.7%). It was noticeable that there was made less use of this possibility in Vienna (37.9%) and also in Graz (44.1%) and for instance in Linz (53.3%). Victims who were not represented by PPRs brought claims themselves twice as frequently as those who were represented.

The question examined over and above this, as to whether an injured party was offered the opportunity to set out his claims at all, can be confirmed in two third of cases in which the injured party made no use of his right to do so. The victims of negligent traffic offences found less opportunities.

We can assume that those victims who had submitted their claims in more detail, also had the opportunity to do so, and so it can be shown that the presiding judge gave the PPs the opportunity to comment upon their claims in a total of 82.5% of proceedings.
This is usually the case (classified according to offences) in so far as property offences are concerned with and without violence, and in up to 80% of offences with deliberate violence, whilst in cases of negligent physical injury, only two thirds of the injured parties received the opportunity to do so.
Differences can be noted when considering the different types of court seats. In Innsbruck (92.5%) almost all PPs obtained the opportunity to comment on their claims and in Vienna just over 84.3%, in Linz and Graz around 78%.

In Innsbruck (84.6%) and Vienna (75%) where almost all injured parties had the possibility to submit their claims, just under 50% of them made no use of this. There was more opportunity given to male PPs to submit their claims (76 : 65%) but females took advantage of this right more frequently - particularly with regard to the opportunities provided.

The concept, the grounds for the differing figures of joinings as PP in cases of individual forms of offences could - according to the form of a self fulfilling prophecy - lay in the decision practice of the courts relating to claims by private participants in various forms of offences, cannot be confirmed by the data produced by us (see Table 7).
The single case of private participation in an offence against morality, was admittedly referred to civil law channels for a decision. This, however, is not significant because of the small statistical figures. The PP claims in cases of assaults, were recognized in the majority as a whole or rather partly recognized (with a modification in respect of the level of damages). The highest number of groups of offences could have been found here, arising from transferrals to the civil legal channels (33.3%).

Table 7: Decision about PP Claim
- According to Category of Offence -

	I abs. %	II abs. %	III abs. %	IV abs. %	V abs. %	Total abs. %
Accepted entirely	21 36.8	14 19.7	35 61.4	16 43.2	-	86 38.6
Accepted according to grounds	9 15.8	21 29.6	-	2 5.4	-	32 14.3
Partly accepted	4 7.0	7 9.9	5 8.8	6 16.2	-	22 9.9
Transfer to civil law procedure	19 33.3	20 28.2	12 21.0	7 18.9	1 100.0	59 26.4
Given up by PP in procedure	4 7.0	5 7.0	2 3.5	2 5.4	-	13 5.8
Not mentioned in judgement	-	4 5.7	3 5.3	4 10.8	-	11 5.0
N=	57	71	57	37	1	223

I: assaults
II: negligent physical injuries
III: property offences
IV: property offences with violence
V: sexual offences
VI: private prosecution offences

Table 8: Decision about PP Claim
- According to Court Districts -

	Vienna abs. %	Linz abs. %	Innsbruck abs. %	Graz abs. %	Total abs. %
Accepted entirely	10 19.6	30 50.0	15 28.3	31 52.5	86 38.6
Accepted according to grounds	-	8 15.3	7 13.2	17 28.8	32 14.3
Partly accepted	6 11.8	3 5.0	11 20.8	2 3.4	22 9.9
Transfer to civil law procedure	25 49.0	12 20.0	14 26.4	8 13.6	59 26.4
Given up by PP in procedure	6 11.8	2 3.3	4 7.5	1 1.7	13 5.8
Not mentioned in judgement	4 7.8	5 8.4	2 3.8	-	11 5.0
N=	51	60	53	59	223

The practice of not making a final decision, is clearly recognizable in cases of negligent physical injuries e.g. traffic accidents, in which the PP claim was either recognized according to this ground and with that amount, or was referred in its entirety to civil legal channels. Recognition of claims according to grounds and amounts, was more likely to be the exception (20%).

PP claims in cases of property offences, were decided completely differently. Adjudications were the rule here (around 70%) and transferrals the exception.

When the decision practice of individual court districts is examined (see Table 8) it shows that in Linz and in Graz in around 50% of cases, the PP claim was recognized entirely. However this occured in Innsbruck less frequently (28.3%) and in Vienna merely in a fifth of cases. In Vienna, the practice of a complete transferral to civil legal channels, appears to be the predominating practice. Complete or part recognition of claims made by victims who were represented by PPRs just as transferrals to civil legal channels took place as fundamental decisions. The damages of those PPs who were not represented by counsels were adjudicated (45%) or referred in their entirety to civil legal channels.

The fact that this cannot be attributed to the difficulty of the decision concerning civil legal claims, is shown by the assessment of the question as to whether additional investigations into the extent of damages were carried out, in relation to the preparation of the civil legal decision (see § 365 Sec. 2 2. Sentence StPO). When such investigations took place this has usually been in cases of property offences (28.1%) and relation to property offences with violence (21.6%); in cases of deliberate physical injuries (7%) and negligent physical injuries (15%) in which compensation for pain and suffering was involved, such investigations were (for example in the form of additional opinions from experts) more an exception than the rule. The chair person or presiding judge in Vienna and Graz in particular, were inclined to carry out additional investigations in order to be able to make a decision regarding the civil law claim of the injured parties in the criminal procedure.

It must be said however that in an average of 5% of cases, the decision regarding the civil legal claim of the injured party, was simply "forgotten", i.e. no decision was made in respect of the application made by the injured party (this affected most of all the property offences where violence was involved, and almost exclusively those PPRs who were not represented by PPRs). These figures can be classified according to the place of court. For

instance in Vienna and Linz there exists a rate of around 10% of unanswered PP claims. Such a case did not arise in Graz at all, and the rate in Innsbruck is average.

2.2.1.2 Presence in the Trial (§ 427 Sec. 2 No. 3 StPO)

70% of injured parties/PP take part on average in the trial procedure in Graz the figure was slightly more (74%). Particularly high rates of attendence were established in cases of deliberate and negligent physical injuries (80%); victims of property offences where violence was involved (63.9%) exhibited less interest in participation. The case was likewise in relation to property offences (51.4%).

The numbers of victims who were not represented by counsel, were more frequently present in the main proceedings, although not significantly so in comparison to those who were represented (86 : 82%).

Up to the stage of being questioned themselves, injured parties/PPs are not allowed to be present except in exceptional cases (3-10%, an exception is illustrated in the case of a private prosecution - 90%). However in comparison, this happend frequently in Linz (16%); in eight cases the injured parties were removed by the presiding judge from the courtroom. The right of the PP to be present at the trial and to be able to assert rights of interrogation, comment and other participation, is in conflict with the definition (§ 248 Sec. 1 StPO) that witnesses (and as such, the injured party/PP are as a rule also present) have to wait outside the courtroom until they are questioned in order to establish the truth. Whether or not the injured parties were represented by counsel, did not play any role according to our results.

It is also of further interest to evaluate how often PPs were accompanied in the trial by their counsel. There appeared to be major differences according to the type of offence concerned. In cases of negligent physical injuries, the victims of cases were supported in the trial by their counsel in 65%, and in cases of deliberate violent offences the victims were supported in just under 50% of cases. In cases of property offences with or without violence, however, the injured parties were accompanied by a counsel in approximately 20% of procedures.

Classification according to the seat of court involved, brought out marked differences. Around a half of the PPs in Innsbruck and Vienna were supported by counsel, whereas in Linz and Graz, only a third of the PPs entered the proceedings with a representative.

Table 9: Fulfilling the Duty of Care and Supervision towards the PP, by the Presiding Judge
- According to Category of Offence -

	I abs. %	II abs. %	III abs. %	IV abs. %	V abs. %	Total abs. %
Question as to joining as PP	81 49.4	54 55.7	46 62.2	37 69.8	2 14.3	220 53.3
N=	164	97	74	53	14	402
Advice as to right of comment	9 15.8	4 5.6	2 3.5	-	-	15 6.7
Advice regarding right to question	4 7.0	3 4.2	1 1.8	-	-	8 3.6
Opportunity to question a witness	13 22.8	2 2.8	2 3.5	1 2.7	-	18 8.1
Opportunity to question the accused	18 31.5	6 8.4	8 14.0	6 16.2	1 100	39 17.5
Opportunity to introduce PP claims	46 80.7	47 66.2	53 92.9	37 100	1 100	184 82.5
Opportunity for final speech	28 49.1	13 18.3	3 5.3	6 16.2	-	50 22.4
Advice as to right of appeal	7 12.3	1 1.4	1 1.8	2 5.4	-	11 4.9
N=	57	71	57	37	1	223

I: assaults
II: negligent physical injuries
III: property offences
IV: property offences with violence
V: sexual offences
VI: private prosecution offences
Multiple responses possible.

2.2.1.3 *Application to carry out an Inspection at the Scene of the Crime*

Of the total of 223 private participants who took part in the trial iteself, three (= 1.3%) made an application to carry out a search at the scene of the crime. Two concerned traffic accidents and one a burglary with theft involved. Two of these applications were allowed and the other in the case of the traffic accident, was refused. The PPs were not represented by agents.

Of the total of 121 proceedings in which representatives of the PP were present, only one such application was made in a single case.

2.2.1.4 Motions for the Admission of Evidence (§ 47 Sec. 2 No. 3 StPO)

PPs made such applications only twice (= 0.9%, deliberate violence offences, property offences) and both applications were allowed. The PPs were not represented by agents in these proceedings.

PP representatives were only somewhat insignificantly more active and made such applications to take evidence in seven procedures (= 5.8%).

2.2.1.5 Comments upon Statements (§ 427 Sec. 2 No. 3 2. Sentence StPO)

As a requirement for the observation of the right "to comment", it should first of all be checked as to what extent the presiding judges have carried out their duty in advising the PP about his right to participate, and only then can the actual observation of this right be examined.

Of the total of 223 PPs present at the trial, 15 (= 6.7%) were advised as to their right to comment (see Table 9). These cases concerned most of all assaults (9; up to 15.8%), negligent physical injuries (4; up to 4.1%) and property offences (2; up to 2.7%).

Classifying such cases according to the courts involved, indicates (see Table 10) that the presiding judges followed their obligation to caution almost exclusively in Linz (in 12% of cases). In Graz, the judges cautioned only twice and in Vienna and in Innsbruck, none of the PPs were advised of their right to comment.

A trend can be recognized in the behavior of the presiding judges. It accords with whether the PP was accompanied by a lawyer. All instructions were given to the non-represented PP, if a PP representative was present, therefore no instructions took place.

In seven procedures (= 3.1%) the PPs asserted every opportunity to express their views. In 44 cases (= 19.7%) they actually made a comment. In more than three quarters of the court proceedings, the PPs never asked for these to speak (see Table 11).

If one observes the individual categories of offences, clear differences can be seen. Just under a half of victims of assaults at least sometimes com-

mented (45.6%) and likewise around a fifth of those injured by property offences with or without violence. Only in exceptional cases (7%) did the victims of negligent physical injuries make use of this right.

Table 10: Fulfilling the Duty of Care and Supervision towards the PP, by the Presiding Judge - According to Court Districts -

	Vienna abs. %	Linz abs. %	Innsbruck abs. %	Graz abs. %	Total abs. %
Question as to joining as PP	47 45.6	60 55.6	56 56.0	58 56.9	221 53.5
N=	103	108	100	102	413
Advice as to right of comment	-	13 21.7	-	2 3.4	15 6.7
Advice regarding right to question	-	8 13.3	-	-	8 3.6
Opportunity to question a witness	5 9.9	9 15.0	2 3.8	2 3.4	18 8.1
Opportun. to question the accused	6 11.8	21 35.0	8 15.1	4 10.2	39 17.5
Opportunity to introduce PP claims	43 84.3	47 78.3	49 92.5	45 76.3	184 82.5
Opportunity for final speech	7 13.7	34 56.7	6 11.3	3 5.1	50 22.4
Advice as to right of appeal	1 2.0	6 10.0	-	4 6.8	11 4.9
N=	51	60	53	59	223

Multiple responses possible.

Whereas in Vienna, Linz and Innsbruck, this form of participation was used to an average extent (around 25%), the victims from Graz took advantage of their right to comment only up to 13.6% (see Table 12). The question as to whether the injured parties were represented by agents did not play a role in the observation of these rights.

The question as to whether or not the presiding judge influenced the possibility of the awareness of this right, was examined as a possible cause for the awareness with which this right to comment was usualized.

It was shown that the presiding judges as a rule (70-80%) did act completely neutral. The presiding judges were more encouraging towards the victims of assaults (17.6%) and property offences involving violence (12.2%); comments in cases of property offences where violence was involved, and in cases of sexual offences (= 12.5%) were however partly prevented.

The behavior of the presiding judges in individual court districts was clearly varied. Whilst the judges in the Linz behaved encouragingly (33.4%), the number of obstructions and hinderances (6,5 namely 15%) were particularly and comparatively high in Graz.

2.2.1.6 Questions put to the Accused, Witnesses and Experts (§ 47 Sec. 2 No. 3 2. Sentence, § 249 Sec. 1 StPO)

The presiding judge is duty bound with regard to rights of questioning, just as they are in relation to making comments, to advise the PP and give him/her the opportunity to question witnesses, the accused and experts.

Our research shows that the presiding judge observes this duty to caution less frequently in relation to the right to question than in relation to rights to comment (see Table 9). On average, 3.6% of PPs were advised. The victims of assaults were most frequently advised of their right to present questions (7%) whereas this practically never happend in cases of property offences with or without violence and likewise sexual offences.

The statements in relation to the right to comment in respect of the individual court districts, also apply in relation to rights of questioning. Advice in respect of this right took place exclusively in Linz (in 13.3% of cases). However in Vienna, Innsbruck and Graz, the PP was not informed about his right to question.

Table 11: Observance of Active Rights by PP in Main Trial Proceedings - According to Category of Offence -

	I abs. %	II abs. %	III abs. %	IV abs. %	V abs. %	Total abs. %
Statements	26 45.6	5 7.0	11 19.3	8 21.6	1 100	51 22.8
Questions to witnesses	4 7.0	2 2.8	1 1.8	2 5.4	-	9 4.0
Questions to accused	-	1 1.4	-	1 2.7	-	2 0.8
Motions to gather evidence	1 1.8	-	1 1.8	-	-	2 0.8
Refusal of motions	-	-	-	-	-	-
Other motions	-	2 2.8	1 1.8	1 2.7	-	4 1.8
PP claim carried out	22 38.6	14 19.7	45 78.9	22 59.5	1 100	104 46.6
Concluding speech	2 3.5	1 1.4	1 1.8	1 2.7	-	5 2.2
Right of appeal	-	-	-	-	-	-
N=	57	71	57	37	1	223

I: assaults
II: negligent physical injuries
III: property offences
IV: property offences with violence
V: sexual offences
VI: private prosecution offences
Multiple responses possible.

The trend not to instruct the injured parties in this way, could therefore be seen, if they were accompanied by a lawyer in the trial process.

It was also important to investigate as to whether the presiding judge gave the PP the opportunity to question witnesses, experts and those accused, in order to research the area of observance of the right to question (see Table 9).

It was shown that the PP was given more opportunity to question those accused (on average in 10% of cases, deliberate violent offences 17.5%, negligent physical injuries 2.8%) in comparison with questioning of witnesses (on average 4%, deliberate violent offences 10.5% and in relation to other groups of offences, practically no opportunity was given).

The exception here was Linz, where the PP was allowed to put questions to the accused parties in 35%, to the witnesses in 15% of cases, whereas this was allowed, in relation to other courts, in a maximum of 5-10% of cases (see Table 10).

Those victims who were not represented by agents were given the opportunity to question witnesses (14 : 7%) and accused parties more frequently (8 : 4%) in comparison to those appearing accompanied by representatives.

According to the objective assessment of the observer, - apart from 80-90% of magistrates who behaved completely neutral - the opportunity to question was more likely to be demanded in cases of deliberate violence offences (in 10.8% of cases) and offences where private charges were raised. In contrast questions in cases of sexual offences, and property offences where violence was involved (10% of cases) were even prevented.

Whereas in Linz in 13.8%, and in Innsbruck the impression existed in 10% of proceedings that the judge encouraged the questions of the PP, this was not the case in Vienna and Graz. In Vienna, PPs were not encouraged to put questions (13.8%) and in Graz questions were even prevented in 11.8% of cases. In one concrete case, the presiding judge prohibited all questions from the PP.

The presence of an agent mostly resulted in greater neutrality on the part of the presiding judge. Unrepresented PPs were either encouraged or hindered to a great extent.

Male victims were more frequently allowed the possibility of questioning than their female counterparts (15 : 5%).

The right to question was in fact practically never used (see Table 11). This is particularly so in the case of questioning the accused party, although the PP was more frequently given the chance to question in such a case (questions by the PP occurred only in one case of negligent physical injury and property offences where violence was involved = 0.9%). In contrast, the injured parties asserted their right to question witnesses in cases of deliberate violent offences and property offences involving violence, at least (most of all in Linz) sometimes (5-7%).

The right to question was made use of almost exclusively by PPs who were not represented by counsel. Victims who were with their agents, did not as a rule raise questions. No distinction can be established between male and female PPs in so far as the use of the right to question is concerned, inspite of the more frequent opportunity to do so being given to men, in relation to women (women questioned however more frequently than men).

The PP representatives only made little use of their right to question witnesses (on average 38.5% at least "seldom put questions to the witnesses") and experts (16.7%). More frequently, however, they put questions to the accused parties (57.3%). It is noticeable that the right to question was more frequently made use of in relation to property offences (85%) than in relation to the other forms of offences (merely up to 30-40%).

According to the court districts (see Table 12) the right to question is made use of for around 40% (Vienna, Linz) it is used more frequent in Innsbruck (55.6%) and in contrast the figure for Graz (17.9%) is extremely low.

Apart from the predominant number of judges who behave completely neutrally (around 80-90%) according to the subjective impression of the observer of the trial, the presiding magistrates encouraged the advocates (most of all in cases of negligent physical injuries, i.e. traffic accidents). Prevention of the use of this right was not established and a question by the PP representative was prohibited by the presiding judge in merely one case in Graz.

Table 12: Observance of Active Rights by PP in Main Trial Proceedings
- According to Court Districts -

	Vienna abs. %	Linz abs. %	Innsbruck abs. %	Graz abs. %	Total abs. %
Statements	12 23.6	17 28.3	14 26.4	8 13.6	51 22.8
Questions to witnesses	2 4.0	5 8.4	2 3.8	-	9 4.0
Questions to accused	-	1 1.7	-	1 1.7	2 0.8
Motions to take evidence	-	1 1.7	-	1 1.7	2 0.8
Refusal of motions	-	-	-	-	-
Other motions	-	2 3.3	1 1.9	1 1.7	4 1.8
PP claim carried out	19 37.3	32 53.3	27 50.9	26 44.1	104 46.6
Concluding speech	2 3.9	1 1.7	1 1.9	1 1.7	5 2.2
Right of appeal	-	-	-	-	-
N=	51	60	53	59	223

Multiple responses possible.

2.2.1.7 Rejection of Court Officials

In a total of 624 of the proceedings evaluated, three rejections were made. Two of these were instigated by the PP representative and one brought by the accused. The injured party was never active in this way. Both applications by the PP representatives were directed against the associate judge and were dismissed.

2.2.1.8 Keeping the Final Speech (§ 47 Sec. 2 No. 3 3. Sentence StPO)

The extent to which the PP was given the opportunity by the presiding magistrate to make a closing speech to which he or she is entitled, must be examined.

On average, 22.4% of PPs obtained the opportunity to make a closing speech (see Table 9). Distinct differences in respect of the individual forms of offences are recognizable. Almost a half of the victims of assaults had this opportunity, whereas those injured parties in cases of negligent physical injuries and similarly of property offences where violence was involved, only had the opportunity of not making a final speech in up to 16% of cases. Victims of simple property offences and offences against morality were not given the opportunity to make a final speech in those cases which were examined by us.

There was on the other hand a noticeable difference in the practice of the courts themselves (see Table 10). Whilst in Linz, more than a half of the victims (56.7%) were given the opportunity to make a final speech, this was given only in 13% of the cases in Vienna and Innsbruck, in Graz merely in 5% of cases.

The behavior of the presiding judge is clearly noticeable dependent upon whether the PP was legally represented in the trial. 43.1% of those victims who were not represented by an agent, were given the opportunity to make a closing speech, whereas only 5.8% of those injured parties who were accompanied by a PP representative, had this opportunity.

PP representatives in cases of negligent physical injuries were given the opportunity to make a final speech particularly frequently, (82.6%) and similarly in two thirds of cases relating to deliberate violent offences and property offences. The presiding judges gave little opportunity to the counsel representing the victims in cases of property offences where violence was involved (28.6%). Only another seven cases were recorded however in respect of the latter. The PP representatives in Vienna, Linz and Innsbruck

were given the opportunity to make a final speech in all court proceedings, and in Graz in contrast, this was the case in only 43% of cases (see Table 10).

In actual fact, the final speech was only made by 2.2% of injured parties (= 5 cases) which is distributed evenly across the groups of offences and court districts (see Tables 11, 12). Male victims spoke out more frequently than females. These cases exlusively concerned injured parties who were not represented by counsel.

The PP representatives took advantage of their opportunity to make a final speech in more than 60% of proceedings. This applied particularly in cases of traffic, property and assaults. In just under a half of the closing speeches, the applications were made with regard to liability. The distinctions arising between the individual courts themselves are very noticeable. For instance, in Linz and Innsbruck around 90% of PPRs made a closing speech, only one third of PPRs in Vienna and Graz.

Apart from the application concerning the decision of a civil legal claim, applications in relation to a concluding speech, were made by PPs merely three times in total (= 1.3%). Two of these were directed at the liability of the offender and one related to the measure of punishment. All three applications were made by PPs not represented by agents.

2.2.1.9 Appeal against Judgement (§ 366 StPO)

It is a condition of the law to be observed, that the victim has to be advised on his right of appeal against civil legal claims in the judgement (§ 366 StPO); the adherence to this obligation to advise by the presiding judge, shall be checked as a precondition.

Detailed instruction regarding the possible rights of appeal took place exclusively in cases of deliberate violent offences and also merely in four cases (= 1.8%). In a further seven cases (= 3.1%) the PPs were formally advised. The rest of the injured parties (95.1%) were not advised of their right to appeal at all (see Table 9). According to the courts districts classified, a total of 10% in Linz and 6.8% in Graz of the PPs were formerly advised, in Vienna and in Innsbruck no such advice regarding rights of appeal were given (see Table 10). No distinction could be established between male and female and likewise legally represented and non represented victims.

As to be expected, there was not a single case of appeal brought by a PP or rather PP representative, against either the civil law decision of the district courts, or against the transferral to civil legal channels (§ 366 Sec. 3 StPO).

2.2.1.10 Further Motions

Only one of the total number of 223 PPs applied for the transfer of the (tape recorder) records of the trial (§ 271 Sec. 6 StPO). He was not represented by an agent.

The representatives of the private participants did not make any such application.

Only a single PP (the same one) applied to receive a copy of the judgement according to § 270 StPO. He was - as already established - not represented by an agent.

PP representatives made such an application on eleven occasions (exclusively in cases of assaults and negligent physical injuries).

According to § 373a StPO, the PP has the right to demand advance payment of the compensation from the government, which has been unappealable awarded to him as a result of a death, physical injury, health or property damage.

There was not a single application in the 624 proceedings examined by us for such advance payment of compensation sums. This can be attributed to the restrictive and particularly complicated formulation of the conditions of such a claim (see *Krainz* 1990), and also to the lack of publicity in respect of this provision.

The PP has the right according to § 20a StGB in cases of confiscation of profits, to demand compensation from the sums of money collected by the government.

This compensation provision is, as a result, not used because according to § 20a StGB, taxation of profit is only possible if the profit reaches a sum of one million shillings. There was no case of such taxation in the 624 criminal proceedings researched by us. Observance of this right of application on the part of the PP, was therefore not possible.

The same right applies to the PP, to demand his compensation from a custody security deposit which is declared to be forfeited (§ 191 Sec. 3 StPO).

Of those proceedings investigated by us, there was not a single case of such forfeiture of deposited money. Therefore such an application was not possible by the PP.

2.2.2 *Safeguarding Rights of Protection*

The protection of one's private spheres by means of a motion to exclude the public and likewise the participation in reliable persons in the main proceedings can most of all be referred to as rights of protection in the trial, alongside the privileges to refuse to give evidence.

2.2.2.1 *Motion to Exclude the Public of the Trial*

The exclusion of the public occurred in total 14 times in the 624 proceedings assessed. These cases concerned exclusively offences against morality. In only one case the exclusion was attributed to the application of the injured party and in this case, the discussion of circumstances within the confidential sphere of the injured party, were presented as the grounds (§ 229 Sec. 2 StPO).

2.2.2.2 *Participation of Reliable Persons*

In cases of exclusion of publicity, the injured party has a right to demand the presence of up to three people within his trust (§ 230 Sec. 2 StPO).

In order for this right to be asserted, the question must be examined as to whether the injured party has been advised of this right itself.

In the 14 proceedings in which publicity of the trial was excluded, only once was an injured party advised about this right (= 7.1%).

Not a single injured party demanded the presence of such reliable persons.

2.2.2.3 *Exercise of the Right to refuse Evidence*

As already mentioned in relation to the preliminary proceedings, the right of relatives of the accused to refuse to give evidence, presents an important opportunity to endanger the private spheres of the injured party and/or also the relationship to the accused by means of avoiding a testimony made under the obligation to tell the truth (mostly incriminating testimonies).

There were a total of 56 injured persons who were relatives of the accused, in the sense of § 152 StPO, § 72 StGB. According to offence categories, relatives in cases of deliberate violent offences (44 cases) and offences against morality (6 cases) appeared as victims of the accused parties most of all.

In order to assess this right of refusal, adherence to the obligation by the presiding judge to advise, must be examined (see Table 13). This showed that the judges observed their legal duty in 86.8% of cases. In 14% however,

grounds of nullity could have been submitted because of the omission of such instruction. Set out according to the court districts, a high instance of cautioning could be established in Linz (100%) and Graz (92.9%), whereas omissions happened more frequently in Innsbruck (83.3%) and most of all in Vienna (75%).

In so far as the observance of the right to refuse to give evidence is concerned, a significant dependance in respect of the fact of the advice could be seen. Whereas the victims of the accused in Linz and Graz (where cautioning regularly took place) refused to give evidence in 64% and 57% of cases, this occurred in Vienna and Innsbruck, where instances of advising the parties took place to a lesser extent - merely in 25% and 41% of cases.

Table 13: Observance of the Relatives' Rights to Refuse Evidence according to § 152 StPO in the Trial - According to Court Districts -

	Vienna abs. %	Linz abs. %	Innsbruck abs. %	Graz abs. %	Total abs. %
Injured party advised by presiding judge	12 75.0	14 100	10 83.3	13 92.9	49 86.8
Injured party refused to give evidence	4 25.0	9 64.3	5 41.7	8 57.1	26 46.4
Injured party expressly gave up refusal	8 50.0	3 21.4	4 33.3	4 28.6	19 33.9
Party made no use of expression	4 25.0	2 14.3	3 25.0	2 14.3	11 19.6
N=	16	14	12	14	56

Multiple responses possible.

From the legal point of view, the second possible response of the injured party can be considered in the clearly expressed renounciation of his right to refuse. This occurred in 20-30% of cases and therefore confirms the above impression that the possibility of an injured party making a decision as to what alternative to take, is improved by the instruction of his right to refuse evidence, i.e. his legal position is prejudiced by the omission. Whereas in Linz and Graz just under 90% of victims showed themselves to be decisive in this respect, only 50% by comparison, in Vienna did so.

Male victims appeared considerably less often as witnesses related to the accused, than females in comparison, and these victims - relatively speaking - made use of their right to refuse evidence less often. Those injured parties represented by agents refused however much less often than those who were represented (12 : 51%). This could on the one hand be attributed to the higher level of instruction given to unrepresented injured parties (96 : 75%). On the other hand the answer may lie in a defence strategy that in cases of victims who are represented by agents, the rate of expressed renounciaton of this right of refusal is higher.

Table 14: Observance of Rights of Protection of those injured during the Trial
- According to Category of Offence -

	I abs. %	II abs. %	III abs. %	IV abs. %	V abs. %	Total abs. %
Application for exclusion of publicity in trial	-	-	-	-	1 7.1	1 0.2
Participation of reliable persons	-	-	-	-	-	-
Refusal to give evidence (§ 153 Sec. 1 StPO)	18 11.0	6 6.2	6 8.2	2 3.8	-	32 8.0
Refusal to give evidence (§ 153 Sec. 2 StPO)	-	-	-	-	1 7.1	1 0.2
N=	164	97	74	53	14	402

I: assaults
II: negligent physical injuries
III: property offences
IV: property offences with violence
V: sexual offences
VI: private prosecution offences
Multiple responses possible.

2.2.2.4 Refusal to give Evidence according to § 53 Sec. 1 StPO

The injured party has the right in the trial proceedings (likewise in the preliminary proceedings) to refuse to give evidence, namely to refuse to answer questions, if such a statement could result in his criminal prosecution, disgrace or significantly prejudice his property rights.

The judge in these cases is admittedly duty bound to make such an instruction as soon as he recognizes criteria for the right to refuse to give evidence, and the omission itself is however not citable as a ground for nullity.

Of the 413 proceedings in which the injured parties took part in the trial, this right of refusal to give evidence was taken up 33 times (= 8%), (see Table 15). As a justification for this - admittedly in all groups of offences - the danger of criminal prosecution was given first and foremost (76%) and disgrace, lack of money and prejudice to property rights were only cited once (= 3%). In six cases (18.2%) no ground was given for the refusal to give evidence. No distinctions could be established between male and female injured parties and likewise parties represented or unrepresented.

Table 15: Observance of legal Rights of Protection of the injured Party during the Trial
- According to Court Districts -

	Vienna abs. %	Linz abs. %	Innsbruck abs. %	Graz abs. %	Total abs. %
Application for exclusion of publicity in trial	-	-	1 1.4	-	1 0.2
Participation of reliable persons	-	-	-	-	-
Refusal to give evidence (§ 153 Sec. 1 StPO)	4 3.9	5 5.2	2 2.0	22 2.0	32 7.7
Refusal to give evidence (§ 153 Sec. 2 StPO)	-	-	-	1 1.9	1 0.2
N=	103	108	100	102	413

Multiple responses possible.

In one case in which no ground had been given for the refusal, the injured party was inspite of this forced to give evidence.

2.2.2.5 *Right of a Witness to Refuse to give Evidence according to § 153 Sec. 2 StPO*

A new opportunity for the privilege of refusing to give evidence was created by the Criminal Law Amendment Act of 1987, for those who have been sexually assaulted. The victims can according to this provision, refuse to answer questions regarding circumstances highly personal to them and likewise also details of the offence itself, a description of which they regard as undiscussable. The victims in such a case, should only be brought to answer, if their testimony is of utmost importance because of the particular significance of the statement. The judge is also duty bound to instruct the victim accordingly- in any case without the penalty of nullity. The presiding judges in Vienna and Innsbruck adhered to this duty in a third of cases and in Graz not at all (no case in Linz). In actual fact, a statement was refused in only one case (= 14%) in which questions regarding highly personal matters were involved. The victim was not forced to make a statement (see Table 15).

3. Summary

The first assessments of the data set out regarding observance of active rights by the PP, and the effectiveness of rights of protection, already point to a number of obvious results.

In relation to active rights in the preliminary proceedings, it can be established that the injured parties contributed to around 60% to the introduction of the proceedings by means of their reports and up to the intermediate proceedings, only 39% of victims adjoined the proceedings as PPS.

The observance of active rights in relation to the PPs, was accordingly low at this stage in the court procedure. Personal evidence was most frequently supplied (13%); motions were scarce (5%) and participation in the questioning never happened.

More than a half of the injured parties in the trial proceedings were at the same also PPs. Victims of offences, where the damage was easily calcuable, i.e. clear cases of property offences, emerged twice as frequently as PPs, in comparison with victims with physical injuries and non-material damages.

Clear distinctions can be recognized with regard to the observance of active rights, between rights relating to the enforcement of civil legal claims, and other rights of partictipation.

The presiding judges as a rule gave the the PPs, opportunity to carry out their civil legal claims. This was most frequently asserted by victims of property offences (75%), less often by those of property offences where violence was involved (60%) or deliberate violent offences (38%). The injured parties of property offences however hardly ever proceeded with their claims.

The courts recognized private legal claims, when a damage was presented (for example mere property offences). Additional investigaton into the level of the damage then took place as well, if this meant that no special expense would be incurred (property offences with and without violence). When the damages were however not merely to property but also personal damages, as a rule, these were adjudicated if the level of the damages was already fixed. In other cases, the claim was either recognized as a fact or merely partly recognized, and transferred to civil legal channels (this was the prevailing practice in Vienna for instance).

The civil legal decision was in 5% of cases simply "forgotten" inspite of the joining as PP.

Another picture is presented in relation to rights of participation.

Of those proceedings researched by us, the PPs hardly ever asserted these rights (max. 5%), (questioning, comments, motions, concluding speech). There were two grounds (alongside others) noticeable in the proceeding: on the one hand, the presiding judge rarely adhered to the duty to instruct the PP with regard to his or her rights and opportunities according to law (max. 7%, almost exclusively in Linz). On the other hand they gave the PPs hardly any opportunity to assert their rights of participation (in max. 10%, Linz was an exception with 35%). The PPs - according to the impressions both observers to proceedings - were partly prevented from active participation by the presiding judge (most of all in Vienna and Graz). The PPs received more opportunity to participate merely in relation to the closing speech (22%, Linz 57%).

One indication of a further reason, why the active rights are not used lies in the fact that the right to carry out such claims in cases of deliberate violent offences and negligent physical injuries, is rarely used although the opportunity in such cases is given quite regularly by the presiding judge.

The instructions were given - although rarely - exclusively to PPs who were not accompanied by counsel in the main proceeding. In cases where the PP was represented by counsel, the presiding judge regarded their obligation to instruct "in so far as this appears to be necessary" no longer to habe been given according to § 47a StPO.

The various "rights of protection" (most of all the right to be advised and the right to refuse to give evidence) were only rarely asserted by the injured party in the preliminary proceedings and likewise in the trial (every 1-2 cases). Instruction took place in 85% of cases in which there was a right to refuse to give evidence for the relatives of the accused and in 15% grounds of nullity which have been given because of this omission.

The presiding judges followed the duty to advise parties in respect of the right to refuse to give evidence, which were not tied up with nullity penalties, in a third of cases. The safety authorities however hardly ever obeyed these obligations. The dependence of the use of these rights from the presiding instruction or advice given proves to be true in Linz and Graz where parties were advised of the right to refuse to give evidence in almost all of the cases and refusals were twice as frequent (64 : 25%) in comparison with Vienna and Innsbruck, where only around 75% of related injured parties were so adivsed.

In general, it can be established that the many forms of active rights and also passive rights of the injured party/PP - apart from assertion of civil legal claims - were, without exception, taken advantage of to a minor extent. We can conclude from the data that the omission to give proper instructions (which is legally prescribed) by the presiding judge, and likewise the rare opportunity given to assert (active) rights, may be as important reasons for this.

4. References

Hanak, G. (1984). Kriminelle Situationen. Zur Ethnographie der Anzeigeerstattung. Kriminologisches Journal, 16, 161-180.

Hanak, G. (1990). Dimensionen des Systemvergleichs: Zivilrecht/Strafrecht. Kriminalsoziologische Bibliographie, 66/67, 41-64

Heinz, W. (1985). Anzeigeverhalten der Bevölkerung. In: G. Kaiser, H.-J. Kerner, F. Sack & H. Schellhoss (Eds.), Kleines Kriminologisches Wörterbuch (pp. 27-32). Heidelberg.

Kaiser, G. (1985). Die Rolle des Opfers als Initiator der Verbrechenskontrolle. In: H. Janssen & H.-J. Kerner (Eds.), Verbrechensopfer, Sozialarbeit und Justiz (pp. 25-43). Bonn.

Krainz, K. (1990). Zur praktischen Bedeutung der Wiedergutmachung in Österreich. In: A. Eser, G. Kaiser & K. Madlener (Eds.), Neue Wege

der Wiedergutmachung im Strafrecht. Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht. Vol. S. 18 (pp. 187-217), Freiburg.

Miklau, R. (1987). Die Stellung des Verletzten im Strafverfahren. In: H.-L. Schreiber & R. Wassermann (Eds.), Gesamtreform des Strafverfahrens (pp. 67-76). Neuwied, Darmstadt.

Probst, K. (1986). Aspekte der privaten Beteiligung am Strafverfahren: Strafrechtliche Probleme der Gegenwart, 14, 237.

Schedlberger, R. (1989). Verbesserungen der Rechtsstellung des Opfers im Strafrechtsänderungsgesetz 1987, Anwaltsblatt, 37, 465-475.

Schima, K. (1981). Das Verbrechensopfer und seine Erforschung. Öffentliche Sicherheit, 1, 36-42.

Schwind, H.-D. (1975). Dunkelfeldforschung in Göttingen 1973/74. Eine Opferbefragung zur Aufhellung des Dunkelfeldes und zur Erforschung der Bestimmungsgründe für die Unterlassung von Strafanzeigen. BKA-Forschungreihe, Vol. 2, Wiesbaden.

Steininger, E. (1990). Wiedergutmachung als dritte Spur neben Strafen und Maßnahmen. Juristische Blätter, 112, 137.

Stephan, E. (1976). Die Stuttgarter Opferbefragung. Eine kriminologisch-viktimologische Analyse zur Erforschung des Dunkelfeldes unter besonderer Berücksichtigung der Einstellung der Bevölkerung zur Kriminalität. BKA-Forschungsreihe, Vol. 3, Wiesbaden.

Villmow, B., & Stephan, E. (1983). Jugendkriminalität in einer Gemeinde. Eine Analyse erfragter Delinquenz und Viktimisierung sowie amtlicher Registrierung. Freiburg.

Law and Practice: Two Faces of Reality

- Victims in the Polish Criminal Justice System

Ewa Bienkowska

Contents

1. Introduction

Poland is one of the countries in which victims of crime enjoy numerous rights, and in which the idea of protecting their interests has been fostered for many years (*Marek* 1989). It is also one of the countries where the international activity on behalf of crime victims provided an additional incentive to increase the national activity carried out in this field (*Bienkowska* 1989). In that connection, the victim situation in Poland is often evaluated as a favorable one, especially against the background of international comparisons (*Joutsen* 1987).

On the other hand, closer analysis cannot produce such an optimistic picture. It concerns not only the law enforcement practice associated with victim problems. Actual legal norms are also at stake. In the second half of the eighties, their development could be characterized by a clear dualism: the undertakings targeted at improving the victim's fate, were accompanied by other ones, being introduced in the areas not associated with the victims' problem at a glance, but actually harmful to their interests. Hence, the danger clearly appeared of implementing the international victims standards merely formally, with none of the real, possible improvements. Moreover, such a danger relates not only to the past; it seems that it is still present. Some symptoms appeared also nowadays in connection with the works over the criminal law reform.

We deal here with very important problems. The aims of improving the victim's position, and implementation of international standards are of particular interest at present in numerous countries. Preventing merely symbolic action in this field is a prerequisite of a successful progress.

2. The Victim's Situation in Theory and in Practice

2.1 Starting Point - Penal Legislation of 1969

The penal legislation of 1969, which is still in force although substantially amended, paid considerable attention to victims of crime.

As far as the **substantive criminal law** is concerned (*Bienkowska* 1986), it took account first of all of their interests in the norms associated with

criminal policy. The basic provision in this regard (Art. 50) states that the court imposing the penalty, should take into consideration the kind and extent of the damage caused by the offence, and the perpetrator's behavior after the commission of the offence. This provision has been consequently developed:

1. The attitude of the perpetrator, especially when he has made efforts to redress the damage or its prevention, may serve as a premise for extraordinary mitigation of penalty (Art. 57);
2. redressing the damage and apologizing to the injured person have been adopted as probationary duties associated with conditional discontinuance of liberty (Art. 35), suspended penalty (Art. 75), and with parole (Art. 94);
3. the possibility to adjudge a punitive financial award for the benefit of the injured person has been provided for in some cases;
4. the supplementary penalty of deprivation of parental or guardianship rights has been associated with the protection of victims (Art. 41), as well as the court order for publication of the sentence for public information (Art. 49).

The **procedural criminal law** in its turn (*Waltos* 1986) has provided victims with quite extensive opportunities for active participation in the criminal proceedings. First of all, prosecuting some offences has been made dependent on their initiative through the introduction of a private accusation mode (Art. 49 et seq.). In some other instances, public prosecution depends on the complaint filed by the injured person (Art. 5). The victim has been granted the status of the party to preparatory proceedings, although some rights resulting from this have been restricted. On the other hand, the victim has been admitted to the trial as a party to the proceedings in case of acting as auxiliary prosecutor, pending however the approval by the court (Art. 45), or as a civil plaintiff who, within the framework of the civil law action in the criminal proceedings, claims damages resulting directly from this crime (Art. 52).

2.2 The Trend of the Seventies and of the Early Eighties - Strengthening the Protection of Victim Interests

The seventies were marked by increased activity on behalf of victims of crime in Poland. This resulted quite clearly from growing interest in this field throughout the world. There was as a result, an overall evaluation of

the system which existed for protecting the interests of victims of crime, as well as a proposal, the first of its kind, to set up a state compensation fund (*Cieslak & Murzynowski* 1974).

A kind of substance of such a fund was also created. In 1974, the After-care Fund (the so-called "Post-penitentiary Assistance Fund") was established. Provision was also made for the injured parties and their families be granted financial support from the Fund. In the same year, the Alimony Fund was created in order to provide assistance for children and others suffering financial troubles owing to the failure to furnish alimony payments, i.e. from the perpetrators of the offence of non-compliance with their alimony obligations.

In the seventies, the Supreme Court tried to effect the enforcement of the norms favorable to victims, as many as three times. In 1971, the Court recommended that the duty to redress damages should be treated as a rule in conditional discontinuance of the proceedings, and in 1979, it extended this recommendation (also embodying the duty to apologize to the injured person) of imposing the penalty of limitation of liberty. In 1976, the Court adopted an overall approach to the series of problems connected with the strengthening of victim protection at the trial stage of the proceedings. In this regard, the Court recommended adopting a proper attitude toward victim-witnesses, the widest possible admission of victims as auxiliary prosecutors, facilitating claiming damages within the framework of criminal proceedings, as well as the widest possible adjudication of punitive awards for the benefit of injured parties, and of restitution.

However, research projects investigating the court practice of enforcing respective norms of the substantive criminal law did not reveal the expected effects of the Court's recommendations. In general terms, the practice of imposing obligations for the benefit of victims of crime was not satisfactory in the seventies (*Bienkowska* 1986). As far as the functioning of the respective procedural institutions is concerned, it is well known only that at the beginning of the seventies, the opportunity to act as auxiliary prosecutor was used to a negligible extent (*Waltos* 1973).

The tendency aimed at making the victim's position much stronger than the one provided for in the penal legislation of 1969, found its expression in the draft amendments to both substantive, and procedural criminal laws, of 1981. It was reflected especially in the proposals aimed at creating an independent legal norm that would constitute a basis for the punitive awards for the benefit of victims of crime, widening opportunities to act as auxiliary

prosecutors and civil plaintiffs, enabling the injured parties to approach the courts with their own charge sheets, or improving their rights in the preparatory proceedings.

2.3 The Discrepancies of 1985 and their Consequences

The first half of the eighties in Poland was a very complicated period from a political and economical viewpoint; its climax was the imposition of martial law, and all the consequences of it. In particular, it enabled the powerful lobby that promoted the revival of the idea of a repressive criminal law as enforced in the seventies, to gain importance. This lobby was successful in promoting the introduction of the so-called "May Laws" of 1985.

The effects produced by those laws turned out to be very serious. On the one hand, the introduction of the special proceedings on a large scale caused the victim to be either deprived in practice of the opportunity of enjoying his/her rights (summary proceedings) or even to be entirely removed from the criminal process (proceedings by writ of payment). On the other hand, due to the priority given to prison sentences to the detriment of alternative measures and the great intensity of financial repression, those laws severely hindered the very possibility of granting and obtaining restitution (*Bienkowska & Skupinski* 1988).

The victim's situation was therefore severely worsened, and this even extended to the legal norms themselves.

At the same time however, the idea of providing victims with assistance was officially promoted. Some actions were undertaken in that regard in the same year (1985). First of all, the Foundation for Assisting Victims of Crime was set up and was intended to serve as a substitute for a state compensation fund. The conditions were very liberal, and provided victims - at least formally - with more opportunities than was the case in other countries. Moreover, the Public Prosecutor General recommended his subordinated public prosecutors to take particular care of victims, and to help them as far as possible during the court proceedings (*Bienkowska* 1989).

The consequences of one of the "May Laws", namely of the Act of Special Penal Liability, turned out to be long-lasting. In spite of the gradual growth of the importance of the followers of a liberal approach, the inclusion of some provisions of this Act in the Code of Criminal Procedure was forced through in the middle of 1988. It concerned the special modes of the

proceedings. At the same time the Penal Law Reform Commission was appointed which stated that one of the basic assumptions of the reform would be an improvement of the protection afforded to victims.

2.4 The Present Reform of Criminal Law - Does it Actually Aim at Safeguarding Victim Interests?

The drafts of the Penal Code and the Code of Criminal Procedure, as presented in the autumn of 1990, may help in answering this question. Unfortunately, it would be difficult to accept the proposals contained in those documents. First of all, it concerns the provisions on restitution, and on punitive awards for the benefit of the victims.

Whilst the Draft Penal Code rightly transforms both, restitution and the award, making them penal measures, it provides at the same time, for a strange way of imposing them. First, imposition of restitution would only take place on the motion of the injured person. However such a motion would not be binding upon the court, which could impose the award instead of restitution and it would be for the victim the only way of acquiring the award. In this respect, the proposals contained in the Draft Code seem to attach greater importance to the "setting" and to the status understood formally, than to the practical possibilities of enjoying such rights more easily and frequently (*Bienkowska* 1990a; *Bienkowska*, forthcoming a). Moreover, the Draft Code of Criminal Procedure maintains the previous rule according to which the injured person who is neither a private or auxiliary prosecutor, nor civil plaintiff does not enjoy the status of the party to the court proceedings. As a result, he/she may neither make a statement before rendering the judgement by the court, nor challenge such a judgement. Generally, the Draft Code is more inclined to limit itself to breaking down certain formal barriers pointed out many times by scholars (*Gronowska* 1989; *Bienkowska* 1990b). The only far-reaching change is the proposal to allow victims the right to prosecute in case of the decision on discontinuance of preparatory proceedings by public prosecutor. It is obviously - at least formally - an important power which is of significance in the area of protecting victim interests.

The question yet arises as to whether - in general terms - the proposed modifications are sufficient, and whether they can positively affect the position of victims of crime. It is to be stressed that the reform of the Polish criminal law has scarcely been based on empirical knowledge of the enforcement of norms intended to serve victims, this, in my opinion, is one of its most important faults.

2.5 What, in Practice, is decisive regarding the Situation of Victims of Crime?

The research projects carried out so far provided most information on the situation of victims of crimes covered by the private accusation mode of the proceedings. The outcome of these research works proved that the approach adopted by law enforcement agencies is not satisfactory, and fails to meet the expectations of victims (*Gaberle & Czapska* 1983; *Fuszara* 1989).

As far as the public prosecution proceedings are concerned, the only conclusion is that the procedural activity of victims is moderate (*Bownik* 1989). Moreover, the introductory sample research on views held by victims which was carried out at the beginning of 1990, provided the grounds for the statement that this mode of proceedings is not satisfactory in so far as victims are concerned. This also applies to private accusation proceedings. The reasons for this are not limited to the statutory limitations of the victim's procedural rights (*Bienkowska*, forthcoming b). Another research project provides us with a more comprehensive picture (*Bienkowska & Erez*, forthcoming).

The project concerned 1,296 victims, i.e. 51% of the sample of 2,451 people selected in a way that provided proper statistical representation from amongst all victims who appeared in cases where final sentences were passed, in the whole territory of Poland in the first half of 1990. The questionnaires mailed to the respondents contained questions concerning social and demographic characteristics of the respondents, types of criminal victimization, previous relations with the offender, procedural activity, and opinions on the criminal justice system from the viewpoint of victim interests.

The majority (80.1%) of the respondents took part in cases conducted according to the public accusation procedure. Their procedural activity was not considerable. About one third (36.4%) of them acted as auxiliary prosecutors, and just one sixth (16.7%) acted as civil plaintiffs. Much more frequently (50.0%) the participants of the private accusation proceedings assumed the role of civil plaintiff. It is notable that the main reason reported by a half of respondents for non-activity as auxiliary prosecutor or civil plaintiff was the lack of any information in relation to such a possibility, and that none of the respondents reported that he/she had not been admitted by the court.

Generally speaking - according to the opinions held by victims - they were not informed sufficiently of their rights: almost half (46.0%) of them

stated that they received no information at all, a quarter (26.3%) that they were only provided with information from time to time, and the remaining quarter (27.7%) alone concluded that they had all the necessary information.

The general evaluation of the criminal justice system from the viewpoint of victim interests was not positive, since the system was evaluated negatively by four fifths (80.2%) of the respondents. This evaluation concerned both modes of the proceedings, although the private accusation was assessed to be slightly better: it was evaluated positively by a quarter (23.7%), while the other was evaluated positively by one fifth (19.0%) of the respondents taking part in the respective procedures.

Amongst the factors that affected the victim's opinion, the element of acquiring - regardless of the source - compensation of damages or injuries resulting from crime played an important role. The percentage of victims who evaluated the system negatively was highest (86.3%) among those who did not receive compensation, almost equal (84.2%) within the group of those who received compensation in part, and clearly lower (56.2%) among those who were fully compensated (differences statistically significant: chi-square 15.557, df=2, $p < .001$).

A similarly important factor was the satisfaction with penalties imposed on the offenders. The majority (58.1%) of victims who evaluated the system positively were satisfied with sentencing, wheras the majority (69.0%) of victims evaluating it negatively were not satisfied (differences statistically significant: chi-square 32.277, df=2, $p < .001$).

Also important in this regard was, how the victims evaluated the possible impact of their statements in the proceedings upon sentencing. Disappointment caused by sentencing which fell short of expectations was associated first of all with the negative evaluations (93.4%) of the system, whereas among the victims who were not disappointed in this way, the percentage of negative evaluations (46.9%) was halved (differences statistically significant: chi-square 30.949, df=1, $p < .001$).

Direct contact with the criminal justice system changed opinions held by many victims. The belief that the system was worse, appeared most frequently (88.4%). This factor was also of significance as far as the general evaluation of the degree to which the interests of victims were protected are concerned. Namely, the highest (97.0%) percentage of the respondents who expressed their negative opinions about the system appeared among those who came to the conclusion that it was worse than expected, clearly lower (65.8%) - among those who did not change their opinions, and the lowest

(52.9%) - among those who described the system as being better than expected (differences statistically significant: chi-square 36.958, d=2, $p < .001$).

3. Discussion and Conclusion

The analysis of the development and functioning of the Polish legal system which to some extent concerns victims of crime as described above, precipitates a number of thoughts, particularly concerning the criminal policy.

Polish society after World War II, was being educated in the spirit of punitiveness, and unfaltering support for prison sentences, since penal law was being used as an instrument to exert political pressure and to combat political opposition. Criminal law also served as the most impressive piece of evidence of carrying out crime control projects. The most recent example is the "May Laws" of 1985. In this connection, respective propagandistic actions were performed. Hence, it is not surprising that Polish society is characterized by rigorous attitudes, and that the majority of victims associate their negative feelings towards the criminal justice system with the penalties which they feel are unreasonably lenient.

At the same time, the criminal justice machine focuses its energy - in the opinions of the victims - on extenuating the offender. Victims feel that they are completely dispensable, and frequently offended, since the defence of perpetrators is often conducted at their expense. The most flagrant evidence is the lack of due care on the part of prosecution agencies in the area of providing victims with information on their rights - despite the clear duty in to do so, contained in Art. 10 of the Code of Criminal Procedure. This finding is most surprising, since the reason for passiveness on the part of the victim turned out to be the failure to comply with the duty of providing them with adequate information on procedural opportunities, and not the statutory barriers as might be expected.

The victims are treated in the criminal proceedings as objects in spite of the fact that the law grants them quite numerous rights. Improvement of their situation may therefore be achieved - not only by breaking down certain statutory barriers which impede the practical opportunity to exercise those rights, but by treating them as subjects.

It seems that one of the ways of achieving this goal would be changing the criminal policy from one which is penalty-oriented to one which is restitution-oriented. The way in which a restitution is regulated is therefore

of particular importance, the more so that the factor is at stake which is co-decisive as far as the degree of satisfaction of the victim with the final result of the criminal proceedings is concerned.

On the other hand, an important role might be attached to granting the victim full legal status as party to both, the preparatory proceedings and the trial. This would prevent the victim feeling neglected, and would prevent any abuse of the victim during the course of defending the offender. It would not clearly infringe upon the rights of the offender since the restitution-oriented criminal policy would be - as it seems - more rational, and as such - easier to be accepted, because of its consistency with common beliefs that each injustice or damage should be redressed *(Bienkowska*, forthcoming c).

The considerations presented above lead to the following final conclusion: In order to actually improve the fate of victims of crime, it is not enough just to promulgate such an idea, or merely implement it formally. It is not enough to create theoretical guarantees of such an idea alone without learning about, and paying attention to its practical consequences. In particular, merely taking care of the superficial attributes of individual legal solutions intended to serve victim needs, seems to be a serious mistake. The importance and role of such solutions are determined by their contents.

4. Summary

An account of the development of legislation and activities supporting victims of crime in Poland, during the period 1970-1990 has been presented in this paper, as well as of the law enforcement practice. Poland is one of the countries which pays much attention to victims of crime. In the mid-eighties, however, the idea of improving their fate was restrained. The legal provisions which were introduced, contained norms both favorable to victims of crime and prejudiced their interests at the same time. The inconsistency also appears nowadays, and affects the work in respect of penal law reform. It seems that more stress is being put on the formal status of some institutions in the course of those works than on the actual improvements which would extend opportunities favourable to victims. Poor knowledge of the practical consequences of the legal provisions now in force also undermine any possible beneficial effects of these works. As a result, those very legal barriers would be broken down which were identified in course of theoretical analyses. It turned out that they are not important, as far as the practical determinants of the victim's situation are concerned. An actual improvement would require bringing about many more far-reaching changes.

5. References

Bienkowska, E. (1986). Der Schutz der Interessen des Verletzten (bei natürlichen Personen) im Lichte der Vorschriften des polnischen materiellen Strafrechts sowie der Tätigkeit des Staates zugunsten der Opfer von Straftaten. In: A. Eser, G. Kaiser & E. Weigend (Eds.), Zweites deutsch-polnisches Kolloquium über Strafrecht und Kriminologie. Rechtfertigung und Entschuldigung, Schwangerschaftsabbruch, Gewaltkriminalität, Stellung des Verletzten (pp. 389-423). Baden-Baden: Nomos.

Bienkowska, E. (1989). Declaration of basic principles of justice for victims of crime and abuse of power - the Polish experience. In: Changing victim policy: the United Nations Victim Declaration and recent developments in Europe (pp. 46-67). Helsinki: HEUNI No.16.

Bienkowska, E. (1990a). Standardy europejskie w odniesieniu do ofiar przestepstw a reforma prawa karnego materialnego. Panstwo i Prawo, 6, 93-101.

Bienkowska, E. (1990b). Sytuacja pokrzywdzonego (osolfizycznej) w polskim procesie karnym na tle posnowien Deklaracji ONZ o podstawowych zasadach sprawiedliwosci dla ofiar przestepstw i naduzyc wladzy. Przeglad Prawa Karnego, 1, 76-86.

Bienkowska, E. (forthcoming a). Protection of rights of victims of crime in Poland: When do we really assist them? Annales Internationales de Criminologie.

Bienkowska, E. (forthcoming b). Victims of crime in the Polish criminal procedure (The basic findings of interviewing a sample of victims of crime). World Society of Victimology Newsletter.

Bienkowska, E. (forthcoming c). Kilka refleksji o reformie prawa karnego na tle wynikow badania ankietowego ofiar przestepstw. Panstwo i Prawo.

Bienkowska, E., & Erez, E. (forthcoming). Victims in the Polish criminal justice system: Law and reality. International Journal of Comparative and Applied Criminal Justice.

Bienkowska, E., & Skupinski, J. (1988). Ustawy karne z 10 maja 1985 r. w praktyce (Na przykladzie orcznictwa sadow rejonowych). Panstwo i Prawo, 2, 72-82.

Bownik, S.J. (1989). Niektere zagadnienia zwiazane zochrona pokrzywdzonego w swietle badan empirycznych. Problemy Praworzadnosci, 10, 32-40.

Cieslak, M., & Murzynowski, A. (1974). Wynagrodzenieskzody osobie pokrzywdzonej przestepstwem i jegznaczenie w sferze prawa karnego. Studia Prawnicze, 2, 63-92.

Fuszara, N. (1989). Codzienne konflikty i odswietna sprawiedliwosc. Warszawa: Uniwersytet Warszawski.

Gaberle, A., & Czapska, J. (1983). Postepowanie w sprawach z oskarzenia prywatnego. Wroclaw: Ossolineum.

Gronowska, B. (1989). Ochrona uprawnien pokrzywdzonego w postepowaniu przygotowawczym. Zagadnienia karnoprocesowe i wiktymologiczne. Torun: Uniwersytet Mikolaja Kopernika.

Joutsen, M. (1987). The role of the victim of crime in European criminal justice systems. A cross-national study of the role of the victim. Helsinki: HEUNI No.11.

Marek. A. (1989). Protection and assistance to crime victims in the socialist countries of Europe: A comparative approach in outline. EuroCriminology, 2, 101-110.

Waltos, S. (1973). Oskarzyciel posilkowy w praktyce sadowej (na podstawie praktyki sadow krakowskich). Panstwo i Prawo, 10, 107-118.

Waltos, S. (1986). Zur Problematik der Beteiligung des Verletzten am Strafverfahren in Polen. In: A. Eser, G. Kaiser & E. Weigend (Eds.), Zweites deutsch-polnisches Kolloquium über Strafrecht und Kriminologie. Rechtfertigung und Entschuldigung, Schwangerschaftsabbruch, Gewaltkriminalität, Stellung des Verletzten (pp. 363-388). Baden-Baden: Nomos.

Victim Participation in Sentencing, Sentence Outcome and Victim's Welfare

Edna Erez

Contents

The last two decades have been marked by a revival of interest in victims of crime. This renewed interest in the "forgotten persons" in criminal justice is the combined result of several factors: public concern about increasing crime rates coupled with frustration over law-enforcement efforts to reduce crime; the emergence and organization of special subgroups of victims, particularly women, who have called political attention to the problems of domestic violence and sexual assault; victim associations that have stirred media interest by demanding more effective redress, protection, and justice for victims while pointing to two decades of disproportionate concern over and apparent improvement in the rights of offenders (*Goldstein* 1982; *Lamborn* 1985; *Waller* 1983), and empirical and clinical research which has demonstrated that suffering from victimization is not limited to physical and economic loss but also includes short- and long-term psychological distress (e.g. *Bard & Sangrey* 1986; *Cook et al.* 1987).

The discovery of the victim's plight, and the detailed and disturbing descriptions of secondary victimization - the wounds suffered by crime victims when they come in contact with the criminal justice system as complainants or witnesses - were followed by a wave of legislative action. Various state and federal laws mandated programs and services for victims to alleviate the suffering from both from the crime and from the criminal justice process. Research evaluating the instituted programs and the services provided, and studies that addressed victims' concerns and attitudes gradually appeared.

The most consistent finding to emerge from studies of victims' attitudes toward the criminal justice process was their frustration with and alienation from the system (*Forst & Hernon* 1985; *Hagan* 1982; *Kelly* 1984a; 1984b; *Knudten et al.* 1976; *Shapland et al.* 1985). These studies have suggested that victims' grievances are more with the procedures of the criminal justice system, particularly their lack of involvement and "standing" in the decisionmaking process (*Welling* 1988), than with the supposed injustice of the outcome.

These findings have led to demands to bring the victims back into the process and provide them with the right to be heard concerning the impact of the crime on their lives and with an opportunity to voice their concerns and express their wishes regarding the offender's disposition. In most states and in the federal system this right has been granted and has become known as the victim impact statement.

This article examines the development of the concept of victim impact statement, its rationale, and its various forms. It then examines the arguments for including the victim in the criminal justice process and the

objections to it. As the central concerns in this debate revolve around the impact of victim input on sentence outcome, on victim distress and satisfaction with justice, particular attention will be given to recent evidence on these issues. The article concludes with the implications of victim participation in sentencing for the justice system and the victim movement's goals.

1. The Need for Victim Participation in Sentencing and Legislative Responses

The historical evolution of the penal system and the decline in the penological importance of the victim (see *Schafer* 1968) resulted in a criminal justice process in which victims play only a secondary role. They report crimes to officials who decide whether to prosecute the case or what type of punishment to request. In court proceedings the victim is an observer or, at best, a witness.

The separation of the victim from the criminal justice process has meant that the civil action for damages has been split off from the criminal prosecution and that a fine, if ordered, is paid to the state. Private prosecution by victims has been virtually abandoned in the United States, and the prosecutor has been given a monopoly over the criminal process (*Goldstein* 1982; *Sebba* 1982). The victim is presumably represented by the prosecutor, who is supposed to pursue the victim's interest.

This combined change in the concept of crime and administration of justice has resulted in a host of economic and psychological problems for victims and, most importantly, in perceptions of injustice. A national movement concerned with ameliorating the victims' plight and providing them with various rights has emerged (*Hudson* 1984; *Smith* 1985; *Erez*, forthcoming). Initially the movement's efforts to achieve reform focused on the economic difficulties resulting from the crime. Programs for compensation from the state and restitution from the offender were instituted in most states to alleviate the financial difficulties associated with the victimization (*U.S. Department of Justice* 1983; *Galaway* 1988). Psychological counseling and other services to treat the distress resulting from the crime were also provided (*McGuire* 1987; *Smith* 1985). As the process has continued, the battle for victims' rights has expanded into areas beyond its initial focus and has recently centered on victims' reintegration into the criminal justice process (*Erez*, forthcoming; *Goldstein* 1982; *Kelly* 1987, *Rubel* 1986; *Posner* 1984).

The demand for increased victim participation in the sentencing process was the result of studies that documented victims' alienation from the system. Studies of victims before the law consistently demonstrated their frustration and disillusion with the criminal justice system. Complaints about delays, unnecessary continuances, uncomfortable waiting rooms, risk of intimidation by offenders, and insensitive criminal justice practitioners were routinely associated with victims' experiences of the criminal justice process (*Elias* 1984; *Kelly* 1984a; 1984b; *Knudten et al.* 1976). But the most important grievance mentioned by victims was their lack of "standing" and voice in the proceedings. As one victim expressed it, "why didn't anyone consult me? I was the one who was kidnapped, not the state of Virginia". (*President's Task Force on Victims of Crime* 1982, p. 9).

The presumption that the prosecutor represents the victim is contradicted by many victims' experiences. The exclusion of the victim from the criminal justice proceedings (except for the initial complaint to the police) is evident in several stages of the process. The victim currently plays no formal role in the decision to charge or refuse to charge (*Wainstein* 1988), and the courts are reluctant to review prosecutors' charging decisions (*Welling* 1988). The victim has no power to compel prosecution of the crime, neither "standing" to contest decisions to dismiss or reduce charges, or to plea bargain, nor can the victim challenge the sentence imposed on the offender (*Hall* 1975; *Welling* 1988). If the public interest comes into conflict with that of the victim, the former prevails. Public-interest considerations often have nothing to do with the strength of the victim's case or the level of injury he or she sustained. Issues such as the defendant's utility as a state witness in another case, correctional concerns related to the offender, or the priority given to a certain type of offense may determine whether or not a defendant will be prosecuted (*Goldstein* 1982).

Feelings of alienation develop as victims realize that their requests for involvement are consistently denied and their opinions and concerns are ignored. Furthermore, in many cases victims are never informed about the status of the case or its outcome. The prosecutor need not tell them why a charge has been reduced or a plea bargained.The courts also view victims as witnesses, while victims perceive themselves as parties (*Rubel* 1986). Victims often have the misconception that being the victim in a particular case makes it "their case" (*Young* 1987, p. 56). It is difficult for victims to understand that they are not a party to the trial of their offenders and that they have no control over the process (*Kelly* 1984b; *Young* 1987).

This collective experience of victims has led to a perception that the criminal law is unresponsive (*Goldstein* 1982). The lack of a formally recognized role for victims, and their corresponding inability to voice their

feelings or concerns have been identified as a crucial matter for victims' satisfaction with justice. Demands have been made for reintegrating victims into the criminal process or, minimally, of providing them with a mechanism for voicing their concerns and wishes concerning the crime and the disposition of the offender. These needs have been aptly expressed by the *President's Task Force on Victims of Crime* (1982, pp. 76-77), which asserted that

> (v)ictims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized...

Because of strong disincentives for court officials to consider victims' interests (*Chelimsky* 1981; *Davis* 1983), and results of experimentation which indicate that prosecutors do not convey victims' concerns to court officials (*Davis et al.* 1984), it has been argued that programmatic action alone may not be sufficient to bring about change, and that only legislative action mandating victims' rights to express their opinions directly to the judges will ensure that their wishes become known (*Davis et al.* 1984). To guarantee that such legislation will be both, introduced and effective, the *President's Task Force on Victims of Crime* has proposed an amendment to the Constitution concerning victims' rights to be heard. It would add the following sentence to the Sixth Amendment: "Likewise, the victim in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings" (*President's Task Force on Victims of Crime* 1982, p. 114). The supporting argument in the commentary is that "the victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed" (p. 114). The *Task Force Report* concludes that an amendment of the Constitution is required to redress this oppression and that "the fundamental rights of innocent citizens cannot be adequately preserved by any less decisive action" (pp. 114-115).

In response to demands for increased victim participation in the criminal justice process, and the belief that victim involvement may prove beneficial to the criminal justice system without diminishing defendants' rights or increasing criminal-justice-system costs, several avenues of victim participation recommended by the *President's Task Force Report on Victims of Crime* (1982) have been adopted by various states and the federal government. Although victims' participation may extend to all stages of the

criminal justice process, from arrest to the postsentencing correctional decisions, (see *Hall* 1975; *Sebba* 1982), the changes adopted in the United States pertain mostly to the sentencing and correctional (primarily parole) stages. With the widespread practice of plea bargaining (about 90% of felony cases, *Kamisar, LaFave & Israel* 1980, p. 1222), a few states have extended the participatory right to plea negotiations. The changes also include notification programs aimed at keeping victims informed concerning the status of the offender's case and its outcome. Few states have amended their constitutions to include victim rights articles (*Lamborn* 1987).

The most important legislative reform in the area of victims' rights has been the integration of victims in the sentencing stage through the use of victim impact statements (*McLeod* 1986). Victim impact statements (VIS) are statements made by the victim and addressed to the judge for consideration in sentencing. They usually include a description of the harm in terms of financial, social, psychological, and physical consequences of the crime. In some jurisdictions VIS also include a statement concerning the victim's feelings about the crime, the offender, and a proposed sentence (*Hoffmann* 1983; *McLeod* 1986), referred to as the victim statement of opinion.

Generally, two models express the current possibilities for victims' involvement in the sentencing process. The first model requires or allows the preparation of a written VIS that is introduced at the sentencing hearing, typically as an attachment to the presentence report. The second model expands on the first by granting the victim the right to allocution - a form of speech - at the time of the sentencing (*McLeod* 1986, pp. 503-504). The party responsible for preparing the victim impact information varies, ranging from probation departments, to prosecutors' offices, to victim service agencies. Victim impact statements also differ in content and form, ranging from simple checklists in some states, to lengthy descriptive statements, both oral and written, in others (*McLeod* 1988). As of 1987, 48 states had provisions authorizing some form of victim participation in conjunction with sentence imposition (*McLeod* 1988, p. 3), and the federal government has implemented this right in the 1982 Omnibus Victim and Witness Protection Act and the Victims of Crime Act of 1984.

2. Arguments Concerning Victim Participation in Sentencing

Supporters of the victim's right to participate in sentencing have presented various moral, penological and practical arguments in its favor. Some argue that the effectiveness of the sentencing - the public condemnation for the crime - may be increased if the victim conveys his or her feelings (*Rubel*

1986; *Young* 1987). Victim participation will render the process more democratic and reflective of the community's response to crime while recognizing the victim's wishes for party status (*Forer* 1980) and individual dignity (*Henderson* 1985, pp. 1003-1005). It will also increase the victim's cooperation with the criminal justice system (*Davis* 1983; *Goldstein* 1982) thereby enhancing system efficiency (*McLeod* 1986). The provision of information about the harm suffered by the victim will increase proportionality and accuracy in sentencing (*The President's Task Force on Victims of Crime* 1982; *Rubel* 1986; *Lamborn* 1987), thus promoting the "fairness" component of the "just deserts" model of justice (*Fogel* 1975; *Sebba* 1985), and remind "judges, juries, and prosecutors that behind the "State" is a real person with an interest in how the case is resolved" (*Kelly* 1987, p. 76). Victim involvement and the opportunity to voice their feelings are also necessary for reduction in victims' distress and feelings of inequality relative to the offender (*Kilpatrick & Otto* 1987; *Hammer* 1989), and for their satisfaction with justice, psychological healing and restoration (*Erez* 1989a; 1990). Fairness also dictates that "when the court hears, as it may, from the offender, his or her lawyer, family and friends, the person who has borne the brunt of the offender's crime should also be allowed to speak" (*Sumner* 1987, p. 204). Lastly, some argue that victim participation may advance the various goals of sentencing: Retribution is enhanced when the extent of the harm caused to the victim is disclosed so that the punishment meted out can be measured against the level of harm caused. Victim participation enhances deterrence because it increases the prosecutorial efficiency, which in turn increases the certainty of sanction. Incapacitation is advanced if the victim has a special knowledge about the defendant's potential for future criminal activity. Victim participation might also promote rehabilitation as the offender confronts the reality of the harm he or she caused to the victim (*Talbert* 1988, pp. 211-219).

The objections to victims' input in sentencing center mostly on legal arguments concerning the appearance of justice and actual justice, and on some practical concerns. Some argue that allowing the victims input will undermine the court's insulation from unacceptable public pressures (*Rubel* 1986). Others are concerned about the possibility of an increase in sentencing disparity and arbitrariness if victims are included in the sentencing process (*Hall* 1975; *Ranish & Shichor* 1985). The latter argument was one of the rationales for rejecting the use of victim impact statements in capital cases (Booth v. Maryland, 1987). Prosecutors object to victim participation in sentencing because they fear that their control over the cases will be eroded and the predictability of outcomes reduced (*Davis et al.* 1984). Defense lawyers naturally view increased victim involvement as hindering the defense (*Davis et al.* 1984; *Henderson* 1985). Concerns over delays and

additional expenses for an already overburdened system if victims are allowed to participate are also mentioned (*Carrington & Younger* 1979). Some further argue that victim input would add very little useful or novel information which is not already available to the court (*Carrington & Younger* 1979; *Mosk* 1978). Others are concerned that victims' "recognition" may not be realized because practical and other considerations may prevent judges from implementing victims' wishes.

The major objections to victim input, however, are based on ideological grounds. Opponents of the participatory right express the concern that rights gained by the victims are rights lost to the defendant, and that bringing the victim back into the process means a reversion to the retributive, repressive, and vengeful punishment of an earlier age (*Sebba* 1985). These reforms would shift the primary goal of criminal justice administration from meeting the concerns of the state to meeting those of the private individual, thereby returning criminal prosecution to the days when it was little more than a branch of tort law (*Abrahamson* 1985). The victim's desire for understanding and social support, it is argued, is transformed into a criticism of the offender's "advantageous" status in the criminal justice process (*Fattah* 1986; *Kosaki* 1990). Some argue further that victims' anguish has been exploited or mistranslated into support for the conservative ideology (*Henderson* 1985). The demands for "law and order" have been used to produce a structure of criminal law and procedure that closely resembles the "crime control model" so antithetical to liberal thought (*Henderson* 1985; *Viano* 1987), and bringing the victim back into the process is seen as another attempt to accomplish the goal of harsher punishment (*Henderson* 1985). *The American Bar Association* (1983), in a discussion of victim/witness legislation, concludes that on the average victim impact statements will most likely result in stiffer sentences.

With regard to victims' welfare, some have suggested that one of the dangers resulting from the victims' movement and victim advocacy is "to create expectations among crime victims that are not or could not be met" (*Fattah* 1986, p. 11). Opponents of victim participation in the criminal justice process have argued that instituting formal procedures for victims' input may be counterproductive: the opportunity for input in sentencing may create or heighten the expectation that this input will be considered in sentencing decisions. Because judges are sometimes precluded from considering a victim's request, those who realize that their opinions are unimportant or are ignored may become embittered and resentful (*Henderson* 1985, p. 1006). The experience with compensation programs provides some support for the argument that when victims are led to believe that they will receive a benefit, their satisfaction with justice is decreased if these expec-

tations are not fulfilled (*Elias* 1984). Others are concerned that allowing victim imput will aggravate victims' psychological well-being as they relive the crime experience (*Kilpatrick & Otto* 1987).

3. Sentence Outcome, Satisfaction with Justice and Victims' Distress

Research has not confirmed many of the fears expressed by those who object to increasing victims' participation in sentencing. Victims have not been found to be more punitive than the general public (*Hough & Moxon* 1985; *Boers & Sessar* 1990), and they usually do not request the maximum penalty (e.g., *McDonald* 1982; *Smale & Spickenheuer* 1979; *Erez* 1989a). A study examining the content of victim impact statements has found that only one-third of victims in felony cases request that the offender be incarcerated (*Erez & Tontodonato* 1990). Further, in a study on the desires of assault victims, a fairly large proportion of victims wanted help or counseling rather than punishment for their assailants, even in cases where the assailant was a stranger (*Kosaki* 1984). Although studies of victims' evaluation of justice have indicated that most victims think offenders are not punished enough, these feelings also characterize the general public. A recent national punishment survey found that "public attitudes tend to be more punitive than actual practice" (*Zimmermann et al.* 1988, p. 120). Despite perceptions of courts' leniency, only about one-third of victims view harsher sentences as a consideration in improving victims' relations with the court (*Erez* 1989a; *Forst & Hernon* 1985).

The "retributive" element in some victims' opinions about sentencing may reflect their lack of knowledge about alternative dispositions. When victims recommend imprisonment, they usually do so because they are not aware of any other options, such as community service, treatment disposition, or even restitution (*Henderson & Gitchoff* 1981). Victims also tend to accept recommendations for disposition made by prosecutors (*Heinz & Kerstetter* 1979) or even by experts hired by the defense attorney (*Henderson & Gitchoff* 1981). Better information on the criminal justice process for victims is often as important a factor for a positive evaluation of the criminal justice system as harsher sentences (*Forst & Hernon* 1985). Keeping victims informed and updated about the case not only gives them a sense of control (*Bard & Sangrey* 1986) but also acknowledges victims as the aggrieved party (*McLeod* 1986).

Research also indicates that including the victims in the criminal justice process does not usually cause delays or additional expenses (*McDonald* 1982; *Hudson* 1984; *Forst & Hernon* 1985) and may sometimes result in quicker disposition of the case (*Heinz & Kerstetter* 1979). Although some prosecutors in one study reported logistic and procedural difficulties in acquiring victim impact statements, they generally viewed victim input in a positive light (*Henley et al.*, forthcoming). This opinion was shared by judges (*Henley et al.*, forthcoming). Further, most judges and prosecutors in another study (*Hillenbrand & Smith* 1989) thought that victims' input in the form of VIS improved the quality of justice by influencing restitution rewards and sentence type and length. Very few officials believed that victims' input created or exacerbated problems.

Although most court officials feel that victims' input is important for sentencing decisions and desirable (*Hillenbrand & Smith* 1989), research has shown that in practice little is done to inform victims about their right for input or to elicit this information (*Villmoare & Neto* 1987; *Kilpatrick et al.* 1989; *Henley et al.*, forthcoming; *Erez* 1989a). One study found that less than half of the victims are aware of their right to allocution (*Villmoare & Neto* 1987) and very few victims (about 6%-8%) exercise this right (*McLeod* 1987; *Erez & Tontodonato* 1990). Another study (*Erez* 1989a) reported that about fifth of the victims did not know what a victim impact statement is, and the same proportion of victims claimed that they did not fill out a victim impact statement whereas in reality they had. *Kilpatrick et al.* (1989) found that while judges estimated that they received a written VIS in most of the cases over which they presided, few victims reported having been asked to make a statement, and VIS were found to be present in only 8-15% of court files. *Hillenbrand* and *Smith* (1989) found that only about one fourth of the victims were given the opportunity to make an impact statement. This failure to elicit the information for VIS may be explained by the fact that many prosecutors and judges feel that victim impact statements seldom or never contain novel or more detailed information than they would have had otherwise, or because prosecutors are skeptical about the extent to which judges consider victims' input in sentencing decisions (*Henley et al.*, forthcoming). Practical problems associated with bringing victims for the interview may also explain the low percentage of VIS in court files (*Henley et al.*, forthcoming).

The research on the impact of victim input on sentence outcome indicates that victim participation has only a limited effect on the sentence. *Walsh's* (1986) research on the participation of Ohio rape victims in sentencing via victim impact statements suggests that the court was most likely to recognise the desires of the victim when they were consistent with the courts' own

view of an appropriate sentence. Further, the court was likely to ignore the victim's wishes concerning the sentence where the victim expressed a desire for probation rather than imprisonment. The study by *Erez* and *Tontodonato* (1990) on the effect of victims' input in the form of victim impact statements and the victims' allocution right suggests that these two avenues of victim's input differ in their impact on the sentence. In examining 500 felonies in which an offender was sentenced, *Erez* and *Tontodonato* (1990) found that victim retributiveness or requests for incarceration do not influence the court's choice of sentence when all relevant factors are taken into consideration. The decision whether to grant probation or impose a prison sentence is explained primarily by legal considerations, such as the severity of the offense, or prior conviction. This study, however, found that the presence of a victim impact statement in the file does influence the likelihood of prison sentence. Thus, the details of the crime and its impact on the victim, rather than victims' specific retributive requests, influence the likelihood of a probation sentence. A recent survey of judges concerning the effect of VIS confirms that judges designate "objective" information (e.g. the physical and financial impact of the crime) to be more useful in sentencing decisions than "subjective" types of information (e.g. social effects), and particularly the victim's opinion of the sentence (*Hillenbrand & Smith* 1989, p. 80). Once a prison sentence is imposed, the victim impact statement does not significantly affect the length of prison sentence (*Erez & Tontodonato* 1990). Lastly, victim presence in the court during sentencing, but not exercising the allocution right (i.e. speaking at the time of sentencing), also had some effect on the length of prison sentence. Typically, those victims who come to the sentencing hearing tend to be involved at many phases of the trial process, thus providing a constant reminder to the judge of the severity of the crime and the pain suffered by the victim (*Erez & Tontodonato* 1990, p. 468).

The finding of no effect of the allocution right is consistent with prior research on this issue (*Villmoare & Neto* 1987) which notes the possible reasons for it: "...by the time the victim comes to the court, a well prepared probation report having been reviewed by a well prepared judge leaves little reason for modification of an intended decision. A victim's emotional appeal to the court cannot carry more weight in place of facts and criteria" (*Villmoare & Neto* 1987, p. 37). The sentencing stage is ritualistic in nature and input at this point is not likely to be considered, as the decision has already been made (*Erez & Tontodonato* 1990). In this sense, the victim allocution right only constitutes a symbolic aspect of the integration of the victim in the process, whereas the opportunity for a written input (such as VIS) is a more realistic and efficient approach to enable the victim to influence the sentencing decision (*Erez & Tontodonato* 1990).

Research on the effect of victim participation in the process on satisfaction with justice is scarce, and most of the studies conducted do not examine participation through victim impact statements or the victim's allocution right. *Hagan's* (1982) study in Canada found that victims were more likely to believe that sentences imposed were "about right" after participation. He therefore concluded that victim participation can increase satisfaction of victims without introducing much change in the process. However, participation in this study was measured by the victim's physical presence in proceedings and the amount of interaction they had with various court functionaries. *Hammer's* (1989) study has examined outcome satisfaction of victims by comparing various modes of processes and outcomes (dismissals, jury trials and plea bargained sentences) which in turn allow for differential degrees of victim participation. His study suggests that "process control", or victim participation, is associated with satisfaction with the outcome. This study, however, did not address participation through VIS or the use of the allocution right.

Erez's (1989a) study examined the effect of victim participation via victim impact statement and victim allocution on satisfaction with justice. A distinction was made between outcome and process satisfaction. In accordance with procedural justice theory (e.g. *Tyler* 1988), "control" or "representation", measured by the filing of victim impact statement, was associated with satisfaction with the outcome (sentence). The study, however, suggests that filing VIS may raise victims' expectations to influence the outcome, and when victims feel that their input had no effect on the outcome, their satisfaction with the sentence is decreased. This unintended effect of raising victims' expectations was also reported as a problem in a recent survey of court officials (*Hillenbrand & Smith* 1989). Satisfaction with the criminal justice process as a whole was not found to be influenced by whether victims had input in the form of VIS (*Erez* 1989a).

The effect of participation through VIS on victims' distress was examined by *Erez* (1989b). The study suggests that, in accordance with equity theory, victims' distress level is influenced by the perceived severity of the sentence and by whether they received restitution. If the offender's sentence is perceived as fair, or if the victim received restitution - two factors that best reflect victim perception of equity vis-à-vis the offender - distress is reduced. Similarly, *Hammer's* (1989) study suggests that perceived fairness (equity) of the sentence influences victims' recovery. "Process control" through written input was not found to have an effect on victims'distress level (*Erez* 1989b).

Although victims' distress is not directly influenced by aspects of procedural justice such as written or oral statements, input in the form of VIS is

nonetheless important for victims'distress, as it has some effect on the severity or type of sentence imposed on the offender (*Erez & Tontodonato* 1990) which in turn influences perception of equity by the victim.

4. Conclusion

Victim participation in sentencing and its impact on sentence outcome and victims' welfare need to be examined in the context in which they are practiced.

The research on the implementation of victims'rights for input highlights the ambivalence court officials feel towards these rights. Despite the fact that prosecutors and judges are sympathetic to victims, this sympathy is not translated into enthusiastic endorsement and implementation of their rights. Organizational hurdles, coupled with resentment or fear about the potential impact of victim participation on the discretion and power of court functionaries, and doubts about the need for such input, result in a minimal participation of victims. As long as practitioners only pay lip service to integrating victims in sentencing, the impact of victims' input on sentence outcome and victim satisfaction with justice will continue to be miniscule and insignificant. To improve the implementation of these rights and induce officials to change their behaviour, it is necessary to generate incentives strong enough to overcome a tendency to preserve the status quo (*Henley et al.*, forthcoming) and undo the advantages court officials often have in excluding victims from proceedings (*Davis* 1983; *Davis et al.* 1984).

The results of the recent studies on the effect of victim participation in sentencing on sentence outcome and on victims' distress and satisfaction with justice may provide such an incentive. These studies suggest that victim participation or input may result in increased satisfaction with the outcome. It may also indirectly reduce victim's distress through influencing the punishment so that it is perceived as fair by the victim. Victim integration in the process is thus crucial for both procedural and substantive justice. For the former it provides a critical component for satisfaction with justice, "the opportunity to present the case to the authorities before decisions are made" (*Tyler* 1988, p. 11). For the latter, it elicits information that helps decision-makers arrive at better decisions (*Talbert* 1988; *Erez & Tontodonato* 1990).

The findings concerning the effect of victim input on sentence outcome also question the validity of arguments raised by critics of the victims' participatory rights, or at least place them in a proper perspective. To argue that the plight of victims has been used to harshen punishment and implement the conservative efforts for "law and order" is to ignore two crucial

issues highlighted by the research on the effect of victims' input: the victims' need for expressing their views and the way in which victims' input influences the punishment process. The victims who choose to exercise their participatory rights are those whose victimization is personal, and involves a higher level of suffering and pain. To prevent its expression is to deny victims a necessary ingredient in their healing or restoration (*Erez* 1990). In addition, the information about the harm sustained by the victim provides an accurate assessment of the severity of the offense - the primary consideration in sentencing - and may thus enhance the aims of punishment (*Talbert* 1988). And it is this description of the harm contained in the VIS that makes some difference in the punishment outcome, rather than the victim's punitive request for a particular type of disposition (*Erez & Tontodonato* 1990; *Hillenbrand & Smith* 1989). The characterization of the latter as "placebo justice" (*Walsh* 1986) is more consistent with reality.

Participation, however, may be counterproductive when victim expectations are raised concerning the effect of their participation on the outcome. Court officials may address this potential source of resentment for victims by informing them about a realistic range of sentences and describing the considerations involved in the imposition of punishment (*Erez* 1989a).

The procedures and practices of the criminal justice system present several constraints to the implementation of victims' right for participation and its potential for influencing the sentences. Some principles of the adversarial system, determinate sentencing schemes or plea bargaining practices, have a major impact on judges' discretion or willingness to consider victims' input. As input into criminal justice decisions, particularly sentencing, is of major importance to victims, some have gone so far as to propose a reevaluation of the common assertion that the victim has no "standing" in criminal cases (*Goldstein* 1982). Others have suggested the adaptation of criminal procedure only in special circumstances (*Green* 1988; *Wainstein* 1988). Still others have warned against the theoretical and practical implications of providing victims with "standing" rights (*Sumner* 1987), or argued that a meaningful reintegration of victims can be made effectively within the current structure of criminal law (*Welling* 1987). The empowering of victims to have a say in all important decisionmaking points, particularly sentencing, is necessary for victims' recognition, restoration and satisfaction with justice (*Erez* 1989a; *Hillenbrand & Smith* 1989). If the results of the research presented here are replicated in the future, the increase in proportionality and accuracy in sentencing, coupled with the increased satisfaction with justice and the symbolic recognition of victims as an aggrieved party which the recent reforms provide, may constitute an incentive for a more

effective implementation of victims' right for input. These reforms can hardly be conceived as a vehicle for vindictiveness or support for the conservative efforts for harsher punishment.

5. References

Abrahamson, S.S. (1985). Redefining roles: The victims' rights movement. Utah Law Review, 3, 517-567.

American Bar Association (1983). Guidelines for fair treatment of victims and witnesses in the criminal justice system. Prepared by the Victims' Committee, Criminal Justice Section. Chicago: American Bar Association.

Bard, M., & Sangrey, D. (1986). The crime victim's book. New York: Brunner/Mazel.

Boers, K., & Sessar, K. (1990). Do people really want punishment: On the relationship between acceptance of restitution, needs for punishment and fear of crime. In: K. Sessar & H.-J. Kerner (Eds.), Developments in crime and crime control research: German studies on victims, offenders and the public (pp. 126-149). New York: Springer-Verlag.

Carrington, F., & Younger, E.E. (1979). Victims of crime deserve more than pity. Human Rights, 8, 10-15.

Casper, J.D. (1978). Having their day in court: Defendant evaluations of the fairness of their treatment. Law & Society Review, 12, 237-251.

Casper, J.D., Tyler, T., & Fisher, B. (1988). Procedural justice in felony cases. Law & Society Review, 22, 483-507.

Chelimsky, E. (1981). Serving victims: Agency incentives and individual needs. The recent past: Why has so little been done? In: S. Salasin (Ed.), Evaluation of victim services (pp. 73-97). Beverly Hills, CA: Sage.

Christie, N. (1977). Conflicts as property. British Journal of Criminology, 17, 1-15.

Cook, R.F., Smith, B.E., & Harrell, A.V. (1987). Helping crime victims: Levels of trauma and effectiveness of service. Washington, D.C.: National Institute of Justice. US Department of Justice.

Davis, R.C. (1983). Victim/witness noncooperation: A second look at a persistent phenomenon. Journal of Criminal Justice, 11, 233-287.

Davis, R.C., Kunreuther, F., & Connick, E. (1984). Expanding the victim's role in the criminal court dispositional process: The results of an experiment. Journal of Criminal Law and Criminology, 75, 491-505.

Dolliver, J.M. (1987). Victims' rights constitutional amendment: A bad idea whose time should not come. Wayne Law Review, 34, 29-49.

Eikenberry, K. (1987). Victims of crime/victims of justice. Wayne Law Review, 34, 29-49.

Elias, R. (1983). Victims of the system: Crime victims and compensation in American politics and criminal justice. New Brunswick, NJ: Transaction.

Elias, R. (1984). Alienating the victim: Compensation and victim attitudes. Journal of Social Issues, 40, 103-116.

Elias, R. (1986). The politics of victimization. New York: Oxford.

Erez, E. (1989a). Victim impact statements and victims' satisfaction with justice. Paper presented at the Western Society of Criminology Annual Meeting, Orange, California.

Erez, E. (1989b). Crime, punishment and victim's distress. Paper presented at the Fifteenth International Congress on Law and Mental Health, Jerusalem, Israel.

Erez, E. (1990).Victim participation in Sentencing: Rhetoric and Reality. Journal of Criminal Justice, 18, 19-31.

Erez, E. (forthcoming). The impact of victimology on criminal justice policy. Criminal Justice Policy Review.

Erez, E., & Tontodonato, P. (1990). The effect of victim participation in sentencing on sentence outcome. Criminology, 28 (3), 451-474.

Fattah, E.A. (1986). Prologue: On some visible and hidden dangers of victim movements. In. E.A. Fattah (Ed.), From crime policy to victim policy: Reorienting the justice system (pp. 1-14).

Fogel, D. (1975). We are the living proof. Cincinnati: Anderson.

Forer, L.G. (1980). Criminals and victims. New York: W.W. Norton.

Forst, B.F., & Hernon, J.C. (1985). The criminal justice response to victim harm. Washington, D.C.: NIJ, U.S. Department of Justice (Research in brief), June.

Galaway, B. (1988). Restitution as innovation or unfilled promise? Federal Probation, 51, 3-14.

Goldstein, A.S. (1982). Defining the role of the victim in criminal prosecution. Mississippi Law Journal, 52, 515-561.

Green, S.P. (1988). Private challenges to prosecutorial inaction: A model declaratory judgment statute. Yale Law Journal, 97, 488-507.

Hagan, J. (1982). Victims before the law: A study of victims' involvement in the criminal justice process. Journal of Criminal Law and Criminology, 73, 317-329.

Hall, D.J. (1975). The role of the victim in the prosecution and disposition of the criminal case. Vanderbilt Law Review, 28, 932-995.

Hammer, J.H. (1989). The Effect of offender punishment on crime victim's recovering and perceived fairness (equity) and process control. Unpublished Ph.D. Dissertation. Ann Arbor, Michigan: University Microfils.

Heinz, A., & Kerstetter, W. (1979). Pretrial settlement conference: Evaluation of a reform. Law & Society Review, 13, 349-366.

H*einz, A., & Kerstetter, W.* (1980). Victim participation in plea bargaining: A field experiment. In: W.F. McDonald & J.A. Cramer (Eds.), Plea bargaining. Lexington, MA: Lexington Press.

Henderson, J., & Gitchoff, G.T. (1981). Using experts and victims in the sentencing process. Criminal Law Bulletin, 17, 226-233.

Henderson, L.N. (1985). The wrongs of victim's rights. Stanford Law Review, 37, 937-1021.

Henley, M., Davis, R.C., & Smith, B.E. (forthcoming). The reactions of prosecutors and judges to victim impact statements. International Review of Victimology, Special Issue on Victim Participation in the Criminal Justice Process, Edna Erez, Editor.

Hillenbrand, S.W., & Smith B.E. (1989). Victim Rights Legislation: An assessment of its impact on criminal justice practitioners and victims. Report of the American Bar Association to the National Institute of Justice.

Hoffman, M. (1983). Victim impact statements. Western State University Law Review, 10, 221-228.

Hough, M., & Moxon, D. (1985). Dealing with offenders: Popular opinion and the views of victims - findings from the British Crime Survey. The Howard Journal of Criminal Justice, 24, 160-175.

Hudson, P.S. (1984). The crime victim and the criminal justice system: Time for a change. Pepperdine Law Review, 11, 23-62.

Joutsen, M. (1987). Listening to the victim: The victim's role in European criminal justice systems. Wayne Law Review, 34, 95-124.

Kamisar, Y., LaFave, W., & Israel, J. (1980). Modern criminal procedure, 5th ed. St. Paul, MN: Wet Publishing Co.

Karmen, A. (1984). Crime victims: An introduction to victimology. Belmont, CA: Brooks/Cole.

Kelly, D.P. (1984a). Victims' perceptions of criminal justice. Pepperdine Law Review, 11, 15-22.

Kelly, D.P. (1984b). Delivering legal services to victims: An evaluation and prescription. Justice System Journal, 9, 62-85.

Kelly, D.P. (1987). Victims. Wayne Law Review, 34, 69-86.

Kidd, R.F., & Chayet, E.F. (1984). Why do victims fail to report? The psychology of criminal victimization. Journal of Social Issues, 40, 39-50.

Kilpatrick, D.G., & Otto, R.K. (1987). Constitutionally guaranteed participation in criminal proceedings for victims: Potential effects on psychological functioning. Wayne Law Review, 34, 7-28.

Kilpatrick, D.G., Tidwell, R.P., Walker, E., Resnick, H.S., Saunders, B.E., Padulovich, J., & Lipovsky, J.A. (1989). Victims' rights and services in South Carolina: The dream, the law, the reality. Final report of the Medical University of South Carolina to the South Carolina Public Safety Programs Office.

Knudten, R.D., Meade, A., Knudten, M., & Doerner, W. (1976). The victim in the administration of criminal justice: Problem and perceptions. In: W.F. McDonald (Ed.), Criminal justice and the victims (pp. 115-146). Beverly Hills, CA: Sage.

Kosaki, L.C. (1984). "The 'known' criminal: Non-stranger crime in the criminal court". Unpublished Dissertation, Ann Arbor, Michigan: University Microfils.

Kosaki, L.C. (1990). "More shadow than substance? The victim impact statement and victims' rights". Paper presented at the American Political Sciences Association Annual Meeting.

Lamborn, L.L. (1985). The impact of victimology on the criminal law in the United States. Canadian Community Law Journal, 8, 23-43.

Lamborn, L.L. (1987). Victim participation in the criminal justice process: The proposals for a Constitutional Amendment. Wayne Law Review, 34, 125-220.

McDonald, W.F. (1982). The victim's role in the American administration of criminal justice: Some developments and findings. In: H.J. Schneider (Ed.) The victim international perspectives (pp. 397-402). New York: de Gruyter.

McGuire, S. (1987). Victims' rights laws in Illinois. Two decades of progress. Crime and Delinquency, 33, 532-540.

McLeod, M. (1986). Victim participation at sentencing. Criminal Law Bulletin, 22, 501-517.

McLeod, M. (1987). An examination of the victim's role at sentencing: Results of a survey of probation administrators. Judicature, 71, 162-168.

McLeod, M. (1988). The authorization and implementation of victim impact statements. Washington D.C.: National Institute of Justice.

Mosk, S. (1978). The mask of reform. Southwestern University Law Review, 10, 885-893.

National Organization for Victim Assistance (1985). Victims rights and services: A legislative directory. Washington, D.C.: National Organization for Victim Assistance.

Posner, A.K. (1984). Victim impact statements and restitution: Making the punishment fit the victim. Brooklyn Law Review, 50, 301-338.

President's Task Force on Victims of Crime (1982). Final report. Washington, D.C.: U.S. Government Printing Office.

Ranish, D.R., & Shichor, D. (1985). The victim's role in the penal process: Recent developments in California. Federal Probation, 49, 50-57.

Rubel, H.C. (1986). Victim participation in sentencing proceedings. Criminal Law Quarterly, 28, 226-250.

Schafer, S. (1968). The victim and his criminal. New York: Random House.

Sebba, L. (1982). The victim's role in the penal process: A theoretical orientation. American Journal of Comparative Law, 30, 217-240.

Sebba, L. (1985). Victims and the parameters of a justice system. Paper presented at the Fifth International Symposium on Victimology, Zagreb, Yugoslavia, August.

Shapland, J., Willmore, J., & Duff, P. (1985). Victims in the criminal justice system. Aldershot: Gower.

Smale, G.J.A., & Spickenheuer, H.L.P. (1979). Feelings of guilt and need for retaliation in victims of serious crimes against property and felons. Victimology, 4, 75-85.

Smith, B.S. (1985). Trends in the victims' rights movement and implication for future research. Victimology, 10, 34-43.

Smith, B.S., & Huff, C.R. (1989). From victim to political activitist: An empirical examination of the victims' rights movement. Paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences, Washington, D.C.

Sumner, C.J. (1987). Victim participation in the criminal justice system. Australian and New Zealand Journal of Criminology, 20, 195-217.

Talbert, P.A. (1988). The relevance of victim impact statements to the criminal sentencing decision. U.C.L.A. Law Review, 36, 199-232.

Tyler, T.R. (1984). The role of perceived injustice in defendants' evaluations of their courtroom experience. Law & Society Review, 18, 51-74.

Tyler, T.R. (1988). What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures. Law & Society Review, 22, 103-135.

U.S. Department of Justice (1983). Victim and witness assistance. Bureau of Justice Statistics Bulletin, May 1983.

Viano, E. (1987). Victim's rights and the Constitution: Reflections on a bicentennial. Crime and Delinquency, 33, 430-451.

Villmoare, E., & Neto, V.V. (1987). Victim appearances at sentencing hearings under the California victims' bill of rights. Washington, D.C.: U.S. Department of Justice, N I J (Executive Summary).

Wainstein, K.L. (1988). Judicially initiated prosecution: A means of preventing continuing victimization in the case of prosecutorial inaction. California Law Review, 76, 727-767.

Waller, I. (1983). Declaration on the protection and assistance of crime victims. Victimology Newsletter, 3, 1-7.

Walsh, A. (1986). Placebo justice: Victim recommendations and offender sentences in sexual assault cases. Journal of Criminal Law and Criminology, 77, 1126-1141.

Welling, S.N. (1987). Victim participation in plea bargains. Washington University Law Quarterly, 65, 301-356.

Welling, S.N. (1988). Victims in the criminal process: A utilitarian analysis of victim participation in the charging decision. Arizona Law Review, 30, 85-117.

Wolfgang, M.E. (1982). The individualization of the victim. In: H.J. Schneider (Ed.), The victim in international perspective. New York: de Gruyter.

Young, M.A. (1987). A constitutional amendment for victims of crime: The victims' perspective. Wayne Law Review, 34, 51-68.

Zehr, H., & Umbreit, M. (1982). Victim offender reconciliation: An incarceration substitute. Federal Probation, 46, 63-68.

Zimmerman, S., Alystyne, D., & Dunn, C. (1988). The National Punishment Survey and public policy consequences. Journal of Research in Crime and Delinquency, 25, 120-149.

Cases Cited

Booth v. Maryland (1987). 107 S. Ct. 2529.

Evaluation of Victim Impact Statement Projects in Canada: A Summary of the Findings

Carolina Giliberti

Contents

1. Background

Over the past few years the needs and concerns of the victims of crime have received increasing attention in Canada and around the world.

Advocates of victims' rights have argued that the introduction of victim impact statements would make the criminal justice system more accountable to victims. It was also felt that increased involvement by victims in the judicial process would reduce their sense of estrangement and powerlessness in the face of an apparently insensitive system. By providing victims with an opportunity to inform the court of the actual effect on them of a crime, it was hoped that their sense of alienation would be reduced and that they would be more willing to cooperate with the criminal justice system in the future.

1.2 The Canadian Experience

The impetus for developing victim impact statement programs in Canada followed the 1983 report of the Federal-Provincial Task Force on Justice for Victims of Crime. The task force recommended that:

> "The **Criminal Code** be amended to permit the introduction of a victim impact statement to be considered at the time of sentencing" (Recommendation 21).

The report of the Canadian Sentencing Commission (1987) also noted the importance of victim impact statements. Recognizing the extent to which victims have felt excluded and manipulated by the criminal justice system, the Commission recommended that:

> "Where possible, prior to the acceptance of a plea negotiation, crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim" (Recommendation 13.2).

In October 1988, Bill C-89, **An Act to Amend the Criminal Code (Victims of Crime)** was proclaimed. Included in this Act was a provision that permits the introduction of victim impact statements into the justice process at the time of sentencing.

In 1986, the Department of Justice, as part of Canada's contribution to the international movement in this area and as an aid to federal policy formulation, initiated six demonstration projects across the country to examine a specific instrument designed to help meet these needs - the Victim Impact Statement (VIS). The VIS is a written account, for use in court, of the personal response of victims to the crimes committed against them.

1.2 Six Demonstration Projects

The VIS demonstration projects, funded by the Department in six Canadian cities, were designed to test different models for implementing programs. Each of the six projects, five of which have now been evaluated, featured a different setting and context.

Victoria: The VIS project in Victoria was based in the Police Department. A constable had overall responsibility for contacting the victims and arranging for preparation of the statement. This was done by personal interview, and the constable prepared the statement, based on interview notes, which was then delivered to the crown prosecutor.

North Battleford: The project here was staffed by a civilian coordinator, employed specifically for the job and based at Royal Canadian Mounted Police (RCMP) quarters. The coordinator developed five different questionnaires depending on the type of offence (all the other projects used a single form) and conducted the interview in the victim's home. The victim then signed the statement and the coordinator prepared a narrative summary. Both documents were given to the RCMP and the crown prosecutor.

Winnipeg: A full-time worker attached to the provincial Attorney General's department was responsible for the project in Winnipeg. The Court Unit staff of the Police Department, Winnipeg identified eligible cases. Interviews were conducted with the victims, who then checked the notes for accuracy and signed the questionnaire. The worker also prepared a narrative summary, which served as the actual VIS. The statement was considered the property of the victim and was introduced into court by the crown attorney only after the disposition of guilt and before sentencing. Copies were given to the defence counsel and to the judge. In the other projects, the VIS was entered into the system as soon as it was completed and was considered the property of the court, to be used at the discretion of the crown attorney. Thus, if the statement was not used by the Crown, the judge and defence counsel were unaware of its existence.

Calgary: A civilian project coordinator operated out of the Calgary Police Department, using a mail-out/mail-back questionnaire to obtain statements.

This required that the victims complete the questionnaire themselves with no assistance from staff. The completed, signed statement was sent to the crown prosecutor's office where it would be used at the prosecutor's discretion.

Toronto: An officer of the Metropolitan Toronto Police Force distributed the VIS form to victims of serious crimes, and the completed document was then returned to the officer. The statement was sent to the crown prosecutor's office, to be used at the prosecutor's discretion.

Montreal: The Montreal VIS project was located in the crown prosecutor's office and victims filled out the statement form themselves, though a worker was available to assist as required. The evaluation of this project is not yet complete.

1.3 Evaluation of Projects

In considering the evaluation results, two factors that have a bearing on the findings should be borne in mind. First, the projects were evaluated before recent legislative changes to the **Criminal Code**. These changes, proclaimed in 1989, provided, among other things, legislative authority to introduce victim impact statements into the sentencing process - authority that did not exist at the time of the VIS projects. Although judges could hear victim impact statements without such authority, their use in the absence of legislation was perceived by some criminal justice officials to be problematic. As a result, although there was support for having victims complete statements, filing or presenting of the statement in court was not always encouraged.

Second, these projects were innovative demonstration projects that evolved over time. Procedures and practices changed during the course of the projects and as a result, the research had to adapt to these changes.

The evaluations of all projects covered three main areas:

1) the operator of the program and how successful the program had been preparing and presenting the statements in court;

2) the effect of participation in the program on victims' satisfaction with the criminal justice process and their participation in the process; and

3) the effect of victim impact statements on the justice system.

Several research methods and data sources were used in these evaluations: interviews with victims, crown attorneys, police, judges, defense counsel,

and VIS program staff; checklists completed by prosecutors; content analysis of completed statements; and analysis of data from police, court and program files.

2. How Well did the Programs Operate?

2.1 Completion Rates

One of the key areas of interest in the evaluation was a comparison of completion rates for the different project models. For example, are victims more likely to complete statements if they are personally interviewed or if they are sent a mail-out questionnaire? As Table 1 indicates, the rate of completion is much higher when victims prepare a VIS in a personal interview.

Table 1: Rate of Completion of Victim Impact Statements by Project

	Method of Delivery/ Preparation	No. of Eligible Victims	Completion Rate	
			(n)	%
Victoria (18 months*)	Personal contact Interviewer completes VIS	459	202	44
North Battleford (18 months*)	Personal contact Interviewer completes VIS	502	260	52
Winnipeg (20 months*)	Personal contact Interviewer completes VIS	901	320	35
Calgary (16 months*)	100% mail-out Victim completes VIS and returns by mail	7,035	1,266	18
Toronto (14 months*)	Combination personal delivery and mail-out. Victim completes VIS	1,766	421	24

* Length of evaluation phase.

Researchers found that the only significant personal factor influenced completion rates was the age of the victim: victims over 50 had the highest

rate of return in all projects. Researchers also found that in three sites the completion rates for sexual assault were slightly higher than those for other personal offences.

Despite the number and variety of attempts to contact victims (e.g., telephone calls at different times of the day, sending letters, personal visits), all projects experienced difficulties in contacting a sizeable proportion of victims. In those projects where personal contact was made and an interview requested (Victoria, North Battleford, and Winnipeg) the rates of refusal and noncontact were reasonably consistent. As indicated in Table 2, the majority of "noncompletions" occurred because the victim could not be contacted. The reasons given by victims who refused to participate in the programs were consistent across all projects as well. The most common reason was that the victim regarded the offence as too minor to warrant a statement. Other reasons were that victims were too busy, they wanted to put the incident behind them, or they experienced language problems in completing the statement.

Table 2: Reasons for Noncompletion Rates of Statements in Victoria, North Battleford and Winnipeg Projects

	No. Eligible Victims	Refusals		Noncontact	
		%	(N)	%	(N)
Victoria	459	17	78	35	160
North Battleford	502	11	55	27	138
Winnipeg	901	16	144	38	342

Note: Refusal and noncontact rates are not known for Calgary and Toronto because of the manner in which contact was made. All victims received the VIS in the mail. It is important to note, however, that both projects experienced a very high noncompletion rate (Calgary - 82%, Toronto - 76%).

Victims were asked why they wanted to complete a statement or what they hoped to gain as a result. Although many reasons and expectations were advanced, most victims expressed the hope that giving a VIS would influence the sentence given to offenders, assert the "rights of victims over offenders", and generally ensure that justice was done.

Victims were asked if they had difficulty in completing the statement and if they had any fears about their participation in the program. Response to

the first question depended, as might be expected, on the method of obtaining the statement. In Winnipeg and North Battleford, where statements were completed through personal interview, a small group of participants (15% and 9% respectively) reported initial difficulty in understanding the questions.

However, significant numbers of participants also said they had difficulty when required to complete the statements themselves. Twenty-seven per cent of participants in the Calgary program said they would have liked someone to help them. Reasons given included a desire to ensure that "the statement was properly done" and problems with language and writing, particularly when trying to express the emotional impact of the crime. Some victims said they preferred a mail-out form, which indicates they should probably be given this option if they refused to take part in an interview-based program.

Between 14% and 28% of participants expressed anxiety about participation in the program, and the fear they experienced were consistent across all projects: the primary concern was that the offender or the offender's friends would seek revenge.

Prosecutors and judges were asked what methodes they preferred for obtaining statements. These officials expressed a preference for whichever methods being used in their own programs, although for different reasons. They tended to emphasize matters to do with the quality or acceptability of the statements once prepared, rather than the advantages of the actual method of preparation.

In Victoria, where statements were prepared by police constables following personal interviews with the victims, there was unanimous feeling among prosecutors that an interview-based system provided more useful victim information than a mail-out system. The judges interviewed voiced the same opinion.

At Calgary, in contrast, judges and prosecutors involved in the mail-out/mail-back method indicated a strong preference for statements that were written and signed by the victims themselves rather than those prepared by a third party.

3. Effects of Victim Impact Statements on Victims

Advocates of victim impact statements argue that, among other worthwhile results, the statements lead to greater participation by victims in the criminal justice system, and increase their feelings of satisfaction with the system and the role they have played in it.

3.1 Level of Satisfaction

In the evaluation, researchers asked both participating and nonparticipating victims about their level of satisfaction with the program and with the criminal justice system in general. Participants in all projects reported a high level of satisfaction with the program.

Contrary to expectations, there was no difference in the degree of victims' satisfaction when their statements were used in court and when they were not. This held true over all projects, including the two (North Battleford and Calgary) where one group of participants knew with certainty that their statements had not been used because no charges had been laid. It appeared that participants derived benefits from the program that were not contingent on the actual use of the statement.

When asked to comment on which aspects of the program they considered to be most helpful, victims indicated that it was to be given the opportunity to talk with someone about the offence and its effects and to have this information conveyed to the court, to be given useful information about the case, and to have the opportunity to contact someone in the event of a problem arising.

3.2 Level of Participation in the Criminal Justice System

Researchers found that, generally, there were no differences between program participants and nonparticipants with regards to contacts with criminal justice system officials, or in the number of victims voluntarily attending court or sentencing. However, to a slight but consistent degree participants were better informed than nonparticipants about what was happening in their own cases.

3.3 Satisfaction with How Case Was Handled

Victims in the Victoria, North Battleford, Calgary and Winnipeg evaluations were asked how satisfied they were with their overal experience and the handling of their cases by the criminal justice system. Table 3 indicates that levels of satisfaction were similar across projects, and between participants and nonparticipants. Although in three of the four evaluations more VIS participants than nonparticipants expressed satisfaction with their overall experience, the differences were not significant.

Table 3: Satisfaction with Whole-Experience of Case: Comparison of VIS Participants and Non-participants

	Participants % Satisfied	Nonparticipants % Satisfied
Victoria	52	39
North Battleford	58	64
Winnipeg	59	48
Calgary	53	47

Sources of satisfaction with the judicial system were very similar in both groups, with responses most frequently centred on the positive manner in which the police handled the case, and the fairness and sensitivity shown to the victim.

In most of the evaluations, researchers sought to assess what might account for the degree of overall case satisfaction in both the participant and nonparticipating groups. Two contributing factors were identified. The first was the extent to which victims felt they had been adequately informed about their case. The results indicate that there is a positive correlation between being adequately informed about case progress and feeling satisfied with the system. Victims who felt that their information needs were met also felt more satisified with the overall handling of their case. The second factor was the use of victim impact statements by the court. Although the relationship between statement use and victim satisfaction was confused by the fact that few victims were aware of whether or not their statements had been used, the Calgary evaluation found that when VIS participants thought their

statements had been used by prosecutors, they were considerably more likely (70% as opposed to 42%) to indicate they were satisfied with the handling of the case.

There was less similarity between participants and nonparticipants about the main sources of dissatifaction. One major difference was found in the North Battleford evaluation, when the primary source of dissatisfaction for both the participant and nonparticipants was the failure of the criminal justice system to meet their expectations, though this reason was cited more frequently by the participant group (41%) than the nonparticipant group (28%). This finding appears to lend weight to the argument that victims who have been given the opportunity to complete a statement may end up more disillusioned because their expectations have been heightened.

3.4 Attitudes Towards Criminal Justice Officials

Measures of retrospective (prior to the offence) and current attitudes towards criminal justice system officials were compared between participants and nonparticipants in Calgary, Winnipeg, Victoria and North Battleford. (Previous involvement with the criminal justice system as a victim or offender was taken into consideration in data analysis). Overall, the VIS particpant and nonparticipant groups remained very similar in their attitudes and attitude changes. A slight but consistent increase in positive attitudes towards actors in the criminal justice system (except towards defence counsel) was demonstrated by VIS participants. The major difference between VIS participant and nonparticipant groups was their attitudes towards the police. In Victoria and North Battleford, VIS participants reported a significantly more positive change of attitude towards the police than nonparticipants.

3.5 Reporting Future Incidents

A final measure of attitudes toward the criminal justice system concerned the cooperation of victims as evidenced by their willingness to report crime in the future. This varied substantially by jurisdiction. In Calgary and North Battleford, there were no differences between participants and nonparticipants in willingness to report. In Victoria and Winnipeg, on the other hand, participants were more willing than nonparticipants to report crime in the future.

3.6 Attitudes Towards Sentences Imposed

Victims' attitudes towards sentencing were examined generally and in relation to their own cases. It is noteworthy that over all evaluations and in all groups, the majority of victims held negative attitudes towards sentencing both before and after their cases. That having been said, the Winnipeg and Victoria evaluations did find VIS participants to be more supportive of sentences imposed by the courts than nonparticipants.

4. Effect of Victim Impact Statements on the Justice System

4.1 Use of Victim Impact Statements

Crucial to an examination of the effect of victim impact statements on the criminal justice system is whether the statements were in fact used in the process. In looking at use of statements, the researchers applied the broadest definition possible. "Use" included anything from referring to a statement in submission to sentence, to actually filing the statement as an exhibit in court.

The stated intention of all projects was to provide the victim, through the medium of the VIS, with a means of speaking independently and directly to the court at the time of sentencing. As Table 4 indicates this goal was met in varying degrees across the five projects.

With the exception of the Victoria project, very few statements were actually used in court when the use or nonuse of statements was at the discretion of the prosecutors. Reasons given by prosecutors for not using the statement included the belief that they contained no new information, that many were too vague or irrelevant to be used, that they were of doubtful accuracy, and that they added to the cost burden of the system.

Table 4: Rate of Use of Victim Impact Statements

	No. of Evaluation Cases with a Completed VIS*	No. of Times VIS used by Prosecutor at Time of Sentencing		No. of Times VIS Formally Presented to the Court	
		%	(N)	%	(N)
Victoria	91	58	53	0	0
North Battleford	39	38	15	3	1
Winnipeg**	113	Not known		43	49
Calgary	125	14	18	0	0
Toronto***	60	83	50	67	40

* Cases have been restricted to those with a guilty finding (i.e., the VIS was able to be used at the time of sentencing). The limited numbers of cases reflects the small number of checklists completed by prosecutors.

** The Winnipeg project called for the distribution of statements to the prosecutor, defence, and judge at the time of sentencing. No direct measure of the use made of the statements, by prosecutors at the time of sentencing, is available.

*** The Toronto findings were based on interviews with 60 prosecutors who were asked about their most recent case in which a VIS had been completed.

The Winnipeg project was the only one that formally established a procedure allowing for the distribution of statements to the judge and defence counsel as well as the prosecutor. Although the procedures established in Winnipeg should have resulted in a 100% presentation of statements to the court once a verdict of guilty had been reached, in fact only 43% of the statements were actually distributed. The remaining 57% were not introduced owing to a mixture of program and court procedures, as well as prosecutor discretion. In some situations, crown prosecutors simply would not introduce victim impact statement, despite the fact that the project called for their introduction.

Although the measurement of prosecutors' "use" of statements was somewhat different in the Toronto project, the evaluation results were encouraging. Of the 40 statements reported as being formally presented to the court, two thirds were entered as exhibits and one third as crown submissions.

4.2 Other Nonsentencing Uses for the Statements

It is argued that information contained in a victim impact statement could be used at other nonsentencing points in the process. It is interesting that the two projects reporting the least use of statements by prosecutors at the time of sentencing - Calgary and North Battleford - also reported the highest level of use at points other than sentencing. Prosecutors at both projects used the statements most frequently to provide background information, but also reported using them in up to 20% of cases for negotiations with defense counsel, the examination of victims and witnesses, and during summation of the case in court. Overall the findings indicate that the level of use of victim impact statements for purposes other than sentencing was consistently below 25% in all projects.

4.3 Content of the Statements

One argument against the use of victim impact statements is that they do not contain information not already available in police documents: that the statements are merely a new way of "packaging" existing information. In a systematic comparison of the content of statements with police and probation records, no evidence was found to substantiate this argument. Police reports were found to contain much less detail on the effects of a crime on the victim. Generally, victim impact statements were found to be the only source of information routinely available to the court on the emotional impact of the crime.

Another major criticism of the VIS is that victims are vengeful and that they will use this mechanism to "get back" at the offender. There was little or no evidence to support this contention. In Winnipeg only one of the 81 victims interviewed commented in a way which could be considered vengeful, and in Victoria a content analysis of completed statements found such comments in only three instances out of 84.

Calgary data on victims' views of the value of the statements suggested that revenge and vindication did not figure highly in victims' minds when they decided to return the statements, and the contents of the completed documents supported this view.

4.4 Views of Prosecutors, Judges and Police

Prosecutors' opinions on the impact and usefulness of the VIS varied considerably across the evaluations. At one extreme, the Toronto evaluation found that an overwhelming majority of prosecutors believed that victim

impact statements could play a useful role in the system. They believed that the statement allowed the victim to have a say, that it provided more information, and that it helped the judge understand the victim's point of view. At the other extreme, North Battleford prosecutors perceived the statement as being of no benefit to the criminal justice system aside from its use as a background document for the crown attorney's case and they remained convinced that the victim's feelings had no role to play in court decision-making. These widely differing viewpoints are reflected in the use made of statements by prosecutors at the time of sentencing.

Generally, police did not see the program as imposing a significant burden on their workload, and most agreed that its benefits outweighed any extra work involved. Their most frequently mentioned concern was the small number of victims completing and returning the statements. Another misgiving was that crown prosecutors were not using the statements to the extent the police believed they should. Almost every officer interviewed stressed that the statement's most important feature was the fact that these were the victim's own words, not a police or crown interpretation of the victim's situation. They believed that the submission of the VIS itself, not merely the presentation of a summary, was the only appropriate form of use.

Judges were interviewed in all but the Toronto project. It is a telling comment on the extent of the use of the statements in court that in two of the evaluations, the judges either had no experiences with a statement, or were surprised to learn that they had in fact heard cases in which a VIS had been obtained.

5. Conclusions

What have we learned from these evaluations? First, the findings dispel a number of myths. Victims do not use the VIS as a retributive tool and there is no evidence to suggest that the statements are vengeful in nature. In addition, the statements do not duplicate existing information.

Second, the research has dispelled any illusions about the overall utility of the VIS to the criminal justice system. Completing a statement does not necessarily lead to greater victim satisfaction with the system, nor does it increase the victims' willingness to cooperate with the system in the future. Completing a statement does not, by itself, make the victims feel better about how the system is handling their case. They want to be informed about the progress of their case and they want information on how the criminal justice system operates.

However, the third, and perhaps most important finding of this research is that an overwhelming majority of victims, found the experience of completing a statement to be positive and would participate again if victimized. Completing a statement appears to result in an increase in the victims' belief that their views are of interest in the criminal justice system.

Because very few statements were actually used in court, the findings that pertain to the impact of the statements on the system and the victim are preliminary at best. However, it is to be hoped that the recent change to the **Criminal Code** that provides legislative authority to introduce victim impact statements in the sentencing process, plus these preliminary findings, will encourage criminal justice officials to actively promote the use of the VIS.

Police Response to Spousal Violence in Israel: Some Preliminary Findings*

Simha F. Landau

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1. Abstract

The present study investigates all (415) cases of spousal violence known to the police in Jerusalem during 1987. The main aspects investigated relate to the type of police decisions in these cases, the factors related to police decisions, as well as some other characteristics of the complaint. In most cases (87%), police merely record the complaint, without opening a criminal file. A criminal file is opened in less than 13% of the cases, with only 9% being prosecuted in court. Police decision to criminalize a suspect is more likely when the complaint is about a physical assault and when the suspect has previous complaint(s) filed against him/her. Wives' complaints (comprising 82% of total complaints) relate almost exclusively to actual physical violence or threats of violence. Husbands, on the other hand, complain much more frequently about non-violent acts (i.e. violations of court injunctions and other complaints). In the great majority of women's complaints, there is no counter complaint by the husband. On the other hand, most complaints by husbands are part of a mutual-complaint pattern. Mutual complaints are considerably more prevalent in non-violent events and in cases where multiple recidivist suspects are involved. The findings indicate that a harsher policy on the part of the police is needed, in order to better cope with the problem of spousal violence.

2. Introduction: The Role of Police in Dealing with Spousal Violence Cases

There is a general consensus that we do not know the real extent of spousal violence. In a national survey of family violence in the U.S., 28% of those surveyed reported marital violence at some point in the marriage (*Straus* 1978; *Straus et al.* 1980). One of the main conclusions of this national study is that 3.8% of American women had been victims of violence during the twelve months prior to the interview.

Officials at the Ministry of Labor and Welfare in Israel recently estimated that about 10% of all married women in the country are/have been victims of spousal violence (*Steiner* 1988). Thus, inspite of the uncertainty regarding the exact extent of this phenomenon, researchers and practitioners alike agree that spousal violence is a serious social problem and should be dealt

as such by the appropriate social agencies. In most cases of spousal violence, the police are the first official agency to deal with the problem, serving as the "gateway," "point of access" and "signpost" to other agencies. However, the small proportion of family violence that is reported to the police makes this type of violence one of the most underreported of crimes. According to the FBI statistics, marital violence is ten times less reported than rape (*Martin* 1978). *Walker* (1979) found that only 10% of abused women reported their victimization to the police. In a recent study, using interview data from a nationally representative sample of 6,002 American families, *Kaufman-Kantor* and *Straus* (1987) found that only 13% of severe wife assaults were reported to the police. In a survey on 595 Israeli battered women who have approached a recently established center for the prevention of family violence, it was found that almost two thirds (63.4%) of these victims have never involved the police in their problems (*Lev-Ari* 1986). Thus, even the police, the most readily available official agency, deals only with the tip of the iceberg of this social problem. The actions taken by the police are of utmost importance, as they influence not only future behavior of known victims but also that of the "silent majority" of victims, regarding the involvement of the police in their victimization.

Numerous studies in this field report that in their dealings with domestic violence, police are influenced by several stereotypes and beliefs:

1. The widely held stereotype in society that views spousal violence as normative behavior. This stereotype is reflected in a variety of popular sayings and beliefs, e.g., a man's home is his castle, the sanctity of the home belongs to the private person, etc. (*Berk & Loseke* 1981; *Homant & Kennedy* 1985; *Martin* 1976). According to *Davis* (1981), one of the "structure rationales" of police to justify their non-reaction is that violence is a natural condition of marital intimacy and not a criminal event, and therefore there is no need for police to get involved.

   Many police officers believe they are acting according to public consensus, one that "endorses violence as an appropriate means for social control of women" (*Faragher* 1985). In a private conversation between the present author and a police officer who until recently was in charge of the department dealing with domestic violence in Jerusalem, the latter offered a very simple and straightforward definition of a battered woman: "A battered woman is a disobedient woman."

2. A second stereotype widely held by police with regard to domestic violence is that it is "dirty work" (*Davis* 1981). Making a record in

such cases does not bring the glory brought to the police by solving intriguing murder cases, for example. Added to this is the high risk involved in domestic violence cases. According to FBI statistics, 20% of the total police officers killed in the line of duty died while answering family disturbance calls (*Langley & Levy* 1977).

Police officers tend to measure their job performance according to the substantive work accomplished. They often view their work with domestic violence as a peace keeping role and not a law-enforcement role.

3. Police often justify their non-action in domestic disturbances by their belief that the women will ultimately fail to press charges and so their intervention will not help anyway (*Faragher* 1985). However, a study in England shows that only one in ten women drop charges that they have pressed (*Dawson & Faragher* 1977).

The above stereotypes and beliefs held by the police are obviously reflected in their response to spousal violence cases. *Johnson* (1985), citing two studies, reports that in both, only about one third of the women who approached the police found them to be helpful. *Bell* (1985), dealing with police disposition of domestic violence cases in Ohio, found that in 69% of the cases no action was taken at all. In the previously cited Israeli study (*Lev-Ari* 1986), in 6 out of 10 cases in which police were involved, they took no action whatsoever against the violent spouse. It seems justifiable to expect, therefore, that in principle, police attitudes and practices with regard to spousal violence in Israel should not be noticeably different from other countries. However, no detailed study on this topic has yet been conducted in Israel.

3. Israel Police Regulations and Practices Regarding Spousal Violence

Most offenses covered by the heading of "spousal violence" are considered by the police as relatively light offenses (misdemeanors such as threats, insults, slight attacks, causing bodily harm, causing damage to property, etc.). In these cases, the police are granted wide discretionary powers as to their action.

Current police response to spousal abuse is based on police regulations of 1979. These regulations were established following a research report submitted by a police-team (*Eliram et al.* 1977) which investigated all cases

of spousal violence known to the police during the first half of 1976 (1-6 1976) in a sample of 13 police divisions from all over the country. The four largest urban areas of Israel (Jerusalem, Tel-Aviv, Haifa and Beer-Sheva) were included in this sample. One of the main recommendations of this research team was to appoint a "conflict resolution officer" in each police unit to be in charge of dealing with conflicts within families, between neighbors and "similar light criminal offenses." The task of this officer would be to investigate the case, to try and resolve the conflict and/or refer the parties to other appropriate social agencies and to make a recommendation as to the appropriate police response to the complaint. The implementation of this recommendation is not very clear. Police standing regulations specify that the task of this officer is to deal with all misdemeanor cases of this character. However, the head of the Israeli Police Investigation Department recently disclosed that his department has cancelled the "conflict resolution" role of this officer in cases of domestic violence (*Sde-Or* 1987).

Figure 1 presents the sequence of the decision-making process and the official alternatives available to the police at the various stages of dealing with spousal violence.

In the following lines, the main regulations regarding the decision alternatives are specified.

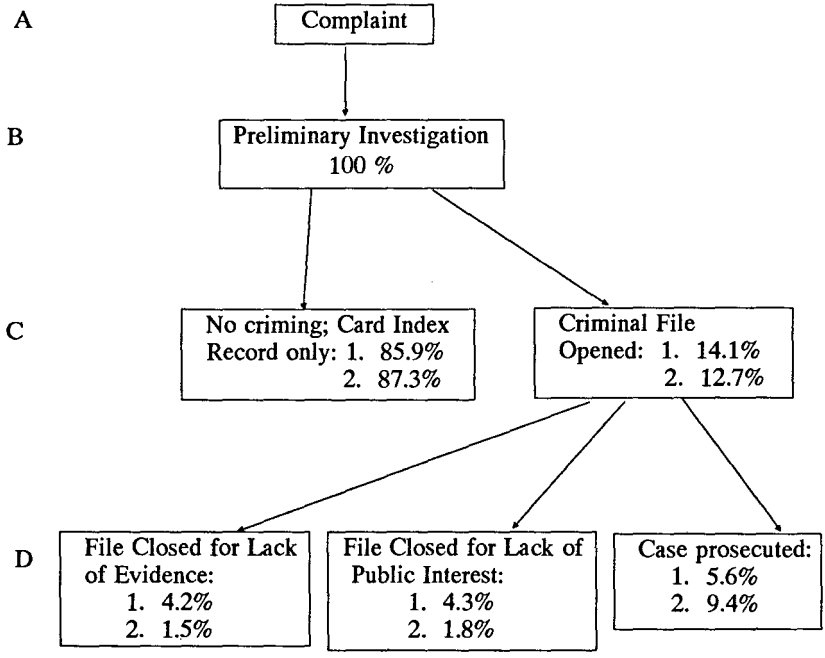
As a rule, in each case of wife battering the police is instructed to open a criminal file against the husband. In special circumstances, a "non-criminal" procedure is allowed if all the following conditions are fulfilled:

1. The act was not serious.
2. No real bodily harm was caused to the woman.
3. The woman, on her own initiative withdraws the complaint against her husband or, from the outset, requests that he be only cautioned.
4. It is evidently clear that no pressure has been exerted on the woman (regarding the cancelation of complaint) by the husband or any other interested party.
5. There is no criminal file or "non-criminal" procedure on record against the husband for wife-beating or for assault in similar circumstances.
6. The husband admits to have committed the offense and expresses remorse (after being cautioned).

The above regulations require that each police unit establish a card index record (arranged in alphabetical order) to include the details about all domestic violence complaints and police decisions on each incident. Cases

in which a non-criminal decision is taken are not recorded in the central police computerized criminal register and can be found only in the local police manual card index record as reference in case of further complaints.

Figure 1: Police Decision-Making Process in Cases of Spousal Violence*



* In each decision in stages C and D, the first figure refers to the study of *Eliram et al.* (1977), and the second refers to the present study.

Opening a criminal file does not automatically lead to prosecuting the case in court (see Fig. 1). The file may be closed for lack of sufficient evidence, or for lack of public interest. This second ground for closing the criminal file is used mainly in cases where the woman withdraws her complaint (*Sde-Or* 1987).

As can be seen from Fig. 1, the vast majority (85.9%) of spousal violence complaints are defined by police as "non-criminal" cases. Of every 100 complaints, only in 14, is a criminal file opened against the violent spouse. However, only less than half (5.6%) of these 14 cases are finally prosecuted. Most of the cases are closed, either for lack of evidence (4.2%) or for lack of public interest (4.3%).

In the above study (*Eliram et al.* 1977), large discrepancies were found among the 13 police divisions with regard to the proportion of cases for which a criminal file was opened. This proportion varies from 0% to 37.5% of the cases. These discrepancies are found not only between large Metropolitan divisions and smaller municipal areas (where one could expect more informal treatment by the police), but also between different large Metropolitan areas. For example, in Jerusalem the proportion of criminal cases (i.e., criminal file opened) was 31.7%, which is about 2.5 times larger than the corresponding proportion found in Haifa (12.9%) during the same period. It should be noted, however, that a great difference exists between these two cities also with regard to the rate of spousal violence cases known to the police. In Jerusalem, this rate is only 1.136 per 1,000 population, while in Haifa it is almost three times higher (3.083 per 1,000 population). This variation could be due to a number of factors, such as different police practices, the larger proportions of Arabs and ultra-religious Jews in Jerusalem (i.e., groups less likely to involve police in spousal violence), etc. Another finding revealed by *Eliram et al.* (1977) relates to the high proportion of cases prosecuted in Jerusalem: 60.0% of criminal cases in this city were prosecuted in court, a rate more than double that of the other (combined) 12 divisions (28.3%).

The main contribution of the above study is that it provides basic preliminary data with regard to police response to spousal violence in Israel more than ten years ago. However, this study did not investigate the factors that affect police decisions in these cases. It is the aim of the present study to fill in this gap in our knowledge with regard to police response to spousal violence in Israel.

4. The Study

The present study is part of a larger project investigating all cases of spousal violence known to the police in Jerusalem during 1987. The main objectives of the project are to examine:

1. The factors that affect police response to these cases;
2. The rates of "case mortality" from the initial complaint to the police up to the prosecution stage, and the factors associated with this "mortality";
3. The prevalence of spousal violence complaints in various population groups as well as in various areas of the city, given the special cultural and ethnic composition of the population in Jerusalem;
4. The working relationship between the police and other official and non-official agencies in dealing with cases of spousal violence;
5. The response of the courts to the problem in those cases which are prosecuted.

Special attention is focused on possible discrepancies between official regulations and actual policy regarding spousal violence cases.

Regarding the time frame of the project it should be noted that for recidivists (i.e., suspects against whom more than one complaint was filed), complaints prior to 1987 were also included. Mutual complaints (i.e., both spouses filing complaints) relate to previous years even if there was only one complaint in 1987. This was done in order to obtain fuller data regarding the temporal patterns and frequency of spousal violent events known to the police. The data of the present study refer only to the last complaint against each suspect, i.e., each suspect is counted here only once.

The total number of suspects included in this analysis is 415, most of them (70.4%) are "first timers", i.e., they were involved only in one event known to the police.

The preliminary findings presented here are based on the rather limited (and in many cases, incomplete) details on spousal violence found in the card index record, and the routine recording register of the Jerusalem police headquarters.

The most striking demographic characteristic of this sample is that it is almost exclusively (97.9%) Jewish inspite of the sizeable proportion of non-Jews (mainly Arabs) in this city: non-Jews comprise close to 30% of the population in Jerusalem (*Central Bureau of Statistics* 1985), yet in our sample only about 2% are non-Jews. This discrepancy between the two ethnic groups in reporting spousal violence will be investigated in the further stages of the project.

Table 1 presents selected characteristics of reported spousal violent events in Jerusalem. In these events, the great majority (78.6%) of complaints are

of wives against their husbands, less than one fifth (17.9%) of the cases are of husbands complaining against their wives. Only a very small proportion (3.5%) of these events come to the attention of the police through other sources (neighbors, relatives, etc.).

About 3 out of 4 complaints relate to physical assaults, while one out of four has to do with threats of violence, violations of court injunctions or other complaints (e.g., telephone harassment, causing damage to property, etc.).

It is of interest to note that almost one quarter of the events (23.1%) were found to pertain to the category of "mutual complaints". According to some police officers, spousal violence complaints (including mutual complaints) are sometimes encouraged by a spouse's lawyer in cases of legal separation or divorce procedures. This aspect will also be further investigated in the later stages of the project.

Table 1: Selected Characteristics of Spousal Violence Events (in Percent)

A.	**Complainant**	%
	1. Wife	78.6
	2. Husband	17.9
	3. Other	3.5
	Total	100.0
B.	**Type of Complaint**	
	1. Physical assault	74.0
	2. Threats of violence	11.9
	3. Violation of court injunction	9.2
	4. Other	4.9
	Total	100.0
C.	**Mutual Complaints**	
	1. Mutual complaints	23.1
	2. No mutual complaints	76.9
	Total	100.0
D.	**Previous Complaints**	
	1. No previous complaint	72.0
	2. 1 previous complaint	13.0
	3. 2-3 previous complaints	8.9
	4. 4+ previous complaints	6.0
	Total	100.0

As stated earlier, the majority of suspects are "first timers", and only less than 30% are recidivists with between one and 18 previous complaints filed against them. As shown quite clearly in Figure 1, the proportion of "no criming" cases in our study is slightly higher than that found in the study of *Eliram et al.* (1977). On the other hand, in 1987 the proportion of files closed for lack of evidence or public interest is lower, and the proportion of cases prosecuted is considerably higher than in the previous study.

4.1 Factors Related to Police Decision

In view of the high proportion of non-criming decisions in police response to spousal violence, it is important to examine the factors related to police decisions in these cases. When all the relevant data is collected, this will be accomplished by means of multivariate statistical analyses. At this stage, however, the relationship between police decision and the variables available at this stage of the project is presented in Tables 2-5.

Table 2, relating police decision to type of complaints, shows that the decision to criminalize the suspect is the highest in cases of physical assault. However, the differences between the categories in this table do not reach statistical significance.

Table 2: Type of Complaint by Police Decision (in Percent)

Decision	Type of complaint				
	Physical assault	**Threats of violence**	**Violation of court injunction**	**Other**	**Total**
1. No criming	85.4	95.6	90.3	88.9	87.2
2. Criminal file opened	14.6	4.4	9.7	11.1	12.8
Total	100.0	100.0	100.0	100.0	100.0
N	281	45	31	18	375

$x^2 = 3.939$; d.f. = 3; p = .268 (n.s.)

When police decision is related to number of previous complaints (Table 3), these two variables are found to be strongly related. The more previous complaints a suspect has against him/her, the greater the tendency

of the police to criminalize him/her on the current complaint. As seen in Table 3, the chance of a suspect with two or more previous complaints to be criminalized is more than four times that of a first timer. However, the most striking finding in Table 3 is that even in cases of multiple recidivists (the 2+ category) most suspects (70%) are not crimed at all. This practice is in sharp contradiction to Section 5 of the police regulations, which specifies that the no criming procedure is to be implemented only in cases of suspects without a previous record (criminal or non-criminal) of spouse abuse. This discrepancy between official regulations and actual policy and practice reflects the reluctance of police to recognize spousal violence as a social problem and act accordingly. It seems that the previously mentioned statement of a police officer that a battered woman is a disobedient woman is clearly reflected in the findings of Table 3.

Table 3: Number of Previous Complaints by Police Decision (in Percent)

Decision	Number of previous complaints			
	0	1	2+	Total
1. No criming	92.7	76.5	69.8	87.3
2. Criminal file opened	7.3	23.5	30.2	12.7
Total	100.0	100.0	100.0	100.0
N	274	51	53	378

$x^2 = 27.227$; d.f. = 2; $p < .0001$.

Table 4 reveals that the police decision is not related to whether the complainant is the wife or the husband. On the other hand, suspects belonging to the "mutual complaint" category (Table 5) have a greater chance of being criminalized than those not included in this category. This is apparently due to the fact that suspects in the mutual complaints category tend to have more previous complaints filed against them, as will be shown below.

Table 4: Complainant by Police Decision (in Percent)

Decision	Complainant		
	Wife	Husband	Total
1. No criming	87.2	89.5	87.6
2. Criminal file opened	12.8	10.5	12.4
Total	100.0	100.0	100.0
N	297	57	354

x^2= .226; d.f. = 1; p = .634 (n.s.).

Table 5: Mutual Complaint by Police Decision (in Percent)

Decision	Complaint		
	Mutual complaint	No mutual complaint	Total
1. No criming	80.3	88.8	81.1
2. Criminal file opened	19.7	11.2	18.9
Total	100.0	100.0	100.0
N	71	304	375

x^2= 3.756; d.f. = 1; p = .053.

4.2 Factors Related to Complainant and Mutual Complaints

An indirect (but not less important) way to more fully understand factors related to police decisions is to analyze in some detail the two cardinal characteristics related to the complainant: which spouse filed the complaint, and whether the other spouse also filed a complaint (not necessarily for the same event). Tables 6-9 relate to these characteristics.

Table 6 shows quite clearly that wives' complaints relate almost exclusively to actual physical violence or threats of violence. Husbands, on the other hand, complain much more frequently about non-violent acts (i.e., violation of court injunction and other complaints). Thus, our findings are in line with those of many previous studies which show that spousal violence is predominantly a problem of battered women and quite rarely a problem of battered husbands.

Table 6: Complainant by Type of Complaint (in Percent)

Type of complaint	Complainant		
	Wife	Husband	Total
1. Physical assault	79.0	62.0	75.8
2. Threats of violence	12.4	5.6	11.2
3. Violations of court injunction	5.4	21.1	8.3
4. Other	3.2	11.3	4.7
Total	100.0	100.0	100.0
N	314	71	385

x^2= 29.889; d.f. = 3; p < .0001.

Table 7 presents the distribution of wife and husband complaints in relation to the combination of two factors: Recidivism and mutual complaints. This table reveals that for the great majority of women's complaints, there is no counter complaint from the husband. On the other hand, most complaints by husbands are part of a mutual-complaint pattern.

Table 7: Complainant by Recidivism and Mutual Complaint (in Percent)

A			
Recidivism and mutual complaint	**Complainant**		
	Wife	**Husband**	**Total**
1. First timer, no mutual complaint	63.4	29.6	57.1
2. First timer, with mutual complaint	6.7	39.4	12.7
3. Recidivist, no mutual complaint	22.6	9.9	20.3
4. Recidivist, with mutual complaint	7.3	21.1	9.9
Total	100.0	100.0	100.0
N	314	71	385
x^2= 76.196; d.f. = 3; p < .0001.			
B			
1+3. No mutual complaint	86.0	39.4	77.4
2+4. With mutual complaint	14.0	60.6	22.6
Total	100.0	100.0	100.0
N	314	71	385

x^2= 71.741; d.f.= 1; p < .001.

When the dates of complaints become available, it will be possible to ascertain who files the first complaint in mutual complaint cases. It is reasonable to assume that in most cases it is the woman, since she is the underdog in the great majority of spousal violence events.

Tables 8 and 9 relating mutual complaints to type of complaint (Table 8) and to the number of previous complaints (Table 9) show quite clearly that mutual complaints are considerably more prevalent in non-violent events (i.e., categories 3 and 4 in Table 8) and in cases where multiple recidivist suspects are involved (i.e., category 3 in Table 9).

Table 8: Mutual Complaint by Type of Complaint (in Percent)

Type of complaint	Complaint		
	Mutual complaint	**No mutual complaint**	**Total**
1. Physical assault	71.0	75.6	74.6
2. Threats of violence	4.3	13.6	11.5
3. Violation of court injunction	16.1	7.0	9.1
4. Other	8.6	3.8	4.9
Total	100.0	100.0	100.0
N	93	77.3	409

$x^2 = 15.692$; d.f. = 3; $p < .001$.

Table 9: Mutual Complaint by Number of Previous Complaints (in Percent)

Number of previous complaints	Complaint		
	Mutual complaint	**No mutual complaint**	**Total**
1. 0	54.7	77.0	71.8
2. 1	15.8	12.3	13.1
3. 2+	29.5	10.7	15.1
Total	100.0	100.0	100.0
N	95	317	412

$x^2 = 22.781$; d.f. = 2; $p < .001$.

5. Discussion

The extremely high proportion of no criming in spousal violence cases in Israel is very disturbing. It is particularly disturbing that in the last ten years the proportion of criming of these cases has hardly changed, and the proportion of prosecutions has increased only modestly. These high proportions of non-criming undoubtedly discourage battered women from complaining altogether, or from complaining a second time after a no-criming decision following the first complaint. In part, this may explain the large proportion of first timers in our sample: Women do not bother to complain a second time after experiencing non-action on the part of the police "in response to" their first complaint. An alternative explanation could be that the first complaint had the desired deterrent effect on the husband. However, both anecdotal information and systematic studies on this topic indicate that this is the less probable explanation.

We found that women complain more frequently about actual violence and have much less complaints filed against them by their husbands. Thus, cases of women complaining about physical violence with no mutual complaints seem to constitute the more genuine cases of spousal violence on which police should concentrate and respond more harshly.

In comparison to women, males as complainants are much more involved in non-violent events and in mutual complaints. Some of these events are cases in which complaints of spousal violence are part of ongoing or prolonged marital conflict and dispute related to separation or divorce procedures. It would seem that these cases strengthen the police stereotypes about spousal violence which in turn encourages their practice of non-intervention and non-crimining of spousal violence in order not to be manipulated by conflicting spouses involved in marital dispute. However, even if such cases do exist (and their real extent is still to be ascertained), they undoubtedly comprise only a minority of spousal violence cases recorded by the police.

6. References

Bell, D.J. (1985). Domestic violence: Victimization, police intervention, and disposition. Journal of Criminal Justice, 13, 525-534.

Berk, S.F., & Loseke, D.R. (1981). Handling family violence: Situational determinants of police arrest in domestic disturbances. Law and Society Review, 15, 315-346.

Central Bureau of Statistics (1985). Statistical abstract of Israel. Jerusalem: Government Press.

Davis, P. (1981). Structured rationales for non-arrest: Police stereotypes of the domestic disturbance. Criminal Justice Review, 6, 8-15.

Dawson, B., & Faragher, T. (1977). Battered women's project: Interim Report, Department of Sociology, University of Keele.

Eliram, Y., Aharoni, Z., & Terer, A. (1977). Police action in complaints of battered women: A research report. Jerusalem: Israel Police Headquarters.

Faragher, T. (1985). The police response to violence against women in the home. In: J. Pahl (Ed.), Private violence and public policy: The needs of battered women and the response of the public services (pp. 110-125). London: Routledge and Kegan Paul.

Homant, R.J., & Kennedy, D.B. (1985). Police perceptions of spouse abuse: A comparison of male and female offenders. Journal of Criminal Justice. 13, 29-44.

Johnson, N. (1985). Police, social work and medical responses to battered women. In: N. Johnson (Ed.), Marital violence (pp. 109-124). London: Routledge and Kegan Paul.

Kaufman-Kantor, G., & Straus, M.A. (1987). Stopping the violence: Battered women, police utilization and police response. Paper presented at the American Society of Criminology Meeting, Montreal, Canada.

Langley, B., & Levy, B. (1977). Wife beating: The silent crisis. New-York: E.P. Dulton.

Lev-Ari, R. (1986). Family violence. Tel-Aviv: Naamat Center for the Prevention of Family Violence.

Martin, D. (1976). Battered wives. New-York: Pocket Books.

Martin, D. (1978). Battered women: Society's problem. In: J.R. Chapman & M. Gates (Eds.), Women: The victimization of women (pp. 111-143). Beverly Hills: Sage Yearbooks in Women Policy Studies, Vol. 3.

Sde-Or, M. (1987). Battered women: The policy of the police. Paper presented at a Conference on Spousal Violence, Institute of Criminology Hebrew University of Jerusalem, Israel.

Steiner, Y. (1988). Women are beaten at all ages, in all societies, and for a variety of reasons. Ha'aretz Daily Newspaper. 27.3.88.

Straus, M.A. (1978). Wife beating: How common and why? Victimology, 2, 443-458.

Straus, M.A., Gelles, R.J., & Steinmetz, S.K. (1980). Behind closed doors: Violence in the American family. New-York: Doubleday/Anchor.

Walker, L.E. (1979). The battered woman. New-York: Harper and Row.

Policing Family Disputes: An Empirical Analysis of Police Response to Domestic Violence in Bavaria

Wiebke Steffen

Contents

1. Subject and Goals of the Study

The empirical analysis of police response to family disputes was carried out by the Criminological Research Group of the Bavarian Police upon request of the Bavarian Ministry of the Interior during the years 1988 and 1989.

This request demonstrates the altering change in the significance of domestic violence (of which "family disputes" are an integral part) which has come about in recent years in the Federal Republic of Germany: Domestic or family violence and here especially violence by men against their wives or girlfriends is, according to present (very incomplete) knowledge, meanwhile known to be one of the most serious problems existing of violent crime. This is due not at last to the fact that this form of violence, because of its inherent nature, still remains socially least controllable and is therefore widely underestimated in its frequency and seriousness.

Typical of the Federal Republic of Germany is that this change in the significance of domestic violence is out of all proportion compared to the very unsatisfying state of research on this subject. At present, however, it is impossible to obtain reliable data on the different kinds, the (statistical) extent and the development of domestic violence. According to these deficits there is no sufficient knowledge of the prevention and control of this violence. Nevertheless it can and must be assumed that domestic violence is not restricted to a small percentage of families at risk.

The unsatisfactory state of research also applies to the part of domestic violence which is defined as "family disputes" by the police. According to the definition used by the German police a "family dispute" is any quarrel, altercation or strife, including domestic violence (without sexual assaults and the abuse of children), between family and household members which is reported to the police by the affected persons themselves or by other witnesses such as neighbours or acquaintances.

As far as we know there has only been one empirical study carried out in the Federal Republic of Germany up to now which refers explicitly to family disputes. Unfortunately, the results of this analysis of 54 police responses to domestic disturbances were only published in part (*Krause* 1984). A further study on this subject, which also was published only in part, was carried out by *Benard* and *Schlaffer* (1986) for the Austrian police. Otherwise the knowledge of policing family disputes refers to the police'

"knowledge by experience" (*Giese & Stendel* 1974; *Füllgrabe* 1974; *Weger* 1980; *Deutsches Polizeiblatt* 1983) and/or the statements of police officers and victimized women which have been published in studies primarily concerned with the protection and treatment of female victims (*Clausen* 1981; *Hagemann-White et al.* 1981; *Sack & Eidmann* 1985; *Chelmis* 1985; *Bergdoll & Namgalies-Treichler* 1987).

Considering the almost non existing reliable knowledge of police response to family disputes, the discussion of this response and, above all, the quantity and severity of the reproaches which are brought against the police are noteworthy.

The police are blamed for coping inefficiently and passively with domestic violence and for not giving the anticipated and badly needed protection and assistance to victimized women. They are blamed for primarily pursueing conflict settlement by restoring peace through conciliation and mediation and not by arresting and prosecuting the (male) offender. Therefore, up to now, domestic violence and especially wife battering is still valuated and handled by the police as a "private affair" and not as a criminal act for which the offender is responsible and for which he should be treated in exactly the same manner as if the offence had occured outside the family (e.g. *Hagemann-White et al.* 1981; *Bergdoll & Namgalies-Treichler* 1987; *Hagemann-White* 1989).

These reproaches come primarily from the womens' movement to whom much credit must already go for the change in the significance of domestic violence. But the representatives of this movement are not satisfied with this improvement: The feminist approach to domestic violence and especially to wife battering is not only aimed to spotlight this violence and lift the taboo but rather to totally non-privatise it by prosecution.

In this sense, the police are urged to adjust the aim of their response to family disputes from the restoration of "domestic tranquillity" to law enforcement. The police are urged to reduce the deficits in prosecution for acts of domestic violence and to abolish the double standards for reactions to acts of violence inside and outside the family (*Hagemann-White* 1989, p. 135).

This request is not met by the police with unanimous approval - the case is quite the reverse. To be sure, police too are not content with their present responses to family disputes but do not believe themselves capable of efficiently coping with domestic disputes and violence incidents at all. For settling a conflict by conciliation and counselling is not thought to be a "real" task of the police and even though law enforcement is actually "police-like" it seems to be no remedy at all in this case. Law enforcement

and prosecution are looked upon as counterproductive because police prosecution and criminal punishment would almost always increase existing tensions and conflicts. Therefore, law enforcement and prosecution would only aggravate the domestic dispute instead of giving the anticipated and intended help. Actually, the police can do little towards a definite settlement of the conflict and should therefore be the last link in the chain of interventions in cases of domestic violence.

Whether or not this is true, the problem for the police is that they are the first and not the last link in the chain of formal interventions because of their prominent position as a crisis intervention agency in domestic dispute incidents. If it were only for this reason (and not for the requests put to them) the police must strive for the "proper" police response to family disputes.

Due to the very poor state of research on domestic violence in general and on policing family disputes especially this "proper" method is difficult to find. For that reason, this study is aimed at giving some advice to or at least hints for coping more efficiently with family disputes through an empirical analysis of police response to incidents of domestic dispute and violence.

2. Methods

In order to make inquiries on police responses to family disputes the Bavarian uniformed police officers were asked to fill in questionnaires after each and every response. Those questionnaires asked for the nature and seriousness of the dispute, the social and behavioural characteristics of the participants and the police methods and measures of coping with these conflicts.

During October and November 1988 there were 2,074 domestic dispute calls reported and analysed in the whole of Bavaria; one year later a subsequent inquiry followed concerning the judicial disposition of the cases referred to the public prosecutors of each court district in Bavaria.

The presentation of the most important findings of these inquiries follows the assumptions, requests and allegations made in literature which are especially relevant to the characteristics of family disputes in general, actual police response in particular and to the possible and/or necessary consequences to be drawn for future policing.

3. Findings

3.1 The Initial Point of Police Responses to Family Disputes

The results concerning the initial point of police response to family disputes i.e.

- findings on the nature of the disputes themselves and
- findings on the social and behavioural characteristics of the parties concerned,

indicate that the estimation of policing family disputes by the police officers as "problematic" and "disliked" is not due to their quantity but to their specific quality.

3.1.1 Family Dispute Responses do not happen very often

Contrary to what is often stated but not proved in literature, policing family disputes do not belong to the more frequent police activities: According to the results of this study its share in all police responses to (emergency) calls lies under 1%. Taking into account considerable regional differences - the frequencies within the seven Bavarian police headquarters range between 5.4 and 9.4 family dispute responses per 10,000 multiple person households - policing family disputes is not "normal" in the sense of being a "daily event" for the police officers. Therefore, the police officers can neither develop a "routine response" nor can they rely solely upon their knowledge by experience.

3.1.2 The Nature of Family Disputes is very often unintelligible and unforeseeable

It is not only very difficult for the police officers to obtain more routine because of the comparative rarity of their responses to family disputes but even so because the nature of the disputes varies greatly and only rarely there is sufficient information available before their arrival at the place of action. "Family disputes" can be trifles but can also be serious strifes with life-threatening, even mortal results for the parties concerned:

- More than half of the 2,074 analysed disputes (53%) had only been quarrels, 42% of them, however, violent incidents.
- Even when violence occurred during the dispute there were not always persons injured: Only 25% of the victims (as well as 6% of the offenders) were more or less seriously hurt. 30 victims (and 5 offenders) were so badly injured that they had to be taken to a hospital; 3 victims were killed.
- Apart from that 36% of the victims and even 10% of the offenders were obviously disturbed.
- Before or during the presence of the police 42% of the offenders and even 16% of the victims behaved belligerently in an aggressive manner. This was due not at last to the fact that almost half of the offenders (47%) and nearly a quarter of the victims (22%) were drunk or had been drinking.

Because of the possible though not always existing seriousness of these conflicts, responses to family disputes gain a high priority in the "dispatch hierarchy" of police headquarters: In 83% of all responses analysed the police came to the places of action immediately, in 87% of all responses with two officers.

The police were called very frequently during the evening- and night-hours (but only slightly above average on weekends): 65% of all calls occurred between 6 p.m. and 3 a.m.

For the most part the police were called by the disputants themselves, mostly by the victims. In a good third of all incidents (38%) the families involved were already known to the police from one or more previous responses.

69% of the disputes took place between spouses or cohabitees, 20% between parents and their (grown up) children. Additional persons, primarily family or household members (76%), were at the place of action in more than half of the incidents (58%) when the police arrived.

In two-thirds (65%) of the cases the dispute was already finished when the police got to the place. Only in a quarter of all cases (24%) the dispute was still in full activity; in approximately one-tenth of the cases (8%) the dispute began anew upon arrival of the police.

3.1.3 Responses to Family Disputes are not dangerous for the Police Officers themselves

Responses to family disputes are considered to be "problematic" and "disliked" not only because the police officers do not know the nature of the conflict which awaits them but also because they do not know what awaits them personally. Police response to family disputes is normally described as being dangerous for the police officers involved because the aggressions can be turned against them and the victim very often sides with the offender against the police.

The findings of this study do not confirm these statements: In only 3% of the responses (or in 61 cases) the offenders behaved belligerently against the police and there was no single case detected in which the victim took side with the offender against the police.

The fact that 97% of all family disputes were disposed of peacefully, likewise contradicts the often stated allegation that such aggressions against the police are caused by a clumsy and unprofessional handling of the disputes by the police officers themselves.

As a rule the police do not have to take aggressions against themselves into consideration: According to the findings of this study it only happened rarely that the offender - and not at all the victim - of the family dispute behaved belligerently against the police.

Although this situation is favourable in itself, it might become problematic for the police officers' awareness of their own safety: In spite of and directly because of the rare occurrence of aggressions against the police the officers must be trained for the potential dangerousness of their responses to family disputes.

3.1.4 Domestic Disputes are primarily verbal and physical Abuse of Wives by their Husbands

The police term "family dispute" conceals and minimizes the existing violent relationships within the family. According to the findings of this study, family disputes are in no way equally entitled to all family members but are primarily verbal or physical violence from men towards women: 79% of the victims are female, and 91% of the offenders are male (the following data refer to the 1,491 police responses in which the officers were able to determine the offender-victim-statuses).

The disputes between male offenders and female victims (76% of all cases) are by far the most frequent and at the same time the most difficult

ones to be foreseen by the police officers: For on the one hand they can be settled relatively unproblematic; on the other hand they can escalate into serious wife battering and even, in three cases, to mortal consequences for the wives.

The dominance of male offenders is most apparent in disputes between spouses or cohabitees: Here 89% of the victims are women and 92% of the offenders are men. This type of dispute is also the one which causes more than two-third (69%) of all police responses.

Women are only seldom offenders (in 10% of the police responses). In 30% of these disputes other women were victimized. Contrary to male offenders the female ones are more often visibly disturbed, and although they behave less aggressively they are more often injured (by the male or female victim).

If men become victims of family disputes at all, then they are mostly attacked and assaulted by other men (in 69% of these disputes) and above all in two dispute situations: During disputes between "parents and their grown up children" and during disputes between "other family members and relatives". In these two situations men make up for 46% respectively 50% of the victims and 90% respectively 84% of the offenders.

Disputes between men (14% of all police responses) are by far the most aggressive in nature. These families are very often known to the police from previous responses and are also the ones burdened with the most problems.

3.1.5 Family Disputes are spread among all social Classes and occur in the Country as well as in the Cities

Family disputes are spread among all social classes and occur in the more rural areas as well as in the bigger cities of Bavaria. According to these findings family disputes are neither a problem of the lower social classes nor a problem of the big cities. There are, however, hints that the police are more often called by families in impairing socioeconomic circumstances and by families which live in the more rural parts of Bavaria: In other words by families which either do not see subjectively other remedies or by families which objectiveley do not have other possibilities to settle the conflict.

3.1.6 Family Disputes have a long Conflict-Background behind them

The data provided by the police officers to the probable causes and motives of the actual disputes make clear that the disputes to which the police are called generally took place in families with long conflict-histories.

Above all they are caused by alcohol and alcohol abuse problems: 51% of the offenders and 23% of the victims of the actual disputes are under the influence of alcohol. In the second place are problems which are related to the seperation or divorce of spouses or cohabitees: At least one quarter of the spouses lived in separation or divorce, almost one third of them stayed in the same appartment.

With regard to the generally rigid conflicts it is surprising to find that the police responded in only one third (38%) of the calls to families which were already known to the officers from previous responses. But, as it could be expected, those "recidivist" families are the ones with the greatest problems: The disputes are more aggressive and are also more often characterized by factors which are related to social and economic pressure. It is with these "families at risk" that conflict settlement is rarely "done" with a one-time intervention (whether by the police or by other agencies).

3.1.7 Summary

The findings on the initial point of police responses to family disputes make evident that these responses do not get their importance for the police through their frequency or their dangerousness for the officers themselves but rather through their specific qualities.

Family disputes range from relatively harmless (verbal) quarrels to massive assaults with life-threatening and even mortal consequences for the persons involved. Only rarely do the police officers know before their arrival at the place of action which of these situations will await them. However, they can assume that in the majority of those disputes women will be insulted or battered by their husbands or friends and that the offender is drunk and has behaved belligerently.

The following findings on the methods and measures of police response to family disputes i.e.

- findings on the nature and the frequency of different police measures used in general,
- findings on the use of law enforcement measures especially and
- findings on the probable anticipations und interests of the victims,

will show how the police officers "handle" these situations, which measures they take to settle the conflict, and to which extent their proceedings support the allegation that the police do not equal to their important task of preventing and controlling domestic violence.

3.2 The Methods and Measures of Police Responses to Family Disputes

3.2.1 Police Response to Family Disputes: Conciliation and Mediation but also Law Enforcement

Although less than half of the family dispute incidents to which the police are called can be classified as serious or actually violent, and although in two-thirds of the police responses the disputes have already calmed down before the arrival of the police, and although only one-third of the families is already known to the police from previous responses, there is almost no response in which the police officers did not take any measures to settle the conflict: the term "no measures at all" only refers to 6% of all 2,074 analysed responses.

The frequency and the nature of the measures adopted by the police depend, as expected, on the situation they came upon: The least problematic for the police officers are the already "calmed down" disputes, the most problematic are the relatively few cases in which the dispute begins anew upon arrival of the police.

Based on all 2,074 police responses, the measures which are most prominent are those which are intended to restore peace ("domestic tranquillity") and to emphasize legal norms through "conciliation and mediation" and "explaining the course of law".

The use of measures of law enforcement depend upon the seriousness of the dispute and whether an acute danger must be done away with: In cases of domestic violence (42% of all responses) criminal complaints are almost always filed if the victim has been injured.

Even in cases of "only" conciliated or mediated disputes, the measures of the police are mostly aimed at the offenders of the family disputes and not at the victims. That means that the police officers follow their usual (penal) conditions of action which place the offender (respectively disturber) and not the victim in the middle of police proceedings, even in their "peace restoring function".

This finding also applies to the extent in which the offenders and/or the victims are requested to leave the apartment: Even this measure is in no way primarily aimed at the victim as the person who is supposed to be the weaker one and therefore easier to influence. Whereas in 20% of the responses the offenders were ordered or forced to leave the apartment, the victims were in only 15% of all cases either asked to leave the apartment or brought directly to other persons by the police.

3.2.2 Criminal Justice (Penal Social Control) is characterized by Routines of Non-Intervention in Cases of Family Disputes

The practice of law enforcement by the police must be strictly distinguished from the practice of law enforcement done by criminal justice. According to the findings of this study the reproach of practicing "routines of non-intervention" (*Frommel* 1989) clearly applies to criminal justice but not to police.

3.2.2.1 Initiation of Law Enforcement by the Police

27% of all police responses result in a criminal complaint; 78% of these penal reports refer to offences of bodily injury. The dominance of these offences indicates that the practice of filing a criminal complaint is closely related to the obvious seriousness of the family dispute and the probable damage done to the victim:

- when the dispute was carried out verbally (1,088 cases), criminal complaints were only filed by the police in 7% of those incidents;
- when the victim was visible disturbed (737 cases), criminal complaints were filed by the police in 34% of those incidents;
- when the dispute was carried out in a physical-aggressive manner (876 cases), criminal complaints were filed by the police in 53% of those incidents;
- when the victim was injured during a violent dispute (519 cases), the rate of criminal complaints filed by the police amounts to 74%.

To be sure, the police officers could have filed more criminal complaints. According to the pledge of the German police to the principle of legality (i.e. the obligation to prosecute all punishable offences), they even must have done so. However, according to the findings of this study, it is doubtful whether a more often or even "automatic" filing of a criminal complaint would be reasonable or even desirable. These doubts refer to the disposition practices used by criminal justice and the fact that already half of the complaints are only filed by the police and are not initiated or supported by the victim in a separate private complaint.

3.2.2.2 Disposition of Preliminary Proceedings in Cases of Family Disputes by Criminal Justice

The disposition practices of criminal justice (i.e. public prosecutor offices and courts) are characterized by routines of non-intervention: The public

prosecutors dismiss 84% of the preliminary proceedings and even the few criminal complaints which are charged result to 21% in a dismissal or an acquittal by courts (the following findings are based on the cases which had been already disposed of by the public prosecutor's office respectively the court at the time of data collection).

The prosecutorial decision whether or not to prosecute (charging decision) is not based on the same factors as the police decision whether or not to file a criminal complaint - i.e. the seriousness of the dispute, its probable meaning for the victim, and the fact whether the victim had been injured or not - but rather on formal legal criteria.

According to these "normative rules of application" a punishable offence will be more likely charged and less likely be dismissed

- the less likely the offence is typical of a family dispute (but for example an act of resisting a police officer in the execution of his office or offences like theft or drug offences which had been detected "by chance" during the police response);
- the more serious the offence is according to the punishment laid down in the penal law;
- the more frequent several offences have been committed by one offender.

Otherwise or at least more apparent than the police, public prosecutors and judges follow routines of non-intervention in the disposition of cases of family disputes: Violent crime offences, which are typical of these disputes, are even more dismissed and even more seldom charged and convicted than violent acts which are committed outside the family.

In their disposition practice public prosecutors (and judges) are obviously not impressed or influenced by the extent to which this violence is made public by criminal complaints: This statement is proved by the comparison of the frequencies of criminal complaints filed by the police and the prosecutorial dismissing decisions in every single police headquarter. With one exception, the public prosecutor's offices more frequently dismiss the preliminary proceedings in those court districts where many criminal complaints have been filed.

3.2.3 *The Victims are cooperative but not always interested in Law Enforcement*

According to the charging and sentencing decisions of public prosecutors and judges it seems to be doubtful whether the police should initiate law enforcement more often - as it is requested by the womens' movement. The doubts do not only refer to the fact that every dismissal can be understood by the offender as a "permit" for further acts of violence but also to the behaviour of the victims and their presumed interests in law enforcement and punishment.

The findings of this study prove that on the one hand the victims want to settle the conflict by the police - the police are called mainly by the disputants themselves - but on the other hand they do not seem to want the offender to be prosecuted all the time: The vast majority of complaints are filed by the police officers; private complaints are laid by the victims in only 18% of all family dispute incidents.

But if the victims decide for law enforcement they will stick to this decision: Withdrawal of complaints by the complainants were found to be very rare.

3.2.4 *The Effects of Police Methods of Intervention and Non-Intervention*

Police responses to family disputes do not only occur with variable frequencies in the areas of the seven Bavarian police headquarters but are also disposed of in very variable ways, especially with relation to the extent to which law enforcement measures have been initiated by the police. By the example of two police headquarters it is possible to compare the proceedings and effects of the both methods of conflict settlement which differ on principle:

- the method of intervention, i.e. emphasizing the actual meaning and sanctioning power of the police by settling the dispute through measures of law enforcement;
- the method of non-intervention, i.e. emphasizing the symbolic meaning and sanctioning power of the police by settling the dispute through mediation and counselling.

The comparison of both methods shows that it is impossible to decide for one or the other method on principle: The method of intervention seems

neither to be more successful nor - as it is often stated - more detrimental for the future behaviour of the offender. Law enforcement and prosecution do not necessarily lead to an increase of the existing tensions and conflicts.

On the other hand is the method of non-intervention not less successful than the method of intervention - at least from a police point of view: The few complaints filed by the police officers following the method of non-intervention lead relatively more often to charges and convictions and the families are lesser inclined to call the police again.

But is successful policing also a success from a victim's point of view? For "non-intervention" also implies a certain indifferent behaviour on part of the police and especially that the police do not take side with the victims.

4. Conclusions and Recommendations

According to the results of this study the police response to family disputes is in many ways different from what could be expected by the reproaches and statements made in literature and can not, above all, be criticized as being "totally unsatisfactory".

But this conclusion does not justify the statement that the police response to family disputes is sufficient and efficient on all accounts and nothing or only a little bit should be changed or improved. That conclusion would not only be contradictory to the dissatisfaction of all parties concerned as it is expressed in the literature but it would be contradictory to some problematic findings of this study too.

These findings refer not only to the often unintelligible and unforeseeable nature of the disputes and the required police response or to the omission of possible and/or indispensable criminal complaints or to the obvious disagreement of police and criminal justice on how to react on domestic violence, but also to the remarkable regional differences in policing family disputes - especially with regard to the initiation and disposition of charges.

Apart from the fact that such regionally different methods of policing and prosecuting are usual - that is proved by every supraregional comparison - but by no means desirable, these differences unmistakably indicate that the question of the necessity and the benefits of law enforcement in cases of family disputes is still unanswered.

Therefore the police officers are often uncertain of how to behave when responding to family dispute calls. Hence it may follow that the victims and the offenders of the disputes are not treated suitably and adequately - and that the police response is criticized as being insufficient.

For any recommendations to be made for a better future policing of family disputes the following research results should also be taken into consideration - besides the findings of this study:

- the experiences which have been made in other countries - especially in the USA and in England - with the effects of more law enforcement in cases of family disputes ("arrest programmes");
- the results of research on sanctioning and sentencing and their effect on the German Penal Law, especially on the German Juvenile Criminal Law;
- the results of the research on victims' anticipations and interests, especially on the victims' needs for punishment and restitution.

4.1 Experiences with "Arrest Programmes" and their Consequences for the German Police

In other countries, especially in the USA but also in England, the problems of domestic violence and the police response to it were "discovered" and discussed earlier than in the Federal Republic of Germany. Therefore, suggestions and programmes for a more adequate policing were earlier made and tested.

Above all, there were the results of research proving the decrease of violence after a more repressive intervention of the police (i.e. arresting the offender) in cases of family disputes (*Sherman & Berk* 1984; *Ellis* 1987) which caused the German womens' movement to call for a similar way of policing family disputes in Germany too (*Hagemann-White* 1989, p. 135).

But a critical analysis of these results shows that they can only be applied with caution to German policing conditions: The proceedings of the (American and English) police under the conditions of the principle of opportunity can not be compared to the proceedings of the German police under the pledge of the principle of legality.

Obviously, the police in the USA and England only used "repressive" methods - i.e. filing criminal complaints and arresting the offenders - on very rare occasions. Therefore, even after implementing the "arrest pro-

grammes" they do not come up with the extent of "criminalization" which has been already reached by the German (at least by the Bavarian) police when responding to family disputes.

That is why the results of these "arrest programmes" can not be used to justify the call for more law enforcement by the German police on principle. But they can be used for giving arguments against the doubts and the prejudices which do not only exist within the police with regard to the use of "repressive" methods when settling a family dispute: The results of the various research projects do indicate that these methods do not intensify existing conflicts but, on the contrary, support the prevention of further violence by deterrence.

Therefore, it is justified to call for the elimination of the deficits in the detection and investigation of domestic violence and for the elimination of the different standards in dealing with acts of violence committed inside or outside the family. But, according to the results on sanctioning and sentencing and on the victims' needs and interests, it is not justified to see the aim of police responses to family disputes in law enforcement on principle.

4.2 The Effects of the Research on Sanctioning and Sentencing on the German (Juvenile) Criminal Law

The results of the research on sanctioning and sentencing show that the different kinds of interventions and punishments have nearly the same effects on the future behaviour of the offenders - if any effects at all!

Therefore, the tendency - above all in the Juvenile Criminal Law - does not go to more criminalization and punishment but to the reduction of criminalization and to the development of alternatives to criminal punishments. In general, it is intended to do "less" than "more" and to confirm the ideas of non-intervention and minimization of punishments (*Kerner* 1989; *Heinz* 1990).

And with regard to domestic violence, there is no sufficient evidence that in cases of family disputes more often and more severe sanctioning will have a better effect on the future behaviour of the offenders than in acts of violence committed outside the family.

That is why there is no need to call for more law enforcement in cases of family disputes on principle, but to call for more specific responses to the individual cases - according to what criminal law and law enforcement can afford: One must keep in mind that criminal law and law enforcement are not aimed to the settling and mastering of family conflicts.

4.3 Results of the Research on the Needs and Interests of the Victims

Such "specific responses" can also come up to the anticipations of the victims too: The few German-language research projects on the victims' needs for satisfaction show a remarkable calm attitude of the victimized persons towards the punishment of the offenders - and they show also the victims' needs for assistance and their interests in restitution and compensation (*Weigend* 1989, p. 404). Especially in cases of less serious crimes the needs for assistance and compensation have priority to an extensive punishment of the offender.

This result is above all typical of the victims of domestic violence: It is known by research that families want to keep domestic disturbances and their settlement as their own business - based on the principle of public and judicial non-intervention. Research results show that the principle of private settlement of domestic conflicts is only seldomly broken and that there do exist considerable reservations towards the involvement of formal agencies and publicly organized services even when the conflict has become violent. That is why neither the call for the police nor the laying of a private complaint can be put on a equal footing with the intention for law enforcement.

4.4 Conclusions

Knowing these results, measures of law enforcement should only be initiated in cases of family disputes when it is necessary to eliminate the deficits in detection and investigation and the different standards for the reaction on violence inside and outside the family.

According to the findings of this study the responding methods of the Bavarian police to family disturbance calls could be, on principle, an example for such a well-founded and specific use of law enforcement. For the police responses

- refer to the characteristics of the conflict itself and not (only) to domestic violence as a punishable act,
- mean mediation, counselling and symbolic emphasizing of legal norms in cases of non-violent disputes but
- law enforcement and prosecution in cases of serious violence.

On principle, this response should be adequate when settling family disputes. But the criticism of police responses indicates that there are still problems to be solved. In our point of view, one of the main problems hampering an overall adequate settling of family disputes is the pledge of the German police to the principle of legality even in cases of family disputes. For this principle only describes the legal obligations but not the reality of police proceedings.

The reality of policing - not only - family disputes is not "governed" by the principle of legality but characterized by the individual ways of every single police officer to opportunity decisions - but unfortunately he is not prepared for discretion by training (*Baurmann et al.* 1988, p. 124). Therefore, these "individual ways to discretion" can be problematic: The regular violations of the principle of legality when policing family disputes are located in a "grey area" and that hinders not only the control and supervision of their proceedings by the public prosecutor or other agencies but also the enactment of clear guidelines and an adequate training of the police officers. That is why the "individual ways to discretion" can result in an often unprofessional reaction of the police officers to the family disputes - with unsatisfactory effects for all parties concerned.

4.5 Recommendations

Therefore, we suggest to eliminate this "grey area" from the police responses to family disputes - but not by trying to enforce the principle of legality but by sanctioning the reality of policing. This suggestion corresponds to the general tendency of de-criminalization and to the fact that the police officer in action can better decide on adequate and useful measures than the public prosecutor.

Under the current German law such a sanctioning of the reality of policing is only possible if the public prosecutor agrees and formally delegates (parts of) his discretionary power to the police officers. At the moment, there do exist two examples for this delegation in the Federal Republic of Germany: The "Victim-Young-Offender-Restitution-Project" in Braunschweig where the police recommend compensation (*Pfeiffer* 1989; *Heuer* 1990) and the "Police-Diversion-Project" in Schleswig-Holstein (*Schinke* 1989; *Hering & Sessar* 1990) where the police themselves can caution young offenders and can advise the public prosecutors to dismiss the proceedings.

For the police response to family disputes we recommend the following "combination approach":

1. Initiation of law enforcement:

   If there are indications that the family dispute is a serious one - e.g. victims have been injured, calls for the police have occurred repeatedly, children are involved - and/or if the victim wants to lay a complaint, the police have to initiate law enforcement by filing a criminal complaint. The "warding off" of private complaints or the referral of the complainants to civil law are not allowed.

   If police officers initiate law enforcement than they have to do it with all consequences. This demand refers especially to the gaining of sufficient evidence: With regard to offences committed inside the family the police officers have to investigate as thoroughly as in the case of offences committed outside the family - just not to provoke the dismissal of the preliminary proceedings for "lack of evidence".

2. Final settlement of the disputes by counselling and cautioning:

   If there are less serious conflicts and/or if the victim does not want law enforcement, the police should be entitled to settle the dispute by counselling and cautioning but not by sanctioning the "offender".

   After having settled the conflict in this way, the police have to inform the public prosecutor formally about the measures taken - i.e. conciliation, mediation, or information on the course of law. Besides, the responses and the measures taken have to be registered in the information system of the police.

   This formal delegation of parts of the discretionary power of the public prosecutor to the police must correspond to an adequate training of the police officers who must be able to decide on law enforcement or on counselling and cautioning. Besides, the police officers must be able to inform the victims in a comprehensive and well-founded way in order to give them the help and assistance they are expecting.

   With regard to this we prefer a general training of all (uniformed) police officers to the installment of specific "family crisis intervention teams" as they have been established in some cities of the USA. A general training corresponds more to the conditions of an area state and prevents the impression that the police officers should act as social workers when policing family disputes.

From our point of view, the recommended "combination approach" opens up new realistic vistas for the victims, the police and the public prosecutors: Consequent prosecution when it is necessary - with a corresponding good chance of success with regard to the prosecutorial charging decisions - and

a as legally accepted (prosecutorial supervised) method of settling the conflict by the police officers themselves in cases of less serious family disputes.

5. References

Baurmann, M.C., Plate, M., & Störzer, H.U. (1988). Polizeirelevante Aspekte bei der Auseinandersetzung mit dem Gewaltbegriff. In: Bundeskriminalamt (Ed.), Was ist Gewalt? - Auseinandersetzungen mit einem Begriff. Sonderband der BKA-Forschungsreihe. Vol. 2. Wiesbaden.

Benard, C., & Schlaffer, E. (1986). Die Polizei und Gewalt in der Familie. Öffentliche Sicherheit, 51.3, 11-15.

Bergdoll, K., & Namgalies-Treichler, C. (1987). Frauenhaus im ländlichen Raum. Schriftenreihe des BMJFFG. Bd. 198. Stuttgart: Kohlhammer.

Chelmis, S. (1985). Gewalt gegen Frauen - Hilfen statt Behinderung. Bremen: Oberjohann.

Clausen, G. (1981). Mißhandelte Frauen im Netz sozialer Hilfen in Hamburg. Hamburg: Leitstelle Gleichstellung der Frau.

Deutsches Polizeiblatt (1983). Einschreiten bei Familienstreitigkeiten. Heft 2.

Ellis, D. (1987). Policing wife-abuse: The contribution made by domestic disturbances to deaths and injuries among police officers. Journal of Family Violence, 2, 319-333.

Frommel, M. (1989). Utopische, realistische und rhetorische Forderungen an eine Reform der sexuellen Gewaltdelikte. Zeitschrift für Sexualforschung, 2, 132-146.

Füllgrabe, U. (1974). Einschreiten bei Familienstreitigkeiten - eine häufige Aufgabe. Die psychologische Betrachtung. Deutsche Polizei. Heft 8, 242-245.

Giese, W., & Stendel, H. (1974). Einschreiten bei Familienstreitigkeiten - eine häufige Aufgabe. Deutsche Polizei, 8, 241-242.

Hagemann-White, C. (1989). Gewalt gegen Frauen. In: Bundeskriminalamt (Ed.), Was ist Gewalt? Sonderband der BKA-Forschungsreihe. Vol. 3. Wiesbaden.

Hagemann-White, C., Kavemann, B., Kootz, J., Weinmann, U., & Wildt, C.C. (1981). Hilfen für mißhandelte Frauen. Schriftenreihe des BMJFFG. Bd. 124. Stuttgart: Verlag W. Kohlhammer.

Heinz, W. (1990). Diversion im Jugendstrafverfahren. Zeitschrift für Rechtspolitik, 1, 7-11.

Hering, E., & Sessar, K. (1990). Praktizierte Diversion. Pfaffenweiler: Centaurus Verlag Ges.

Heuer, K.-H. (1990). Die Täter-Opfer-Ausgleichsempfehlung der Polizei. DVJJ-Journal, Nr.132.

Kerner, H.-J. (1989). Jugendkriminalität, Mehrfachtäterschaft und Verlauf. Bewährungshilfe, 36, 202-220.

Krause, M. (1984). Familienstreitigkeiten - Der Polizeibeamte als Konfliktpartner. Deutsche Polizei, 4, 17-24.

Marks, E., & Rössner, D. (Eds.). (1989). Täter-Opfer-Ausgleich. Bonn: Forum Verlag Godesberg.

Pfeiffer, H. (1989). Einbeziehung der Polizei in das Modellprojekt Täter-Opfer-Ausgleich in Braunschweig. In: E. Marks & D. Rössner (Eds.), Täter-Opfer-Ausgleich (pp. 65-76). Bonn: Forum Verlag Godesberg.

Sack, F., & Eidmann, D. (1985). Gewalt in der Familie. Kurzfassung des Forschungsberichtes. Hannover: Universität.

Schinke, G. (1989). Täter-Opfer-Ausgleich in Schleswig-Holstein. In: E. Marks & D. Rössner (Eds.), Täter-Opfer-Ausgleich (pp. 278-282). Bonn: Forum Verlag Godesberg.

Schwind, H.-D., Baumann, J., & et al. (Eds.) (1990). Ursachen, Prävention und Kontrolle von Gewalt. Analysen und Vorschläge der Unabhängigen Regierungskommission zur Verhinderung und Bekämpfung von Gewalt (Gewaltkommission). (vols. 1-4) Berlin: Duncker & Humblot.

Sherman, L., & Berk, R.A. (1984). The specific deterrent effects of arrest for domestic assault. American Sociological Review, 49, 261-272.

Weger, J. (1980). Polizeiliches Einschreiten bei Familienstreitigkeiten, Nachbarstreitigkeiten pp. Deutsche Polizei, 6, 28-30.

Weigend, T. (1989). Deliktsopfer und Strafverfahren. Berlin: Duncker & Humblot.

Rape - The Reactions of the Criminal Justice System and the Situation of the Victims in the Federal Republic of Germany

Dieter Dölling

Contents

1. Introduction

In recent years criminal justice concerning rape cases has become a focal point of public and scientific discussions in the Federal Republic of Germany. Here and in the following only the "old" states within the Federal Republic of Germany are considered - not the territory of the former German Democratic Republic. The debate is connected with the efforts of gaining emancipation and equal rights for women. The discussion is characterized by critical statements on the prosecuting authorities. They are accused for their lack of protection for the interests of the raped women.

The criticism has been pointed out in two directions. On the one hand criminal justice is accused of not prosecuting rapists energetically enough. Credibility of raped women is said to be doubted because of prejudices and it is maintained that this leads to unjustified dismissals or acquittals. Moreover, in case of conviction sentences are considered too low. On the other hand the treatment of rape victims by police and administration of justice is the object of criticism. It is criticized that women while undergoing questioning and during the trial are exposed to unjustified doubts on their credibility, disparagement and disproportionate infringements of privacy (see on the development of the discussion *Degler* 1981, p. 9; *Kaiser* 1988, pp. 677, 688). As a reaction to the criticism of the treatment of rape victims during the criminal proceedings the legislator has passed the "Law for Victim's Protection" of 18.12.1986. The implications of this law are discussed in *M. Kaiser's* article (in this volume). The present study deals mainly with the way of procedure of police and administration of justice when clearing and sanctioning rape cases. Because of the connection of these questions with the treatment of the victim during criminal proceedings there will subsequently be dealt with the problems of the conduct of police and administration of justice towards the victim.

2. The Clearing-up of Rape Cases and the Conviction of the Suspect

The problems of the clearing-up of rape cases and the conviction of the offender already become clear by looking into the crime statistics. According to the Criminal Statistics of the Police the clearance rate in rape cases

in recent decades was on the whole 70 % and thus considerably above the general clearance rate. In 1988 71,3 % of the rape cases which came to the notice of the police were solved. The clearance rate of all offences registered in the Criminal Statistics of the Police of 1988 was in contrast to this at 45,9 % (see *Bundeskriminalamt* 1989, p. 37).

However, many of the rape cases which are registered as cleared by the police are not charged, as - according to the view of the public prosecutor - judicial evidence is not possible. In 1988 the police identified 3,708 suspects in rape cases (see *Bundeskriminalamt* 1989, p. 100). In contrast to this the number of the defendants adjugded because of rape - i.e. the accused brought to court by the public prosecutor and against whom a final court decision (conviction, acquittal or dismissal) was passed - only amounted up to 1,403 in the Statistics of Criminal Prosecution (see *Statistisches Bundesamt* 1990, p. 16, 18). Related to all registered offences in 1988 (without the traffic offences) the relative discrepancy between suspects - 1,314,080 - and adjugded defendants - 599,486 - was considerably lower (see *Bundeskriminalamt* 1989, p. 43; *Statistisches Bundesamt* 1990, p. 12).

The numbers of the suspects recorded in the Criminal Statistics of the Police and the data of the Statistics of Criminal Prosecution on the adjugded persons, however, cannot be compared directly because of the lack of compatibility of both statistics (cf. *Göppinger* 1980, p. 151). When interpreting these numbers carefully, though, they justify the assumption that the public prosecutor in rape cases does far above average not bring the suspects to court by indictment but drops the case (see also *Rieß* 1989, p. 374). However, the quota of indictments in rape cases has probably risen in recent years. In 1968 there were 5,040 suspects and 1,276 adjugded persons, in 1988 the numbers are 3,708 and 1,403 (cf. *Bundeskriminalamt* 1969, p. 50; 1989, p. 100; *Statistisches Bundesamt* 1970, p. 34; 1990, pp. 16, 18).

The difficulties of producing evidence in rape cases also become obvious when considering the number of acquittals in this offence, which is above average. In 1988 15,5 % of all defendants adjugded in rape cases were declared not guilty. The quota of acquittals related to all offences (without the traffic offences) was on the other hand only 4,2 % (calculated in accordance with *Statistisches Bundesamt* 1990, pp. 36, 40, 42). The percentage of acquittals in rape cases has decreased in recent years from 24,4 % 1968 and 23,1 % 1978 to 15,5 % 1988 (calculated according to *Statistisches Bundesamt* 1970, p. 34; 1979, p. 10; 1990, pp. 40, 42). A decrease of acquittals related to all offences (without the traffic offences)

can be seen as well: from 6,7 % 1968 to 5,2 % 1978 to 4,2 % 1988 (calculated in accordance with *Statistisches Bundesamt* 1970, p. 52; 1979, p. 28; 1990, p. 36).

Some information on arising problems in rape cases as for clearing-up and conviction can be taken from the analysis of files on criminal proceedings of rape cases. In the following there will be presented data from a research promoted by the Bundeskriminalamt on the crucial factors on clearing-up and conviction of offences, which - besides burglary, robbery and fraud - also had rape cases as an issue (see *Dölling* 1987). The study is based on a comparison of solved and unsolved cases. Regarding rape altogether 257 offences that were reported to the police in the two cities of Hannover and Kassel from 1977 to 1979 were analysed, 139 of which were solved, 118 could not be solved. The results of both cities can be combined as the findings Hannover and Kassel are similar.

The analysis of files also shows that the majority of cases stated as solved by the police does not lead to a conviction of the suspect. In 47,5 % of the solved cases the public prosecutor filed a charge and in only 30,2 % of the solved cases conviction took place. Here and in the following with charge and conviction also those cases are recorded in which the accused is held responsible not due to rape but due to another offence, e.g. sexual compulsion or bodily injury. When taken into consideration all unsolved offences and the presumable high number of unreported rapes - there are estimations of the dark figure of 1:3, 1:5 and 1:10 (see *Amelang* 1986, p. 286; *Baurmann* 1983, p. 98; *Kaiser* 1988, p. 679) it becomes evident that only a small number of all rape offences leads to a conviction.

Whenever rape is reported to the police the problems regarding identification and conviction of the offender are substantially determined by the situation in which the police begin their investigation. The police cleared only 26 % of those cases in which the offender attacked the victim suddenly.. 15,4 % of the cases which happened as an assault led to a conviction. When contact was established without assault the police declared 73,7 % of the cases as solved. However, in these cases there arose such massive difficulties in producing evidence that the quota of conviction was only 17,1 %. Therefore, both, cases with assault and non-assault-cases lead to nearly the same quota of conviction (see Table 1 below). Whereas in cases of assault the main problem is the identification of the suspect, there is on the other hand in non-assault-cases the main problem the conviction of the suspect.

A similar implication lies in the offender-victim-relation. From the cases in which offender and victim did not know each other before taking up the

contact that led to the offence, the police cleared 35,2 % and 15,3 % resulted in a convicted. The police declared all those cases as solved in which offender and victim knew each other before the offence. However, only 19,7 % of these cases led to a conviction.

Presently, in the centre point of the discussion, there is the problem of how to find evidence in cases where victim and suspect knew each other before the offence. However, before entering the particulars of this problem it should be noted that the identification of the suspect in a fair number of cases causes considerable difficulties. The low solving-rate, as far as sudden attacks and cases without acquaintance of offender and victim before the offence are concerned, verifies this fact. This is especially the case when the police do not manage to identify the suspect immediately after the offence. In the research reported here a distinction has been made of the information available in the first period of investigation and that of the remaining course of investigation. The first period deals with: information gained from the informant and witnesses from the scene of crime, the report of the scene of crime and the statements of either a suspect caught at once or known by name already at the beginning of the investigation.

As seen in Table 2 nearly all cases with a suspect being identified in the first period of investigation were declared as solved by the police. 25,4 % of these cases led to a conviction. If there was no suspect identified in this first phase the solving-rate was only 20,3 % and just 9,1 % led to a conviction. So, if the identification does not take place right in the beginning of the investigation, an offender has a good chance to avoid conviction. The low solving-rate of investigations after the initial activities of the police, in a case with not yet identified offenders, should be a reason for improving criminal investigations.

As mentioned before a specific problem in rape cases is that it is especially difficult to bring up evidence against an identified suspect. In order to analyse this, 147 cases were examined. In these cases the suspect was known by name by the end of the investigation. Above all, the defendant's as well as the victim's testimonies were most important as to the results of the cases. In those few cases in which the defendant makes a partial or full confession the rates of indictment and conviction are above average (see Table 2, Sec.1). If the defendant does not confess, the victim's statements are very important - the higher the victim's willingness to cooperate with criminal justice, in particular to give detailed information on the offence, the higher the probability of conviction (see Table 2, Sec. 2). However, if the victim's statements have "weak points", i.e. are

there hints for simulating an offence or withdraws the victim her incriminating testimony or is the statement contradictory to itself, a conviction is hardly taken into consideration (see Table 2, Sec. 3 to 5).

The probability of conviction is higher, if the victim's statement that incriminates the suspect is supported by evidence which gives reason to believe the offence - according to the criminalistic theorems accepted in the practice of the criminal courts. This is the case, for example, if the following circumstances are given: injury of the victim, preserving of traces, existence of further incriminating witnesses in addition to the victim, a connection between the case and other crimes (e.g. a series of offences) and previous convictions of the suspect, especially for similar offences (see Table 2, Sec. 6 to 12).

If the above mentioned incriminating circumstances do not exist, and if the statements of victim and offender are contradictory, in many cases the public prosecutor and the court consider evidence as not substantial. The probability of conviction is especially low in the following constellations: victim and offender were acquainted before the offence, the initiative for taking up contact came totally or partially from the victim, the victim went voluntarily with the suspect to the scene of the crime, the victim exchanged some sort of tenderness with the suspect before the offence (see Table 2, Sec. 13 to 16).

The presented results of the study are confirmed by the findings of other studies which also deal with criminal proceedings concerning rape offences. The file analysis carried out by *Blankenburg, Sessar* and *Steffen* (1978) in eight departments of public prosecution in the Federal Republic of Germany showed that criminal proceedings dealing with rape led to higher indictment rates if the following characteristics exist: a confession of the suspect, parallel pendency of several offences and previous convictions of the suspect. There were higher dismissal rates, if suspect and victim were acquainted and if injuries of the victim could not be ascertained (p. 123). *Weis* (1982) analysed the files of 178 criminal proceedings concerning rape cases, which happened from 1977 till 1979 in the state of Saarland. The analysis showed that the conviction rate was higher if the accused had previous convictions - especially for similar offences - and that the dismissal rate was higher, if the suspect and the victim were acquainted before the offence (pp. 205-207).

A study investigating the rape cases which were reported to the police in Bremen from 1975 until 1980 and carried out by *Vier, Müller* and *Rauch* (1984) yielded a quota of 7 % simulated offences. An analysis of 52 criminal records concerning rape in Bremen of the year 1979 which deal

with identified suspects was made by *Warnke* (1986). The results show that the conviction rate was lower in relation to a higher acquaintance level between victim and suspect and that the conviction rate was higher in cases with an assault (p. 29).

A detailed analysis of 326 criminal records with identified suspects of the years 1977 until 1979 concerning cases of rape and sexual compulsion from the administrative district of Detmold was carried out by *U. Steinhilper* (1986). According to this study there were, among others, higher indictment and conviction rates if the following characteristics were existent: the suspect made a confession, the victim's readiness to cooperate with the criminal justice agents was high, the victim was injured, the suspect was also prosecuted for other offences or had previous convictions for the same type of offence. In contrast to this, lower rates of sanctioning were stated, if the victim had exchanged some sort of tenderness with the suspect before the offence or if there had existed a close relationship between the suspect and the victim (p. 155, p. 223).

When summing up the results of the studies concerning the problems of producing evidence it may be said that there are a few cases with false complaint or in which the informant's statement is insufficient in such a way that evidence cannot be produced in court. The number of these cases, however, is so small, that there is no reason to generally mistrust the statements of rape victims. The furnishing of evidence is especially problematic in those cases, where suspect and victim knew each other before the offence or the victim took up contact with the accused voluntarily, and if the victim's and the suspect's statements contradict each other in respect to the committing of the offence, especially intercourse under compulsion or threat. The problems of producing evidence are increased in these cases if the victim's statement is not supported by other evidence, such as injuries, which are accepted by the administration of justice as being incriminating.

For an appropriate evaluation of these cases the knowledge gained in criminological and psychological studies on the interactions in rape cases and the credibility of the victim's statements should be applied in the criminal justice system. To some extent in the practice of the administration of justice there may still be assumptions on typical or untypical behaviour of rape victims which are not in accordance with empirical research. For example, analyses of proved rape offences show that victims often do not put up enduring resistance. The victim often does not fight back if she feels extremely threatened. Resistance that is shown in the beginning ceases when the victim notices that it is hopeless. Some manners of conduct, for example accompanying somebody into his apartment, which in previous

studies were brought in connection with a consent to sexual contact, are often practiced today without any agreement to sexual contact (cf. *Michaelis-Arntzen* 1981, p. 10).

The consideration of the evidence in rape cases, however, is difficult. All the individual cases that have to be solved by the court very often differ in their special characteristics, and thus cannot be put into a general pattern. The empirical data gained so far provide a relatively rough structure. In future research it will be important to analyse the constellations of evidence in rape cases in an even more detailed and differentiated way.

3. The Determination of the Penalty in Rape Cases

§ 177 I StGB provides in rape cases a range of punishment of 2 to 15 years. In less serious cases the range of punishment according to § 177 II StGB covers a period of 6 months to 5 years. When applying criminal law relating to young offenders there can - besides educational or disciplinary measures - be imposed prison sentence for juveniles, the minimum length of which is 6 months and the maximum length is 10 years (§ 18 JGG).

Some information about the practice of determination of penalty in rape cases can be found in the data of the Statistics of Criminal Prosecution, compiled in Tables 3 and 4. In 1988, 898 defendants out of 900 who were convicted on account of rape and under the General Criminal Law were punished with imprisonment. As Table 3.1 shows 48,7 % of the prison sentences were up to 2 years long. Thus, nearly half of the prison sentences did not exceed the minimum sentence of § 177 I StGB. Another 43,7 % of the prison sentences were in the range of more than 2 years to 5 years. Therefore, with the exception of a few, all sentences were in the lower third of the standard range of punishment of § 177 I StGB, which covers 2 years to 15 years.

The concentration of the sentences in the lower range can mainly be attributed to the frequent application of more lenient ranges of punishment - in contrast to the standard range of punishment of § 177 I StGB. *Greger* (1987) analysed the convictions regarding rape cases in Bavaria in the year 1982 under General Criminal Law. According to this study the courts assumed in 22 % of the 171 proceedings a less serious case in terms of § 177 II StGB. In 56 % of the proceedings, in which the courts applied the standard range of punishment of § 177 I StGB as a basis, they mitigated the range of punishment of § 177 I StGB according to § 49 I StGB in consideration of diminished criminal responsibility of the offender or

because the convicted person had committed only an attempt. So, in only 32 % of all sentences the not reduced standard range of punishment of § 177 I StGB was applied.

This practice of determination of penalty in rape cases cannot be seen as an expression of an extraordinary mildness of the courts towards the offence in question, but corresponds with the general tendency of the courts to take sentences from the lower parts of the ranges of punishment. In 1988, for example, 47,4 % of the persons sentenced to imprisonment because of plain robbery under § 249 StGB got a penalty that lasted up to one year, i.e. up to the minimum length of the standard range of punishment under § 249 I StGB. Regarding convictions because of aggravated robbery under § 250 StGB 74,5 % of the imposed imprisonments did not exceed the minimum length of 5 years determined in the standard range of punishment under § 250 StGB (see Table 3, Sec. 2 and 3). Thus, in robbery cases as well the courts often qualify cases as less serious or refer to milder ranges of punishment out of other reasons.

A comparison of the sentences imposed for rape with the sanctions for the adjugded offences on the whole shows, that the sentences for rape are clearly above average (see Table 3, Sec. 1 and 5). Moreover, the penalties for rape have become more severe in the last two decades (cf. to the increase of penalties concerning sexual crimes of violence also *Rieß* 1989, p. 367). Whereas in 1968 22,3 % of the imprisonments because of rape were above 2 years, the quota was 51,4 % in 1988 (see Table 3, Sec. 2 to 5). In contrast to this, a general tendency towards noticeable higher sentences cannot be observed, when robbery and the whole of the adjugded offences are taken into account (see Table 3, Sec. 2 to 5). Likewise, as to the convictions according to the Juvenile Court Act the sentences concerning rape are much more severe than 20 years ago (see Table 4).

The data of the Statistics of Criminal Prosecution only reflect rough structures of the determination of penalty. On the basis of these data it is not possible to conclude, that the determination of penalty in rape cases under the aspects of a just retribution for guilt and an effective prevention suffer from severe deficiencies and that the victim's legitimate interests are neglected in an aggravating manner. The intensification of sentences in recent years indicates that the criminal courts have been sensitized for the wrongful character of rape. In order to establish a well-founded evaluation of the determination of penalty in rape cases, however, detailed case studies are necessary. In this connection there should be born in mind, that - considering the present empirical findings on the individual and general

preventive effects of penal sanctions - strong preventive effects can hardly be expected by a further aggravation of penalties (see also *Frommel* 1985; *Teufert* 1980, p. 244).

4. The Treatment of Rape Victims during criminal Proceedings

The manner of conduct of police and administration of justice towards rape victims has often been criticized. Studies in which rape victims were asked about their experiences with the criminal justice system give a differentiated picture. In 102 telephone interviews carried out by *Weis* 1979 the women's opinions differed quite much. Yet, the majority reported negative experiences with the prosecuting authorities (doubt of credibility, accusation of contributory negligence, discriminating treatment). 48,6 % of the women stated that they would not give notice to the police anymore if they would be raped again (cf. *Weis* 1982, p. 162).

In interviews with 45 women who became rape victims in Bremen in the year 1979, the majority assessed the treatment of the police and the criminal investigation department as having been all right or better than that. If the women, who did not give their opinions about the police, are not taken into account, the quotas for the positive judgements were 83,8 % for the police and 72,7 % for the criminal investigation department. Though, 40,9 % of the victims stated, having felt mistrust from the police (see *Fehrmann* 1986, p. 65). In interviews with 107 rape victims carried out by *Kahl* (1985) the women assessed the conduct of the police very differently. The judges were mainly rated as being sober-minded or helpful. 70,6 % of the women stated, that they would again give notice to the police in another rape case (p. 50).

When interpreting these data the methodological limits of the interwies have to be considered. The representative selection of the telephone interviews carried out by *Weis* is doubtful, as there may have answered above all women who had made negative experiences with the criminal justice system. In some cases, the proceedings of which the women reported, lie back many years. In general, the results of the interwiews do not indicate that the majority of the proceedings are subject to drastic faults concerning the treatment of the victim. However, in a considerable number of cases several deficiences can be noted, such as unjustified doubts towards the victim (see for the assessment of the interviews also *Steffen* 1978, p. 90).

These deficiencies have to be reduced. The more understanding police and administration of justice towards raped women are, the more the women are ready to give notice to the police and to make detailed statements in the trial and the more effective criminal justice can fulfil its function of preventing crime. The situation may have improved in recent years by, for example, the activities of women commissioners in police authorities and the special departments for sexual violence in public prosecutor's offices (see *Wassermann, Böttcher, G. Steinhilper & Volz* 1990, p. 834). To evaluate the activities of these new institutions empirical research is necessary. Moreover, further efforts, especially in the field of training and education of police officers, public prosecutors and judges have to be made.

When a case of rape is reported, the duty of the authorities of criminal justice is not only to solve the case but to help and support the victim. In this respect there is a great need for facilities that offer help. In recent years possibilities for emergency calls and houses for battered women have been founded (cf. *Bergdoll & Namgalies-Treichler* 1987; *Hagemann-White et al.* 1981; *Teubner, Becker & Steinhage* 1983). A cooperation of criminal justice, local communities and women groups appears to be recommendable. They should set up and coordinate facilities that give rape victims the necessary support (see also *Baurmann* 1983, p. 521).

5. Summary

In the Federal Republic of Germany an intensive discussion has been going on about the problem, whether criminal justice protects the interests of rape victims well enough. With regard to the clearing-up and sanctioning of rape offences the following results can be taken from criminal statistics and empirical research:

The clearing rate of rape offences is above average. However, the cases in which the police does not manage to identify the offender immediately after their information of the crime are problematic. In those cases the probability of identifying the offender on grounds of further investigations is low.

In rape cases with identified suspects the quota of dismissals for lack of evidence by the public prosecutor and the quota of acquittals are above average. Producing evidence is especially difficult in those cases in which the offender contacted the victim without assault, suspect and victim had been acquainted before the offence and the victim's statements are not

supported by other evidence which is generally considered incriminating by the criminal courts. For adequate decisions on these cases criminal justice should use criminological and psychological findings concerning the committing of rape offences and the credibility of testimonies.

Penalties for rape lie mainly in the lower third of the standard range of punishment, but are above average compared with other offences and have been increased in recent years. The treatment of rape victims by police and administration of justice is likely to be inadequate in a considerable number of cases - though not in the majority -, and this in spite of improvements during the recent years. In order to offer the victims the necessary help cooperation of criminal justice, communities and women's groups is recommendable.

6. Tables

Table 1: The Situation at the Beginning of the Investigation and the Results of Criminal Proceedings in Rape Cases (in %)

Sec.	Variable	n	Clea-rance	Charge	Convic-tion
1	Way of taking up contact with the victim:				
	assault	104	26.0	20.2	15.4
	contact without assault	152	73.7	29.6	17.1
	unknown	1	0	0	0
2	Suspect identified in the first period of investigation				
	yes	114	96.5	41.2	25.4
	no	143	20.3	13.3	9.1

Table 2: Charges and Convictions in Rape Cases with identified Suspects (in %)

Sec.	Variable	n	Charge	Conviction
1	Confession during investigations			
	no	121	41.3	24.0
	partial	12	83.3	58.3
	full	7	85.7	85.7
	no interrogation	7	0	0
2	Victim's readiness to cooperate with the police and the criminal jurisdiction			
	none	3	0	0
	low	10	0	0
	medium	15	13.3	13.3
	considerably high	87	51.7	31.0
	very high	32	59.4	40.6
3	Clues indicating a simulated offence			
	strong	14	7.1	0
	weak	13	7.7	0
	none	120	53.3	35.0
4	Withdrawal of an incriminating testimony by the victim			
	yes	6	0	0
	partial	8	18.5	18.5
	no	132	49.2	31.1
5	Victim's testimony without contradictions			
	no	2	0	0
	partial	11	18.2	9.1
	yes	133	48.1	30.8

(cont. next page)

Table 2 (continued)

Sec.	Variable	n	Charge	Conviction
6	Victim injured			
	yes	78	50.0	33.3
	no	68	39.7	23.5
	unknown	1	0	0
7	Victim tried to escape			
	yes	65	52.3	33.8
	no	82	39.0	24.4
8	Preserving traces at the scene of crime			
	yes	41	58.5	34.1
	no	106	39.6	26.4
9	Number of incriminating witnesses			
	1	78	37.2	20.5
	2 and more	69	53.6	37.7
10	Connection with other offences			
	yes	30	70.0	56.7
	no	117	38.5	21.4
11	Previous convictions of the suspect			
	yes	80	52.5	33.8
	no	60	38.3	25.0
	unknown	6	0	0
12	Previous convictions - for similar offences			
	yes	19	63.2	57.9
	no	118	44.1	25.4
	unknown	10	20.0	10.0

(cont. next page)

Table 2 (continued)

Sec.	Variable	n	Charge	Conviction
13	Offender-victim-relation			
	related	2	0	0
	close acquaintance	38	47.4	18.4
	passing acquaintance	34	35.3	23.5
	neither related nor acquainted	71	50.7	38.0
	relation unknown	2	0	0
14	Contact initiated			
	by victim	10	30.0	20.0
	by victim and offender likewise	44	40.9	18.2
	by offender	92	48.9	34.8
	unknown	1	0	0
15	Voluntariness of the contact between victim and offender -			
	victim went voluntarily into the offender's apartment	40	33.8	7.5
	victim has voluntarily let the offender into her apartment	18	38.9	22.2
	victim went voluntarily to another scene of crime	22	36.4	22.7
	contact was not voluntary	65	58.5	44.6
	character of contact unknown	2	50.0	50.0
16	Victim's behaviour before the offence			
	voluntary exchange of some sort of tenderness	11	27.3	9.1
	sexual advances rejected by the victim	61	44.3	26.2
	no sexual advances	73	49.3	34.2
	unknown	2	0	0

Table 3: Penalties under General Criminal Law for Rape, Robbery and Criminal Offences as a whole (without Traffic Offences) 1968, 1978 and 1988

Sec.	Offence	Year	Convicted persons altogether	Imprisonment		From the persons sentenced to imprisonment got in %				
				n	% of all convicted persons	up to 1 year	1-2 years	2-5 years	more than 5 years	probation
1	Rape	1968	596	596	100.0	45.6	32.0	19.8	2.5	21.8
		1978	857	854	99.6	36.8	21.8	36.2	5.3	34.2
		1988	900	898	99.8	17.4	31.3	43.7	7.7	36.1
2	Plain robbery*	1968	348	346	99.4	33.5	35.8	27.2	3.5	16.8
		1978	770	754	97.9	41.2	34.6	21.8	2.4	35.7
		1988	843	827	98.1	47.4	34.3	17.1	1.1	52.7
3	Aggravated robbery*	1968	830	829	99.9	16.0	27.0	39.7	15.7	5.1
		1978	602	600	99.7	8.0	15.3	41.5	35.2	8.8
		1988	968	959	99.1	6.3	21.1	47.1	25.4	18.8
4	Plain and aggravated robbery together	1968	1178	1175	99.7	21.2	29.6	36.0	13.2	8.5
		1978	1372	1354	98.7	26.5	26.1	30.5	16.9	23.8
		1988	1811	1786	98.6	25.4	27.2	33.3	14.2	34.5
5	Offences altogether (without traffic offences)	1968	266775	104240	39.0	88.4	6.7	3.8	0.5	36.3
		1978	315122	76560	24.3	82.9	10.5	5.2	1.3	60.2
		1988	369940	84050	22.7	79.1	13.5	6.1	1.3	66.3

* Due to modifications of the statutory definitions of plain and aggravated robbery in 1974 a comparison of the numbers of 1968 with the ones of 1978 and 1988 concerning these offences is hardly possible.

Source: *Statistisches Bundesamt* 1970, p. 110; 1979, p. 102; 1990, p. 108.

Table 4: Penalties under Criminal Law relating to young Offenders for Rape, Robbery and Offences as a whole (without Traffic Offences) 1968, 1978 and 1988

Sec.	Offence	Year	Convicted persons altogether	Prison sentence for juveniles		From the persons sentenced to imprisonment got in %				
				n	% of all convicted persons	up to 1 year	1-2 years	2-5 years	more than 5 years	probation
1	Rape	1968	336	239	71.1	63.2	26.4	10.4	0.0	50.6
		1978	304	277	91.1	55.2	27.6	16.0	1.1	58.5
		1988	207	188	90.8	37.8	38.9	22.7	0.5	52.6
2	Plain robbery*	1968	175	139	79.4	56.0	30.4	13.6	0.0	38.1
		1978	1214	822	67.7	69.7	22.2	7.9	0.3	64.4
		1988	946	610	64.5	57.3	32.3	10.2	0.2	63.0
3	Aggravated robbery*	1968	677	543	80.2	55.1	27.6	16.6	0.7	34.6
		1978	553	511	92.4	42.0	29.1	27.7	1.2	44.6
		1988	680	575	84.6	32.9	43.2	23.0	0.9	55.3
4	Plain and aggravated robbery together	1968	852	682	80.0	55.3	28.2	16.0	0.5	35.3
		1978	1767	1330	75.3	59.2	24.8	15.4	0.6	56.9
		1988	1626	1185	72.9	45.5	37.6	16.4	0.5	59.2
5	Offences altogether (without traffic offences)	1968	60060	10186	17.0	78.9	16.0	4.6	0.6	48.1
		1978	91878	17837	19.4	72.4	19.9	7.0	0.7	61.0
		1988	75930	14326	18.9	62.8	28.0	8.6	0.6	64.3

* See * in Table 3.
Source: *Statistisches Bundesamt* 1970, p. 156 et seq.; 1979, p. 202 et seq.; 1990, p. 210 et seq.

7. References

Amelang, M. (1986). Sozial abweichendes Verhalten. Entstehung - Verbreitung - Verhinderung. Berlin Heidelberg: Springer.

Baurmann, M.C. (1983). Sexualität, Gewalt und psychische Folgen. Eine Längsschnittuntersuchung bei Opfern sexueller Gewalt und sexuellen Normverletzungen anhand von angezeigten Sexualkontakten. Wiesbaden: Bundeskriminalamt.

Bergdoll, K., & Namgalies-Treichler, C. (1987). Frauenhaus im ländlichen Raum. Stuttgart Berlin Köln Mainz: Kohlhammer.

Blankenburg, E., Sessar, K., & Steffen, W. (1978). Die Staatsanwaltschaft im Prozeß strafrechtlicher Sozialkontrolle. Berlin: Duncker & Humblot.

Bundeskriminalamt (Ed.) (1969). Polizeiliche Kriminalstatistik 1968. Wiesbaden: Bundeskriminalamt.

Bundeskriminalamt (Ed.) (1989). Polizeiliche Kriminalstatistik 1988. Wiesbaden: Bundeskriminalamt.

Degler, H.-D. (1981). "Das fast perfekte Delikt". Die Lage vergewaltigter Frauen und die öffentliche Meinung über das Sexualverbrechen. In: H.-D. Degler (Ed.), Vergewaltigt. Frauen berichten (p. 9-28). Reinbek bei Hamburg: Rowohlt.

Dölling, D. (1987). Polizeiliche Ermittlungstätigkeit und Legalitätsprinzip. Eine empirische und juristische Analyse des Ermittlungsverfahrens unter besonderer Berücksichtigung der Aufklärungs- und Verurteilungswahrscheinlichkeit. Wiesbaden: Bundeskriminalamt.

Fehrmann, H. (1986). Die vergewaltigte Frau im Kontakt mit der Schutz- und der Kriminalpolizei. In: H. Fehrmann, K. Jakobs, R. Junker & C. Warnke (Eds.), Das Mißtrauen gegen vergewaltigte Frauen. Erfahrungen von Vergewaltigungsopfern mit Polizei und Justiz (p. 55-97). Wiesbaden: Bundeskriminalamt.

Frommel, M. (1985). Opferschutz durch hohe Strafdrohungen? Der vergiftete Apfel vom Baume des Puritivismus. Monatsschrift für Kriminologie und Strafrechtsreform, 68, 350-359.

Göppinger, H. (1980). Kriminologie (4. ed.). München: Beck.

Greger, A. (1987). Strafzumessung bei Vergewaltigung. Monatsschrift für Kriminologie und Strafrechtsreform, 70, 261-277.

Hagemann-White, C., Kavemann, B., Kootz, J., Weinmann, U., Wildt, C.C., Burgard, R., & Scheu, U. (1981). Hilfen für mißhandelte Frauen. Stuttgart/Berlin/Köln/Mainz: Kohlhammer.

Kahl, T. (1985). Sexualdelinquenz und Polizeiverhalten unter besonderer Berücksichtigung der Vergewaltigung. Marburg: Elwert.

Kaiser, G. (1988). Kriminologie. Ein Lehrbuch (2. ed.). Heidelberg: Müller.

Michaelis-Arntzen, E. (1981). Die Vergewaltigung aus kriminologischer, viktimologischer und aussagepsychologischer Sicht. München: Beck.

Rieß, P. (1989). Zur Aburteilungspraxis bei sexueller Gewaltkriminalität. Ein Delikts- und Zeitrahmenvergleich anhand der Strafverfolgungsstatistik. In: H.-H. Jescheck & T. Vogler (Eds.), Festschrift für H. Tröndle zum 70. Geburtstag am 24. August 1989 (p. 369-393). Berlin New York: de Gruyter.

Statistisches Bundesamt Wiesbaden. (Ed.). (1970). Fachserie A Bevölkerung und Kultur. Reihe 9 Rechtspflege 1968. Stuttgart Mainz: Kohlhammer.

Statistisches Bundesamt Wiesbaden. (Ed.). (1979). Strafverfolgungsstatistik 1978 (Ausführliche Ergebnisse). Wiesbaden: Statistisches Bundesamt.

Statistisches Bundesamt Wiesbaden (Ed.). (1990). Strafverfolgung 1988 (Vollständiger Nachweis der einzelnen Straftaten). Wiesbaden: Statistisches Bundesamt.

Steffen, W. (1987). Gewalt von Männern gegenüber Frauen: Befunde und Vorschläge zum polizeilichen Umgang mit weiblichen Opfern von Gewalttaten. München: Bayerisches Landeskriminalamt.

Steinhilper, U. (1986). Definitions- und Entscheidungsprozesse bei sexuell motivierten Gewaltdelikten. Eine empirische Untersuchung der Strafverfolgung bei Vergewaltigung und sexueller Nötigung. Konstanz: Universitätsverlag.

Teubner, U., Becker, J., & Steilhage, R. (1983). Untersuchung "Vergewaltigung als soziales Problem - Notruf und Beratung für vergewaltigte Frauen". Stuttgart Berlin Köln Mainz: Kohlhammer.

Teufert, E. (1980). Notzucht und sexuelle Nötigung. Ein Beitrag zur Kriminologie und Kriminalistik der Sexualfreiheitsdelikte unter Berücksichtigung der Geschichte und der geltenden strafrechtlichen Regelung. Lübeck: Schmidt-Römhild.

Vier, L., Müller, W., & Rauch, G. (1984). Die vorgetäuschte Vergewaltigung. Kriminalist, 16, 353-359.

Warnke, C. (1986). Die vergewaltigte Frau im Gestrüpp einer opferfeindlichen Strafverfolgung. In: H. Fehrmann, K. Jakobs, R. Junker & C. Warnke (Eds.), Das Mißtrauen gegen vergewaltigte Frauen. Erfahrungen von Vergewaltigungsopfern mit Polizei und Justiz (pp. 13-54). Wiesbaden: Bundeskriminalamt.

Wassermann, R., Böttcher, R., Steinhilper, G., & Volz, G. (1990). Verhinderung und Bekämpfung von Gewalt aus der Sicht der Strafrechtspraxis. Gutachten der Unterkommission VI. In: H.D. Schwind, J. Baumann et al. (Eds.), Ursachen, Prävention und Kontrolle von Gewalt. Analysen und Vorschläge der Unabhängigen Regierungskommission zur Verhinderung und Bekämpfung von Gewalt (Gewaltkommission). Vol. II. Erstgutachten der Unterkommissionen (pp. 755-856). Berlin: Duncker & Humblot.

Weis, K. (1982). Die Vergewaltigung und ihre Opfer. Eine viktimologische Untersuchung zur gesellschaftlichen Bewertung und individuellen Betroffenheit. Stuttgart: Enke.

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