

**ENFORCEABLE RIGHTS FOR VICTIMS OF CRIME IN ENGLAND AND
WALES**

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KEY WORDS

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ABSTRACT

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The thesis draws on the author's own contribution to a co-authored text Wolhuter, *et al*, 2009), which was aimed at introducing students to the legal landscape pertaining to victims' rights in England and Wales. All the arguments presented and issues addressed in this contribution constitute the author's own work, and were developed without any form of collaboration with the co-authors. While the thesis incorporates the basic issues that arose for consideration in the author's contribution to this text, it goes beyond this contribution to develop a systematic framework for the recognition of enforceable victims' rights flowing from the overarching rules of EU law.

The thesis explores the extent to which the entrenchment in English law of enforceable rights for victims of crime in general, and socially unequal victims in particular, will reduce secondary victimisation at the hands of criminal justice agencies. The absence of such rights in English law constitutes a significant lacuna in the state's responses to victims, particularly in light of the recent recognition of enforceable victims' rights in EU law. The thesis accordingly seeks to contribute to the generation of a victims' rights discourse in the UK, with the aim of encouraging the introduction of enforceable rights for victims. To this end, it engages in a comparative analysis of victims' rights in EU law, European human rights law and American law. It contends that the United Kingdom ought to agree to be bound by the *Draft Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime* (2011, the "Victims' Directive"), which will render the victims' rights enshrined therein directly enforceable in national courts. In addition, it considers each of the rights in the *Framework Decision on the standing of victims in criminal proceedings* (2001/220/JHA), and its prospective successor, the Victims' Directive, including the rights to information, respect and recognition, protection, participation and compensation, pointing to ways in which these rights may be given full effect in English law. In particular, the thesis advocates the recognition of active victim participation to empower victims in the pre-trial and trial processes. It maintains that the models of active victim participation in German and Swedish law, namely auxiliary prosecution and victims' lawyers, reduce secondary victimisation, particularly for vulnerable victims of serious

offences, and ought to be introduced in English law. The thesis also evaluates the position of socially unequal victims, namely women victims of gender-based violence, minority ethnic victims of racially and religiously motivated crime, lesbian, gay, bisexual and transgender (“LGBT”) victims of homophobic and transphobic crime, and victims of elder abuse. It locates these victims within the framework of international and European human rights law, and recommends reforms to English law that would facilitate and enhance their exercise of the victims’ rights that it advocates. The thesis concludes by delineating the contours of a victims’ rights’ model, which encompasses the recognition of victims’ rights as enforceable human rights, the correlation of these rights with the right to freedom from discrimination, and the introduction of active procedural rights in the pre-trial and trial processes.

February 2012



DECLARATION

I declare that *Enforceable Rights for Victims of Crime in England and Wales* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Lorraine Winifred Wolhuter

February 2012

Signed:



ACKNOWLEDGEMENTS

I owe a considerable debt of gratitude to several people for their encouragement, support and assistance, without which the thesis would not have been completed.

First and foremost, I would like to express my wholehearted gratitude to Allah, the Almighty, without Whose love, generosity, guidance and empowerment I would have been unable to write this thesis. “Doth not man see that it is We Who created him from sperm? Yet behold! He (stands forth) as an open adversary! And he makes comparisons for Us, and forgets his own (origin and) Creation: He says, ‘Who can give life to (dry) bones and decomposed ones (at that)?’ Say, ‘He will give them life Who created them for the first time! For He is Well-versed in every kind of creation!’ ‘The same Who produces for you fire out of the green tree, when behold! ye kindle therewith (your own fires)!’ ‘Is not He Who created the heavens and the earth able to create the like thereof?’ Yea, indeed! for He is the Creator Supreme, of skill and knowledge (infinite)! Verily, when He intends a thing, His Command is, ‘be’, and it is! So glory to Him in Whose hands is the dominion of all things: and to Him will ye be all brought back” (Holy Qur’an 36: 77-83, Yusuf Ali translation).

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CHAPTER 1: INTRODUCING VICTIMS – VICTIMOLOGY AND VICTIMS' POLICY

1. INTRODUCTION

The last century has witnessed marked changes in the position of victims of crime (see section 3 below) with victims becoming “key player[s]” instead of “forgotten actor[s]” in the criminal justice process (Zedner, 2002: 419). However, the reforms to criminal justice policy and practice that have effected these changes have been premised, for the most part, on meeting victims' needs rather than on granting them enforceable rights. This thesis aims to demonstrate that the reduction of secondary victimisation at the hands of criminal justice agencies (see chapter 2) requires the entrenchment of enforceable rights for victims of crime in general, and socially unequal victims in particular. The absence of such rights in English law constitutes a significant lacuna in the state's response to victims, particularly in light of the recent recognition of enforceable victims' rights in the law of the European Union (“EU law”). The thesis accordingly seeks to contribute to the emergence of a victims' rights discourse in the United Kingdom (“UK”), with the aim of encouraging the introduction of enforceable rights for victims. To this end, it engages in a comparative analysis of victims' rights in EU law, European human rights law and American law. It contends that the UK ought to agree to be bound by the *Draft Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and*

protection of victims of crime (2011; the “Victims’ Directive”) and that victims’ rights legislation ought to be introduced in pursuance thereof. In addition, it considers each of the rights in the Council of Europe *Framework Decision on the standing of victims in criminal proceedings* (2001/220/JHA, the “Framework Decision”) as well as those in the Victims’ Directive, which is due to replace the Framework Decision in the near future (see chapter 2). These rights include the rights to information, respect and recognition, protection, participation and compensation. The thesis points to ways in which these rights may be given full effect in English law. In particular, it advocates the recognition of active victim participation to empower victims in the pre-trial and trial processes. It maintains that the models of active victim participation in German and Swedish law, namely auxiliary prosecution and victims’ lawyers, reduce secondary victimisation, particularly for vulnerable victims of serious offences, and ought to be introduced in English law (see chapter 4). The thesis also evaluates the position of socially unequal victims, namely women victims of gender-based violence, minority ethnic victims of racially and religiously motivated crime, lesbian, gay, bisexual and transgender (“LGBT”) victims of homophobic and transphobic crime, and victims of elder abuse, locating them within the framework of international and European human rights law (see chapter 6). It recommends the correlation of the rights enshrined in the Equality Act 2010 (“EA”) with the above-mentioned general victims’ rights, in order to facilitate and enhance the exercise of such rights by socially unequal victims. The thesis concludes by

delineating the contours of a victims' rights' model, which encompasses the recognition of victims' rights as enforceable human rights, the inclusion of a right to non-discrimination in the exercise and enjoyment of these rights, and the introduction of active procedural rights in the pre-trial and trial processes.

However, in order to highlight the contribution of this analysis of victims' rights to current victims' discourse in the UK, it is necessary to situate it within the context of the victimological theorising and criminal justice policy pertaining to victims that has informed the state's response to primary and secondary victimisation. This introductory chapter accordingly assesses the various strands of victimological theory that have influenced the development of victims' policy as well as the key developments in such policy from the end of the Second World War to the present. It concludes by providing a brief synopsis of the substantive chapters of the thesis.

2. VICTIMOLOGICAL THEORY

The birth of the sub-discipline of victimology after World War II gave rise to an academic focus on victims of crime (Mawby & Walklate, 1994: 69-70). Victimological theories embody several strands, each with their own specific impact on criminal justice policy regarding victims. This section assesses the tenets of each of these strands. The manner in which each strand has influenced criminal justice policy and practice is explored in section 3 below.

2.1 Positivist victimology

2.1.1 Early positivist victimology

There is some dispute concerning the origin of the term “victimology”. Dussich ascribes the first usage of the term to an article by the European scholar Mendelsohn in 1956 (Dussich, 2006: 116). Goodey also attributes the origin of the term to Mendelsohn, but contends that he first used it in a paper presented “at a congress meeting held in Rumania in 1947” (Goodey, 2005: 11). Kearon and Godfrey, on the other hand, maintain that Mendelsohn coined the term in 1940 (Kearon & Godfrey, 2007: 26). By contrast, Zedner states that it was first used by the European scholar Wertham in 1949 (Zedner, 2002: 420). Whatever the exact source of the term, it is clear that its advent is attributable to scholars writing in the positivist tradition.

These early scholars were concerned to identify scientific, value-free facts about victims of crime that are universally and objectively valid (Hoyle, 2007: 148). Cultural, social or historical variations were not recognised. In accordance with this scientific method, scholars attempted to locate “patterns, regularities and precipitative characteristics of victimising events” which were encapsulated in a series of victim typologies (Mawby & Walklate, 1994: 10). Consequently, positivist victimology has been defined as comprising

the identification of factors in individuals or their environment that conduce to a non-random risk of victimisation, a concentration on inter-personal crimes of violence, and the identification of victims who may be held to have contributed to their victimisation (Miers, 1989: 3).

The work of the so-called “founding fathers of victimology” (Mawby & Walklate, 1994: 12), Von Hentig and Mendelsohn, testifies to the positivist predilection for victim typologies which are infused with notions of victim proneness and victim precipitation. In his book *The criminal and his victim* (Von Hentig, 1948: 436, quoted in Fattah, 2000: 22), Von Hentig, highlighting the relationship between victims and offenders, contended that many victims play a causative role in the victimising event. He devised a victim typology illustrating the victim proneness of certain groups of victims (Zedner, 2002: 420). His general categories encompassed young persons, elderly persons, women, persons with mental disabilities, immigrants, members of minority groups and “dull normals”, whereas his psychological categories included “... the depressed, the acquisitive ... the wanton ...” (Spalek 2006: 34) and the “tormentor” (Goodey, 2005: 12). He maintained that the depressive murder victim, for instance, “... lacks ordinary prudence and discretion ...”, whereas the wanton murder victim exhibits “female foibles” (Rock, 2007: 43). The tormentor, typified by “... the ‘nagging’ wife who is beaten by her husband ...”, provokes her victimisation (Goodey, 2005: 12). Furthermore, he argued that some sexual offence victims “... are

themselves ‘wanton’ ...” and that, in view of their gullibility, black persons are “... more likely to become the victim of confidence tricksters ...” (Williams, 1999: 16).

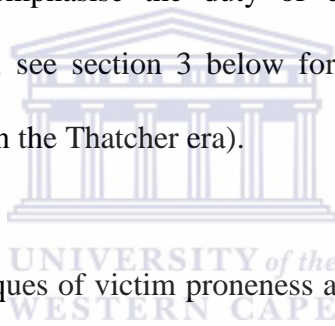
In a similar vein, Mendelsohn maintained that there was a relation between victim culpability and the victimising event. He devised the concept of victim precipitation to describe the role of those victims who are culpable in their own victimisation. According to Rock, the concept refers to “... the criminally provocative, collusive or causal impact of the victim in a dyadic relation ... called the ‘penal couple’” (Rock, 2007: 42). Only victims who are entirely innocent do not feature in this dyadic relation. Mendelsohn thus contended that there were degrees of victim culpability, which ranged from complete innocence to the highest level of guilt (Mawby & Walklate, 1994: 12). The greater the degree of victim precipitation, the greater would be the degree of the victim’s guilt. For instance, a person who casts the first blow in a fight and consequently receives injuries would be a guilty victim, whereas an aged victim of a mugging would be innocent (Goodey, 2005: 96-97). Likewise, young persons, “sexually vulnerable” persons and “socially respectable” persons would be innocent victims in contrast to those who are unemployed or homeless (Goodey, 2005: 96-97).

The concept of victim precipitation was taken up by Wolfgang in his book *Patterns in criminal homicide* (1958). In his view, victim precipitation

occurred in cases where the victim directly and positively precipitated the offence (Zedner, 2002: 420). He examined homicides that had taken place in Philadelphia between 1948 and 1952, contending that 26 per cent had been precipitated by victims (Zedner, 2002: 420). Wolfgang's doctoral student, Amir, applied the concept of victim precipitation to rape cases (Spalek, 2006: 34). Amir's work, *Patterns of forcible rape* (1971), comprised an analysis of police records of forcible rape in Philadelphia, in which he maintained that 19 per cent were precipitated by victims (Zedner, 2002: 420). He developed a victim typology ranging "... from the 'accidental victim' to the 'consciously' or 'unconsciously seductive' victim ..." (Spalek, 2006: 34). In his view, victim precipitating behaviour included "... meeting an offender in a bar, picnic or party, possessing a 'bad' reputation ... consuming alcohol ..." (Rock, 2007: 45), initially agreeing to sexual intercourse but changing one's mind and failing to resist the offender's advances (Zedner, 2002: 420).

The concepts of victim proneness and victim precipitation have been subject to extensive criticism, particularly by feminist scholars. Walklate has argued that the concept of victim precipitation is gender-blind, being premised on an equality between victim and offender that may not exist, particularly in cases of sexual assault. It is thus incapable of application to situations involving unequal power relations (Walklate, 2004: 34). Furthermore, it is founded on a legalistic concept of rationality that is often synonymous with white male rationality (Walklate, 2004: 36-37). When applied to socially unequal victims,

such as victims of gender-based violence, and racially motivated and homophobic hate crime, it amounts to blaming victims for the unequal social conditions that frame offenders' abuse of power. In defence of the concept of victim precipitation, Fattah has argued that it ought not to be viewed as blaming victims, but rather as attempting to determine factors that account for the victimisation of certain individuals (Spalek, 2006: 35). However, as Spalek has stated, there is "... a thin line between blame and account, especially within discourses [such as the Thatcherite notion of active citizenship] that emphasise the duty of citizens to avoid victimisation" (Spalek, 2006: 35; see section 3 below for a discussion of the concept of active citizenship in the Thatcher era).



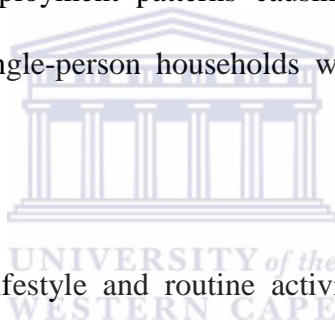
Besides these critiques of victim proneness and victim precipitation, criticism has also been directed more broadly at the methodological shortcomings of the early positivist work. It has been contended that the positivist typologies individualised victimisation, failing to consider its broader structural underpinnings (Goodey, 2005: 99). In consequence, these typologies did not give recognition to the ways in which victimisation is socially reproduced (Mawby & Walklate, 1994: 12). Furthermore, the positivist acceptance of the legal definition of victimhood precluded an analysis of hidden crimes, such as corporate crime and domestic violence (Mawby & Walklate, 1994: 12, 9). It also obscured the ways in which criminal justice agencies cause secondary victimisation (Dignan, 2005: 33).

However, despite these shortcomings, positivist victimology has had a lasting impact on criminal justice policy, particularly as regards the use and development of victim surveys (Dignan, 2005: 32). In addition, the concept of victim precipitation informs recent work on repeat victimisation, which has emphasised the high rate of re-victimisation of certain groups, such as victims of racist violence, as well as of certain neighbourhoods (Goodey, 2005: 98).

2.1.2 Lifestyle and routine activity theory

The lifestyle approach and routine activity theory drew on and extended the concept of victim precipitation, which, having been employed to explain individual victimisation, did not adequately explain patterns of victimisation. In order to account for such patterns, Hindelang, Gottfredson and Garofalo, in their work *Victims of personal crime: an empirical foundation for a theory of personal victimisation* (1978), developed the concept of lifestyle (Walklate, 2004: 35), defined as the manner in which "... 'individuals allocate their time to vocational activities and leisure activities' ..." (Spalek, 2006: 36). They contended that factors, such as the amount of time spent outside the home, the nature of activities pursued and the means of transport used (Walklate, 2004: 35) are correlated to the risk of victimisation because they affect the likelihood of coming into contact with offenders at certain times and places (Spalek, 2006: 36).

Similarly, routine activity theory, developed by Cohen and Felson (1974), maintained that “direct-contact predatory violations” occur when three elements, namely “... motivated offenders, suitable targets, and absence of capable guardians ...” converge in time and space (Fattah, 2000: 30). Cohen and Felson contended that socio-economic changes after the Second World War have generated changing patterns of routine activity, such as “... work, leisure [and] social interaction ...” (Spalek, 2006: 36), facilitating such convergence. These changes include greater mobility and ease of moving goods, altered employment patterns causing homes to be vacant and the increase of “... single-person households with their weak guardianship ...” (Rock, 2007: 50).



Drawing on the lifestyle and routine activity approaches, amongst others, Fattah has listed ten factors that are conducive to an increased risk of victimisation, namely opportunities, risk factors, motivated offenders, exposure of victims, associations of victims, dangerous times and places, dangerous behaviour, high-risk activities, the absence of defensive or avoidance behaviours on the part of victims, and structural or cultural proneness to victimisation. He explains each of these factors as follows: opportunities refer to those “... closely linked to the characteristics of potential targets ... and to [their] activities and behaviour”; risk factors refer to factors linked to “sociodemographic characteristics”; motivated offenders “... select their victims/targets according to specific criteria”; “... exposure to potential

offenders and to high-risk situations and environments enhances the risk of criminal victimization”; associations refer to the fact that persons who associate with potential offenders “... run a greater risk of being victimized than those who [do] not”; “... dangerous times such as evening, late night hours and weekends ...” and “... dangerous places such as places of public entertainment ...” carry a greater risk of victimisation; dangerous behaviours such as “provocation”, “negligence and carelessness” increase the chance of victimisation; high-risk activities, such as “... the pursuit of fun, which may include deviant and illegal activities ...” and “prostitution” enhance the risk of victimisation; absence of defensive or avoidance behaviours refers to the fact that “... risk-takers are bound to be victimized more often than risk-avoiders”; and structural/cultural proneness refers to the “... positive correlation between powerlessness, deprivation and the frequency of criminal victimization” (Fattah, 2000: 30-32).

Several criticisms have been levelled at the lifestyle approach and routine activity theory. Spalek has argued that they focus on conventional crimes, including street crime and burglary, and consequently fail to address crimes such as racially motivated crime, gender-based crime and corporate crime (Spalek, 2006: 37). Furthermore, by imposing a duty on victims to change their lifestyles or routine activities in order to reduce the risk of victimisation, they blame victims who do not adopt such measures to avoid being victimised (Spalek, 2006: 37). Despite having extended the concept of victim

precipitation to include patterns of victimisation rather than individual victimising events, these approaches do not escape the positivist failure to embed victimisation within its socio-structural context.

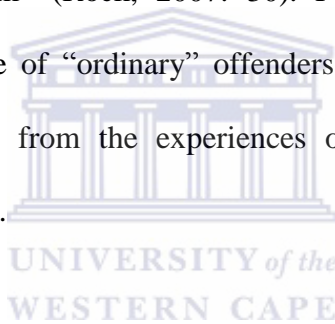
2.2 Radical victimology

2.2.1 General

Radical victimology emerged in the late 1960s and early 1970s (Mawby & Walklate, 1994: 13), taking issue with the individualised account of victimisation and the uncritical acceptance of a legal definition of victimhood by positivist victimology (Dignan, 2005: 33). Schwendinger and Schwendinger, for instance, contended that, by emphasising legally defined crimes, positivists failed to consider the harms caused by the powerful (Spalek, 2006: 38). By contrast, radical victimology was concerned with the manner in which victimhood is socially constructed (Spalek, 2006: 39), placing this question within the broader structural determinants of the capitalist system. In so doing, it highlighted the ways in which the state, the law and the criminal justice system rendered certain forms of victimisation invisible (Mawby & Walklate, 1994: 13). Victims of such forms of victimisation, namely “... victims of police force, the victims of war, the victims of the correctional system, the victims of state violence, [and] the victims of oppression of any sort ...”, were thus the focus of radical

victimologists (Mawby & Walklate, 1994: 13). Marxist victimologists added a concern for the victimisation of workers, focusing on work-related harms such as deaths and injuries arising from “... unsafe work practices and conditions ...” (Spalek, 2006: 39).

Victims of everyday crimes, such as burglary and theft, and the reality of their experiences of victimisation were accordingly ignored (Rock, 2007: 30). Fear of everyday crime was regarded as “false consciousness” or the consequence of “penal populism” (Rock, 2007: 30). Furthermore, radical victimology tended to conceive of “ordinary” offenders as victims of state crime, thus diverting attention from the experiences of those whom they victimised (Dignan, 2005: 33).



In their concern to address the way in which the state produces victims, some radical victimologists, such as Elias, adopted the framework of human rights (Mawby & Walklate, 1994: 14). From this perspective, a human rights violation constitutes a crime, consequently generating victimisation (Spalek, 2006: 39). These scholars adopted a broad definition of human rights, spanning civil and political rights, such as the right to liberty and equality, as well as socio-economic rights, such as the right to housing, food and healthcare (Mawby & Walklate, 1994: 16). The victimisation that was consequent upon a violation of these rights was also broadly defined, and included victims of “... state oppression, war, and corporate crime ...” (Spalek,

2006: 39). Mawby and Walklate have maintained that, despite its importance, the use of a human rights framework has not been subject to sufficient theoretical analysis in radical victimology (Mawby & Walklate, 1994: 16).

Radical victimology, both in general and in its human rights variant, has been subject to considerable criticism. Mawby and Walklate have argued that, in view of their focus on class to the exclusion of other axes of inequality such as “... gender, race and age ...”, radical victimologists presented a partial account of victimisation (Mawby & Walklate, 1994: 16). Furthermore, they were insensitive to the experiences of victims of “ordinary” crime (Mawby & Walklate, 1994: 17). In consequence, radical victimology has had a limited impact on criminal justice policy. In addition, the human rights perspective has given rise to very little research (Mawby & Walklate, 1994: 14).

2.2.2 Radical left realism

Radical left realism appeared in the 1980s (Spalek, 2006: 41) in response to the failure of radical victimology to address the lived experiences of victims of “ordinary” crime. While its main proponents in the UK were Young, Matthews, Lea and Kinsey (Spalek, 2006: 41), it was also influential in the United States of America (“US”) and elsewhere, with “the Crime and Justice Collective in California” devoting considerable attention to the “... need for a left-wing programme on crime control” (Young, 1986: 25). Young contended

that left realism “... necessitates an accurate victimology ...” that steers a middle course between radical conceptions that “... play down victimisation ...” and right-wing accounts that “... celebrate moral panics” (Young, 1986: 23). Utilising the notion that “... intervention should occur at all points in the square of crime (state agencies, public involvement, the structural causes of offending and victim support) ...” (Young & Matthews, 1992: 3), left realists set out to document the ways in which crime was experienced differentially on account of gender, race, age, class and geographic location (Spalek, 2006: 41). They thus attempted to depict the lived realities of people in communities at high risk of criminal victimisation (Spalek, 2006: 41). Their methodology remained largely positivist, insofar as they used victim surveys to document these differential experiences of victimisation. However, they adopted local surveys, such as the Islington Crime Survey, contending that such surveys revealed the impact of structural inequality on peoples’ experiences of victimisation more accurately than national surveys (Goodey, 2005: 100).

In the UK, left realists pursued a political agenda, demanding “an ‘engaged’ criminology” that was exhibited by their connection to local authorities controlled by the Labour Party and concretised by their opposition to the positivist focus on victimisation patterns that were abstracted from their social context (Mawby & Walklate, 1994: 15-16). In addition, they advocated a socialist concept of citizenship in terms of which citizens (and hence also victims) have both rights and obligations (Mawby & Walklate, 1994: 16).

They were accordingly “left” because they emphasised the structural underpinnings of victimisation and “real” because they highlighted victims’ lived experiences of victimisation (Goodey, 2005: 100).

Despite the fact that they espoused a more practical approach than their “left idealist” radical victimological counterparts, left realists nonetheless attracted considerable criticism. Walklate has contended that their use of victim surveys led them to accept the concept of lifestyle that informs such surveys (Walklate, 2004: 36), and hence implicitly to engage in the victim blaming that characterises positivist approaches. In a similar vein, Mawby and Walklate have argued that the use of victim surveys has restricted left realists’ ability to depict social reality fully (Mawby & Walklate, 1994: 15). In particular, left realism is open to criticism on account of its incomplete understanding of racially motivated victimisation, its failure to portray women’s lived experiences of victimisation and its oversight of the victimisation experienced by men (Spalek, 2006: 41). Furthermore, it focused predominantly on street crime at the expense of other, hidden forms of crime, such as corporate crime (Spalek, 2006: 42).

Left realism has also attracted criticism at a theoretical level for its inability to theorise the relation between agency and social structure. It did not explain the ways in which peoples’ experiences are shaped by structural constraints in

cases where they are not aware of such constraints, or the ways in which people resist their structural conditions (Spalek, 2006: 44).

2.3 The contribution of feminism to victimology

Several victimological concepts have been viewed with unease by feminist scholars. They contend that the term “victim” itself, which bears the female gender in French, imports “passivity and powerlessness” and that the concept of “victim precipitation” implicitly blames victims for their own victimisation (Walklate, 2004: 54). Consequently, victimology has been regarded as a tool for women’s oppression (Walklate, 2004: 54). It is thus difficult to conceive of *a* feminist victimology. Nevertheless, feminist theory has had a marked impact on the development of critical victimology (see section 2.4 below) as well as criminal justice policy and practice. This section considers two strands of feminist theory, namely radical feminism and critical race feminism, each of which have made significant contributions to victimological theory and criminal justice policy pertaining to victims. In addition, it briefly explores recent work on masculinity theory that challenges the radical feminist focus on violence against women and documents men’s experiences of victimisation.

2.3.1 Radical feminism

Radical or second-wave feminism developed in the 1970s, contesting the tenets of a number of theoretical approaches. First, it aimed to address the limitations of liberal feminism, which proceeded on the assumption that the social order recognised the equality of men and women, that women were denied equality in law only and that the feminist project was accordingly to achieve gender equality through a process of legal reform (Walklate, 2004: 41). The radical feminist response was to highlight the existence of a patriarchal social structure that generated unequal gender relations. The attainment of gender equality thus necessitated the dismantling of patriarchy, rather than mere legal reform. In addition, radical feminism pointed to the failure of liberal feminism to recognise the family as a site for the oppression of women, arguing that this rendered domestic violence invisible (Hoyle, 2007: 147).

Second, radical feminists maintained that “malestream” criminological and victimological theory, having failed to capture the reality of gender relations under patriarchy, were unable to explain women’s experiences of victimisation. Radical feminists castigated positivist victimology for its reliance on concepts such as victim precipitation that blamed women, particularly rape victims, for their own victimisation (Walklate, 2004: 56), and for the methodological shortcomings of the early victim surveys, which

obscured women's lived realities of gender-based violence (Hoyle, 2007: 148) by focusing on the public at the expense of the private sphere (Mawby & Walklate, 1994: 11). In addition, they contended that the failure of radical criminology (and victimology) to address the reality of women's experiences of gender-based violence amounted to "... an analytic and empirical gap ..." (Rock, 2007: 44) that arose from its focus on class oppression under capitalism to the exclusion of other forms of oppression, particularly gender oppression. In her work *Women, crime and criminology* (1976), for instance, Smart criticised the exclusion of women offenders as well as women victims from the ambit of radical criminology, advocating the development of a theory which not only comprises "a critique of sexism" but also the inclusion of "a woman's perspective" (Smart, 1976: 183; Rock, 2007: 44).



Radical feminism was thus concerned with a macro-level analysis of gender relations under patriarchy. Scholars such as MacKinnon contended that such an analysis revealed that women's oppression is maintained by male power expressed in gender-based violence (MacKinnon, 1989: 127-128). Furthermore, the state reinforces this oppression by adopting a male perspective. For MacKinnon –

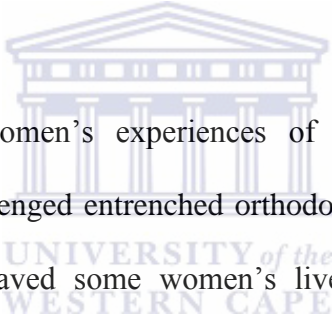
The state is male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interests of men as a gender - through its legitimating norms, forms, relation to society, and substantive policies (MacKinnon, 1989: 161-162).

The infusion of this male perspective into law and criminal justice policy renders gender-based violence invisible by exempting the private sphere from state scrutiny and thereby sustains male dominance. One of the central aims of the feminist project was accordingly “... to make visible what has been invisible ...” (Mawby & Walklate, 1994: 10-11) by articulating women’s lived realities of gender-based violence (Spalek, 2006: 42).

In order to theorise these lived realities, radical feminists contended that it was necessary to develop a feminist epistemology that challenged “malestream” theory’s claim to universality, rationality and objectivity. They maintained that the objective and value-free science of positivist victimology was premised on a male perspective that has been obscured by “... ‘the regime of rationality’, rooted in the idea of an abstract knower ...” (Walklate, 2004: 55). By contrast, for radical feminists, a feminist way of knowing focused on women’s concrete experiences. The fact that these experiences straddle the public as well as the private sphere generates knowledge, which is more objective than that of “malestream” victimology and makes it possible to expose processes that have hitherto been invisible (Walklate, 2004: 55).

Radical feminism thus advocated a feminist methodology that involved women doing empirical research about women (Walklate, 2004: 55-56). Such research involved qualitative rather than quantitative methods to “... describe and explain women’s experiences of and responses to victimisation” (Hoyle,

2007: 148). Feminist-inspired empirical research highlighted the endemic nature of rape, sexual assault and domestic violence under patriarchy, and has had a significant impact on criminal justice policy and practice pertaining to victims in the UK (see section 3 below). It also revealed that many women did not passively accept their oppression but actively resisted it and managed their lives around the violence they experienced (Spalek, 2006: 42). Stressing women's agency, radical feminism thus rejected the term "victim" and adopted the term "survivor", which denotes strength and optimism (Cook & Jones, 2007: 129).



In highlighting women's experiences of gender-based violence, radical feminism has challenged entrenched orthodoxies about victimisation and has undoubtedly "... saved some women's lives" (Hoyle, 2007: 165). It has nonetheless attracted considerable criticism, particularly on two accounts. First, critical race feminists have argued that radical feminism is premised on an essentialist perspective of womanhood that ignores the differential experiences of minority women. Second, masculinity theorists have contested the view of masculinity portrayed by radical feminism and have maintained that its focus on women obscures men's experiences of victimisation. The following sections explore these two concerns.

2.3.2 Critical race feminism: The concept of intersectionality

Critical race feminists take the view that gender essentialism, viz. the equation of women's experiences as victims with the experiences of white women, regardless of race, excludes the experiences of minority women (see Wolhuter, *et al*, 2009: 25-26). Critical race theory likewise negates these experiences due to its essentialist equation of minority ethnic experiences with those of minority men. Consequently, minority women's experiences are downgraded to a space "... that resists telling" (Crenshaw, 1993b: 1242). In order to give expression to this space, a multivalent, or a fluid, perspective must be developed "... that sees back and forth across boundary" (Williams, quoted in Laster & Raman, 1997: 211).

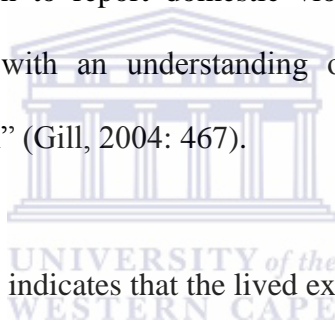


Crenshaw's concept of intersectionality reflects such a multivalent perspective. In her view, an intersectional analysis highlights the uniqueness of minority women's experiences rather than fragmenting them into women's or racial minorities' experiences (Crenshaw, 1993a: 385). Intersectionality is founded upon the recognition that "individuals experience the complex interplay of multiple systems of oppression operating simultaneously in the world" (Bond, 2003: 76). Consequently, it must be differentiated from an additive approach, in terms of which gender is the focal axis of subordination and other axes, such as race, are regarded as aggravating rather than

qualitatively transforming the experience of gender oppression (Bond, 2003: 145).

An intersectional analysis of South Asian women's experiences of domestic violence in the UK exemplifies the way in which the concept of intersectionality is able to capture the uniqueness of these experiences. South Asian communities are founded upon a dual hierarchy that subordinates women, not only to their husbands and other male members of their family on the basis of gender, but also to their mothers-in-law and other older female members of their family on the basis of age (Chana, 2005: 38). Furthermore, the morality of their conduct is framed by the cultural dyad of honour and shame, in which male honour and shame is privileged (Gill, 2004: 474; Bhopal, 1997: 64-65). Honour emphasises putting the needs of the family first. Consequently, victims of domestic violence are required to keep the domestic violence private in order to avoid shaming the family (Gill, 2004: 474). Defying this cultural norm opens women to the risk of serious punishment and even death (Chana, 2005: 29). In addition, no support is forthcoming from senior female members of their families, because it is regarded as more important to "... [save] face and family unity ..." than to ensure one's own safety (Gill, 2004: 477). Cultural constraints, founded on gender and age subordination, thus preclude minority women from reporting their victimisation to criminal justice agencies (Chana, 2005: 18).

These constraints are coupled with racial “othering” by the white community (Bhopal, 1997: 77), which filters into the outlook of criminal justice agencies. In a bid to avoid the perception that they are culturally insensitive, criminal justice agencies have been reluctant to intervene in domestic violence incidents involving minority communities (Chana, 2005: 24). Such a lack of intervention exacerbates the isolation of minority victims. Furthermore, victims’ perceptions of police racism compound the problem of low reporting rates. Gill contends that, in order to appreciate the reasons for the reluctance of minority women to report domestic violence, criminal justice agencies must be imbued with an understanding of “... the historical impact of institutional racism” (Gill, 2004: 467).



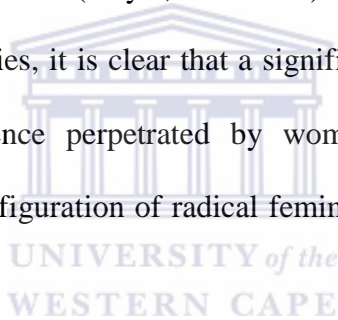
The above analysis indicates that the lived experiences of South Asian women are interwoven with gender, race, culture and age oppression in a manner that almost inevitably silences them. An intersectional analysis is able to depict the multifaceted nature of these experiences in a way that is not possible in a radical feminist analysis. The value of an intersectional analysis is beginning to be recognised in recent mainstream feminist work (Hoyle, 2007: 153) and, to a lesser extent, in English law and criminal justice policy (see chapter 6).

2.3.3 Masculinity theory

Recent work on masculinity has challenged the view of manhood adopted by radical feminists. Connell, for instance, has contended that the slogan characteristic of radical feminism, namely that “all men are potential rapists”, universalises male behaviour in a manner that is inconsonant with social reality (Walklate, 2004: 72; see Connell, 1987: 56-58). Furthermore, the radical feminist conflation of “man” with masculinity assumes the existence of a static and universally applicable masculinity (Walklate, 2004: 72), obscuring different masculinities that do not all foster male dominance. Connell has argued that the dominant form of masculinity (“hegemonic masculinity”) in contemporary society is heterosexual masculinity (Connell, 1987: 186; Walklate, 2004: 74). Men who behave according to heterosexist norms and values exercise hegemonic power, thereby denigrating other forms of masculinity, such as homosexuality, as well as femininity (Walklate, 2004: 74, see Connell, 1987: 183, 186). It is the expression of *this* form and not other forms of masculinity that underpins violence against women.

In addition, masculinity theorists have contended that the focus of radical feminism on women masks the fact that many men also experience sexual assault and domestic violence (Rock, 2007: 46). This contention is supported by recent research showing a significant increase in the number of male rapes reported to the police (Rumney, 2001: 213) as well as the prevalence of male

victims of domestic violence. Some scholars, such as Fergusson, have gone so far as to suggest that there is gender symmetry in domestic violence and that it is accordingly “... not determined by gender or patriarchy” (Hoyle, 2007: 149). However, such claims have been contested. It has been argued that scholars who have found that equal numbers of men and women commit acts of domestic violence conflate serious forms of domestic violence with aggressive behaviour, such as slapping (Hoyle, 2007: 150-151). By contrast, those studies that focus on serious forms of domestic violence reveal that most men are the perpetrators (Hoyle, 2007: 151). However, despite the differences in the various studies, it is clear that a significant number of men are victims of domestic violence perpetrated by women. Masculinity theorists thus advocate the reconfiguration of radical feminist theory in order to reflect this reality.



2.4 Critical victimology

Critical victimology emerged in the 1990s as a challenge to positivist and radical victimology, particularly as regards their notions of agency and structure (Spalek, 2006: 44). It contested the positivist conception of victim passivity, which obscured the extent to which victims may resist their victimisation, as well as the absence in positivist victimology of an analysis of the way in which social structure shapes victimisation. It criticised the focus of radical victimology on a class analysis to the exclusion of other structural

factors such as race and gender (Spalek, 2006: 44). Furthermore, it was concerned to rectify the division between academic victimology and victim advocacy, suggesting “... a combined critical reading ...” in which theoretical and activist approaches to victimisation are construed within “... the context of a ‘social reality’ that reflects social and political developments ...” (Goodey, 2005: 95).

Drawing on insights from feminist theory, the primary proponents of critical victimology, Mawby and Walklate, aimed to place victims’ lived realities within a critical theoretical analysis of the relationship between agency and structure (Spalek, 2006: 44). Such an analysis must commence with an empirical inquiry into “... what constitutes the real ...”, namely an inquiry that considers the processes that play a role in “... the construction of everyday reality” (Mawby & Walklate, 1994: 18-19). These processes include –

people’s conscious activity, their ‘unconscious’ activity (that is, routine activities people engage in which serve to sustain, and sometimes change, the conditions in which they act), the generative mechanisms (unobservable and observed) which underpin daily life, and finally, both the intended and the unintended consequences of action which feed back into people’s knowledge (Mawby & Walklate, 1994: 19).

This understanding of “the real” facilitates the exposure of victimisation that has been obscured by mainstream victimology, such as gender-based violence, racially motivated crime, homophobic crime and elder abuse. By documenting

victims' lived realities in this way, critical victimology was able to explain victims' subjectivity more accurately and to include an analysis of agency, namely the ways in which victims negotiate and resist their experiences of victimisation (Mawby & Walklate, 1994: 19). Mawby and Walklate contended that this conception of "the real" does not necessitate the rejection of victim surveys, but does require an acknowledgment that they are not able to depict "... the generalities of victimisation ..." as well as the specifics of lived reality (Mawby & Walklate, 1994: 19). A critical empirical method must thus employ not only victim surveys, but also "... imaginative comparative and longitudinal studies ..." (Mawby & Walklate, 1994: 20).

Critical victimology situated this empirical analysis of victims' lived realities within a critical structural framework that focuses on the role of the state and the law in the construction and reconstruction of these realities (Mawby & Walklate, 1994: 20; Spalek, 2006: 44). The relationship between structure and agency is not determinist but recursive (Mawby & Walklate, 1994: 20), in that structure and agency mutually shape one another in a way that brings about social change. Within the context of this recursive relationship, critical victimology attempted "... to appreciate how the generative mechanisms of capitalism and patriarchy set the material conditions in which different victims' movements have flourished" (Mawby & Walklate, 1994: 21) and, at the same time, to explore ways in which victims (or groups of victims)

negotiate these material constraints to bring about changes in their social conditions (Mawby & Walklate, 1994: 177).

Mawby and Walklate contended that the recognition of victims' rights constitutes one of the central ways of effecting these social changes. A needs-based response that does not translate needs into rights would merely produce a "discretionary response" from criminal justice agencies that would not empower victims (Mawby & Walklate, 1994: 178). However, a victims' rights discourse has certain limitations. In light of the fact that the criminal justice system uses the terms "complainant" and "defendant", the term "victim" has no legal meaning. Even if it were legally recognised, its usage would nonetheless be open to criticism as it draws on a neutral concept of victimhood that obscures the structural underpinnings of victims' lived realities (Mawby & Walklate, 1994: 178; see also section 2.3 above for a feminist critique of the term "victim" and its replacement with the term "survivor"). For Mawby and Walklate, a rights claim ought thus to be "... based upon structural inequities rather than on ... criminal victimisation alone" (Mawby & Walklate, 1994: 178).

In an attempt to resolve these concerns with victims' rights, Mawby has advocated a "justice-based approach" in terms of which victims have substantive rights that are recognised independently of their needs (Mawby & Walklate, 1994: 179). However, Mawby and Walklate maintained that this

approach must not be restricted to “... a narrowly defined range of criminal victimizations ...” but must reflect the reality that victims have differential power to access and enforce their rights (Mawby & Walklate, 1994: 179). It must accordingly be informed by a concept of victims’ rights as human rights that highlights the structural underpinnings of victimisation (Mawby & Walklate, 1994: 179).

Furthermore, drawing on the insights of radical feminists such as MacKinnon, Mawby and Walklate pointed to the fact that criminal justice agencies function within “... a deeply embedded patriarchal framework ...” which hinders the effectiveness of a rights-based agenda (Mawby & Walklate, 1994: 185). In order to facilitate the viability of this concept of victims’ rights as a vehicle for social change, it must thus be accompanied by advocacy for transformation of the laws, policies and practices of the patriarchal (and capitalist) state by which it is structurally constrained (Mawby & Walklate, 1994: 186).

The contribution of critical victimology to victimological theory has been significant (see section 3 below). Not only has it emphasised the importance of the social context in which victimisation occurs, it has also highlighted the contested nature of the concepts of “victim” and “victimisation” and the fact that they are “... historically and culturally specific” (Dignan, 2005: 35). In addition, its focus on victims’ lived realities has explicated the link between

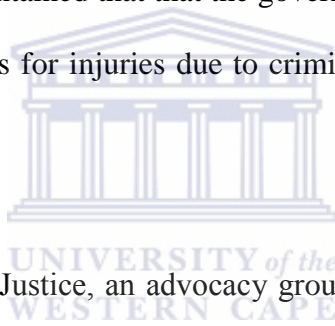
victimisation and social inequality on the grounds of gender, race, age and sexual orientation, amongst others. However, its inclusion of “unconscious” victimisation has been criticised. Critics have argued that it may not be ethical to “... claim positions for [victims] that they do not claim themselves” (Spalek, 2006: 45). Despite this criticism, the emphasis of critical victimology on the importance of using victims’ capacity for active resistance to develop strategies for social change, particularly by means of advocating the recognition of victims’ rights as human rights, constitutes the theoretical approach that most strongly promotes the kind of victims’ advocacy that accommodates the diversity of victims’ experiences. It accordingly forms the theoretical framework for the arguments for the recognition of enforceable victims’ rights put forward in the thesis (see chapter 2).



3 KEY DEVELOPMENTS IN POLICY AND PRACTICE

The development of victimological theory since the Second World War has been matched by a proliferation of criminal justice policies pertaining to victims in the UK. This section addresses the key moments in the growth of this victims’ policy against the backdrop of the various victimological theories, indicating which theoretical approaches have received the most government support (see Wolhuter, *et al*, 2009: 1-6).

In the early post-War years criminal justice policy regarding victims was founded on the welfarism that informed the state's duty to shield its citizens from "... disease, squalor, and ignorance, idleness, and want" (Mawby & Walklate, 1994: 70). This duty was premised on the view that citizens, as parties to an implied social contract, have the right to be insured against such conditions (Mawby & Walklate, 1994: 70-71). A welfarist philosophy underpinned the call for victim compensation by Margery Fry in the 1950s. Relying on the principles of collective responsibility and collective social insurance, Fry maintained that that the government was under an obligation to compensate victims for injuries due to criminal victimisation (Dignan, 2005: 43).



After Fry's death, Justice, an advocacy group, continued her work, and their efforts culminated in the introduction of the Criminal Injuries Compensation Scheme ("CICS") in 1964 (Dignan, 2005: 43; Mawby & Walklate, 1994: 75). Compensation was only awarded to "deserving" victims of violent crime (Mawby & Walklate, 1994: 75). Like positivist victimology, this operated to exclude victims who precipitated or played a part in their victimisation (see section 2.1.1 above).

Nevertheless, the CICS was founded on the importance of catering for the needs of victims, a concern which was taken up by Victim Support in the 1970s. The first Victim Support scheme, in Bristol, was funded by the

National Association for the Care and Resettlement of Offenders (“NACRO”) (Goodey, 2005: 104). Other schemes emerged surprisingly quickly, and the National Association of Victim Support Schemes (which eventually became Victim Support) was set up in 1979 (Goodey, 2005: 104).

Victim Support expanded in the 1980s, receiving significant funding from the government. Mawby and Walklate have ascribed its good standing with the government to three reasons. First, unlike other organisations such as Rape Crisis (see below), Victim Support was not critical of the government (Mawby & Walklate, 1994: 80). Second, it did not urge dependence upon government, but encouraged victims to empower themselves as “active citizens”. This approach coalesced with the Thatcher government’s dislike of “the dependency culture” that had emerged after the Second World War (Mawby & Walklate, 1994: 80-81). Third, the provision of victim services consolidated the concept of citizens as consumers of public services that the Conservative government wished to instil in public attitudes (Mawby & Walklate, 1994: 81). The concept of consumerism accorded with the government’s view that citizens have responsibilities in addition to rights (Mawby & Walklate, 1994: 85).

By virtue of the extensive funding it received from the government, Victim Support was soon able to provide assistance to victims of crime nationally (see chapter 3). In light of its political neutrality, Victim Support initially

assisted “neutral” victims of street crime and property offences, although it did extend its services to victims of rape (Mawby & Walklate, 1994: 80, 82).

As has been indicated in section 2.3.1 above, radical feminism focused on violence against women and children, situating it within the patriarchal social structure. It accordingly contested the positivist notion of victim precipitation, maintaining that it constituted victim-blaming that masked the patriarchal structure in which gender-based violence was embedded. Academic radical feminism provided the impetus in the 1970s for the establishment of women’s organisations, such as Rape Crisis, that supported victims and called for legal reforms (Dignan, 2005: 56; see chapter 3).

In the 1980s, the government turned its attention to the issue of violence against women and children. “Rape suites” were set up in police stations to enable victims to report rapes in a more comfortable, less threatening environment. The Home Office imposed duties on the police to use their powers of arrest more often in cases of domestic violence. In addition, live TV links were introduced to facilitate the testimony of child victims of sexual abuse (Mawby & Walklate, 1994: 82; see chapter 3)

The government also began to use national and local victim surveys more regularly in the 1980s (Goodey, 2005: 15). However, this was due primarily to the government’s inability to lower the crime rates than to the emergence of

a victim-centred perspective. Nevertheless, these surveys documented information about fear of crime and the impact of crime on victims, which resonated with the importance attached by left realists to responding to the reality of victims' experiences of crime (Goodey, 2005: 15; see section 2.2.2 above).

A corresponding level of interest in victims developed in the Council of Europe in the 1980s. It adopted the European Convention on the Compensation of Victims of Violent Crime (the "Compensation Convention") in 1983, which imposed a duty on Member States to play a part in compensating victims of intentional crimes of violence who have been seriously injured (see chapter 5). In the same way as the CICS, the Compensation Convention is founded on the concept of "deserving" victimhood, enshrining the view that victims who precipitate their victimisation should not be awarded compensation.

The 1980s also saw the introduction of two important recommendations by the Committee of Ministers of the Council of Europe. The first, *Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure* (1985), required Member States to take cognisance of victims' interests in the criminal process. The second, *Recommendation No. R (87) 21 of the Committee of Ministers to Member States on assistance to victims and*

prevention of victimization (1988), introduced state duties to cater for victims' needs outside of the criminal justice system (see chapter 3). These instruments evinced a growing realisation by the Council of Europe that the interests of victims had been marginalised in the past, and that reforms were necessary to give effect to these interests.

While the concern for victims in the UK and in Europe in the 1980s represented a discernible change from previous decades, the concern was to provide for victims' needs rather than grant them legally enforceable rights. By contrast, the 1990s heralded the beginning of a victims' right discourse. As has been indicated in section 2.4 above, rights for victims were proposed by critical victimologists to ensure that victims' lived experiences of victimisation were made the subject of an effective government response (Mawby & Walklate, 1994: 179). By the 1990s Victim Support had shed much of its political neutrality in favour of a more activist stance. Consequently, it played a significant role in the emergence of this rights-discourse by advocating the introduction of victims' rights (Dignan, 2005: 53; Victim Support, 1995; see chapter 3). Unfortunately, the government vacillated. The first *Victim's Charter* (Home Office, 1990) was not enforceable and merely contained "guiding principles" for victims' treatment (Dignan, 2005: 66-67). The second *Victim's Charter* (Home Office, 1996) only introduced "service standards". These standards did not enshrine enforceable rights for victims, but merely granted them an expectation that

criminal justice agencies would, amongst other things, provide them with information, respect and support. However, although the *Victims' Charter* (Home Office, 1996) lacked enforceability, Rock has maintained that its significance resided in the fact that it was the government's first formal commitment to victims and amounted to a "substantial improvement" in their "lot" (Rock, 2004: 162; see chapter 2).

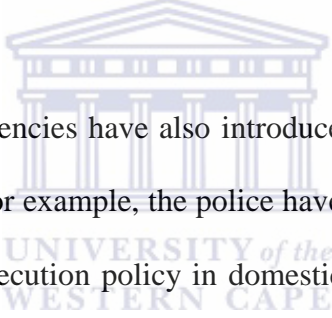
Other important events also characterised the 1990s. Victim Support received funding from the government to pilot the Witness Service in a number of Crown Courts. The Witness Service was aimed at providing support and assistance to victims at court. By 2002, all Crown Courts and magistrates' courts in England and Wales had a Witness Service (Victim Support, 2002: 18; see chapter 3). In addition, the government introduced comprehensive measures for the protection of victims in court. The Youth Justice and Criminal Evidence Act 1999 ("YJCEA") enshrined various victim-centred reforms to the law of evidence. In appropriate circumstances, victims were allowed to testify with the aid of special measures, such as a live TV link or video recording. Furthermore, defendants were prevented from cross-examining rape complainants in person, and the admissibility of sexual history evidence was prohibited, except in narrowly delineated circumstances (see chapter 3). These reforms were premised on the need to encourage victims, especially vulnerable victims, to testify by alleviating their experiences of secondary victimisation during the court process.

By the beginning of the twenty first century, victims were substantially closer to the centre of criminal policy than had hitherto been the case. However, governmental discourse on victims was framed in the language of needs rather than rights, and victims remained Crown witnesses with no legal standing.

By introducing enforceable victims' rights, the Framework Decision ushered in a new era in regard to victims of crime. The Framework Decision, which binds the UK, grants victims a range of rights, including the right to information and the right to protection (see chapter 2). Although the Labour government reacted to the Framework Decision by undertaking to introduce statutory victims' rights (Home Office, 2001), no such rights materialised. Instead it returned to the discourse of "needs" and "services" for victims (Home Office, 2002; see chapter 2).

The *Code of Practice for victims of crime* (2005; the "Victims' Code"), enacted in response to the Framework Decision, reflects this discourse. It was introduced in pursuance of the Domestic Violence, Crime and Victims Act 2004 ("DVCVA") and imposes duties on criminal justice agencies, including the police and the Crown Prosecution Service ("CPS"), to provide victims with information, protection and respect, amongst other things. However, the Victims' Code restricts victims' avenues for redress to a complaints mechanism rather than granting them enforceable rights (see chapter 2).

The twenty first century has also witnessed the introduction of a range of other victim-centred reforms. In October 2001, Victim Personal Statements (“VPS”) were introduced nationally, enabling victims to explain how the crime has affected them. VPS are considered by the courts at the stage of sentencing. As such, they give victims a “voice” during sentencing but do not permit them to participate actively in the proceedings (see chapter 4). In addition, the Coroners and Justice Act 2009 (“CJA 2009”) effects several reforms to the provisions of the YJCEA pertaining to special measures for vulnerable and intimidated witnesses (see chapter 3).



Criminal justice agencies have also introduced specific measures for socially unequal victims. For example, the police have a pro-arrest policy and the CPS has a positive prosecution policy in domestic violence cases. Sexual Assault Referral Centres (“SARCs”) have been established for rape and sexual assault victims. The police and the CPS have implemented positive policing and prosecution policies in order to improve their responses to racially and religiously motivated victimisation, as well as homophobic and transphobic crime. The growth of these policies testifies to the increasing significance accorded by the government to the broader structural underpinnings of victimisation (see chapter 6). In addition, the EA, which has been enacted recently, grants victims of discrimination and harassment rights of action against public authorities, including those who discriminate against or harass them in the provision of services or the performance of public functions. This

right of action heralds a new era in which socially unequal victims are granted legal standing in appropriate cases (see chapter 6).

Very significantly, the close of the first decade of the twenty first century has been marked by the drafting of a proposed Victims' Directive, which will consolidate and extend enforceable rights for victims across Europe, and which will replace the Framework Decision. Unfortunately, it is as yet uncertain whether the UK will accept this Directive (see chapter 2).

The last three decades have seen the emergence of a plethora of restorative justice initiatives that seek to respond to victims' needs outside of, or in tandem with, the formal criminal process (see chapter 5). These initiatives include family group conferencing, restorative cautioning and community conferencing, processes which aim to restore the relationships between victims, offenders and communities that have been fractured by crime (Obold-Eschleman, 2004: 572). However, while restorative justice does evince a concern for victims, its concern to meet the needs of offenders and the community precludes it from propounding "... a radical vision of victim empowerment" (Braithwaite, 2002: 160). Consequently, restorative justice is not founded on a victims' rights discourse.

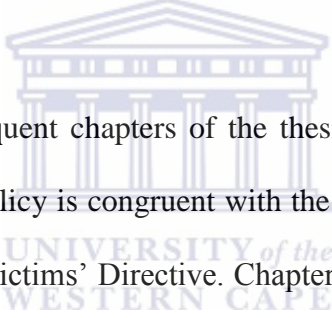
The foregoing analysis indicates that concern to meet victims' needs has led to a wide range of laws and policies aimed at supporting victims that make

significant inroads into the traditional criminal process. While these laws and policies have progressively brought victims into the centre of criminal justice policy, there has been no change to the formal status of victims. They are not regarded as parties to criminal proceedings and have no enforceable rights to insist that criminal justice agencies discharge their obligations. Despite the fact that other common law jurisdictions, such as the US, and civil law jurisdictions, such as Germany, grant victims comprehensive enforceable rights (see chapters 2 and 4), the UK has refused to do likewise. On the basis of the rights in the Framework Decision and the Victims' Directive, as well as the legal position in other jurisdictions, the thesis contends that the UK ought to introduce such enforceable rights.

4 OVERVIEW OF THESIS

Against the backdrop of the above analysis of the development of criminal justice policy pertaining to victims, and drawing on insights derived from critical victimology and critical race feminism, the substantive chapters of the thesis advocate the introduction of enforceable rights for victims in the UK. In order to highlight the need for the introduction of such rights, chapter 2 commences by outlining the nature and extent of secondary victimisation in the criminal process. Thereafter it evaluates the emergence of a victims' rights discourse in EU law and in the jurisprudence of the European Court of Human Rights ("ECtHR") and, to a surprisingly large extent, also in the jurisprudence

of the English courts. However, the chapter demonstrates that, even though the UK government has introduced the Victims' Code, it has no firm plans to act on this discourse by introducing enforceable rights. By way of comparison, the chapter considers the American Crime Victims Rights Act 2004 ("CVRA"). It maintains that the UK ought to accept the Victims' Directive and enact legislation similar to the CVRA that entrenches enforceable rights. However, the chapter highlights the importance of supplementing such rights with specific measures for socially unequal groups to enhance their ability to access these rights effectively.



Each of the subsequent chapters of the thesis considers the extent to which English law and policy is congruent with the various rights in the Framework Decision and the Victims' Directive. Chapter 3 commences by setting out the provisions of the Framework Decision and the Victims' Directive pertaining to the support and assistance of victims. It assesses the services and functions of Victim Support and other "unofficial" agencies, and contends that the fact that victims have no enforceable right to support and assistance has not prevented the UK from complying with its duties in terms of EU law. In addition, the chapter evaluates the degree to which the Victims' Code and the provisions for vulnerable victims in the YJCEA, as amended by the CJA 2009, are consonant with the government's obligations in the Framework Decision and the Victims' Directive to provide victims with information and protection, amongst other things. It maintains that, despite the fact that the

government has broadly complied with these obligations, the lack of enforceability of the Victims' Code and the fact that the measures in the YJCEA, as amended by the CJA 2009, are discretionary, minimise the utility of these instruments for victims.

Against the backdrop of the right to be heard in the Framework Decision and the Victims' Directive, chapter 4 engages in a comparative assessment of victim participation in criminal proceedings. It considers the strengths and weaknesses of VPS in the UK, and argues that, as they do not generate party status for victims, they amount merely to passive participation. The chapter analyses the auxiliary prosecution procedure in German and Swedish law, highlighting the fact that, as it confers full party status on victims, it amounts to active participation. The chapter also explores the provisions permitting victims' lawyers in these legal systems, as well as in the US. It maintains that if Sweden, a jurisdiction with adversarial trials, is able to use auxiliary prosecution and victims' lawyers effectively, the introduction of such procedures in the UK will not be inconsistent with adversarial principles.

The first part of chapter 5 examines victims' right to compensation in light of the government's obligations in the Compensation Convention, the Framework Decision and the Victims' Directive. It contends that, barring some discrepancies, the CICS is consonant with the Compensation Convention. In addition, the chapter considers the existing provisions for imposing

compensation orders on offenders, arguing that, while they are congruent with the Framework Decision and the Victims' Directive, certain difficulties, such as ineffective enforcement mechanisms, hinder their utility for victims. The first part of the chapter concludes by surveying recent reform proposals by the coalition government.

Chapter 5 then turns to an analysis of restorative justice initiatives in England and Wales in light of the provisions of the Framework Decision and Victims' Directive, as well as of international instruments. It maintains that restorative justice initiatives harbour several dangers for victims, particularly socially unequal victims, which may compound secondary victimisation. Consequently, it applauds the inclusion in the Victims' Directive of safeguards for victims in restorative processes. The chapter concludes by arguing that the UK ought to focus on the introduction of enforceable rights in the formal process rather than on the expansion of restorative initiatives.

Chapter 6 evaluates the position of victims from a range of unequal social groups, namely victims of gender-based violence, racially and religiously motivated crime, homophobic and transphobic crime, and elder abuse, in English law. The decision to restrict the chapter to victims from these groups is not meant to suggest that other victims, such as child victims and victims with disabilities, do not also experience social inequality. Instead, it flows from the author's view that a comprehensive analysis of the position of child

victims and victims with disabilities necessitates the inclusion of a psychosociological perspective that is beyond the ambit of the thesis. Consequently, the chapter only explores the extent to which criminal justice responses to the above-mentioned forms of victimisation comply with the UK's obligations in terms of international and European human rights law. It demonstrates that, apart from elder abuse, criminal justice agencies have effected significant reforms to their responses to victims of such crimes, but that a range of flaws continue to beset these responses. The chapter concludes by considering the rights granted to victims in terms of the EA to institute actions against public authorities for discrimination and harassment in the provision of services and the performance of public functions, and argues that, in order to enhance the effectiveness of these rights, the enforceable victims' rights that it advocates ought to be supplemented by a right to non-discrimination in their enjoyment and exercise.

Chapter 7 comprises a synopsis of the primary arguments raised and the main conclusions reached in the thesis. In addition, it delineates the contours of a proposed victims' rights model for the criminal process.

CHAPTER 2: SECONDARY VICTIMISATION AND THE DEVELOPMENT OF A VICTIMS' RIGHTS DISCOURSE

1. INTRODUCTION

This chapter commences by assessing victims' experiences of secondary victimisation at the hands of criminal justice agencies, with particular reference to victims of gender-based violence and racially motivated and homophobic crime. Thereafter, it considers the UK's response to secondary victimisation in light of the emergent discourse of victims' rights in EU law and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("ECHR"). As the present author has contended elsewhere (Wolhuter, *et al*, 2009: 119), one of the key characteristics of a right is that it enables the right-bearer to institute legal proceedings for its enforcement. This chapter shows that, whereas the Council of Europe, the ECtHR and the English courts are moving to the recognition of enforceable rights for victims, the English government is, with certain limited exceptions, reluctant to follow suit.

In order to demonstrate that this movement to enforceable rights is not restricted to Europe, the chapter highlights the recent recognition of enforceable victims' rights in the American CVRA. It contends that English law ought to introduce enforceable rights for victims in order to bring the UK into line with such international trends. However, it draws attention to the fact

that, even if such enforceable rights are recognised, they may be inaccessible to victims from socially unequal groups. The introduction of enforceable rights thus must be accompanied by measures designed to facilitate their accessibility to victims from such groups.

2. SECONDARY VICTIMISATION

Secondary victimisation may be conceived as the insensitive and inadequate treatment of victims by criminal justice agencies, particularly the police, the CPS and the courts (Spalek, 2006: 11-12). Research has shown that, while all victims experience secondary victimisation, victims from socially unequal groups, such as victims of gender-based violence, racially motivated crime and homophobic crime suffer particularly seriously at the hands of criminal justice agencies. This section briefly assesses the secondary victimisation experienced by victims generally and focuses on the experiences of victims from socially unequal groups (In order to demonstrate the deleterious impact of secondary victimisation on victims, this section assesses the nature and extent of secondary victimisation prior to the introduction of reforms to the criminal justice process. Reforms to ameliorate secondary victimisation for victims in general are discussed fully in chapters 3, 4 and 5, while reforms to address the experiences of victims from socially unequal groups are discussed in chapter 6).

2.1 Victims in general

In the ordinary course, victims' first experience of the criminal justice system occurs when they report an offence to the police. Early research into victims' experiences demonstrated that many victims perceived the police as insensitive and unhelpful (Wright, 1996: 24). Police were criticised as being "... helpful towards themselves ..." rather than helpful to victims (Wright, 1996: 24). For instance, they took statements from victims who were still reeling from the immediate aftermath of the offence (Wright, 1996: 24). One of the central complaints made by victims, however, is that police did not provide them with information concerning the progress of their cases, leaving them feeling confused and marginalised (JUSTICE, 1998: 26). In particular, police ignored the relatives of murder victims, leaving them in the dark regarding the progress of the case (JUSTICE, 1998: 55). There was also a tendency to hand the matter to the CPS for prosecution against the victim's wishes, which caused distress (Wright, 1996: 24). In addition, the CPS, in deciding whether to prosecute offences, did not consult victims (Dignan, 2005: 72).

In view of the fact that victims have no formal party status in criminal proceedings, there was a tendency to treat victims as "evidentiary cannon fodder" not deserving of "common courtesy" when they were required to attend court to testify (Dignan, 2005: 64). Victims frequently incurred

expenses and sustained loss of earnings in order to testify at court, receiving little or no compensation from the state (Wright, 1996: 25). Upon their arrival at court, victims were not told where the case was to be heard (JUSTICE, 1998: 65). Many victims were consigned to waiting rooms shared with the defendant's family and friends and were given no refreshment facilities (Dignan, 2005: 74). Inadequate measures existed to protect victims from intimidation by the defendant's family and friends (JUSTICE, 1998: 74). In addition, court buildings lacked sufficient child-care facilities (JUSTICE, 1998: 68-9). Victims were also given no opportunity to meet CPS barristers (JUSTICE, 1998: 70-71). Furthermore, they were subjected to numerous adjournments and delays (Dignan, 2005: 74), were not informed when the case was about to commence and were often not told that a defendant had belatedly pleaded guilty (JUSTICE, 1998: 65, 66).

Victim satisfaction with the courts was accordingly low. Wright has pointed to a study indicating that more than a third of victims did not receive sufficient advance notice of the date and time of their testimony, and more than half of them felt that they were not "... consulted adequately about the date, and were not told what to do in the courtroom" (Wright, 1996: 25). Furthermore, the roles of various court officials were not explained to three quarters of victims (Wright, 1996: 25).

The adversarial courtroom procedure exacerbated victims' experiences of secondary victimisation. Victims frequently complained that they were not permitted to "... tell their story in their own words ..." but were required instead to furnish exact answers to questions by Crown counsel (Wright, 1996: 25). In light of the fact that the aim of defence counsel is to cast aspersions on the veracity of victims' testimony and to attack their credibility, victims' experiences of cross-examination were particularly traumatic (Dignan, 2005: 64). Many victims experienced cross-examination as intrusive, humiliating and degrading, and were left wondering why they were subjected to such hostility at the hands of defence counsel (Ellison, 1998: 607-608). The trauma associated with cross-examination has led many victims to choose not to report their victimisation (Wright, 1996: 26). Those victims who did choose to report and whose "offenders" were convicted experienced complete exclusion at the stage of sentencing (Dignan, 2005: 65).

Despite the introduction of several far-reaching reforms to the criminal process (see chapters 3, 4 and 5), victims continue to experience secondary victimisation. Dignan has contended that the adversarial restrictions on victim participation inevitably consign victims "... to a limited, partisan and confrontational role within the criminal justice process" (Dignan, 2005: 85).

2.2 Victims of gender-based violence

This section considers the secondary victimisation experienced by rape and domestic violence victims. Although the emphasis is on women as victims, the experiences of men as victims are also discussed.

2.2.1 Rape victims

Over and above the traumatic experience of the rape itself, rape victims suffer further victimisation by criminal justice agencies (Temkin, 2002: 3). Victims who report rapes to the police are treated insensitively (Williams, 1999: 61). Prior to the introduction of reforms to police policy (see chapter 6), victims were required to make statements as soon as they reported the rape, regardless of whether they were still in a state of shock. Furthermore, they were subjected to intrusive and irrelevant questions. A documentary by Roger Graef, which was screened on television in 1982, depicted a rape victim being questioned by the police. She was asked questions such as ““Have you ever been on the game? How many times have you had sex? How many men have you had sex with? Can you count them on the fingers of one hand?”” (Spalek, 2006: 106).

Although the furore that followed this documentary led to the introduction of several reforms, such as the use of rape suites (Spalek, 2006: 106), police

attitudes to rape victims continued to be grounded in a patriarchal understanding of women's sexuality (Williams, 1999: 61) that generated insensitive treatment and attitudes of disbelief. Temkin has contended that many police officers are unsympathetic to rape victims because they believe that victims frequently make false allegations of rape (Temkin, 2002: 4). Although some women do make false complaints, the rate of such false complaints is no higher in rape cases than in any other cases (Temkin, 2002: 5). Erroneous beliefs in false allegations have led to the "no criming" of cases, particularly where the victim knows the perpetrator (Spalek, 2006: 106), and have caused victims to withdraw their statements (Temkin, 2002: 5). Even in cases where the police have taken further action in response to the report of rape, victims have complained that they received little or no information concerning the progress of their cases (Williams, 1999: 62), leaving them anxious and confused.

Besides the trauma associated with their interactions with the police, rape victims must face the further ordeal of a medical examination. Victims have stated that the experience of undergoing a medical examination amounted to the worst form of secondary victimisation. Some characterised it as "... a further sexual assault and an ordeal in its own right" (Temkin, 1996: 14). Prior to the introduction of reforms (see chapter 6), police surgeons, who were predominantly male, frequently displayed insensitivity and even hostility to victims (Temkin, 1996: 2). Moreover, victims were "... often given no advice

about pregnancy and sexually transmitted diseases” (Temkin, 1996: 2). Temkin’s study of women who had undergone medical examinations in the area of Sussex between 1991 and 1993 (Temkin, 1996: 4) found that 86 per cent of victims “... were wholly, mainly or partly negative about their experiences of the examination” (Temkin, 1996: 8).

Having been required to endure traumatic contact with the police and an even more harrowing medical examination, victims’ next encounter is with the CPS. The practice on the part of the CPS of accepting pleas to lesser offences such as indecent assault has caused “... considerable anger and distress for women who have made the difficult decision to report rape” (Williams, 1999: 62). Furthermore, victims have complained about the absence of communication with Crown counsel prior to the trial. A study by Victim Support has indicated that victims were disappointed and frustrated by prosecutors’ unwillingness to discuss the case with them prior to the trial and criticised them as “distant” (Ellison, 2007: 701). This absence of prosecutorial support, coupled with the denial of party status and the right to legal representation, left victims to fend for themselves in the run up to the trial as well as during the trial itself.

Victims have labelled their experiences of cross-examination – the hallmark of adversarial trials – as tantamount to a “second rape” or as generating the feeling that they, rather than the defendant, are the ones on trial (Lees, 2002:

106). Research by Victim Support has demonstrated that victims regard “... cross-examination as ‘patronising’, ‘humiliating’, ‘being made to feel as if they were on trial’ and ‘worse than the rape’” (Ellison, 1998: 607). These experiences have been ascribed to the tactics employed by defence counsel to cast aspersions on victims’ characters in order to undermine their credibility (Ellison, 2007: 695) and to depict the alleged rape as consensual sexual intercourse (Easton, 2000: 179). For instance, defence counsel have drawn on rape myths and stereotypes to contend that the absence of physical injuries points to consent and the delay in reporting indicates fabrication by the victim (Ellison, 2007: 695). They have also used evidence of the victim’s past sexual activity to suggest that she consented to the alleged rape (Temkin, 2002: 9). In addition, in order to portray victims as deviating from the norm of appropriate womanhood, defence counsel have scrutinised victims’ personal lives, questioning them about their provocative clothing and behaviour, their financial position, their motherhood role and their use of alcohol and drugs (Ellison, 2000: 41). Apart from these strategies, defence counsel have also employed bullying tactics, such as rapid-fire and repetitive questioning about intimate details of the alleged rape (Ellison, 2000: 43), in order to try to distort victims’ versions of events and to render them consistent with consensual intercourse (Temkin, 2002: 9).

Critics have expressed concern at the lack of judicial intervention to curb such defence tactics (Temkin, 2002: 9). However, Ellison has contended that the

“macho adversarialism” of criminal proceedings encourages the use of intimidating and humiliating tactics by defence counsel (Ellison, 2000: 45). Moreover, the adversarial concept of judicial detachment and passivity precludes the judiciary from intervening for “fear of appearing partisan ...” (Ellison, 2000: 48-49). Consequently, Ellison has argued that secondary victimisation consequent upon cross-examination is embedded within the principle of adversarialism itself and cannot be removed without radical transformation of the adversarial process (Ellison, 2000: 57).

On the other hand, however, there is evidence to suggest that judicial apathy was located not only in the dictates of adversarialism but also in patriarchal attitudes on the part of the judiciary. The following summing up to the jury by Judge Wild in the Cambridge Crown Court in 1982 testifies to the existence of such attitudes:

Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it, she only has to keep her legs shut and she would not get it without force and there would be marks of force being used (Temkin, 2002: 10).

In light of the above features of secondary victimisation, the offence of rape has had a markedly high rate of attrition. Many cases were not reported, but even those that were reported were subjected to “no-criming”, prosecutorial downgrading of offences and plea-bargaining. Furthermore, a study by Harris

and Grace revealed that a mere 6 per cent of rape cases “... recorded by the police as rape resulted in convictions and that cases broke down at each stage, no-criming, no further action, acquittals and downgrading to lesser offences” (Easton, 2000: 168-169).

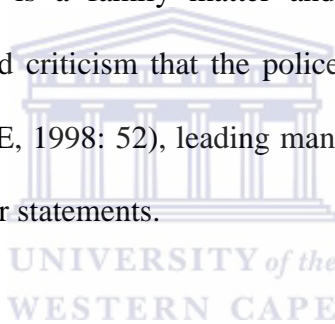
Williams has argued that reforms are only capable of effecting limited change to the experiences of rape victims “... as attitudes towards rape have their origins in patriarchal assumptions about women’s sexuality ... and change in this area is bound to be slow, resisted as it is by a male establishment and the individual vested interests of men” (Williams, 1999: 61).

However, recent research has demonstrated that it is not only women rape victims but also their male counterparts that have experienced secondary victimisation. Male victims of rape have reported that they receive insensitive treatment at the hands of the police (Rumney, 2001: 206). In addition, they have been subjected to aggressive and humiliating cross-examination by defence counsel, as well as the use of tactics to undermine their credibility. For instance, counsel have pointed to the lack of physical resistance and injury as evidence that the victim consented to the alleged rape (Rumney, 2001: 208). They have drawn on victims’ past sexual activity to cast doubt on their credibility or to argue that they consented (Rumney, 2001: 209). These tactics are strikingly similar to those employed in cross-examining women rape victims (Rumney, 2001: 212), and suggest that men’s experiences of

sexual violence are embedded in masculinist perceptions of male sexuality that do not accord with their lived experiences (see chapter 1).

2.2.2 Victims of domestic violence

Prior to the advent of recent reforms (see chapter 6), domestic violence victims experienced severe secondary victimisation. Police responded insensitively to reports of domestic violence, adopting the attitude that domestic violence is a family matter and not “real” police work. Such responses prompted criticism that the police did not take domestic violence seriously (JUSTICE, 1998: 52), leading many victims to choose not to report or to withdraw their statements.

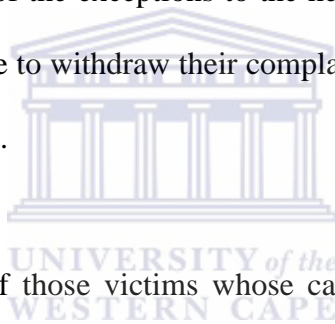


Minority women faced (and continue to face) the additional burden of police racism, expressed in hostility and lack of interest, causing them to be more hesitant than white women to report domestic violence (Gill, 2004: 466, 467; Sundari & Gill, 2009: 174). The barriers to reporting are compounded for undocumented immigrant women, whose fears of police xenophobia coupled with the threat of deportation consign them to remain in abusive relationships rather than seek police assistance (Gill, 2004: 478, 479). There are also language and cultural barriers to minority women’s access to victim support services (Spalek, 2002a: 70). Many victim support services fail to understand the importance of religion in the lives of minority women, and may “... judge

them for conforming to ... prejudiced assumptions about the controlling and patriarchal nature of religion” (Spalek, 2006: 111). Furthermore, research has shown that Victim Support contacts more white women than women from minority ethnic communities (Spalek, 2002a: 70). Minority women thus are marginalised not only by police racism, but also by cultural insensitivity on the part of victim support agencies.

Women whose cases were referred by the police to the CPS faced the frequent CPS practice of reducing charges, particularly from assault occasioning actual bodily harm to common assault (Cretney & Davis, 1997: 148). Prosecutors justified this practice on the basis that reduced charges ensure that the matter will be heard in the magistrates’ court, which is more favourably disposed to hearing domestic violence cases than the Crown Court (Cretney & Davis, 1997: 149). On the other hand, Cammiss has contended that prosecutors have minimised the seriousness of domestic violence cases due to their expectation that the victim will reconcile with the defendant and accordingly withdraw her complaint (Cammiss, 2006: 707). In view of the high rate of withdrawals, this expectation is not unjustified. Hoyle and Sanders, for instance, have found that most domestic violence victims refused to make statements or withdrew their statements (Hoyle & Sanders, 2000: 16). However, those women that did not wish to withdraw their complaints perceived such charge reductions as a signal that the criminal justice system devalued their experiences (Cretney & Davis, 1997: 149).

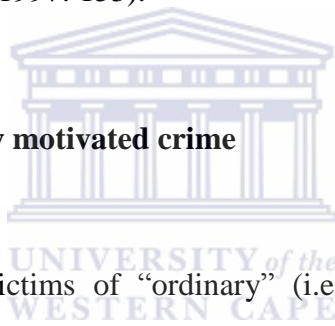
Furthermore, women have complained of lack of adequate communication with prosecutors (Cretney & Davis, 1997: 150). Many victims feared attending court on account of actual or threatened intimidation by the abuser if they testified (Spalek, 2006: 107). Prior to the introduction of the Witness Service (see chapter 3), the absence of prosecutorial contact was particularly traumatic for such victims as there was no one to make arrangements for their safety. In addition, the courts were (and still are) unwilling to permit the statements of domestic violence victims who are too afraid to testify to be admitted in terms of the exceptions to the hearsay rule (see chapter 3). Many women thus choose to withdraw their complaints or do not attend court due to fear for their safety.



The experiences of those victims whose cases reached court are similar to those of rape victims. Victims felt unable to narrate their testimony fully, reporting that prosecutors often presented a truncated version to the court (Cretney & Davis, 1997: 151). During cross-examination, defence counsel either depicted the couple as having reconciled, or employed images of the victim as “... a woman scorned, a jealous woman, or a drunken woman ...” (Cretney & Davis, 1997: 151). Victims thus experienced the court process as eliding their interests and marginalising their experiences of victimisation. These experiences were compounded by patriarchal attitudes on the part of many magistrates. In a study of magistrates’ attitudes to domestic violence as reflected in their proposed sentences in six vignette cases, Gilchrist and

Blissett found that magistrates regarded cases not requiring medical treatment where the woman's behaviour challenged gendered conceptions of the "good wife" and the "good mother" as the least serious forms of domestic violence (Gilchrist & Blissett, 2002: 350, 360). Other studies have shown that sentencing in domestic violence cases was premised on a conception of domestic violence as "... trivial and non-criminal" (Cretney & Davis, 1997: 152). Women victims thus viewed the outcomes of domestic violence cases as failing to reflect the seriousness of their experiences of domestic violence (Cretney & Davis, 1997: 153).

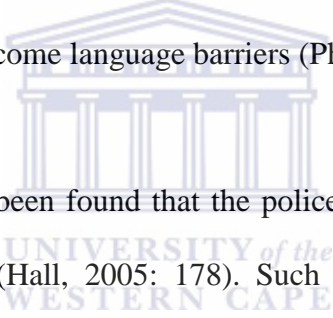
2.3 Victims of racially motivated crime



Minority ethnic victims of "ordinary" (i.e. non-racially motivated) crime suffered (and continue to suffer) extensive secondary victimisation by criminal justice agencies, particularly the police. Research has shown that the police fail to take adequate action to investigate ordinary everyday crime against minority ethnic groups ("MEGs") and that those reporting victimisation may suffer harassment in the form of "... rough treatment, inappropriate questioning and immigration checks" (Bowling & Phillips, 2002: 122).

However, victims of racially motivated crime fare much worse than do minority victims of "ordinary" crime. The police often fail to discern the

racial element in racially motivated crime and, even where they do, they tend to place racial incidents at the “... lower end of the hierarchy of police relevance” (Hall, 2005: 193, 197). Furthermore, they are slow to respond, unwilling to investigate and frequently hostile to victims (Hall, 2005: 193). A study undertaken in North Plaistow revealed criticisms that police were not doing enough, were failing to keep victims informed of the progress of the investigation and generally did not appear interested (Hall, 2005: 193-194). Victims have also complained that they are treated as suspects rather than victims (Victim Support, 2006a: 66) and that the police have insufficient interpreters to overcome language barriers (Phillips & Sampson, 1998: 130).



In addition, it has been found that the police completely disregard low-level racial harassment (Hall, 2005: 178). Such attitudes ignore the reality that racially motivated victimisation is often repeated and occurs on a continuum that ranges from low-level harassment to serious violence (Bowling & Phillips, 2002: 113). This disregard of low-level harassment fuels perceptions of police racism and discrimination on the part of MEGs. The Commission for Racial Equality indicated that it frequently received complaints concerning police discrimination against minority ethnic victims (Field & Roberts, 2002: 497).

Recent research has demonstrated that such discrimination is not restricted to victims in urban areas but also occurs in rural areas (Garland & Chakraborti,

2004; Garland & Chakraborti, 2006). Rural victims reported secondary victimisation that is similar to their urban counterparts. However, incidents of police racism and insensitivity may occur more frequently due to the fact that police in rural areas “... are not as used to dealing with racist incidents as those working in urban areas” (Garland & Chakraborti, 2006: 60). Criticisms of the police treatment of minority ethnic victims also extend to their inappropriate and insensitive responses to religiously motivated victimisation. In the aftermath of the events of 11 September 2001, for instance, Muslims who reported Islamophobic harassment were told by the police to “stay at home” (Islamic Human Rights Commission, 2002). The Islamic Human Rights Commission has contended that advice of this nature “... legitimises the further isolation and marginalisation of an already excluded community ...” and compounds Muslim victims’ lack of confidence in the police (Islamic Human Rights Commission, 2002).

Studies have demonstrated that police racism is not the preserve of a few “bad apples” but is deeply embedded within police occupational culture (Lea, 2000: 221-222). Some officers have sympathy for whites who regard their areas as having been “taken over” by MEGs, and who deprecate the fact that Asian people speak and dress in ways that differ from whites. Such racist views are conveyed in the ways in which police treat victims (Bowling & Phillips, 2002: 123).

Racism within police culture received the urgent attention of the government in the wake of the racist murder of Stephen Lawrence, an African-Caribbean teenager, in southeast London in 1993 (McGhee, 2005: 16-17). The investigation by the London Metropolitan Police Service (“MPS”) into the murder was appallingly inadequate and the perpetrators were not prosecuted. Racist stereotyping caused the police to regard Stephen Lawrence’s friend, Duwayne Brooks, who witnessed the murder, as a suspect “... rather than the victim of an unprovoked attack” (Davie, 2007: 90). The MPS also treated Mrs Lawrence, the victim’s mother, in a patronising way. Furthermore, the MPS attempted to discredit Imran Khan, the family’s solicitor. The primary error on the part of the MPS was its refusal to admit to the racist motivation of the murder as well as the racism that underpinned the police investigation (McGhee, 2005: 20).

The incident gave rise to the MacPherson Inquiry, which found that “the investigation was marred by a combination of professional incompetence, institutional racism and a failure of leadership by senior officers” (MacPherson, 1999: para 46.1). The Inquiry defined institutional racism as –

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people (MacPherson, 1999: para 6.34).

The Inquiry made several recommendations for the eradication of institutional racism from within the MPS as well as other police forces throughout the UK, which have generated widespread reforms to police policy and practice. Despite these reforms, however, minority ethnic victims continue to experience racism and insensitivity on the part of the police (see chapter 6).

The secondary victimisation that minority ethnic victims experience is not restricted to their interactions with the police. Victims have reported insensitive treatment by other statutory and voluntary agencies. For instance, research concerning the Crime and Disorder Partnerships established in terms of the Crime and Disorder Act 1998 (“CDA”) to respond, amongst other things, to racially motivated victimisation “... has been equivocal at best, and damning at worst” (Bowling & Phillips, 2002: 123-124). Studies have shown that participants in these initiatives tended to deny the significance of racist victimisation, adopted victim-blaming attitudes and were hesitant “... to investigate or take action against perpetrators for fear of a white backlash” (Bowling & Phillips, 2002: 124). A study by Phillips and Sampson of multi-agency responses to racist victimisation on an East London housing estate found that the multi-agency initiative failed for these reasons (Phillips & Sampson, 1998: 129).

Victims of rural racism have also complained that statutory and voluntary agencies, such as Citizens Advice Bureaux, respond inadequately to reports of

racist victimisation (Garland & Chakraborti, 2006: 61). Studies have demonstrated that agencies in rural areas fail to regard racist victimisation as important and assume that, in light of the small numbers of MEGs in rural areas, the extent of such victimisation is insignificant (Garland & Chakraborti, 2004: 135-136).

In addition, minority ethnic victims have expressed misgivings about Victim Support. It is regarded as linked to the police and has an image of being a white, middle class organisation (Victim Support, 2006a: 43). Many victims are unable to communicate with Victim Support volunteers in view of their inability to speak English and the lack of interpreters or foreign language speakers (Victim Support, 2006a: 64). Many victims thus choose to turn to their own community agencies, such as the Muslim Community Helpline, rather than Victim Support (see chapter 3).

Very little research has been conducted into minority ethnic victims' experiences of the CPS and the court process. The available research shows that victims are often fearful of testifying and lack the motivation to do so, particularly in view of their perception that a conviction is unlikely (Victim Support, 2006a, 46). However, 75 per cent of the respondents in a study by Victim Support stated that they would testify if the offender were to be prosecuted. Many victims were disappointed and frustrated at the lack of proceedings against offenders (Victim Support, 2006a: 52).

The rate of prosecutions for racially motivated offences is very low, with the CPS prosecuting only one in four racially aggravated offences (McGhee, 2005: 30). Prosecutors have been criticised for downgrading racially aggravated offences too easily or accepting pleas to lesser offences that do not reflect the element of racist motivation (Burney, 2003: 31). However, studies have shown that the reasons for such downgrading have less to do with racism and insensitivity on the part of the CPS than with the difficulties of proving racial motivation or hostility, which is an element of the aggravated offences (Burney, 2003: 31). Similar concerns have been raised regarding the prosecution of religiously motivated offences, with scholars pointing to the low rate of prosecution for such offences (Spalek, 2006: 146), as well as the difficulty of proving religious motivation and hostility (Idriss, 2002: 908). Minority victims of racially or religiously motivated crime thus rarely become involved in the court process.

2.4 Victims of homophobic crime

The literature concerning the treatment of victims of homophobic crime by criminal justice agencies is sparse. However, the available evidence suggests that the majority of victims choose not to report incidents to the police for fear of secondary victimisation (Williams & Robinson, 2004: 215; Hall, 2005: 194-195). Victims' fears include fear of police discrimination and ill-

treatment as well as fear of the consequences of acknowledging their sexual orientation (Hall, 2005: 195).

Victims' perceptions of police homophobia (Victim Support, 2006a: 66) have been verified by research documenting the existence of homophobic attitudes within police occupational culture. These attitudes find expression in discriminatory practices and harassment of lesbian, gay and bisexual ("LGB") people (Williams & Robinson, 2004: 214-215) and have led scholars to contend that, like racism, police homophobia is institutionalised (McGhee, 2005: 129). The police fail to take reports of homophobic crime seriously (Moran, 2004: 928) and reports result in few police investigations (McGhee, 2005: 128). Furthermore, prosecutions and convictions of homophobic crimes are rare (McGhee, 2005: 128). LGB victims thus experience marginalisation and exclusion from the criminal justice process.

3. ENGLISH LAW AND POLICY: VICTIMS' NEEDS OR VICTIMS' RIGHTS?

From the 1970s onwards, and particularly since the 1980s, victims' organisations have urged the British government to introduce reforms to eliminate secondary victimisation (see chapter 1). This section, which draws on the present author's work (Wolhuter, *et al*, 2009: 128-131), analyses the government's response to such victim advocacy, indicating that, with some

exceptions, it is founded on the notion that victims have needs that generate entitlements or expectations rather than legally enforceable rights. It engages in a brief overview of the *Victim's Charters* (Home Office, 1990; Home Office, 1996) and the government policy that preceded the introduction of the Victims' Code. Thereafter it assesses the legal nature of the Victims' Code.

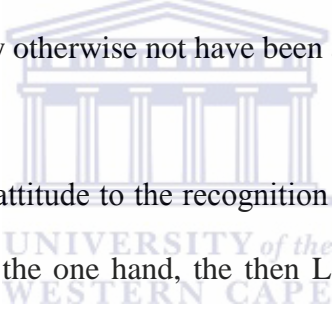
3.1 The position prior to the Victims' Code

The *Victim's Charters* 1990 and 1996 (Home Office, 1990, Home Office, 1996) constituted the first wide-ranging attempts on the part of the state to meet the needs of victims in the criminal justice system. Although the Victim's Charter 1990 was entitled a "Statement of rights of victims of crime", it merely contained "guiding principles" concerning the treatment of victims and was not legally enforceable (Dignan, 2005: 66-67). It was criticised for "... falsely raising victims' hopes by dressing service standards in the language of rights ..." (Goodey, 2005: 127).

The *Victim's Charter* 1996 relinquished the language of rights, being entitled "A statement of service standards for victims of crime". It granted victims entitlements to or expectations of services from criminal justice agencies (Rock, 2004: 160) and was not legally enforceable. These services included victims receiving information, amongst other things, about the progress of the police investigation, the trial proceedings and the release of offenders; having

their views considered by the CPS and the courts, amongst others; being treated with respect and sensitivity in court; and being offered emotional and practical support, such as assistance in claiming compensation.

Although the *Victim's Charter* gave victims the expectation of such services, the fact that it lacked enforceability meant that it granted victims no rights as consumers of these services or substantive rights as citizens (Goodey, 2005: 131). However, it nonetheless provided "... a formal authority to act" (Rock, 2004: 162), thereby facilitating gains as regards the consideration of victims' interests which may otherwise not have been achieved.



The government's attitude to the recognition of enforceable rights for victims has fluctuated. On the one hand, the then Lord Chancellor expressed strong disapproval of the establishment of "... a new comprehensive tier of legally enforceable rights for victims" (Rock, 2004: 535). On the other hand, in response to the Framework Decision (see section 4 below), the government stated that it aimed to establish statutory rights for victims (Home Office, 2001b; Home Office, 2001c), including the rights to be treated with dignity and respect; to support; to protection; to give and receive information; to compensation or reparation; and to a transparent criminal justice process (Home Office, 2001b: para 3.104).

Despite these statements of intent, however, enforceable statutory rights for victims were never enacted. Instead, state discourse reverted to the language of victims' "needs" and "services" for victims. In *Justice for all* (Home Office, 2002b), the government stressed the importance of putting victims at the "heart" of the criminal justice system, and rebalancing the system in favour of victims (Home Office, 2002b: paras 0.22, 0.3). At the same time its talk of statutory victims' rights gave way to an intention to introduce a Victims' Code of Practice imposing responsibilities on criminal justice agencies "... to ensure that the needs of victims and witnesses are met" (Home Office, 2002b: para 2.43). Likewise, in *A new deal for victims and witnesses* (Home Office, 2003c) it stated that the "overarching aim" of its victims' strategy "... is to improve services to victims and witnesses and to increase their satisfaction with those services" (Home Office, 2003c: para 3.1).

This reversion to the language of needs as opposed to rights has attracted criticism. For instance, Jackson has contended that, rather than uttering rhetorical statements of commitment to victims' interests, the government should ensure the existence of specific remedies for victims whose rights have been infringed, resulting in "... consequences for criminal justice agencies which failed to deliver these rights" (Jackson, 2003: 326).

3.2 The Victims' Code

In accordance with the above government policy, the Victim's Code imposes service obligations on various criminal justice agencies. These obligations include the provision of information throughout the criminal justice process, appropriate protection, such as special measures, and sensitivity and respect (see chapter 3). The Victim's Code binds, inter alia, the following criminal justice agencies: the police (para 5); the Joint Police/CPS Witness Care Units (para 6); the CPS (para 7); Her Majesty's Court Service (para 8); and the Criminal Injuries Compensation Authority (para 13).

The Victim's Code does not grant victims enforceable rights but merely affords them a mechanism for instituting complaints. As De Than has argued, it lacks "... real status and courtroom enforceability" (De Than, 2003: 182). Paragraph 16.1 provides that, in the first instance, if victims are of the view that any of the agencies have not fulfilled their obligations in terms of the Victims' Code, they should discuss the matter with the person with whom they have been dealing at the relevant agency. If they remain dissatisfied, they should "... make a complaint through the internal complaints procedure of that service provider". If their complaint is not addressed satisfactorily, they may complain to the Parliamentary Ombudsman, who is empowered in terms of s.47 and schedule 7 of the DVCVA to investigate and report to Parliament on such complaints. The number of complaints that have been made to the

Ombudsman is surprisingly low. Only three complaints were made in 2007, and only two in 2008 (Reeves & Dunn, 2010: 54). The reasons for such a low rate of complaints are not known (Reeves & Dunn, 2010: 54).

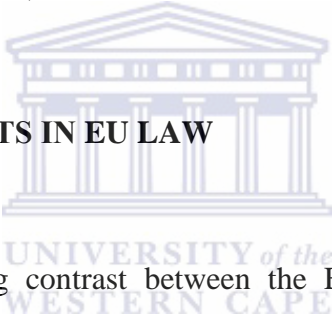
Section 48 of the DVCVA provides for the appointment of a Commissioner for Victims and Witnesses, who is currently Louise Casey (Ministry of Justice, undated). In terms of s.49(1), the Commissioner's functions are to promote victims' and witness's interests, to take appropriate steps to encourage "... good practice in the treatment of victims and witnesses ...", and to keep the operation of the Victims' Code under review. However, the Commissioner may not exercise these functions to take up particular victims' causes or as regards "... anything done or omitted to be done by a person acting in a judicial capacity or on the instructions of or on behalf of such a person" (s.51).

Section 34(1) of the DVCVA expressly provides that, if an agency breaches a code duty, no criminal or civil liability may ensue. However, in terms of s.34(2), the Victims' Code "... is admissible in criminal or civil proceedings and a court may take into account a failure to comply with the code in determining a question in the proceedings". It is as yet uncertain when a breach would be deemed relevant to such a question, but Ward and Bird suggest that it may be relevant to "... questions about whether special

measures directions should be made under the Youth Justice and Criminal Evidence Act 1999” (Ward & Bird, 2005: 92).

It is thus clear that, in general, there are no statutorily enforceable rights for victims of crime. Although the coalition government has yet to produce a comprehensive policy on victims, it has recently indicated its commitment to devising “... ways to match the responsibility shown by victims ... in participating in criminal justice with a clearer set of rights” (Ministry of Justice, 2010: para 83).

4. VICTIMS’ RIGHTS IN EU LAW



There is a striking contrast between the English distaste for enforceable victims’ rights and the drive to establish such rights in EU law. The burgeoning discourse of victims’ rights in Europe may be said to have emerged in three waves. The first wave, which commenced in the 1980s, is to be found in non-binding Recommendations of the Committee of Ministers of the Council of Europe (see Wolhuter *et al*, 2009: 120-121). The first one – *Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure* (1985) – emphasised the importance of providing information to victims concerning, amongst other things, the date and place of the hearing, opportunities to claim compensation and the availability of legal assistance (article 9). It also recommended the provision

of information regarding victims' injuries and losses to the court to enable it to consider victims' compensation needs in sentencing (article 12). In addition, it provided that victims should be able to request a review of a decision not to prosecute, and be granted the right to institute a private prosecution (article 7). However, it did not advocate enforceable victims' rights or active victim participation in criminal proceedings. It nonetheless marked the birth of a consciousness of the significance of victims' interests on the part of the Council of Europe.

Recommendation No. R (87) 21 of the Committee of Ministers on assistance to victims and prevention of victimization (1987) dealt with the provision of support and assistance to victims outside the criminal justice system. It has been replaced by *Recommendation Rec (2006) 8 on assistance to crime victims* (2006), which is placed firmly within a victims' rights framework. Article 2 provides that states must ensure that victims' rights are recognised and respected with reference to human rights, particularly the rights to "... security, dignity, private and family life ..." and that the measures in Rec (2006) 8 must be "... made available to victims without discrimination". These measures include the imposition of the following duties on Member States: to provide victims with medical, psychological and social assistance and to ensure that vulnerable victims have access to special measures to assist them in testifying (article 3); to ensure that victims have access to information about support services, court procedure, protection, legal advice, etc. (article

6); and to provide compensation to victims of serious, intentional, violent crimes and their families if the victim has died (article 8).

Although Rec (2006) 8 is not binding on Member States, it is nevertheless noteworthy for the way in which it elaborates and concretises the rights enshrined in the Framework Decision (see chapter 3 for a detailed discussion of the provisions of Rec (2006) 8).

The Framework Decision, which is binding on Member States, represents the second wave of the discourse of victims' rights at the European level, and signifies the formal inclusion of this discourse in EU law (see Wolhuter, *et al*, 2009: 121-122). It was adopted in 2001 in pursuance of article 34(2) of the pre-Lisbon Treaty on European Union ("TEU"). Article 34(2)(b) provided that, in order to approximate the laws and regulations of Member States, the Council of Europe may adopt framework decisions, which are binding as regards "... the result to be achieved ..." but not as to the "... form and methods ..." of achieving such results. Framework decisions do not have "direct effect". The Framework Decision grants victims several rights, including the right to receive "... information of relevance for the protection of their interests ..." throughout the criminal justice process (article 4; see chapter 3); the right to protection, particularly as regards their safety and privacy, including, where necessary, the right to testify in a manner that shields them from "... the effects of giving evidence in open court ..." (article 8; see chapter

3); the right to have the possibility of being heard and to give evidence safeguarded (article 3; see chapter 4); and the right to compensation (article 9; see chapter 5).

The extent to which these rights are enforceable appears from the decision of the European Court of Justice (“ECJ”) in *Criminal Proceedings Against Pupino* [2005] 3 WLR 1102. The ECJ held that the principle of harmonious interpretation (indirect effect) applies to framework decisions (Fletcher, 2005: 872), and thus that the Framework Decision obliges national authorities, particularly national courts, to interpret domestic law “... in conformity with Community law” (para 34). However, the interpretation must accord with Convention rights, particularly the right to a fair trial (para 59) and may not result in “... an interpretation of national law *contra legem*” (para 47).

Pre-Lisbon article 35(1) TEU clothed the ECJ with jurisdiction “... to give preliminary rulings on the validity and interpretation of framework decisions ... and on the validity and interpretation of the measures implementing them”. In terms of article 35(2) TEU, Member States who had made a declaration accepting such jurisdiction could refer matters to the ECJ. In *Pupino* the ECJ took the view that the existence of this jurisdiction meant that individuals could invoke the Framework Decision in national courts to obtain “... a conforming interpretation of national law” (para 38).

The principle of indirect effect, coupled with the right of individuals to invoke the Framework Decision in national courts, thus constituted a mechanism for the enforcement of victims' rights (Fletcher, 2005: 875). However, the UK did not make the requisite declaration (Lööf, 2006: 429), depriving victims of the opportunity to request a referral to the ECJ. Pre-Lisbon, the scope for victims' reliance on the Framework Decision in the UK was thus dependent upon the extent to which domestic courts were willing to uphold their duty to give it indirect effect.

The changes effected by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community 2007 ("the Lisbon Treaty") paved the way for the third wave of victims' rights discourse in EU law. In terms of the Lisbon Treaty, the legislative instruments of the EU no longer include framework decisions, and the principle of indirect effect no longer applies. Instead, all matters falling within the erstwhile Third Pillar (which included victims' rights) now fall to be regulated legislatively by the usual EU legislative instruments, namely regulations, directives and decisions, which have direct effect (Fletcher, 2011: 19). Fletcher takes the view that, in light of the similarity between framework decisions and directives, the latter is likely to replace the former as the "instrument of choice" (Fletcher, 2011: 19).

In addition, article 1.51 of the Lisbon Treaty abolishes article 35 TEU, with the result that all erstwhile Third Pillar matters are subject to the general jurisdiction of the ECJ (Barents, 2010: 719), which is renamed the Court of Justice of the European Union (“CJ”; Barents, 2010: 709). Consequently, the restrictions on the preliminary rulings procedure discussed above no longer apply (Piris, 2010: 188).

However, in terms of article 10.1 – 10.3 of the Lisbon Treaty Protocol on Transitional Provisions, the powers of the CJ in regard to Third Pillar law that pre-dates the Lisbon Treaty continue to be restricted, as set out in the pre-Lisbon article 35, for a period of five years, unless the relevant legislation “... is replaced or amended ... after the entry into force of the Lisbon Treaty” (Piris, 2010: 189). Consequently, if a framework decision is repealed or amended within this period, it becomes subject to the general jurisdiction of the CJ. After the expiry of the five-year period, all unchanged legislation will be subject to the general jurisdiction of the CJ (Fletcher, 2011: 20).

As regards the UK, the transformative consequences of a victims’ rights instrument with direct effect and subject to the general jurisdiction of the CJ have been muted. Article 10(4) of the Transitional Protocol provides that, six months before the five-year period expires, the UK may decide not to “... accept the new powers of the ECJ, in which case all pre-existing [Third Pillar] legislation (which has not since been amended) will cease to apply to it”

(Fletcher, 2011: 20). However, article 10(5) permits the UK to “... opt-back into some of the measures as it sees fit” (Fletcher, 2011: 20). In addition, when an amendment to a Third Pillar instrument is proposed, the UK may decide to “opt out” of it, rendering the instrument non-binding and non-applicable in the UK (Piris, 2010: 199). The combined effect of these “opt out” provisions means that the UK is able to sidestep the application of post-Lisbon instruments in the erstwhile Third Pillar if it chooses.

One such instrument, which is of central importance to the entrenchment of victims’ rights in EU law, and which represents the third wave of victims’ rights discourse in the EU, is the proposed Victims’ Directive. Paragraph (6) of the Preamble states that the Victims’ Directive will replace the Framework Decision. The Victims’ Directive grants victims several rights, some of which are more extensive than those contained in the Framework Decision. They include the following: the right to information (articles 3 and 4; see chapter 3); “... the right to interpretation and translation” (article 6; see chapter 3); the right to support (article 7; see chapter 3); the right to protection, with specific reference to the protection of vulnerable victims (articles 17 – 23; see chapter 3); various rights to participate in the criminal process (articles 8, 9 and 10; see chapter 4); and rights in regard to compensation, mediation and restorative justice processes (articles 11 and 15; see chapter 5). If it is enacted, the Victims’ Directive will have direct effect and will be subject to the general jurisdiction of the CJ. Consequently, domestic courts will be required to give

effect to it, and aggrieved victims will have standing to raise the issue of the non-compatibility of domestic law with its provisions in criminal proceedings. However, as paragraph (29) of the Preamble indicates, the consequences of the enactment of the Victims' Directive for the UK are currently uncertain, as the UK has to decide whether to opt in or out of its provisions.

5. VICTIMS' RIGHTS IN CONVENTION JURISPRUDENCE

As the above analysis has sought to demonstrate, despite the establishment of a discourse of enforceable victims' rights in EU law, the UK government has been reluctant to open itself to the introduction of such rights in domestic law. However, the English judiciary has recently been displaying great willingness to follow the victims' rights jurisprudence that has been developed by the ECtHR in the interpretation of the ECHR.

Although the ECHR does not explicitly enshrine victims' rights, the ECtHR has integrated victims' rights into its jurisprudence in three primary respects (Wolhuter, *et al*, 2009: 122). First, it has accorded victims an independent civil right to a fair trial in certain circumstances. Second, it has incorporated victims' rights/interests into the proportionality requirement of the defendant's right to a fair trial in article 6 ECHR. Third, it has imposed positive obligations on Member States to ensure that victims' rights to life in article 2 ECHR, freedom from torture and inhuman or degrading treatment or

punishment in article 3 ECHR, and respect for private and family life in article 8 ECHR are upheld. This integration of victims' rights into Convention jurisprudence has been replicated by the English judiciary in several recent judgments. This section assesses the case law of the ECtHR and the English courts in the above three respects.

5.1 Independent civil right to a fair trial

In terms of article 6(1) ECHR, in the determination of their civil rights and obligations, all persons are "... entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". As the present author has noted (Wolhuter, *et al*, 2009: 123), the ECtHR has recognised that victims have rights to a fair trial in civil proceedings in certain circumstances. In *Osman v UK* (2000) 29 EHRR 245, for instance, it held that article 6(1) applies to a victim who wishes to sue the police in negligence for a failure to investigate effectively and to prevent the crime (paras 139-140). It also held that the domestic court's refusal to entertain the victim's claim constituted a blanket police immunity that unjustifiably restricted the victim's right (para 151).

In *Perez v France* (2005) 40 EHRR 39 it confirmed that, as article 6(1) applies to "... the determination of civil rights and obligations", it applies to a *partie civile*, who is a party to the criminal proceedings for the purpose of

pursuing his/her compensation claim (paras 71-72). However, because the *partie civile*'s interest in the proceedings is limited to compensation, and does not extend to the "... criminal aspect of the proceedings ...", his/her "... rights in relation to the principle of equality of arms and the adversarial system are not the same as those of the accused in relation to the prosecutor" (*Gorou v Greece (No. 4)* (2010) 50 EHRR 27, para 26).

Like the ECtHR, the English courts have recognised victims' civil right to a fair trial in certain circumstances (Wolhuter, *et al*, 2009: 133-134). For instance, although the UK does not recognise the *partie civile* procedure, it does afford victims a civil right to claim compensation from the Criminal Injuries Compensation Authority ("CICA"). In *C v Secretary of State for the Home Office* [2003] EWIJC 1295, the Court of Queen's Bench affirmed that, as the CICS is statutory, "... a well-founded claim to compensation under the Scheme is a 'civil right' ..." and the applicant is accordingly entitled to a fair hearing in terms of article 6(1) (para 43; see also *S v Criminal Injuries Compensation Board* [2004] SLT 1173, para 144).

However, the ECtHR has adopted a different view. In *August v UK* (Application no. 36505/02, 21 January 2003) it held that the Scheme is *ex gratia* and that it is accordingly not apparent that victims have a civil right to claim compensation. It held further that, even if article 6(1) was engaged, the substantive content of a civil right is a matter for the domestic authorities not

the ECtHR (para 2). It is submitted that the ECtHR erroneously regarded the English Scheme as *ex gratia*. The English judiciary, as well as CICA itself, distinguish between the common law scheme that preceded the Criminal Injuries Compensation Act 1995 and subsequent schemes (see *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union and Others* [1995] 2 AC 513, 553; Rock, 2004: 284). The former was clearly *ex gratia* and only afforded victims a legitimate expectation of compensation. On the other hand, the later schemes are statutory and therefore grant a civil right to applicants with well-founded compensation claims (see chapter 5).

5.2 Incorporation of victims' rights/interests into defendant's right to fair trial



The victim's right to a fair trial expressly applies only to civil cases and article 6 ECHR refers only to the defendant's right to a fair trial in criminal proceedings. Nonetheless, the ECtHR and the English judiciary have incorporated the victim's rights/interests into the proportionality requirement of the defendant's right to a fair trial (Wolhuter, *et al*, 2009: 123). The instances in which they have done so have concerned the limitation of the defendant's right in article 6(3)(d) "... to examine or have examined witnesses against him". The courts have taken the view that, where witnesses are too afraid to testify, their rights/interests may legitimate the use of anonymous evidence, hearsay evidence or special measures, such as the relaying of pre-

recorded interviews. In appropriate circumstances, the limitation on the defendant's right in article 6(3)(d) that such measures entail may be justified.

Doak has contended that these measures do not dilute the protection given to defendants. Although the defendant's rights are clearly not subject to those of the victim, it is erroneous to assume "... that the victim is not worthy of basic minimum standards of protection within the criminal process" (Doak, 2003: 26). The rest of this section is concerned with an analysis of the way in which the courts have given victims such minimum standards of protection in the context of article 6 ECHR.

5.2.1 Witness anonymity



In *Doorson v The Netherlands* (1996) 22 EHRR 330, which concerned witnesses granted anonymity because of fear of reprisals from the defendant, a drug dealer, the ECtHR held that there was no violation of article 6(3)(d) (see Wolhuter, *et al*, 2009: 124). It justified this view by arguing that the interests of victims and witnesses, while not expressly protected by article 6, are protected by other Convention rights, such as the rights to life, liberty and security of the person, and respect for private and family life (para 70). The principles of a fair trial thus require that defence interests must be balanced against victims'/witnesses' interests in appropriate cases (para 70). Measures such as anonymous testimony may be used in order to protect witnesses,

provided that they are strictly necessary and that the limitations on the defendant's right are "... sufficiently counterbalanced by the procedures followed by the judicial authorities" (para 72). However, the ECtHR emphasised that convictions must not be founded "... solely or to a decisive extent on anonymous statements" (para 76).

The issue of witness anonymity has come to the fore in recent English decisions. In *R v Davis; R v Ellis and Others* [2006] 2 Cr App R 32 (see Wolhuter, *et al*, 2009: 134-135), the appellants argued that their rights to examine witnesses in article 6(3)(d) had been violated by the use of anonymous witnesses. The Court of Appeal took the view that the issue of witness anonymity engages not only the defendant's right to a fair trial, but also the witness's rights in terms of articles 2 and 8 ECHR. It emphasised that witness anonymity is not expressly prohibited by article 6, provided that it is possible for the witness to be examined by or on behalf of the defendant (para 30). It held that the purport of ECtHR jurisprudence is that witness anonymity is not inconsonant with the right to a fair trial, provided that the need for such anonymity is clearly established, that cross-examination of the anonymous witness is possible, and that, overall, the trial is fair (para 51). Very significantly, it took the view that this jurisprudence does not lead to the conclusion that, as regards an anonymous witness who is justifiably and genuinely afraid, "... the trial will inevitably be considered unfair, and the

conviction unsafe, simply because the evidence of the anonymous witness may be decisive to the outcome” (para 51).

However, the court stressed that, in order to prevent disadvantage to the defendant, a court must examine an application for witness anonymity “... with scrupulous care ...” and must “... ensure that necessary and appropriate precautions are taken to ensure that the trial itself will be fair” (para 59). On the facts, the court found that there was sufficient independent evidence in support of the anonymous testimony and that the trials were fair and the convictions were safe (paras 101, 140).

On appeal, in *R v Davis* [2008] 2 Cr App R 33, the House of Lords came to a different conclusion. Having surveyed the Strasbourg jurisprudence, Lord Mance, with whom the majority of their Lordships agreed, stated that “... it is considerably less certain ...” that the ECtHR has imposed “... an absolute requirement that anonymous testimony should not be the sole or decisive evidence, or whether the extent to which such testimony is decisive may be no more than a very important factor to balance the scales” (para 89). However, he took the view that the ECtHR would not have permitted anonymous testimony on the facts of the present case. The testimony was the sole or decisive basis for the defendant’s conviction. Moreover, the defence cross-examination was restricted severely by the anonymity of the witness, as well as by the distortion of their voices and the use of screens to shield them from

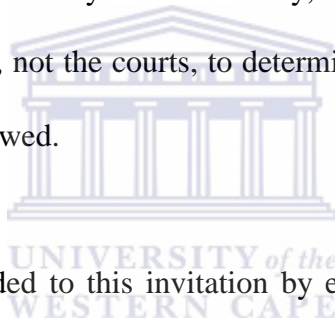
the view of the defendant and his counsel. There were no counter-balancing measures in place, and article 6(3)(d) was accordingly violated (para 96).

In *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1, the ECtHR was faced with a contention by the UK government, reflective of Lord Mance's above dictum, that the purport of the Strasbourg case law was not to impose "... an absolute rule, prohibiting the use of statements if they are the sole or decisive evidence, whatever counterbalancing factors might be present" (para 37). Its response, which was made within the context of both anonymous and hearsay evidence (para 36; see section 5.2.2 below), was to express doubt whether any counterbalancing measures could justify the admission of such a statement (para 37). While not imposing an unequivocal prohibition on the admission of such evidence, ECtHR jurisprudence has achieved a greater degree of certainty than Lord Mance suggested.

Nonetheless, the ECtHR was prepared to recognise that "special circumstances" obtain where the matter concerns *identified* witnesses who are prevented from testifying by fear caused by the defendant. In such cases, *hearsay evidence* may be admissible even if it is the sole or decisive evidence against the defendant (para 37; see section 5.2.2 below). In *Davis*, Lord Carswell, albeit obiter, expressed support for the view that such a principle ought to apply to anonymous witnesses (para 60). However, the ECtHR in *Al-*

Khawaja made no mention of a similar exception pertaining to anonymous witnesses.

Having found a violation of article 6(3)(d) in *Davis* (see above), Lord Mance went further, holding that, in view of the fact that Convention jurisprudence does not require Member States to recognise witness anonymity, the matter fell to be decided in terms of English law (para 97). In principle (barring exceptional circumstances that do not apply to frightened witnesses), English law does not permit anonymous testimony, and the decision to introduce it is one for Parliament, not the courts, to determine (paras 97, 98). Consequently, the appeal was allowed.



Parliament responded to this invitation by enacting temporary legislation in the form of the Criminal Evidence (Witness Anonymity) Act 2008 (“CEWAA”), in terms of which courts have the power to grant witness anonymity orders. The provisions of the CEWAA were given permanent effect by the CJA 2009. The fact that anonymous evidence is the sole or decisive evidence against the defendant is not an automatic bar to the admission of such evidence, but merely a factor to be considered by the court (s.89(2)(c); see chapter 3 for a discussion of the relevant provisions of the CJA 2009). It remains to be seen whether the ECtHR will regard this approach as Convention compliant. However, in the recent decision of the Supreme Court in *R v Horncastle* [2010] 1 Cr App R 17, Lord Phillips,

speaking for the court, held that the Strasbourg “sole or decisive” rule must not be applied in English law, either in the case of anonymous evidence or in the case of hearsay evidence, despite the ECtHR decisions to the contrary (paras 50, 108; see section 5.2.2 below for a full discussion of Lord Phillips’ judgment).

5.2.2 Witness statements (hearsay)

The present author has pointed to the willingness of the ECtHR to admit witness statements in certain cases where the witness is reluctant to testify (Wolhuter, *et al*, 2009: 124). In *Lucà v Italy* (2003) 36 EHRR 46, which concerned a co-accused who refused to testify (para 33), the ECtHR stated that it may be necessary in certain cases to refer to witness statements made during the investigation stage, particularly where the witness is too afraid to testify. Provided that the defendant has been afforded the opportunity to challenge the statements, either when they were made or at a later stage in the proceedings, their admission will not contravene article 6(3)(d). The court emphasised, however, that a conviction based “... solely or to a decisive degree ...” on a witness statement where the defendant has not been able to examine the witness at any stage of the proceedings violates article 6 (para 33).

This situation occurred in *PS v Germany* (2003) 36 EHRR 61, a decision concerning a child victim of sexual abuse who was too traumatised to testify in court (para 27). The ECtHR stated that the importance of arranging criminal proceedings in a way that protects the interests of young witnesses, particularly in sexual offence cases, must be considered in terms of article 6 (para 28). However, it held that, primarily because the victim's statement was the only direct evidence, the conviction was based to a decisive extent on this statement and thus that article 6(3)(d) had been violated (paras 30-32).

The English courts have adopted an expansive approach to the admission of hearsay evidence in the case of frightened witnesses that goes further than that of the ECtHR (see Wolhuter, *et al*, 2009: 135-136). In *R v M (KJ)* [2003] 2 Cr App R 21, the essential or only witness would not testify because of fear (para 59). The trial judge admitted the witness's statement in terms of the hearsay provisions of s.23 of the Criminal Justice Act 1988 ("CJA 1988"; see chapter 3). The Court of Appeal took the view that the rule that a "... conviction based solely or mainly on the impugned statement of an absent witness ... violates the right to a fair trial ..." does not admit of no exceptions, because if it did, that would lead to unacceptable witness intimidation (paras 59-60). However, on the facts, it found that the witness was flawed and that the admission of his statement had breached the defendant's right to a fair trial, particularly as the defendant, being unfit to stand trial, could not testify (paras 61-62).

This approach was applied in *R v Sellick and Sellick* [2005] 2 Cr App R 15, which also concerned the hearsay provisions of s.23 of the CJA 1988. The Court of Appeal held that in cases where the witness was kept away by the defendant causing the witness to fear, article 6(3)(d) would not be infringed if the witness's statement was read without the defendant having an opportunity to challenge the witness, even where the evidence was the "sole or decisive evidence" against the defendant (paras 51-52). The court added, however, that courts must take care to ensure that the hearsay provisions in the CJA 1988, as well as the new provisions in the Criminal Justice Act 2003 ("CJA 2003"; see chapter 3) are not abused. They must scrutinise all the circumstances carefully prior to exercising their discretion to admit the evidence, particularly where it is decisive evidence. They must warn juries to take account of the defendant's difficulty in not being able to cross-examine the witness (para 57). The Court of Appeal in *R v Xhabri* [2006] 1 Cr App R 26, albeit not concerned with the hearsay evidence of frightened witnesses but with other hearsay provisions of the CJA 2003, held that article 6(3)(d) does not encompass an absolute right for defendants to cross-examine every witness against him/her and that it was not infringed by these hearsay provisions (paras 42-44).

O'Brian (2005: 494) has argued that the courts' approach to the right in article 6(3) is not consistent with its plain language, as it is a "minimum" right that must be upheld in order to ensure that the trial is fair. O'Brian's view has been vindicated, in part, by the judgment of the ECtHR in *Al-Khawaja*. The ECtHR

held that article 6(3)(d) is indeed a minimum right that must be granted to defendants, and cannot be construed as a mere illustration of issues that must be considered in determining whether the trial is fair (para 34). It reiterated its existing jurisprudence that the admission of hearsay evidence, which is the sole or decisive evidence against a defendant who has had no opportunity to challenge it, violates article 6(1)(d). It expressed strong doubt whether “... any counterbalancing factors ...” could justify the admission of a hearsay statement in such cases (para 37). However, approving *Sellick*, it stated that such counterbalancing factors would be present in the “special circumstances” where a witness is being kept from testifying “... through fear induced by the defendants” (para 37). Consequently, it is only untested hearsay in cases where the fear emanates from a source other than the defendant, and which amounts to the sole or decisive evidence against the defendant, that falls foul of article 6(3)(d).

In the recent decision in *Horncastle*, the Supreme Court has crossed swords with the ECtHR. Lord Phillips, speaking for the court, stated that the rationale for the “sole or decisive test” in Strasbourg jurisprudence, namely that “... the risk of an unsafe conviction based solely or decisively on ... hearsay evidence is so great that such a conviction can never be permitted”, has been given effect in English law by the safeguards contained in the CJA 2003 (para 92). These safeguards include the fact that the judge is obliged, in terms of s.78 of PACE, to exclude evidence that “... would have such an adverse effect on the

fairness of the proceedings that the court ought not to admit it". They also include the duty of the judge, in terms of s.125(1) of the CJA 2003, to stop the proceedings if "... the case against the defendant is based wholly or partly on ..." hearsay evidence and such evidence is "... so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe" (para 36).

Lord Phillips expressed the view that these safeguards would, in most cases, lead to the same result as the application of the Strasbourg rule (para 92). He also stated that the ECtHR case law, particularly as regards the "sole or decisive rule", "... has developed largely in cases relating to civil law rather than common law jurisdictions ..." and has not taken sufficient account of these safeguards (para 107). Consequently, he held that the hearsay provisions of the CJA 2003, and not the "sole or decisive" rule, must be applied in English law.

However, this difference of opinion between Strasbourg and the English courts is yet to be resolved. The UK has referred the decision in *Al-Khawaja* to the Grand Chamber of the ECtHR and its judgment is awaited (European Court of Human Rights, 2010).

5.2.3 Special measures

As the present author has demonstrated (Wolhuter, *et al*, 2009: 125), the ECtHR has recognised that victims' interests must be taken into account in the proportionality element of the defendant's right to a fair trial in instances where special measures such as pre-recorded testimony are used in order to free the witness from having to testify in court. This approach was adopted in *SN v Sweden* (2004) 39 EHRR 13, a case concerning a victim of sexual abuse whose testimony was admitted via video and audio recordings (para 35). This testimony was "... virtually the sole evidence ..." upon which the applicant's conviction was based (para 46).

The ECtHR held that, because sexual offence victims experience trials as an ordeal, their right to respect for private life must be considered in determining whether the defendant has received a fair trial. However, the special measures must not prevent the defendant from being able to exercise his/her rights adequately and effectively (para 47). The court took the view that the use of pre-recorded video and audio testimony had not done so *in casu* as the applicant's counsel had consented to the victim being interviewed by the police without the applicant (or his counsel) being present (paras 49-51), and thus that article 6(3)(d) had not been violated.

In terms of the YJCEA, witnesses cannot testify only by means of pre-recorded video evidence but must also employ other special measures such as live television links (see chapter 3). Consequently, the English judiciary has not been required to determine the compatibility of pre-recorded evidence on its own with article 6 ECHR. However, in *R (D) v Camberwell Green Youth Court*; *R (Director of Public Prosecutions) v Camberwell Green Youth Court* [2005] 2 Cr App R 1, the House of Lords held that the provisions of s.21 YJCEA were compatible with article 6(3)(d) ECHR (see Wolhuter, *et al*, 2009: 136-137). Section 21 pertains to child witnesses in need of special protection, viz. child witnesses in certain listed offences, particularly sexual offences, whose evidence must be given by live television link as well as video recording, if the latter is available (s.21 YJCEA has been amended by s.100 CJA 2009. See chapter 3 for a discussion of the amended provisions). Baroness Hale of Richmond held that, as these measures afford the defendant an opportunity to challenge the witness directly during the trial, they do not infringe article 6 (para 51).

Relying on *SN v Sweden*, Lord Rodger of Earlsferry stated that the ECtHR has not interpreted article 6(3)(d) as requiring the defendant to be given a right to be present in the room where the witness is testifying and that the defence may nonetheless be given a proper opportunity to question and challenge prosecution witnesses even in cases where, on good grounds, the defendant is not present during the questioning. Good grounds exist in the case of s.21, as

its provisions aim “... to further the interests of justice by adopting a system that will assist truthful child witnesses to give their evidence to the best of their ability” (para 15).

5.3 Positive obligations

The third way in which the ECtHR has incorporated victims’ rights into Convention jurisprudence is by imposing positive obligations on Member States to ensure that victims’ rights to life, freedom from torture and inhuman or degrading treatment or punishment, and respect for private and family life are upheld (Wolhuter, *et al*, 2009: 125). The ECtHR has emphasised that these obligations require the state, not only to take positive measures to protect victims from state action in violation of their rights, but also to protect them from the infringement of their rights by private individuals. These rights thus apply both vertically and horizontally (Klug, 2004: 113). Until recently, the English courts have been hesitant to follow the ECtHR. However, a series of recent judgments reveals that, in some respects, they are becoming more willing to do so. This section engages in an overview of the Convention jurisprudence in this respect.

5.3.1 Right to life

Article 2.1 ECHR provides that –

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The present author has documented the ECtHR's reliance on article 2 to impose positive duties on criminal justice agencies to protect victims (see *Wolhuter, et al*, 2009: 125-126). In *Osman v UK* the second applicant argued that the state's failure to protect him from being assaulted and his father from being killed by a person that the police knew or ought to have known was a danger to them, amounted to a violation of his right to life in article 2 ECHR. The ECtHR held that, in principle, Member States have a positive obligation in terms of article 2 to take all reasonable steps "... to avoid a real and immediate risk to life of which they have or ought to have knowledge" (para 116). On the facts, however, it held that the applicants were unable to demonstrate that the police knew or ought to have known that there was such a risk to life, and thus that article 2 had not been violated (paras 121-122).

However, in *Edwards v UK* (2002) 35 EHRR 19, the ECtHR found that both the substantive and procedural elements of article 2 had been violated. The applicants' son had been killed by his prison cellmate. As regards the

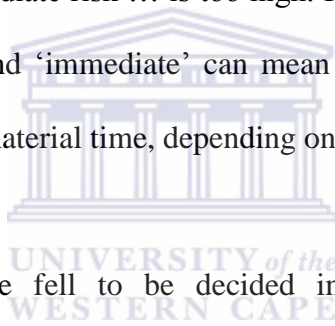
substantive element, the ECtHR held that, despite the fact that the prison authorities knew or ought to have known that the cellmate was a “... real and serious risk to others...”, they had failed to pass on known information about him and had screened him inadequately. The state had accordingly breached article 2 (paras 60, 64). In regard to the procedural element, the ECtHR affirmed that the state’s duty to protect life in article 2, read with its duty in terms of article 1 to “... secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires that it undertake an effective investigation into the death (para 69). It emphasised the importance of the next-of-kin’s involvement in the procedure of the investigation “... to the extent necessary to safeguard his or her legitimate interests” (para 73). It found, on the facts, that the applicants were only entitled to attend the inquiry held by the state when they were testifying, and that they were not entitled to legal representation or to question witnesses. The state had accordingly breached the procedural obligation of article 2 (paras 84, 87).

The ECtHR held further that the state had infringed the right to an effective remedy in article 13 by failing to provide the applicants with an effective domestic remedy. It stressed that article 13 requires that the victim or the victim’s family must have access to “... a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention”, which had not occurred *in casu* (paras 97, 101).

In the recent decision in *Opuz v Turkey* (2010) 50 EHRR 28, which involved the failure of the criminal justice authorities to take effective steps to prevent the killing of the applicant's mother by her (the applicant's) abusive husband (para 118), the *Osman* test was applied successfully. The court found that, within the context of an "escalating" situation of domestic violence, and "... a significant risk of further violence ..." (para 134), the criminal justice agencies "... could have foreseen a lethal attack ..." by the applicant's husband (para 136). Despite the foreseeability of such an attack, the agencies "... failed to address the issues at all" (para 147) and gave "... exclusive weight to the need to refrain from interfering with what they perceived to be a 'family matter'" (para 143). They failed to exercise "... due diligence ... to protect the right to life of the applicant's mother ...", resulting in a violation of art 2 ECHR (para 149; *Opuz v Turkey* also concerned a violation of article 3 ECHR. See section 5.3.2 below for a discussion of this aspect of the decision). In addition, the ECtHR held that, against the backdrop of international law, and within the context of the level of domestic violence in Turkey (see paras 184-198), the killing of the applicant's mother constituted "... gender-based violence which is a form of discrimination against women" (para 200). The failure of the criminal justice agencies to take protect her from being killed thus contravened article 14, read with article 3 ECHR (para 202).

The positive obligation in article 2 ECHR, and its relationship to the common law of tort, has been subject to differing opinions on the part of the Court of

Appeal and the House of Lords. In *Van Colle v Chief Constable of Hertfordshire* [2006] HRLR 25 (see Wolhuter, *et al*, 2009: 137-138), the claimant's son, a prospective prosecution witness, had been killed by the defendant, and the claimant instituted action against the police in terms of s.7 of the Human Rights Act 1998 ("HRA") for unlawfully breaching article 2 ECHR. The Court of Appeal held that prosecution witnesses constitute a special category entitled to more protection than private citizens in general (para 49). It stated that, in the case of such witnesses, "... the *Osman* threshold of a real and immediate risk ... is too high. If there is a risk on the facts, then it is a real risk, and 'immediate' can mean just that the risk is present and continuing at the material time, depending on the circumstances" (para 56).



Although the case fell to be decided in terms of the HRA and the jurisprudence of the ECtHR was accordingly applicable (para 77), the court also considered the position at common law. It referred to the decision in *Hill v The Chief Constable of West Yorkshire* [1989] AC 53, where the House of Lords held that the police were not under a general duty of care to "... identify or apprehend an unknown criminal ..." or to protect private persons who may suffer harm from such a criminal, unless "... their failure to apprehend him had created an exceptional added risk, different in incidence from the general public at large from criminal activities, so as to establish sufficient proximity of relationship between the police officers and the victims of the crime". According to the House of Lords, public policy requires police immunity from

liability for negligence in investigating and suppressing crime (para 68). The court also referred to the House of Lords' decision in *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24, where Lord Steyn stated that, in light of the jurisprudence of the ECtHR, the rule in *Hill* concerning police immunity requires reformulation "... in terms of the absence of a duty of care" (para 70).

The court took the view that the House of Lords in both *Hill* and *Brooks* had recognised the possibility of exceptional circumstances where a duty of care would be established (para 72). It held that circumstances justifying a successful claim against the state for breach of its positive obligation to protect life in terms of article 2 ECHR would also justify the finding of a duty of care in terms of the common law and the concomitant recognition of a remedy in negligence (para 76).

On the facts, the court found that the state had breached a positive duty under article 2 ECHR to protect the life of the claimant's son, as the fact that he had been threatened was known to the police and generated an immediate risk to life, which the police knew or ought to have known. In addition, the police failed to take appropriate measures which were reasonably available to alleviate the risk (paras 87-88). The court also found a violation of article 8 ECHR as the failure of the police to protect the son's life and, consequently, his loss of life, destroyed his family life entirely (para 94). It accordingly

awarded the claimants damages because, in its view, such damages were necessary to afford them just satisfaction (para 108).

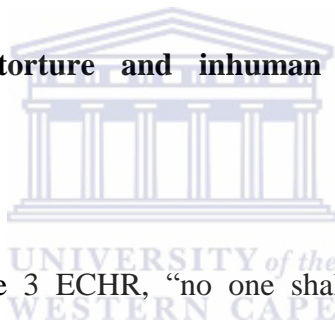
Unfortunately, however, the House of Lords in *Van Colle v Chief Constable of the Hertfordshire Police; Smith v Chief Constable of the Sussex Police* [2009] 1 AC 255 was unwilling to uphold this expansive approach by the Court of Appeal. The appeal concerned two cases heard together. The first, *Van Colle*, was brought pursuant to sections 6 and 7 of the HRA, and was founded on a violation of article 2 ECHR only (para 64). The second, *Smith*, constituted an action in negligence for breach of an alleged duty of care on the part of the police to take steps to stop the appellant's ex-partner "... from carrying out his threats to kill him ...", resulting in the appellant sustaining "... serious and permanent injury ..." (para 64).

As regards *Van Colle*, Lord Hope, for the majority, held that, on the facts, the test in *Osman* had not been satisfied (para 68) and that, being "invariable", it did not permit the use of a lower threshold in cases such as *Van Colle* (para 70). Consequently, there had been no breach of article 2 ECHR (para 71).

As regards *Smith*, Lord Hope, also for the majority, took the view that, by stating that "a retreat from the [core] principle in Hill's case would have detrimental effects for law enforcement" (para 30), Lord Steyn in *Brooks* had laid "... down a principle of public policy that was to be applied generally"

(para 73, 74) and which did not admit of exceptions in specific cases (para 75). Furthermore, the law of tort ought not to be extended in light of article 2 ECHR to impose a duty of care on the police, as cases falling within the purview of the test in *Osman* can be brought pursuant to the HRA (para 82). Consequently, victims whose right to life has been infringed because the police did not act to prevent “... a real and immediate risk to life ...” are constrained to pursue a remedy under the HRA and not under the common law.

5.3.2 Freedom from torture and inhuman or degrading treatment or punishment



In terms of article 3 ECHR, “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The ECtHR has emphasised the importance of imposing positive obligations on the state to protect people from harm falling within the ambit of article 3 (see Wolhuter, *et al*, 2009: 127-128). Most of the judgments of the ECtHR in this regard have concerned the state’s failure to protect vulnerable persons, such as children and women, from physical and sexual abuse. In *A v UK* (1999) 27 EHRR 611 the applicant, who had been seriously assaulted by his stepfather, argued that the state had breached article 3 by failing to ensure that the criminal law effectively protected him. The ECtHR held that the provisions of article 1 (see above), read with article 3, impose a duty on Member States to adopt

measures to ensure that persons, particularly children and other vulnerable persons, “... are not subjected to torture or inhuman or degrading treatment or punishment ...” by the state or by private persons (para 22). The fact that English law recognised a defence of “reasonable chastisement” to assault meant that the UK was in violation of this duty (paras 23-24). Section 58 of the Children Act 2004 has addressed this violation by criminalising the corporal punishment of children if it results in “actual bodily harm” or constitutes “cruelty” (Allen, 2005: 335).

In *Opuz v Turkey*, the ECtHR held that the applicant, who was subjected to extensive domestic violence at the hands of her husband, was a vulnerable person within the meaning of the rule in *A v UK* (para 160), and that the violence was “... sufficiently serious to amount to ill-treatment within the meaning of art. 3 of the Convention” (para 161). It found, on the facts, that the criminal justice agencies had failed to take effective steps to protect the applicant from the violence and that, consequently, article 3 ECHR was breached (para 176). Very significantly, the ECtHR also found that, in light of the provisions of international law on violence against women, and within the context of the documented incidence of violence against women in Turkey (see paras 184-198), the domestic violence experienced by the applicant constituted “... gender-based violence which is a form of discrimination against women” (para 200). The failure of the criminal justice agencies to take effective steps to protect the applicant from such violence accordingly

amounted to a contravention of article 14, read with article 3 ECHR (para 202).

Much of the Strasbourg and English jurisprudence on the application of article 3 ECHR to vulnerable persons has concerned the obligations of local authorities in child abuse cases. In *Z and Others v UK* (2002) 34 EHRR 3, the applicants had been subject to severe abuse by their fathers and argued that the local authority had violated article 3 by failing to take steps to terminate the abuse. On the facts, the ECtHR found that the abuse had been brought to the attention of the local authority, who had failed to comply with its statutory duty to protect the applicants, and that there was accordingly a breach of article 3 (paras 74-75). It went further, however, and held that the fact that domestic law did not provide the applicants with the means to ensure a determination of their allegations or the possibility of receiving compensation constituted a breach of the duty in article 13 to provide an effective remedy (para 111).

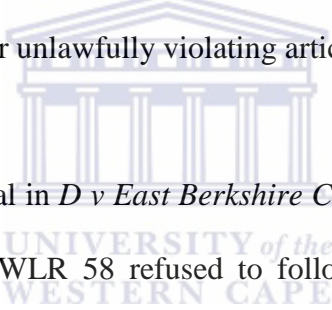
The ECtHR likewise found breaches of article 3 and article 13 in *E v UK* (2003) 36 EHRR 31, a case concerning the failure of the local authority to take steps to protect the child applicants from sexual abuse (paras 101, 116). In *DP and JC v UK* (2003) 36 EHRR 14, which involved a claim by the child applicants that the state, in the form of the local authority, had breached its duty to protect them from serious sexual abuse by their stepfather, the ECtHR

found no violation of article 3, but nonetheless found that article 13 had been infringed (paras 114, 138).

The English courts, albeit initially unwilling to impose positive obligations on local authorities in abuse cases, have recently signified a commitment to doing so. As the present author has indicated (see Wolhuter, *et al*, 2009: 138-139), the obstacle to the success of the domestic claims of the applicants in *Z v UK* and *E v UK* was the judgment in *X v Bedfordshire County Council* [1995] 2 AC 633. The House of Lords held that, for policy reasons, the local authorities did not owe the applicants a duty of care in such circumstances.

In the subsequent decision in *S v Gloucestershire County Council; L v Tower Hamlets London Borough Council and Another* [2001] Fam 313, the claimants brought actions against the local authorities in negligence, alleging that they had breached their duty of care by failing to protect the claimants against sexual abuse by their foster fathers. Unlike the applicants in *Z v UK* and *E v UK*, the claimants had already been removed from their parents and placed in the care of foster parents by the local authorities. The Court of Appeal held that it is unlikely that a local authority would be able to raise a defence involving a blanket immunity and that the House of Lords in *Bedfordshire County Council* did not purport to hold that "... child abuse cases are bound to fail as a class" (*Gloucestershire County Council*, 338).

However, the decision in *Gloucestershire County Council* dealt not with a violation of article 3 ECHR, but with the preliminary question of whether the local authorities could successfully apply for the claims to be struck out. On the facts, the court found that it could not be said that the first claimant's claim had no real prospect of success and could thus not be struck out, but that the second claim had no such prospect and must be struck out (paras 344, 347). In light of the ECtHR's approach in *Z v UK*, the court's willingness to refuse to strike out a claim in negligence against a local authority for failing to protect children from abuse may pave the way for future courts to hold local authorities liable for unlawfully violating article 3 ECHR in such cases.



The Court of Appeal in *D v East Berkshire Community Health NHS Trust and Another* [2004] 2 WLR 58 refused to follow the decision in *Bedfordshire County Council*. Although the case concerned claims against local authorities regarding erroneous allegations of abuse (para 1), and thus did not fall within the ambit of article 3 ECHR, it is nonetheless significant for the development of the case law concerning the obligation on local authorities in abuse cases. Lord Phillips expressed the view that, in cases under the HRA, English courts must consider Strasbourg jurisprudence. In cases concerning an alleged violation of article 3 ECHR, "... the court is likely to have to consider whether the local authority knew, or should have known, that positive action was called for. This will necessarily involve consideration of the conduct of the individuals involved" (para 79). Consequently, the policy reasons relied on by

the House of Lords in *Bedfordshire County Council* to decide that local authorities do not have a duty of care to children in abuse cases “... will largely cease to apply” (para 81). Very significantly, he concluded that *Bedfordshire County Council* “... cannot survive the Human Rights Act” (para 83). While claims concerning conduct arising after the HRA may be brought in terms of the HRA, claimants bringing claims concerning conduct arising before the HRA would have no remedy. Accordingly, local authorities must be held to have a duty of care in negligence as well as a positive obligation under the HRA (para 83). Lord Phillips concluded that –

it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse ... It is possible that there will be factual situations where it is not fair, just or reasonable to impose a duty of care, but each case will fall to be determined on its individual facts” (para 84).

In *D v East Berkshire Community Health NHS Trust and Others* [2005] 2 AC 373, which concerned a claim in negligence by the parents against the local authorities regarding the erroneous claims of abuse (para 1), the House of Lords did not subject the Court of Appeal’s decision to refuse to follow *Bedfordshire County Council* to any adverse comment and must thus be taken to have approved it (Steele, 2010: 421).

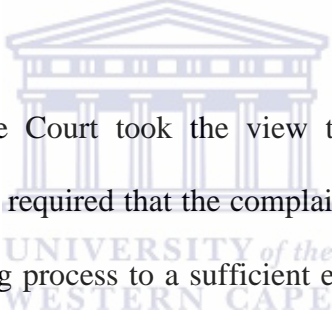
5.3.3 Respect for private and family life

Article 8.1 ECHR provides that “everyone has the right to respect for his private and family life, his home and his correspondence”. In terms of article 8.2 –

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The present author has pointed out that it has been settled law for many years that article 8 not only imports a negative state duty to avoid interfering with private and family life, but also a positive state duty to take steps to ensure respect for private and family life, both by the state itself and by private individuals (Wolhuter; *et al*, 2009: 128). In *X and Y v The Netherlands* (1986) 8 EHRR 235, the ECtHR held that this positive duty includes the duty to protect the applicants from sexual abuse by ensuring the existence of an effective criminal law (para 23). It affirmed this approach in *Stubbings v UK* (1997) 23 EHRR 213, stating that sexual abuse victims have a right to be protected by means of effective deterrent measures from such serious invasion of their private lives (para 62).

The positive duty on the state to respect private and family life that is implicit in article 8 ECHR has both substantive and procedural elements (see Wolhuter, *et al*, 2009: 139). In other words, it extends not only to the substantive protection of respect for private and family life, but also to procedural propriety in instances involving potential impairment of the right. In the English decision in *R (TB) v Stafford Crown Court* [2006] EWHC 1645 (Admin), the judge in a sexual offence trial ordered the disclosure of the complainant's medical records. She instituted proceedings claiming that such disclosure violated article 8 ECHR.



The Administrative Court took the view that the procedural requirement implicit in article 8 required that the complainant must have been involved in the decision-making process to a sufficient extent to ensure that her interests were protected. If this did not occur, her right to respect for private and family life has been violated and “... the interference resulting from the decision will not be capable of being regarded as ‘necessary’ within the meaning of Art. 8” (para 23). The court held that the fact that the complainant had not been given notice of the defendant's application for disclosure of her medical records or the opportunity to make representations before the court ordered such disclosure, constituted an unjustifiable violation of article 8, and that the trial court had thus acted unlawfully (para 25).

It appears from the above discussion that the ECHR has been given a generous interpretation by the ECtHR to further the development of victims' rights. Moreover, the English judiciary is demonstrating increasing willingness to follow this jurisprudence and, at times, even to adopt a broader approach than it requires (Wolhuter, *et al*, 2009: 128).

6. VICTIMS' RIGHTS AND JUDICIAL REVIEW

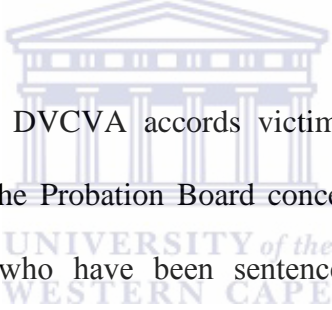
The role of the courts in upholding victims' rights is not restricted to the interpretation and application of Convention jurisprudence. By contrast, the English judiciary is displaying a growing readiness to use its powers of judicial review to take cognisance of victims' rights. However, in light of the fact that victims are only given standing to apply for judicial review in narrowly delineated circumstances, the power of the courts in this regard is necessarily limited. The present author has pointed to three circumstances in which the courts have exercised their powers of judicial review to consider victims' rights (see Wolhuter, *et al*, 2009: 131-133).

First, CPS decisions not to prosecute are subject to judicial review (see, *inter alia*, *R v Director of Public Prosecutions, Ex parte C* [1995] 1 Cr App R 136; *R v Director of Public Prosecutions, Ex parte C* [2000] WL 281275; *R v Director of Public Prosecutions, Ex parte Manning* [2001] QB 330; *R (on the application of Patricia Armani da Silva) v Director of Public Prosecutions*,

Independent Police Complaints Commission [2006] EWHC 3204 (Admin)). However, the grounds on which the courts will exercise their power to review such decisions are restricted. In *R v The Director of Public Prosecutions ex parte C* [2000] WL 281275, the court affirmed that it may only intervene if it is shown that the Director of Public Prosecutions decided not to prosecute due to an unlawful policy, or failed to act in terms of his/her own policy contained in the Code of Practice for Crown Prosecutors, or made a perverse decision which no reasonable prosecutor could have made (para 7). The court held that the failure by the CPS to consult a victim about a decision not to prosecute does not fall within any of these factors and thus does not constitute a procedural impropriety entitling the court to intervene (para 31).

There are nonetheless recent signs that the judiciary is adopting a more flexible approach. In *Ex parte Manning* the Court of Appeal quashed a prosecutorial decision not to prosecute in a case involving a death in custody. Although it took the view that the power to review must be “sparingly exercised,” it added that the threshold for review should not be too high, as judicial review constitutes the only method of obtaining “... redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied” (para 23). Burton (2001: 376-377) has taken the view that, although the courts purport to be unwilling to intervene in discretionary prosecutorial decisions, they are “... increasingly recognising the need for some accountability to themselves”.

Second, as was affirmed in *R v Criminal Injuries Compensation Board, Ex parte A* [1999] 2 AC 330, it is settled law that a victim has standing to apply for judicial review of the decisions of CICA. The applicant's compensation claim had been refused due to insufficient evidence. She applied for judicial review on the basis that the attention of the Board had not been drawn to the existence of medical evidence in support of her claim (*Ex parte A*, 343). The House of Lords held that there had been a violation of the rules of natural justice, quashed the Board's decision and remitted the matter to it for reconsideration (*Ex parte A*, 345, 347).



Third, s.35 of the DVCVA accords victims the right to receive relevant information from the Probation Board concerning the release of sexual and violent offenders who have been sentenced to at least twelve months' imprisonment, and to make representations concerning conditions for their release (see chapter 3). Ward and Bird take the view that victims have standing to challenge matters pertaining to these provisions in judicial review proceedings (Ward & Bird, 2005: 95).

Although the judiciary thus has some oversight of decisions affecting victims of crime, judicial review does not enable victims to claim damages for losses suffered in consequence of the violation of their rights and is thus, on its own, an insufficient means of protecting victims' rights.

7. TOWARDS ENFORCEABLE RIGHTS

The above analysis shows that, while EU law has enshrined enforceable rights for victims, and is in the process of extending them, the UK government is unwilling to follow suit (see Wolhuter, *et al*, 2009: 139-141). Instead, it has chosen to impose service obligations on criminal justice agencies, which, if breached, only entitle victims to complain. By contrast, following the example of the ECtHR, the English judiciary has begun to employ its power to scrutinise state action in terms of the HRA to grant rights to victims in certain respects. It has also adopted a more expansive approach to judicial review within the context of victims' rights. However, in view of the nature of legal development by casuistic means, the gains that have been made are unfortunately ad hoc and fragmented, being limited to the contours of the claims brought to court. Consequently, victims are without legal remedies in all the areas that fall outside these contours.

In order to bring English law into line with international trends, the unenviable position of such victims ought to be rectified. The UK ought to exercise its power to "opt in" to the Victims' Directive, making it directly applicable in English law, and entitling aggrieved victims to rely on it in a domestic court in order to ensure that the rights it enshrines are upheld.

In pursuance of the Victims' Directive, the government could introduce enforceable statutory rights for victims, as has recently occurred in the US. The American CVRA was adopted after a protracted but unsuccessful attempt on the part of victims' rights advocates to obtain a constitutional victim's rights amendment to the American Constitution (Kyl, *et al*, 2005: 591). It enshrines broad rights such as "... 'the right to be treated with fairness and with respect for the victims' dignity and privacy' and the right to 'reasonable protection' ...". In addition, it provides for specific rights, including the right to notice, the right "... not to be excluded from public proceedings ..." and the right "... to be reasonably heard at public proceedings involving release, plea, or sentencing" (Beloof, 2005: 342). The CVRA expressly grants victims the right to approach the courts in respect of a breach of its provisions. It provides for a non-discretionary writ of mandamus, which requires the court to determine the victim's application forthwith and to "... order such relief as may be necessary to protect [his or her] ability to exercise the rights" (Beloof, 2005: 343). The CVRA accordingly enshrines enforceable rights, in respect of which victims are given legal standing. Whether or not similar legislation is enacted in the UK depends on the existence of the political will to do so, which unfortunately presently appears to be lacking.

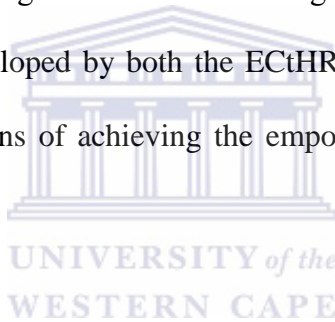
However, even if the UK were to accept the Victims' Directive and enact legislation enshrining enforceable victims' rights, such rights may be inaccessible to victims from socially unequal groups. Section 2 above has

illustrated the ways in which victims of rape and domestic violence experience secondary victimisation by criminal justice agencies, discouraging them from reporting crimes. Likewise, racially discriminatory attitudes and practices on the part of criminal justice agencies reinforce the unwillingness of victims of racially motivated crimes to report their experiences. There are similar levels of under-reporting of homophobic victimisation, which are linked to fear of police homophobia. Moreover, elder abuse is a “hidden” crime that is rarely reported (see chapter 6).

Within this context, many victims may be unable to access rights enshrined in victims’ rights legislation. Spalek has argued that, in order to respond more effectively to victims’ lived experiences, victims’ rights must be “... conceptualised in a wider framework ...” that recognises that “... racial, sexual and economic (alongside other forms) of equality are dependent upon wider cultural, social, political and economic processes” (Spalek, 2006: 115, 126). Victims’ rights legislation thus must be correlated more directly with human rights and anti-discrimination law, as Rec (2006) 8 suggests (see section 4 above). In addition, it must be supplemented by multi-agency strategies on the part of criminal justice and community agencies designed to generate effective responses to the victimisation experienced by victims from socially unequal groups (see chapter 6 for a detailed discussion of these concerns).

8. CONCLUSION

This chapter has documented the ways in which victims, particularly victims of gender-based violence and racially motivated and homophobic crime, experience secondary victimisation at the hands of criminal justice agencies. It has emphasised that, while EU law has chosen to entrench enforceable victims' rights to address such secondary victimisation, the UK government has been loath to follow suit (see Wolhuter, *et al*, 2009: 141-142). It has also pointed to the emergence of a victims' rights' discourse in the Convention jurisprudence developed by both the ECtHR and the English courts, but has noted the limitations of achieving the empowerment of victims by casuistic means only.



The chapter has contended that the UK government ought to follow its European counterparts by accepting the Victims' Directive and introducing statutory rights for victims along the lines of the American CVRA. However, it has highlighted the fact that victims' rights legislation may be inaccessible to victims from unequal social groups and has introduced the argument (which is taken up in chapter 6), that such legislation must be linked to human rights and anti-discrimination law and underpinned by specific criminal justice policies to facilitate access by victims from such groups.

CHAPTER 3: SERVICE RIGHTS

1. INTRODUCTION

Ashworth distinguishes between service and procedural rights for victims of crime. Whereas the former encompass rights such as the right to support and assistance and the right to information, the latter include the right to legal representation and the right to participate in criminal proceedings (Ashworth, 1993: 498-499). This chapter evaluates the content of the service rights (which are, for the most part, unenforceable) and the corresponding obligations on criminal justice agencies, where applicable, recognised in English law, against the backdrop of the relevant provisions of EU law (the question of procedural rights for victims is considered in chapter 4).

The chapter commences by considering the right to support and assistance, focusing on the work of Victim Support and selected unofficial agencies. Thereafter, it assesses the rights to information, recognition and respect, and the correlative duties imposed on criminal justice agencies in terms of the Victims' Code. Finally, it addresses the right to protection, documenting the duties placed on criminal justice agencies in terms of the Victims' Code to protect the safety and security of victims, and pointing to the ways in which the rules of evidence and procedure have been altered to accommodate vulnerable and intimidated victims and witnesses.

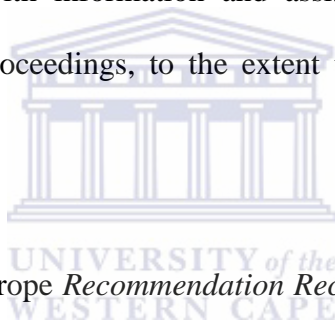
The chapter contends that, while the rules of English law and policy pertaining to service rights comply with European standards in most respects, the retention of judicial discretion in areas such as the admission of sexual history evidence and hearsay evidence creates the space for these standards to be sidestepped.

2. SUPPORT AND ASSISTANCE

Drawing on the present author's work (Wolhuter, *et al*, 2009: 143-154), this section documents the provisions of Council of Europe instruments and the proposed Victims' Directive pertaining to the duties on Member States to encourage the support of and assistance to victims of crime. It assesses the work of Victim Support, the Witness Service and the joint police/CPS Witness Care Units ("WCUs") in light of these provisions, maintaining that, by supporting and promoting the work of these agencies, the government has complied with its duties. However, as many victims from unequal social groups, such as victims of gender-based violence, and racially motivated and homophobic crime, do not report their victimisation, and are thus not referred to Victim Support by the police, this section also considers various "unofficial" victims' organisations who work to support such victims.

2.1 EU Law

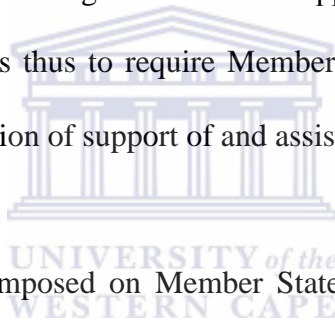
The Framework Decision (see chapter 2), contains provisions governing the duties of Member States concerning the support of and assistance to victims. Article 13.1 requires Member States to promote such support and assistance, either by providing trained criminal justice personnel or by recognising and funding victim support organisations. In terms of article 13.2, they must encourage criminal justice personnel or victim support organisations to provide victims with information and assistance and to accompany them during criminal proceedings, to the extent to which this is “necessary and possible”.



The Council of Europe *Recommendation Rec (2006) 8 on assistance to crime victims*, which, albeit not binding, is nonetheless of persuasive value (see chapter 2), supplements the above provisions. Article 5 repeats the obligation on Member States to “provide or promote” victim support services, stating that these services must, inter alia, give victims free “... emotional, social and material support ...”, deal competently with their problems, give them information about their rights and available services, and ensure that their services are confidential.

The proposed Victims’ Directive extends the right to support in some respects. Unlike its predecessor, article 7.1 provides that “Member States shall

ensure that victims and their family members, in accordance with their needs, have access to free of charge, confidential victim support services”. These services must include the provision of “... information, advice and support ...” regarding their rights and “... their role in criminal proceedings”; information about “specialist services” or referral to such services; “... emotional and psychological support ...”; and practical and financial advice (article 7.2). In addition, Member States must “... facilitate the referral of victims ... to victim support services” (article 7.3) and must “... promote ... specialist support services, in addition to general victim support services” (article 7.4). The tenor of article 7 is thus to require Member States to take on more positive duties in the provision of support of and assistance to victims.



These duties are imposed on Member States in respect of all victims. The instruments do not expressly address the support needs of victims from unequal social groups, particularly racial minority, LGBT and elderly victims (see chapter 6), who may face structural, societal and/or cultural barriers to accessing official agencies. However, the UK provides significant support to such victims through its “unofficial” agencies, and Victim Support has recently begun to focus on improving its services to them (see sections 2.2 and 2.4 below).

2.2 Victim Support

Victim Support, a national charity providing assistance and support to victims of crime, has its origins in a small local group established in Bristol in 1974 (Victim Support, 2004b: 2). Until recently, it comprised a network of 77 Victim Support schemes throughout England and Wales (Victim Support, 2008: 6). However, in consequence of a decision taken in June 2007, these schemes merged to form a single national charity (Victim Support, 2008: 6). In the financial year 2009-10, it had about 1,500 paid staff as well as approximately 6,500 volunteers (Victim Support, 2010a: 19) and provided services to about 1.2 million victims (Victim Support, 2010a: 12). More or less 90 per cent of these victims are contacted through police referrals (Victim Support, 2008: 15).

In view of its independent status, Victim Support is not bound by the Victims' Code. However, it is heavily dependent on government funding, and receives approximately £30 million per year. It received an additional £5.8 million from the Office of Criminal Justice Reform in 2008 in order to roll out its enhanced services for victims (Victim Support Plus) nationally (Victim Support, 2008: 17; see section 2.2.1 below). In the financial year 2009-10 it received an additional £8 million due to the fact that it was asked by the government to take responsibility for the National Victims' Service (Victim Support, 2010a: 4; see section 2.2.1 below). In the financial year 2009-10 the

total amount received from the Ministry of Finance was £38.6 million (Victim Support, 2010a: 30). Victim Support also supplements its funds through fundraising (Victim Support, 2004b: 2).

In the early stages of its development, Victim Support addressed the needs of stereotypical victims, such as victims of domestic burglary. From the mid-1990s onwards, however, its focus has included the provision of support and assistance to all victims of crime (Dignan, 2005: 50). It has also evolved from a politically neutral organisation, which was perceived as closely related to the state, to a more overtly political one, which engages in advocacy to change government policy. Furthermore, it has sought to forge links with other community agencies, and has committed itself to the extension of its presence in the local community. In 2007, it accepted the government's invitation to roll out Victim Support Plus, an enhanced set of services for victims that is now available nationally (Victim Support, 2008: 8; see section 2.2.1 below). In 2010, it agreed to work with the government as the "... key agency delivering a new National Victims' Service" (Victim Support, 2010c; see section 2.2.1 below).

Consequently, Victim Support's work has several dimensions, comprising the provision of services, advocacy and inter-agency work. In addition, it has introduced, and retained oversight of, the Witness Service.

2.2.1 Services

At the request of the government, Victim Support has recently enhanced its services in two main respects. First, in 2008 it rolled out Victim Support Plus nationally. Second, in 2010 it agreed to play the leading role in the provision of the National Victims' Service (Victim Support, 2010c). Prior to these changes, Victim Support offered a range of more basic services to victims of crime and their families and friends. These services included the provision of information, practical help and emotional support (Victim Support, 2006c: 25). The information provided concerned, amongst other things, the criminal justice system, compensation claims, housing and medical assistance. Practical help took the form of assistance with compensation claims, insurance claims, housing applications or medical services. Emotional support comprised listening and the provision of comfort and reassurance to victims (Williams, 1999: 90).

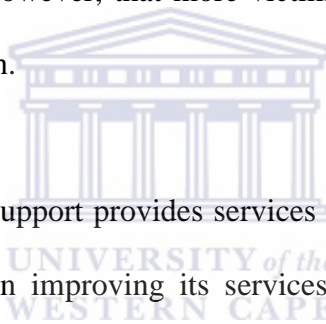
Contact was usually initiated telephonically or by letter, although there was also a practice of "cold-calling" in limited cases. If the victim wished to accept Victim Support's services, a volunteer would visit the victim at his/her home. In non-serious cases, there was usually only one visit. However, in serious cases, such as sexual assault or rape, victims could be visited more than once, depending on their wishes. Although Victim Support used a limited number of specially trained volunteers in the case of serious offences, who

worked with victims over a longer period, the usual practice was to refer such victims to specialist counselling services (Williams, 1999: 90-91).

In 2005, the government proposed the introduction of Victim Care Units (“VCUs”) to provide an enhanced level of support to victims (Criminal Justice System, 2005b). VCUs were successfully piloted by Victim Support from October 2006 to March 2007 in Salford, Nottingham and York (Government News Network, 2007). The success of these pilots led to the establishment of Victim Support Plus (rather than VCUs) throughout England and Wales by October 2008 (Victim Support, 2008: 8).

Victim Support Plus comprises several improvements to the services offered by Victim Support. Opening hours for victim services have been extended. Victims are contacted by telephone more quickly after they have been referred to Victim Support. Needs assessments are now routinely completed when volunteers first make contact with victims (Victim Support, 2008: 8). The purpose of these assessments is to determine whether immediate practical help is required, such as the emergency fitting of locks or assistance with transport or childcare (Victim Support Nottinghamshire, undated). In addition, there is follow-up contact in order to determine whether the initial services have been helpful and whether further assistance is required. Furthermore, more resources are available for practical assistance (Victim Support, 2008: 8).

Over and above these services, a national telephonic service, the Victim Supportline, has been in existence since 1998 (Victim Support, 2004b: 5). Its aim is to increase self-referrals and enable victims who have not reported the crime to contact Victim Support (Dignan, 2005: 52). The line, which is located in the National Office in London, is staffed by approximately seven members of staff and 42 volunteers (Spalek, 2006: 96). Research has demonstrated that victims, particularly those from racial minority communities, have been slow to use the Supportline (Spalek, 2006: 96). It may be the case, however, that more victims will use the line as it becomes more widely known.



Although Victim Support provides services to a wide range of victims, it has focused recently on improving its services to victims from unequal social groups. It has contended that more services are required to assist child victims of “ordinary” offences, such as theft, burglary or violence, as the majority of children’s charities focus on supporting victims of child abuse (Victim Support, 2004b: 12). It has advocated enhanced and more widely accessible services for victims of rape and domestic violence (Victim Support, 2004b: 12-13). It has acknowledged that support for victims of homophobic crime is inadequate, and has stressed the importance of having trained specialist volunteers to provide services to such victims (Victim Support, 2004b: 13).

The spearheading of the National Victims' Service, which is Victim Support's most recent enterprise, has enabled it to introduce heightened national services, first, to the family members of homicide victims and, thereafter, to victims of all crimes (Victim Support, 2010a: 8). These services include, amongst others, making contact with victims quickly "... to determine their support needs, seven days a week ..."; using electronic resources to maintain contact with and provide support to victims; engaging in thorough needs assessments with a view to devising "... an individually-tailored support strategy ...", and providing "... immediate emotional support from a trained support worker ..." if necessary (Victim Support, 2010a: 8).

2.2.2 Advocacy



As was mentioned in section 2.2 above, Victim Support has adopted a progressively more politicised attitude to its work with crime victims. However, unlike many of the "unofficial" agencies considered in section 2.4 below, Victim Support has not set itself against the government, preferring to work in collaboration with it. It is a member of the government interdepartmental Victims Steering Group, and is thus able to exercise an influence on the development of government policy regarding victims (Dignan, 2005: 53). Despite the fact that it is an independent charity, it may thus be described as engaging in advocacy from within. In this respect, its priorities have included lobbying for the introduction of victims' rights,

proposing the extension of victim services into the realm of social welfare, recommending the reform of the law regulating victim compensation, and suggesting that services to specific groups of victims be enhanced.

The emergence of Victim Support's more pro-active attitude to advocacy, which occurred in 1995, was signalled by arguments in favour of the recognition of victim's rights (Dignan, 2005: 53). The rights that it advocated included the core rights to information and explanation, protection, compensation, and respect and assistance (Victim Support, 1995: 9-10). However, it did not initially recommend that these rights be legally enforceable, maintaining that victims ought not to be saddled with decision-making responsibilities in the criminal justice system (Victim Support, 1995: 8).

However, by 2001 it had changed its stance, and began calling for the enactment of enforceable victims' rights legislation, which provided "... clear remedies if the rights are breached" (Victim Support, 2001). It noted that most of the rights in the Framework Decision are available to victims in the UK, but that there were some gaps, such as the limited availability of legal aid for victims (Victim Support, 2002b: 9, 12). It also urged the government to appoint a Commissioner for Victims of Crime (Victim Support, 2001) and played an important role in influencing the content of the DVCVA (Victim Support, 2004b: 9). These advocacy strategies have had a measure of success,

with the government enacting the Victims' Code. However, in view of the government's refusal to introduce enforceable rights for victims, Victim Support has not won its battle entirely (see chapter 2). It has recently called on the coalition government to sign the Victims' Directive (Victim Support, 2011), which would lead to such enforceable rights (see chapter 2). It remains to be seen whether the government will respond positively to this call.

Besides advocating the introduction of victims' rights, Victim Support has contended that imposing obligations on criminal justice agencies to address victims' needs is insufficient to fulfil all their needs effectively. In addition, obligations ought to be imposed on social welfare agencies outside the criminal justice system, such as health, housing and education (Victim Support, 2002a: 5). For instance, victims should be granted access to free healthcare services (including counselling and psychiatric treatment) that are geared to meeting their needs. In addition, victims' housing needs (such as the need to move to safe accommodation) ought to be given priority (Victim Support 2002a: 6, 10; Dignan, 2005: 55). The government has responded positively to these proposals by requiring government departments outside the criminal justice system "... to recognise and support victims and witnesses" (Victim Support, 2004b: 9).

Victim Support has also been very critical of the restrictiveness of the rules concerning victim compensation. It has argued, for instance, that the "same

roof” principle, in terms of which no compensation is payable for injuries sustained prior to 1 October 1979 where the victim and offender were living together, causes “extreme distress” and self-blame to victims and ought to be abolished (Victim Support, 2003: 6). In addition, it has criticised the introduction of fixed surcharges for convictions, as they reduce the amount available for compensation orders against defendants of limited financial means (Victim Support, 2004a; see chapter 5).

The evolution of a more politicised attitude on the part of Victim Support is signified not only by its advocacy in favour of victims’ rights, but also, from the 1990s onwards, by its recommendations for the development of specific measures to address the needs of victims from unequal social groups. In a research paper published in 1996, it recommended, amongst other things, that victims of rape and sexual assault be given information, support, protection and assistance to ameliorate their experiences of secondary victimisation by police and medical examiners. It also suggested that the procedures for evidence-in-chief and cross-examination be reformed to reduce the trauma of testifying (Victim Support, 1996: 59). Most of these recommendations have since been implemented (see sections 3 and 4 below, as well as chapter 6).

In recent years, Victim Support has commissioned research into the experiences of victims of racially and religiously motivated crime, as well as victims of homophobic crime (Victim Support, 2006a). The research suggests,

amongst other things, that Victim Support should develop a coherent service delivery framework for such victims that forms part of its national strategy (Victim Support, 2006a: 70) and that the police should encourage reporting by victims “... whose immigration status or other activities may make them reluctant to report such crimes” (Victim Support, 2006a: 73). It also recommends that Victim Support and other community agencies should “... seek to engage the CPS in hate crime work” (Victim Support, 2006a: 74).

However, despite Victim Support’s recent efforts to engage in advocacy on behalf of victims who experience victimisation based on race, religion or sexual orientation, research has shown that it receives few police referrals pertaining to such victims. The 2002/3 statistics for Victim Support referrals demonstrate that the overwhelming majority of referrals related to violent and sexual offences, burglary, theft and criminal damage, whereas domestic violence referrals and referrals for racially motivated crimes (approximately 5 per cent and 2 per cent respectively) accounted for a very small percentage of the total number of referrals (Dignan, 2005: 51).

Victim Support has also conducted research into the experiences of families of homicide victims (Victim Support, 2006b), expressing the view that it should ensure that its services for victims bereaved by homicide be managed more effectively, and develop partnerships with police Family Liaison Officers and other community agencies (Victim Support, 2006b: 91-92). It has stressed the

importance of campaigns highlighting the needs of such victims, particularly as regards legal advice and representation (Victim Support, 2006b: 93).

Most recently, Victim Support has called on the coalition government to ensure, in its proposed sentencing reforms (Ministry of Justice, 2010), that, as victims and witnesses will derive great benefit from “effective rehabilitation”, such rehabilitation should “... be at the heart of the prison system” (Victim Support, 2010b: 32). It has also recommended that sentences should be explained clearly to victims to enable them to understand the effect of sentencing more fully (Victim Support, 2010b: 33). In addition, in order to obviate situations where offenders delay, or fail to make, payment pursuant to compensation orders, a compensation fund should be established to pay victims the amount ordered upfront. Any amounts subsequently received from the offender should then be paid into the fund (Victim Support, 2010b: 33; see chapter 5).

2.2.3 Community and inter-agency work

Over the past few years, Victim Support has developed working partnerships with criminal justice agencies as well as community organisations. Victim Support’s National Standards require that Victim Support be “... represented on local racial harassment, hate crime forums, sexual assault referral centres and domestic violence forums” (Victim Support, 2006c: 32). This requirement

has arisen in consequence of the Crime and Disorder Reduction Partnerships (“CDRPs”) that have been established in terms of the CDA (see chapter 6). Victim Support is involved with many of the initiatives of such partnerships (Spalek, 2006: 97).

Besides its involvement in CDRPs, Victim Support has forged working partnerships with other community organisations, such as Women’s Aid and Kidscape, in a bid to share knowledge and resources (Spalek, 2006: 94). It also works in partnership with, and supports SAMM (Support After Murder and Manslaughter), a small charity providing support to the relatives of homicide victims (Dignan, 2005: 52).

The above analysis demonstrates that Victim Support, having grown from a small group of volunteers in Bristol, has been central to the emergence of victim support and assistance in the UK. By comparison to other support organisations in Europe, it is regarded widely as “... an unparalleled success story” (Goodey, 2005: 105).

2.3 Witness Support

This section evaluates the measures for the support and assistance of witnesses at court by the Witness Service, which operates under the aegis of

Victim Support, and by the joint police/CPS WCUs that have been established recently.

2.3.1 Witness Service

In response to complaints by victims that they received inadequate information, support or protection during court proceedings, Victim Support advocated the introduction of a Witness Service. It obtained government funding and ran pilot Witness Services in seven Crown Courts in 1989 (Spalek, 2006: 95). By 1996, it had established a Witness Service in every Crown Court in England and Wales (Dignan, 2005: 53). However, Victim Support took the view that the Witness Service ought to be extended to magistrates' courts, as more than 90 per cent of criminal cases are heard in these courts. In 1999, it obtained government funding to do so, and by 2002, a Witness Service had been established in all magistrates' courts (Victim Support, 2002a: 18).

In principle, the Witness Service provides support for prosecution and defence witnesses, as well as their family and friends (Victim Support, 2006c: 27). However, in practice, it supports few defence witnesses, as such witness are rarely referred to it (HMCPSI/HMICA/HMIC, 2009: 69). One of the objectives of the Witness Service is to ensure that all witnesses are given pre-trial court familiarisation visits. It also provides witnesses with information

about court procedure and the process of giving evidence (Williams, 2005: 122). In the case of vulnerable and intimidated witnesses, if the witness consents, the Witness Service will inform the court that s/he requires special measures to facilitate the process of testifying (Spalek, 2006: 95; see section 4.3.1 below for a discussion of special measures).

In addition, Witness Service volunteers, who have received training concerning court procedure, will accompany the witness to court on the day of the trial, if s/he so wishes, in order to provide moral and emotional support. However, volunteers may not provide legal advice or discuss the evidence with witnesses (Williams, 2005: 122-123). Volunteers will also provide support if witnesses are distressed after testifying, and will refer them to Victim Support for further support, should they wish (Victim Support, 2006c: 27). In certain areas, the Witness Service has been given funds recently to expand its services to vulnerable and intimidated witnesses. These enhanced services include earlier contact with witnesses, more preparation for the trial, visits by volunteers outside the court premises, and post-trial support (HMCPSI/HMICA/HMIC, 2009: 113).

Witness uptake of the Witness Service has been good. The Witness Satisfaction Survey (2002) indicates that eight out of ten witnesses are offered assistance from the Witness Service, and Victim Support has stated that 95

per cent of witnesses using the Service are satisfied or very satisfied (Spalek, 2006: 96).

2.3.2 Witness Care Units

Joint police/CPS WCUs were established in pursuance of the government's *No witness, no justice* programme, which was successfully piloted in Essex, Gwent, North Wales, South Yorkshire and the West Midlands in 2003 and 2004 (Criminal Justice System, 2004).

There are presently 165 WCUs in England and Wales (Reeves & Dunn, 2010: 46), which are staffed, inter alia, by Witness Care Officers. Although WCUs are a joint police/CPS initiative, members of staff are drawn "...predominantly from the police with varying and often minimal CPS presence" (HMCPSI/HMICA/HMIC, 2009: 85). One of the functions of WCUs is to supervise the care of witnesses from the time a charge is laid until the case is concluded (Criminal Justice System online, undated). To facilitate the discharge of this function, WCUs are required to perform needs' assessments for all witnesses (HMCPSI/HMICA/HMIC, 2009: 50). The existence of this duty complies with the requirement in article 18.3 of the Victims' Directive that all victims must be needs-assessed to determine vulnerability (see section 4.1 below). WCUs have a duty in terms of the Victims' Code to keep witnesses informed of the progress of the case and the time at which they are

required to give evidence (see section 3.2.3 below for a discussion of this duty). They also provide practical assistance with matters such as childcare and transport (Criminal Justice System online, undated). In addition, they assist vulnerable witnesses to obtain special measures (Criminal Justice System, 2004).

Although WCUs refer witnesses to the Witness Service for practical and emotional support and assistance (Criminal Justice System online, undated), their relationship to the Witness Service is somewhat unclear. As many of their functions are also performed by the Witness Service (see section 2.3.1 above), there is a danger of unnecessary duplication of services.

2.4 “Unofficial” agencies

As many victims from unequal social groups approach non-governmental organisations that are sympathetic to their needs rather than criminal justice agencies or Victim Support, this section evaluates the activities of a selection of these organisations.

2.4.1 Organisations responding to gender-based violence

Sexual assault and domestic violence have been central concerns of the feminist movement since the 1960s. Certain non-governmental organisations,

such as Rape Crisis, which emerged in the 1970s, provide services to victims from an overtly feminist perspective, which views gender-based violence as flowing from the exercise of male power within a patriarchal society. In 2008, there were 38 affiliated Rape Crisis centres grouped together under the umbrella organisation, Rape Crisis (England and Wales) (Women's Resource Centre and Rape Crisis (England and Wales), 2008: 2).

Rape Crisis centres are run predominantly by volunteers, although there are usually one or two paid staff members (Williams, 1999: 93). The centres provide “specialist support” as well as “counselling and information” to women victims of rape (Rape Crisis, undated). Staff and volunteers are trained in non-directive counselling and provide long-term counselling, if necessary (Williams, 1999: 95). Although most centres provide services to women and girls only, a few support male victims as well (Women's Resource Centre and Rape Crisis (England and Wales), 2008: 30). The majority of victims who approach Rape Crisis have experienced sexual abuse many years previously, with relatively few victims having recent experiences of sexual abuse (Women's Resource Centre and Rape Crisis (England and Wales), 2008: 34). The centres emphasise victim confidentiality and there is thus no pressure to report the rape to the police if the victim is unwilling to do so (Williams, 1999: 95).

In addition to its practical services for victims, Rape Crisis also engages in advocacy in order to raise awareness of the patriarchal underpinnings of violence against women (Dignan, 2005: 56). It has thus contributed to the government's recognition of the need to reform law and policy to better respond to rape victims' lived realities of both primary and secondary victimisation (see chapter 6).

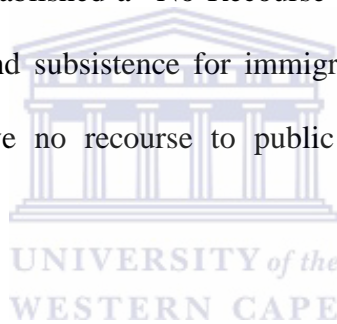
Although the various centres are financed primarily through fund-raising, they also receive grants from central and local government (Women's Resource Centre and Rape Crisis (England and Wales), 2008: 6). However, over the years, financial assistance has been sparse and sporadic, which led to a serious funding crisis in the first decade of the twenty first century. Nine centres were forced to close, and existing centres were constrained to cut back on the services that they provide to victims (Women's Resource Centre and Rape Crisis (England and Wales), 2008: 8, 31). Rape Crisis ascribed this crisis to the "... lack of responsibility taken by Government to address funding to, and closures of, Rape Crisis centres" (Women's Resource Centre and Rape Crisis (England and Wales), 2008: 25). Fortunately, however, Rape Crisis has recently received substantial funding from the coalition government. In January 2011, the government announced the creation of a "Rape Support Fund" for three years for "... existing Rape Crisis Services" (Rape Crisis, 2011a). In March 2011, the Ministry of Justice announced its intention to award Rape Crisis about £600,000 for the establishment of an additional four

Rape Crisis Centres (Rape Crisis, 2011b). The receipt of this new funding will enable Rape Crisis to avert the closure of existing Centres and extend its services to victims (Rape Crisis 2011a; Rape Crisis 2011b).

In view of the commitment of Rape Crisis to radical feminist principles (see chapter 1), it has not devised an agenda that reflects the experiences of racial minority women adequately. Consequently, most services to racial minority victims of gender-based violence have been provided by other organisations, such as the Southall Black Sisters (“SBS”), a London-based charity established in 1979. SBS adopts a critical race feminist perspective, emphasising the way in which the intersection between race and gender discrimination shapes racial minority women’s experiences of rape and domestic violence (see chapter 1). SBS’s funding is drawn mainly from non-governmental sources. It provides a range of services to women in its catchment area of Ealing. Such services include the provision of practical help and support by one of the organisation’s three case-workers, as well as counselling, which includes psychotherapy and group support. SBS also runs a national telephonic advice service, and will refer women from outside its catchment area to appropriate support agencies (Southall Black Sisters, undated).

Besides these services, SBS engages in advocacy and campaigning regarding domestic and other forms of gender-based violence. For instance, one of its

campaigns concerns the issue of forced marriage. It has expressed concerns about the government's reluctance to intervene in such cases, contending that non-intervention amounts to racism and that all women have a right to state protection (Southall Black Sisters, undated). SBS also made submissions to the government in the course of the enactment of the DVCVA, arguing for the provision of full protection to minority women who are victims of domestic violence and who are subject to immigration control and the "no recourse to public funds" rule (Southall Black Sisters, undated; see chapter 6). In addition, it has established a "No Recourse Fund", which is used to provide accommodation and subsistence for immigrant women victims of domestic violence who have no recourse to public funds (Southall Black Sisters, undated).



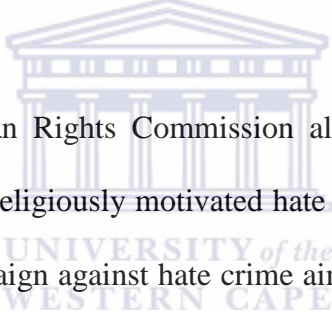
SBS has called on the coalition government, in the course of its development of a strategy to end violence against women and girls (HM Government, 2011a; see chapter 6), to take account of its duties in terms of the EA and "... to ensure issues affecting BME women and girls have a specific focus ..." in the strategy, rather than being added on "... as an after-thought" (Southall Black Sisters, 2011). In particular, it has advocated the provision of "specialist services" designed to "empower" BME women and girls and to respond to intersectional discrimination (Southall Black Sisters, 2011). The coalition government has evinced a commitment to consider these recommendations (HM Government, 2011a: 6).

Support and assistance for minority women who experience rape and domestic violence is also available from a range of other, smaller charities and non-profit organisations. For instance, the Muslim Community Helpline provides a telephonic service to support Muslim women experiencing a range of social problems, including sexual abuse (Muslim Community Helpline, 2010). For many racial minority women, it may be preferable to seek assistance from organisations such as the SBS and the Muslim Community Helpline, because, unlike secular agencies, including Victim Support and Rape Crisis, these organisations are sensitive to their cultural and religious views and needs (Spalek, 2006: 110).

2.4.2 Organisations responding to racism and Islamophobia

Several organisations provide services to, and advocate on behalf of, victims of racially motivated crime and Islamophobia. For example, the Forum Against Islamophobia and Racism (“FAIR”), established in 2001, is an independent organisation aiming to eradicate racism and religious hatred of British Muslims. It conducts campaigns, including the Fair Justice for All Campaign, which was launched in 2002 after the Bradford disturbances of 2001. This campaign aimed to contest the disproportionate sentences imposed on those involved in the disturbances and to provide support for those in prison and their families (FAIR, undated b).

FAIR is a member of the Muslim Safety Forum, which established a reporting scheme, *Don't Suffer in Silence*, in collaboration with the police and other agencies, in Tower Hamlets, London, in 2004, to encourage Muslims to report religiously motivated crimes (FAIR, undated a). It also monitors and records incidents of Islamophobia (FAIR, undated a). In addition, it has recently engaged in inter-faith advocacy, calling for an end to Islamophobic and Anti-Semitic victimisation (FAIR UK and the Joseph Interfaith Foundation, 2009). However, it is primarily a campaigning organisation and does not provide counselling or practical assistance to individual victims.

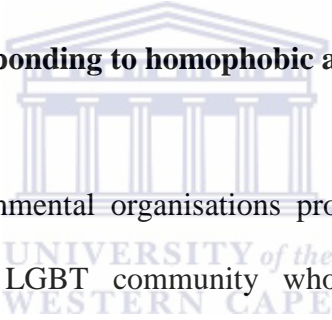


The Islamic Human Rights Commission also advocates the eradication of Islamophobia and religiously motivated hate crime against Muslims. In 2001, it launched a campaign against hate crime aimed at addressing the increase in anti-Muslim violence and harassment in the aftermath of September 11. It also monitors and reports on the incidence of such Islamophobic incidents in the UK. (Islamic Human Rights Commission, 2002). In addition, it has recently set up “... a pilot project ... to assess the levels of hostility and discrimination faced by Muslims in Europe” (Islamic Human Rights Commission, 2010: 16).

The Islamic Human Rights Commission provides services, such as advocacy, advice and conflict resolution to individuals who have experienced racism and Islamophobia. In addition, it refers individuals to specialist services in appropriate cases (Islamic Human Rights Commission, 2010: 6-7).

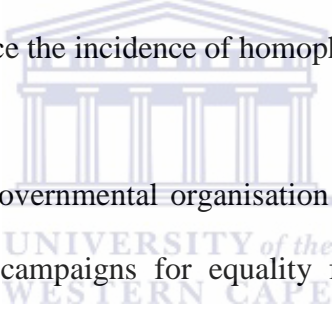
While these organisations are, for the most part, engaged in advocacy rather than victim support and assistance, they may be viewed as “unofficial” victim support agencies because their advocacy has assisted the government to recognise the need for a criminal justice response to victims of religiously motivated crime (see chapter 6), which inures to the benefit of victims. Furthermore, their activities may also have contributed to Victim Support’s concern to extend its services to victims of racially and religiously motivated crime (Victim Support, 2006a).

2.4.3 Organisations responding to homophobic and transphobic victimisation



Several non-governmental organisations provide support and advocacy for members of the LGBT community who experience homophobic and transphobic crime, as well as secondary victimisation by criminal justice agencies, particularly the police (see chapter 6). The Gay London Police Monitoring Group (“GALOP”) was established in 1982 with the objective of exposing police harassment of gay men and providing services to gay men who were victims of police harassment (GALOP, undated). By 1990, GALOP was providing services to lesbians as well, and by the end of the 1990s, it had extended its services to the entire LGBT community. In 2004, it officially included transgender persons within its remit (GALOP, undated).

The services provided by GALOP include a helpline for members of the LGBT community to report homophobic or transphobic incidents, as well as to receive advice and assistance regarding the reporting of incidents to the police. GALOP also makes provision for the online reporting of such incidents, assists victims who have difficulties with the police and is willing to report incidents to the police on victims' behalf (GALOP, undated). In addition, it has established a live online interactive help facility to enable victims to chat live online with one of the GALOP advisors (GALOP, undated). GALOP also engages in research and advocacy in order to challenge and reduce the incidence of homophobia and transphobia.



Stonewall, a non-governmental organisation established in 1989, is engaged in advocacy, and campaigns for equality for LGBT persons and for the elimination of homophobic/transphobic discrimination and victimisation. Its campaigns include the Education for All campaign, which was launched in 2005 to assist in the task of eradicating homophobia and homophobic bullying in schools (Stonewall, undated). It has also recently published *The gay British crime survey 2008* (Dick, 2008), in which it explores the incidence of homophobic crime in England and Wales (see chapter 6). In addition, it has engaged in research on homophobic hate crime for the Equalities and Human Rights Commission (Dick, 2009; see chapter 6). Although it works with a range of community organisations to cater for the needs of LGBT persons, and runs a telephonic information service giving victims information about

referrals, it does not provide individual support or assistance (Stonewall, undated).

The advocacy and campaigning activities of organisations such as GALOP and Stonewall have contributed significantly to an increased public awareness of homophobic and transphobic victimisation, and may be said to have encouraged criminal justice agencies to develop appropriate policies to address such victimisation (see chapter 6). They may also have played a role in Victim Support's re-assessment of its services to the LGBT community (Victim Support, 2006a).

The logo of the University of the Western Cape, featuring a classical building facade with columns and a pediment, with the text 'UNIVERSITY of the WESTERN CAPE' below it.

3. INFORMATION, RESPECT AND RECOGNITION

Against the backdrop of the relevant provisions of the Framework Decision and the Victims' Directive, this section considers the measures in the Victims' Code imposing duties on criminal justice agencies to provide victims with information, to treat them with respect, and to recognise their interests. It contends that, although these measures comply with European standards, the fact that the duties are not enforceable may undermine their effectiveness, particularly for victims from socially unequal groups.

3.1 EU Law

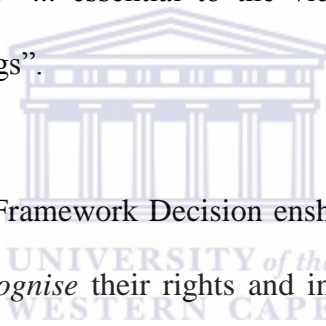
As the present author has documented (Wolhuter, *et al*, 2009: 155-156), the Framework Decision (see chapter 2) places obligations on Member States to ensure that criminal justice agencies give victims relevant information, and to accord them respect and recognition.

In terms of article 4, which regulates the duty to give *information*, Member States must ensure that, as of their first contact with criminal justice agencies, victims have access to information that is relevant to “... the protection of their interests”. Such information includes, amongst other things, details of the time when and the manner in which victims may report the offence, the nature of the procedures that follow the report and the victim’s role in these procedures, as well as the manner and circumstances in which victims may receive protection (article 4.1). Furthermore, victims who so wish must be kept informed of the outcome of their complaint, of the progress of the proceedings (unless exceptional circumstances exist, which may impede the proper conduct of the matter if the victim receives such information), and of the sentence (article 4.2). In addition, in terms of article 4.3, in cases where victims’ safety may be at risk, Member States must ensure that victims are informed of the offender’s release. Article 4, which expressly grants victims a right to information that corresponds with these duties, thus applies throughout the criminal process, from the making of a complaint to the

offender's release (see article 6 of *Recommendation Rec (2006) 8 on assistance to crime victims* (Rec (2006) 8), which contains similar provisions regarding victims' right to receive information).

The provisions of articles 3 and 4 of the Victims' Directive, which regulate the duty of Member States to provide *information*, are broadly the same as the provisions of article 4 of the Framework Decision. In an important respect, however, they go further. The provisions of article 4.2 of the Framework Decision, detailing the victim's right to information concerning the outcome and progress of the case, and the sentence, receive significant elaboration in article 4.1 of the Victims' Declaration. Article 4.1 imposes a duty on Member States to make sure that victims are informed that they have a right to information (and are in fact given this information if they so choose) concerning "... any decision, including reasons for that decision, ending the criminal proceedings ..., such as a decision not to proceed with or to end an investigation or prosecution, or a final judgment in a trial, including any sentence" (article 4.1(a)). The inclusion of information concerning decisions not to continue investigations and prosecutions is significant, in that it ensures that victims are apprised of the necessary information to enable them to seek reviews of these decisions. In addition, victims must be informed that they have a right to information (and are in fact given this information if they so choose) about "... the time and place of the trial ..." (article 4.1(c)).

The Victims' Directive goes further than the Framework Decision in an additional respect. Unlike the Framework Decision, which makes no reference to facilities for interpretation and translation, article 6.1 of the Victims' Directive expressly provides that "... victims who do not understand or speak the language of the criminal proceedings ..." have the right to receive free interpretation services at the pre-trial stage as well as in court. In addition, article 6.4 provides that such victims have the right to be given free translations of their complaints, decisions to end the proceedings, and other information that is "... essential to the victim's exercise of their rights in criminal proceedings".



Article 2.1 of the Framework Decision enshrines duties to treat victims with *respect* and to *recognise* their rights and interests. It provides that Member States must "... ensure that victims have a real and appropriate role ..." in the criminal justice system, that they "... are treated with due respect for the dignity of the individual during proceedings ..." and that their rights and legitimate interests, particularly as regards criminal proceedings, are recognised. In terms of article 15, Member States must take steps to create progressively the necessary conditions to enable secondary victimisation to be eliminated and to prevent victims from being pressurised unnecessarily, especially in fora such as police stations and courts. While article 2.1 does not confer an express right on victims to be treated with respect and recognition of their interests, it does place unconditional duties on Member States.

Consequently, it is arguable that such a right is implicitly recognised. However, as the duty in terms of article 15 is only to create progressively the conditions that eliminate secondary victimisation, it may be construed as merely giving victims a legitimate interest rather than a fully-fledged right.

By contrast, the Victims' Directive places less emphasis on *respect* and *recognition*. Article 1 merely provides that the aims of the Victims' Directive include ensuring that victims "... are recognised and treated in a respectful, sensitive and professional manner, without discrimination of any kind". Consequently, recognition and respect of victims are goals to be pursued rather than the object of a right on the part of victims. In addition, unlike article 15 of the Framework Decision, article 25.2 merely enjoins Member States to ensure that criminal justice and support agencies collaborate to "... minimise ... the risks of secondary and repeat victimisation". Consequently, it provides for neither a fully-fledged duty to eliminate secondary victimisation, nor a duty to create progressively the conditions in which such victimisation may be eliminated.

3.2 Duties in the Victims' Code

The foregoing discussion shows that EU law imposes far-reaching obligations on Member States concerning victims' rights to information, and (to a lesser extent) to respect and recognition. This section evaluates the duties imposed

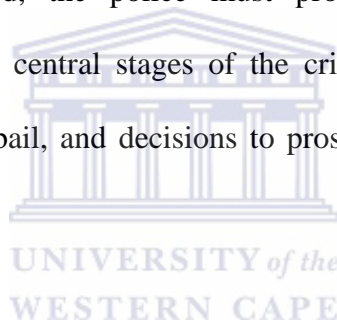
on criminal justice agencies in terms of the Victims Code to determine whether the government has discharged these obligations (see chapter 6 for a detailed discussion of the government's duties and criminal justice responses vis-à-vis victims of gender-based violence, racially and religiously motivated crime, homophobic and transphobic crime, as well as elder abuse).

3.2.1 Police

In terms of paragraph 5 of the Victims' Code, the police have several duties to provide *information* to victims who report offences (see Wolhuter, *et al*, 2009: 158). They must ensure that victims have access to information about Victim Support and other local support services. If this information is given in the form of the "Victims of crime" leaflet, the police must, provided resources are available, ensure that it is "... in a language or format the victim can understand" (para 5.3). This provision contains the only reference in the Victims' Code to a duty to accommodate the needs of victims who do not understand English. There is no general requirement that victims be granted access to interpretation and translation services. In this respect, therefore, the Victims' Code does not comply with the duty of Member States to provide interpretation and translation to victims in article 6 of the Victims' Directive (see section 3.1 above).

With the exception of minor property offences (para 5.5), and sexual offences, domestic violence and homicide unless the victim expressly consents (para 5.6), the police must explain to victims that their details will be given to Victim Support unless they do not wish this to be done (para 5.4).

In cases where there is no suspect, the police must inform victims of the progress of the case until the investigation is closed (para 5.9). They must also inform victims of the reasons for not charging a suspect (para 5.10). Where a suspect is arrested, the police must provide victims with information concerning all the central stages of the criminal justice process, including arrest, release on bail, and decisions to prosecute or not to prosecute (paras 5.14-5.26).



A recent study has shown that, although the police are aware of their duties in terms of the Victims' Code, they are "... not always clear about its detail, such as timescales for completion of notifications and updates to victims" (HMCPSI/HMICA/HMIC, 2009: 28). Furthermore, while the satisfaction of victims with police progress updates is improving, the level of this satisfaction is "... lower than that for other aspects ..." of victims' involvement with the police (HMCPSI/HMICA/HMIC, 2009: 28).

Over and above these duties in terms of the Victims' Code, the Association of Chief Police Officers ("ACPO") has produced various guidelines for police to

follow in responding to the needs of victims, particularly those from unequal social groups. The various police forces have also established internal policies for responding to such needs (see chapter 6).

3.2.2 Crown Prosecution Service

As the present author has pointed out (Wolhuter, *et al*, 2009: 158-159), s.32(5)(b) of the DVCVA provides that the Victims' Code may only impose duties on the CPS that do not relate to the discharge of a function involving the exercise of a discretion (see chapter 4). Accordingly, the duties regarding the provision of information, as well as respect and recognition, are formulated in a manner that avoids restricting the CPS' discretion.



As regards its duty to provide *information*, the CPS must inform victims of the following decisions: to continue a prosecution, that there is insufficient evidence to bring a prosecution, and to alter or drop any charge. However, it need not do so if it is of the opinion that such notification is “inappropriate or unnecessary”, or that legal reasons prohibit the provision of any “... explanation beyond setting out the tests in the Code for Crown Prosecutors” (paras 7.2-7.5). The Victims' Code will fall short of the Victims' Directive in this respect, as article 4.1 of the Victims' Directive imposes an unqualified duty on Member States to provide victims with information regarding the ending of prosecutions (see section 3.1 above).

The Victims' Code also requires the CPS to provide victims with reasons for delays to the proceedings, and to indicate the likely length of the delay (para 7.10). A recent HMCPSI assessment has shown that, in a substantial number of cases, prosecutors do not comply with these duties to provide information (HMCPSI/HMICA/HMIC, 2009: 42).

In addition, the Victims' Code imposes duties on the CPS to *respect and recognise* the interests of victims. In cases involving homicide, child abuse, sexual offences, racially and religiously motivated crimes and homophobic or transphobic crimes, the CPS is required to offer to meet victims if they decide not to bring a prosecution or to drop or alter the charges, unless it takes the view that, in the circumstances, no meeting should take place. If this view is taken, the prosecutor must record his/her reasons in writing (paras 7.6, 7.7; see chapter 6). If possible, prosecutors must introduce themselves to victims at court, and answer any questions that victims may have (para 7.9).

Besides the duties contained in the Victims' Code, the CPS has established policies for responding effectively to certain groups of socially unequal victims, such as victims of rape, domestic violence, racially and religiously motivated crime and homophobic/transphobic crime (see chapter 6).

3.2.3 Witness Care Units

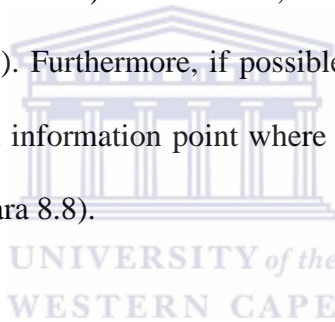
In addition to duties to provide support and assistance, the Victims' Code imposes duties regarding the provision of *information* on the joint police/CPS WCUs (see section 2.3.2 above; Wolhuter, *et al*, 2009: 160). Paragraph 6.3 provides that WCUs must inform victims if they are required to give live evidence. Furthermore, they must ensure that adult witnesses receive the "Witness in court" leaflet, and that witnesses younger than seventeen years, in cases involving sex, violence or cruelty, receive the "Young witness" information pack (paras 6.5, 6.6). These documents provide witnesses with information concerning matters such as the court layout and the way in which they are expected to behave when they testify.



WCUs must inform victims of the outcome of all pre-trial hearings, the dates of all court hearings, the verdict and/or sentence, the details of appeals lodged and the results of such appeals. They must explain the meaning and effect of sentences imposed, and answer victims' questions (paras 6.7-6.9). Consequently, besides providing support and assistance to victims (see section 2.3.2 above), WCUs function as conduits between criminal justice agencies, on the one hand, and victims, on the other, in order to facilitate the smooth flow of information. However, recent research has revealed that the performance of WCUs as regards notifying victims of court hearings and outcomes is "less than satisfactory" (HMCPsi/HMICA/HMIC, 2009: 59).

3.2.4 Court Service

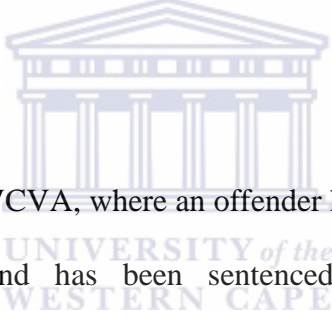
In terms of the Victims' Code, the Court Service has several duties to relay *information* to victims through WCUs and the police, as well as to *respect* victims and *recognise* their interests (see Wolhuter, *et al*, 2009: 160-161). As regards the provision of information, the Court Service must notify the WCUs of the court dates for hearings, as well as decisions concerning bail, all later hearings, adjournments, postponements, appeals and the outcome of appeals (paras 8.2, 8.3, 8.9-8.12). In addition, it must notify the police of bail decisions (para 8.3). Furthermore, if possible, the Court Service must ensure the existence of an information point where victims may receive information about their case (para 8.8).



The duty of the Court Service to provide victims with respect and recognition of their interests underpins its duty to ensure, if possible, that victims wait no more than two hours to testify, and to ascertain their telephone numbers so that they may leave the court building and be contacted when they are required to testify (paras 8.6, 8.7). However, recent research has shown that waiting times are too long, and that this is a concern for many witnesses (HMCPSI/HMICA/HMIC, 2009: 72).

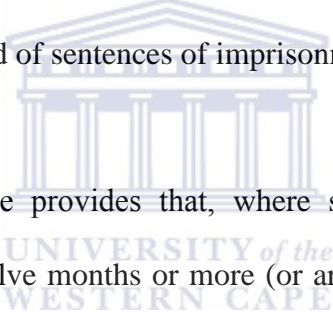
3.2.5 Probation Service and Parole Board

The DVCVA grants victims the right to receive relevant *information* concerning the release of sexual and violent offenders, as well as the right to “make representations” concerning conditions for the offenders’ release (see Wolhuter, *et al*, 2009: 169-170). The Victims’ Code reiterates and amplifies the provisions of the DVCVA. Despite the fact that the right to make representations forms part of victims’ right to be heard (see chapter 4), it is discussed in this section in view of its statutory relation to the right to receive information.



In terms of s.35 DVCVA, where an offender has been convicted of a sexual or violent offence and has been sentenced to at least twelve months’ imprisonment or detention, the local probation board “... must take all reasonable steps ...” to determine whether the victim wants to make representations. These representations must concern “... whether the offender should be subject to any licence conditions or supervision requirements ...” upon release and, if so, what these conditions or requirements should be. The probation board must also “... take all reasonable steps ...” to determine whether the victim wants to receive information about the licence conditions or supervision arrangements (if any) that are to apply to the offender upon release (s.35(1)-(5)).

If the victim makes representations, the probation board must forward them to the requisite decision-making body (s.35(6)). If the victim wishes to receive information, the probation board "... must take all reasonable steps ..." to give the victim information regarding the licence conditions or supervision arrangements concerning contact between the offender and the victim (and his/her family), as well as any other appropriate information (s.35(7)). The DVCVA includes similar provisions pertaining to victims' rights to be given information and to make representations where offenders convicted of sexual or violent offences are given hospital orders and hospital directions, amongst other things, instead of sentences of imprisonment (ss.36-44).



The Victims' Code provides that, where sexual or violent offenders are imprisoned for twelve months or more (or are given hospital orders, hospital directions, etc.), WCUs must provide the victim with a copy of the "National Probation Service Victim Contact Scheme" leaflet and refer the victim's details to the Probation Service (para 6). This duty exists to ensure that victims are notified about their rights to be given information and to make representations regarding the offender's release, and to notify the Probation Service that victims have a potential interest in the matter.

In addition, the Victims' Code repeats the duties imposed on probation boards in the DVCVA (para 10). It also provides that the Probation Service has a discretion, in consequence of information obtained from a victim, to

recommend the inclusion of conditions concerning non-contact or exclusion on prisoners' licences (para 11.3). Furthermore, prisons must ensure that the Probation Service is furnished with information concerning conditions in prisoners' licences so that it may notify the victim. The National Offender Management Service must ensure that victims are able to telephone the Prison Service helpline if they receive unwanted contact from a prisoner or if they wish to voice concerns about the prisoner's release (para 11.2).

The Parole Board must consider victims' representations and must reflect this consideration in parole decisions (para 12). It must inform the Probation Service of any conditions regarding victims, in order that victims may be informed. Furthermore, it must "... consider any information regarding the victim that relates directly to the current risk presented by a prisoner in deciding whether or not to grant or recommend release and reflect this in the parole decision."

Padfield and Roberts point out that the imposition of conditions on an offender's release may impinge on his/her right to respect for private and family life in article 8 ECHR in certain cases (Padfield & Roberts, 2010: 269). In the decision in *R (on the application of Craven) v Secretary of State for the Home Department* [2001] All ER (D) 74 (Oct) (discussed in Padfield and Roberts, 2010: 269-270), the family of a murder victim and the offender were from the same area. Consequently, the family requested the Parole Board not

to permit the offender to return to the area (para 5). The Parole Board excluded the offender from that area (paras 1, 3). While the court found that the exclusion engaged article 8 ECHR (para 27), it held that the interference with this right was proportionate (para 45). It took the view that –

A democratic society should be sensitive to the emotional harm caused to victims of crime, particularly of the most serious of crimes, to their anxieties and concerns, and to the risks of emotional or psychological harm in the event of an encounter between [a] convicted murderer and the family of his victim (para 35).

The provisions of the DVCVA, giving victims the above rights to make representations and receive information, constitute the only statutorily entrenched victims' rights currently recognised in English law. As such, it is likely that they may be enforced by way of applications for judicial review (see chapter 2).

4. PROTECTION

This section assesses measures for the protection of victims in the Victims' Code and in recent statutes, such as the YJCEA, the CJA 2003 and the CJA 2009 against the backdrop of the relevant provisions of the Framework Decision and the Victims' Directive. It contends that, although these measures comply with European standards, the fact that they are subject to judicial

discretion may impede their effectiveness, particularly for victims from unequal social groups.

4.1 EU Law

As the present author has documented (Wolhuter, *et al*, 2009: 156-157), article 8 of the Framework Decision obliges Member States to provide victims with protection. Victims, as well as their families and other persons in a similar position, where appropriate, must be given “... a suitable level of protection ...” where there is “... a serious risk of reprisals ...” or evidence of a “... serious intent to intrude upon their privacy” (article 8.1). Suitable measures must be adopted in court proceedings in such cases to protect their “... privacy and photographic image ...” (article 8.2). In addition, contact between victims and offenders on court premises must be prevented, and separate waiting areas for victims must be provided progressively (article 8.3).

In terms of article 8.4, Member States must ensure that, where victims, especially vulnerable victims, need protection “... from the effects of giving evidence in open court ...”, they may be permitted to testify in a way that will facilitate such protection, using any suitable means that accord with the principles of the relevant legal system (see article 10 of Rec. (2006) 8 for similar provisions). Article 8 expressly grants victims a right to these protective measures.

The Victims' Directive expands the ambit of the right to protection significantly. Article 17.1 provides that measures must be made available by Member States for the protection of victims and their families "... from retaliation, intimidation, repeat or further victimisation". This provision encompasses a broader range of safety issues than the narrower concept of "reprisals" in article 8.1 of the Framework Decision. Article 17.2 itemises these measures, providing that they must include measures for "physical protection", for the avoidance of contact between victims and offenders in criminal proceedings, and for minimising "... the risk of psychological and emotional harm to victims during questioning or when testifying". The provisions of article 23.1 concerning the protection of victims' "... privacy and photographic images ..." are broadly the same as those of article 8.1 of the Framework Decision.

Article 18 contains provisions not found in the Framework Decision. It lists categories of vulnerable victims, namely "children", "persons with disabilities", and "... victims of sexual violence ... and human trafficking" (articles 18.1 and 18.2). In addition, article 18.3 requires non-enumerated victims to be assessed "... to determine whether they are vulnerable". Moreover, all vulnerable victims must be assessed to decide "... which special measures ... they should benefit from" (article 18.4).

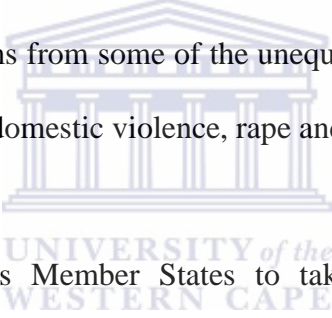
In terms of article 20, all victims have a right to be questioned “without unjustified delay” at the pre-trial stage. Interviews must be restricted to a minimum number, and victims have the right to “... be accompanied, where appropriate by their legal representative, or a person of their choice, unless a reasoned decision has been made to the contrary.”

Article 21 specifies the special measures to which vulnerable victims are entitled. In terms of article 21.2, pre-trial interviews must be conducted in designated premises by trained professionals, and all interviews must be “... conducted by the same persons unless this is contrary to the good administration of justice.” Furthermore, sexual violence victims are entitled to interviews “... by a person of the same sex”. Article 21.3 provides for special measures in court “... to avoid visual contact between victims and defendants ...”; to enable victims to testify “... without being present ...”; to avert irrelevant questions about victims’ private lives; and to conduct hearings in camera. Additional special measures must be provided for child victims, namely the use of video-recorded evidence and the appointment of “a special representative” where the child cannot be represented by parents or guardians (article 22).

The provisions of the Victims’ Directive concerning the right to protection, particularly as regards vulnerable victims, constitute a welcome extension of the comparatively sparse protection provisions of the Framework Decision.

However, the non-binding *Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence* (1997) (“Rec. No. R (97) 13”) contains more expansive provisions concerning the right to protection, which will continue to supplement the Victims’ Direction in the same way as they currently supplement the Framework Decision.

In view of the fact that Rec. No. R (97) 13 applies to vulnerable victims in general, its provisions are discussed within the present context of the right to protection. However, it also contains several provisions pertaining to the protection of victims from some of the unequal groups discussed in chapter 6, namely victims of domestic violence, rape and elder abuse.



Article 17 requires Member States to take “... legislative and practical measures ...” to protect vulnerable witnesses from intimidation and to ease pressure when they give evidence against family members in criminal cases. Children (article 19), as well as victims of domestic violence and elder abuse (article 21), must be afforded special protection. Article 27 recommends that pre-recorded video statements be used to prevent “... face to face confrontation and unnecessary repetitive examination”. It also provides that audiovisual techniques may be used at trial to enable the court to hear the witnesses away from each other’s presence. In terms of article 28, the judge must supervise the examination of the witness closely, and in cases, especially sexual offence cases, where cross-examination may traumatise a witness

excessively, s/he must “... consider taking appropriate measures to control the manner of questioning”. Furthermore, criminal justice agencies must attempt to avoid subjecting vulnerable witnesses to secondary victimisation (article 23).

In terms of article 10, Member States may grant witnesses anonymity as “... an exceptional measure ...”. There must be “... a fair balance between the needs of criminal proceedings and the rights of the defence ...”, which must include giving the defence an opportunity to contest the need for anonymity, the credibility of the witness, and the source of his/her knowledge. Anonymity should only be permitted where the witness’s life or freedom, or the ability of an undercover agent to engage in future work “... is seriously threatened” (article 11). Additional measures to protect witnesses, such as screens, facial disguise or voice distortion, should be available, if appropriate (article 12). Significantly, article 13 provides that a conviction must “... not be based solely or to a decisive extent ...” on anonymous evidence (see section 4.3.5 below for a discussion of this criterion).

4.2 Duties in the Victims’ Code

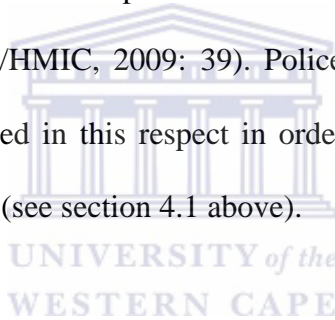
In addition to duties to provide victims with information, and to respect and recognise their interests (see section 3.2 above), the Victims’ Code imposes

duties on criminal justice agencies to protect vulnerable and intimidated victims and witnesses.

The police (see Wolhuter, *et al*, 2009: 158) must “... take all reasonable steps to identify vulnerable or intimidated victims ...”, and, if these victims qualify for special measures and must testify, the police must explain the measures to them (paras 5.7, 5.8). A recent study has revealed that police officers are not always familiar with the legal meaning, and distinction between, vulnerable and intimidated victims (see section 4.3.1 below for definitions of vulnerable and intimidated victims and witnesses), and that many use “common sense” to identify such victims. This lack of knowledge may cause officers to fail to identify victims who are eligible for special measures, or to give ineligible victims false hopes (HMCPSI/HMICA/HMIC, 2009: 25). Furthermore, Burton, *et al* (2006: 237-238) maintain that the existence of stereotypical views of “ideal” victims has impeded the recognition of victims as vulnerable or intimidated in domestic violence cases, as well as in cases where the victim and the defendant have a close relationship.

Paragraph 7.8 of the Victims’ Code imposes duties on the CPS (see Wolhuter, *et al*, 2009: 159) pertaining to the protection of vulnerable and intimidated victims. The CPS is required to ensure that procedures are in place to aid prosecutors to determine whether to apply for a special measures direction in cases concerning vulnerable or intimidated victims (see section 4.3.1 below

for a discussion of special measures directions). Recent research has shown that, at the charging stage, prosecutors identify vulnerable victims in only 55 per cent of cases, and intimidated victims in only 50 per cent of cases (HMCPSI/HMICA/HMIC, 2009: 36; see also Burton, *et al*, 2006: 234). Likewise, Hoyano (2007: 851) points to studies indicating that special measures for all vulnerable and intimidated victims have not “... become embedded in the routine practice of the police and the Crown Prosecution Service”. Consequently, many eligible victims are left without protection until much later in the criminal process – sometimes as late as the day of trial (HMCPSI/HMICA/HMIC, 2009: 39). Police and prosecutorial practice will have to be improved in this respect in order to ensure compliance with the Victims’ Directive (see section 4.1 above).



The Victims’ Code also imposes duties to protect victims, particularly vulnerable and intimidated victims, on the Court Service (see Wolhuter, *et al*, 2009: 160-161). In terms of paragraph 8.4, the Court Service must ensure that victims have access to separate waiting areas and seats in the courtroom that are not near to those of the defendant’s family and friends. In addition, where the court has made a special measures direction, the Court Service must ensure that special measures are available, if possible (para 8.5; see section 4.3.1 below for a discussion of special measures directions). A recent study has shown that almost all courthouses have separate waiting areas for witnesses (HMCPSI/HMICA/HMIC, 2009: 71). Furthermore, all courthouses

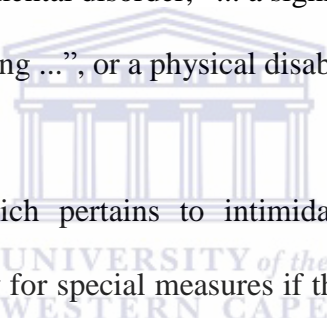
in the study have “... the full range of special measures ...” (HMCPST/HMICA/HMIC, 2009: 76). Unfortunately, however, these measures are not always available in each courtroom, and many courthouses experience technological difficulties with the equipment, causing inconvenience and delays for witnesses (HMCPST/HMICA/HMIC, 2009: 76, 77).

4.3 Protective measures in court

The secondary victimisation experienced by victims of rape and domestic violence during the trial, particularly in evidence-in-chief and cross-examination, has been outlined in chapter 2. These experiences are shared by other vulnerable victims, such as children (Ellison, 2001: 12). Drawing on the present author’s work (Wolhuter, *et al*, 2009: 161-169), this section evaluates the relevant provisions of the YJCEA, the CJA 2003 and the CJA 2009, which contain protective measures to alleviate secondary victimisation in the trial process. These measures comprise the use of special measures to assist victims to testify, the restriction of sexual history evidence, cross-examination and reporting of cases, and the admission of hearsay evidence and anonymous evidence in certain circumstances. These measures uphold the right to protection of vulnerable and intimidated witnesses, as required by the Framework Decision and the Victims’ Directive (see section 4.1 above).

4.3.1 Special measures

The YJCEA, as amended by the CJA 2009, contains an array of provisions governing the use of special measures to assist vulnerable and intimidated witnesses to testify (see Wolhuter, *et al*, 2009: 161-163). Section 16 (which pertains to vulnerable witnesses), provides that a witness qualifies for special measures if s/he is younger than eighteen at the time of the hearing (s.16(1)(a)), or if, in the court's opinion, the evidence is likely to be reduced in quality due to a mental disorder, "... a significant impairment of intelligence and social functioning ...", or a physical disability or disorder (s.16(1)(b)).



Section 17(1) (which pertains to intimidated witnesses) provides that a witness will qualify for special measures if the court is of the opinion that the quality of the evidence is likely to be reduced because of the witness's fear or distress concerning the adducing of testimony. In order to decide whether this is the case, the court is required to consider several factors, such as the witness's age, social and cultural background, ethnic origins, domestic circumstances, and religious beliefs (s.17(2)). Victims who are witnesses in sexual offence cases are automatically eligible for special measures, unless they inform the court that they do not want to use such measures (s.17(4)). Section 99 of the CJA 2009 inserts a new s.17(5), which provides that witnesses in proceedings pertaining to certain offences involving weapons, such as murder, manslaughter and non-fatal offences against the person (see

the new Schedule 1A to the YJCEA), automatically qualify for special measures, unless they inform the court that they do not wish to qualify. This provision enables victims from unequal social groups, such as victims of domestic violence, racially motivated and homophobic hate crime, whose victimisation involves weapons, to qualify automatically for special measures.

Prior to the introduction of the CJA 2009, s.21 of the YJCEA regulated the provision of special assistance to child witnesses (under seventeen), especially child witnesses in need of special protection. Such witnesses included those giving evidence in sexual offence, kidnapping and assault cases. The court was required to admit pre-recorded video evidence (see below) by child witnesses in need of special protection and permit them to give evidence by live television link (see below) as regards any matter that had not been pre-recorded, if the requisite measures were available (s.21(3), s.21(4)(a)). Apart from child witnesses in need of special protection, the court could dispense with special measures if it was of the view that such measures would not "... be likely to maximise the quality of the witness's evidence" (s.21(4)(c), s.21(5)).

The provisions of s.21 pertaining to child witnesses in need of special protection were criticised for disempowering child witnesses by depriving them of the opportunity to choose other methods of testifying (Hoyano, 2007: 856-857). Consequently, a recent governmental review group proposed the

abolition of the distinction between child witnesses in need of special protection and other child witnesses, and recommended that special measures for child witnesses ought to "... be based on the 'assessed need' of the witness" (Hoyano, 2007: 857). Flowing from these proposals, the CJA 2009 makes substantial changes to s.21. First, it abolishes the category of "... child witnesses in need of special protection ...", making s.21 applicable to child witnesses generally (s.100(2)). Second, it provides that, if the child witness does not wish to give evidence by pre-recorded video recording and/or by live link, the court may permit evidence to be given by other means if, in its opinion, this "... would not diminish the quality of the witness's evidence" (s100(4)(b)). If, in consequence, the child is to testify in court, the court must make a special measures direction requiring the use of a screen (see below). Hoyano (2010: 351) states that the consequence of this provision is "... that the admission of the video interview and live link can now be challenged for *every* child witness ..." and that this generates the possibility that the prosecution may have to show that, in the absence of these special measures, "... a child might otherwise give no, or incomplete, evidence".

Further, the court need not make a special measures direction requiring the use of a screen if the child does not want to use one and, in the court's opinion, this "... would not diminish the quality ..." of his/her testimony, or if it is of the view that using a screen "... would not be likely to maximise the quality ..." of his/her testimony (s.100(5)). When deciding whether to accede

to the child's wish not to testify by means of a pre-recorded video, live link or screen, the court must consider several factors, including the child's age and maturity, the child's ability to understand the consequences of his/her wish, any relationship between the child and the defendant, and the child's "... social and cultural background and ethnic origins ..." (s.100(6)).

Besides its provisions pertaining to specific categories of vulnerable and intimidated witnesses, the YJCEA also contains a range of special measures to assist such witnesses to testify. In terms of s.23, the witness may testify from behind a screen so that s/he cannot see the defendant. In terms of s.24, the witness may testify by way of a live television link (see also, s.51 CJA 2003). The CJA 2009 has amended s.24 to include a provision that a support person may accompany the witness while s/he is testifying by live link (s.102(1)).

In addition, s.25 of the YJCEA provides that the court may exclude all persons except the defendant, legal representatives and interpreters from the courtroom while a witness is testifying in sexual offence cases, or in cases where there are reasonable grounds to believe that a witness may be intimidated. The court may also dispense with the wearing of wigs or gowns for the duration of the witness's testimony (s.26).

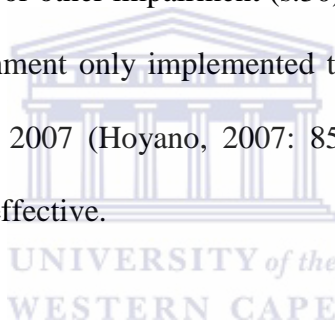
Furthermore, a video recording of an interview with the witness may be admitted as his/her evidence-in-chief (s.27). However, if the judge is of the

opinion that the interests of justice require that the video-recorded evidence must not be admitted, s/he will not grant a special measures direction to this effect (s.27(2)). In addition, if "... the witness will not be available for cross-examination ...” and the parties have not agreed that the witness need not be available for cross-examination, the court may order that the video-recorded evidence may not be admitted (s.27(4)(a)). Prior to the CJA 2009, the YJCEA provided that, if the video-recorded evidence is admitted, the witness may not give evidence in any other way in regard to anything that "... has been dealt with adequately ...” in his/her recorded evidence (s.27(5)(b)(i)), and may not do so regarding anything else in his/her recorded evidence without the court’s permission (s.27(5)(b)(ii)). The CJA 2009 removes the distinction between s.27(5)(b)(i) and (ii) by inserting a new s.27(5)(b) to the effect that the witness may not give evidence in any other way regarding anything in the pre-recorded testimony, without the court’s permission (s.103(2)). If the court gives its permission, it may order that the evidence be given by live link (s.27(9)).

In terms of s.28, in cases where video-recorded evidence has been admitted as evidence-in-chief, the court may also admit video-recorded cross-examination and re-examination. This provision, which has been highly controversial, has never been brought into force. Instead, a governmental review group has recommended recently that s.28 ought to be revised to apply to witnesses who are the most vulnerable, and then only if there is no other "... way in which

they would be able to give evidence” (Hoyano, 2007: 855). Examples of eligible witnesses would include those who are very young, terminally ill or suffering from a mental incapacity (Hoyano, 2007: 855). The government has yet to respond to this recommendation.

The YJCEA introduced two further special measures that only apply to s.16 witnesses, namely the use of intermediaries (s.29) and devices to enable the witness to communicate or receive questions and answers despite having a disability, disorder or other impairment (s.30). Although s.29 has existed for a decade, the government only implemented the intermediary special measure nationally in June 2007 (Hoyano, 2007: 850), and it is too soon to know whether it will be effective.



Apart from child witnesses in need of special protection, who are automatically entitled to the relevant special measures (see above), the court must determine whether any one or more of the special measures is likely to improve the quality of the witness’s evidence, and, if so, which measure(s) will be likely to do so. If it decides to allow the special measures, it must make a special measures direction in the requisite terms (s.19(2)). Special measures directions are always made conditional upon their availability in the relevant court (s.18). If testimony has been adduced by way of special measures in a jury trial, the court is required to warn the jury that this may not prejudice the defendant (s.32).

In *R (D) v Camberwell Green Youth Court; R (Director of Public Prosecutions) v Camberwell Green Youth Court* [2005] 2 Cr App R 1, the House of Lords held that the special measures contained in s.21 YJCEA do not infringe the defendant's right to examine witnesses in terms of article 6(3)(d) of the ECHR (see chapter 2). It is thus unlikely that the courts will find any of the other special measures in contravention of this right.

The foregoing analysis indicates that special measures comply with the ECHR. They are also consonant with, and in several respects more encompassing than, the requirements of the Framework Decision and the proposed Victims' Directive. However, Ellison has contended that the courts' predilection for oral testimony has hampered the use of special measures for complainants in rape cases (Ellison, 2000:53). Consequently, the routine use of such measures requires a dramatic change in courtroom culture on the part of both prosecution and defence (Quinn, 2003:142; see also, Ellison, 2001: 60-61).

Fortunately, the CJA 2009 goes a long way to ensuring that pre-recorded video evidence is used more routinely in such cases. Section 101 inserts a new s.22A into the YJCEA making special provision for vulnerable (s.16) and intimidated (s.17) victims of sexual offences who are not under the age of eighteen at the time of the hearing, in cases where the trial does not take place in the magistrates' court. If, on application for pre-recorded video evidence to

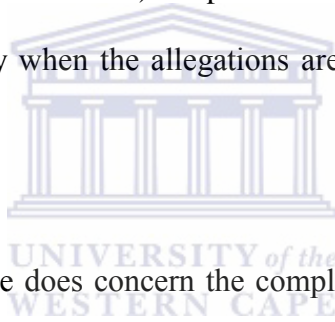
be used, the court determines that the victim qualifies for assistance in terms of s.16(1)(b) or s.17, it must grant the application, unless, in its opinion, testifying in such a way “... would not be likely to maximise the quality ...” of the victim’s testimony.

4.3.2 Restrictions on sexual history evidence

The YJCEA introduced substantial restrictions on the admissibility of sexual history evidence (see Wolhuter, *et al*, 2009: 163-165). The purpose of these restrictions is to protect rape victims from traumatic and intrusive cross-examination regarding their sexual past that causes significant secondary victimisation (see chapter 6 for a discussion of other measures to reduce such secondary victimisation). In sexual offence cases, no evidence or question under cross-examination concerning the victim’s past sexual behaviour may be adduced or asked by or on behalf of the defendant, unless the court allows it (s.41(1)).

“Sexual behaviour” is defined in s.42(1)(c) as “... any sexual behaviour or other sexual experience, whether or not involving the accused or any other person, but excluding (except in s.41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused”. The courts have construed this definition narrowly to exclude evidence of previous false allegations by the complainant, leaving

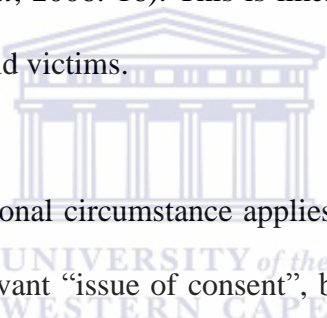
defendants free to cross-examine victims about these allegations. In *R v M* [2009] EWCA Crim 618 the Court of Appeal confirmed that “evidence or questions” concerning previous false allegations “... are not about any sexual behaviour of the complainant”. However, in order to find that the evidence or questioning does concern a false allegation, there must be “... a proper evidential basis for asserting that the previous complaint was made and was untrue” (para 21). This approach is open to criticism as encompassing a threshold for the admission of evidence of allegedly false complaints that is too low (Thomas, 2010: 795). A preferable approach for many is to admit such evidence only when the allegations are “demonstrably false” (Thomas, 2010: 795).



Where the evidence does concern the complainant’s sexual behavior, s.41(2) provides that the court may admit sexual history evidence in specifically delineated circumstances, provided that it is satisfied that to refuse leave may render the conclusion of the jury or court unsafe on a “... relevant issue in the case”.

The first such circumstance is where the evidence or question, although relating to a “relevant issue”, does not relate to “an issue of consent” (s.41(3)(a)). For instance, s.42(1)(b) provides that the defendant’s belief in consent, as opposed to the existence or otherwise of consent itself, is not an issue of consent. Many defendants rely on a belief that the victim consented,

as an alternative to a contention of consent. Consequently, this provision generates a loophole that will enable many defendants to succeed in having sexual history evidence admitted (Temkin, 2002: 210). Furthermore, an allegation by the defendant that he did not have intercourse with the victim is not an issue of consent. Accordingly, he will be able to lead sexual history evidence in support of this allegation (Kelly, *et al*, 2006: 15). In cases involving sexual offences with children below the age of consent, sexual history evidence will also be admissible, as it will not relate to an issue of consent (Kelly, *et al*, 2006: 16). This is likely to cause significant secondary victimisation to child victims.

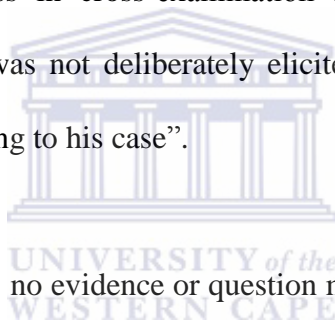


The second exceptional circumstance applies where the evidence or question does involve a relevant “issue of consent”, but concerns the victim’s alleged sexual behaviour “... at or about the same time...” as the incident giving rise to the charge (s.41(3)(b)). In *R v A (No. 2)* [2001] 2 Cr App R 21, Lord Steyn stated that evidence that the victim invited the defendant to have sexual relations with her earlier in the evening prior to the alleged rape would be admissible in terms of this provision. He added, however, that it is not possible to “... extend the temporal restriction to days, weeks or months” (para 40). Despite this temporal restriction, the admission of such evidence is founded on the myth that a woman who had been raped would not have behaved in this way (Temkin, 2002: 213).

The third exceptional circumstance applies if the evidence or question does concern a relevant “issue of consent”, but concerns sexual behaviour of the victim, which was allegedly “so similar”, either to behaviour which occurred as part of the incident giving rise to the charge, or to any of the victim’s other sexual behaviour which occurred “... at or about the same time ...” as this incident, “... that the similarity cannot reasonably be explained as a coincidence” (s.41(3)(c)). The following hypothetical example provided by Kibble illustrates this provision. A woman was gang raped by a group of men whom she had met for the first time on the evening of the alleged rape, with whom she had been drinking and dancing, and with whom she had left voluntarily. The defendants wished to adduce evidence that the victim had been involved in similar conduct three weeks before the event, that she had suggested sexual activity, as she had done at the time of the alleged rape, and consequently that she had consented to the sexual intercourse (Kibble, 2005: 195-197). The admission of this kind of evidence gives credence to the myth that women who have consented to morally dubious conduct in the past must have done so at the time of the offence.

The last exception arises where the evidence or question concerns evidence adduced by the prosecution regarding the victim’s sexual behaviour, and the court is of the view that such evidence or question would not go further than is necessary to rebut or explain the prosecution’s evidence (s.41(5)). For instance, if the prosecution lead evidence that the victim was a chaste married

woman, the defence may lead evidence that she had committed adultery. In *R v Hamadi* [2007] Crim LR 635, 637, the Court of Appeal stated, albeit obiter, that, in its natural meaning, the phrase “... evidence adduced by the prosecution ...” in s.41(5) referred to evidence given by witnesses for the prosecution during evidence-in-chief as well as evidence elicited by the prosecution during cross-examination. However, in order to ensure that the defendant receives a fair trial, s.41(5) must be read broadly to permit the defendant to lead evidence to explain or rebut “... something said by a prosecution witness in cross-examination about the complainant’s sexual behaviour which was not deliberately elicited by defence counsel, and was potentially damaging to his case”.



In terms of s.41(4), no evidence or question may be regarded as relating to “... a relevant issue in the case ...” if, in the court’s opinion, it may reasonably be assumed that the purpose (or primary purpose) of the evidence or question is to impugn the victim’s credibility. Unfortunately, the Court of Appeal in *R v Martin* [2004] 2 Cr App R 22 has watered down the effectiveness of this limitation. It held that, even if one of the purposes of the evidence or question is to impugn the credibility of the victim, such evidence or question is admissible, if its purpose or main purpose is not to impugn her credibility (para 37).

The objective of s.41 was that, unless a victim's past sexual behaviour fell within the ambit of one of the above exceptions, it was irrelevant. However, notwithstanding this objective, the House of Lords in *R v A (No. 2)* reintroduced the judicial discretion to admit sexual history evidence that does not fall squarely into one of these exceptions. Lord Steyn held that the provisions of s.41, in particular s.41(3)(c), insofar as they relate to previous sexual activity between the victim and the defendant, must be interpreted as being subject to the defendant's right to a fair trial in terms of article 6 ECHR. Consequently, "... logically relevant sexual experiences ..." between a victim and a defendant may sometimes be admissible in terms of s.41(3)(c). Equally, however, there will be instances in which previous sexual activity between the victim and the defendant will be irrelevant, for instance, "... an isolated episode distant in time and circumstances ..." (para 45).

The test, said Lord Steyn, is whether the evidence or question was "... so relevant to the issue of consent that to exclude it would endanger the fairness of the trial". If it was so relevant, it ought not to be excluded (para 46). The trial judge must use his/her discretion to determine whether this test is satisfied (para 45). Lord Steyn emphasised, however, that, in applying this test, "due regard" must be given to the "... importance of seeking to protect the complainant from indignity and from humiliating questions" (para 46). Beyond positing the above example of an irrelevant relationship between the victim and the defendant, the court did not clarify the distinction between

relevant and irrelevant prior relationships. Accordingly, Temkin has argued that it is likely that evidence concerning a prior relationship “... will generally be admitted in the future for fear of a successful appeal” (Temkin, 2002: 224).

Historically, the judiciary has displayed a gendered attitude to the admissibility of sexual history evidence (Lees, 2002: 151; Temkin, 2003: 219-221). Recent research by Kelly, *et al* indicates that such gendered attitudes persist. For instance, one of the judges interviewed in their study stated that it is “... relevant whether a woman was a virgin or a whore ...”, and that, “... if a woman accepts a lift home in a car and she and the alleged offender end up in a cul-de-sac where she claims she is raped, then it is relevant whether she comes from a nunnery or whether she has had sex in a cul-de-sac six times before” (Kelly, *et al*, 2006: 50). The reinstatement of judicial discretion in *R v A (No. 2)* may thus be viewed by judges as an invitation to adopt an expansive approach to the admissibility of evidence of past sexual relations between victims and defendants. Kelly, *et al* found that the judges interviewed had a tendency to adopt a broad interpretation of *R v A (No. 2)* and to permit sexual history evidence on the basis that a fair trial would not result otherwise, regardless of the terms of s.41 (Kelly, *et al*, 2006: 73). Of even greater concern is their finding that sexual history evidence is allowed in many trials in the absence of s.41 applications, and with no objection from either prosecutors or judges (Kelly, *et al*, 2006: 45).

It is consequently arguable that the legislature's attempt to protect rape victims from secondary victimisation has been unsuccessful. On the one hand, the provisions of s.41 themselves permit sexual history evidence that draws on rape myths in some cases (see above). On the other hand, *R v A (No. 2)* has re-opened the door to the admission of the sexual history between victims and defendants based on gendered conceptions of women's sexuality. While such loopholes will probably be held to be Convention compliant by the ECtHR due to the importance of balancing defendants' rights and victims' rights, they nonetheless place rape victims in an unenviable position. Temkin has contended that the position of rape victims in this respect may be ameliorated by the introduction of victims' lawyers (Temkin, 2003: 241; see chapter 4).



4.3.3 Restrictions on cross-examination

The YJCEA introduced several restrictions on cross-examination by the defendant in person (see Wolhuter, *et al*, 2009: 165-166). The objective of these restrictions was to counter the secondary victimisation experienced by rape victims due to bullying tactics employed by unrepresented defendants who cross-examined them in person (Temkin, 2002: 320-321). Such bullying tactics included the defendant wearing the same clothes in court as he had at the time of the rape, as well as asking the victim "... intimate questions about sex, her sexual health, and her underwear" (Temkin, 2002: 320-322). In order to protect victims from such secondary victimisation, s.34 of the YJCEA

provides that the defendant in a sexual offence case may not cross-examine the victim in person regarding the sexual offence (or any other offence) with which he is charged (see chapter 6 for an analysis of other measures to alleviate the secondary victimisation of rape victims).

Section 35 recognises that defendants representing themselves may also bully victims in other cases, such as child abuse cases. In terms of s.35(1), no defendant may cross-examine in person a protected witness regarding an offence covered by s.35, or any other offence with which s/he is charged. A protected witness is the complainant or a witness to the commission of the relevant offence, who is either a child or who is to be cross-examined after having testified by video-recording or other evidence made or given at the time he or she was a child (s.35(2)). The offences to which s.35 applies include sexual and physical offences against children (s.35(3)).

In addition, in terms of s.36, a court may refuse to allow a defendant to cross-examine in person in cases that do not fall within the purview of s.34 and s.35. The court may exercise this discretion if, in its opinion, it is likely that the quality of the witness's testimony in cross-examination would be reduced if the defendant cross-examines in person and would be improved if such cross-examination were disallowed, and that the prohibition of such cross-examination would not be against the interests of justice. The courts thus have the power to protect vulnerable victims other than victims of rape and child

abuse from experiencing secondary victimisation by unrepresented defendants.

However, in order to ensure compliance with the defendant's right to a fair trial in article 6 ECHR, the court must request the defendant to find a lawyer to conduct the cross-examination (s.38(2)). If the defendant does not do so, the court must decide whether the appointment of a lawyer to conduct the cross-examination is in the interests of justice (s.38(3)). If it is, the court must appoint a lawyer (s.38(4)) at state expense (s.40). If the court deems it necessary, it must warn the jury that the defendant must not be prejudiced by inferences being drawn from his/her inability to cross-examine in person, or by the fact that a court-appointed lawyer rather than the defendant's own lawyer conducted the cross-examination (s.39).

These restrictions have eliminated a significant aspect of secondary victimisation, signifying the government's commitment to upholding victims' right to protection. Unfortunately, however, they are insufficiently far-reaching. Victims of rape, domestic violence and child abuse experience secondary victimisation, not only by unrepresented defendants cross-examining them in person, but also by defence counsel (see Ellison, 1998: 606; Cretney & Davis, 1997: 151; Ellison, 2001: 13). Ellison maintains that it is unsatisfactory that the debate has been restricted to the traumatic nature of cross-examination by the defendant in person, and has ignored "... the much

more frequent and often equally disturbing experience of cross-examination by defence counsel” (Quinn, 2003: 148). Chapter 4 argues that the introduction of victims’ lawyers, equipped with the right to object to confrontational questioning by the defence, is necessary in order to protect victims from this ordeal.

4.3.4 Hearsay evidence

The admission of hearsay evidence in certain circumstances may enable witnesses who are too afraid to testify to escape the harrowing experience of cross-examination by the defence (see Wolhuter, *et al*, 2009: 167-168). Before the CJA 2003, the circumstances in which hearsay evidence was admissible where witnesses were unwilling to testify due to fear were governed by the CJA 1988 (see below). The CJA 2003 has broadened these circumstances. Section 116(1), read with s.116(2)(e), provides that a statement not made in oral evidence is admissible as evidence of any matter stated if it is made by a person whose oral evidence on that matter would have been admissible in court; the person has been identified to the court’s satisfaction; through fear, the person does not testify (or continue to testify) orally, “... either at all or in connection with the subject matter of the statement ...”; and the court permits the statement to be adduced as evidence. “Fear” must be given a broad construction, and includes, for instance, “... fear of the death or injury of another person or of financial loss” (s.116(3)).

The court may permit the admission of such a statement only if, in its opinion, the admission is required in the interests of justice (s.116(4)). The court must consider the following in making its decision: the contents of the statement; the risk that its admission or exclusion will be unfair to any party, with particular regard to the difficulty of challenging it if the person does not give oral evidence; the fact that a special measures direction may be made; and any other relevant circumstances (s.116(4)(a)-(d)). Nevertheless, the court may exclude the statement if, in its opinion, "... the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence" (s.126(1)(b)). Furthermore, the court's discretion to exclude the statement in terms of s.78 of the Police and Criminal Evidence Act 1984, as well as any other relevant discretionary power, is preserved (s.126(2)).

Section 116 has extended the circumstances in which the statements of frightened witnesses were admissible in terms of the CJA 1988. In terms of s.23(1), read with s.23(3), of the CJA 1988, a first-hand hearsay statement in a written document made to a police officer or another person "... charged with the duty of investigating offences or charging offenders ...", by a person who did not give oral evidence due to fear, amongst other things, was admissible. Section 116 applies, not only to written, but also to oral statements, and does not require the statement to be made to a police officer. In addition, as stated

above, “fear” is construed broadly. According to O’Brian, the Law Commission Report (which preceded the CJA 2003) “... suggests that it would be enough to trigger this provision if the witness is ‘just scared of the process of giving evidence’” (O’Brian, 2005: 484).

In *R v Sellick and Sellick* [2005] 2 Cr App R 15, the Court of Appeal held that, in cases where the defendant causes the witness to be too afraid to testify, the admission of hearsay evidence in terms of s.23(1), read with s.23(3), of the CJA 1988, complies with the defendant’s right to examine witnesses in article 6(3)(d) ECHR. This is so even if the evidence is the “sole or decisive evidence” against the defendant (paras 51-52). However, it emphasised that the courts must take care to ensure that these provisions, as well as those in s.116 of the CJA 2003, are not abused (para 57). This view has been endorsed by the House of Lords in *R v Horncastle* [2010] 1 Cr App R 17, para 104, and by the ECtHR in *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1, para 37 (see chapter 2).

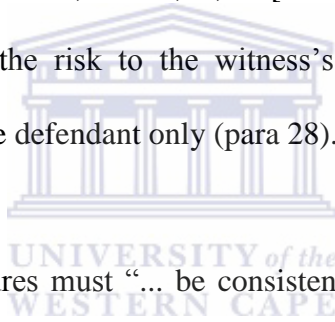
Despite this expansive approach to the admission of hearsay evidence, the courts are reluctant to admit it in cases involving victims of racially and religiously motivated crime and homophobic and transphobic violence, where the victim is the only witness (see chapter 6). In view of the fact that such victims are among those who experience the most fear (which frequently emanates from the defendant or his/her associates), this judicial reluctance

hampers the admission of hearsay evidence in cases involving victims who have the greatest need for protection. While the hearsay provisions comply with the government's duty to uphold victims' right to protection, they may thus be less than effective in practice.

4.3.5 Anonymous witnesses

Within the context of its commitment to putting victims at the heart of criminal justice (see chapter 2), the admissibility of anonymous testimony, particularly in the case of frightened witnesses, was one of the Labour government's key concerns. The CEWAA, which was temporary legislation valid until the end of 2009, introduced witness anonymity orders. The CJA 2009 effected the permanent enactment of the CEWAA. Section 86 empowers courts to grant a witness anonymity order requiring appropriate measures to be taken regarding a witness to preclude the disclosure of his/her identity, not only to the public, but also to the defence. Such measures include withholding the witness's name and other details; using a pseudonym; prohibiting questions that may result in identification; screening the witness; and modulating the witness's voice (s.86(2)). However, screens and voice modulation may not prevent the judge, jury or interpreter, if any, from seeing the witness and hearing his/her natural voice (s.86(4)).

Before a court may grant a witness anonymity order, three conditions must be satisfied. Insofar as they apply to frightened witnesses, these conditions are as follows. First, the measures must be necessary to protect the witness's safety, the safety of another, or "... serious damage to property" (s.88(3)(a)). When deciding whether the measures are necessary, the court must take cognisance of "... any reasonable fear ..." on the witness's part that s/he, or another, "... would suffer death or injury ...", or that "... serious damage to property" would result if s/he were identified (s.88(6)). In *R v Mayers, Glasgow, Costelloe, Bahmanzadeh, R v P, V, R* [2009] 1 Cr App R 30, the Court of Appeal held that the risk to the witness's safety may emanate from any source, not only the defendant only (para 28).



Second, the measures must "... be consistent with the defendant receiving a fair trial" (s.88(4)). Third, the order must be necessary "... in the interests of justice ..." because the court considers it important that the witness gives evidence, and s/he would not do so without the order, or that "... real harm to the public interest ..." would ensue if the witness does not testify anonymously (s.88(5)). In *Mayers*, the court emphasised that the requirement that the witness will not testify without the order means that the witness must refuse to testify. Mere reluctance or unhappiness at the prospect of testifying is insufficient (para 26).

The court must consider several factors in determining whether the conditions have been fulfilled. These include the defendant's right to know the witness's identity; whether the witness's testimony may be "the sole or decisive evidence" against the defendant; whether the testimony may be tested properly without disclosing the witness's identity; and whether there are other "reasonably practicable" ways to protect the witness's identity (s.89). In *Mayers*, the court held that the object of these factors is to protect the defendant's interests (para 19). It stated further that, although the "sole or decisive evidence" criterion is merely a factor, and not a condition for the imposition of an order, it "directly impinges" on the second condition, namely that the measures must be consistent with a fair trial. If the evidence is both the sole and the decisive evidence, it may be more difficult to comply with the second condition (para 23).

In terms of s.90, if a witness testifies anonymously in consequence of a witness protection order, the court is required to warn the jury in appropriate terms that the fact that the order has been made must not prejudice the defendant.

The CJA 2009 does not address the question whether anonymous hearsay evidence is ever admissible. The court in *Mayers* held that neither the CEWAA nor the hearsay provisions in the CJA 2003, permit the admission of such evidence, and that, should it wish to do so, the matter must be dealt with

by Parliament (para 113). Ormerod maintains that it is very unlikely that the ECtHR “... would ever condone a conviction based on anonymous hearsay” (Ormerod, 2009: 279).

The provisions on anonymity comply in most respects with the Framework Decision, the Victims’ Directive and Rec. No. R (97) 13. However, the relegation of the “sole or decisive evidence” criterion to a mere factor, rather than a prerequisite for the granting of a witness anonymity order, is inconsonant with article 13 of Rec. No. R (97) 13 (see section 4.1 above). It is also inconsistent with the jurisprudence of the ECtHR. However, the Supreme Court has held in *Horncastle* that the ECtHR jurisprudence on the “sole or decisive” criterion must not be applied in the case of anonymous testimony in English law (para 50; see chapter 2). This consideration apart, it remains to be seen whether the courts will include victims from unequal social groups amongst those that it deems eligible for witness anonymity orders.

4.3.6 Restrictions on reporting

In order to ensure that certain victims who testify are not intimidated or traumatised in consequence of giving evidence, the YJCEA provides that their identity and other personal details may be protected (see Wolhuter, *et al*, 2009: 168-169). A court may order that, for the duration of court proceedings, the personal details or images of a witness younger than eighteen may not be

published, if publication may cause people "... to identify him [or her] as a person concerned in the proceedings" (s.45).

Upon application, a court may also make a reporting direction regarding adult witnesses in certain cases (s.46). In terms of such a direction, the witness's personal details or images may not be published during his/her life, if publication may cause people "... to identify him [or her] as being a witness in the proceedings". A reporting direction may be made if the court decides that the witness qualifies for protection, and that the direction may improve the quality of his/her testimony or the degree of his/her co-operation (s.46(2)). A witness qualifies if, in the court's opinion, the quality of the witness's evidence or the degree of his/her co-operation "... is likely to be diminished by reason of fear or distress ... in connection with being identified by members of the public as a witness in the proceedings" (s.46(3)). In order to determine a witness's eligibility, the court must have regard to several factors, such as age, social and cultural background, ethnic origins, domestic circumstances, religious beliefs, as well as any views expressed by the witness (s.46(4), s.46(5)).

These provisions may benefit victims from unequal social groups (see chapter 6), such as victims of domestic violence and racially and religiously motivated crime, by preventing fear of possible reprisals by members of the victim's or the defendant's family or the public generally. They may also protect victims

of homophobic and transphobic crime from public scrutiny of their private lives and sexuality, as well as the possibility of further victimisation due to their sexuality. Accordingly, these reporting restrictions conform to the duty in article 8 of the Framework Decision and article 23 of the Victims' Directive to protect such victims' privacy.

5. EFFECTIVENESS OF SERVICE “RIGHTS”

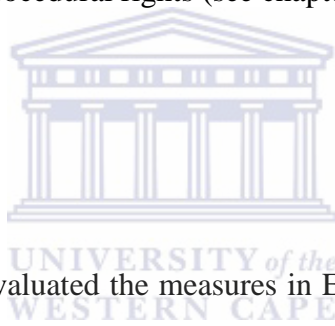
The analysis of the support and assistance afforded to victims (see sections 2.2 and 2.3 above) has shown that, with the help of Victim Support, the UK has gone beyond complying with its duties in the Framework Decision (as well as the proposed Victims' Directive) to being at the forefront of service provision in Europe (see Wolhuter, *et al*, 2009: 154). The lack of an enforceable right to support and assistance, as well as the absence of statutory duties on Victim Support, has not hampered the quality of services to victims. However, use of these services by victims from unequal social groups, particularly racial minority and LGBT victims, has been limited, due to structural and cultural barriers to reporting. Nevertheless, these victims receive support and assistance from “unofficial” agencies. The advocacy of such agencies has contributed to the emergence of efforts by the government and Victim Support to enhance services to such victims.

The same cannot necessarily be said of the other service rights discussed in this chapter (see Wolhuter, *et al*, 2009: 170-171). Although the measures giving effect to the rights to information, respect and recognition, and protection are consonant with European standards, several difficulties persist. The duties on criminal justice agencies in the Victims' Code are not enforceable, merely entitling victims to complain if they are not discharged. Victims who face non-complying agencies thus have no legal standing to enforce compliance by court action (see chapter 2). In light of research indicating that agencies, particularly the police, do not always fulfil their obligations, especially to victims from unequal social groups (see chapter 6), the absence of legal standing places victims in an unenviable position. In addition, apart from the prohibition of cross-examination by the defendant in person in cases involving sexual offences and protected child victims, all the protective measures in the YJCEA are subject to judicial discretion. Victims thus cannot insist that the courts employ these measures.

Even the statutory right to information regarding the release of sexual and violent offenders is underpinned by an obligation on the Probation Service merely to take reasonable steps to provide such information. The vagueness of the "reasonableness" criterion enables the Probation Service to avoid its duties without victims being able to insist on the information. However, victims may institute proceedings for judicial review (see chapter 2).

Although these measures demonstrate that the government is serious about its commitment to victims, the barriers to their practical effectiveness are causes for concern. Chapter 2 has argued that the coalition government must accept the Victims' Directive and introduce enforceable victims' rights granting victims legal standing to enforce the discharge of duties in terms of the Victims' Code by court action, in order to strengthen the position of victims. An additional means of doing so, within the context of proceedings involving judicial discretion, is to afford victims the status of parties to the proceedings with enforceable procedural rights (see chapter 4).

6. CONCLUSION



This chapter has evaluated the measures in English law and policy regulating service rights, namely support and assistance, information, respect and recognition, and protection, against the backdrop of the duties of Member States in EU law. It has found that, while most existing measures comply with these duties, improvements are necessary to ensure that victims, especially socially unequal victims, have access to these right. It has contended that the rights must be made enforceable (see chapter 2). As will be argued more fully in chapter 7, the recognition of such enforceable service rights is indispensable for the effective implementation of a conception of victims' rights as human rights.

CHAPTER 4: PROCEDURAL RIGHTS

1. INTRODUCTION

While chapter 3 has addressed victims' rights to receive certain services from criminal justice agencies, this chapter considers the controversial question whether victims ought to be granted procedural rights in the criminal process. Fenwick defines procedural rights as those which "... afford the victim opportunities of influencing certain decisions at various stages of the criminal process ... through consultation or participation in them" (Fenwick, 1997: 318). These rights include the right to be consulted by the CPS in deciding whether to prosecute or to accept a plea; by the court in deciding sentence; and by the Parole Board in deciding whether the offender should be released (Ashworth, 1993: 499). More broadly, they also include the right to legal representation and the right to participate in the trial.

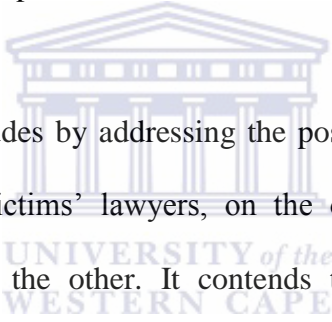
As victims are merely witnesses for the Crown, they have no legally enforceable procedural rights (apart from the right to make representations concerning the release of offenders; see chapter 3). However, in order to alleviate their experiences of secondary victimisation (see chapter 2), recent reforms have granted them limited (unenforceable) procedural rights (see Wolhuter, *et al*, 2009: 173-174). In consequence of these reforms, the CPS must take into account the effect on victims of its decisions whether to

continue prosecutions and to accept pleas from the defendant. In addition, victims may make Victim Personal Statements (“VPS”) stating how the offence has affected them, for consideration by the court at the stage of sentencing.

This chapter evaluates these procedural “rights” in light of the relevant provisions of EU law. In order to highlight their limitations, it analyses the measures granting victims procedural rights in the US, Germany, Sweden and the Netherlands. It contends that the US, which allows victims to make victim impact statements and, in certain cases, also permits victim statements of opinion on sentencing, opens the criminal process to a punitive law and order ideology that violates defendants’ due process rights and fails to achieve real victim empowerment. However, it maintains that the willingness of the US to permit victims legal representation is a welcome sign of the incorporation of a traditionally inquisitorial measure into an adversarial system.

The chapter also demonstrates that auxiliary prosecution, which is used in several Continental jurisdictions, grants victims of serious offences comprehensive procedural rights that ameliorate secondary victimisation extensively. In addition, almost all Continental jurisdictions permit legal representation for victims, which gives them a strong voice in the criminal process. In order to illustrate the compatibility of these procedures with inquisitorial as well as adversarial systems, the chapter analyses their use in

an inquisitorial system (German law) and in a mixed system, which has an adversarial trial (Swedish law). It maintains that, as these procedures have met with success in Sweden, they may be introduced in the UK without overhauling its adversarial system. The chapter also considers the adhesion procedure in Dutch law, in terms of which victims may join their civil compensation claims to the criminal proceedings. However, it argues that compensation orders, which are used in the UK, meet victims' compensation needs adequately, and that the adhesion procedure would be of little value in the English criminal process.



The chapter concludes by addressing the possible conflict between auxiliary prosecution and victims' lawyers, on the one hand, and defendants' due process rights, on the other. It contends that, in light of the increasing convergence between adversarial and inquisitorial systems, as well as the recognition of an inclusive concept of a fair trial that covers both defendants' and victims' rights, these measures do not violate defendants' rights, as long as victims are not allowed to express opinions on sentence.

2. FORMS OF PARTICIPATION

The term "victim participation" has come to signify the exercise by victims of their procedural rights. Consequently, in order to facilitate the analysis of these rights, it is necessary to delineate the various meanings that have been

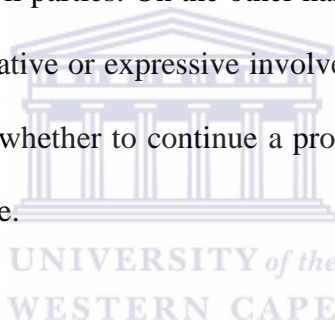
given to the term “victim participation” (see Wolhuter, *et al*, 2009: 174-175). Edwards maintains that such participation may take one or more of four possible forms. First, victims may have decision-making control, which would oblige criminal justice agencies to “... ascertain and apply the victim’s preference in the particular case” (Edwards, 2004: 974). In view of the probability that it would impede control by the prosecution of the proceedings, and violate defendants’ due process rights (see section 7 below), the UK is unlikely to favour this form of participation.

Secondly, victims may have the right to be consulted, which would require criminal justice agencies to establish and consider victims’ views “... about the appropriate course of action at a particular stage of the process ...”, but would not grant victims the power to determine outcomes (Edwards, 2004: 975). Victims in the UK have the right to be consulted regarding certain pre-trial matters, such as decisions whether to continue prosecutions (see section 4.1 below). Thirdly, victim participation may take the form of information-provision. This form pertains to the need of criminal justice agencies “... to receive information from or about the victim” (Edwards, 2004: 976). Fourthly, victims may have the right to express themselves by providing information or communicating their feelings to such agencies (Edwards, 2004: 976). The last-mentioned two forms of victim participation are commonly regarded as being achieved by the making of VPS (see section 4.3 below).

The forms of victim participation described by Edwards do not find formal expression in the English law of criminal procedure. In view of the fact that the procedural “rights” to which they relate are not enforceable, this is not surprising. By contrast, the concept of victim participation is firmly entrenched in the rules of criminal procedure in most European jurisdictions. Those victims, who act as auxiliary prosecutors, or civil parties using the adhesion procedure, are regarded as parties to the proceedings (see section 6.4 below). Consequently, the concept of victim participation refers to the exercise of enforceable procedural rights by such victim parties. Although these procedural rights involve expression, consultation and the provision of information, they are not distinguished according to their function or purpose. Instead, they are defined by the extent to which they are active or passive. Within the context of auxiliary prosecution in German law, active procedural rights include the right to lead evidence, to request the recusal of a judge and the right, within limits, to appeal against a conviction. Passive procedural rights, on the other hand, encompass the right of access to the dossier, and the right to legal representation and legal aid (Niedling, 2005: 79-80). Contrary to passive rights, active rights permit victims to contribute positively to the criminal proceedings.

From the perspective of English law, where victims’ strongest participation involves being heard at the stage of sentencing, all these rights, whether construed as active or passive from a European perspective, amount to active

victim participation. In terms of traditional English adversarialism, for instance, permitting a victim legal representation at trial constitutes an impermissible degree of victim participation that violates defendants' due process rights. As against the comprehensive procedural rights granted to victims in European jurisdictions, the limited involvement of victims in the English criminal process may be viewed as passive. Consequently, this chapter defines active participation as the involvement of victims who are parties to the criminal proceedings with procedural rights, such as auxiliary prosecutors and civil parties. On the other hand, passive participation refers to the limited consultative or expressive involvement of victims in prosecutorial decisions, such as whether to continue a prosecution or accept a plea, and in the sentencing stage.

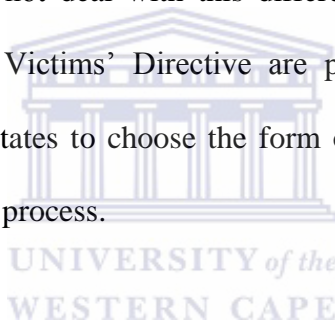


Nevertheless, in light of the recent willingness in the US to recognise victims' lawyers in certain cases, this distinction between active and passive participation is becoming a question of degree rather than an absolute divide. Although victims' lawyers have been regarded traditionally as anathema in common law jurisdictions, they are becoming increasingly common in the US (see section 5.4 below). Furthermore, victim statements of opinion on sentence, which are permitted in some states in the US, introduce active participation into what would otherwise be a passive victim impact statement on the effects of the crime (see section 5.3 below). Apart from these changes, however, a fundamental dichotomy persists between the recognition of formal

party status for victims in Continental jurisdictions and the absence of such party status in common law jurisdictions.

3. EU LAW

This dichotomy has led to a strongly held difference of opinion in the Council of Europe between Continental and common law jurisdictions (see Wolhuter, *et al*, 2009: 176-177). While the Council of Europe's early statements on victims' rights do not deal with this difference of opinion, the Framework Decision and the Victims' Directive are premised on a compromise that permits Member States to choose the form of victim participation that most suits their criminal process.



Council of Europe *Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure* (1985) is concerned, for the most part, with passive participation. In terms of article 12, the court is required to receive "... all relevant information concerning the injuries and losses suffered by the victim ..." in order that it may consider the victim's need for compensation and "... any compensation or restitution by the offender ..." in deciding the appropriate sentence. Nevertheless, it does provide for active victim participation, albeit to a limited extent. In terms of article 7, victims must have the right to subject decisions not to prosecute to review, or the right "... to institute private proceedings". The right to the

review of prosecutorial decisions may involve active participation, but does not necessarily do so (see section 4.1 below). On the other hand, the right to institute a private prosecution clearly amounts to active participation (Niedling, 2005: 79). However, in light of the fact that private prosecutors are required to fund prosecutions themselves, they are not commonly encountered in practice and, consequently, are not considered in this chapter.

The provisions regarding victim participation in the Framework Decision reflect the outcome of a heated debate between Member States from common law jurisdictions and those from civil law and Nordic jurisdictions. Article 3 provides that “each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence”. However, according to sub article 9 of the preamble, Member States are not required to treat victims “... in a manner equivalent to that of a party to proceedings”. The Framework Decision thus leaves the decision whether to grant victims party status or to regard them as mere prosecution witnesses to individual Member States.

Article 6 also manifests the above compromise. On the one hand, Member States must ensure that victims have access to non-legal advice regarding “... their role in the proceedings”, which must be gratuitous, if necessary. On the other hand, they must ensure that victims have legal aid, in appropriate cases, “... when it is possible for them to have the status of parties to criminal proceedings”. This restriction of the obligation to ensure legal aid to victims

who are parties to the criminal process was due to the refusal of the UK and Ireland to accept the provisions of the original draft of article 6. This draft provided that –

Irrespective of the possibility of victims participating in procedure as a witness or a party, Member States shall ensure an opportunity for victims to participate as such, in accordance with the provisions of this Framework Decision. Member States shall ensure that all victims, regardless of their means, have access to legal advice, provided free of charge if need be (Rock, 2004: 517).

As an unrestricted obligation to provide legal advice to all victims was unacceptable to the UK and Ireland (Rock, 2004: 517), the draft article 6 was amended to achieve agreement among Member States. Had the UK and Ireland not refused to accede to the draft article 6, legal advice for all victims would have become the norm throughout Europe. In consequence of this compromise, models of active participation, such as auxiliary prosecution and adhesion, as well as passive models, such as VPS, comply with the Framework Decision.

The provisions of the Victims' Directive are, with some modifications, broadly the same as those of the Framework Decision. Article 9 imposes a duty on Member States to "... ensure that victims may be heard during criminal proceedings and may supply evidence". Article 10.1 expressly entrenches the right of victims "... to have any decision not to prosecute

reviewed”. Article 12 perpetuates the distinction in the Framework Decision between party and non-party victims by providing that Member States have a duty to make sure that victims are able to “... access ... legal aid, where they have the status of parties to criminal proceedings”.

4. VICTIM PARTICIPATION IN THE UK

Victims are mere Crown witnesses in the English criminal process, and thus have no active participation rights. Although they have been given limited passive participation rights at the pre-trial and sentencing stages, they have no participatory rights during the trial. This section, which draws on the present author’s work (Wolhuter, *et al*, 2009: 177-183), considers recent reforms that have introduced these limited forms of passive participation.

4.1 Decisions to prosecute

The Victims’ Code does not apply to prosecutorial decisions whether to prosecute. The reason for this is to be found in s.32(5)(b) of the DVCVA, which prevents duties being imposed on the CPS in regard to the discharge of a function involving the exercise of discretion (see chapter 3). The CPS exercises its discretion to make decisions whether to prosecute in pursuance of two tests in the Code for Crown Prosecutors (CPS, 2010a, the “Prosecutors’ Code”).

First, in terms of the evidential sufficiency test, there must be “... sufficient evidence to provide a realistic prospect of conviction” (para 4.5). Second, in terms of the public interest test, a prosecution must be in the public interest (para 4.11). In addressing the public interest test, the CPS must “... take into account any views expressed by the victim regarding the impact that the offence has had”. In addition, it should consider “... any views expressed by the victim’s family ...” in cases such as “... homicide or where the victim is a child or an adult who lacks capacity” (para 4.18). The Prosecutor’s Pledge (CPS, undated) reiterates these provisions. The requirement that the CPS must consider victims’ views enables victims to be involved in prosecutorial decisions. However, the extent of such involvement is limited, as the CPS is required to consider any views expressed by victims or their families, and not to take active steps to determine such views if victims do not make them known.

Although CPS decisions not to prosecute may be taken on judicial review (see chapter 2), the courts’ powers of judicial review are restricted. In *R v The Director of Public Prosecutions ex parte C* [2000] WL 281275, for instance, the court held that the failure of the CPS to consult a victim about a decision not to prosecute does not constitute a procedural impropriety, and that the court cannot intervene in the CPS’s decision (para 31). Consequently, victims have little leeway to participate in decisions whether or not to prosecute.

4.2 Decisions to accept pleas

Victims may not participate in prosecutorial decisions to accept a guilty plea in exchange for a sentence discount or a guilty plea to a lesser charge. Only the prosecution and the defence may engage in plea bargaining. Moreover, plea bargaining is not subject to the Victims' Code as it involves the exercise of discretion by the CPS (see section 4.1 above). In terms of the Prosecutors' Code, however, in determining whether accepting a guilty plea is in the public interest, the CPS is required to "... ensure that the interests and, where possible, the views of the victim, or in appropriate cases the views of the victim's family, are taken into account." The CPS nevertheless retains the power to make the final decision (para 10.3). In terms of the Prosecutors' Pledge (CPS, undated), the CPS has undertaken to determine the views of victims or their families by speaking to them, where practical, when deciding whether to accept a guilty plea.

The *Attorney General's guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise* (Attorney General, 2005) also require the CPS to ascertain victims' views in deciding whether to accept pleas. According to the guidelines, victims' views are important as they "... may assist in informing the prosecutor's decision as to whether it is the public interest, as defined by the Code for Crown Prosecutors, to accept or reject the

plea” (para B.3). The CPS has committed itself to complying with these guidelines (CPS, 2006).

Despite these policies, however, the scope for victim involvement in plea decisions is limited. They may not contribute to plea bargaining negotiations and, unlike their American counterparts (see section 5.2 below), they may not participate in plea hearings. This inability to participate generates secondary victimisation as victims may not only feel marginalised, but also discontented by a conviction or sentence that does not reflect the impact of the crime accurately. Doak contends that this lack of participation “... may ... interfere with [victims’] right to have the truth of past events officially acknowledged” (Doak, 2008: 124). Ashworth and Redmayne maintain that guilty pleas benefit victims because they are spared the ordeal of testifying (Ashworth & Redmayne, 2005: 283). However, they admit that victims may have more mixed responses to sentence discounts, and refer to research demonstrating that rape victims would prefer to testify to ensure that the defendant does not receive a sentence discount in exchange for a guilty plea (Ashworth & Redmayne, 2005: 283).

4.3 Victim Personal Statements

Since October 2001, victims have been permitted to make VPS in which they set out how the crime has affected them (Walklate, 2007: 116). This section

explains the VPS Scheme and considers whether it is an effective method of involving victims at the sentencing stage.

4.3.1 VPS scheme

A VPS constitutes a statement in writing by the victim documenting the physical, emotional, psychological and financial impact of the crime. It may be made by any person who has been the subject of a prosecutable criminal act by another person. Furthermore, the family members or partners of victims of homicide and serious offences involving sexual and physical assault, as well as the parents of a child victim, are eligible to make VPS. Victims who are sole proprietors and small business partners are also eligible (Rock, 2004: 211).

There are two stages to the VPS. First, the victim makes a statement to the police when s/he makes the witness statement. At this stage, the statement includes "... matters such as bail, compensation, problems of vulnerability, medical and psychological damage, and the victim's willingness to take part in restorative justice" (Rock, 2004: 210). Second, the victim may make a further statement at a later stage once the long-term effects of the crime are manifest (Rock, 2004: 210).

The Court of Appeal has formulated a *Practice Direction (Victim Personal Statements)* [2002] 1 Cr App R 69 setting out the approach courts must adopt to VPS. Courts are required to consider and take into account the VPS as well as any supporting evidence before imposing sentence. However, they may not make unsubstantiated assumptions about the impact of the offence on the victim. Although courts may take the consequences to the victim into account when passing sentence, they must disregard his/her opinions on the sentence (para 3).

Before the *Practice Direction* was issued, courts were known to consider victims' opinions on sentence in certain cases (Edwards, 2002). In *R v Perks* [2001] 1 Cr App R (S) 19, the Court of Appeal pointed to two exceptions to the rule that victims' opinions on sentence were irrelevant. First, the sentence may be tempered to take cognisance of the fact that the sentence imposed on the offender is aggravating the victim's distress. Second, it may be reduced if the fact that the victim has forgiven the offender or does not wish to press charges shows "... that his or her psychological or mental suffering must be very much less than would normally be the case" (para 15).

However, this approach is at odds with the decision in *McCourt v UK* (1993) 15 EHRR CD 110 where the European Commission agreed with the Home Office that victims' families are not sufficiently impartial to be involved in sentencing (para 1). This reasoning also applies to direct victims. It is

submitted that victims' opinions on sentence are rightly irrelevant. While active participation in the pre-trial and trial processes is necessary to empower victims and alleviate secondary victimisation, the same reasoning does not apply to the inclusion of victims' opinions on sentence. Taking cognisance of such opinions lends weight to a law and order ideology that harnesses "... victims in the service of severity" (Ashworth, 2000: 186) and constitutes an unjustifiable violation of defendants' rights (see section 7 below).

4.3.2 Effectiveness of VPS

There is a difference of opinion concerning the effectiveness of VPS. Proponents of therapeutic jurisprudence contend that VPS facilitate catharsis and closure, which promotes healing for victims (Erez, 2000: 167; Erez, 1999: 552). VPS also facilitate the communication by courts of the fact that the state has recognised "... the harm that victims have suffered" (Roberts & Erez, 2010: 240). On the other hand, theorists of procedural justice maintain that granting victims an opportunity to "tell their stories" gives them control of the criminal process and increases their satisfaction with it, irrespective of the actual outcome (Erez, 2000: 167). In addition, it has been argued that VPS vindicate victims as parties to the criminal process (Goodey, 2005: 166). However, the legal status of victims in the UK, which, unlike that of their European counterparts (see section 6 below), is that of mere Crown witnesses, does not lend support to this view.

Proponents of VPS also point to the ways in which VPS benefit the criminal justice system. VPS furnish criminal justice agencies with information, enabling them to comprehend the effects of the crime on the victim, which influences their decisions (Goodey, 2005: 166). Furthermore, taking cognisance of the ways in which crimes harm victims is said to encourage "... accurate or effective sentencing outcomes" (Edwards, 2001: 41). Drawing on their research regarding victim impact statements in South Australia, Erez and Rogers contend that such statements have enhanced sentence accuracy and proportionality without increasing punitiveness (Erez & Rogers, 1999: 235). In view of victims' tendency "... to understate, rather than overstate ...", the impact of the crime, VPS have not led to sentences of increased severity (Goodey, 2005: 169; Erez, 1999: 549).

Many scholars disagree strongly with the above analysis of the benefits of VPS. They maintain that VPS are inconsistent with traditional sentencing aims, and lack practical value for victims. Ashworth argues that VPS may result in the imposition of sentences on the basis of harm that was unforeseen by the offender. He questions the accuracy of an approach that permits an offender to "... receive a more severe sentence because his victim suffered abnormally serious after-effects", while allowing another offender to "... receive a much lower sentence because his victim was counselled successfully and apparently recovered quickly" (Ashworth, 1993: 505-506). In addition,

VPS may inject more arbitrariness into the criminal process than already exists and, consequently, may violate the defendant's right to a fair trial (Walkate, 2007: 117).

Opponents also question whether VPS actually benefit victims. Ashworth maintains that research regarding the English VPS pilot projects indicates that the hopes of many victims that their statements would influence the outcome were dashed because the statements had little impact on the charge or the sentence (Ashworth, 2000: 198).

Recent research shows that VPS have a negligible effect in practice. Tapley demonstrates that, despite being entitled to make VPS, victims are frequently not given the opportunity to do so (Walkate, 2007: 120). Erez contends that the ineffectiveness of VPS in practice is due to resistance from legal professionals (Erez, 2000: 178). On the other hand, Sanders maintains that using VPS in traditional common law systems is not an appropriate way to obtain victim participation (Sanders, 2001: 457). Their lack of practical effect is thus not surprising. Tagging victims' input on to the tail end of the criminal process rather than permitting them to participate at the pre-trial and trial stages facilitates the expression of views that do not empower victims procedurally or prevent secondary victimisation (see section 7 below). It is submitted that victim participation may only satisfactorily be achieved by introducing European procedures, such as auxiliary prosecution (see section

6.4.1 below). However, as Erez emphasises, VPS constitute the only means, in the adversarial system *as currently conceived*, for victims to give voice to their experiences of victimisation (Erez, 2004: 499).

4.4 Victims' Advocate Scheme/Victim Focus Scheme

The opportunity for victims to participate in the criminal process was expanded in April 2006 by the introduction of pilot schemes permitting the family members of homicide victims to make family impact statements ("FIS") and to be legally represented at the sentencing stage (Walklate, 2007: 115). These pilots were conducted from April 2006 to April 2008 (Sweeting, *et al*, 2008: 1) in the Central Criminal Court in London, as well as in the Birmingham, Cardiff, Manchester and Winchester Crown Courts (*A Protocol issued by the President of the Queen's Bench Division*, 2006).

Like VPS, the aim of FIS was to give family members an opportunity to explain the effect of the homicide to the court at the stage of sentencing. According to Rock, one of the primary purposes of FIS was to facilitate catharsis (Rock, 2010: 209). However, FIS differed from VPS in that family members could choose whether to make an oral or a written statement and could be legally assisted (*A Protocol issued by the President of the Queen's Bench Division*, 2006). The devising and presenting of the FIS occurred according to the following procedure. The FIS was initially made in writing

with the aid of a police Family Liaison Officer. Thereafter, it was considered by the court at the Plea and Case Management Hearing (“PCMh”). The family member had to indicate whether an oral or a written statement would be made at the sentencing stage, and whether s/he would be assisted by a lawyer or a “lay friend” (*A Protocol issued by the President of the Queen’s Bench Division*, 2006). If the family member opted for a lawyer “... paid for out of public funds ...”, the lawyer would be chosen immediately after the PCMh to give him/her time to prepare adequately (*A Protocol issued by the President of the Queen’s Bench Division*, 2006). To ensure that the lawyer was able to fulfil his/her duties properly, s/he had to be furnished with relevant information, including copies of prosecution and defence applications pertaining to matters such as “... advance sentence indication, reporting restrictions, special measures, details of dates of pre-trial hearings and the proposed trial date” (Criminal Justice System, 2005a, para 71).

If the family member decided to make a statement orally at the sentencing stage, the procedure for adducing evidence-in-chief was followed. However, the lawyer had to confine his/her questions to the impact of the homicide on the family. To avoid violating the right to a fair trial, the defendant had to be given an opportunity to cross-examine (*A Protocol issued by the President of the Queen’s Bench Division*, 2006).

Despite the provision for lawyers to assist family members when delivering their statements, a recent study of the Victims' Advocate Scheme pilots found that few family members used the services of a lawyer (Sweeting, *et al*, 2008: 19). By contrast, family members preferred "... prosecution counsel to deliver the FIS", leading the researchers to conclude that Family Liaison Officers and prosecution counsel "... had displaced any role that the independent advocate might play" (Sweeting, *et al*, 2008: 20). However, the study recommended that the question whether "... independent advocates should be rolled out ..." must be considered further by the government (Sweeting, *et al*, 2008: 60). A study by Rock of the pilots concluded that, although the FIS were aimed at

... restoring respect to victims and their families ... they could not always accomplish their object because there was too much competing anguish, too deeply entrenched an adversarial system, and too many problems ... with staging a novel form of ritual performance (Rock, 2010: 226).

Prior to the completion of the pilots, the government chose not to implement the Victim Advocate Scheme nationally, but to introduce a different national scheme, the Victim Focus Scheme, in October 2007 (Rock, 2010: 225). The new Scheme comprises the handing of written FIS (renamed VPS) to the judge (Rock, 2010: 225) or having them read out in court by prosecution counsel (Sweeting, *et al*, 2008: 33-34). However, the scheme does not guarantee family members the opportunity to allocute (Sweeting, *et al*, 2008: 34). Doak, *et al* maintain that this limitation of victims' ability to allocute "...

will undoubtedly undermine any therapeutic potential that direct account making might have held” (Doak, *et al*, 2009: 675). In addition, the possibility of a lawyer reading out the VPS or participating in any way in the proceedings seems to have disappeared.

5. VICTIM PARTICIPATION IN THE US

In view of the fact that the limited avenues for passive victim participation in the UK are modelled on American measures, it is necessary to consider the relevant American law on the subject. Accordingly, this section assesses victims’ rights to participate in the pre-trial and sentencing stages in American law (see Wolhuter, *et al*, 2009: 183-186). Although it is concerned primarily with federal law, it adverts to state law briefly.

The CVRA (see chapter 2), a federal statute, entrenches victims’ right to participate in the criminal process. In particular, victims have “the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”. Furthermore, the majority of states grant victims the right to be heard at these stages of the criminal process.

5.1 Decisions to prosecute

Notwithstanding the provisions of the CVRA, the importance of prosecutorial independence in the American criminal process means that the prosecutor's discretion to decide whether to prosecute is relatively unrestrained. Like his/her English counterpart, the final decision concerning prosecution rests with the prosecutor (Frase & Weigend, 1995: 337). Nonetheless, victims may require that the prosecutor consult them before exercising his/her discretion to prosecute (Gershman, 2005: 574).

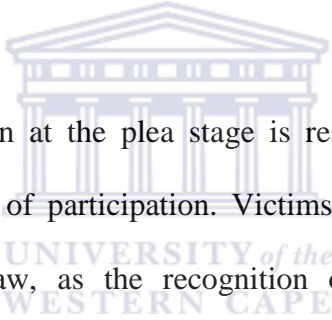
Some states also allow victims to bring applications for judicial review of prosecutorial decisions not to prosecute. However, such decisions are usually challenged in front of a grand jury. In consequence, victims have the power informally to sway decisions regarding charges (Beloof, 1999: 317).

5.2 Decisions to accept pleas

In terms of the CVRA, victims have the right to be heard at plea hearings. This right may be enforced by means of a writ of mandamus (Beloof, 2005: 343). In addition, a number of states grant victims the right to participate at the plea stage. Twenty-two states require prosecutors to consult victims or ascertain their views regarding plea agreements (Verdun-Jones & Tijerino, 2005: 198). In terms of the Code of Virginia (para 19.2-11.01), for example, a

plea agreement may not be accepted by the trial court unless the prosecutor has consulted the victim (Verdun-Jones & Tijerino, 2005: 198).

Several states, including Minnesota, Rhode Island and Arizona, permit victims to be heard at plea hearings (Cassell, 2005: 866-867). In terms of the Arizona Criminal Code (para 13-4423), for example, victims are entitled to be present at plea hearings and make their views known to the court before it decides whether to accept a plea agreement (Verdun-Jones & Tijerino, 2005: 199).



Victim participation at the plea stage is restricted to these expressive and consultative forms of participation. Victims have no right to veto pleas in federal or state law, as the recognition of such a right would violate defendants' due process rights to an unjustifiable extent.

5.3 Victim participation in sentencing

In terms of the CVRA, victims have the right to be “reasonably heard” at the stage of sentencing. All states thus allow victims to make written victim impact statements (“VIS”) indicating the impact of the crime. However, it was initially uncertain whether the right to be “reasonably heard” includes the right to allocute, which is recognised in some states.

This right was given a broad interpretation by the Ninth Circuit in *Kenna v District Court* 435 F.3d 1011 (9th Cir. 2006; cited in Butler, 2006: 26). The court refused to accept the argument that a victim may not speak at the stage of sentencing, and that the right to be “reasonably heard” applies to written statements only. By contrast, it stated that the term “heard”, defined broadly, grants victims the “... right to provide oral and written impact statements” (Butler, 2006: 23). In the court’s view, the right to make an oral statement is “... a right to personally ‘allocute’, much like that of the defendant” (Baron-Evans, 2006: 49). Consequently, it remitted the matter to the trial court, ordering it to avoid infringing the defendant’s constitutional rights, but to take account of the fact that, to comply with the victim’s right to allocute, the sentence must be vacated and a fresh hearing on sentence must take place (Baron-Evans, 2006: 54). Similarly, in *United States v Degenhardt* 405 F.Supp. 2d 1341 (D. Utah 2005, cited in Beloof, 2006: 42), the court held that the CVRA permits victims to speak in person at the sentencing stage (Belooof, 2006: 37).

The Court in *Kenna* premised its decision on Congress’s intent that “... victims be full participants in the criminal justice system” (Butler, 2006: 23). Consequently, Beloof maintains that victims are independent participants at the stage of sentencing, who do not require the court’s permission or the request of the parties (Belooof, 2006: 41). However, the distinction in American law between “participant” and “party” must be borne in mind.

Victims are participants when they exercise their rights to participate in the criminal process. They are parties when they enforce rights that they have been denied in the criminal process by instituting action outside the parameters of the trial (Beloof, 2005: 272). Although the degree of their participation in the American criminal process is much more significant than the English criminal process, they are nevertheless not parties to criminal proceedings, as is the case in auxiliary prosecution and adhesion in European jurisdictions (see section 6.4 below).

Having clarified the position of written and oral VIS in federal law, the decision in *Kenna* will probably encourage the recognition of victim allocution in all states. However, the question whether victims have the right to give opinions on sentence was not addressed by the court. A minority of states permit victims to furnish such opinions by way of Victim Statements of Opinion (“VSO”) (Beloof, 1999: 324).

In *In re Kenna (Kenna II)* 453 F.3d 1136 (9th Cir. 2006; cited in Baron-Evans, 2006: 55), the victim’s counsel had contended in the district court that victims have the right, in terms of the CVRA, to obtain access to a pre-sentence report to enable them to recommend a sentence (Baron-Evans, 2006: 51). In making this contention, counsel referred to a senatorial statement in Congress that “victim impact” includes not only the impact of the crime on the victim but also “sentencing recommendations” (Baron-Evans, 2006: 51). The district

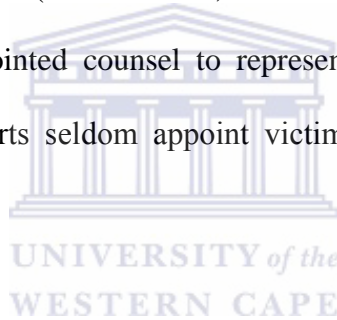
court held that the CVRA did not give victims the right to obtain a pre-sentence report. The Ninth Circuit upheld the district court's decision. The implication of this decision is that victims do not have the right to make sentencing recommendations (Baron-Evans, 2006: 51).

It is unfortunate that the court did not expressly state that victims have no such right. Nonetheless, the implication of the decision is a welcome corrective to the views of scholars such as Beloof and Cassell, who contend that victims have an interest in punishment, justifying the inclusion of their opinions on sentence (see Beloof, 2005: 311; Cassell, 2005: 893-894). To admit such opinions allows the infusion of individual vengeance that violates defendants' due process rights, without empowering victims procedurally or alleviating secondary victimisation. It is to be hoped that the court's refusal to permit VSOs at federal level will encourage states using VSOs to reconsider their position, and dissuade states who do not use them from entertaining the idea of introducing them.

5.4 Victims' lawyers

Despite the American commitment to adversarialism, which would appear to preclude the recognition of victims' lawyers, there is clear authority in both federal and state law for the use of such lawyers.

Victims are not expressly given the right to legal representation in the CVRA. However, if a material conflict of interest arises between a prosecutor and a victim, the prosecutor must advise the victim that s/he may seek legal advice (Cassell, 2005: 916). It is therefore permissible, in terms of the CVRA, for a victim to have legal assistance. Butler contends that it is "... implicit in the CVRA provisions regarding the court's obligation to ensure that victims' rights are afforded ..." that the court has the power to appoint victims' lawyers. As authority, he cites the decision in *United States v Stamper* 766 F.Supp. 1396, 1397 (D.N.C. 1991; cited in Butler, 2006: 28), where a "... federal court appointed counsel to represent a victim" (Butler, 2006: 24). However, the courts seldom appoint victims' lawyers in practice (Beloof, 1999: 321).

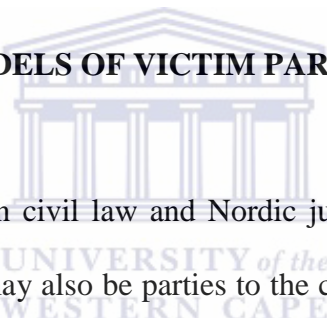


Nevertheless, victims have the right to use private lawyers in federal court as well as in most state courts. Such lawyers are subject to the prosecutor's control and participate in the trial with his/her permission (Beloof, 1999: 320; O'Hara, 2005: 236). For instance, the Tennessee Code (para 8-7-401(a)) provides that victims or their families may employ private lawyers to work alongside the district Attorney General or his/her deputies in prosecuting cases. The Attorney General has discretion to determine the extent to which such private lawyers may participate (Gershman, 2005: 564). In *Hughes v Bowers* 711 F.Supp. 1574 (N.D. Ga. 1989; cited in Gershman, 2005: 567), the

federal district court held that the presence of such lawyers is not in and of itself constitutionally improper (Gershman, 2005: 567).

At least as far as victims' lawyers are concerned, the American approach to victim participation bears a stronger resemblance to the European approach (see section 6.3 below) than its English common law counterpart. However, contrary to the American position, victims' lawyers in European jurisdictions are not restricted by prosecutorial control.

6. EUROPEAN MODELS OF VICTIM PARTICIPATION

The logo of the University of the Western Cape, featuring a classical building facade with columns and a pediment, with the text 'UNIVERSITY of the WESTERN CAPE' overlaid in a light blue color.

Although victims in civil law and Nordic jurisdictions are witnesses for the prosecution, they may also be parties to the criminal proceedings, armed with procedural rights similar to those of the prosecution and defence. This section, which draws on the present author's work (Wolhuter, *et al*, 2009: 186-195), evaluates the models of victim participation in these jurisdictions. While it focuses on the trial, it also considers the pre-trial process briefly.

Most European jurisdictions have similar models of victim participation. This section analyses the use of victims' lawyers and auxiliary prosecutors in German law, which is inquisitorial, and Swedish law, which is a mixed system with an adversarial trial process, in order to show that these models are compatible with inquisitorial as well as adversarial trial procedures. It also

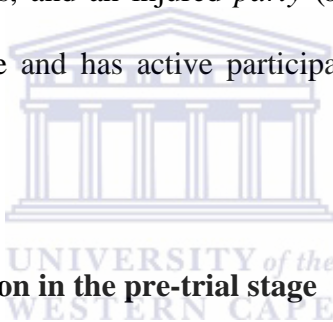
considers the adhesion procedure in Dutch law, which has an adversarial trial process (Brienen & Hoegen, 2000b: 647).

6.1 Party and non-party victims

European jurisdictions make a distinction between victims who are and victims who are not parties to the proceedings. As this distinction is unknown in common law jurisdictions, it is necessary to explain it prior to assessing the European models of victim participation.

There is a distinction in German law between a victim in the broad sense (*Opfer*) and an injured person or party (*Verletzte*). The term *Verletzte* is used within the context of victims' procedural rights. However, it is not defined in the *Strafprozeßordnung* (Code of Criminal Procedure, "St.PO"), and, accordingly, its meaning must be sought within the context of the section in which it appears (Brienen & Hoegen, 2000b: 362). A *Verletzte* who is an injured *person* (a prosecution witness) is not a party to the proceedings, but has the right to a lawyer (s.406f(1) St.PO). By contrast, a *Verletzte* who is an injured *party* is a full party to the proceedings with active participation rights, including the right to a lawyer. Such an injured party is one who acts as an auxiliary prosecutor or who employs the adhesion procedure, in terms of which his/her civil claim for compensation is joined to the criminal proceedings.

A similar distinction is made in Swedish law. The term *brottsoffer*, which is the colloquial term for “victim of crime”, has no legal meaning. The appropriate legal term is *målsägande*, defined in s.8 of the Swedish *Rättegångsbalk* (Code of Judicial Procedure, “CJP”) as “the person against whom the offence was committed or who was affronted or harmed by it”. It refers either to an injured *person* or an injured *party* in the abovementioned sense (Brienen & Hoegen, 2000b: 889). A slightly less complex distinction is made in Dutch law between a victim in the broad sense (*slachtoffer*), who is a prosecution witness, and an injured *party* (*benadeelde partij*), who uses the adhesion procedure and has active participation rights (Brienen & Hoegen, 2000b: 668).



6.2 Victim participation in the pre-trial stage

Germany, Sweden and the Netherlands employ an inquisitorial pre-trial procedure. Accordingly, the investigation, which is conducted by the police and the prosecution, is overseen by an examining magistrate, who decides whether the dossier is ready for trial. The judiciary in these jurisdictions is thus much more actively involved in the pre-trial process than its counterpart in common law jurisdictions.

Despite the inquisitorial nature of the pre-trial proceedings, the extent to which victims may participate differs between these jurisdictions. Victims

participate to a considerable extent in the German pre-trial process. Whether they are injured persons or injured parties, victims are entitled to have their pre-trial participation rights exercised by a lawyer on their behalf. However, it is uncertain whether this right applies to police questioning (Walther, 2006: 114).

The injured person/party is entitled to participate significantly in decisions to prosecute. Section 171 St.PO provides that prosecutors who decide not to prosecute or who stop the prosecution must furnish the injured person/party with the reasons for their decision. If the injured person/party is not satisfied with these reasons, s/he is entitled to follow a three-stage review procedure. First, having received the prosecutor's reasons, the injured person/party may lodge objections to these reasons with the superior prosecutor. Secondly, if the superior prosecutor refuses to overturn the initial decision, the injured person/party may apply for judicial review. Thirdly, if, on review, the court decides against the injured person/party, s/he may appeal against this decision.

However, the ambit of this right to appeal is restricted. It only applies where the prosecutor's decision was premised on a lack of "substantial suspicion", viz. that a conviction was unlikely due to "... lack of evidence or legal obstacles" (Walther, 2006: 114). Accordingly, the right is exercised rarely in practice (Frase & Weigend, 1995: 350).

Furthermore, injured persons as well as injured parties have a right to discovery, entitling them "... to see the prosecutor's file and to inspect the evidence" (*Akteneinsicht*) (Walther, 2006: 115; s.406e(1) St.PO). However, injured persons must furnish a statement of good cause in order to qualify for *Akteneinsicht*, whereas injured parties who are acting as auxiliary prosecutors qualify automatically (Walther, 2006: 115). Consequently, auxiliary prosecutors have extensive participation rights in the pre-trial process.

The pre-trial participation rights of victims in Swedish law are less extensive than those in German law. The prosecution must consider the injured person's or injured party's views in deciding whether to waive a prosecution in terms of s.7 CJP. In doing so, the prosecution must balance the injured person/party's interest in prosecution against the public interest. The prosecution must notify the injured person/party if it decides not to continue the prosecution, and must furnish him/her with a clear explanation of the reasons for its decision (Wergens, 2002: 274). The injured person/party is entitled to appeal against the district or regional prosecutor's decisions to "... the regional prosecutor or the Attorney General" respectively (Svensson, 1995: 34). S/he has no right to appeal to a court. Furthermore, s/he has no right to discovery (Wergens, 2002: 275). However, s/he does have the right to a lawyer at the pre-trial stage, including when being "... heard by the police or prosecutor" (Svensson, 1995: 38).

Dutch law only grants pre-trial participation rights to injured parties who use the adhesion procedure. As this procedure may be initiated at any stage, whether before or during the trial, the injured party's pre-trial rights are considered in the discussion of adhesion (see section 6.4.2 below).

6.3 Non-party victims' lawyers

German law permits injured persons (prosecution witnesses) to be represented by lawyers who have the right to be present while the injured person is being examined by the court and the prosecution, to object to questions on their behalf and to apply for the public to be excluded in certain cases (ss.406f(1)-(2) St.PO). These lawyers are not paid for out of state funds.

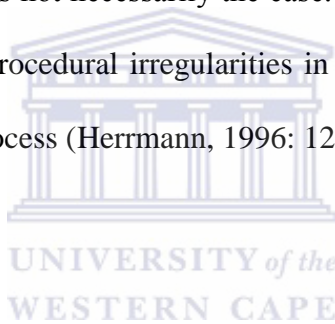


The Swedish *Lag om Målsägandebiträde* (Act Concerning Counsel for the Injured Person/Party) provides for the appointment of lawyers for injured persons and injured parties in serious offences, such as sexual offences, murder and kidnapping (ss.1(1)-(2)). Furthermore, if, in view of his/her personal relationship and other circumstances, s/he is deemed to be in particular need of a lawyer, the injured person/party is also entitled to a lawyer in the case of other offences punishable by imprisonment (s.1(3)). The state appoints and funds the lawyer (Bacik, *et al*, 1998: 288). It is the lawyer's duty to protect the injured person/party's interests in the case and to provide him/her with support and assistance (s.3). The role of the injured person's

lawyer is limited to being present during the trial (Wergens, 2002: 277). However, it has been proposed that the injured person's lawyer should be allowed to question the defendant, witnesses and experts (Temkin, 2002: 293).

Traditionally, lawyers for prosecution witnesses have been viewed as incompatible with adversarial principles (see section 7 below). However, the fact that such lawyers are permitted in American law (see section 5.4 above) indicates that this is not necessarily the case. Similarly, victims' lawyers have not given rise to procedural irregularities in Swedish law, which also has an adversarial trial process (Herrmann, 1996: 129).

6.4 Victim Parties

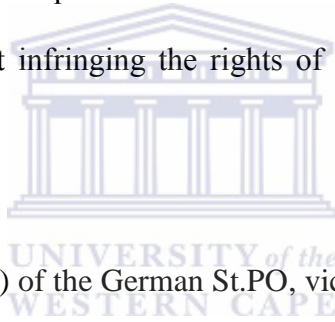


This section evaluates the active procedural rights granted to injured parties acting as auxiliary prosecutors in German and Swedish law and as civil parties in adhesion proceedings in Dutch law.

6.4.1 Auxiliary prosecution

Not only Germany and Sweden, but also several other European jurisdictions, such as Austria, Denmark, Portugal (Brienen & Hoegen, 2000b: 80, 218 & 778) and Poland (Doak, 2005: 309), employ a tripartite procedure in terms of

which victims of serious offences may act as auxiliary prosecutors, alongside the state prosecutor, in the defendant's trial. The fact that Sweden, Denmark and Portugal have adversarial trials (Herrmann, 1996: 129) demonstrates that auxiliary prosecution is not a purely inquisitorial procedure. This section emphasises the similarities in the auxiliary prosecution procedure in Germany and Sweden, in order to illustrate that it is equally suitable to both inquisitorial and adversarial proceedings (Interestingly, victim participation in trials in the International Criminal Court has been referred to by Doak as an illustration of the use of such participation "... in a forum that largely adopts adversarial procedures without infringing the rights of the accused" (Doak, 2008: 137-138)).



In terms of s.395(1) of the German St.PO, victims of serious offences that "... have a very personal impact on the victim (or the victim's family), including murder, assault, kidnapping, and sexual assault ..." (Pizzi & Perron, 1996: 54-55), may participate as an auxiliary prosecutor (*Nebenklager*) in the defendant's trial. Such victims are thus both auxiliary prosecutors and prosecution witnesses. Their right to participate is premised on the rationale that victims ought to be able to give effect to their interest in gaining satisfaction for the harm they have suffered in consequence of the offence (Pfeiffer, 1993: 1603).

Victims must apply for permission to act as an auxiliary prosecutor by handing a declaration of joinder to the court (s.396(1) St.PO). This declaration only becomes effective upon preferment of public charges. Consequently, victims may only act as auxiliary prosecutors if the state institutes criminal proceedings. The court determines the application after having heard the prosecutor. The court's decision is not subject to challenge (s.396(2) St.PO).

If s/he is granted permission to participate, the auxiliary prosecutor becomes a party to the proceedings with active participation rights. His/her entitlement to a court-appointed lawyer is contingent upon whether the offence is serious or non-serious. Section 397a(1) St.PO makes a distinction between *Verbrechen* (serious offences) and *Vergehen* (non-serious offences), which is similar to the American distinction between felonies and misdemeanours (Brienen & Hoegen, 2000b: 355). If the offence is serious, such as sexual assault (Frey, undated: 63), the auxiliary prosecutor has the right to a court-appointed lawyer in respect of all the offences to which the auxiliary prosecution procedure applies. However, if the offence is non-serious, s/he only has the right to such a lawyer if s/he is younger than 16 years or unable to look after his/her own interests properly. The state bears the costs of the lawyer, although the defendant will be ordered to pay these costs if s/he is convicted (Niedling, 2005: 103-104).

In cases that do not fall within the provisions of s.397a(1), the auxiliary prosecutor also has the right to legal aid if s/he cannot afford a lawyer, provided that the case concerns complex facts or law or s/he is unable to look after his/her own interests properly or cannot be expected to do so (s.397a(2) St.PO). The right to legal representation applies even if the victim who is entitled to act as an auxiliary prosecutor does not do so (s.406g(1) St.PO).

The auxiliary prosecutor has several procedural rights. A brief explanation of German trial procedure is necessary to appreciate the significance of these rights. The procedure is inquisitorial, aimed at finding the truth, and judge-rather than party-centred (Bacik, *et al*, 1998: 234). Evidence is led by means of narrative (Walther, 2006: 116). The defendant testifies first, and thereafter the victim (Pizzi & Perron, 1996: 46) and the witnesses follow. The judge calls witnesses, but the three parties' lawyers may also request that evidence be led.

The parties and the witnesses are questioned first by the trial judge and the lay judges. Thereafter, the parties' lawyers may do so (Pizzi & Perron, 1996: 47). The defendant is not considered a witness and accordingly has an unlimited right to silence, which includes the right to refuse to answer questions (Pizzi & Perron, 1996: 62). As the judge is in charge of questioning, there is no distinction between the prosecution and defence cases, or between examination-in-chief and cross-examination (Pizzi & Perron, 1996: 55).

Section 239(1) St.PO allows cross-examination, provided that it is jointly requested by the prosecution and the defence. However, "... aggressive partisan 'distortions' of a witness's recollection are seen as irreconcilable with the overall stress on inquisitorial methods of finding the truth", and cross-examination is consequently seldom used (Frase & Weigend, 1995: 357-358). The objective of questioning is thus to elucidate the evidence rather than to cast aspersions on the witness's credibility.

Within the above procedural context, the auxiliary prosecutor has active procedural rights that are congruent with those of the prosecution and the defence. These rights include the rights to be present throughout the trial, despite the fact that the auxiliary prosecutor also testifies as a prosecution witness; to request the recusal of a judge; to challenge an expert witness; to object to orders made by the judge; to object to questions; to apply for evidence to be adduced; and to make statements (s.397(1) St.PO).

Furthermore, the defendant may be removed from the courtroom in certain cases, if the aims of finding the truth or protecting witnesses are endangered (Walther, 2006: 116). The auxiliary prosecutor may ask that the defendant be removed while s/he testifies (Brienen & Hoegen, 2000b: 381). In addition, s/he may leave the courtroom if the proceedings cause too much distress, provided that his/her lawyer remains. Finally, like the prosecution and defence, the auxiliary prosecutor may present a closing argument (Frey,

undated: 62). Although s/he may ask for a specific sentence, s/he is not allowed any dispositive involvement as "... questions of sentencing are considered to lie in the realm of professional prosecutors and judges" (Walther, 2006: 117).

After the trial has concluded, the auxiliary prosecutor may appeal independently of the prosecution (s.401(1) St.PO). However, the right of appeal is not unrestricted. The auxiliary prosecutor may not appeal against the sentence, or appeal in order that the defendant be convicted of an offence in respect of which the auxiliary prosecution procedure does not apply (s.400(1) St.PO). Consequently, s/he may in effect only appeal against the merits of a decision concerning an offence for which auxiliary prosecution is permissible. Like counsel for the prosecution and defence, counsel for the auxiliary prosecutor may exercise the above-mentioned rights on his/her behalf (Bacik, *et al*, 1998: 237-238; s406f(2), s.406g(2) St.PO).

Auxiliary prosecution in Swedish law bears a strong resemblance to its German counterpart. Section 8 CJP provides that "... when a prosecutor has instituted a prosecution, the [injured party] may support the prosecution". The injured party has active procedural rights similar to those of the prosecution and defence (Brienen & Hoegen, 2000b: 890). S/he is entitled to be represented by a lawyer funded by the state.

Unlike the position in German law, however, auxiliary prosecution in Swedish law operates within the context of an adversarial trial. Once the charge has been read and the defendant's plea has been entered, oral testimony is adduced. The defendant and the witnesses, including the victim who acts as an auxiliary prosecutor, give narrative evidence (Herrmann, 1996: 144; Macphail, 2002). The victim testifies first, followed by the defendant and the witnesses. The victim and defendant are not required to testify under oath.

The prosecutor, victims' lawyer, defence counsel and judge, in turn, question the victim after s/he has testified. The lawyers question the defendant in the same sequence after s/he has testified, except that defence counsel questions the defendant before the victims' lawyer does so. The witnesses are questioned first by the party who calls them, and thereafter by counsel for the other parties and the judge (Svensson, 1995: 26). The questioning takes the form of cross-examination, but is not aggressive (Wergens, 2002: 259). The judge must ensure that the victim is not treated inappropriately or asked irrelevant questions (Wergens, 2002: 279). After the court has decided that no further questions are needed, the prosecutor and counsel for the other parties present arguments. The court then retires to consider its verdict (Svensson, 1995: 26).

The auxiliary prosecutor's lawyer has several procedural rights within the above context. These rights include the rights to be present for the whole trial;

to speak on the victim's behalf; to object to prosecution and defence questions; to cross-examine the defendant; to request that witnesses be called on the victim's behalf; and to address the court on guilt or innocence and the appropriate sentence (Bacik, *et al*, 1998: 288-289). The lawyer is also entitled to lodge and argue an appeal on the victim's behalf (s.8 CJP).

Apart from the right to request the recusal of a judge and the right to challenge an expert, as well as some procedural differences due to the adversarial nature of the trial, auxiliary prosecution is the same in Sweden as it is in Germany. Its use in both systems demonstrates that the common law antipathy to auxiliary prosecution is due more to traditionalist attitudes than to fundamental procedural differences. It is consequently quite possible to employ this procedure in the UK to alleviate secondary victimisation and to empower victims. As long as auxiliary prosecutors are not allowed to influence the sentence, the procedure does not violate defendants' due process rights (see section 7 below). However, only victims of serious offences are eligible for auxiliary prosecution in German and Swedish law, and, it is submitted, the introduction of auxiliary prosecution in English law ought to be restricted in the same way.

6.4.2 Adhesion

Most European jurisdictions (including, amongst others, Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and Turkey; see Brienens & Hoegen, 2000: 77, 134, 217, 318, 363, 405, 440, 557, 586, 668, 735, 777, 856, 890 & 974), permit injured parties to institute adhesion proceedings, namely proceedings joining the civil claim for compensation to the criminal proceedings. Many of these jurisdictions, such as the Netherlands, Sweden and Spain, have adversarial trials (Brienens & Hoegen, 2000b: 647; Herrmann, 1996: 129). This section considers Dutch law to illustrate the operation of adhesion within the context of an adversarial trial. However, in light of the existence of compensation orders in English law, which constitute a penal sanction (s.130 of the Powers of Criminal Courts (Sentencing) Act 2000; see chapter 5) and do not require an application by the victim (Brienens & Hoegen, 2000b: 258), the adhesion procedure would contribute little to victims' position in the English criminal process.

In Dutch criminal procedure, victims are generally mere prosecution witnesses who do not participate actively in the proceedings (Ellison, 1997: 78). However, if a victim has been harmed directly by a criminal act (Bijlsma, 2005: 63), s/he may act as a civil claimant, joining the claim for material and non-material damages to the criminal proceedings against the defendant

(Ellison, 1997: 194). The victim may choose to join the proceedings at the pre-trial stage or during the trial (Bijlsma, 2005: 70). To join at the pre-trial stage benefits the victim by eliminating the need to appear at trial, as there is no rule of law requiring the victim to appear personally (Bijlsma, 2005: 62).

A victim who has joined the proceedings in this manner becomes an injured party (*benadeelde partij*; Brienens & Hoegen, 2000b: 668). The injured party's family members may also act as civil claimants (Brienens & Hoegen, 2000b: 668). If the prosecutor decides not to continue the prosecution after the victim has joined the proceedings, s/he is required to notify him/her in writing, providing reasons for the decision. The injured party may complain to the court about the prosecutor's decision (Bijlsma, 2005: 63).



The injured party is entitled to legal representation at the pre-trial stage as well as during the trial, and may be eligible for legal aid if s/he is in financial need (Brienens & Hoegen, 2000b: 659, 669). However, Dutch law does not provide court-appointed lawyers or automatically state-funded lawyers in serious cases. Consequently, if the injured party is not eligible for legal aid, s/he must employ a privately funded lawyer.

The injured party has a significant right of pre-trial discovery. S/he may inspect and photocopy the dossier, although she requires prosecutorial permission to do so. Permission may be refused "... to protect an ongoing

investigation, the rights of the defendants, or because of ponderous arguments of general interest” (Brienen & Hoegen, 2000b: 669). However, the injured party may appeal to the Minister of Justice and, thereafter, to the Council of State, against a prosecutor’s refusal to grant permission (Brienen & Hoegen, 2000b: 669).

The Terwee Act 1995 provides that, at the trial stage, the court or the injured party may divide the civil claim into complex and simple components. The complex component will be determined by a civil court as an ordinary claim in tort. The simple component, on the other hand, will be decided in the criminal proceedings (Ellison, 1997: 195). Studies have demonstrated that judges are not well disposed to the adhesion procedure and readily consider civil claims (or parts of such claims) too complex to be decided in the criminal proceedings (Brienen & Hoegen, 2000b: 688-689). Accordingly, an injured party who is ineligible for legal aid will be constrained to pay for the civil suit, the costs of which are significantly higher than the criminal proceedings. This state of affairs inures to the detriment of rape victims, as many legal professionals regard rape cases as complex matters requiring civil proceedings (Ellison, 1997: 195).

Besides the above pre-trial rights, the injured party has procedural rights at trial, which may be exercised on his/her behalf by his/her lawyer. These rights comprise the rights to question witnesses or experts concerning the

compensation claim; to use an interpreter, if necessary; and to address the court concerning the compensation claim after each address by the prosecutor (Bijlsma, 2005: 72). While the injured party is not entitled to call witnesses or experts, s/he may ask the prosecutor to do so on his/her behalf (Brienen & Hoegen, 2000b: 669). The procedural rights of the civil claimant are accordingly more limited than the procedural rights of the auxiliary prosecutor.

Before compensation may be awarded, the offender must be convicted and given a penal sanction. Although the injured party may appeal against the court's refusal to grant the compensation claim, s/he may not appeal independently against an acquittal (Brienen & Hoegen, 2000b: 669-670). The compensation claim must be enforced by the civil claimant. There is no state mechanism for the enforcement of such claims (Brienen & Hoegen, 2000b: 695). In addition to the expense of separate civil suits, this lack of state assistance restricts the accessibility of adhesion proceedings, and they are seldom used in practice (Ellison, 1997: 196).

The German and Swedish auxiliary prosecution procedure grants victims of serious offences the most far-reaching procedural rights of the above European models of victim participation. While the procedural rights of non-party victims are more circumscribed, the fact that they are entitled to lawyers empowers them much more extensively than their English counterparts. The

Dutch adhesion procedure has many practical shortcomings and is less useful to victims than the English compensation order, which, interestingly, the Netherlands has introduced (Brienen & Hoegen, 2000b: 658).

7. VICTIM PARTICIPATION AND DEFENDANTS' RIGHTS

Drawing on the work of the present author (Wolhuter, *et al*, 2009: 195-198), this section argues that the use of auxiliary prosecutors for victims of serious offences in the UK would alleviate much of the secondary victimisation experienced by these victims in the criminal process. Amongst other things, this procedure would facilitate access to information, the ability to question witnesses, to lead evidence, to make statements, and to object to humiliating and intrusive cross-examination (Rock, 2004: 531). Victims from unequal social groups, such as victims of gender-based, racially motivated and homophobic crime (see chapter 6), frequently suffer serious fatal and non-fatal offences against the person, and would consequently be eligible for the auxiliary prosecution procedure. Victims of less serious offences, who are intimidated by the criminal process but do not experience secondary victimisation to the same extent as victims of serious offences, ought to be allowed victims' lawyers, despite the fact that they are witnesses for the Crown.

Common law opponents of such procedures premise their objections on the notion that the presence of a third party or a victims' lawyer is incompatible with the adversarial principle of equality of arms (Doak, 2005: 298). Lord Justice Auld has expressed the view that the introduction of auxiliary prosecutors would be unfair (Doak, 2008: 145). The assumption that informs these perspectives is that such procedures would pit the shared interests of the victim and the prosecution against those of the defendant, and cause the latter to face a double onslaught (Beloof, 1999: 320). Within an adversarial context, active victim participation would consequently violate the defendant's right to a fair trial. Spencer maintains that "... defendants must of necessity be the centre of the proceedings ..." and that the interests of victims and witnesses "... must inevitably take second place" (Spencer, 2004: 37).



However, this representation of victims' rights and defendants' rights as inevitably riven by conflict obscures "... new avenues for criminal justice development" (Goodey, 2005: 180). One of these new avenues involves recognising the increasing overlap between adversarial and inquisitorial processes, as well as the significance of moving to an inclusive principle of fairness in criminal proceedings that encompasses both defendants' and victims' rights. For example, many civil law jurisdictions, including Germany, have adopted the principle of equality of arms, which has brought common law and civil law procedures into closer proximity (Frase & Weigend, 1995: 358). Furthermore, traditionally adversarial jurisdictions are

beginning to incorporate what have hitherto been perceived as inquisitorial processes. For instance, the US permits victims to be legally represented at trial (see Beloof, 1999: 320-321).

Flowing from this growing convergence between the systems, an inclusive understanding of the principle of a fair trial has emerged. As Walther points out, "... the trial must be fair not only with regard to the position of the defendant but also with regard to the positions of witnesses and victims" (Walther, 2006: 113). In *Doorson v The Netherlands* (1996) 22 EHRR 330, the ECtHR adopted such an inclusive concept of trial fairness, holding that the principles of a fair trial require that defendants' and victim/witness's interests be balanced in appropriate cases (para 70; see chapter 2). Furthermore, in *Perez v France* (2005) 40 EHRR 39, it held that a civil claimant in adhesion proceedings has a right to a fair trial in terms of article 6(1) ECHR and that this "... approach is consistent with the need to safeguard victims' rights and their proper place in criminal proceedings" (paras 71-72; see chapter 2). Significantly, the ECtHR regards victims' lawyers as an unremarkable feature of criminal proceedings (see, for instance, *SN v Sweden* (2004) 39 EHRR 13, where the fact that the victim had been legally represented had no bearing on the court's determination that the defendant had received a fair trial).

Notwithstanding its decisions favouring trial fairness for victims as well as defendants, the ECtHR's concept of trial proceedings is deeply rooted in

adversarialism. In *Doorson* it held that, in general, trials must comprise public hearings in which all evidence must "... be produced in the presence of the accused ... with a view to adversarial argument" (para 73). The incorporation of victims' interests flowing from an inclusive concept of trial fairness has not been held to disturb the adversarial balance between the prosecution and defence.

Sanders argues that tripartite proceedings such as auxiliary prosecution are consonant with trial fairness to both victims and defendants. He advocates a freedom model, in terms of which the criminal process must employ measures that "... maximize the totality of freedom ..." of both victims and defendants (Sanders, 2002: 210). Auxiliary prosecution for victims of serious offences enhances the prospect of dialogue and understanding and decreases the likelihood of secondary victimisation. Accordingly, it maximises the freedom of victims without decreasing the freedom of defendants (Sanders, 2002: 222). Equally, legal representation for victims of less serious offences enhances dialogue and understanding and alleviates the ordeal of the criminal process. As such victims remain prosecution witnesses with limited procedural rights the defendant's freedom is not decreased.

However, victim statements of opinion on sentence do not enhance victims' freedom as much as they hamper defendants' freedom (Sanders, 2002: 210). Such statements open the door to the acceptance by the court of sentiments

based on vengeance (or forgiveness) that undermine the principle of proportionality in sentencing and violate the due process rights of the defendant.

The increasing convergence of adversarial and inquisitorial systems, as well as the emergence of an inclusive concept of trial fairness, reveals that it is not the principle of adversarialism that precludes the introduction of procedures such as auxiliary prosecution and victims' lawyers, but the existence of traditionalist views that regard these procedures as inquisitorial only (Goodey, 2005: 180). These views, which are strongly held "... in some influential quarters ..." of the legal establishment (Rock, 2004: 529), are premised on the assumption that active participation rights grant victims control of criminal proceedings. In reality, procedures such as auxiliary prosecution (and *ipso facto* also victims' lawyers) do not involve victims in decision-making control, but grant them the important right "... to speak and to be heard" (Wemmers, 2005: 130). Nonetheless, as Doak states, it is likely that "... the institutional reluctance of lawyers to tolerate a third party ..." (or a victim's lawyer, for that matter) will not be easily defeated (Doak, 2008: 147).

8. CONCLUSION

The government cannot give effect to its rhetoric of "giving victims a voice" (Home Office, 2001b: 73) merely by providing victims with inconsequential

involvement in prosecutorial decisions and sentencing. As the present author has argued (Wolhuter, *et al*, 2009: 198), to empower victims fully, and to alleviate secondary victimisation, victims need procedural rights throughout the criminal process. European procedures such as auxiliary prosecution and victims' lawyers are not only the most effective means of doing so, but also ensure fairness to defendants. Far from being an inquisitorial feature whose introduction in an adversarial system ought to be resisted, active victim participation should be valued as a means of ensuring the dignity and respect due to victims as citizens in a participatory democracy (Edwards, 2001: 44). As is elaborated more fully in chapter 7, the recognition of procedural rights is a pre-condition for the effective use, on the part of victims, of the service rights examined in chapter 3 during pre-trial and trial proceedings.

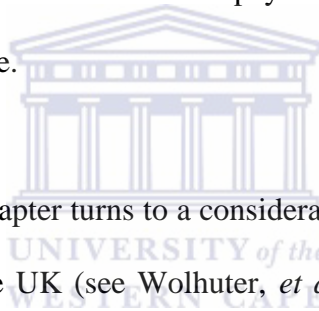
CHAPTER 5: VICTIM COMPENSATION AND RESTORATIVE JUSTICE

1. INTRODUCTION

In many respects, victim compensation and restorative justice (“RJ”) are disparate measures that have little in common. For instance, while measures for victim compensation, whether by the state or by individual offenders, form part of the formal criminal justice system, RJ initiatives often operate alongside, or independently of, the formal system. Furthermore, the participatory process, involving victims, offenders and the community, that is the hallmark of RJ, is absent from compensatory measures. However, as Dignan has pointed out, insofar as state compensation may “... be seen as an embodiment of society’s resolve to repair the harm that has been caused by an offence ...”, and as a mechanism “... symbolically to reforge the social bonds that bind people together”, its aims are congruent with those of RJ (Dignan, 2005: 44-45). In addition, measures for the compensation of victims by offenders, such as compensation orders and reparation orders, “... are closely allied to ...” RJ initiatives (Dignan, 2005: 108). In light of these conceptual similarities, victim compensation and RJ are considered together in this chapter.

The chapter commences by evaluating state compensation in the UK within the framework of the government’s obligations in terms of the European Convention on the Compensation of Victims of Violent Crimes

1983 (the “Compensation Convention”; see Wolhuter, *et al*, 2009: 199). It maintains that, whereas the early non-statutory CICS complied with these obligations, the current tariff-based CICS may fail to meet the requirements of the Compensation Convention in certain respects. The chapter also assesses the measures for individual offenders to compensate victims, including compensation orders, surcharges and recovery orders, against the backdrop of EU standards. It points out that these measures are consonant with the requirements of the Framework Decision and the Victims’ Directive, but contends that their efficacy is hampered by the fact that many offenders are unable to pay compensation and that orders are difficult to enforce.



Thereafter, the chapter turns to a consideration of the RJ processes that are burgeoning in the UK (see Wolhuter, *et al*, 2009: 215). It highlights the increasing recognition of such processes in EU law, as well as international bodies, and discusses government policy and restorative initiatives in England and Wales. The chapter contends that the drawbacks of RJ for victims outweigh its advantages and that, notwithstanding the flaws in the CICS, its benefits for victims are greater than any benefits flowing from RJ. It contends further that victim-centred reform should be directed at the improvement of victims’ position within the formal criminal process rather than at the proliferation of RJ initiatives. In particular, it argues that RJ fails to consider social inequalities and that RJ processes are accordingly unsuitable for victims from unequal social

groups, such as victims of gender-based violence and racially motivated and homophobic crime.

2. VICTIM COMPENSATION

2.1 EU Law

The Compensation Convention, which binds the UK, regulates the entitlement of victims to compensation by the state (see Wolhuter, *et al*, 2009: 199-201). If compensation is not forthcoming from other sources, Member States are obliged to contribute to the compensation of victims who qualify for such compensation. Eligible victims are those who have suffered “... serious bodily injury or impairment of health directly attributable to an intentional crime of violence ...” as well as “... the dependants of persons who have died as a result of such crime” (article 2.1). The perpetrator does not have to be prosecuted or punished in order for this duty to arise (article 2.2).

Article 3 provides that Member States in whose territory an offence is committed are required to compensate victims who are citizens of any Member State that is party to the Compensation Convention, as well as citizens of Member States of the Council of Europe who reside permanently in the state where the offence occurred. In *Ian William Cowan v Tresor Public* 1989 ECJ 195, the ECJ held that, in order to

circumvent a contravention of article 7 of the EEC Treaty, which prohibits discrimination based on nationality, a state must compensate a citizen of another Member State on the same basis as it compensates its own citizens. It may not subject a compensation award for physical injury sustained by the victim of an assault in its territory to the condition that the victim has a residence permit or is a citizen of a country with which it has a reciprocal agreement (para 20).

The Council *Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims* (the “Compensation Directive”) establishes the administrative procedures to be employed by Member States when dealing with such “cross-border” victims (see articles 1-11). It provides that Member States must pay compensation to victims of “... a violent intentional crime ...” who experienced such a crime in their territory (articles 1 and 2). In order to give effect to this duty, and to the administrative procedures it establishes, the Compensation Directive requires that Member States must have compensation schemes for “... victims of violent intentional crimes ...” that guarantee “... fair and appropriate compensation to victims” (article 12.2).

In terms of article 4 of the Compensation Convention, Member States are required to compensate eligible victims for loss of earnings, medical expenses, hospital costs and funeral expenses, and, in the case of dependants of victims who have died, for loss of maintenance. The

Compensation Convention thus requires compensation awards that reflect victims' losses due to the crime. However, there are certain restrictions on this loss-based criterion. For example, Member States are permitted to set upper and lower limits beyond which compensation will not be awarded (article 5). Furthermore, compensation may be denied or decreased due to the victim's financial situation (article 7).

Like the CICS (see section 2.2 below), the Compensation Convention is founded on a concept of "innocent" or "blameless" victimhood. Compensation may be denied or decreased on account of the victim's, or the applicant's, conduct "... before, during or after the crime, or in relation to the injury or death ..."; the victim's, or the applicant's, involvement in "organised crime" or membership of "... an organisation which engages in crimes of violence ..."; and the fact that an award, whether in full or at all, would be inconsistent with justice or public policy (article 8).

In order to ensure that victims are not doubly compensated, Member States may deduct or reclaim sums received by the victim "... from the offender, social security or insurance or ... any other source" (article 9).

Recommendation Rec (2006) 8 on assistance to crime victims (2006), which is not binding but merely persuasive, also contains provisions regarding state compensation. It recognises categories of qualifying victims and types of losses that parallel those in the Compensation

Convention (see article 8). However, it does not provide for exclusions on account of victims' conduct or financial circumstances and is accordingly not expressly founded on a concept of "innocent" victimhood.

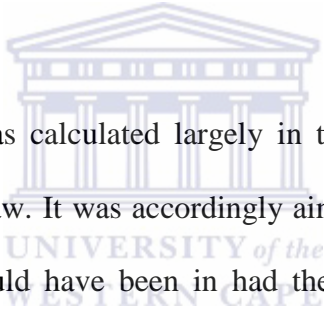
Besides the above provisions concerning state compensation, the Council of Europe has also recognised victims' right to be compensated by offenders. In terms of article 9.1 of the Framework Decision, Member States are obliged to guarantee victims' entitlement to receive a decision within a reasonable time, during criminal proceedings, concerning compensation by the offender, unless national law provides for compensation to be paid in another way. In addition, Member States are required to encourage offenders to compensate victims adequately (article 9.2). Article 15 of the Victims' Directive replicates these provisions. However, neither the Framework Decision nor the Victims' Directive imposes duties regarding the enforcement of compensation orders. In view of the fact that the lack of enforcement measures hampers victims' access to compensation by offenders (see section 2.3.1 below), the absence of enforcement duties constitutes a serious lacuna.

2.2 Criminal injuries compensation

This section briefly discusses the historical background to the CICS. Thereafter, it evaluates the schemes that have been introduced in terms of the Criminal Injuries Compensation Act 1995.

2.2.1 Origins and development

The CICS began as a non-statutory scheme to compensate “deserving” victims of violent crime (see Wolhuter, *et al*, 2009: 201-202). Established in 1964, it was the first victim compensation scheme in Europe (Dignan, 2005: 43). Awards were made *ex gratia*, and victims thus had no right to compensation (Williams, 2005: 93). The CICS was open to victims of violent crime of any nationality and thus complied with the provisions of the Compensation Convention as well as the Compensation Directive (see section 2.1 above).



Compensation was calculated largely in the same way as common law damages in tort law. It was accordingly aimed at putting the victim in the position s/he would have been in had the offence not been committed. However, the criterion of common law damages was limited by the existence of a minimum threshold for eligibility and a maximum limit for loss of earnings. Furthermore, the Criminal Injuries Compensation Board (“CICB”) was permitted to deduct all sums received by the victim from public funds in consequence of the crime (Duff, 1998: 114). In the same way as the Compensation Convention, the CICS also allowed the refusal or reduction of compensation due to the victim’s conduct or involvement in criminal activity.

In consequence of a swing of government opinion in the late 1970s and the 1980s, the scheme (with some alterations) was entrenched in the CJA 1988. The new statutory scheme retained the principle of common law damages and introduced a legal right to compensation (see *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union and Others* [1995] 2 AC 513, 517). The scheme was to be brought into force by the Home Secretary (s.171(1)). However, by the early 1990s, the tide had turned, the government becoming increasingly concerned at the rising costs of awards based on common law damages. Consequently, instead of bringing the scheme contained in the CJA 1988 into force, the government decided to introduce a tariff-based scheme, in terms of which "... injuries of comparable severity would be grouped into 25 tariff levels, ranging from £1000 to £250 000, and there would be no separate payment made for loss of earnings or expenses" (Duff, 1998: 125).

However, the new scheme, which was brought into force by the Home Secretary in 1994 (Duff, 1998: 133), was short-lived. In *Ex parte Fire Brigades Union and Others*, the majority of the House of Lords held that the introduction of the tariff scheme was unlawful. Lord Browne-Wilkinson stated that s.171 of the CJA 1988 obliged the Home Secretary to consider whether to bring the statutory scheme into force. By using his prerogative power to introduce the tariff scheme, he had failed to exercise this statutory duty and had thus acted unlawfully (*Ex parte Fire Brigades Union and Others*, 554).

2.2.2 Criminal Injuries Compensation Act 1995

The government responded by enacting the Criminal Injuries Compensation Act 1995 (the “1995 Act”), which repeals the relevant provisions of the CJA 1988 (s.12(1)) and introduces a modified tariff scheme (see Wolhuter, *et al*, 2009: 202-209). In terms of s.1 of the 1995 Act, the Home Secretary is empowered to devise and implement the scheme. Compensation must henceforth be calculated by reference to a standard amount reflecting the nature of the injury; an additional amount for loss of earnings and special expenses in cases specified by the Home Secretary; and a further amount in cases of fatal injury (s.2(2)).

The standard amount must be determined in accordance with a tariff devised by the Home Secretary. If the injury is not reflected in the tariff, the standard amount must be computed in terms of other relevant provisions of the scheme (s.2(3)). Consequently, the usual award is the tariff-based amount, but it may be supplemented by additional sums in appropriate cases. The 1995 Act also gives victims the right to the internal review of compensation decisions, as well as the right to appeal against such review decisions (sections 4 and 5).

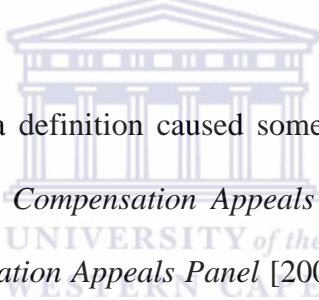
(i) The Criminal Injuries Compensation Scheme 1996

The first modified tariff scheme was brought into force on 1 April 1996 (Duff, 1998: 134). The CICS (Home Office, 1995, the “1996 Scheme”) replaced the CICB with the Criminal Injuries Compensation Authority (“CICA”), who was henceforth to administer the Scheme (para 85). While the 1996 Scheme has been superseded, first, by the CICS 2001 (Home Office, 2001a, the “2001 Scheme”; see section 2.2.2 (ii) below) for claims brought after 1 April 2001, and, more recently, by the CICS 2008 (Criminal Injuries Compensation Authority, 2008, the “2008 Scheme”; see section 2.2.2. (iii) below) for claims brought after 3 November 2008, most of its provisions have not been changed. Consequently, this section encompasses a detailed assessment of the provisions of the 1996 Scheme regarding eligibility for compensation and the method of computing such compensation before addressing the changes brought about by the 2001 and 2008 Schemes.

(a) Eligibility

Like the Compensation Convention and the common law scheme, the 1996 Scheme was founded on a concept of “innocent” victimhood. It recognised a range of circumstances purporting to denote culpability that exclude victims from eligibility for compensation (see below).

Victims who suffered a criminal injury on or after 1 August 1964, as well as close relatives of deceased victims (para 6), qualified for compensation, even if the offender had not been convicted (para 10). A criminal injury encompassed one or more personal injuries, including physical injury and mental injury and disease, sustained in the UK and “directly attributable” to a violent crime, amongst other things (para 8, read with para 9). The Scheme contained no definition of a violent crime, and CICA and the Criminal Injuries Compensation Appeal Panel (“CICAP”) were thus left to decide whether, on the facts of the case, the relevant conduct amounted to such a crime (Miers, 2006: 696).



This absence of a definition caused some disagreement in *R (August) v Criminal Injuries Compensation Appeals Panel*; *R (Brown) v Criminal Injuries Compensation Appeals Panel* [2001] QB 774. August and Brown were victims of sexual offences that had been committed while they were under the age of 16. They had consented to the commission of these offences. CICAP had refused their claims for compensation, holding that, by virtue of their consent they had not been victims of crimes of violence and, consequently, did not qualify for compensation (*August*, 778). On review, the court confirmed CICAP’s decision, acceding to the view that indecent acts with underage children do not all amount to crimes of violence (*August*, 786, 793).

This judgment was upheld by the ECtHR in *August v UK* (Application no. 36505/02, 21 January 2003). The ECtHR took the view that, in light of the fact that the offender had been subject to criminal sanctions, the UK had complied with its duty, in terms of article 8 ECHR, to protect the applicant. It held that article 8 does not encompass a right to receive compensation and that the courts' refusal to regard sexual offences against children as violent crimes in all cases is not tantamount to the violation of the applicant's right to protection (*August v UK*, 5).

The effect of this approach is that, although sexual conduct with an underage child is a criminal offence regardless of his/her consent, the child's consent prevents the crime from being characterised as a crime of violence for the purpose of a compensation claim. It fails to recognise that child sexual offences involve an abuse of power that renders the conduct violent and that consequently ought to negate the child's consent. Victim Support has contended that the existence of such an abuse of power effectively deprives victims of the freedom to refuse, and that they ought to qualify for compensation (Victim Support, 2003: 4).

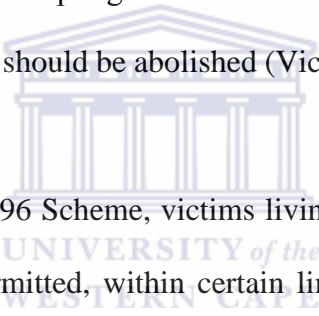
A further controversial exception was entrenched in para 7(b) of the 1996 Scheme. It provided that, in cases where a criminal injury was suffered prior to 1 October 1979 while the victim and the offender were living together as family members, no compensation was payable. This principle

(referred to as the “same roof” principle) excluded victims of domestic violence and intra-familial sexual abuse from eligibility for compensation.

In *S v Criminal Injuries Compensation Board* [2004] SLT 1173, CICA had refused to grant compensation to the petitioner, who had been sexually abused by her father while she lived with him. The court confirmed CICA’s decision on the basis of the “same roof” principle. It held further that this decision did not amount to unjustified discrimination in terms of article 14 read with article 6(1) ECHR. Being excluded from eligibility for compensation by the “same roof” principle, the petitioner did not have a civil right. Consequently, the facts did not fall within the ambit of article 6(1) (para 145). The court added that, even if the facts did fall within the ambit of article 6(1), the discrimination was justified. The “same roof” principle was a proportionate method, based on financial considerations, of attaining the legitimate aim of having a scheme to compensate victims of crime (paras 153-154). While the court accepted that ECtHR jurisprudence requires “very weighty reasons” to justify discrimination based on race, sex or religion, it held that the same standard does not apply to compensation claims (para 154).

Regrettably, a similar interpretation of the “same roof” principle was adopted by the ECtHR. In *Stuart v UK* (Application no. 41903/98, 6 July 1999), the applicant – a victim of child sexual abuse whose compensation claim had been denied due to the “same roof” principle – had contended

that this denial contravened articles 3, 8 and 14 ECHR. The ECtHR took the view that the positive obligations imposed on the state in pursuance of articles 3 and 8 do not extend to an obligation to compensate victims who suffer injury at the hands of private individuals (para 1). It rejected the applicant's contention that the distinction in the 1996 Scheme between victims to whom the "same roof" principle applied and those to whom it did not apply amounted to a violation of article 14, holding that this distinction did not fall within the ambit of articles 3 or 8 (para 2). Consequently, the applicant's claim failed. Victim Support maintains that the "same roof" principle generates distress and self-blame on the part of victims and that it should be abolished (Victim Support, 2003: 6).



In terms of the 1996 Scheme, victims living in the same household as the offender were permitted, within certain limits, to claim compensation in cases occurring after 1 October 1979. Para 16 provided that if the victim and the offender were living together as family members in the same household (even if the offender did not actually inflict the injury), compensation would be denied, unless the following two grounds were present. First, with the exception of non-prosecution for good reasons, the offender had been prosecuted. Second, as regards adult intra-familial violence, the victim and the offender no longer lived together at the time of the claim, and were unlikely to live together in future. The second ground applied to spouses as well as unmarried persons who lived together as husband and wife. It did not apply to children who were injured in the

domestic environment, but CICA had to be satisfied that it would not be against the child's interest to make an award (para 15).

Further grounds for exclusion, reflecting those allowed by the Compensation Convention (see section 2.1 above), were contained in para 13 of the 1996 Scheme. Compensation could be denied or decreased if the claimant did not take "... all reasonable steps to inform the police ..." or another appropriate body without delay; did not "... co-operate with the police or other authority in attempting to bring the assailant to justice ..."; did not provide "reasonable assistance" to CICA or another appropriate body concerning the claim; engaged in conduct "... before, during or after the incident ..." that rendered compensation partially or wholly inappropriate; or had unspent previous convictions or other evidence of poor character that likewise rendered compensation partially or wholly inappropriate. If the victim was deceased, para 13 applied to the deceased as well as the claimant (para 14).

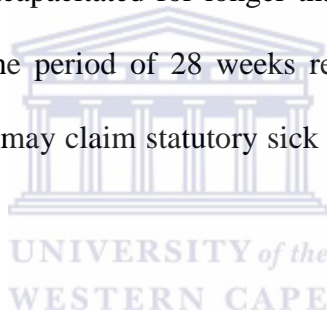
Barring the claims of victims who fail to report the crime or co-operate with the police may inure to the detriment of victims from unequal social groups, such as victims of domestic violence and racially motivated and homophobic crime, who face structural barriers to reporting (see chapter 6). In addition, the refusal or reduction of compensation based on the claimant's conduct and previous convictions may create difficulties for claimants. The effect of unspent convictions on a compensation claim is

established by means of "... a 'sliding scale' that attaches penalty points that depend on the nature of the sentence imposed and the lapse of time since its imposition" (Miers, 2006: 706-707). More or less one third of all compensation claims are denied on account of the claimant's conduct or unspent convictions (Goodey, 2005: 146). A victim whose offending is related to his/her victimisation may be affected detrimentally by the denial or substantial reduction of his/her claim.

In *R (on the application of M) v Criminal Injuries Compensation Appeals Panel* [2001] EWHC Admin 720, CICAP had decreased the applicant's compensation claim in respect of sexual abuse by two-thirds on account of her previous convictions, regardless of the fact that her offending had been caused by her abuse. The review court held that the decision to effect this reduction "required further elaboration" (para 80). As CICAP had failed to provide sufficient reasons for its decision, the court quashed it. Although this judgment benefited the applicant, many other victims whose cases are not heard by a court may have their claims denied or reduced on account of offending that is linked to their victimisation, and which should not affect their claims. Regrettably, as the Compensation Convention allows such exclusions without taking into account the fact that the victim's offending may be related to his/her victimisation, the government has no obligation to abolish or alter this exclusion.

(b) Calculation of compensation

The 1996 Scheme required that a “standard payment” must be made regarding a claim for compensation (para 22(a), read with para 25). This “standard payment” was calibrated along a scale of 25 different fixed levels of compensation that applied to various injuries. The tariff scheme that was declared unlawful by the House of Lords (see section 2.2.1 above) was accordingly retained. However, the 1996 Scheme allowed the tariff to be increased by sums for loss of earnings and special expenses if the victim was incapacitated for longer than 28 weeks in consequence of his/her injury. The period of 28 weeks reflects the period in respect of which the victim may claim statutory sick pay (Duff, 1998: 134; subparas 22(b) and (c)).



The absence of payments for loss of earnings and special expenses in the case of victims who have not been incapacitated for longer than 28 weeks does not necessarily violate the requirement in the Compensation Convention that Member States must pay medical expenses, hospital costs and loss of earnings. The obligation to pay medical expenses and hospital costs is arguably discharged by the availability of the National Health Service. Furthermore, the obligation to pay loss of earnings is met by the payment of statutory sick pay to victims during the first 28 weeks. However, persons who are unemployed, self-employed, in receipt of low wages, or employed on short-term contracts do not qualify for statutory

sick pay (Duff, 1998: 136). As regards such persons, the 1996 Scheme thus failed to comply with the government's obligations in terms of the Compensation Convention to pay loss of earnings.

The 1996 Scheme also applied to certain categories of indirect victims. These categories comprised the parents and children of deceased victims, and their spouses and partners who had lived with them for a specified period or, as regards spouses or former spouses, who were financially dependent on them at the time they died (para 38). All these categories of persons were eligible for compensation. If the victim died in consequence of the victimisation, the compensation award included the standard tariff, claims for loss of dependency and claims for loss of parental services, where relevant (see paras 39-42). Consequently, the 1996 Scheme met the state obligation in the Compensation Convention to pay for funeral expenses and loss of maintenance (see section 2.1 above).

The ceiling for a compensation award was set at £500,000 (para 23). With the exception of tariff-based awards, all compensation would be decreased proportionately where the victim received payments from other sources regarding the injury, such as insurance, social security benefits or court-awarded damages from the offender (para 45; para 48). The objective of this rule, which mirrors that contained in the Compensation Convention, was to prevent victims from receiving double compensation at the expense of the taxpayer.

Before 1 October 2006 (see section 2.2.2. (ii) below), this rule, coupled with the rules of the social security system, had a two-fold impact on victims in receipt of social security. First, the compensation was decreased by the amount of social security paid to them on account of the injury. Second, the compensation was viewed “... as capital for the purpose of calculating means-tested benefits”, decreasing the benefits payments for many claimants (Williams, 2005: 95).

In light of the strict preconditions for claims for loss of earnings and special expenses, most victims were only eligible for the standard tariff (Duff, 1998: 134). Notwithstanding the outcry that greeted the government’s attempt to introduce a tariff by executive action, therefore, it succeeded in entrenching a statutory tariff-based scheme that continues to apply to the present (see sections 2.2.2 (ii) and (iii) below).

(ii) The Criminal Injuries Compensation Scheme 2001

With effect from 1 April 2001, a new scheme was brought into force, which applied to all compensation claims received by CICA on or after that date. Apart from minor changes, its rules regarding eligibility reflected those contained in the 1996 Scheme (para 6 and para 8). Consequently, victims who suffered physical or mental injuries (para 9), which are “directly attributable” to violent crimes, amongst other things, qualified for compensation.

Like its forerunner, the 2001 Scheme retained the “same roof” principle (para 7(b)) and limited claims for compensation by victims of intra-familial abuse who were victimised after 1 October 1979 (para 17). Furthermore, the same exclusions applied to victims who failed to cooperate with the authorities or who engaged in inappropriate conduct (para 13). However, the 2001 Scheme contained a new exclusion relating to the consumption of alcohol and drugs. Having considered a claimant’s conduct before, during and after the crime, a claims officer could deny or decrease an award if s/he believed that, by consuming alcohol or drugs excessively, the claimant contributed to the circumstances causing the injury, and that this contribution took place in a way that made “... a full award, or any award at all ...”, inappropriate (para 14). Victim Support has contended that intoxication, per se, ought not to be considered in determining eligibility for compensation (Victim Support, 2004a). The Compensation Convention allows exclusions based on the victim’s conduct, and it is accordingly unlikely that this new exclusion violates its provisions.

Although the tariffs were revised to reflect the inflation rate (Rock, 2004: 283), compensation was computed in the same way as the 1996 Scheme. Qualifying victims were consequently entitled to the standard tariff applicable to their injury, as well as awards for loss of earnings and special expenses if they were incapacitated for more than 28 weeks in “... direct consequence of the injury” (para 23). However, the 2001 Scheme

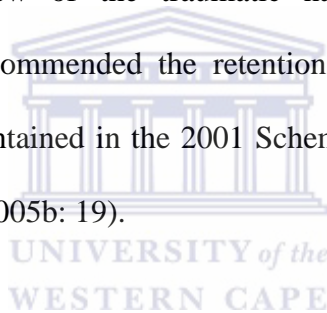
increased the tariff for child victims of sexual abuse (Rock, 2004: 283) and extended the rules regarding claims by close relatives of deceased victims to same sex partners (para 38).

The 2001 Scheme retained the ceiling of £500,000 (para 24), as well as the rules regarding the deduction of sums received by victims from other sources, such as social security payments, insurance monies and court-ordered damages (para 45 and para 48). However, the detrimental effect on victims in receipt of social security benefits that resulted from the deduction of such benefits from compensation awards, and from the fact that the compensation was considered capital for the purpose of assessing eligibility for benefits (see section 2.2.2. (i) above), was alleviated with effect from 1 October 2006. Although benefits continue to be deducted from compensation awards, such awards are excluded from the calculation of means-tested benefits (Criminal Justice System, 2005b: 19).

(iii) The Criminal Injuries Compensation Scheme 2008

After the 2001 Scheme had been in operation for about 4 years, the government, in a bid to cut costs, attempted to curtail the ambit of the CICS extensively (see Wolhuter, *et al*, 2009: 209-210). It recommended that the scheme be restricted by the criterion of “seriousness” so that compensation would only be paid in respect of the most serious injuries. It advocated a “clinical definition” of “seriousness”, which would draw “...

on the experience of the civil courts in awarding damages, the insurance industry ... and the medical profession” (Criminal Justice System, 2005b: 18). Less serious injuries would no longer be included in the CICS. Instead, support and assistance would be available from Victim Support Plus for victims of lesser injuries (see chapter 3). Furthermore, while qualifying serious injuries would attract increased tariff payments, compensation for loss of earnings and special expenses would no longer be available. In addition, the government proposed to raise the ceiling of £500,000 for tariff payments (Criminal Justice System, 2005b: 18). However, in view of the traumatic nature of sexual offences and homicides, it recommended the retention of the method of calculating compensation contained in the 2001 Scheme for these offences (Criminal Justice System, 2005b: 19).



The rationale of these proposals was clearly to define “seriousness” in a way that “... ‘set the bar very high’ in an attempt to deprive many potential claimants of a financial award” (Sugarman, 2006: 188). Fortunately, none of these proposals has seen the light of day, and the new 2008 Scheme, with minor modifications, replicates the provisions of its predecessors (see Criminal Injuries Compensation Authority, 2008).

In the same way as the 1996 and 2001 Schemes, victims who have sustained a criminal injury on or after 1 August 1964, as well as the close relatives of deceased victims (para 6), are eligible for compensation, even

if the offender has not been convicted (para 10). A criminal injury comprises one or more personal injuries, such as physical and mental injury and disease, “... sustained in and directly attributable to an act occurring in Great Britain”, which constitutes, amongst other things, “a crime of violence” (para 8, read with para 9). Like its forerunners, the 2008 Scheme does not contain a definition of a crime of violence, and the courts’ jurisprudence concerning the meaning of the concept accordingly continues to apply (see section 2.2.2 (i) (a) above).

Furthermore, despite the criticisms of Victim Support, the 2008 Scheme retains the “same roof” principle (para 7(b)), as well as the provisions concerning the eligibility of victims of intra-familial violence who suffered injury after 1 October 1979 (para 17). However, these provisions have been extended to include same sex partners living together (para 17(2)). In addition, with minor modifications, the 2008 Scheme replicates the provisions of the 2001 Scheme concerning exclusions based on the applicant’s conduct or failure to cooperate with the authorities (paras 13 and 14).

Although the tariffs have been revised to reflect the rate of inflation, compensation is calculated in the same way as the 1996 and 2001 Schemes. Eligible victims are thus entitled to the standard tariff applicable to their injury, as well as sums for loss of earnings and special expenses if

they have been incapacitated for more than 28 weeks “... as a direct consequence of the injury” (para 23).

The 2008 Scheme retains the upper limit of £500,000 for compensation claims (para 24). Apart from minor changes, the rules concerning the deduction of monies received by victims from other sources, such as social security payments and insurance monies, are the same as those in the 2001 Scheme (paras 45 and 48).

The primary change effected by the 2008 Scheme is the replacement of CICAP by the First-Tier Tribunal, which was established in terms of the Tribunals, Courts and Enforcement Act 2007 as a generic tribunal to hear appeals against government bodies in respect of which it has been given jurisdiction (Tribunals Service, undated). In terms of the 2008 Scheme, the First-Tier Tribunal is to act as an appellate and review body for victims who are dissatisfied with the decisions of the claims officer at first instance (see para 53ff).

The above analysis has shown that, with the exception of the limits regarding awards for loss of earnings that prejudice victims who do not qualify for statutory sick leave, the 1996, 2001 and 2008 Schemes comply with the Compensation Convention. In addition, the “same roof” principle, as well as the exclusion of sexual offences involving consenting child

victims from the definition of violent crime, has been upheld by the ECtHR (Wolhuter, *et al*, 2009: 209).

The coalition government is currently engaged in a review of the 2008 Scheme in an ostensible bid to improve the compensation of victims of the 7/7 terror attacks in London (BBC News, 2010). However, the government has hitherto been unwilling to publicise the content of the review. Justice Minister Crispin Blunt has recently refused to accede to requests in Parliament for details concerning the review and the proposed date of its completion, merely stating that “the Criminal Injuries Compensation Scheme is currently subject to review. We intend to bring forward proposals in due course” (Hansard, 2011). The government’s reticence in this regard has generated concerns on the part of victims’ groups that compensation payments are to be reduced without consultation (Telegraph, 2011). It consequently remains to be seen whether the revised compensation scheme will comply with European standards.

2.3 Compensation by the offender

In terms of the Framework Decision and the Victims’ Directive, Member States must take steps to ensure that victims are given a decision concerning compensation by offenders during the criminal proceedings, as well as steps to encourage offenders to pay such compensation to victims (see section 2.1 above). Although the mechanisms for the payment of

compensation by offenders assessed in this section are consonant with the Framework Decision and the Victims' Directive, a number of barriers exist, such as the courts' hesitance to order compensation and the difficulty of enforcing orders, which hamper the ability of victims to obtain access to such compensation.

2.3.1 Compensation orders

The Criminal Justice Act 1972 clothed the courts with the power to make compensation orders requiring offenders to compensate victims for any loss, damage or injury due to the crime (Ashworth, 2005: 298; see Wolhuter, *et al*, 2009: 210-212). These provisions were revised in terms of the Criminal Justice Acts 1982, 1988 and 1991 and are presently contained in the Powers of Criminal Courts (Sentencing) Act 2000 ("PCCSA").

In terms of s.130(1) of the PCCSA, the court may impose a compensation order in the place of, or in addition to, another sentence. However, if the sentence is mandatory or fixed by law, it may be supplemented, but not replaced, by the compensation order. The court may make the order *mero motu* or on application by the victim. It may order the offender to compensate the victim for "... personal injury, loss or damage ..." consequent upon the offence, or for funeral expenses or bereavement payments if death occurred as a result of the offence. Section 130(3) requires the court to give reasons for refusing to order compensation

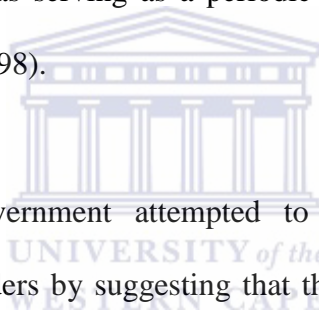
where it has the power to do so. In terms of s.130(11), the court must consider the offender's means in deciding whether to order compensation and, if so, the amount of such compensation. If the offender cannot afford to pay compensation and a fine, the court must accord preference to compensation (s.130(12)). The same enforcement procedure applies to both fines and compensation orders, and offenders may be imprisoned for failure to pay (Ashworth, 2005: 300).

Compensation orders are more effective than the adhesion procedure used in many European jurisdictions, such as the Netherlands, Sweden and Germany, which joins the victim's compensation claim and the defendant's criminal trial (see chapter 4). In contrast to adhesion proceedings, compensation orders do not require an application by victims, freeing them from the burden of establishing their claims (Brienen and Hoegen, 2000b: 258). Furthermore, compensation orders are enforced by the state, while orders made in adhesion proceedings are enforced by the victim him/herself (Brienen & Hoegen, 2000a: 288).

Nevertheless, several practical difficulties exist as regards the imposition and enforcement of compensation orders. Many courts do not impose compensation orders because the necessary information is not forthcoming (Victim Support, 2004a). Research demonstrates that courts frequently do not impose compensation orders despite having the power to do so, and that the use of compensation orders is decreasing (Ashworth, 2005: 301).

The courts' hesitance to impose such orders is largely due to the fact that many offenders do not have the means to pay compensation (Spalek, 2006: 103). However, many courts are also unwilling to order compensation where the offender is sentenced to imprisonment (Spalek, 2006: 103).

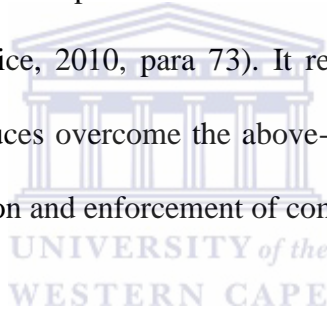
Even where the courts do impose compensation orders, many victims' access to such compensation is hampered by difficulties of enforcement. Payments may be delayed (Spalek, 2006: 103) or small instalments may be made, which victims perceive "... as insulting or as trivializing the original offence, as well as serving as a periodic reminder of the loss involved" (Williams, 2005: 98).



The Labour government attempted to improve the enforcement of compensation orders by suggesting that the courts be given the power to impose orders attaching the offender's earnings or benefits in order to ensure that compensation is paid (Home Office, 2004, para 32; Criminal Justice System, 2005b: 14)). As such orders would involve monthly instalments, often for small amounts (especially where benefits are attached), they would be unlikely to be of much value in practice. Victim Support has advocated the introduction of a system in terms of which the government initially pays the compensation monies and empowers the courts to recover such monies from offenders (Victim Support, 2004a; Victim Support, 2010b: 24). Although the Labour government indicated

that it was willing to do so, it subsequently decided that the cost of doing so was too prohibitive (Victim Support, 2004a).

The coalition government has recently announced that it intends to increase the use of compensation orders by creating "... a positive duty for courts to consider imposing a compensation order in all cases where there is an identified victim ..." and by encouraging them "... to use compensation orders as a standalone punishment" (Ministry of Justice, 2010, para 72). In addition, the coalition government aims to devise means of ensuring that compensation orders are enforced more effectively (Ministry of Justice, 2010, para 73). It remains to be seen whether any reforms it introduces overcome the above-mentioned practical difficulties with the imposition and enforcement of compensation orders.



In the absence of effective reforms, despite the fact that compensation orders are more effective than the European adhesion procedure, these practical difficulties detract considerably from their value to victims. Consequently, the fact that, unlike many of their European counterparts, victims in the UK do not have to claim compensation from offenders as a precondition to claiming state compensation, is to be welcomed.

2.3.2 Surcharges

In order to reduce its outlay on compensation, the Labour government suggested that surcharges for offenders be introduced (Home Office, 2004, para 40; see Wolhuter, *et al*, 2009: 213). Section 14 of the DVCVA consequently provides for the introduction of such surcharges by amending the CJA 2003. In terms of s.161A CJA 2003, courts must impose surcharges when sentencing offenders. However, the amount of the surcharge must be decreased if the court imposes a compensation order and the offender lacks the means to pay both the compensation order and the surcharge. Section 161B contains analogous provisions regarding fines. Furthermore, s.15 DVCVA increases the maximum amount payable by way of a fixed penalty notice in order to include a surcharge. The income from surcharges is paid into the Victims' Fund, which exists to compensate individual victims and to fund victims' organisations (Williams, 2005: 97). The coalition government has recently expressed its intention to extend the victims' surcharge "... to other types of sentence and [to increase] the amount levied" (Ministry of Justice, 2010, para 74).

Victim Support has contended that, as surcharges consist of small sums, victims may view them as humiliating or offensive. Furthermore, surcharges may cause courts to reduce compensation orders where offenders lack the means to pay both surcharges and compensation

(Victim Support, 2004a). Surcharges may also be unfair to offenders (Williams, 2005: 97).

2.3.4 Recovery orders

In another cost-cutting exercise, the Labour government suggested that CICA ought to be permitted to reclaim from offenders the compensation it has paid to victims (Home Office, 2004, para 72; see Wolhuter, *et al*, 2009: 213-214). Consequently, s. 57 DVCVA has amended the 1995 Act to allow the Home Secretary to make regulations providing for recovery orders, which order offenders to pay all or part of the compensation paid by CICA that is directly attributable to their offence. The sums recovered by CICA must be put into the Victims' Fund to compensate individual victims and fund victims' organisations (Williams, 2005: 97).

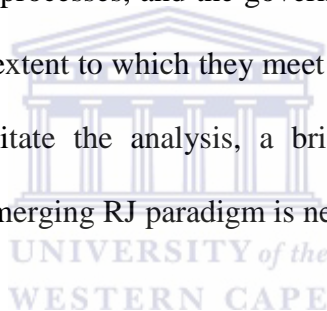
While Victim Support is in favour of recovery orders, it has warned that offenders, whose victims are known to them, may try to take revenge if they receive a recovery order (Victim Support, 2004a). Steps must accordingly be taken to protect victims adequately in these circumstances.

Other European jurisdictions contain provisions analogous to recovery orders. However, the limited financial means of many offenders bodes ill for the practical significance of these orders to victims (Home Office, 2004, paras 76-77).

The above analysis has demonstrated that the measures for requiring offenders to compensate victims are ineffective in many respects. Despite its drawbacks, the CICS is thus an indispensable means of enabling victims to recover the losses consequent upon their victimisation.

3. RESTORATIVE JUSTICE

With the support of the government, RJ processes have flourished in England and Wales in the last decade. The primary purpose of this section is to assess these processes, and the government policy that informs them, to determine the extent to which they meet the needs of victims. However, in order to facilitate the analysis, a brief examination of the central concepts of the emerging RJ paradigm is necessary.



3.1 The restorative justice paradigm

It is difficult to ascribe a single theoretical foundation to RJ (see Wolhuter, *et al*, 2009: 215-218). Instead, it may be viewed more accurately as an eclectic “... accretion of practical experience” (Pollard, 2000: 10). For proponents of RJ, crime is the result of unresolved conflict and requires dialogue between victims, offenders and the community in order to deal with its effects (Elton & Roybal, 2003: 50). The primary “stakeholders”, namely the victim, the offender and the community, must take part in the restorative process so that victims’ needs may be met and offenders may

be held responsible for remedying the injuries they have caused (Reimund, 2004/2005: 670). The objective of RJ is to attain more victim participation, offender responsibility and community protection than the formal criminal process offers (Shenk, 2001/2002: 190-191). It emphasises the restoration of “right relations” (Thorburn, 2004/2005: 873) rather than the punishment of offenders.

However, proponents of RJ adopt disparate concepts of restoration. Those who adhere to the “encounter” conception focus on restorative processes, highlighting the benefits of an encounter between victims, offenders and the community that is independent of the formal criminal process (Johnstone & Van Ness, 2007: 9). By contrast, proponents of a “reparative” conception, albeit also in favour of restorative encounters, nevertheless believe that “... *partially* restorative solutions to problems of crime ...” may take the form of “reparative *sanctions*” imposed in the traditional criminal process (Johnstone & Van Ness, 2007: 14).

Proponents of the encounter approach maintain that restorative processes must encompass certain values, including “consensual participation” by the stakeholders, courteous dialogue, the balancing of the interests of victims and offenders, and the principle of voluntariness (Dignan, 2002: 172). In their view, processes, such as victim-offender mediation, restorative conferencing and community conferencing embody these values (Obold-Eschleman, 2004: 581; see section 3.3.2 below). The

restorative nature of the process is vital – any outcome that follows upon it is regarded as satisfactory (Obold-Eschleman, 2004: 582).

The encounter conception has been criticised for its failure to recognise the value of restorative outcomes (Dignan, 2002: 174). Proponents of the reparative conception, such as Bazemore and Walgrave, contend that the central concern of RJ is to restore the injury caused by crime (Walgrave, 2002: 192). While deliberative processes are indeed more amenable to restorative outcomes, non-deliberative, coercive processes, which lead to partial restoration, should be employed in cases where deliberative processes fail or cannot be used (Walgrave, 2007: 565). The reparative conception thus views measures such as restitution, community service, victim support, victim compensation and offender rehabilitation programmes as restorative (Van Ness & Nolan, 1998: 54). Certain RJ proponents favour an approach that uses both restorative processes and restorative outcomes, arguing that a completely “restorative system” requires such a holistic approach (Van Ness & Nolan, 1998: 54; Obold-Eschleman, 2004: 583).

RJ is depicted as victim-centred, with proponents contending that justice must commence with the needs of victims (Williams, 2005: 58). Victims are empowered by being given “... a forum in which their voices are both heard and respected” (Green, 2007: 176). Within this forum, which is informal and encourages dialogue and free communication, victims are

able to tell their stories and give voice to their feelings (Gay, 1999/2000: 1654). Victims are also free to ask offenders fundamental questions, such as why they committed the crime (Johnstone, 2002: 66).

In addition, RJ proponents adopt the view that victims are in need of hearing offenders express remorse and apologise for committing the crime (Gay, 1999/2000: 1654). The likelihood of this occurring is increased by the interaction between victims and offenders that characterises the restorative process (Strang & Sherman, 2003: 28). Some proponents also argue that total restoration may necessitate forgiveness by victims (Strang & Sherman, 2003: 28). However, besides receiving healing and empowerment, victims need restitution for their injuries. Even if complete material compensation is not forthcoming, partial compensation is nonetheless restorative in view of its symbolic value (Johnstone, 2002: 66). Participation in a restorative process that leads to restorative outcomes, such as compensation and an apology, affords victims healing and closure, enabling them to move forward.

Proponents of RJ adopt disparate views of the relationship between RJ and the traditional criminal process. Abolitionists regard RJ as an alternative paradigm that ought to supersede the traditional process (Dignan, 2005: 106). While this view was widely held in the nascent stages of the RJ movement, few presently hold it. The majority of proponents advocate either separatism or integrationism.

Separatists take the view that the objectives, processes and values of RJ and those of the formal criminal process are fundamentally distinct. Consequently, in order to prevent the contamination of RJ processes, the two processes ought to operate independently of each other (Dignan, 2005: 106). The separatist approach has several drawbacks. First, independent RJ schemes have low rates of referral and accordingly find it difficult to continue to operate. Second, they may cause “double punishment” by working with offenders who face sanctions by the formal system. Third, separatism renders it likely that RJ processes will be financially insecure and marginalised (Dignan, 2002: 179). There are also reasons of principle that militate against a separatist approach. The possibility of inequalities of power in RJ processes renders it likely that they may lead to injustice. Consequently, they require the checks and balances offered by the traditional criminal process (Walgrave, 2007: 561). In particular, the lack of procedural safeguards may violate offenders’ due process rights (Reimund, 2004/2005: 683-684). RJ processes should accordingly take place within the protective framework of the formal criminal justice process.

Various models for integrating RJ and the formal system have been proffered. Braithwaite advocates a “regulatory pyramid” in which RJ constitutes the foundation of criminal justice interventions, with strategies based on deterrence and incapacitation being reserved for instances in which RJ does not succeed. Such punitive strategies must nonetheless

encompass RJ values wherever possible. Furthermore, there should be “... de-escalation back down the pyramid to restorative justice whenever punishment has succeeded in getting the safety concerns under control” (Braithwaite, 2002: 166-167).

Walgrave likewise recommends a “maximalist” approach, which employs restorative measures in as many cases as possible (Walgrave, 2000: 263-264), but uses “restorative coercion” if RJ fails. He contends that there are limits to voluntary RJ and that coercion must consequently be used frequently. He thus advocates “... a system that can use coercion, according to due process, to protect citizens from offenders and from abuse of authority as well” (Walgrave, 2000: 272).

Dignan takes the view that Braithwaite’s model results in increasingly punitive responses to “... repeat and recalcitrant offenders ...” and does not address the failures of the formal criminal process (Dignan, 2002: 180). He advocates a “systemic” model in which RJ is the basis of criminal justice interventions. In cases where the failure of RJ necessitates formal court-imposed sanctions, these sanctions must themselves be imbued with the values of RJ. Courts would thus be required to impose “restoration orders”, such as victim compensation or reparation. Nevertheless, he concedes that incapacitative measures ought to be used in cases in which there is the likelihood of serious physical harm to others (Dignan, 2002: 180-183).

Although these differing theoretical views exist regarding the relationship between RJ and the formal system, international and European instruments, as well as English law, policy and practice are clearly founded on a state-dominated model.

3.2 International and European provisions

International and European forums have increasingly advocated RJ processes since the turn of the century (Willemsens & Walgrave, 2007: 492; see Wolhuter, *et al*, 2009: 218-220). This section examines the relevant provisions of the Council of Europe *Recommendation No. R (99) 19 on mediation in penal matters* (1999; “Recommendation No. R (99) 19”), the Framework Decision, and the Victims’ Directive, as well as the United Nations *Resolution on basic principles on the use of restorative justice programmes in criminal matters* (2002, the “UN Resolution”). While the Framework Decision and the Victims’ Directive focus on victims, the other two instruments merely refer to victims’ interests within the framework of their primary concern with RJ or mediation.

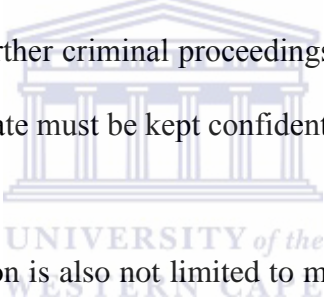
Recommendation No. R (99) 19 limits its provisions to mediation rather than RJ processes as a whole. In terms of article I, the Recommendation applies to processes in which victims and offenders participate actively in the resolution of disputes arising from crime with the aid of “... an impartial third party (mediator)”. In terms of article II, mediation should

be “... available at all stages of the criminal justice process ...” and mediation services ought to be granted independence within the criminal process. Decisions to order mediation and assessments of the outcomes of mediation must be made by “criminal justice authorities” (article IV). Mediation is thus placed under the control of the criminal justice system. In terms of article III, a procedural model corresponding to the court process must be adopted. In particular, procedural safeguards, such as the right to legal assistance, must be applied to mediation processes.

The Framework Decision also regulates mediation rather than RJ processes broadly conceived. In terms of article 10, Member States are required to advocate mediation processes in criminal cases for suitable offences and to ensure that cognisance is taken of agreements reached in such processes. The inclusion of a provision obliging Member States to promote mediation indicates an intention, on the part of the framers of the Framework Decision, to grant victims an entitlement to participate in mediation. However, unlike other provisions in the Framework Decision, such as those concerning the provision of information and victim protection (articles 4 and 8; see chapter 3), article 10 does not expressly provide that victims have a right to mediation.

The Victims’ Directive is broader than the Framework Decision insofar as it regulates “restorative services” as well as mediation. Like the Framework Decision, it does not grant victims a right to these processes.

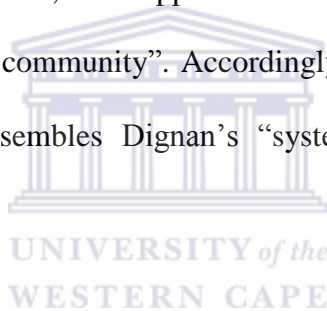
However, flowing from a concern that victims may experience victimisation in such processes, it grants victims a “right to safeguards in the context of mediation and other restorative justice services” (article 11). In order to give effect to this right, a duty is imposed on Member States to “... establish standards to safeguard the victim from intimidation or further victimisation.” Such standards require that victims must give their “... free and informed consent ...” to participate in these processes; that they must be given “... full and unbiased information ...” before participating; that the offender must acknowledge responsibility for his or her conduct; that “... any agreement should be arrived at voluntarily and should be taken into account in any further criminal proceedings”; and that discussions that are conducted in private must be kept confidential” (article 11.1).



The UN Resolution is also not limited to mediation. In terms of article I.1, RJ programmes are those that use “... restorative processes and [seek] to achieve restorative outcomes”. Restorative processes entail the active participation of victims, offenders, and other affected individuals or community members in resolving disputes arising from crime, generally with the aid of a facilitator. They include “... mediation, conciliation, conferencing and sentencing circles” (article I.2). Restorative outcomes are agreements reached as a result of restorative processes, “... such as reparation, restitution and community service ...”, the objective of which is to meet parties’ needs and responsibilities and to bring about “... the reintegration of the victim and the offender” (article I.3). Consequently,

this broad definition of RJ is consonant with the holistic approach to RJ that encompasses both processes and outcomes (see section 3.1 above).

Despite its broad conception of RJ, the UN Resolution nonetheless provides that RJ programmes be placed under the control of the formal criminal justice system. In terms of article II.11, where RJ is not feasible or possible, cases must be referred to the formal authorities to decide. The UN Resolution also provides that criminal justice officials should “... encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community”. Accordingly, it advocates an integrationist approach that resembles Dignan’s “systemic” model (see section 3.1 above).



Furthermore, RJ programmes must contain procedural safeguards and be overseen by the judiciary. While RJ programmes may be used at any stage of the criminal process (article II.6), “... procedural safeguards guaranteeing fairness to the offender and the victim ...”, particularly the right to legal counsel, must be adopted (article III.13). The outcomes of agreements reached in RJ programmes must also be overseen by the courts in suitable cases or incorporated into their decisions (article III.15). Proponents of RJ who posit an integrationist model have likewise emphasised the importance of due process and oversight by the judiciary (see section 3.1 above).

The current concern with RJ in international and European forums reflects the growing centrality of RJ in domestic jurisdictions. Nevertheless, the UN Resolution and Recommendation No. R (99) 19 are not binding, leaving domestic jurisdictions to decide upon the status of RJ. In addition, the provisions of the Framework Decision and the Victims' Directive evince an intention to grant victims a mere entitlement, rather than a right, to participate in mediation (see above). However, the right to safeguards within restorative processes enshrined in the Victims' Directive is to be welcomed, as it is aimed at preventing abuses of such processes that inure to the detriment of victims (see section 3.3.3 below).

3.3 Restorative justice in England and Wales



This section examines government policy regarding RJ, and documents the RJ processes that are presently burgeoning in England and Wales, both within and parallel to the formal criminal process (see Wolhuter, *et al*, 2009: 220-228).

3.3.1 Government policy

At its inception in the 1990s, RJ was reserved for youth justice. The Labour government regarded the three “Rs” of RJ, namely, responsibility, restoration and reintegration, as central to youth justice policy (Home Office, 1997). In consequence, young offenders (as well as their families)

were admonished to take responsibility for their offending; to apologise and make amends to victims; and to permit themselves to be reintegrated into the community after the wrong has been remedied (Dignan, 2005: 109). The government's primary concern was to ensure that offenders made reparation, or amends, for their offending. Consequently, reparation "... constitutes a key theoretical and practical base ..." for many RJ interventions concerning young offenders, including reparation orders in the CDA and referral orders in the YJCEA (Crawford, 2000: 296; see sections 3.3.2 (iv) and (v) below).

The Labour government's commitment to RJ was confirmed in the White Paper *Justice for all* (Home Office, 2002b). RJ schemes were said to provide "... constructive, community-based responses to crime", generating the participation of all stakeholders in the resolution of issues relating to "... the aftermath of the offence and any implications for the future" (Home Office, 2002b, paras 5.8, 7.32). However, the government's first holistic RJ strategy was set out in the consultation document *Restorative justice: the government's strategy* (Home Office, 2003a). The government maintained that RJ gives victims a more powerful "voice" in the criminal process and ensures that offenders assume responsibility for their offending and desist from crime (para 1.4). It defined RJ broadly, including processes and outcomes such as mediation, family group conferences and reparation. It recommended the use of these measures for adults and young offenders, as well as for minor and serious offences, such

as robbery and burglary (para 2.18). This holistic approach was to be placed within the framework of a victim-centred process that focused on care and respect for victims (Home Office, 2003a: 34).

The Labour government aimed to make the best use of RJ to ensure that victims' needs were met and that recidivism was reduced (para 5.1). It advocated a dual strategy to attain this goal, namely to include RJ at all stages of the formal criminal process and to work towards the complete integration of RJ into the formal system (para 5.2). Consequently, notwithstanding its wide definition of RJ and its appreciation of the fact that RJ processes function both within and alongside the formal system, the Labour government's strategy, like the UN Resolution and the European instruments, was predicated upon state control of RJ. However, its policy of "responsibilisation" paved the way for it to shirk its responsibility for crime by placing it on the shoulders of the stakeholders in RJ processes (Green, 2007: 182; Crawford, 2000: 304).

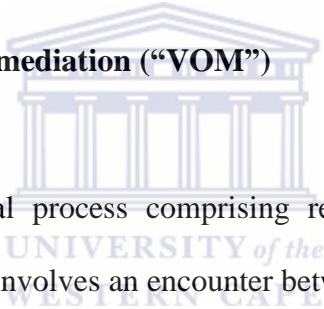
The coalition government has continued the Labour government's commitment to RJ. It has recently announced an intention to increase "... the range and availability of restorative approaches" (Ministry of Justice, 2010, para 78). It aims to effect this, amongst other things, by ensuring that, where appropriate, RJ "... is a fundamental part of the sentencing process" (Ministry of Justice, 2010, para 79), and by including the results of pre-sentence restorative conferences in pre-sentence reports (Ministry

of Justice, 2010, para 81). These statements of intent indicate that the coalition government, like its predecessor, will continue to locate control of RJ within the state.

3.3.2 Restorative justice initiatives

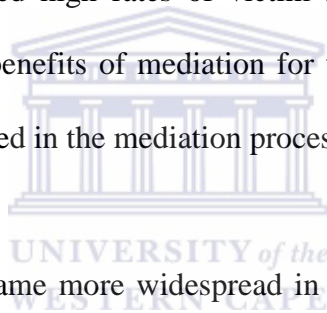
Present policy on RJ indicates that the government has endorsed the numerous RJ initiatives that have emerged in England and Wales in the last decade. This section examines the most important of these initiatives.

(i) **Victim-offender mediation (“VOM”)**



The first informal process comprising restorative features was VOM. Direct mediation involves an encounter between the victim and offender in person in the presence of a trained mediator, who functions as a go-between but who may not “... propose or impose a decision ...” on either of the parties (Dignan, 2005: 112). By contrast, “shuttle” or indirect mediation exists to facilitate restoration for victims and offenders who are not willing to meet in person (Williams, 2005: 79). Despite the fact that proponents of RJ view it as less satisfactory, many victims prefer to engage in indirect mediation as they regard it as a safer option (Williams, 2005: 79).

VOM emerged in the UK in the 1980s but only became increasingly common in the late 1990s (Goodey, 2005: 193). The Home Office played a large part in the nascent stages of VOM by funding “... four pilot mediation projects in Cumbria, Coventry, Wolverhampton and Leeds” (Goodey, 2005: 191). Both the police and the courts referred cases to these projects, which were concerned primarily with young offenders charged with property offences, such as theft and criminal damage (Goodey, 2005: 191-192). The majority of victims were corporate bodies (Goodey, 2005: 192). Notwithstanding the fact that a study of these projects by Marshall and Merry showed high rates of victim satisfaction, it is an unreliable indicator of the benefits of mediation for victims, as very few individual victims participated in the mediation processes (Goodey, 2005: 192).



While VOM became more widespread in the late 1990s, it has not been integrated fully into the formal criminal process (Dignan, 2005: 113). By contrast, it is run by outside agencies, such as Mediation UK (Van Ness & Nolan, 1998: 82), or takes place in particular criminal justice agencies, such as the police or the probation service (Dignan, 2005: 114). The use of outside agencies is regarded as advantageous to victims, as they may be more at ease outside the traditional system (Home Office, 2003a, para 2.21). However, without sustained state support, independent VOM has experienced funding shortages, resource constraints and low referral rates (Dignan, 2005: 114). It has accordingly been superseded by restorative

conferencing programmes, which have received firmer government backing (Dignan, 2005: 115).

Proponents of RJ maintain that VOM benefits victims as well as offenders. Victims are granted the freedom to ask questions about the crime and to give voice to their feelings about its effect on them. They may also be empowered and receive healing and closure (Elton & Roybal, 2003: 52). However, although research has demonstrated high rates of victim satisfaction with direct VOM, most victims in England and Wales use indirect VOM (Dignan, 2005: 137). In their recent study, Shapland, *et al* report that the majority of victims opted for indirect rather than direct VOM (Shapland, *et al*, 2011: 118).

Victim Support has contended that VOM is riven with problems, with many victims feeling pressurised by courts and/or offenders to participate, or doing so from a sense of civic duty rather than a desire to obtain healing. It has emphasised that victims must not be given the wrong impression by promises of healing when the actual objectives of VOM “... are crime reduction and the re-education of the offender” (Wright, 2002: 657).

(ii) **RJ conferencing**

In the last few years, RJ conferencing has superseded VOM as one of the principal RJ measures in England and Wales. It began as a trial project by the Thames Valley Police (Johnstone, 2002: 115) and grew into a permanent part of their practice. Several other police forces also currently employ it. While the projects were used initially for young offenders, they have been expanded to encompass adults as well (Goodey, 2005: 200; Shapland, *et al*, 2011). RJ conferencing was used originally for relatively minor offences, such as theft and non-serious property offences. Recently, however, it has begun to be used increasingly for serious and repeat offenders (Fox *et al*, 2006: 133).

The police employ RJ conferencing in three contexts. First, in suitable cases, a restorative caution is given to offenders who would otherwise stand trial (Johnstone, 2002: 115). A RJ facilitator (most commonly a police officer) heads the proceedings, which are attended by the offender and his/her family (Dignan, 2005: 121). Cautioning for young offenders has been reformed and entrenched in the CDA, which has been consolidated in the PCCSA. Two cautions may be given to young offenders in appropriate cases. The first is a warning or reprimand, and the second is a final warning. Those offenders who receive final warnings are required to join a “rehabilitation programme”, where suitable, in terms of which they may be required to apologise to victims or make reparation to

victims or the community (Dignan, 2005: 110). In terms of s.22 of the CJA 2003, adult offenders may receive a conditional caution in appropriate cases, which imposes conditions concerning rehabilitation and the making of reparation. In practice, RJ conferencing may be used to facilitate such conditional cautions. However, Hoyle has noted that “restorative, conditional cautions” are seldom used and “... almost none involve victims” (Cunneen & Hoyle, 2010: 27).

The second context in which RJ conferencing is used relates to restorative conferences. A RJ facilitator heads such conferences, which are attended by the offender and his/her family, as well as the victim and his/her supporters. The third context relates to community conferences, which are attended by the offender and his/her family, the victim and his/her supporters, as well as community representatives (Dignan, 2005: 121).

RJ conferences aim to confront offenders with the effects of their offending, to make it possible for them to understand the reasons for it, to encourage them to desist from further offending, and to facilitate an apology to victims and the making of “a reparative action plan” (Johnstone, 2002:115-116). Their objectives, as regards victims, are to make it possible for victims to give voice to their feelings about the crime, and to meet and, if possible, forgive the offenders (Johnstone, 2002: 116). While direct victims may receive both material reparation and symbolic

reparation, which takes the form of an apology, indirect victims may only receive symbolic reparation (Young, 2000: 238-239).

Restorative conferencing, as used by the Thames Valley Police, is founded upon Braithwaite's theory of reintegrative shaming (Rock, 2004: 301-302). Braithwaite has contended that offenders must be shamed for their offending. However, such shaming must not be disintegrative, such as the shaming that occurs in the formal criminal process, but must be aimed at reintegrating offenders into the community. Reintegrative shaming takes place in two stages. The shaming stage comprises the shaming of the offender in front of the victim and his/her "community of care", namely, family members, friends and community representatives (Dignan, 2005: 102). Such shaming consists of expressing disapproval of the offence, not of the offender him/herself (Goodey, 2005: 198). The victim's presence and participation enables the offender to confront the offence and to avoid using "techniques of neutralization", such as denying that there is a victim or that harm occurred (Dignan, 2005: 103). The presence of the offender's "community of care" causes the shaming to affect the offender more profoundly than the presence of an impersonal judge (Dignan, 2005: 103).

The reintegrative stage takes place after the shaming stage, and aims to facilitate agreement on appropriate reparation and the offender's reintegration "... into the law-abiding community" (Dignan, 2005:103).

The fact that the offender's "community of care" is present is an important

contributory factor to the attainment of such reintegration (Dignan, 2005: 103).

Proponents of RJ maintain that reintegrative shaming benefits offenders as well as victims. Victims experience catharsis by listening to the offender's "full story" and meeting the offender in person dissipates their fears (Johnstone, 2002: 117). Furthermore, victims are empowered by participating in the process and are able to achieve "closure" by being given an opportunity to forgive the offender (Johnstone, 2002: 117; Shapland, *et al*, 2011: 147). In the belief that victims benefit from participating in RJ conferencing using reintegrative shaming, the Thames Valley Police have provided victims with a greater role in their projects than was the case in the initial RJ processes in England and Wales (Rock, 2004: 307).

It has been contended that the use of reintegrative shaming in restorative conferences is inconsonant with the ideals of RJ (Morris & Maxwell, 2000: 208). To turn victims into "shamers" does not facilitate reconciliation, but constitutes "... 'victim prostitution' in which victims are effectively 'used' in order to bring about certain effects on offenders with a view to reducing the incidence of offending" (Dignan, 2005: 117). Furthermore, it is inappropriate to expect victims to forgive their offenders. By contrast, the withholding of forgiveness may be "morally right" in certain circumstances (Johnstone, 2002: 134).

Some studies have demonstrated that, notwithstanding its apparent advantages to victims, RJ conferencing has low levels of victim participation. Hoyle has shown that one or more victims attended only 14 percent of the Thames Valley Police restorative conferences that were held in the three years after they were introduced (Hoyle, 2002: 103). Consequently, many victims are excluded from the restorative process. Victims did not participate for personal reasons, including unwillingness to attend and fear of retaliation. However, the poor implementation of the RJ projects constituted a further reason for the lack of victim participation (Hoyle, 2002: 105, 116). Furthermore, victims who did not wish to participate directly were not given sufficient opportunities to participate indirectly (Hoyle, 2002: 106). Accordingly, RJ conferencing has been criticised for being too focused on offenders (Dignan, 2005: 143). However, not all studies reveal low rates of victim participation. Shapland, *et al* found that a significant number of victims participated in the restorative processes surveyed in their study (Shapland, *et al*, 2011: 118).

Research has demonstrated that victims are unsure of the value of material reparation. Strang and Sherman found that, while RJ conferencing has a greater chance of leading to restitution than the formal criminal process, it is uncertain whether all victims regard restitution as a suitable way of redressing the harm (Strang & Sherman, 2003: 34). Shapland, *et al* found that, while very few RJ conferences involved financial compensation or reparation, most victims were not less satisfied as a result (Shapland, *et al*,

2011: 142). Instead, victims were more concerned with “... the symbolic reparation of offenders taking control of their lives and deciding to change their life patterns away from offending” (Shapland, *et al*, 2011: 143).

A further concern with RJ conferences using reintegrative shaming is that the empirical evidence does not unequivocally support allegations by proponents that such conferences reduce recidivism (Goodey, 2005: 198).

(iii) Family Group Conferences (“FGCs”)

After having been implemented successfully in New Zealand (Reimund, 2004/2005: 676), FGCs were introduced in the UK. They are used principally for young offenders (Dignan, 2005: 119). While FGCs in New Zealand are employed for all offences except for murder (Rock, 2004: 299), they are usually employed for less serious offences in England and Wales. However, certain projects are known to use FGCs for serious offences. For instance, the Essex Family Group Conference Service uses FGCs in the case of young offenders who have committed serious offences, offend persistently, or “... are at high risk of re-offending” (Home Office, 2003a, para 2.7).

A conference facilitator heads a FGC, which is attended by the offender, his/her family and persons invited by the family, the victim, his/her supporters and/or family members, and a police officer (Goodey, 2005:

195). Only victims and offenders are permitted to participate actively in the process. The other persons present play a supporting role only (Dignan, 2005: 116-117).

Proponents of FGCs contend that they are victim-centred, being premised on meeting the needs of victims. As such, they make victims feel better about the offence, encourage them to reconcile with offenders, generate consensual reparative outcomes, and reintegrate victims and offenders into the community (Dignan, 2005: 117). Research into FGCs in New Zealand found that most victims who participated felt better for having done so, and stated that the FGC had given them a “voice” in deciding suitable outcomes (Morris & Maxwell, 2000: 211). Nonetheless, about 25 per cent of victims felt worse, amongst other things, because they did not consider the offenders’ apologies genuine and received no reparation (Morris & Maxwell, 2000: 212). In light of the fact that young offenders and their families have insufficient financial resources, few FGCs lead to financial reparation (Morris & Maxwell, 2000: 210).

The FGCs had relatively low levels of victim participation (Dignan, 2005: 140) and victims who did attend expressed less satisfaction than professionals and families with the outcomes of the FGCs (Morris & Maxwell, 2000: 212). Although Morris and Maxwell contend that victims were dissatisfied because of poor practice rather than any intrinsic faults in FGCs (Morris & Maxwell, 2000: 217), Dignan maintains that practical

improvements are unlikely to resolve problems arising from victims' beliefs that apologies were not real or from the failure to obtain reparation (Dignan, 2005: 141).

Projects using FGCs in England and Wales have had considerable problems, including low rates of referral, disagreements with criminal justice agencies and low levels of victim participation (Dignan, 2005: 143). Recent research has shown that there is little empirical evidence "... that the needs of victims received primary importance" (Zernova, 2007: 497). Many FGCs were conducted without victims and many victims thought that the process existed principally for offenders' benefit (Zernova, 2007: 497, 498). The research also demonstrated that insufficient attention was given to material reparation and that only two of the conferences studied incorporated a discussion of material reparation (Zernova, 2007: 497-498). It also referred to the fact that victims may be in danger of being pressurised to participate in FGCs by facilitators appealing to their sense of civic duty (Zernova, 2007: 498). Finally, the research showed that assertions by proponents that FGCs generate the empowerment of victims lacked empirical support and that the roles of victims were limited to ensure that the state retained control over offenders (Zernova, 2007: 503). This research provides support for the view that FGCs use victims to obtain the reduction of recidivism rather than the empowerment of victims (Zernova, 2007: 503) and that, in consequence, they are focused on offenders rather than victims (Johnstone, 2002: 19).

(iv) **Reparation orders**

Reparation orders for young offenders under the age of 18 years were the first sentencing option with restorative features to receive the force of law in terms of the provisions of the CDA, which have since been consolidated in the PCCSA (see Wolhuter, *et al*, 2009: 212, 226).

Section 73(1) of the PCCSA provides that a court may impose a reparation order for offences not carrying a sentence fixed by law. These orders may require young offenders to make reparation to identifiable victims or the community. They may not be imposed along with custodial sentences or community orders (s.73(4)). Making reparation does not include paying financial compensation (s.73(3)). Young offenders may be ordered to make reparation by apologising to victims or repairing damaged property (Home Office, 1997). The victim's consent to the order is necessary, and the order may not require the offender to work for more than 24 hours in total (s.74(1)). The court is obliged to give reasons for deciding not to order reparation in cases where it has the power to do so (s.73(8)).

The requirement that the victim must consent to the order is indicative of a measure of restorativeness, the premise being that both victims and offenders should benefit from reparation orders (Wasik, 1999: 471). Nevertheless, the government has stated that, although the victim's opinion concerning the kind of reparation must be taken into account, the

court has the final decision-making power in this respect (Wasik, 1999: 476). The fact that reparation orders are court-imposed rather than voluntarily determined by the parties detracts from their restorativeness (Dignan, 2005: 111) and opens them to criticism as being premised upon an “authoritarian” model of RJ (Williams, 2005: 67).

Nonetheless, proponents of RJ contend that reparation orders do embody some restorative features, such as giving victims an opportunity to meet offenders and to come to an understanding of why the offence was committed (Goodey, 2005: 201). However, although victims of less serious offences, such as property offences, may benefit therapeutically from being involved in decisions about reparation and experience closure by receiving reparation, victims of offences against the person may be traumatised by the process. Furthermore, victims who need financial reparation are unlikely to benefit from non-financial reparation.

In any event, in practice, few reparation orders require offenders to make reparation directly to victims. Studies have demonstrated that courts are hesitant to grant adjournments to enable victims to be consulted about reparation before the sentence is imposed. Consequently, the majority of reparation orders require young offenders to engage in community reparation (Dignan, 2005: 135). In addition, reparation orders are founded principally on the policy of diverting young offenders from the formal criminal process in order to reduce recidivism and to “... limit the costs of

future arrests, trials and incarceration to the public purse” (Goodey, 2005: 202). Consequently, they are focused on offenders rather than on victims (Goodey, 2005: 203).

(v) **Referral orders**

Referral orders, the second statutory sentencing option for young offenders that has restorative features, were introduced by the YJCEA, which has been consolidated in the PCCSA (see Wolhuter, *et al*, 2009: 227-228). Referral orders may be imposed in cases where the court is dealing with an offender who is younger than 18 years in regard to an offence which has no sentence fixed by law and the court does not wish to order custody or an absolute discharge (s.16(1)). Referral orders may be compulsory or discretionary.

Originally, if the offender had pleaded guilty and had not previously been convicted of an offence or bound over, a referral order was compulsory (s.17(1), read with s.16 (2)). However, the government has subsequently made referral orders discretionary in these circumstances if the offence is non-imprisonable (Dignan, 2005: 131). In addition, referral orders are discretionary if the offender has pleaded guilty to at least one of the offences with which s/he is charged, and not guilty to at least one of the others, and has not previously been convicted or bound over (s.17(2), read with s.16(3)).

In terms of a referral order, the young offender must be required to attend meetings of a youth offender panel, which consists of at least one member of the Youth Offending Team (s.18(1), read with s.21(3)). The panel's aim is to obtain an agreement from the young offender regarding a programme of behaviour directed at the prevention of recidivism (s.23(1)). The programme may make provision for reparation, mediation or community work, amongst other things (s.23(2)). The terms of the agreement amount to a youth offender contract, which may not be shorter than 3 months or longer than 12 months in duration (s.23(6), read with s.18(1)).

Panel meetings must be attended by the young offender and his/her parent, guardian or other "appropriate person" if s/he is younger than 16 years. "Appropriate persons" may also attend if the young offender is over the age of 16 years (s.20). Furthermore, the young offender may have a support person (s.22(3)). Victims and their supporters are permitted to attend (ss.22(4) and (5)). If the panel determines at its final meeting that the young offender has observed the terms of the youth offender contract satisfactorily, the referral order is discharged (s.27). If the contract has not been observed satisfactorily, or if it has been breached, the panel must refer the young offender to the court (s.27).

According to the government, victims are central to the process of referral orders. Advantages to victims include giving them a forum to air their opinions, to question offenders with a view to gaining insight into the

reasons for the offence, and to obtain an acknowledgement of their injuries. They may also obtain material and/or emotional reparation (Dignan, 2005: 148-149).

The government piloted referral orders in 11 areas in 2000 (Crawford & Burden, 2005: 8). An assessment of these pilots revealed high rates of victim satisfaction regarding the standards of procedural justice in panels, but dissatisfaction concerning the restrictions placed on the participation of victims (Crawford & Burden, 2005: 8). In the case of some of the pilots, for instance, victims who had participated were asked to leave after reparation had been discussed, but before the programme of activities for the young offender had been decided (Crawford, 2006: 137). Levels of victim attendance were also very low, with victims attending panel meetings in a mere 13 per cent of cases (Crawford & Burden, 2005: 8). Reasons for the low levels of attendance by victims included problems in contacting victims, resource limitations and time constraints (Goodey, 2005: 204).

A later study also revealed low levels of participation by victims (Crawford & Burden, 2005: 37). Reasons included the limited time-span for the holding of panel meetings, the holding of such meetings at times that were inconvenient for victims, victims' fear of reprisals, as well as their unwillingness to meet with offenders in person (Crawford & Burden, 2005: 38-39). While victims who did attend were positive about having

been “given a voice” and having obtained closure, many victims were unhappy with the limited follow-up information they were given and the lack of cognisance taken of their opinions (Crawford & Burden, 2005: 47, 52-53).

In addition, the study demonstrated that tension between community participation and victim participation contributed to the low levels of victim attendance. The involvement of the community may hamper the centrality of victims, “... particularly if the community is thought capable of injecting a victim perspective by virtue of its own status and role as indirect or secondary victim of a crime” (Dignan, 2005: 152). Youth justice agencies that are not in favour of the participation of victims may thus use community involvement as a substitute for the attendance of victims (Dignan, 2005: 152). This difficulty is exacerbated by the tendency of youth offender panels to favour community rather than victim reparation (Crawford, 2006: 137).

Low levels of attendance by victims, restrictions on the participation of victims and inadequate victim reparation detract from the restorative features of referral orders and expose them to criticism as overly focused on offenders. Furthermore, they are entrenched in a coercive criminal justice framework that “... offends cherished restorative ideals of voluntariness” (Crawford & Burden, 2005: 14).

3.3.3 Effectiveness of restorative justice for victims

The previous section has examined a number of problems that beset RJ processes in practice, particularly as regards victims' experiences. This section considers a broader question of principle, namely whether the paradigm of RJ is reconcilable with the effective empowerment of victims or whether, as Braithwaite contends, it is at odds with "... a radical vision of victim empowerment" (Braithwaite, 2002: 160; see Wolhuter, *et al*, 2009: 228-231).

Proponents of RJ have struggled to resolve the conflict between the restorative value of voluntariness and the practical reality that RJ processes are frequently not voluntary. For some proponents, voluntariness is vital (see, e.g., Wright, 2002: 659). Consequently, processes embodying coercive features do not qualify as restorative. Nonetheless, the majority of RJ proponents take the view that coercion may be used to buttress restorative values in appropriate cases (see, e.g., Walgrave, 2007: 565; Obold-Eschleman, 2004: 599). For example, Walgrave maintains that "restorative coercion" ought to be employed, as there are limits to voluntariness, which require that force, within the parameters of due process, be applied by the criminal justice system (Walgrave, 2000: 272).

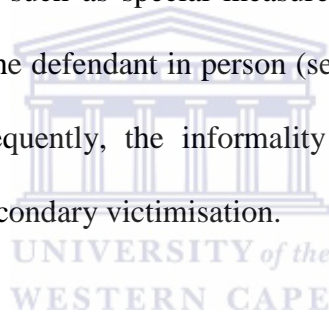
However, the "... specter of punishment in the background ..." (Braithwaite, 2002, quoted in Williams, 2005: 66) may detract from the

integrity of restorative processes in the eyes of victims. Research has shown that many offenders who participate in FGCs in England believe that they are obliged to do so (Zernova, 2007: 500). Offenders who apologise and make reparation because they believe that they are required to do so, or because they wish to avoid the formal process, are unlikely to be regarded as credible by victims. Further research has shown that victims regard reparation as lacking credibility if it is made to avoid the prospect of criminal proceedings (Crawford, 2000: 300).

The lack of integrity of processes that use “restorative coercion” may cause victims to decide not to participate or to participate out of a sense of civic duty rather than a belief that they may obtain healing or closure (see sections 3.3.2 (i) and (iii) above). Consequently, instead of empowering victims, such processes may generate secondary victimisation (Cunneen & Hoyle, 2010: 135). While Shapland, *et al* found “... no evidence of secondary victimisation ...” in their study (Shapland, *et al*, 2011: 144), it does not appear that the study included victims of gender-based, racially or religiously motivated or homophobic crime, for whom the experience of RJ may well generate secondary victimisation (see below). The focus of the Victims’ Directive on safeguards to ensure the absence of secondary victimisation is thus to be welcomed (see section 3.2 above).

The informal nature of RJ processes constitutes another difficulty for victims, as the safeguards of the traditional criminal process may be

absent. It is true that proponents of RJ who advocate an integrationist approach, such as Walgrave, as well as instruments, such as Recommendation No. R (99) 19 and the UN Resolution, call for safeguards premised on due process, including legal assistance, to ensure that abuse does not occur in RJ processes (see sections 3.1 and 3.2 above). Nevertheless, it is not always possible to comply with such safeguards in practice, particularly as RJ processes are headed by facilitators who are not legal professionals. In addition, the protective measures available to victims, especially vulnerable and intimidated victims, in the traditional criminal process, such as special measures and the prohibition of cross-examination by the defendant in person (see chapter 3) do not apply to RJ processes. Consequently, the informality of the RJ process may lead intrinsically to secondary victimisation.



Besides the above difficulties, which apply to all victims, additional difficulties exist concerning the use of RJ processes in cases involving victims from unequal social groups. Notwithstanding the fact that proponents of RJ regard victims as central stakeholders in RJ processes, RJ is premised upon a neutral concept of victimhood that masks social inequalities based on gender, race, sexuality and age, amongst others (Green, 2007: 181). In light of the fact that RJ processes are "... firmly embedded within state practice ...", this concept of victimhood is difficult to challenge (Cunneen & Hoyle, 2010: 133). The obfuscation of social inequalities may undermine the "... protection and promotion of [human]

rights in restorative justice programmes”, which may impede the empowerment of victims from unequal social groups (Skelton & Sekhonyane, 2007: 585). Furthermore, the valorisation of the concept of “community” by RJ proponents obscures the social exclusion, coercion and power imbalances that beset many communities (Crawford, 2000: 291). The “moral authoritarianism” which informs RJ is founded upon an assumption that communities are characterised by consensus, and is resistant to a critical inquiry that draws attention to the existence of unequal social relations (Williams, 2005: 63).

The deleterious effect of such concepts of victimhood and community is brought to light by the experiences of victims of gender-based violence and racially motivated and homophobic hate crime (see chapter 6). A number of RJ proponents recommend RJ processes for gender-based violence. They contend that RJ will empower victims by giving them a “voice”, validating their accounts of the crime, and “... acknowledging that [they] are not to blame ...” (Daly, 2006: 338). They maintain that victims experience the RJ process as less threatening than the traditional criminal process on account of its informality (Daly, 2006: 338).

Hoyle argues that RJ processes may be able to contest the patriarchal mindsets of perpetrators, their families and friends that “excuse or condone” gender-based violence (Cunneen & Hoyle, 2010: 77). However, in order to convey official “... condemnation of the offender’s behaviour

...” in domestic violence cases, she contends that RJ processes should be imposed by the courts along with a sentence, unless the incident is “less serious”, in which case an RJ process should be imposed “as an alternative” (Cunneen & Hoyle, 2010: 79). In cases where there is no formal process because the victim has chosen not to give evidence and the criminal justice agents have decided not to compel her to do so, a restorative conference may be used as “... an expedient form of diversion from prosecution” (Cunneen & Hoyle, 2010: 80).

Approaches such as these fail to consider the existence, within RJ processes, of fundamental barriers to the effective empowerment of victims of gender-based violence. Many communities are fraught with patriarchal attitudes. Consequently, the involvement of the community in RJ processes may traumatise victims by trivialising gender-based violence (Johnstone, 2002: 29-30). A neutral facilitator may not be able to impede the influence of such attitudes and the inequalities of power that inform them (Bannenberg & Rössner, 2003: 72). Furthermore, the use of RJ may render victims vulnerable to further violence, especially where victims and offenders are known to each other (Daly & Stubbs, 2007: 159). Hoyle concedes that such “pitfalls” exist (Cunneen & Hoyle, 2010: 77-78).

Cunneen maintains that, because RJ regards “... an offence as a discrete, past event ...”, it is unable to capture the reality that domestic violence “... is commonly recurrent” (Cunneen & Hoyle, 2010: 151). In addition, the

making of apologies by offenders is particularly inapposite in domestic violence cases, as remorse and apology constitute part of the cycle of domestic violence (Daly & Stubbs, 2007: 160). Rather than empowering victims, forgiveness may undermine their sense of autonomy, particularly in sexual assault cases (Daly & Stubbs, 2007: 160-161).

The use of RJ processes in the case of hate crimes is characterised by similar shortcomings. Nevertheless, scholars have recommended the use of RJ in such cases. Hudson takes the view that, in light of the limited number of convictions for hate crime, RJ may signal its unlawfulness more effectively than the traditional criminal process. It enables the victim to tell his/her story directly, generating comprehension on the part of the offender of the victim's injuries. Furthermore, instead of being subject to stigmatisation and exclusion, the offender experiences reintegrative shaming (Hudson, 2006: 277).

Hudson's approach lacks an appreciation of the potential damage that may be caused to victims of hate crime by RJ processes. The involvement of the community generates a risk of injustice to victims. Racially motivated and homophobic offences are premised on prejudices that are often shared by the community in question (Dignan, 2005: 171). Furthermore, the inequalities of power that exist between victims and offenders may filter into the RJ process, in view of the absence, or practical inefficacy, of procedural safeguards and the use of a neutral facilitator. In addition, as

hate crimes cause injury, not only to the direct victims, but also to the entire social group whose characteristic is targeted, the making of reparation and apology to individual victims cannot restore the social relationship fully. As Cunneen maintains, the “public denunciation” pursuant to the formal criminal process may be preferable “... because it speaks to the broader social group more directly than a private apology to an individual” (Cunneen & Hoyle, 2010: 155).

It is fortunate that RJ processes are not used generally for domestic violence, sexual assault and racially motivated or homophobic crime in England and Wales. However, the Thames Valley Police RJ conferencing programmes include domestic violence (Dignan, 2005: 170), and the Hate Crimes Project of the London Southwark Mediation Centre has engaged in direct and indirect VOM in cases of non-serious hate crimes (Cunneen & Hoyle, 2010: 74). It is to be hoped that these initiatives do not constitute a sign that the UK is to follow the recent tendency in foreign jurisdictions, such as the US, Australia and New Zealand, to use RJ for gender-based violence and hate crime (Daly & Stubbs, 2007: 160).

4. CONCLUSION

This chapter has examined the strengths and weaknesses of compensation and restorative justice from the perspective of victims. Its assessment of state compensation has demonstrated that the CICS has a number of

drawbacks that cause victims difficulty (see Wolhuter, *et al*, 2009: 214). These drawbacks include decreasing or denying victims' claims based on their past conduct or criminal activity, excluding victims in terms of the "same roof" principle, denying compensation to consenting child victims of sexual offences, and failing to pay compensation for special expenses and loss of earnings to victims who do not qualify for statutory sick pay. Notwithstanding these shortcomings, the CICS is consonant with the Compensation Convention in most respects and constitutes the most generous compensation scheme in Europe (see Rock, 2004: 266).

The chapter's examination of RJ processes in England and Wales against the backdrop of European and international instruments has yielded less positive results (see Wolhuter, *et al*, 2009: 231). It has highlighted the practical disadvantages of these processes for victims and has emphasised a number of intrinsic theoretical difficulties with the RJ paradigm, particularly from the perspective of victims from unequal social groups. In view of these concerns, it is contended that state compensation constitutes a more effective manner than RJ of redressing victims' injuries. It is contended further that, if the traditional criminal justice process is transformed in the way outlined in the thesis, it will be more conducive than RJ to the empowerment of victims. The recognition of enforceable rights for victims (see chapter 2) and the application of anti-discrimination law to victims from unequal social groups (see chapter 6), will alleviate secondary victimisation in the criminal process. In addition, the adoption

of auxiliary prosecution for serious offences and victims' lawyers for less serious offences (see chapter 4) will empower victims procedurally during the trial. Furthermore, training programmes aimed at the eradication of prejudice and the removal of imbalances of power may be implemented more effectively in the criminal justice system than in the community (see chapter 6).

While the Framework Decision and the Victims' Directive approve the use of mediation (and, in the case of the Victims' Directive, also RJ more broadly conceived), they also require reform of the formal process to improve victims' positions. The UK ought to focus on the transformation of the traditional criminal process rather than expending much-needed resources on the development of RJ processes that, by the admission of their own advocates (see Braithwaite, 2002: 160; section 3.3.3 above), are incompatible with the complete empowerment of victims.

CHAPTER 6: RIGHTS OF VICTIMS FROM SOCIALLY DISADVANTAGED GROUPS

1. INTRODUCTION

This chapter examines the responses of the government and criminal justice agencies to gender-based violence, racially and religiously motivated crime, homophobic and transphobic crime, and elder abuse, within the framework of the UK's international and European human rights obligations. It contends that, although the UK has made appreciable progress in the prevention, investigation and punishment of these forms of victimisation, as well as in the reduction of secondary victimisation, current law and policy fails to comply with international and European standards in several respects.

Minority ethnic women's lived experiences of domestic violence are not addressed adequately. The rates of prosecution and conviction for rape, racially and religiously motivated crime, and homophobic and transphobic crime, are low. Racial, religious and homophobic prejudice on the part of the police continues to exist. A comprehensive criminal justice policy to prevent, investigate and punish elder abuse is lacking.

The chapter maintains that, in order to bring its law and policy into line with international and European standards, and to capture the dynamics of victims'

lived realities, the government must correlate the victims' rights that constitute the focus of previous chapters with the relevant provisions of the EA.

2. INTERNATIONAL AND EUROPEAN HUMAN RIGHTS OBLIGATIONS

This section engages in an overview of the UK's obligations in international and European human rights law and EU law regarding the groups of socially disadvantaged victims under review (see Wolhuter, *et al*, 2009: 233-235, 242-244, 250-251, 255-256).

2.1 Gender-based victimisation

As a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (the "Women's Convention"), the UK is bound by its provisions. Although gender-based violence is not prohibited expressly, the Committee on the Elimination of Discrimination Against Women ("CEDAW") has stated that the definition of discrimination against women in article 1 includes gender-based violence (CEDAW, 1992: para 6).

The Women's Convention requires States Parties to adopt "... all appropriate measures to eliminate discrimination against women by any person,

organization or enterprise” (article 2(e)). They must also take appropriate steps, such as enacting legislation, to alter or abolish discriminatory “... laws, regulations, customs and practices ...” (article 2(f)). CEDAW has stated that, in terms of general international law, states have a positive duty to “... act with due diligence ...” to prevent, investigate and punish acts of gender-based violence, not only by public, but also by private persons (CEDAW, 1992: para 9). Consequently, it has recommended that States Parties must adopt “... appropriate and effective measures ...” to combat gender-based violence committed by public or private persons (CEDAW, 1992: para 24(a)). They must ensure that domestic law protects women adequately and that the judiciary, the police and other public officials receive “gender-sensitive training” (CEDAW, 1992: para 24(b)). They must also ensure that domestic violence attracts criminal penalties, and that legislation is enacted prohibiting honour based defences to charges of assault or murder within a domestic violence context (CEDAW, 1992: para 24(r)). In addition, they must “... take all legal and other measures that are necessary to provide effective protection of women against gender-based violence ...”, such as criminal sanctions, civil remedies and compensation (CEDAW, 1992: para 24(t)).

The UK has also signed the (non-binding) Declaration on the Elimination of Violence Against Women 1994 (the “Women’s Declaration”). In terms of article 1, “violence against women” is gender-based violence, which includes threats of such violence as well as coercion, which occurs “... in public or in

private life ...”. States Parties are required to adopt “... a policy of eliminating violence ...” and to use “... due diligence to prevent, investigate and ... punish ...” gender-based violence committed by the state or private persons (article 4). In the same way as the Women’s Convention, the Women’s Declaration thus imposes liability on State Parties for gender-based violence by public bodies as well as private persons, where the standard of due diligence has not been met.

The United Nations *Resolution on crime prevention and criminal justice measures to eliminate violence against women* (1997) elaborates on the nature of the measures that states are required to adopt in order to respond to gender-based violence effectively. For instance, states must ensure that legal provisions pertaining to violence against women are enforced consistently “... in such a way that all criminal acts of violence against women are recognized and responded to accordingly by the criminal justice system” (para 8(a)). They must make provision for a court process that is “... accessible and sensitive to the needs of women subjected to violence ...” (para 10(d)). In addition, they are required to ensure that criminal justice agencies receive appropriate “... crosscultural and gender-sensitivity training ...” (para 12(a)).

The issue of gender-based violence has also received the attention of the Council of Europe. *Recommendation Rec (2002) 5 on the protection of women against violence*, albeit not binding, imposes far-reaching duties for the

protection and empowerment of victims. States are required to assist and support victims and to ensure the provision of services to immigrant women (articles 23, 24). They must guarantee that police accord victims respect and dignity, respond to their complaints in confidence, and provide female police officers wherever possible (article 29). They are required to ensure that victims do not “... suffer secondary (re)victimization or any gender-insensitive treatment by the police, health and social personnel [and] judiciary personnel” (article 33). As regards trials, states must develop special conditions for victims’ evidence that obviate repetition and reduce the distress caused by the proceedings (article 42). In addition, they must avert “... unwarranted and/or humiliating questioning ...” of victims and provide measures protecting victims from threats and revenge (articles 43, 44; see chapter 3 for a discussion of similar provisions for the protection of victims in terms of *Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence* (1997) (“Recommendation R (97) 13”). They must also protect immigrant victims of domestic violence by considering giving them an independent right of residence to enable them to leave the abuser (article 59).

The very recent adoption of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011; the “European Women’s Convention”) signifies an increased commitment to the eradication of gender-based violence in Europe. In terms of article 4.1, all

persons, especially women, have the right “... to live free from violence in both the public and the private sphere”. States Parties have a duty “... to exercise due diligence to prevent, punish and provide reparation ...” for gender-based violence committed “by non-State actors” (article 5.2).

In addition, States Parties have a range of duties that accord victims specific rights. For instance, they are required to provide victims with information concerning sources of victim support and legal remedies “... in a language they understand” (article 19). They must also provide victims with “general” and “specialist support services” (articles 20, 22), as well as “... rape crisis or sexual violence referral centres ...” (article 25), shelters (article 23) and free 24-hour telephonic help-lines (article 24). In addition, victims must be granted “... adequate civil remedies against the perpetrator ...” and against state agencies for failing to adopt appropriate “... preventive or protective measures” (article 29). States Parties must also accord victims “... the right to claim compensation from perpetrators ...” as well as state compensation if compensation is not forthcoming from “other sources” (article 30).

Furthermore, States Parties have several duties in regard to the criminal process. For instance, article 54 provides that sexual history evidence may only be admitted “... when it is relevant and necessary”. Article 56 mandates protective measures during the criminal process, such as measures permitting victims to give evidence “... without being present ...” at court or in the

absence of the offender, using “... appropriate communication technologies”. It also enshrines victims’ right “... to be heard ... directly or through an intermediary”. Article 57 requires States Parties to grant victims “... the right to legal assistance and to free legal aid ...”.

It is noteworthy that article 4.3 requires States Parties to ensure that the provisions of the European Women’s Convention, particularly as regards these victims’ rights, are made available “... without discrimination on any ground” including “sex, gender, race, colour, ... religion, ... sexual orientation, gender identity, [or] age.” Consequently, it engenders the space for the protection of victims from intersectional victimisation (see section 3.1.4 below). In addition, cultural, customary, religious or honour-based grounds may not be invoked to justify gender-based violence (article 12.5).

In a bid to alleviate the vulnerability of immigrant women victims of domestic violence whose residence status is dependent on that of their partner (see section 3.1.4 below), article 59 provides that States Parties must grant such victims “... an autonomous residence permit ...” in “... particularly difficult circumstances ...”. However, article 78.2 permits States to enter reservations in respect of article 59.

The above analysis indicates that wide-ranging duties to prevent, investigate and punish gender-based violence and to empower and protect victims

constitute the backcloth to the UK government's responses to gender-based violence.

2.2 Racially and religiously motivated victimisation

Both racial and religious discrimination are prohibited by United Nations instruments. The Convention on the Elimination of All Forms of Racial Discrimination 1966 (the "Race Convention"), which binds the UK, places obligations on States Parties to prevent and punish racial victimisation. States Parties must criminalise and punish incitement to racial discrimination and acts of racial violence (article 4(a)). They must guarantee all persons equality before the law regardless of "... race, colour, or national or ethnic origin ..." in respect of their rights to security of the person and to state protection from "... violence or bodily harm ..." by public or private persons (article 5(b)). They must also accord all persons "... effective protection and remedies ..." and "... just and adequate reparation or satisfaction ..." for racial discrimination (article 6).

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 (the "Declaration on Religion") requires States Parties to take steps "... to prevent and eliminate ..." religious- or belief-based discrimination "... in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil,

economic, political, social and cultural life” (article 4.1). Such steps include passing or repealing legislation in order to ensure that religious- or belief-based discrimination is outlawed (article 4.2). Although it is not binding, the Declaration on Religion has exerted an influence on the development of international and national law and policy pertaining to the protection of religious minorities from victimisation (see further below; see also section 3.2 below).

The Committee on the Elimination of Racial Discrimination (“CERD”), which was set up in pursuance of article 8 of the Race Convention, has recommended that States Parties introduce sentence enhancement for racially motivated offences by means of legislation (CERD, 2005: para 4(a)). It has also recommended that States Parties require criminal justice agencies to treat victims who report racially motivated offences “... in a satisfactory manner ...” and impose “... disciplinary or penal sanctions ...” on police who fail to accept a complaint of racist conduct (CERD, 2005: paras 11, 12). Furthermore, States Parties must emphasise to prosecuting authorities that the prosecution of racist conduct is important (CERD, 2005: para 15).

During the court process, victims must receive assistance, such as legal aid, “... information about the progress of the proceedings ...”, and protection from intimidation (CERD, 2005: para 17). Criminal justice agencies must receive training to generate attitudes of respect for human rights, tolerance,

understanding of inter-racial matters, and sensitivity to “intercultural relations” (CERD, 2005: para 5(b)).

CERD has expressed disquiet about the incidence of racially motivated violence and harassment, as well as institutional racism on the part of the police in the UK, calling upon the government to ensure the effective implementation of its policies to address these forms of racist victimisation (CERD, 2001). In addition, it has voiced concern about the rise of Islamophobic incidents in the UK following the events of September 11, advocating the introduction of an offence of incitement to religious hatred (CERD, 2003). Although the UK is not bound by these recommendations and opinions, they have nonetheless exercised an influence on the direction of law and policy (see section 3.2 below).

The provisions of several Council of Europe instruments also protect minorities and prohibit racism. The Council of Europe *Framework Convention for the protection of national minorities* (1995. CETS No.: 157) provides that national minorities have the right to equality before the law and freedom from discrimination (article 4) and obliges Member States to protect them from “... threats or acts of discrimination, hostility or violence ...” on account of “... their ethnic, cultural, linguistic or religious identity” (article 6.2).

Furthermore, the *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law* (2008/913/JHA) imposes a duty on Member States to punish intentional, public incitement to violence or hatred on the grounds of "... race, colour, religion, descent or national or ethnic origin" (article 1.1.(a)). However, the obligation to punish such conduct when it is directed at religion is only mandatory insofar as the conduct "... is a pretext ..." for a "... reference to race, colour, descent or national or ethnic origin" (article 1.3). While Member States may punish such conduct when it is directed at religion alone, they are not obliged to do so. For instance, they may choose not to criminalise incitement to "pure" anti-Muslim hatred or violence that is not "a pretext" for anti-Asian or anti-Arab hatred or violence. In view of the growing equation of Islamic identity and "global terrorism" (Chakraborti, 2007: 111), this lacuna may aggravate Islamophobic victimisation. Consequently, the inclusion of such "pure" religious hatred in the Racial and Religious Hatred Act 2006 ("RRHA"; see section 3.2.1 below) is to be welcomed.

The Council of Europe established the European Commission Against Racism and Intolerance ("ECRI") in 1993, with a mandate to monitor measures for the elimination of "... violence, discrimination and prejudice ..." based on "... race, colour, language, religion, nationality and national or ethnic origin" (ECRI, quoted in Goodey, 2007: 425). The ECRI has recommended that Member States introduce offences of incitement to racial and religious

violence, hatred or discrimination, as well as sentence enhancements for racially motivated offences (ECRI, 2002: paras IV.18, IV.21). It has recommended that Member States respond firmly to racial discrimination and misconduct on the part of the police (ECRI, 2007: para II) and ensure that the police investigate racist offences thoroughly (ECRI, 2007: paras III.11, III.14). It has also advocated the adoption of active measures by Member States to prevent discrimination, violence and harassment directed at Muslims (ECRI, 2000).

The above international and European instruments oblige states to prevent, investigate and punish racially and religiously motivated crime and to eliminate racism on the part of the agents of criminal justice. Consequently, they are founded on an acknowledgement that private persons as well as public bodies perpetrate such offences.

2.3 Homophobic and transphobic victimisation

Contrary to gender-based and racially and religiously motivated victimisation, homophobic and transphobic victimisation has not received the attention of a specific international or European human rights instrument. However, the provisions of several general instruments extend protection to such victimisation. For example, article 7, read with article 2, of the International Covenant on Civil and Political Rights 1966 (“ICCPR”) applies to all persons,

including LGBT persons. In terms of article 7, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. In terms of article 2.1, States Parties must ensure that the rights enshrined in the ICCPR are accorded to all persons without discrimination on the ground of sex, amongst other things. In *Toonen v Australia* (Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)), the Human Rights Committee (“HRC”) held that the protected ground of sex in article 2.1 includes sexual orientation. It has also expressed the view that article 7 applies to acts causing both physical and mental harm (Human Rights Committee, 1992: para 5). The impact of homophobic and transphobic crime on victims may be both physical and mental (see Wolhuter, *et al*, 2009: 105-106). Accordingly, such crime constitutes cruel, inhuman or degrading treatment on the basis of sex, and contravenes article 7.

According to the HRC, States Parties are under an obligation to protect all persons from the conduct mentioned in article 7, whether it emanates from public or private persons. This obligation requires that the conduct must be criminalised and that effective steps must be taken to prevent and punish it (Human Rights Committee, 1992: paras 2, 8). Amnesty International has argued that homophobic crime is an international human rights violation, which triggers the responsibility of the state (Amnesty International, 2001). Consequently, states have a duty to criminalise homophobic violence and

incitement to hatred against LGBT persons and to ensure that criminal justice agencies are trained appropriately (Amnesty International, 2001).

The issue of homophobic victimisation has also received the attention of the Council of Europe Parliamentary Assembly. It has voiced concern about the extent of such victimisation, and has recommended that ECRI's mandate be broadened to encompass homophobia (Council of Europe Parliamentary Assembly, 2000: paras 2, 11.ii) Furthermore, like all persons, LGBT persons fall within the purview of article 3 ECHR. Article 3, read with article 1, outlaws inhuman or degrading treatment and imposes a positive obligation on Member States to adopt measures ensuring that public and private persons do not treat vulnerable persons in an inhuman or degrading manner (*A v UK* (1999) 27 EHRR 611, para 22; see chapter 2).

2.4 Elder abuse

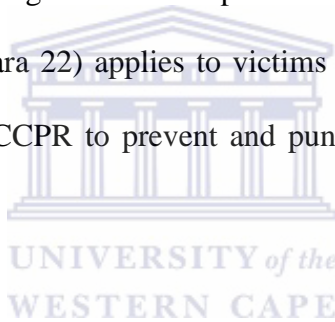
Elder abuse, which comprises victimisation of the elderly on account of their age, includes "... abuse and neglect in homes ..." and residential institutions, as well as "... financial fraud and exploitation ..." (Breux & Hatch, 2003: 208). It is not, per se, regulated by any enforceable international or European human rights instruments. At the international level, only the non-binding United Nations *Principles for older persons* (1991) pertain to older persons, in particular. Article 17 of the Principles provides that "... older persons should

be able to live in dignity and security and be free of exploitation and physical or mental abuse”. At the European level, article 23 of the Revised European Social Charter, which is binding, enshrines the “... right of elderly persons to social protection ...” (Van Bueren, 2009: 3). However, it does not contain specific provisions concerning elder abuse, and is thus insufficient, on its own, to protect elderly victims.

The non-binding Recommendation R (97) 13 makes provision for victims of elder abuse. It urges Member States to grant special protection to such victims (article 21), including special measures to facilitate the process of testifying and judicial supervision of the way in which witnesses are examined (articles 27, 28). It also exhorts Member States to take steps to eliminate secondary victimisation at the hands of criminal justice agencies (article 23; see chapter 3).

While the above provisions (with the exception of the Revised European Social Charter) are not binding, the fundamental rights in binding instruments such as the ICCPR and the ECHR apply to all persons, including elderly victims. The right to life (article 6 ICCPR, article 2 ECHR) and the right to freedom from inhuman or degrading treatment or punishment (article 7 ICCPR, article 3 ECHR) are particularly relevant to the issue of elder abuse. Help the Aged has expressed the view that states have a positive duty to adopt measures to facilitate the effective exercise of these rights by elderly people

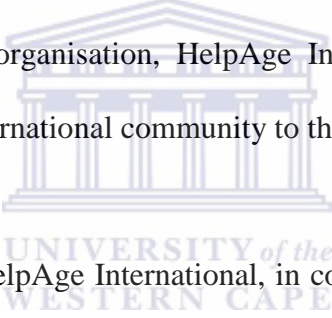
(Fitzgerald, 2006: 92). For instance, the duty, pursuant to article 2 ECHR, to take reasonable steps “... to avoid a real and immediate risk to life of which they have or ought to have knowledge” (*Osman v UK* (2000) 29 EHRR 245, para 116; see chapter 2) applies to an elderly victims in circumstances where the police know or ought to know that there is a real and immediate risk to his/her life by family members or care-givers. Similarly, the decision in *A v UK* that article 1, read with article 3 ECHR, imposes a positive obligation on the state to make sure that vulnerable persons do not experience “... torture or inhuman or degrading treatment or punishment ...” at the hands of public or private persons (para 22) applies to victims of elder abuse, as does the state duty in article 7 ICCPR to prevent and punish cruel, inhuman or degrading treatment.



In recent years, there has been a growing consensus on the part of the international human rights community that elder abuse is a human rights violation that merits specific attention. The erstwhile UN Secretary-General, Kofi Annan, labelled elder abuse a violation of human rights (United Nations Economic and Social Council, 2002). The UN International Plan of Action adopted in Madrid in 2002 situated elder abuse within the framework of human rights (World Health Organization, 2002), recommending that states must enforce laws outlawing elder abuse and establish multi-agency strategies to respond to it (HelpAge International, 2002: 10). In 2009, the United Nations urged states to persist in “... their efforts to implement the Madrid

Plan of Action ...” and to take heed of the importance of affording elderly people all human rights (United Nations, 2009).

The International Network for the Prevention of Elder Abuse (INPEA) has been instrumental in generating this increase in international concern with elder abuse. Its objectives are to foster awareness of elder abuse and to call for the development of effective responses to it (Penhale, 2006: 166). It received the status of a non-governmental organisation with the United Nations in 2003 (Penhale, 2006: 168) and played a prominent role in the above Plan of Action. The work of the organisation, HelpAge International, has also drawn the attention of the international community to the issue of elder abuse.



The INPEA and HelpAge International, in collaboration with other interested non-governmental organisations, have called for a United Nations Convention on the Rights of Older Persons. They maintain that the instruments currently dealing with older persons, such as the Madrid Plan of Action, are not binding and are consequently ineffective, and that the protection afforded by the general conventions, such as the ICCPR, is insufficiently far-reaching (INPEA, *et al*, 2010: 3, 6). In a recent report, the UN Secretary-General has referred with approval to the possibility of introducing such a convention, stating that it would “... clarify and consolidate existing international norms with respect to the rights of older persons ...” and “... provide the framework for national legislation” (United Nations General Assembly, 2009: para 62).

Speaking at a recent International Symposium on the Rights of Older People, Van Bueren has called for a European Convention on the Rights of Older Persons to "... protect the civil, political, economic, social and cultural rights of older persons" (Van Bueren, 2009: 9)

It remains to be seen whether the United Nations and the Council of Europe will respond to these calls. For the moment, however, while the non-binding instruments and the rights in general human rights instruments apply, in principle, to victims of elder abuse, in practice very few victims receive such rights-based protection.

3. SOCIALLY DISADVANTAGED VICTIMS IN ENGLISH LAW AND POLICY

This section evaluates the government's responses to gender-based victimisation, racially and religiously motivated victimisation, homophobic and transphobic victimisation, and elder abuse against the backdrop of its international and European human rights obligations. It argues that, although, by and large, the government is complying with its obligations in regard to victims of rape and domestic violence, it is not responding adequately to victims who experience intersectional victimisation on the basis of gender, race and culture. In addition, the absence of enforceable rights for such

victims is inconsonant with the state duties in the European Women's Convention (see section 2.1 above; see also chapter 2).

Furthermore, this section maintains that, in spite of the recent attempts of the government to prevent, investigate and punish racially and religiously motivated crime and to reduce secondary victimisation at the hands of criminal justice agencies, discriminatory attitudes and practices continue to exist. It also maintains that the current law and policy regarding victims of homophobic and transphobic crime fails to protect victims from the crimes themselves as well as from secondary victimisation by criminal justice agencies. Consequently, it argues that the UK government is falling short of its international and European obligations in regard to the prevention and punishment of these forms of victimisation.

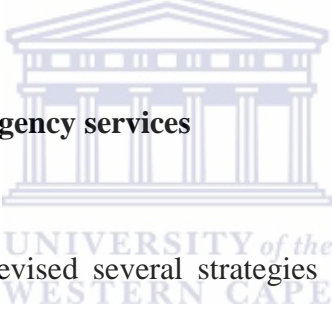
Finally, this section demonstrates that elder abuse is marginal to criminal law and criminal justice policy and that the UK is accordingly failing to align its domestic law and policy with the nascent international and European human rights discourse on elder abuse highlighted in section 2.4 above.

3.1 Gender-based victimisation

The coalition government's response to gender-based violence, which is set out in its recent *Call to end violence against women and girls: action plan*

(HM Government, 2011a), and which builds on the strategy of its predecessor, *Together we can end violence against women and girls* (HM Government, 2009), is founded on the need to comply with its international and European duties to prevent, investigate and punish gender-based violence, on the one hand, and to support, assist and empower victims, preventing secondary victimisation, on the other (see Wolhuter, *et al*, 2009: 235, 238). This section evaluates the extent to which current criminal justice law and policy, which is reflective of, or aspiring to fulfil, the aims of this strategy, does in fact comply with these international and European duties.

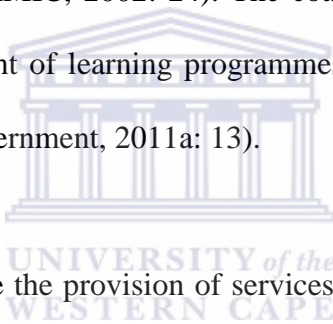
3.1.1 Police and multi-agency services



The police have devised several strategies to improve the rate of reported rapes and the quality of investigations (see Wolhuter, *et al*, 2009: 235-236). A number of forces have units specialising in rape cases. For instance, the MPS runs “Project Sapphire”, which is a unit in each borough of its jurisdiction comprising officers who are specially trained to investigate rape and to assist and support rape victims (Metropolitan Police Service, undated, *Project Sapphire*). In addition, all police forces have officers who are specially trained to deal with rape and sexual assault (HM Government, 2009: 65), and many have rape chaperones to support victims throughout the investigation (HMCPSI/HMIC, 2002: 24; Temkin, 2002: 274). Furthermore, the Forensic Science Service and ACPO have attempted to maximise the collection of

forensic evidence by introducing a “first response kit” for use in rape cases (Criminal Justice System, undated: 15).

However, despite these signs of progress, a “culture of scepticism” persists (HMCPSI, 2007: 45), impeding the development of a uniformly sensitive response to rape victims. HMCPSI/HMIC has recommended that police training on the dynamics of rape must be reviewed to ensure that standards are improved and that appropriate services are given to victims across all police forces (HMCPSI/HMIC, 2002: 24). The coalition government has called for “... the development of learning programmes ...” for police on gender-based violence (HM Government, 2011a: 13).



In a bid to enhance the provision of services to rape victims, the government has established Sexual Assault Referral Centres (“SARCs”) in several police areas. There are presently 30 SARCs across England and Wales, and an additional 15 are in the process of being established (Government Equalities Office, 2010a: 49). The Labour government pledged to ensure that each police area will have at least one SARC by 2011 (HM Government, 2009: 50).

The objective of SARCs is to act as a comfortable and safe environment for rape victims to undergo forensic examinations, medical treatment and counselling. They are run jointly by the police, the health authorities and other statutory and non-statutory agencies, and thus constitute a multi-agency

partnership response to rape (ACPO, undated: 3, 6). They are staffed, where possible, by female forensic medical examiners, as well as nurses, counsellors or psychologists (ACPO, undated: 12-13). All staff must undergo specialist training that is appropriate to their respective capacities. HMCPSI/HMIC has pointed out that many forensic medical examiners are trained in general matters only, and has recommended, with government approval (Home Office, 2002a: 12), that they undergo rape-specific training (HMCPSI/HMIC, 2002: 7). Despite this recommendation, the recent Stern Review documented the persistence of problems with forensic services, such as the difficulty of finding female forensic medical examiners and the lack of rape-specific training (Government Equalities Office, 2010a: 64). It recommended that the government should ensure that “... more appropriate accreditation ...” for forensic medical examiners is introduced, and that all victims are able to choose a male or female examiner (Government Equalities Office, 2010a: 66). The coalition government has endorsed this recommendation (HM Government, 2011b: 14-15).

The government has also introduced Independent Sexual Violence Advisors (“ISVAs”) to work with victims of rape and sexual assault throughout the pre-trial and trial process as well as thereafter (Ellison, 2007: 708). ISVAs exist “... in 38 areas in England and Wales” (Reeves & Dunn, 2010: 63) and the coalition government has pledged funds to “... provide for 86 ISVA posts across the country based on Home Office funding alone” (HM Government,

2011a: 15). Although many ISVAs work in SARCs, several also work in voluntary organisations dealing with rape (CPS, 2009b: para 7.30). As professionally trained rape specialists, ISVAs provide a vital link between victims and victim support organisations, facilitating the coordination of victim safety throughout all agencies (CPS, 2009b: para 7.30). The recent Stern Review revealed “... unanimous praise for the work done by ISVAs ...”, recommending that they should be viewed as central to the services to rape victims (Government Equalities Office, 2010a: 103, 106).

The multi-agency approach to rape is matched by a multi-agency approach to domestic violence (Wolhuter, *et al*, 2009: 238-241). On the one hand, the police have adopted a policy of rigorously policing domestic violence. Police are required to investigate all domestic violence reports (ACPO, 2008a). All police forces have introduced a pro-arrest policy (Home Office, 2003b: 14), in terms of which the police are encouraged to arrest the perpetrator against the victim’s wishes, if necessary. Hoyle and Sanders have argued that pro-arrest policies negate the agency of victims by assuming that they are incapable of making effective choices and that the police and policy makers are better placed to act in their best interests (Hoyle & Sanders, 2000: 19). In their view, victims should be “... empowered to make the choices which are most likely to lead to an end to the violence ...” and pro-arrest policies do not always lead to this result (Hoyle & Sanders, 2000: 30). Nevertheless, the

pursuit of such policies is undoubtedly preferable to the previous hesitation of the police to become involved in domestic violence incidents.

Along with the rigorous pro-arrest policies of the police, the DVCVA represents an attempt to “crack down” on domestic violence. In terms of s.1, a breach of a molestation order, which previously constituted contempt of court (Burton, 2003: 302), is criminalised and may be prosecuted irrespective of whether or not the victim consents (Bessant, 2005: 16). In terms of s.10, common assault is made an arrestable offence under the Police and Criminal Evidence Act 1984, freeing the police from having to apply for a warrant to arrest a perpetrator of domestic violence. Section 12 provides that a court may impose a restraining order where a perpetrator is convicted of *any* offence (Bessant, 2005: 25-26), and also where s/he is acquitted, if the court deems it necessary in order to “... to protect a person from harassment by the defendant” (s.12(5)). In terms of s.5, causing or allowing the death of a child or a vulnerable adult is made a new offence. The offence is aimed at cases which do not amount to the offences of murder or manslaughter, thereby facilitating the prosecution of deaths caused in domestic violence circumstances.

Recent reform signifies a move to enhance the tough approach to domestic violence contained in the DVCVA. ACPO recommended that the police should be permitted to impose a “... Domestic Violence Protection Order (or

notice) ...” for up to 14 days, in order to prevent a suspected perpetrator from entering the victim’s premises or contacting the victim (ACPO, 2009: 53).

In response, the Crime and Security Act 2010 (“CSA”) provides that a police officer of the rank of superintendent or higher may issue a domestic violence protection notice if s/he has reasonable grounds to believe that the suspected perpetrator “... has been violent towards, or has threatened violence towards ...” the victim and that it is necessary to issue the notice to protect the victim from such violence or threat of violence (s.24). The notice must prohibit the suspected perpetrator from molesting the victim, and may also, amongst other things, prohibit him/her from evicting the victim or entering the victim’s premises. If the police have issued such a notice, a constable must apply to a court for a domestic violence protection order within 48 hours of the service of the notice on the suspected perpetrator (s.27).

The court may impose such an order if it is of the view, on a balance of probabilities, that the defendant “... has been violent towards, or has threatened violence towards ...” the victim and that it is necessary to impose the order to protect the victim from such violence or threat of violence (s.28). The provisions concerning the content of the order are the same as those concerning the content of the notice (s.28(6); s.28(8)).

These provisions usher in a new dispensation in which the choice of the victim to apply for a protection order is supplanted by the power of the police. Consequently, while they represent a tougher stance to domestic violence, they are open to criticism for undermining the autonomy of victims.

The governmental “crackdown” on domestic violence represented by pro-arrest policies and tough domestic violence legislation is supplemented by a focus on attaining best practice in the support and assistance of victims. All forces receive training in domestic violence and most forces have Domestic Violence Units (“DVUs”), whose function is not only to investigate domestic violence, but also to support and assist victims (Home Office, 2003b: 25). For instance, the Thames Valley Police DVU has specially trained Domestic Violence Officers who aim to ensure the provision of a victim-centred, professional service that meets victims’ needs (Domestic Violence Forum, Royal Borough of Windsor and Maidenhead, undated). Members of the DVU contact all victims by telephone or post, and will meet them in person, if necessary. If a victim reports an incident, it is “... formally recorded and investigated ...” and the DVU liaises with the CPS concerning the prosecution (Domestic Violence Forum, Royal Borough of Windsor and Maidenhead, undated). However, the approach of Domestic Violence Officers differs from unit to unit. While some emphasise prosecution, others focus on supporting victims (Hoyle & Sanders, 2000: 28). Hoyle and Sanders note that some

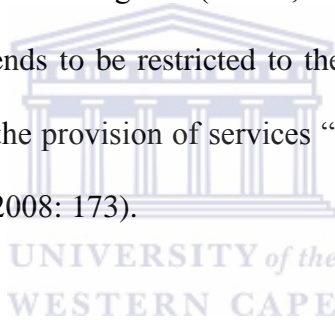
officers assist victims significantly, empowering them to adopt courses of action aimed at terminating the violence (Hoyle & Sanders, 2000: 30).

Over and above their independent work with victims, the police are becoming increasingly active in multi-agency partnerships. Many Community Safety Partnerships (“CSPs”, formerly known as CDRPs, which were established by the CDA) and Community Safety Units (“CSUs”) engage in domestic violence work (Home Office, 2003b: 12; Hall, 2005: 173). In addition, Multi-Agency Risk Assessment Conferences (“MARACs”) have burgeoned in recent years. MARACs are multi-agency meetings focusing “... on the safety of high-risk domestic violence victims ...” in order to “... devise a risk management plan to reduce the harms faced by the victim and their families” (HM Government, 2009: 73). There are currently 225 MARACs across England and Wales, and the government has committed funds to their growth and expansion (HM Government, 2011a: 15).

Independent Domestic Violence Advisors (“IDVAs”) constitute one of the central figures in MARACs as well as in Specialised Domestic Violence Courts (“SDVCs”; see section 3.1.3 below). IDVAs are specially trained to work with high risk victims and research has shown that their work has led to less victims refusing to participate in prosecutions (HM Government, 2009: 49). There are currently more than 700 IDVAs in England and Wales, and the

government has committed itself to the provision of “stable” funding for them (HM Government, 2011a: 15).

Hoyle and Sanders emphasise the importance of multi-agency work as a supplement to a pro-arrest policy in order to ensure that domestic violence is dealt with effectively (Hoyle & Sanders, 2000: 30). However, research by Welsh has shown that many multi-agency initiatives are poorly attended by criminal justice agencies, and that they frequently “... focus on ‘joint-talking’ rather than on ‘joint-working’ ...” (Welsh, 2008: 171, 173). Even where work is being done, it tends to be restricted to the evaluation and development of policy rather than the provision of services “... to individual women and their children” (Welsh, 2008: 173).



3.1.2 Crown Prosecution Service

The CPS has made a commitment to the rigorous pursuit of rape and domestic violence prosecutions and the sensitive treatment of victims (see Wolhuter, *et al.*, 2009: 236-237, 239). It has specialist rape prosecutors in each CPS area who are required, in principle, to have training and experience in the prosecution of rape and sexual assault (CPS, 2009b: para 3.6). In pursuance of a joint protocol between the police and the CPS, these specialist prosecutors “... work closely with the police” and assume responsibility for a particular case throughout the criminal process (CPS, 2009b: paras 3.5, 3.7). The CPS

also has Area rape co-ordinators who function to ensure the local implementation of “... national initiatives and legislative changes ...” (HMCPSI, 2007: 94). Despite these efforts, however, the CPS has been criticised for failing to ensure that all specialist prosecutors and Area rape co-ordinators have attained an appropriate standard of training and experience (HMCPSI, 2007: 94-95). The CPS has committed itself to ensuring that such specialists will receive sufficient training (HM Government, 2011a: 20).

The CPS has evinced a commitment to instruct barristers with skills that are appropriate to rape cases, and to require them to speak to victims before they testify (CPS, 2009b: para 7.24). In addition, it is negotiating with the Bar Council to make it mandatory for barristers to receive training in the dynamics of rape, including “... the ‘softer’ skills of dealing with victims ...”, thereby introducing a system of “.... counsel accreditation for rape” (HMCPSI, 2007: 134).

In an attempt to decrease the rate of attrition, the CPS has adopted a rigorous pro-prosecution policy, stating that, provided that the test of evidential sufficiency is satisfied, “... rape is so serious that a prosecution is almost certainly required in the public interest” (CPS, 2009b: para 4.5). If the CPS decides not to prosecute or to drop or alter the charges, it is required, in terms of the Victims’ Code, to offer to meet victims of sexual offences unless it

takes the view that the circumstances are of such a nature that a meeting ought not to take place (see chapter 3).

If the CPS decides to prosecute and the victim withdraws her complaint or no longer wishes to testify, it will consider the other evidence, as well as the interests of the victim, and may decide to pursue the prosecution without requiring the victim's testimony, if it has enough other evidence (CPS, 2009b: para 5.15). If the CPS believes the victim's testimony is necessary, it will consider the possibility that a court may admit her statement as hearsay evidence (see chapter 3), which will obviate the need for oral evidence. However, it has emphasised the difficulty of convincing a court to permit hearsay evidence in cases where the victim is the only witness (CPS, 2009b: para 5.18). HMCPSI has criticised the CPS for failing to consider the prospect of requesting the court to admit hearsay evidence in sufficient cases (HMCPSI, 2007: 115).

The CPS will only compel an unwilling victim to testify if the specialist rape prosecutor, having consulted "... the police and any other interested person ...", is of the view that it is necessary to do so (CPS, 2009b: para 5.19). Consequently, while the CPS is committed to a rigorous pro-prosecution policy, it aims to avoid forcing unwilling victims to testify wherever possible. However, the practical feasibility of this commitment to respecting victims' wishes is difficult to determine, particularly in view of the dearth of sufficient

additional evidence in many rape cases. In such cases, the CPS will continue to be constrained to force victims to testify or to drop prosecutions, thereby increasing the rate of attrition.

Until recently, prosecutors were not permitted to interview witnesses prior to the trial as the coaching of witnesses is prohibited (Ellison, 2007: 699). However, pre-trial witness interviews have been introduced recently to enable the CPS to gauge the strength of the evidence in order to make more informed decisions whether or not to prosecute (Ellison, 2007: 702). In terms of the Code of Practice regulating pilot projects using pre-trial witness interviews, such interviews were to be used for vulnerable witnesses in “exceptional cases” only (DPP, 2005: para 9.2). However, rape and sexual assault cases accounted for more than a third of pre-trial witness interview pilots (Roberts & Saunders, 2008: 835), and it is therefore likely that such cases will continue to constitute a prominent feature of pre-trial witness interviews. Nonetheless, as the aim of such interviews is the facilitation of prosecutorial decision-making rather than victim assistance, their benefits for rape victims are likely to be limited.

Like its rape policy, the CPS domestic violence policy is premised on the vigorous pursuit of prosecutions as well as the sensitive treatment of victims. It has specialist domestic violence prosecutors (HM Government, 2009: 65), as well as domestic violence coordinators in every CPS Area who “... work

with other agencies to implement [CPS] policy, address problems, identify and share good practice, and ... attend multi-agency meetings” (CPS, 2009a: para 3.12). All prosecutors receive training in domestic violence (Home Office, 2003b: 27).

The CPS has adopted a positive prosecution policy, stating that it will “almost always” prosecute domestic violence cases if the evidential sufficiency test is satisfied and the victim is prepared to testify (CPS, 2009a: para 6.4). It will also pursue prosecutions even if the victim withdraws his/her complaint or is not willing to testify. If it has enough other evidence, it may decide to prosecute without compelling the victim to testify (CPS, 2009a: para 5.18). However, such cases are likely to be rare, as police investigations frequently yield insufficient other evidence (Ellison, 2003: 765).

While some police forces have attempted to enhance their methods of gathering evidence, introducing novel measures, such as the use of cameras to document victims’ injuries, most forces are nonetheless unable to gather enough independent evidence (Ellison, 2003: 765-766). Consequently, in the majority of domestic violence cases, the victim’s statement is the only evidence (Ellison, 2002: 836-837), which precludes a prosecution without the victim giving evidence. In such cases, where the victim’s evidence is necessary, the CPS policy regarding the use of hearsay evidence, special measures and the circumstances in which it will compel victims to testify

parallels its rape policy (see CPS, 2009a: paras 5.19, 5.20, 5.24). In addition, some prosecutors use pre-trial witness interviews in domestic violence cases to attempt to reverse “a witness retraction” (Roberts & Saunders, 2008: 835).

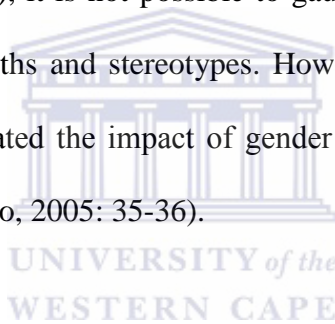
Despite its stated policy, however, the CPS is reluctant in practice to compel unwilling victims to testify (Ellison, 2002: 834). Therefore, victim withdrawal or refusal to testify will continue to result in decisions not to prosecute in many cases. However, as Hoyle and Sanders contend, criminal justice interventions in domestic violence incidents ought to aim to terminate the violence rather than rigidly pursue prosecutions (Hoyle & Sanders, 2000: 32). Provided that they function effectively, multi-agency interventions not involving prosecution may be more capable of achieving this aim in cases where victims are unwilling to pursue charges (see section 3.1.1 above).

3.1.3 Court process

Chapter 3 evaluated procedures aimed at the reduction of secondary victimisation in rape trials, including special measures, the prohibition of cross-examination by the defendant in person, and restrictions on the admission of sexual history evidence. The chapter maintained that, while these procedures have ameliorated victims’ negative experiences of the court process, they are unable to remove secondary victimisation entirely. In order to ensure the most effective empowerment of rape victims, chapter 4

advocated the introduction of auxiliary prosecutors or victims' lawyers. In the absence of such measures, secondary victimisation will persist and rape victims will continue to be unwilling to testify, thereby increasing the rate of attrition.

The possible adherence to rape myths and gender stereotypes on the part of the jury is also cause for concern. In light of the prohibition on direct research concerning the manner in which juries reach their decisions (see s.8 Contempt of Court Act 1981), it is not possible to gauge the extent to which jurors do adhere to such myths and stereotypes. However, research using a simulated jury has demonstrated the impact of gender stereotypes on jurors' decisions (see Finch & Munro, 2005: 35-36).



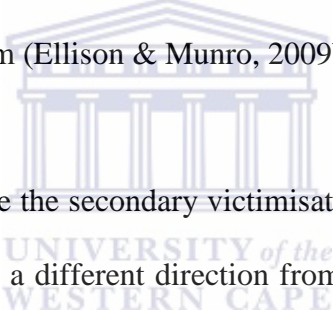
In particular, Ellison and Munro found that mock jurors were significantly more reluctant to convict in simulated trials involving complainants who showed no signs of physical injury (Ellison & Munro, 2009a: 206). Mock jurors also displayed confusion in cases where complainants failed to show emotion while testifying (Ellison & Munro, 2009a: 211). Research such as this signifies the persistence of stereotypical beliefs that rape is inevitably accompanied by force and that lack of emotion while testifying is indicative of falsity. HMCPSI/HMIC has recommended that prosecutors should be trained to present evidence and information to the jury in a way that averts reliance on rape myths and stereotypes (HMCPSI/HMIC, 2002: 12).

Interestingly, however, the Stern Review has pointed out that the jury conviction rate for rape cases is higher than that for attempted murder (Government Equalities Office, 2010a: 91). Consequently, juror adherence to rape myths and stereotypes may be less than the above research on mock jurors suggests.

Reliance on rape myths and gender stereotypes on the part of the judiciary is an additional source of secondary victimisation (see chapter 2). In order to alleviate the influence of such myths and stereotypes, judicial training programmes run by the Judicial Studies Board contain a section on violence against women and sexual offences (Equal Treatment Advisory Committee, 2010). Furthermore, rape cases are currently allocated to “ticketed” judges who have received prior approval as possessing the requisite expertise (HMCPSI, 2007: 134). Such “ticketed” judges are required, once in “every three years”, to “... attend a three-day course which covers topics such as rape trauma, medical and forensic science, and legal and procedural issues” (Government Equalities Office, 2010a: 93). However, there are insufficient “ticketed” judges in some areas, leading to delays in the hearing of cases (HMCPSI, 2007: 134).

A further source of secondary victimisation has been the subject of recent reform proposals by the government. Research has shown that many victims of rape experience post-traumatic stress disorder (“PTSD”) or rape trauma

syndrome (“RTS”). In the absence of knowledge about this disorder, judges and jurors may regard behaviour on the part of complainants, such as late reporting, oversights in evidence, and the inability to answer certain questions, as signifying fabrication or lack of credibility (Criminal Justice System, 2006: 16). In a bid to prevent such responses, the government has proposed the enactment of legislation permitting expert testimony on PTSD or RTS (Criminal Justice System, 2006: 19-20). However, these proposals have provoked stringent criticism from the judiciary, amongst others (Ellison & Munro, 2009a: 214), and the government has not yet indicated whether it plans to pursue them (Ellison & Munro, 2009b: 364).



Reforms to alleviate the secondary victimisation of domestic violence victims at court have taken a different direction from reforms in rape trials. In 2003, SDVCs were piloted in five areas, including Leeds, Wolverhampton and West London (Home Office, 2003b: 28-29; Walklate, 2008: 42-43). In view of their reported success in improving victims’ experiences of the court process (CPS, 2007-2008) the number of SDVCs has increased significantly. In 2009, there were 127 SDVCs in England and Wales (HM Government, 2009: 67). The coalition government has stated that it intends to facilitate the expansion of SDVCs (HM Government, 2011a: 30).

SDVCs constitute a multi-agency strategy for responding to domestic violence victims, comprising partnerships between “... police, prosecutors,

court staff, the probation service, local authorities and specialist support services” (HM Government, 2009: 67). Although they are not housed in separate court buildings, cases involving domestic violence are grouped together on a specific day or are “fast-tracked” through the criminal process, and there are “... separate entrances, exits and waiting areas ...” to preclude contact between victims and defendants (CPS, 2009a: para 14.1). Furthermore, victims are supported and advised by IDVAs and all prosecutors and magistrates have received domestic violence training (CPS, 2009a: para 14.1). Consequently, support and assistance for victims is more effective (Eley, 2005: 114), complex cases are more able to receive specialised attention and magistrates are more easily able to order perpetrators to be “fast-tracked” to rehabilitation programmes for domestic violence perpetrators (Eley, 2005: 115). In addition, they are able to impose more consistent sentences than ordinary courts (Eley, 2005: 114).

However, research has demonstrated that magistrates in SDVCs permit the importance of keeping families together to influence their sentencing decisions in much the same way as magistrates in ordinary courts. While magistrates in SDVCs are more willing to order custody for defendants who are still in a relationship with the victim in the case of serious injuries, they seem to be unwilling to separate these families for long periods, giving such defendants shorter sentences than those defendants who have also inflicted serious injuries but are separated from their families (Dinovitzer & Dawson,

2007: 666). Such reluctance highlights the importance of more training for magistrates in the dynamics of domestic violence in order to enable them to place the safety of victims above familial ideology.

The foregoing analysis has shown that, despite the fact that the response of criminal justice agencies to rape and domestic violence victims has improved considerably, secondary victimisation persists, and the fear thereof continues to result in a high rate of attrition. In order to discharge its duty to prevent, investigate and punish rape, the government must ensure the wholesale translation of its stated commitment to eradicating secondary victimisation into the practical reality of the criminal justice process. As regards domestic violence, however, the fact that prosecution rates are low is not necessarily open to criticism, as prosecution is not invariably in victims' interests, particularly in cases where they are reluctant to testify. Consequently, the government's duty in such cases is arguably to respect victims' right to self-determination rather than to pursue prosecutions rigidly.

3.1.4 Minority ethnic victims of domestic violence

Despite the government's broad compliance with its international and European duties concerning domestic violence, it is failing to discharge these duties in regard to minority ethnic victims (see Wolhuter, *et al*, 2009: 241-242). A contextual analysis of the lived realities of minority ethnic women

reveals that they are embedded within a complex matrix of social relations in which cultural concepts of appropriate womanhood intersect with racism and social exclusion on the part of the white community to impede the reporting of domestic violence (see chapter 2). Accordingly, victims are less likely to report their experiences of victimisation than their white counterparts (Home Office, 2003b: 55; Sundari & Gill, 2009: 174).

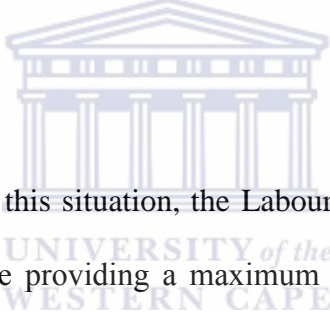
While the government has taken cognisance of the fact that minority ethnic victims may be hesitant to report due to cultural concepts of shame (Home Office, 2003b: 55), it has yet to recognise or address the impact of fear of institutional racism on the reporting rates of domestic violence. The CPS has emphasised that minority ethnic victims may have experienced racism at the hands of criminal justice agencies, which may deter them from reporting offences (CPS, 2009a: para 1.14), but has not devised a policy to address such experiences. In addition, research has shown that SDVCs with high rates of successful prosecutions are located in areas with small minority ethnic communities, and that very few measures are in place to support victims from such communities. It has also demonstrated that SDVCs with lower levels of successful prosecutions have higher numbers of defendants from minority ethnic communities, which indicates “... a need for a focus on equality and diversity ...” (CPS, 2007-2008). Despite the fact that such inadequacies are noted, no measures have been taken to enhance the quality of criminal justice responses to minority ethnic victims.

However, recent criminal justice policy includes a focus on offences committed in the name of honour. ACPO has devised a strategy to respond to honour based violence (ACPO, 2008b), and the CPS has expressed its commitment to prosecuting perpetrators of such violence "... with the full force of the law" (CPS, 2009a, 1.15). The CPS is running a pilot scheme in terms of which cases of honour based violence are tracked and specially trained prosecutors are assigned to prosecute perpetrators (ACPO, 2008b: para 6.12.2). A concerted response to honour based violence is to be welcomed. Nevertheless, a focus on such violence without an accompanying focus on the full spectrum of domestic violence in minority ethnic communities is open to criticism for failing to address the "continuum of violence" that minority ethnic women experience daily (see Spalek, 2006: 58).



Over and above cultural, gendered and racist constraints, immigrant victims of domestic violence face an additional institutional impediment to the reporting of domestic violence. Women who enter the UK on a spousal visa by virtue of their marriage to a British citizen or permanent resident are required to remain in the relationship for a minimum of two years before becoming eligible to apply for indefinite leave to remain in the UK and hence avoid the threat of deportation (Chana, 2005: 25). Therefore, until recently, victims of domestic violence who left their abuser were vulnerable to deportation.

However, the Labour government introduced a concessionary rule, in terms of which a victim is eligible for settlement in the UK if she is able to prove that she left her partner on account of domestic violence (Home Office, 2003b: 45). This concession, albeit theoretically able to enhance the position of immigrant victims, is insufficiently far-reaching in practice. Such victims are subject to the “no recourse to public funds” rule, which disqualifies them from access to any state benefits while they are pursuing their application for permission to remain indefinitely (Home Office, 2003b: 45). Accordingly, victims are exposed to the danger of destitution until their immigration status has been finalised.



In a bid to address this situation, the Labour government announced a three-month pilot scheme providing a maximum of “... 40 days’ accommodation and living support ...” to such victims while their applications for permission to remain indefinitely are being finalised (HM Government, 2009: 52). The coalition government extended this scheme until March 2011 (Southall Black Sisters, undated). Fortunately, this limited assistance will be replaced in April 2012 by the provision of state benefits to such victims (HM Government, 2011a: 16).

The foregoing analysis has highlighted the dual disadvantage faced by minority ethnic victims of domestic violence. Both domestic violence law and policy and race relations law and policy (see section 3.2 below) fail to address

fully their lived realities of domestic violence. Consequently, they experience intersectional discrimination which causes them to fall through the cracks of both anti-sexist and anti-racist legal interventions (Crenshaw, 1993a: 385; see chapter 1).

3.2 Racially and religiously motivated victimisation

This section considers the extent to which government policy regarding racially and religiously motivated crime is in keeping with its international and European human rights obligations (see section 2.2 above). It documents reforms to the substantive criminal law as well as the criminal justice process, highlighting the extent to which discriminatory attitudes and practices have survived the advent of such reforms.

3.2.1 Racially and religiously motivated offences

As the present author has documented elsewhere (see Wolhuter, *et al*, 2009: 244-246), substantive racially and religiously motivated offences have been introduced incrementally in English law. The Public Order Act 1986 (“POA”) criminalises incitement to racial hatred. Pursuant to s.18(1), a person commits an offence if s/he uses “... words or behaviour ...” or displays material, which are “... threatening, abusive or insulting ...”, if s/he has the intention “... to stir up racial hatred ...” or if such hatred “... is likely to be stirred up ...” in

the circumstances. Before a prosecution may be brought, the Attorney General's consent is required (CPS, 2010b: 13). Few prosecutions have been brought for this offence, regardless of the fact that it has been in existence for many years (Hall, 2005: 123).

Within the context of the growing equation of Islam and terrorism after September 11 (McGhee, 2005: 99), controversy surrounded the attempts of the government to introduce an offence of incitement to religious hatred. A majority of the House of Lords excluded clause 39 of the Anti-Terrorism, Crime and Security Bill 2001, which contained such an offence, from the final text of the Bill (McGhee, 2005: 102). A storm also accompanied the next attempt to introduce such an offence in the Religious Offences Bill 2002 (McGhee, 2005: 115-116).

The government finally succeeded in introducing an offence of incitement to religious hatred in terms of the RRHA 2006, which inserted s.29B into the POA. Section 29B creates an offence of using "... threatening words or behaviour ..." or displaying threatening material with the intention of stirring up "religious hatred". The offence is committed whether it takes place in public or private, unless the person is inside a dwelling and is not seen or heard by anyone outside the dwelling (s.29B(2)). Section 29A defines "religious hatred" as "... hatred against a group of persons defined by reference to religious belief or lack of religious belief". Unlike the offence of

inciting racial hatred, the offence of inciting religious hatred must be accompanied by an intention to do so. Unless the defendant confesses, it will be almost impossible to prove the existence of such an intention, which detracts from the enforceability of the offence (Goodall, 2007: 113). In addition, the Attorney General must consent to the bringing of a prosecution. In light of the political nature of his office, political considerations may impede the institution of prosecutions (McGhee, 2005: 107-109).

While the offences of incitement to racial and religious hatred demonstrate the government's concern to outlaw such conduct, the limited number of prosecutions that are likely to ensue, or to be successful, augurs ill for the protection of victims. In order to ensure an effective response, the government must develop strategies that go beyond criminalisation, such as education programmes and checks on media stereotyping (see Hall, 2005: 230-231), to eradicate discriminatory social attitudes and practices.

The UK has also introduced racially and religiously aggravated offences. A range of such offences are contained in s.28 to s.32 of the CDA (as amended by the Anti-Terrorism, Crime and Security Act 2001). In terms of s.28(1), a "... racially or religiously aggravated ..." offence is one (a) where the defendant, "... at the time of committing the offence, or immediately before or after doing so ...", shows hostility towards the victims on the basis of "... the victim's membership (or presumed membership) of a racial or religious

group ...” or one (b) that is completely or partly motivated “... by hostility towards members of a racial or religious group based on their membership of that group”. While a racial group is defined with regard “... to race, colour, nationality (including citizenship) or ethnic or national origins” (s.28(4)), a religious group is defined with regard “... to religious belief or lack of religious belief” (s.28(5)).

A number of offences, namely assault occasioning bodily harm, assault with the intention to do grievous bodily harm, common assault, criminal damage to property and certain offences involving public order and harassment (ss.29-32) may be aggravated on the basis of race or religion. A conviction of any of these aggravated offences is subject to an enhanced sentence. In terms of s.82 (which is reproduced in s.153 of the PCCSA and contained almost to the letter in s.145 of the CJA 2003), racial or religious aggravation that accompanies offences falling outside the ambit s.29 to s.32 must be treated as an aggravating factor and presiding officers must indicate in open court that this is the case.

Critics have contended that, in view of their breadth, racially and religiously aggravated offences capture “... low-level, surface racist incidents ...” rather than “... deep-seated ideological hatred ...” (McGhee, 2005: 30). However, such criticism overlooks the reality that racially and religiously motivated victimisation frequently constitutes an “... ongoing pattern of harassment and


violence ...” which spans “low-level harassment” as well as serious assaults (Phillips & Sampson, 1998: 126-127), and which is more likely to be committed by “ordinary” people than by right-wing extremists (Iganski & Levin, 2004: 119; Garland & Chakraborti, 2006: 65). Consequently, offences that have a broad ambit mirror the reality of racially or religiously motivated victimisation more accurately than offences that are narrowly construed.

However, concern has been expressed that, regardless of their breadth, these offences do not result in successful prosecutions. Research has revealed a high rate of attrition for racially and religiously aggravated offences, with only 42,600 such offences being recorded by police in 2006, as against “... 184,000 racially motivated incidents ...” being reported by respondents in the 2006/2007 British Crime Survey. Furthermore, of these recorded offences, “... only 11,500 charges of racially aggravated offending were prosecuted ...” in 2006, and a mere 5,166 convictions ensued (Gadd, 2009: 757).

Reasons for this high attrition rate include the low rate of reporting and poor relations between victims and the police (Malik, 1999: 412). In addition, the difficulty of proving the presence of racial hostility or racial motive encourages prosecutors to charge perpetrators with the basic offence rather than the aggravated one, to facilitate successful prosecutions (Burney, 2003: 31). Consequently, defendants may not only receive lighter sentences, but may be freed from the stigma of a conviction for a racially motivated offence.

Likewise, the difficulty of proving religious hostility or religious motive may cause defendants to be charged with basic offences rather than religiously aggravated ones (Idriss, 2002: 908). Dangers such as these necessitate police and prosecutorial training in order to strengthen the confidence of minority ethnic communities in the commitment of criminal justice agencies to the policing and prosecution of racially and religiously motivated victimisation (Iganski, 1999: 392; see sections 3.2.2 and 3.2.3 below for a discussion of such training programmes).

3.2.2 Police and multi-agency partnerships



In the aftermath of the MacPherson Inquiry (MacPherson, 1999), which charged the MPS with institutional racism, several reforms designed to improve the responses of the police to racially motivated victimisation were introduced (see Wolhuter, *et al*, 2009: 246-248). Likewise, the growing institutionalisation of Islamophobia documented by the Commission on British Muslims and Islamophobia (McGhee, 2005: 99) generated a concern on the part of the police to transform their responses to anti-Muslim victimisation.

ACPO has introduced principles of good practice for policing hate crime, including racially and religiously motivated crime (ACPO, 2005: para 2.2.8). Like the MacPherson Inquiry (MacPherson, 1999), it defines a racist incident

as "... any incident which is perceived to be racist by the victim or any other person" (ACPO, 2005: para 2.3.2; Mason, 2005: 842-843). Similarly, it defines a faith based incident as "... any incident which is perceived to be based upon prejudice towards or hatred of the faith of the victim or so perceived by the victim or any other person" (ACPO, 2005: para 2.3.5).

ACPO has underlined the duty of the police to avoid secondary victimisation in their responses to reports of such incidents (ACPO, 2005: para 2.5.1). Attendance at the scene of an incident must be made mandatory and a "positive arrest" policy must be adopted (ACPO, 2005: para 6.2.1). Furthermore, victims must be treated sensitively (ACPO, 2005: para 5.1.6). Third party reporting measures, such as reporting sites at places of worship and community centres, must be used in order to encourage reporting (ACPO, 2005: para 5.3). Victims must be accorded appropriate services (ACPO, 2005: paras 6.2, 6.3), such as interviewing officers from the same ethnic group and visits by trained Crime Prevention Officers (ACPO, 2005: para 6.3.1). Witnesses must be given pre-court familiarisation visits and must be accompanied to court on the day of the trial (ACPO, 2005: para 11.4.1).

In addition, ACPO has encouraged the consolidation and development of multi-agency approaches to victim services and support, recommending that the police form relationships with local organisations, such as Victim Support, and statutory as well as community agencies (ACPO, 2005: para 6.3.1). In its

view, the statutory CSUs, acting in tandem with other agencies, such as housing and education authorities, are central to the provision of “... medium to long-term support ...” for victims (ACPO, 2005: para 7.3.7). Multi-Agency Panels, whose functions include responding to racially and religiously motivated crimes, have been established in many parts of England and Wales (Bennetto, 2009: 34).

As the immediate object of the strictures of the MacPherson Inquiry (MacPherson, 1999), the MPS has striven to reform its treatment of victims to comply with ACPO’s principles of best practice. It has introduced a hate crime policy that employs the MacPherson definition of a racist incident (Mason, 2005: 842-843; see above) as well as a victim-centred definition of religious hate crime (MPS, undated, *Hate crime policy*). It has developed a “Diversity Strategy” aimed at improving its response to racially motivated victimisation, supporting victims more sensitively, and eradicating institutional racism (Hall, 2005: 172). It has established CSUs to protect and support victims of hate crimes, amongst other things (Hall, 2005: 177). In addition, it has introduced a “Hate Crime Victim Charter”, which sets out the services that CSUs must provide to victims as well as other information concerning support for victims (Hall, 2005: 187).

CSUs are not restricted to the London Metropolitan area. Suffolk County Council’s multi-agency Racial Harassment Initiative falls within the local

CSU (Jalota, 2004: 145). It supports victims through the provision of interpretation and translation facilities, counselling, a telephone helpline and pre-trial assistance (Jalota, 2004: 148-149). It acts collaboratively with the Suffolk CSPs, which has enhanced its victim support work (Jalota, 2004: 152).

Research has revealed that these police and multi-agency strategies have had some beneficial consequences. For example, the police recording and treatment of racially and religiously motivated hate incidents has improved in the aftermath of the MacPherson Inquiry (Chakraborti, 2007: 114; Editorial, 2005: 900; Bennetto, 2009: 33-34). However, beliefs on the part of individual victims as well as minority ethnic and faith communities that the police are insensitive and indifferent continue to exist.

In view of research indicating that police stops and searches are being directed even more disproportionately at members of minority ethnic communities in the period after the MacPherson Inquiry (Davie, 2007: 89), these beliefs may be well-founded. Between 2001 and 2002-2003, in the aftermath of September 11, stops and searches of Asian persons increased by nearly 400 per cent (Mythen, *et al*, 2009: 738). Between July 2003 and July 2004, they increased by more than 300 per cent (McGhee, 2005: 99). Between 2004-2005 and 2005-2006, the number of stops and searches of Asian persons continued to rise (Reid, 2009: 170). The Equality and Human Rights Commission has

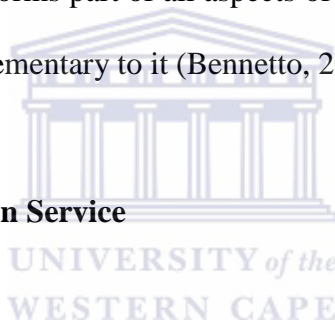
noted with concern that, during the past fifteen years, black people have been between "... five [and] eight times more likely to be stopped and searched than a white person ...", and Asian people "... have been stopped and searched around twice as often as white people" (Bennetto, 2009: 21).

Victims' perceptions of police discrimination and insensitivity also mirror aspects of their experiences other than stops and searches. Rural victims of racially and religiously motivated crime receive poor services and report experiences of racial stereotyping and exclusion by the police and other local agencies (Garland & Chakraborti, 2006: 59-64). Multi-agency partnerships responding to racially motivated victimisation have been found to blame victims and to display reluctance to pursue offenders in case of "a white backlash" (Bowling & Phillips, 2002: 124). Furthermore, the relationships between the police and many members of the Asian community are characterised by "... lack of confidence and trust ...", which is due predominantly to the way in which counter-terrorism legislation is being implemented (Mythen, *et al*, 2009: 744). The persistence of discriminatory attitudes and practices on the part of the police and other agencies lends credence to Hall's statement that "... changes to proscriptive policy are not a guarantee that success will be achieved 'in the real world'" (Hall, 2005: 207).

The MacPherson Inquiry (MacPherson, 1999) underlined the significance of training police in race relations and cultural diversity in order to transform

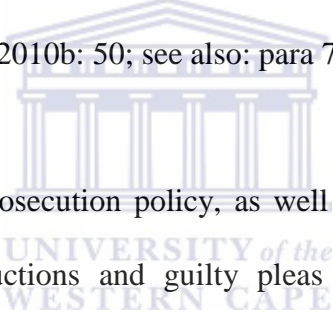
discriminatory attitudes and practices (Hall, 2005: 175). Likewise, ACPO has emphasised that training is necessary to ensure that the police respond appropriately to victims (ACPO, 2005: para 17). Consequently, issues pertaining to “... community and race relations ...” have been included in all police training programmes (Hall, 2005: 175-176). Recently, new programmes have been established nationally, and “... post-entry race and diversity training ...” also occurs in all forces (Bennetto, 2009: 15). However, the Equality and Human Rights Commission has called for evidence showing that such training forms part of all aspects of police training, rather than being separate and supplementary to it (Bennetto, 2009: 39).

3.2.3 Crown Prosecution Service



As the present author has shown (see Wolhuter, *et al*, 2009: 248-249), the CPS has manifested a commitment to the rigorous prosecution of racially and religiously motivated crimes. It has stated that it will prosecute such crimes “... fairly, firmly and robustly ...”, because the importance of such crimes is such that prosecution is “almost always” in the public interest (CPS, 2010b: 5, 22). It has committed itself to the establishment of “Hate Crime Scrutiny Panels” across all CPS areas to monitor its approach to the prosecution of hate crimes, including racially and religiously motivated crimes (CPS, 2010b: 52).

The CPS has conceded that, as the racial or religious hostility or motive necessary for a conviction of a racially or religiously aggravated offence is difficult to prove, it is sometimes necessary to charge the defendant with the basic offence in the alternative, in order to ensure a conviction if the requisite proof for the aggravated offence is lacking (CPS, 2010b: 25). However, it has emphasised that its intention is not to encourage guilty pleas to basic offences, and that it will not accept such pleas without "... proper reasons for doing so" (CPS, 2010b: 25, 43). If a prosecutor decides to drop or change the charge substantially, s/he will offer to provide the victim in person with the reasons for doing so (CPS, 2010b: 50; see also: para 7 of the Victims' Code).

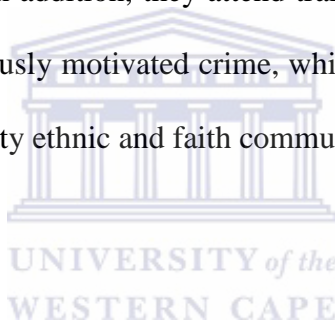


The CPS's firm prosecution policy, as well as the stringency with which it views charge reductions and guilty pleas to lesser offences, provides a welcome counter to research showing prosecutorial willingness to reduce charges or accept guilty pleas to basic offences to avert difficulties of proof (see section 3.2.1 above). Nonetheless, in view of the fact that it is the definitional elements of the offences themselves that cause these difficulties of proof, it is open to doubt whether the CPS will be able to transpose its policy into practice.

The CPS has stated that, as supporting evidence is frequently not forthcoming, "... it will usually be necessary for the victim to give evidence" (CPS, 2010b: 29). However, it will attempt to adduce any other available evidence to

support or replace the victim's testimony (CPS, 2010b: 29). If the victim withdraws the complaint or is not willing to testify, the CPS policy regarding the continuation of the prosecution in the absence of the victim's testimony, the use of hearsay evidence, and the circumstances in which it will compel the victim to testify replicates its policy regarding rape and domestic violence (see CPS, 2010b: 32, 33, 35-40; section 3.1.2 above).

All prosecutors receive training in "... equality and diversity awareness ..." (CPS, 2010b: 5). In addition, they attend training courses on the dynamics of racially and religiously motivated crime, which were designed with the aid of members of minority ethnic and faith communities (CPS, 2010b: 5).

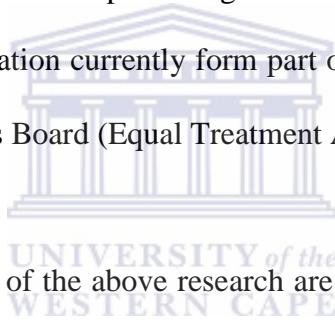


3.2.4 Court process

There is much less evidence of discriminatory attitudes and practices in regard to minority ethnic victims in the court process (see Wolhuter, *et al*, 2009: 249-250). This dearth of evidence may suggest that racial bias is less prevalent in the court process than it is in the pre-trial process.

A recent study revealed that no minority ethnic witnesses reported racial bias in the Crown Court and that as few as 7 per cent of such witnesses reported racial bias in the magistrates' courts (Hood, *et al*, 2003). While it is possible that minority ethnic victims may experience juror discrimination in the form

of the unfounded acquittal of white defendants, there is no indication that this is the case (Daly & Pattenden, 2005: 680). By contrast, a recent study has shown that, “white juror conviction rates overall were ... highest where the victim was [b]lack, and where the defendant was either [w]hite or Asian (but not [b]lack)” (Thomas, 2007: 183). Minority ethnic victims as well as defendants appear to be experiencing the court process as more impartial in recent years (Abbas, 2004: 8). As regards the Crown Court, this may be due to judges’ commitment to training in race relations and diversity awareness (Abbas, 2004: 13). Issues pertaining to racially motivated victimisation and religious discrimination currently form part of the training courses offered by the Judicial Studies Board (Equal Treatment Advisory Committee, 2010).



While the findings of the above research are encouraging, the reality remains that, in view of low reporting, recording and prosecution rates, very few cases of racially or religiously motivated crimes reach the courts (see section 3.2.1 above).

The foregoing analysis has highlighted the fact that, regardless of the plethora of reforms to criminal justice law and policy, the UK has not discharged its international and European obligations. Although there are areas of improvement, the recording, prosecution and conviction rates remain very low, revealing a failure to comply with the duty to punish offenders. The

continued existence of secondary victimisation at the hands of the police constitutes further evidence of the UK's non-compliance with its duties.

3.3 Homophobic and transphobic victimisation

Unlike gender-based victimisation and racially and religiously motivated crime, homophobic and (to a lesser extent) transphobic victimisation has only recently come to be one of the areas of focus of criminal justice law and policy. This section considers recent reforms against the backdrop of the government's international and European obligations.

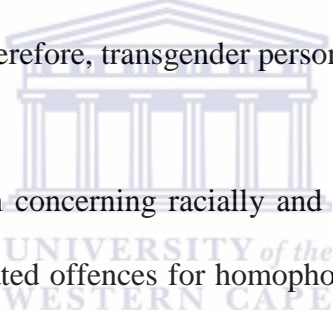
3.3.1 Offences



The UK has recently witnessed the introduction of offences outlawing homophobic hatred (see Wolhuter, *et al*, 2009: 251-252). Section 29B of the POA (as amended by the Criminal Justice and Immigration Act 2008) extends the offences of inciting religious hatred (see section 3.2.1 above) to homophobic hatred. Such hatred is described as "... hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both)" (s.29AB). In terms of s.29B, as amended, the use of "... threatening words or behaviour ..." or the display of threatening material is an offence if it is accompanied by an intention "... to stir up ... hatred on the grounds of sexual orientation." Like the offence of

stirring up religious hatred, this offence must be committed intentionally, which generates the prospect of difficulties of proof impeding convictions (see section 3.2.1 above).

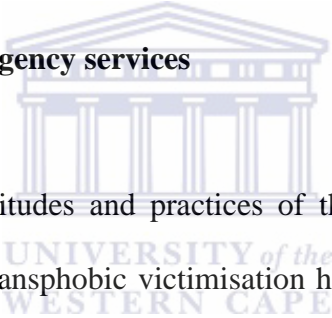
These provisions, which came into force in March 2010, clearly apply to LGB persons but not to transgender persons (Ministry of Justice, 2010: para 4). The government has indicated that it is not necessary to criminalise the incitement of hatred on the basis of gender identity at present, but has conceded that it may become necessary in the future (Ministry of Justice, 2010: paras 19, 20). For the moment, therefore, transgender persons are left out in the cold.



Unlike the position concerning racially and religiously motivated crime, the UK has no aggravated offences for homophobic or transphobic victimisation. However, ss.146(2) and (3) of the CJA 2003 provide that the demonstration by the defendant of hostility to the victim due to his/her "... sexual orientation (or presumed sexual orientation) ...", or the defendant's full or partial motivation "... by hostility towards persons who are of a particular sexual orientation ...", is an aggravating factor, which the presiding officer must mention in open court. Section 146 does not apply to hostility due to "... gender identity or presumed gender identity" (CPS, 2007: para 3.2). However, the court does have "... a general power and discretion to increase sentences that are aggravated by transphobic hostility" (CPS, 2007: para 7.7).

While the specific racially and religiously aggravated offences carry enhanced sentences (see section 3.2.1 above), sentences for offences falling within s.146 are not enhanced automatically. The court has discretion to determine the weight to attach to the aggravating factor. This disparate treatment between LGB victims and victims of racially and religiously aggravated offences, as well as the omission of transgender persons from the ambit of s.29B of the POA and s.146(2) and (3) of the CJA 2003, arguably amount to a violation of article 7, read with article 2, of the ICCPR (see section 2.3 above).

3.3.2 Police and multi-agency services



Changes to the attitudes and practices of the police and other agencies to homophobic and transphobic victimisation have been slow (see Wolhuter, *et al*, 2009: 252-254). The rate of reporting of homophobic and transphobic offences is extremely low (Hall, 2005: 195). A recent survey by Stonewall has revealed that three out of four victims of homophobic offences did not report the matter to the police (Dick, 2008: 20). In addition, the police frequently do not record homophobic offences as hate crimes (Dick, 2009: 8). Consequently, these offences generate very few police investigations and prosecutions (McGhee, 2005: 128), and there is "... a very low conviction rate" (Dick, 2009: 12). Many members of the LGBT community believe that the police and multi-agency partnerships are institutionally homophobic (McGhee, 2005: 129). In order to address these concerns, the police and the

CPS, liaising with statutory and community agencies, have introduced measures to improve the way they handle homophobic and transphobic incidents.

In 1998, a statutory duty was imposed on the police to record homophobic crimes, to include members of the LGBT community in CSPs, and thereby to police such crime in a more positive way (Williams & Robinson, 2004: 217). ACPO has defined homophobic and transphobic incidents as those which are perceived as homophobic or transphobic respectively "... by the victim or any other person" (ACPO, 2005: paras 2.3.3, 2.3.4). The principles of best practice that ACPO has developed in regard to racially and religiously motivated incidents (see section 3.2.2 above) apply equally to homophobic and transphobic incidents.

ACPO has taken the view that the police must respond with sensitivity to reports of homophobic and transphobic victimisation and must adopt positive measures to eliminate reporting barriers, in order to generate trust on the part of LGBT communities (ACPO, 2005: paras 15.9.15, 15.10.4). In addition, it has recommended that properly trained LGBT liaison officers must be appointed in all police forces to act as contact persons for both the police and LGBT communities (ACPO, 2005: paras 15.9.18, 15.10.7). It has urged that all police officers receive training in awareness of issues concerning LGBT persons (ACPO, 2005: para 15.9.19). It has also encouraged the use of self-

reporting and third party reporting schemes as such schemes increase reporting rates (ACPO, 2005: para 15.9.22).

However, these recommendations have not been implemented by all police forces. Research demonstrates that criminal justice agencies and the police, in particular, still do not treat homophobic offences seriously (Moran, 2004: 928) and are still homophobic (Moran & Skeggs, 2004: 55). Nevertheless, there are some encouraging signs of good practice. For example, the Hampshire Constabulary has appointed lesbian and gay liaison officers who receive special training in responding to homophobic victimisation. It has also set up a partnership with the Southampton Gay Community Health Service to provide victim services, such as anonymous reporting (McGhee, 2005: 130). The Greater Manchester Police have “community consultation groups” which have led to enhanced relationships between the police and members of the LGB community (Williams & Robinson, 2004: 214). Police in Wales have also improved their treatment of the LGB community (Williams & Robinson, 2004: 230). Although these improvements are heartening, they are unlikely to lead to complete trust between the police and the LGBT community without a broader transformation of the attitudes and practices of criminal justice agencies (Williams & Robinson, 2004: 217).

The police response to transgender victimisation is a greater cause for concern than its approach to homophobic victimisation. Moran and Sharp maintain

that the police do not understand the lived experiences of transgender persons. Officers may erroneously interpret transphobic incidents as homophobic incidents, which may affect their “... strategic and operational responses ...” deleteriously (Moran & Sharp, 2004: 409). They may also fail to realise that the victimisation experienced by transgender persons may differ according to their chosen gender identity. The police must be trained in order to understand that these experiences are differentiated, not only according to gender identity, but also according to other structural hierarchies, such as gender and race (Moran & Sharp, 2004: 411). For example, a male to female transgender person may experience victimisation on account of their gender identity as well as their status as a woman (Moran & Sharp, 2004: 405).

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3.3.3 Crown Prosecution Service

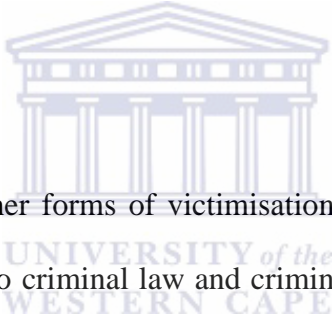
The CPS has adopted a positive prosecution policy concerning homophobic and transphobic crime (see Wolhuter, *et al*, 2009: 254), stating that it views such crime as “more serious” than non-hate offences and that prosecutions will consequently “almost always” be in the public interest (CPS, 2007: para 5.8). Homophobic Crime Co-ordinators have been appointed in every CPS area, in order to ensure that this policy is implemented effectively (CPS, 2007: para 12.2).

The CPS has adopted a definition of homophobic and transphobic incidents corresponding to the ACPO definition (see section 3.3.2 above). It has stressed that prosecutors must treat victims with sensitivity, particularly concerning their fears of “being outed”, and must attempt to ensure that they have access to special measures to facilitate the process of giving evidence (CPS, 2007: paras 4.4, 10.15). Prosecutors will also ask the court to order reporting restrictions to protect victims’ identity in appropriate circumstances (CPS, 2007: para 4.4).

The CPS has stated that, although the victim is frequently the sole witness in homophobic or transphobic offences, and that his/her testimony will consequently usually be required, it will attempt to use other available evidence “... as an alternative to the victim’s evidence ...” in order to ease the pressure on victims who are reluctant to testify (CPS, 2007: paras 5.11, 5.12). In cases where the victim no longer wishes to testify, the CPS policy concerning the continuation of prosecutions without the victim’s testimony, the use of hearsay evidence and the circumstances in which it will compel the victim to testify parallels its policy regarding rape and domestic violence (see CPS, 2007: paras 9.2, 9.8, 9.7; section 3.1.2 above). Although the CPS’ positive prosecution policy signifies a commitment to increasing the extremely low rate of prosecution of homophobic and transphobic offences, the practical efficacy of this policy is open to doubt in light of the low reporting rate (see section 3.3.2 above).

In contrast to their responses to racially and religiously motivated crime, criminal justice responses to homophobic and transphobic crime leave much to be desired. The existence of fragmented police strategies, a CPS policy that is likely to be ineffective, and a dearth of cases brought to court, highlight the extent to which the UK government is failing to discharge its duty to prevent and punish homophobic and transphobic victimisation, as required by articles 7 and 2.1 ICCPR (see section 2.3 above), or to eradicate secondary victimisation.

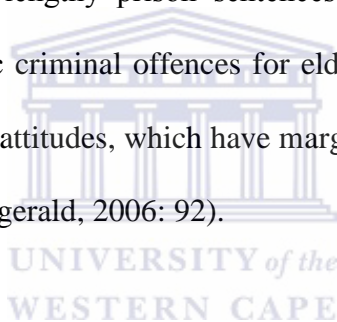
3.4 Elder abuse



Contrary to the other forms of victimisation discussed in this chapter, elder abuse is marginal to criminal law and criminal justice policy in the UK. This section assesses the provisions that do exist against the backdrop of the emerging human rights discourse on elder abuse discussed in section 2.4 above (see Wolhuter, *et al*, 2009: 254-258). With reference to the elder abuse strategies adopted in the US, it argues that the effective prevention and punishment of elder abuse and the protection of victims necessitates a coherent strategy encompassing the introduction of elder abuse offences and the development of a multi-agency response to victims in which criminal justice agencies play an active role.

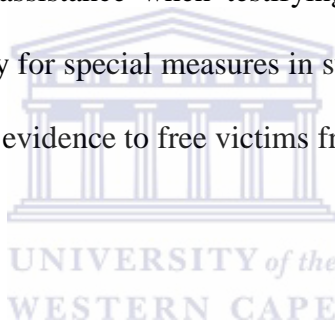
3.4.1 English law and policy

There is no offence of elder abuse in English law, although offenders may be prosecuted for ordinary criminal offences in appropriate cases. In addition, there is no statutory power of sentence enhancement in cases involving an element of aggravation due to the victim's age (CPS, 2008: para 11.1). However, the Court of Appeal has emphasised the seriousness of crimes against older persons, stating that the perpetrators of such crimes "... can expect to receive lengthy prison sentences" (CPS, 2008: para 11.1). The absence of specific criminal offences for elder abuse may be ascribed to the existence of ageist attitudes, which have marginalised the criminal dimensions of such abuse (Fitzgerald, 2006: 92).



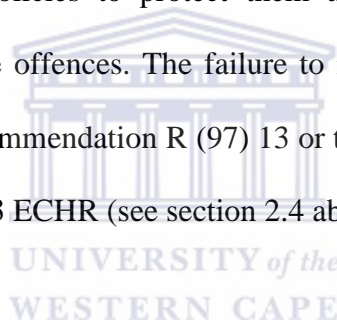
With the exception of the CPS (see below), no criminal justice agencies have developed comprehensive policies on elder abuse. Instead, responsibility for elder abuse has been given to Social Services, creating the impression that elder abuse "... is a social rather than criminal issue" (Department of Health, 2000; Action on Elder Abuse, *et al*, 2004: 5). Furthermore, elderly victims are subsumed within the government policy applicable to vulnerable adults generally (Fitzgerald, 2006: 91). Consequently, local multi-agency partnerships have developed policies and procedures for adult protection (Manthorpe, 2006: 143), which generates the danger that the dynamics of elder abuse, and the particular needs of victims, will be ignored.

Although these multi-agency partnerships are headed by Social Services, health authorities, the police and the CPS are also members (Manthorpe, 2006: 144). However, the police have yet to devise a national policy for the investigation of elder abuse offences. The CPS is currently the only criminal justice agency to have a policy pertaining to the elderly. It has stated that it views offences against the elderly as “serious” and, consequently, that it is “... likely that a prosecution will be needed in the public interest” (CPS, 2008: para 4.8). It has committed itself to ensuring that elderly victims are provided with support and assistance when testifying. Amongst other things, it has undertaken to apply for special measures in such cases, and to seek actively to use other available evidence to free victims from having to testify (CPS, 2008: paras 2.8, 5.9).



In cases where victims are not willing to testify, the CPS policy regarding the continuation of the prosecution without the victim, the use of hearsay evidence, and the circumstances in which it will compel victims to testify replicates its policy regarding rape and domestic violence (see CPS, 2008: paras 10.2, 10.6, 10.5; section 3.1.2 above). If a prosecutor decides not to institute a prosecution, or the defendant is not convicted, the CPS has undertaken to work with agencies, such as Social Services, “... to ensure that where appropriate non-criminal or other remedies or interventions are pursued” (CPS, 2008, 10.13).

The introduction of a positive prosecution policy is to be welcomed. However, it is unlikely to have much practical effect in the absence of comprehensive policies on the part of all criminal justice agencies, particularly the police. In addition, it is likely to be muted by the overarching discourse of social policy that informs the government's response to vulnerable adults. This discourse hinders the emergence in the UK of a human rights discourse on elder abuse that emphasises the duty of the state to take positive steps to recognise victims' fundamental rights by introducing criminal justice policies to protect them and to prevent, investigate, and punish elder abuse offences. The failure to introduce such policies is not in keeping with Recommendation R (97) 13 or the provisions of article 7 ICCPR and articles 2 and 3 ECHR (see section 2.4 above).



3.4.2 American law

The approach to elder abuse in most American states is founded on the conviction that law enforcement strategies, coupled with social and health services, are indispensable for an effective response to such abuse (Breux & Hatch, 2003: 231). Consequently, the law of most states underlines the criminal nature of elder abuse, and comprises statutory offences pertaining to the "... abuse, neglect, and financial exploitation ..." of the elderly (Moskowitz, 2002-2003: 633). In addition, some states have sentence enhancement legislation in respect of certain offences, such as assault,

committed against elderly persons, while others regard the advanced age of the victim as an aggravating factor (Moskowitz, 2002-2003: 633).

For example, the state of California has introduced broadly defined elder abuse offences (see Moskowitz, 2002-2003: 634-635). In terms of s.368(b)(1) of the California Penal Code, a person commits an offence who knows or ought reasonably to know that the victim is elderly and who, in circumstances that are likely to cause serious bodily injury or death -

willfully causes or permits [the victim] to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder ..., willfully causes or permits the person or health of the elder ... to be injured, or willfully causes or permits the elder ... to be injured, or willfully causes or permits the elder ... to be placed in a situation in which his or her person or health is endangered.

The penalties for committing the above offence are increased if serious bodily injury or death is caused (s.368(b)(2) and (3)). Further penalties are prescribed in s.368 for other offences against elderly persons, such as theft and fraud (Luu & Liang, 2005-2006: 180).

The California Attorney General's Office has implemented policies supplementing these offences. They include a stated intention to investigate and prosecute elder abuse, the establishment of a hotline to facilitate

reporting, and the running of training programmes for the employees of care institutions (Luu & Liang, 2005-2006: 180-181). Furthermore, the California Commission on Peace Officer Standards and Training trains police in the dynamics of elder abuse (Moskowitz, 2002-2003: 636). In a bid to increase the number of prosecutions, the state of California, as well as the majority of other states, have introduced mandatory reporting of elder abuse for certain groups, such as such as nurses, social workers and medical practitioners (Luu & Liang, 2005-2006: 184-185).

However, the prosecution rate for elder abuse offences is low, regardless of the enactment of specific offences and the development of positive prosecution policies and mandatory reporting laws (Davidson, 2004: 339). This may be due to the fact that, despite the existence of criminal sanctions for failure to comply with mandatory reporting laws, there is a low rate of reporting of known abuse (Luu & Liang, 2005-2006: 185). It may be due also to the existence of cost and resource constraints, and to the fact that many cases of elder abuse are not detected because they occur in victims' homes rather than in care institutions (Davidson, 2004: 339-340). Nevertheless, comprehensive criminal justice policies to prevent and punish elder abuse are a much more effective means of protecting victims' human rights than a social adult protection policy that obscures the criminal dimensions of elder abuse.

The federal government has signified its commitment to responding to elder abuse at federal level. The Elder Justice Act 2009, which came into force in March 2010, allocates considerable funding to the prevention, detection, investigation and prosecution of elder abuse. It amends the Social Security Act (42 U.S.C. 1397) by adding a title on elder justice, which is defined as referring, amongst other things, to "... the recognition of an elder's rights, including the right to be free of abuse, neglect and exploitation" (s.2011(6)(B)). It establishes an Elder Justice Coordinating Council, whose duties include making recommendations for coordinating the activities of the health service, the Department of Justice and other agencies in regard to "... elder abuse, neglect, and exploitation and other crimes against elders" (s.2021(f)(1)). It also establishes an "... Advisory Board on Elder Abuse, Neglect and Exploitation ..." for the purpose of generating elder justice strategies and making "... recommendations to the Elder Justice Coordinating Council" (s.2022(a)).

In addition, it makes provision for grants to establish and run forensic centres "... to develop forensic expertise regarding, and provide services relating to, elder abuse, neglect, and exploitation" (s.2031(a)). It imposes a duty on the health service to provide funding to "... adult protective services that investigate reports of the abuse, neglect, and exploitation of elders" (s.2042(a)(1)). It provides for grants to states to conduct "demonstration programs" testing training courses concerning the detection and prevention of

elder abuse, amongst other things (s.2042(c)(1), (2)). It also provides for the regulation of surveyors' training concerning the investigation of elder abuse (s.2046(b)(1)). Furthermore, it imposes a duty on "... federally funded long-term care facilities ..." to report offences against elders to law enforcement agencies. Failure to discharge this duty results in the imposition of civil penalties (s.1150B).

The establishment of a multi-agency elder abuse structure at federal level is to be welcomed. However, the imposition of overall responsibility on health and social services, and the lack of a federal criminal justice policy, marginalises the human rights and criminal dimensions of elder abuse. Consequently, the federal approach resembles the UK's social adult protection policy rather than the multi-pronged strategy emphasising law enforcement that has been adopted by most states.

The state approach to elder abuse parallels the UK's responses to racially and religiously motivated crime. Both have criminalised the conduct, introduced sentence enhancement legislation or aggravation in sentencing, and developed positive policing and prosecutorial policies. Accordingly, an elder abuse strategy in the UK could be modelled on its existing strategies to combat racially and religiously motivated crime. In order to respond to the emerging international human rights discourse on elder abuse, and to comply with Recommendation R (97) 13, the UK ought to introduce such a strategy.

4. ENFORCEMENT OF STATE OBLIGATIONS

It appears from the foregoing analysis that, with the aim of complying with its international and European obligations, the UK has implemented a wide range of reforms that seek to prevent, investigate and punish victimisation experienced by socially unequal groups, and to alleviate secondary victimisation. However, there are significant areas in which the government has yet to demonstrate compliance with these obligations (see Wolhuter, *et al*, 2009: 258-259). Many women minority victims of domestic violence fall through the cracks of domestic violence and race relations law and policy. The rate of attrition in rape cases remains high. Racially and religiously motivated crimes, and homophobic and transphobic crimes, are not consistently policed and there are few prosecutions. Minority ethnic communities and LGBT persons continue to perceive the police as biased. Elder abuse victims occupy a marginal position in criminal law and criminal justice policy.

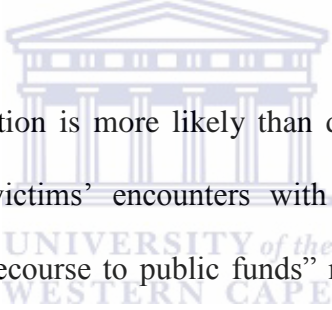
While aggrieved victims may, in principle, approach the HRC or the ECtHR for redress, the process is expensive, time-consuming and consequently not likely to be used by many victims. Accordingly, this chapter does not consider these forms of redress. Instead, it is restricted to an analysis of the domestic remedies for victims that have been introduced in the EA, and an exploration of the manner in which these remedies may be correlated with the enforceable victims' rights which this thesis advocates.

4.1 Remedies for discrimination and harassment

Hepple contends that the EA signifies a move to “transformative equality”, which aims to remove “systemic inequalities” and eliminate “poverty and disadvantage” (Hepple, 2011: 10, 22). The EA protects several listed characteristics, including sex, race, religion or belief, sexual orientation and gender reassignment (s.4). When a public authority or private body provides a service or performs a public function, it is unlawful to engage in, amongst other things, direct discrimination, indirect discrimination or harassment on the basis of one of these characteristics (EA, Part 3; Hepple, 2011: 25). Consequently, all criminal justice agencies, being public authorities, are bound by these provisions. However, prosecutorial decisions whether to institute or continue prosecutions are exempt from discrimination or harassment claims (EA, Sched 3: para 3; Hepple, 2011: 110).

Direct discrimination occurs where one person treats another “less favourably” than other persons, “... because of a protected characteristic” (s.13(1)). In view of the significance accorded by the criminal justice reforms discussed above to meeting the needs of socially unequal victims (with the exception of victims of elder abuse), direct discrimination on the part of criminal justice agencies is unlikely.

Indirect discrimination, on the other hand, occurs where one person applies to another “... a provision, criterion or practice ...” which is neutral, on its face, but which “... puts, or would put, persons with whom [the other] shares the characteristic at a particular disadvantage ...” compared to others, and which “... puts, or would put, [the other] at that disadvantage” (s.19; Hepple, 2011: 64). However, there is no indirect discrimination if the “... provision, criterion or practice ...” is “... a proportionate means of achieving a legitimate aim” (s.19(2)(d)). An intention to discriminate is not required (Equality and Human Rights Commission, 2011: para 5.24).



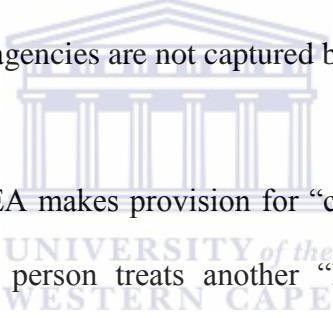
Indirect discrimination is more likely than direct discrimination to occur in socially unequal victims' encounters with criminal justice agencies. For instance, the “no recourse to public funds” rule, which precludes immigrant victims of domestic violence from claiming state benefits while their applications for indefinite leave to remain are being considered (see section 3.1.4 above) is a facially neutral provision insofar as it applies to all immigrant domestic violence victims regardless of race. However, in view of their social and economic marginalisation, as well as the familial ostracism they experience for having brought shame on the family (see chapter 2), South Asian women are likely to be put “at a particular disadvantage” by this provision.

While indirect discrimination is likely to occur more frequently in the criminal justice process than direct discrimination, and its extension to all the protected characteristics is thus to be welcomed, it nonetheless fails to capture all the facets of disadvantage experienced by socially unequal groups. This is because, being premised on substantive rather than transformative equality, it does not operate to remove systemic disadvantage (Hepple, 2011: 19-20). For instance, the fact that there is a very low rate of reporting of homophobic crime (see section 3.3.2 above) due to LGB victims' lack of trust in the police cannot be said to amount to indirect discrimination on the part of the police because the police reporting procedures do not "put" LGB victims "at a particular disadvantage". By contrast, the disadvantage flows from a perception of institutional homophobia that cannot be linked to a specific police provision or practice. Fortunately, the imposition of public sector equality duties compensates for the "... limitations of the indirect discrimination provisions" (Hepple, 2011: 20; see below).

Harassment occurs, amongst other things, where a person "... engages in unwanted conduct related to a relevant protected characteristic, and ... the conduct has the purpose or effect of ... violating ..." the dignity of another, or "... creating an intimidating, hostile, degrading, humiliating or offensive environment for ..." the other (s.26(1)). It is a form of conduct that is likely to occur more frequently than direct and indirect discrimination in the context of socially unequal victims' interactions with criminal justice agencies. For

example, institutional racism on the part of the police would likely qualify as harassment of victims reporting racially motivated crimes (see section 3.2.2 above). The same would apply to police service provision that was informed by gender stereotypes.

Unfortunately, however, harassment on the basis of religion or sexual orientation is not unlawful when committed by a public or private body providing a service or performing a public function (Hepple, 2011: 80). Consequently, Islamophobic or homophobic attitudes and practices on the part of criminal justice agencies are not captured by the harassment provisions.



Section 14 of the EA makes provision for “combined discrimination”, which occurs where one person treats another “less favourably” due to “... a combination of two relevant protected characteristics” (s.14(1)). Such combined discrimination may only take the form of direct discrimination – indirect discrimination and harassment do not fall within the ambit of s.14 (Hand, 2011: 484). The exclusion of indirect discrimination and harassment constitutes a significant limitation of the purview of s.14. Most instances of intersectional discrimination amount, at most, to indirect discrimination, or, at least, to harassment, but rarely to direct discrimination.

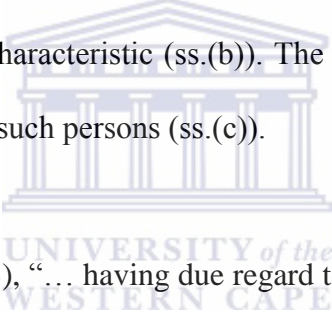
Furthermore, the restriction of s.14 to two grounds only precludes claims for intersectional discrimination that encompass a number of grounds (Hepple,

2011: 62). For example, the low rate of reporting of domestic violence by minority ethnic women, which is due to the intersection of institutional racism, gendered conceptions of appropriate womanhood, cultural conceptions of shame and age hierarchies (see section 3.1.4 above; chapter 1) spans more than two grounds and does not arise by way of direct discrimination. Consequently, s.14 fails to capture minority women's lived experiences of domestic violence.

The EA accords aggrieved victims a right of action for redress in the civil courts in respect of unlawful conduct, including direct and indirect discrimination and harassment (Equality and Human Rights Commission, 2011: para 14.7). In view of the fact that these forms of conduct are "statutory torts" (Hepple, 2011: 170), the ordinary principles of tort law apply. The courts are empowered to award declarations of rights, damages and injunctions (Hepple, 2011: 170). However, there are several difficulties with this right of action, in particular the fact that victims will, for the most part, have to pay the legal costs themselves (Hepple, 2011: 164). While the recognition of a right of action is to be welcomed, constituting as it does one of the few enforceable rights for victims, the absence of state-funded legal representation will render it inaccessible to many victims.

4.2 Public sector equality duties

In addition to rendering the above forms of conduct unlawful, the EA provides for the extension of public sector equality duties “... across the board to all protected characteristics” (Hepple, 2011: 11). Section 149(1) provides that public authorities are required to “have due regard” to three matters. The first is the need to eradicate discrimination and harassment, amongst other forms of prohibited conduct (ss.(a)). The second is the need to “... advance equality of opportunity ...” between those who have, and those who do not have, a protected characteristic (ss.(b)). The third is the need to “foster good relations” between such persons (ss.(c)).



In terms of s. 149(3), “... having due regard to the need to advance equality of opportunity ...” includes “... having due regard ... to the need to ...” alleviate “disadvantages suffered” by protected persons; to adopt measures to cater for the “different” needs of protected persons; and to “encourage” protected persons “... to participate in public life or in any other activity in which participation by such persons is disproportionately low”.

Unlike the discrimination and harassment provisions, this public sector equality duty represents the beginnings of a government commitment to transformative equality, namely the eradication of systemic disadvantage and exclusion (see Hepple, 2011: 22, 134). The duty has far-reaching implications

for the transformation of the criminal justice response to victims from unequal social groups. For instance, it arguably requires the government to develop a comprehensive criminal justice policy regarding elder abuse (see section 3.4.1 above). It certainly requires a focus on eradicating institutional racism and homophobia (see sections 3.2.2 and 3.3.2 above). In addition, it commits the government to ensure that its strategy to eliminate gender-based violence accommodates the realities of minority women appropriately (see section 3.1.4 above). Unfortunately, however, s.156 precludes "... a cause of action at private law ..." by victims if the government fails to discharge the duty. Judicial review constitutes the only avenue of redress for aggrieved victims with a "sufficient interest" in the matter (Hepple, 2011: 140). Apart from judicial review, action to enforce the duty may only be taken by the Equality and Human Rights Commission (see Equality Act 2006, ss.20-32).

4.3 Enforceable victims' rights and the Equality Act 2010

It appears from the above analysis that the EA has ushered in a new framework that has the potential to empower socially unequal victims significantly. For the first time, such victims have access to enforceable rights. However, difficulties persist, the most notable being the exclusion of religion and sexual orientation from the ambit of harassment in the provision of services and the performance of public functions, and the restrictive ambit of combined discrimination (see above). Another lacuna concerns victims'

inability to institute action against the CPS for deciding not to institute or continue prosecutions (see Wolhuter, *et al*, 2009: 261). Aldana-Pindell highlights the fact that a state duty to prosecute crimes violating the rights to life and personal integrity exists in international human rights law, and consequently that victims ought to have a justiciable right to prosecutions (Aldana-Pindell, 2002: 1413, 1415).

Nevertheless, the introduction of the EA has effected a fairly radical transformation of the legal milieu for socially unequal victims in the UK. However, in order to utilise this transformed milieu to greatest effect and to highlight the relationship between discrimination and victimisation, the rights of action in the EA should be extrapolated, insofar as they pertain to socially unequal victims, and transposed into an enforceable victims' rights instrument, along with the other victims' rights that constitute the focus of the thesis.

The Victims' Directive incorporates an awareness of the need to correlate victimisation and discrimination. Non-discrimination in the provision of "protection and support", victim participation and treatment of victims is an *aim* of the Victims' Directive (article 1). However, unlike article 4.3 of the European Women's Convention (see section 2.1 above), there is no *right* to non-discrimination in the enjoyment and exercise of the victims' rights it enshrines. Nonetheless, it is submitted that the reference to the importance of

avoiding discrimination in article 1 constitutes sufficient textual evidence for the fact that the EU is committed to the eradication of discrimination in its proposed victims' rights regime. Consequently, the thesis contends that the UK ought to add a non-discrimination clause to the victims' rights legislation that it advocates (see chapter 7 for a more detailed discussion of this issue).

5. CONCLUSION

This chapter has demonstrated that, although current law and policy contain far-reaching strategies to prevent, investigate and punish victimisation based on gender, race, religion and sexual orientation, and to reduce secondary victimisation, analogous strategies for victimisation based on gender identity and advanced age are limited. Furthermore, several flaws continue to beset the criminal justice responses to victims from all the socially disadvantaged groups discussed in the chapter.

The chapter has also highlighted the strengths and weaknesses of the rights accorded to these victims in the EA. It has contended that, despite its shortcomings, the EA represents a new dawn for socially unequal victims and that, in order to maximise its benefits for such victims, the UK ought to correlate the rights in the EA with the other victims' rights advocated in the thesis. The contours of the suggested framework for these rights are

delineated in the three-tier model of victims' rights that constitutes the focus of the concluding chapter.



CHAPTER 7: CONCLUSION – A VICTIMS’ RIGHTS MODEL FOR THE CRIMINAL PROCESS

1. INTRODUCTION

The thesis has aligned itself with the critical victimological tenet that the agency of victims must be utilised to develop strategies to eradicate secondary victimisation and to empower victims in the criminal process. Along with critical victimologists such as Mawby and Walklate (1994), it has contended that victims’ agency may be channelled most effectively through the medium of victims’ rights (see chapter 1). Consequently, the thesis has aimed to make a case for the introduction of rights that clothe victims with legal standing to institute actions for their enforcement, and to demarcate the form that these rights should take and the content that they should embody.

The aim of this chapter is two-fold. First, it outlines the main conclusions reached in each of the substantive chapters of the thesis concerning the extent to which the UK complies with European standards. Second, it devises a model of victims’ rights that it maintains ought to be the foundation of victims’ rights legislation in the UK (see Wolhuter, *et al*, 2009: 265-269).

2. COMPLIANCE WITH EUROPEAN STANDARDS

Apart from a number of significant exceptions, the provisions for victims in English law and policy are consonant with European standards, and, in some respects, even surpass these standards. In collaboration with Victim Support and other “unofficial” victims’ agencies, such as Rape Crisis and Southall Black Sisters, the UK has succeeded in establishing the best support services for victims in Europe (see chapter 3). In this respect, it clearly complies with the requirements of the Framework Decision and the proposed Victims’ Directive. Furthermore, with the exception of some limitations on compensation claims for special expenses and loss of earnings for certain victims, the CICS complies with the Compensation Convention and is widely thought to be the most generous compensation scheme in Europe (see chapter 5). However, these achievements are confined to a space *outside* of the formal criminal process.

A somewhat bleaker picture emerges regarding victims’ position *within* the formal process. The Victims’ Code imposes wide-ranging duties on criminal justice agencies, such as the police and the CPS, to provide victims with information, respect and recognition, and protection. Barring the absence of duties to provide non-English speaking victims with appropriate services for interpretation and translation, these duties are congruent with the provisions of the Framework Decision and the Victims’ Directive (see chapter 3).

However, the fact that they do not give rise to enforceable rights entitling aggrieved victims to institute proceedings against criminal justice agencies detracts from their effectiveness for victims and is not in keeping with the aim of the proposed Victims' Directive (see below).

Within the context of the right to protection, the YJCEA, as amended by the CJA 2009, enshrines expansive measures, including special measures and the prohibition of cross-examination by the defendant in person, to facilitate the process of testifying for vulnerable victims. By virtue of their breadth and inclusiveness, these measures comply with the requirements of the Framework Decision and the Victims' Declaration. However, the fact that the decision to grant special measures is discretionary creates a barrier to their effectiveness for victims, as research has documented reluctance on the part of the judiciary and legal professionals to accept that special measures are part of mainstream legal practice (see chapter 3).

A difference of opinion has arisen between the ECtHR and the Supreme Court as regards the extent to which the provisions in the CJA 2003 concerning hearsay evidence and those in the CJA 2009 regarding anonymous evidence comply with article 6 ECHR. While Strasbourg jurisprudence insists that hearsay or anonymous testimony that is the "sole or decisive" evidence against the defendant violates article 6(3)(d), the Supreme Court has set its face against this conclusion (see chapter 2). Consequently, the hearsay and

anonymous testimony provisions are inconsistent with European standards. While the nature of this inconsistency inures to the benefit of victims by making hearsay and anonymous testimony more easily admissible, the picture that emerges in practice is considerably less positive, particularly for victims from socially unequal groups, as courts are unwilling, for the most part, to admit such evidence where the victim is the only witness (see chapter 6).

The provisions in the YJCEA regulating the admission of sexual history evidence in rape trials, as reinterpreted by the House of Lords in *R v A (No. 2)* [2001] 2 Cr App R 21 to ensure compliance with the defendant's right to a fair trial in article 6 ECHR, are also consistent with European standards. However, the reinsertion of judicial discretion that the decision in *R v A (No. 2)* has entailed has re-opened the door to the admissibility of evidence of victims' previous sexual relationships with the defendant, the inclusion of which has been subject to trenchant criticism for its reliance on rape myths and gender stereotypes (see chapter 3).

Within the context of the procedural right to be heard, the UK has granted victims limited avenues for passive participation in the pre-trial and trial processes. As regards the former, victims' views must be considered in prosecutorial decisions to prosecute and in plea bargaining negotiations, but they have no right to participate actively in these processes. Traditional conceptions of adversarialism preclude victims from participating in any

respect in the trial itself, except to testify as witnesses for the Crown. While victims may participate passively at the stage of sentencing by means of making VPS, research has shown that VPS have had a limited impact in practice. Nonetheless, in view of the deference accorded by EU law to the dictates of trial procedure in common law jurisdictions, these restricted “rights” to participate passively are congruent with the Framework Decision and the Victims’ Directive. However, the exclusion of victims of serious crimes from party status in the trial process compounds their experiences of secondary victimisation (see chapter 4).

By and large, English law and policy concerning the prevention, investigation and punishment of gender-based violence, and the empowerment of victims, accords with European standards, although some gaps remain. For instance, the intersectional dynamics of minority women’s experiences of domestic violence are not captured in criminal justice policy and, consequently, victims are left without adequate protection (see chapter 6). The UK’s record as regards the prevention, investigation and punishment of racially and religiously motivated crime and homophobic and transphobic violence is less satisfactory. Prosecution and conviction rates are low, and evidence of discriminatory attitudes and practices on the part of criminal justice agencies, particularly the police, continues to exist, despite the strictures of the MacPherson Inquiry (MacPherson, 1999) and the recommendations of ACPO (see chapter 6). Accordingly, English law and policy falls short of European

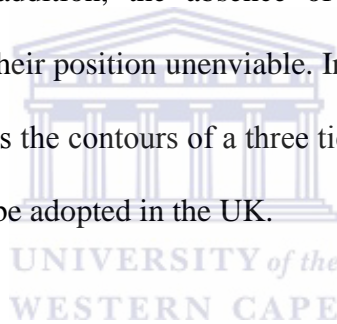
standards in these respects. Furthermore, the absence of a comprehensive policy on the prevention, investigation and punishment of elder abuse signifies the UK's failure to align its law and policy with the emerging human rights discourse on rights for elderly victims in Europe and internationally (see chapter 6).

Nevertheless, the rights of action accorded to victims of discrimination and harassment by public authorities in the provision of services and the performance of public functions in the EA represent a breakthrough for socially unequal victims. For the first time, aggrieved victims have legal standing to institute actions against recalcitrant criminal justice agencies. Despite its breadth, however, the EA has a number of shortcomings. The prohibition of harassment in the provision of services and the performance of public functions does not extend to religious belief and sexual orientation, leaving victims who experience Islamophobic and homophobic harassment by criminal justice agencies without a remedy. Furthermore, the provisions regarding combined discrimination are unduly restrictive, excluding indirect discrimination and harassment, as well as intersectional discrimination on more than two grounds. In addition, while the EA imposes a wide-ranging public sector equality duty on all public authorities, breach of this duty does not give rise to a right of action at civil law (see chapter 6). In spite of these shortcomings, however, the provisions of the EA represent a new era for the

rights of socially unequal victims in the UK, and testify to the UK's compliance with EU law in this respect.

3. A VICTIMS' RIGHTS MODEL

While the transformations effected by the EA are to be welcomed, the locus of the rights of action for discrimination and harassment in anti-discrimination legislation impedes the development of a discourse linking discrimination and victimisation. In addition, the absence of enforceable rights for victims generally renders their position unenviable. In a bid to address these concerns, this section outlines the contours of a three tier model of victims' rights that it contends ought to be adopted in the UK.



The first tier embodies a conception of victims' rights as founded on fundamental human rights. The Council of Europe has recognised that victims' rights flow from human rights (see *Recommendation No. Rec. (2006) 8 on assistance to crime victims*, article 2). This recognition also informs the rights enshrined in the Framework Decision and the Victims' Directive (see chapter 2).

However, the significance of conceiving of victims' rights as human rights is rendered devoid of substance in the UK by the government's unwillingness to grant victims standing to enforce such rights. It refused to make the requisite

declaration recognising the ECJ's jurisdiction "... to give preliminary rulings ..." on framework decisions (articles 35(1) & (2) TEU), thereby preventing aggrieved victims from invoking the Framework Decision in English courts. Likewise, it has relegated to itself the power to decide not to accept the provisions of the Victims' Directive, which, when in force, will give victims' rights direct effect in the domestic law of Member States. Whether or not the coalition government decides to exercise this power is a question for the future (see chapter 2).

The central contention of the thesis is that, in order to give effect to the first tier of victims' rights, it is necessary for the UK to agree to accept the Victims' Directive and, thereby, to introduce enforceable rights for victims. In addition, in order to give flesh to the bones of the Victims' Directive, victims' rights legislation analogous to the American CVRA ought to be enacted (see chapter 2). Such legislation would enable victims to ensure, by way of court action, that criminal justice agencies complied with their duties, such as those contained in the Victims' Code. By analogy to the CVRA, a duty could be imposed on the judiciary to give effect to victims' rights immediately, namely during the criminal proceedings themselves (Beloof, 2005: 343). Furthermore, the provisions concerning special measures in the YJCEA, as amended by the CJA 2009, could be amended to accord victims a right to such measures, enforceable in the relevant criminal proceedings themselves. The introduction of enforceable rights that give victims legal standing would facilitate victim

empowerment greatly and contribute to the alleviation of secondary victimisation in the criminal process.

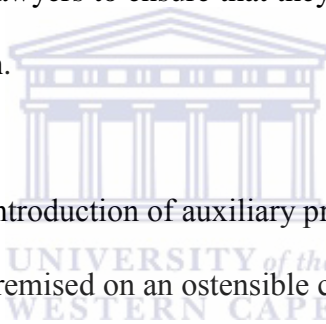
In light of the continued existence of discriminatory attitudes and practices on the part of criminal justice agencies, the persistence of intersectional oppression that precludes minority victims from reporting gender-based violence, and the absence of a concerted criminal justice response to elder abuse, socially unequal victims may not be in a position to access these rights. Consequently, the second tier of the victims' rights model is premised on the importance of linking the rights of action in the EA for discrimination and harassment in the provision of services and the performance of public functions with the enforceable victims' rights advocated in the first tier. This connection may be effected by means of the inclusion of a non-discrimination clause in the victims' rights instrument granting victims the right to freedom from discrimination in the exercise and enjoyment of the substantive rights enshrined in it.

However, the shortcomings of the provisions of the EA (see section 2 above; see also chapter 6) impede their effectiveness for socially unequal victims, particularly in cases of intersectional victimisation and victimisation on the grounds of religious belief or sexual orientation by criminal justice agencies. Therefore, the proposed anti-discrimination clause must, it is contended, be supplemented by the imposition of a positive duty on criminal justice agencies

analogous to the public sector equality duty in the EA. Very importantly, this duty must be given substantive legal effect by granting victims a right of action to sue recalcitrant criminal justice agencies for failing to discharge it. The inclusion of such a two-pronged second tier (comprising a right to freedom from discrimination as well as an actionable positive duty on criminal justice agencies) will inure to the benefit of socially unequal victims by levelling the playing field in the criminal justice process.

The enactment of enforceable victims' rights granting legal standing to victims, even if reinforced by a non-discrimination clause and positive state duties, is insufficient per se to empower victims as long as their procedural status remains that of mere Crown witnesses. Consequently, the third tier of the victims' rights model comprises the recognition of procedural rights for victims in pre-trial and trial proceedings. On the basis of a comparative analysis of German and Swedish law, the thesis has advocated the introduction of auxiliary prosecutors for victims of serious offences, such as gender-based violence, and racially and religiously motivated and homophobic crime (see chapter 4). The auxiliary prosecution procedure transforms victims into full parties to the proceedings with procedural rights analogous to those of the prosecution and defence. These rights include the rights to legal representation, to object to judicial orders and questions from counsel, and to apply to have evidence adduced.

While victims of less serious offences should remain Crown witnesses, they ought to be granted the right to legal representation. Procedural rights such as these will make a marked contribution to the alleviation of secondary victimisation in the pre-trial as well as the trial process. The presence of lawyers will serve to buttress victims against the predations of defence counsel during cross-examination, and will facilitate the raising of objections to defence applications to admit sexual history evidence. However, the UK ought to follow the example of Sweden and Germany and provide victims with state-funded lawyers to ensure that they are able to exercise their right to legal representation.



Opposition to the introduction of auxiliary prosecutors and victims' lawyers in the UK, which is premised on an ostensible concern to protect defendants' fair trial rights, finds little support in Strasbourg jurisprudence. Indeed, the ECtHR, while expressing commitment to adversarial trials, has not taken the view that upholding the rights of defendants as well as the interests of victims detracts from the principles of adversarialism (see *Doorson v The Netherlands* (1996) 22 EHRR 330; see also chapter 4). Furthermore, victims' lawyers are a frequent and unremarkable feature of trials in civil law jurisdictions and have been accepted without comment by the ECtHR (see, for example, *SN v Sweden* (2004) 39 EHRR 13, where the fact that the victim had been represented by a lawyer was of no consequence in the court's decision that the defendant had received a fair trial; see also chapter 4).

In addition, jurisdictions with adversarial trial processes, such as Sweden, grant victims procedural rights, and even the US, which is noted for its adversarialism, allows victims' lawyers. Consequently, opposition to procedural rights for victims is founded more on traditional conceptions of adversarialism than on any substantive incompatibility between such rights and the adversarial process (see chapter 4).

While this three tier model of victims' rights is advocated as a significant means of ensuring the empowerment of victims and the reduction of secondary victimisation, it is clearly not a panacea for all evils. Rights, per se, are insufficient to transform discriminatory and insensitive attitudes and practices on the part of criminal justice agencies. Accordingly, training for the police, CPS and the judiciary, with particular reference to the lived realities of victims of gender-based violence, racially and religiously motivated crime, homophobic and transphobic victimisation, and elder abuse must be given prominence in English law and policy. Admittedly, with the exception of elder abuse, the UK has evinced a commitment to ensuring that such training occurs (see chapter 6).

4. CONCLUDING REMARKS

While the EU institutions, as well several European jurisdictions, have committed themselves to the entrenchment of enforceable victims' rights, the

views of the English legal establishment, which are in opposition to the above victims' rights model, are strong, well-entrenched and likely to be resistant to change (see chapter 4). Whether the transformations advocated in the thesis will be accepted or consigned to a space reserved for well-meaning but misguided academic endeavour will ultimately depend on the extent to which commitment to sovereignty and national identity outweighs economic and political pressure to achieve European uniformity.



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