The past twenty-five years have seen a proliferation of legal and social policy reforms designed to ameliorate the position of the victim inside (as well as outside) the criminal justice system. A milestone in the United States was undoubtedly the President’s Task Force on Victims of Crime, established in 1982, which proposed far-reaching reforms both on the state and the federal levels, including an amendment to the United States Constitution.¹ A 1984 survey of victim-related legislation in the United States identified 1,489 pages of victim-oriented legislation,² while by 1997 the legislative database of the National Victim Centre included 28,000 federal and state victim rights statutes!³

The pace of developments has tended to be slower in most other countries. One factor may be that pressure groups such as feminists have had less political power, or that the political culture is less susceptible to popular pressures; conversely, the criminal justice culture may be more

¹ See President’s Task Force on Victims of Crime, Final Report (1982). The proposal for a constitutional amendment was not then acted upon, but such a proposal has recently been debated in the United States Congress.
resistant to change. Another probable factor is that victims have traditionally been better protected in some other systems. This would apply both to traditional societies, which to an extent have served as a model, or at least an inspiration, for contemporary reforms in western countries, and to so-called civil law and other non common law systems, which tended in the past to grant victims more recognition, e.g., by way of the “adhesion process” as a civil party, or in some cases (notably Germany) the possibility of representation for the purposes of the criminal proceedings (nebenklage).

Nevertheless, legislative reform with regard to victims has also been on the agenda of most western and many non-western countries. Pressure has also been forthcoming on the international level, by United Nations and other agencies, as well as on the part of the World Society of Victimology, particularly since 1985 when the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime.

What has been the nature and content of victim-oriented legislative reforms? These have assumed many and varied forms, including: state compensation, offender restitution, victim notification of criminal justice decision-making, an enhanced victim role at the various stages of such decision-making (bail, prosecution and plea-bargaining, sentencing – including victim impact statements, parole), programmes for victim assistance (both of a material and a psychological nature), imposition of levies on offenders to pay for victim programmes, escrow of offender profits to benefit victims (“Son-of-Sam” laws), the encouragement of civil law remedies – directed both at the offender and third parties, and the

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6 Infra note 29.


development of alternative, informal procedures, such as mediation and reconciliation.\(^9\)

Other types of criminal justice reform which may be considered to be “victim-linked”, albeit less explicitly, are those which deal with the scope of the criminal law and the severity of sentencing. Thus, even the restoration of the death penalty in California in 1982 was achieved by means of a so-called “victims’ rights” referendum (“Proposition 8”).\(^{10}\)

These reforms are very diverse in character, suggesting that the so-called victims’ rights movement lacks a clear-cut agenda as to what is being sought for victims: greater protection? material improvement? psychological satisfaction? – and as to who is to provide it: the offender? the state?\(^{11}\) A need has emerged for the classification of victim-oriented reforms, in order to identify the underlying models and policies and to facilitate an assessment of their respective merits. Some (albeit limited) attention has been devoted to this type of conceptualization in the victimological literature.\(^{12}\)

In a recent book, I identified two criteria for such classification. The first focussed on the relationship of the reform to the criminal justice system, viz., whether it aimed (a) to bring about change within this system (e.g., by granting victims rights to information, consultation or representation), (b) to create or improve remedies outside the criminal justice system and without impinging upon it (e.g., by establishing a state compensation fund), or (c) to replace the criminal justice system by an alternative institution more sympathetic to the victim (e.g., mediation).\(^{13}\) The second criterion adopted for the purpose of classifying and analysing victim remedies related to the identity of the agency on which responsibility was being placed vis-à-vis the victim. Most of the reforms can be classified as

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\(^9\) For surveys of these developments see R. Elias, The Politics of Victimization (1986); L. Sebba, *supra* note 5.


\(^{11}\) Such diversity may derive from the fact that this “movement” is in fact a coalition of different forces, with differing, indeed sometimes inconsistent, agendas: see L. Sebba, *supra* note 5, pp. 2–10; Weed, *supra* note 3.


\(^{13}\) See L. Sebba, *supra* note 5, p. 13, and chapters 7–11. A fourth category, designated “catch-all”, referred to reforms combining the above-mentioned categories.
consistent with one of two underlying models, the one offender-oriented and the other state-oriented. An obvious illustration is in the area of financial remedies, where each of the two models has produced a remedy, offender restitution on the one hand, and state compensation from a public fund on the other. In an earlier article I designated the first of these two models the “adversary-retribution model”, since it tends to increase the identity between the victim and the prosecution as the defendant’s adversary in the criminal proceedings, and the second the “social defense-welfare model”, since it tends to classify victims with those other social groups in need of protection and welfare, a category not substantially different from that in which offenders were placed under the positivist approach in the past.

This classification is of course not independent of the previous one. For while remedies outside the criminal justice system may be sought from either the offender or the state (the identity of the responsible agent being left open), involvement of the victim within the criminal justice system is consistent only with the perception of the offender as the responsible party. For this reason these classifications will be of limited usefulness for the purposes of the present article, which will focus primarily upon reforms within the criminal justice system.

A third criterion for classifying victim remedies which has been adopted in the analytical literature, whether explicitly or implicitly, is based upon a distinction between “rights” and “needs” or “services”. A rights approach perceives the victim as having certain entitlements.

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14 Ibid., chapters 12–13.
following (as well as prior to\textsuperscript{18}) the commission of a crime; and this approach tends to attribute to the victim a role \textit{vis-à-vis} the law enforcement authorities – and ultimately \textit{vis-à-vis} the offender. A needs or services approach perceives the victim as a candidate for assistance in the wake of (or for protection prior to\textsuperscript{19}) the trauma he or she has undergone.

This differentiation in fact masks two distinct questions. The first question is whether the primary goal of the prospective reform should be to enhance the victim’s role in the criminal justice system and other legal proceedings, or to provide material and emotional support or protection for the victim with the aid of the helping professions. It should be noted, however, that such support or protection may itself be related to the legal proceedings, insofar as professional help or other techniques may be required to reduce the trauma inflicted upon the victim in the course of the proceedings.

A separate question is whether reforms with regard to the victim should be based on legal rights or should be at the discretion of officials. This question is distinct from the preceding one; for while welfare services are commonly associated with discretion, they may be available as of right.\textsuperscript{20} Conversely, while assumption of a role in the legal proceedings may generally be associated with rights, it may be dependent on the discretion of officials.\textsuperscript{21}

This article will take into account both of these distinctions. The main differentiation will be between reforms designed to enhance the victim’s participation in the legal (mainly criminal justice) proceedings, as opposed to those intended primarily to protect the victim from trauma – or to alleviate its effects (This is in effect a dichotomy between the victim as an active subject of rights as opposed to the victim as a passive object of protection, a dichotomy strongly resembling the duality which has become apparent in recent times in the concept of “children’s rights”\textsuperscript{22}). Whether

\textsuperscript{18} The possibility of a right to protection from victimization will be referred to below.
\textsuperscript{19} Many of the legal provisions to be considered below are concerned with the \textit{prevention} of victimization.
\textsuperscript{21} See, \textit{e.g.}, below, in relation to recent Israeli legislation (text accompanying notes 161 and 207).
\textsuperscript{22} The term “children’s rights” used to relate to the perceived needs of children, who were thus the objects of such rights. Increasingly (particularly within the context of the United Nations Convention on the Rights of the Child) recognition has been given to the child’s right to express his or her views and to participate in decision-making impinging
the remedy is to be exercised as of right or at the discretion of officials will be a secondary consideration.

In addition to the classifications referred to above, it may also be helpful when considering victim-oriented reforms within the criminal justice system to be mindful of a more (perhaps the most) traditional classification in this area: that between substantive and adjectival law, between procedure and evidence, and between offence definitions and sentencing – the latter itself having substantive, procedural and evidential aspects. This fourth classification may be particularly appropriate in the context of the present article, which, as noted, will be focussed primarily on the victim’s role in the criminal justice system, rather than extraneous remedies.

While such differentiation may seem elementary to jurists, the choice of the area of the law in which reforms are pursued sometimes seems to be arbitrary or ad hoc, rather than based upon theoretical considerations. Thus, in the case of victim-oriented reforms, selection of the area to be reformed seems to depend primarily on the public visibility of a particular issue, and the political clout of the advocates, rather than a careful consideration of the nature of the problem and the systemic implications of the proposed reform.

For example, is the main problem in the present context that the victim lacks a voice in the proceedings, in which the remedies will be mainly procedural? Is it that the obstacles impeding the conviction of the offender (and presumably, as a consequence, the protection of victims) are too onerous, or that there is insufficient sensitivity to the personal and psychological needs of the victim during the course of the trial, in which case the emphasis should be on reform of the rules of evidence? Or is the scope of the criminal law too narrow to provide adequate protection for victims (e.g., in the area of domestic violence or sexual imposition) in which case the focus will be on the reform of the substantive criminal law, by the expansion of offence definitions or by the narrowing of defences? It may be noted in this context that the victims’ rights literature has tended to neglect this last area in favour of a focus on procedural issues.

Further, in terms of sanctioning policy, when is it appropriate to create a new offence rather than to specify a new aggravating circumstance, and when is there rather a need to reform the procedural or evidentiary aspects of sentencing? Indeed, the question may also be raised as to whether it is indeed the criminal justice system that should be the object of reform, rather than torts or welfare law, for example.

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It is proposed here to explore further some of these issues in the context of the legal system in Israel, on which relatively little has been written from a victimological perspective. Victim-related reforms will be considered in the context of the criminal justice system as a whole. Emphasis will be laid on reforms relating to the offender-oriented model – its main alternative, the state-oriented model, being so far undeveloped – while taking into account the rights-welfare dichotomy. Analysis of the developments will be considered according to the traditional divisions of the criminal law as referred to above (substantive law, procedure, evidence, sentencing). Some attention will also be devoted to other relevant areas of the law, such as tort and administrative law, as well as to the recent trend towards constitutionalization of Israel’s legal system.

How far Israel, or indeed any other single country, can be considered “representative” for this purpose may of course be questionable, although in terms of its criminal justice system Israel may have much in common with other post-colonial common law countries. For the purpose of attaining a better perspective on this it will be appropriate to begin with a brief historic overview of those aspects of Israel’s criminal justice system which have a bearing upon the role of the victim.

I. BACKGROUND TO ISRAEL’S CRIMINAL JUSTICE SYSTEM

Upon independence in 1948, Israel “inherited” its legal system from the British Mandatory authorities. The British had, during their thirty-year control of Palestine, replaced most of the Ottoman law applied by the Turkish authorities (from whom Palestine was conquered in 1917), largely by means of Ordinances which substantially reflected English common law, sometimes modified to take account of the local culture or the needs and preferences of the colonial regime, such as the absence of juries.

Half a century later, much still remains of the formal structures, although the content has been substantially modified. Thus, while the Criminal Procedure (Trial Upon Information) Ordinance of 1924 was repealed by the Criminal Procedure Law of 1965 (subsequently issued as a New Version in 1982), the Criminal Code Ordinance, 1936, and the Evidence Ordinance have been retained, albeit subject to numerous amendments and reformulations (in the Hebrew language). The norm whereby the Criminal Code was to be interpreted in accordance with the English common law was repealed in 1972; while in 1980 the norm that gaps in the law were to be filled by “the principles of common law and equity current in England” (enacted at the beginning of the British Mandate) was, under the Foundations of Law Act, replaced by a reference to “the principles of freedom, justice, honesty and peace of the Israeli heritage.”

This legal heritage was reflected in the procedural provisions relating to the status of the victim. The Mandatory authorities retained some provisions of the Ottoman Code of Criminal Procedure, which was, in turn, based upon the French code, enabling civil parties to participate in criminal actions. Israel’s Criminal Procedure Law of 1965 repealed these
provisions. However, following a series of Mandatory provisions in this respect, the right to file a private criminal complaint (in effect, a private prosecution) was retained for a selected list of offences, in cases in which no public prosecution was undertaken.

In other cases, i.e., in respect of offences for which the private criminal complaint was not available, the decision of the authorities to refrain from investigating or prosecuting the case had to be notified to the complainant (usually, but not necessarily, the victim), who then had the right of appeal to the Attorney General (a power delegated to the State Attorney). Authority was expressly granted by statute to the law enforcement agencies to refrain from investigating or prosecuting “in the public interest”, rendering by implication the victim’s interests of secondary importance. At most, victim-related considerations might be one element comprising the public interest.


30 S. 226(6) of the Law.

31 These Mandatory provisions were reviewed recently by the Supreme Court in Schubert v. Tsafir, 46(IV) P.D. 136 (1992) a leading case on private criminal complaints. In her review Netanyahu J. stated that this institution was also recognised in the Ottoman Code of Criminal Procedure (section 1 of the Code was cited in this context), and thus preceded the British enactment. However, the wording of this section as it appears in Kantrovitch (supra note 29) emphasises the state monopoly in relation to criminal prosecutions, and indicates that the only private action available was a civil one: “The action for the application of the punishment prescribed by the law is an action of public order; consequently it can only be instituted by the official specially appointed thereto by the law. The action for injury caused by a crime, a misdemeanour or contravention is a civil action; consequently it is competent to all who have suffered injury therefrom. The action for diyet for criminal homicide is also in this class” (Kantrovitch, ibid., p. 6).

32 See, now, s. 68 of the Criminal Procedure Law [Consolidated Version], 1982, and the Second Schedule of the Law. The offences which may be prosecuted privately include various forms of trespass and nuisance, assaults and wounding under the penal code, as well as offences against the environment, offences relating to elections and offences involving intellectual property rights. The right to file the complaint is granted to “any person” (i.e., it is not restricted to victims).

33 Ibid., ss. 63–66.

34 Ibid., ss. 59 and 62.

35 In England, even after the establishment of the Crown Prosecution, victim-related factors were virtually ignored in considering the “public interest”; see T. Hetherington, Prosecution and the Public Interest 143ff (1989). However the approach in this respect appears to have been recently modified: see J. Fionda, Public Prosecutors and Discretion: A Comparative Study 36–37 (1995). For the traditional approach in the United States, see Frank W. Miller, Prosecution: The Decision to Charge a Suspect with a Crime (1969); L. Sebba, supra note 5, pp. 34–38.
Beyond this, the procedural provisions prevailing during the early years of the state took little heed of victim interests, except in relation to the protection of children involved in sex offences. Under the Law of Evidence Revision (Protection of Children) Law, 1955, such children were not to be examined by the police but by specially appointed “child examiners”,\(^{36}\) and were not to testify in court unless authorisation was forthcoming from a child examiner (\(i.e.,\) unless he or she believed that such testimony would not be traumatic for the child). In other cases the testimony recorded by the child examiner was admissible in evidence, in breach of traditional prohibitions on hearsay evidence.\(^{37}\) This law may be perceived as a precursor of contemporary legislation around the world in this area.\(^{38}\)

The ideology that inspired the 1955 law, however, was unrelated to victim rights. Rather, it was part of the paternalist-welfare system that dominated social and legal policy during the first decades of Israel’s history.\(^{39}\) In this context reference may also be made to the 1974 amendment to the Youth (Care and Supervision) Law, which imposed a duty on some professionals to report cases of physical or mental harm caused to a minor where there was a suspicion that the harm had been inflicted by the person responsible.\(^{40}\)

Finally, the Criminal Code Ordinance of 1936, the sentencing provisions of which were revised in 1954 (and were subsequently incorporated into the Penal Law of 1977), provided for compensation orders of modest amounts as a sentencing option.\(^{41}\) These were to be paid by the offender to the injured party, and to be enforced as if they were civil judgments.\(^{42}\)

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\(^{36}\) The original term used in the official translation was “youth interrogator”: see Laws of the State of Israel, vol. 9, p. 102. Prof. Harnon (in a Hebrew publication) suggested they be renamed “Child Examiners”, in part because their function is restricted to persons under fourteen years old. As to the term “examiner”, see also E. Harnon, *Examination of Children in Sexual Offences – The Israeli Law and Practice*, 1988 Criminal L. Rev. 263 at 264, note 2. Recent legislation replaced the Hebrew term for “youth” with the Hebrew term for “child”.

\(^{37}\) See ss. 2, 4, and 9 of the Law of Evidence Revision (Protection of Children) Law, 1955. Some of the subsequent amendments to this law will be considered below.

\(^{38}\) See, \(e.g.,\) Children’s Evidence in Legal Proceedings: An International Perspective (J.R. Spencer et al., eds., 1989).

\(^{39}\) Cf. L. Sebba, *Sanctioning Policy in Israel – An Historical Overview*, 30 Israel L. Rev. 234 (1996) at 241 ff. Another declared objective of this law, as specified in the Explanatory Note to the Bill, was the need to secure convictions, \(i.e.,\) law enforcement.

\(^{40}\) See infra note 93 and accompanying text.

\(^{41}\) The sum specified was 100 (British) pounds in 1936, and 500 Israeli pounds in 1954. For the subsequent adjustments of these sums, see infra note 188 and accompanying text.

\(^{42}\) The analogy with a civil judgment may have been influenced by the possibility of joinder as a civil party when the provisions were enacted. Section 43 of the Criminal Code
Beyond these provisions, there seems to have been no particular concern for victims in the criminal justice system at this time. In this respect, Israel did not differ from most other common law jurisdictions.

With the advent of the movement for the enhancement of victims’ rights, it might have been expected that Israel would have been in the forefront of these developments. It may be noted that Israel and Israelis have played a significant role in the development of the field of victimology in modern times. Advocate Beniamin Mendelsohn (a Romanian Jew who immigrated to Israel) is said to have invented the term “victimology”,43 to signify an academic focus on the victim. In the 1970s, Israel Drapkin and his colleagues at the Hebrew University organized the first international symposium in this field.44 Moreover a tradition of academic research in this area has been maintained,45 perhaps partly inspired by the Holocaust experience. But in spite of some Israeli involvement in the international movement for victim rights,46 there was little victim-related reform in Israel prior to the 1980s other than the isolated examples referred to above.

In the last decade, however, there has been something of an avalanche of reform activity in this field. This appears to have been the result of initiatives taken by “moral entrepreneurs” in government service47 and by

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44 For the proceedings of this symposium, see I. Drapkin and E. Viano, supra note 23.
45 For a review of Israeli research in this area, see S.F. Landau and L. Sebba, supra note 23. A later version of this survey may be found in R. Friedmann, supra note 23, pp. 359–387.
46 There was, for example, some Israeli involvement in the evolution of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985, while Israelis have in recent years been elected to various human rights bodies of the United Nations, some of which are (at least indirectly) pertinent to victims’ rights. Some of these issues are discussed in such journals as the Israel Yearbook of Human Rights.
47 Reference must be made here to the missionary zeal of Yehudit Karp, Deputy Attorney General, for her involvement in drafting legislation, some of this within the framework of ad hoc bodies established in order to review policies in this area, notably the Committee on Domestic Violence, which reported in 1989; see Ministry of Justice, Report of the Committee on the Subject of the Investigation, Prosecution and Trial Policies Regarding Offences of Violence in the Family and Violence between Spouses 1989 (in Hebrew). On
Knesset members,\textsuperscript{48} as well as pressure exerted by a number of voluntary associations identifying with the interests of particular sectors of the population, primarily women and children.\textsuperscript{49} (Reference should also be made in this context to the pressure exerted in a somewhat different fashion by the families of military victims, in particular the victims of military accidents.\textsuperscript{50}) Encouragement has also been forthcoming from the media, in its condemnation of existing practices. A greater focus on victim rights may also be related to other emerging ideologies, such as “law-and-order”, desert sentencing, and communitarianism.

The increasing orientation of the various components of Israel’s criminal justice system towards the victims of crime may also be consistent with recent constitutional developments.

\section*{II. CONSTITUTIONALISATION}

While Israel has as yet no formal constitution, a series of “basic laws” have been adopted.\textsuperscript{51} The most recent of these, the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation (both enacted in 1992), have at least a quasi-constitutional character in terms of (a) their subject-matter, (b) the type of linguistic formulations employed, and (c) their claim to supra-statutory status. Thus, on the first point, the main focus of the laws is to declare succinctly a number of fundamental rights. The

\textsuperscript{48} The system of primaries adopted by the main political parties has dramatically increased the activities of “private members”, notably in the drafting of legislative proposals. Proposals relating to victim rights or protection seem to be a popular area for such activity.

\textsuperscript{49} Among the many associations of this type that have been established in recent years, mention may be made of the National Council for the Child, Defence for Children International, and the Women’s Network. These organizations have been instrumental in promoting legislative reform (see, e.g., note 196 infra). An earlier interest in the rights and needs of the elderly in the context of victimization seems to have waned (although this sector fielded its own “pensioners’” party in recent national and local elections).

\textsuperscript{50} See R. Shapira, Criminal Law: From a Focus on the Individual to the Determination of Inter-Group Conflicts, 1996–1997 Yearbook Israeli L. 629–671 (in Hebrew). Insofar as the bereaved families achieved some recognition of their status in the criminal (military) justice system (see infra note 147 and accompanying text), this seems to have been effected by direct negotiation with the authorities concerned, and recourse to the (civil) High Court of Justice, rather than by political or parliamentary means; see \textit{ibid}.

\textsuperscript{51} For an explanation of the concept of these laws, and a listing of the eleven basic laws so far adopted, see A. Maoz, \textit{Constitutional Law}, in I. Zamir and S. Colombo, \textit{supra} note 23, pp. 7–8. Drafts of three more such laws have been circulated by the Ministry of Justice.
Basic Law: Human Dignity and Liberty declares that there will be no violation of life, body or dignity (section 2), no violation of property (section 3) and no deprivation or restriction of liberty (section 5). It also guarantees freedom of movement (section 6) and the right to privacy and intimacy (section 7). These rights are, of course, subject to qualification under other legal provisions. As for linguistic technique, the opening clauses of these laws refer to the principles of the Declaration of Independence and “the values of the State of Israel as a Jewish and Democratic state”. Finally, both Basic Laws purport to limit the power of the legislature to derogate from the principles laid down therein. Nevertheless the extent to which these Basic Laws amount to a “constitutional revolution” is a matter of much controversy among jurists.

The Basic Law makes no express reference to victims, nor is there any indication of an awareness that it impinges upon victims’ rights in any way. There is thus some irony in the speculation that the Basic Law may have the potential to achieve as much for victims as some of the regular legislation introduced expressly for this purpose. Similarly, the Basic Law may be contrasted with the constitutional amendments adopted by many states in the United States (as well as the proposed amendment of the

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52 Particular reference may be made to s. 8, the so-called “limitation clause”, which allows for an infringement of the specified rights under legislation which (i) “befits the values of the State of Israel”, (ii) “is directed towards a worthy purpose” and (iii) “to an extent that does not exceed what is necessary”. Further, s. 10 maintains the validity of previously-existing law, while s. 12 makes provision, albeit limited, for emergency regulations.

53 Thus, s. 1 of the Basic Law: Human Dignity and Liberty, which was added as part of an amendment in 1994, states as follows: “Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all people are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.”

54 See s. 1A of the Law: “The purpose of this Basic Law is to safeguard human dignity and freedom, in order to entrench in a Basic Law the values of the State of Israel as a Jewish and Democratic State.”

55 See especially s. 8, cited above, and s. 11, which states: “All governmental authorities are obligated to respect the rights under this basic law.” That subsequent legislation inconsistent with these provisions would be invalid was confirmed by the Supreme Court in the case of United Mizrachi Bank v. Migdal, 49(4) P.D. 221 (1995).

56 Menachem Alon, Criminal Law in a Jewish and Democratic State, 13 Bar-Ilan Law Studies 27 (1996) at p. 84 (in Hebrew); Aharo Barak, The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law, 31 Israel L. Rev. 3 (1997). See also the Mizrachi case (see previous note), in which a variety of views were expressed on this topic by different Supreme Court justices.

57 See notes 47–48 and accompanying text.
federal constitution) that are explicitly victim-oriented in their language. In this respect, the Basic Law bears a resemblance to the Canadian Charter of Rights and Freedoms, with which comparisons are often made. Both of these documents are drafted in rather general terms, allowing the courts to determine their precise significance and applicability.

The ramifications of this Law in respect of offenders’ rights have been discussed extensively in the contemporary legal literature. Implications of the law for victims have attracted much less attention, but some indications of judicial thinking on this topic are beginning to emerge. Thus President Shamgar, in his judgment in the Ganimat case, declared:

The Basic Law: Human Dignity and Liberty carries a statutory, constitutional message to every individual in society and not only to offenders. The victim and potential victim and every innocent citizen is entitled to dignity and liberty from fear, terror and harm, no less than the accused. The right of the woman not to be beaten and degraded is no less than the right of her batterer-husband to his liberty. The right of a young woman travelling innocently on the roads not to fall the victim of another rape, is no less than the right of an accused not to be detained.

This judgment was concerned with the issue of pre-trial detention. Indeed, much of the analysis of the implications of the Basic Law has arisen in the context of procedural issues. In this context such comments reflect the view that when law enforcement personnel (including the judiciary) consider the weight to be attributed to suspects’ and defendants’ rights vis-à-vis the interests of the community, the interests of individual (as well as potential) victims should also be taken into account. In addition to such procedural issues, however, the Basic Law may have implications in terms of substantive criminal law, not only in the direction of precluding vaguely defined offences or the excessively intrusive criminalization of

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58 See The Implications of Israel’s New Basic Laws Concerning Human Rights for Criminal Law, 13 Bar-Ilan Law Studies 5 (1996), and A. Barak, supra note 56.
59 But see supra note 23.
60 See Ganimat, 49(IV) PD 589 (1995), at p. 621, cited in E. Harnon, supra note 23, pp. 266–267. Additional citations of President Shamgar appear in a Hebrew version. See also the judgment of Barak J. in the same case, on the criminal law’s focus “on the liberty of the accused, on the one hand, and the interest of the victim and of the public, on the other hand” (cited in A. Barak, supra note 56, p. 8). One commentator has argued, however, that fundamental rights granted to accused persons should not be balanced by the attribution of equivalent rights to other persons: see Ariel Bendor, Procedure and Evidence: Developments in the Basic Rights of the Person in Criminal Procedure, 1996–1997 Yearbook Israeli L. 481, at p. 490 (in Hebrew). This argument is akin to that put forward in the context of the proposed amendment of the United States Constitution to the effect that the latter is intended as a bulwark against undue government interference, rather than as an instrument of protection from fellow citizens: see James M. Dolliver, Victims’ Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come, 34 Wayne L. Rev. 87 (1987).
private conduct (e.g., related to deviant sex or to substance abuse), but also in terms of expansion of a criminal prohibition, in order to protect the citizen from unwarranted victimization. Thus, for example, the traditional view that marital rape was excluded from the ambit of the offence of rape, had it not already been overruled both by judicial interpretation and statute, would surely have been reconsidered by virtue of the references to dignity and integrity of the person under the Basic Law. The balancing of competing interests implicit in the analysis of President Shamgar may thus be applicable to substantive issues no less than procedural ones, a view to which he himself lent credence in an observation in the Shomrat case to be considered below.

Indeed the strong wording of the Basic Law with regard to the right to life, integrity of the person and property on the part of all persons even suggests the creation of a quasi-constitutional right to be protected from victimization, as was claimed by one writer in an American context. Recognition of such a right would have implications not only in terms of the functioning of the criminal justice system, but also in terms of civil law remedies against state agencies, whether in order to compel them to grant such protection, or to provide compensation for the failure to have done so.

62 Or the creation of a new offence (D. Bein, ibid., p. 255).
63 The term “unlawfully” appearing in the old definition of rape was initially reformulated in the official Hebrew version of the penal code as “who is not his wife”. However the Supreme Court held that this term was to be interpreted in the light of the law applicable to the personal status of the parties involved, and thus prohibited marital rape among Jews: Cohen v. State of Israel, 35(III) P.D. 283.
64 In supporting an objective standard for determining whether the defendants in a rape case were aware of the victim’s lack of consent, President Shamgar declared: “The law – as an instrument for the protection of the person – as a means for preserving the liberty of the person and his (her) honour, must protect not only the defendant but to no lesser a degree also the person liable to be raped.” See State of Israel v. Beeri et al., 48(I) P.D. 302 (1993), at p. 360.
65 See R.L. Aynes, Constitutional Considerations: Government Responsibility and the Right not to be a Victim, 11 Pepperdine L. Rev. 63 (1984). The European Court of Human Rights has held that the state has a duty to provide protection from sexual abuse under its criminal law: X and Y v. The Netherlands (reported in II Case Law of the European Court of Human Rights 282 (V. Berger, ed., 1992)).
III. SUBSTANTIVE CRIMINAL LAW

On one level almost any addition to the criminal law may be said to "protect victims" from the harm it is sought to penalise, except insofar as there may also be "victimless" crimes. Thus, in principle, the enactment of new offences or the expansion of existing ones (whether by statute or judicial precedent) may be considered "victim-oriented" reforms. This also applies to many of the numerous penal (or quasi-penal) offences enacted in modern times having a "regulatory" character pertaining to such issues as road traffic, health, employment and environmental hazards. While normative provisions of this nature may have far-reaching implications in respect of victims, they have attracted relatively little attention in the victimological literature, which has tended to focus on conventional crimes. Another development which has been somewhat neglected in this literature is the internationalisation of criminal law in respect of certain forms of conduct. States parties to relevant conventions may be obligated to penalise specific conduct, and in some cases may be granted universal jurisdiction, i.e., the right to try even non-nationals for acts committed outside the territory. Examples of crimes governed by international conventions are genocide and torture, as well as narcotics offences. While the latter is sometimes perceived as a "victimless" crime, the universal prohibition on torture and genocide is calculated to protect potential victims from the worst excesses mankind can devise. Further, current negotiations for a convention against transnational organised crime are directed at substantive aspects of victimisation, such as trafficking in women and children, as well as procedural aspects.

At the same time, criminal law reform in recent times has also encompassed some of the more traditional areas of the criminal law. A notable example in Israel was the broadening of the definitions of sexual

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66 The expressions "harm" and "victim" both raise definitional problems: J. Feinberg, Harm to Others (1984), and Marlene Young-Rifai, Victimology: A Theoretical Framework, in The Victim in International Perspective 65–79 (H.J. Schneider, ed., 1982).


68 See, however, M. Young-Rifai, supra note 66, who, following the writings of Beniamin Mendelsohn, argued for a wide definition of victimology, which would include many non-criminal injuries such as natural disasters. Further, some writers have been concerned with the victims of white-collar crime; see, e.g., David Shichor, Corporate Deviance and Corporate Victimization: A Review and Some Elaborations, 1 Int’l Rev. Victimology 67 (1989).

69 See J. van Dijk, President’s Message, 3(2) Victimologist 3 (1999).
intercourse and sodomy. The legislation also criminalised consensual sexual intercourse involving “exploitation of authority in the course of an employment or service relationship . . .”

Further, in the (in)famous Shomrat case, in which a young girl living on a kibbutz was intimidated over a period of time by a group of youths, the concept of “consent” as a defence to sexual acts (or more accurately as negativing the actus reus) was interpreted narrowly. Indeed, Cheshin J. (on this point in a minority) likened the sexual act to a contract for which explicit agreement was required. However, the prosecution’s appeal against the acquittal of the defendants in the district court turned mainly on the issue of mens rea or mistake, i.e., whether the defendants could be held not to have known that the victim was not consenting. For this purpose, the justices of the Supreme Court applied a very wide concept of “recklessness”, enabling them to attribute mens rea to the defendants and reverse the acquittal. Moreover, as noted above, President Shamgar specifically referred to the need for the protection of victims.

Further protection from unwanted sexual advances has recently been provided under the Prevention of Sexual Harassment Law, 1998, which incorporates detailed definitions of sexual harassment and “persecution”, attaching both criminal and civil sanctions. This law applies to both sexes,
and one of its declared aims is sexual equality. Special protection is provided under the new law for minors, “vulnerable persons”, patients and employees. Yet another reform intended to extend the protection of the criminal law vis-à-vis minors (although perhaps better classified as a procedural reform) is the extension of the limitation period in respect of sex offences against minors, which only begins to run when the minor reaches majority (eighteen years old).

The focus of the criminal law has traditionally been on the offender and the extent of his or her culpability. This is reflected in the formulation of penal prohibitions, which were almost exclusively concerned with the conduct of the perpetrator rather than the characteristics of the victim. Moreover, there was generally not much emphasis on the specific character and dimensions of the harm, beyond its general categorization. In recent years, however, provisions of the criminal law have become more specifically victim-oriented, with a greater focus upon the precise nature of the harms (such as psychological harm) and the characteristics of the victims. Penal law provisions have increasingly been enacted specifically to protect certain categories of citizen regarded as being particularly vulnerable. This emphasis on victim harm is, of course, echoed in “tariff” sentencing models currently being adopted under the influence of desert philosophy.

On a theoretical level, the emphasis on victim harm in the substantive provisions of the criminal law may be regarded as the obverse of the trend to decriminalise so-called “crimes without victims”, even though the latter development derives its inspiration from a very different source, namely, the nineteenth century liberal ideology of John Stuart Mill. According to this philosophy, the criminalisation of sexual deviance, gambling, etc.,

77 S. 1 of the Law. A more limited provision of this kind was enacted ten years earlier as part of the Equal Opportunities at Work Law, 1988.
78 S. 3(a)(6) of the Law. In these cases, if there has been an exploitation of the relative status of the parties, the condition that harassment is only perceived as being constituted if the conduct persists after the victim has indicated a lack of interest in the defendant’s proposals is waived.
79 S. 354, Penal Law, 1977 (introduced in 1996). It is specified that a prosecution may only be filed more than ten years after the alleged offence has been committed with the consent of the Attorney General. The amendment was intended to deal with cases in which victims refrained from complaining either because of their dependence on the offender or because of the repressed memory syndrome: see Penal Law (Amendment no. 53) (Reservation as to Limitation in Sex Offences against a Minor) Bill, 1995, Hatsaot Hok no. 2449, p. 238.
promoted the enforcement of morality rather than the protection of the
citizen, and therefore went beyond the purview of the criminal law.\textsuperscript{81}

It is arguable that this emphasis upon the need for a victim in order
to justify a penal norm serves to encourage the current trend toward a
greater specification of victim categories or victim harms. However, the
ideological forces promoting the latter reforms are clearly of a different
ilk, deriving rather from the alleged failure of the criminal law to provide
adequate protection to certain vulnerable groups and to attribute an
appropriate level of severity to certain types of crime, particularly those
involving violence. Moreover the groups concerned are frequently in
conflict with supporters of the liberal ideology on the issue of victimless
crimes, since they view certain forms of deviant sexual conduct, such
as pornography, as a direct threat to the populations in question (\textit{i.e.},
women and children).\textsuperscript{82} To an extent, this conflict might thus be seen as
having more of an empirical than an ideological foundation, turning upon
whether pornography encourages the victimization of women and children.
However it also involves an implicit critique of the liberal ideology.\textsuperscript{83}

The expansion of criminal law interventionism for the protection of
specified populations also has its roots in the ideology which seeks to
question the dividing line traditionally adopted both in substantive crim-
nal law and in enforcement norms between the “public” and the “private”
domains, whereby oppressive acts committed against family members and
persons in other intimate relationships were beyond the pale of the criminal
law (or of law enforcement).\textsuperscript{84} The private domain, when not left entirely
to self-regulation,\textsuperscript{85} was subjected to paternalistic interventionism for the
protection of the victim. The infliction of punitive sanctions directed at
the offender was excluded. Recent extensions of the penal law in this
and related spheres are intended to minimize this dichotomisation, so that

\textsuperscript{82} See the views of Catharine MacKinnon and others analysed in Nadine Strossen,
\textsuperscript{83} \textit{Ibid}. Somewhat related issues arise in the context of “hate crimes”, where (mere?)
motivation with respect to a particular type of victim (likely to be a member of an ethnic
minority, and thus more vulnerable) may render a crime more serious: see, \textit{e.g.}, \textit{Wisconsin v. Mitchell}, 113 S.Ct. 2194 (1993); and see J. Jacobs and K. Potter, Hate Crimes: Criminal
Law and Identity Politics (1998). A superficially similar but analytically very different
provision in Israel, dating back to the mandatory period, defines homicide as murder where
the intention was to kill another person of the same race as the victim (see s. 301, Penal
Law, 1977).
\textsuperscript{84} See, \textit{e.g.}, R. Gavison, \textit{Feminism and the Public/Private Distinction}, 45 Stanford L.
\textsuperscript{85} See L. Zedner, \textit{Regulating Sexual Offences within the Home}, in Frontiers of Crimi-
invocation of the criminal justice system should no longer be confined to
the public domain.

The provisions relating to “Injury to Minors and the Vulnerable”, which
were added to the Penal Law in 1990,86 provide a notable example of
the new “victim-oriented” norms under Israeli law. These are designed to
protect minors and persons who “because of their age, sickness, or physical
or mental handicap, mental retardation or any other reason cannot provide
for their own living, health or welfare needs”.87 Assaults causing actual
harm committed against such persons attract severe penalties, especially
if perpetrated by persons responsible for their care.88 These provisions
constitute a new article in Israel’s Penal Law or code.89 However, while the
new offence of “physical, psychological sexual abuse” under section 368C
may include some forms of conduct not previously covered, most acts
covered by the provisions of the new article would have been punishable
previously as assaults. It is thus arguable that the main effect of the enact-
ment (apart from the reporting provisions which will be considered below)
was to increase the maximum sentences for this type of abuse.90 Similarly,
by virtue of a 1996 amendment, the maximum term has been doubled
where the assault was committed against a family member, including a
minor or vulnerable person for whom the defendant is responsible.91

Yet perhaps more significant than the substance of the change is the
technique by which this has been achieved. Rather than specifying a list of
aggravated circumstances for the existing offence of assault causing actual
harm (s. 380, Penal Law, 1977), new offences have been created and a new
article added to the code. This seems to have been designed to convey more
strongly the message that minors and vulnerable persons are categories
of victims for whom special protection is provided by the criminal law.
Inflicting harm upon such persons is not merely higher on the seriousness

88 S. 368B, Penal Law, 1977; also section 382.
89 Chapter 10, art. 6.1 of the Penal Law, 1977, introduced by way of the Penal Law
(Amendment no. 26), 1989.
90 The maximum penalty for the new offence is nine years imprisonment, whereas the
maximum term for a simple assault, under s. 379 of the Penal Law, is only two years, and
only three years under s. 380, where actual injury has been inflicted.
91 See Penal Law (Amendment no. 49) of 1996, which amended s. 382. The same
amendment doubled the maximum penalty for the offence of wounding, when committed
against a family member. (See ss. 334 and 335, Penal Law, 1977, as amended.) See also
s. 351 (introduced in 1990), which provides for more severe sentences in respect of sex
offences committed with in the family.
tariff than the infliction of harm upon other persons, it is in a different category qualitatively.

Another technique of criminal law legislation with a strong victim orientation is the creation of a secondary norm in order to render the primary norm more effective.92 For example, under a 1974 amendment to Israel’s Youth (Care and Supervision) Law of 1960, a failure on the part of certain professional personnel (such as physicians) to report child abuse by the person responsible for the child was rendered an offence. The new chapter of the Penal Law, entitled “Injuries to Minors and the Vulnerable”, imposes a duty to report a variety of offences endangering the health and welfare of persons falling within these categories, where such offences are attributable to someone responsible for the welfare of that person. The provisions of this enactment require treatment personnel, including physicians, nurses, educationalists, welfare workers, police, psychologists, criminologists, para-medics and persons involved in the administration of a residential home, who have reasonable grounds to believe that such an offence has been committed, to report the offence either to an authorised welfare worker or to the police. A similar duty is imposed on the public in general if the offence has been committed “recently”.93 Welfare workers are themselves obliged to report the offence to the police unless they are exempted by a specially-appointed committee. The police, in turn, are obliged to consult a welfare worker before reaching a decision as to whether to instigate criminal proceedings.94 The offence is created specifically for the protection of persons whose victimization has already been recognised under some other penal provision, hence its designation here as a “secondary norm”.

Another type of “secondary offence” which has always been a part of Israel’s criminal legislation is that of failing to use all reasonable means to prevent the commission of a felony.95 This offence seems to go beyond the usual scope of punishable omissions, which are either related to some other conduct of the perpetrator (e.g., handling of weapons, driving a vehicle, etc.) or to a special relationship creating a duty to act (physician, parent,

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92 See the differentiation by J. Feinberg, supra note 66, at p. 21, between “primary” penal norms, and penal norms “as a last resort”. Feinberg, however, was referring to penal norms created as a means of enforcing civil obligations. Here I am referring to secondary penal norms, adopted in order to strengthen primary norms that are themselves penal.
93 See ss. 368D(b) and (a), Penal Law, 1977, as amended.
94 Ss. 368D (f) and (g). These provisions of a procedural character were incorporated here in an amendment to the (substantive) penal code.
Section 262, on the other hand, may be seen as creating a duty to assist law enforcement authorities, or, alternatively, to protect the public at large, and prospective victims in particular. Although rarely invoked, this provision was recently in the limelight as the basis of indictments connected with the assassination of Prime Minister Yitzhak Rabin.

Further, the Knesset recently adopted a provision (at the instigation of a private Member) imposing a general duty to assist (or “rescue”), a duty which has not hitherto been incorporated in the criminal law of Israel, except, as noted, where a special relationship exists between the person in need of assistance and the person in a position to provide that assistance. This duty is imposed on any member of the general public in a position to prevent a sudden and immediate danger to a person’s life or health. In cases where the danger is created by a criminal act or omission, the duty to assist may, too, be perceived as a “secondary” norm, designed to render the primary norm more effective, or at least to mitigate the harm inflicted. Unlike the felony prevention case, but like the duty to report, the duty will normally arise only after the offence has been committed.

96 See the provisions headed “Responsibility for Person’s Welfare” in chapter 10, article 3, of the Penal Law, 1977 (ss. 322–326). Also: George P. Fletcher, Rethinking Criminal Law (1978), at section 8.3.

97 Margalit Har-Shefi, an associate of Yigal Amir, Rabin’s killer, has been convicted of this offence. An appeal is pending. More controversially, the Attorney-General has ordered prosecution under the same provision of Avishai Raviv, an agent provocateur who worked for the secret service.

98 See S.Z. Feller, I Elements of Criminal Law 399 ff. (1984). However, a duty to assist has existed for some while under s. 146 of the Traffic Regulations of 1961, requiring passers-by to assist the victims of road accidents. For analysis of the duty to assist, see The Duty to Rescue (M.A. Menlowe and A. McCall Smith, eds., 1993).

99 See: Thou Shall not Stand Aside when Mischief Befalls Thy Neighbour Law, 1998. The assistance offered may be direct, or by means of calling for help. The name of the law is based upon a citation from Leviticus, chapter 19, verse xvi. The Bill was originally proposed as an amendment to the Penal Law (see Penal Law (Amendment no. 45) (Thou Shall not Stand Aside when Mischief Befalls Thy Neighbour) Bill, 1995, Hatsuot Hok no. 2370, p. 348), but the provision was ultimately enacted as an independent statute. The penalty for contravening the law is a fine.

100 Where the danger is unconnected with a criminal act, there is of course no criminal victimisation, but some writers would argue that the matter nevertheless pertains to victimology. See, e.g., M. Young-Rifai, supra note 66.

101 The recently-adopted Prevention of Sexual Harassment Law also incorporates a “preventive” secondary norm. Under s. 7 of the Law, an employer of more than twenty-five employees is required to publish a code summarising the content of the law and providing a complaints mechanism. The failure to issue such a code renders the employer liable to a fine under s. 8.
While victim rights (or at least victim protection) may be more easily identified with the creation and interpretation of specific offences, the general part of the criminal law may also be involved. First, the scope of criminal liability, and thus implicitly the protection of victims, is determined not only by offence definitions, but also by the application of basic principles of liability, e.g., by decisions as to the possible types of mens rea and their definitions, or by the willingness of the courts to impose criminal responsibility on the basis of negligence or strict liability. One analysis some years ago noted a trend on the part of the Israeli courts to expand criminal responsibility.\textsuperscript{102}

In recent times the main actor in this area has been the legislature, which in 1994 adopted an entirely new code of principles, replacing the “general part” of the Penal Law of 1977.\textsuperscript{103} The orientation of the new code (the main inspiration for which was the 1984 draft by Professors Feller and Kremnitzer\textsuperscript{104}) is towards the strengthening of the principle of culpability, tending to narrow the scope of criminal responsibility. Thus the new code re-established principles (from which the case law had somewhat deviated) in favour of strict interpretation: in cases of doubt it favours acquittal and creates a presumption against criminal liability based on negligence. The definition of negligence has itself been modified, and for regulatory offences the new code favours “strict” rather than “absolute” liability.\textsuperscript{105} These presumptions form part of the “subjective” approach adopted by the authors of the new code, laying emphasis on culpability as the basis of responsibility.\textsuperscript{106} In the same vein, the punishment of attempts was equalised with that for the main offence.\textsuperscript{107}

In many respects, application of a more subjective approach to criminal responsibility, insofar as it militates against responsibility based upon strict liability or even negligence, tends to narrow the scope of the crim-
inal law, and thus, theoretically, the protection of the victim. In the context of attempts, however, the outcome is reversed, and criminalisation, if not expanded, is at least intensified. The emphasis on the state of mind derogates from the significance of the external conduct. The intent to harm the victim (subject to a minimum requirement of external manifestation) becomes as serious as the actual commission of the harm, and attracts punishment of equal severity.

Another factor determining the scope of criminal responsibility (and hence the protection of victims) is the range of possible defences available to the perpetrator of an alleged offence and their definitions. The broader the defence, the narrower the scope of the liability and, at least in theory, the lesser the protection for the victim. Here, too, the definitions have been revised as part of the new codification. Adherence to principles of subjective culpability has tended to narrow criminal responsibility. For example, in respect of offences for which mens rea is required, an honest mistake of fact will negate criminal liability, without the requirement that the mistake be reasonable. In this respect, a conviction for rape may now be more difficult to secure. Moreover, in some circumstances a mistake of law, even of criminal law, may also negate liability. The defence of self-defence, on the other hand, which was apparently broadened by a 1992 amendment to the Penal Law, adopted at the height of the Intifada, was again modified in the course of the comprehensive reform of 1994.

The notion of criminal defences may raise particularly sensitive problems in those areas of human interaction which stimulate the question: which of the parties involved is the “true victim”, at least insofar as the criminal law continues to be posited upon an agent-victim dichotom-

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108 This assumes the perpetrator might have taken measures to prevent even unintended harmful conduct.
109 Further, the requirement that the defendant “begins to put his intention into execution by an overt act and by means adapted to its fulfilment …” was replaced by the more flexible “did any act which is not merely preparatory” (see the previous s. 33 and the new s. 25 of the Penal Law, 1977).
110 It seems, however, that the courts tended to apply a subjective test here even prior to the legislative reform: see R. Kannai, supra note 74.
111 S. 34S, Penal Law, 1977. This will apply where “the mistake could not reasonably have been avoided”.
112 Under the 1994 revision, the defence of self-defence (now s. 34J, Penal Law, 1977) only applies if the defendant’s act was “immediately necessary”, and if the harm prevented was “tangible”. See A. Enker, Duress, Self-defence and Necessity in Israeli Law, 30 Israel L. Rev. 188 (1996). On the other hand, the defence of necessity (differentiated from self-defence since the 1992 amendment) was widened by the 1994 reform in eliminating the requirement of proportionality and the non-applicability of the defence to conduct causing death: see the new s. 34K and previous s. 22A.
Recognition that the perpetrator of the alleged offence may also have been a victim, whether of the ultimate victim or of another, may lead to a modification of criminal responsibility, by means of one of three techniques: (a) by way of granting a complete defence, such as self-defence, (b) by down-grading the offence, such as by the reduction of murder to manslaughter, on the grounds of provocation, or (c) by mitigation of sentence. The circumstances in which the perpetrator of an apparent offence should on policy or ideological grounds be perceived as a victim, and which of the three legal solutions should be adopted, is highly controversial, particularly in the domestic context of battered women.

By implication, recognition of a reduction in the perpetrator’s responsibility attributes to him or her the status of victim (pro tanto), while attributing a degree of guilt to the victim of the alleged offence. In Israel, cases in which battered family members have risen up against their oppressors have given rise to an amendment to the law of murder. Murder committed in these circumstances, since an amendment of 1995, no longer attracts a mandatory life sentence. Criminal guilt is thus perhaps beginning to be perceived as “zero sum” in the way that tortious liability for negligence may be divided up between the parties. For in the circumstances described here, the conduct of the person offended against, if he or she be still alive, will also generally be punishable.


115 S. 300A(c), Penal Law, 1977, as amended. Under the original Bill, such “diminished responsibility” would have reduced the offence from murder to manslaughter (with a similar result). In the well-known case of *Carmella Buchbut*, 49(III) P.D. 647 (1995), which preceded the amendment, the defendant, after twenty-four years of severe physical and mental abuse, shot her husband thirty-one times. She was charged with and convicted only of manslaughter, and at least one member of the Supreme Court took the view that in this particular case the elements of premeditation required for murder were lacking. Thus the new provision may not necessarily be required for cases of this type.

116 See James J. Gobert, *Victim Precipitation*, 77 Columbia L. Rev. 511 (1977) at 546–552. Gobert deals mainly with the victim’s possible responsibility as a secondary party to
In some respects, then, the general principles of criminal responsibility have been expanded. But the overall tendency of the new General Part of the criminal code towards strengthening the principle of culpability has tended to narrow the bounds of criminal responsibility. Moreover the victim does not generally feature here in the relevant debates, which focus almost exclusively upon the offender.

Legislative reforms with regard to definitions of specific offences, on the other hand, such as those dealing with cruelty to children and other “vulnerable persons”, have had a much clearer victim orientation. Generally speaking the image of the victim implicit in such legislation is consistent with the traditional paternalistic approach of the Israeli legislature, like that which inspired the 1955 Law concerning testimony of children under fourteen involved in sex offences. The protection of the state has now been extended to additional categories.

In some instances, however, a concept of victim rights or victim autonomy may be implicit in such reforms. An example is the modification of the definition of rape that now places greater emphasis on the importance of the woman’s consent. Victim autonomy is also recognised under the new law against sexual harassment, which specifies that generally the offence is only constituted if the conduct persists after the victim has demonstrated a lack of interest in the defendant’s proposals.

The (dominant) protective approach, on the other hand, is also reflected in the “secondary norms” referred to, which impose a duty on persons fulfilling certain roles to report the infliction of cruelty on vulnerable persons. In some circumstances this duty is imposed upon the general public. Similarly, all persons must take steps to prevent the commission of a felony, and recently a general duty to assist persons in danger has been created. While some of these reforms may be perceived as being designed to assist the police in the performance of their functions, or even as a

the perpetrator’s offence; but in some cases the victim may be guilty of an independent offence.

117 However, penalisation of consensual sexual relations where there is a relationship of authority between the parties, under section 346(b) of the Penal Law, is arguably paternalistic. The same applies to the second part of this provision which penalises (as a sex offence rather than merely fraud) consensual sexual relations where a married man presents himself as single and promises marriage. The extent to which consent of the victim should in principle negate criminal responsibility, a topic which has been much debated in recent years in Britain (see, e.g., The Law Commission, Consent in Criminal Law (1995)), seems to have attracted relatively little attention in the context of Israeli penal policy; but see Ruth Kannai, Consent of the Victim in Criminal Law, 29 Mishpatim 389 (1998) (in Hebrew).

118 Again, this precondition is waived where the victim is perceived as in need of special protection.
delegation of the responsibility for public safety to the community, they also give expression to a strong element of ideological communitarianism. A rights or autonomy-oriented penal system, on the other hand, might rather place greater responsibility upon the victim for the prevention of the crime.

IV. CRIMINAL PROCEDURE AND EVIDENCE

The 1990s have been witness to an emphasis on human rights in some areas of criminal justice, at least at the level of public and professional discourse, if not always reflected in practice. Factors contributing to this development include the adoption of the Basic Laws referred to above, the ratification of various international human rights conventions, and the activity of voluntary organisations in this field. Specifically, reference may be made to two new laws, governing pre-trial detention and establishing a public defender’s office. However the more general trend over the past decades has been in the direction of a “toughening up” of various aspects of the criminal justice system, a move from “due process” to “crime control” (to use Packer’s terminology), or in favour of what is politically termed a “law and order” agenda. Such policies are sometimes presented as addressing victims’ needs, as in the judgment of President Shamgar in the context of the (in)famous section 10A of the Evidence Ordinance regarding the admissibility of out-of-court statements. These policies, however, are not really designed for the benefit of individual victims, but are aimed rather at the protection of the general public, i.e., of “potential victims”.

Nevertheless reforms enacted to enhance the case for the public prosecution may benefit the individual victim, while other reforms have been intended primarily for this purpose.

An example of a victim-related procedural reform intended primarily to benefit the prosecution is the provision of the procedure code (which has

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122 Herbert. L. Packer, supra note 15.
123 In the Haj Yehieh case (47(III) 661, 679).
124 Ibid.
been modified from time to time) enabling a witness – often the victim – to be called to testify “without delay” once an indictment has been filed, but before the trial has formally commenced, or even before an indictment has been filed. This provision is intended for cases in which intimidation of the witness is anticipated, or where there are grounds for believing that the witness may not be available when the trial takes place (e.g., he or she is about to leave the country). In these circumstances the speedy hearing may be of benefit to the victim, as well as the prosecution. A proposed amendment would go further, and enable this provision to be invoked following an alleged sex offence where the court believes it to be “required to protect the mental health of the complainant or to enable him [or her] to be mentally rehabilitated”.

Provisions of this nature, while clearly beneficial to the prosecution, may be seen as “victim-oriented”. Rather than granting the victim any active rights, however, they are essentially protective measures which can be seen as consistent with the historically dominant welfare philosophy. Some so-called “victims’ rights” recognised in many states of the United States are also a reflection of this approach. Thus the “right to protection from offender harm” is reflected in provisions which invest the courts with the power to refuse bail, or to incorporate a “no contact” order as a condition of release, while the “right to privacy” may involve a limitation on

125 See s. 117 of the Criminal Procedure Law [Consolidated Version], 1982. When first enacted, the provisions were restricted to specified types of offences or situations where such occurrences were considered to have a high probability, such as complaints by prostitutes against pimps, or complaints by tourists about to leave the country. Under the present provision, the special procedure may be followed “where there are reasonable grounds to believe that it will be impossible to adduce the evidence at the trial or if there is a fear that the use of pressure, threats, intimidation, force, or the promise of benefit will prevent the witness from truthful testimony at the trial…” A further provision (s. 117A) was recently added in relation to the testimony of children under fourteen involved in sex offences, and other offences to which the Law of Evidence Revision (Protection of Children) Law, 1955, applies. The procedure in this case is subject to the approval of a child examiner (supra notes 36–38 and accompanying text).

126 See the Ministry of Justice Memorandum on the draft of the Criminal Procedure Amendment Bill (Taking Evidence in Sexual Offences), 1993. Also: Dan Bein, The Changes in the Balance Between the Protection of the Victim of Rape and the Preservation of the Defendant’s Rights, 42 Hapraklit 281 (1995), who states that this proposal is not at present being pursued by the Ministry of Justice.

the disclosure of identifying information in criminal justice records, or the holding of a trial in camera.

While reforms of this type raise important issues as to how far they in fact create rights on the part of the victims rather than discretionary powers vested in the courts and, more particularly, as to whether and how they must be balanced against defendants’ rights, they do not necessarily involve any change in the victim’s status in criminal proceedings. Research conducted in various countries has indicated, however, that victims are dissatisfied not only with the failure of the prevailing system to consider their welfare, but also with its failure to view them as relevant parties to the process, in spite of their victimisation being the trigger for this process.

How far victims wish for, or should be granted, an active role in the decision-making process is a subject of considerable controversy. United States laws, and even constitutional amendments, have granted victims participation rights in the criminal process. Thus, the Florida Constitution grants victims (or their representatives) “the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings,” while a proposed amendment to the United States Constitution would grant victims the right to be heard and to submit a statement at the bail, plea negotiation, sentence and parole proceedings. Reforms advocated or adopted in Britain and other European countries, however, have mostly been more modest. This is also true of Israel, where legislative reforms (or proposals) designed to enhance

128 Ibid., p. 329.
129 Cf. s. 68(b) of Israel’s Courts’ Law (Consolidated Version), 1984, which empowers a court to hear cases in camera, inter alia, for the protection of the interest of a child or “vulnerable person”; or of that of a complainant or defendant in a sex offence. This was recently extended to sexual harassment cases. A wide interpretation of these provisions was recently given by Judge Rotlevy in the Tel-Aviv District Court (infra note 159).
130 See, e.g., J. Shapland et al., Victims in the Criminal Justice System (1985); L. Sebba, supra note 5, chapter 5.
132 Article I, section 16(b). See also infra note 262. For a survey of the various provisions, see National Victim Centre, supra note 127, section 9.
134 See, e.g., Victims in Criminal Justice: Report of the Justice Committee on the Role of the Victim in Criminal Justice (1998). However, many jurisdictions in continental Europe have traditionally granted victims some role in the system.
victim participation in the criminal justice system have generally been cautious. In spite of considerable ambivalence on this topic, the principle of the right to file a private prosecution was reaffirmed in Schubert v. Tsafir, in which a private prosecutor sought an order – such as might be granted to a public prosecutor – to have the defendant detained in custody for the duration of the proceedings. The Supreme Court held that parity between the private and the more usual public prosecution entitled a private prosecutor to petition the court for such an order. Moreover, new offences have been added to the Schedule to the Criminal Procedure Law from time to time, especially offences of a public character (e.g., offences relating to elections and environmental offences), thereby extending the potential use of this remedy.

On the other hand the ambivalent attitudes of the authorities towards this institution in Israel, as in some other jurisdictions, was revealed when, following a suggestion by District Court Judge Hadassah Ben-Ito, following a suggestion by District Court Judge Hadassah Ben-Ito, following a suggestion by District Court Judge Hadassah Ben-Ito, following a suggestion by District Court Judge Hadassah Ben-Ito, following a suggestion by District Court Judge Hadassah Ben-Ito.
a legislative amendment was adopted to empower the court to require that a private prosecutor appoint an advocate to represent him (or her) where the court is of the opinion that the prosecutor is “incapable of directing the proceedings, or is directing them in a vexatious manner”. Failure to comply with such a ruling by the court may result in the dismissal of the prosecution. Clearly the citizen-prosecutor was felt to be a burden on the court. Moreover Netanyahu J., in the course of her judgment in Schubert v. Tsafir, proposed that private prosecutions should be subjected to preliminary judicial scrutiny, along the lines suggested by the Royal Commission on Criminal Procedure in England. On the other hand she also asserted that the State’s capacity to prevent the prosecution from proceeding by “taking it over”, and then submitting no evidence, or by the issue of a stay on the part of the Attorney-General, should be used sparingly. A recent proposal to abolish private prosecution has so far made little headway.

Secondly, reference may be made to the waiver of “standing” restrictions on petitioners to the High Court of Justice, thereby facilitating legal action in specific instances for the purposes of compelling the public prosecution authorities to prosecute, the prison authorities to refrain from releasing, etc. Under the traditional approach, a petitioner had to indicate a material interest in the proceedings, and it was held that the victim had no special interest in this respect. The liberal view held by some justices today posits that any petitioner may raise an issue of a public character that impinges directly upon the rule of law. Moreover, in the first Ganor

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140 See H. Ben-Ito, The Private Criminal Complaint, 25 Haraklit 521 (1969) (in Hebrew); also s. 73, Criminal Procedure Law.
142 Ibid., pp. 148–149. This criticism would not apply if the prosecution were taken over in order to seek a conviction, a power granted to the District Attorney (and exercisable by notice to the court within fifteen days of receiving a copy of the private complaint) under s. 71 of the Law.
143 The suggestion was raised at a meeting of the Permanent Advisory Committee on Criminal Procedure (private communication from Prof. Harnon). One of the main reasons for the failure to proceed with this proposal was apparently that in certain areas of the law, such as copyright and the environment, law enforcement initiatives are left entirely to the victims.
144 Reichbach v. A.G., 14 P.D. 2127 (1960). Similarly, the United States Supreme Court has held that “[a] private citizen lacks a judicially cognisable interest in the prosecution or non-prosecution of another” (Linda R.S. v. Richard D., 410 U.S.614 (1973), at 619).
case, in which the High Court nullified the Attorney-General’s decision not to prosecute highly-placed persons involved in the manipulation of bank shares on the ground of “lack of public interest”, President Barak went so far as to say that since “any person” could lodge a complaint with the police, and appeal to the Attorney General against non-prosecution, such a person had standing *vis-à-vis* the Attorney-General, and thus necessarily before the High Court. 146 *A fortiori* standing is thereby granted to victims. 147 Further, as this and other recent cases indicate, the High Court now regards the decision to refrain from prosecution on the grounds of “lack of public interest” as reviewable in substance. In this respect, decisions by the Attorney General are no different from those of other public servants, and may be overturned on grounds of unreasonableness. 148

Thirdly, attempts have been made by criminal justice personnel to develop a greater awareness of victim interests. The police investigations and prosecutions department has established a section with responsibility for victims, and four sets of instructions have been issued for police treatment

146 Ibid., p. 506. Ganor was again successful in a later petition seeking to review the Attorney-General’s decision to refrain from prosecuting ex-Minister Avner Shaki for improper conduct in relation to the distribution of state funds; *Ganor v. Attorney General*, Takdin Elion 93(3), 406 (1996). There is no indication in this report that the issue of standing was raised.

147 See, e.g., the attempt to prevent the granting of a Presidential pardon to two Palestinian women terrorists convicted of murder: *Meir Eindor and The Terror Victims Organization v. Israel Government and Minister of Justice*. (The petition was not directed at the President owing to his immunity from court proceedings.) The petition was rejected on the merits and not because of lack of standing; see Jerusalem Post, Aug. 12, 1996. In a more recent case, the daughter of a murdered victim successfully petitioned the High Court to have a pardon annulled, where the request for the pardon had been based on fraudulent medical claims of imminent death (H. Ct. 706/94, *Ronen v. Rubenstein et al.*). In another case the bereaved families of soldiers killed in a military accident petitioned the High Court to compel the Judge Advocate-General to appeal against the leniency of the sentence imposed: see *Shafran v. Judge Advocate-General*, 48(V) P.D. 573. (The petition was rejected by a 2:1 majority.) See on this case R. Shapira, *supra* note 50.

148 See D. Kretzmer, *Judicial Review of Attorney-General’s Prosecutorial Decisions*, 5 Pililim: Israel Journal of Criminal Justice 121 (1996) (in Hebrew). Recent constitutional amendments adopted in the United States do not bestow such rights upon victims. Article 1, section 30 of the Texas constitution specifically grants victims or their representatives standing to enforce the victim’s rights (participation, information, restitution, etc.). It is apparently the only state to do so (see National Victim Centre, *supra* note 127, Table 2-B): “but [s]he does not have standing to participate as a party in a criminal proceeding or to the disposition of any charge”. See on this issue also the solutions proposed by academic writers such as S.P. Green, *supra* note 139, and K.L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 California L. Rev. 727 1988, pp. 727–767; and see, generally, *Victims in Criminal Procedure* (D.E. Beloof, ed., 1999).
of (1) victims in general, (2) complainants in cases of rape and indecent assaults using force, (3) offences of violence between spouses and (4) offences of violence against minors within the family.\footnote{149}

In 1988 the State Attorney issued a set of instructions to the public prosecutors on “Assistance for the Victims of the Offence and for Prosecution Witnesses in Criminal Proceedings”. These were updated in 1994.\footnote{150} Their declared purpose was to ensure that victims and witnesses were to be treated with honour, fairness and understanding, and to assist them in obtaining compensation and in protection from further harm. The means whereby these were to be achieved were set out in the instructions, and each district attorney was to appoint a victim liaison officer to ensure implementation. The victim’s right to be notified of all relevant decisions was recognised “if requested by the victim”, while the same section of the Instructions (section 7) exhorted prosecutors to consider calling the victim to testify at the sentencing stage.\footnote{151} Other sets of instructions issued by the State Attorney provided that victims should be allowed to see the indictment,\footnote{152} and that prosecutors should be updated with regard to the medical condition of all victims (but particularly victims of violence, sex and traffic offences) prior to reaching a plea-bargain or pleading on sentence – victim harm and the damage inflicted by the offence being central factors for the prosecutors to take into consideration.\footnote{153} A further set of instructions specified that plea bargains should not be concluded in sex offences and child abuse cases without special precautions, including a social report on the whole family.\footnote{154}

\footnote{149} Communication from the Crime Victims Section of the police. Leaflets on some of these topics were prepared for distribution to the public. See also the booklet issued by the Ministry of Justice entitled “Know Your Rights and Duties: Guide for the Victim and Prosecution Witness”. Revised and more comprehensive instructions are currently under consideration.


\footnote{151} The victim’s right to request information was incorporated in the booklet (presumably available to the public). However, as regards calling the victim to testify at the sentencing hearing, more cautious language was employed: “The prosecutor will consider, at your request, in special cases and where appropriate, the possibility of calling you to testify…” (Know your Rights, etc., p. 14).

\footnote{152} State Attorney’s Instructions, no. 3.4: Delivering a Copy of the Indictment to the Complainant and the Victim of the Offence, Jan. 2, 1994.

\footnote{153} State Attorney’s Instructions, no. 9.1: Clarification of the Medical Status of the Victim of the Offence before Making a Plea Arrangement or before the Sentencing Stage, Jan. 2, 1994.

\footnote{154} State Attorney’s Instructions, no. 8.2: Plea Arrangements for Sex Offences and Offences of Child Abuse in the Family.
While the State Attorney’s instructions are not legally binding,\textsuperscript{155} and it seems that their implementation has been very partial,\textsuperscript{156} press reports indicate that certain criminal justice agencies (in particular in the military context) show increasing willingness to meet with victims and hear their views.\textsuperscript{157} Moreover a prison release committee (Israel’s equivalent of a parole board) recently allowed the Attorney-General’s representative to submit a letter from the victim’s family, objecting to a prisoner’s release,\textsuperscript{158} and the Tel-Aviv District Court has allowed a complainant’s attorney to plead in court that a trial should be held \textit{in camera}.\textsuperscript{159} Conversely, in another case the Courts-Martial Appeals Court, at the behest of the High Court of Justice, considered a request from bereaved families to be present at the trial of officers allegedly responsible for deaths by negligence.\textsuperscript{160}

On a more formal level, two recent legislative developments may have a more radical effect on the victim’s role. Legislation pending on plea bargaining (literally: “plea arrangements”) proposes that where the charge relates to certain specified felonies, “…the prosecutor may provide an opportunity to a person directly harmed by the offence or his legal representative (hereinafter ‘the victim’), to comment on the plea arrangement to be offered to the defendant; the victim’s comments, if proffered, will be taken into account among the prosecutor’s considerations regarding the plea arrangement”.\textsuperscript{161}

\textsuperscript{155} See on this E. Harnon, \textit{supra} note 23, p. 269, n. 51.
\textsuperscript{156} This impression is based upon conversations with a number of persons involved in the criminal justice system. However, a project is currently being implemented in conjunction with the Israel Women’s Network and the Association of Centres for the Assistance of Victims of Sexual Attacks in Israel “For the Accompaniment of Victims of Sex Offences in the Criminal Process.” (The syntax of the Hebrew original indicates that the term “victims” here applies exclusively to females.) A similar project has been undertaken in respect of child victims and witnesses by the National Council of the Child.
\textsuperscript{157} R. Shapira, \textit{supra} note 50.
\textsuperscript{158} Hasharon Prison Release Committee Decision re M. Ben-Shitreet of May 21, 1996. The letter was held to be relevant insofar as it related to the prisoner’s predicted dangerousness.
\textsuperscript{159} \textit{State of Israel v. Mizrahi and Bashan}, Decision of the Tel-Aviv District Court of Dec. 15, 1998. Rotlevy J., while citing a Supreme Court precedent, regarded this decision as a further step in the recognition of the victim’s standing in criminal procedure.
\textsuperscript{160} The request was rejected on security grounds, but following a further intervention of the High Court, a compromise was reached whereby the bereaved families would be represented at the trial by a prominent military figure. See R. Shapira, \textit{supra} note 50. Subsequently (following the conviction and sentencing of the officers) the families attempted to intervene to have the sentence increased on appeal: see the \textit{Shafran} case referred to above (note 147).
\textsuperscript{161} See the Criminal Procedure (Amendment no. 19) (Plea Arrangements) Bill, Hatsaot Hok no. 2374, 1995, p. 360; an English translation appears in E. Harnon, \textit{supra} note 23,
While the discretionary character of the prosecutor’s power in this respect is problematic (and may perhaps be regarded as discriminatory in relation to victims not so consulted), the proposal is radical in the Israeli context. It grants express recognition to the victim as an interested party, implicitly recognizes the victim’s potential need for legal representation, and obligates the law enforcement agency concerned (in this case the prosecutor) to take the victim’s views, if sought, into consideration. On the other hand the proposal is modest compared with developments in the United States, where victims have in some places played an active role in the plea-bargaining process, and were some state constitutions now grant the victim extensive rights “at all crucial stages of criminal proceedings”.

As to Israel’s laws of evidence, there have been substantial reforms in recent years, almost all of them focussed on the victims of sex offences. A “rape shield” amendment was adopted, to restrict the cross-examination of a witness (victim) regarding her or his past sexual experience. The requirement of corroboration in sex offences was eliminated, although the court is still required, in the absence of corroboration or other additional evidence, to state why it has relied upon the testimony of a sole witness (i.e., the victim). In the light of this requirement there is arguably still a degree of discrimination (certainly differentiation) with regard to the victims of sex offences. The courts, particularly the Supreme Court...

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162 E. Harnon, ibid.

163 See the evaluations of such processes described in Wayne Kerstetter and A.M. Heinz, Pretrial Settlement Conference: An Evaluation (1979); Deborah Buchner et al., Evaluation of the Structured Plea Negotiation Project: Executive Summary (1984). The findings of these studies (summarised in L. Sebba, supra note 5, pp. 216–221) indicate that even such radical reforms may have only a modest impact on the proceedings and their outcome.

164 Supra note 132 and accompanying text.

165 S. 2A of the Procedural Amendment Law (Examination of Witnesses), 1957, added in 1988: “The Court will not permit an examination in the matter of the sexual history of the victim of an offence under Part E of chapter 10 of the Penal Law, 1977, unless it should find, for reasons to be recorded, that to prohibit the examination may cause the defendant a miscarriage of justice.” The formulation of the proviso has been criticised as being too widely framed. On rape shield laws generally, see J. Temkin, Rape and The Legal Process 122ff. (1987); C. Spohn and J. Horney, Rape Law Reform (1992).

166 See section 54A(b) of the Evidence Ordinance [New Version], 1971, added in 1982.

in the *Shomrat* case, have substantially narrowed the circumstances in which the accused may be taken to have believed that the victim was consenting to a sexual act. The callousness and indifference exhibited by the youths in that case was held to be the equivalent of knowledge. This topic was considered earlier in the context of the reform of the substantive criminal law, but seems also to have an evidentiary aspect.

An amendment to the Evidence Ordinance of 1991 renders family members competent to testify against each other where the offence charged is a sex offence; previously such testimony was allowed only where the offence charged was designated an offence of violence. Legislation adopted in 1995 provided that the testimony of a victim of a sexual offence may be given not in the presence of the accused “if the court finds that testifying in the presence of the defendant may be harmful to the complainant [defined as meaning the victim] or detrimental to the testimony”. The legislation endeavoured to protect the defendant’s rights, by ensuring that the defendant be afforded the means of viewing such a witness during the course of the testimony, of hearing her or him and asking questions. The technique whereby this was to be achieved was left some what unclear, but regulations issued in the following year suggest close-circuit television as an option.

In the context of the present article, however, it should be observed that while protection of the victim, as well as ensuring the effectiveness of the testimony, has a high priority in this reform, the victim’s input in

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168 Supra note 64, and accompanying text.
169 For the contrary view, see R. Shapira, *supra* note 50, at p. 646.
170 See Evidence Ordinance (Amendment no. 9) Law, 1991.
171 See section 2B of the Procedural Amendment Law (Examination of Witnesses), 1957, added in 1995.
172 The defendant is also guaranteed the assistance of counsel (not always provided under Israel law), with whom he must be able to retain contact, and through whom he may question the witness. See sections 2B(b) and (c) of the above Law.
173 “The testimony not in the presence of the defendant will be given outside the courtroom or by other means which will prevent the witness seeing the defendant” (section 2B(a) of the Law).
174 “The court … may order that the testimony be heard by means of close-circuit television or by another means …” If necessary, the court may move the hearing to another location. See sections 4(a) and (b) of the Procedure Amendment Regulations (Examination of Witnesses) (Adducing Testimony of the Complainant in respect of a Sex Offences not in the Presence of the Defendant), 1996. There is an analogy here with the system approved by the United States Supreme Court for child victims. The extension of this system to rape victims is discussed in L.H. ThIELmayer, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims be Permitted to Testify by Closed-Circuit Television?*, 67 Indiana L.J. 797 (1992).
the decision to adopt the special procedure is by no means assured. The
decision to adopt this procedure may be made by the court, at its discre-
tion, “on its own motion, or at the request of the prosecutor”.175 Moreover
such a decision may be reached “after the parties have been provided an
opportunity to put forward their arguments”.176 Since the victim is neither
“the prosecutor” nor “a party”,177 there is no express provision for ensuring
that her or his views constitute an important element in the decision, or are
indeed conveyed at all.

Meanwhile, the law for the protection of children under fourteen
involved in “morals” offences has been the focus of considerable debate,178
and has undergone some modifications. These include a provision similar
to the one described in the previous paragraph, to the effect that where a
parent has been charged with a sex offence and a minor (i.e., in this case
under eighteen years old) is to testify against that parent, the court may
order that such testimony be heard not in the presence of the defendant-
parent, but in the presence of the defendant’s advocate.179 The additional
provisions incorporated in the amendment described in the preceding
paragraph for the protection of the defendant’s rights were not specified
here. Moreover the provisions of the law with regard to children’s testi-
mony (and the role of the child examiner), formerly restricted to “morals
offences”, now also apply to most offences against the person involving
children under fourteen.180 Thus the dominance of considerations related
to protection of the victim (as opposed to the rights of the defendant) and
the controlling role of the child examiner (rather than the judge) in this
area of the law may be seen to have expanded.181

It may be noted that concern for the welfare of child witnesses –
coupled with a concern that prosecutions may fail in the absence of their
testimony – has given rise to debate and reform of this area of the law in

175 S. 2B(a) of the Law.
176 S. 2B(b) of the Law.
177 Indeed, it is specifically provided that the court may exclude the witness from the
proceeding at which the “parties” express their views on the adoption of the special
procedure; see section 2B(d) of the Law.
178 State of Israel, Report of the Committee to Study the Subject of Offences with a
Sexual Background Committed against Children (1987) (in Hebrew), and the articles by E.
Harnon, supra note 36.
179 See section 2A, Law of Evidence Revision (Protection of Children) Law, 1955. The
provision was enacted in 1989 and amended in 1991.
extension was not incorporated in the bill, and emergency legislation has been adopted to
delay its implementation.
181 E. Harnon, supra note 36.
many jurisdictions. The Supreme Court of the United States has held that the accused’s right to confront witnesses does not preclude the taking of an alleged child victim’s testimony by closed-circuit television, where face-to-face confrontation would be harmful to the child; even hearsay statements reported by adults may in certain circumstances be admissible. Under the Israeli system such a departure from traditional hearsay rules has been long entrenched under the child examiner procedure, under which the child’s testimony is witnessed by neither the defendant or his or her counsel, nor by the judge. The concerns to which this has given rise resulted in a recent amendment requiring videotaping of the examination so that the tape may subsequently be viewed by both the court and the defendant.

It is evident that there has been a growing concern for the predicament of the victim in these areas, but that the victim is viewed primarily as an object of protection rather than an autonomous subject of rights whose views should be sought in the decision-making process. A second limitation is the tendency to focus upon sex offences and domestic violence, rather than to generalise with regard to the victim’s status.

V. SENTENCING

Sentencing provisions have both substantive and procedural (including evidentiary) aspects. Substantive provisions may have direct or indirect implications for the victim.

The substantive provisions with the most direct implications for the victim are those that enable the court to order the defendant to pay restitution to the victim. While, as noted, such a provision was incorporated in

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185 Supra notes 36–38 and accompanying text.
186 The explanatory notes to the bill refer to the recommendations of the Committee on Criminal Procedure, and the 1988 article by Prof. E. Harmon, supra note 36, as its inspiration. A regulation requiring the tape recording of the Youth Interrogator’s examination was introduced in 1989. Under the new legislation, tape recordings will be used only if a video cannot be made or if the child will not cooperate (new section 5A.) If the same obstacles prevent a tape recording, reliance will be placed on a written record.
the criminal code inherited from the British,\textsuperscript{187} the law has since undergone significant reforms: (a) the sums which the courts may award are regularly updated (presently NIS 84,400 per offence);\textsuperscript{188} (b) execution of the award, previously left to the victim to be enforced as a civil debt, is to be implemented by the law enforcement authorities in the same way as a fine;\textsuperscript{189} (c) the restitution order takes precedence over a fine with respect to sums so levied;\textsuperscript{190} and (d) the courts, when imposing a fine, are enjoined to take into account its likely effect upon the offender’s ability to compensate the victim.\textsuperscript{191}

Israel has also adopted “community”-related sanctions in recent years. In addition to probation, which has existed since the mandatory period, community service (on the British model) has been adopted,\textsuperscript{192} as well as a novel sanction providing for “prisoners” to remain at home and work in the community.\textsuperscript{193} These sanctions, however, are not expressly linked to victim needs.

Two other recent innovations, on the other hand, are clearly oriented to the protection of victims. Under an amendment to the Penal Law adopted in 1996, an offender who behaves violently towards his or her family may receive an order to be treated in the community.\textsuperscript{194} Further, a recent amendment to the Weapons Law of 1949 provides for the discretionary revocation of a licence to carry a weapon where an offender is convicted of a violent offence, and mandatory revocation where the violence was directed at

\textsuperscript{187} Provisions for offender restitution were also incorporated in the Probation Ordinance and the Juvenile Offenders’ Ordinance, and have been retained under the equivalent Israeli legislation.

\textsuperscript{188} S. 77(a), Penal Law, 1977 (as amended). Special provision is made for updating the level of compensation (as well as the level of fines) under sections 35 and 64 of the Law, in accordance with the cost-of-living index.

\textsuperscript{189} S. 77(c), Penal Law. However, in \textit{Nissim v. State of Israel}, 43(1) P.D. 498–499 (1989), the Supreme Court held that the court issuing the restitution order is not empowered to specify a period of imprisonment to be served in lieu of payment. One reason for this ruling is that the purpose of the restitution order is to benefit the victim, who has nothing to gain if the offender goes to prison.

\textsuperscript{190} \textit{Ibid.}

\textsuperscript{191} S. 63(c), Penal Law.

\textsuperscript{192} Ss. 71A–71F of the Law.

\textsuperscript{193} Ss. 51A–51L of the law.

\textsuperscript{194} S. 86, Penal Law, 1977 (as amended). The provision does not require that the offence of which the offender has been found guilty be one of violence. Another provision adopted at this time empowered the court to make a similar order when issuing a (civil) protection order under the Family Violence Prevention Law, 1991.
family member. Reference may also be made here to a recent proposal to create a register of offenders who have committed certain offences against children.

As to the severity level of sanctions in general, this may be said to affect victims on a number of levels. Adopting a utilitarian or consequentialist analysis, sentences of a certain level of severity may be thought required for the purpose of deterrence or incapacitation, and thus to protect future victims. On a retributive approach, on the other hand, the principle of an appropriate level of severity may be seen as satisfying not only the public as a whole, but also the individual victim. However, this principle may also be seen as a (consequentialist) goal which must be tested empirically, i.e., to determine how far the public and the victim are in fact satisfied with a particular level of sentencing.

While these arguments are not generally analysed in depth in the context of Israeli policy-making, sympathy for victims has in recent years led to the enhancement of penalties in certain areas, in particular sex offences, domestic violence and assaults committed against “the vulnerable”. Under the prevailing system the courts have, with few exceptions, complete discretion as to the sentences they impose, subject only to the maxima laid down by law. As in other common law countries, and in particular the United States, there has been pressure to adopt legisla-
tion specifying mandatory minimum sentences, by way of reaction to the imposition of supposedly lenient sentences on the part of the courts.

This pressure led to the appointment in 1996 of a public committee headed by then-Supreme Court Justice Eliezer Goldberg. A majority of its members opted for a tariff of “points of departure” which would serve as the starting point for determining the appropriate sentence, a system in essence resembling guideline or presumptive sentences. The underlying principle is essentially desert – specifically, “an appropriate relationship between the penalty and the seriousness of the offence and the culpability of the offender”. As with the United States federal sentencing guidelines, the proposed provisions include express references to the victim. Meanwhile, however, the Bill which provoked the establishment of the committee was adopted, requiring the courts to impose 25% of the maximum prison sentence for certain sex offences, or else to specify what were the special reasons for refraining from imposing such a sentence.

The legitimacy of various sentencing alternatives is likely to be considered in the future on the basis of the Basic Law: Human Dignity and Liberty, which in principle prohibits punishment and other infractions of human rights unless sanctioned by “a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required ...” The courts will have to consider how far the various sentencing objectives comply with these criteria, including objectives designed to meet victims’ needs, whether directly or indirectly. One

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202 See s. 1(a) of the majority’s proposed bill, on p. 21 of the Report. In circumstances specified by the bill, the desert principle may give way to incapacitation or rehabilitation.

203 One of the elements of the desert principle is “the harm inflicted on the victim” (s. 1(b) of the bill). Aggravating circumstances include exploitation of the vulnerability of the victim, and a multiplicity of victims: see ss. 6(b)(4) and (8) of the majority’s proposed bill. An effort to repair the damage inflicted by the offence or to compensate for it would be a mitigating circumstance (s. 7(c)(4)).

204 See the Penal Law (Amendment no. 51), 1998. The offences to which this provision applies are rape (s. 345, Penal Law), the more serious forms of indecent assault (ss. 348(a) and (b)), and the more serious sex offences against family members (ss. 351(a), (b), (c)(1) and (c)(2)). The proviso empowering the court to impose a lesser sentence in effect replicates the general provision in this vein referred to above (note 200). Minimum penalties for violence inflicted on family members are the subject of a pending private member’s bill.

205 Ss. 2, 5, and 8, Basic Law, supra, notes 52–56 and accompanying text.
writer has suggested that the welfare and rehabilitation needs of the victim should be recognised as a legitimate sentencing objective.206

This discussion may also be relevant in the context of a radical procedural innovation recently adopted by the Knesset. The Criminal Procedure Law [Consolidated Version], 1982, has been amended to empower a court which has convicted a defendant for a sex offence to order an official designated for the purpose by the Minister of Labour and Welfare “to draw up and submit a report on the situation of the person injured by the offence . . . and on the damage caused to the injured party as a consequence of the offence”.207 This may be seen as the victim equivalent of the pre-sentence investigation traditionally requested for offenders.208 The official submitting the report (who will in practice be a social worker)209 may, under the provisions of the law, be questioned in court regarding the report, but the injured party may not be called upon to do so.210 The report will be shown to the parties but the court may refrain from allowing the defendant access to the full report.211

These provisions, which are clearly modelled on the American “victim-impact statements” (now also adopted in some other jurisdictions),212 may

207 S. 187(b), Criminal Procedure Law [Consolidated Version], 1982. This amendment was introduced in 1995, together with the provisions referred to above (notes 171–177 and accompanying text), relating to the testimony of the victims of sex offences. Both these provisions apply to all sex offences under Chapter 10, article 5, of the Penal Law, with the exception of the least serious form of indecent assault under s. 348(c).
208 “Just as the murderer should be considered as an individual, so too the victim is an individual . . .”, from Justice White’s minority opinion in Booth v. Maryland (55 L.Ed. 4836 (1987)). This case, in which evidence relating to the victim was held by the majority of the Supreme Court to be inadmissible at a capital sentencing hearing, was subsequently overthrown in Payne v. Tennessee, 115 L.Ed.2d 720 (1991). See L. Sebba, Sentencing and the Victim: The Aftermath of Payne, 3 Int’l Rev. Victimology 141 (1994).
209 The law refers to a “public servant”, who may be either an employee of the state or of a local authority, to be appointed by the Minister of Labour and Welfare. The possibility envisaged in the bill (no. 2290 of 1994) that community volunteers might be appointed has been excluded by the above wording. Regulations have entrusted this role primarily to probation officers. However, ss. 187(f) and (g) ensure that the same probation officer cannot simultaneously be involved in the preparation of reports on both victims and offenders.
210 Ss. 191A (b) and (c) of the Law.
211 S. 191A (a) of the Law.
212 “As of 1995, every state allows victim impact evidence at sentencing, either through input into the presentence report or through presentation of a written or oral statement at the sentencing hearing – indeed, most states allow both forms.” See National Victim Centre, supra note 127, p. 231. Where the statement relates to the victims’ views it may be called a “Victim’s Statement of Opinion”: see L. Sebba, supra note 5, p. 195.
convey to the victims that they are a part of the process, and that their predicament has not been forgotten. Moreover, they may provide an information base for a more accurate estimate of the harm inflicted by the offence, and consequently for arriving at a more just sentence.

Victim-impact statements are, however, generally controversial, both on procedural and substantive grounds. The procedural issue is less acute in the Israeli context, in that there is clearly no attempt to render the victim even a quasi-party. On the contrary, the criticism here is based on the limited scope of the provisions. Insofar as they are only to be invoked at the discretion of the court, they may, like the plea-bargaining proposal, be considered discriminatory, or at least unequal in application. Moreover their restriction to sex offences may be regarded as discrimination against victims of other types of offence, whose situation will be unknown to the court, unless the new provisions are expanded, or unless the traditional sentencing provisions are exploited to accommodate victim testimony.

The substantive issue relates to the extent to which sentencing should be associated with the significance of the harm inflicted upon the particular victim, rather than the degree of seriousness which may be attributed to that harm in the “standard case”, as advocated by Andrew von Hirsch. Further, if indeed the harm and suffering inflicted upon the individual victim (and the victim’s family) may legitimately be taken into account in the sentencing equation, the question arises whether the ambit of this harm and suffering should be limited by what was specifically foreseen, or perhaps by what could reasonably have been foreseen, by the

213 See also supra note 153, on the State Attorney’s instruction to prosecutors to obtain up-dated information, prior to plea-bargaining and sentence, on the medical harm inflicted on victims.


215 For arguments that the victims of sex offences undergo greater suffering than other victims, and have been discriminated against in the past, see the position paper submitted by I. Yaar on behalf of the Israel Bar.

216 S. 187(a) of the Criminal Procedure Law [Consolidated Version], 1982, provides that “. . . the prosecutor will, on the matter of the punishment, bring evidence of the defendant’s previous convictions, and may also bring other evidence for this purpose”. Similarly, s. 190, which empowers the court to order that the defendant undergo medical or other examinations, further provides that the court may order “other investigations which appear to be helpful in determining the sentence.” The scope of these provisions, in relation to the victim, seems not to have been settled.

perpetrator. Submission of evidence relating to the highly personalized experiences of the victim and the victim’s family might result in the infringement of acceptable principles of sentencing, including desert-oriented (retributive) sentencing. Moreover, instead of a move towards greater structuring and uniformity in sentencing, as advocated by many modern critics of the old philosophy of individualized sentencing, a new form of individualization of sentencing would predominate, based upon the characteristics, and perhaps also the idiosyncratic opinions, of the victim.

The risk that the introduction of victim-impact statements in Israel will lead to erratic sentencing is reduced by the very limited provision for these statements, being restricted to a few offences and only to be called for at the court’s discretion; and by the absence of juries in the Israeli system, which is generally believed to render decision-making less emotive. On the other hand, the combination of a selective use of the victim-impact statement with an absence of sentencing guidelines, as under the Israeli system (pending the adoption of the majority recommendation of the Goldberg committee) does create a potential for disparate sentencing. Such an outcome, in addition to creating an injustice vis-à-vis offenders, might be resented by some of the victims, in particular where no victim-impact statement was called for, and perhaps in cases of non-sexual violence, where the victim-impact statement is not available. This is a matter which can be determined only by empirical evaluations.

See L. Sebba, supra note 208. This question pertains to the somewhat neglected topic of the applicability of principles of culpability in sentencing: see A. Ashworth, Sentencing and Criminal Justice (2nd ed., 1995).


Some empirical studies conducted in Israel have found evidence of disparities in sentencing: see, e.g., Y. Hassin and M. Kremnitzer, The Offence of Breaking and Entering – Variables Affecting Consistency in Sentencing, 22 Mishpatim 533–569 (1993) (in Hebrew). On the other hand, the minimum sentence provisions introduced for some of the offences to which the victim impact provisions apply may serve to reduce the probability – or at least the scale – of the disparities.

For an overview of the studies conducted on victim-impact statements, see D.P. Kelly and E. Erez, supra note 131.
VI. ALTERNATIVES TO CRIMINAL JUSTICE

It is sometimes suggested that victims have no role to play in the contemporary criminal justice system, but that their justice needs should be met outside this system.\(^{223}\) This may take the form of an alternative forum for confronting the alleged perpetrator of the wrong, or of provision by the state (or other agencies) to meet the victim’s needs, without the direct involvement of the perpetrator.

The “alternative forum” traditionally recognised for dealing with a victim’s justice needs with respect to the perpetrator of an alleged wrong is of course the civil court. The Israeli legal system, after depriving victims of the option of filing a civil claim in the criminal court, adopted certain measures to facilitate the filing of a claim in a civil court, in the wake of a criminal trial. Israel followed England in overturning the rule rendering evidence of a criminal conviction inadmissible in a subsequent civil action.\(^{224}\) Moreover the legislature added a provision enabling the victim (or plaintiff) to file a civil claim in the court of conviction, to be heard by the same bench.\(^{225}\) However, this provision seems to be rarely used.

A public committee reviewing policies regarding domestic violence recommended the use of protection orders as a civil alternative (or supplement) to criminal prosecution.\(^{226}\) Appropriate legislation was adopted in 1991. Such an order may be directed against a person perceived to be threatening a family member, whether physically or sexually, and may require that the person keep away from the home, or refrain from harassment, or from bearing a weapon. An application for such an order may be filed either by a family member, a social worker appointed under the Youth Law, or a representative of the Attorney-General.\(^{227}\)

Alternative modes of dispute resolution have recently developed in Israel, but these developments have taken place mainly in a purely civil context.\(^{228}\) The concepts of restorative justice and mediation, increas-

\(^{223}\) For an extensive discussion of this question, see L. Sebba, supra note 5.

\(^{224}\) Ss. 42A–42E, Evidence Ordinance [New Version], 1971. These provisions were added in 1973.

\(^{225}\) S. 77, Courts Act [Consolidated Version], 1984.

\(^{226}\) Ministry of Justice, supra note 47.

\(^{227}\) Prevention of Family Violence Law, ss. 2, 3. A recent amendment has expanded the powers of the court under this law, inter alia extending the maximum duration of a protection order to a period of one year: Prevention of Family Violence Law (Amendment no. 3), 1997.

\(^{228}\) See, e.g., the provisions for mediation under s. 79C of the Courts Law [Consolidated Version], 1984 (enacted in 1992).
ingly popular in other jurisdictions,229 have as yet received little impetus, although one programme of this type has been instigated by the juvenile probation service in Beer-Sheba.230

Victim remedies, however, may be reflected in other ways than proceedings directed against the perpetrators. The state and other agencies may have a role to play. Great Britain, the United States and many other countries have developed wide-ranging programmes for victim compensation, provided by the state,231 and for victim support, generally supplied by community or voluntary agencies, but supported out of public funds.232 Israel has no comprehensive scheme of this nature. State compensation for the victim is limited to isolated categories, such as victims of terror, Holocaust victims, and “good Samaritans”.233 Victim support is provided by non-governmental agencies, but almost exclusively for victims of sex offences (rape crisis centres) and domestic violence (shelters for battered women).234

229 See, e.g., D.N. van Ness, New Wine and Old Wineskins: Four Challenges of Restorative Justice, 4 Crim. L. Forum 251 (1993). See also the concept of “shaming and reintegration” for offenders (but generally involving the victim) developed by John Braithwaite (e.g., in Crime, Shame and Reintegration (1988)), and its implementation in the framework of “family conferencing”: see, e.g., Christine Alder and Joy Wundersitz, Family Conferencing and Juvenile Justice (1994).

230 See The ‘Pekaat’ Project: Programme for Reconciliation between Victim and Offender, in Crime and Social Work 330 (Y. Wozner et al., eds., 1994) (in Hebrew). Reference may also be made to the Bedouin tradition of “Sulha” for the resolution of disputes in traditional Arab communities. It may also be noted that the provision in the Probation Ordinance for offender restitution also refers to payment by way of reconciliation (between the parties).


234 More recently, experimental projects have been developed for the accompaniment of child and woman victims throughout the process, and a coalition of organisations concerned with victims has been established with a view to developing coordinated policies.
On the other hand, a crime victim may in some cases have a legal remedy against the state under traditional civil law principles. In Israel, as in England, public authorities may in some circumstances owe a duty of care to individual members of the public, and may thus be liable in tort for failure to perform their duty, not excluding duties connected with law enforcement.235 An analysis of this area of the law indicates that a trend towards narrowing the duty of care in England236 has not been followed in Israel.237 Nevertheless, in similar circumstances Israeli courts would not arrive at a conclusion different from that reached by the House of Lords in the “Yorkshire Ripper” case, which refused to hold police liable for failure to protect the lives of potential women victims of a serial killer.238

It may be, however, that the wording of the Basic Law: Human Dignity and Liberty, with its strongly formulated guarantees of protection for all citizens, may result in an expansion of governmental liability for failure to prevent victimization,239 in particular where there may have been awareness of a high risk of such an occurrence. Similarly, the Basic Law may add a new dimension to such questions as whether citizens may call upon state agencies (i.e., the police) for their protection, rather than having to rely upon private security.240

In addition to the Basic Law: Human Dignity and Liberty, another source of normative protection for potential victims of certain types of


236 See the recent English case of Stovin v. Wise [1996] 3 All E.R. 801 (H.L.), in which a majority of the House of Lords held that a local authority could rarely be sued in a private action for negligent omissions (in this case a failure to maintain the highway). Such a right was created only if the authority behaved irrationally, or if there were exceptional grounds for holding that the statute imposing the duty to act conferred a right to compensation on the part of individuals. See J. Convery, Public or Private? Duty of Care in a Statutory Framework: Stovin v. Wise [1996] 3 W.L.R. 388 in the House of Lords, 60 Modern L. Rev. 559 (1997).


239 See the Aynes thesis on the “right not to be a victim” (supra note 65); and see E. Gross, supra note 23.

abuse may be found in the international human rights conventions ratified by Israel. In particular, under the terms of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Israel has undertaken, *inter alia*, to “take effective measures to prevent acts of torture . . .” and “to ensure in its legal system that the victim . . . obtains redress and . . . rehabilitation.” The provisions of the Convention, however, have not yet been specifically incorporated into Israel’s domestic law.

VII. CONCLUSIONS

This article has considered the potential of the different branches of the criminal justice system in Israel in promoting the interests of crime victims. Victim-related developments were noted in the substantive criminal law, criminal procedure, evidence and sentencing. Brief consideration has also been given to possible remedies outside the criminal justice system, including civil law, administrative law and informal dispute settlement.

A radical reorientation of procedural, evidential and sentencing structures (and perhaps also the substantive law) could doubtless be achieved by transferring the handling of complaints from the criminal justice system to an alternative, informal, forum of dispute resolution, a concept which has gained wide support in the academic literature, and has given rise to the adoption of (generally experimental) policies in some other jurisdictions. It seems unlikely, however, that pressures emerging in Israel to meet the needs and interests of victims will be satisfied in the near future by such alternatives, although the success of such developments in the civil sphere may serve as a model.

Other proposals for meeting victims’ needs outside the criminal justice system, such as adoption of more comprehensive welfare remedies, including state compensation, are unlikely to be adopted in a period of economic retrenchment; nor are the courts likely to recognize an

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242 See articles 2 and 14 of the Convention.


244 It should be noted that under a purely informal system of dispute resolution the civil-criminal distinction might lose its significance.
all-embracing right “not to be a victim”, enforceable against the state. Moreover research in other countries suggests such remedies may not satisfy victims’ desires for greater involvement in the adversary processes focussing on the offender. In this respect, encouragement of tort suits against offenders may have a greater potential, as this involves a recognition that the dispute (or conflict) “belongs” to the victim.245

Victims’ needs have been translated by the moral (and legal) entrepreneurs active on their behalf in policy-forming bodies (the Knesset, the government, and non-governmental agencies) into four main areas of reform: (a) expanding the ambit of the criminal law; (b) harsher penalties (including mandatory minima); (c) reducing trauma which victims may undergo during encounters with police and courtroom proceedings; and (d) increasing input and participation in criminal justice processes.

In the area of substantive criminal law, new offences have been created, and pre-existing ones expanded, whether by legislative amendment or judicial interpretation, although these developments have been partially balanced by a greater emphasis on subjective culpability as a basis for criminal responsibility (tending to narrow its ambit). Much of the expansion of the substantive criminal law has been formulated in terms that emphasise the protection of victims (in particular “the vulnerable”). This is reinforced by the enactment of secondary norms, designed to ensure the effectiveness of primary ones. The orientation of this strategy is thus principally protective, although recognition of the victim’s autonomy (consistent with a rights orientation) is sometimes implicit, e.g., in the legislature’s definition of sexual harassment, and the Supreme Court’s treatment of the issue of consent in rape.

Assessing the effectiveness of such reforms raises complex empirical issues beyond the scope of this paper; but it may be noted that the expansion of the criminal law seems to have been little studied in the sociological-penological literature (outside the area of “the enforcement of morality”246). Perhaps the most appropriate penological frame of reference here is the denunciatory justification of punishment, to which Johannes Andenaes attributes long-term deterrent properties, i.e., as the values conveyed by the prohibition penetrate mores over time.247 Clearly this topic is worthy of closer attention in both the penological and the victimological literature.

246 i.e., in such areas as the prohibition of alcohol consumption, or deviant but consensual sexual conduct. See, e.g., E. Schur, H.A. Bedau, supra note 67.
Further, to the extent that an incipient trend towards greater emphasis on the victim’s autonomy continues, this trend will increasingly conflict with the traditional paternalist protective orientation, in particular in relation to the question of whether and in what circumstances consent negates criminality. It may also lead to further progress towards the elimination of “victimless” crimes, and perhaps also a revival of the issue of the victim’s responsibility for failure to prevent the crime.

The policy of harsher sentencing norms, while often perceived – or at least presented – as a victim-oriented remedy, may be costly to both offenders and the public, and is unlikely to enhance the security of potential victims. Moreover (as with the adoption of new substantive norms), the main focus is on the perceived needs of the public as a whole rather than the individual victim. Increasing penal severity as such will do little to satisfy victims as long as they remain excluded from the process. On the other hand, if reforms are adopted in the direction of structured sentencing, some token acknowledgment may thereby be granted to the significance of victim-related factors in the sentencing equation.

A related but distinct policy approach is reflected in a number of recent measures that lay emphasis on “social defence” rather than severity per se. I refer to the provisions whereby family violence offenders may be ordered to undergo treatment, and are liable to mandatory revocation of their licences to carry a weapon. These measures are designed to protect persons already victimised by the offender, as well as others with whom he or she may have contact. To some extent this is also true with respect to the proposal for a register of offenders who have been convicted of certain offences against children although clearly the emphasis here is on the protection of victims in the second category, that is, potential additional victims. These measures, while they raise civil liberties issues, may have a greater potential than severity of sentence for the protection of victims. However, their effectiveness can only be determined by empirical research. Moreover they are applicable only to specific offence-offender categories.

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248 On the limited effectiveness of deterrent and incapacitative policies, see A. Blumstein, J. Cohen and D. Nagin, supra note 197. On mandatory minima, see M. Tonry, supra note 197.


250 M. Ancel, Social Defence (1965).
The policy of minimizing the trauma inflicted upon victims, reflected historically in the 1955 law providing for child examiners in sex cases involving children, has continued to develop. This policy reflects the needs/services orientation which (with victim protection) has constituted the dominant trend in the history of Israel’s victim-related reforms. While elsewhere this orientation has given rise to the establishment of comprehensive programmes for victim assistance and victim compensation, attempts to promote these in Israel have so far had only modest success. On the other hand the focus on enhancing victim welfare within the criminal justice system has continued. The continuation of this policy is evident in the expansion of the provisions of the 1955 law, in the “rape shield” amendment, and the recent provisions whereby victims of sex offences may testify without the defendant being present.

This line of reform may be justified in terms of its main objective, which is preventing “secondary victimization”, but raises serious issues in terms of traditional guarantees for the defendant (in spite of certain precautions adopted by the legislature in this respect), in particular the right to cross-examine witnesses (in this context, victims may be perceived as being “in the service of the prosecution”). How far the need to protect the victim from trauma justifies creating (increasing?) the risk of wrongful conviction may be questioned. In some cases of this nature it may be better to waive the prosecution and, in appropriate cases, employ civil or welfare procedures, such as restraining orders.

A more pertinent reservation in the present context, however (i.e., when seeking comprehensive victim-oriented remedies), is that many of these reforms have focussed on certain categories of victim perceived a priori as more vulnerable, and are not designed to reduce the frustration of other types of victim who may feel alienated in the course of traditional adversarial proceedings.252

Thus, in the context of victim satisfaction, increasing victim participation in the process seems potentially the most desirable strategy. Research conducted both in Israel and abroad indicates that enhancing victim involvement does not necessarily increase punitiveness, and may have

251 Andrew Ashworth, *Victims’ Rights, Defendants’ Rights and Criminal Procedure*, in *Integrating a Victim Perspective in the Criminal Justice System* (A. Crawford and J. Goodey, eds., 2000), who refers to “victims in the service of severity” and “victims in the service of the offender”. For an elaboration of this radical critique of the victim’s role in the system, see Marilyn D. McShane and Frank P. Williams III, *Radical Victimology: A Critique of the Concept of Victim in Traditional Victimology*, 38 Crime and Delinquency, 258 (1992).

252 See, e.g., J. Shapland et al., *supra* note 130.
the opposite effect. Current reforms designed to elicit victims’ views on plea bargains and to report on victim harm at the sentencing stage may appear to present a threat to defendants’ rights. It is more probable, however, in the light of experience elsewhere, that these reforms will have very limited effect owing to such factors as lack of awareness, limited applicability, and neutralisation techniques on the part of criminal justice personnel.

Note should also be taken of the Supreme Court’s reaffirmation (in the case of *Schubert v. Tsafrir*) of the importance of the institution of private prosecution, perhaps the ultimate form of “victim involvement”. While a valuable contribution to discourse on the role of the victim, it seems unlikely to lead to a massive revival of this procedure, which continues to attract criticism in some quarters.

On the other hand, if the various procedural reforms are successful and are expanded, resulting in more active victim involvement in the system, proposals for alternative forms of dispute resolution in which the parties directly concerned play a more active role, and without increasing punitiveness, may be stimulated in the long run.

In the short term, however, there is clearly a risk that enhancing the role of the victim may constitute a threat to traditional defendant guarantees. In general terms, such enhancement may take three forms: (1) increasing information on victim harm available to decision-makers in the penal process, as in the recent reform applicable to sex offences in Israel; (2) providing victims with an opportunity to express their views, as under the plea bargaining proposal; (3) providing victims with a veto power, as has been suggested elsewhere in the context of plea-bargaining. *Prima facie* the threat to defendants’ rights would appear to be greater where provision is made under law for the expression of the victim’s views or for

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254 See: R. Elias, *Victims Still* 61ff. (1993); E. Erez and L. Rogers, *supra* note 4. In the context of the Israeli reforms it may be noted that the provision for “victim-impact” statements reform is recent and the extent of its implementation as yet unknown, the plea-bargain reform has yet to be enacted, and the State Attorney’s Instructions in relation to the treatment of victims seem to be largely disregarded: *supra* notes 149–153, and accompanying text.

255 *Supra* note 31.


257 It is unclear whether current provisions would allow for a victim to express such views.

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a veto-power. On the other hand, since, as research demonstrates, victims to whom attention is shown tend not to be vindictive, the problem may rather be one of unevenness of outcomes.

By contrast, merely increasing information available to decision makers on victim harm would seem, again *prima facie*, to be innocuous. Indeed it would appear to be consistent with traditional criminal justice objectives, in which victim harm plays a central role as a factor to be considered in the decision-making process. Here, however, there is a risk that criminal justice agencies become imbued with “law and order” rhetoric. This has certainly been the experience of the United States, where the combination of the admissibility of evidence on the effects of a crime on the victims (or – in murder cases, on their families), jury sentencing and the availability of capital punishment, has had dire consequences for defendants.259

Some states in the United States have raised the recognition of victim rights to a constitutional principle. At least twenty-nine states have amended their constitutions in order to incorporate some reference to the victim.260 These reforms, as well as some of the earlier statutory models,261 have often been labelled “Victims’ Bills of Rights”. In some cases, particularly where victim participation in the process is specified, a “balance” is sought by adding a proviso that the enforcement of such rights should not prejudice the traditional rights of the defendant.262 Such balancing, however (also envisaged by President Shamgar in the *Ganimat* case263) may prove a formidable task for any constitutional (or other) court, although it has been recently attempted by the European Court of Human Rights.264 Moreover, the task may be rendered even more formid-

259 *Payne v. Tennessee*, *supra* note 208.
260 See the Addendum to the Victims’ Rights Sourcebook of the National Victim Centre, *supra* note 127; L.L. Lamborn, *supra* note 3.
261 See also 42 USC, sec.10606 (“Victims’ Rights”).
262 According to Article 1, section 16(b) of the Florida Constitution, “Victims of crime or their lawful representatives, including the next of kin in homicide cases, are entitled to the right to be informed, to be present and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.” See also Article 15, section 15 of the Kansas *Constitution*, and, on the possible formulations of the proposed federal constitutional amendment, R.P. Mosteller, *supra* note 133, at note 51. For analyses of the process of balancing victims’ and offenders’ rights see, in the United States context, Christopher R. Goddu, *Victims’ Rights or a Fair Trial Wronged?*, 41 Buffalo L. Rev. 245 (1993) and, in the Israeli context, D. Bein, *supra* note 126.
263 *Supra* note 60 and accompanying text.
264 See the cases referred to in the editorial comment of the Criminal Law Review, September 1998, and in A. Ashworth, *supra* note 251. See also Marc Groenhuijsen, *Conflict of Victims’ Interests and Offenders’ Rights in the Criminal Justice System*, in
able should the balancing also take into account possible obligations on the part of the state towards the victim in areas such as police protection and victim welfare.

Thus it seems probable that the Israeli courts may be required to develop a new jurisprudence in the context of the Basic Law: Human Dignity and Liberty (and of the basic laws on social and justice rights, if enacted\(^\text{265}\)), leading to ongoing re-evaluation of the respective rights and responsibilities of government, offenders and victims in the area of public and private security, and of the respective roles of criminal, civil and welfare law. Similar issues are likely to be faced by other common law countries.

CONCLUDING NOTE

In 1999 a Victims’ Right Bill was proposed by a number of Knesset members, with a view to granting victims (a) procedural rights, (b) compensation rights and (c) assistance. In response, the governmental established a committee to prepare its own bills in these areas. A draft on topic (a) was completed by summer 2000. This placed emphasis on rights to information and protection, but would also provide the victim with certain participation rights.

\(^\text{265}\) Drafts of a Basic Law: Social Rights and Basic Law: Justice Rights have been issued by the Ministry of Justice. Their relevance to the position of victims is somewhat unclear. The former includes health and social welfare among the “conditions for ensuring an honourable existence for its citizens” for which the state would undertake to strive. The latter would require a fair trial for all.