

## Sociology 4099: Victimology

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### Overheads Week 6: Victims and Criminal Justice 1: Legal Issues and Subject's Experiences

This week we will review:

- (i) Victims' legal position, and
- (ii) Victims' experiences with the justice system

This will include:

- (1) The *historical construction* of the victim's legal role;
- (2) Its *interactional result* at each stage of Canadian criminal proceedings;
- (3) Recent procedural changes to assist victims; and
- (4) Data from my own research.

#### **(I) Historical Construction:**

\*Historically:

- Early participation by victims
- Gradually supplanted by doctrine of King's Peace"
- Prosecution by/in name of state
- Utilitarian reformers
- Sharpened contrast between crimes and torts

\* Today:

-A *criminal proceeding* is an *adversarial process* between two parties: *The state and the accused.*

- The *victim* is not a party to the proceeding, and has no legal standing to dispute decisions of the Crown Prosecutor, who works for the *state*, and is

*not the victim's lawyer.*

- The victim only has *two roles* to play:

- (1) to call the police to report the crime; and
- (2) to act as a witness for the prosecution if called.

\* The traditional response to victims who complain is to suggest a *civil lawsuit* for damages against the offender

\* This situation contrasts sharply with the role of victims in countries with differing legal traditions (e.g. joinder of criminal and civil cases).

\* These principles above impact the experiences of victims *at every stage of our criminal justice process.*

## **(II) Interactional Results:**

### **(a) The Police Investigation:**

Problems traditionally experienced by victims:

#### **(1) Police response to victims' initial complaints:**

- Slow response/ screening
- Arrests made in only few cases
- Frustrating/ demeaning/ dangerous
- zero tolerance policies vs. cutbacks

#### **(2) Treatment of the victim during the investigation:**

Traditional problems:

- Insensitive questioning of victims and family members
- Failure to provide information about support services
- Putting the victim or his/her family under investigation

- Sudden, inconvenient and upsetting demands to ID suspects
- Long delays or refusal to respond to requests for information
- Public revelation of unwelcome information
- Holding victims' property for investigation
- Returning upsetting items to victims.

**(3) Methods of informing families of death or injury:**

- No standard procedures in past (e.g. could be by telephone/ in press)
- Mitigated today by training/ victim service programs.

**(b) Arrest/Bail:**

\* Grounds for arrest: successful investigation

\* Uncommon for an accused to be held in jail pending court. *Alternative measures* include:

- "appearance notice"
- "promise to appear"
- "recognizance"

\* Mandatory language in Criminal Code directs that police "shall" release the accused unless:

- necessary to establish offender's identity
- necessary to secure evidence
- to prevent the continuation of the offence
- to prevent the commission of another offence

\* If not released by police, the Criminal Code requires a bail hearing to be held very shortly afterwards where the Crown must "show cause" why the accused's continued detention is required. Generally, only succeeds when:

- detention is necessary to ensure the accused's appearance in court
- if necessary in the "public interest"
- if for the "protection and safety of the public "

From a victims' standpoint several aspects are very disturbing here:

- (1) Mandatory language/ burden on the Crown: dangerous individuals slip through the cracks
- (2) In most cases, no money has to actually change hands
- (3) There is no place for the victim to participate/ have input
- (4) Lack of information provided to victims.

### **(c) The Charging Process:**

Generally:

- An “information” is laid before justice of peace by police
- Communication between the Crown/ defence: decision made to increase, decrease or withdraw the charges.

Victims:

- Crown under technical duty to consider impact on victim
- Actual consultation with the victim has been rare
- Victim has *no legal standing* as a party to:

compel Crown prosecution of the offence;  
contest decisions to dismiss or reduce the charges;  
to accept plea bargains.

- Deals often cut “behind closed doors” / no input
- Upset over “inadequate” sentences
- Reinforces feelings of ineffectiveness/powerlessness

### **(d) Arraignment:**

\* Usually the first court appearance. Charges read & the accused enters plea.

\* If accused pleads guilty:

- proceeds to sentencing
- the victim may be given no information about this procedure
- victims (witnesses) "not required" - no chance to tell story.

\* If accused pleads not guilty, a hearing date will be set by counsel:

- Little input/ consideration of victim-witnesses
- Date may be weeks or months away
- Sudden subpoenas to attend
- Frustrating delays/ adjournments

### **(e) Preliminary Inquiry:**

\* For certain offences a preliminary inquiry may be held, *at the election of the accused*:

- determines whether sufficient evidence to send the accused to trial
- gives accused "two kicks at the can"
- accused either discharged or ordered to stand trial

\* Victims concerns:

- Traditionally shared waiting room with accused/defence witnesses
- Victims/ family exclusion from proceedings (subpoenas)
- When present, victims traditionally been given little warning of disturbing evidence
- Inadequate witness fees
- Evidence pointing to guilt is often excluded (voir dices)
- Witnesses re-live event on the stand/ emotionally damaging
- Harsh public cross-examination by defence / revictimization
- Accused being given two chances to walk free

### **(f) The Trial:**

\* Many of same concerns as above

\* The differences for victims at trial are:

- The possibility of additional upsetting evidence;
- Having to endure a further period of uncertainty; and
- The issue is now guilt or innocence ("proven guilty beyond a reasonable doubt")
- Having to relive the crime *twice*, and still face the possibility that the accused go free
- Appeals / granting bail pending appeal (drags out process/ safety concerns)

### **(g) Sentencing:**

\* When an offender has been convicted of an offence, the court will hear representations of both Crown and Defence counsel before passing sentence.

\*Victims have objected to several aspects of this process:

- Victims traditionally have little input;
- The historical trend towards more lenient sentencing/ emphasis on rehabilitation
- Courts keeping public opinion at arms length, even while acting on behalf of society
- Continued lack of information provided to victims
- Disparity and inconsistency in sentencing practices
- Problems in obtaining restitution

\* With regard to Victim Impact Statements, reported problems include:

- Until recently, were only done at the discretion of judge
- Restrictions on victims' comments
- Must be filed 2 days prior to sentencing. Problem when sentencing done after immediate guilty plea
- Cross-examination by defence
- Often aren't passed on to CSC and Parole

- Often ineffective in impacting final sentence.

### **(h) Parole:**

\* In cases where a sentence of imprisonment is imposed:

- UTA's can be granted at 1/6 of an offender's sentence
- Full parole eligibility is set at 1/3 in most cases
- Statutory release is generally set at the 2/3 point.
- Victims often feel that they have little if any say.

\* Relative lack of information available to victims from parole and corrections authorities. Victims *may, on request*, receive information such as:

- The date, type of release, and destination of the offender
- Certain terms and conditions attached to the release
- Whether the offender is returned to custody
- The fact that the offender has escaped custody

Victims have objected to this position on three grounds:

(1) By placing the onus on victims, many violent offenders may be released and seek to wreak revenge on unsuspecting victims.

(2) Victims have *no right to information*.

(3) Until recently, representations by victims to the Parole Board have, as a matter of procedure, been shared with the offender. This has at times resulted in harassment.

### **(i) Other Matters:**

- Young Offender's Act/Youth Criminal Justice Act.
- Dangerous Offender Legislation.
- Section 745.

### **(III) Recent Changes to Criminal Justice Institutions Relating to Victims of Crime:**

There have been a number of high-profile initiatives in recent years attempting to make the criminal justice process more sensitive to victims' concerns.

\* The *Federal Government*, for example:

(i) Passed Bill C-89 allowing:

- victim impact statements
- *in camera* hearings
- improved restitution and return of property to victims
- courts to order a ban on publishing the identity of witnesses
- imposed a "victim fine surcharge" on fines

(ii) Passed the "rape shield law"/made amendments

(iii) Passed making "stalking" an offence

(iv) Introduced further restitution provisions to the Criminal Code

(v) Passed legislation facilitating the use of DNA evidence

(vi) Increased sentences for those convicted of murder in Youth Court.

(vii) Limited the use of the drunkenness defence.

(viii) Increased sentences for hate crimes.

(ix) Passed Bill C-68 on gun control:

- increased penalties for illegally importing firearms
- increased penalties for the use of guns in a crime
- set up a national firearms registry



(x) Tightened up eligibility for judicial review hearings for murderers under the “faint hope clause.”

(xi) Created a new category of "long-term offender" mandating tougher supervision.

(xii) Has been looking at electronic monitoring for violent as well as non-violent offenders.

*Provincial Governments* have also been active. For example, they have:

(i) Long since introduced Criminal Injuries Compensation Programs.

(ii) Introduced Victim-Witness programs in some police and Crown Prosecutors offices across the country.

(iii) Passed so-called "Victims' Bills of Rights"

(iv) Trained police to sensitively deal with victims/ provide information

(v) Given police the power to publicize the names of released offenders that they believe pose a threat

(v) Introduced computerized systems to inform victims of the progress of an offender's trial.

Finally, there are *four emerging developments*:

(i) A slightly more open position by Correctional Services and the Parole Board regarding the release of information (e.g. a 1-800 number to call)

(ii) A more open position re: victim submissions at parole hearings in some jurisdictions (e.g. B.C.)

(iii) The Federal Victims' Bill of Rights, including:

- increased opportunities for victim input on bail and parole hearings
- removing the discretion of the judge and enshrining victim's "right" to make an impact statement

(iv) A slowly developing trend where victims apply to have private counsel act on their behalf as "intervenor" in the criminal justice process.

Ultimately:

\* Recent changes have made some progress towards alleviating the victim's plight in the criminal justice system.

\* However, *many of these remain at the discretion of officials within the system.*

\* It must be remembered that:

- the victim is still *not a party to the proceeding*
- has *very few, if any, enforceable rights*
- the process is still controlled by the state and defence counsel.

#### **(IV) Data from my Own Research:**

In 1999-2000 I conducted a study of:

- 24 clients and 5 support staff of Provincial Victim Services
- 10 clients and 6 support workers at a local womens' shelter/ outreach
- 12 clients and 10 support volunteers of impaired driving organization

One of the purposes was to examine the various "entry points" for the victim identity. One of these involved victims' encounters with the CJS.

Findings:

(A) Many people did not identify with the victim status simply as the result of victimization (31.9%), while 51% did.

(B) Those who claimed *initial* victim identity found that this was *exacerbated* by their encounters with the CJS. This “revictimization” involved :

- (1) Processes
- (2) Outcomes

\* Revictimizing processes (encourage sense of powerlessness):

- Neglect of their rights
- Lack of input
- Opportunities for offender to “play the system”
- Lack of information
- Numerous delays
- Harsh cross examination
- Offender abusing victim through system

\* Revictimizing Outcomes:

- Expectations/ let down
- Breaching orders/ little response
- “Lenient sentences
- Parole system’s impact

(C) Some individuals who didn’t express victim identity at the outset claimed that this was initiated by their encounters with the CJS (18.2% of sample):

- Many of the same reasons (processes and outcomes)

(D) 15.9% claimed that encounters with CJS had little/no impact on victim identity:

- Often had little involvement/ avoided it
- Limited their expectations
- Focused energies/ attention elsewhere

(E) 4.5% of clients had unclear pattern:

- Simultaneously pointing to aggravating and mitigating factors
- Support staff agreed

(F) No clients or support staff unequivocally claimed that the CJS mitigates one's sense of victimhood.

**Conclusion:**

\* Clients with extensive dealings with the CJS find that its procedures/outcomes either *initiate* or *add to* their sense of victimization

\* Some avoid this by limiting involvement/ focus/ expectations

\* A significant portion of individual's sense of victimization derives from encounters with the CJS.