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# SHIFTING THE BALANCE BETWEEN THE RIGHTS OF VICTIMS AND THE RIGHTS OF DEFENDANTS IN CRIMINAL PROCEEDINGS: A COMPARATIVE STUDY OF ISRAELI AND AMERICAN LAW

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“But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to filament. We are to keep the balance true.”

Justice Cardozo in *Snyder v. Massachusetts*<sup>1</sup>

In light of the recent legislative revolution in Israel,<sup>2</sup> judicial discourse in the realm of criminal procedure presently focuses primarily on the constitutional rights of the defendant.<sup>3</sup>

In an adversarial system of criminal law, the spotlight is usually upon the interests of either the State or the accused.<sup>4</sup> There is, however, another, largely silent, party to criminal trials. As the former Chief Justice of the Israeli Supreme Court, Meir Shamgar, recently pointed out,

[t]here is frequent talk about the balance between the rights of the

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1 291 U.S. 97, 122 (1934) (Justice Cardozo).

2 See A. Barak, *The Constitutional Revolution: Protected Human Rights*, 1(1) Law & Gov't in Isr. 9 (1992) (Hebrew); A. Barak, *Protected Human Rights: Scope and Restrictions*, 1(2) Law & Gov't in Isr. 253 (1993) (Hebrew) (hereinafter Barak, *Protected Human Rights: Scope and Restrictions*).

3 See, e.g., Symposium, *The Effects on Criminal Law of the Enactment of the Basic Laws Pertaining to Human Rights*, 1 Legal Res. 13 (1996); E. Gross, *The Procedural Rights of the Suspect or the Accused under the Basic Law: Human Dignity and Liberty*, 1 Legal Res. 155 (1996).

4 For a review of the subject, see Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 Stan. L. Rev. 937 (1985).

suspect or accused and the rights of the public. From the listener's perspective, this terminology conveys the image of a persecuted individual (the suspect or accused) versus the full Goliathic might of society, a powerful collective big brother, seemingly raising his fist.<sup>5</sup>

Rather, the violent delinquent, the rapist, the robber, and the person who recklessly endangers life constitute real dangers to the hapless victim, whom society is unable to protect in times of need. In most instances, society is able to respond only after the deed has been committed, which is often too late. The balance, in effect, is not between an omnipotent, anonymous public and the suspect or the accused but, rather, between a person accused of an offense, who persists in posing a threat to society and to its individuals members, and the potential or actual victim of the crime as well as any witnesses.<sup>6</sup>

The enactment by Israel's legislature, the Knesset, of the Basic Law: Human Liberty and Dignity,<sup>7</sup> which carries constitutional weight, has led to a revolution as the judiciary, the legal community, and society as a whole determine the full scope of the concept of human dignity vis-à-vis the suspect or the accused. However, the concept of human dignity applies also to the victim; he too has certain rights stemming from this concept.<sup>8</sup>

Recent years have witnessed a change in public opinion insofar as the victim's status in criminal proceedings is concerned,<sup>9</sup> and public movements have taken up the struggle to protect the rights of particular categories of

5 F.H. 2316/95, *Ganimath v. State of Israel* 49(4) P.D. 589 (author's translation) (emphasis added).

6 *Id.*

7 1992 *Sefer HaHukim* [S.H.] 1391.

8 The Basic Law: Human Dignity and Liberty carries with it a constitutional message to every individual in society. However, this message is intended for the whole of society and not only for the criminals in it. The actual and the potential victim of an offense and every innocent citizen are entitled to the protection of their dignity and liberty against fear, threat and injury, no less than the accused. The right of a woman not to revert to being a punching bag for blows and humiliation is of no less importance than the right of her violent husband to his freedom. The right of a young girl, who innocently moves around on roads, not to be a victim of another rape is no less strong than the right of the accused not to be arrested . . .

Former Chief Justice Shamgar, in *Ganimath*, 49 P.D. at 621 (author's translation).

9 See C.R. Goddu, *Victim's "Rights" or a Fair Trial Wronged?*, 41 *Buff. L. Rev.* 245, 250-57 (1993).

victims.<sup>10</sup> A multilateral social dialogue has been set in motion on the question of whether the existing constitutional balance between the State's interests and the rights of the defendant should be reconsidered in view of the victim's rights and interests in human dignity.

This article will examine certain constitutional issues relating to victims of crimes, in light of the inception of this constitutional revolution.

The constitutional issues can be divided into two spheres: the substantive and the procedural. The former sphere, which this article will only partially touch upon, relates to the victim's right to be protected through the enactment of clearly defined offenses, the delineation of clear guidelines on what constitutes legitimate self-defense, and the enforcement of appropriate punishments.

The procedural sphere, which will be the focus of this article, traces the victim's right to be involved in criminal proceedings, the type of involvement, and his procedural rights. The first section of this article will present a short historical synopsis of the victim's status in criminal proceedings under English law. The second section will attempt to examine the victim's status in contemporary Israeli law. The third section will deal with the victim's status in the United States. The fourth section will present a proposed new balance, warranted by the constitutional revolution in Israel, between the rights of the suspect or accused and those of the victim. The fifth section concludes the study.

### I. The Victim's Status in Criminal Proceedings: An Historical Synopsis

In tribal England, as in other ancient societies, the family constituted the primary social nucleus. Family members bore mutual responsibility for the criminal deeds of one another. During this period there was no central government as we know it. The victim's affairs were attended to by him and his family; there was direct privity between victim and offender. The price of the offense committed could be settled by paying either monetary or other

10 For a review of the main movements established in the U.S. related to this subject, see S.S. Abramson, *Redefining Roles: The Victims' Rights Movements*, 2 Utah L. Rev. 517, 521-32 (1985). The author explains the rise of the new victim's rights movements in the U.S. as a result of the significant growth in the crime rate and that this phenomenon is not restricted to any specific strata of American society: "The victim is no longer only a rape victim or a minority or a poor person. The victim has become middle class America. We are all potential victims." *Id.*

equitable “damages.” Alternatively, if fiscal recompense was not forthcoming, the victim or his familial representatives could avenge his honor or the spilling of his blood by carrying out a “blood feud,” namely, by inflicting injury on the perpetrator or on a member of the perpetrator’s family.<sup>11</sup>

During the feudal period, new norms regarding recompense of the victim of a crime came to be accepted. For instance, compensation, known as *wer* or *wergild*, was granted to a victim’s family in cases of death or grave bodily harm, while *bot* was compensation to be paid to the victim’s family for harm of a lesser degree, and *wite* was a fine to be paid by the perpetrator to the landowner or the King for a similar crime. At the turn of the seventh century, the matter of compensation, its rate, and manner of payment to the victim became incorporated into law.<sup>12</sup>

During the feudal period, both landowners and the Church, a focal governing body in England, played a pivotal role in the compensation process. A share of the compensation that the perpetrator was required to pay to the victim or to his family was paid to the Church or to the landowner, the victim’s feudal lord. This amounted to the beginnings of the transfer of the victim’s representation from his relatives to an authority unrelated to him.<sup>13</sup>

Concurrently, in this period, the King’s law courts began to develop. Although this process would continue over several centuries, its inception could already be detected in the feudal period in the acts legislated by King Ethelbert. The monarch became the legal entity to which compensation was

- 11 Henry D. Traill, *Social England* 5 (1899). See also J. Hagan, *Victims Before the Law, The Organizational Domination of Criminal Law* 8 (1983) (quoting E.Z. Ziegenhagen, *Victims, Crime and Social Control* 36 (1977)): “Contrary to modern conceptions of punishment, the injury inflicted upon the perpetrator reflected the damage sustained by the victim as well as the context in which the offender was apprehended; and contrary to contemporary western conceptions, the moral guilt of the perpetrator was of no concern.”
- 12 The scholar Hibbert describes the prevailing system during that period:

A man who lays with a maiden belonging to a king, for example, had to pay fifty shillings compensation, but if it was a “grinding slave” the compensation was halved. Compensation for laying with a nobleman’s serving maid was assessed still lower at twelve shillings and with a commoner’s serving maid six shillings. If a freeman raped the slave of a commoner he had to pay more than five shillings’ compensation, but if a slave raped this same girl he was castrated.

C. Hibbert, *The Roots of Evil: A Social History of Crime and Punishment* 4 (1963).

- 13 *Id.* See also C.R. Jeffrey, *The Development of Crime in Early English Society*, 47 *J. of Crim. L., C. & P. Sc.* 647–66 (1957).

paid for certain transgressions in addition to, and sometimes in lieu of, the compensation paid to the victim.<sup>14</sup>

Criminal proceedings, however, continued to be characterized as a private proceeding, in that it fell within the scope of responsibility of victims or their alternates to initiate criminal proceedings, summon the defendant, gather the evidence, and meet the formal requirements of the statement of claim.<sup>15</sup> The shift to a somewhat more modern judicial system took place only during the reign of Henry II. During this period, feudal statutory law was dissolved and was replaced by Common Law. This constitutional “revolution” widened the already existing chasm between Church and State insofar as criminal law was concerned. Responsibility for enforcing criminal law was gradually transferred from the Church and landowners to the Common Law courts. As early as 1226, an agreement entered into between the family of a murder victim and the defendant’s family could not absolve the defendant from criminal liability.<sup>16</sup> The State no longer sanctioned the settlement of criminal disputes by way of an agreement between victim and offender.

Nevertheless, the victim’s initiative, or that of his alternates, was still required in order to activate criminal proceedings; this requirement remained in force in England until the end of the nineteenth century. The pivotal role of the victim as the initiator of the judicial procedure and as the person in whose name the defendant was brought to trial was challenged by the well-known scholar Cesare Beccaria in the mid-eighteenth century. Beccaria opined that criminal law was intended primarily to serve society’s interests rather than those of the victim. He claimed that the objective of a criminal trial was not to gain compensation for the victim but, instead, to inflict punishment in order to deter the accused and others like her from carrying out similar crimes in the future and, in this manner, to compel the offender to pay her dues to society. Beccaria maintained that

[t]he aim of punishment is neither to torment nor to afflict a sensible being, nor to prevent a crime which has already been committed from

14 See Hagan, *supra* note 11, at 9. Hagan quotes Dorothy Whitelock, *The Beginning of English Society* 139–42 (1952).

15 J.B. Thayer, in his well-known book, *A Preliminary Treatise on Evidence at the Common Law* 8–9 (1989), notes: “. . . [t]he preservation of very old traditional methods, as if sacred; a rigid adherence to forms; the absence of a development of the rational modes of proof.”

16 See Hagan, *supra* note 11, at 10.

taking effect . . . the aim of chastisement is nothing but to prevent the criminal from injuring society anymore, to deter his fellow citizens from attempting similar crimes.<sup>17</sup>

The focal point of this thesis is the utilitarian approach. Jeremy Bentham expanded upon Beccaria's approach,<sup>18</sup> attempting to explain chastisement in scientific terms. The most significant development in this respect, however, was the application of the guiding principles of modern economic capitalism to this theory. According to these principles, the victim lacks all standing in a criminal proceeding; any injury caused by the perpetrator's behavior is deemed to be directed against society, and the victim is not entitled to take any part in decision-making regarding the initiation and conducting of criminal proceedings. Hence, the public prosecutor acts on behalf of society as a whole, rather than on behalf of the victim.<sup>19</sup>

As noted, until the nineteenth century, the prevailing attitude was that criminal proceedings were the private concern of the victim. He would initiate the proceedings, and he was responsible for carrying out the investigation and for gathering evidence. By the mid-nineteenth century, this principle increasingly came to be viewed as invalid, since in numerous instances, a criminal trial was not instigated merely due to the fact that the victim or his family lacked the resources. Both the growing realization that the existing system was unjust as well as the newly-emerging utilitarian theories prompted, in 1879, the establishment of a central police force and the office of the Attorney General.

The result of this constitutional change was that the victim no longer constituted the focal point of criminal proceedings and his formal standing as a participant in the trial was negated. Utilitarian philosophy was in the ascendant; it held that injury was inflicted on society and the State rather than on the individual and that considerations of expedience, cost versus benefit, should prevail in the matter of trial and punishment of the offender.

17 Beccaria (1764), as quoted in E. Halevy, *The Growth of Philosophic Radicalism* 57 (M. Morris trans., 1960).

18 J. Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns & H.L.A. Hart eds., 1970).

19 As pointed out by Hagan, *supra* note 11, at 11, "[t]his principle required a fundamental change in English and North American systems of criminal justice — a shift from private to public prosecution."

## II. The Victim's Role in Criminal Proceedings: The Israeli Perspective

In order to understand the victim's position in criminal proceedings, it is necessary to attempt to define the crossroads and stages of a criminal investigation and trial where the victim's involvement would seem plausible:

- (1) initiating criminal proceedings;
- (2) the criminal investigation;
- (3) the decision to bring the suspect to trial;
- (4) reaching a plea bargain with the accused;
- (5) conduct of the trial; and
- (6) sentencing.

Two further issues will be considered:

- (7) protecting the victim during criminal proceedings, and
- (8) compensating the victim.

It is important to bear in mind that although the criminal proceeding in Israel is derived from the Common Law system, already from the outset it diverged substantially from the accepted norms in England: trial by jury, a fundamental and pivotal element of the English penal system, has never existed in Israel. Moreover, while in England by the nineteenth century, the investigation of crimes was carried out by an examining magistrate within the framework of a preliminary investigation, in 1965 Israel replaced the British Mandate criminal proceedings with the Israeli Criminal Procedure Law, which, *inter alia*, abolished the preliminary investigation and transferred the investigation of all types of crimes into the hands of the police. In 1982, the 1965 law was replaced by a new law that incorporated different amendments to the prior Act. Since 1982, a number of additional important amendments have been incorporated into the Criminal Procedure Law (Consolidated Version) (hereinafter "1982 Criminal Procedure Law"), and this Law is the product of Israeli originality. I will discuss below certain innovative provisions that do not exist in the Anglo-American legal system.

### *1. The Victim and the Initiation of Criminal Investigations*

Section 58 of the 1982 Criminal Procedure Law provides that any individual is entitled to file a complaint to the police that a crime has been committed. Section 59 provides that if the police are aware that a crime has been committed, either due to the lodging of a complaint or by any other means, an investigation must be launched.

It is evident from these provisions that the victim's initiative is, indeed, a

sufficient but not necessary condition for commencing criminal proceedings. The police are authorized to initiate an investigation even if the victim or his alternates have not filed a complaint.<sup>20</sup>

On the other hand, neither a victim nor his alternates have a vested right that filing a complaint will lead necessarily to the opening of an investigation. Indeed, section 59 authorizes a police officer from the rank of captain upward to direct against investigating a complaint for a misdemeanor or a misfeasance if he or she determines that there is no public interest in so doing or if another authority is legally competent to investigate the offense.<sup>21</sup> This refusal, however, entitles the complainant to appeal to the Attorney General<sup>22</sup> and, possibly, even to contest the latter's decision in the Supreme Court.<sup>23</sup>

It would appear that the Basic Law: Human Dignity and Freedom did not affect this state of affairs. This is not so much due to the Law's preservation clause<sup>24</sup> as it is to the fact that in Israel, the victim still lacks the right to have his complaint investigated should the State show prevailing interests for non-investigation. The current terms of section 59 seem to provide the best formula for protecting the victim's right to having his claim investigated. A balance is created in that on the one hand, the police are bound to investigate serious criminal offenses and a failure to do so cannot be justified by other legitimate considerations, whereas for less serious crimes, legitimate arguments not to investigate must be considered.

It should be noted that despite the importance of the initiative of the victim in bringing his matter to the attention of the authorities and despite the fact that at times, absent such initiative, the police would be unable to

20 Justice Kedmi correctly points out that when it is a matter of opening an investigation based on information, the police must determine the priority to be given to this information and establish an appropriate order of work. The only recourse for checking police discretion is to petition the High Court of Justice. *See* 1 Y. Kedmi, *On Criminal Procedure* 246 (1989).

21 The concept of "lack of public interest" is an open one prone to broad interpretation; it can include complaints that, according to the police, relate to neighborly disputes, or personal disputes where police intervention will only make matters worse, or the investigation of petty matters, which have been known since the Amendment to the Penal Law as "deminimis matters" (Penal Law § 34(17)). *See also* 1 Kedmi, *supra* note 20, at 247.

22 *See* Criminal Procedure Law § 64.

23 *See, e.g.*, H.C. 561/75, *Ashkenazi v. Minister of Defence*, [1976] 30(3) P.D. 309.

24 Section 10 of the Law states that "[t]here is nothing in this Basic Law to invalidate a law in force prior to the legislation of the Basic Law." Formally, the validity of the Criminal Procedure Law, including its amendments until the legislation of the Basic Law, is safeguarded.

investigate the case due to a lack of relevant sources of police information, it is accepted that in general, the victim is under no legal obligation to inform the police. Moreover, we may wonder whether the victim has the right to prevent an investigation from being undertaken, for instance, where the perpetrator is a relative, a family member, or a friend.<sup>25</sup> Prior to the legislation of the Basic Law: Human Dignity and Freedom, victims did not have the right to prevent an investigation from being opened, and even today, we cannot speak of the victim's constitutional right that his matter will not be investigated without his consent. If we were to agree with the thesis that the victim's consent is required to open criminal proceedings, then we would recognize a privity of a "civil" nature between victim and criminal, a state of affairs that prevailed in England over a century ago.

Rather, the nature of privity in Israeli criminal procedure currently is primarily public, namely, between the public or State and the criminal.<sup>26</sup> It therefore is not appropriate to discuss conditioning proceedings upon receipt of the victim's approval.<sup>27</sup>

## 2. *The Victim and the Criminal Investigation*

Another issue is the victim's right to be involved in the criminal investigation. It would seem that at present, no such right exists. The 1982 Criminal Procedure Law does not offer victims any degree of involvement in the investigative process.

The term "involvement" over the course of the investigation can refer to a number of potential situations. We could ask, for instance, whether the

25 The problem is likely to arise mainly with regard to offenses involving violence within the family, where the victim's considerations are difficult and perhaps also conflicting. For these reasons, the police have made a practice in the past, as a matter of policy, of not "breaking in" to the family circle and investigating complaints on this subject. However, this trend has changed today due to the understanding that the victim in most cases is trapped within the framework, and in order to protect the victim, there is no alternative but to commence the inquiry. See the Audit Report on the subject, Ministry of Police, *The Manner in which the Police Handles Violence between Spouses* (Dec. 1993). See also Part F-1 of the 1977 Penal Law, dealing with offenses against minors and defenseless persons, and in particular, see section 368(d) of the Law, which prescribes a duty to report a parent in respect of an offense against a victim covered by this part of the Law.

26 See section 11 of the Criminal Procedure Law, which states that the plaintiff in criminal law is the State, represented by the prosecutor.

27 This, with regard to offenses of misfeasance and misdemeanor. As for offenses that are crimes, there is no discretion as to whether to commence an investigation under section 59 of the Criminal Procedure Law.

victim has the right to expect the police to inform him regarding the progress of the investigation, or the right to be present during the course of the investigation, or even the right to play an active role in the investigative process, for example, interrogating witnesses and offering directions for the investigation. The Criminal Procedure Law does not recognize the victim's right to be involved in the investigation in any manner or any stage whatsoever. For as long as the State's prescriptive role is to uphold and to enforce society's rules and for as long as the utilitarian theory prevails as the core of the adversarial system, it seems that there will be no room for granting the victim of a crime formal standing.

Nevertheless, it is possible that different rules should be applied for cases in which the police, during the course of an investigation, offers a plea bargain or the opportunity to turn an offender into a state witness. This option will be discussed below.

### *3. The Victim and the Decision to Bring the Suspect to Trial*

Does the victim have the constitutional right to be involved or heard regarding the question of whether to bring the suspect to trial?

Section 62 of the 1982 Criminal Procedure Law mandates that if the investigative material presented to the prosecutor includes sufficient evidence that a crime has been committed, the prosecutor must indict the suspect, unless he or she determines that under the circumstances, the public interest will not be served. Section 62 provides that the complainant has the right to submit an appeal to the Attorney General against the prosecutor's decision not to prosecute.<sup>28</sup> In any event, a victim also has the right to appeal to the court if he is the complainant in the file.

However, does this arrangement, which grants the victim the right to challenge the prosecutor's decision to refrain from bringing a suspect to trial, guarantee a sufficient balance between the various conflicting interests?

It is necessary to differentiate between the two sets of circumstances under which a prosecutor is allowed to refrain from filing an information, namely, if there is a lack of sufficient evidence or a lack of public interest. The victim has no constitutional right to participate with the prosecutor, either of his

28 This is the case unless it relates to one of the offenses included in the second supplement of the Law. The list includes the details of offenses where the victim of a crime is entitled to file a private criminal complaint against the accused.

own volition or through his attorney, in examining and evaluating the body of evidence.

On the other hand, in cases where the prosecutor determines that the evidence available warrants indictment but that an information should not be filed due to lack of public interest, the victim does have the right to be heard, although he may file an appeal. The concept of human dignity, which includes the dignity of the victim, can sustain the interpretation that the victim has a right to be heard in matters concerning indicting the precipitator of his injury, as long as it does not encroach upon the Attorney General's professional responsibility. A proper balance between the different interests involved in the matter is thereby achieved.

#### 4. *The Victim and Plea Bargains*

Does the victim have a constitutional right to be involved in plea bargaining discussions with the accused?<sup>29</sup>

Plea bargaining in Israel's judicial system does not fall within the realm of statutory law. Instead, it is the product of judicial practice, and recently it was proposed that it be anchored in statutory law.<sup>30</sup> Within the framework of the victim's constitutional rights, it is proper and considerate to listen to and consult with the victim or his representative in all matters relating to agreements entered into with the accused and benefits pledged to her.<sup>31</sup>

In the context of plea bargaining, it is conceivable that the accused will enjoy certain benefits, beginning with hearings of dismissal, to reduction of charges, and, finally, agreements to mitigate her sentence. On the other hand, consideration should be given to the victim's legitimate expectation

29 My analysis also includes a "state witness" agreement.

30 The 1995 draft bill for the Criminal Procedure Law (Amendment No. 19) (Plea Bargain Arrangement), 2374 *Hatzaot Hok* [H.H.] 360 (1995).

31 The draft bill also adopts a similar view, although to a more modest extent. For example, section 1 of the draft bill states that section 155D will be added to the Criminal Procedure Law (*id.* at 361) and will prescribe:

Where the accused is charged with a crime under Parts A, B, E, F-1 or G of Chapter Ten of the Penal Law, 1977, the prosecutor is entitled to give an opportunity to a person who was directly injured by such an offense, or to his legal representative (hereinafter — "the victim") to comment on the plea bargain arrangement offered to the accused. The victim's comments, if same are given, will be taken into account in the prosecutor's considerations with relation to the plea bargain arrangements.

(author's translation).

that the public prosecutor's office will represent him, will charge the perpetrator of the crime as she justly deserves, and will solicit a punishment befitting the crime. The victim should have the constitutional right to be consulted with if anything precludes the fulfillment of this legitimate expectation and to have his opinion heard regarding the formalizing of a plea bargain.<sup>32</sup>

### 5. *The Victim and the Trial*

One of the prominent issues regarding the victim's involvement in criminal proceedings is the question of his right to participate in the conduct of the trial against those who harmed him.

It is necessary to clarify what is meant by "conduct of the trial." One could envision the victim appearing as supplementary prosecutor, with all that this would entail. It is possible to imagine a lesser degree of involvement, such as a limited privilege to supplement the evidence presented by the prosecutor, to interrogate witnesses after they have been interrogated by the prosecutor, or to give a statement during the conviction and sentencing stages of the trial.

It should be remembered that while civil law is characterized by privity between private individuals, in criminal law, privity exists between the State and the citizen.<sup>33</sup> As a result of this differentiation, the legislature refrains from recognizing any contingencies whereby the victim may participate in the conduct of a criminal trial, with one exception that proves the rule, namely, bringing private criminal charges.

The concept of private criminal charges is likely an historical vestige of the period when criminal privity existed between victim and accused. As noted, over the years, the victim's role was replaced by a governmental body, and the handling of most criminal transgressions was removed from the victim's jurisdiction. A small number of crimes, however, mostly offenses or misdemeanors, continued to be characterized by direct privity between victim and accused.<sup>34</sup> Even in these cases, however, the victim's dispensation to person-

32 On investigating the truth and plea bargain arrangements, see E. Gross, *Plea Bargaining and the Search for Truth*, 1992(3) Plilim 251 (Hebrew); see also the author's book on state witnesses, E. Gross, *The Crown Witness* (1988).

33 The latter type of privity applies also in the civil law sphere where, for example, the State sues or is sued in respect of damage or liability under contract or tort.

34 See the list of offenses in the Second Schedule to the Criminal Procedure Law. The exception is when the accused is a civil servant, in which case, a precondition to the

ally bring his contention claim to trial is narrow and conditional. Indeed, after receiving competent notification that private criminal charges have been filed, the Attorney General has the prerogative to supersede the complainant and the State Attorney's office will conduct the prosecution.<sup>35</sup>

The prevailing legal provisions on this matter reflect the accepted norms that in principle, prosecution rests with the public authorities and that the victim as a private individual has no right to interfere or to participate in the conduct of the trial. Did the Basic Law: Human Dignity and Freedom, which created the option of a different outlook on the rights of the victim, change this situation?

Recognition of the victim's right to participate in the conduct of a trial beyond what is currently permissible might be seen to stem from the conceptual upheaval engendered by the Basic Law, so great that its repercussions were felt throughout the entire legal system.<sup>36</sup> It is doubtful however whether such a radical change can be inferred from the concept of the victim's dignity and liberty. This point will be left for later consideration, and we will return to it after a review of the relevant comparative constitutional law.

#### 6. *The Victim and the Sentencing Process*

If one has misgivings regarding the victim's right to participate in the prosecution's conduct of the trial, there must be less hesitance regarding his right to be involved during the judicial stages leading to sentencing.

Although the Criminal Procedure Law does not specifically state that the victim has the formal right to be heard regarding the form and severity of the punishment of the convicted offender, such an option does, nevertheless, exist with the prosecutor's consent.<sup>37</sup>

Is the Basic Law: Human Dignity and Freedom likely to alter matters? It

commencement of legal proceedings is obtaining the permission of the Attorney General; Criminal Procedure Law § 69.

35 Criminal Procedure Law § 71.

36 Such recognition of the victim's right to participate in the conduct of the trial would render our judicial system comparable to the system of certain European countries. W.T. Pizzi & W. Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 Stan. J. Int'l L. 37 (1996).

37 Section 187 (A) of the Criminal Procedure Law determines that once "the court has convicted the accused, the prosecutor will present evidence regarding the accused's previous convictions before sentence is passed, and he is also entitled to bring other evidence in this matter" (emphasis added). Within the framework of other evidence, it is accepted to hear the victim's statement. See also 2 Kedmi, supra note 20, at 286.

seems that here, the answer is in the affirmative. This conclusion derives from the fact that the victim must be allowed recourse to the court and to express his opinion on matters of importance to him and that this in no way impedes the prosecutor's work, nor does it represent an infringement of the prosecutor's professional duties.

The current Criminal Procedure Law shows an imbalance in this matter. On the one hand, the Law enables the accused to convey to the court the attenuating circumstances of her case,<sup>38</sup> while on the other hand, it fails explicitly to allow the victim to appear in court and to make a statement if he so desires.<sup>39</sup> Generally, at the time of sentencing, the information available to the court is not sufficiently balanced, since the victim is not summoned to court and has no formal right to initiate a hearing. The result is that at this procedural stage, most of the factual material conveyed originates from the accused and her witnesses. This is even more so the case in instances where the accused has confessed to the crime, since under this contingency, the victim usually is not called to testify on the circumstances of his injury.

As a result of a recent debate involving the balance of rights between the defendant and the victim of a sexual crime, regarding the information brought forth in court, the Knesset amended the Criminal Procedure Law to enable the victim of a sexual crime, if he or she wishes, to inform the court of his or her condition as a result of the crime.<sup>40</sup> Although at present, this prerogative is limited to victims of sexual crimes, there is no reason not to extend it to victims of other types of crimes on the basis of the interpretation of the dignity of the victim.

### *7. Protecting the Victim During Criminal Proceedings*

Does the victim of a crime have the constitutional right to receive protection throughout the duration of the investigative proceedings and the trial?

In Israel, there is no *de facto* comprehensive constitutional standard on this matter, as there is in the U.S.<sup>41</sup> It is worthwhile to reflect briefly on some of the precautionary measures that may form part of the victim's constitutional right to protection of his dignity and liberty.

38 See § 189; *cf.* 2 Kedmi, *supra* note 20, at 292–95.

39 This right is recognized in the U.S. See, e.g., G.P. Fletcher, *With Justice for Some — Victim's Rights in Criminal Trials* 198–201 (1995).

40 Section 187(B). The amendment came into effect in January 1997.

41 See, e.g., the codified Victim and Witness Protection Act, 1984, Publ. L. No. 98-473, 98 Stat. 2170, at 42 U.S.C. 10601-05 (1988).

The debate in this context does not revolve around a potential victim's license to demand protection from the State against an eventual injury, prior to a crime. Rather, it pertains to the right of an individual who has already been injured over the course of a crime to demand from the authorities protection from further harm.

The first and foremost question that arises in this context is whether to protect the victim from the perpetrator of his injury. In certain instances, the suspect is likely to inflict further harm on her victim or a member of his family, either in order to complete her misdeed, to intensify the suffering or damage caused, or to deter her victim from lodging a complaint or testifying against her.

In theory, all victims are entitled to expect such protection from the State.<sup>42</sup> This should be seen as a constitutional obligation imposed upon the authorities. In the absence of specific legislation that determines the scope of this right and its implementation, however, it is difficult to envision its enforcement.<sup>43</sup>

One of the methods for ensuring that a victim will not be harmed repeatedly by the accused during the course of the legal proceedings is to incarcerate the latter. For instance, section 21A(1) of the Criminal Procedure Law includes as one of the justifications for arrest until the conclusion of the proceedings the existence of reasonable grounds to believe that if allowed to go free, the accused will endanger the life of another. The Supreme Court endorsed section 21A as reflecting the appropriate balance between the right of the accused and the rights of all others concerned in the matter.<sup>44</sup>

The victim's right to protection exists, however, not only vis-à-vis the accused, but also against the latter's envoys or those who may not hesitate to impose further injury on the victim. Within this context, it is imperative that the victim be protected on his way to and from court and throughout his court appearances. This is important not only to ensure his safety there, but

42 This right is today a constitutional one and stems from the contents of section 4 of the Basic Law: Human Dignity and Liberty, which reads: "All persons are entitled to protection of their life, body and dignity," and the State is obliged to honor this right, as stated in section 11 of the Basic Law: "All governmental authorities are bound to respect the rights under this Basic Law."

43 It might be possible to petition to the High Court of Justice in order to compel the police or other government agency to safeguard the security of the victim, in a case where such agency has ceased to do so or has not complied with its statutory duty.

44 Chief Justice Shamgar in F.H. 2316/95, Ganimath v. State of Israel 49(4) P.D. 589, 621.

also to establish a comfortable atmosphere which will shelter the victim from an encounter with the defendant's family or friends. The establishment of areas of segregation within the courthouse is not only warranted by reality, but is also the victim's constitutional right.

An interesting question that arises in the context of victim protection is whether the victim has a right to protection from mental anguish resulting from his obligation to testify against the defendant. In order to answer this question, it is necessary to examine the circumstances under which such an affront may occur. Situations where mental harm could ensue include cases of sexual or violent crimes.<sup>45</sup> The constitutional provision to protect victims against additional mental hardship is, I would argue, anchored in the Basic Law: Human Dignity and Freedom.<sup>46</sup>

Since it is assumed that from a conceptual perspective, the rights of the accused and the victim are not absolute but relative,<sup>47</sup> the question is how to balance these conflicting rights. These rights are horizontal,<sup>48</sup> and a balance between them can be reached by examining whether adopting the victim's right endangers the defendant's ability to defend herself adequately or whether this would only aggravate her position but with no risk of causing a miscarriage of justice. The underlying assumption is that there is a need to uphold the defendant's procedural rights, namely, her constitutional guarantee to defend herself. Thus, the defendant is entitled to be present in the courtroom and to confront witnesses, to demand that they "look her in the eye" and state their claims. Judicial proceedings in general and criminal proceedings in particular cause stress and embarrassment to the witnesses because of the tension involved in testifying, in confronting the defendant, and in cross-examination. However, these factors, even if they cause some mental distress to the witnesses and especially to the victim, cannot justify

45 The only circumstance that has been recognized under Israeli legislation and in most countries that follow the Anglo-American legal system is where the testimony of a minor is involved, whether the minor is a victim of a sexual offense or a witness thereto. The minor has a right, especially if the accused is his parent, not to testify in the presence of the accused, for fear of psychological damage. See Rules of Evidence Amendment Law (Protection of Children), 1955, § 2(a) (1990 amendment).

46 Sections 2, 4, and 11.

47 "The basic rights which are protected under Basic Laws are not absolute. They are only relative rights. This relativity does not derive from the definition of human rights, rather from their disposition in the Basic Laws and the limitations which the Basic Laws place on them." Barak, *Protected Human Rights: Scope and Restrictions*, *supra* note 2, at 255.

48 Barak, *Protected Human Rights: Scope and Restrictions*, *supra* note 2, at 265.

denying a procedural constitutional right such as the defendant's right to confront witnesses testifying against her; she is entitled to demand to remain in the courtroom and be confronted by her accusers. Conversely, there may be some excessively difficult cases where it is certain that compelling the victim to testify in the presence of the defendant would likely cause the victim grievous mental harm, even endanger his life. Under such circumstances, the prosecution is faced with the dilemma of deciding whether, in light of the crucial and irreplaceable nature of his testimony, to force the victim to testify at the risk of causing him severe harm or to forego his testimony and, in so doing, to enable the release of an individual who, under different circumstances, might be convicted and who should be placed behind bars.

It seems expedient to borrow the balance established for the disclosure of relatively privileged evidence in order to set the correct procedural balance between the victim's right to protection of his mental well-being and the defendant's right to due process and justice.<sup>49</sup> The focal point of the formula of the former is the need to uncover the truth and prevent abuse of the law.<sup>50</sup> In the former context, where the disclosure of privileged evidence may harm state security, the court has held:

...[r]endering justice in this context signifies conducting fair criminal proceedings to uncover the truth and not to cause an injustice to the specific accused who has been charged. Accordingly, if the privileged investigative material is vital to the accused's defense, then justice

49 "We are not interested in a single language for balancing, according to which the scope of human rights will be determined. We are interested in a large number of balancing formulae, which will change according to the eventualities created by the reciprocal relationship between the various rights." Barak, *Protected Human Rights: Scope and Restrictions*, *supra* note 2, at 265; *see also* H.C. 153/83, *Levi v. Southern Dist. Police Commander*, [1984] 38(2) P.D. 393, 401, *translated in 7 Selected Judgments Sup. Ct. Isr.* 109 (1983–1987).

50 For example, if we examine the immunity in favor of the State under section 44(a) of the Evidence Ordinance, the court is required to strike a balance between

two conflicting interests. On the one hand there is the interest which serves as the cornerstone for the entire criminal process, namely, uncover the truth so that an innocent person will be acquitted and a guilty person convicted . . . On the other hand, there is the consideration that public interest sometimes requires the non-revelation of investigative material, as its exposure may harm state security.

Justice Barak in *M.A. 838/84, Livne v. State of Israel*, [1984] 38(3) P.D. 729, 733–35.

certainly demands the disclosure thereof, and this consideration outweighs any possible security consideration. No security argument, regardless of its significance, can weigh heavier than the relative weight of a specific trial, than the weight of an innocent person being convicted of a crime.<sup>51</sup>

On the basis of this formula, the Knesset recently amended the procedure dealing with testimony given in court by a victim of a sexual crime.<sup>52</sup> The Amendment to the Law states that the court is entitled, either on the basis of its own motion or upon application by the prosecutor, to permit the complainant to testify in the absence of the accused. While the law did not establish a balancing formula, "under these circumstances, the upsurge of judicial balance formulae was unavoidable; according to which the limitations of each person's rights will be settled."<sup>53</sup>

Is any apprehension that a victim may suffer harm sufficient to deny the defendant's right to confrontation? The answer is most certainly not. It should not be assumed that a slight and fleeting injury can justify denying the defendant her fundamental right to be present at her trial and to confront her accusers in court.

Even though the law does not define the nature of the injury to the victim, it seems that the Amendment aimed for the minimal possible damage to the defendant's constitutional rights. Only when substantive rather than transient harm is inevitable, leading to a degeneration in the complainant's mental state or a disruption of his treatment, and as long as on the other hand, there is no fear that removal of the defendant from the courtroom during testimony would cause a miscarriage of justice, the court may favor the victim's right.<sup>54</sup>

With regard to the victim's protection throughout the duration of a criminal proceeding, it is worthwhile to recall a provision added to the law that was intended to create a balance between the right of a sexual crime victim to safeguard his or her privacy and reputation with the defendant's right to conduct a comprehensive cross-examination and to uncover the

51 *Id.* at 738.

52 See Criminal Procedure Amendment Law (Interrogation of Witnesses) (Amendment No. 2), S.H. 1511 (1995). There appears to be no similar precedent for such a provision in the laws of countries that follow the adversarial system.

53 Barak, *Protected Human Rights: Scope and Restrictions*, *supra* note 2, at 264.

54 The courts apparently have not yet been asked to examine the constitutionality of this provision.

truth. Section 2(a) of the 1957 Amendment of Procedure (Examination of Witnesses) Law states that the court will not admit examination of a complainant's sexual history unless it deems that precluding such an examination would lead to a miscarriage of justice.

Here it seems that the legislature has established a balance formula based on the principle that the defendant's right to conduct a cross-examination in the matter of a victim's sexual history is subordinate to the victim's right to safeguard privacy and reputation.<sup>55</sup> Does this formula conform with the legislative test of the Basic Law: Human Dignity and Freedom? It seems that with respect to the objectives of this provision, as well as the balance of interests of all those concerned, section 2(a) is, indeed, constitutionally valid. Similar to other cases of conflicting procedural rights during a trial, the preference that must be given to uncovering the truth and to preventing any miscarriage of justice to the defendant is apparent in the legislature's qualification of the aforementioned balance formula with the express condition that prohibiting a cross-examination must in no way cause a miscarriage of justice to the defendant.

#### *8. Compensation of the Victim by the Defendant and/or the State*

A discussion of the victim's constitutional rights is not complete without addressing the matter of whether and what compensation is to be paid to the victim by the defendant and/or the State. This, of course, is apart from any right to compensation under civil law, such as in tort law.<sup>56</sup>

Until the enactment of the Basic Law: Human Dignity and Freedom, the issue of victim compensation in the framework of criminal proceedings in Israel was regarded as an auxiliary matter, secondary to the prominence of the court hearing on the accused's punishment. The assumption was probably that the matter of compensation should be determined in separate proceedings and that there should be no divergence from the principal objective of the sentencing phase of the trial.<sup>57</sup>

55 For a comparison to the Rape Shield Acts in the U.S., see H.R. Galvin, *Shielding Rape Victims in the State and Federal Courts*, 70 Minn. L. Rev. 763, 906-07 (1986).

56 Regarding the question of constitutional remedy of damages in the field of civil law, see D. Barak-Erez, *Constitutional Torts* 241-80 (1993).

57 Section 88 of the Penal Law, 1977, specifically provides: "[a]cquittal in criminal trial, or the imposition of a punishment or compensation according to Section 77, does not constitute an exemption from liability for damages under any other law." See also 2 Kedmi, *supra* note 20, at 330. Since the findings and conclusions of an unappealable

Until the enactment of the Basic Law: Human Dignity and Freedom, section 77(a) of the Penal Law, 1977, served as the judicial basis for determining damages. This section states that if an accused is convicted, the court is entitled to require her to pay the victim of her crime a monthly payment of no more than 61,000 New Israeli Shekels for each crime for which she is convicted, for the harm and suffering caused to the victim.

Does the victim have the constitutional right to force the convicted perpetrator to pay him damages within the framework of criminal law? As we have seen, in ancient law, compensation was an accepted punitive means to remedy harm caused to the victim. Moreover, in modern-day U.S. law, the tendency is to regard compensation as part of the punitive mechanism, as will be further discussed below. There is no logical reason why the offender should not be forced to pay for the damage she inflicted on her victim, in its entirety or in part, as part of her punishment. Does the adjudication that every person is entitled to protection of his life, body, and dignity<sup>58</sup> not encompass, as part of the constitutional remedy, acknowledgment of the victim's entitlement not only to redress for the harm he has suffered, but also to a court decree for the perpetrator to pay restitution as an inherent part of her punishment? The answer to this option is at least arguably yes.<sup>59</sup>

Finally, with regard to punitive damages,<sup>60</sup> the question arises as to whether the victim has the right to demand that the State shoulder the burden of restitution for harm he has suffered as a result of the offense. No Israeli legislation has explicitly acknowledged such a right, and it remains to be seen whether the Basic Law: Human Dignity and Freedom will be interpreted as recognizing this right. The absence of explicit statutory recog-

criminal verdict are likely to serve as *prima facie* evidence in a civil trial, they will naturally facilitate the victim's or his alternates' burden of proof. *See Evidence Ordinance (New Version) § 42 (a) (1973).*

58 Basic Law: Human Dignity and Liberty § 4.

59 An interesting dilemma can be raised in this context: is a suspect who, although convicted at trial, claims that the authorities breached her constitutional rights, entitled to demand compensation from the civil servants concerned? This issue is likely to arise in the context of breach of constitutional rights as procedural rights or in the sphere of the law of evidence, for example, with regard to an unlawful search or arrest that leads to the seizure of evidence and, ultimately, to a conviction. It seems that the answer to these questions is in the negative.

60 The meaning of the term in this context is not necessarily the same as that given to the term in the sphere of tort law; *see Rookes v. Bernard*, [1964] 1 All E.R. 356; *Bradford Metropolitan City Council v. Arora*, [1991] 3 All E.R. 545.

dition, however, does not necessarily negate the existence of such an obligation on the part of the State. Indeed, the answer to this lacuna must be derived from the fundamental concepts and values that form the foundation of Israeli society. Since Israel is a democratic country, there can be no dispute that it is incumbent upon the State to provide adequate protection to all its citizens. In principle, the breach of this obligation as a result of an offense committed by one of its citizens would transfer to the State the responsibility for the consequences. The range of constitutional rights, however, cannot only be determined at a theoretical level, but must be subject to the country's de facto ability to implement these rights. When we talk about the State's undertaking, we are in fact referring to the undertaking of each one of its citizens, who ultimately are the bearers of this burden of protection. From a practical and financial point of view, however, there is no real reason not to distribute the cost and responsibility of the damage among all citizens. This may be achieved through, for instance, obligatory general insurance, similar to health insurance and work liability insurance.<sup>61</sup>

Given every individual's inherent right to protection of life and body and the State's duty to protect this right, it is possible that a victim would petition the Supreme Court, requesting that the Court advise the Knesset to address this lacuna once and for all.

### III. The U.S. Experience

"In order to maintain and to strengthen our democratic system of law and order, it is essential that the rights of the victim of a crime be just as fully protected as the rights of a criminal offender."<sup>62</sup>

In the attempt to learn from the constitutional experience of the Anglo-American judicial system, it should be remembered that the historical development of English jurisprudence had bearing on the constitutional perception of the criminal procedural system. Initially it was believed that it was the duty of criminal justice to compel the criminal offender to redress the harm inflicted upon the victim or his family.<sup>63</sup> As a consequence, privity was

61 Perhaps the National Insurance Law could be amended to include this component.

62 Wis. Stat. S. 949.001 (1983-1984), as cited in A.M. Morgan, *Criminal Law Victim Rights: Remembering the "Forgotten Person" in the Criminal Justice System*, 37 Stan. L. Rev. 573, 593 (1987).

63 See, e.g., A. Goldstein, *Defining the Role of the Victim in Criminal Prosecutions*, 52

regarded as existing between the victim and the suspect as individuals, and accordingly, the duty to initiate proceedings and the responsibility for the outcome of those proceedings lay with the individual victim and perpetrator, respectively. At a later date, however, it became evident that reliance on a social order where only the strong could find relief was unjust.<sup>64</sup>

Within a short period of time, crime came to be regarded as a menace to society at large. The imminent and precarious nature of the entire social make-up generated new theories on the government's responsibility to enforce law and order<sup>65</sup> and made evident the need for setting new norms of behavior. This state of affairs was especially prominent in America, where after the Declaration of Independence, it came to be understood that as in England, it was of paramount importance to shift the responsibility for upholding law and order from the citizens into the hands of a central government.<sup>66</sup> At this juncture, however, society was confronted by an ominous phenomenon of quite a different nature, namely, the enforcement of a cruel law that completely disregarded the rights of suspects and accused.

The constitutional charter of rights for criminal suspects was revoked, and during the first few decades of the century, it was feared that some of the American states had turned into police states. The authorities abused the criminal law system to their purposes and the result was rampant and severe political persecution. In the late 1950s and 1960s, in response to this intolerable situation, a more liberal philosophy and more propitious approach with regard to the rights of the accused took hold.<sup>67</sup> Several years later, however,

Miss. L.J. 515, 549–50 (1982) [hereinafter: Goldstein, *Role of the Victim*]; A. Goldstein, *Prosecution: A History of the Public Prosecutor*, in 3 *Encyclopedia of Crime and Justice* 1286 (S.H. Kardish ed., 1983); W.F. MacDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 *Am. Crim. L. Rev.* 649, 651–56 (1976); Abramson, *supra* note 10, at 521.

64 Those victims who could not afford to pay all that was entailed in the legal procedure in terms of gathering evidence, catching and indicting the accused were in fact forced to come to terms with the injury and harm caused to them. See Abramson, *supra* note 10, at 522.

65 The prominent theory in this matter was the utilitarian theory of Beccaria and Bentham. Hagan, *supra* note 11, at 11.

66 N.A. Carlson, *Corrections in the United States Today: A Balance Has Been Struck*, 13 *Am. Crim. L. Rev.* 615, 620–21 (1976). Abramson, *supra* note 10, at 522, points out that “[b]y the time of independence, the enlightenment writers appealed to nineteenth century America. Turning to government to take care of the problem of crime was in keeping with the spirit of the nineteenth century.” See also L.N. Henderson, *supra* note 4, at 942.

67 See P.B. Kurland, *Politics, the Constitution, and the Warren Court* (1970); F.A. Allen,

it became apparent that this more liberal approach failed to address the problem of a mounting crime rate in the United States.

The last twenty years have witnessed a change in the make-up of the U.S. Supreme Court, with the appointment of conservative justices, and there has been a corresponding conservative shift in the Court's interpretation of defendants' rights.<sup>68</sup> Against the background of the public's weariness of a high crime rate and lack of personal safety,<sup>69</sup> victims' support groups were established.<sup>70</sup> Furthermore, the situation induced President Reagan to appoint a task force to examine the judicial and constitutional issues relating to victims' rights.

Although the task force made far-reaching proposals for reform and for a new balance between the opponents in criminal proceedings, it also proposed, *inter alia*, to amend the Sixth Amendment to add a special provision referring to a victim's right to participate in every stage of the criminal proceeding.<sup>71</sup> The victims' rights groups understood that it would be difficult to pass such all-encompassing and far-reaching measures, and they therefore suggested approaching Congress with a more moderate proposal. The objective was to amend the U.S. Constitution and to encourage states to amend their state constitutions so that victims would be provided with formal standing during some of the procedural stages in order to ensure that some of their interests would be considered and protected. As we will see later, this venture was partially successful; more than twenty states have already recognized that victims have constitutional rights.<sup>72</sup>

In 1982, Congress passed a law to promote and protect the rights of witnesses and victims of a crime, known as the Victim and Witness Protection

*The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1976 U. Ill. L. F. 518.

- 68 The change took place with the appointment of Chief Justice Warren Burger and has continued through the current Court presided over by William Rehnquist. *See* S. Davis, *Justice Rehnquist and the Constitution* (1989); *cf.* Goddu, *supra* note 9, at 252–55.
- 69 One of the reasons for the rise in crime in the U.S. was a sharp decrease in victims' willingness to complain and cooperate with the authorities. *See* United States Dept. of Justice, *Myths and Realities about Crimes* (1978), as presented by Goddu, *supra* note 9, at 248.
- 70 Abramson, *supra* note 10, at 523–32. *See also* C.R. Goddu, *supra* note 9, at 248–50.
- 71 President's Task Force on Victims of Crime, *Final Report* 114 (1982) [hereinafter: *President's Task Force*].
- 72 Pizzi & Perron, *supra* note 36, at 39.

Act.<sup>73</sup> Although this Act did not meet all the expectations of the victim support groups, it did confirm that victims have constitutional rights and that society must attend to their needs. As a result of this Act, in conjunction with the later Victims of Crime Act of 1984,<sup>74</sup> a budget was allocated and the necessary funds made available for remedying the suffering of victims. Support was provided to victims in the form of compensation and protection throughout the proceedings, and a support and a witness protection program was established to protect prosecution witnesses from retaliation for testifying.

Following the enactment of these federal laws, most of the American states passed similar legislation. State legislation also created a financial support system for victims, to meet their needs and ensure their well-being.<sup>75</sup>

Seventeen states were not satisfied by the enactment of legislation to support victims financially<sup>76</sup> and decided to formulate a charter of rights for victims.<sup>77</sup> In most instances, these charters encompass peripheral rights, such as the victim's right to be informed regarding the progress of the relevant criminal proceedings, to be protected from threats by the suspect or others, and to the return, as quickly as possible, of any property that was confiscated by the investigative authorities.

What is missing from these charters of rights? They do not grant the right to participate in criminal proceedings as an opponent or adversarial party in the proceedings. There is no ratification of the victim's right that the prosecution will solicit his, or his attorney's, advice in any of the important decisions involved in the criminal proceeding.<sup>78</sup> Indeed, the victim rights groups were not satisfied by this legislation, and demands were voiced for an adjustment of the balance between the constitutional rights of suspects and

73 The Victim and Witness Protection Act of 1992, Publ. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. § 1512-1515, 3579-3580 (1988)); see also Victims of Crime Act, 1984, Publ. L. No. 98-473, 98 Stat. 2170 (codified at 42 U.S.C. § 10601-10605 (1988)).

74 Publ. L. 98-473, 98 Stat. 2170 (1984).

75 See a review of the legislation in Goddu, *supra* note 9, at 250.

76 Goddu lists forty-seven states that, by 1992, included in their constitutions a detailed plan to compensate victims of crime; Goddu, *supra* note 9, at 250. See also J.R. Anderson & P.L. Woodard, *Victims and Witness Assistance: New State Laws and the System's Response*, 68 *Judicature* 221, 222 (1985).

77 Goddu, *supra* note 9, at 250.

78 *Id.* at 251.

victims.<sup>79</sup> The President's Task Force was also aware of this profound discrepancy and referred to it in its recommendations.<sup>80</sup>

The calls for balancing the respective parties' constitutional rights were not the only demands for change that were heard.<sup>81</sup> For example, in 1992, the American Bar Association urged adoption of a constitutional model known as the Uniform Victims of Crime Act.<sup>82</sup> Although its clauses are not revolutionary, this model nevertheless represents an important turning point for the future.

Few American states have been prepared to grant the victim of a crime formal standing prior to the beginning of the trial. The Supreme Court has held that victims have no standing at that stage.<sup>83</sup> While in the state of Utah if the prosecution declines to put a suspect on trial, the victim has the right to appeal this decision in court,<sup>84</sup> and some states require that the prosecutor consider the victim's opinion, most states still confer on the prosecutor the sole power to decide whether to prosecute.<sup>85</sup>

### *1. Plea Bargain*

Some states do show some willingness to consider the victim at the negotiation stage of a plea bargain with the accused. Under the American Bar Association's constitutional model, it is desirable to consult with the

79 See, e.g., R.L. Aynes, *Constitutional Consideration: Government Responsibility and the Right Not to Be a Victim*, 11 Pepp. L. Rev. 63 (1984); President's Task Force, *supra* note 71, at 7.

80 The President's Task Force stated: "The neglect of a crime victim is a national disgrace. The President is committed to end the neglect and restore the balance to the administration of Justice." See also Henderson, *supra* note 4, at 949.

81 M. Dolliver, *Victim's Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 Wayne L. Rev. 87 (1987); Symposium, *Perspectives on Proposals for a Constitutional Amendment Providing Victim Participation in the Criminal Justice System*, 34 Wayne L. Rev. 1 (1987).

82 See Fletcher, *supra* note 39, at 190: "Most of the Uniform Victims of Crime Act is devoted to securing compensation from the state and reparation from the defendant for the harm inflicted. A small portion of the Act is addressed to issues of victim participation."

83 "A citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution . . . the victim is a private citizen who lacks a judicially cognizable interest in the prosecution or non-prosecution of another." Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

84 The Utah Constitution, Article 8, Section 10. Moreover, in certain instances, the law empowers the court to appoint an attorney *pro tempore*. *Id.*

85 Note how the court treated this subject in *People v. Mack*, 473 N.E. 2d 880 (Ill. 1984).

victim before negotiating a plea bargain with the suspect. The prosecutor would not be bound, of course, to honor the victim's wishes. The final decision ultimately must be based on the public's best interest.<sup>86</sup>

In the context of the adversarial system and the prosecutor's overall discretion in all matters related to the conduct of criminal proceedings, it is equitable that the prosecutor be the sole authority for the resolution of certain matters, so long as, of course, his judgment is made in good faith. For instance, the prosecutor has been given exclusive discretion regarding whether to prosecute, since he or she represents the government institution best equipped for making an unbiased and objective decision. If, for example, this authority were subject to the consent of the victim or of any another interested party, subjectivity might seep into criminal proceedings and there would be the risk that individuals would resort to an immensely powerful social tool to pursue a personal vendetta. This is unconscionable, both from a moral and a judicial perspective. On the other hand, no conflict exists between the prosecutor's authority to decide whether to prosecute and his or her obligation to consult with people upon whom the decision will have direct bearing, such as the victim of the crime. This duty to consult in no way undermines the prosecutor's authority.

In the context of plea bargaining, the restraints on the prosecutor's exclusive authority are less obvious and less effective than in the case of the decision whether or not to prosecute. When the prosecutor and defendant announce in court that they have reached an agreement and that the indictment has been changed, there is no opportunity for anyone to notify the court if the agreement completely overlooks the factual reality of the case, if excessive leniency is being shown toward the accused, or if irrelevant considerations have received too much weight.

More balanced criminal proceedings result from granting formal status to the victim to participate in the deliberations prior to making an agreement with the suspect, followed by a *locus standi* to appeal the agreement in court. This ensures efficient supervision of the plea bargain agreement by the court, a significant benefit, preventing it from unknowingly consenting to agreements that would not promote the due course of justice.<sup>87</sup>

86 In the view of the ABA, victims have no rights to veto a plea bargain because prosecutors should be free to act in the "interests of the state"; Fletcher, *supra* note 39, at 192.

87 As Professor A. Goldstein justly comments:

He [the court] cannot easily know the nature of the injury done to the victim or the

## 2. *Conduct of the Trial*

Considerably more problematic is the matter of allowing the victim to participate in conducting the trial with the prosecutor. In this context a few issues should be considered with regard to the adversarial system and related conceptual questions. Let us consider in what way the non-participation of the victim in the conduct of the trial may lead to an infringement of his rights.

The main cause of dissension between the prosecutor and the victim is likely to arise in professional matters regarding the proper conduct of prosecuting the case. Once it has been determined that a criminal action is not a private action in nature and because the crime has repercussions against society as a whole, it is proper to remove the administration of justice from the individual — the victim — and transfer it to the public representative. Once again there can be no justification for setting out on a collision course with the prosecutor, with the State's encouragement. Moreover, the court has no substantial tools at its disposal to reach a decision in a complementary privity between prosecutor and victim, even if we were to recognize the latter's right to object to the prosecution's handling of the case. Thus, when mention is made today of a trend to allow greater victim participation,<sup>88</sup> the

appropriateness of the sentencing range left to him unless one or the other party tells him. When consensus has been reached by the parties, he must get assistance from someone who has a genuine interest in the proceedings. The victim is plainly such a person. I would bring the victim into the system by authorizing him to participate as a party . . . and before conviction, in hearings on dismissals, charge reductions and guilty pleas.

Goldstein, *Role of the Victim*, *supra* note 63, at 557.

- 88 Victim participation in the proceedings should not entail the victim's right to sit at the prosecution's table, since even this fact may prejudice the accused's right to a fair trial. The opposite conclusion was reached, however, under the laws of the state of Alabama, where the law entitled the victim to sit at the prosecutor's table. ALA Code § 15-14-53 (Supp. 1992). Further on,

A victim of an offense shall not be excluded from the court of counsel table during the trial or hearing or any portion thereof conducted by any court which in any way pertains to such offence, provided, however, a judge may remove a victim from the trial or hearing or any portion thereof for the same causes and in the same manner as the rules of court or law provide for exclusion or removal of the defendant.

ALA Code § 15-14-54 (Supp. 1992). The appellate court did not find there to be any deprivation of the accused's constitutional rights pursuant to this right of the victim; *Pierce v. State*, 576 So. 2d 236 (1990); *Crow v. State*, 485 So. 351 (1984).

purport is not to afford him the standing of supplementary prosecutor.<sup>89</sup>

Moreover, at this stage, different or contradictory interests between prosecutor and victim are not to be expected. The common objective is to present the prosecution's version of events to the court successfully. The prosecution's version usually relies on the victim's testimony, except in those rare cases when the prosecution decides a priori to present a different account of the occurrences. In such instances, the victim's remedy is not to present his version alongside that of the prosecution, but to set in motion a preliminary hearing, where it is incumbent upon him to persuade the official in charge of the prosecution as to which version will be submitted by the prosecution at the trial. This proceeding can be carried out within the framework of the prosecutor's office or by applying to the court for review of the propriety of the prosecution's decision.

In the context of the victim's right to participate as a party in the conduct of the trial, it must be asked whether he has the right to refrain from testifying or at least to refrain from direct confrontation with the suspect in court. In the United States, where the defendant's right of confrontation is anchored in the Sixth Amendment to the Constitution,<sup>90</sup> it was determined, as in Israel, that the defendant's right is not an absolute right overriding all other rights.<sup>91</sup> Insofar as the actual formula of balance between conflicting

89 Apparently, the only example in the U.S. of victim participation as a supplementary prosecutor is in the state of Utah. There, with the prosecution's permission, as well as that of the court, it is permissible for the victim's counsel to assist the prosecutor in his work, although even this does not give the victim the standing of supplementary prosecutor.

*Cf.* Fletcher, *supra* note 39, at 193–97. Fletcher believes it worthwhile to consider adopting the inquisitorial system practiced in Europe, where the victim is entitled to take part in the criminal procedure as a supplementary prosecutor, especially in those cases where the victim incurred monetary loss. There the court rules even on the civil claim, in parallel with convicting the accused. The author is aware of the problematics involved with allowing the victim to take an active part in the conduct of the proceeding, since the adversarial system relies on different assumptions from those of the civil system, common on the Continent. Therefore, it is not apt to talk about the “import” of rules that are not necessarily suitable to the system in force here. For the difference between the two judicial systems, see M. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506 (1973); Pizzi & Perron, *supra* note 36.

90 “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const., Amend. VI.

91 “The confrontation clause does not guarantee 5 defendants the absolute right to a face-to-face meeting with the witnesses against them at trial.” *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990).

constitutional rights is concerned, U.S. courts and probably the U.S. legislative branch took extreme caution in the case of minors, when they consented to compromising some of the defendant's rights.<sup>92</sup>

It would seem that recognition of an adult's right not to suffer further mental anguish through direct confrontation depends on the court's willingness to acknowledge this right as important enough based on the public interest to justify a rejection of the constitutional right to confrontation.<sup>93</sup> As aforementioned, the U.S. courts have hitherto been unwilling to regard the right of an adult victim to avoid face-to-face confrontation with the suspect under any circumstances to be sufficiently significant. In this matter, Israel is far more advanced than the U.S.<sup>94</sup>

### 3. Sentencing

After a suspect is convicted, there is usually a separate hearing to determine his sentence.<sup>95</sup> At this stage, it is certainly pertinent to discuss a new balance of interests. There is usually no legitimate reason why the accused should enjoy the constitutional right to have her statement and that of her witnesses heard before sentence is passed. The assumption here should be that the victim is entitled to have the court informed of the extent of his loss and suffering caused by the accused, so that alongside the attenuating circumstances proffered by the accused, the court will also be influenced by the aggravating circumstances of the conduct of the accused vis-à-vis the victim.

Here it is certainly reasonable to speak of the victim's constitutional right that his voice be heard, whether to equilibrate the relevant details presented

92 Usually in cases of child witnesses, the balance can be found by hearing the child testify over one-way closed circuit television to protect the child's emotional well-being and to allow the accused to watch the testimony in real time and to direct his counsel as to the cross-examination; see Abramson, *supra* note 10, at 561; cf. E. Forman, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 Hastings L.J. 437 (1989); J. Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 Hastings L.J. 1259 (1992); L.J. Thielmeyer, *Beyond Maryland v. Craig: Can and Should Adult Victims Be Permitted to Testify by Closed-Circuit Television?*, 67 Ind. L.J. 797 (1992); compare Criminal Justice Act § 32A (1991) (Eng.).

93 See Thielmeyer, *supra* note 92, at 813.

94 See Criminal Procedure Amendment Law (Witness Investigation) § 2A, 2B (1957) (the Law was amended in 1995).

95 Usually, in cases involving a matter of a mandatory punishment, discussion is superfluous. Conversely, on the Continent, the debate regarding responsibility and punishment is unified, and when the judges announce a conviction they also announce the sentence. See Fletcher, *supra* note 39, at 194.

to the court before sentence is passed or because the victim is entitled at this juncture to ask the court to grant him compensation as part of the punishment. The court will be better able to carry out its duty if the victim is permitted to offer his statement.

On the federal level, as well as in most states, the concept of the Victim Impact Statement has been adopted as part of the victim's constitutional right to make a statement, either in the form of a written report or as oral testimony, before sentence is passed on the accused.<sup>96</sup>

This recognition of the victim's rights has repercussions on his standing in plea bargaining, especially in negotiations leading to a commuting of the sentence. The right to be heard before sentence is passed entails the right to be heard also at this stage of negotiations which affect the severity of the punishment.<sup>97</sup>

The victim's right to be heard engenders projections to the future, when the subject of the accused's punishment is once again approached, for instance at the parole board,<sup>98</sup> or when a request for parole is submitted to the relevant authorities.<sup>99</sup> Both of these cases are but an extenuation of the sentence hearing, and if the victim has the constitutional right to be heard before sentence is passed on the person who harmed him, his right is equally valid when the time comes to consider reducing a sentence which was already imposed.

96 Fed. Crim. P. 32(c)(3)(E):

Before imposing sentence the court must . . . if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentence hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

*See also* the law suggested by the Bar Association: Uniform Victim of Crime Act § 203, "The court shall permit the victim to present a victim-impact statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which it was perpetrated and the victim's opinion regarding the appropriate sentence."

*See also* Abramson, *supra* note 10, at 545. By 1989, forty-eight states had recognized the victim's right to make a statement before sentencing is passed. *See* D.R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal*, 27(2) *Am. Crim. Rev.* 391, 399 (1989).

97 Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 *Pepp. L. Rev.* 117 (1984).

98 "States have also begun to require the victim to be notified of parole hearings and to allow victims to communicate about the offender's release."

99 Abramson, *supra* note 10, at 547.

Some legal scholars have objected to this constitutional right of the victim. For example, Professor Yale Kamisar points out that unlike the prosecutor, the victim is motivated by feelings of revenge; objectivity is of no consequence to him and he is not held accountable to the rules of "uniformity of punishment" which must prevail at sentencing. Moreover, there is the risk that a victim will be unable to differentiate between his right to be heard and the court's right to reject his petition regarding the type and severity of punishment. Such frustration may lessen future cooperation between victims and the prosecution. Kamisar is also disturbed by the unfairness of a judge being subjected to the victim's direct plea, which may mislead and influence his judicial objectivity.<sup>100</sup>

However, research has shown that criticism unfounded and that the courts are able to use the information brought by the victim in an educated and balanced manner and thus reach a more just punishment.<sup>101</sup> Moreover, the concerns expressed by Kamisar cannot negate the rationality and validity of the victim's right to be heard at this stage.<sup>102</sup>

Others hold that the accused's punishment might be influenced by the victim's testimony, but not necessarily because of factors for which the latter is responsible. Fletcher, for instance, strenuously criticizes the influence of the testimony of relatives of murder victims who testified about how the murder affected the victim's family. Fletcher does not believe that the accused should be given additional punishment for murdering, in that case, the father of a three-year-old child; there can be no additional moral guilt for which the accused should receive enhanced punishment, in Fletcher's view.<sup>103</sup> In my opinion the defendant should be held accountable for the consequences of his actions, even if at the time of the crime he was not aware of the victim's special personal circumstances. It is indeed paramount to understand how

100 D. Kiessel, *Crime and Punishment: Victim's Rights Movement Presses Courts, Legislatures*, 70 A.B.A., J. Jan. 1984, at 25, 26.

101 A.M. Heinz & W.A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargain*, 13(2) Law & Soc'y Rev. 349, 359 (1970). See also Abramson, *supra* note 10, at 548, where she remarks that "[d]espite such concerns . . . research has shown that victim participation at sentencing is less disruptive and less vindictive than expected."

102 See also *Payne v. Tennessee*, 501 U.S. 808 (1991).

103 Fletcher, *supra* note 39, at 199-200, states that

The moral character of the victim, whether good or bad, should be irrelevant. If we genuinely respect human life, the murder is just as heinous whether a three year old boy survives a homicidal assault on the family or not.

the punishment will affect those who survive the victim, that it is the accused who caused these developments and must be held responsible for them, on the basis of the causal connection between her behavior and the effect.

#### 4. *Victim Compensation*

A further issue with respect to victim's rights is the validity of the victim receiving restitution from the accused as part of the latter's sentence.

Some may retreat from this form of punishment, viewing it as mere civil compensation grafted onto the criminal proceeding.<sup>104</sup> Conversely, others claim that the punishment is not complete if it fails to look after the victim of the crime. The choice of the right course of action should flow from the objectives of punishment. If we agree that one of the aims of punishment is to force the accused to bear the consequences of his actions as part of his rehabilitation and re-absorption into society, it is incumbent upon him to pay compensation to the victim, such that the concept of punitive damages is correct.<sup>105</sup>

Punitive damages in their present form originate from the Kantian notion that this is the most effective method to put things right. Indeed, it is the victim's right that the perpetrator be chastised by also obliging him to pay compensation to ensure the victim's rehabilitation. If this also benefits the accused and contributes to his rehabilitation, then it is a significant additional advantage.<sup>106</sup>

It is true that there is a certain degree of "overlap" between punitive and civil damages, since both are intended to remedy harm inflicted on the victim. The civil facet, however, may be in part motivated by financial considerations, such as who will pay for the damages and for what causes of

104 See, e.g., M. Raymond, *The Unconstitutionality of the Victim and Witness Protection Act under the Seventh Amendment*, 84(6) Colum. L. Rev. 1590 (1984).

105 Goldstein reminds us that this institution became crystallized in English law toward the end of the nineteenth and the beginning of the twentieth centuries as part of the new concept regarding the objectives of punishment. See Goldstein, *Role of the Victim*, *supra* note 63, at 521; See also Jacob, *Reparation or Restitution by the Criminal Offender to his Victim*, 61 *Crim. L. & Criminology* 152 (1970); Richard E. Laster, *Criminal Restitution: A Survey of the Past and an Analysis of its Present Usefulness*, 5 *U. Rich. L. Rev.* 71 (1970); Notes & Legislation, *Restitution and the Criminal Law*, 39(7) *Colum. L. Rev.* 1185 (1939).

106 E. David, *The Critical Philosophy of Kant* 377–78 (1889) (presented in Goldstein, *Role of the Victim*, *supra* note 63, at 521).

action, while the punitive facet accomplishes one of the objectives of chastisement: rehabilitation of the accused by forcing him to remedy the victim's loss.

There are criminal offenders with the means to make restitution and those who are unable to afford it. The Supreme Court ordered that these facts be taken into consideration at the time of sentencing or when probation is considered.<sup>107</sup> However, the Court failed to find any unconstitutionality in the enforcement of punitive damages because it might prove favorable to a wealthy criminal.<sup>108</sup>

In the United States, on the recommendation of the President's Task Force, the 1982 Victim and Witness Protection Act establishes the victim's right to receive compensation.<sup>109</sup> Some attempts were made to question the constitutionality of this Act by claiming that it belittled the defendant's right to a civil trial by jury guaranteed by the Seventh Amendment to the Constitution. Most of the federal judgments rejected this claim,<sup>110</sup> as have done scholars.<sup>111</sup> In over half of the states,<sup>112</sup> laws were enacted entitling crime victims to compensation. The idea is to transpose the emphasis and the balance of resources from the rehabilitation of the criminal to the rehabilitation of the victim.

This legislation for compensation has a lacuna in that it usually restricts

107 *Bearden v. Georgia*, 461 U.S. 660 (1983).

108 Justice White wrote:

[p]overty does not insulate those who break the law from punishment. When probation is revoked for failure to pay a fine, I find nothing in the Constitution to prevent the trial court from revoking probation and imposing a term of imprisonment if revocation does not automatically result in the imposition of a long jail term and if the sentencing court makes a good-faith effort to impose a jail sentence that in terms of the State's sentencing objectives will be roughly equivalent to the fine and the restitution that the defendant failed to pay.

*Id.* at 675. See also Goldstein, *Role of the Victim*, *supra* note 63, at 560.

109 Before the 1982 Act, the courts were authorized to subordinate probation to the payment of restitution. See 18 U.S.C. § 3579(g) (1982) "If . . . defendant is placed on probation or paroled . . . any restitution ordered under this section shall be on condition of such probation or parole."

110 *United States v. Palma*, 760 F.2d 475 (3d Cir. 1985); *United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985).

111 See Note, *The Constitutionality of the Victims' Restitution Provisions of the Victim and Witness Protection Act*, 70(5) Va. L. Rev. 1059 (1984).

112 See Goldstein, *Role of the Victim*, *supra* note 63, at 523.

the entitlement to the victims of violence and makes no provisions for the victims of non-violent crimes, such a fraud and theft.<sup>113</sup>

In sum, in the U.S. there is a clear trend to heed the victim's needs, whose presence is required not only to advance the criminal proceeding but also as the object of constitutional rights. At the same time, while the scope of constitutional rights is still in dispute, it is clear that the American legal system has no intention to adopt the continental model of victim participation in criminal proceedings as a supplementary prosecutor.

The adversarial model does not permit a radical re-balancing such that the victim will act as another opponent of the accused. Any such re-balance also would inevitably lead to the erosion of the defendant's constitutional rights. Such a re-balance is, then, neither warranted nor desirable. Even the umbrella organization of the American victims rights groups did not deem it necessary to talk about amending the Constitution to grant victims standing similar to that of the accused or the State.<sup>114</sup>

In contrast to this, American justice is prepared to allow the victim to participate in those stages of the criminal proceeding which do not pose a threat to its adversarial character. Thus, for instance, it is possible to involve the victim in the preliminary proceedings before decisions on bringing indictments, plea-bargaining arrangements, sentencing, or releasing him on bail, and protecting him during the trial.

This section may best be concluded with the words of Professor Goldstein:

I have argued that we should move beyond notification and into rights of victims, even beyond a mere right of "allocution," to a genuine right of victims to participate as parties in those parts of the process where the adversary system is not working, where they can make special contribution, or where they have a special stake, as in restitution. The purpose is not only to make the victim feel better but also to assure fuller consideration of issues of accuracy and legality where there is a risk that such issues will be submerged by the pressures of bureaucracy, politics and plea bargaining.<sup>115</sup>

113 *Id.* at 524. The June 1996 Congressional proposal to amend the Constitution to anchor this right of compensation also was limited to certain types of victims, especially victims of violence.

114 Pizzi & Perron, *supra* note 36, at 39.

115 *See* Goldstein, *Role of the Victim*, *supra* note 63, at 561.

#### IV. The New Balance Between the Charter of Victims' Rights and the Charter of Defendants' Rights in Light of the Constitutional Changes in Israel after 1992

The starting point of this article was that "constitutional" changes took place in Israel after the enactment of the Basic Laws, especially the Basic Law: Human Dignity and Freedom of 1992, and that just as a legislated charter of defendants' rights must be discussed, so must a legislated charter of victims' rights be similarly appraised. The two charters are based on the fact that both defendants and victims have constitutional rights in the substantive as well as the procedural criminal spheres.

The conceptual basis for the standing of a victim of a crime and the range of his constitutional rights stem from the utilitarian theory of justice, as propounded mainly by Bentham, Mill and Hart. This school of thought holds that society will benefit from the victim's involvement in criminal proceedings as long as it does not derogate from the due and just course of the proceedings.

Another starting point for determining the balance between the competing rights of the accused and victim is that the balance must in no way divert from the criminal proceedings' central objective ensuring the administration of justice<sup>116</sup> and extrication of the truth. A third assumption in the search for a balance formula is that the concepts of human dignity and liberty do not embody absolute values. These values, as well as the value of truth, should not necessarily prevail above all else, since there are exceptional situations when one value must yield to another value.<sup>117</sup>

The fourth assumption on which our current thesis is based is that Israel follows the adversarial system, in contrast to the inquisitorial or civil system common on the Continent. Therefore, when we attempt to understand the scope of victims' constitutional rights in our judicial system, it is preferable to look to democratic countries committed to the adversarial system, rather than to the continental countries.

It should be remembered that the inquisitorial system places the main burden of responsibility for criminal proceedings in the hands of the judges and that the parties have a limited role.<sup>118</sup> In such a case, the "intrusion" of a

116 From Barak's speech at the swearing-in ceremony for new judges at Beit Ha'nassi (the President's Residence) on September 28, 1996.

117 *Id.* at 6.

118 Pizzi & Perron, *supra* note 36, at 47; see also R.S. Frase & T. Weigend, *German Criminal*

third party in the hearing would not represent a breach of the balance of the accused's "adversarial" rights. In Israel, however, any attempt to add a third party, especially during adversarial stages such as the presentation of evidence by the prosecution or the defense, could impair the defendant's rights and require her to struggle against two opponents.

Under Israeli law, as in American law, certain victim rights are recognized: the victim's right to challenge the police or the prosecutor's decision on investigation and indictment is safeguarded both by his prerogative in Israel to appeal to the Attorney General as well as his recourse to the High Court of Justice. However, comparison with the American judicial system teaches that the victim under Israeli law also must be entitled to a spectrum of constitutional rights, including involvement in certain stages of trial such as participation in the preliminary proceedings prior to indictment and incarceration until the conclusion of the proceedings. These stages include hearings concerning the accused's release on bail or deliberations towards a plea-bargain, as well as hearings before and after sentencing, including hearings before the agencies authorized to commute the accused's sentence or allow him early release and the probation board of the Presidential pardon committee. These subjects are of intrinsic importance to the victim, and his involvement and right to be heard do not derogate from the accused's constitutional rights. However, given utilitarian considerations, where legitimate public interests outweigh the victim's interests, the victim has no constitutional right that his interests will have preponderance.

Granting these rights ensures that the authority has at its disposal additional information, and if found to be relevant, there is no reason why it should not be taken into consideration.

We have also seen from the American model that the potential victim is entitled to effective protection against injury from the society in which he lives. However, I am unaware of any psychological protection afforded to the adult victim during the proceedings in the United States. Thus, for instance, the victim has no right to refrain from face-to-face confrontation with the accused in court during his testimony in order to prevent a reoccurrence of his mental state by reliving the trauma of the injury. In America this right is granted only to minors, not to adults.

Logically speaking, it is difficult to differentiate between a minor and an adult on this issue, if in both instances there is evidence establishing the likelihood of harm to the victim. In these exceptional cases, removal of the accused from the courtroom and allowing him to observe the testimony on closed-circuit television while directing his counsel should not be construed as unjustified interference with his right of confrontation.

In contrast with the United States, Israel leads in this sphere. The Knesset recently endorsed that in exceptional cases, sexual crime victims are entitled to testify in the absence of the accused.<sup>119</sup>

The interests of the victim should also be taken into consideration regarding the procedures and the rules of evidence in criminal proceedings relating to the accused's guilt. Take, for example, a victim of a sexual crime. Until recently, the courts required corroboration of the victim's testimony as a condition to the adequacy of the evidence against the accused. The legislature repealed this requirement, which was found to be objectionable and to complicate the trial of criminals. Just like any other party interested in the outcome of the trial, the victim has the right to impress upon the court that the rules of evidence are inappropriate and prejudice his right to establish the veracity of his account. When the rules of evidence are detrimental to the victim's constitutional rights, they too become subject to constitutional control.

Finally, in the U.S., the victim's right to compensation was recognized both as part of the accused's punishment as well as an institutional obligation upon the State. In Israel we have a parallel provision, found in section 77 of the Penal Law of 1977, which provides that the court is authorized to require compensation from the accused to the victim totaling up to 61,000 New Israeli Shekels for each offense for which he was convicted. It may be questioned, of course, whether this sum is sufficient in those cases where harm inflicted on the victim is much greater, but the victim still has the right to sue the accused for the full extent of the damages due him in a civil action. Moreover, the prior law must be respected insofar as section 10 of the Basic Law: Human Dignity and Freedom provides that "[t]his Basic Law does not have the effect of prejudicing the validity of a law in force prior to the Basic Law."<sup>120</sup> Conversely, the right to obtain restitution from the State is a right

119 Sections 2A and 2B of the Criminal Procedure Amendment Law (Investigation of Witnesses), 1957.

120 Some believe that amendments to the Penal Law after the enactment of the Basic Law:

that can be anchored today in sections 4 and 11 of the Basic Law: Human Dignity and Freedom<sup>121</sup> as part of the victim's constitutional remedies.<sup>122</sup>

### V. Conclusion

A constitutional change has taken place recently in Israel, causing us to move from a charter of human rights based on court rulings to a legislated charter of rights.

As Justice Zamir said regarding the bearing of the Basic Law: Human Dignity and Freedom on fundamental rights: "The Basic Law does not order us only to respect the liberty of a person, especially that of the accused, rather it obliges us to defend all the other rights of other people *who have become or are likely to become the accused's victims*."<sup>123</sup>

There is a clear trend to permit victims to play a more active role in stages of criminal proceedings. This trend represents a correct and just balance of rights in criminal proceedings.

Israel should learn from the American experience regarding victims' standing as well as the constitutional changes occurring in the U.S. However, insofar as the balance of evidentiary rights between accused and victim is concerned, Israel is more advanced than the United States and should persevere in its course of action.

Human Dignity and Liberty in 1992 have the effect of making all the provisions of the law subject to constitutional examination.

121 Sections 4 and 11. *See supra* note 53.

122 It is possible that in practice the State will obligate its citizens to participate in insurance to cover compensation of this sort, perhaps by increasing the amounts of National Insurance.

123 M.A. 3899/95, *State of Israel v. Gamal*, [1993] 49(3) P.D. 164, 168. *See also* opinion of Former Chief Justice Shamgar in M.A. 3507/95, *Reuben v. State of Israel* (unpublished).